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RED LIGHTS OUT: A LEGAL HISTORY OF PROSTITUTION, DISORDERLY
HOUSES, AND VICE DISTRICTS, 1870-1917

Rice University

Ph.D. 1984

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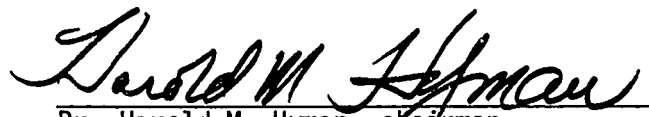
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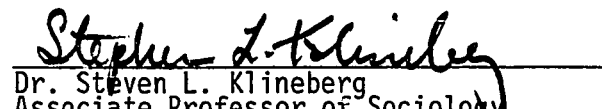
A THESIS SUBMITTED
IN PARTIAL FULFILLMENT OF THE
REQUIREMENTS FOR THE DEGREE

DOCTOR OF PHILOSOPHY

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Abstract

RED LIGHTS OUT: A LEGAL HISTORY OF PROSTITUTION, DISORDERLY HOUSES, AND VICE DISTRICTS, 1870-1917

by
THOMAS C. MACKEY

The dissertation is a close examination of the changes and continuities in law applied to prostitutes, bawdy houses, and the application of state police power by cities to segregate both into municipal vice districts. Throughout American history, moral reformers and social commentators recognized prostitution as a social, moral, and urban problem. The debate over the best policy to deal with prostitution was never louder than in the Progressive Era when states passed red-light abatement acts, when newspapers reported on white slavery, when purity crusaders were in full voice, and when cities shut down their vice districts. But prostitution as a criminal offense within the legal context of the courts and the legal traditions of American law has not been explored. If a moral reform group hired a lawyer to do something about a local prostitution problem, the lawyer would find actions in criminal law against prostitution and the keeping of disorderly and bawdy houses and he would find actions in equity to stop and prevent the immoral use of property for disorderly and bawdy purposes. And how did the red-light abatement acts change the law's procedures and standards against bawdy houses and how effective were the acts in closing bawdy houses, vice districts, or stopping prostitution? Furthermore, the turn-of-the-century lawyer might have found himself confronted with a city's policy of districting its bawdy houses and prostitutes into a specific area of the city.

The seven chapters of the dissertation begin with a review of some of the writings on prostitution control in the nineteenth and early twentieth century. Then the prostitute-as-vagrant, the theory used against prostitution, is examined. Disorderly houses--the property used for an immoral purpose--provides the focus for chapter three while how the courts actually dealt with disorderly house cases is reviewed in the fourth chapter. Municipalities using state police power to district their immoral houses and women, especially St. Louis

and New Orleans, is considered in the fifth chapter, with Houston's decision to district its houses (and to later segregate by race those houses) provides the topic for chapter six. In 1917, Houston closed its vice district and chapter seven covers the reasons for the closing and the events leading to the shutting off the red-lights in Houston.

DEDICATION

I dedicate this dissertation to my parents, Howard and Blanca Mackey, and my sister, Julie Mackey, because of their support for me through the years. Besides, after all the strange feats I have pulled over the years which strained their patience, they continue to hold high hopes for me. They earned this dedication.

ACKNOWLEDGMENTS

To reach this point in time, I have many people to acknowledge, remember, and thank. While an undergraduate at Beloit College I developed a series of friends whom I miss but who continue to influence me. Many thanks to Joseph Kobylka and Janet Wallace Kobylka, Jim Schroeder, Keith Moe, Thomas Todoroff, Lyle Fritsch, Richard Kobylka, John Wallach, Kay Carlson, Janet Savina, Linda Linthicum, and especially Brenda Irish for reasons we both understand.

As a graduate student at Rice University from 1979 to 1984, no one has exercised a greater influence on me and my graduate pursuits than Dr. Harold M. Hyman. Being a five-year veteran of his graduate seminar in American legal and constitutional history, I am now a better researcher, writer, historian, and person because of Dr. Hyman's encouragement and his urgings to "follow through" with the research, the thought, and the latest paper. His is a debt which will loom large as time goes by.

Graduate school and seminar would have been impossible had it not been for fellow graduate students such as Claudine Ferrell, John Hughes, George Hoemann, and recently Jim Peterson and Charles Banker. Thanks to the graduate committee of the History Department of Rice University for the financial support afforded me as a graduate student. Other Rice people who have worried about me and boosted my spirits on occasion would be John Boles, Katherine Drew, Michael Fitzsimmons, Charles Garside, Albert Van Helden, Evelyn Nolan, Megan Seaholm, Mary Winkler, Mike Perry, Dean James, Bob Goggin, Kelly Kane, Tami Chappell, and Darlene Collins. Assorted others I owe thanks to are Mike LeJune, Dana LeJune, Gretchen Edmiston, John Battler, and the whole Valhalla crew at Rice. I reserve special thanks to Cathy Monholland who typed the final draft of this dissertation. Thanks y'all.

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INTRODUCTION

Throughout American history moral reformers and social commentators recognized prostitution as a social, moral, and urban problem. The debate over the best public policy to deal with prostitution was never louder than in the Progressive Era when states passed red-light abatement acts, when newspapers reported on white slavery, when purity crusaders were in full voice, and when cities shut down their vice districts. But prostitution as a criminal offense within the legal context of the courts and the legal traditions of American law has not been explored. If a moral reform group hired a lawyer to do something about a local prostitution problem, the lawyer would find actions in criminal law against prostitution and the keeping of disorderly and bawdy houses and actions in equity to stop and prevent the immoral use of property for disorderly or bawdy purposes. Furthermore, the turn-of-the-century lawyer might have found himself confronted with a city's policy of districting its bawdy houses and prostitutes into a specific area of the city. The red-light abatement acts changed the law's procedures and standards against bawdy houses but how effective were the acts in closing vice districts or stopping prostitution? From within a legal context, what were the legal actions against the publicly immoral woman, the prostitute, the legal actions against the property put to an immoral use, the bawdy house, and the legal status of city-sponsored districting of its bawdy houses and prostitutes? These three topics form the focus for the following inquiry.

I use the dates 1870-1917 as general brackets of my time period. Although I discuss some cases prior to 1870, most of my cases and legal interpretations on the developing lines of precedent fall between 1870 and America's entry into World War One. But 1870 is a particularly useful date to use as a starting point because in that year Christopher Columbus Langdell began the "scientific" study of the law at Harvard. With the changing type of legal training from apprenticeships to schooled lawyers came a need for both easy-to-use reference words to quickly find the law and a uniform system of reporting state appellate cases. Langdell's emphasis on the "case method" and training in the principles of the law led legal authors to write treatises not on

American law generally such as James Kent or William Story had done before the Civil War, but new writers sliced off a topic of the law and wrote extensively on that narrow topic; examples would be John F. Dillon's The Law of Municipal Corporations (1873) or Horace G. Wood's The Law of Nuisance (1875). Such works provided the texts for classes in the new law schools.

Along with these new legal treatises "explaining" the law of some topic came the new regional reporter system of state appellate cases. These reporters provided the latest judicial decisions on the principles of the law as applied in fact situations and these books of cases meshed with the legal treatises to provide the law to the student or legal researcher. The legal treatises buttressed with the supporting case law illuminated and disseminated cases and legal principles throughout the country. What might have been an isolated New York case on the admissibility of the general reputation of a keeper of a bawdy house could, after the reporters began, be read and cited as precedent by judges in very different parts of the country. The treatises and reporters tried to knit together a variety of legal precedents and cases into a consistent and coherent whole on the law of any legal topic such as disorderly houses or prostitution.

1870, then, can be used as an opening bracket for my time period because of the changes in American law in the late nineteenth century and the changes in legal pedagogy that affected the law of prostitution and disorderly houses. But 1870 is a useful date as well because in July, 1870, St. Louis established its much-studied vice district by municipal ordinance through powers granted the city by Missouri. Its social "experiment" with vice districting, being the first to use such city districting power, provides another divide in my material. And because so much of the social purity reformers' efforts sought to eliminate the red-light district from American cities, a policy which began with St. Louis' 1870 decision, further supports 1870 as the opening bracket of this inquiry.

The seven chapters which follow begin with a review of some of the writings on prostitution control in the nineteenth and early twentieth century. Then the prostitute-as-vagrant, the theory used

against prostitution, is examined. Disorderly houses--the property used for an immoral purpose--provides the focus for chapter three while how courts dealt with disorderly house cases is reviewed in the fourth chapter. Municipalities using state police power to district their immoral houses and women, especially St. Louis and New Orleans, is considered in the fifth chapter, with Houston's decision to district its houses (and to later segregate by race those houses) provides the topic for chapter six. In 1917, Houston closed its vice district and chapter seven covers the reasons for the closing and the events leading to the shutting off of the red-lights in Houston.

CHAPTER 1

The Literature of Harlotry: Three Examples

"Arguments are unnecessary to prove the existence of prostitution," began William W. Sanger in his 1859 book, The History of Prostitution: Its Extent, Causes, and Effects Throughout the World.¹ As the resident physician of the New York state charity hospital on Blackwell's Island off New York City, Sanger had developed a consuming interest in the city's population of prostitutes. But despite Sanger's opening remark, arguments about prostitution's existence and its many facets have proliferated in the one hundred and twenty-five years since The History of Prostitution appeared. Later writers on the social problem of prostitution followed Sanger's lead in wondering who were the women of the street? Did prostitutes choose their life or were they forced into their trade? If forced, then by what or whom--economic necessity, individual faults, flawed character development, bad family experiences, or physical coercion by third parties such as pimps or other women? And what would be the best public policy to limit the moral and social damage done by prostitutes and the bawdy houses in which they lived?

As an urban as well as a social problem, prostitution provided a topic of investigation and controversy from the Civil War to World War One. Not all the works on prostitution in the period can be reviewed but a representative selection provides the major outlines and themes of the debates over "the social evil." First, William Sanger's The History of Prostitution with its curious blend of careful investigation and broad generalization represents a view of prostitution from the mid-nineteenth century. Second, an article from the turn of the century which calls for an alteration in the public policy of the repression of prostitution. And, third, an article defending the policy of repression. Each of the works reflects its author's concerns, fears, and assumptions about prostitution and the law in urban America.

William Sanger's The History of Prostitution has remained an obscure but respected part of the historiography of prostitution even if Sanger himself remains almost unknown. Born in Hartford, Connecticut, on August 10, 1819, he received some medical education at Wheeling, Virginia, before moving to New York City and completing his studies in 1845 at the College of Physicians and Surgeons. He spent some of his professional life at Bellevue Hospital and, in 1853, the Board of Governor's of Blackwell's Island state hospital appointed Sanger resident physician. Soon after taking up his duties, he plunged into his study of New York's prostitution--even touring numerous European countries studying their regulation efforts. In all, Sanger spent three years investigating and writing The History of Prostitution. In 1860, a year after the book's publication, Sanger retired to private practice which he pursued until his death in 1872.²

Sanger left a work of enduring interest. He spent the first two-thirds of The History of Prostitution treating the history of prostitution by countries and geographical areas. The final third of the work focused on New York City and provides the best contemporary insight into mid-nineteenth-century American prostitution. Although not as wide-ranging as the British social investigator, Henry Mayhew, Sanger's work is comparable to Mayhew in his concerns and interpretations.³ Sanger "explained" prostitution to his and succeeding generations. His work provided later writers with material to argue whether prostitution resulted from bad home life, from economic necessity, or from the male-dominated double-standard culture. This flexibility, however, limited the influence of The History of Prostitution. The rambling, eclectic quality of the work thwarted Sanger's effectiveness. As a result, his proposals went unheeded during his time. Today, his work is only occasionally remembered as an example of nineteenth-century thought on prostitution.

Judged by the standards of modern research techniques and methods, Sanger's work fails because of its cultural and racial biases. But when judged by the standards of his contemporaries who surveyed social problems in the 1850s, his work holds up well. For example, Sanger's work compares favorably with the reports of the Children's Aid Society

of New York City, the brain child of Charles Loring Brace.⁴ Both Sanger and Brace believed they could improve the quality of city life for all of the city's inhabitants by altering the lives of specific wayward groups--the women of the streets and children. Brace wanted to drain homeless children out of the city to the healthy atmosphere of the country. Sanger wanted police oversight of the city's prostitutes and hospitals to care for diseased women. Perhaps only the investigations into slavery and slave conditions by abolitionists were more complete than Sanger's work. But in comparison to slavery, the threat posed by the urban fixtures of prostitutes and bawdy houses pales. Frederick Law Olmsted's travels, for example, could rivet public attention in the late 1850s in a way Sanger's prostitution case studies could not.⁵ The question of whether the Union would persevere and the effects of emancipation consumed the interest and passion of social reformers for decades after the 1860s. Small wonder, then, that Sanger's 1859 work went overlooked by the public. But if overlooked, his work was not totally forgotten and subsequent moral reformers tried to apply it to their own times.

Over half of his text--the first four hundred and fifty pages--traces prostitution and its accompaniments (bawdy houses, pimps, and madams) from the earliest tribes of the ancient Hebrews to Sanger's time. The ancient world takes up five chapters; France required another five chapters. The moral conditions of the countries of Western Europe, North Africa, and Russia each rated a chapter. Great Britain is covered in four chapters which survey the history of prostitution and morals from the Anglo-Saxons to the era of Victoria. Sanger devotes five more chapters to a hodge-podge of regions: Mexico, Central and South America, the North American Indian Nations, "Barbarous Nations," and "Semi-Civilized" ones.⁶

Much of Sanger's survey of the countries of the world can be discounted because of his racial and cultural perspective. Most white, western, males in the middle of the nineteenth century honestly believed in the racial superiority of the Western world, generally, and of the United States, in particular for Sanger. True, Sanger had his doubts about France, a country whose morals have always been suspect, and he

treated Russia with a great deal of skepticism. But his whole presentation led to a portrait of prostitution in New York City as the major correctable flaw of a great city. Sanger believed New York could become the pinnacle of morality if the city adopted his suggestions to control prostitution. By tinkering with the control of a small immoral minority of the women in the city, New York could be the most moral of the great cities of the world.

Given the idiosyncratic and impressionistic quality of much of Sanger's work, why pay attention to its section on New York City? Other sources exist for other countries, such as A. J. B. Parent-Duchâtelet for Paris and William Acton for England, but for America, and especially for its largest city, Sanger provides the most thorough and complete insight into New York City's prostitution.⁷

In order to gather information on the women, Sanger employed a straightforward methodology--he asked them about themselves. From his position at the pauper hospital, he oversaw the medical treatment given to venereal diseased prostitutes sent to Blackwell's Island by the justice courts and the police. He developed an interest in discovering the motivations for women becoming prostitutes and he first presented his idea of a prostitution investigation to the Board of Governors of the hospital some time in 1855.⁸ The Board adopted his plan on October 23, 1855, and helped Sanger obtain the aid and assistance of the mayor, Fernando Wood, and the chief of police, George W. Matsell. With the help of the police captains of New York's twenty-two wards, Sanger asked two thousand prostitutes a battery of thirty-seven questions while they were being held in police custody.⁹ By polling in this manner, he did not confine his survey to just the infected women he treated in his hospital. Unfortunately, Sanger never mentioned the exact dates of the polling or whether he made allowance for possible duplication. Was a woman arrested for vagrancy and interviewed in one ward and then re-arrested in another ward to be re-interviewed a few days later? Did Sanger build in some check to his survey to prevent such overlap? Sanger merely tried to assure the reader ". . . as to the authenticity of the statistics given, which were mainly collected under my own observation."¹⁰ The test of his results would be his

questionnaires, but the entire survey burned when the hospital on Blackwell's Island caught fire on February 13, 1858.¹¹ Because of the destruction of the records, Sanger's figures have to be used prudently, but the records' absence need not rule out an analysis of his findings.

The first question Sanger asked was, "How old will you be next birth-day?"¹² The range of responses ran from fifteen to seventy-seven years old. Eighty-one women fell between the ages of fifteen and seventeen years old but thirteen hundred women, or sixty-five percent of the two thousand surveyed, claimed to be between the ages of eighteen and twenty-four years old. These figures dovetail with other figures on prostitution from the period and even from the modern era.¹³ Sanger divided their ages into five-year blocks. From that view point, three-eighths of all the women surveyed were between fifteen and twenty years old and another three-eighths were between twenty-one and twenty-five years old. By any formula, therefore, a solid majority of the women were in their late teens and early twenties.

But when Sanger emphasized the youth of the women, he did so in an unusual manner. He spoke of them as though they were children. When he used the term "juvenile," Sanger implied an individual innocent and untainted by the world, a child more than a young adult. The age of consent (twelve years old for a female by common law) played no part in his determination of juvenile nor did the concept of the age of majority (by common law, the day after the twenty-first birthday). Rather, he saw the prostitutes, at least the younger ones, as pitiful, passive, wayward infants in need of understanding and care. He did not believe they had chosen to pursue their immoral calling; through the weakness of youth and their sex, they erred. This vision of prostitute as child led him to announce, in one of his more florid flights of rhetoric, that the prostitutes included

. . . many who are but mere children; who but recently knelt at a mother's side, and in infantile accents breathed a prayer to the Almighty; who but recently sprang with eager, joyous bound to the returning footsteps of a father; who in a happy and innocent home, have but recently given promise of a bright and virtuous life. Therein are also included many who were deprived by death of their natural protectors, and who, thus left unwatched and uncared for, have fallen before the destroyer ere yet the age of womanhood was reached.

The case histories Sanger retold to support the contention of the prostitute as child emphasized instances where the women, after being seduced at fourteen or fifteen years of age, soon went into prostitution. He also recited instances when an eighteen or nineteen year old woman committed to Blackwell's Island for medical treatment admitted to having been a prostitute for several years.

The lives of most of the women Sanger used as examples ended in death from alcohol abuse, disease, destitution, or a combination of these problems. "The average duration of life among these women does not exceed four years from the beginning of their careers," he stressed.¹⁵ He alleged that it was "a totally well established fact" that a quarter of new York City's prostitutes died each year. For Sanger, only an early death lay at the end of a prostitute's journey through life. The parable he taught showed their fall from the grace of virtue and true womanhood to the disgrace of prostitution and certain death. The story of the fall would be told again, in many ways, but never quite so well and so succinctly as by Sanger.

. . . Take for example, the career of a female who enters a house of prostitution at sixteen years of age. Her step is elastic, her eye bright, she is the 'observed of all observers.' The habitués of the place flock around her, gloat over her ruin while they praise her beauty, and try to drag her down to their own level of depravity while flattering her vanity. As the last spark of inherent virtue flickers and dies in her bosom, and she becomes sensible that she is indeed lost, that her anticipated happiness proves but splendid misery, she also becomes conscious that the door of reformation is practically closed against her. But this life of gay depravity can not last; her mind becomes tainted with the moral miasma in which she lives; her physical powers wane under the trials imposed upon them, and her career in a fashionable house of prostitution comes to an end; she must descend the ladder of vice. Follow her from one step to another in her downward career. To-day you will find her in our aristocratic promenades; to-morrow she may be forced to walk in more secluded streets. To-night you may see her glittering at one of the fashionable theatres; to-morrow she will be found in some one of the infamous resorts which abound in the lower part of the city. To-day she may associate with the wealth of the land; to-morrow none will be too low for her company. To-day she has servants to do her bidding; to-morrow she may be buried in a pauper's coffin and a nameless grave.

Another survey question revealed as much about Sanger's thinking on prostitution and women as it did about the prostitutes. In the middle of his survey, he asked, "What was the cause of your becoming a prostitute?" For the two thousand women surveyed, "destitution" led the list of causes with five hundred and twenty-five responses. Sanger could understand poverty but the next named cause he could not. Five hundred and thirteen responses were "inclination." Sanger went out of his way to argue against "inclination," which he defined as ". . . a voluntary resort to prostitution in order to gratify the sexual passions," a concept that clashed with the nineteenth-century ideal of the "passionless" woman.¹⁷ How could one-fourth of the women surveyed have moved into prostitution to satisfy their non-existent sexual feelings? Sanger equivocated.

In itself such an answer would imply an innate depravity, a want of true womanly feeling, which is actually incredible. The force of desire can neither be denied nor disputed, but still in the bosoms of most females that force exists in a slumbering state until aroused by some outside influences. No woman can understand its power until some positive cause of excitement exists. 18

Accordingly, no woman could freely choose to pursue prostitution. A female could not commit such an act unless some positive force acted on that "slumbering state" forcing her to turn bad. Female sexuality existed, if it existed at all, in a passive state of ignorant bliss. Corrupting influences from outside the individual brought that sexuality to life. For Sanger, those outside forces consisted of males (especially if "reciprocal affection" was involved), female friends (who had yielded to passion's power), and drink ("the excitement of alcohol"). Without some corrupting force women could not know the all-consuming power of their passions. After all, ". . . the full force of sexual desire is seldom known to the virtuous woman."¹⁹ The Pandora's box of female sexuality remained naturally closed and locked. If women said they had an inclination to enter prostitution, they deceived themselves. The primary cause of their entry into the trade lay not with themselves, believed Sanger, but outside themselves. Sanger looked upon the prostitutes as victims of others' villainous behavior. He did not hold the women responsible for their own behavior because others stimulated their unnatural life.

The real problem, Sanger argued, was not the prostitutes or prostitution but venereal disease. Venereal disease threatened everyone from the immoral women to their customers to innocent third parties such as wives and children and thereby threatened the moral fiber of New York City and possibly the nation. Although medical knowledge about the etiology of the disease remained clouded throughout the nineteenth century, physicians did know that venereal disease was sexually transmitted. Doses of drugs, especially mercury, could send the symptoms of venereal disease into remission, but mercury did not eradicate the illness. Sanger found it revealing that two-fifths or eight hundred and twenty-one of the women surveyed admitted having had a venereal disease of some kind.²⁰ Although he believed that the women's ignorance about the disease or their shame at admitting to being ill kept the reported cases of venereal disease down, Sanger, nevertheless, found the number who confessed to having the disease distressing enough.

Sanger would base his "remedial measures" on this threat to the public's health from venereal disease, but on the question of the actual number of diseased prostitutes in New York City, Sanger's case is at its weakest. He arrived at a determination of an aggregate number by asking the police captains in the various wards how many public women and bawdy houses they knew of in their neighborhoods.²¹ Numerous problems exist with this method: How did Sanger know that the police captains provided accurate numbers? Did they underreport to make their areas appear less immoral than they really were? Did their reports overlap so that the same women appeared in the figures for two or more different wards? Sanger simply accepted the statistics the police provided.

Through a bewildering set of calculations, Sanger came to the conclusion that 7,860 prostitutes resided in New York City in 1858, far fewer than the 25,000 to 30,000 earlier investigators estimated.²² He divided the 7,860 into three categories with the largest group being the 6,000 public prostitutes. Sanger believed that another 1,660 women visited houses of assignation while the remaining 200 women were "kept mistresses." Sanger illustrated what this figure of 7,860 prostitutes actually meant by saying, "Let them march up Broadway in

single file, and allow each woman, thirty-six inches (and that is as little room as possible, considering the required space for locomotion), and they would reach from the City Hall to Fortieth Street."²³

His point about the prevalence of prostitution made, Sanger then used his numbers to support his recommendations which would remove the threat to the city from all these venereally diseased prostitutes. Because Sanger thought that the pace of depravity in society had quickened and worsened, he wanted measures to control and prevent further promiscuity. "It is scarcely possible," he fretted, "that promiscuous sexual intercourse can be carried on much more extensively than it is at present. The vice seems to have reached its culminating point."²⁴ And with an increased rate of sexual contact the possibility of contracting venereal disease increased as well. "The City of New York contains, at this day, venereal infection sufficient to contaminate all the male population of the United States in a very short period of time."²⁵ Sanger feared an epidemic of sexual contact which would touch off an epidemic of disease which would threaten . . . --he never finished his logic. But he knew society had to be relieved of the incubus of personal incontinence and disease through stricter prostitution control.

Relief for these ills lay in creative use of public power at the local level. Sanger called for the establishment of a special department within the police force, a "Medical Police Department."²⁶ He would provide a three-tiered system of support for this department.

- (1.) A suitable hospital for the treatment of venereal disease;
- (2.) A legally authorized medical visitation of all known houses of prostitution, with full power to order the immediate removal of any woman found to be infected to the designated hospital;
- (3.) The power to detain infected persons under treatment until they are cured, a term of time which none but medical men can decide.

27

In a period when governments--city, county, state--provided almost no services, especially "social services," Sanger's plan appears ambitious. Cities of the 1850s provided some police protection but that force was relatively new to the urban scene. The city

also provided some fire protection, always a concern with wood building materials, and provided municipal courts for disposing of minor offenses. It oversaw the letting of contract for utilities (gas, water, sewers). The county, an under-rated cog in the triad of state administration, primarily oversaw the conditions of the roads and bridges and provided the sheriff and county courts. The state provided the major courts, some state hospital facilities, and directed the internal improvements of the state through the letting of contracts. Structurally, the state held all the "police power"--the duty to act in defense of its citizens' health, safety, welfare, and morals--and the state could delegate aspects of that power to the state's administrative arms--counties and cities. Sanger wanted to graft on to this decentralized, federated governmental form a system of state hospitals for curing venereally diseased prostitutes. He called for the hiring, at the public's expense, of highly trained medical personnel as well as support crews of nurses, orderlies, and cleaning staff.²⁸

The cost of building a new hospital and staffing it, even in an age of institution building, would be costly.²⁹ But could city finances support an increase in the police force to oversee the sexual habits of prostitutes and their clients? Would it be reasonable to leave to the physician alone the determination of the length of confinement in hospital? Would a woman confined for venereal disease have any remedies through which to seek her release? Sanger anticipated such questions and brushed them aside; he believed that the threat to society from prostitutes with venereal disease was great enough to override the normal legal protection against an unreasonable imprisonment.

But as a practical matter, the writ of habeas corpus most concerned Sanger. While working on Blackwell's Island, he had seen the police turn over an infected prostitute for care and treatment only to have her released on order of writs obtained by her brothel keeper, lover, or acquaintance.³⁰ Sanger hoped to evade this intrusion of legal procedure into what he thought was strictly a medical matter. He believed that the law frustrated his best intentions and argued by

an analogy of another contagious disease, yellow fever.

It would be as reasonable for a lawyer to petition the courts to order a vessel detained in Quarantine by the Board of Health because she was infected with yellow fever to be brought to her wharf in this city, and there to have permission to disseminate the disease on board, as it is for the same individual to apply for a writ of certiorari, the effect of which is to take an abandoned woman reeking with disease from an institution where she is under treatment, and allow her to extend the venereal poison to every one who may have intercourse with her. 31

He would use the police power of the state to create an institutional setting to cure their venereal disease. Then he would amend the rights of a class of women by limiting their liberty on the basis not of reformation or punishment for a crime, but on public health grounds. The women needed to be detained for their own good--and society's. After all, had he not shown that the number of prostitutes in the city to be small and had he not consistently maintained that the women infected with venereal disease and affected by his remedial measures were really child-like creatures needing guidance, support, and care, not punishment? Sanger wanted to use state police power to protect the public's health and combine it with the state's authority to act as an overseer of wayward children and orphans, parens patriae.³² By conceptualizing prostitutes as children, his suggestion of involuntary commitment to hospital until medical authorities determined the proper time for release appeared far less harsh.

And how difficult would such a proposal be to formulate and enforce? Sanger thought it would be easy. "No lawyer would find any difficulty in drafting a short act giving the Police Department the power, [upon Medical Bureau recommendation], to remove any diseased woman to proper hospital, and retain her there until cured."³³ This "short act," according to Sanger, would sail through the state legislature, obtain funding, be put into action, and the social problem of prostitution would begin to lessen. The police would know, arrest, and commit to hospital women who were not just prostitutes but venereally infected prostitutes. Held in the hospital, not for any crime but for their health and protection, the women would receive care for their ailments, would learn the error of their ways, and would perhaps choose to abandon their life.

Not only would the fallen be recovered but the temptations to those who might fall would be eliminated. A system of public surveillance by the police would close a great many haunts where "dishonest characters" waited to send a helpless woman down the wrong path. The amount of prostitution would decrease, Sanger believed, since prostitution needed secrecy and with the trade known to the police and with medical men visiting the houses to search for disease, the natural shame of women and the dread of public exposure would deter many women from pursuing a career in prostitution.³⁴

Sanger drew on his observations of European regulating systems to suggest two measures which continue to generate debate: licensed bawdy houses and municipal vice districts. On the question of licensing, Sanger knew that he would receive criticism on the grounds of "making vice a sort of revenue." But he pointed out that "acknowledged social evils have, ere, this, been made to contribute to the public funds."³⁵ Alcohol and prostitution were occasionally called twin evils in the nineteenth century and it was the licensing of businesses selling alcohol Sanger emphasized as an example of the state taxing a vice. If alcohol constituted an evil and the state taxed its distribution and consumption, why not prostitution? Sanger estimated that an additional one hundred thousand dollars could be added to the public's treasury by placing a one percent tax on the business of prostitution.

On vice districting, Sanger sounded the common refrain of localizing the evil effects of prostitution. Better policing would be possible by preventing the movement of bawdy houses into areas previously free of such places and thereby "preventing the depreciation of property which takes place in any neighborhood where a brothel is established." Sanger recommended strong medicine for a tough problem, but if the medication worked, the health of the whole body politic would be improved.³⁶

Unfortunately the events of 1859-1860 drowned out his call for action. The threat from the South--slavery--pushed Sanger's ideas into the background of public debate. New York never tried to implement Sanger's recommendations. However, his plan cannot be called a

complete failure. Sanger's proposals poorly fit the governmental structure and social attitudes of the time. The overlapping levels of government clouded questions of funding and supervision. Americans believed they had a special mission from God to lead the world in self-government and from moral turpitude. The belief in the moral up-rightness of the individual was cemented in the social and legal milieu, and Sanger's call for the surveillance and the control of prostitutes cut across the grain of those convictions. The reality may have been an era of growing social and personal controls because of industrialization with its accompanying division of labor but the perception of unfettered individualism persisted. The law placed checks upon such capricious governmental actions as Sanger envisioned and the law viewed prostitution and the property used to house the immoral trade in its own mysterious way. Among lawyers, judges, legislators, and police the feeling ran deep that the law provided adequate remedies for society and tampering with the writs or using the police power to license bawdy houses over-stepped the bounds of reasonableness. Writers in the general and legal literature used and cited Sanger's work in the years following the Civil War and his arguments are being reassessed. His work is still valuable for what he said about prostitution and what he personified about his age.

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Forty-one years passed between the publication of Sanger's The History of Prostitution and the publication of two particularly intriguing articles on prostitution and its control. In some ways, they revealed a hardening of the arguments about the best course to pursue in dealing with "the social evil."

If the arguments had changed somewhat by the turn of the century, America had changed much. The crisis of the Union had arisen and had been met; the effects of emancipation had reverberated for decades after reunion. Despite the hopes of the 1850s and 1860s, blacks had faded to virtual invisibility. In 1896, Jim Crow received constitutional respectability. The Spanish-American War, more a jingoist fracas than a war, had come and gone. The nation saw nine presidents inaugurated between 1861 and 1901--and had seen three killed in office. People filled in the continent, and the census bureau

had declared the frontier at an end. America's Indians had been subdued and tucked away to reservations. Waves of so-called "new immigrants" had begun to arrive in the country and be bottled up in the cities of the East Coast and Midwest. American industrialism had grown and would continue to expand. The dislocations and readjustments which resulted from this expanding culture of capitalism had in turn produced a reform movement that was in full voice by 1900.³⁷

A heightened fear of prostitution and immorality reflected these stresses in the apparently unstable world of early twentieth-century America. An organized woman's rights movement helped to fuel this increased concern about prostitutes. The double standard of sexual behavior, whereby a man could--perhaps was expected to--indulge himself in sensual behavior while the woman who did risked scorn and social ostracism, had come under attack. A social purity movement composed of the woman's rights activists, the religious, and some professionals, sought to break the double standard, institute one standard of morality, and rear a generation of children in a pure, Protestant life. In the "new abolitionist's" thinking, the only appropriate public policy affecting prostitution was its total repression. The full force of the law and public opinion had to be brought against the immoral trade. The individual women were to be pitied and reformed, but all public reminders of the trade's existence had to be wiped out.³⁸

Like Sanger, the social purity forces sought to limit the damage done to society by prostitution. But these turn-of-the-century reformers wanted to eradicate prostitution and instill the values of small-town, rural America on a pluralistic society. Segments of the "better classes" sought to hold on to the past and hold back the future. The highly visible targets of the saloon and its twin, prostitution, became flash points in the fight for purity.³⁹ Perhaps by striking out against these obvious evils, the world would change for the better.

The forces of social purity hoped to influence public opinion through books, articles, and pamphlets. The period from 1900 through World War One saw an explosion of works on vice. Vice connoted a range

of frowned-upon activities, but it especially meant prostitution and alcohol.⁴⁰ Social purity reformers in the Progressive Era produced shelves of books and volumes of articles on the social evil and its attendant problems. Unlike the isolated Sanger, no single Progressive source adequately depicts the varied strains of this period of moral outrage. However, two examples from this mass of material can serve as representative pieces. In the 1900 issue of Municipal Affairs, wedged between articles on the cost of running local government and on improving civil service, appeared "Municipalities and Vice."⁴¹ The publication hardly stands today for its literary quality or for its influence on public policy, but it is interesting as representative of the Progressive, reform-oriented journal writing of the time.

The unknown author began rhetorically by asking, "What should be the attitude of the city government--the people acting collectively--towards vice, and principally towards prostitution?" Three options existed for cities: periodic fining of women, "localization" of the women and their houses, and "public registration" along European lines of prostitution control but with American twists. Yet none of these options sufficed. An informal system of fining as a licensing technique could be ruled out if for no other reason than it was "only one degree removed from secret blackmail."⁴² Fining would not protect the public and might keep women in their unfortunate trade by taking money away from them. Localization (vice districting) failed as well. "Entire sequestration" could not be accomplished because some women would not want to live within the specified areas where the police and licensing could keep track of them. Further, localization produced other problems. Where would the vice district be located? If in the poorer sections of the city, "as is usually done else where the plan has been adopted," then "why should the children of the poor be forced to view such sights which are too vulgar and evil for the children of the rich."⁴³ Public registration provided the third option, but its applicability to America was doubtful. The author noted that European regulations and inspections had been "only moderately successful." Regulation was poorly adapted

to the United States because the continental system violated "our moral ideas" and "to embody it in law violated our social assumptions." The author does not make clear what exactly those moral ideas and social assumptions were, but he likely meant a restriction of the prostitute's movements and mandatory medical examinations.⁴⁴

Having ruled out a system of periodic fines, localization, and a European-like system of municipal control, the article then presented the author's plan which amounted to a strengthening of existing methods and laws. For example, "there is no question but that the laws regarding indecent exposures and public solicitation should be made more severe and more rigidly enforced."⁴⁵ Women plying their vocations as prostitutes should not be allowed to live in crowded tenements where they provided a bad example to the young. This desire to protect the young fed into the suggestion that no woman under twenty-one years of age be allowed to practice prostitution. By statute or municipal ordinance the woman, the brothel keeper, and the customer all would be liable to be fined, even though the author earlier ruled out fining, if the prostitute involved was under twenty-one.⁴⁶ The police would issue a card to each woman bearing her photograph and address and stating that she was of the required age of twenty-one and that she wanted to be a "common woman." By requiring all prostitutes to be twenty-one or older, the law would guarantee protection for young girls by preventing them from entering the trade and would protect young boys since the older age of the prostitutes would repel them. The protection of the young from exposure to prostitution at too early an age and the desire to control and suppress "all external evidence of prostitution" constituted the goals to work towards in the public policy on prostitution.⁴⁷ The problem was not prostitution, which the article held to be constant throughout history, nor the current laws on prostitution. The problem lay in the lack of enforcement. This failing could be remedied by strengthening the power of the police to enforce the law against public exposures and by raising the age a woman could become a prostitute.

Absolutely not, retorted another anonymous article in the

following issue of Municipal Affairs.⁴⁸ The 1901 article sought to shore up the 1900 break in the social purity dam around prostitution and vice. Where the 1900 article believed the European system of controls had been "only moderately successful," the 1901 article believed the regulation of prostitution failed completely. Not only did the European model not diminish disease and limit prostitution, it wrecked worse havoc by corrupting the moral sense of the communities which used such regulations.

In rebuttal, the 1901 article argued against fines for prostitutes who were under twenty-one years old. The anti-regulationist argued that fines hurt the women. Prostitutes had but one source of income and in order to pay their fines they would have to sin again. The fine also assumed the form of a "license" to practice the immoral trade. To avoid fining the women, the anti-regulationist would have the police arrest the women; "commitment for six months to a prison would at least be punishment, while a fine is not."⁴⁹ The author qualified this statement by stressing reformation. First, "probation officers and court officials (all women)" should be allowed to accompany police on their raids and try "on the spot" to persuade women to turn themselves into one of the houses for the fallen instead of going to court. If the woman refused, she would be arrested and the court should send her to a "reformatory" for support and aid. If, at some undisclosed time, the reformatory determined her to be "incorrigible," then the court should sentence her to prison "for the longest term possible."⁵⁰ Society acting through the courts and the expanding social service bureaucracy should provide the woman every opportunity to reclaim herself, the article stated. But if the woman choose not to reform, then society should confine her and exact its punishment. The protection of morality demanded not only the suppression of public manifestations of prostitution but also the imprisonment of unrepentant prostitutes.

By restricting public prostitution through imprisonment and vigilant policing, the 1901 article continued, a new world could begin. The "foundation causes" of prostitution lay in the double standard of morality and in the belief that vice was a necessary evil for men. By

breaking the double standard and raising all people to a single level of morality--a morality of continence and self-discipline--the millenium could be brought just that much closer. In the meantime, other evils could be attacked, such as police corruption, the saloons, and the love of money.⁵¹

The law played an important part in this cleanup and reform of society. The law could not make men good, but it could help men to act virtuously. To do that the laws must set a high standard for men to live up to in their daily lives, lectured the anti-regulationist. Present law could improve human character by imitating "higher law." The author here introduced religion into the argument. The laws affecting morals had to conform to religion.⁵² The law should have no leeway to come to an accommodation with prostitution. The law could only oppose prostitution. Prostitution's extermination could be justified as a means of sculpting human life to reflect more accurately the perfect world of Christianity.

For the regulationist of 1900, the law needed only to be fine-tuned in order to mitigate the public aspects of prostitution and to act as a kind of damage control system. In a different vein, law for the abolitionist of 1901 could be used only negatively to stop, prevent, repress, and suppress prostitution in support of the positive goal of a pure, moral world in which thrived the equality of the sexes. The social problem remained constant; the perception of the law's usefulness changed.⁵³

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Although these works represent a larger body of investigations, researches, and writings on prostitution, they leave at least one element in need of study, the law, a thread which joins the three works discussed. None of these three writings focused exclusively on the law or examined how the law approached prostitution and bawdy houses or how the law evolved in its dealings with prostitution. But they all believed the law to be important. Sanger wanted the city and the state to coordinate their actions against prostitution, the legislature to fund hospitals for the treatment of venereal disease, and the state to use its authority to control prostitution in order to protect the public's health. The two writers at the turn of the century saw the law

as a means to proceed towards each author's goals. In the first, the goal was better enforcement and deterrence, in the second, prostitution's elimination.

Prostitution in the law has languished in the literature of prostitution. The legal aspects of the public offense have been turned over to lawyers for study and the history of prostitution in law is too important to be left to lawyers. Prostitution constituted a criminal offence, one well known to the law, and the remedies the law provided affecting prostitutes and bawdy houses should be assessed. A long-term perspective on the laws relating to public women, city-sanctioned red-light districts, and their closings provide insight into the relationship between law and the social problem of prostitution.

¹William W. Sanger, *The History of Prostitution: Its Extent, Causes, and Effects Throughout the World* (New York: Harper & Brothers, 1859 reprinted New York: Arno, 1972), 17. *The History of Prostitution* has been reissued at least seventeen times: 1869, 1874, 1876, 1895, 1898, 1899, 1906, 1910, 1913, 1919, 1921, 1937, 1972, and 1974.

²The biographical information on Sanger can be found in James Wunsch, "Prostitution and Public Policy: From Regulation to Suppression, 1858-1920," (unpublished Ph.D. dissertation, the University of Chicago, 1976), 9. *The History of Prostitution* may have been Sanger's only published work; I find no others. The *New York Times* favorably reviewed the work on November 10, 1859.

³Henry Mayhew, *London Labour and the London Poor: A Cyclopaedia of the Conditions and Earnings of Those That Will Work, Those That Cannot Work, and Those That Will Not Work* (4 vols., London: Frank Cass, 1967 reprint of 1861 edition), especially see vol. 4, pp. 35-272, 355-65.

⁴Brace set up a program of picking up homeless children off the streets of New York City, cleaning them up, and sending them to the West to begin new lives. He hoped to snip potential criminals in the bud, rid the city of overcrowding, and (perhaps most important) remove the children from the influences of the Catholic Church. In the countryside, they would grow up to be honest Protestant farmers. On Brace, the Children's Aid Society, and nineteenth-century attitudes towards children, see Charles Loring Brace, *The Dangerous Classes of New York and Twenty Years Work Among Them* (New York: Wynkoop & Hallenbeck, 1880 reprint of 3rd edition, Montclair, New Jersey: Patterson Smith, 1976); Emma Brace, ed., *The Life of Charles Loring Brace* (New York: Arno, 1976 reprint of 1894 edition); *Annual Report of the Children's Aid Society* in David J. Rothman, ed., *Poverty U. S. A.: The Historical Record* (New York: Arno, 1976); Joseph M. Hawes, *Children in Urban Society: Juvenile Delinquency in Nineteenth Century America* (New York: Oxford University Press, 1971); Miriam Z. Langsam, *Children West: A History of the Placing-Out System of the Children's Aid Society, 1853-1890* (Madison: The State Historical Society of Wisconsin, 1964); Robert M. Mennel, *Thorns and Thistles: Juvenile Delinquency in the United States, 1825-1940* (Hanover, New Hampshire: The University Press of New England, 1973); Steven L. Schlossman and Stephanie Wallach, "The Crime of Precocious Sexuality: Female Juvenile Delinquency in the Progressive Era," *Harvard Educational Review*, 48 (February 1978), 65; Steven L. Schlossman, *Loye & the American Delinquent: The Theory and Practice of "Progressive" Juvenile Justice, 1825-1920* (Chicago: The University of Chicago Press, 1977). For children and prostitution see Deborah Gorham, "The 'Maiden Tribute' of Modern Babylon Re-examined: Child Prostitution and the Idea of Childhood in Late Victorian England," *Victorian Studies*, 21 (Spring 1978), 353.

⁵Frederick Law Olmsted, *The Cotton Kingdom: A Traveller's Observations on Cotton and Slavery in the American Slave States*, Arthur M. Schlesinger, ed., (New York: Knopf, 1953).

Sanger, like Brace, had his doubts whether people ought to live in cities at all. And, like Brace, he saw mass movement to the country as a possible answer to the city's problems. For example, Sanger wrote,

Our cities are overcrowded; remove some of their inhabitants to the country. In our cities work can not be obtained; in the country both male and female laborers are urgently required. In cities an unemployed woman is exposed to innumerable temptations; in the country she need never be unemployed, and consequently would escape such dangers [like low wages and prostitution]. p. 530

Sanger specifically singled out the Children's Aid Society for praise in controlling the city. For more on Brace and the anti-urban sentiment of the nineteenth century, see Paul Boyer, *Urban Masses and Moral Order in America, 1820-1920* (Cambridge, Mass.: Harvard University Press, 1980) and Richard R. Wohl, "The 'Country Boy' Myth and Its Place in American Urban Culture: The Nineteenth Century Contribution," *Perspectives in American History*, 3 (1969), 77.

⁶Sanger, *The History of Prostitution*, 427. Under "Barbarous Nations" Sanger discusses the entire continent of Africa and Australasia as well as the West Indies, Java, Sumatra, and Borneo. Under "Semi-Civilized" he examines the subcontinent of India, China, Japan, Persia, Afganistan, Turkey, Iceland, and Siberia.

⁷Alexander Jean Baptiste Parent-Duchatelet, *De la prostitution dans la ville de Paris, consideree sous le rapport de l'hygiene, de la morale et de l'administration: ouvrage appuye de documents statistique pruiise dans les archives de la prefecture de police* (Paris, 1836); William Acton, *Prostitution, Considered in Its Moral, Social, and Sanitary Aspects in London and other Large Cities and Garrison Towns with Proposals for the Control and Prevention of Its Attendant Evils* (London: Frank Cass and Co., 1972 reprint of the 2d edition, 1870, first published in 1857).

⁸Sanger, *The History of Prostitution*, 28-30.

⁹*Ibid.*, pp. 450-451 for the list of all the questions Sanger asked.

¹⁰*Ibid.*, p. 31.

¹¹*Ibid.*, p. 451.

¹²*Ibid.*, pp. 452-455.

¹³See Judith R. Walkowitz, *Prostitution and Victorian Society: Women, Class, and the State* (New York: Cambridge University Press, 1980), 17-18, or Charles Winick and Paul M. Kinsie, *The Lively Commerce: Prostitution in the United States* (Chicago: Quadrangle Books, 1971), 31, 49, 74, or James H. Bryan, "Occupational Ideologies and Individual Attitudes of Call Girls," *Social Problems*, 13 (Spring 1966), 441.

¹⁴Sanger, *The History of Prostitution*, 32.

¹⁵*Ibid.*, p. 455. Italics in original. William Acton, writing on prostitution in London and in defense of Britain's Contagious Diseases Acts, believed prostitution a "transitory state." "I have every reason to believe that by far the larger number of women who have resorted to prostitution for a livelihood, return sooner or later to a more or less normal course of life." Quite a different picture than Sanger presented. Acton, *Prostitution*, 39, 49, and see Walkowitz's analysis of Acton in *Prostitution and Victorian Society*, 44-46.

¹⁶Sanger, *The History of Prostitution*, 453.

¹⁷*Ibid.*, p. 488. The other causes Sanger listed with the number of responses are: "Seduced and abandoned, 258; Drink, and the desire to drink, 181; Ill-treatment of parents, relatives, or husbands, 164; As an easy life, 124; Bad company, 84; Persuaded by prostitutes, 71; Too idle to work, 29; Violated, 27; Seduced on board emigrant ships, 16; Seduced in emigrant boarding houses, 8."

¹⁸Sanger, *The History of Prostitution*, 488. The recent years have seen an explosion of work on women's history and the nineteenth-century perception of women's sexuality forms a part of that explosion. See G. J. Barker-Benfield, *The Horror of Half-Known Lives: Male Attitudes Toward Women and Sexuality in the Nineteenth-Century* (New York: Harper & Row, 1976); Nancy F. Cott, *The Bonds of Womanhood: "Women's Sphere" in New England, 1780-1835* (New Haven: Yale University Press, 1977); Nancy F. Cott, "Passionlessness: An Interpretation of Victorian Sexual Ideology, 1780-1850," *Signs: A Journal of Women in Culture and Society*, 4 (Winter 1978), 219; Carl N. Degler, *At Odds: Women and the Family in America from the Revolution to the Present* (Oxford: Oxford University Press, 1980); Carl N. Degler, "What Ought To Be and What Was: Women's Sexuality in the Nineteenth Century," *American Historical Review*, 79 (December 1974), 1467; Ann Douglas, *The Feminization of American Culture* (New York: Avon Books, 1977); Steven Marcus, *The Other Victorians: A Study of Sexuality and Pornography in Mid-Nineteenth-Century England* (New York: Basic Books, 1966); Ronald Pearsall, *Public Purity, Private Shame: Victorian Sexual Hypocrisy Exposed* (London: Weidenfeld and Nicolson, 1976); Kathryn Kish Sklar, *Cathering Beecher: A Study in American Domesticity* (New York: W. W. Norton & Co., 1973); Carroll Smith-Rosenberg and Charles Rosenberg, "The Female Animal: Medical and Biological Views of Woman and Her Role in Nineteenth Century America," *Journal of American History*, 60 (September 1973), 332; Eric Trudgill, *Madonnas and Magdalens: The Origins and Development of Victorian Sexual Attitudes* (New York: Holmes & Meier, 1976); and Barbara Welter, "The Cult of True Womanhood, 1820-1860," *American Quarterly*, 13 (Summer 1966), 151.

¹⁹Sanger, *The History of Prostitution*, 489.

²⁰*Ibid.*, p. 487. A lengthy bibliography could be cited on the nineteenth century and venereal disease. Britain established its state-regulated prostitution for certain military bases on the grounds that venereal disease threatened the health of the Army. Parliament passed the Contagious Diseases Act on July 29, 1864, 27 and 28 Vict. cap. 85, and amended the act on June 11, 1866, 29 Vict cap. 35. The government suspended compulsory medical examinations of registered prostitutes on April 15, 1886. Four Parliamentary commissions convened to investigate the operations of the acts in 1867, 1869, 1871, and 1882. Their reports can be found in the *British Parliamentary Papers* (Health and Infectious Diseases, vols. 4-7, Shannon, Ireland: Irish University Press, 1970). See also Richard L. Bianco, "The Attempted Control of Venereal Disease in the Army of Mid-Victorian England," *Journal of the Society for Army Historical Research*, 45 (Winter 1967), 234; Paul McHugh, *Prostitution and Victorian Social Reform* (New York: St. Martin's Press, 1980); J. B. Post, "A Foreign Office Survey of Venereal Disease and Prostitution Control, 1869-1870," *Medical History*, 22 (July 1978), 327; Theodore Rosebury, *Microbes and Morals: The Strange Story of Venereal Disease* (New York: Viking, 1971); Owsei Temkin, "Therapeutic Trends and the Treatment of Syphilis Before 1900," *Bulletin of the History of Medicine*, 29 (July-August 1955), 309; Walkowitz, *Prostitution and Victorian Society*; Judith R. and Daniel J. Walkowitz, "We Are Not Beasts of the Field": Prostitution and the Poor in Plymouth and Southampton Under the Contagious Diseases Acts," *FS, Feminist Studies*, 1 (Winter 1973), 73.

²¹Sanger, *The History of Prostitution*, 582.

²²*Ibid.*, p. 584. Edward K. Spann in *The New Metropolis: New York City, 1840-1857* (New York: Columbia University Press, 1981), 251, using Sanger's work and figures called New York the "capitol of American prostitution." For a work on all of New York's women, see George Ellington (pseud.), *The Women of New York, or the Under-World of the Great City* (New York: Arno, 1972 reprint of New York: New York Book Co., 1869).

²³Sanger, *The History of Prostitution*, 585. A house of assignation was a hotel-like business with furnished rooms to let by the hour. Unlike a bawdy house, in which women lived, no woman lived in an assignation house except perhaps its keeper.

²⁴Sanger, *The History of Prostitution*, 646.

²⁵*Ibid.*, p. 645.

²⁶*Ibid.*, p. 643, 652. On medical police, see George Rosen, "Cameralism and the Concept of Medical Police," *Bulletin of the History of Medicine*, 27 (January 1953), 21; George Rosen, "The Fate of the Concept of Medical Police," *Centarus*, 5 (1957), 97. The most well developed retort to Sanger appeared in 1914, Abraham Flexner's *Prostitution in Europe* (New York: Century Co., 1914). The Bureau of Social Hygiene, the organization on the front lines in the Progressive fight against prostitution and vice and funded with Rockefeller money, underwrote Flexner's investigation. He did not disappoint them. He concluded that all the regulation efforts of Europe were failures. Flexner had made his mark with his report on the quality of medical education in the United States; see Robert P. Hudson, "Abraham Flexner in Perspective: American Medical Education," *Bulletin of the History of Medicine*, 46 (November 1972), 545.

²⁷Sanger, *The History of Prostitution*, 643-644. Sanger denied adamantly that his hospital internment proposal was a kind of punishment or that non-medical people should have any over-sight of the hospital. He lectured,

Inmates of hospitals have too long endured the stupid interference of non-medical men, and it is time that medical law exclusively was considered in the direction and management of buildings devoted to medical purposes. This is especially necessary in a syphilitic hospital, on account of the character of its patients. No amount of imprisonment as a punishment ever yet reformed a prostitute, and it never will; all intercourse with prisoners, be it ever so transient, has but confirmed women in vice. 644

²⁸See Harold M. Hyman and William M. Wiecek, *Equal Justice Under Law: Constitutional Development, 1835-1875* (New York: Harper & Row, 1982); Morton Keller, *Affairs of State: Public Life in Nineteenth Century America* (Cambridge, Mass.: Belknap Press, 1977); William Nelson, *The Roots of American Bureaucracy, 1830-1900* (Cambridge, Mass.: Harvard University Press, 1982). For New York, see Spann, *The New Metropolis*.

²⁹David J. Rothman, *The Discovery of the Asylum: Social Order and Disorder in the New Republic* (Boston: Brown and Co., 1971), and his follow-up work, *Conscious and Convenience: The Asylum and Its Alternatives in Progressive America* (Boston: Little, Brown and Co., 1980).

³⁰Sanger, *The History of Prostitution*, 638-639, 649.

³¹*Ibid.*, p. 649.

³²For the best explanation of *parens patriae* and how the states and courts applied the concept in the nineteenth century, see Steven L. Schlossman, *Love & the American Delinquent: The Theory and Practice of "Progressive" Juvenile Justice* (Chicago: The University of Chicago Press, 1977).

³³Sanger, *The History of Prostitution*, 649, italics in original.

³⁴*Ibid.*, pp. 651-653.

³⁵*Ibid.*, p. 651.

³⁶*Ibid.*, pp. 649-654.

³⁷A lengthy bibliography could be cited here as well. As a beginning see Paul Boyer, *Urban Masses and Moral Order in America, 1820-1920* (Cambridge, Mass.: Harvard University Press, 1978); Samuel P. Hays, "The Politics of Reform in Municipal Government in the Progressive Era," *Pacific Northwest Quarterly*, 55 (October 1964), 157; Samuel P. Hays, *The Response to Industrialism, 1885-1914* (Chicago: The University of Chicago Press, 1957); Gabriel Kolko, *The Triumph of Conservatism: A Re-interpretation of American History, 1900-1916* (New York: Free Press of Glencoe, 1963); Glenn Porter, *The Rise of Big Business, 1860-1900* (New York: Crowell, 1977).

³⁸Keith Thomas, "The Double Standard," *Journal of the History of Ideas*, 20 (April 1959), 195. The best work on social purity is David Pivar, *Purity Crusade: Sexual Morality and Social Control, 1868-1900* (Westport, Conn.: Greenwood, 1973). The term "new abolitionist" is his. Also see his "Cleansing the Nation: The War on Prostitution, 1917-1921," *Prologue: The Journal of the National Archives*, 12 (Spring 1980), 29.

³⁹The temperance movement has a history all its own. As a beginning, see Norman C. Clark, *Deliver Us from Evil: An Interpretation of American Prohibition* (New York: W. W. Norton, 1976); Larry Englemann, *Intemperance: The Lost War Against Liquor* (New York: The Free Press, 1979); Joseph R. Gusfield, *Symbolic Crusade: Status Politics and the American Temperance Movement* (Urbana: University of Illinois Press, 1963); Jon M. Kingsdale, "'The Poor Man's Club': Social Functions of the Urban Working-Class Saloon," *American Quarterly*, 25 (October 1973), 472; W. J. Rorabaugh, *The Alcoholic Republic: An American Tradition* (New York: Oxford University Press, 1979); Ian R. Tyrell, *Sobering Up: From Temperance to Prohibition in Antebellum America, 1800-1860* (Westport, Conn.: Greenwood, 1979).

⁴⁰Roland Robert Wagner, "Virgine Against Vice: A Study of Moral Reformers and Prostitution in the Progressive Era," (unpublished Ph.D. dissertation, University of Wisconsin-Madison, 1971), 153, counted the number of entries in the *Reader's Guide to Periodic Literature* for "prostitution" from 1890 to 1918. The numbers broke down as follows:

1890-1899	4
1900-1904	17
1905-1909	15
1910-1914	145
1915-1918	25

⁴¹"Municipalities and Vice," **Municipal Affairs**, 4 (December 1900), 698. I have seen no speculation as to the author of this article. The Reform Club of New York City published **Municipal Affairs** between 1897 and 1903. The journal declared itself "devoted to the Consideration of City Problems from the stand point of the Taxpayer and the Citizen."

⁴²"Municipalities and Vice," 700.

⁴³*Ibid.*, p. 702.

⁴⁴*Ibid.*, pp. 669-700. As representative, the author reproduced the regulations for prostitutes for Copenhagen. They directed prostitutes to register with the police, registration had to be voluntary, they had to live in special houses in the city, and prostitutes had to consent to bi-weekly medical examinations. Further, prostitutes were forbidden:

1. To appear in any indecent costume.
2. To show indecent behavior.
3. To follow anybody, to speak to anybody, or make signals to anybody.
4. To appear at the window or to remain at the door or on the sidewalks.
5. To stand in groups or to walk to and fro in any public place.
6. To be in a theater or other place of amusement except those permitted by the police.
7. To sit as guests at restaurants and hotels.
8. To extort money, although the police may be called in to enforce payment of proper charges.
9. To appear in certain sections of the city.

⁴⁵"Municipalities and Vice," 704.

⁴⁶*Ibid.*, p. 705.

⁴⁷*Ibid.*, p. 706.

⁴⁸"Another View of Municipalities and Vice," **Municipal Affairs**, 5 (June 1901), 376. Edwin R. A. Seligman in his **List of Books on the Social Evil** (New York: Library Department of the American Vigilance Association, 1912), attributed this article to Josephine Shaw Lowell (1843-1905), the philanthropist, reformer, and one of the founders of the Charity Organization Society.

⁴⁹"Another View of Municipalities and Vice," 383.

⁵⁰*Ibid.*

⁵¹*Ibid.*, pp. 382-383.

⁵²*Ibid.*, p. 387.

53. For the best secondary works, see Pivar, *Purity Crusade*; Walkowitz, *Prostitution and Victorian Society*; Mark Thomas Connelly, *The Response to Prostitution in the Progressive Era* (Chapel Hill: University of North Carolina Press, 1980); Ruth Rosen, *The Lost Sisterhood: Prostitution in America, 1900-1918* (Baltimore: The Johns Hopkins University Press, 1982). None of these works focus on the law.

A few of the more interesting contemporary and secondary works are: Jane Addams, *A New Consciousness and an Ancient Evil* (New York: Macmillan, 1912); Eric Anderson, "Prostitution and Social Justice: Chicago, 1910-1915," *Social Service Review*, 48 (June 1974), 203; Fred W. Baldwin, "The Invisible Armor," *American Quarterly*, 16 (Fall 1964), 432; Paul S. Boyer, *Purity in Print: The Vice-Society Movement and Book Censorship in America* (New York: Charles Scribner's Sons, 1968); John C. Burnham, "American Historians and the Subject of Sex," *Societas: A Review of Social History*, 2 (Autumn 1972), 307; John C. Burnham, "The Progressive Era Revolution in American Attitudes Towards Sex," *Journal of American History*, 59 (March 1973), 885; Chicago Vice Commission, *The Social Evil in Chicago* (Chicago: Gunthrop-Warren, 1911 reprinted New York: Arno, 1970); Garna L. Christian, "Newton Baker's War on El Paso Vice," *Red River Valley Historical Review*, 5 (Spring 1980), 55; Committee of Fifteen, *The Social Evil, with Reference to Conditions Existing with the City of New York* (New York: Putnam's Sons, 1902 reprinted New York: Garland, 1979); Egal Feldman, "Prostitution, the Alien Woman, and Progressive Imagination, 1910-1915," *American Quarterly*, 19 (Summer 1967), 192; Jeremy P. Felt, "Vice Reform as a Political Technique: The Committee of Fifteen in New York, 1900-1901," *New York History*, 54 (January 1973), 24; Leslie Fishbein, "Harlot or Heroine? Changing Views of Prostitution, 1870-1920," *Historian*, 43 (November 1980), 23; Paul H. Hass, "Sin in Wisconsin: The Teasdale Vice Committee of 1913," *Wisconsin Magazine of History*, 49 (Winter 1965-1966), 138; Reginald Wright Kauffman, *the Girl That Goes Wrong* (New York: Moffat, Yard, and Co., 1911); Reginald Wright Kauffman, *The House of Bondage* (New York: Grosset and Dunlap, 1910); George J. Kneeland, *Commercialized Prostitution in New York City* (New York: Bureau of Social Hygiene, 1913 reprinted Montclair, New Jersey: Patterson Smith, 1969); Roy Lubove, "The Progressive and the Prostitute," *Historian*, 24 (May 1962), 308; James R. McGovern, "The American Women's Pre-World War I Freedom in Manners and Morals," *Journal of American History*, 55 (September 1968), 315; Elizabeth C. MacPhail, "When the Red Lights Went Out in San Diego: The Little Known Story of San Diego's 'Restricted' District," *Journal of San Diego History*, 20 (Spring 1970), 1; Robert E. Riegal, "Changing American Attitudes Toward Prostitution," *Journal of the History of Ideas*, 29 (July-September 1968), 437; Ruth Rosen and Sue Davidson, eds., *The Mamie Papers* (Old Westbury, New York: The Feminist Press, 1977); Willoughby Cyrus Waterman, *Prostitution and its Repression in New York City, 1900-1931* (New York: Columbia University Press, 1932); Howard B. Woolston, *Prostitution in the United States, Prior to the Entrance of the United States into the World War* (New York: Century Co., 1921 reprinted Montclair, New Jersey: Patterson Smith, 1969).

Consult the bibliography for other works on prostitution in the nineteenth and twentieth centuries.

CHAPTER TWO

To Prescribe Them As A Class: Prostitutes as Vagrants

An improved understanding of prostitution before the Great War requires an exploration of its legal aspects. What approaches and options did the law have against a minority of immoral women between the Civil War and World War One America? Answers lie in three bodies of legal materials: first, English legal traditions, fictions, and remedies against vagrants; second, nineteenth and twentieth-century American legal treatises that elaborated on the received English traditions; and third, high state court cases that demonstrated how the courts applied "book" theories to fact situation.

America's legal heritage toward immoral females has its roots in one of the cataclysmic events in human history--the Black Death of 1349-1351. In Britain the plague struck during the reign of Edward III (1327-1377) thinning the population by approximately one-third.¹ English society became, in the economist's phrase, labor-scarce with corresponding inflated prices for goods and services and greater employment opportunity for agricultural workers. Because of inflation and the wandering of agricultural workers from one manor to another, to cities, or to areas willing to offer higher wages to attract labor, Parliament passed measures to restrict the movement of persons and to control, if not to roll back, wages.² In 1349 Parliament enacted the Ordinance of Laborers, the preamble of which outlined its reasons for passage.

Because a great Part of the People, and especially
of Workmen and Servants, late died of the Pestilence,
many seeing the necessity of Masters, and great
Scarcity of Servants, will not serve unless they
may receive excessive Wages, and some rather willing
to beg in Idleness, than to Labour to get their
living; . . . Ordained: That every Man and Woman
of our Realm of England, of what condition he be,
free or bond, able in body, and within the age of
three score years, . . . be required to serve 3

Parliament, the following year, strengthened the wage and price provisions of 1349 by altering the Ordinance of Laborers to the more permanent form of a statute, the Statute of Laborers. In

particular, the 1350 statute attempted to confine laborers to their place of residence at whatever wages a master offered.⁴

James Fitzjames Stephen, the nineteenth-century British legal historian, provided the accepted interpretation of the Statute of Laborers and its relation to vagrancy law which English and American courts and legal commentators still follow.⁵ Stephen argued that not only did masters want to confine working people to their residences at pre-plague wages but the "legislation was to provide a kind of substitute for the system of villainage and serfdom, which was breaking down."⁶ He envisioned the Statute of Laborers as the fountainhead of legislation on vagrancy. Since the Statute, at least theoretically, attempted to bind the agricultural worker to the land, any wandering became circumspect. Wandering in search of better wages in the middle of the fourteenth century shaded into vagrancy. "A man must work where he happened to be, and must take the wages offered him on the spot, and if he went about, even to look for work, he became a vagrant and was regarded as a criminal."⁷ Because of the statutes of 1349 and 1350, a person leaving a manor or estate became a "vagrant," not far removed from a deserter. If caught, according to the provisions of 1350, the wanderer would be sent back to his place of residence to take up his or her service again.

Despite these laws and improved enforcement machinery, wandering continued.⁸ Parliament found it necessary to strengthen, amend, and extend the foundation of vagrancy laid down in the Statute of Laborers. It passed numerous new statutes affecting the homeless, wandering individual.⁹ For example, statutes passed in 1383 and 1388 made wandering about the countryside without taking work a criminal offense per se.¹⁰ In 1414, minor magistrates received from Parliament the power to try vagrancy cases. These local justices of the peace became responsible for keeping the work force in place; they would try vagrancy offenses rather than wait for the Quarter sessions to meet. Summary justice meant local control over the movement of local workers.¹¹

Beginning about 1530, the concern of the authors of the vagrancy statutes shifted from an interest in what previous writers have called economic criminality--the runaway serf--to an interest in controlling potential criminals.¹² Punishments grew more and more severe. An

act of 1530 provided that any convicted offender be tied to the back of a cart and paraded around the town market while being whipped "till his body be bloody." Five years later Parliament passed a statute making the third conviction for vagrancy a capital felony.¹³

This trend toward severity culminated in the so-called "Slavery Act" of 1547.¹⁴ This measure repealed all previous pronouncements on vagrancy as not being severe enough. Courts and lawyers had come to view the vagrant as a potential criminal who needed to be controlled since "idleness and vagabondry [were] the mother and root of all thefts, robberies, and all evil acts and other mischiefs." As for punishments, the Slavery Act called for different kinds of branding of the vagrant on conviction of the first two offenses with death upon a third conviction.¹⁵

These sixteenth-century acts revealed a legislative problem in differentiating between the chronically idle and the temporarily unemployed. Both groups routinely traveled the countryside: the first group undoubtedly committing at least a few criminal acts; the second group seeking employment. Yet by 1530 both groups had a criminal status regardless of the purpose of their behavior. Persons fitting the description of wanderers and idlers were part of a criminal element, not because they had committed an overt act, but by virtue of their status as a potential criminal. Vagrants threatened society not with the loss of agricultural labor but with potential crime. Ironically, as William F. Maher, a modern legal commentator, has pointed out, "the vagrancy laws encouraged unemployed persons to enter lives of crime, since mere idleness already made them subject to barbaric punishments."¹⁶

This "status criminality," discussed in more detail below, did not lessen the importance of vagrancy law as an instrument for controlling the wandering, idle population. But the social function of vagrancy law changed as time passed. By the early seventeenth century, the lack of care and support for Britain's poor and homeless became critical. Older resources of monastic charities and private philanthropy no longer provided adequate relief. In 1601, during the reign of Elizabeth I, Parliament laid the foundation for the parish rate system and for what we know as the old poor law. As part of this foundation

the vagrancy laws formed "the criminal aspect of the poor laws."¹⁷ Several Parliamentary statutes strengthened the ties between the Poor Law and the vagrancy laws, with the formalization of the tie coming in the Vagrancy Act of 1824.¹⁸ Instead of lumping the vagrant and the unemployed person together, the Vagrancy Act divided them by their conduct into three classes: 1) idle and disorderly persons; 2) rogues and vagabonds; and 3) incorrigible rogues. Each class of vagrancy conduct was related to specific criminal acts. The mere status of being a vagrant no longer constituted an offense; vagrancy became the commission of some known crime against the state or the individual, criminal conduct.

Britain's vagrancy law history illuminates how vagrancy came to be applied against American prostitutes. During the second period of vagrancy development in Britain when status criminality held sway, emigrants settled North America. Vagrancy as status criminality was "received" into the laws of New World colonies. Unlike Britain, which developed a third stage of vagrancy based on criminal conduct, status criminality became fixed in American colonial law, and later, state law. Since the determination of vagrancy turned on the elastic standard of status, vagrancy could expand to cover numerous classes of people. Prostitutes, keepers of houses of prostitution, and any one dependent on a prostitute for a livelihood were species of vagrants.¹⁹

In the common law selectively received by the colonies, prostitution was not an offense.²⁰ Parliament's statute of Circumspecte Agatis of 1285 restrained the royal courts from interfering with the church courts in cases involving sexual matters. Prostitution, as an act of incontinence, fell to the church to punish and control. Therefore, royal or secular courts could not indict or punish prostitution per se.²¹ Although prostitution was not indictable the individual prostitute could be prosecuted as a vagrant. So the legal fiction ran that prostitution was not a technical term at law nor an offense known to the law. Rather the law took notice of the prostitute as a vagrant with an all-too-visible means of employment which offended public decency and morals. Since the law viewed the prostitute as a vagrant and routinely dealt with vagrants through local courts of original jurisdiction, the publicly immoral woman proved to be easy to

prosecute. Courts had long been summarily trying vagrants since 1414. American courts of the most local jurisdiction--justice of the peace and municipal courts--continued to dispose summarily of such offenses.²²

Seventeenth- and eighteenth-century common law had embodied within it in the status criminality approach towards vagrants as well as the tradition of summarily trying vagrants. Both of these characteristics of the law of vagrancy persisted throughout the nineteenth and into the twentieth century, with the only change in the law of prostitution coming when states made it a statutory offense.²³

The law is more than Parliamentary enactments, colonial legal heritage, and state statutes. Legal writers, commentators, and legal text authors defined aspects of American prostitution. Legal treatise writers interpreted the law and suggested directions for its future growth to fulfill the promise of earlier enactments and decisions. Some treatise writers stand out. Their writings influenced the law beyond their own times and helped the law to adapt to society's needs and goals.

Legal treatise writers paid far more attention to the property used for an immoral purpose (discussed in the next chapter) than to the vagrant or prostitute. For example, few books influenced eighteenth- and early nineteenth-century American legal thinking more than William Blackstone's Commentaries, especially the 1803 edition with American references by St. George Tucker.²⁴ In focusing on idleness, which he called "a high offense against the public economy," and in describing "idle persons and vagabonds," Blackstone followed the "ancient statutes" that described vagrants as those who "wake on the night, and sleep on the day, and haunt customable taverns, and ale-houses, and routs about; and no man wot from whence they come, ne whether they go." Blackstone divided vagrants into the three classes the 1824 Vagrancy Act later used as its standard. "All these are offenders," he lectured, "against the good order, and blemishes in the government, of any kingdom."²⁵ Blackstone's definition failed to set out the kinds of conduct which caused an individual to be classed as a vagrant while implying that vagrants endangered public order because of their potential threat to society. Vagrants formed a class worthy of the law's criminal sanctions not because of any act they committed but because of their

status as potential criminals.

In his note on Virginia's law, St. George Tucker agreed with Blackstone but defined a vagrant as

Any able bodied man, who, not having wherewithal to maintain himself, shall be found loitering, and shall have a wife, or children without means for their subsistence, and any able bodied man, without a wife and child, who, not having wherewithal to maintain himself, shall wander abroad, or be found loitering without betaking himself to some honest employment, or shall go about begging, shall be deemed and treated as a vagrant. 26

Tucker, who used the male example, noted that the able-bodied should take to some kind of "honest" employment. On this hook of legal fiction, the law would catch the prostitute as vagrant.

A vagueness in the definition of vagrancy continued throughout the nineteenth century but not without coming under scrutiny and questioning. Christopher G. Tiedeman's A Treatise on the Limitations of Police Power (1886) devoted a few pages to a discussion of the charge of vagrancy and its usefulness in controlling the vagrant.²⁷ Tiedeman referred to vagrants as "the chrysalis of every species of criminal;" the vision of vagrant as criminal. He reviewed Blackstone's so-called ancient meaning, "such as wake on the night, and sleep on the day," and added Noah Webster's definition of a vagrant, ". . . one who wanders from town to town, or place to place, having no certain dwelling, or not abiding in it, and usually without the means of livelihood."²⁸ Of offenses coming under the rubric of vagrancy, Tiedeman mentioned "an indecent exposure of one's person on the highway" and "a boisterous and disorderly parade of one's self by a common prostitute." Tiedeman believed such offenses were included under vagrancy because of the ease of conviction.²⁹

But Tiedeman pressed the definition and nature of vagrancy. "What is the tortious element in the act of vagrancy?" he asked. Idleness? Tiedeman noted that idleness is only indirectly injurious to the state or the community in that an idler is not producing. Idleness would not subject a person to criminal punishments. A person has a right to live idly as long as he does not violate some duty to the state. Having a fixed residence is not a duty. Problems arose with the homeless only when they became a burden to the state for their

support. If the individual had no support, no way to stay off the public dole, then he became a threat to the community. With no income, the individual was more likely to become a criminal or become a burden to the state through the poor relief.

Tiedeman also expressed a concern about the summary proceedings in vagrancy cases. Known for his defense of property and property rights against capricious governmental action, he titled his work A Treatise on the Limitations of Police Power to underline his concern about how far the state could use its power to affect private property.³⁰ Tiedeman's distrust of the power of the states showed in his section on the control of vagrants. He viewed the state as a necessary evil but an evil nonetheless, and the discretion held by police forces and the lower courts over individuals worried him. Even if a person had money in his pocket, a police officer could arrest him on suspicion. An officer's suspicion and not the commission of some overt act could form the basis of an arrest. A policeman's suspicion might rest upon a former conviction for a crime or upon "presumption of associates" (bad friends), or the most questionable to Tiedeman, "the police officer may rely upon his ability to trace the lines of criminality upon the face of the supposed offender." For Tiedeman the arrest "is too often unsupported by any reasonably satisfactory evidence."³¹ Although the vagrancy catch-all statutes served to control the idle and those who might become a charge upon the state, he urged prosecutors to secure the necessary evidence and build a respectable case against the vagrant. Summary proceedings before the lowest courts deprived the accused of the common law right to a jury trial and, Tiedeman reminded lawyers, merely because an individual was charged with vagrancy was no excuse not to live up to the standards of the law. In vagrancy cases,

the whole method of proceeding is in direct contradiction of the constitutional provisions that a man shall be convicted before punishment, after proof of the commission of a crime, by direct testimony, sufficient to rebut the presumption of innocence, which the law accords to every one charged with a violation of its provisions.

Prove the offense and secure a conviction, Tiedeman said, and keep the prosecution closely tied to the wording of the state vagrancy statute. Make sure the individual is afforded all the protections

the law provides before summarily fining or sending him to jail for vagrancy. Tiedeman cared little if at all about vagrants; he cared a great deal about the state's power to restrict the liberty of individuals. If the state, through its local courts, could summarily and arbitrarily dispose of vagrancy cases and incarcerate individuals on suspicion and not for the commission of a criminal act, where would the limits be drawn of the state's power to affect individuals? Who would be safe from state meddling? Therefore, Tiedeman, who argued that the state must not interfere with the liberty of individuals to do with their property what they wished, carried his logic through to argue that the state should also not interfere with the liberty of a poor man/woman because of a suspicion of homelessness, indigency, or vagrancy.

Vagrancy received further elaboration from a treatise writer at the turn of the century who inquired specifically into the relationship of vagrancy and prostitution. A law professor at the University of Chicago, Ernst Freund, in his work The Police Power: Public Policy and Constitutional Rights, developed Tiedeman's themes of vagrancy as a legitimate police measure yet also as a threat to individual liberty.³³ Freund focused on the police power, the duty and right of a state to protect the "safety, order, and morals" of its citizens. States exercised power directly through enforcement agencies or delegated limited powers to local administrative units, the counties and cities. Freund believed that local authorities needed enough power to control local problems, yet he realized that local control could threaten individuals' liberty if given too much unchecked power and discretion in enforcement. He championed the right of a state to act in defense of the public's morals in local situations but only in reasonable ways. Individuals, even vagrants, had rights which the state should not arbitrarily ignore.

Freund noted that vagrancy is a "condition of criminality." Again the sense of being a vagrant, not of committing a vagrant act, was the key to understanding the concept. As to the history of vagrancy in Britain and America, Freund saw only that the concept reached back to the time of Edward III and "was firmly established at the beginning of our government."³⁴ Vagrancy consisted of two types of behavior.

The first involved obviously illegal acts that violated public order or affronted public morality. Freund listed the nightwalking of prostitutes in this category. A second class of behavior consisted of other vagrant acts such as loitering about a public place by persons of a certain description. Prostitution fit into either category. This division of vagrancy offenses divided into two parts, one defined by state statutes and covered by the criminal law and the other being offenses against the peace, good order, and custom of a locality that fell under the cognizance of the state police power. These sanctions against vagrancy and prostitution split the law's actions against the immoral individual. Police--whether of a municipality or the sheriff and constables of a county--enjoyed discretion as to which kind of judicial action to apply against individuals. They could proceed under the criminal law of the state in a state court charging the statutory offense of prostitution, or they could act under the common law in the courts of summary proceedings, charging vagrancy. The overwhelming percentage of cases went to the courts of summary proceedings because of the simplicity and efficiency of such local courts.³⁵

Such prosecutions worried Freund. He feared that the vagueness of the vagrancy statutes and prosecutions would lead to unnecessary arrests and detainments of women. Because of the summary nature of the proceedings few protections for the defendants existed. "A summary administrative commitment of prostitutes as a police measure might logically lead to indefinitely prolonged deprivation of liberty since the vicious disposition which justifies the original detention would also justify its continuance."³⁶

This view was based on two assumptions. Even prostitutes should not be arbitrarily confined since their status as vagrants did not overrule their rights as citizens, argued Tiedeman. A prostitute did not revoke or in any manner abandon her rights as a citizen of the state and, especially, as an individual accused before a court of a criminal act or omission. Freund revealed a hesitancy to support confinement in minor criminal cases. Imprisonment was a criminal punishment, he argued. The state should use carefully the procedures of the criminal law before depriving an individual of his/her liberty.

Confinement as a punishment after a vagrancy conviction confused criminal law offenses with common law offenses, punishments, and procedures. Such a mixing of the state police power with the criminal law alternatives could prove dangerous to the liberty of defendants in vagrancy cases.

Rather than run the risk of mixed procedures and remedies, Freund wanted to approach vagrancy as a distinctive criminal act. Remembering the three-stage development of Britain's criminal law, Freund thought that American law ought to move from the second stage, status criminality, to the third stage, conduct criminality. Indeed, he believed the change had already taken place. As he phrased it,

vagrancy and criminal idleness do not constitute in the eye of the law a social status to be dealt with by police control, but criminal acts to be punished by the criminal courts.

Make vagrancy a criminal offense dependent on a definable act; do not let it rest upon the vague status of being a prostitute.

Freund explained that vagrancy as a criminal offense would need three components: an absence of a lawful means of support, a neglect to seek employment, and a public display of these conditions.³⁸

An absence of support, the first component, harkened back to the use of vagrancy laws to avoid overburdening the public purse. Unlike Tiedeman, who believed a man could be idle as long as he did not become a public burden, Freund thought a person had a positive duty to seek employment to avoid becoming a charge to the public. Not only must the individual seek employment but it must be lawful. Therefore, a prostitute was liable to Freund's criminal vagrancy charge. In Freund's view, prostitutes, unless old or ill, did not seek employment to support themselves. The problem was their employment. In early twentieth-century America, prostitution was an unlawful trade. Its practitioners engaged in an offensive, stigmatized, socially reprehensible practice. A prostitute would be liable to criminal prosecution if she continued to ply her trade because she supported herself unlawfully, if she failed to seek lawful employment, and if her presence affronted public decency.³⁹

Freund wanted to change the manner in which the law approached

vagrancy and prostitution. But until the states altered the law of vagrancy prostitution continued to be both a statutory offense and a type of vagrancy. This split character of the law of prostitution meant Freund also discussed prostitution as it fell within the jurisdiction of the state police power; Freund finished his argument about what vagrancy ought to be and moved on to discuss vagrancy as lawyers would actually encounter it in their work. As a guide for legal practitioners, Freund defined prostitution as "the promiscuous admission of men to intercourse for gain and as a means of livelihood," a most general definition even in law.⁴⁰ But once admitting that prostitutes were vagrants and that they came under the control of the police power of the states, what specific grounds did the states have to exercise control over prostitutes? Freund listed five reasons for use of the police power against prostitutes, three of which looked prospectively to the possible bad results of prostitution while two reasons dealt with current threats from it. Prostitution was "apt to become a public nuisance in its outward manifestations, . . . prostitutes are apt to become a burden to the public when no longer able to ply their trade; the haunts of vice are also apt to be the haunts of crime." Prostitution presented current problems since it was "antagonistic to marriage" and the public's morals; the venereal diseases carried by some prostitutes "endanger[ed] the health of innocent women and children."⁴¹ With the law viewing the prostitute as a vagrant and with state interference over prostitutes based on a broad definition of prostitution and the state's police power, the law could cast a wide net over women accused of prostitution.

Although the law controlled the behavior of this class of women, it did not leave them totally defenseless. Freund acknowledged that the repression of prostitution, the public policy most Americans favored in the early twentieth century, failed because of poor enforcement, legal technicalities, and social inertia. Yet repression was the public policy. Prostitutes were liable to the penalties of the criminal law. They were, therefore, "entitled to the safeguards of criminal procedure."⁴² What those criminal procedures were Freund did not specify. His audience knew that such safeguards included the presumption of innocence in favor of the defendant with the state

bearing the burden of proving a criminal act according to prevailing standards of evidence. Even a prostitute, Freund stressed, had a right to a fair and speedy trial even if being prosecuted in a court of summary jurisdiction.

Freund also denounced the fining of prostitutes as a licensing technique, although it was commonly used by local police authorities to control immoral women. Criminal law, Freund intoned, could not be a mere regulator allowing prostitutes to continue to ply their trade under certain restrictions. He believed that such a police accommodation with prostitution frustrated the law's goal of repressing the trade. Any form of licensing would therefore not only be illegal but would place an unnecessary restriction upon the liberty of the women. As Freund phrased the relationship between the law's goals, licensing, and the personal liberty of the women, "the punishment inflicted upon her must be in conformity with the law of the land, which does not know licensed illegality conditioned upon the acceptance of a diminished status of personal liberty."⁴³ Licensing ran counter to the law and deprived women of their right to ply their vocation unrestrained while accepting the risks of prosecution.

Another difficulty the law encountered when dealing with prostitution lay in the kinds of restrictions the law could place on this class of women. For example, Freund discussed the viability of an option which, had Freund favored it, would have warmed William Sanger's heart, the control of prostitution by medical authorities on public health grounds. But Freund ruled out such an option,

... our courts have uniformly held that an interference with the liberty of the person and body under such sanitary power is justified only in cases of imminent danger, as e.g. in epidemic diseases, and the danger of contagion from prostitutes is certainly not of that character.

To adopt such a medical-legal plan against prostitutes would put the law on the horns of a dilemma.

The prevention of the spread of venereal disease would fall within the province of the police power, but it would require such specific regulations as would practically amount to legal recognition of prostitution--the very thing which our legislative policy will not concede.

Having exhausted his arguments, definitions, and the remedies available about prostitution, Freund admitted that when all was said and done, the control of prostitution was a local matter. Police arrested women on vagrancy charges who were without legitimate means of support or who walked the streets soliciting. Local police used their power of arrest to uphold the "public morals and decency" as they saw fit. But what standards did the police use to know what was decent and what constituted street solicitation? Freund provided no answers, calling this wide latitude of police action and discretion an "extra-legal condition." In reality, police use of vagrancy, Freund eventually conceded, came down to an easy method of controlling prostitutes regardless of the law's standards. This reality of prostitution control was another reason, he argued, for the law to change its perception of the prostitute as vagrant and move toward treating prostitution as a crime and not as a status.

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What was actually happening in the thousands of counties, cities, towns, and villages in America as opposed to what the legal treatise writers in their intellectualizing said ought to be happening? In sheer numbers, the courts of summary jurisdiction, the municipal courts, and the justice of the peace courts, disposed of the overwhelming majority of complaints brought against women accused of vagrancy. Some cases involving prostitutes reached appeals court levels in several states. This body of case law supplemented the legal treatises. The case law provided the "what was" to the treatise writers' "what ought to be."⁴⁵

Cases divide into three categories: those dealing with the definition of the offense, civil suits involving slander, and cases discussing the particularities of one state's law against prostitution.⁴⁶ The conflicts and issues in these cases between real people before courts of law indicate that legal actions against prostitution were far less clear-cut than the treatise writers suggested.

Freund had noted that in law prostitution was generally defined as "the practice of a female offering her body to an indiscriminate intercourse with men."⁴⁷ One of the earliest cases discussing the

definitional problems of the offense had arisen in Massachusetts in 1846. John Cook stood charged with "fraudulently and deceitfully enticing away an unmarried woman for the purpose of prostitution."⁴⁸ For almost a year prior to trial, November 1844 to September 1845, seventeen-year-old Emily Forrest had lived with the defendant's family, caring for Cook's sick wife. During that year, Cook tried to persuade Forrest to go away with him which she eventually consented to do but with stipulations: one, that she should not live with him as his wife, and two, "that her chastity should never be violated without her consent." Cook apparently agreed since Forrest testified that without any coercion she traveled with him to Philadelphia where he hired a room with one bed in which they both slept. He "repeatedly solicited her chastity" and became angry at her refusal of his advances. She further swore that Cook twice pushed her out of bed for not yielding and once pinched her on the arm. At trial, the jury found Cook guilty of enticing for prostitution, a statutory offense. He appealed, arguing that enticing did not cover one man enticing a woman from her home for the purpose of sexual intercourse with him only.⁴⁹

Massachusetts Supreme Court Judge Charles A. Dewey regretted that the court had to deal with a case involving the "painful details of grossly immoral acts, and open violations of divine law." Dewey phrased the question before the court as whether the state legislature meant the enticing statute to include enticing for one man's use of for common prostitution, "especially the procuring of female's for houses of ill-fame."

First, Dewey reminded the parties that courts interpreted statutes strictly, that is, close to the generally understood meaning of the words of the statute. Courts applied the law only as embodied in the statutory pronouncements of the legislature. Dewey believed the legislature defined the offense of enticing for prostitution not generally but particularly: "for the purpose of prostitution at a house of ill-fame, assignation, or elsewhere." What the legislature meant by "prostitution" then became the question for the court. For definitions Dewey turned to a non-legal source since, in 1846, "no such legal definition[s] of the term 'prostitution' are to be found." He cited the definitions of prostitution in several dictionaries

with Webster's receiving particular approval: "the act or practice of offering the body to an indiscriminate intercourse with men."⁵⁰

Having decided that enticing had to be for prostitution at a "house of ill-fame, assignation, or elsewhere" and that prostitution meant a female's indiscriminate intercourse, Dewey decided that Cook had been wrongly convicted. For enticing to occur, the taking of a female could not be for sexual intercourse with one man only. The sexual contact had to be of a more general, indiscriminate nature. By narrowing the statute to exclude cases of mere seduction, the court restricted the offense to enticing women to enter houses of prostitution. Cook allowed the court to focus on the offense, sharpen the statute, and borrow a definition of prostitution.

Much judicial ink would be spilled elaborating and discussing Dewey's definition of prostitution. However, a female who permitted indiscriminate sexual intercourse--occasionally with the added requirement of "for gain"--showed great staying power and weight in law.

In the twenty years following Cook the definition of prostitution altered. Not Dewey's dictionary definition, but a formula-like definition was used in an 1866 Maine case. State v. John A. Stoyell paralleled Cook in its charge and in its fact situation. Maine authorities charged Stoyell with enticing for the purpose of prostitution for a house of ill-fame, assignation, or elsewhere, but the facts showed that only Stoyell had sexual relations with the woman.⁵¹

Chief Judge of the Maine Supreme Court John Appleton, citing Cook, provided what came to be the textbook definition of prostitution.

A prostitute is a female given to indiscriminate lewdness for gain. In its most general sense, prostitution is the setting one's self to sale, or of devoting to infamous purposes what is in one's power. In its more restrictive sense, it is the practice of a female offering her body to an indiscriminate intercourse with men; the common lewdness of a female.

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All elements of the offense--still used today--are contained in Appleton's definition. Prostitution necessarily meant a female who indiscriminately accepted all offers for sexual intercourse from any and all men for gain.⁵³

Yet courts soon dropped the requirement for gain from the definition. Iowa's Supreme Court amended the definition of prostitution in State v. Clark (1889).⁵⁴ From an Iowa case eight years prior to Clark, the state's supreme court continued a line of reasoning which held that with charges of prostitution the "accompanying circumstances" of the case were to be taken into account at trial and on appeal. "It is not for the court to say the sexual intercourse alone is or is not sufficient to establish the woman to be a prostitute."⁵⁵ In Clark, the court elaborate on the earlier hint as to "accompanying circumstances" by dropping the need for gain. Judge Joseph M. Beck, speaking for a unanimous court, defined a prostitute as a woman who submitted to indiscriminate sexual intercourse which she "invites or solicits by word or act, or any devise." Further, "her avocation may be known from the manner in which she plies it, and not from any pecuniary charges and compensation gained in any other manner."⁵⁶ Withdrawing the requirement for gain in the definition broadened the offense of prostitution and clouded the definition. Any woman who behaved in the manner of a prostitute whether or not she was a practicing prostitute stood liable to be arrested under the Clark decision. Questions remained. Who decided what the behavior of a prostitute was and upon what standards a prosecution should be based? Clark withdrew one of the standards for changing prostitution--for gain--and replaced it with a vague phrase--in the manner of a prostitute. By this new definition, even the woman who engaged in occasional sexual activity could fall into the class of prostitutes.

As a standard, the necessity of "gain" continued to appear in later judicial opinions. In 1910, the Supreme Court of Washington heard arguments in a case where Max Thuna was charged with the crime of living with a prostitute.⁵⁷ To convict Thuna, the trial court defined the term "common prostitute" for the jury. Thuna objected and appealed part of the court's definition which read, ". . . whether a woman is a common prostitute is a question of fact which does not depend alone upon the number of persons with whom she has had illicit intercourse, nor does it depend upon the question of whether she submits herself for gain."⁵⁸ Was or was not gain a factor in determining

whether a woman was a prostitute, Thuna appealed? Some textbooks and some cases included the need for gain in the definition of prostitution and, if not present, the charge was faulty and could be overturned.⁵⁹ A majority of the Washington court held to the Clark precedent.

While we are of the opinion that the sake of gain is probably the most usual motive, it is not the only one, and it is not necessarily essential to constitute a common prostitute. A woman who submits herself to indiscriminate sexual intercourse with men, without hire, is certainly as much a common prostitute as one who does so solely for hire.

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Yet out of a court of nine, four justices disagreed with this definition and supported the definition of prostitution Thuna offered at trial: "a woman given to promiscuous sexual intercourse for hire or gain." In other words, the courts of the late nineteenth and early twentieth centuries developed two definitions regarding the standard elements necessary to define a woman as a prostitute. Gain as a requirement for prostitution remained uncertain throughout the period.

Did the definitions conflict with or support society's wider definition of prostitution? In Victorian and Edwardian America, when popular culture tended to consider women either Madonnas with little or no sexuality or Magdalens, the definition of prostitution without the standard of gain probably fit well. For example, the social stigmas that accompanied the fallen women of the late nineteenth century were evident in Clark. Whether the law followed or led social trends in labelling behavior as deviant is not a question to be solved here. But the law probably both led and followed society in enforcing the social reprobations against this immoral minority of women.

The relationship between vagrancy and one of its types--prostitution--also received judicial scrutiny. In 1860, Catherine Forbes of New York City brought a writ of habeas corpus to Judge Josiah Sutherland of the New York Supreme Court. A "police justice" of New York City had committed Forbes to the city prison after convicting her of being "a common prostitute and idle person." Sutherland heard her appeal in chambers and released Forbes on the grounds that she had not been convicted of being a common prostitute. He narrowed the ques-

tion in the case: "did competent and satisfactory testimony that the prisoner was a common prostitute and idle person, authorize her conviction and commitment as a vagrant?" By so structuring the question, Sutherland confronted the problem of who fit the status of a vagrant. As he explained, "by certain statutes, all persons coming with a certain description defined and declared by the statutes, are declared to be vagrants, and provision is made for their trial, conviction, and imprisonment."⁶² Two state statutes covered the situation. The first contained the classic definition of a vagrant as a person without legitimate and visible means of support and employment. Prostitutes were not mentioned in the statute. But they could fall under its authority if they became public charges or by street walking. Sutherland ruled that a conviction under this statute would need not only a woman's confession but also "competent testimony" as to her prostitution. Sutherland also pointed to a second statute. In 1833, New York had passed a law declaring vagrants of "all common prostitutes who had no lawful employment whereby to maintain themselves" in New York City.⁶³

Sutherland distinguished between these statutes and the New York criminal law. Such statutes described a class and were "of the nature of public regulations to prevent crime and public charges and burdens." They did not prohibit an act or punish a crime but attempted to protect society from the effects of prostitution. Vagrancy formed a condition of a person regardless of fault, and the vagrant's liberty had to give way to the public's safety and welfare. Only these goals could justify such statutes and summary convictions without a jury trial. Sutherland believed the statutes to be constitutional, although they "should be construed strictly and executed carefully in favor of the liberty of the citizen." Magistrates needed discretion to decide cases but such discretion provided an "almost unchecked opportunity for arbitrary oppression or careless cruelty."⁶⁴ Neither state statute declared common prostitution or idleness to be criminal acts. Sutherland found *Forbes*[†] commitment an unlawful deprivation of her liberty. Cases such as *Forbes* accentuated the tensions between status criminality and the law's desire for exact definitions of criminal acts with corresponding and

and appropriate judicial reactions. Prostitution and vagrancy defied that desire.

Occasionally lower courts had only themselves to blame for abusing their powers over vagrants, and especially prostitutes, and thereby putting themselves in messy judicial positions. Mamie Peabody v. State (1894) provides a particularly clear example of this abuse not only because the lower court and the appeals court ignored Sutherland's warnings about strict construction and prudent court action but because the high court of Mississippi upheld a conviction on unusually strange grounds.

Peabody involved three Vicksburg prostitutes--Mamie Peabody, Belle Johnson, and Tinie Walker--who had been charged and convicted of vagrancy, "being common prostitutes without other means of support or employment."⁶⁵ The statement of facts recited a long description of the women and their manners: they did no work and held no property; they had no money but paid their rent (and financed the litigation); they dressed up in the evening and sat in front of their house or strolled the streets; they, "with fair speech," solicited men who went into the house with them and closed the door; one of the women had been seen in bed with a man; they were often seen doing nothing, day and night. At trial, the state presented no direct evidence of guilt nor was any testimony introduced showing that the women ever received any money from any man for any immoral purpose. In their defense, the women presented no evidence. Instead, they moved that the charge be dropped because the state had not proven the charge with sufficient evidence. Judge John D. Gilland, who refused their request, instructed the jury that if they believed the women to be common prostitutes without other employment, they should convict. Defense attorneys reminded the jury and the court that the state had to show beyond a reasonable doubt that the women had had indiscriminate intercourse with men, had received payment, and had no other means of support. "The law requires the same degree of strictness of proof in this case as in a charge of murder," defense lectured. Nevertheless, the jury convicted the women. To any lawyer of the period none of this detail would appear out of the ordinary or unusual. What provides the twist to this case is the race of the women--all were black.⁶⁶

In its brief presented Mississippi's Supreme Court, defense relied on one of the foundations of the criminal law--the presumption of innocence of the accused. Since no testimony had been entered at trial showing the women had held themselves out for promiscuous sexual contact for hire, defense argued that "it cannot be assumed that the men went to the house of the defendants for an unlawful purpose." On appeal, as at trial, the women claimed that the state had failed to make its case against them. But Frank Johnson, Attorney-General of Mississippi, disagreed. He argued that "in cases of this character, it is not necessary to prove by direct fact. This may be inferred as a necessary conclusion." Johnson stressed that the general reputation of the women had been proven and immoral acts, such as soliciting, had been shown.

Judge Albert H. Whitfield began the opinion of the Mississippi high court by holding the state's position. He explained that the offense "is rarely established by the same fullness or directness of proof by which more open violations of law are made out." Comparing the description of the Vicksburg women with the story of prostitution in Proverbs, the court decided the case not on any judicial principle or stare decisis but on the Biblical invective against prostitution. Whitfield sermonized, "this portrait [Proverbs 7: 5-27] is accurate; its colors have lost none of their vividness in the lapse of centuries, and upon the authority of this great text, reflected in all textbooks and decisions, the judgement is affirmed."⁶⁷

Sutherland's worries in Forbes about the threat to individual liberties from an unrestrained use of the police power and from lower court prerogative were confirmed in Peabody. Mississippi's Supreme Court relied upon no precedent although both sides had presented case law and legal authorities in their briefs. Peabody showed that the rights for an immoral minority, though citizens, might carry no weight before the courts of their own state. Although Whitfield did not once mention race in his decision, the fact that the women were black undoubtedly affected the Mississippi court of 1894 on some level of consciousness. But the high court--by its Biblical allusion--appeared more concerned with the prostitution than with the question of race.

Since the state Supreme Court decided against the women and decided the case in the way it did, where did Peabody's remedy lie? Rightly or wrongly, Mamie Peabody had run out of legal options before the courts.

Occasionally the direct approach to a problem fails to tell an investigator all he wants to know about a problem. Defining prostitution through definitional cases is not the only source on the practical realities of the legal nature of prostitution. Other kinds of legal actions supported the definition of prostitution and further reveal how the courts applied the definition.

Slander suits were one such action. It is not the purpose here to review the general law of slander or to elaborate on the delicacies of a slander charge. However, slander cases were decided in civil courts when a woman had to defend herself against a charge of being called a prostitute. In the late nineteenth and early twentieth centuries calling or referring to a woman as a prostitute invoked emotional responses from both sexes. Prostitution carried a heavy social stigma and being publicly called a prostitute was not taken lightly.

Jacob Rodebaugh v. Rachel C. Hollingsworth arose from Indiana in 1855 and provides the first case of interest.⁶⁸ At trial, Hollingsworth won a thousand-dollar verdict from which Rodebaugh appealed. Rodebaugh is a confused case because the fact situation mixed the concepts mixed the concepts of prostitution, fornication, and incest. As the strangely worded statement of facts recounted the defamatory words,

Somebody told me (defendant meaning [Rodebaugh]) that she (plaintiff meaning [Hollingsworth]) acknowledged to him (one John Cropper [a third party]) that Nero (meaning brother of the plaintiff) had screwed her (meaning plaintiff's brother had carnal intercourse with the plaintiff) upstairs the night before. And again, she (plaintiff meaning) owned to him (meaning one John Cropper) that Nero (plaintiff's brother meaning) had screwed her (meaning had carnal intercourse with plaintiff) upstairs the night before. . . .

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Indiana's Supreme Court continued recounting the facts of the case in this stilted legalese for over a page of the decision. Nowhere in the facts is prostitution alleged; nowhere did Rodebaugh claim Hollingsworth accepted any kind of payment for consenting to sexual relations. In fact, the court strayed from using any known legal term to describe

the behavior. Instead, the Supreme Court confused prostitution with the generic term "whoredom."

Judge Samuel E. Perkins, writing for the court, spoke of charging a female with "whoredom" under a statute although the statute dealt with the specific offense of prostitution. Whoredom, Perkins asserted, was "a thing not in itself necessarily criminal in the eye of the law."⁷⁰ He tried to give whoredom a legal meaning by defining it as " . . . any act of sexual intercourse between a married female and a male person not her husband, or between an unmarried female and a male person." Perkins elaborated only slightly on how he would have distinguished the first half of his definition from adultery and the second half from fornication. "Whoredom," he proposed, "is a comprehensive term, including every species of illicit intercourse between the sexes." Despite his effort, the definition of "whoredom" still conflicted with the offenses of prostitution, seduction, fornication, and adultery. A whore, Perkins defined, was a woman who engaged in a "single act of the kind," a much harsher definition than that of a prostitute in criminal law which needed the standards of indiscriminate sexual intercourse and, the hazier standard, for gain. Perkins would place the stigma of being a whore upon any woman who had engaged in sexual contact even once. He wanted to make whoredom an overarching term. Fornication and prostitution would be acts of whoredom. Supposedly the purpose of the term would be its usefulness in cases where the specific charge of prostitution failed but a conviction might still be achieved on the general charge of whoredom. For whatever reasons--overbreadth, its overlap with other offenses, or the limited availability of state court decisions among states in 1855--other courts in other states failed to follow Perkins's interpretation of whoredom.⁷¹

Slander and prostitution formed the heart of another case which occurred in Iowa. In Sheeney v. Cokley (1876) Sheeney charged Cokley with calling her a whore in the presence of her father and brothers, thereby slandering her. She sued for \$10,000. Cokley claimed to have been attacked by Sheeney's male relatives and "made what ever statement he did make while excited and angry." At trial, Sheeney won and Cokley appealed.⁷²

In brief to the Supreme Court of Iowa, Cokley expanded and amended his answer to the charge and admitted calling Sheeney a whore after her marriage. He further alleged that while unmarried she had sexual relations with Edward Sheeney--to whom she was bethrothed, later married, and to whom she delivered a child. Further, Cokley claimed she had behaved in a "lewd and licentious manner and made indecent proposals." Sheeney denied all the allegations against her and pointed out that at trial thirty witnesses testified that before her marriage her "reputation for chastity was good, and that her pregnancy was the only thing they had ever heard against her chastity."⁷³

Cokley based his remarks on an incident which occurred on October 18, 1871, when it was proved, how is not said, that Sheeney--then unmarried--had sexual intercourse with Edward Sheeney. Ten days later, Edward Sheeney married the woman. Cokley slandered Sheeney sometime after the marriage. It is not clear from the fact situation whether the eighteenth of October was the first sexual contact--since only six and a half months later she delivered the child--or whether the contact came during a period of engagement.

Iowa's Supreme Court's approach to the case focused on a single question: did Sheeney's behavior justify calling her a whore after her marriage? For the court, Judge James G. Day began by noting "that this was an act involving a high degree of moral turpitude" Yet did Sheeney's actions fit the "natural and ordinary" understanding of the term whore? Day thought not, and drew a distinction between being engaged and yielding to a fiance's advances before marriage and behavior more characteristic of a whore. Unlike the Rodebaugh decision, Day kept close to the prostitution definition used in criminal prosecutions. "A whore is a woman," he reminded the parties, "who practices unlawful commerce with men, particularly one that does so for hire; a harlot, a concubine, a prostitute." Day's description lacked the precision of the definition used in criminal prosecutions for prostitution. For example, "unlawful commerce" could mean many kinds of activities, from receiving stolen property to keeping a disorderly house. Nor did this definition allege an indiscriminate sexual intercourse. Perhaps the court believed that in the context of the case at hand no further elaboration was necessary. Maybe, but any lawyer worth his shingle would easily pick

part such imprecision.

Although the court drew a loose construction of the word whore, Day did not mean the term to be all-inclusive. He did not forget that a woman might "acquire the character of a whore without being generally available to men." A mistress was a whore, for Day, although she gave herself only to one man. But did Day's definition of a whore adequately describe Sheeney's behavior? No, for she gave her affection to one man, her affianced. Day could not condone Sheeney's actions, calling it a "grave offense against morality," but her behavior did not justify Cokley calling her a whore--before or after her marriage. Edward Sheeney and wife may not have exercised proper discretion in their intimate relations before marriage, but their behavior did not provide Cokley a defense against the charge of slander.

In 1889 a case came to the Oregon Supreme Court which moved slander/prostitution cases into the mainstream of slander law. That case tested the standard use of the word prostitute against normal slander standards, most slander cases turning on the question of actionable words (a concept not even raised in Rodebaugh and Sheeney).⁷⁴ In slander prosecutions actionable words are divided into two classes: words actionable in and of themselves or per se because they are a general injury, and words actionable only after plaintiff alleges and proves special damages or injuries. What words are actionable per se is the vexing question ordinarily before the courts in slander cases.

It is this question of actionable words per se on which May Davis v. S. P. Sladden turned. Sladden made numerous comments before third parties about Davis's character such as "'Fenton [a third party] sent those two prostitutes to talk to may wife' (meaning this plaintiff and her mother)."⁷⁵ At the time of the slander, Davis had a living husband and carried a good name and character. Davis alleged no special damages, claiming the words actionable per se.

Judge William P. Lord for a unanimous Oregon Court traced slander back to English ecclesiastical and common law courts. Because offenses such as fornication and adultery originally fell within the jurisdiction of the ecclesiastical courts, the temporal courts of common law ruled that slanderous remarks alleging such offenses were not

actionable per se, thereby avoiding doubly punishing someone, one by the church courts and once by the secular courts.

By the late nineteenth century, offenses such as adultery and fornication had become statutory crimes in America. These statutes substantially altered the old rules of slander. Any slanderous remarks about such offenses had come to mean the same as charging the slandered person with a crime. Instead of the spiritual transgression of adultery, the offense had become the crime of adultery, and since the words alleged the commission of a crime, the words were actionable per se. In the case at hand, Sladden referred to Davis, a married woman, as a prostitute. Prostitution, according to the court, was "promiscuous sexual intercourse for the sake of gain."⁷⁶ Judge Lord reasoned that Sladden, by calling Davis a prostitute, charged adultery to her because of her married status. "As a married woman, the plaintiff could not be a prostitute without having committed repeated adulteries," Lord said. Further, to say of this woman that she is a

. . . "prostitute" is necessarily to impute to her the guilt of adultery and as under our law adultery is indictable and punishable, such words charge a crime and are actionable per se.

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Since the words charged a crime and were actionable as if the crime had been alleged, no special damages need to be asked. In Davis, a case the high court of Oregon called a "hard one," Davis's trial victory stood because the slanderous words Sladden uttered charged a crime. Davis set the standard through at least 1920 for slander cases involving the accusation of prostitution.⁷⁸

What slander/prostitution cases displayed then is two-fold: the better conceptualization of the charge of prostitution in slander cases over time and a movement in the civil law charge of slander toward the criminal law definition of prostitution. Courts became more sophisticated in their discussion and more rigorous in their determination of standards of slander throughout the period. These slander cases also show a movement away from broad overarching definitions of irregular and extramarital sexual relations toward the more precise standards of the criminal law. In slander cases can be seen a divergence between the wider social meaning of "prostitute" as an

insult--a woman who may have strayed from the sexual norm once--and the legal meaning of "prostitute" limited to those women who held themselves out for indiscriminate sexual intercourse for gain. In this instance, as occasionally happens in law, the law reflected less the general social norm and more the internal standards of the law for precision and clarity.⁷⁹

Further complications in the law/prostitution/society relationship in the late nineteenth and early twentieth centuries can be found in Texas's law of prostitution. From Uvalde County, Texas, a thinly populated area of south-central Texas, came Springer et al. v. State in 1880.⁸⁰ Springer did not actually involve the charge of vagrancy or prostitution, but rather the defendants--V. R. Springer, Lee Guthrie, and Frank Waller--were charged with keeping a disorderly house, the legal term for a house of prostitution. In a short decision appellate Judge Samuel A. Willson upheld the indictment against Springer and then addressed himself to one of the defendant's arguments. They insisted that the indictment against them was faulty because the charge was not in conformity with the state statute against disorderly houses. In the statutory description of a disorderly house, the critical phrase read that a disorderly house was kept "as a common resort for prostitutes and vagabonds." Texas's Court of Appeals faced the question whether the terms prostitute and vagabond were synonymous. Willson read the criminal code definition of vagabond as meaning that not every prostitute was a vagabond nor every vagabond a prostitute. He pointed out that the code detailed only the "common prostitute" as a vagrant. "Are all prostitutes common prostitutes?" wondered the court. No, a prostitute is an unchaste woman, one who had "surrendered herself to illicit sexual intercourse with men." As the Texas court divided the term prostitute,

A common prostitute is a public prostitute, who makes a business of selling the use of her person to the male sex for the purpose of illicit intercourse. A woman may be a prostitute, and yet have illicit connection with one man only; but to be a common prostitute, her lewdness must be general and indiscriminate.

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By Willson's definition any woman who engaged in sexual intercourse without the benefit of marriage would be a prostitute. A common prostitute meant what the legal treatise writers said, a woman given

to indiscriminate sexual intercourse for gain. In Texas, therefore, a prostitute was not a vagrant, but a common prostitute was. Any unmarried woman accused of engaging in sexual conduct could be labeled a prostitute by the courts but could not be charged with vagrancy. Only common prostitutes were vagrants.

Undoubtedly the Texas court knew that they had split the standard definition of prostitution but why is unclear. Perhaps the judges were trying to reflect the widely held social view of prostitute as any sexually active unmarried woman.

Prostitution, vagrancy, and the Springer precedent culminated in the 1918 case of Mamie Cox v. State.⁸² Cox had been convicted of vagrancy and fined fifty dollars on November 16, 1917. She appealed and the Texas Court of Criminal Appeals thereupon spent considerable time reviewing the testimony from the case. That testimony showed that cab drivers, after picking up Cox, stopped at various Austin hotels and picked up unidentified men. The cab driver would go to secluded areas outside of town where Cox and the men went out of sight for "some 40 minutes" before returning to the cab and Austin. R. M. Thompson, who lived in the same house as Cox, testified that he had seen Cox, on numerous occasions, sleeping with an Edgar Martin as well as other men. W. H. Farley added that he had gone to high school with Cox, and in March, 1917, he called her on the phone from Hutto, outside of Austin. Cox and a female friend took a train to Hutto where Farley and another male met them. Cox and her friend "stayed" with the men on cots in the depot until 5 a.m., swapping partners some time in the evening. Each woman received ten dollars for the night.⁸³ One week later, the women returned to Hutto, "stayed" the evening, and returned by morning train at Austin. Again, each woman received ten dollars.

Taking the stand in her own defense, Cox revealed that, indeed, she was not a little lamb, but in reviewing her testimony, the court said, ". . . she had not had an illicit intercourse with any man since she promised to live right, which was about two years before the time she was testifying."⁸⁴ In regard to the man whom witnesses testified had slept with Cox, she acknowledged that he had approached

her about returning to her past life. But in a melodramatic statement, she told the court that he would have to kill her before she returned to her past life. Her testimony totally denied any act of sexual intercourse for gain since abandoning her immoral life two years earlier.

In his decision, Judge A. C. Prendergast moved quickly through the legal treatises and case law defining prostitution. He believed the jury had sufficient reason to believe Cox's behavior fit the description of being a prostitute. What troubled the court was not whether she had committed acts amounting to prostitution but a question raised by Cox's lawyer about whether on the day of the indictment Cox was a common prostitute. This hair-splitting lawyer's question was not without its purpose. Cox's lawyer questioned whether past behavior supported a charge on the day the state brought the indictment. In other words, could Cox be convicted if she had reformed before the indictment alleged her to be a common prostitute? Was being a prostitute a past condition or a present status or did the two overlap?⁸⁵

Prendergast, puzzled by the argument, nevertheless argued away Cox's argument and legal citations. "Prosecutions for all offenses must necessarily be of past occurrences," the court concluded. No reason could be found to uphold Cox's claim partly because "such a contention has not before been made" Such "new" arguments would mean no court had passed upon its legitimacy. In spite of the argument, the court affirmed Cox's conviction.

Cox's question intrigued the judges enough, however, to grant a rehearing on the question of status. With Prendergast dissenting from the re-hearing statement, Judge William L. Davidson explored the ramifications of Cox's argument.⁸⁶ After reviewing her claim "with some degree of interest, and . . . with care and caution," Davidson concluded that vagrancy was a "present condition or status and not an abandoned condition or status." Being a common prostitute meant a status at the time of the indictment. Cox may have been a vagrant in the past, perhaps continuing into the present, but if she had abandoned her life as a prostitute before the time of the indictment, she was neither a vagrant nor open to prosecution for being a prostitute. Vagrancy, the court laid down, is a present and existing status.

"The incubus upon society which constitutes vagrancy is a present status, not a past relation or condition," Davidson emphasized.⁸⁷

Having defined vagrancy as a present condition, Davidson argued against Cox's conviction. Two acts of traveling by train to sexual rendezvouses did not make a woman a common prostitute; neither did sleeping with one man in Austin. In the incidents involving the cabs, sexual intercourse or prostitution was not proven. Going to secluded areas with men was insufficient evidence to prove prostitution. Davidson reminded his legal audience that the law presumed Cox innocent of any illegal act, and from the facts presented, the presumption would be in favor of her not being a prostitute. Following Springer, the Court of Criminal Appeals held that not every woman who indulged in illicit intercourse was a common prostitute since the difference between a prostitute and a common prostitute was great. Davidson then reversed both Prendergast's decision and the decision of the lower court, and remanded the case back to lower authorities to drop or retry on these new grounds.

Cox provided the longest judicial interpretation of the controversies and complexities involving prostitution and vagrancy. Texas's Court of Criminal Appeals not only upheld the idea of a prostitute having the status of a criminal vagrant but narrowed the ground in favor of the accused by stressing the status had to be a present one and not a past condition. Police and prosecutors could still charge women with prostitution, but they now had a different standard to meet in their indictments, a precision not previously needed. Changing vagrancy and prostitution did not relieve the prosecutors of the responsibilities of living up to the legal standards of evidence, proof, and the presumption of innocence.

Further judicial defense of these standards can be found in a final Texas case. A city council's power to remove the mayor from office provided the main issue in the 1881 case of James A. Milliken v. The City Council of the City of Weatherford.⁸⁸ Milliken appealed to the Texas Supreme Court seeking to bar the city council from removing him from office because he had rented--knowingly or not is not clear--a house to prostitutes. After Milliken became mayor, the city council passed an ordinance making it an offense to rent any "room,

house, or place" to prostitutes.⁸⁹ Upon Milliken's conviction, the city council attempted to remove him from office. Involved in political maneuverings and power plays, Milliken had alienated the council. But the reason why the council used this ordinance as the hook to hand Milliken and remove him does not appear in the case summary.

Whatever the local situation, the Texas Supreme Court would not allow the ordinance to stand. Judge Micajah H. Bonner applauded the counsel's desire to rid the city of "dens and haunts of prostitution" and to stop prostitution's "nefarious traffic in property, reputation, and souls of fellow beings, within the limits of the city"90 Yet he ruled that the city did not have the power to make renting a room an offense. He believed the ordinance went too far in restricting the liberty of prostitutes to obtain housing.

That unfortunate and degraded class against whom the ordinance was mainly intended, however far they may have fallen beneath the true mission of women, which it is one of our highest duties to foster and protect in social and domestic life, are still human beings, entitled to shelter and the protection of the law; and the council did not have the power to so far proscribe them as a class as to make it a penal offense in any one to rent (sic) them habitation without regard to its use.

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Prostitutes they might be, but because they were citizens of the state and competent individuals before the law, they could not be denied housing by the city council. Texas's high court declared the ordinance null and void as "unreasonable and in contravention of common right." Cities could protect themselves through vagrancy ordinances, but the courts would not allow ordinances to deny individuals housing.

Undoubtedly the de facto social pressures involved in residential housing patterns played a larger role in determining where prostitutes lived than did the de jure regulations and municipal ordinances. But when city councils tried to clothe social restrictions in legal dressing, the courts could review the ordinance for constitutionality. For the case at hand, since Milliken had been convicted under an unconstitutional ordinance, his conviction was overturned. In Milliken, the court limited the alternatives open to cities to remove and/or control prostitutes within their limits and Milliken was able to beat the effort to remove him from office.

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Defining the prostitute in law proved to be a more elusive task than might be at first expected. Within the closed community of the law, with its long history, approach, and standards, the minority of publicly immoral women presented problems. In the late nineteenth and early twentieth centuries, the law had its tradition of the prostitute-as-vagrant, an offense open to prosecution in the courts of summary jurisdiction. Justice of the peace and municipal courts handled the vast majority of the legal actions taken by police and prosecutors against prostitutes. Yet when a prostitute or a creative lawyer decided to invest the time, expertise, and money in challenging a vagrancy statute or a slander prosecution or a city ordinance, courts had trouble agreeing on the nature of the offense. However, by not hardening its legal position and definition, the law retained a flexibility to respond to both individual cases--since courts act only when cases are brought to them--and changed legal and social settings. An example would be the Iowa case that cast doubt on the requirement "for gain," State v. Clark. Textbooks and the basic legal finding aids today include the need for gain in the definition of prostitution. But the blurring of that point fit well into the development of a restrictive morality a century ago. In a society with little tolerance for the sexually active woman (especially if she acted publicly and for a livelihood), the need for gain would become superfluous.

Society's push for a wider and looser definition of prostitution encompassing any sexual behavior in a woman before marriage was always countered by the law's pull for precision and clarity in its definitions, forms, and procedures. Lawyers, judges, and prosecutors continued to believe that the process of arrest, trial, and appeal formed a workable remedy against "the social evil." No wonder the forces of social purity believed the law hindered rather than helped their attacks against prostitution. Despite an occasional voice raised against the status of a prostitute as a vagrant--the Progressive writer and social critic George Kibbe Turner called vagrancy a "curious old legal waste-basket"--law and society held two different ideas of the evil to be combatted.⁹² Purity reformers defined the evil posed by prostitution in terms of the wasted lives of the women, the commercialization of the trade, the

double standard, and prostitution's threat to the family. Law viewed the evil in terms of the prostitute as vagrant, a probable criminal, an unworking, potential consumer of the public relief. In its approach to the minority of publicly immoral women, the law resisted the social pressures to measurably alter its traditional approach to prostitution. A prostitute's status as a vagrant proved, in the long run, a more enduring concept than any of the social pressures brought against both the law and prostitution.

Notes

¹Much has been written on the Black Death and its effects. Consult a Black Death bibliography for a complete listing of citations but briefly see A. R. Bridbury, "The Black Death," *Economic History Review*, 26 (November 1973), 577; May McKisack, *The Fourteenth Century, 1307-1399* (Oxford: Clarendon Press, 1959); William H. McNeill, *Plagues and People* (Garden City, New Jersey: Anchor Press, 1976); J. F. D. Shrewsbury, *a History of Bubonic Plague in the British Isles* (London: Cambridge University Press, 1970); Philip Zieger, *The Black Death* (New York: John Day Co., 1969).

Fourteenth-century England was the century when Parliament matured. Edward III needed money and men for his ill-fated expeditions on the continent, in Scotland, and in Ireland, and he simply could not afford to finance his expeditions from the royal revenues. To deal with this financial need, Parliament met often, forty-eight times during the fifty-five-year reign of Edward III. Enter the Black Death, with Parliament sitting and able to respond. See Bryce Lyon, *A Constitutional and Legal History of Medieval England* (2nd ed., New York: W. W. Norton, 1980), chapter 34, "The Maturing of Parliamentary Institutions," pp. 535-561.

²23 Edw. 3, c. 1 (1349).

³Ibid. Translated in William F. Maher and William E. Williams, "Vagrants--A Study in Constitutional Obsolescence," *University of Florida Law Review*, 22 (Winter 1970), 384, 388. Original can be found in the *Statutes of the Realm* and in Bertha Haven Putnam, *The Enforcement of the Statute of Laborers: During the First Decade of the Black Death, 1349-1359* (New York: Columbia University Press, 1908), appendix, pp. 8-12. See also P. Michael Lahan, "Trends in the Law of Vagrancy," *Connecticut Law Review*, 1 (December 1968), 350, 350-351.

⁴25 Edw. 3, c. 3 (1350); 25 Edw. 3, c. 7 (1350).

⁵James Fitzjames Stephen, *A History of the Criminal Law in England* (3 vols., London: Macmillan and Co., 1883). See volume 3, pp. 203-204, 266-275. Following his interpretation see Gary V. Dubin and Richard C. Robinson, "The Vagrancy concept Reconsidered: Problems and Abuses of Status Criminality," *New York University Law Review*, 37 (January 1962), 102, 104; Caleb Foote, "Vagrancy-type Law and Its Administration," *University of Pennsylvania Law Review*, 104 (March 1956), 603; Maher and Williams; and Lahan above in note three.

⁶Stephen, *A History of the Criminal Law in England*, 204, 274.

⁷Ibid., p. 267.

⁸Putnam, *The Enforcement of the Statute of Laborers*, 9-56.

⁹1 Rich. 2, c. 6 (1377); 2 Rich. 2, c. 3 (1388).

¹⁰7 Rich. 2, c. 5 (1383); 2 Rich. c. 3 (1388).

¹¹12 Hen. 5, c. 4 (1414). See also 11 Hen. 7, c. 2 (1494); 19 Hen. 7, c. 12 (1503).

¹²Dubin, "The Vagrancy Concept Reconsidered," 105; Lahan, "Trends in the Law of Vagrancy," 351; Maher and Williams, "Vagrants--A Study in Constitutional Obsolescence," 389; Stephen, *A History of the Criminal Law in England*, 274. Stephen used the unfortunate sentence, "The vagrant came to be regarded as a probably criminal than as a runaway slave."

Serfs and slaves are different statuses, a fact Stephen knew. Unfortunately, recent writers have accepted his wording uncritically. Lahen, for example, relied heavily on Stephen's wording but Dubin did better by using the concept serf in a section title but not in the text.

¹³ Whipping statute, 22 Hen. 8, c. 12 (1530); 3d offense, 27 Hen. 8, c. 25 (1535).

¹⁴ 1 Edw. 6, c. 3 (1547). Though a little late in time focus, see Paul A. Slack, "Vagrants and Vagrancy in England, 1598-1664," *Economic History Review*, 27 (August 1974), 360.

¹⁵ Quoted in Maher and Williams, "Vagrants--A Study in Constitutional Obsolescence," 390. For a first offense, the individual was branded on the breast with a "V," declared a slave, and turned over to anyone willing to take him for a period of two years feeding him exclusively on bread and water. For a second offense, the individual was branded on the cheek with an "S" for slave and declared a slave for life. If the individual ran away a third time, caught, and convicted, he was hanged.

¹⁶ Maher and Williams, "Vagrants--A Study in Constitutional Obsolescence," 390. Barbaric to us, perhaps, but defensible from the standards of sixteenth-century England.

¹⁷ Stephen, *A History of the Criminal Law in England*, 206; Dubin, "The Vagrancy Concept Reconsidered," 106; Maher and Williams, "Vagrants--A Study in Constitutional Obsolescence," 391; Poor Relief Act, 43 Eliz. 1, c. 2 (1601).

¹⁸ 12 Anne, c. 23 (1713); 13 Geo 2, c. 24 (1741); The Justice's Commitment Act, 17 Geo. 2, c. (1744); 32 Geo. 3, c. 45 (1792); Vagrancy Act, 5 Geo. 4, c. 84 (1824). Britain's Court of Appeals definitively interpreted the Vagrancy Act and conduct criminality in *Ledwith v. Roberts*, K. B. 232 (1937). I can find little on the vagrant in historical literature. Much work has been done on vagrancy and law in Britain and America. What work of merit that has been done is in the legal literature, although most of these works suffer from the lawyer's present-mindedness. See the notes above and Anthony G. Amsterdam, "Federal Constitutional Restrictions on the Punishment of Crimes of Status, Crimes of General Obnoxiousness, Crimes of Displeasing Officers, and the Like," *Criminal Law Bulletin*, 3 (May 1967), 205; Harvey David Brooks, "Vagrancy: A Constitutional Battle," *Syracuse Law Review*, 16 (Spring 1965), 646; "Criminal Law--Vagrancy--Magistrate's Jurisdiction Over Offenses," *New York Law Forum*, 5 (January 1959), 99; Anthony A. Cuomo, "Mens Rea and Status Criminality," *Southern California Law Review*, 40 (Spring 1967), 463; William Sidney Davis, "Vagrancy--Loitering Laws: Antithesis to Recent Jurisprudential Trends," *Tennessee Law Review*, 35 (Summer 1968), 617; William O. Douglas, "Vagrancy and Arrest on Suspicion," *Yale Law Journal*, 70 (November 1960), 1; Paul G. Flynn, "Vagrancy Laws and the Right to Privacy," *University of San Francisco Law Review*, 2 (April 1968), 337; John E. Hauge, "Vagrancy--A Crime of Status," *Wake Forest Intramural Law Review*, 6 (March 1970), 307; W. Christian Hoyer, "Constitutional Law: The Belated Demise of a Vagrancy Statute," *University of Florida Law Review*, 25 (Fall 1972), 227; William A. Kurtz, "Two More Strikes Against Vague Vagrancy Ordinances: *Palmer v. Euclid* and *Coates v. Cincinnati*," *Ohio State Law Journal*, 32 (Fall 1971), 902; Forrest W. Lacey, "Vagrancy and Other Crimes of Personal Condition," *Harvard Law Review*, 66 (May 1953), 1203; R. V. Lavoie, "Criminal Code--Bill of Rights--Whether Offense of Vagrancy by Common Prostitute Constitutes Discrimination By Sex," *University of British Columbia Law Review*, 6 (December 1971), 442; G. M. McClure, "Vagrants Criminals and the Constitution," *Denver Law Center Journal*, 40 (November-December 1963), 314; Beverly C. Moore, "Vagrancy and Related Offenses," *Harvard Civil Rights-Civil Liberties Review*, 4 (Spring 1969), 291; John M. Murtagh, "Status Offenses and Due

Process of Law," *Fordham Law Review*, 36 (October 1967), 51; Cliff Nelson and Ray Steele, "The Vagrancy Dilemma: An Empirical Study," *Osgood Hall Law Review*, 7 (January 1970), 177; Raymond Nimmer, "Court Directed Reform of Vagrancy-Type Laws," *Judicature*, 54 (August-September 1970), 50; Note, "Criminal Law--Due Process--Statute Proscribing Loitering for the Purpose of Prostitution is Not Unconstitutionally Vague," *Fordham Urban Law Journal*, 6 (Fall 1977), 159; Note, "An Over-Extended Application of Vagrancy Statutes," *Washington University Law Quarterly*, (December 1961), 425; Rollin M. Perkins, "The Vagrancy Concept," *Hastings Law Journal*, 9 (May 1958), 237; Leon Radzinowicz, *A History of English Criminal Law and Its Administration from 1750* (4 vols., London, Stevens, 1948-1976), vol. III, pp. 21, 52-54, 73-74; C. J. Ribton-Turner, *A History of Vagrants and Vagrancy and Begging* (London: Chapman & Hall, 1887 reprinted Montclair, New Jersey: Patterson Smith, 1972); Charles Rosenbleet and Barbara Pariente, "The Prostitution of the Criminal Law," *American Criminal Law Review*, 11 (1973), 373; Arthur H. Sherry, "Vagrants, Rogues, and Vagabonds--Old concepts in Need of Revision," *California Law Review*, 48 (October 1960), 557; Neal Sundeen, "Criminal Law--Daniel Dean Baker v. The State of Texas, 478 SW 2nd 445 (1972)," *Texas Southern University Law Review*, 2 (Winter 1973), 323; Joseph Van Walraven, "Vagrancy: Loitering as Definitional Conduct in Oklahoma," *Tulsa Law Journal*, 8 (Spring 1972), 74; John T. Walsh, "Vagrancy: A Crime of Status," *Suffolk University Law Review*, 2 (Spring 1968), 156; Donald H. Whaley, "The Constitutionality of Loitering Ordinances," *St. Louis University Law Journal*, 6 (Fall 1960), 247; Robin Yeamans, "Constitutional Attacks on Vagrancy Laws," *Stanford Law Review*, 20 (April 1968), 782; Harry M. Zimmerman, "Louisiana Vagrancy Law--Constitutionally Unsound," *Louisiana Law Review*, 29 (Fall 1969), 361.

¹⁹ See Maher and Williams, "Vagrants--A Study in Constitutional Obsolescence," 391, for a comparison of the Elizabethan statute and the Florida vagrancy statute; their similarity is striking. See also the list of thirty species of vagrants in Dubin, "The Vagrancy Concept Reconsidered," 109-111. Besides the usual classes of vagrants such as the common prostitute, gambler, and drunkard, Dubin listed seven categories pertaining especially to prostitutes: the common prostitute, the common prostitute in public, the keeper of a house of prostitution, the inhabitant of a house of prostitution, the dependent of a prostitute, the solicitor--pimp--, and the habitual associate of a prostitute.

²⁰ "Prostitution," *Corpus Juris Secundum* (CJS), vol. 73, sec. 2, p. 224 with citations thereunder.

²¹ *Circumspecte Agatis*, 13 Edw. 1, stat. 4 (1285). See Rosenbleet, "The Prostitution of the Criminal Law," 373. Most of the literature fails to stress this point enough. See the federal case of *Gladys Bailey v. United States*, 98 F. 2nd 306 (1938).

²² William E. Nelson, *Americanization of the Common Law: The Impact of Legal Change on Massachusetts Society, 1760-1830* (Cambridge, Mass.: Harvard University Press, 1975); David H. Flaherty, "Law and the Enforcement of Morals in Early America," *Perspectives in American History*, 5 (1971), 203; Julius Goebel and T. Raymond Haughtery, *Law Enforcement in Colonial New York: A Study in Criminal Procedure, 1664-1776* (reprint Montclair, New Jersey: Patterson Smith, 1970); A. Chroust, *The Rise of the Legal Profession in America* (2 vols., Norman, Oklahoma: University of Oklahoma Press, 1965); Roscoe Pound, *The Formative Era of American Law* (New York: P. Smith, 1938).

²³ Only recently have states changed their vagrancy statutes to take account of male prostitution. Pamela Ann Roby provides the best work of the change in state prostitution statutes. See her "Politics and the Criminal Law: Revision of the New York State Penal Law on Prostitution," *Social Problems*, 17 (Summer 1969), 83; "Politics and Prostitution: A Case Study of the Formation, Enforcement, and Judicial Administration of the New York State Penal Laws on Prostitution, 1870-

1970." (unpublished Ph.D. dissertation, New York University, 1971); "Politics and Prostitution: A Case Study of the Revision, Enforcement, and Administration of the New York State Penal Laws on Prostitution," *Criminology*, 9 (February 1972), and with Virginia Kerr, "The Politics of Prostitution," *Nation*, 241 (April 10, 1972), 463. Much more can be done on state vagrancy/prostitution statutes.

²⁴St. George Tucker, *Blackstone's Commentaries: with Notes of Reference to the Constitution and Laws of the Federal Government of the United States and of the Commonwealth of Virginia* (5 vols., Philadelphia: William Young Birch and Abraham Small, 1803 reprinted New York: Augustus M. Kelley, 1969).

²⁵*Blackstone's Commentaries*, 169. Division also found in Justice's Commitment Act, 17 Geo. 2, c. 5 (1744).

²⁶*Blackstone's Commentaries* 169. Virginia's statute passed in 1794. Tucker mentioned other statutes against idlers usually focused on gamblers.

²⁷Between Tucker in 1803 and Tiedeman in 1886, none of the major legal doctrinal writers considered vagrancy in-depth. Nathan Dane, James Kent, Joseph Story, Thomas Cooley, and Joel P. Bishop spent considerable time worrying about property used for an immoral purpose but spent no time on the vagrant person. Tiedeman's thoughts on vagrancy stand out. See Christopher G. Tiedeman, *A Treatise on the Limitations of Police Power in the United States Considered from Both a Civil and Criminal Standpoint* (St. Louis: F. H. Thomas Law Book Co., 1886), 116-122. Tiedeman's influence on the law and society in the late nineteenth century is considered in Clyde E. Jacobs, *Law Writers and the Courts: The Influence of Thomas M. Cooley, Christopher G. Tiedeman, and John F. Dillon Upon American Constitutional Law* (Berkeley: University of California Press, 1954), especially see pp. 58-63 and other parts of Jacobs where Tiedeman is discussed.

²⁸Tiedeman, *A Treatise on the Limitations of Police Power*, 117.

²⁹*Ibid.*

³⁰Jacobs, *Law Writers and the Courts*, 58-63. Jacobs called Tiedeman's work "The most extreme defense of constitutional laissez faire principles ever written" (p. 27). See Tiedeman's preface, *A Treatise on the Limitations of Police Power*, v-viii.

³¹*Ibid.*, p. 120.

³²*Ibid.*

³³Ernest Freund, *The Police Power: Public Policy and Constitutional Rights* (Chicago: Callaghan & Co., 1904).

³⁴*Ibid.*, p. 97, sec. 97, Vagrancy, vagabondage, and criminal idleness.

³⁵A typical example would be a case from the justice of the peace precinct one in Harris County, Texas. Margaret Valentine, Sweltie Johnson, and Vivy Williams were charged with vagrancy on February 25, 1913, case #17768. Typically for such cases, they waived their right to a jury and pleaded guilty. The court fined them a dollar each plus costs: \$5.00 County Attorney's fee, \$3.80 Justice's cost, \$4.00 court cost amounting to a total of \$13.80 each for a charge of vagrancy. Justice of the Peace Precinct One, Harris County, 17 February-22 April, 1913, Houston Metropolitan Research Center, Houston Public Library.

An extensive literature exists on the growth and development of police forces in Britain and America; generally see Robert M. Fogelson, *Big-City Police* (Cambridge, Mass.: Harvard University Press, 1977); Mark H. Haller, "Historical Roots of Police Behavior: Chicago, 1890-

1925," *Law and Society Review*, 10 (Winter 1976), 303; David R. Johnson, *Policing the Urban Underground: The Impact of Crime on the Development of the American Police, 1800-1887* (Philadelphia: Temple University Press, 1979); Roger Lane, *Policing the City: Boston, 1822-1885* (Cambridge, Mass.: Harvard University Press, 1967); Michael D. Maltz, "Crime Statistics: A Historical Perspective," *Crime and Delinquency*, 23 (January 1977), 32; Wilbur R. Miller, *Cops and Bobbies: Police Authority in New York and London, 1830-1870* (Chicago: University of Chicago Press, 1976); Eric H. Monkkonen, "Blood and Space: More Studies on Nineteenth-Century Crime and Justice," *Journal of Urban History*, 7 (February 1981), 239; Eric H. Monkkonen, *The Dangerous Class: Crime and Poverty in Columbus, Ohio, 1860-1885* (Cambridge, Mass.: Harvard University Press, 1975); Eric H. Monkkonen, *Police in Urban America, 1860-1920* (Cambridge: Cambridge University Press, 1981); James Richardson, *The New York Police: Colonial Times to 1901* (New York: Oxford University Press, 1976); Eugene J. Watts, "Police Response to Crime and Disorder in Twentieth Century St. Louis," *Journal of American History*, 70 (September 1983), 340.

Work on police forces (and prostitution for that matter) in the South is skimpy. A particularly good article on Austin, Texas's prostitution is David G. Humphrey's "Prostitution and Public Policy in Austin, Texas, 1870-1915," *Southwestern Historical Quarterly* 86 (April 1983), 473. For Houston, Texas police see Louis J. Marchiafava, "Institutional and Legal Aspects of the Growth of Professional Urban Police Service: The Houston Experience, 1878-1848," (unpublished Ph.D. dissertation, Rice University, 1976).

³⁶Freund, *The Police Power*, 98, sec. 98, Vagrancy not a state of dependence.

³⁷*Ibid.*, p. 99, sec. 99, Vagrancy a criminal offense.

³⁸*Ibid.*

³⁹*Ibid.*, p. 228, sec. 244, Measures against prostitutes.

⁴⁰*Ibid.*, p. 226, sec. 242, Prostitution--Scope and ground of state control. Freund described prostitution as "a species of sexual vice particular to women;" the usual assumption of turn-of-the-century America.

⁴¹*Ibid.*

⁴²*Ibid.*, p. 229, sec. 244, Measures against prostitutes.

⁴³*Ibid.*

⁴⁴*Ibid.*, p. 230. Freund footnoted that such a scheme had been adopted by American military authorities in Manila, Philippines. As Freund told the story, "... Commissioner [William Howard] Taft, in a telegram to the Secretary of War, admitted that since November 1900, to check the spread of venereal disease, known prostitutes were subjected to certified examination." Here is a topic of importance, but which, to the best of my knowledge, has received no work or investigation. A question which immediately comes to mind is whether the medical examination of prostitutes in far-away Manila on Philipinos was alright while the examination of American prostitutes constituted an unseemly alternative. Much could be done on American colonial policy toward Philippino prostitution.

⁴⁵Carl N. Degler, "What Ought To Be and What Was: Women's Sexuality in the Nineteenth Century," *American Historical Review*, 79 (December 1974), 1467.

⁴⁶G. Edward White, "The Appellate Opinion as Historical Source Material," *Journal of Interdisciplinary History*, 1 (Spring 1971), 491. The aim here is not to review all the high state court decisions involving prostitution. Rather, some cases stand out in the body of case law which courts across the country cited and followed as precedent. These cases are not "great" cases of American law but the stuff of the day-to-day world of lawyers and law.

⁴⁷Occasionally this definition is supplemented by adding, "the common lewdness of a female, as distinguished from sexual intercourse confined to one man." For definitions, see 50 CJS 800, (1930); 73 CJS 224, (1951); 42 Am. Jur. 260 (1942); 63 Am. Jur. 2nd., 364 (1972); 33 Tex. Jur. 945 (1934); 46 Tex. Jur. 2nd. 487 (1963).

⁴⁸*Commonwealth v. John Cook*, 12 Met. (53 Mass.) 93 (1846).

⁴⁹*Ibid.*, pp. 93-94.

⁵⁰*Ibid.*, p. 97. The Iowa Supreme Court followed *Cook* as precedent in 1859 quoting long sections of Dewey's decision, *State v. Ruhl*, 8 Iowa 447 (1859). *Ruhl* reiterated that prostitution was not seduction or illicit sexual intercourse with one man only but "a common, indiscriminate, illicit intercourse, or offering of the body for an indiscriminate commerce with men."

⁵¹*State v. John A. Stoyell*, 54 Me. 24 (1866). Stoyell met the unidentified woman at a railroad station. He had taught her music. He persuaded her to travel to Bath, Maine, with him as a lark and promised to bring her back home in five hours. She went willingly with him and upon arriving at Bath he took a room at a hotel, locking himself and her in the room. She protested but he reassured her she would be returned home soon. Stoyell sent for some sort of intoxicating liquor which he convinced her to drink. She became intoxicated and he had sexual intercourse with her. They had dinner after which they had sexual relations again before starting back to her home. He told her to fabricate a story to tell her parents but she was afraid to enter the house. They returned to the hotel and engaged in sexual relations. They returned to her residence the next day. Stoyell urged her to go to Portland, Maine, with him saying, "she might as well be hung for a sheep as a lamb." She refused, returned home, and delivered a child eight and a half months later.

⁵²*State v. Stoyell*, 27. Appleton overturned Stoyell's conviction and pointed out that Stoyell's only purpose was sexual gratification not putting her into a house of prostitution or providing other men to have sexual relations with her. Prosecutors used the wrong charge. Instead of enticing, Stoyell should have been charged with at least kidnapping, rape, fornication, and seduction. Also see *James T. Osborn v. State*, 52 Ind. 526 (1876); *Jesse Huff v. Commonwealth*, 37 SW 1046 (1896); and *People v. Orange A. Carrier*, 46 Mich. 442, 9 NW 487 (1881).

⁵³See notes 40 and 47.

⁵⁴*State v. Clark*, 78 Iowa 492, 43 NW 273 (1889).

⁵⁵*State v. Rice*, 56 Iowa 431, 9 NW 343 (1881).

⁵⁶*State v. Clark*, 494.

⁵⁷**State v. Max Thuna**, 59 Wash. 689, 109 Pac. 331 (1910); rehearing, 111 Pac. 768 (1910).

⁵⁸*Ibid.*

⁵⁹Thuna meant cases such as **Commonwealth v. Cook**, note 48; **State v. Gibson**, 111 Mo. 92, 19 SW 980 (1892); **Springer et al. v. State**, 16 Tex. App. 591 (1884); **State v. Stoyell**, 54 Me. 24 (1866).

⁶⁰**State v. Max Thuna**, 690. In a related case, **James Fahnestock v. State**, 102 Ind. 156, 1 NE 372 (1885), the issue arose whether a single act of voluntary sexual intercourse between an unmarried female and a male person made the woman a prostitute? This question posed the problem without involving the idea of gain at all. The trial court had instructed the jury that one act did constitute a woman a prostitute but Indiana's Supreme Court overruled the lower court. One act did not make a woman a prostitute.

⁶¹**People v. Catherine Forbes**, 4 Parker (N. Y.) 611 (1860).

⁶²*Ibid.*, p. 612.

⁶³*Ibid.*, p. 613.

⁶⁴*Ibid.*, p. 614. A parallel case involving vagrancy and prostitution is **Ex parte Alice McCarthy**, 72 Cal. 384, 14 Pac. 96 (1894).

⁶⁵**Mamie Peabody v. State**, 72 Miss. 104 (1894).

⁶⁶*Ibid.*, pp. 105-106. We know very little about black prostitutes in the South from after the Civil War to the present. The field is almost void although David C. Humphrey has some to say about black prostitution in Austin, "Prostitution and Public Policy in Austin, Texas, 1870-1915," 489-493. See also James R. McGovern, "'Sporting Life on the Line': Prostitution in Progressive Era Pensacola," **Florida Historical Quarterly**, 54 (October 1975), 131; and C. Vann Woodward, **The Strange Career of Jim Crow** (3d revised edition, New York: Oxford University Press, 1974), 102.

⁶⁷**Mamie Peabody v. State**, 108. Proverbs 7: 5-27 begins, "that they may keep thee from the strange woman/ from the stranger which flattereth with her words. . . ."

⁶⁸**Jacob Rodebaugh v. Rachel Hollingsworth**, 6 Ind. 339 (1855).

⁶⁹*Ibid.*, p. 340. In the first sentence, Rodebaugh claimed to have heard about Hollingsworth from Cropper directly. In the second sentence, Rodebaugh alleges that Hollingsworth confided in Cropper about her alleged sexual contact with Nero.

⁷⁰*Ibid.*, p. 343.

⁷¹Perkins decided the case by using his definition of whoredom to uphold Hollingsworth's actions for slander against Rodebaugh.

⁷²**Sheeney v. Cokley**, 43 Iowa 183 (1876). The case did not provide the first name of Cokley or the woman he called a whore. Edward Sheeney is the husband of the slandered woman. In this case, the problem of

standing may have been at issue. Could a woman file a slander suit in 1876 Iowa? Perhaps if she was a **feme sole** but when Sheeney filed the suit she was married. That may explain the lack of her name appearing in the court's decision.

⁷³**Sheeney v. Cokley**, 184. Why the court did not switch the names of the parties from the trial title, **Sheeney v. Cokley**, to the appeals title, **Cokley v. Sheeney**, is unknown. The usual procedure would be to switch the names.

⁷⁴**May Davis v. S. P. Sladden**, 17 Or. 259, 21 Pac. 140 (1889).

⁷⁵*Ibid.*, p. 266.

⁷⁶*Ibid.*, p. 264. As precedent, the court cited some of the above cases, **State v. Stoyall** [**Stoyell** in original], 54 Me. 27 (1866); **Commonwealth v. Cook**, 12 Met. (53 Mass.) 93 (1846); **State v. Ruble** [**Ruhl** in original], 8 Iowa 453 (1859); **Osborn v. State**, 52 Ind. 528 (1876); **Fahnestock v. State**, 102 Ind. 165 (1885); **Sheeney v. Cokley**, 43 Iowa 183 (1876).

⁷⁷**Davis v. Sladden**, 265.

⁷⁸*Ibid.*, p. 267 for "hard one." See also **Ida Barnett v. Florence Phelps**, 191 Pac. 502 (1920).

⁷⁹Other cases worth reviewing which touch upon the meaning of "prostitute" are: **Ella Kauffman and others v. People** 11 Hun. (18 NYC) 82 (1877); **People v. Treney C. Marshal**, 59 Cal. 386 (1881); **People v. Armand Demousset**, 71 Cal. 611 (1887); **Mason v. State**, 29 Tex. App. 24, 14 SW 71 (1890), all were abduction for prostitution; **State v. William Gibson**, 111 Mo. 92, 19 SW 980 (1892), concubinage and abduction for prostitution, a long entangled case; **State v. John Mitchell**, 149 Iowa 362, 128 NW 378 (1910), conspiracy to induce minors to commit lewdness, black males and white girls; **Rachael Lopez v. State**, 70 Tex. Cr. R. 71, 156 SW 217 (1913), abduction for juvenile prostitution; **Clara B. Bowman v. State**, 73 Tex. Cr. R. 194, 164 SW 846 (1914), disorderly house prosecution and "vag" offense; **Pauline Levy v. State**, 84 Tex. Cr. R. 493, 208 SW 667 (1919), vagrancy; and **State v. Roger Marsh**, 196 NW 930 (1924), abduction for the purpose of prostitution.

⁸⁰**V. R. Springer et al v. State**, 16 Tex. App. 591 (1884).

⁸¹*Ibid.*, p. 593. By 1900, the division between being a prostitute and being a common prostitute was treated as simply a normal, not-very-surprising part of the law; see **Mrs. E. J. Daily v. State**, 55 SW 821 (1900).

⁸²**Mamie Cox v. State**, 205 SW 131 (1918).

⁸³*Ibid.*, p. 132. Quotation marks in original.

⁸⁴*Ibid.*

⁸⁵*Ibid.*, p. 133.

⁸⁶*Ibid.*, p. 134.

⁸⁷*Ibid.*, pp. 134-135.

⁸⁸**James A. Milliken v. The City Council of the City of Weatherford**, 54 Tex. 388 (1881).

⁸⁹The appropriate section of the ordinance read:

. . . Be it further ordained, that any prostitute or lewd woman who shall reside in, stay at, or inhabit any room, house, or place within the limits of this city, or any person who shall knowingly furnish, rent, let, or lease any premises or place within the city limits to any prostitute or lewd woman, or to any person for their use, shall be deemed guilty of an offense.

⁹⁰**Milliken v. City Council**, 393.

⁹¹*Ibid.*, p. 394. For other city ordinances, see **George Shafer, and Elmira, his wife v. Daniel G. Mumma**, 17 Md. 331 (1861); **Braddy v. City of Milledgeville**, 74 Ga. 516 (1885); **Ex parte Maurice Cannon**, 94 Tex. Cr. R. 257, 250 SW 429 (1923); for anti-night-walking ordinances, see **State v. Emma Dowers**, 1 Hadley (45 N. H.) 543 (1864); **Nora Stokes v. State**, 92 Ala. 73, 9 So. 400 (1890); **Williams v. State**, 98 Ala. 52, 13 So. 33 (1893).

⁹²George Kibbe Turner, "The Strange Woman," **McClure's Magazine**, 41 (May 1913), 25. See also Turner's "The City of Chicago: A Study in Great Immoralities," **McClure's Magazine**, 28 (April 1907), 575, and "The Daughter's of the Poor: A Plain Story of the Development of New York City as a Leading Center of the White Slave Trade of the World, under Tammany Hall," **McClure's Magazine**, 34 (November 1909), 45. Also the social purity anti-vice writings in chapter one.

The status of the prostitute-as-vagrant survived the onslaught of the social purity forces at the turn of the century and a rejuvenated feminism of the 1960s and 1970s. Progressives had little influence on the individual prostitute in law but more success on the law of disorderly houses. Recent feminist agitation has succeeded in removing the sexist bias from the definition of prostitution. Most statutes have dropped the restriction of prostitution from "a female" and added "a person." See Roby, note 23 above.

CHAPTER THREE

These Moral Pests: Aspects of the Law of Nuisance, Disorderly Houses, and Bawdy Houses

The law of disorderly houses is little used by prosecutors today, little discussed by lawyers, and no longer written about in either the legal or popular presses. Yet the legal methods, powers, and means public officials and private individuals have at their disposal to combat a municipality's cluster of bawdy houses have a long history. The law of disorderly houses received a good deal of attention from legal treatise writers in the nineteenth century when almost all of prostitution's trade was carried on out of some building or structure. Perhaps surprisingly, given the lack of interest in the subject, the law of disorderly houses still constitutes the major avenue of prosecution against businesses catering to vagrants, prostitutes, drunkards, and gamblers. As noted in the previous chapter, background in the law of vagrancy proved useful in understanding the prostitute in law; likewise, a background in the law of nuisance aids in understanding the law's actions towards disorderly houses in general and bawdy houses in particular. Such a background will show how the law viewed and moved against the property used to house the prostitute's trade. British and American legal treatise opinions, the law of nuisance, and the Progressive Era's red-light abatement acts will demonstrate that as with the prostitute, the bawdy house in law was not a simple evil to be combatted.

Sir Edward Coke's Third Part of the Institutes of the Law of England (1628) and the Texas case of Stokeley v. State (1897) are separated by almost two hundred and seventy years, yet they are tied together by the same legal attitude towards disorderly houses.¹ Coke would have recognized the offense and legal actions involved in Stokeley. On the day after Christmas, 1896, Frank Stokeley used the back room of his store in Commanche County, Texas, to hold a post-Christmas dance for twenty or thirty of his friends. About eleven that evening Howard Williams arrived with a woman. She seated herself by the stove, but because no other women were present and because the men were drinking, Stokeley escorted her to his house, seventy yards from

from the store. From eleven to past midnight the woman ". . . disrobed herself and engaged in indiscriminate acts of prostitution . . . with any and everybody who would pay her charge," which was two dollars. In testimony at Stokeley's trial for keeping a disorderly house, witnesses said that everyone at the dance knew the woman was plying her trade as a prostitute and that ten men, including Stokeley, took advantage of her services.² Stokeley denied he had engaged in sexual contact with the woman or knew of her activities. He further testified that when he realized what she was doing he forced her to leave.

After the jury found Stokeley guilty of running a disorderly house he appealed, arguing that since he had no knowledge of the woman's behavior and had made her leave when he did learn, he could not be convicted of running a disorderly house. Texas's Court of Criminal Appeals disagreed. Judge James M. Hurt cited the testimony of numerous witnesses alleging Stokeley's contact with the woman and his putting the woman in his house as proof of his knowledge of the woman's actions. With such incriminating testimony and the appeals court's usual reluctance to overturn jury finding, Hurt upheld Stokeley's conviction for keeping a disorderly house.

To discuss this long-lived offense of keeping a disorderly house and place this single case in an historical context, it is necessary to go to the source, Coke. He began the section on bawdy houses in the Institutes by shifting the offense from the world of man to the kingdom of God. "The keeping of them is against the law of God, on which the Common Law of England in that case is grounded." The common law had no choice but to conform to the law of God, and Coke proved God's opposition to bawdy houses by footnoting several Biblical citations in Numbers, Deuteronomy, and Ezekiel.³ Making man's law conform to God's law is not new in the history of law nor foreign to the mythical origins of most societies but of more importance here is Coke's thinking on legal remedies for the evil and his thoughts on the temporal courts' jurisdiction over the offense.

Coke wrote that "the keeper, he or she, of such houses is punishable by indictment at the Common Law by fines and imprisonment."⁴ Coke established with this one sentence three of the enduring features

of the law of disorderly houses: 1) both sexes could be indicted for the keeping; 2) keeping was an offense at common law; and 3) the process of indictment provided the means to move against disorderly houses in what would become the criminal law. In addition, recalling that prostitution was not an offense at common law, Coke explained that " . . . although adultery and fornication be punished by the ecclesiastical law, yet the keeping of a house of bawdrie, or Stewes, or brothel-house, being as it were a common nuisance, is punishable by the common law."⁵ Here then lay another avenue against bawdy houses--through nuisance--that would in time come under the jurisdiction of the chancellor and equity courts in civil law. Individuals could be prosecuted for separate acts of immorality depending upon their marital status. A person could be charged with adultery, for example, if one or both of the parties were married, or fornication, if the two persons, neither married, engaged in sexual contact. The women who staffed bawdy houses were probably unmarried and engaged in their trade with numerous men. They did not commit prostitution as the modern mind would label the behavior; rather, they committed fornication--an offense falling under the jurisdiction of the ecclesiastical courts since it was an offense of incontinence. If a prosecution on the grounds of fornication failed, the women of a bawdy house could always be arrested and tried as vagrants. Bawdy houses, Coke believed, threatened individuals by being "the cause of many mischiefs, not only to the overthrow of their bodies, and the wasting away of their livelihoods, but to the endangering of their souls."⁶ By the early seventeenth century, the common law had taken jurisdiction over the traditional ecclesiastical offenses such as fornication and the punishment of keepers of bawdy houses. Coke, however, still felt uneasy enough about the common law's role in such matters to pay his respects to the church's traditional concerns about the offense, the spiritual danger to the individual's soul.

Coke provided the broad basis of the theoretical framework for the law's actions against the property used to house prostitutes. Indictments (with the accompanying fines and imprisonments following the standards and procedures of a criminal trial) and nuisance actions (with the civil process of abatements) formed the two types of legal

actions against bawdy houses. The accompanying rule that persons of either sex could be indicted for the keeping of a bawdy house originated with Coke. Well into the nineteenth century, legal treatise writers and judges cited Coke as the original authority on the law of disorderly houses, and all the later treatise writers adhered to Coke's first principles.

William Hawkins, in his Pleas of the Crown (1724), expanded on Coke and together with him provided the underlying assumptions behind the offense of keeping a disorderly house.⁷ Hawkins displayed an attitude of certainty and exactness when he dealt with the offense of keeping a disorderly house, an attitude later writers continued. He believed little time need be spent on the law of bawdy houses, they "being so gross a Nature, and there being also so few Questions relating to [them] worth considering." Hawkins followed Coke's lead but in broader language. He placed the offense under the cognizance of the common law and stipulated that keeping a bawdy house fell to the temporal courts for review. He also stated that a bawdy house was a nuisance

not only in respect of its endangering the Public Peace, by drawing together dissolute and debauched Persons, but also in respect of its apparent Tendency to corrupt the Manners of both Sexes, by such an open Profession of Lewdness.

8

Here were the evils to be limited by closing bawdy houses. The problem was in property being used for the congregating of people potentially dangerous to the quiet and good order of the community. There was no evil in any particular act of immorality or vice for which the property was used; the problem was the "drawing together" of potential criminals to one spot. The other evil or problem was the tendency of bawdy houses to prevent the formation of potential centers of crime, thereby avoiding threats to public morality. Later treatise writers de-emphasized his second concern and focused on the drawing together of dangerous people whether they be thieves, drunkards, gamblers, or prostitutes. Through the common law offense of keeping a bawdy house, Hawkins wanted to prevent centers of crime and threats to public morals.

Forty-nine years after Hawkins's work appeared, Blackstone published his immensely influential Commentaries (1765), St. George Tucker's 1803 edition having the widest readership and influence in

America.⁹ Tucker's Blackstone focused on the law's actions against bawdy houses. No longer simply describing the evil, it guided lawyers on how to proceed against immoral places, detailing in early form the labyrinth of nuisance law familiar to modern law students. It included the general principles of law applicable to disorderly houses and bawdy houses. Blackstone reconfirmed Coke and Hawkins in that the state could move against bawdy houses through its criminal process of indictment, fines, and imprisonment. The problem, however, was that the criminal law might fine the keeper or temporarily remove him or her to the work house or prison while the building and the use to which it was put remained unchanged. Prostitutes, if not also arrested, fined, and/or imprisoned, continued to ply their trade from the building or structure whether or not the keeper faced criminal proceedings. The problem for citizens and public officials was how to prevent the building being used by the prostitutes. The remedy lay through nuisance law in an action of abatement. What then was a nuisance?

As Coke and Hawkins defined the evil of disorderly houses, Blackstone provided the foundation of the law of nuisance applied to disorderly houses. Blackstone did not manufacture the law of nuisance out of thin air, since Coke, Hawkins, and others had previously dealt with nuisance as it pertained to disorderly houses. But Blackstone delineated nuisance's limits and goals and its link to both disorderly houses and bawdy houses. He explained that a nuisance "signifies anything that worketh hurt, inconvenience, or damage" and that nuisances were of two kinds: public and private.¹⁰ Public nuisances were a public wrong or crime, "an annoyance to all the King's subjects." Private nuisances formed a private wrong between individuals, "anything done to the hurt or annoyance of the land, tenements, or hereditaments of another." Blackstone used as an example of a nuisance to a building or dwelling the construction of a house so close to a neighbor's that the new roof overhung the building and threw water on it. Or, a neighbor's house could be a nuisance if it obstructed "ancient lights" from reaching the building or if the neighbor kept hogs or other animals in his house and made the air "unwholesome," thereby rendering "the enjoyment of life and property uncomfortable." All were nuisances to a person's

personal property. Nuisance to a person's real property, land, would include building a smelting plant which emitted fumes which in turn killed neighbor's cattle or ruined his crops. It was also a nuisance to divert a stream from its natural course to the detriment of neighboring land as well as "to corrupt or poison a water-course, by erecting a dyehouse or lime-pit for the use of trade, in the upper part of a stream." These were nuisances since their "consequenses must necessarily tend to the prejudice of one's neighbour." While Blackstone described only these physical nuisances to real and personal property, later treatise writers would differentiate between physical nuisance and moral nuisances. Bawdy houses fell into both categories.

Having described what nuisances were, Blackstone moved on to detail the remedies against them, and in doing so laid down a rule of nuisance that would remain unchanged in America until the Progressive Era. The rule was "no action lies for a public or common nuisance, but an indictment only."¹¹ The law of Blackstone's time and the law received into the common law of the American colonies and states, held that no private individual, even if he claimed his own particular damages, could maintain a nuisance action since his damages were held in common with his neighbors. Only the states, or for Blackstone the crown, held the power to indict the nuisance and to fine or imprison the perpetrator of the nuisance. Yet immediately after having ruled out individual action against a nuisance, Blackstone waived. He cited one exception:

where a person suffers some extraordinary damage, beyond the rest of the King's subjects, by a public nuisance; in which case he shall have private satisfaction.

12

It was left to the civil courts in equity to decide whether the individual had incurred enough "extraordinary damage" to be entitled to a private action for the abatement of the nuisance. The injured party bore the burden of proving to a court his special damages. In his Commentaries under "Wrongs," Blackstone elaborated on why individuals should, as a general rule, be denied individual actions against nuisances. He feared a multiplicity of suits. "It would be unreasonable to multiply suits, by giving every man a separate right if action,

for what damnifies him in common with only the rest of his fellow subjects."¹³

Later in his Commentaries, Blackstone discussed nuisances under the heading, "Of Offenses Against the Public Health, and Public Police or Oeconomy." In a catch-all section on clandestine marriages, bigamy, polygamy, wandering soldiers and mariners, and "outlandish persons . . . Egyptians and gypsies,"¹⁴ Blackstone repeated his nuisance doctrines. "Common nuisances," he began, "are such inconvenient or troublesome offenses, as annoy the whole community in general, and not merely some particular person."¹⁵ As examples, he described highways, bridges, or public rivers rendered dangerous to travel by either a positive act--blocking a highway with a fence--or a failure to act--the failure of a county or a region to repair a bridge. He also cited offensive trades and manufacturing concerns which were detrimental to the public, particularly the keeping of hogs in a city. Finally, Blackstone came to a crucial point in the Commentaries for the law of disorderly houses. He wrote,

~~All disorderly Inns, or ale-houses, gaming houses, bawdy houses, stage-plays, unlicensed booths, and stages for rope-dancers, mountebanks, and the like, are public nuisances, and may upon indictment be suppressed and fined.~~

16

Blackstone relied on Hawkins to support this statement, and Americans and American law took the words to heart. From this point grew the American law of disorderly houses and bawdy houses. The lasting influence of these simple sounding points of law presented in a cold, didactic manner cannot be underestimated. The American commentators and treatise writers continued the Blackstone, Hawkins, Coke approach to disorderly houses while elaborating on and incorporating specific fact situations as they arose. An illustration of Blackstone's influence is Nathan Dane's A General Abridgement and Digest of American Law (1823).¹⁷ One of the surprising aspects of Dane's work is that despite his sincere attempt to provide a complete abridgement and digest of American law he blatantly relied on English law, precedent, and Blackstone's commentaries. Dane discussed the "American" law of bawdy houses in a section entitled "Crimes Against Religion and Morality" by referring only to Blackstone and the English case law that Blackstone

cited.¹⁸ He recounted that bawdy houses were indictable at common law and that they were public nuisances because of the threat they posed to public morals. Dane recited the standard illustrative cases on the finer points of law involved in the indicting of bawdy houses, i.e., that if someone was to rent a house as a bawdy house, the renter was not entitled to the rent, and a wife, as well as a husband, could be indicted for the keeping of a bawdy house. Although Dane's English case examples involved questions of bawdy houses and nuisances, American cases had reached the appeals level in some jurisdictions. Dane appeared not to know about such state cases perhaps because he was handicapped by the scarcity of American law books and reports.¹⁹

That bawdy houses were a scourge to be fought was clear for Dane, who called them a "pernicious evil in every society where they exist." Following Blackstone but providing some contemporary criticism, Dane wrote that bawdy houses "are not only nuisances [sic], and corrupt morals in a high degree, but they are also destructive of health, as seats of pestilence and disease, especially since the foul disease has become so prevalent."²⁰ Dane continued to borrow from Blackstone when he dealt directly with bawdy houses and the law of nuisance. "For every common and public nuisance the remedy is by indictment, and therefore one shall not have a private action."²¹ With a footnote to Hawkins's Pleas of the Crown but no Massachusetts citation, Dane stated that "it has been decided in England and Massachusetts, that it is a nuisance to keep a bawdy house, so a gaming house etc."

Seemingly frustrated in his attempt to describe nuisance's relationship to property used for an immoral purpose, Dane concluded his section on nuisances by saying "every case will depend much upon its own circumstances, and it is totally impractical to lay down rules which will serve in all cases, or to find cases decided which will apply to those, even generally, that daily arise."²² But the law of nuisance as applied to bawdy houses was equally difficult for Dane to describe. By what standards could public officials and the average lawyer know with some degree of certainty when to indict under the common law and when to allow an abatement of the nuisance? Dane's desire for some sort of standards for the offense as well as a desire for some

degree of consistency in prosecuting the offense are long-held lawyer's desires. A need to respond to changed circumstances and a need to avoid breaking the bonds of continuity with the past required that Dane make the received legal traditions of Blackstone, Hawkins, and Coke fit the American scene of the early 1820s. But Dane appeared to say that as a matter of daily practice perhaps the tension could not be resolved. [I]t is totally impractical to lay down rules which will serve in all cases . . . ," Dane left the issue open-ended.

This uneasiness about the standards of nuisance also appeared in the works of one of America's most prolific writers on the criminal law during the mid-nineteenth century, Joel Prentiss Bishop. Bishop's works, which unlike Dane's did not try to catalogue all of America's law across the country, reflected the changing styles of writing on American law. Rather, he wrote strictly on points of criminal law, criminal procedure, and a third and overlapping field, statutory crimes. By breaking the law into small, almost encyclopedic-like segments, Bishop helped lawyers focus quickly on that aspect of the criminal law most relevant to their needs. Yet this fragmentization of a legal topic, typical of the changing legal pedagogy, reinforced the societal perception of a fractured, unreal quality to the law--an ironic result since Bishop had hoped to make the law more accessible to both the lawyers and the laymen.²³

In his Commentaries on the Law of Statutory Crimes (1873) Bishop devoted several sections to common law nuisances and especially the the nuisance of bawdy houses.²⁴ Following and citing Blackstone, he divided nuisances into two types, public and private, and wrote that public nuisances were indictable and private nuisances actionable. Bishop employed, like Blackstone, a broad definition in describing nuisances. "All acts," he wrote, "(and a neglect to do what the law requires of one is an act, as well as doing what the law forbids) which tends to create a sort of general evil in the community at large, may be deemed nuisances when they are of such a magnitude as to require the interposition of the judicial tribunals." Yet after so confident a statement, Bishop demonstrated the same nagging doubt about nuisances and their nature as Dane.

But in determining what are such acts, we are to look at the adjudications; because justice must travel in a uniform way It is, therefore, impossible to state in exact and brief words, such as should constitute a definition, what are the limits of the doctrine of indictable nuisances.

25

Again Bishop, like Dane, revealed the unknowable quality of nuisances. Lawyers usually speak and write with great confidence but Dane and Bishop took the humble and unusual position revealing doubts about the definition or standards of indictable nuisances.

Bishop's Commentaries on the Criminal Law stayed closer than did his study of statutory crimes to the traditional style and form of the legal treatise.²⁶ And, consistent with Dane, Bishop demonstrated the lawyer's need to tie the centuries together, to try to continue the fiction of a seamless web of law. After defining a bawdy house as a "kind of nuisance," Bishop provided a verbatim restatement from Coke on bawdy houses and used the Englishman as his source for the law's reasons for taking an interest in such houses. Bishop also referred to Blackstone's description of the various fact situations involving bawdy houses (who could be indicted for the keeping, for example). But for his main discussion of the law of bawdy houses, Bishop relied not on Coke or Blackstone but Hawkins. Hawkins wrote that a bawdy house was a nuisance ". . . endangering the Public Peace, by drawing together dissolute and debauched Persons, but also in respect of its apparent Tendency to corrupt the Manners of both Sexes . . . ," and Bishop emphasized the "drawing together" of Hawkins's definition. For example, on whether the house in question had to be kept for gain, Bishop believed it did not because of "the tendency to corrupt the public morals is the gist of the offense, and the matter of lucre has no effect on this."²⁷ The law's goal was to counter the drawing together of dangerous persons to a house, not any "lucre" gained from the house. In the preface to the section on bawdy houses, Bishop warned readers that "morality, religion, and education are three main pillars of the state, and the substance of all private good. A community from which they are banished presents more than the gloom of the original chaos."²⁸ Bawdy houses had been before Bishop, and continued to be after Bishop, threats to the public morals, points of potential danger to the public

peace and, if not contained, perhaps the first step towards a return to a Hobbs-like world of chaos. This threat to society could be controlled through indicting the keepers of the bawdy houses and this link between bawdy houses and the prevention of chaos added weight to the law's approach to bawdy houses through nuisance law. Such a threat, not merely to single individuals but to society as a whole, constituted the reason why public nuisances had to be controlled by the state through indicting the keepers of the bawdy houses.

In both his Commentaries on the Criminal Law and his Commentaries on the Law of Criminal Procedure (1872), Bishop elaborated on the place of disorderly houses, as opposed to the specific nuisance of bawdy houses, in the general scheme of physical nuisances.²⁹ His definition of disorderly houses paralleled the concept of the state police power, the right of the state to act to protect its citizens' health, safety, welfare, and morals. He wrote,

The term disorderly house is sometimes used in a very broad sense, as including bawdy houses, common gambling houses, and places of a like character, to which people promiscuously resort for purposes injurious to the public morals, or health, or convenience, or safety. 30

All such places were open to indictment as public nuisances. Yet the breadth of this definition disturbed Bishop. He would limit disorderly houses to "mean only a house or other place to which people resort to the disturbance of persons lawfully in the place, or to the disturbance of the neighborhood."³¹ Once again, Bishop tried to bring the offense back in line with the same threat to society posed by bawdy houses, only in this instance he was defining a broader term, the disorderly house.

Throughout the latter half of the nineteenth century, courts, prosecutors, and defense attorneys relied on Bishop as one of their authorities in support of the various fact situations which arose on both the original and appellate levels.³² The legal profession turned to Bishop for guidance on the legal remedies against disorderly houses and bawdy houses. And because Bishop relied on the writings of Coke, Hawkins, and Blackstone, their writings affected America's legal definition of what was a bawdy house and how bawdy houses posed a danger to society.

The guiding late-nineteenth century treatise of the law of nuisance appeared in 1875, Horace Wood's The Law of Nuisances.³³ His treatise was just one of many influential legal treatises which appeared in the late nineteenth century, and in the preface to his 897-page study of nuisances, he knew he was breaking new ground.³⁴ Although apologizing for any faults the book possessed, Wood nevertheless lectured his readers that ". . . it must be remembered that I was a pioneer in this 'wilderness' of law, with no compass to guide me, but left to find my way through the entangled mass, as best I might." He went on to say that no other single work dealt solely with nuisance law. And legal writers who devoted a chapter or a section to nuisance worked more to hide the subject than reveal its outlines. These unnamed works were "necessarily superficial views of the subject, and calculated to mislead, rather than serve as a guide."³⁵ Wood knew his audience, "the student and the practicing lawyer," and cast his preface as both a wish and a challenge. He wished they would find the work useful in their professional life, and he challenged them to find any errors or inconsistencies in the volume. Deliberately playing on the image of a "pioneer" and a pathbreaker, Wood ended his preface in a tone reminiscent of the false modesty of Daniel Boone who denied the obvious importance of exploration. "[I]f I have failed to grasp the subject with . . . vigor, or set it forth with the clearness desirable, I have the satisfaction of knowing that I have at least cleared the way for some abler and more vigorous writers, who may hereafter take up the subject."³⁶ Despite Wood's attempt at modesty, his treatise set the standard and guided both the bench and bar on the law of nuisance.

Although Wood the pioneer wrote in the tradition of Dane and Bishop, like his fellow Americans, he began by reviewing Hawkins. In the section in which he discussed nuisances generally and bawdy and disorderly houses in particular, Wood demonstrated the lawyer's desire to conform past legal experiences and precedents with the current circumstances of everyday life by first citing cases from England. Like Bishop, he also bolstered his work with numerous American decisions and elaborations on the nature of the offense and the technical problems associated in indictment and prosecution; yet

his desire not to appear to be innovative--almost a desire not to release the dead hand of the past--directed his work and interpretations. Wood hoped to prove that his law of nuisance formed one link in a continuous chain of development from a few first principles set forth by the masters of the common law--Hawkins in particular--to later cases and treatise interpretations that fulfilled the earlier promise and writings of the masters. Moral reformers of the late nineteenth century and early twentieth century would become impatient with the law's procedures and apparent remoteness from the needs of the day partly because of this inherent backward-looking concern of the law.

Wood's backward looking view began by placing bawdy houses within the nuisance category of offenses and reaffirming that the keepers of these houses could be indicted whether the houses were located "in a city or a forest." He did not elaborate on "forest," but Wood probably wanted to avoid the argument that if a bawdy house were in a remote, unpopulated area it might not be a nuisance. Bawdy houses were always a threat to society regardless of their location, and courts knew bawdy houses to be an evil, "for the common experience of mankind shows that the probable and natural consequences of such establishments will be detrimental to the moral and social welfare of the public."³⁷

Wood then attempted to close one of the most troublesome points of the law of bawdy houses. The question centered on whether to be defined as a bawdy house, a house had to be used for the purpose of prostitution or whether it could merely be kept and held out to the general public as a house of prostitution. Wood took the broader position that if a keeper of a house held it out as such there was no need to prove an actual resort to the house for an act of prostitution. This question of definition fed into a second question of whether the general reputation of the house, its keeper, the frequenters, and residents could be introduced into evidence to prove it was being held out to the public as a house of bawdry. In addition to the questions of evidence, a related issue received much attention from Wood, landlord/tenant problems that grew out of a property's use as a bawdy house.³⁸ Very quickly, then, Wood's study of bawdy houses

as a kind of nuisance became consumed with technical problems of evidence and definition, thereby reducing the time spent on theorizing on the nature of the offense.

Nuisance actions by private individuals drew Wood's attention, and his reaction to such attempts provided an opportunity to dampen any sentiments in the law in favor of private nuisance actions against bawdy houses. He observed that some people who lived in close proximity to bawdy houses believed they could abate nuisances themselves. "But this is a serious mistake," he warned. Wood lectured his legal audience that, "no nuisance, whose effect is merely moral, can be abated except by the courts, and by the courts only, by the administration of such punishments as will be likely to cause the parties to desist."³⁹ Remedy for the acknowledged evil of bawdy houses lay in the courts, not in private individuals alleging special damages from the property being used to keep a bawdy house. Wood put his law colleagues on notice to channel their clients' outrage and indignation against bawdy houses through the law by indicting the keepers. "It is very laudable on the part of the people, in any community, to desire to be rid of these moral pests, and the indignation experienced by them at the presence of such institutions in their midst is just," empathized Wood,⁴⁰ but he would limit the range of options and remedies available to those who felt their right to live in a moral neighborhood was being violated. In particular, Wood feared that individuals would not use the law at all in their clean-up campaigns. "[T]hey will not be justified in attempting to check the evil by riotous or unlawful means," he warned.

Wood reflected a generalized fear of mob action typical of persons of property or property interests in the late nineteenth century as they looked out upon a rapidly changing America. Wood appeared to fear that if a mob's assault on a bawdy house, either by tearing it down or burning it could not be prevented by judicial resolution then perhaps none of the mass social movements of the period could be prevented from damaging or destroying personal property.⁴¹ After all, with a bawdy house the property was not the problem. The problem lay in the use to which the property's occupants employed it. And the

courts provided a route to defuse community hostilities since bawdy houses were nuisances.

The courts are always ready to punish the offense, and individuals will not be justified either in tearing down, assaulting, or in any manner injuring the house or demolishing the furniture, or assaulting the inmates thereof, or doing any other unlawful acts.

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Wood, therefore, actually had two purposes for denying individuals a remedy: 1) to prevent mob action and require a resort to the courts for relief, and 2) to shore up the legal and judicial dam which protected property and property rights. Even property put to an immoral use deserved judicial and legal protection from unrestrained and illegal actions by individuals or groups. This position did not mean Wood supported immoral activities. Rather, the improper use of the property could be prevented through well-recognized legal processes. By indicting the keepers of the bawdy houses and/or the landlords who allowed their property to be used as a bawdy house and by arresting the individual inmates of the houses as vagrants, the law could eliminate persons who improperly used the property and could quiet complaining neighbors.

A final section of Wood's treatise on nuisance which is of interest here dealt with the more general offense of disorderly houses.⁴³ Common law nuisances different from bawdy houses, disorderly houses "embrace[d] a large class of other houses, kept for entirely different purposes." Wood cast a wide judicial net over the kinds of places and people who frequented these places and made a house disorderly.

A disorderly house is any place of public resort in which unlawful practices are habitually carried on, or which becomes a rendezvous or place of resort for thieves, drunkards, prostitutes, or other idle, vicious, and disorderly persons, who gather there to gratify their depraved appetites, or for any purpose; for such persons are regarded as dangerous to the peace and welfare of the community, and their presence at any place in considerable numbers is always a just cause of alarm and apprehension.

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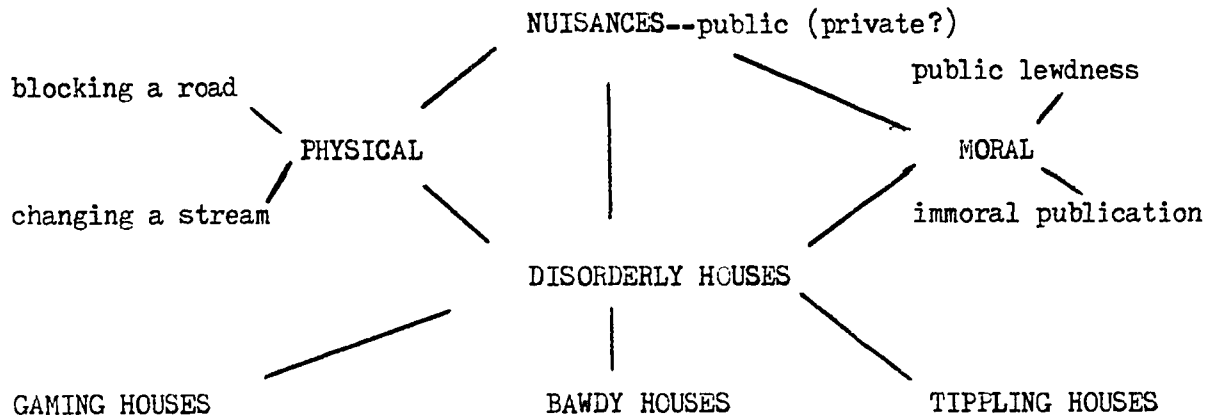
But this net was too wide. Besides containing first amendment difficulties about the right of assembly for peaceful purposes, Wood's statement contained definitional difficulties. If a state legisla-

lature today tried to employ such a definition in a state statute, the courts would declare it void for vagueness and overbreadth. For example, any place where the classes of persons described were found, regardless of their behavior, could be a disorderly house. And that list of classes of persons would appear to be indefinitely expandable. Thieves, drunkards, and prostitutes are recognized classes of individuals in law which prosecuting authorities could identify and try. As discussed in the last chapter, they are a type of "status" offenders, classes of vagrants. But "other vicious, idle, and disorderly persons" lacked any kind of standard to guide prosecutors.

Despite these points, did Wood's description and definition of disorderly houses and persons reflect the standards of the 1870s? Probably so. Disorderly houses referred to a wider set of uses of property than strictly for prostitution. Just as the law traditionally divided vagrants into three types--prostitutes, drunkards, and gamblers--the law also divided disorderly houses into three types: bawdy houses, tippling houses, and gaming houses. From these kinds of resorts for the criminal element came the threat for Wood. Thieves (a vaguer description of persons than the standard vagrant categories) and other "idle and disorderly" persons were most likely to be found in or using buildings for their illegal or immoral purposes. Furthermore, just as Wood pointed out that it was not necessary to show a house was used for prostitution but merely that it was held out to the public as a place of possible resort for prostitution, so too with disorderly houses. Noise and immoral acts, Wood wrote, were not necessary elements in proving a place was kept as a disorderly house. Rather, a broader standard--"illegally governed and regulated"--had to be met. In wording reminiscent of Hawkins, Wood summarized, "[I]t is enough to show that the practices indulged in are unlawful, and destructive of public morals or of the public peace, or dangerous to the lives and property of the community."⁴⁵

A schematic of the law of nuisance as applied to bawdy houses before the turn of the century will aid in making Wood's structure of bawdy houses, disorderly houses, and nuisance clearer (See Figure 1). The general category of law is nuisance. The legal writers discussed

BAWDY HOUSES IN LAW



Bawdy houses pre-red light abatement:

1. Usually considered a public nuisance and rarely a private nuisance.
2. Actionable through the criminal courts' procedure of indictment and fining or imprisonment of the keeper, occasionally the landlord.
3. Actions brought almost exclusively by public authorities.

Bawdy houses after red light abatement:

1. Usually considered a private nuisance and rarely a public one.
2. Actionable through the civil courts' procedure of injunction and abatement.
3. Action brought by any individual alleging injury within a state statute defined locality, normally a city or a county.

(Coke, Hawkins, Blackstone, Dane, Bishop, and Wood) said there are two kinds of nuisances, public and private depending on the type and extent of the injury. The most typical kinds of nuisances are public. These include such physical nuisances as blocking a public road with a wagon or a fence and changing the course of a stream so as to affect downstream users. Another branch of public nuisances are moral nuisances, those behaviors which tend to corrupt the morals of a community. Behavior such as public lewdness (public nudity) or the printing and distributing of immoral publications are moral nuisances. Public officials controlled such nuisances through the criminal process of indictment with private suits in civil law alleging special damages from a public nuisance and requesting an abatement. Disorderly houses, the broader term of properties put to immoral or dangerous use, are public nuisances and share in the qualities of both physical and moral nuisances. A building or structure can be a physical nuisance because of its tendency to draw together potentially dangerous persons who threaten the peace and good order of the neighborhood or community. Disorderly houses are also moral nuisances because of the activities in which their occupants engage. The prostitute, thief, drunkard, or gambler, like the building, tend to cause disturbances to either the public peace or the public morals. Within the category of disorderly houses are three specific kinds of houses catering to three specific kinds of vagrants: the gaming house, the tippling house, and the bawdy house.

Bawdy houses possessed aspects of both physical and moral nuisances. Further, bawdy houses had a tendency to affect the community as a whole rather than a specific individual so that they were more likely to be public and not private nuisances. Public officials indicted public nuisances usually focusing on the keeper of the bawdy house who stood liable to be fined and imprisoned. In this manner, public authorities abated the nuisance. Police or sheriffs arrested as vagrants all the inmates of a disorderly house or bawdy house, thereby removing any possibility of further improper use of the property. From this legal structure, a bawdy house could be described in law as a type of disorderly house and a public, physical, and moral nuisance.

Despite the structure's long use and history, the Progressive reform of the red light abatement acts substantially altered this legal schema of bawdy houses. From 1900 up to the outbreak of World War One, Progressive America experienced one of its reforming paroxysms and one reforming strain of those times was the purity crusades. Social purity entailed a wide variety of societal, familial, and personal reforms which David Pivar in his 1973 Purity Crusade captured so well.⁴⁶ To build a new and purer society, the social purists, together with the new social hygienists, totally and uncategorically opposed prostitution and municipal vice districts. These "new abolitionists," to borrow Pivar's phrase, believed that to break the double standard of sexual behavior men had to be raised to the female standard of purity. In order to accomplish this improvement in male morals, temptation to men had to be curtailed, if not eliminated. Total continence for both sexes before marriage was the goal of the social purists, and in order to reach that goal prostitution as well as clusters of municipal bawdy houses had to be banished. But how?

The best of reforming desires are worth little if they are unable to change public policy. In America's state-based federal system, reformers had several levels of government from which to choose to implement their reforms. Cities are creatures of their states and can exercise no powers not specifically delegated to them in their organic act, the city charter. And although counties are important, and an underrated cog in intrastate federalism, a single county's efforts against prostitution might succeed only in scattering prostitutes and bawdy houses to adjoining counties. Hardly a workable solution for the purity of all society. Nation-wide reform efforts to bring pressure on the federal government had to originate in the states, and it was the states where the reformers found their success. On the state level, with local pressure from cities and counties, the purity reformers changed policy.

By 1900, all of the American states had written laws making the keeping of a bawdy house, renting a house for prostitution, and being a prostitute statutory offenses.⁴⁷ However, such statutes did not mean that the law of disorderly houses, nuisance, or vagrancy altered. The

state statutes had merely made positive law out of the received common law traditions and specified the common law standards in the statutes. The principles of the law against bawdy houses and prostitutes remained unchanged: the criminal law could indict a bawdy house as a nuisance, a private individual could initiate a suit in equity courts for special damages, and prostitutes were vagrants.

Purity reformers sought more efficient ways to move against bawdy houses and feared what they perceived to be the commercialization of prostitution. With commercialization of a trade a greater need existed to produce more goods for sale. The specter of white slavery grew out of this idea. In an era of great business consolidations in a male-dominated world, it was easy for the reformers to cast their arguments in terms of an intrastate, interstate, or even international business, almost conspiracy, to create and support a market in women's bodies. The reformers needed an ax to cut off the tentacles of this immoral octopus.

The ax they found went by the harmless-sounding name of the injunction and abatement laws. Few reforms can succeed without a catch-word or phrase to draw people's attention and interest and the phrase "the injunction and abatement laws" possessed no such potential. Soon, however, reformers and the popular press came to call these revised state statutes the "red light abatement acts." State legislators might vote against alterations in the state's injunction law but few could vote against "the red light abatement acts." After a slow start, the early twentieth century saw numerous states adopt various red light abatement acts and fundamentally alter actions in equity against property used for immoral purposes.

Although the state red light abatement acts have influenced modern society, they have received only limited attention from researchers. For example, Ruth Rose in The Lost Sisterhood mentions the red light abatement acts but failed to place them in any legal/historical context. Instead, she cited them simply as "important weapons in the arsenal of legislation against prostitution;"⁴⁸ as one of the more efficient ways the burgeoning, heartless, capitalist, male-dominated world subjugated women. She correctly noted that the red light abate-

ment acts were efficient and effective, but she was not interested in what was new about the acts and the changes in law that made them so effective. That the red light abatement acts had come into existence satisfied Rosen but their existence does not answer the most obvious of questions--Why did they work?

They worked because they opened up private nuisance actions to anyone. While Maine (1891) and Texas (1907) had previously scouted the legislative territory, the most prominent red light abatement act and the one most copied came out of America's bread basket, Iowa, in 1909. State studies on the passage and implementation of the red light abatement acts do not exist and their absence forces a reliance on contemporaries for the effectiveness of the acts. Perhaps most important of these contemporaries was Bascom Johnson, a lawyer who became director of the law enforcement division in the American Social Hygiene Association. He early understood the importance of the red light abatement acts and praised them in several pamphlets and in the journal Social Hygiene where in a March, 1915, article he outlined the aims, means, and successes of the acts.

Seventeen states and the District of Columbia had adopted some form of an injunction and abatement law by the time of Johnson's 1915 summary. By 1917, thirty states had passed such laws.⁵⁰ The early successes that states achieved in shutting down clusters of bawdy houses, some in vice districts, and some not, served to fire purity pressure groups in other states to lobby for similar measures. The red light abatement acts spread quickly throughout the nation and Johnson underscored the significance and the legal change that the acts brought,

. . . they give to individual citizens in any community the right to prevent by injunction the continued operation of houses of lewdness, assignation, and prostitution as nuisances without having to prove such individual citizens suffered special damages different from those suffered by them in common with the public.

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In other words, the red light abatement acts turned the common law rules upside-down. Under the new state statutes private individuals had the right to begin an action of abatement and to seek an injunction in courts of equity. Individuals no longer bore the burden of proving

special damages in the civil courts. Not only the states but all private individuals could close bawdy houses. Before the acts, bawdy houses as a type of disorderly house were public nuisances and only rarely considered to be private nuisances that injured a person's property. The rule changed as the red light abatement acts blurred the distinctions between public and private nuisances on the theory that any person in a locality, not just adjoining property owners, could be adversely affected by bawdy houses. On closer inspection the simple sounding red light abatement acts profoundly changed the law of nuisance as applied to disorderly houses and bawdy houses.⁵²

Johnson pointed to three reasons why "those citizens who regarded such places as nuisances" sought to change the law: cost, greed, and police toleration. First, private nuisance actions under the common law or under state statutes had proven long, tedious, and costly. Furthermore, if an individual chose to endure the length, tedium, and expense, the courts could still find against the suit and the individual's efforts would have come to naught. Second, property owners found disorderly houses, and especially bawdy houses, lucrative ventures. They could, for example, charge exorbitant rent to the women to house their trade in a building or structure. And it was hardly likely that the owners would report themselves so prosecuting authorities could begin indictments against them. Finally, the lack of enforcement by local police and prosecutors of state statutes and the common law frustrated the reformers' goal of wiping out prostitution. Police toleration of bawdy houses in local situations had to be short-circuited. "Those citizens," and Johnson meant the social purity reformers in alliance with some lawyers, business people, and the new group of "professionals" such as the social workers and the social hygienists, wanted a cheap, simple means to change the use of property in other parts of the city or county not contiguous to their own property. The red light abatement acts fit this need exactly.

Iowa's 1909 law, the standard followed by other states, defined as a nuisance "any building, erection, ground, or place used for the purpose of lewdness, assignation, or prostitution."⁵³ But the law went further than just the building or place in describing what was a

nuisance. The statute described the "furniture, fixtures, musical instruments, and the contents" of the building as part of the continuing nuisance to be abated. The statute also described a wide class of persons as both keepers in a broad sense and owners and landlords who could be enjoined by the act.

The hook of the act lay in who could bring suit to enjoin the continued use of a building for immoral purposes. The state statute focused on the county as the enforcement arm of the statute and as the political jurisdiction that determined who could bring a suit in a geographical region. The Iowa act provided that the county or district attorney or "any citizen of the county" could institute an action of abatement by applying to the county or the state district court for a temporary injunction against the property. From this point, civil procedure guided the injunction and abatement process. Legal papers had to be filed properly, notice had to be served to the defendants who had to be given a three-day warning of a hearing on the prayer for an injunction. If satisfied by evidence produced at the initial hearing that a nuisance existed, the court could issue a temporary injunction. At trial on the question of the need for a permanent injunction, the statute specified that the general reputation of the place would be admissible. Additionally, the court could direct the prosecutor to continue a suit for abatement even if a citizen had begun the action and wanted to discontinue it. If the court decided against the citizen's suit, the citizen bringing the suit stood liable for all costs to both parties and the court.

If, however, the court found against the defendants and issued a permanent injunction abating the nuisance, that injunction restrained all parties from continuing the nuisance. The court could direct the removal and sale of personal property from the place to cover the costs of the removal, the closing, and the keeping closed of the place. Any balance would go to the defendant. The injunction stood for one year unless the defendant paid all court costs and posted a bond guaranteeing the abatement of the nuisance for one year, after which time all court orders ceased to have effect against the property. Any violation of the court's directives carried a fine of from two hundred to one

thousand dollars and/or imprisonment from three to six months. The statute specified that trials for nuisance abatements, like those for prostitutes charged with vagrancy, were to be summary and without juries. Wording from state statute to state statute varied as did some provisions. For example, a few states provided for a three-hundred-dollar tax to be levied against the building, ground, owners, and agents of the building after the issuance of the permanent injunction.

These red light abatement acts of the Progressive Era opened up the law of nuisance to fit the desires of the organized local purity reformers. The revised injunction and abatement laws did not confiscate property nor even necessarily close off the use of property for a long time if the owners posted their bonds, paid their costs, and prevented further immoral use of the property. But the statutes provided a clear, efficient means for persons opposed to the visible signs of prostitution to force the closure of bawdy houses without frontally attacking property. In fact, the red light abatement acts proved so effective that most keepers and owners of bawdy houses moved to close their businesses as soon as reformers asked the courts for a temporary injunction.

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The period from the World War through the 1920s witnessed a change in the prostitute's trade. The automobile and the telephone allowed more and more women to operate out of single rooms and apartments. Yet the red light abatement acts provided an underestimated push to their changing occupation. The existence of a well-funded, articulate reform movement able to hire lawyers, pressure state legislatures, and maintain access to newspapers and Progressive journals influenced public sentiment against prostitution and developed support for the use of the injunction and abatement laws. The coming of the war aided the reformers' efforts to cause the demise of the red light districts in America. In the purity reformers' thinking, only pure American soldiers could make the world safe for democracy. So these factors--red light abatement acts permitting a greater use of the law against bawdy houses, an organized pressure group lobbying state legislatures and influencing public opinion, and the war--led to the closing of the vice districts and the removal of clusters of bawdy houses from the urban

American scene.

The war and the social purity movement have received attention elsewhere, but the change in law brought by the red light abatement acts forms the keystone which gave the whole anti-prostitution movement the cohesion and legal means needed to be effective, to change public policy. Traditional legal thought and procedure affecting properties used to house prostitutes from Coke to Blackstone to Dane to Wood had been altered. After passage of the red light abatement acts, "these moral pests" could be shut down and be spoken of in the past tense. These injunction and abatement statutes provided the practical means to implement the purity reformers' goal for a city environment free of bawdy houses. Much work can still be done on state injunction and abatement acts and on city closures of vice areas--such as those in St. Louis, New Orleans, and Houston, discussed in later chapters--and with such studies the important changes wrought by the red light abatement acts in the law of nuisance will become more fully appreciated. The winds of reform had found a way to snuff out America's flickering red lights.

Notes

¹ Sir Edward Coke, **Third Part of the Institutes of the Law of England** (4 vols., London, 1628; reprinted New York: Garland, 1979). **Frank Stokeley v. State**, 40 SW 971 (1897).

² **Stokeley v. State**, 40 SW 971 (1897). The case does not mention the woman's name nor mention how the county prosecutor heard about the dance and chose to charge Stokeley with keeping a disorderly house.

³ Coke, **Third Part of the Institutes of the Law of England**, 205, cap. XCVIII.

⁴ Ibid.

⁵ Ibid.

⁶ Ibid. For the medieval roots of the law, see Bryce Dale Lyon, **A Constitutional and Legal History of Medieval England** (2nd edition, New York: W. W. Norton & Company, 1980). The best work on Coke is Catherine Drinker Bowen, **The Lion and the Throne: The Life and Times of Sir Edward Coke (1552-1634)** (Boston: Little, Brown and Co., 1956). Following Coke see Michael Dalton, **The County Justice: Containing the Practice of the Justice of the Peace . . .** (London: William Rawlins and Samuel Roycroft, 1705), 292-293. Coke spent the bulk of his section on bawdy houses discussing the Bankside brothels. See Coke, 205-206 and E. J. Burford, **Bawds and Lodgings: A History of the London Bankside Brothels c. 100-1675** (London: Peter Owen, 1976).

⁷ William Hawkins, **A Treatise of the Pleas of the Crown** (London: E. Sayer, 1724-1726; reprinted New York: Arno, 1972). On the changing forms and uses of legal treatises see S. W. B. Simpson, "The Rise and Fall of the Legal Treatise: Legal Principles and the Forms of Legal Literature," **University of Chicago Law Review**, 48 (Summer 1981), 632.

⁸ Hawkins, **Pleas of the Crown**, 196. Following both Coke and Hawkins see Richard Burn, **Ecclesiastical Law** (2 vols., London: H. Woodfall and W. Strahan, 1763), I, 662-663.

⁹ St. George Tucker, **Blackstone's Commentaries, with Notes of Reference to the Constitution and Laws of the Federal Government of the United States and of the Commonwealth of Virginia** (5 vols., Philadelphia: William Young Birch and Abraham Small, 1803; reprinted New York: Augustus M. Kelley, 1969), IV, 216-222; V, 161-168.

¹⁰ Ibid., vol. IV, p. 216 and all quotes in the paragraph.

¹¹ Ibid., p. 217.

¹² Ibid., p. 220.

¹³ Ibid., vol. V., p. 167.

¹⁴ Ibid., p. 165.

¹⁵ Ibid., p. 167.

¹⁶ Ibid. italics in original. Coke, Hawkins, and Blackstone relied upon several English cases which later American treatise writers would use as well; see *Domina Regina v. Pierson*, 1 Salk. 382, 91 Eng. Rep. 333 (1795); *Domina Regina v. Williams*, 1 Salk. 384, 91 Eng. Rep. 334 (1795); *Rex v. Higginson*, 2 Burr. 1232, 97 Eng. Rep. 806 (1762); *Rex v. Felix MacDonald*, 3 Burr. 1645, 97 Eng. Rep. 1026 (1765).

For a positive review of Blackstone, see John V. Orth, "Sir William Blackstone: Hero of the Common Law," *American Bar Association Journal*, 66 (February 1980), 155. On the critical side, see Daniel J. Boorstin, *The Mysterious Science of the Law: An Essay on Blackstone's Commentaries Showing How Blackstone, Employing Eighteenth-Century Ideas of Science, Religion, History, Aesthetics, and Philosophy, Made of Law at Once a Conservative and a Mysterious Science* (Boston: Beacon Press, 1941, 1958).

¹⁷ Nathan Dane, *A General Abridgement and Digest of American Law* (8 vols., Boston: Cummings, Hilliard & Co., 1823-1829). Nathan Dane does not normally spring to mind when discussing American legal thinkers of the early national period but perhaps he should. Born December 27, 1752, graduated from Harvard in 1778, studied law and practiced in Beverly, Massachusetts, Dane did not enter public life until 1782 when he became a member of the Massachusetts legislature. In 1785, he moved to the federal level and became a member of the Continental Congress until 1789. The authorship of the Northwest Ordinance of 1787 which included the phrase "that there shall be neither slavery nor involuntary servitude in the said territory" is commonly attributed to Dane. From 1790 to 1796, he served in the Massachusetts Senate. After 1796 he held no continuing public office but an occasional judgeship and a state position to revise Massachusetts's statutes and charters. A federalist, Dane served as a delegate to the ill-fated Hartford Convention of 1814. His *Digest* consumed his later years. He is best known for the chair of law he endowed in 1829, the Dane professorship of law at Harvard. He saw that his friend, fellow lawyer, judge, and treatise writer, Joseph Story, received the first appointment to the chair. Dane endowed the chair with \$10,000 which he increased in 1831 with an additional \$5,000. Dane died at home in Beverly, Massachusetts, February 15, 1835. See James Grant Wilson and John Fiske (eds.), *Appletons' Cyclopaedia of American Biography* (New York: D. Appleton & Co., 1887), II, 72. Lawrence M. Friedman, *A History of American Law* (New York: Simon and Schuster, 1973), 280-281.

¹⁸ Dane did not give the case citation to the withholding of rent but did cite *Domina Regina v. Williams*, 1 Salk. 384, 91 Eng. Rep. 334 (1795) for the indictment of the wife in her capacity of government and management of the house, not its ownership. In other parts of his section on bawdy houses, Dane cited all the cases listed above in footnote sixteen.

¹⁹ The best short piece on early American law reports is Erwin C. Surrency, "Law Reports in the United States," *American Journal of Legal History*, 25 (January 1981), 48. The lack of law books is touched upon in several other works; see Maxwell Bloomfield, *American Lawyers in a Changing Society, 1776-1876* (Cambridge, Massachusetts: Harvard University Press, 1976); Lawrence Friedman, *The Law in America* (New York: Simon and Schuster, 1973); Morton J. Horwitz, *The Transformation of American Law, 1780-1860* (Cambridge, Massachusetts: Harvard University Press, 1977); William E. Nelson, *Americanization of the Common Law: The Impact of Legal Change on Massachusetts Society, 1760-1830* (Cambridge, Massachusetts: Harvard University Press, 1975).

²⁰ Dane, *Digest of American Law*, VI, 682.

²¹ Ibid., VII, 64.

²² Ibid., III, 45 first quote, 46 second quote and quote in next paragraph.

²³For a concise biography on Bishop see the obituary written by his son, Charles S. Bishop, "Joel Prentiss Bishop, L.L.D.," *American Law Review*, 36 (January 1902), 1. Much work can still be done on America's changing legal pedagogy and law schools in the nineteenth century and twentieth century. See generally William C. Chase, *The American Law School and the Rise of Administrative Government* (Madison: University of Wisconsin Press, 1982); Lawrence Friedman, *A History of American Law* (New York: Simon and Schuster, 1973); William Hurst, "Changing Responsibilities of the Law School, 1868-1968," *Wisconsin Law Review*, (1968), 305, 336; William R. Johnson, *Schooled Lawyers: A Study in the Clash of Professional Cultures* (New York: New York University Press, 1978); Morton Keller, *Affairs of State: Public Life in Nineteenth Century America* (Cambridge, Massachusetts: Belknap, 1977); Robert Stevens, *Law School: Legal Education in America from the 1850s to the 1930s* (Chapel Hill: The University of North Carolina Press, 1983); Robert Stevens, "Two Cheers for 1870: The American Law School," *Perspectives in American History*, 5 (1971), 424; Arthur H. Sutherland, *The Law at Harvard: A History of Ideas and Men, 1817-1967* (Cambridge, Massachusetts: Belknap, 1967); Charles Warren, *History of the Harvard Law School and the Early Conditions in America* (New York: Lewis Pub. Co., 1908 reprinted New York: DaCapo Press, 1970).

²⁴Joel Prentiss Bishop, *Commentaries on the Law of Statutory Crimes* (Boston: Little, Brown & Co., 1873), editions in 1883 and 1901.

²⁵*Ibid.*, p. 359 both quotes.

²⁶Joel Prentiss Bishop, *Commentaries on the Criminal Law* (2 vols., Boston: Little, Brown & Co., 1856), editions in 1858, 1865, 1868, 1872, 1877, 1882, 1892, 1923. Case citations in Bishop's footnotes change but the text remained the same from edition to edition.

²⁷*Ibid.*, p. 606.

²⁸*Ibid.*, p. 545.

²⁹Joel Prentiss Bishop, *Commentaries on the Law of Criminal Procedure* (2 vols., Boston: Little, Brown & Co., 1866, 1872).

³⁰Bishop, *Commentaries on the Criminal Law*, 611.

³¹*Ibid.*

³²Also widely used and relied upon was Francis Wharton's *A Treatise on the Criminal Law of the United States* (Philadelphia: Kay and brothers, 1846), twelve further editions from 1852 to 1935.

³³Horace G. Wood, *A Practical Treatise on the Law of Nuisances, in Their Various Forms; including Remedies therefor at Law and in Equity* (Albany, New York: John D. parsons, 1875), editions in 1883 and 1893. See also on disorderly houses, Salon D. Wilson, "Disorderly Houses," *The Criminal Law Magazine and Reporter*, 10 (July 1888), 513.

³⁴The most prominent legal works of the period were: James Kent, *Commentaries on American Law* (Philadelphia: Blackstone Publishing Co., 1826-1830), fifteen editions, revisions, and enlargements between 1832 and 1894; Joseph Story, *Commentaries on the Constitution of the United States: with a preliminary review of the constitutional history of the colonies and states, before the adoption of the Constitution* (Boston: C. C. Little and J. Brown, 1833), editions in 1851, 1858, 1873, 1891; Thomas M. Cooley, *A Treatise on the Constitutional Limitations Which Rest Upon the Legislative Power of the States of the American Union*

(Boston: Little, Brown & Co., 1868), editions in 1871, 1874, 1878, 1883, 1890, 1924; John F. Dillon, *The Law of Municipal Corporations* (New York: James Cockcroft & Co., 1872), editions in 1873, 1881, 1890, 1911; Christopher G. Tiedeman, *A Treatise on the Limitations of Police Power in the United States considered from both a civil and criminal standpoint* (St. Louis: The F. H. Thomas Law Book Co., 1886); James L. High, *A Treatise on the Law of Injunctions* (Chicago: Callaghan and Co., 1873), editions in 1874, 1879, 1880, 1890, 1905; Charles Fisk Beach, *Commentaries on the Law of Injunctions, As Determined by the Courts and Statutes of England and the United States* (2 vols., Albany, New York: H. B. Parsons, 1895); John Henry Wigmore, *A Treatise on the System of Evidence in Trials at Common Law including the Statutes and Judicial Decisions of All Jurisdictions of the United States* (Boston: Little, Brown & Co., 1904), editions 1908, 1923, 1940.

For a secondary work on three of these people, see Clyde E. Jacobs, *Law Writers and the Courts: The Influence of Thomas M. Cooley, Christopher G. Tiedeman, and John F. Dillon Upon American Constitutional Law* (Berkeley: University of California Press, 1954).

Innumerable lawbooks, texts, and treatises could be cited which follow this outline of bawdy houses, disorderly houses, and nuisance law. Listed below are a few, perhaps too many, of the nineteenth and early twentieth century works lawyers and judges consulted on the law of disorderly houses. See John Adams, *The Doctrine of Equity: A Commentary on the Law as Administered by the Court Chancery* (Philadelphia: T. & J. W. Johnson & Co., 1850), editions in 1852, 1855, 1859, 1873, 1881, 1890; John Bouvier, *Institutes of American Law* (Philadelphia: Robert E. Peterson & Co., 1854), editions in 1858, 1870, 1872, 1880, 1882; Edgar W. Camp and John F. Crowe, eds., *The Encyclopedia of Evidence* (13 vols., Los Angeles: L. D. Powell Co., 1904); Joseph Chitty, *A Practical Treatise on the Criminal Law* (Brookfield: E. Merriam & Co., 1832, reprinted New York: Garland, 1978); William L. Clark, *Handbook of Criminal Law* (St. Paul: West Publishing Co., 1894), editions in 1902, 1915, 1934; David S. Garland and Lucius P. McGehee, *The American and English Encyclopedia of Law* (32 vols., Northport, Long Island: Edward Thompson Co., 1887-1896); Howard C. Joyce, *A Treatise on the Laws Relating to Injunctions* (3 vols., Albany, New York: Mathew Bender & Co., 1909); Emlin McClain, *A Treatise on the Criminal Law, As Now Administered in the United States* (2 vols., Chicago: Callaghan and Co., 1897); John Norton Pomeroy, *A Treatise on Equity Jurisprudence, as Administered in the United States of America* (San Francisco: Bancroft-Whitney, 1881), editions in 1883, 1886, 1892, 1905, 1907, 1918, 1941; Henry Roscoe, *A Digest of the Law of Evidence in Criminal Cases* (Philadelphia: T. & J. W. Johnson & Co., 1836), seventeen editions from 1840 to 1952; William Oldnell, *A Treatise on Crimes and Indictable Misdemeanors* (6 vols., Philadelphia: PH H. Nicklin and T. Johnson, 1865, reprinted New York: Garland, 1979), fourth edition used, seventeen editions from 1831 to 1950; Theodore Sedgwick, *A Treatise on the Rules Which Govern the Interpretation and Construction of Statutory and Constitutional Law* (New York: Baker, Voorhis & Co., 1857, 1874); H. C. Underhill, *A Treatise on the Law of Criminal Evidence* (Indianapolis: The Bowen-Merrill Co., 1898), editions in 1910, 1923, 1935; Francis Wharton, *A Treatise on Criminal Procedure* (San Francisco: Bender-Moss Co., 1849), several titles and numerous editions up to 1918.

³⁵ Wood, *The Law of Nuisances*, p. iii.

³⁶ Ibid.

³⁷ Ibid., p. 36. Wood discussed bawdy houses on pp. 36-43.

³⁸ Ibid., pp. 36-37.

³⁹ Ibid., pp. 39-40.

⁴⁰ Ibid., p. 40.

⁴¹ See generally Robert H. Wiebe, *The Search for Order, 1877-1920* (New York: Hillard Wang, 1967); Samuel P. Hays, *The Response to Industrialism, 1885-1914* (New York: Chicago: University of Chicago Press, 1967); Morton Keller, *Affairs of State: Public Life in Late Nineteenth Century America* (Cambridge, Massachusetts: Belknap, 1977), and the older Eric F. Goldman, *Rendezvous with Destiny: A History of Modern American Reform* (New York: Knopf, 1952); and Richard Hofstadter, *The Age of Reform: From Bryan to FDR* (New York: Knopf, 1955).

⁴² Wood, *The Law of Nuisances*, 40.

⁴⁴³ *Ibid.*, pp. 43-45.

⁴⁴ *Ibid.*, p. 43.

⁴⁵ *Ibid.*, p. 44.

⁴⁶ David J. Pivar, *Purity Crusade: Sexual Morality and Social Control, 1868-1900* (Westport, Conn.: Greenwood, 1973) and his "Cleansing the Nation: The War on Prostitution, 1917-1921," *Prologue: The Journal of the National Archives*, 12 (Spring 1980), 29.

⁴⁷ For one state example, Texas passed its first disorderly house statute in 1856. It read simply,
A disorderly house is one kept for the purpose of public prostitution, or as a common resort for prostitutes, vagabonds, free negroes, and slaves.
Later revisions would substantially lengthen and complicate this statement. See William S. Oldham and George W. White, *A Digest of the General Statute Law of the State of Texas* (Austin: John Marshall & Co., 1859). The Texas legislature revised the disorderly house statute in 1887, 1889, and 1907. The 1907 statute change will be reviewed in-depth in the chapter on the districting of Houston's vice in 1908. For the statutes, see H. P. N. Gammel, *The Laws of Texas, 1822-1897* (10 vols., Austin: The Gammel Book Co., 1898), IX, Twentieth Legislature, 1887, p. 63; IX, Twenty-first Legislature, 1889, pp. 33-34. *General Laws of the State of Texas Passed at the Regular Session of the Thirtieth Legislature, 8 January-12 April, 1907* (Austin: Von Boeckman-Jones Co., 1907), 246-248.

⁴⁸ Ruth Rosen, *The Lost Sisterhood: Prostitution in America, 1900-1918* (Baltimore: The Johns Hopkins University Press, 1982), 29.

⁴⁹ Bascom Johnson, "The injunction and Abatement Law," *Social Hygiene*, 1 (March 1915), 231. Also by Johnson, see "Good Laws . . . Good Tools: Injunctions and Abatements versus Houses of Prostitution," *Social Hygiene*, 38 (May 1952), 204; "Law Enforcement Against Prostitution From the Point of View of the Public Official," *National Municipal Review*, 9 (July 1920), 427; "Next Steps," *Social Hygiene*, 4 (January 1918), 9.

⁵⁰ Rosen, *The Lost Sisterhood*, 29.

⁵¹ Johnson, "The Injunction and Abatement Law," 231.

⁵² For other contemporary works on the red light abatement acts see, "Another Red Light District Gone," *Survey*, 39 (October, 1917), 97; John C. Buchanan, "War Legislation Against Alcoholic Liquor and Prostitution," *Journal of Criminal Law, Criminology, and Police Science*, 9 (February, 1919), 520; "California Red-Light Law Still in Doubt," *Survey*, 33 (November, 1914), 167; "California Women and the Vice Situation," *Survey*, 30 (May 1913), 162; "Closing a Vice District by Strangulation," *Survey*, 35 (December 1915), 229; Mary Robert Coolidge, "California Women and the Abatement Law," *Survey*, 31 (March 1914), 739;

George Gould, "Laws Against Prostitution and Their Use," *Social Hygiene*, 27 (October 1941), 335; Franklin Hichborn, "The Anti-Vice Movement in California II. Rehabilitation," *social Hygiene*, 6 (July 1920), 365; Franklin Hichborn, "The Anti-Vice Movement in California I. Suppression," *Social Hygiene*, 6 (April 1920), 213; Franklin Hichborn, "California's Campaign Against Entrenched Vice," *Survey*, 32 (July 1914), 430; Franklin Hichborn, "California's Fight for a Red Light Abatement Law," *Social Hygiene*, 1 (December 1914), 6; Franklin Hichborn, "The Organization that Backed the California Red Light Abatement Bill," *Social Hygiene*, 1 (March 1915), 194; "Illinois' Abatement Law Held Constitutional," *Survey*, 37 (November 1916), 173; Marion M. Jackson, "The Atlanta Campaign Against Commercialized Vice," *Social Hygiene*, 3 (April 1917), 177; George J. Kneeland, "Commercialized Prostitution and the Use of Property," *Social Hygiene*, 2 (October 1916), 561; Joseph Mayer, "The Passing of the Red Light District--Vice Investigations and Results," *Social Hygiene*, 4 (April 1918), 197; Robert McMurdy, "Use of the Injunction to Destroy Commercialized Prostitution," *Journal of Criminal Law, Criminology, and Police Science*, 19 (February 1929), 513; Note, "Equity-Public Nuisance-Bawdy House-Injunction by Private Individual," *Columbia Law Review*, 6 (January 1906), 56; Note and Comment, "The Abatement of Prostitution," *Social Hygiene*, 2 (January 1916), 131; Note and Comment, "The Injunction and Abatement Law in Erie, Pennsylvania," *Social Hygiene*, 3 (January 1917), 139; Note and Comment, "The Injunction and Abatement Law in Indianapolis," *Social Hygiene*, 3 (January 1917), 137; Note and Comment, "New Jersey's Injunction and Abatement Law Declared Unconstitutional," *Social Hygiene*, 6 (January 1920), 138; Note and Comment, "Vice Conditions and Reform in New Orleans," *Social Hygiene*, 3 (July 1917), 403; Note and Comment, "The Abolition of the Red Light District in Baltimore," *Social Hygiene*, 2 (April 1916), 282; "Prostitution Banished in One New York Town," *Survey*, 30 (May 1913), 158; "Red-Light of Day Light in Cleveland," *Survey*, 36 (April 1916), 113; "Segregation," *Survey*, 31 (January 1914), 474; "The Social Evil: Vice Reports and Investigations," *National Municipal Review*, 5 (October 1916), 698; A. Leo Weil, "In the Hands of the Police: A Plea for New Legislation to Make and Enforce Laws Against Vice," *Survey*, 30 (May 1913), 203; Frederick H. Whittin, "Obstacles to Vice Repression," *Social Hygiene*, 2 (April 1916), 145; "Wisconsin's Last Segregated District Closed," *Survey*, 33 (December 1914), 328; Clinton Rogers Woodruff, "Vice Reports and Investigations," *National Municipal Review*, 4 (October 1915), 687.

53 Johnson, "The Injunction and Abatement Law," foldout between pp. 232 and 233. All of the following information on procedure and standards are found on the foldout and in the point-by-point text following 232.

CHAPTER FOUR

To Dispel the Blush of Shame: Disorderly Houses in American State Case Law

Nineteenth-century legal theoreticians wrote to inform the practicing lawyer and to instruct apprentices in the mysteries of the law. With the beginning of the scientific method of legal training at Harvard in 1870, the new case books and hornbooks still attempted to guide the lawyer and student in their craft. Yet the certainty and clarity with which the treatise writers presented their doctrines (whether it be criminal law or nuisance law) sometimes dissolved when touched by a fact situation in which real people stood charged with a crime. The offense of keeping a disorderly house or the civil proceeding of persons claiming special damages from a nuisance proved to be far less tidy than pictured by the treatise writers. All American treatise writers, from Nathan Dane onward, paid at least some attention to disorderly houses, bawdy houses, and nuisance actions and all the writers supplemented their treatises with footnotes to the newest disorderly house cases arising from a variety of appellate jurisdictions.¹

This chapter explores the case law, the law in day-to-day application against the social problem of disorderly houses--the other side of the street, as it were, of the earlier theoretical writings. For example, appellate courts had to decide cases which centered on questions of the admissibility of the kinds of evidence at trial.² What sort of proof did the prosecution have to establish in order to convict a house of being disorderly or a person of keeping a bawdy house? Appeals courts usually focused their decisions on several issues: 1) the admissibility of the testimony to the general reputation of the house in a community; 2) the admissibility of the reputation of the keeper of the house and what constituted "keeping;" and 3) the reputation of the house's inmates. Other topics which received judicial attention in the nineteenth century and early twentieth century on the state appellate level were actions between individuals seeking a remedy from the nuisance of a bawdy house and the judicial defense of the property of bawdy houses when attacked by a mob.

Together with the previous chapter's theories, these five areas of legal issues come close to completing the legal picture of disorderly houses and bawdy houses.

The earliest reported state case dealing with a house of prostitution arose in Massachusetts in 1825.³ The judges of the Massachusetts Supreme Court heard the case of Commonwealth v. Reuban Harrington at the Suffolk and Nantuckett term, March 18, and handed down their decision on March 24. Harrington did not center directly on either a disorderly house or a bawdy house prosecution but rather a contract letting a house to a woman to be used for the purpose of prostitution. At the time, 1825, Massachusetts had no statute covering such a contractual relationship. Harrington owned but did not occupy the building and he knew that the woman, Susan Bryant, would use the house as a house of prostitution. The court faced the question of whether the agreement for renting the house constituted an offense at common law? Harrington's defense argued that the crime described in the indictment was not an offense known to the law. Harrington argued that no state statute prohibited the agreement and, in any case, the contract contained no express agreement that the house would be used for any unlawful purpose. Without citing any cases, the defense reminded the court in a contradictory phrase that "there is no precedent, until within a year or two, of an indictment at common law for such an offense." "[Y]et similar immoral acts," the defense pointed out, "must have certainly occurred in large cities, both in this country and in England, for a long period of time." So although such contracts might have been common, the state of Massachusetts had not made it an offense knowing to rent a house for use as a house of prostitution; neither was it an offense at the common law of England.⁴

County attorney J. T. Austin argued that the prosecution did not have to prove an express agreement existed to rent the house as a house of prostitution. Rather, circumstantial evidence would prove that an implied agreement existed, and evidence that Susan Bryant was "a woman of ill fame" supported the implied agreement. Austin noted that the offense was indictable because it affected the public generally. After all, Harrington stood charged not with entering into

an illegal contract but with enabling another to carry on a nuisance.⁵ Austin called the agreement "a gross offense against public morals," and although it may not have been prosecuted before, the facts fell into the general principles of an immoral contract substantiating the indictment.

Chief Judge Isaac Parker delivered the court's opinion and defined the issues as whether the renting of a house with the intent of using it as a house of prostitution, in the absence of a state statute, was indictable at common law. Was it not a misdemeanor to aid another to commit a misdemeanor, he wondered? The court found against Harrington on the grounds that although letting the house was itself an innocent act Harrington let it knowing it would be used to house prostitutes. Since, the court explained, the common law made the keeping of a bawdy house an offense, it followed that the letting of the house to be used as a bawdy house was also an offense and indictable.⁶ The judges paid high tribute to the defense council's argument that no such offense existed since no previous English precedents could be found; nevertheless, the court found the offense indictable. Harrington demonstrated one court's willingness to expand common law doctrines to cover a new social/legal arrangement in the absence of state statutes and upheld the common law doctrine of the indictability of persons entering into immoral contracts for renting bawdy houses.

Gaming houses are one of the three kinds of disorderly houses under the general heading of nuisance law, and a gaming house as a disorderly house was the center of United States v. Jacob Dixon (1830).⁷ The case focused on the validity of an indictment against a gaming house as a common nuisance for the housing and playing of the game "faro." Judge William Cranch of the district court for the District of Columbia narrowed the question to whether a nuisance could be indicted under a 1792 act for Washington and Georgetown which prohibited the "setting up, keeping, and maintaining certain gaming tables, or devices, in any tavern or house occupied by a retailer of wine, spiritous liquors, &c."⁸ By using the common law standards of a gaming house, Cranch focused on the keeping and maintaining of a gaming house

and not on the playing of the game of faro. He limited the reasons why the indictment might stand if the house was kept "for lucre and gain, at which divers idle and dissolute persons were permitted to assemble and game for a divers large and excessive sums of money." Cranch proceeded through a lengthy review of numerous English precedents, statutes, and treatises on the keeping of gaming houses with Hawkins's Pleas of the Crown playing the largest role in his reflections.⁹ Reflecting Hawkins's influence, Cranch wrote that the reason why a gaming house was a common nuisance was

... that it tends to draw together idle and evil-disposed persons; to corrupt their morals, and to ruin their fortunes; which is the same reason which is given in the case of houses of common prostitution. 10

On the basis of the English, precedents, statutes, and texts, Cranch declared the house a gaming house, and a common nuisance. The indictment against the house stood, and Dixon linked the English precedents with American nuisance law.

Connecticut provided the next case of interest and one which touched upon an issue of bawdy houses which would continue throughout the century. Woodruff Cadwell v. State came before the Supreme Court of Errors at its Hartford term in 1846 and involved an indictment against a bawdy house on Commerce Street in Hartford.¹¹ At trial in the county court of Hartford, the prosecutor introduced testimony from several people who resorted to the house to engage in prostitution. In particular, witnesses testified that Maria Alford had gone to the house two years previously for an immoral purpose. To that allegation defense objected on the grounds that she died before the passage of the 1845 statute making keeping a disorderly house a crime. The trial court overruled the objection and let stand the evidence as inferring that people resorted to the house now for the same reason that they did in the past. When the prosecutor also attempted to offer into evidence the general reputation of the house prior to the passage of the 1845 statute, defense objected claiming such evidence was hearsay. The trial court again let the evidence stand as showing the type of people who previously resorted and who continued to resort to the house.

In their briefs to the Connecticut high court, Cadwell's lawyers tried to reverse the jury's finding of guilty on several grounds, one of which was the admissibility of the reputation of the frequentors like Alford and the general reputation of the house.¹² Defense argued that "reputation is no evidence of a crime, nor admissible to prove it." To charge a person with a crime under a statute before its passage as a statute, the defense stressed, would be ex post facto in violation of the state constitution. On the other hand, T. C. Perkins argued for the state that "a house of ill-fame, is one reputed to be a bawdy house."¹³ In order to know the reputation of the house, Perkins argued that it was admissible to inquire about its reputation in the community. Following that thought--to know for what purposes people resorted to the house--the state could inquire about the character of such persons.

Judge William Lucius Storrs delivered the opinion of the court and began by commenting on the phrase "bawdy house." The state statute prohibited any person from "keeping a house of ill-fame, resorted to for the purpose of prostitution or lewdness," and Storrs ruled that the "house of ill fame" was equivalent to "bawdy house." Their commonly understood meaning "denote[d] a house which is not merely reputed to be, but which [was] in fact, a brothel or bawdy house."¹⁴ This definition of reputation limited the standards of reputation from any place, not proved, that popular gossip alleged was a bawdy house. Bawdy houses existed only in those buildings or structures which were actually kept as a bawdy house, not merely reputed to be so. By establishing this standard, prosecutors applied the statute against keeping a bawdy house to one "actually guilty of the offense, [rather] than one who [was] generally suspected, but maybe really innocent." After all, the court continued, every word in a statute should be construed as having an effect and should be favorably interpreted to persons accused under the statute. Therefore, to prove that a person kept such a house, prosecution had to show 1) that the house was "commonly believed to be a brothel," and that 2) it "should be actually one of that kind of description."¹⁵ And to prove a house's reputation and actual use, the testimony of witnesses with knowledge of its use, actual and reputed, could be entered into

court just like any other kind of testimony. Such testimony from competent witnesses would not be hearsay and would be admissible "for the purpose of proving that it was in truth a brothel."¹⁶

By the Cadwell decision, both the reputation of the house and its actual use had to be proven by the testimony of witnesses on both the reputation and the actual use and resort to the house. Cadwell placed a heavy burden on the prosecution.

By contrast, consider the far lighter burdens placed on the prosecution in homicide cases of the time. In such felony prosecutions the defendant could not give testimony on his own behalf and prosecutors built cases which tended to prove the commitment of the offense. This while bawdy houses and their keeping and homicide were all areas of social offenses, the stricter standard of evidence was applied in cases dealing with property, proving an immoral use of property. The law made it far more difficult to label a house a bawdy house than to make a person a felon.

Storrs's attempt in Cadwell to define the standards of admissible evidence became clouded and lost in later case law. For example, over the course of years, one state's supreme court, Iowa's, decided similar cases on the admissibility of evidence in two different ways and presented state courts in the late nineteenth century with differing lines of precedent. State v. Hand (1858) and State v. Lyon (1874) are separated by nineteen years, but together form the first cases in conflicting lines of precedent.¹⁷

Chief Judge George C. Wright of the Iowa Supreme Court devoted his whole decision in Hand to questions of the admissibility of the reputation of both the house and the keeper. To convict, both the prosecution and the defense agreed in their briefs that the house had to be shown to be used as a resort for prostitution and that the defendant was its keeper and all also agreed that the house's character could be determined by reputation. Defense appealed, however, arguing that the defendant could not be proven to be such a house's keeper by evidence of "common reputation as to his character."¹⁸

The court agreed. Wright wrote that the defendant's character was "entirely immaterial" in determining if he was the keeper of the

house because the charge in the case focused on the house and not the keeper. To prove the house's character, "its fame--ill fame" as well as the character of those persons resorting to the house could be shown. In order to know whether the defendant kept the house, character was not at question. Rather, the court lectured, actions were. The jury's determination that he acted as the house's keeper and "so held himself out to the world" as its keeper was the proper test of who kept a bawdy house.¹⁹ The defendant's character played no part in the determination of "keeping" by the Hand decision of 1858.

In State v. Lyon (1874), the court recounted facts that showed the trial judge excluded testimony as to the general reputation of the house and the general reputation of the house's inmates as prostitutes.²⁰ Citing Hand, Judge William E. Miller overruled the lower court's exclusion of the evidence of the "bad character of the persons resorting" to the house. The character of the persons was sound evidence but the character of the house was not. Miller stated that the house was property which possessed no inherent character of its own except through how its occupants used it. Only facts about the residents and frequenters could so corrupt the reputation of the house, "The facts, and not evidence of general character must, therefore, be the only evidence competent to establish the bad character of the house."²¹

Hand focused on the keeper and his/her culpability in disorderly house cases while saying little of the persons resorting to the house or the general reputation of the house. In Lyon, reputation of the house was rightly excluded, the Iowa high court decided, but its use could be shown by the bad character of its residents and those who resorted to the house. Yet, later courts in other cases in other states confused and crossed the two cases and the judicial determinations in each.

In the same year as Lyon, 1874, the Supreme Court of Maine stressed similar standards of evidence in a disorderly house/bawdy house case. State v. Joseph E. Boardman involved several issues but by far the most important in this lengthy case was the question of the admissibility of evidence about the reputation of the house.²² At trial, the judge allowed testimony which showed 1) "particular acts of lewdnes and pros-

titution upon the premises;" 2) "testimony tending to show the general reputation for chastity of the men and women accustomed to frequent the house," and 3) "testimony tending to show the general reputation of the house itself" The trial court admitted testimony tending to show "that the house was in fact a house of ill fame, resorted to for the purpose of lewdness and prostitution." Objecting to such testimony, Boardman appealed to the Maine Supreme Court.²³

Judge Jonathan G. Dickerson delivered the unanimous opinion of the court and, after a review of the meaning of "bawdy house," analyzed Boardman's indictment. To determine whether the indictment was good, Dickerson said two points had to be established: 1) that the house was kept as a bawdy house, and 2) that Boardman kept it. The court confirmed that the "gist of the offense consists in the use, not in the reputation of the house."²⁴ A house's reputation for holding prostitutes may not be clearly proven but if no facts showed an actual use of the house for prostitution then reputation meant nothing. Also, if the facts did show an actual use for prostitution, a house's reputation was immaterial, mooted by the facts of its use. Therefore, without substantiating testimony to an actual use of the building for prostitution, testimony to the house's reputation constituted hearsay and was inadmissible.

Dickerson closed off an avenue to prove whether a house was a bawdy house or not. He ruled out any use of the general reputation of the house. So, Miller in Lyon and Dickerson in Boardman, from different courts, in widely separated states but in the same year, came to a similar conclusion on the admissibility of the general reputation of the house in bawdy house cases. According to Judge John A. Parker in a note appended to Boardman and to which the unanimous court agreed,

The house must be proven to be a house of ill-fame
by facts and not by fame.

25

Boardman confirmed the admissibility of the general reputation of persons resorting to a house and added weight against the admissibility of the reputation of the house itself in disorderly house cases. The Boardman note also set the standard used in disorderly house and bawdy house cases for the rest of the century. Some cases did arise where

appeals courts upheld the use of the general reputation of the house without showing an actual use, but they were few.²⁶ "By facts and no by fame," established the standard normally used by appellate courts. In fact, the judge-made standard of the inadmissibility of the general reputation of the house formed one of the legal barriers the later Progressive reformers sought to overcome. When the states wrote or re-wrote their injunction and abatement laws, usually following the 1909 Iowa statute, every state allowed by statute the admissibility of the general reputation of the house. By writing into statute law such a clause, the reformers changed the law of evidence to allow what had previously been hearsay evidence to stand judicial scrutiny. The red light abatement acts loosened the law of evidence against those accused of keeping a disorderly house or a bawdy house.

Another issue before state courts in disorderly house cases in the last half of the nineteenth century focused on lucre or gain and whether a house had to be kept for profit. In State v. Bailey (1850), Judge Samuel Dana Bell of the New Hampshire Supreme Court confronted several questions going back to first principles of disorderly house law, questions such as whether keeping a disorderly house was a common law offence, whether the common law had effect in New Hampshire, whether the indictment was sufficient, and whether the failure of the indictment to allege that the house was being kept for lucre flawed the indictment enough to void it.

Citing English decisions, Bell held disorderly houses to be indictable at common law²⁸ and, although New Hampshire prosecutions were rare, that part of the common law was in force in the state. Bell's lasting contribution to the law of disorderly houses consisted of his holding that the need for gain or lucre was not necessary, "not material" to the offense. Echoing the received legal treatise traditions, Bell wrote,

The substance of the offense is the keeping such a house as is a common nuisance to the community, and whether this is done for the motive of gain or for some other object is unimportant.

29

But the question of gain and the question of the admissibility of evidence showing the general reputation of the house were not the

only questions state appellate courts faced in disorderly house cases. Fact situations sometimes shifted interest to a different yet parallel question--the admissibility of the general reputation of the keeper. State v. Hand (1858) touched upon the question of the keeper and decided that a person could be proven to be a keeper if he or she acted like the keeper or held him/herself out to the world as such.³⁰ But the Hand decision was not alone nor did it dominate later decisions in later appeals cases. Issues of keepers and keeping merged into questions of definition and landlord/tenant issues in a wider variety of situations.

From a Texas case in 1859 arose the issue of who was the "keeper" of a disorderly house. On appeal to the Texas Supreme Court, James Couch tried to have his conviction for keeping a disorderly house overturned on the grounds of insufficient evidence.³¹ Couch and an untried co-defendant, John Earl, shared in the management of a grocery on the Alamo Square, San Antonio, Texas. A "Madame Candelario" lived in a house adjoining Couch's and she held a city license to hold "fandangoes." All the women who attended the dances were prostitutes and used "indecent and obscene language." Couch held the lease to the premises from W. R. Knox who built the houses and grocery and who allowed Candelario to use her house rent free. At the time of the indictment, J. Humphries held title to the buildings. Couch kept the bar in the grocery with Earl occasionally relieving him. Candelario testified that she lived in the house with her family, paid no rent, organized the fandangoes, and collected the admission charge. Couch had nothing to do with the dances. At trial, the jury found Couch guilty of keeping a disorderly house and fined him \$125. He appealed, arguing the verdict was contrary to the evidence in the case.

In his brief to the Texas court, Couch's attorney argued that the state prosecuted the wrong person.³² The evidence proved only that Couch rented the property while the prosecution alleged that he was the "reputed proprietor of the house." Further, he argued that the evidence did not show Couch kept the property, that he was even present during the dancing, or that he had any knowledge of illegal proceedings occurring in the house. Knox owned the property and allowed Candelario to live rent free in the house and hold the fandangoes.³³ Not Couch

but Candelario should have been prosecuted for keeping a disorderly house because she had control of the activities in the house. Couch's defense stressed that the evidence did not support the indictment much less the conviction because Couch did not "keep" the house.

But his arguments carried no weight before the Texas Supreme Court.³⁴ Judge Oran M. Roberts, soon to be the head of the Texas secession convention, upheld Couch's conviction in a terse statement on the grounds that at trial Couch did not object to the state's prima facie case against him. More important, the Couch statement raised the question of who "keeps" or is the "keeper" of such establishments. Just as in case law for the admissibility of the general reputation of the house, the question of who keeps became a legal search for standards of admissible evidence proving keeping.

In the next year, 1860, a case came before the Supreme Court of New Hampshire which encountered the same question. A grand jury at Hillsborough indicted James M'Gregor for keeping a disorderly house.³⁵ At trial, over defense's objection, the state introduced into testimony that M'Gregor had traveled to Nashua, procured a woman, and returned with her to the house named in the indictment. Testimony also showed that he did not keep the house himself but did so jointly with another, unnamed person. M'Gregor's lawyers objected to the testimony as hearsay and to the court's instructions to the jury re-emphasizing M'Gregor's travels and keeping. The jury found M'Gregor guilty.

Both the defense and the state in State v. M'Gregor submitted briefs to the New Hampshire Supreme Court arguing points of law. Besides a technical difficulty with the indictment, M'Gregor's defense argued that evidence of their client's travels should not have been admitted as it was irrelevant to the charge of keeping. Such evidence was "calculated to prejudice unfavorably the minds of the jury."³⁶ Further, the court should not have allowed testimony as to the alleged reputation of the persons frequenting the house since if the house was disorderly it had to be proven to be so by fact and not by reputation. Defense also argued that M'Gregor was only one of the keepers and should have been indicted jointly with the other keeper. Solicitor for New Hampshire, A. F. Stevens, supported the lower court's

procedure and rulings arguing that the indictment was properly drawn. Procuring was a "substantial fact" tending to prove "the keeping and occupation, as well as the character of the house." Also, the court did not err in admitting testimony as to the class of persons resorting to the house; that testimony proved the general reputation of the the character of the house and that M'Gregor's single indictment was correct.³⁷

Judge Asa Fowler upheld the lower court's ruling. He believed that M'Gregor's travels to procure a woman for a Manchester house "had some tendency to show that the defendant had the management of the house."³⁸ Fowler stressed this idea of management as equivalent to keeping. Continuing, he noted, that it did not matter whether M'Gregor acted in principle, agent, servant, or at the command of another because the indictment meant to affect persons with "criminal management of the house." By Fowler's standard, the person with criminal management of the house stood liable to be indicted for keeping a disorderly house. Fowler also upheld the admission of the reputation of the character of the frequentors and the house. Since "notoriously reputed prostitutes and libertines" resorted to the house when M'Gregor managed it, their presence supported the indictment and his criminal management. Fowler also borrowed a phrase from Hawkins's Pleas of the Crown. In describing the house, he noted that the nuisance from such a house consisted in the "drawing together dissolute persons engaged in unlawful and injurious practices, thereby endangering the public peace and corrupting good morals."³⁹ It was the person who improperly managed the property that "kept" the house by the M'Gregor decision.

Although the court in the next case did not use the phrase "criminal management," Harwood v. People also provides an example of what might be considered criminal management.⁴⁰ In the 1863 case, Harwood hoped to overturn a conviction for keeping a bawdy house and attacked evidence which showed repeated arrests for prostitution of women at his house. It also showed Harwood paid their bail after their arrest. The trial court allowed testimony showing the character of the persons resorting to the house, the type of business for which the house was

used, and Harwood's knowledge of the character of the women and their behavior. The New York Court of Appeals agreed. After all, the court said, "[a] man careful of the reputation of his house, and regulating it upon correct principles, is not accustomed to have found there women notoriously charged with the offense of prostitution."⁴¹ Legitimate businessmen, the court appeared to be saying, did not run bawdy houses, and the testimony against Harwood supported the charge of keeping a bawdy house. His conviction stood. Criminal management, then, could be proven by the type and character of the frequentors, their reputation, the house's reputation, and the defendant's actions as keeper.

These principles, however, remained buried in the case law and no clear standard emerged regarding proving the keeping of a bawdy house. For example, in William Allen v. State (1884), Judge John P. White of the Texas Court of Appeals wrestled with the question of the admissibility of the general reputation of the keeper.⁴² He acknowledged that the general reputation of the house and the people resorting to the house was admissible but he stopped there. Quoting from Hand, White restated the Iowa court's rule that a person could not be proven to be the keeper of a house by his character. As summarized,

Evidence of rumor or common report of a fact is not
admissible if better evidence is obtainable; and
certainly better evidence ought to be obtainable
than mere common report or general reputation 43

Like questions of character about the house, facts that proved a person kept a house had to be used in court; a person's bad repute among his neighbors could not be. Proofs of acts were necessary to convict a person of keeping a disorderly house.

The best judicial examination of this uneven and somewhat confusing array of case law came out of Rhode Island in 1893. In State v. Clara Hull, Judge Pardon E. Tillinghast dealt with the admissibility of the general reputation for chastity of the keeper of a common nuisance, a bawdy house.⁴⁴ Hull sought a new trial because at her original trial the court admitted testimony about her chastity. The state asked several witnesses such question as "Do you know what is Clara Hull's reputation for chastity?" and then argued for the

testimony's admissibility before the Rhode Island Supreme Court. But Tillinghast refused to allow such testimony to stand. With numerous state citations and legal treatises as support, Tillinghast lectured the parties on one of the basic principles of the law of evidence in criminal cases.

It is a fundamental principle of the criminal law that character of the defendant cannot be impeached or attacked by the state unless he puts his character in issue, either by becoming a witness in his own behalf or by offering evidence in support of his character.

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Tillinghast went on to say that the court saw no reason to Inquire about Hull's character just because the state charged her with keeping a house of ill fame. The Rhode Island court had no doubt that evidence as to the general reputation of the house, "the inmates, and those who frequented the place," could be entered into evidence at trial, and it listed a wide variety of state cases as precedent.⁴⁶ Tillinghast then reviewed at length the case of State v. Hand and added his own judicial nod of approval to Wright's statements on the evidence of the keeper.⁴⁷ Evidence that a defendant held himself out to the world as the keeper of the bawdy house was the evidence courts wanted to see in trials of alleged keepers; they did not want proof of the keeper's chastity or bad reputation in general. The state's introduction of such evidence and the trial court's acceptance of it constituted a reversible error and Tillinghast ordered a new trial for Hull.⁴⁸

Closely allied to and occasionally overlapping with the questions of the general reputation of the keepers were questions of the reputation of the inmates of houses alleged to be bawdy houses. As in the cases above, defense attorneys usually tried to exclude as being inconclusive testimony showing the bad character or reputation of the residents of a house. An example of such an argument arose in the Missouri case of Anna J. Clementine v. State in 1851.⁴⁹ Clementine had been charged, tried, and convicted in the St. Louis criminal court for keeping a bawdy house as a common nuisance. She appealed on several grounds, but most importantly for the defense was the admissibility of the character of the women seen at Clementine's

house. The trial court allowed witnesses to testify to the bad character of the buildings, residents, and inmates. Clementine's lawyers strenuously objected, pointing out that character consisted of what the public thought of others. To be admissible in a criminal case meant it was "full of perils" for the accused. Reputation of character would, defense argued, "convict an asylum of Magdalens."⁵⁰ But both the state in brief to the Missouri high court and Judge James H. Birch in his decision brushed aside Clementine's concerns. The court concurred with the state's statement that the "character of those who frequent a house charged with being a bawdy house is a legitimate subject of inquiry."⁵² Clementine's conviction stood.

Admissibility of the character of the residents of a house alleged to harbor prostitutes came up again, five years later, and was again swept away as unimportant. In Commonwealth v. Timothy Kimball (1856), Kimball had been indicted for keeping a bawdy house as a common nuisance in Raynham, Massachusetts, and at trial the judge allowed testimony to the character of the women in the house and the character of their conversations in the house.⁵² Kimball objected at trial and appealed his conviction but with no success. Judge George T. Bigelow called the testimony "direct and pertinent evidence of the character of the house."⁵³ By his decision, therefore, the reputation and character of the residents and their conversation could be entered in court to support a charge of keeping. Indeed, later courts commonly cited Kimball whether the question was of the general reputation of the house, keeper, or residents.

Another state supreme court discussed the admissibility of the character of the residents of a house as proof of the general character of the house. Judge Robert S. Gould of the Texas Supreme Court in the 1875 case of Mary Sylvester v. State believed that the character of the house's occupants was admissible to show the character of the house.⁵⁴ The case arose out of Galveston, Texas, and involved a type of bawdy house, a house of assignation where no prostitutes lived permanently but which rented rooms for short periods of time for immoral purposes. Only one witness testified that he had been to Sylvester's house for a "lascivious purpose," while other witnesses testified that they under-

stood the reputation of the house and its occupants to be bad. Over the objections of Sylvester's lawyers, the trial judge let the evidence stand. The jury convicted Sylvester and she appealed.

Judge Gould upheld the conviction and the admissibility of the evidence although he had his apprehensions about the sufficiency of evidence. Citing Bishop's Criminal Procedure, he wrote, "It is believed to be well settled that the character of the occupants may be established by evidence of their general reputation."⁵⁵ The court believed that if the question had been on the sufficiency of evidence, then the judges might have ruled differently. But, even if the general reputation of the house and inmates was thin, the "additional facts of evidence in this case were sufficient to both convict and to refuse to overturn that conviction."⁵⁶ Sylvester further confused the question of whether the general reputation of the residents of a house was admissible evidence in disorderly houses cases.

The admissibility of the character of disorderly house inmates turned up again in two Alabama cases of 1877. In both Sparks v. State and Toney v. State defendants stood charged with keeping disorderly houses--bawdy houses in both cases--and the character of the occupants became a factor in proving the character of the house and the manner in which the defendants kept the houses.⁵⁷ In both cases, at trial and upheld on appeal, the prosecution used the reputation of the occupants of alleged bawdy houses to prove the use of the houses or the bad character of the houses' keepers. The mundane nature of the question of the reputation of the occupants and the lack of extensive case law on the question point to the accepted position the admissibility of character held in disorderly house cases. Lawyers, especially defense lawyers, appeared to assume that the general reputation of occupants could be used at trial and was not a contended point of error on appeal. The question of inmates, like the question of the reputation of frequentors,⁵⁸ became just another part of the fabric of disorderly house cases in the nineteenth century.

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This lengthy and complicated case law on the admissibility of the general reputation does not make up the total range of cases involving disorderly houses and bawdy houses. Other situations arose and other points of law were appealed to state high courts for clarification and decision. No matter how complete the treatises had tried to be, the multiplicity of legal questions and fact situations outstripped the theoretical arguments. Judges, prosecutors, and defense attorneys were left to stretch their arguments or discard some of the facts in order to fit the accepted Procrustean bed of disorderly house legal thought.

Other areas of litigation focused on questions tied to houses kept by husbands and wives, to landlord/tenant relationships, and to owner/agent problems. In 1867, a case involving a question of a husband and wife keeping a bawdy house reached the Massachusetts Supreme Court, Commonwealth v. Robert Wood.⁵⁹ Wood's wife owned the building as separate property and Wood exercised only a slight degree of control over the building. She lived with Wood on the premises and operated a bawdy house. The facts showed that Wood did not share in the profits of the house. Nevertheless, the jury found him guilty of keeping a bawdy house from which he appealed.

In brief to the Massachusetts court, Wood's lawyers argued that because "the keeping of a house of ill-fame [was] an offense particular to the female sex," the general rule of coverture did not apply.⁶⁰ Generally, coverture meant that after marriage the woman became civilly dead in law, a non-person. Courts could not hold her accountable for her actions because, the theory ran, she always acted at the direction and urging of her husband; she had no legal standing except through her husband who was responsible for any and all of her actions.⁶¹ The Attorney General argued that coverture still applied even in a bawdy house case where the wife owned the building and furniture. "The authority to conduct the household remains in the husband," he explained.⁶²

Judge Reuban A. Chapman began his decision by providing a synopsis of coverture. He stressed the common law rule that coverture excused the wife from punishment for "many crimes" because the law assu-

med that she acted under her husband's compulsion. "He alone," the court expounded, "is held responsible for such crimes."⁶³ Husbands bore the burden of punishment for crimes committed by their wives. So too husbands in their position as head of the household bore the burden of restraining their wives from committing crimes. Wood had the responsibility to prevent his wife from running a brothel out of his household even though she owned the property. This he failed to do and Chapman upheld his conviction for keeping a bawdy house.⁶⁴

A similar question of husband/wife arose in the 1915 Texas case of Mrs. John Jackson v. State.⁶⁵ Jackson was convicted of keeping a disorderly house, appealed, and argued that as a married woman she could not be convicted of keeping even though she had entered the lease and paid the rent. Her husband had authorized her to enter the lease and furnished her money to pay the rent but she had control of the bawdy house. In this case, the appellate court held her responsible for her actions. Texas's statute specified that the "owner, lessee, or tenant" stood liable for the offense of keeping, and Jackson had signed the lease and was the tenant. Her status as a wife did not protect her from prosecution and the court confirmed her conviction.

Questions about the owner/agent relationship in disorderly house cases arose in several other Texas cases although the issue did arise in other states. In 1895, Jack Flynn had been indicted and convicted of the statutory offense of "permitting a disorderly house to be kept on the premises whereof he was owner" although he argued that he did not own the property.⁶⁶ Flynn attempted to overturn his conviction on the grounds that he was an agent and not an owner. Flynn had rented the building to Minnie Clark with full knowledge that it would be used as a house of prostitution, but Frank Gorman, not Flynn, owned the building; therefore, the indictment attacked the wrong person. Judge W. L. Davidson held Flynn to be an owner because the statute directly specified that if one person owned the property but another had "possession, charge, or control" of the property both persons could be considered owners in prosecutions under the statute. Flynn could be convicted of being an owner under the statute and Texas's Court of Criminal Appeals affirmed his conviction.

But the same year the same court decided differently another case also dealing with the owner/agent relationship. In Maggie Mitchel v. State (1895), the relevant statute provided that "owner, lessee, or tenant" was to be punished for keeping a disorderly house.⁶⁷ Facts showed that Lyda Ryan owned the building in Temple, Texas, and lived nearby. Ryan collected the money from the house, "bought the beer," and saw to the business management of the house. A frequentor to the house for "illicit purposes" testified that Mitchel visited the women of the house and appeared to exercise some control and management. Confusing the matter more, Mitchel testified that she was nothing more than a "servant and employe" of Ryan's, working for twenty dollars a month. Mitchel acknowledged that she did occasionally collect the rent for the rooms but otherwise did not exercise any management or control over the house. At trial, the court instructed the jury that if they found Mitchel acted as if she owned the property then she could be held to be the principle offender in the case. Mitchel's lawyer objected, arguing that the statute specified only "owner, lessee, or tenant," but the trial court overruled the objection and on the question of jury instruction Mitchel appealed.

Again, Judge Davidson wrote the opinion of the court. He found that the recent state legislature had changed the disorderly house statute from allowing prosecution of all persons who kept the house to permitting prosecutions only of the "owner, lessee, or tenant." Judicial interpretation of such revision took the statute at face value; the court assumed that the legislature knew what they were doing when they changed the law and wanted to limit the law to owners, lessees, and tenants. This limitation excluded servants from prosecution for keeping a disorderly house; therefore, the Court of Criminal Appeals overturned the jury's findings and remanded the case back to the trial court.

The unevenness of the Flynn and Mitchel decisions provided examples to later defense lawyers on how to structure their appeals and on what grounds to appeal disorderly house cases. Flynn should have argued and stressed his position as servant to beat the conviction of keeping. Prosecutors had to choose carefully whom to prosecute if they hoped to keep in line with the varying and variable rulings and statutory

provisions.

Another issue that occasionally arose in disorderly house cases was whether one woman resorting to a room in a building made the house disorderly. The North Carolina case of State v. Augusta A. Evans (1845)⁶⁸ dealt with this question. Evans lived by herself on the second floor of a rooming house in Rowan County, North Carolina. Numerous residents and witnesses of the boarding house said they saw men occasionally enter Evans's room, but no witness could testify to any improper conduct. Evans appealed her conviction for keeping a disorderly house on the grounds that keeping a house included the idea of public use of a building or room for indiscriminate acts of unchastity and that prosecution did not show she owned the building and "kept" a disorderly house in it. Evans's defense admitted that perhaps she had entertained men in her room, thereby committing adultery--Evans allegedly being married--but asserted that the offense of keeping a disorderly house had not been proven against her.

The North Carolina Supreme Court overturned the conviction and the indictment. Chief Judge Thomas Ruffin held that the indictment was sufficiently drawn to sustain the charge of keeping a disorderly house but not a bawdy house. Bawdy houses were kept, he explained, for the resort of persons of both sexes for immoral purposes. He continued, "The residence of an unchaste woman--a single prostitute--does not become a bawdy house because she may habitually admit one or many men to an illicit cohabitation with her." Such a display of incontinence the common law left to the spiritual courts to correct.⁶⁹ As a rule, one woman living alone could not constitute a bawdy house, bawdy houses meaning "the common habitation of prostitutes--a brothel." On the basis of the facts before him, Ruffin found Evans to be nothing more than a woman living quietly apart from her husband, no witness having established any bad reputation or fact to her or any of her male visitors. Evans may have been an adultress, but the state had to charge, try, and prove that offense, not the keeping of a disorderly house as a bawdy house.

Another court in a similar case drove home the need to prove "resort to" a house in order to designate the place as a bawdy house. Maria Lambert, in Commonwealth v. Maria Lambert (1866), had been convicted of keeping a house of ill-fame because she had leased rooms to

couples living as man and wife though not legally married.⁷⁰ No other rooms were so leased nor did Lambert permit prostitutes to ply their trade from her tenement. The Massachusetts Supreme Court disagreed with the indictment and Lambert's conviction. Leasing the room did not constitute the offense of keeping. The Massachusetts statute under which the state prosecuted Lambert aimed to reduce the number of places of public resort. The court in an unsigned decision and quoting from an earlier tippling house case reaffirmed that "the mischief which the statute seeks to prevent is the existence of such places of resort with the temptations which they hold out and the vices which they engender and encourage."⁷¹ No cohabitation and no individual woman living in a room made a bawdy house. The common resort for immoral purposes formed part of the use of the building as a bawdy house.

Another case in this same vein came out of Michigan in 1889, People v. Jennie Pinkerton.⁷² Pinkerton had been convicted of keeping a house of ill-fame under a state statute and sentenced to the Detroit House of Corrections. Judge James V. Campbell took the case as an opportunity to stress the high court's duty to protect those wrongly accused, tried, and convicted of criminal offenses. From the limited recitation of facts in the case, the trial court and prosecution appeared to have badly botched the case against Pinkerton, and Campbell went out of his way to remind the lower court and prosecutor that Pinkerton was entitled to a "fair trial" and "to be protected carefully against invasions of legal right."⁷³ He also emphasized that the statute in question did not seek to curb unchastity but rather bawdy houses which had an evil reputation in the neighborhood and which could be proven by showing actual resort to the house for "lewd purposes" to the nuisance of the area. For Campbell, provable resort, a bad reputation, and public nuisance made up the ingredients of a bawdy house, and no house without these qualities could be reached by the law of disorderly houses. The Michigan Supreme Court had no wish to protect such keepers, but the court had a duty to protect the innocent.

The utter destruction of reputation that justly reaches persons guilty of such an offense as is charged is reason why no person should be convicted of it without full legal proof. It is a

charge which, if false, is a cruel one;
and while the law has no particular regard for
actual criminals, it protects, or should pro-
tect, against false charges.

Only one person--one "was was in concert with the police"--actually went to Pinkerton's house and Campbell threw out that evidence because a house resorted to only once was not a bawdy house. Lacking further proof, the evidence did not sustain the charge or the conviction.⁷⁵ Campbell upheld Pinkerton's appeal.

Just as the above cases can be described as instances when keepers were not keepers, the following cases deal with disorderly houses which were not disorderly. In Johnson County, Texas, in 1882, C. L. McElhaney was convicted of keeping a disorderly house as a common resort for prostitutes and vagabonds.⁷⁶ He owned a saloon in Cleburn, Texas, which had two rooms. One room held a bar and piano and the other tables and chairs. McElhaney sold a variety of goods from the saloon such as whiskey, cigars, and ice. Women reputed to be prostitutes frequented his saloon as did men "who had no residence, occupation, or visible means of support." Yet "a great many good people" bought beer, liquor, and ice from the saloon, including the mayor of Cleburn, who testified that he often bought drinks and ice in the store and "never saw anything wrong there."⁷⁷ McElhaney appealed his conviction arguing that the verdict was contrary to the law and evidence.

Judge Samuel A. Willson quoted the pertinent section of the Texas disorderly house statute which defined a bawdy house as "one kept for the purpose of public prostitution, or as a common resort for prostitutes and vagabonds." Not every house, Willson explained, became disorderly under the statute. The house had to be "kept for the purpose" of prostitution, which McElhaney's house was not. McElhaney operated a "legitimate business" from the house and not a bawdy house. Perhaps he kept it as a disorderly tippling house but that was not charged. McElhaney's saloon was neither a disorderly house nor kept as a resort for prostitutes plying their trade, and Willson reversed and remanded the case.⁷⁸

Another case involving a house of dubious use that was not a disorderly house came out of North Carolina in 1889. In State v.

Calley, Calley had been indicted and convicted of both keeping a bawdy house and keeping a disorderly house.⁷⁹ Witnesses' testimony proved numerous instances of drunkenness at Calley's house as well as numerous instances of sexual contact. Just one part of the facts read that

On one occasion, at night, a witness saw a man in the house of the defendant in bed with one of her daughters; that at that time the defendant was in a room, below stairs; that at another time a witness went to the house at night, got drunk on whiskey, he did not get there, and lay across a bed until 4 o'clock next morning, and when he awoke he saw a man in bed with a daughter of the defendant, and also a man in bed with herself, in another room;

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In his appeal Calley claimed the facts did not support the charge or the conviction.

Judge John Merrimon found himself on the horns of a dilemma. He could not accept Calley's behavior and management of her house as totally harmless yet neither could he find grounds to support the conviction. He had harsh words for Calley: "the defendant was guilty of reprehensible, vicious, and disgraceful conduct on repeated occasions" which proved she was a "woman of loose morals." The evidence proved Calley and her daughters to be "whorish persons," but her behavior did not prove that she kept a bawdy house, which Merrimon defined as a "house as a habitation for prostitutes." Frequent and indiscriminate sexual encounters did not make Calley's house "a place of common resort for prostitutes and lewd people of both sexes." Nor was her house a disorderly house. Calley lived away from any town and did not create a nuisance to any adjoining town or to the public. Any people living in the neighborhood and any possible passersby saw nothing and knew little about Calley. The North Carolina Supreme Court decided the trial court should have found Calley not guilty. The trial court did not so instruct the jury and that was a reversible error. Despite the proven behavior of Calley, her house was beyond the reach of the law.

Yet another case involved a house that the courts tried to reach but after an individual improperly used the property. The house in question was used improperly; however, the impropriety was not its use as a bawdy house (which was never doubted) but its burning by a mob.

Phineas L. Ely v. Board of Supervisors of Niagara County (1867) confirmed the fears Horace Wood expressed in his 1875 treatise The Law of Nuisances.⁸¹ Wood had sympathized with the outrage of local residents over the presence of bawdy houses but he urged lawyers and prosecutors to use the courts to abate the nuisance. Ely represented all the reasons why Wood feared mob action.

Maria Moody, who originally owned the buildings and who later stepped out of the case with the court's permission, substituting Ely, sued the county under an 1855 New York state statute which provided for compensation for parties "whose property may be destroyed in consequence of mobs or riots." On September 15, 1865, in Niagara City, New York, Moody had lost two houses and all the furniture in the houses because of the actions of "a mob or riot." However, Moody had not lived up to one of the provisions of the statute since she had not informed the sheriff of "any threat or attempt to destroy the property."⁸² The facts showed that Moody was not told of the damage to her property until the burning was almost over. After she was informed of the fire, the police took Moody into custody and held her in jail until the damage was completed. The facts also showed that the police acted "in concert with the rioters." Moody never denied that the house had been run as a bawdy house and that she had run it for a number of years. Ely, acting for Moody, sought to reinstate the trial court's verdict in Moody's favor for \$4,500 damages. The county had won at the appeals level, and Ely appealed to the New York Supreme Court seeking a return to the original decision.

In a unanimous decision, Judge William W. Scrugham wrote that Moody's failure to provide notice of any threat or attempt against her property did not void her claim. After notice to the proper officer, he was supposed "to take all legal means to protect the property attacked or threatened." But because Moody heard of the attack after it had begun and was then confined, by the police, her duty to report the attack was impossible, especially after the property's "total destruction."

Scrugham added more details of the case in his decision. At trial, the county had tried to picture Moody's bawdy house as a "ren-

devoid of thieves, robbers, and murderers."⁸³ The specific reason for the mob action or riot also appeared. The night preceeding the riot, "a resident and citizen of the town . . . in exercise of his duty as a policeman" was murdered near the house, and the town's people, including the rest of the police force, rioted.

The county argued that it was not liable for the damages to the houses because of a clause in the statute that negligence on the injured party's part exempted the county from payment.⁸⁴ But the court turned down this argument. Keeping a bawdy house and allowing disreputable people to congregate at the house was "criminal wickedness," Scrugham wrote, but keeping a bawdy house did not equal either carelessness or negligence in the sense intended by the 1855 statute. Bawdy houses were nuisances and courts stood ready to abate the use of the building as a nuisance. As the court said about this bawdy house, "the destruction of the building and its furniture is not necessary to its abatement, and is unlawful; so too, are riots and mobs."⁸⁵

Scrugham, in dicta, then spoke of the law's responsibility to protect property. Like Wood, Scrugham empathized with the hostile indignation bawdy houses created in neighborhoods. Yet the indignation did not justify unlawful acts against the property. And even if the general public should become motivated toward violence against the property, such violence should "be kept within lawful bounds by the public authorities, whose duty it is to prevent all riots, and to protect all property from injury" Just because Moody kept a bawdy house in her property did not place the property "beyond the pale of the law's protection by her detestable and criminal conduct"

She still had the right to expect and to rely implicitly upon the zeal and ability of the proper public officers to defend her house and furniture against the unlawful effects of any public indignation her evil practices might provoke.

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A bawdy house was entitled to legal protection from mobs just like any other kind of property. Moody's activities caused public indignation, but this indignation if handled through legal channels would not have led to the destruction of her property; therefore, she had not been

careless or negligent with her property.

Ely provided an early judicial statement favoring police "neutrality" in mob situations and demonstrated how far at least one court would go to try to maintain order and protect property. Later treatise writers, Wood included, cited Ely as proof of judicial interest in both abating bawdy houses and preventing their destruction by mobs.⁸⁷

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The final body of case law does not deal with the criminal offense of keeping a bawdy house or disorderly house or the standards of who keeps and who to prosecute. A last section of cases comes out of the civil law courts in equity in actions seeking to enjoin and abate bawdy houses as common public nuisances. In these cases private individuals sought civil courts to declare the houses and their use as nuisances and to restrain them from further immoral use. Private individuals brought these suits and bore the burden of proving special damages beyond their neighbor's by the nuisance. As shown in the previous chapter, the legal writers from Blackstone onward urged criminal prosecutions of bawdy houses through the indictment process rather than private actions through civil suits to make courts abate nuisances. The criminal courts handled the overwhelming majority of cases involving disorderly houses and bawdy houses, but occasionally someone attempted a civil remedy seeking relief from a nuisance. However, the scarcity of such suits in the nineteenth century is impressive in showing the legal profession's dislike of such suits when juxtaposed to the use of the civil remedy of the red light abatement acts of the Progressive Era. Previous to the reform, most cases were decided in the criminal courts, and after the reform most of the actions against houses used for an immoral purpose took place in the civil courts in equity.

America's earliest civil case enjoining a bawdy house arose from Baltimore in 1857, Margaret Hamilton v. John Whitridge and others.⁸⁸ The case came before the Maryland Supreme Court after the trial court granted the prayer for injunction and the circuit court upheld the injunction. Prefacing the Supreme Court's opinion, the Maryland reporter included the circuit court's opinion so that in Hamilton the

two judicial levels of opinion can be seen. At the circuit level, Judge William George Krebs presented the facts of the action and wrote a lengthy opinion. The trial court had granted an injunction against Hamilton restraining her from occupying and using a house at 51 Frederick Street as a house of ill fame. Plaintiffs sought to prevent the establishment of a bawdy house in their neighborhood rather than close down one already in operation; the suit wanted to prevent a prospective use, not curtail a present one. One of the citizens aligned with Whitridge in the suit owned and lived next door to the house Hamilton bought, 49 Frederick Street. Plaintiffs argued in brief to the circuit court that they suffered from the nuisance in general with the rest of the neighborhood but that "they will [also] be especially wronged and injured . . . , and that [their property] will be greatly depreciated and lessened in value"⁸⁹ Further, the plaintiffs argued to Krebs that their remedy at law was not adequate and they were "remediless" against the nuisance unless Hamilton could be enjoined from moving into the house.

In her response, Hamilton admitted she purchased 51 Frederick Street and planned to occupy it and attacked the plaintiffs' standing to bring the suit. Number 49 Frederick Street was owned by one of the plaintiffs, Rezin Haslup, but the other three plaintiffs lived away from Frederick Street although they owned shops on the street. To their allegation that she kept bawdy houses for a living and was a reputed bawd herself, she declined to answer in order not to incriminate herself.

Krebs, after reviewing both briefs, recounted the facts as he saw them. To the above description he added that Haslup lived next to the house Hamilton purchased with "his wife and three daughters aged, respectively, fourteen, sixteen, and eighteen years." Krebs brought to light Hamilton's two convictions for keeping a bawdy house in June and November of 1855 in Baltimore to show that she intended to turn the Frederick Street address into a house of prostitution as well. Krebs proved, to his satisfaction, that Hamilton wanted to create an indictable public nuisance in the house, but did his court have "the power, by injunction, to restrain her from doing so?"⁹⁰

To answer his own rhetorical question, Krebs turned to legal treatises and case law, mostly British, on the question of the abatement of nuisances although none of the cases dealt with a bawdy house. In the end, Krebs answered yes, the nuisance of a bawdy house could be abated and his court had the power to do just that.⁹¹ But in order to reach his conclusion, he had to dispose of Hamilton's lawyer's argument that the suit sought not to abate a physical nuisance but to make the court a "moral censor." In other words, Hamilton tried to argue that a bawdy house was not a physical nuisance but a moral one. With this argument, Krebs did not agree. He reminded Hamilton that the suit was grounded not on the offense to the community's morals but on the law's opposition to the business and the use of property she proposed. He called the keeping of a bawdy house an "illegitimate employment and a public nuisance."⁹² Her immoral use of the property depreciated the value of the plaintiffs' property which was the cause of the action to prevent her move. Krebs stated that he could find no basis or authority which divided actions against physical nuisances, which courts could abate, from moral nuisances, which courts could not abate. Actions in equity against bawdy houses as nuisances could be successful if the injured party showed special damages, as Whitridge and others had done, and Krebs continued the injunction against Hamilton.

Hamilton continued up the appeals ladder from Krebs's circuit court to the Maryland Supreme Court. At this level, Hamilton's lawyer argued first that no proof existed that she was going to keep a bawdy house in the building. Second, even if she was going to keep a bawdy house there, the court's issuance of an injunction at the urging of the private parties was the wrong judicial response. The trial court should have waited for the exhaustion of criminal proceedings because the remedy was at law and not in equity. Third, a private remedy for the nuisance was incorrectly sought because the nuisance was not a physical nuisance nor did it result in the loss of "the physical enjoyment of the comfort or the tenements of the complainants."⁹³ Whitridge did not submit a brief to the Maryland high court.

Judge William Hallam Tuck, writing for an unanimous Supreme Court, agreed with the description of facts as presented by Krebs in the lower court and agreed that Hamilton was preparing to open a bawdy

house in the building. That ruling, however, still left the question of whether equity courts in America had the power to issue such injunctions against nuisances which deprived persons of the enjoyment of their property and lessened that property's value. Tuck reviewed the difference between an indictment at common law in the criminal courts and the position of equity to effect a remedy when the injury complained of was not adequately covered by the indictment process. In Hamilton, Whitridge did not want Hamilton to open a bawdy house and Tuck ruled that equity courts could both prevent and remedy evils to a person's property.⁹⁴

On this ground, Tuck could have ended his decision and upheld the injunction, but he continued, in dicta, to drive home the concept of the use of equity to abate and prevent bawdy houses. In particular, Tuck spoke to defense's suggestion of a difference between physical and moral nuisances and the equity court's ability to reach physical nuisances and their supposed inability to affect moral nuisances. Tuck's own words best reveal his opinion on such a proposition:

. . . it would be strange, indeed, if when the court's powers invoke for the protection and enjoyment of property, and may be rightfully exercised for that purpose, its arm should be paralyzed by the mere circumstance that, in the exercise of this jurisdiction, it might incidentally be performing the functions of a moral censor, by suppressing a shocking vice denounced by law, and amenable to its penalties from the earliest times. And if, the authorities show, the court may interfere when the physical senses are offended, the comfort of life destroyed, or health impaired, these alone being the basis of the jurisdiction, the present complainants, . . . should not be disappointed merely because the effect of the process will be to protect their families from the moral taint of such an establishment as the appellant proposes to open in their immediate vicinity. 95

Maryland's Supreme Court affirmed the decision of the lower courts and continued the injunction against Hamilton.

The right of equity courts to take cognizance over private actions against the nuisance of bawdy houses was Hamilton's contribution. It set the rule and provided the precedent for the law and private individuals, but lawyers and private individuals never used the process of actions in equity with much frequency and twenty-seven years after Hamilton the New York Supreme Court held just the opposite--

that courts of equity could not enjoin and restrain bawdy houses. Jacob Anderson v. Eunice J. Doty (1884) arose out of Rochester, New York, with Anderson alleging damage to his property by a decreased property value and a poorer class of renters. He also sought money damages in the sum of \$3,000.⁹⁶ Judge William Rumsey wrote the majority opinion for a split court. He was swayed by Doty's arguments that for an equity court to act a nuisance had to be a physical, present nuisance. In particular, Rumsey placed great weight on Anderson's failure to allege bothersome noise, physical discomfort, or tangible injury to his property. Anderson had complained of "consequential" injury from people avoiding the house, and because he had to show he was injured beyond his neighbors by "some sensible physical discomfort or visible injury to property."⁹⁷ Physical damage to property had to be proven before an action to abate could be sustained. Furthermore, Rumsey equated the keeping of a bawdy house with a crime. Courts of equity were not "proper tribunals" to control crime. Rumsey, a bit naively, wrote that if Anderson and "all persons aggrieved by the existence of such places" would use the criminal courts, "the law would be promptly and vigorously enforced."⁹⁸ Use the criminal law, he urged, because the civil courts in equity could not abate the nuisance.

Judge George Baker disagreed and read his fellow judges and legal audience the law of nuisance applied against bawdy houses. Citing Hamilton, Baker held that Anderson was entitled to equitable relief and that Anderson's alleged injuries did not have to be physical, sensible damages. The loss of property value and renters was enough. Baker also believed that cash damages of \$3,000 should have been awarded.⁹⁹ Rumsey and the court overturned the trial court's injunction against Doty that Baker wanted to see continued. Anderson threw the viability of nuisance actions in doubt.

Another New York case seven years later overruled the Anderson decision and brought New York's case law principles in line with mainstream thinking on civil suits seeking injunctions and on the use of property. The 1891 case of John P. Cranford et al. v. Martin D. Tyrell presented the New York Supreme Court with a similar case situation as Anderson.¹⁰⁰ Cranford sought to restrain Tyrell from running a bawdy house in his property and to recover damages caused by the nuisance.

Judge John C. Grey recited the standard rule--the standard of special damages--that in order to support a private suit substantial injury had to be shown from a nuisance. Public authorities saw to the termination of such nuisances through the criminal law. Grey then spent a few minutes on the just use of property and when courts could interfere with private property. Clearly Grey hoped property would be used wisely and legally. He wrote, "One who uses his property lawfully and reasonably, . . . can do injury to nobody." As a general rule the law could not interfere with anyone's enjoyment of his property if the individual did not "invade the legal rights of his neighbor." But if his use rendered neighbor's property "uncomfortable" or damaged the neighbor's health, a private action could be supported in a civil court.¹⁰¹ Tyrell operated a common nuisance which sufficiently affected Cranford's property to show special damages. Therefore, Cranford deserved the injunction, and Grey overturned the 1884 Anderson decision.

Occasionally persons became frustrated with the criminal law, even when it acted, and they initiated civil suits against bawdy houses and their keepers. The controversy involved in one of these suits reached the Texas Supreme Court in 1884, G. B. Marsan v. A. F. French.¹⁰² French owned a lot and house in Galveston, Texas, which he had acquired in 1873 and where he lived with his wife, three small children, and his wife's five sisters. Marsan bought the lot next door in 1878 and built three houses on the property, "all built close to each other, without yard room, and in close proximity to [French] which he rented to prostitutes to ply their trade." Such buildings were known as "cribs," small poorly built houses rented at high rates to prostitutes. French had filed numerous criminal complaints against the tenants of the buildings, and the Galveston county prosecutor had charged and tried the tenants for keeping bawdy houses. But instead of closing down the houses, the defendants pleaded guilty, paid their fines, and went back to their work. Marsan took no action to stop the use of his property for prostitution. French did not want the women in the cribs to pay their fines and go back to work; he wanted the houses closed and the women in the cribs to move away and take their nuisance with them.

French then tried the civil side of the law, and at trial Judge William H. Stewart granted the request for the injunction and awarded French \$1,000 in damages.

Marsan appealed and Judge John W. Stanton, for a unanimous Texas Supreme Court, upheld the lower court's action as a just use of equitable relief.¹⁰³ Marsan had permitted his property to be improperly managed thereby injuring the rights of a neighbor, and for that reason Stanton let the injunction stand against the property. French shut off Marsan's possible argument of trying the criminal law instead of the civil law, and once it became clear that Marsan would not stop the immoral use of the property French's suit was justified as a remedy against the nuisance.

Confusion reigned in a Washington state case which provided a mix of criminal procedure against keeping a bawdy house, civil procedure against the nuisance of a bawdy house, and some creative police administration by the local sheriff. Washington's Supreme Court sorted out the case of Mary E. Coffey alias Mollie Rosencrans v. Territory of Washington in 1890.¹⁰⁴ An exasperated Chief Judge Thomas J. Anders noted in his decision "This case is sui generis." It was in Tacoma, Washington, in October 1888 when Coffey rented a house to Nettie Parnell. W. H. Snell, prosecuting attorney for the territory, initiated a criminal indictment against Parnell for maintaining a nuisance by keeping a house of ill fame. At this point the territorial court directed the sheriff of the county to abate the nuisance, a civil remedy. The territory's criminal action did not involve Coffey who, after Parnell left the area, assumed control of the property. The sheriff did not immediately obey the court's request to abate the nuisance, but five months later, in March 1889, the sheriff "placed a keeper in the house without the consent and against the will of the owner thereof." The sheriff left the keeper on the premises until late April at a cost of five dollars a day to Coffey who still had not been charged with any crime. In May the sheriff filed an affidavit to the court saying that his investigations showed that Coffey continued the nuisance begun by Parnell so he, the sheriff, set into action the court's request for an abatement of the nuisance. Snell, in May 1889, went to court seeking an execution of the abatement order and \$514 in damages from Coffey

for the expenses incurred in keeping her property from being used as a house of prostitution. Coffey lost at trial and appealed.

Judge Anders wanted nothing to do with the whole unfortunate affair, but he began by saying that the only allegations against Coffey were in the sheriff's affidavit and "that was manifestly insufficient in law to warrant the subsequent action of the court."¹⁰⁵ The sheriff's motivation fooled no one; he wanted to obtain a court order to regain his expenses from Coffey for a nuisance carried on by Parnell whom the sheriff failed to abate in the first place. The sheriff's keeper amounted to nothing more than a trespasser, Anders argued, and he delivered a first-year law-school lecture on the difference between a criminal indictment against a bawdy house and a civil suit to enjoin a nuisance. In either case, the sheriff's and the court's actions had to conform to law. Coffey may have continued to run a bawdy house from the premises, but the legal actions were against Parnell and enforcement should have never been tried against Coffey.¹⁰⁶ Anders upheld Coffey's demurre and objection to the whole proceeding and reversed the lower court's orders against Coffey.

Coffey showed the troubles that local police and judges and courts and prosecutors could get themselves into when acting against the disorderly house of bawdy houses. But Coffey was an exception and by the end of the century private individuals were successfully using the equity courts to close down bawdy houses in their neighborhoods. Two cases demonstrate the sorts of situation from which persons sought relief. In N. J. Blagen v. R. C. Smith (1899), Blagen sought to enjoin Smith from operating houses as prostitutes' cribs in Portland, Oregon.¹⁰⁷ Blagen owned a four-story building worth \$8,000 which, he argued, depreciated in value due to the operation of the cribs diagonally across from the building. He asserted that the depreciated value showed special damages entitling him to equitable relief and an injunction to abate the nuisance in Smith's buildings. Smith countered that he, too, had an investment to protect in the buildings in question. He had spent \$5,000 to repair the buildings, and the only way he could recoup his investment was to keep the houses rented. Smith denied he rented the houses for immoral purposes; he rented them to "any person who might

wish to rent them." He further admitted that "they were cheap" and purposely so because they were located next to wharves on the Willamette River which commonly flooded. Smith argued that no one except "the poorest class of people" would use the buildings as a residence and that the area was removed from the city center and was infrequently traveled, especially by ladies. The trial court granted a temporary injunction pending trial where Blagen produced evidence to show that in spite of the temporary injunction, "five or six Japanese prostitutes had moved into the buildings."¹⁰⁸ Further, the trial court found that Blagen's building did not suffer any injuries beyond those of his neighbors since the whole area was a semi-vice district called the Whitechapel district. Within the district, the court located fifteen saloons and twenty-eight other cribs. Blagen lost his motion for a permanent injunction and appealed.

For a unanimous Supreme Court, Judge Frank A. Moore reviewed private nuisance actions in Oregon's law and nuisance actions generally, relying on Wood's Law of Nuisances¹⁰⁹ to show bawdy houses as a type of nuisance. Blagen was entitled to relief, said the Oregon court, even though his business and property were within such a district. Moore hypothetically suggested that if the law could not reach a bawdy house in a district, then a bawdy house and a church might exist side by side. Rhetorically he asked,

If it were possible for such a thing to exist unmolested in a civilized community, what measure of damages in an action at law would compensate outraged decency, dispel the blush of shame that flashes the modest cheek of virtue, or still the conscience of those who would worship in a sanctuary that was maintained in the least degree by money collected as indemnity from the maintenance of a brothel.¹¹⁰

But no need to worry, Moore held, because all city property was damaged by the presence of bawdy houses, and if a person's property was so close to a public nuisance to injure the enjoyment of the property that property owner was entitled to an injunction. Smith's use of his property for cribs damaged Blagen's building enough to support the action for relief. Moore overturned the trial court's finding and granted the permanent injunction.

A last case varied the fact situation from Blagen, but the legal thinking on private nuisance actions remained consistent. In another Washington case, E. Dempsie v. F. L. O. Darling et al. (1905), Judge Ralph O. Dunbar for the Supreme Court overturned a trial court's decision denying an injunction.¹¹¹ Dempsie did not own a house or a building for Darling's bawdy house on the second and third floors of an adjoining building to damage. Rather, Dempsie owned a vacant lot next to Darling's bawdy house. In a prospective statement, Dempsie feared that any building he might put up on the lot would be hurt by falling property values because of the continuing presence of the nuisance of a bawdy house. On this ground, Dempsie sought an injunction. Darling demurred, arguing a technicality that the complaint failed to "state facts sufficiently to constitute a cause of action." The local court sustained Darling's demurrer and Dempsie appealed.

Judge Dunbar struck down the trial court's determination of the complaint and denied that Dempsie's argument of future damages was too "remote and speculative."¹¹² Dunbar believed it unreasonable to deny legal action until Dempsie had gone to the expense of constructing a building and advertising for renters. Dempsie's right to enjoy his property "without hindrance through the operation of a nuisance" need not be denied until he built on the land. Darling's operation of a bawdy house from the next building fulfilled the court's usual requirement of evidence of immediate injury to the property, Dunbar noted. The nuisance of bawdy houses were different from other nuisances and courts could relax their standards of evidence a bit to control the evil. Bawdy houses were

. . . degrading, immoral, indecent, and always under
ban of the law, and courts ought not be too exacting
with citizens who are asking relief from such
impositions upon their rights.

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Dunbar and his fellow judges decided Dempsie deserved the injunction and overturned the trial court's denial of an equitable relief.

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Out of this long series of case law comes a feeling of trial courts, appeals courts, and prosecutors not being confident when they dealt with disorderly house/bawdy house cases regardless of whether the

case involved a criminal indictment or a civil nuisance action. Treatise writers wrote with clarity and precision on disorderly houses, but judges, prosecutors, state appeals judges argued and wrote about real litigations involving conflicting parties, and the whole area of disorderly house law appeared far less clear cut. In some cases the treatise writers reflected the case law, as with the judicial determination that a house need not be kept for gain or that the keeper of a bawdy house was the person who held him/herself out to the world as such. At other times, the case law followed the received legal traditions. Throughout the period, courts, reflecting Hawkins's influence, considered bawdy houses nuisances because of the threat they posed to the community by the congregating of dissolute and vagrant persons who tended to endanger the community and undermine its morals. But despite the legal treatise writers' disapproval of private nuisance actions, persons sought equitable relief more and more as the nineteenth century ended, and the courts, if not the doctrinal writings, allowed the actions to stand.¹¹⁴

The Progressive moral reformers were wrong when they said that the use of law against property used to house prostitutes did not work. The law worked but it worked within its own environment and traditions and within its own constraints. Reformers wanted an overnight change in the law to close down bawdy houses speedily and effectively. They achieved their goal by grafting on to the law the red light abatement acts which substantially changed the law's approach to property used for immoral purposes. Through legal writings and through the evolving principles from cases, the law of disorderly houses may have changed enough on its own to quiet the purity reformers' moral indignation at the law's apparent slowness and over-technicality. But the red light abatement acts shortcircuited any such development. And they broke the chain of principles, treatises, and case law that had composed the law of disorderly houses which separated the disorderly house law of the nineteenth century from the disorderly house law of the twentieth century.

Notes

¹A few of the most important works are, in alphabetical order: Charles Fisk Beach, *Commentaries on the Law of Injunctions, As Determined by the Courts and Statutes of England and the United States* (2 vols., Albany: H. B. Parsons, 1895); Joel Prentiss Bishop, *Commentaries on the Criminal Law* (2 vols., Boston: Little, Brown, 1856-1858, plus editions); Thomas M. Cooley, *A Treatise on the Constitutional Limitations Which Rest Upon the Legislative Power of the States of the American Union* (Boston: Little, Brown, 1869); Nathan Dane, *A General Abridgement and Digest of American Law* (Boston: Cummings, Hilliard & Co., 1823); John F. Dillon, *The Law of Municipal Corporations* (New York: James Cockcroft & Co., 1873); James L. High, *A Treatise on the Law of Injunctions* (Chicago: Callaghan and Co., 1905, 4th edition); Howard C. Joyce, *A Treatise on the Laws Relating to Injunctions* (3 vols., Albany: Matthew Rander & Co., 1909); James Kent, *Commentaries on American Law* (Philadelphia: Blackstone Publishing Co., 1826-1830); Joseph Story, *Commentaries on the Constitution of the United States: with a preliminary review of the constitutional history of the colonies and states, before the adoption of the Constitution* (Boston: C. C. Little and J. Brown, 1833, second edition, 1851); Christopher G. Tiedeman, *A Treatise on the Limitations of Police Power in the United States considered from both a Civil and Criminal Standpoint* (St. Louis: The F. H. Thomas Law Book Co., 1886); Horace G. Wood, *A Practical Treatise on the Law of Nuisances, in their Various Forms; including Remedies Therefor at Law and in Equity* (Albany: John D. Parsons, Jr., 1875). For a complete listing of the legal treatises consulted, see the bibliography. Although the charge in the cases reviewed is one of keeping a disorderly house, my research focus is on those disorderly house cases which deal with bawdy houses.

²Rarely was the case of a court of original jurisdiction, the trial court, reported. Usually the person convicted of keeping a disorderlyhouse did not appeal their convictions. Instead, they paid their fines, perhaps served a month or two in the county jail, and went back to work until indicted again. So although a good many cases did not make it up to the appeals level, those cases were typical of the majority of disorderly house cases.

Not all appeals disorderly house cases can be reviewed in the body of this chapter. For a listing of all disorderly house cases with an emphasis on bawdy houses, see the appendix at the end of the chapter.

³*Commonwealth v. Reuben Harrington*, 3 Pick. (20 Mass.) 26 (1825).

⁴*Ibid.*, p. 27. The case lists Harrington's attorney's last name, Dunlap, who used two Massachusetts case citations and four English cases in his brief.

⁵*Commonwealth v. Harrington*, p. 29.

⁶*Ibid.*, pp. 29-31. parker discussed four cases in his decision, all English.

⁷*United States v. Jacob Dixon*, 4 Cranch C. C. (4 Dist. of Col.) 107 (1830). For other cases arising out of the District of Columbia, see *United States v. Charles Columbus*, 5 Cranch C. C. (5 Dist. of Col.) 304 (1837); *United States v. Coulter*, 1 Cranch C. C. (1 Dist. of Col.) 203 (1804); *United States v. Henry Grey*, 2 Cranch, C. C. 675, 26 Fed. Cases, no. 15,251 (1826); *United States v. Harriet and Henrietta Jour-dine*, 4 Cranch C. C. (4 Dist. of Col.) 338 (1833); *United States v. Adam Lindsay*, 1 Cranch C. C. (1 Dist. of Col.) 245 (1805); *United States v. Sally McDowell*, 4 Cranch C. C. (4 Dist. of Col.) 423 (1834); *United States v. Priscy Nailor*, 4 Cranch C. C. (4Dist. of Col.) 372 (1833); *United States v. W. Prout*, 1 Cranch C. C. (1 Dist. of Col.) 203 (1804); *United States v. Polly Rollinson*, 2 Cranch C. C. (2 Dist. of Col.) 13 (1810); *United States v. Jemima Stevens*, 4 Cranch C. C., Fed. Cases, no. 16, 391 (1833); *United States v. Eliza Warner*, 4 Cranch C. C. (4 Dist. of Col.) 342 (1833). These cases dealt with pro-

secutions of taverns as disorderly house for selling liquor on Sunday, for selling to slaves and negroes, and holding the admissibility of general reputation of the house at trial in the District.

⁸**United States v. Jacob Dixon**, p. 109 and the next quote, Act of 1797, c. 110, sec. 2.

⁹Cranch cited no American or English case or treatise.

¹⁰**United States v. Jacob Dixon**, p. 113. Compare this quote with William Hawkins's **A Treatise of the Pleas of the Crown** (London: E. Sayer, 1724-1726, reprinted New York: Arno, 1972), 196. A bawdy house fell to the cognizance of the common law not only in respect of its endangering the Public Peace, by drawing together dissolute and debauched Persons, but also in respect of its apparent tendency to corrupt the Manners of both Sexes, by such an open Profession of Lewdness.

Like the definition of prostitution, Cranch's inclusion of the need for lucre or gain was eventually dropped. See text below and **State v. D. Bailey**, 21 N.H. 343 (1850).

¹¹**Woodruff Cadwell v. State of Connecticut**, 17 Conn. 467 (1846).

¹²The other points of contention was the meaning of the term "bawdy house" in the 1845 statute and the testimony of another less important writer than Alford which defense tried to dismiss as irrelevant.

¹³**Cadwell v. State**, pp. 470-471.

¹⁴**Ibid.**, p. 471. For the state statute, see Statutes of Connecticut of 1845, c. 20, p. 22. No work exists comparing the dates when states began to pass disorderly house statutes though Connecticut's is one of the earliest I know of.

¹⁵**Cadwell v. State**, p. 472.

¹⁶**Ibid.**

¹⁷**State of Iowa v. Hand**, 7 Iowa 411 (1858) and **State v. Lyon**, 39 Iowa 379 (1874).

¹⁸**State v. Hand**, p. 412. Hand is the appellant although the case name is not reversed as is standard practice.

¹⁹**Ibid.**, p. 413.

²⁰**State v. Lyon**. 39 Iowa 379 (1874). Lyon won because of the exclusion of general reputation and Iowa appealed.

²¹**State v. Lyon**, p. 380. To stay on the focus of **Hand** and **Lyon**, some case law will be skipped over. The more interesting of the cases will be annotated here and see the appendix for cases between the years 1858 and 1874 for the rest of the disorderly house and bawdy house cases to reach the appeals level. One interesting pre-Civil War case arose out of Texas in 1858, **Charles Stephanes v. State**, 21 Texas 194. The appeal came from Harris County which included Houston

and struck down an indictment charging Stephanes with keeping a disorderly house "by allowing and permitting great numbers of drunken negroes to congregate and use indecent language, and entertaining them to the great annoyance, etc." For other cases, see *State v. Laura Main*, 31 Conn. 572 (1863), involved indictment difficulties; *State v. John Foley*, 45 N.H. 466 (1864), underlined the idea that houses have to be existing in fact and not merely by reputation; *Cora Morris v. State*, combined with *Mollie Williams v. State*, 38 Texas 604 (1873), held that the reputation of a house in a community was sufficient to prove its use in direct contradiction of previous cases and *Lyon* a year later. Two other Texas cases with indicting problems that reached only the Texas Court of Appeals level were *Helen Bigby v. State*, 5 Tex. App. 101 (1878) and *Kate Lowe v. State*, 4 Tex. App. 34 (1878).

Usually disorderly houses and bawdy houses are thought of as a house or building. But not exclusively so in law. For example, in the case of *Bill Killman v. State*, 2 Tex. App. 222 (1877), the Texas Appeals Court held that a tent could be a disorderly house kept for prostitution. Another example would be *Charles Tracy v. State*, 42 Tex. Cr. R. 494, 61 SW 127 (1901) where the Texas Court of Criminal Appeals held a wagon to be a disorderly house. Tracy hired women by the month to travel with him by hack and wagon. He received part of their income from prostitution carried on from the wagon.

²²*State of Maine v. Joseph E. Boardman*, 64 Me. 523 (1874).

²³*Ibid.*, p. 526. Both defense and the state submitted briefs to the court which the reporter synopsized on pp. 526-258.

²⁴*State v. Boardman*, p. 529.

²⁵*Ibid.*, p. 530. Dickerson distinguished *Boardman* from *Cadwell v. State*, 17 Conn. 467 (1846) which held that it was necessary to prove the general reputation of the house and that it was so in fact. *Boardman* limited *Cadwell* by dropping the need for reputation and focusing solely on the fact of the use of the house as a bawdy house.

²⁶Following *Boardman*, see *Thomas Henson v. State of Maryland*, 62 Md. 231 (1884); *Ann Handy v. State*, 63 Miss. 207 (1885); *State v. Hendricks*, 15 Mont. 194, 39 Pac. 93 (1895); and *M. N. Bass v. State*, 66 SW 558 (1902).

Cases in conflict with *Boardman*, see *William C. Drake v. State*, 14 Neb. 535, 17 NW 117 (1883); *Sara v. State*, 22 Tex. App. 639, 3 SW 339 (1887); *H. A. Sprague v. State*, 44 SW 873 (1898); *Minnie Wimberly v. State*, 53 Tex. Cr. R. 11, 108 SW 384 (1908).

For other cases touching on *Boardman* issues, see *Ed Harkey v. State*, 33 Tex. Cr. R. 100, 25 SW 291 (1894); *Kate Gamel v. State*, 21 Tex. App. 357, 17 SW 158 (1886); *L. Ahr v. State*, 31 SW 657 (1895); *James Forbes v. State*, 35 Tex. Cr. R. 24, 29 SW 784 (1895); *I. Golden v. State*, 34 Tex. Cr. R. 143, 29 SW 779 (1895); *T. F. Brady v. State*, 57 SW 647 (1900); and *Dolly Owens v. State*, 53 Tex. Cr. R. 1, 108 SW 379 (1908).

²⁷*State v. Bailey*, 21 N.H. 343 (1850).

²⁸Bell cited three English cases, five English treatises, and two Massachusetts cases in proving disorderly houses nuisances at common law.

²⁹*State v. Bailey*, p. 345.

³⁰*State of Iowa v. Hand*, 7 Iowa 411 (1858). One of the few law review articles to cover the offense of disorderly houses, see "What Constitutes Keeping A House of Ill-Fame," *Criminal Law Magazine and Reporter*, 7 (1886), 111.

³¹James Couch v. State, 24 Tex. 557 (1859).

³²Ibid., p. 558.

³³Ibid., p. 559.

³⁴Neither Couch's lawyers nor Judge Roberts cited any case law or treatise in their writings. The case is void of any citation to any precedent or previous thinking in the question of keeping in disorderly house cases.

³⁵State v. M'Gregor, 41 N.H. 407 (1860). The facts of the case include a verbatim copy of the Hillsborough indictment.

³⁶State v. M'Gregor, p. 410.

³⁷Ibid., p. 411.

³⁸Ibid., 412.

³⁹Ibid., 413.

⁴⁰Harwood v. People, 26 N.Y. (Court of Appeals) 190 (1863). The case arose in Syracuse.

⁴¹Ibid., p. 192. Judge Henry E. Davis wrote the opinion.

⁴²William Allen v. State, 15 Tex. App. 320 (1884), in the same vein, see John Burton v. State, 16 Tex. App. 156 (1883).

⁴³Allen v. State, p. 323. For Hand see State v. Hand, 7 Iowa 411 (1858) and above.

⁴⁴State v. Clara Hull, 18 R.I. 207 (1893). Hull kept the house in Providence.

⁴⁵State v. Hull, p. 208. Tillinghast cited cases from across the country and probably reflects the influence of the changed legal pedagogy in the regional reporter systems. With the rise of the Langdell method of legal training begun at Harvard in 1870 and his case method used to train lawyers, a national system of reporting appellate cases developed monopolized by the West Publishing Company. Tillinghast used the new legal finding aids and cases--or one of his clerks did--and wrote for a national audience while deciding a case of local concern.

⁴⁶For example, Tillinghast cited State v. Boardman, 64 Me. 523 (1874) and State v. Lyon, 39 Iowa 379 (1874).

⁴⁷State v. Hand, 7 Iowa 411 (1858).

⁴⁸Hull's attorney tried a variety of arguments to cover his client's case. He argued for a new trial on the grounds that the prosecutor's closing remarks so prejudiced that jury that Hull's right to a fair trial was compromised. The prosecutor argued that Hull, by not taking the stand in her own defense but instead choosing to remain silent, tacitly concurred with the charges against her. This statement influenced Tillinghast too, and he would not allow it to stand.

It was the defendant's privilege as well as right, not only to remain silent herself, but also not to offer any testimony in her defense, but to rely on the presumption of innocence which obtained in her favor, and the insufficiency of the evidence produced by the State to convict her (pp. 211-212).

In other words, just because Hull was charged with keeping a bawdy house did not mean she lost her rights against self-incrimination. The state had to prove her guilty, she did not have to prove her innocence. Prosecutors prove your charge, said Tillinghast, because the appeals courts stood ready to support a defendant's right to presumption of innocence.

Despite Tillinghast's decision, his writing did not reach every judge, court, and state; see *Mrs. E. J. Daily v. State*, 55 SW 823 (1900) which admitted the bad reputation of the keeper.

⁴⁹*Anna J. Clementine v. State of Missouri*, 14 Mo. 112 (1851).

⁵⁰*Ibid.*

⁵¹*Ibid.*, p. 113.

⁵²*Commonwealth v. Timothy Kimball*, 7 Grey (73 Mass.) 328 (1856). See following *Kimball, Commonwealth v. Edward Gannett*, 1 Allen (83 Mass.) 7 (1861) and the admission of a conversation, see *Commonwealth v. Joseph A. Harwood*, 4 Grey (70 Mass.) 41 (1855).

⁵³*Commonwealth v. Kimball*, p. 330. The influence of Hawkins's *Pleas of the Crown* on American law of disorderly houses can be seen again in *Kimball*. Judge Bigelow later in the decision paraphrased Hawkins.

The nuisance [of bawdy houses] consists in drawing together dissolute persons engaged in unlawful practices, thereby endangering the public peace, and corrupting good morals. (p. 331)

Compare with William Hawkins, *A Treatise of the Pleas of the Crown* (London: E. Sayer, 1724-1726, reprinted New York: Arno, 1972), 196.

⁵⁴*Mary Sylvester v. State*, 42 Tex. 496 (1875).

⁵⁵*ibid.*, p. 497.

⁵⁶Gould went on to underline a minor point of law. Sylvester argued that "she lived quietly, peaceable life, and that there was no noise or disturbances at the house." No matter, "disorderly" referred not how peaceably a house was kept but the immoral use of the property to house prostitutes.

⁵⁷*Sparks v. State*, 59 Ala. 82 (1877) and *Toney v. State*, 60 Ala. 97 (1877). See also *Harriet Perry et al. v. State of Nebraska*, 37 Neb. 623, 56 NW 315 (1893), the "et al." was another defendant in the case, Maria Longscrew.

⁵⁸Only a few cases focus on the admissibility of the general reputation of frequenters of bawdy houses and they appeared in the early to mid-nineteenth century. See *Benjamin Brooks v. State of Tennessee*, 2 Yerg. (10 Tenn.) 482 (1831); *United States v. Jemima Stevens*, 4 Cranch C. C. 341, 27 Fed. Cases no. 16, 391 (1833) and *Commonwealth v. Joseph A. Harwood*, 4 Grey (70 Mass.) 41 (1855).

⁵⁹*Commonwealth v. Wood*, p. 227.

⁶⁰*Ibid.*, p. 227.

⁶¹Trusts developed--or rather were manufactured by lawyers--as a means for married women to continue to hold separate property. Yet even in an equitable trust, the woman needed a male trustee even if it was only a technicality.

⁶²*Commonwealth v. Wood*, p. 227.

⁶³*Ibid.*, p. 228.

⁶⁴Massachusetts had recently passed a married women's property act and defense argued that the state statute had changed the common law rule of coverture. No so, Chapman ruled. It did not "take away his power to regulate his household so far as to prevent his wife from committing this offense, or relieve him from responsibility [to stop her business] if it is committed." For another case of husband/wife, see *A. W. Willis v. State*, 34 Tex. Cr. R. 148, 29 SW 787 (1895).

A variation of this case can be found in *Mrs. R. Cook v. State*, 42 Tex. Cr. R. 539, 61 SW 307 (1901), where a mother beat a conviction for keeping--although she exercised some control over the house, invited men there, paid the property's taxes, lived in one room, and was herself a prostitute--because her daughter held the lease to the house and the state statute specified the "owner, lessee, and tenant."

⁶⁵*Mrs. John Jackson v. State*, 77 Tex. Cr. R. 483, 179 SW 711 (1915). for similar cases see *Rabb v. State*, 13 SW 1000 (1890) and *Mrs. E. Morse v. State*, 47 SW 989 (1898).

⁶⁶*Jack Flynn v. State*, 35 Tex. Cr. R. 220, 32 SW 1041 (1895). Texas disorderly house cases holds a prominent position in the case law of the late nineteenth and early twentieth centuries. The treatises reflected this prominence of Texas case law.

⁶⁷*Maggie Mitchel v. State*, 34 Tex. Cr. R. 311, 30 SW 810 (1895). For related cases, see *Lou Lamar v. State*, 30 Tex. App. 693, 18 SW 788 (1892); *Ab Stratton v. State*, 44 SW 506 (1858); *John Carlton v. State*, 51 SW 213 (1899); *Will Humphries v. State*, 68 SW 681 (1902).

⁶⁸*State v. Augusta A. Evans*, 27 N.C. 603 (1845). The state appealed the case because the trial court granted an arrest of judgment on the grounds that the indictment failed to allege the offense of keeping in any particular house described in the indictment. See the indictment, p. 603.

⁶⁹*State v. Evans*, p. 607. Ruffin relied on Hawkins's *Pleas of the Crown* and the English case, *Domina Regina v. Pierson*, 1 Salk. 382, 91 Eng., Rep. 333 (1795) which had a similar fact situation.

⁷⁰*Commonwealth v. Maria Lambert*, 12 Allen (94 Mass.) 177 (1866).

⁷¹The court quoted from *Commonwealth v. Charles Stahl*, 7 Allen (89 Mass.) 304, 305 (1863). Following both *Evans* and *Lambert*, see *Mollie Moore et al. v. State*, 4 Tex. App. 127 (1878); *People v. Helen Gastro*, 75 Mich. 127 (1889); *Sallie Ramey v. State*, 39 Tex. Cr. R. 200, 45 SW 489 (1898); and *State v. Henry Seba*, 200 SW 300 (1918).

⁷²*People v. Jennie Pinkerton*, 79 Mich. 110 (1889).

⁷³*Ibid.*, p. 112.

⁷⁴*Ibid.*, p. 113.

⁷⁵A variation of this theme of a single resort not a bawdy house is a case where the householder twice had sexual intercourse with his servant beat a charge of using his dwelling for the purpose of prostitution; see *State v. Irvin*, 9 NW 760 (1902).

⁷⁶*C. L. McElhaney v. State*, 12 Tex. App. 231 (1882).

⁷⁷*Ibid.*, p. 232.

⁷⁸A parallel case is *H. E. Harmes v. State*, 26 Tex. App. 190, 9 SW 487 (1888).

⁷⁹*State v. Calley*, 104 N.C. 858, 10 SE 888 (1889).

⁸⁰*Ibid.*, p. 456. Witnesses also saw one of the defendant's daughters having sexual intercourse against a barn and another had an eighteen-month-old bastard child.

⁸¹*Phineas L. Ely, Successor etc., Respondent v. The Board of Supervisors of Niagara County, Appellant*, 36 NY 297 (1867).

⁸²*Ibid.*, p. 297.

⁸³*Ibid.*, p. 299.

⁸⁴*Ibid.*, p. 300.

⁸⁵*Ibid.*

⁸⁶*Ibid.*

⁸⁷See *August Loehner and Wife, Appellants v. Home Mutual Insurance Company, Respondent*, 17 Mo. 247 (1852) and *Deer & Rose v. State*, 14 Mo. 348 (1851), as forerunners of *Ely* involving burning or assaulting bawdy house.

For more of the case law on bawdy houses and disorderly houses which touched all of the issues above see the following second level cases. *Alta Scarborough v. State*, 46 Ga. 26 (1872); *E. C. Crofton v. State*, 25 Ohio 249 (1874); *Jesusa Lasindo v. State*, 2 Tex. App. 59 (1877); *Thomas Albertson v. State*, 5 Tex. App. 89 (1878); *Mary Samlley v. State*, 11 Tex. App. 147 (1881); *Curry v. State*, 24 SW 516 (1893); *Maggie Downs v. State*, 23 SW 684 (1893); *Arch Johnson v. State*, 24 SW 410 (1893); *Mike Mansfield v. State*, 24 SW 901 (1894); *Mennie Merrell v. State*, 29 SW 41 (1895); *Clay Brown v. State*, 48 SW 176 (1890); *Lillie Hamilton v. State*, 60 SW 39 (1900); *I. Stone v. State*, 85 SW 807 (1905); *State v. George T. Olds*, 217 Mo. 305, 116 SW 1083 (1909); *Idell Riley v. State*, 58 Tex. Cr. R. 176, 125 SW 582 (1910); *A. J. Mosher v. State*, 62 Tex. Cr. R. 42, 136 SW 467 (1911); *Clara B. Bowman v. State*, 73 Tex. Cr. R. 565, 166 SW 519 (1914); *Mattie Nichols v. State*, 75 Tex. Cr. R. 67, 170 SW 304 (1914); *W. E. Chadwick v. State*, 86 Tex. Cr. R. 269, 216 SW 397 (1919).

⁸⁸*Margaret Hamilton v. John Whitridge and others*, 11 Md. 128 (1857).

⁸⁹*Ibid.*, p. 130. Italics in original.

⁹⁰*Ibid.*, p. 131.

⁹¹See the list of cited cases on p. 133 and Krebs's review of the treatises and cases, pp. 133-139.

⁹²*Hamilton v. Whitridge*, p. 140.

⁹³*Ibid.*, p. 142.

⁹⁴*Ibid.*, p. 146.

⁹⁵*Ibid.*, pp. 147-148.

⁹⁶*Jacob Anderson v. Eunice J. Doty*, 33 Hun. (NY) 160 (1884).

⁹⁷*Ibid.*, p. 161.

⁹⁸*Ibid.*, p. 163.

⁹⁹*Ibid.*, pp. 163-169. Following *Anderson*, see *Mollie Neaf v. E. Palmer et al.*, 103 Ky. 496, 45 SW 506 (1898).

¹⁰⁰*John P. Cranford et al. v. Martin D. Tyrell*, 128 NY 341 (1891).

¹⁰¹*Ibid.*, p. 344.

¹⁰²*G. B. Marsan v. A. F. French*, 61 Tex. 173 (1884).

¹⁰³*Ibid.*, pp. 175, 177. Following *Marsan* see *George F. Redway et. al. v. Jenny Moore*, 3 Idaho 312, 29 Pac. 104 (1892) and *State v. Ben M. Patterson*, 14 Tex. Cr. R. 465, 37 SW 478 (1896) where the state initiated a civil action.

¹⁰⁴*Mary E. Coffey alias Mollie Rosencrans v. Territory of Washington*, 1 Wash. 325 (1890).

¹⁰⁵*Ibid.*, p. 328.

¹⁰⁶*Ibid.*, p. 329. For another bungled case, see *Evaline Brooks v. State*, 4 Tex. App. 567 (1878).

¹⁰⁷*N. J. Blagen v. R. C. Smith*, 34 Or. 394, 56 Pac. 292 (1899).

¹⁰⁸*Ibid.*, p. 397.

¹⁰⁹*Ibid.*, pp. 339-408. See the comments in Wood's treatise in the previous chapter, Horace G. Wood, *A Practical Treatise on the Law of Nuisances, in their Various Form; including Remedies Therefor at Law and in Equity* (Albany: John D. Parsons, 1875), especially pp. 36-46.

¹¹⁰*Blagen v. Smith*, p. 407. For similar cases, see *R. L. Weakley v. W. W. Page et al.*, 102 Tenn. 178, 53 SW 551 (1899); and *E. E. Ingersoll et al. v. E. Rousseau*, 35 Wash. 92, 76 Pac. 513 (1904). Ingersoll involved cribs as well.

¹¹¹E. Dempsie v. F. L. O. Darling et al., 39 Wash. 125, 81 Pac. 152 (1905).

¹¹²Ibid., p. 127.

¹¹³Ibid., p. 129.

¹¹⁴For other private nuisance actions, see *Ex parte Allison*, 48 Tex. Cr. R. 634, 90 SW 492 (1905); *Ex parte Allison*, 99 Tex. 455, 90 SW 870 (1906); *Ethel Clopton v. State*, 105 SW 994 (1907); *Gracie Lane v. R. V. Bell*, 53 Tex. Civ. App. 213, 115 SW 910 (1909); *Ex parte Marie Morgan*, 57 Tex. Cr. R. 551, 124 SW 99 (1910); *Ex parte Ward Roper*, 61 Tex. Cr. R. 68, 134 (1911); *Ex parte M. L. Looper*, 61 Tex. Cr. R. 129, 134 SW 345 (1911); *Maud Campbell v. Wesley Peacock*, 176 SW 774 (1915); *Mrs. J. F. Moore v. State*, 107 Tex. 490, 181 SW 438 (1915); *Joseph Weis v. Superior Court of San Diego County et al.*, 30 Cal. App. 730, 156 Pac. 464 (1916).

CHAPTER FIVE

Cities, State Police Power, and Prostitution

On July 5, 1870, in accordance with powers granted in a revised city charter, St. Louis passed the "social evil ordinance." This ordinance began the city's public policy of regulating and licensing bawdy houses and of medically examining registered prostitutes for venereal disease. John C. Burnham, a historian and the best authority on St. Louis's regulation, has called the St. Louis policy a unique "social experiment."¹ No other American city attempted to implement the French or continental system of "reglementation," as it was called, and indeed no other American city would push their formal or informal policy toward prostitution to the extremes St. Louis did. Its city council turned over the administration of the ordinance to the city's new Board of Health which had a force of medical police to enforce the ordinance, the power to issue licenses to both houses and women, and the power to appoint six physicians to check the women's health. The Board of Health bought a house for use as a hospital and paid the doctor's costs through the licensing fees charged the women and houses.

This use by St. Louis of its delegated state police power to control a local vice situation deserves more attention than previous observers have given it. Burnham and others overlooked the changed legal attitudes and relationships that such a city policy entailed. They overlooked the ordinance's importance as it related to the state constitution, city/state relations, and the law which allowed city-licensed prostitution and bawdy houses. And they ignore the fact that city leaders believed that if given state authority they could control prostitution in its social, legal, medical, and police features. Post-Civil War cities actively used the state police power delegated to them in their charters to protect their citizens' welfare and morals and to improve the quality of city life. Therefore, this chapter focuses on what Burnham does not, cities and their use of state police power to control and limit the social problem of prostitution and the physical problem of bawdy houses. Three elements of the neglected area are em-

phasized: first, how cities applied delegated power to control local prostitution situations; second, the legal issues involved in St. Louis's regulation as seen through a previously unexamined series of litigations arising from the city's social experiment; and third, the legal issues involved in America's most famous vice district, New Orleans's Storyville, as seen through litigation before Louisiana's Supreme Court and the Supreme Court of the United States.

The phrase the "state police power" describes the duty of individual states to act on behalf of their citizens' health, safety, welfare, and morals. A more precise definition has eluded legal writers, constitutional commentators, and jurists, but all would agree with Chief Judge Lemuel Shaw's 1851 statement in Commonwealth v. Cyrus Alger. "It is much easier to perceive and realise the existence and sources of this power than to mark its boundaries, or prescribe limits to its exercise." In one of the most-quoted definitions of this seeming enigmatic power of state governments, Shaw went on to describe the police power as

the power vested in the legislature by the constitution to make, ordain, and establish, all manner of wholesome and reasonable laws, statutes, and ordinances, either with penalties or without, not repugnant to the constitution, as they shall judge to be for the good and welfare of the Commonwealth, and the subjects of the same.

2

Thomas M. Cooley in his Constitutional Limitations defined this state duty differently, but together with Shaw's definition, it provided the guiding principle for judges, lawyers, and legislators throughout the late nineteenth century. Like Shaw, Cooley described rather than defined the police power.

The police of a state, in a comprehensive sense, embraces its whole system of internal regulation, by which the State seeks not only to preserve the public order and to prevent offenses against the State, but also to establish for the intercourse of citizens with citizens those rules of good manners and good neighborhood which are calculated to prevent a conflict of rights, and to insure to each the uninterrupted enjoyment of his own so far as is reasonably consistent with a like enjoyment of rights by others.

3

Cooley's description is split between the criminal law sanctions for good order and the duty of the state to facilitate "intercourse" among citizens and to do so with as little friction as possible. He placed upon the state the duty to prevent crime as well as be instrumental in promoting industry, commerce, finance, and economic growth for its citizens. Yet such a power could be expanded by states to dangerous limits that threatened contracts, property, and business with state interference. Because this expandable quality of the police power frightened Cooley, he sought to limit the expansion of the police power.

Nevertheless, Cooley believed that the police power could be properly applied to, among other objects, liquor sales, "taxing forbidden occupations," commerce, and highway regulations for example. Under "Miscellaneous Cases," Cooley listed numerous instances where the states could justly interfere with people and their property. The state possessed the right to interfere with private property, even to the point of its destruction, when "some controlling public necessity demands the interference or destruction."⁴ Times of crises enabled the state to use its power in extraordinary ways such as tearing down buildings to prevent the spread of a fire or to stop the spread of a disease. According to Cooley, legitimate use of the police power also included control or elimination of milldams and graveyards when they became a public nuisance. In addition, states could prohibit the keeping of gaming houses, the sale of immoral books, and the "keeping of houses of prostitution and the resort thereto,"⁵ States could prosecute such establishments because they "have a tendency which is injurious and demoralizing." With that brief statement, Cooley tied together the police power and the offense of keeping a bawdy house permitting the state to move against such immoral businesses.

Christopher G. Tiedeman scrutinized the police power in his lengthy 1886 treatise, A Treatise on the Limitations of the Police Power.⁶

Like Cooley, Tiedeman emphasized and feared that the state would use its legislative power unwisely and threaten or compromise property or the obligation of contracts. In particular, Tiedeman feared runaway demo-

cracy; that state legislative majorities with the backing of the masses would use their votes to control the government, abolish private property, and trample entrepreneurs under foot. He described his fear of an "absolutism of a democratic majority."⁷ This new state majority no longer believed in laissez-faire for the economic realm and Tiedeman claimed they wanted to use the power of the states to interfere in the private affairs of businessmen as a "panacea" for society's ills. To the preface of his work, Tiedeman wrote what amounted to a conservative call to arms.

Socialism, Communism, and Anarchism are rampant throughout the civilized world. The State is called on to protect the weak against the shrewdness of the stronger, to determine what wages the worker shall receive for his labor, and how many hours daily he shall labor.

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These movements and interferences must be opposed, he emphasized, and if the runaway majorities gained control of the state houses, then the power the states could exercise had to be limited and controlled by the legal profession through the courts. Therefore, he saw courts as the conservator of property, property rights, and contractual rights, and to the judges of those courts Tiedeman aimed his suggestions for the limitations of police power.

His guiding principle was "sic utere tuo ut alienum non laedas," which translates roughly as, use your own property in such a manner as not to injure the property of another. Implementation of the principle was to be guided by adherence to strict state and federal constitutionalism. Only with such a guide would "social order and personal liberty" be safe from the "radical experimentations of social reformers."⁹ In his work, Tiedeman distinguished crimes from vices with the latter being "inordinate, and hence immoral, gratification of one's passions and desires."¹⁰ Crimes included acts against other persons and against the state while a vice damaged only the single person involved. And because a vice injured only a single person, the police power did not reach it. The law could not make a vice a crime unless the vice "trespass[ed] upon the rights of the public." Yet Tiedeman would not have the state overlook one large area of activity in vice. He wrote,

. . . no man can claim the right to make a trade of vice. A business that panders to vice may and should be strenuously prohibited, if possible.

11

Tiedeman used fornication to explain his qualifier. Fornication was "a most grievous and common vice" but beyond the reach of the police power. However, the keeping of a house of ill-fame, the business catering to fornication, formed a justifiable reason for interference with property by the state police power. Such a state public policy would be "commendable." Strong state police power might be feared in its application in master/servant relations, obligation of contract agreements, and as a possible tool of runaway state majorities, yet Tiedeman urged and supported the state's use of the power to control the business of prostitution. Both Cooley and Tiedeman had their doubts and concerns about the police power and its limitations in the economic realm, but both concurred that the state police power could and should be used in the moral realm against bawdy houses.

Numerous creative uses of the state police power can be found in some of the appellate court opinions of the late nineteenth century. Cities have no power in and of themselves but are creatures of their states, administrative branches of the state. Cities can exercise no powers not specifically granted them by their states in their organic documents, to use the legal phrase of the period--their city charters. In some instances, states delegated aspects of their power to cities for the control of local prostitution and bawdy houses and the following cases arose from such instances.

In 1861, a case reached the Maryland Supreme Court which distinguished the state police power from the power of the judiciary. George Shafer, and Elmira, his Wife v. Daniel G. Mumma concerned the mayor of Hagerstown, Maryland, and Elmira, who later married Shafer. The proceedings had begun three years earlier in November 1858.¹² Elmira sued Mumma for trespass and false imprisonment for an incident where Mumma, acting in his capacity as the mayor of Hagerstown, had tried, convicted, and fined Elmira for being a lewd woman within the limits of the city corporation. Mumma tried Elmira under authority from the state and in accordance with city ordinances. Elmira filed

suit arguing that Mumma had exercised the judiciary power of the state, not the police power as he claimed. She lost on the circuit court level and appealed to the Maryland Supreme Court in 1861.

Elmira's lawyers struck hard at the argument that Mumma had acted illegally as a judicial officer of the state, contrary to the state constitution, and beyond the authority of any city ordinance.¹³ Her lawyer cited section after section of the state constitution to show the distinctiveness of the judicial power of the state and that the legislature could not delegate judicial power to persons not named in the constitution as judicial officers. As Elmira's lawyers argued before the Maryland high court, "The legislature has no power to exercise or authorize the exercise of judicial power; it cannot grant judicial power."¹⁴ Mumma's claim that he acted according to powers granted the city in its charter and by city ordinance putting that grant of power into effect had no effect and was against the state constitution and good law.

Mumma's brief to the court answered that he exercised only delegated state police power and not criminal jurisdiction, which rightly fell to the judiciary to enforce. He argued that the ordinances of Hagerstown were "police regulations" for the "order, peace, and morals" of the community and were not part of the judiciary. Mumma did not try to supercede the state's authority over offenses to its "peace, government, and dignity" but rather acted "ministerially" by enforcing the police regulations of the city.¹⁵ His lawyers agreed that Mumma's action may have had the "form" of a judicial procedure, but his actions did not constitute the "substance" of a judicial procedure. Maryland's legislature had the power to delegate the "quasi-judicial" exercise of the police power to municipal corporations, Mumma insisted, and the city officials could impose fines for violations of such city ordinances. Mumma believed he had lived up to the spirit of the delegation of police power and that he had not violated the state constitutional divisions between the legislative and judicial powers of the state.

Chief Judge John Carroll LeGrand delivered the opinion of the court. Shafer would, today, be considered a test case of the state delegation of power to the city because Elmira began her suit in November 1858

while the city had passed the disputed ordinances in June 1858.¹⁶ Hagerstown passed the ordinance to control vagrants in the city and specifically listed "lewd women" as one type of vagrant. The facts also showed that Mumma was the mayor and Elmira was a "lewd woman and public prostitute but well behaved on the streets"¹⁷

LeGrand added up that Maryland had given Hagerstown the power to pass the ordinance, Mumma held the office of the mayor, Elmira was a public prostitute, and therefore the city's actions against her were legitimate and proper.

LeGrand turned to Elmira's argument that Mumma had improperly exercised judicial power of the state and not the police power for the good order of the municipality. The argument failed to persuade the Court. LeGrand held that Mumma's actions formed a proper application of the police power and held that from "time immemorial" a distinction existed between the police power and the judicial power of the state in both England and America.¹⁸ LeGrand continued that a certain amount of local discretion over local matters was needed to keep cities policed, an impossibility if every offender had to be prosecuted through the normal criminal process. The state police power afforded the city a simple means to hold in check through summary proceedings vagrants and other unseemly elements of society. Using Baltimore as an example, LeGrand wrote,

It would be next to if not impossible, for a large city like Baltimore to preserve order within its limits, preserve the streets free from interruptions, indeed to do most of the thousand things necessary to be done, to carry on its various and indispensable operations, if in every case it were a necessary preliminary that the offender should be regularly prosecuted by presentment, indictment, and trial. 19

Hagerstown needed summary actions against minor offenders to keep the city functioning smoothly. Summary punishment of vagrants formed a part of the legitimate police power of the state which the city could use. LeGrand ruled that Elmira was prosecuted as a lewd woman "against the decency and morals of Hagerstown" and not by the state of Maryland. Further, LeGrand also pointed out that the city's ordinance did not preclude or supercede any state action against Elmira. Shafer showed

not only that vagrancy was an important tool for cities to control their transient and immoral minorities, but that cities using summary proceedings against vagrants did not infringe upon the judicial authority of the state to prosecute criminals. If, therefore, the state delegated power to the city to control vagrants, the city could pass and enforce ordinances for the summary prosecution of vagrants found within the municipality, a broad grant of power, indeed, to the city.

Such use of state police power came up in an 1878 Idaho Supreme Court case which held that a state prosecution of persons living in a bawdy house was flawed because the state had turned over its power over bawdy houses to a city. In People v. Ah Ho,²⁰ Idaho prosecuted Ho for residing in a bawdy house in Boise City and resorting there for prostitution, a state criminal offense by an 1877 statute. The statute made a person "occupying, residing in, or keeping" a bawdy house in Boise City a misdemeanor offense with a fine of not less than one hundred dollars or six months in jail plus costs.²¹ Boise City's charter gave the city's mayor and council power "to regulate, fix the location of, or abolish" bawdy houses in the city. After being convicted of residing in a bawdy house under the statute, Ah Ho moved for an arrest of the judgment which was denied. She then appealed arguing that the facts of the case did not constitute a public offense.

Judge Henry E. Prickett faced a problem of reconciling the two sections of the statute: the first which appeared to empower the city to decide the offense and not the state, and the second which made it a state crime to live in a bawdy house.²² In a companion case to Ah Ho involving the same state statute, People v. Buchanan, the Idaho Supreme Court decided that the legislature had not created any offense by the 1877 statute. Rather, Prickett ruled that the statute delegated power to the mayor and council to create the offense.²³ In Ah Ho, the court decided that the first section of the statute stood as an amendment to the city charter to control bawdy houses in the city and that the second provided the punishment for the offense once the city passed the appropriate ordinance. Therefore, the municipal authorities and courts and not the state had jurisdiction over the offense. Idaho's indictment against Ah Ho could not stand since living in a bawdy house

was not an offense at common law or by any state statute. Boise City could prosecute and fine such offenders but the state could not; Idaho had given control over the offense to the municipality. Ah Ho committed no crime and Prickett overturned her conviction by the state district court. The court ruled that the legislature had given all of its police power over such an offense to the city to the extent that, lacking a specific state statute, Idaho could not prosecute persons living in bawdy houses.

Another state abdicated its control over prostitutes and bawdy houses but in a less complicated fashion, and its state court had to decide if the state could so delegate its powers. In 1886, the Colorado Supreme Court in Rogers v. People dealt with an 1885 Colorado statute which gave Denver the power to prohibit "exclusively" and suppress bawdy houses in the city.²⁴ Rogers had been convicted in the state district court of keeping a bawdy house, and he appealed arguing that the city had total control of the offense and he could not be convicted by the state. Colorado had a provision in the state's general statutes which prohibited a variety of offenses such as "open lewdness," "public indecency," and "keeping disorderly houses," and the provision had been in the general statutes for close to twenty years by 1886. A conflict of laws faced the court for resolution. Did the newer statute exempt the city from the operation of the older state disorderly house statute?

Judge Joseph C. Helm answered yes. He wrote that since the legislature had used the word "exclusively" in the recent statute it "indicate[d] a design to place that matter entirely under the control of the city council."²⁵ Denver had a charter provision since 1874 which gave the city power to suppress and prohibit disorderly houses, but it did not give the city exclusive authority and control. The Colorado legislature's intent had to have been to knowingly give exclusive power to the city because "exclusively could hardly have found its way into the enactment through inadvertence or mistake." Denver's council had then acted according to the new state delegation of power, passing its new ordinance on disorderly houses. Thereafter all prosecutions of the offense of keeping a disorderly house within Denver's

city limits must have taken place under the city ordinance and not a state statute.

Helm continued and asked rhetorically whether the state could delegate to a city council total control over bawdy houses? He answered by describing the evils of bawdy houses; they were "a constant menace to the public peace and good order of the community in which [they] exist."²⁶ Helm believed that the suppression of bawdy houses was a proper use of the police power by the city since the statute did not permit the city to either license or regulate bawdy houses. It only permitted the city to prohibit and suppress bawdy houses. Persons most directly affected by the houses, he continued, would know best how to deal with the local problem of prostitution. Since

. . . the subject is one with which, from its very nature, the local authorities can more intelligently and effectively deal than can the general assembly. 27

For these reasons, the legislature granted authority to Denver to prohibit or suppress bawdy houses.

One further question vexed Helm and the court about the state's action in Rogers. A section of the Colorado constitution called for a uniform system of courts and law in the state, and the effect of giving Denver exclusive control disturbed that uniformity by exempting Denver from the criminal sanctions of the state's disorderly house statute. Helm recounted Roger's defense argument that Denver's charter amendment destroyed the "uniformity of jurisdiction" described in the constitution.²⁸ Helm reviewed in dept the state's criminal jurisdiction and the state's constitutional power and limitations. He then ruled against the argument of non-conformity of jurisdictions for three reasons; 1) the state constitution sanctioned giving Denver exclusive authority over bawdy houses; 2) the delegation of powers never involved the courts since it merely gave the city council power to act as it saw fit; and 3) the exclusionary statute suspended only a section of the state's general statutes and that disorderly house statutes did not deal with the courts at all.²⁹ With this opinion, Helm and the Colorado Supreme Court reversed Rogers's state conviction and upheld the state's action in delegating to Denver exclusive control over disorderly houses even against state prosecutions

under a general state disorderly house statute. Rogers provided a precedent for other cities that wanted to lobby the state for exclusive control over a local prostitution situation.

Other cities creatively used the state's police power with a variety of success to control prostitutes and bawdy houses. For example, the case of Roxie Paralee v. State (1887) demonstrated an instance where one Arkansas city went too far in its attempt to control prostitutes.³⁰ Camden's city council passed an ordinance which made a prostitute's presence in the town a criminal offense. Paralee was tried on the charge of "returning to the Town of Camden, being a prostitute." At trial, the jury found her guilty and assessed her a fine from which she appealed.

Chief Judge Sterling R. Cockrill of the Arkansas supreme Court began his short decision by reviewing the powers the city possessed. The city could punish "lewd and lascivious behavior on the streets" and indecent and disorderly conduct. Arkansas routinely granted to its cities the power "to suppress bawdy and assignation houses" and the persons who kept such places. But Camden did not charge Paralee with either lewd behavior or running a bawdy house. Cockrill could find no authority "vested in the Camden town council to make Roxie Paralee's mere presence in the town limits a crime, whatever her character for chastity may be."³¹ Camden had gone beyond the powers Arkansas had granted the city in its charter. Paralee stood charged with a non-existent crime and Cockrill overturned her conviction. In order to avoid such a judicial review of the ordinance, Camden should have gone to the state legislature and lobbied for a charter change permitting the city to make the presence of prostitutes in the town a crime. The Arkansas court would have had a much more difficult question before it if the city charter had allowed the ordinance.

A more successful use of delegated state police power arose out of Catlettsburg, Kentucky, to the Court of Appeals in 1899. In Ann Dunn et al. v. Commonwealth, Ann Dunn and Mary Dawson were charged and convicted of being public prostitutes and being on the streets of the city between the hours of seven p.m. and four a.m. without good reason.³² Kentucky had given Catlettsburg the power

in its charter "restrain and punish" prostitutes, and acting under that authority, Catlettsburg placed a nighttime curfew on public prostitutes. Catlettsburg's curfew ordinance called for a five dollar fine upon conviction for each offense. The size of the fine suggests that the city did not want to drive the women out of town, only keep them off the streets and in their houses of residence and/or prostitution. Kentucky's Court of Appeals faced the question of whether the state legislature possessed the constitutional authority "to vest the board of council with the power to enact the ordinance."³³

Judge Thomas H. Paynter began his decision by reviewing the major thinkers on the police power. He quoted at length Cooley's definition from Constitutional Limitations and Blackstone's definition in his Commentaries.³⁴ Like Judge Shaw in Alger, Paynter, too, "found it difficult to define the extent and boundaries of the police power."³⁵ The police power certainly extended to protect the lives, health, and property of its citizens but was always tempered by the limitations "to secure social order and public morals." Paynter defined the suppression of bawdy houses as a just limitation of the use of private property to safeguard the public's morals. He wrote that our social institutions and public consciousness "demand" the suppression of houses of prostitution and prostitutes. Such houses and persons violated social order and tended to destroy "public morals." Paynter continued by supporting the city's actions because the local municipal authorities knew best both the problem and how to remedy it. Catlettsburg's city council knew that

. . . these unfortunate women did nothing for a
livelihood except to make merchandise of them-
selves. The favorite time for their business
is between nightfall and the next day's dawn.

36

Further, the women's business usually meant the congregating of "disorderly and ill-disposed persons" who threatened the public peace.³⁷ Catlettsburg's council knew all these facts and acted to limit the evil and danger posed by the women by keeping them off the streets and allies "during hours in which they could most successfully prosecute their immoral work." Paynter ruled that the Catlettsburg ordinance

was a correct use of the state police power and a "reasonable restraint" upon the women. He believed that the ordinance did not unjustly limit the women's freedom of movement since they could be on the streets at any time if there was a "reasonable necessity" and because for fifteen of the twenty-four hours of the day the women faced no restrictions at all. "The habitual offenders," as Paynter described them, could care for their "reasonable wants" within the fifteen hours, time that provided the women "ample opportunity for healthful exercise."³⁸ Paynter did not provide any standards by which to know which women could be out during the curfew and which women could not, but in small-town, rural America of the late nineteenth century, the local police and citizenry could generally keep close watch on all women moving about the town after seven in the evening. Paynter held Dunn's prosecution by Catlettsburg under a city curfew ordinance for prostitutes as a valid use of the state's police power not contrary to either the state or federal constitution. Dunn provided an excellent sample of how one city attempted to apply innovatively to a specific prostitution problem the state's general grant of power in its city charter.

Other cities tried another tack in controlling, if not suppressing, bawdy houses, disorderly houses, and prostitutes. For example, Des Moines passed an ordinance which made it a misdemeanor to be "found in or frequenting any disorderly house" and the municipal court of the city charged, tried, and convicted T. J. Reynolds under the ordinance. He then asked for a writ of habeas corpus from the state district court because the city had jailed him for the non-payment of the fine. Iowa's Polk County district court granted the writ and the city and state appealed the decision to the Iowa Supreme Court in the mis-titled case of State ex rel etc. v. Botkin in 1887.³⁹ The district court released Reynolds on the grounds that the ordinance did not allege an offense; mere presence in disorderly houses brought a person under the law. Iowa's Supreme Court disagreed with the district court's analysis. Judge Joseph M. Beck interpreted Des Moines's ordinance as forbidding an illegal presence in disorderly houses and instructed the prosecutors to put into their informations that the accused was in

the disorderly house for an unlawful purpose. He placed upon the accused the burden of proving a lawful presence. Iowa's Supreme Court reversed Reynold's release and upheld the city's ordinance saying "no more efficient manner of exercising [the state granted power to repress and restrain disorderly houses] can be devised than to prohibit persons to enter such houses and to be found there."⁴⁰

Des Moines's ordinance withstood judicial scrutiny.

A similar case arose in 1900 when a city attempted to limit the persons visiting and being seen with prostitutes. Kentucky's Court of Appeals, in the case of Joseph Hechinger v. City of Maysville, dealt with a city ordinance that made it unlawful for any person "other than the husband, father, brother, or male relative, to associate, escort, converse, or loiter with a female known as a common prostitute, either by day or night upon any of the streets or allies of the city."⁴¹ Hechinger appealed his conviction and the ordinance to the circuit court which held the ordinance valid; he then appealed to the Court of Appeals.

Judge B. L. D. Guffy began his decision by complimenting the city ordinance for "intend[ing] to accomplish a proper and laudable object," but the court would not let the ordinance stand. Guffy could find no reason for prohibiting male relatives other than a husband, father, or brother to associate with prostitutes. Further, the ordinance would have prohibited mothers, sisters, or female relatives of prostitutes from having contact with the women. Such problems flawed the ordinance because "any person should be allowed to converse with a female long enough to transact any necessary and legitimate business." Unless the person prosecuted had prior knowledge of the "disreputable character" of the woman in question, Guffy believed no one could be legally fined under the ordinance. But, if the city changed the ordinance to allow other male relatives access to the women for lawful purposes and if it allowed female relatives access to the women and made some provision to take care of the prior knowledge problem, Guffy believed the ordinance would be a valid use of the police power.⁴² Hechinger showed that if properly constructed, city ordinances could limit who could associate with prostitutes. Cities could indirectly control and limit prostitution by harassing the clients of prostitutes,

a surprisingly modern prostitution-control alternative.

Not all uses of the state's police power by cities were born of genuine desire to prevent and control prostitutes and bawdy houses. As an example, in 1910 City of San Antonio et al. v. Salvation Army involved a city ordinance passed to prevent the Salvation Army from building "a rescue home for fallen women" next to a popular city park. The ordinance, passed three days after the Army sued San Antonio for denying a building permit, made it

. . . unlawful for any person, firm, corporation,
or association of persons to establish or erect with-
in the corporate limits . . . any building, home,
or institution, for the gathering, care, or refuge
of persons denounced as vagrants.

44

The district court handling the suit upheld the Army's right to build. San Antonio appealed to the Texas Court of Civil Appeals, an appeal that touched upon numerous issues, including vagrancy, prostitution, disorderly houses, nuisance abatement, and the police power.

After beginning his decision by noting the ex post facto nature of the ordinance, Judge Fly explained that persons could be charged with vagrancy if the state could prove they lived a vagrant life on the day and at the time set forth in the indictment. But the instant the vagrant sought help and shelter or to change his/her life, that person no longer carried the status and stigma of being a vagrant.⁴⁵ In lengthy, compassionate dicta, Fly wrote that a woman who had given up her "vicious and degrading vocation" entered such a refuge not for the purpose of "plying her trade" but because she sought a better life for herself. As he defined the question, "Shall a city council be heard to denounce her and those like her, who have left their lives of sin and shame, as vagrants, a menace to society, and outside the pale of sympathy and support?" Fly thought not. "It is not the policy of the law to throw obstacles in the past of reformation" ⁴⁶ Although the residents of a house of refuge may have once been prostitutes, the law recognized their present condition and, once in a reformatory, they were no longer vagrants. Houses of refuge were not gathering places for criminals, Fly wrote, and therefore were not nuisances per se. Fly found San Antonio's attempt to prevent the building of such a

refuge preposterous, distasteful, and an unnecessary limitation of the Salvation Army's right to build on its property a home for "fallen women." "No court in Christendom" could hold such a use of property improper, and neither could San Antonio. Fly struck down the city ordinance and the Salvation Army built its refuge for reforming prostitutes.³⁷

Some cities used the state's police power delegated to them in their charters to try, with various degrees of success, new means to control the social and legal problem of prostitutes and bawdy houses. Probably most cities and towns relied on an informal sort of police regulation/toleration, and other cities that passed ordinances using the police power may not have been challenged in court to the appeals level. But some city councils perceived that they could use the police power to change or better control a local vice situation, and the state courts usually proved willing to approve such application of the police power as long as the ordinance complied with recognized legal standards. Judicially supported, imaginative law-making at the local level of state government, not moral, reformist finger-wagging, provided the answer to a vice problem.

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An American city in the late nineteenth century that applied delegated state police power to its local prostitution problem was St. Louis from 1870 to 1874. St. Louis's "social evil ordinance" has drawn much scholarly attention,⁴⁸ but, as noted above, the legal issues and controversies involved with the ordinance, with the state's delegation of power to license and regulate bawdy houses, and with various other conflict-of-law questions have received no attention until now.

In 1873, Missouri's Supreme Court tackled the legal problems presented by the social evil ordinance in the case of State v. Kate Clark.⁴⁹ The case had its origins in the lobbying efforts of city officials and private citizens, most of who remain unidentified.⁵⁰ Their demands convinced Missouri to grant St. Louis a new city charter on March 4, 1870. Tucked away in a long, involved provision were two words that substantially revised St. Louis's charter. With the addition of the words "to regulate," St. Louis obtained a choice of public policy alternatives towards disorderly houses since the whole phrase

now read "to regulate or suppress bawdy houses or disorderly houses, houses of ill-fame or assignation." The choice of St. Louis's city council was to pass the "Social Evil Ordinance" on July 5, 1870.

State v. Clark grew out of a criminal indictment brought by Missouri against Clark for operating a bawdy house in St. Louis contrary to the state's disorderly house statute. Clark argued at the criminal court level that the charter change, the city ordinance, and her city license to operate a brothel protected her from state prosecution for keeping a disorderly house. In effect, the new charter provision and city ordinance, she argued, exempted St. Louis from the state law against keeping disorderly houses and bawdy houses. Clark lost at the trial level and appealed her case to the Missouri high court which both sides used as a test of the statute, charter, and ordinance.⁵¹

Four lawyers submitted briefs to the Missouri Supreme court, two for the state and two for Clark; their arguments take up the first sixteen pages of the twenty-six-page decision. Clark's first lawyer submitted a brief statement to the court saying only that the state legislature intended to give St. Louis the power to control bawdy houses, a power that extended to allowing their "permissive existence." In regard to the general state disorderly house statute and the charter provision, he urged upon the state Supreme Court the opinion that the charter provision was younger than the statute and amounted to a repeal of the state law in St. Louis.⁵²

Clark's second lawyer, J. G. Lodge, provided a far more in-depth analysis of the ordinance, St. Louis's city charter, and the justification for the ordinance. he began with the statement, "The ordinance in question undoubtedly permits and authorizes bawdy houses to be kept in the city under certain restrictions." He examined all of St. Louis's charters from the first in 1822 through the 1870 revision. All previous charters provided the city power "to restrain or prohibit" bawdy or disorderly houses or a similar such statement.⁵³ The 1870 charter addition "to regulate" dramatically altered the state's grant of power to the city and increased St. Louis's options at prostitution control. After reviewing the meaning of the word "regulate"--to make rules for the governance of--Lodge asked rhetorically, "If the Legislature did

not intend to give the city the power over this subject, . . . why did it not leave the law as it was?" Lodge argued that the legislature intended to grant such power to St. Louis, it did so in a constitutional manner, and the state court's only choice in the matter was to uphold the charter provision and the ordinance as against the state statute. Lodge went one step further and alleged that the younger charter provision repealed the older state statute, at least in St. Louis. On the question of the immorality of the whole charter change and ordinance, Lodge would not respond. Instead, he wrote that the question of the morality or immorality ". . . is a matter for the Legislature to consider." If an ordinance did not contravene the state constitution or the federal constitution and followed from a charter power correctly delegated to the city by the state, no court could overturn it because of its "questionable morality."⁵⁴

Arguing for Missouri, M. W. Hogan denounced the ordinance.

The ordinance, under which the defendant claims the right to carry on and maintain a bawdy house in the city of St. Louis, is no legal defense to this action; because such ordinance is against religion and good morals; because it contravenes the statute laws of the State; and because it is against the spirit of the common law and constitution of the land. 55

Hogan denied that the city council had the power to pass the ordinance. He denied that an ordinance putting into effect the charter provision "to regulate" could license houses which protected women in their "nefarious trade." Hogan believed that Clark's license amounted to a contract between her and the city whereby the city would protect and authorize her trade and that a contract, founded on bad morals, was void. Hogan appealed to the state jurists' sense of religion and decency and asserted that Clark's business was "wrong in itself, and no human legislature can make it right." He reached back to England's common law and to divine law to show the Law's long-standing opposition to the keeping of bawdy houses. In fact, Hogan argued that because of the state's timeless opposition to the keeping of such houses and because every state had laws opposing such keeping, the offense of keeping a bawdy house had become a constitutional principle of the nation "by common consent."⁵⁶

Henry Hitchcock, the last lawyer to present a brief to the court, took a long look at city/state relations and the statute, charter, and ordinance involved. After a point-by-point retort to Lodge's pro-ordinance brief, Hitchcock came to the conclusion that "the ordinance is, but the charter is not, repugnant to the State law."⁵⁷ St. Louis had strayed from a proper reading of the power "to regulate" and the state should have restrained the city from pursuing the policy of licensing and regulating bawdy houses. St. Louis's ordinance stood in such total opposition to the state law that the measures could not be reconciled; therefore, the ordinance had to give way to the state statute. But Hitchcock did not stop there. He shifted his argument and used a debating technique lawyers have long used when arguing cases before high courts.

Even had the Legislature intended by the clause to grant to the city authorities the extraordinary powers deduced from that one word "regulate," and embodied in this ordinance, such grant would be void, as in derogation of the rights of the citizen, and beyond the constitutional powers of the Legislature itself.

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Missouri's legislature may have wanted to delegate such power, but the legislature itself did not have the power to make the delegation to one of its administrative units. Even a state legislature can not do some things, Hitchcock argued, and providing the city power to regulate prostitution in the manner it did was one city action the legislature could not sanction.

Hitchcock pleaded an emotional but powerful legal brief and brought out Sir William Hawkins on the offense of bawdy houses. He also cited Bishop's Criminal Law and Dillon's Municipal Corporations,⁵⁹ while reviewing what the social evil ordinance accomplished. From his perspective, it protected "the trade of harlotry" within St. Louis as long as prostitutes complied with certain regulations "aimed exclusively at certain loathsome physical consequences of their crime." But St. Louis's city council, Hitchcock stressed, ". . . utterly ignored that which is the 'gist of the offense,' to wit its injurious effects on public morals."⁶⁰ Hitchcock's statement placed St. Louis's innovation into the mainstream of legal thinking on the keeping of bawdy houses and disorderly houses.

Continuing his whittling away of Lodge's pro-ordinance brief, Hitchcock called the ordinance "oppressive, discriminating, and unjust." It allowed the keeping and maintaining of a recognized nuisance at common law in any neighborhood while also allowing a certain class of criminals to pursue their "criminal occupation." Later in his brief, he hammered away at the city's giving power to police and medical personnel to enter regulated houses, medically examine the women, and send infected women to hospitals without legal, constitutional, or procedural safeguards. Hitchcock found such city action repugnant to the state and federal constitutions and the Bill of Rights.⁶¹ If Lodge's pro-ordinance brief was a broad and innovative reading of the powers of the state legislature and city council, Hitchcock's provided a far narrower view of state and city powers more in keeping with contemporary legal thought and well within the long developing legal traditions affecting disorderly houses.

In a divided (3-2) decision, Judge W. B. Napton delivered the majority opinion in State v. Clark. Napton limited the issues in the case to one question: did St. Louis's city council have the power under their charter to pass the social evil ordinance? St. Louis's charter gave the city the right "to regulate or suppress bawdy houses" and on those words alone "a doubt would hardly be entertained as to a grant of power."⁶² But Napton found inconsistencies in the charter which bothered him; for example, the charter empowered the city "to suppress" prize-fighting but "to regulate or suppress bawdy houses." Napton overcame such seemingly inconsistent authorizations by deciding that the legislature knew exactly what it was doing choosing to give the city the power to suppress prize-fighting but to give it the choice to either regulate or suppress bawdy houses.

Napton placed great weight on Clark's review of previous city charters which did not allow regulation and the 1870 charter which did. Missouri's legislature could change public policy on any issue it wished, and the majority of the court decided that in 1870 it had changed the state's policy against keeping a bawdy house in St. Louis. After all,

. . . St. Louis had become a large city with nearly a half a million inhabitants--and the Legislature then deemed it advisable to throw upon the authorities of the city the responsibility of deciding what legislation would best promote the morals and health of the city, and therefore virtually said the them: "You are more competent to decide this matter, which concerns you so nearly, than we are. We therefore authorize you to enforce the general laws of the State on this subject and suppress these houses or to regulate them, as you may think best."

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Although Napton gave the charter provision this interpretation, he recognized the legitimacy of the state's argument about the conflict of laws; he called the state law against keeping a disorderly house and the specific charter grant of power to St. Louis "totally irreconcilable." The question then became which one, the state law or the charter provision, was law and overruled the other? Napton decided in favor of the charter change. He wrote that a "particular specified intent on the part of the Legislature overrules a general intent incompatible with the specific one."⁶⁴ For support he referred to a previous Missouri case where the court decided the legitimacy of the legislature's authorizing only certain St. Louis beer houses to be open on Sundays in contravention of the state Sunday closing law. As far as St. Louis was concerned, the Sunday closing exemption repealed the state law in St. Louis and Napton drew a parallel between that case and Clark.⁶⁵

In response to the state's argument for the immorality of the ordinance, Napton fired back a lecture on judicial restraint. Missouri's legislature and not the courts, Napton wrote, could change public policy as it saw fit and for any part of the state. Public policy can be found ". . . in the enactments of our Legislature," he wrote, and for the state's attorneys to say before the Missouri Supreme Court that the charter change was immoral was "disrespectful to the Legislature." Courts assumed, Napton stressed, that legislative enactments were designed "to promote the morals and health of the citizens."⁶⁶ He would not be drawn into an exchange on the immorality of the charter change or the ordinance. "With the expediency, or propriety, or wisdom of a legislative enactment, we have nothing to do." Napton hinted that the remedy for an immoral ordinance lay not to the courts but "should be addressed to the State or city--Legislature." He held that Missouri had granted power to the city to make the ordinance and

that he and the judges in the majority would look no further into the ordinance or its effects than to see if the procedures and forms of its passage conformed to recognized legal standards. This type of judicial decision-making, labeled by legal historians as formalism, provided the means to implement judicial restraint. Napton held that the morality of St. Louis's social evil ordinance was a "legislative, and not a judicial question" and reversed Clark's state conviction for keeping a disorderly house.⁶⁷

Two judges dissented from the majority opinion, Judges H. M. Vories and T. A. Sherwood, and Vories's dissent provides a counterpoint to the majority opinion.⁶⁸ Vories, too, focused on the conflict of laws problem: did the charter change repeal the state disorderly house statute for St. Louis? After a review of the same cases and treatises as the majority, Vories decided it did not and the state statute did apply in St. Louis. St. Louis's charter change "to regulate or suppress" meant for Vories that the city had to find a way to implement the change in policy that was not contrary to state statutes on the subject. He listed a variety of options the city could have used to force bawdy houses to comply with the charter change: St. Louis could have passed an ordinance making it a fineable offense to have a bawdy house's doors open or it could have placed a curfew on the houses or it could have prohibited the houses from displaying signs or other symbols of the house's character. In the opposite direction, Vories speculated that St. Louis could have forced bawdy houses to display a distinctive sign or symbol at the house "so that the inmates could be readily avoided by society."⁶⁹ Vories believed that his suggestions would have regulated the houses in conformity with the charter change "to regulate" while St. Louis had taken regulation to the extremes of licensing and medical examinations. Vories strongly implied that St. Louis's city council had simply gone too far in its interpretation of "to regulate." For Vories, Clark's reliance on the city ordinance authorizing the city to issue a license to operate a bawdy house was itself a misapplication of the charter change. Although he believed St. Louis overstepped its power in the social evil ordinance, Vories did not totally disagree with the city's efforts to control prostitution.

As he wrote, some offenses were so "blended and interwoven with human nature" that it might be better to regulate and control them than to prosecute them, and "it may be that the occupation of the courtesan is one of them."⁷⁰ He hoped a means might be found to mitigate prostitution's evil to society, but he denied that this case and this decision had anything to do with such a question.

Because of the three-to-two decision in Clark, no definitive judicial resolution of the statute, charter, and the ordinance emerged from the case. Missouri's high court never received another chance to review directly the ordinance because the Missouri legislature, on March 30, 1874, under pressure from vice reformers, removed the phrase "to regulate" from the city's charter.⁷¹ However, litigation involving or reflecting the impact of the ordinance and regulation was before the Missouri appellate courts for another thirteen years, until 1887, and one case involving the ordinance reached the Missouri Supreme Court before the legislature repealed the phrase.

One element of controversy was prohibited associations. St. Louis's regulated one class of vagrants--prostitutes--for the city's safety and welfare. But since the city recognized such vagrants as a source for regulation, did an association with persons regulated by the ordinance constitute an offense? In City of St. Louis v. William Fitz (1873), the Missouri high court faced just such a case.⁷²

St. Louis's police arrested Fitz for violating a city ordinance which made it a crime for having "knowingly associating with persons having the reputation of being thieves and prostitutes, previous to August 21, 1871." At the police court level, Fitz lost, as he did in the St. Louis criminal court. He appealed to the Missouri Supreme Court arguing the state did not prove that his association with known thieves and prostitutes was for any unlawful purpose. Neither, Fitz argued, did the state prove that he aided or encouraged vagrants to commit any act prohibited by law or ordinance.

Judge W. B. Napton⁷³ proved unreceptive to arguments for upholding Fitz's prosecution and conviction and the social evil ordinance influenced his opinion. Napton reviewed the case against Fitz and found that only police officers had testified that Fitz accompanied

accompanied thieves and prostitutes and never for an unlawful purpose. In addition, at least fifteen of Fitz's neighbors totally contradicted the police testimony about the character of the persons Fitz knew. As Napton described the ordinance, its workings

city simply authorizes any police officer in the city to arrest any man who may be found at a drinking saloon, licensed by the city, or at a brothel, also licensed, in company with persons suspected by the police as thieves or prostitutes, and a fine of \$500 is imposed for being found at places which the city authorities see fit to license.

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Napton did not argue with the ordinance. Missouri could make police regulations to promote the health and morals of the state and could empower its subdivisions, in this case St. Louis, to take similar steps. But the legislature did not have the power to legislate "the morals and habits of individual citizens." Citizens possessed the right of free locomotion in the state and the right to select the people they associated with for any lawful purpose, and Napton could not see how the legislature or the city council could limit either right. He quietly but forcefully stressed that the law and open courts stood ready to prosecute breaches of the law and good order. Napton's court stood ready to protect Fitz's right of association with persons regulated by the city. In a sweeping statement in defense of the liberty of association, he said,

However humble may be the citizen arrested under an ordinance prohibiting intercourse with [thieves and prostitutes], his right to select his own company, so long as no actual breach of the law occurs, and no intended breach of the law can be established, is as sacred, and as much under the protection of the State, as though he moved in more elevated spheres of society.

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Simply because Fitz, a common laborer in a local elevator company, lived with his mother and sister in a neighborhood "infested with thieves and prostitutes" did not automatically make his association with these persons criminal. Napton would not let such a case of guilt by association stand. He reversed Fitz's conviction.⁷⁶ Napton never mentioned St. Louis's social evil ordinance by name, but his decision implied that a person could not be convicted of the criminal offense of associating with persons, and in places, the city regulated.

Further judicial difficulty and interpretation arose in 1874 when the Missouri Supreme Court decided a case on the powers St. Louis possessed after the March 30, 1874, repeal of the regulatory clause of the city charter. In State v. Vic. DeBar (1874),⁷⁷ Missouri prosecuted DeBar for keeping a disorderly house in St. Louis after the repeal of the "to regulate" section left the city with only "to suppress" powers. DeBar lost at the criminal district court level and appealed to the Missouri Supreme Court arguing the repeal of the disputed section of the charter did not automatically reinstate the operation of the state disorderly house statute in St. Louis. She based her argument on a Missouri statutory provision that read "when a law, repealing a formal law, clause or provision, shall itself be repealed, it shall not be construed to revive such former law, clause, or provision, unless it be otherwise expressly provided."⁷⁸ DeBar argued that the 1870 charter provision repealed the Missouri disorderly house statute's application in St. Louis and when the legislature repealed the 1870 charter provision in 1874, the state disorderly house statute did not immediately resume its authority in St. Louis.

Judge E. A. Lewis delivered the opinion for the majority of the court in another three-to-two opinion.⁷⁹ After reviewing the facts and DeBar's argument, Lewis returned to State v. Clark and upheld the court's majority decision in that case. In a conflict of laws question, the general statute gave way to the particular statute. Lewis's opinion urged the court to stand by its decision in Clark even though the state legislature had repealed the section of the city charter that the court had held valid. St. Louis's social evil ordinance prevailed or should have prevailed over the general statutory offense of keeping a disorderly house. Further, because the 1870 provision repealed the general prohibition of keeping disorderly houses and the 1870 provision was itself repealed, the general state provision still had no force in the city of St. Louis. The remedy to this quirk in the law lay "to the legislative, and not the judicial authorities."⁸⁰ By the 1874 provision, St. Louis had the power to suppress bawdy houses, but Missouri, working through its general criminal state statute against keeping a disorderly house, could not use its power in St. Louis until

the legislature passed a law specifically giving the state such power and avoiding the double repeal provision. Judge Lewis reversed De-Bar's state conviction on these grounds, and the legal and constitutional powers over disorderly and bawdy houses between the state and the city continued in disarray.

In an eight-year span, 1877-1885, Missouri's appeals courts heard one private nuisance action three times. James Givens sued Henry Van Studdiford for knowingly renting a house he owned for use as a bawdy house thereby creating a public nuisance next to Givens' house and depreciating his property's value.⁸¹ Givens asked the trial court not to enjoin the nuisance but rather to award damages amounting to \$25,000. The parties owned adjoining houses on Walnut Street in St. Louis, and Van Studdiford began renting his property to prostitutes in 1872 apparently under the ordinance regulating the social evil.⁸² Givens complained that he could not obtain decent renters because the women next door "indecently exposed themselves at the windows," further proving that Van Studdiford had to have known about the nuisance. Givens showed that the whole area had a "bad fame," that prostitutes occupied other houses in the area, and that the first house rented to prostitutes was Van Studdiford's. Givens lost in the circuit court and appealed.

Judge Robert A. Bakewell delivered the opinion of the Missouri Court of appeals and held that Givens's property had depreciated because of the special nuisance next door to him and because of the declining property values of the area. Bakewell concerned himself with whether a proper charge had been given to the jury, and he found it had not been sufficient because a bawdy house was always a nuisance per se. The Appeals Court also overruled the district court's instructions to the jury defining a bawdy house. In ascertaining damages due to nuisances, Bakewell wrote that "the damage recovered must be the actual depreciation shown to be caused by the existence of the nuisance."⁸³ Although the damages caused by a bawdy house, the court believed, were "very difficult" to know, the decision as to the amount of damages must be decided at trial on the principle they laid down. On these grounds, Bakewell overruled the district court's ruling denying damages to

Givens for Van Studdiford renting his house to prostitutes.

Van Studdiford appealed to Missouri's Supreme Court in October 1880. Judge Warwick Hough, in a one-paragraph statement, upheld the appeals court decision of 1877.⁸⁴ Undaunted, Van Studdiford kept the case in court, asking for and receiving a new hearing by the Missouri Supreme Court which returned another decision in its April 1885 term.⁸⁵

Attorneys for both Givens and Van Studdiford submitted briefs for the rehearing. Van Studdiford relied on the principles of nuisance law, St. Louis's use of the state police power, and the charter change enacting the social evil ordinance. He first pointed out that to sustain a private nuisance action such as Givens's, Givens had to prove a special injury to his property different from the injury sustained from the general neighborhood.⁸⁶ Givens had not proven this special injury, Van Studdiford explained, and therefore his suit ought to fail. Next, Van Studdiford argued that St. Louis's charter provision "to regulate" disorderly houses in the city repealed and "entirely eliminate[d]" from the state criminal code all provisions against keeping or renting disorderly houses in the city. He cited State v. Kate Clark and State v. Vic. DeBar in support of his position.⁸⁷ Missouri's repeal of the charter provision allowing the passage of the social evil ordinance went unmentioned in Van Studdiford's brief.

Missouri's court reporter recorded a good deal less of Givens's brief. His lawyers argued, first, that the state supreme Court had no authority to reconsider Van Studdiford's appeal because he had failed to meet the correct filing dates. In outline-like fashion, Givens stated that he did have a proper action in nuisance against Van Studdiford, that the trial court properly excluded the evidence of the license and ordinance, and that Van Studdiford let the house knowing it would be used to house prostitutes. Van Studdiford, therefore, stood liable to anyone claiming injury from a nuisance in the house, argued Givens.⁸⁸

Judge Francis M. Black began by throwing out Givens's argument that the rehearing should not have been accepted and then reviewed the facts of the case as described above. As Black had discovered, the whole area around both Givens's and Van Studdiford's houses had undergone a transformation in the early 1870s when it had become the site

of St. Louis's bawdy houses. Because of the character of the neighborhood's new residents and their use of the buildings as houses of prostitution, Givens's property depreciated in value. In fact, Blacks's decision showed that Van Studdiford rented his house to none other than Kate Clark, the woman involved in the previous Missouri Supreme Court case on the social evil ordinance.

Black brought up Kate Clark's name for a reason. He settled Givens v. Van Studdiford by extrapolating from State v. Clark and State v. Vic. DeBar. He began by returning to the source of bawdy house thinking in law, Hawkins's Pleas of the Crown, and reaffirmed that bawdy houses were nuisances per se. Yet he faced the problem of harmonizing the legal tradition of Hawkins with St. Louis's regulation efforts. Black agreed that the regulation "was the law in St. Louis so long as the ordinance in question was in force."⁸⁹ Regardless of whether the ordinance was morally correct, it had effect in St. Louis and should have been admitted in evidence at Givens's original trial to show the house "was kept in compliance with [the social evil ordinance's] provisions."

Black broke with established legal traditions and sided with the municipal ordinance.

It is difficult to see how we can hold such a place to be a public nuisance per se so long as it has the protecting hand of the law, and so long as kept within the regulations prescribed by the ordinance. 90

Black believed the trial court erred in assuming the house to be a nuisance and in so instructing the jury. To the jury should have been left the question of whether the residents of the house behaved themselves in a manner that rendered the property a nuisance. If they had, the city license and registration would not have protected the house because even public improvements such as roads, if they became dangerous, could become a public nuisance, and Missouri's Supreme Court held the same rule applied here. St. Louis regulated a natural evil for the public's welfare but the actions of the residents could strip the house of the city's legal protection. Further, Van Studdiford could not be sued for renting the house, Black ruled, because the facts had to show that he rented the property with prior knowledge of its future.

Givens had not proven such prior knowledge.⁹¹ Because Van Studdiford rented the property without knowledge of its future use and because the city ordinance placed what would be a nuisance under the protection and regulation of the law, Givens's suit failed.

Missouri's Supreme Court held the social evil ordinance a valid use of the state police power pursuant to the appropriate charter change upheld in earlier cases. But that valid use and Van Studdiford's renting out of his property as a bawdy house did not provide Givens a remedy against Van Studdiford for the loss of property value to his property. And none of the three cases of Givens v. Van Studdiford gave any indication of where Givens's remedy lay. Perhaps he should have sued the city, if he could have conquered the problem of sovereign immunity, attacking the regulation of prostitution as contributing to his loss of property value. After eight years of litigation, a jury trial, and three appeals court decisions, Givens had not discovered a way to recover a penny of damages to his property from a neighbor's renting his house as a bawdy house under the St. Louis social evil ordinance.

Two years after the last Givens appeal and thirteen years after Missouri's repeal of the St. Louis ordinance, one other case reached the appeals level for decision. In 1887, Missouri's Court of appeals decided Levi L. Ashbrooke et. al. v. Roselle Dale which involved the question of legal and illegal contracts for rent during the period when the disputed ordinance had effect.⁹² Why the case took so long to reach the appeals level, Judge Roderick E. Rombauer's decision did not say, but what is clear is that Dale and another woman began renting 722 Market Street in St. Louis for use as a bawdy house in accordance with the city's regulation of prostitution. Ashbrooke's wife owned the property but he acted as her agent and rented the house knowing it would be used as a house of prostitution. Ashbrooke charged Dale from sixty to seventy dollars a month rent for the house while the rent for such property if rented for "legitimate purposes" was thirty to forty dollars per month. Eventually, Dale stopped payment. Ashbrooke then sued her trying to recover the lost rent. At trial, Ashbrooke lost and appealed.

Judge Rombauer began his decision by recalling the charter revision, the 1874 DeBar decision, and the 1885 Givens decision, all of which he believed reaffirmed that bawdy houses were nuisances and the renting of such establishments were a "public wrong."⁹³ What Ashbrooke's attorneys failed to convince him of, however, was the ordinance's application in St. Louis making it "not unlawful" to keep, and by implication rent, bawdy houses. Nowhere in the decision, either in Ashbrooke's brief, Dale's brief, or in the court's statement, did any party cite State v. Clark (1873) and its ramifications for the rental contract at issue in Ashbrooke. Instead, Ashbrooke had focused his appeal on the admissibility of the reputation of the house at trial and on the court's instructions to the jury. And Rombauer, limiting the issues even more, narrowed them to whether Ashbrooke as agent or Ashbrooke's wife as owner actually rented the house. If the wife rented it, Rombauer stood ready to concede the possibility she did not know or understand it would be used as a bawdy house thereby making the contract valid, whatever the rent and Dale would have been held to the contract. If Ashbrooke rented it as agent for his wife, he would have known--and probably did know--how it would be used; without proof to show the city sanctioned the protection of prostitutes at the time of the contract, he would have unlawfully rented the premises. In this latter case, Ashbrooke's attempt to continue to extract the higher rate of rent would fail. Rombauer determined that Ashbrooke did act as his wife's agent in all business transactions and their attempt to hold Dale to the rental contract was void. Dale did not have to pay the excessive back rent.

Ashbrooke showed yet another legal problem that could arise from such city regulation of prostitution. Prostitutes needed a room or a house from which to operate. Women supporting themselves as prostitutes had entered into contractual relationships with landlords for the rental of property used in their trade between the years 1870 and 1874 when St. Louis regulated and licensed their trade. Did the letting of property for such use, usually considered an illegal contract, constitute an offense at law? St. Louis's social evil ordinance, even if Ashbrooke could have entered it into evidence at trial, had no

provision exempting the renting of property for bawdy houses in St. Louis from the state statute against immoral contracts. St. Louis's ordinance protected the property once an individual used it as a bawdy house, but did that protection extend to the parties for the contract for the renting of the property? Ashbrooke provided no answers since the case turned on the admissibility of reputation issue but the question remains: What kinds of legal relationships and uses of property did such prostitution regulation alter and protect from state prosecution? St. Louis's early-1870s attempt to regulate prostitution continues to raise such questions over one hundred years later. St. Louis's experiment with regulated prostitution presents a more complicated and confusing picture when placed in a legal context than other writers have painted so far.

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St. Louis's efforts are noted for the depth and extremes to which the city went to regulate prostitutes, license bawdy houses, and medically examine the public women of St. Louis, but its experiment was short-lived and passed quickly from the public scene. Other cities in the late nineteenth and early twentieth centuries usually had vice areas that existed by tradition and police toleration rather than positive municipal ordinance. New York's Tenderloin, Chicago's Levee, San Francisco's Barbary Coast, and Fort Worth's Hell's Half Acre testify to the nationwide presence of municipal prostitution vice areas. But these were only the best-known vice areas. Smaller cities and towns had houses or clusters of houses devoted to the trade of prostitution. But perhaps the most well-known, eulogized, written about, researched, and most surrounded by its own mythology was New Orleans's Storyville.

In November 1917, under pressure from the Department of the Navy, New Orleans closed its fabled red light district. Storyville's cheap women and expensive beer in a Cajun atmosphere continues to be an allure today, even if the reality is a heavily policed strip of clip joints and bars featuring topless waitresses. Both the high-class parlor houses, such as Lulu White's Mahogany Hall, and the

roving black, white, and interracial jazz bands live on only in the past and in such works as Al Rose's 1974 Storyville, New Orleans.⁹⁴ Although a journalist, Rose tried to relay a sense of both the district's history and its standing in Louisiana law and New Orleans police administration. For a general survey it succeeds but the final focus of this chapter is not New Orleans's policing, moral, and economic problems. Rather, it is how New Orleans used delegated state police power to affect a local prostitution situation and how the courts, state and federal, viewed and interpreted that use of state power.

New Orleans has a long history of informally districting sections for prostitution as well as for saloons and dance halls. As the South's largest and best port on the Gulf Coast, as the southern terminus of the Mississippi River, and with a French Catholic heritage in a Protestant state, New Orleans became a transmission point for cargo and men. And wherever sailors, stevedors, longshoremen, and flatboatmen congregated, there too could be found the prostitute and bawdy house anxious to provide female companionship for a price. Together with New York on the East Coast, San Francisco on the West Coast, and Chicago on the Great Lakes, New Orleans was a premier city for prostitution--the premier city on the Gulf Coast and the nation's most legendary by the turn of the century.

Prostitution flourished in New Orleans from at least the 1820s and the city's only attempt to license its bordelloes (1857-1858) failed.⁹⁵ Nevertheless, at any one time, only a small section of the city housed the cluster of bawdy houses, and by the 1880s, the city blocks devoted to prostitution, alcohol, and music had settled in an area just above the French Quarter. South Basin Street formed the southernmost border of the vice area with Canal, St. Louis, and Robertson streets roughly completing the boundary.⁹⁶ A smaller vice area known as the "up-town" district and inhabited almost exclusively by black prostitutes existed west of the main area. These districts existed because residential and commercial growth in the city combined with police toleration, corruption, and intention kept the houses together.

And this concentration prevented the damage from noise and offensive behavior from spilling throughout New Orleans.⁹⁷

By the later 1890s, the area had become so controversial that the city council believed it had to take some action to control prostitution. And here it faced a dilemma. New Orleans could not make the trade of prostitution legal; that would exceed its powers and violate all legal precedents and law. But neither could the city sit still and allow the area to run openly and free. How could it limit the evil of bawdy houses without stepping on the toes of the landlords who were making money off the area and appease those who called for the city to protect its citizens' morals? In January 1897 Alderman Sidney Story proposed an ordinance which would make it illegal for any prostitute to live outside an area described in the ordinance and corresponding to approximately where the houses were already established. Story's proposed ordinance then virtually contradicted itself by saying that it did not authorize "lewd women" to occupy a house anywhere in the city.⁹⁸ This confusing legal maneuver can best be seen by quoting from the ordinance.

Be it ordained by the Common Council of the City of New Orleans, That from the first of October, 1897, it shall be unlawful for any public prostitute or woman notoriously abandoned to lewdness to occupy, inhabit, live, or sleep in any house, room, or closet situated without the following limits: [area described]

Provided further, that nothing herein shall be construed as to authorize any lewd woman to occupy, a house, room, or closet in any portion of the city.

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According to Rose, Story had traveled Europe and studied European methods of prostitution control and with the aid of a "prominent New Orleans attorney," Thomas McCaleb Hyman, had drafted the ordinance. Story submitted it to the city council in early January 1897, and the council adopted it on January 29th with an October date for its implementation. But on July 6, 1897, the council adopted a shorter version of the ordinance with the same pertinent phraseology which added the up-town district to the area out of which no lewd woman should be found. This revised version also changed the date on implementation to January 1, 1898.¹⁰⁰

Rose attributes the wording of the ordinance to a suggestion presented ten years earlier in the vice area's unofficial newspaper. Rose's suggestion is unlikely. Besides the problem with the time lag between the 1887 newspaper story and Story's 1897 ordinance, it is unlikely that a middle-class alderman with competent legal counsel would take a public policy suggestion from the vice area's newspaper.¹⁰¹ Instead, Story's exposure to European prostitution control methods and Hyman's legal training could easily have led to the idea not to legalize prostitution positively in a district but to deny housing to prostitutes anywhere except a specified area. In this way, the daily administration of the city's vice could be left to local police authorities while the ordinance might possibly pass judicial scrutiny since it did not positively permit or support prostitution.

On January 1, 1898, the ordinance took effect and eleven months later, on November 21, Louisiana's Supreme Court ruled on the city's vice districting.¹⁰² George L'Hote and several of his neighbors challenged the ordinance in the state district court seeking to enjoin the operation of the ordinance. Although the ordinance did not directly affect L'Hote's property, which was located next to the district, the ordinance would depreciate property values generally in the area and thereby damage his property. At trial, the court enjoined the city from establishing the district affirming L'Hote's argument of future damages if the ordinance went into effect, and from that decision New Orleans appealed directly to the Louisiana Supreme Court.¹⁰³

Judge Henry C. Miller wrote the unanimous opinion for the Supreme Court and interpreted the case as involving the limitations and uses of the state police power by cities. Citing New Orleans's earlier 1857 vice districting attempt, Miller believed that "from an early period it has been the policy of the councils of the city to assign limits for houses beyond certain limits." He listed the boundaries of the district as defined in the 1897 ordinance and placed L'Hote's property approximately a half a block away from them. He also summarized L'Hote's position. L'Hote alleged that his neighborhood had been free of such houses and the ordinance, in changing the neighborhood, would make the area unfit for families. Property values would drop. He also argued

that New Orleans's 1857 ordinance prescribed limits for the city's bawdy houses--different limits than the ones found in the 1897 ordinance--and that the first ordinance exhausted the city's powers to affect bawdy houses. L'Hote asserted that the city's previous, mid-century prostitution control efforts precluded any later city action on the question; he wanted to freeze city action with the 1857 ordinance which segregated the women and houses away from his property.

Miller began his decision by granting that L'Hote had the right to enjoin the enforcement of what he perceived to be an "illegal ordinance."¹⁰⁴ But that was the only point Miller conceded. Miller believed the use of the city's police power to act in defense of its citizens' morals formed an undisputed principle of law.

The regulation of houses of prostitution would seem to be so closely connected with public order and decency, the policy announced by the ordinance has so long been exerted in all large cities of our country, and the power has had such frequent recognition in the charters of this city, that it would seem the power itself cannot be successfully controverted.

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Miller knew that limits existed on the police power, but the ordinance was not beyond the city's power nor did it violate any of L'Hote's guaranteed state or federal constitutional rights. "The ordinance," Miller wrote, "neither sanctions nor undertakes to punish vice." New Orleans tried to limit the negative effects of prostitution by segregating it to a specific location in the city, an action within the city's powers from the state through its charter.

The vice, . . . is simply subjected by this ordinance to that restraint demanded by public interest. The unfortunate class dealt with by the ordinance must live. They are not denied shelter, but assigned that portion of the city beyond which they are not permitted to establish their homes. Thus viewed, the ordinance cannot be deemed open to the objection that it either punishes or grants a license to vice beyond the competency of the council.

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Miller next turned to L'Hote's argument that once the city council acted to confine bawdy houses to a specific location the council could not later alter its decision. L'Hote believed that once bawdy houses moved into a neighborhood the houses could never regain a reputable character even if the use of the houses for pros-

titution ended and the vice moved on. Such houses had taken on an "eneffaceable [sic] stigma, depreciating for all time the value of the property." If that were true, then the city's 1857 decision had ruined a section fo the city and exhausted the city's power to impinge on private rights for the public good. New Orleans's 1897 limits differed from the 1857 limits and the new limits would involve "a fresh and unnecessary sacrifice of private rights."

Miller could not support such a proposition. L'Hote's freezing of public policy to the city's first action did not seem reasonable. Miller found L'Hote's argument too ridged and believed that if the city had once acted on an issue it could act later to conform policy "the changed conditions time has called into existence."¹⁰⁷ Louisiana's Supreme Court supported a more flexible and responsive view of city actions regardless of the unintended injury done to a few of the city's residents. Miller and the court recognized that the use of the state police power did occasionally adversely affect some citizens. But the state's responsibility (and in this case the city's responsibility) to protect the "morals, health, and lives" of the wider community outweighed L'Hote's injury. "To that police power all must yield obedience," the court boomed. Private property and private rights had to give way to governmental actions for the public good. Miller did not deny L'Hote's injury but believed the city's need to control prostitution and the method employed to control prostitution took precedence over L'Hote's depreciated property values. Louisiana's Supreme Court decided L'Hote would be compensated for his injury "by the general public benefit the regulation is designed to subserve,"¹⁰⁸ overturned the trial court's decision against New Orleans, and dissolved the injunction against the ordinance.

Storyville lost at trial, then won in the Louisiana Supreme Court, but faced another life-threatening judicial review in the Supreme Court of the United States in 1900. L'Hote appealed Louisiana's high court decision to the federal court on Fourteenth Amendment grounds, meaning, he alleged New Orleans's actions deprived him of his property (through depreciation) without due process of law. The Court heard arguments on March 20, 1900.¹⁰⁹ In its brief to the Supreme Court,

the city of New Orleans pounded away at the idea that it did not violate its charter in passing the vice districting ordinance and that the ordinance was a fair and just use of delegated state police power.¹¹⁰ New Orleans also argued that the Court should not overturn Louisiana's Supreme Court decision because an issue such as the control of prostitution was best handled at the local level with elected officials responding to the felt needs of the community. If the court interfered, it would have the effect, New Orleans's City Attorney Samuel L. Gilmore argued, of "substituting the discretion of the courts for the discretion of the Council." Cities could regulate bawdy houses using the state police power as a means of preserving the public morals, and that use of the state police power could "never be construed as a violation of the Fourteenth Amendment."¹¹¹ L'Hote's brief to the Supreme Court is not in the public literature but, not unlike New Orleans, he probably argued basically the same points he had presented to the Louisiana Supreme Court but in Fourteenth Amendment terms.¹¹²

On May 14, 1900, Justice David J. Brewer handed down a unanimous decision.¹¹³ Brewer's decision took six pages of the text while the facts filled eight pages. Together they form the Supreme Court's only statement on the use by cities of delegated state police power to control prostitution. The Court would deal with federal legislation affecting the interstate transportation of women for immoral purposes in the 1913 case of Hoke and Economides v. United States, but L'Hote provides the Court's only review of state action against prostitution and defining an area outside of which prostitutes could not live or carry on their trade.¹¹⁴

Justice Brewer began his opinion by reviewing what the case did not involve.¹¹⁵ He pointed out that no "woman of that character" challenged the ordinance's validity. No woman argued that the ordinance deprived her of any of her personal rights or the right to decide where she could live or how to conduct herself. Next, Brewer stressed that no property owner contested the ordinance on the grounds that it deprived him of possible rents and tenants. And, finally, he noted that the ordinance did not give a free hand to the persons to carry on their business in any manner they wanted or which disturbed the public

peace. Since the ordinance both prescribed limits outside of which no prostitute could live and prescribed penalties for public disturbances within the limits, the ordinance did not turn the area over to the district's residents and visitors. Having described who and what was not involved, Brewer narrowed the question to whether a person who owned or occupied property next to such a district could prevent the enforcement of the ordinance.

In dicta, Brewer answered his own question explaining the federal/state relationship as it dealt with issues such as prostitution control. he knew full well that the issue was complicated, both socially and legally, and he believed he knew the best remedy for the problem.

... one of the difficult social problems of the day is what shall be done in respect to those vocations which minister to and feed upon human weaknesses, appetites, and passions. The management of these vocations comes directly within the scope of what is known as the police power. They affect directly public health and morals. Their management becomes a matter of growing importance, especially in our larger cities, where from the diversity of population the things which minister to vice tend to increase and multiply.

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Brewer is not normally thought of as a friend of state police power, but he upheld the use of the police power in this case. In L'Hote, a reader would not have known that Brewer possessed any fear of the possible limitless nature of the police power. For example, after setting out three public policy alternatives on prostitution which the legislatures of the state and/or the city could choose to implement, Brewer announced that the courts had no power to interfere with whatever policy the legislature chose to follow. "It is no part of the judicial function," he lectured, "to determine the wisdom or folly of a regulation by the legislative body in respect to matters of a police nature."¹¹⁷

Having established that the power to decide public policy on matters such as this fell to the police power and the legislatures of the states, Brewer then asked a series of rhetorical questions about whether the use of the police power in New Orleans had been "unjustifiable" or "unwaranted?" Brewer thought not. He reasoned that once the power "to limit the vocation of these persons to certain

localities" had been established then the question of the specific location had no standing. States possessed the right and the power to limit such houses and their occupants to prescribed areas and that power carried with it ". . . the power to discriminate against one citizen and in favor of another." He understood that some people would be injured by the establishment of boundaries and that different boundaries would have injured some one other than L'Hote. But ". . . if the power to prescribe territorial limits exists, then the courts cannot say that the limits shall be other than those the legislative body prescribes." Inquiry into the "reasonableness" of these particular boundaries lay not to the courts, Brewer was saying, but to the legislature. If the current legislature failed to deliver a satisfactory remedy, then L'Hote's remedy lay to the polls to change the composition of the legislature whether it be the city council or the state legislature.

But Brewer also implied that, perhaps, the ordinance was not a bad idea. he called it "an attempt to protect a part of the citizens from the unpleasant consequences of such neighbors. Because the legislative body is unable to protect all, must it be denied the power to protect any?" Brewer gave a judicial nod of approval to New Orleans's use of the state police power to establish a public policy on the subject and appeared to give a judicial wink of approval to the 1897 Storyville ordinance in particular.

Brewer took up L'Hote's argument of "pecuniary injury"--money damages done by the ordinance--by saying that the police power often works injury and that that injury did not limit the use of the police power. Such pecuniary injuries occurred when the police power affected directly some property but such was not the case in L'Hote's instance.

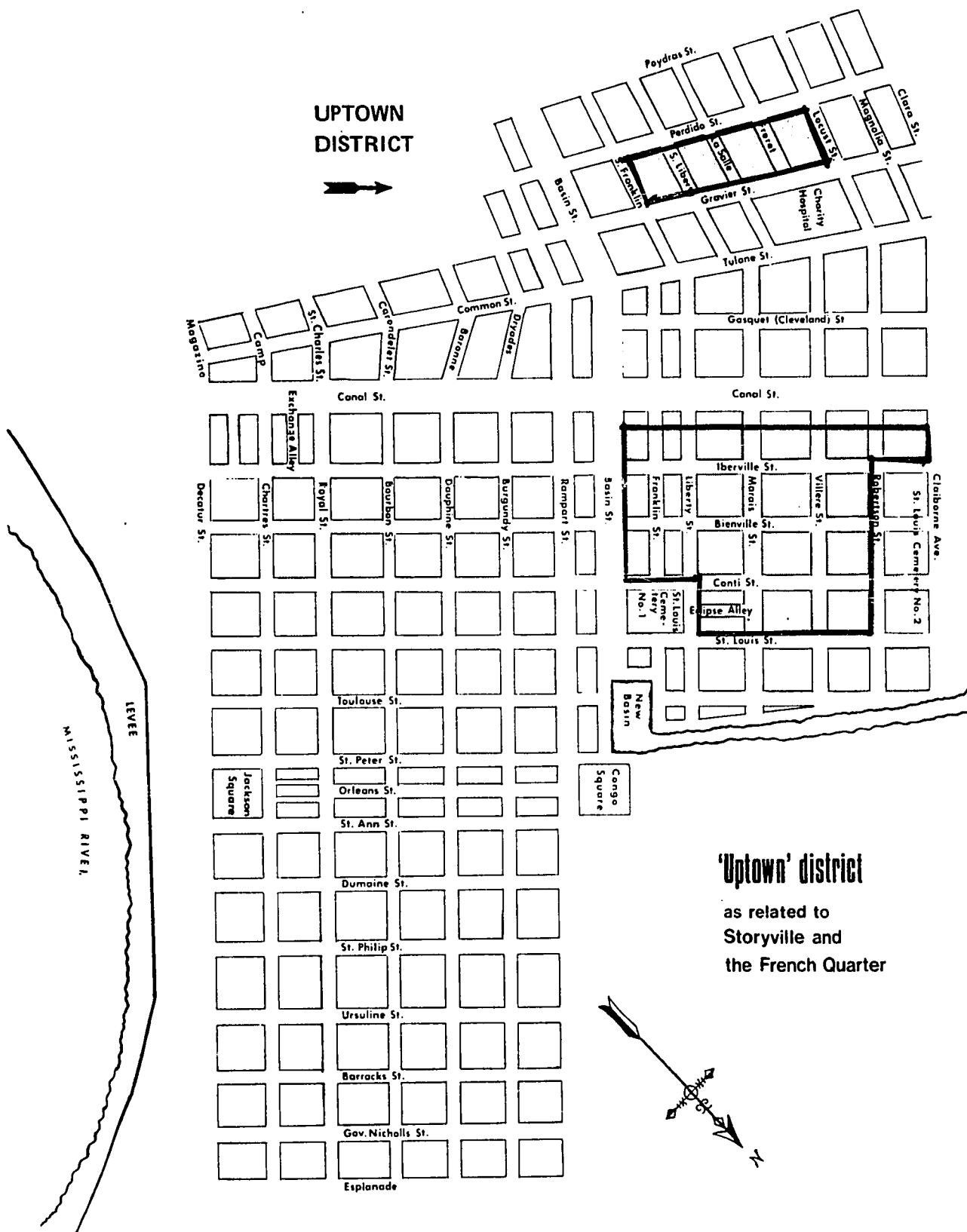
Here the ordinance in no manner touched the property of the plaintiffs. It subjected that property to no burden, it cast no duty or restraint upon it, and only in an indirect way can it be said that its pecuniary value was affected by the ordinance.

L'Hote's alleged injury could not overturn the ordinance; after all, perhaps the bawdy houses would locate in the prescribed limits but away from L'Hote's property. "They may go to the other end of the named district," Brewer speculated. But he had one further suggestion and possible remedy for L'Hote since the suit for an injunction and damages failed. Brewer reminded L'Hote and his lawyer that there was still a remedy at law. "There is nothing in the ordinance to deny the ordinary right of the individual to restrain a private nuisance."¹⁹

Perhaps nuisance law held L'Hote's remedy but Brewer overruled the other issues L'Hote raised. He upheld the districting ordinance and while adhering to the policy of judicial restraint in legislative policy questions he had upheld New Orleans's right to use Louisiana's delegated state police power to enact the ordinance. In addition, he supported the concept of dual federalism by which the states have plenary authority over some matters. Brewer's decision in L'Hote placed such city policy squarely within the prerogatives of the state's power of police and outside any federal question or interference on due process Fourteenth Amendment grounds. L'Hote is not great constitutional law or a landmark case but rather a reflection of the strength of federalism, separation of powers, and state police power in the judicial mind at the turn of the century.

With L'Hote as precedent, it is perhaps surprising that more cities did not enact districting ordinances on the Storyville mode. A few cities did follow New Orleans's example, as the next chapter on Houston's vice district will show, but the majority of the vice areas in the country continued on the edge of the law. Informal police toleration/regulation of the bawdy houses and a resignation among police about the inevitability of prostitution combined with the weight of tradition in favor of handling prostitution at the local level constituted a formidable obstacle against formal restrictions. But cities possessed the power to act, and act creatively by using the state's police power delegated to them in their charters to apply a variety of public policy alternatives to the social problem of prostitution. Some cities exceeded their powers in the search for alternatives to limit or eliminate the red lights from the urban land-

scape, and some cities, like St. Louis in 1870, lobbied the state for the charter change necessary to take control over a local prostitution situation. Cities could affect and change their moral environment and the state courts would support their actions as long as the cities acted within both their charters and the delegation of the state's police power. Moral reformers sought to change societal attitudes about prostitution and formed pressure groups to oppose the policies of some cities with St. Louis's 1874 repeal of the social evil ordinance an example of their pressure. But these restraints originated outside the law and America's legal tradition and constitution structure. In fact, federalism's tradition of localism and state police power forced the moral crusaders out of the churches and pulpits and into the city council chambers and state capitals. City use of state power either to tolerate an informal vice district or, through positive law, to establish a vice district force the training and education of the purity crusaders in the ways of American government and law and transformed them into lobbyists for the purity cause on all levels of the federal system. Thus, even the legal standing of vice districts was as has been in much of American legal history permeated, molded, and shaped by the principles of state police power, federalism, and constitutionalism.



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From:
Al Rose, Storyville, New Orleans: Being an Authentic, Illustrated
Account of the Notorious Red-Light District (University,
Alabama: University of Alabama Press, 1974), 179.

Notes

¹John C. Burnham, "The Social Evil Ordinance: A Social Experiment in Nineteenth Century St. Louis," **Bulletin of the Missouri Historical Society**, 27 (April 1971), 203; and his "The Medical Inspection of Prostitutes in America in the Nineteenth Century: The St. Louis Experiment and Its Sequel," **Bulletin of the History of Medicine**, 34 (May 1971), 203.

²**Commonwealth v. Cyrus Alger**, 7 Cush. (61 Mass.) 53 (1851), 85.

³Thomas M. Cooley, **A Treatise on the Constitutional Limitations Which Rest Upon the Legislative Power of the States of the American Union** (Boston: Little, Brown, 1883), 706, 5th edition.

⁴*Ibid.*, p. 739.

⁵*Ibid.*, p. 743.

⁶Christopher G. Tiedeman, **A Treatise on the Limitations of Police Power in the United States considered from both a Civil and Criminal Standpoint** (St. Louis: The F. H. Thomas Law Book Co., 1886).

⁷*Ibid.*, p. vii.

⁸*Ibid.*, p. vi.

⁹*Ibid.*, pp. vii-viii.

¹⁰*Ibid.*, p. 149.

¹¹*Ibid.*, p. 291.

¹²**George Shafer, and Elmira, his Wife v. Daniel G. Mumma**, 17 Md. 331 (1861).

¹³*Ibid.*, p. 332.

¹⁴*Ibid.*, p. 333.

¹⁵*Ibid.*

¹⁶*Ibid.*, pp. 334-337. The ordinance read that the mayor, on information, shall "cause to be brought before him all vagrant, loose, and disorderly persons, lewd women, keepers of bawdy houses, and persons having no visible means of livelihood, who may be found within the corporation limits of the town, and if found guilty, to fine such person not exceeding \$20."

¹⁷**Shafer v. Mumma**, p. 335.

¹⁸*Ibid.*, p. 336. LeGrand cited no previous case or decision or treatise in support of his position.

¹⁹**Shafer v. Mumma**, p. 336. This is the more ironic if you consider LeGrand's words for public order and remember the pro-Southern riots which occurred when Union soldiers transferred trains and stations in Baltimore in April and May 1861.

- ²⁰**People v. Ah Ho (A Chinese Woman)**, 1 Idaho 691 (1876).
- ²¹*Ibid.*, p. 692.
- ²²*Ibid.*, p. 692-694.
- ²³**People v. Buchanan**, 1 Idaho 481 (1878). For a case prohibiting just visiting a bawdy house, see *Ex parte Annie Johnson*, 73 Cal. 228, 15 Pac. 43 (1887).
- ²⁴**Rogers v. People**, 9 Colo. 450, 12 Pac. 843 (1886).
- ²⁵*Ibid.*, p. 451.
- ²⁶*Ibid.*, p. 452.
- ²⁷*Ibid.*
- ²⁸*Ibid.*, p. 454.
- ²⁹*Ibid.*, pp. 456-457. For a contrary view of city ordinances superceding state law, see **People v. Lucy Mallette**, 79 Mich. 600 (1890).
- ³⁰**Roxie Paralee v. State**, 49 Ark. 165, 4 SW 654 (1887).
- ³¹*Ibid.*, pp. 654-655.
- ³²**Ann Dunn et al. v. Commonwealth**, 105 Ky. 834, 49 SW 813 (1899).
- ³³*Ibid.*, p. 813.
- ³⁴**Cooley, Constitutional Limitations**, 704; Blackstone, 4 Comm. 162. Blackstone defined the police power to be "the due regulation and domestic order of the kingdom, whereby the inhabitants of the state, like members of a well-governed family, are bound to conform their general behavior to the values of propriety, good neighborhood, and good manners, and to be decent, industrious, and inoffensive in their respective status." Paynter also cited the case of **Stone v. Mississippi**, 101 U.S. 814 (1879).
- ³⁵**Commonwealth v. Cyrus Alger**, 7 Cush. (61 Mass.) 53 (1851).
- ³⁶**Dunn v. Commonwealth**, p. 814.
- ³⁷As we have seen in other chapters, Hawkins's influence and writing runs deep in bawdy house law. Compare Paynter's 1899 comments with the following 1724 quote from Hawkins.
That [bawdy houses] come under the Cognizance of the Temporal Law, as a Common Nuisance, not only in respect of its endangering the Public Peace, by drawing together dissolute and debauched Persons, but also in respect of its apparent Tendency to corrupt the Manners of both Sexes, by such an open Profession of Lewdness.
William Hawkins, A Treatise of the Pleas of the Crown (London: E. Sayer, 1724-1726, reprinted New York: Arno, 1972), 196.

³⁸Dunn v. Commonwealth, p. 814.

³⁹State, ex rel., etc. v. Botkin, 71 Iowa 87, 32 NW 185 (1887).
The name "Botkin" is not explained in the case.

⁴⁰State, ex rel., etc. v. Botkin, p. 90.

⁴¹Joseph Hechinger v. City of Maysville, 57 SW 619 (1900).

⁴²Ibid., p. 619. Two other cases involving cities trying to limit the associating with prostitutes, see *City of Watertown v. Maurice Christnacht*, 164 NM 62 (1917) and *James Fisher v. City of Paragould*, 127 Ark. 268, 192 SW 219 (1917).

⁴³City of San Antonio et al. v. Salvation Army, 127 SW 860 (1910).

⁴⁴Ibid., p. 863.

⁴⁵For the status criminality of vagrants, see chapter two.

⁴⁶San Antonio v. Salvation Army, p. 863.

⁴⁷San Antonio had a thriving vice district so the Salvation Army's home was probably well used. See *The Blue Book for Visitors, Tourists, and Those Seeking a Good Time While in San Antonio, Texas* (San Antonio: n. p., 1911-1912) in the Houston Metropolitan Research Center, Houston Public Library. Also see the case where Fort Worth unsuccessfully tried to use the state police power to prevent sexual contact between blacks and whites, *Minnie Strauss v. State*, 76 Tex. Cr. R. 132, 173 SW 663 (1915).

⁴⁸See the citations in note one above and James Wunsch's "Prostitution and Public Policy: From Regulation to Suppression, 1858-1920," (unpublished Ph.D. dissertation, University of Chicago, 1976) and his "The Social Evil Ordinance," *American Heritage*, 33 (February 1982), 50.

⁴⁹State v. Kate Clark, 54 Mo. 17 (1873).

⁵⁰John C. Burnham, "The Social Evil Ordinance: A Social Experiment in Nineteenth Century St. Louis," *Bulletin of the Missouri Historical Society*, 27 (April 1971), 203, 204.

⁵¹By 1873, a repeal campaign had begun in St. Louis led by a Unitarian minister, William Greenleaf Elliot, and his pressures may have prompted the state to indict and try Clark to get the issue before the courts.

⁵²State v. Clark, p. 18.

⁵³Missouri granted St. Louis charters in 1822, 1835, 1839, 1841, 1843, 1851, 1867, and 1870.

⁵⁴State v. Clark, pp. 18-22. Lodge cited numerous cases in support of his argument but relied on three legal treatises for support: Thomas Cooley's *Constitutional Limitations*; Joel Prentiss Bishop's *Commentaries on the Criminal Law* (Boston: Little, Brown and Co., 1872); and John F. Dillon, *The Law of Municipal Corporations* (New York: James Cockcroft & Co., 1870).

⁵⁵State v. Clark, pp. 22-23.

⁵⁶Ibid., p. 24.

⁵⁷Ibid., p. 26.

⁵⁸Ibid., p. 29.

⁵⁹Ibid., see also note fifty-four above.

⁶⁰State v. Clark, p. 30. Compare with Hawkins's statement in note thirty-seven above.

⁶¹State v. Clark, pp. 31-33.

⁶²Ibid., p. 33. Opinion of the majority, pp. 33-37.

⁶³Ibid., p. 34.

⁶⁴Ibid., p. 35.

⁶⁵State v. Binder, 38 Mo. 451 (18).

⁶⁶State v. Clark, p. 35.

⁶⁷Ibid., p. 37.

⁶⁸Ibid., pp. 37-44. Judges David Wagner and Wash Adams joined Napton in the majority. Judge T. A. Sherwood joined Vories in dissent.

⁶⁹State v. Clark, p. 41.

⁷⁰Ibid., p. 44.

⁷¹James Wunsch, "Prostitution and Public Policy," p. 54; John Burnham in his articles says only that the "State legislature nullified the Social Evil Ordinance in 1874" "Social Evil Ordinance," p. 207, and again in his "Medical Inspection of Prostitutes," p. 206, he used the term nullified.

⁷²City of St. Louis v. William Fitz, 53 Mo. 582 (1873).

⁷³Napton wrote the majority opinion in Clark as well.

⁷⁴St. Louis v. Fitz, p. 585.

⁷⁵Ibid., p. 586.

⁷⁶Napton reversed Fitz's conviction on two technicalities: 1) because the criminal court improperly instructed the jury in the case and 2) the charge was "too indefinite and vague." Fitz's indictment did not name the place the police found him associating with alleged thieves and prostitutes nor were the names of the persons alleged to be thieves and prostitutes given to Fitz.

⁷⁷**State v. Vic. DeBar**, 58 Mo. 395 (1874). "Vic DeBar" is referred to as "her" in the decision, probably short for Victoria.

⁷⁸**State v. DeBar**, p. 397, **Wagners Statutes of Missouri**, article 894, sec. 3, cited in the case.

⁷⁹Judges Vories and Sherwood dissented from **DeBar** but wrote no opinion.

⁸⁰**State v. DeBar**, p. 400. Both **Clark** and **DeBar** drew the attention of legal treatise writer John F. Dillon, in the third edition of his **Commentaries on the Law of Municipal Corporations** (Boston: Little, Brown and Co., 1881). Dillon devoted a lengthy footnote to the two cases on the "effect of a special act on a general law." See p. 115 fn.

⁸¹**James Givens v. Henry Van Studdiford**, 4 Mo. App. 498 (1877).

⁸²See James Wunsch, "Prostitution and Public Policy," p. 49, fn. 2. Wunsch wrote that Van Studdiford's renting of his house to prostitutes "ruined" Givens.

⁸³**Givens v. Van Studdiford**, p. 504.

⁸⁴**James Givens v. Henry Van Studdiford**, 72 Mo. 129 (1880).

⁸⁵**James Givens v. Henry Van Studdiford**, 86 Mo. 149 (1885).

⁸⁶*Ibid.*, p. 150.

⁸⁷*Ibid.*, p. 151. Van Studdiford also argued four lesser points in his brief: 1) that when rented, if no nuisance existed at the property, the landlord was not liable for a later nuisance; 2) the landlord, not being the "original creator" of the nuisance, needed notice of the nuisance and a request to remove it before an action could be brought against him; 3) he objected to certain testimony at trial which showed he "might possibly" have rented the property for immoral purposes as "spectual and coniectual;" and 4) the trial court erred in not allowing testimony showing what **Clark** and **DeBar** supported; namely, that a city license "exempted the party holding it from any prosecution by the state for keeping such a house as is here complained of." (p. 152).

⁸⁸**Givens v. Van Studdiford** (1885), pp. 152-153.

⁸⁹*Ibid.*, p. 156.

⁹⁰*Ibid.*, pp. 156-157.

⁹¹*Ibid.*, p. 158. Black also held that Givens did have a proper private nuisance action since he had been deprived of the "full use and enjoyment of the rents of his property."

⁹²**Levi L. Ashbrooke et al. v. Roselle Dale**, 27 Mo. App. 647 (1887).

⁹³**James Givens v. Henry Van Studdiford**, 86 Mo. 149 (1885) and **State v. Vic. DeBar**, 58 Mo. 395 (1874).

⁹⁴**Al Rose, Storyville, New Orleans: Being an Authentic, Illustrated Account of the Notorious Red-Light District** (University, Alabama:

University of Alabama Press, 1974).

⁹⁵Ibid., pp. 8-9. Rose says "... the appellate courts declared the law to be unconstitutional," but provides no case citation to litigation. Rose reprinted xeroxes of licenses issued to madams under this ordinance, but I cannot find the case he alluded to nor confirm his statement about the "unconstitutionality" of the ordinance.

⁹⁶See the map at the end of the chapter.

⁹⁷New Orleans's police aided landlords and madams to keep the peace in the district and kept the houses confined to the district but a history of New Orleans's police with a focus on its vice control efforts is much needed.

⁹⁸Rose, **Storyville, New Orleans**, pp. 37-39, and Appendixes C and D, pp. 192-193, and introduction, pp. 1-3.

⁹⁹Ibid., Appendix C, p. 192.

¹⁰⁰Ibid., pp. 38-39; Appendix D, p. 193.

¹⁰¹Rose cites the **Mascot**, March 26, 1887, as the possible source of the idea of the ordinance.

¹⁰²New Orleans's long history of prostitution and vice districting led to several cases in Louisiana's legal history. See **State v. Minnie Mack**, 41 La. Ann. 1079, 6 So. 808 (1898); **City of New Orleans v. Sweetie Miller et al.**, 142 La. Ann. 163, 76 So. 596 (1917); **State v. Louis McCormick**, 142 La. 580, 77 So. 288 (1918); **City of New Orleans v. Lulu White**, 143 La. 487, 78 So. 745 (1918).

¹⁰³**George L'Hote v. City of New Orleans et al.**, 51 La. Ann. 93, 24 So. 608 (1898). L'Hote lived at 522 Tremé Street, also known as Liberty Street. L'Hote's co-complainants were the Church Extension Society of the Methodist Episcopal Church and Barnardo Gonzales Carbajal, another property owner.

¹⁰⁴**L'Hote v. New Orleans**, p. 96 La. Ann., and p. 49 in So.

¹⁰⁵Ibid.

¹⁰⁶Ibid., pp. 96-97, La. Ann. and p. 49 in So.

¹⁰⁷Ibid., all three quotes.

¹⁰⁸Quote from Dillon, **Municipal Corporations**, p. 93 on p. 50 of the decision.

¹⁰⁹**L'Hote v. New Orleans**, 177 U. S. 587, 20 S. Ct. 718 (1899). The Court lives by its own calendar which means that although the court heard the case in March, 1900, because the Court began its session in October 1899, the case is cited as if it had been decided in 1899.

¹¹⁰New Orleans's brief can be found in Appendix A, pp. 185-190 of Al Rose's **Storyville, New Orleans**.

¹¹¹First quote, p. 188; second quote, p. 189 in Rose, *Story ville, New Orleans*.

¹¹²*L'Hote v. New Orleans* could be expanded into a chapter or an article in itself. The case could be followed from the city level up, through the courts, to the Supreme Court for final decision.

¹¹³*L'Hote v. New Orleans*, 177 U. S. 587 (1899).

¹¹⁴See *Effie Hoke and Economides v. United States*, 227 U. S. 308 (1913); For other United States Supreme Court cases decided on the Hoke precedent see *Athanasaw and Sampson v. United States*, 227 U. S. 326 (1913); *Bennett v. United States*, 227 U. S. 333 (1913); *Harris, alias Smith, and Green v. United States*, 227 U. S. 340 (1913); *Wilson, alias Charles Willard v. United States*, 232 U. S. 563 (1914); *Caminetti v. United States*, 242 U. S. 470 (1917). On the importation of immoral women, see *United States v. Bitty*, 208 U. S. 393 (1908).

¹¹⁵*L'Hote v. New Orleans*, Brewer's decision pp. 595-600.

¹¹⁶*Ibid.*, p. 596. See also Morton Keller's use of the first part of this quote in his *Affairs of State: Public Life in Late Nineteenth Century America* (Cambridge, Mass.: Belknap Press of the Harvard University Press, 1977), 516.

¹¹⁷Brewer wrote that the regulation of bawdy houses could be handled in three ways: "First, absolute prohibition; second, full freedom in respect to place, coupled with rules of conduct; or, a restriction of location of such houses to certain defined limits." *L'Hote v. New Orleans*, p. 597.

¹¹⁸*Ibid.*, p. 600.

¹¹⁹*Ibid.*

CHAPTER SIX

"Mamma, them sure is nasty ladies in that house": Districting and Segregating Prostitution in Houston, 1907-1909

Cities desiring to establish a vice district, such as St. Louis and New Orleans, needed help from the state or, if not the state's help, at least a lack of state opposition. In St. Louis's case, Missouri granted the city the charter change which allowed for the social evil ordinance while in New Orleans's case, the city had the necessary charter provision from earlier charters, to regulate its bawdy houses without state involvement in the city's vice controversy. Both St. Louis and New Orleans had to be Janus-like in their outlook: from one perspective each needed to see their prostitution problem and the public pressures to control the problem. From another perspective, cities needed to recognize the power the state possessed to fight the evil of prostitution and their state delegated powers to combat a local vice situation. In this issue of vice control, cities found themselves wedged between the social problem of prostitution and the state's criminal statutes on vagrancy and disorderly houses, and the state's delegated powers to cities. Through local tolerance, lobbying, and the appropriate charter changes, St. Louis and New Orleans struck a balance between the state's legal restrictions and requirements and local desirers for reform.

A variation on this theme of legal/social interaction in controlling prostitution can be found in Houston's experience with the social evil. Houston and its policies toward prostitution may be more representative of how smaller cities at turn-of-the-century America responded to the presence of prostitutes and bawdy houses.¹ Houston's creation of a vice district will be considered in four closely related phases: one, Texas's revision of its disorderly house statute and the actions of a local district court pursuant to the revision; two, the unintended effects of the statute revision in the physical location of the disorderly houses in Houston and the public response to the disorderly house's changed location; three, Houston's decision to district its prostitution subsequent to a city commission

recommendation; and four, the effort to segregate racially Houston's vice district.²

Houston developed up Buffalo Bayou from Galveston Bay and Galveston, Texas. From about the 1870s until 1900 or so, Houston captured Texas's railroad lines and became the major rail head for the state even though Galveston was Texas's best port. As a major warehousing, manufacturing, and commercial center, Houston grew steadily from a small town after the Civil War to a medium-size city by the turn of the century.³ Like most cities of the period, Houston had its share of disorderly houses and bawdy houses catering to transients, laborers, and native Houstonians. Houston had a long history of accommodation with its disorderly houses punctuated by almost seasonal prosecutions of such places from the 1870s through at least the 1890s.⁴ Most bawdy houses and drinking houses were congregated downtown around the old city hall and the Market Square area of town. By 1907, the newspapers referred affectionately to the area as the "Happy Hollow."⁵ The city and its immoral houses had reached a tacit agreement, a compromise with the houses operating openly and expecting to be occasionally indicted and charged as disorderly houses in the criminal district court and the women expecting to be charged occasionally as vagrants before a justice of the peace in a summary proceeding. Public calls for a clean-up, especially around election time, closed a few houses, restrained a few women in jail, and thinned the pockets of the local police, but within a month or two the houses reopened. This "system" of prosecutions, informal police control, and the city's tolerance of bawdy houses in a specific area of the town describes a typical situation for cities and vice in the period.

Houston's comfortable arrangement with its vice changed in 1907-1908 but not because of anything the city did; Texas revised its disorderly house statute. It is still unclear why Texas chose to revise its statute in 1907. The Journals of the Texas House and Senate provided only an outline of House bill 10's life in the legislature.⁶ What can be gleaned from the sparse record is that Representative J. A. L. Wolfe, of Sherman, Grayson County, entered a revised disorderly house bill into the Texas House on January 10, 1907, and the bill

went to the committee on Criminal Jurisprudence for consideration. House bill 10 passed through the House, then through the Senate, and finally went to a conference committee to hammer out the differences between the House and Senate versions of the bill.⁷ None of the debates on the bill, if any occurred, are recounted in the Journals and the state archives proved equally disappointing. What is known is that the Texas legislature passed the bill and it received Governor Thomas M. Campbell's approval on April 18, 1907.⁸

Texas's revised disorderly house statute possessed two unique provisions. On the one hand, it foreshadowed Iowa's later and much more noted and copied red-light abatement act by providing the civil remedy of an injunction against disorderly houses to any citizen in the state, not just to district and county attorneys. Texas's statute was the second such red-light abatement act in the country and it gave citizens the power to initiate actions of abatement against disorderly houses without the need of showing special injury from the nuisance.⁹ The law provided for prosecutors to start suits and provided

that nothing in the above proviso contained shall prevent such injunction from issuing at the suit of any citizen of the State who may sue in his own name, and such citizen shall not be required to show that he is personally injured by the acts complained of, and the procedure in all cases brought hereunder shall be the same as in other suits for injunction, as near as maybe,

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But what the legislature gave so too it could take away, and the second unique provision in the revised disorderly house statute created a major loop-hole in the act. It may be that this second provision was the reason why the bill needed a conference committee to settle the differences between the House and Senate versions. Article 362a of the statute provided a general grant of power to prosecutors and citizens to enjoin "habitual, actual, threatened, or contemplated use of any premises, place building or part thereof by persons attempting to establish a bawdy house or disorderly house at the location." Texas's revised disorderly house law continued in the next paragraph to say that article 362a and its more detailed companion article, 362b, could not,

... interfere with the control and regulation of bawds and bawdy houses by ordinances of incorporated towns and cities acting under special charters and where the same are actually confined by ordinance of such city within a designated district of such city.

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If the city had both a special charter from the state--meaning a charter granted a city over a certain population passed as a special act of the legislature--and a municipally authorized and established vice district then the personal injunction provisions of the disorderly house statute could not touch the bawdy houses. This loop-hole protected any Texas cities already in possession of a municipal ordinance setting up a vice district from having that district broken up by private suits and it provided an incentive to other cities to establish a vice district. A local prosecutor and the citizens of the area, now armed with the power of injunction, would see that such houses did not stray out of their city-prescribed limits. Providing every citizen with the power to initiate an injunction made every citizen, in effect, an unofficial prosecutor. Citizens using the abatement and injunction law helped bear the burden of keeping the social evil in designated areas. Texas's revised statute provided a remedy for persons on both ends of the "regulate or suppress" prostitution controversy; cities could only prosecute and suppress their bawdy houses unless they operated under a special charter and had passed an ordinance establishing a special district for its disorderly houses. Furthermore, the statute reflected the need for compromise and accommodation necessary to enact laws in popularly controlled state legislatures and the law displayed the social tensions and attitudes of the time over prostitution.

House bill 10 took effect on July 12, 1907¹² and ten days later the Houston city commission began receiving citizens' petitions asking for the closing of the city's bawdy houses. On July 22, F. H. Hellson presented a petition asking to close the "objectionable places" on Texas Avenue and Louisiana Street and on July 29, J. N. Gordon presented a petition asking for a similar closing of places on Louisiana, Texas, and Prairie streets--all in the heart of Houston's traditional vice area.¹³ The commission referred the petitions to

the Police Committee, but took no further action on the complaints.¹⁴

Six months later the revisions of the statute continued to be felt in Houston. A story appeared in the January 23, 1908, Houston Post which told of contempt hearings before the sixty-first district court of twenty-one landlords and residents of the "Hollow."¹⁵ In order to have received such contempt charges, the landlords and residents of the area defied a court order enjoining and abating the continued use of their properties for immoral purposes. The provisions of the revised disorderly house statute had begun to work in Houston.

Judge Norman G. Kittrell stayed the contempt charges for one month and he explained why he chose not to follow through with the charges. One important aspect of prostitution can be seen as a question of housing vagrants in bawdy houses in and out of vice areas and the future housing of the residents of the Hollow concerned Kittrell. He wrote that if the residents of the houses had to move immediately, their move would "result in injustice and danger to residents of houses of other parts of the city now exempt from the presence of such houses and such occupants."¹⁶ Kittrell desired to "minimize the evils resulting from present conditions as far as possible." Kittrell walked a narrow line in his order on the contempt hearings. Houston Hollow's residents stood in contempt of court but if Kittrell insisted on immediately breaking up the area, he ran the risk of spreading the disorderly houses throughout the city. Instead, he stalled for time. After chastising the landlords for renting their properties for immoral purposes, Kittrell modified his contempt decision and the injunctions pending against the defendants. He gave the residents one month, until February 22, to vacate their present places of business. If at that time the residents had not moved, the contempt charge would take effect and the defendants would stand liable to be fined and imprisoned. As a further warning to the residents of the Hollow, Kittrell added that "if any female defendant be charged with soliciting on the street or the sidewalk or from the place where she resides," then the contempt order would take effect immediately regardless of his one-month stay order. Kittrell found a way to both enforce the law and to apply

pressure to the residents to move yet without pushing his authority and the law so hard as to possibly damage the rest of the city by any hasty effort to close the Hollow.

In 1908 Houston, the Hollow existed downtown near commercial businesses but not private residences. Soon after the postponement of the contempt charges against the Hollow's denizens, residents of the second ward, east of the central business district, began to complain about and organize against the movement of disorderly houses into their respectable neighborhood. The second ward confronted an old, enduring problem of American city life.¹⁷ On February 4, residents met to choose a committee to confer with the school board to discuss ways of removing "undesirable residents" from the neighborhood.¹⁸ Without being specific, the Chronicle reported that what concerned the citizens was that "evil conditions exist in close proximity to a school house." After visiting the school board, the committee of the second ward planned to visit the mayor and the city commissioners to inquire about their remedies against such houses. Appeals for help and relief would also be made to other organizations such as the Houston Civic Club and the Pastor's Association, but if all that lobbying failed, the campaign would be "pressed through the medium of an injunction similar to the one employed to rid other sections of undesirable tenants." What appeared to be happening was that the disorderly houses of the Hollow had begun to move out of the central business district down Buffalo Bayou to a working-class residential area, an area in transition from family dwellings to light and medium industry. This movement of houses and their undesirable residents worried the residents of the second ward: ". . . they do not believe that those driven from other sections should be allowed to locate near them, and they are taking the opportunity of working against it."¹⁹ Probably these same citizens welcomed the injunctions against the Hollow but where the prostitutes and bawdy houses of the Hollow should go when the Hollow disappeared did not occur to the second warders until the houses began opening up in their neighborhood. Using the injunction and abatement law did not automatically mean the end of prostitution in Houston, but the use of such legal measures turned out to mean the spread of prostitution

and its accompanying houses to new areas of the city.

On Monday night, February 10, a committee of persons from the ward met with the school board and complained about the presence of "houses of ill-repute" near the Thomas J. Rusk school on the corner of Hamilton and Commerce streets. School board members assured the committee of concerned citizens that the board had already enlisted the city's help in closing down any houses in the vicinity of the school. In fact, the city told the school board that the houses would be closed within a week and the board let it be known that they "would countenance no jeopardizing of the moral atmosphere of the city's schools."²⁰ Mayor Horace B. Rice sent word to the school board that he would use the city's power "to rid the paths of the school children of all dens and traps of vice" then and in the future.

Judge Kittrell entered the final decrees in the injunction suits on February 18, 1908. Of the twenty-one original defendants, only twelve were left by the middle of February to enter such decrees against. According to his decrees and his earlier postponement, the injunction would take effect on February 22. Kittrell's order read that

. . . defendants are perpetually enjoined and restrained from maintaining and operating a disorderly house upon the premises described or from leasing or letting said premises to any other persons for immoral and unlawful purposes and from hereafter doing such things in the district known as the Happy Hollow.

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With the report of the final decrees, further court actions affecting the Hollow ended. Kittrell finalized his worder on Tuesday, the 22d, and none of the public presses lamented the passing of the Hollow.

As a general rule the newspapers of Houston reported even-handedly on the independent actions of the civil clubs, ward clubs, and city officials in the vice controversy of early 1908. Unlike the lurid, yellow journalism of some of the larger northern and midwestern city papers, the Houston Post and Chronicle supported the anti-vice efforts of the citizens but restrained themselves from sensationalizing the city's prostitution problem. In one major exception, however, the Post tried its hand at melodramatic coverage by reporting the responses of some women of the city to the disorderly house problem.

Under the headline "In Defense of Homes Women Join the Fight," the paper described what it called "a kind of terror" in Houston's wives and mothers about the vice threat to their homes and the special threat to their children.²² According to the Post whenever women met together the topic of the "influx of immoral characters during the past two months" dominated their conversations. Some women felt inept and unhappy about only talking about the problem but they did not know how or where to seek relief even when their husbands, brothers, and sons had tried to stem the tide of perceived vice. Like an infection in the body, the paper described the problem: ". . . new houses are being completed and new colonies are constantly coming in to extend the infected area, and to increase and solidify the infection that already exists." The Men's Club wanted to try the injunction procedures to curb the problem, while the women, through their clubs, wanted to appeal directly to the city authorities for help.

Even if the adult population could learn to tolerate the outrageous vice, the article contended, the children of the city were still in danger from the bad effects of such houses and their residents. While walking back and forth from the school in the mornings and afternoons, the disorderly houses corrupted the hearts and minds of the local children. One woman reported that she and her children had to walk past "several immoral resorts" to go to school or to catch a trolley car. She would take hold of the childrens' hands, tell them to "shut your eyes," and hurry them past the offensive houses. Not just young children but older children, as well, had to run a gauntlet of houses and people. As the paper reported, "women in houses along the way to school or stores call to them, proposals have been made," Other problems arose as well. Rusk school's principal, William W. Higgins, ordered the teachers in his charge to discontinue their visits to houses of the children in the neighborhood. Young, female teachers confused occasionally an address and they had mistakenly knocked on the door of a bawdy house instead of the door of a young scholar. As the Post phrased it, "The principal was not willing to subject the young ladies in his charge to possible embarrassment." In a more colorful story about the problems around the Rusk school, the article reported

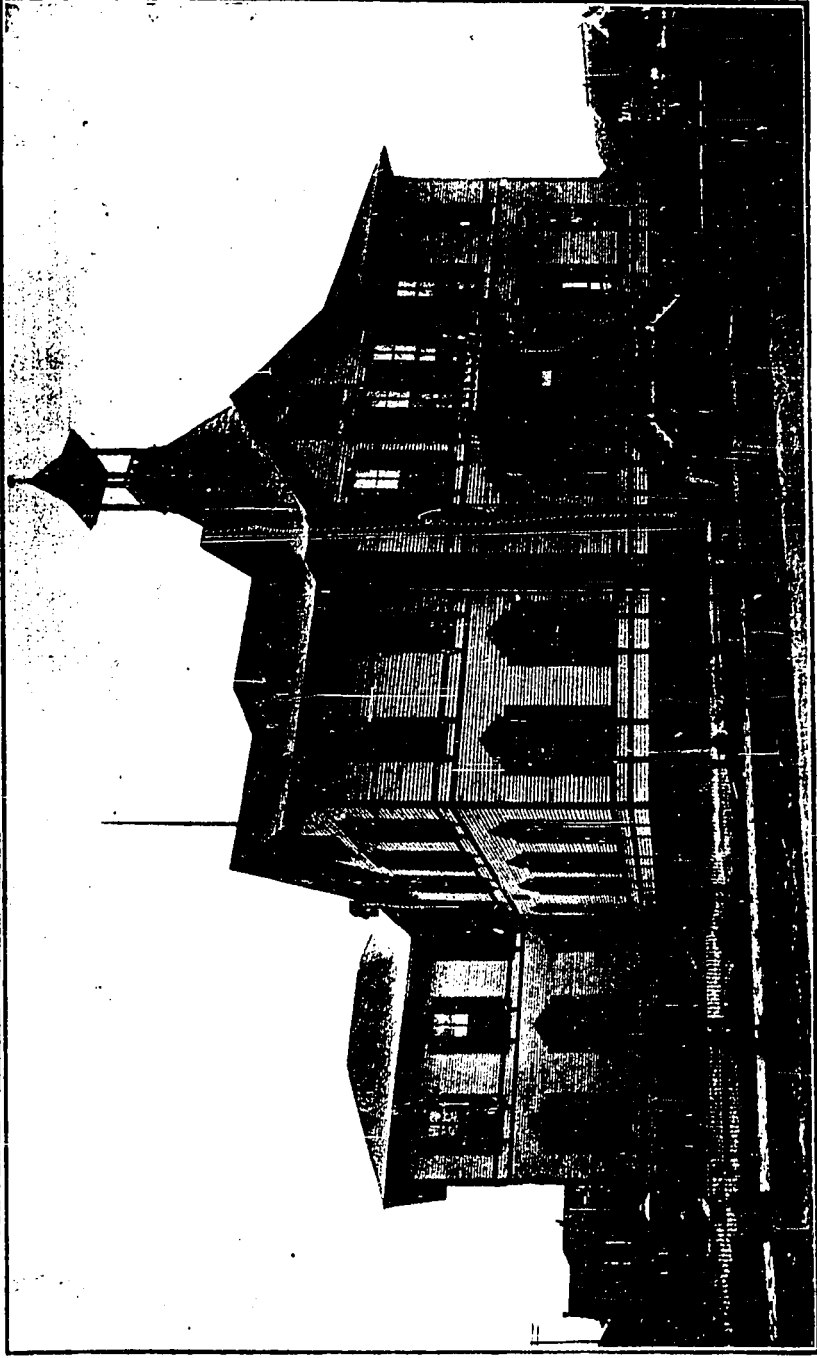
that a six-year old came home one day and told his mother, "Mamma, them sure is nasty ladies in that house."²³ H. J. Dannebaum, head of the trustees of the Houston school board, stressed the importance of raising the area from its moral taint.

The first consideration is the moral atmosphere; it means more than arithmetic or geography; it is absolutely essential, and if the district of the Rusk School can not be delivered from the houses of shame and vice which now infest it, we had better move the school.

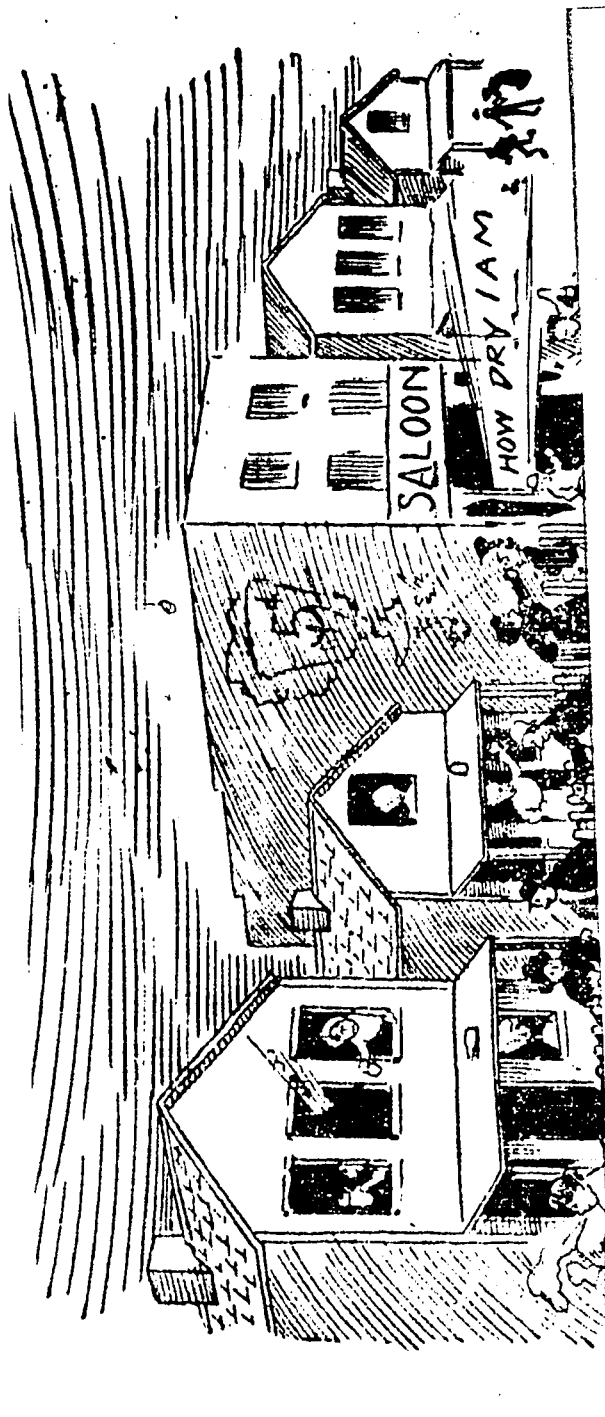
Because of the expense involved, rarely do school board trustees suggest either closing or moving a school. Dannebaum's public statement to that effect underlines just how seriously the school board believed the problem to be. School board concern combined with the local agitation of the ward club formed a powerful pressure group on the city to remedy the problem.

A cartoon appeared in the next day's Post after this "horror" story, February 29th, satirizing the situation on the streets around the school. In the foreground of the picture a boy and girl are walking to school with their books and slates. In the background are a line of five, two-story houses and buildings and a variety of the block's inhabitants. Broken bottles lie in the street and a picture of a five-cent glass of beer adorns an outside wall of one building with a "saloon" sign out front. Women appear in the windows, on the porches, and at the front gates of the houses calling to potential customers. A stout, almost matronly-like, woman walks down the street carrying a bucket foaming with beer; the caption next to her reads "'lady' rushing a bucket." A man with money is pictured speaking to one of the women at a gate to one of the houses while another man is being struck in the nose by a woman, for, the cartoon says, being broke. Another man is pictured staggering down the street drunk ("man with slight jag") while two others tussel on the ground outside of the saloon ("men taking a course of exercise") while the song "How Dry I Am" floats out of the bar. One child has reacted to the scene by staring as if in a trance at the houses while the school boy has dropped his books, covered his eyes, and begun to run from the street.²⁵ With its cartoon, the Post depicted the plight of the neighborhood around and near the Rusk school and pictured the threat to the morals of

Annual Report of the Public Schools of the Independent School District of the City of Houston, Texas, 1907-1908 (Houston: Gray, Dillaye & Co., 1908), 208



THOS. J. RUSK SCHOOL—ONE OF THE OLDER TYPES OF BUILDINGS



children who witnessed such things. The cartoon also provided a glimpse, although biased, into the bawdy house/saloon life of 1908 Houston.

On the evening the cartoon appeared, the second ward men's and women's clubs held a meeting in which a Chicago settlement worker, Allen T. Burns, endorsed the idea of a reservation, a municipal vice district, for the city. Burns combined the settlement work idea with the reservation idea. Settlement work, he explained, meant a neighborhood cooperating and working together on some topic of mutual interest regardless of nationality, religion, or politics. And what could be a more commonly held goal than to provide a clean, moral atmosphere for the city's children? Burns complimented the women on circulating a petition to give to the mayor calling his attention to the problems in the second ward and asking him "to secure the appointment of a reservation and the enforced removal of every character of ill-repute to such a reservation by order of the mayor."²⁶ If the efforts of the women did not succeed, Burns also supported the Men's Club alternative of using the 1907 injunction and abatement law to close the undesirable houses in the ward. Settlement work and moral reform from the ward level up to the city government held the key, Burns told the crowd, to cleanse their neighborhood of the social evil just as he claimed to have seen done in Chicago.

Burns related a less successful effort in New York City to eliminate prostitution to the gathered civic clubs. He probably referred to the famous investigations of the Committee of Fifteen of 1900-1901 to limit the social evil.²⁷ Burns described the effort to clean up New York was like trying "to exterminate the thistle by stamping the thistle down into the earth and resulting in disseminating and scattering the very evil it was sought to destroy."²⁸ So, instead of having vice isolated in one place, the Bowery in New York, the clean-up effort scattered prostitution throughout the East side. Burns drew a parallel between New York and Houston and he urged the gathered Houstonians not to make New York's mistake. He threw his power of moral suasion behind the women's efforts to secure a reservation telling them, ". . . you are following the most successful solution to one of the most difficult of social problems." Houston's civic men's and

and women's clubs in the ward where the problem existed began the agitation for a reservation to confine the disreputable persons. A vice district and not the eradication of prostitution provided a workable solution at prostitution control for some of Houston's citizens.²⁹

On Monday, March 2, the Post carried the text of a sermon delivered on the problem of children passing bawdy houses on their way to school. Reverend William States Jacobs, of the First Presbyterian Church, couched his sermon in religious and moral terms and did not mention the trouble in the second ward specifically. The Post's commentary on the speech, however, tied the sermon and the second ward's agitation together.³⁰ Jacobs worried less about the "open flaunting of shame and vice" before school children than he did about the "poisoning of young minds" which he saw as the true crime. He lashed out against "glaring posters of disgusting indecency" which were nearly as bad as houses of ill-repute for corrupting young persons. He challenged his congregation to stand fast against sin for "if the old, rock-ribbed Presbyterian can't stand for purity, for the safety of homes, for the proper training of children, what are we to expect of the future?" Jacobs's main concern was the influence such posters and houses had on the children. The future worried him when he thought how the children of today were tarnished by such sights and sounds. In order to protect both the children of today, their future, and the future of Christianity, every citizen and Presbyterian had to stand up and oppose the vice which threatened the second ward. Jacobs's speech came as close as Houston ever got to having a "purity crusade," a denominationally-led pressure group seeking the total extermination of prostitution.³¹ No other minister or priest delivered such a sermon to any other Houston congregation.

Houston's media coverage of the city's vice conditions continued the next day in the Chronicle, March 3. Carrying the headling "Has Power to Make District," the Chronicle provided the strongest and clearest public statement on the city's powers to regulate its immoral houses.³² To counter the argument that the city did not have the power to district its prostitution, the paper quoted section sixteen of the city charter then in effect:

The city of Houston shall have the power by ordinance duly passes to prohibit and punish keepers and inmates of bawdy houses and variety shows; to prevent and suppress assignation houses and houses of ill-fame, and to regulate, colonize, and segregate the same.

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After reviewing the state disorderly houses statute and the charter provision, one quoted, but unnamed, attorney determined that the city had the power it needed to establish a reservation or vice district. Since the state law was general, the attorney reasoned, and the charter specific, the charter would take precedence over the statute, " . . . insofar as it applies to conditions and police powers within the corporation limits of Houston."

But the Chronicle found persons less optimistic than the quoted lawyer about the practical decisions and problems involved in establishing a district for prostitution. Police Commissioner James Appleby, the person most likely to have control over a special vice area, had two problems with the reservation idea: first, no place existed in Houston which could be set aside for a reservation; and second, he believed the city did not possess the power to take anyone's property for city use and especially for an immoral use.³⁴ He assessed the vice situation as "a deeper problem than appears on the surface." Other parts of the city, the Chronicle reported, had begun to complain about immoral houses moving into their neighborhoods, not just the second ward. Old bawdy houses and disorderly houses long closed down by the city had begun to open up again. Closing the Hollow appeared to be scattering prostitutes, bawdy houses and disorderly houses not only in the second ward but also to other parts of the city as well.

On the evening of March 3, 1908, Mayor Rice, Police Commissioner Appleby, and Chief of Police George W. Ellis attended a meeting of concerned citizens in the second ward. In the March 4 story on the meeting, the Chronicle stated that citizens wanted to know "How will Mayor Rice go about keeping his promise to clear out the 'undesirable residents' in the Second ward?"³⁵ Rice brought reassurances to the residents but no exact plan to correct the problem. He exhorted the twenty-seven assembled men of the ward club not to speak to him again if he did not clean up the second ward. In a short speech, Rice alluded to the use of the injunction and abatement law as a means to clear

out any immoral houses in a respectable neighborhood and he believed the second warders should go after the persons who rented the houses for immoral purposes. Texas's injunction law gave the citizens and the county prosecutor "plenty of rope" to take care of any prostitution problem in any neighborhood.³⁶

Felix Schram, a neighborhood music teacher, brought up the idea of a reservation. He said that if the city drove those "characters" out of one area of the city, they simply went to live in another area and then those respectable people complained. Schram thought the city should provide such people a place to live, a reservation. He related an incident where, although none of the disputed houses were located within a few blocks of his house, a man mistakenly sought access to Schram's house at three o'clock in the morning. Schram told him to move on or "I would fill him full of shot" and the person moved on. But the incident was typical of the conditions existing in the ward. A reservation away from him and his neighbors was the answer Schram stressed.

But Mayor Rice disagreed. "It's against the law. You can't license crime," the mayor argued. Rice granted that Schram's idea had merit and that it was even a "reasonable solution," but Rice did not believe that Houston had the power to establish such a segregated district for prostitution and vice. State law prohibited such city action and Houston could not "make laws for the State of Texas."³⁷ In early March 1908, Houston's mayor believed that the establishment of a municipal vice district was impossible under existing laws.

Until the end of March, media coverage of the vice problem dropped off. The minutes of Houston's city commission reveal nothing brewing about possible vice alternatives. Between the meeting of the mayor and the ward club on the 3d and the end of March, only one newspaper story appeared related to the vice problem. On Monday the 9th, the Chronicle broke a story entitled "Move to Create Reservations."³⁷ City officials, the report alleged, were deep in the process of trying to set up two separate vice reservations in the city; one for white women and one for black women. Citing state law and the city charter, Houston officials had decided to district the women, force them to re-

main in the districts by city ordinance, and in that way "confine the evil in a certain fixed locality." Neither of the two proposed locations were specifically described in the article but the paper reported that one area in particular was favored as a location for one of the reservations. One major problem faced the city and that was convincing the property owners in the suggested sites to rent their land and houses for the immoral purpose of the reservation. In the particularly prime location, the paper reported, "negro women" would be excluded. They would be located in an area "more in the vicinity of where the greater part of negroes live." As the Chronicle reported the attitude, city officials recognized that "white and negro 'undesirables' should not be within the same district, and the city will thus, if possible, secure two reservations." Houston was and is a southern city and racial concern bubbled just below the surface in any public policy issue in the period. To maintain the southern policy of Jim Crow, Houston considered going to the added expense and trouble of setting up two segregated reservations for prostitution to separate the races.

Houston's city commission received a report from its ordinance committee on March 30, 1908. The report recommended an ordinance districting the city's prostitutes and bawdy houses. Three of the five members of the city commission sat on the ordinance committee putting together the recommended districting ordinance. Both papers carried lengthy stories on the decision to district and the Post printed in full both the ordinance and the commission report which recommended districting without commenting on the plan's strengths or weaknesses.³⁹ In its coverage of the city reaction, the Chronicle did not print the text of the report or the ordinance but did comment on the effects of the ordinance and the problems associated with setting up a district. Houston chose for the site of its reservation neither in central business area of the old Hollow nor the area east of downtown in the second ward. Instead, Houston set aside an area across the city from the second ward, up the bayou away from the downtown and close to the area of the city inhabited by blacks. Contrary to the Chronicle's March 9 story, Houston set up one reservation, not two, and planned to force all "fallen women" into one district. But the women could not move

into the area immediately because the site chosen for them had not been developed. As the Chronicle described the site,

The spot allotted to the fallen women is barren of houses, with the exception of a few scattered negro huts, and one of the first factors to be reckoned with is the construction of abodes in which the women may reside.

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Further, the area was removed from all other residential sections of the city although a few people did live adjacent to the site. In fact, the Chronicle remarked that because the houses would have to be built on the property, the property value of the area would actually rise although, the paper added skeptically, the same had been said of the old Hollow property. Under a suspension of the rules of procedure, Houston accepted the report of its ordinance committee and passed the recommended vice districting ordinance with no dissenting votes.⁴¹

Houston's ordinance committee, with the aid of City Attorney William H. Wilson, drew up the committee's report which explored the city's legal alternatives to its prostitution problem. Houston found itself in a "deplorable state of affairs," said the report, because unlike most cities where such women stayed in one section of the city, in Houston, prostitutes had scattered throughout the city; too close to private residences, churches, and schools. For many years, perhaps as many as twenty-five years, Houston had lived with a de facto district--a district which existed in fact but not by any law or ordinance. Within this de facto district the women and their houses did not direct damage to residences or schools and the bad effects of prostitution were kept to a minimum. But, the commission report continued, "After the passage of the act of the last legislature, this old section or reservation was broken up by actions brought in the district court of Harris County by citizens of the county." Because the women and houses affected by the actions did not live in a municipally sanctioned vice district, the judge had no option but to grant the injunctions against the women even though it meant possibly scattering their bad influence throughout the city. According to the committee's report the mandated closing of the houses by the court moved the social evil problem from where its effects were minimal to areas of the city

where its effects did a maximum amount of injury, especially to children, the report recounted. The committee's report implicitly criticized both the 1907 state disorderly houses statute revision and criticized the local residents who actually used the law. If they had not meddled, the report implied, the women and houses probably would not have moved, the second ward would not have complained about any change in the neighborhood, and the city would not have to go to the trouble of establishing a district for prostitution. Citizen use of the 1907 injunction and abatement law did not result in closing Houston's bawdy houses or stopping prostitution, but their court actions did have the unintended effect of forcing the city to set aside an area of town for the tolerance and continuance of what the abatement actions hoped to prevent in the first place.

Houston's ordinance committee's report recommending districting continued by stressing the city's particularly advantageous position to control the problem of prostitution in the state/county/city relationship. The commissioners believed that neither the state nor the county properly understood the problem of scattered houses of prostitution in the city of Houston. The city's close relationship to its citizens, its commission form of government which combined the legislative and executive duties of a city, the city's police force with its knowledge of the disputed houses, and the city's municipal court to speedily and summarily deal with prostitutes and their houses provided the reasons why the city ought to be in control of its own vice situation. Unlike parallel campaigns in other sections of the country, the commissioners did not speak seriously of the eradication of prostitution nor did they mention any interest or need for a moral clean-up drive in Houston. Prostitution appeared as an inevitable aspect of city life in the report; "this great evil" of prostitution, the commissioners wrote, "exists and has always existed side by side with civilization."⁴²

Houston followed the New Orleans Storyville ordinance in defining limits outside of which no prostitute could live; the same kind of ordinance which the United States Supreme Court had upheld as a valid use of the state police power in the 1900 case of George L'Hote v. New Orleans. Although such an ordinance as Storyville's might have the

appearance of legalizing prostitution inside the limits of the ordinance, in law, the ordinance did no such thing. Yet the Houston ordinance committee's report spoke of a "hesitance" to adopting such an ordinance because, even if legal, the appearance of legalizing prostitution bothered the commissioners. If Houston passed such an ordinance, how that ordinance might effect property also concerned the commissioners.

Yet in spite of such stated qualms, both moral and legal, the commissioners recommended districting the women for two reasons: first, the commissioners returned to the idea of prostitution's inevitability in urban settings.

The successful and permanent exclusion of prostitution from the limits of a city the size of Houston is impossible. It is a fact of general knowledge that the successful permanent exclusion of prostitution from any city of large size has never occurred in the history of the world.

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Prostitution might be suppressed for awhile or from some place, but the commissioners believed it would crop up again somewhere else in the city ". . . doing doubly injury to a society by coming closer to the home and to the young." A forced end to prostitution was not possible, the report decided, so why should the city spend the effort and money trying to accomplish something which could not be done?

Second, even if Houston tried to crack down on the women and houses, they would simply relocate to just outside of the city's limits easily accessible by the electric street cars on the major avenues, and, located there, open for business. Pedestrian traffic and persons riding the trolleys through the city and through residential areas to reach the immoral houses would actually be worse than leaving the women in place in the city proper, alleged the commissioners.

But the location of the district remained a question for the ordinance committee and the commissioners recognized that some one would be inconvenienced by any location selected for the reservation. But any inconvenience done to third parties did not worry the commissioners, they relied directly on Justice David J. Brewer's decision in L'Hote about pecuniary damages not restricting the application of delegated state police power. Brewer wrote, "because the legislative body is

unable to protect all, must it be denied the power to protect any?" Brewer thought not and Houston's ordinance committee agreed. But where to locate Houston's reservation? The old Hollow site was too centrally located to businesses and residences and was not large enough to hold all the houses and prostitutes of the city. But, by moving the site out of the city proper but within the corporation's limits, up Buffalo Bayou, west of the city, a reservation would not be a burden on the city and it could be made to appear an asset for the city. "The property is of little value," the commissioners wrote, "and would be increased rather than diminished in value by the ordinance." Districting would require Houston to fill in an empty area of the city; new houses would have to be built in the area to house the women, and the houses' value would be added to the tax rolls. Houston would benefit from the increased taxable property and the general property value of the area would be increased because of the development on previously unused land. Usually property values fall in and around a city's vice area, but Houston's ordinance committee argued that property values would not fall but rise because of the city's policy of districting its bawdy houses. Further the site chosen for the district lay removed from private residences and schools; it was little traveled and sufficiently large so that additions to the district would not be needed any time soon. City Attorney Wilson assured the commissioners that Houston's proposed ordinance was ". . . practically identical with the one of the City of New Orleans which was held a lawful exercise of the police power by the Supreme Court of the United States." On the basis of the committee's report and findings, Commissioners James A. Thompson and J. Z. Gaston recommended Houston pass the accompanying suggested ordinance and begin immediately to district its prostitution.

Houston's city commission adopted the report and passed the districting ordinance entitled "An Ordinance Colonizing and Segregating Houses of Ill-Fame, and Assignment Houses; Regulating the Same and Proscribing Penalties" on March 30, 1908. In the ordinance, the city specified two reasons for its passage.

Whereas, The City of Houston is authorized by its charter to colonize and segregate houses of ill-

fame, and to regulate same, and
 Whereas, At the present time such houses are scattered
 throughout the body of the City, and in many cases in
 residence sections, and in neighborhood of the public
 schools, thereby constituting a menace to public
 order and decency, to the sanctity of the home and to
 the moral welfare of the young;

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Like New Orleans, Houston made it unlawful for any prostitute to live outside of specified limits in the city. Houston's ordinance, of course, described Houston streets in its first section but the city took the form and wording of the ordinance directly from New Orleans's Storyville ordinance. Houston's reservation never attracted the attention or allure of New Orleans's more famous Storyville but the reservation ordinance accomplished its two goals: it provided a place for the city's bawdy houses and prostitutes to congregate and live and away from residences and schools. Further, because of the city reservation loo-hole in the 1907 state disorderly house statute, the reservation ordinance effectively blocked the use by citizens of the state's injunction and abatement law; the law which created the original problem. Local ward agitation for relief from a vice problem and the action of the city commissioners supported by adequate legal counsel from the city attorney worked together to support a Storyville-like ordinance for the city of Houston. Following the Texas disorderly house statute and its own charter provisions and powers, Houston reached another accommodation with its prostitute population and the physical nuisances of bawdy houses.⁴⁵ Houston devised an acceptable local remedy for a local prostitution problem.

For over a year after the city commission established the reservation, it dropped from the public's sight and public press. But fifteen months later, in June 1909, the reservation again became news. Race relations underlaid the controversy which arose although the major questions in the dispute focused on the state disorderly house statute, the city districting ordinance, and their effects on prosecutions under the state's vagrancy statute.

On Saturday, June 26, 1909, the conflict over the reservation appeared in the newspapers but the actions and stories recounted began two days earlier on the 24th. On that Thursday evening, constables of Harris County's precinct one Justice of the Peace, Michael McDonald,

arrested, for vagrancy, twenty-two and possibly more women in houses on the reservation. Constable Frank Smith and his deputies escorted the women into McDonald's court where they were charged with being vagrants. The women posted appearance bonds and had their trial date set for the next day at two in the afternoon. On Friday morning, attorneys for the women, Arthur E. and Charles A. Heidingsfelder, appeared in the sixty-first district court of Judge Norman G. Kittrell seeking writs of habeas corpus for the women from the justice's custody. Because of the time needed to hear the plea for the writs, their granting, and the issuance of the proper paper to McDonald and his court's officers, McDonald had already begun the two o'clock hearing on the women's vagrancy arrests before being served the state district court's notice of habeas corpus. Instead of appearing in the justice court, probably at the advice of their lawyers, the women appeared at two-thirty in Kittrell's court in the habeas corpus proceedings. Kittrell ordered the women discharged from McDonald's custody and ordered the justice to return their bonds. But McDonald ignored the notice of habeas corpus and proceeded against the women even though they failed to appear in his court. McDonald declared the women's appearance bonds forfeited and he issued alias warrants for their re-arrest. Between three-thirty and nine on the evening of the 25th of June, the constable and his deputies for the justice court re-arrested thirteen of the women. Also that evening, attorneys Heidingsfelder re-applied to Kittrell's court for another release order and they also applied for a temporary injunction against McDonald restraining him from further proceeding against the women. Kittrell granted both the second request for habeas corpus and the temporary injunction about nine-thirty p.m. and had the injunction served on McDonald about ten o'clock p.m. Kittrell's injunction directed McDonald to appear in the district court at ten o'clock the next morning to show cause why the temporary injunction should not be continued pending a full hearing for a permanent injunction. Kittrell threatened to hold McDonald, Smith, and the deputies in contempt of the district court if they failed to appear the next morning.

This series of legal maneuvers, arrests, bonds, writs, hearings,

re-arrests, and courts in such an obvious conflict and disagreement over the women from the reservation proved to be choice material for the papers and both the Post and the Chronicle reported the case as it occurred.⁴⁶ But why would a justice of the peace arrest twenty plus women in the district in the first place? Since the reservation's establishment, numerous women had moved into the area prescribed in the city ordinance so logically houses must have been built in the previously deserted area to house the women and their trade. McDonald's trouble with the area lay not with the state statute or the city charter or the city ordinance or even with the reservation itself. Rather, McDonald objected to the living patterns of the women residing in the district. According to McDonald, two weeks previous to his arrests, he had notified the women of the district that he would use wholesale arrests on the charge of vagrancy to stop white and black women from living in the same house.⁴⁷ In particular, some white women lived in bawdy houses with black "landladies" and that practice especially troubled McDonald. After the two weeks elapsed and the women had not complied with his request to separate, McDonald directed his constable to arrest certain women in the reservation. He denied that his interest in arresting the women lay in the fines they would pay his court and constables. In fact, to curb such suggestions McDonald told the press that if any of the arrested women were convicted, he would donate his fees to a Houston charity. He wanted to separate the races in the reservation. McDonald also told the press that if the women separated and moved apart as he wanted in the first place then he would "gladly dismiss the cases pending and [would] take no further action."⁴⁸ In 1908, Houston established a vice district and, in 1909, Justice of the Peace McDonald wanted to segregate racially that vice district; but did the ordinance and state statute provide some protection and exemption from some kinds of criminal prosecutions?

On Saturday morning, the 26th, at ten o'clock, Judge Kittrell began a hearing on the legal questions and conflicts of the two courts. At the hearing, Kittrell explained that the legal issues surrounding the issuance of the temporary injunction would be presented to McDonald

and his attorneys so that they could prepare their defense and arguments to test the injunction at a later hearing on the request for a permanent injunction. Kittrell set the later hearing for Wednesday, June 30th, and he laid out for McDonald and the press what he considered to be the law in the matter. But he also stressed the tentative nature of his views at that time. McDonald carried the burden of proving why Kittrell should not make the injunction permanent and why Kittrell should drop the habeas corpus proceedings and release the women back into the custody of the justice court.

Both papers published the text of Kittrell's June 26th statement on the laws and policies involved in the dispute.⁴⁹ Kittrell tried to deny that his court and McDonald's court had collided; rather, Kittrell argued that the courts held varying interpretations of the law and once the judges reached a single understanding of the legal points in the case, the friction between the courts would disappear. He began by reviewing the 1907 revised state statute which provided that its penalties did not reach into cities which had set aside special areas for their disorderly houses to congregate.⁵⁰ Houston took advantage of the loop-hole in 1908 and established such a reservation through municipal ordinance. All of the women arrested, Kittrell found, resided in the prescribed area and presumably were "women plying their vocation in that district." Kittrell believed that the revised state statute prohibited judicial or citizen interference by injunction of houses within any such segregated districts but citizens and prosecutors were free to act against any house outside of the district. But what about other provisions of the state's criminal code? Kittrell continued,

. . . so long as the women of ill fame confine themselves and the prosecution of their nefarious business to the limits fixed by the city for the purposes of segregation, that they will not be proceeded against by the authorities under the criminal statutes and that they can not lawfully be proceeded against and punished. 51

Kittrell believed the legislature meant "to exempt certain designated territories from the operation of the criminal law" Not only the injunction but also any other criminal sanction or penalty, Kittrell appeared to say, did not have force in the district and that included

the state's vagrancy statute. Houston acted legally pursuant to its charter and the state statute within the police power of the state and the women living and working such a segregated district committed no criminal offense. Kittrell argued that since the women committed no criminal act, they could not be arrested; and if arrested, their remedy lay to the district court for a writ of habeas corpus and an injunction against future arrests.

Kittrell spoke to McDonald's reasons for arresting the women and segregating the races in Houston's bawdy houses. He provided more details on who McDonald arrested and the race situation within the houses. Some of the landladies were "colored women" who had white women living in the houses with them and McDonald focused on the landladies in his arrests. But McDonald's actions and the reason for his actions did not impress Kittrell, ". . . the law makes no distinction between the colors in the matter of keeping a disorderly house." Regardless of how "abhorrent and repulsive" the idea might be to some citizens, Kittrell wrote, the law provided no more or less penalties for a black or a white woman who ran a bawdy house and the law did not provide any more or less penalties for black and white residents of bawdy houses. Kittrell lectured that if the women lived in the reservation and obeyed the prostitution segregation ordinance, the justice of the peace had no power to arrest the women to separate any white women from living in the same house as any black woman.

Kittrell closed his preliminary statement on the temporary injunction by calling the city ordinance a "rational and reasonable exercise of the police power and a commendable attempt to minimize or mitigate" the evils of prostitution. Since the city enacted the ordinance in conformity with the state's policy on disorderly houses, it was not for the courts to question the state policy. Courts resolved conflicts and decided the law between adversaries but they did not decide state public policy. Kittrell reminded McDonald that he could always appeal any decision of Kittrell's to the Court of Civil Appeals to test the statute, ordinance, and Kittrell's issuance of the writs of habeas corpus and injunction. He instructed McDonald that the forfeited bonds should be returned to the women since McDonald failed

to exercise comity with the district court in delaying the hearing on the forfeiture when served with the notice of habeas corpus. Kittrell acknowledged that the women were "criminal and lead depraved and vicious lives" and yet "they are women and obscure [sic], and in the main poor and outcasts from society." But none of those conditions, Kittrell emphasized, denied the women "fair treatment" under "the law." The women deserved "every legal protection the law throws around every citizen, however low or humble or mean he or she may be."⁵² In Kittrell's thinking the women had not violated any criminal sanction and, McDonald's race concerns notwithstanding, the justice had no legal justification for arresting the women. For these reasons, Kittrell released the women and temporarily enjoined McDonald from interfering with them.

McDonald responded to Kittrell's statement by charging that it was Kittrell who should have observed comity between the courts by not interrupting his vagrancy proceedings against the women.⁵³ McDonald and his lawyers believed Kittrell acted in good faith and in accordance with his impression of the law, but Kittrell's impression that he acted correctly did not make his actions right. McDonald also attacked the writ of habeas corpus Kittrell issued saying that the women had a remedy in law against an unjust prosecution through appeals and not a remedy in equity to the district court for habeas corpus. Vagrancy formed a legitimate part of the criminal code so the women should not have sought a writ for release from the justice court. McDonald also leveled a strong blast at Kittrell's issuance of the injunction. Kittrell improperly used the injunction, a civil equitable remedy, to impede a criminal prosecution and such an equitable remedy had no power to restrain crimes or criminal proceedings. Since the case involved no injury to property or property rights, Kittrell had no authority, McDonald argued, to interfere with an injunction against the justice of the peace or his deputies.

McDonald attempted to tie his actions to the national effort against white slavery and he urged every citizen of Houston to support his actions "with every atom of moral influence" they possessed. McDonald came close to attacking Houston's reservation policy saying

that if "the great mass of good people in Houston" knew the horrors of such houses then the keepers would not be permitted to be open "for one single hour and why the authorities have so long permitted it has always been a mystery" But having gone that far in criticizing the city's policy, McDonald backed off to defend his actions in arresting the women. He said he hoped the arrests would aid the "regulation" of the houses of the reservation. McDonald wanted to regulate better the houses so that,

they shall not be the instruments of negro and
white social equality in Houston with all the
bad influences that that condition suggests,
even in a bawdy house.

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Public squabbling ended until the following Wednesday, June 30, when Kittrell opened a hearing on the request for a permanent injunction. Instead of making a determination on the injunction, Kittrell allowed McDonald and his lawyers to present testimony on the arrests, the vagrancy charge, and submit affidavits on the issues.⁵⁵ McDonald insisted upon the payment of the women's bonds he forfeited when the women appeared before Kittrell's court instead of his court. Attorneys Heidingsfelder argued against the forfeiture on the grounds that at the time the women were under the jurisdiction and protection of the district court and not the justice court. Kittrell continued the hearing until the next day.

On Thursday, the Houston Post reported that two questions had emerged from the hearings: one, whether the city ordinance establishing the district went beyond the limits set forth in the state's disorderly house statute; and two, whether the district court had the right and the power to enjoin a criminal procedure in another court.⁵⁶ Kittrell continued the case for another day for further argument and, in fact, Kittrell heard arguments in the case for another two days.⁵⁷

In final statements on Saturday, July 3d, Kittrell further articulated his own position and listened to arguments from McDonald and his lawyers, the lawyers for the arrested women, and the Houston city attorney and one of his aides.⁵⁸ McDonald argued that he had a right to enforce the state's criminal code in the city's reservation because the state could not delegate any of its legislative power to

the city to exclusively police the area. Houston, although it established the district, did not possess sole legal authority in the reservation and could not selectively enforce the state law. Therefore, McDonald argued that he had every right to arrest the women for vagrancy or for whatever reason. On the other side of the dispute, Houston City Attorney Wilson believed that the state provided the opportunity for cities to set aside a reservation and cities had exclusive control over the area "as eminent domains." If that argument were true, then Houston's police regulations for the district would supplant the state's restrictions and statutes. Yet even after four days of testimony and with the controversy over a week old, Kittrell postponed any decision for at least another week.

On Saturday, July 10th, Kittrell handed down his decision in the dispute; he ruled against McDonald. Kittrell released his long decision to the press and both papers reprinted it in full. After a quick review of the facts of the case and especially the reason why McDonald arrested the women, the Post reported that McDonald served notice of appeal to the Civil Appeals court and that he would keep up his fight "hoping to eventually separate the races." The Chronicle emphasized the importance of the case as a judicial test of all such municipal vice districts in Texas. Kittrell's decision that if a state gave a city the power to set aside a district for prostitution whether it was legal to "then prosecute those women for the very thing for which it especially creates the reservation?"⁵⁹ Neither paper provided any editorial or general comment on either the reservation, McDonald's arrest of the women for racial reasons, nor Kittrell's decision.

Kittrell's permanent order of injunction against McDonald read a great deal like his temporary injunction order of June 26th and he recounted the events of the case from arrest, bonding, the writs of habeas corpus, the forfeiture, the re-arrests, the second writs, and the temporary injunction. Kittrell struck hard at McDonald's lack of respect and comity for the district court's orders and writs. If judges or attorneys could ignore a court's orders because they did not agree with those orders, the whole judicial system of law stood in danger of being destroyed. McDonald should have obeyed Kittrell's no-

tice of habeas corpus and stopped any further proceedings against the women. Since Kittrell made the determination that the women had committed no offense, and since he had the power to issue writs for the women's release, Kittrell believed he acted correctly in the case. McDonald argued that Kittrell lacked the power to issue writs of habeas corpus and injunction in criminal cases. If as McDonald thought, Kittrell could not issue the writs then the whole process of habeas corpus became "an empty formality and a purely perfunctory process." Kittrell would not allow such disrespect of the writs and his court to stand.

In his opinion, Kittrell focused on two questions: one, whether in a municipally authorized and established vice district the women who worked and lived in the area could be prosecuted for violating some of the state's criminal statutes or were aspects of the law suspended against them as long as "They confine their actions to the limits of the reservation?" Two, Kittrell next asked if his court had the power to restrain other judicial bodies from prosecuting women observing the vice segregation order and limiting their behavior to the reservation? Together with the revised state disorderly house statute, Kittrell believed that the Houston city charter provision and the city ordinance constituted a legal vice reservation in the city under the city's control--not the state's. Texas's criminal statutes could not operate against the women in a segregated district, decided Kittrell. He wanted no part of McDonald's argument that the state statute was unconstitutional; he sat on the bench of a court of nisi prius, meaning a court of original jurisdiction with a sitting jury. Courts of appeal rather than district courts decided questions of a statute's constitutionality, and Kittrell appeared to be urging McDonald to appeal on the grounds of the disorderly house statute's constitutionality.

Kittrell did not overlook McDonald's race separation motive in arresting the women in the first place. He called McDonald's action "most commendable" and he "deplored" that McDonald could not "legally effectuate his purpose," but the mere fact of cohabitation of different races of prostitutes in the same bawdy house did not give the justice of the peace the power to interfere with the women in the municipal vice district. Living on the reservation exempted the women from some of

the state's minor criminal sanctions, Kittrell ruled, and Houston held the remedy for such a housing situation on the reservation through the passage of appropriate ordinances to prevent and correct the problem.

On the second question of whether the district court could enjoin another court of equal or lesser jurisdiction, Kittrell spoke with less assurance. He relied on a statement by the Texas Supreme Court which held that as a rule civil proceedings in equity could not interfere with a criminal proceeding or prosecution. But if the facts of a dispute were clear and if the district court decided that the facts constituted no criminal offense, therefore no criminal prosecution was needed; then,

the court may by injunction prevent prosecution,
not thereby enjoining prosecutions for violations
of the criminal law, but enjoining prosecutions
for acts which do not constitute any violation of
law, and therefore, . . . , the parties who commit
them are innocent.

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Kittrell believed he enjoined McDonald from prosecuting innocent persons because the women plying their vocation on the reservation had broken no criminal statutes so McDonald's prosecution was against the law and unreasonable. On these grounds, Kittrell issued a permanent injunction against McDonald.

McDonald appealed Kittrell's decision to the Texas Court of Civil Appeals which handed down its decision in the case of Michael McDonald et al. v. Thelma Denton et al. on December 21, 1910.⁶¹ Judge W. S. Fly wrote the unanimous opinion of the court. Fly reviewed the facts in the case from the arrest of, he stated, twenty-six women on charges of vagrancy by the justice of the peace to the issuance of the writ of injunction preventing the justice from further prosecuting the women. Fly began by citing Thomas M. Cooley's Constitutional Limitations showing that legislative bodies could not discriminate between localities in enforcing state criminal statutes. He ruled that Texas could not do what Kittrell and the city of Houston had argued; that is, the state could not delegate the power to suspend the enforcement of certain state laws in certain places for certain classes of people. Citing the city charter but not the 1907 revised disorderly house statute, Fly believed Texas could not have so suspended its laws for

the reservation and certainly Houston could not have suspended state law only on the basis of its charter and its own ordinance.⁶² Justice of the Peace McDonald had a duty, not just a right, to enforce the state's law, Fly wrote, wherever violations of the state's criminal code occurred. Any other motive McDonald possessed, Fly believed to be inconsequential as long as McDonald properly enforced the state law. Kittrell's and Houston's policy of vice segregation and their arguments in support of the policy appalled Fly.

Under the laws of Texas, prostitution and the keeping of houses of prostitution are crimes, and it is almost inconceivable that a Texas Legislature would confer upon a municipal government the right, not only to regulate, but to license, crime and give it in certain locations approbation and approval.

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Fly allowed no compromise or accommodation with crime.

Fly then shifted his attention to the issuance of the injunction by Kittrell and he took an equally dim view of Kittrell's actions. He stuck closely to the rule of equity courts that they deal only with civil and property rights and that an injunction will not be granted to restrain the prosecution of criminal proceedings or the commission of a criminal act.⁶⁴ McDonald possessed a duty to enforce the state's criminal code which the district court could not interfere with for any reason. Because appeals courts review points of law and not facts, Fly limited himself to the rules of law and he did not concern himself with the facts and problems of the local situation. McDonald's desire to use state law to segregate racially the reservation never came up in Fly's decision. Fly believed the defendants had sought the aid of a court of equity to escape the strong arm of the criminal law from catching and prosecuting them as vagrants, prostitutes, and bawdy house keepers. And he further believed that the district court had improperly and incorrectly aided the women and unnecessarily hampered the justice of the peace from doing his duty. Fly reversed Kittrell's decision against McDonald and dissolved the injunction as well.⁶⁵

Instead of accepting the judgment of the Court of Civil Appeals, Thelma Denton, but more likely her lawyers, appealed to the Texas Supreme Court which delivered its opinion three months after the appeals court, March 22, 1911.⁶⁶ Judge F. A. Williams began by citing a similar case

from Dallas in which the Texas high court had agreed to look into the state disorderly house statute but on different grounds than in Denton v. McDonald.⁶⁷ Like Fly before him, Williams quickly reviewed the facts of the case and upheld Fly's ruling against Kittrell's district court action in enjoining McDonald. Also like Fly, Williams never mentioned McDonald's motives in arresting the women in the first place. Nor did Williams consider the constitutionality of the state's disorderly house statute or the effect the statute had on the Houston situation. Texas's Supreme Court read Kittrell a law school lesson on the difference between the writ of habeas corpus and the writ of injunction. Habeas corpus could be used by district judges to release prisoners from criminal proceedings while an injunction dealt solely with civil matters regarding the invasions of property and property rights. Williams noted that Kittrell had tried to use the injunction to support the habeas corpus orders and that sort of mixing of writs proved defective. Use one or the other of the writs, Williams stressed, but not both in an instance such as Kittrell found before him. The Supreme Court reminded the parties that the Court of Civil Appeals had a duty to correct the misuse of writs by courts of first instance and Fly and the Court of Appeals acted properly in reversing the district court's actions. Williams let stand the appellate court's decision in the case.⁶⁸

So in 1911, Jim Crow bawdy houses in Houston reservation received Texas's judicial blessing. Both the Court of Civil Appeals and the Supreme Court would have read about the racial motivation behind McDonald's enforcement of the state law in the fact statement in Denton's brief and in Kittrell's district court decision and injunction order. Yet both courts stayed within their own self-restraining limits of deciding questions of law and not of fact and both appellate courts found fault with the law as the local district court interpreted it to fit the local situation. For Thelma Denton and the other women joined in the case the courts held no remedy for their forced segregation along racial lines in Houston's red-light reservation.

But over a year prior to the Texas Supreme Court's decision, McDonald's actions may have already had their intended effects on the

reservation. The thirteenth United States census of 1910 showed that 239 women lived in the area of the reservation in 55 houses. Census records also listed the races of all the residents of the all-female houses and, in 1910, the census showed that all black women lived in houses separately from the white women and houses.⁶⁹ In spite of all the legal bickering back and forth over the writs and the arrests, McDonald realized his wish of separating the races within bawdy houses on the reservation through informal pressures and persuasions on the women. He successfully segregated the segregated vice district. Houston's reservation existed in fact and law until just after the outbreak of the First World War, as the next chapter details, and from 1909 to 1917, the red-lights of Houston shone from separate white houses and black houses of prostitution.

Notes

¹Title quote from *Houston Post*, February 27, 1908, p. 5. Historians of the Progressive Era have concentrated their interests on the purity forces' efforts to close vice districts and historians have detailed the closing of numerous such areas. Especially see David J. Pivar, *Purity Crusade: Sexual Morality and Social Control, 1868-1900* (Westport, Conn.: Greenwood, 1973). See also Eric Anderson, "Prostitution and Social Justice: Chicago, 1910-1915," *Social Service Review*, 48 (June 1974), 203; John C. Burnham, "The Progressive Era Revolution in American Attitudes toward Sex," *Journal of American History*, 59 (March 1973), 885; Garna L. Christian, "Newton Baker's War on El Paso Vice," *Red River Valley Historical Review*, 5 (Spring 1980), 55; Mark Thomas Connelly, *The Response to Prostitution in the Progressive Era* (Chapel Hill: The University of North Carolina Press, 1980); Egal Feldman, "Prostitution, the Alien Woman, and the Progressive Imagination, 1910-1915," *American Quarterly*, 19 (Summer 1967), 192; Jeremy P. Felt, "Vice Reform as a Political Technique: The Committee of Fifteen in New York, 1900-1901," *New York History*, 54 (January 1973), 24; Paul H. Hass, "Sin in Wisconsin: The Teasdale Vice Committee of 1913," *Wisconsin Magazine of History*, 49 (Winter 1965-1966), 138; Roy Lubove, "The Progressive and the Prostitute," *Historian*, 24 (May 1962), 308; John S. McCormick, "Red Lights in Zion: Salt Lake City's Stockade, 1908-1911," *Utah Historical Quarterly*, 50 (Spring 1982), 168; James R. McGovern, "'Sporting Life on the Line': Prostitution in Progressive Era Pensacola," *Florida Historical Quarterly*, 54 (October 1975), 131; Elizabeth C. MacPhail, "When the Red Lights Went Out in San Diego: The Little Known Story of San Diego's Restricted District," *Journal of San Diego History*, 20 (Spring 1975), 1; David J. Pivar, "Cleansing the Nation: The War on Prostitution, 1917-1921," *Prologue: The Journal of the National Archives*, 12 (spring 1980), 29; and Ruth Rosen, *The Lost Sisterhood: Prostitution in America, 1900-1918* (Baltimore: The Johns Hopkins University Press, 1982).

²But the major previous works have done almost no work on the opening or tolerance or establishment by law of a municipal vice district. four exceptions are John C. Burnham, "The Medical Inspection of Prostitutes in America in the Nineteenth Century: The St. Louis Experiment and Its Sequel," *Bulletin of the History of Medicine*, 45 (May 1971), 203; and his "The Social Evil Ordinance: A Social Experiment in Nineteenth Century St. Louis," *Bulletin of the Missouri Historical Society*, 27 (April 1971), 203. See Al Rose, *Storyville, New Orleans: Being an Authentic, Illustrated Account of the Notorious Red-Light District* (University, Alabama: University of Alabama Press, 1974), and John S. McCormick, "Red Lights in Zion: Salt Lake City's Stockade, 1908-1911," *Utah Historical Quarterly*, 50 (Spring 1982), 168.

³Neither of the two best works on Houston's history mentions that Houston had a vice district. David G. McComb's anecdotal history mentions prostitution and bawdy houses in the city from time to time, but without elaboration; see *Houston: The Bayou City* (Austin: University of Texas Press, 1969, 1981). Harold C. Platt penned the best work on Houston but focused on the building up the bureaucratic and service delivery infra-structure in the city; see *City Building in the New South: The Growth of Public Services in Houston, Texas, 1830-1915* (Philadelphia: Temple University Press, 1983). Houston has had its share of city booster books telling its "history." As a rule they shed little light on the city's past vice and prostitution. For example, see O. Fisher Allen, *The City of Houston from Wilderness to Wonder* (Temple, Texas: n. p., 130); Ed Ellsworth Bartholomew, *The Houston Story* (Houston: Frontier Press of Texas, 1951); Benajah H. Carroll, *Standard History of Houston, Texas* (Knoxville, Tennessee: H. W. Crew, 1912); A. Pat Daneils, *Texas Avenue at Main* (Houston: Allen Press, 1964); Writer's Program, *Houston: A History and Guide* (Houston: Anson Jones Press, 1942).

In 1860, Houston had a population of 4,845; in 1870, 9,382; 1880, 16,513; 1890, 27,557; 1900, 44,633; 1910, 78,800; and 1920, after the

war boom, 138,276. From **Texas Almanac and State Industrial Guide, 1972-1973** (n. p.: A. H. Belo Corp., 1971). Most of the population of Harris County lived in Houston; in 1910, for example, Harris County, including Houston, had a population of 115,693.

⁴The best work on Houston's nineteenth-century prostitution and vice is Geoffrey Gay's "No Passion for Prudery: Morals Enforcement on Nineteenth Century Houston," (unpublished Master's thesis, Rice University, 1977). He and I have examined the criminal district court records for Harris County. See Criminal District Court, Harris County, Criminal Minutes, Houston Metropolitan Research Center, Houston Public Library, Houston, Texas. Justice of the Peace records are very scattered when they exist at all. HMRC has some while the JPs have no idea what has become of their turn-of-the-century records. Typical of the summary proceedings of the period would be an example from the Justice of the Peace Precinct One for Houston which showed that on February 25, 1913, Margaret Valentine, Sweltie Johnson, and Vivy Williams stood charged with vagrancy, case #17768. They waived their right to a jury trial and were fined \$1.00 each plus costs. Costs amounted to \$3.50 for the Justice, a \$5.00 County Attorney's fee, \$4.00 in general court costs. Those costs added to their fine amounted to \$13.80; not an unsubstantial amount. Houston Metropolitan Research Center, Justice of the Peace Precinct One, Harris County, 17 February 1913-22 April 1913. The full charge against the women usually read they were being charged with being "a vagrant: to wit, a common prostitute."

⁵See **Houston Post**, January 23, 1908, p. 14; **Houston Post**, February 18, 1908, p. 14.

⁶**Journals of the House of Representatives of the Regular Session of the Thirtieth Legislature of Texas** (Austin: Von Boeckmann-Jones Co., 1907), and **Journals of the Senate of Texas Being the Regular and First Called Session of the Thirtieth Legislature** (Austin: Von Boeckmann-Jones Co., 1907).

⁷Houston's and Austin's newspapers simply did not cover the bill. For the bill's progress in the legislature, see **Journals of the House**, pp. 216, 368, 419, 437, 450, 721, 779, 780, 788, 801, and 86. For the conference committee, see pp. 900, 1168, 1331, 1355. In the Senate, see **Journals of the Senate**, pp. 240, 241, 280, 350, 357, 383, 395, 405-406, 469, 474, 524, 543, 811, and 916.

⁸**General Laws of the State of Texas Passed at the Regular Session of the Thirtieth Legislature, 8 January - 12 April, 1907** (Austin: Von Boeckmann-Jones Co., 1907), 246-248. Bill entitled "Disorderly Houses--Defining Same."

⁹Bascom Johnson, "The Injunction and Abatement Law," **Social Hygiene**, 1 (March 1915), 231. Maine passed a quasi-red light abatement act in 1891 but it produced few results.

¹⁰**General Laws**, p. 248, Art. 362b, sec. 1.

¹¹*Ibid.*, Art. 362a, sec. 1. As a bill, House bill 10 received mention in the **Houston Post** on March 4, 1907, p. 9; April 17, 1907, p. 9.

¹²**Houston Post**, July 12, 1907, p. 3.

¹³**City Council Minutes**, July 22, 1907, July 29, 1907, Book P., Houston Metropolitan Research Center, Houston Public Library.

¹⁴Records of the period are skimpy at best. The local newspapers followed Houston's vice conditions spottily. The criminal district court records for the period 1907-1909 are unlocated. No papers of the mayor or city commissioners are available. No police records are available. None of the oral histories done by the staff of the HMRC have turned up any mention of the Hollow or the later vice district. Attempts on my part to speak to the elderly on the topic have proven useless. Perhaps later researchers will be more creative in the search for records of Houston's past prostitution.

¹⁵Houston Post, January 23, 1908, p. 14.

¹⁶Ibid.

¹⁷Children in the cities meant either protecting children from the evils of the city or improving the moral conditions of the city. For the best work on cities and their dangers see Paul Boyer, **Urban Masses and Moral Order in America** (Cambridge, Mass.: Harvard University Press, 1978) and especially see his section on Charles Loring Brace, the Children's Aid Society, and his "solution" to protecting children from the problems of the city.

¹⁸Houston Chronicle, February 4, 1908, pp., 4.

¹⁹Ibid., p. 4. Both quotes.

²⁰Houston Post, February 11, 1908, p. 5; Houston Chronicle, February 11, 1908, pp. 1, 7. See also Houston Chronicle, February 16, 1908, p. 19 when the movement of "undesirable" women out of the Rusk school vicinity is alluded to but not the total clean-up as urged by the second warders.

²¹Houston Post, February 18, 1908, p. 14. Citizen use of the new red-light abatement act can be seen in a listing of the twenty injunctions receiving final decrees. Four plaintiffs undoubtedly in collusion sought to enjoin the remaining houses in the Hollow. The Post listed the cases as:

Douglass Burnett	v. E. D. Polemanakos et al.
H. T. D. Wilson	v. Dixie Darnell et al.
L. H. Perry	v. Dixie Darnell
L. H. Perry	v. Michael DeGeorge et al.
Jesse H. Jones	v. Caroline Eckel et al.
L. H. Perry	v. Josie King et al.
Douglass Burnett	v. Leonard H. Howard et al.
L. H. Perry	v. Sadie Coman
L. H. Perry	v. Mrs. William Rommel et al.
L. H. Perry	v. Lulu Shubeck
H. T. D. Wilson	v. T. F. Loftus et al.
William P. Wilson	v. Frank Dunn et al.

²²Houston Post, February 27, 1908, p. 5. The subtitle of the article read "A Kind of Terror Has Possessed the Wives and Mothers and They Meet Together Planning to Purify Atmosphere in Which They and Children Must Live."

²³Ibid., all quotes.

²⁴Ibid. The Post carried more of the story and events of the vice problem than did the Chronicle. At the time, the Post was Houston's and Texas's most prestigious paper. The Post, not the Chronicle,

stayed on top of the story although neither paper focused very sharply on the issue.

²⁵Houston **Post**, February 28, 1908, p. 4.

²⁶Houston **Post**, February 29, 1908, p. 4; Houston **Chronicle**, February 29, 1908, p. 5. The **Post** headline read, "The Club Will Ask For A Reservation," and the **Chronicle** headline read "Petition and Injunction Are Both Invoked to Cleanse the Second Ward."

²⁷Committee of Fifteen, **The Social Evil, with Special Reference to Conditions Existing in the City of New York** (New York: G. P. Putnam's Sons, 1902, reprinted New York: Garland, 1979). See also Jeremy P. Felt, "Vice Reform as a Political Technique: The Committee of Fifteen in New York, 1900-1901," **New York History**, 54 (January 1973), 34.

²⁸Houston **Chronicle**, February 29, 1908, p. 5.

²⁹The next day the Houston **Chronicle** ran a story entitled "Hollow District Commercialized," March 1, 1908, p. 24. With great pride the article described how the city's old vice district had been closed and how businesses were buying up property in the area. At 511 Louisiana, a wire and iron works company moved in and set up business. The article hinted that if the city paved the streets around Prairie and Louisiana, "new businesses would spring up like jam in the district."

³⁰Houston **Post**, March 2, 1908, p. 5.

³¹See David J. Pivar, **Purity Crusade: Sexual Morality and Social Control, 1868-1900** (Westport, Conn.: Greenwood, 1973) for the composition of the membership and their goals in such reform efforts. See also the closing efforts in other cities listed above. In 1894, the Methodist minister of the Shearn Church in Houston carried on a minor clean-up campaign but it produced no lasting results. See David G. McComb, **Houston: The Bayou City** (Austin: The University of Texas Press, 1969, 1981), 153-154, and his footnotes for the newspaper coverage of the Reverend George C. Rankin's reform efforts.

³²Houston **Chronicle**, March 3, 1908, p. 5.

³³Ibid. City charters for Houston are difficult to find and not always complete when they exist. The words "regulate" and "segregate" appear in the 1899 and 1904 charters but not "colonize." Houston's 1905 charter contained the word "colonize" and it was the charter in effect in 1908. See **Charter of the City of Houston, Harris County, Texas as Amended in 1899** (Houston: W. J. Moore Co., 1899); **Charter and Revised Code of Ordinances of the City of Houston, 1904** (Houston: W. H. Coyle & Co., 1904); **Charter of the City of Houston and General Ordinances** (Houston: W. H. Coyle & Co., 1905) all in the Houston Metropolitan Research Center, Houston Public Library.

³⁴Houston **Chronicle**, March 3, 1908, p. 5.

³⁵Houston **Post**, March 4, 1908, p. 5; Houston **Chronicle**, March 4, 1908, p. 9.

³⁶Houston **Post**, March 4, 1908, p. 5. Both Commissioner Abbleby and Chief of Police Ellis expressed their support for Rice's statement.

³⁷ *Houston Post*, March 4, 1908, p. 5. The rest of the article described other incidents of vice and prostitution in the city and the various committees formed by the ward club to keep the city informed on the moral situation of the neighborhood.

³⁸ *Houston Chronicle*, March 9, 1908, p. 3.

³⁹ *Houston Post*, March 31, 1908, p. 4; *Houston Chronicle*, March 31, 1908, p. 5. For the original record of the city commission committee report recommending district, see City Council Minutes, Houston, Texas, March 30, 1908, Book P., pp. 290-294, Box #8, Houston Metropolitan Research Center, Houston Public Library. For the ordinance, see *Charter of the City of Houston and General Ordinances, 1910* (Houston: Coyle & Co., 1910), 124-127. On October 2, 1911, Houston revised the boundaries of the district at little; see *Charter and Revised Code of Ordinances of the City of Houston of 1914*, E. P. Phelps, comp., (Houston: n. p., 1914), 154. See the appendixes for copies of the commission report and the vice districting ordinance.

⁴⁰ *Houston Chronicle*, March 31, 1908, p. 5.

⁴¹ A misunderstanding flared up at the last minute when Commissioner James Appleby, a member of the ordinance committee, refused to sign the report. He claimed he had not had time to read the report or even see it. Commissioners James a. Thompson and J. Z. Gaston signed the report as a majority of the committee and the report passed out of committee by a 2-1 vote. When the ordinance came before the full city commission, Appleby voted in favor of the ordinance, resulting in its unanimous passage. See *Houston Chronicle*, March 31, 1908, p. 5.

⁴² For the report, see *Houston Post*, March 31, 1908, p. 4, and the city commission minutes cited in note 39 above. In the city commission minutes, the record of the report appears in long-hand and appears to have been written quickly and occasionally sloppily. Outside of a few spelling and capitalization variations, the *Post*'s printing of the report is exact. Nowhere in the report or the ordinance did any public health question arise. Neither did the health question arise at any time during the earlier agitation or later in the vice district's history. Houston's newspapers could cover, write, and print stories on Houston's establishment of a district for "disreputable characters" but the papers refrained from publishing, even mentioning, any possibility of venereal disease problem.

⁴³ *Houston Post*, March 31, 1908, p. 4.

⁴⁴ *Charter of the City of Houston and General Ordinances, 1910* (Houston: W. H. Coyle & Co., 1910), 124.

⁴⁵ The 1908 report of the Houston Independent School District mentioned the problems around the Rusk school and singled out Mayor Rice and the City Commission for special thanks in dealing with the problem. After describing the transition of the neighborhood around the Rusk School from primarily a residential area to a commercial area with the corresponding drop in children attending the school, the District's report recapped the vice problem and solution. To add to the complexity of conditions there during the past year, a number of undesirable people, driven away by the breaking up of the reservation in other parts of the city, moved into the neighborhood. The respectable citizens of the neighborhood made a gallant fight to free their homes from these undesirable neighbors. They appealed to the School Board and City commission. It is to the credit of all concerned, and particularly to the credit of our mayor and his associates in office, that this

fight was finally won and that these undesirables were forced to move away from the neighborhood of the school and the houses surrounding it.

Annual Report of the Public Schools of the Independent School District of the City of Houston, 1907-1908 (Houston: Gray, Dillaye & Co., 1908), 24.

⁴⁶For the timetable of the events of the 24th-26th of June 1909, see *Houston Post*, June 26, 1909, p. 5; and *Houston Chronicle*, June 26, 1909, p. 10. Just as none of the previous histories of Houston mentions the presence of a vice district, none mention this legal/social dispute which arose out of the district.

⁴⁷*Houston Chronicle*, June 26, 1909, p. 10.

⁴⁸*Houston Post*, June 26, 1909, p. 5.

⁴⁹*Houston Post*, June 27, 1909, p. 12; *Houston Chronicle*, June 26, 1909, p. 10.

⁵⁰See **General Laws of the State of Texas Passed at the Regular Session of the Thirtieth Legislature, 8 January - 12 April 1907** (Austin: Von Boeckmann-Jones Co., 1907), 246-248, sec. 362b.

⁵¹*Houston Post*, June 27, 1909, p. 12; *Houston Chronicle*, June 26, 1909, p. 10.

⁵²*Ibid.* City Attorney William H. Wilson's only statement at this time was that if white women and colored were living together in the same houses in the reservation, then Houston could easily remedy the situation through an ordinance prohibiting such arrangements.

⁵³*Houston Post*, June 27, 1909, p. 12.

⁵⁴*Ibid.* Previous quotes as well.

⁵⁵*Houston Post*, June 30, 1909, p. 5; *Houston Chronicle*, June 30, 1909, p. 6.

⁵⁶*Houston Post*, July 1, 1909, p. 16.

⁵⁷See *Houston Post*, July 2, 1909, p. 14; *Houston Chronicle*, July 2, 1909, p. 8; and *Houston Post*, July 3, 1909, p. 14. By this time the papers were calling the case by its legal title, **Thelma Denton et al. v. Michael McDonald**. Denton lived at 830 Arthur in the district and the *Houston City Directory* followed her name with the notation "(c)" for colored. What is strange is the notation for Thelma Denton in the Thirteenth census report of 1910. The United States census enumerator, E. G. Norton, listed Denton in the census as white, not black. Perhaps Denton had enough black heritage to be listed and considered a black in the formal legal papers, but if someone just walked up to her, like Norton, without knowing that technically she was black, she may have looked white. See Manuscript Census Returns, Thirteenth Census of the United States, 1910, Harris County, Texas, Enumeration District 70, 4th ward (Microfilm copy of the Center for Research Libraries used).

⁵⁸*Houston Post*, July 4, 1909, p. 15; *Houston Chronicle*, July 4, 1909, p. 11. From a low of twenty-two, the *Chronicle* this day reported McDonald had arrested thirty women; the exact number is unclear.

⁵⁹Houston Post, July 11, 1909, p. 15; Houston Chronicle, July 11, 1909, p. 25. Not each and every point of law and contention will be reviewed, but the major problems involved in the action. For example, Kittrell spent a good deal of time arguing that a state statutory revision of the state's vagrancy statute did not effect the case at hand or justify McDonald's actions.

⁶⁰Houston Post, July 11, 1909, p. 15; Houston Chronicle, July 11, 1909, p. 25. Kittrell did not cite the Texas Supreme Court case he quoted.

⁶¹Michael McDonald v. Thelma Denton et al., 63 Tex. Civ. A. 421, 132 SW 823 (1910).

⁶²Ibid., p. 825.

⁶³Ibid. Nowhere in the Civil Appeals Court's decision did the state disorderly house statute's revision arise in Fly's argument.

⁶⁴McDonald v. Denton, p. 826.

⁶⁵Ibid., p. 827. Fly denied Denton's motion for a rehearing on technical grounds. For example, Fly in his decision referred to a 1903 city charter and not the 1905 city charter contested in the case. Fly ruled that the two charters varied from each other so little that no matter which charter was studied Houston still could not district a section of the city for the crime of prostitution. As in the main decision, Fly did not cite the 1907 state disorderly house statute revision in the rehearing.

⁶⁶Thelma Denton et al. v. Michael McDonald, 104 Tex. 206, 135 SW 1148 (1911). Attorneys Charles E. and Arthur E. Heidingsfelder stayed with the case from the district court up to the Texas Supreme Court. Who paid for their legal services is not known. Thelma Denton and the other women probably did not have either the money or inclination to take the case to the Supreme Court, but perhaps the landlords of the houses and property did but nothing about the attorneys or who paid them can be discovered.

⁶⁷See Brown Cracker & Candy Co. v. City of Dallas, 104 Tex. 290, 137 SW 342 (1911).

⁶⁸Denton v. McDonald, p. 1149. For cases involving other Texas municipal vice districts see, for Dallas, Henry Hatcher et al. v. City of Dallas et al., 133 SW 914 (1911) and Brown Cracker & Candy Co. v. City of Dallas, 104 Tex. 290, 137 SW 342; for El Paso see Frank A. Spence et al. v. William H. Fenchler et al., 151 SW 1094 (1912) and Frank A. Spence et al. v. William H. Fenchler et al., 107 Tex. 443, 180 SW 597 (1915); for San Antonio see In re Garza, 28 Tex. App. 381, 13 SW 779 (1890) and City of San Antonio v. Lillie Schneider, 37 SW 767 (1896); for Waco see M. W. Davis v. State, 2 Tex. App. 425 (1877) and Viola Arton et al. v. W. E. Dupree, 19 Tex. Civ. App. 390, 46 SW 272 (1898); and for a variety of cases arising out of Houston's reservation see Sadie Coman et al. v. J. W. Baker, 179 SW 937 (1915); J. W. Baker v. Sadie Coman et al., 109 Tex. 85, 198 SW 141 (1917); Leona Hearne v. State, 73 Tex. Cr. R. 390, 165 SW 596 (1914); Terry Hickman v. State, 59 Tex. Cr. R. 88, 126 SW 1149 (1910); F. M. Cabiness v. State, 66 Tex. Cr. R. 409, 146 SW 937 (1912); and Mrs. Mary Farris v. State, 74 Tex. Cr. R. 607, 170 SW 310 (1914).

⁶⁹Manuscript Census Returns, Thirteenth Census of the United States, 1910, Harris County, Texas, Enumeration District 70, 4th Ward, (microfilm copy of the Center for Research Libraries used).

APPENDIX ONE

Houston City Commission Report of March 30, 1908

An ordinance entitled "An ordinance colonizing and segregating houses of ill-fame and assignation houses, regulating the same and proscribing penalties" was introduced, same being accompanied by a letter from the Mayor requesting the same be passed finally at this session of the council. It was placed on its first reading in full and referred to the Ordinance Committee for immediate report. The following is the Committee's report,

Hon. Mayor & Council of the City of Houston:
Gentlemen:--

The Ordinance Committee to whom was referred the petitions and protests of the citizens of the Second and First wards respectively, and of the Public School Authorities of the Independent School District of Houston protesting against the overflow of the residence districts of the city and the neighborhood of the public schools of women of ill-repute, and to whom was referred an ordinance for the segregation of the residences of these women beg leave to report to your honorable body as follows:

There exists at the present time in our city a most deplorable state of affairs with reference to these women. Instead of being located as in most cities of large population in one district a section where a minimum of injury is done to the community and to the public morals, they are now scattered throughout the body of the city; are in close neighborhood of private residences, of churches and of public schools for the education of the young. This unfortunate state of affairs had not existed in Houston until lately. During a great number of years probably as many as 25 years the majority of these women lived to the exclusion of other residences within a district a reservation which while not declared by law or ordinance existed in fact. The residences of these women in this district is away from private residences and schools largely minimized the evil effects of the situation. After the passage of the act of the last legislature, this old section or reservation was broken up by actions brought in the district court of Harris County by citizens of the county. By the terms of the act of

the legislature, these women were subject to be enjoined by an action filed in the district court, unless living within a district created by an ordinance of a city of over ten thousand inhabitants. No such district ever having been created by an ordinance, the district judge who acted in the petitions presented to him had no discretion in the matter, but in conscientious discharge of his duty as a public official to enforce the law was bound to grant the injunctions in hearing. The results, however, were most deplorable as these women were driven from a section where they did a minimum of harm and spread into the residence sections and to the neighborhood of the public schools where the evil was at once brought to a maximum. Hence the situation demanding action on the part of the city government and hence the demands of the citizens that they and their houses and schools be protected from this injury.

The city in some respects occupies a more advantageous position in dealing with this evil than do the State and County authorities. In other respects we are not so favorably situated. The act referred to the legislature having made many offenses connected with this evil punishable by imprisonment as well as by fine, has deprived the city at once of the authority by ordinance to make these same offenses, also offenses against the city of Houston, and of power to punish them with the speedy justice of the Recorder's Court. This seriously embarrasses not only this but other cities, and it would be much better were the legal penalties less, and capable of being enforced in the Municipal Courts. Of course offenses not defined by the state law are not punishable by imprisonment or fine of over two hundred dollars can be reached by ordinance. On the other hand, the city through the intimate connection between its executive and legislative powers, through its large police force in immediate touch with the situation, and through the superior efficiency of its executive powers in the enforcement of the police power occupies a more favorable situation for control of this evil than do other branches of the government.

The late Grand Jury realizing these facts reported on this matter to the district judge of the Criminal District Court as follows: "That the evil is one in the judgment can be handled more effectively by muni-

cipal authorities, then by proceedings under the state law, and that they recommend that some plan be adopted for the purpose of regulating the evil and suppressing its injurious effects upon the community." The responsibility thus placed upon the city by the other departments of the government, is one which in view of the urgent petitions for relief from our citizens we have no disposition to shirk, not withstanding we fully realize the great difficulties surrounding the successful control of this evil which exists and has always existed side by side with civilization.

The practical question that confronts the officials of the city of Houston at the beginning, is whether it was better to confine these unfortunate women within a district or to entirely exclude them now and hereafter from the limits of the city. While the power to district or segregate these women has existed in the city of Houston for many years, naturally however, there has been a reluctance to district them. While the provision by law that these women shall not reside or sleep outside of certain limits does not in the correct use of language nor in law legalize their immoral calling (since these women must live, and must sleep somewhere) the appearance it has of being in some measure an authorization or legalization if immorality naturally creates hesitancy. Also the passage of such an ordinance may affect either persons or property in a way in which we desire to avoid if possible. However, in view of the whole situation, and having carefully considered the whole subject from every stand point both governmental and moral, we have decided that we should segregate the residences of these unfortunate women into a district; and to this conclusion we are urged by two reasons principally, viz:

1st. The successful and permanent exclusion of prostitution from the limits of a city the size of the city of Houston is impossible. It is a fact of general knowledge that the successful permanent exclusion of prostitution from any city of large size has never occurred in the history of the world. It might be apparently excluded for a time (not withstanding the embarrassments created by the act of the last legislature) but it would still exist in a quiet and more suppressed form, and should the city desist from bending all of its energies to

the exclusion of this vice in order to attend to something else it would be immediately back again, and under such attempted exclusion it would be scattered through but the whole city and doing double injury to society by coming closer to the home and to the young. We therefore think no good can be accomplished by attempting what we believe is not capable of successful enforcement.

Secondly: could we exclude these women from the city of Houston our jurisdiction and power is bounded by the limits of the city. They would form clusters on the outskirts of the city most probably on the principle avenues and street car lines leading out of the city. Electric transit has carried a large portion of the residences of the people to the outskirts of the city. The citizens would have the offensive establishments brought in close contact to their homes, and would have the lines of street car communication to their homes ruined by the presence of immoral men and women. Such a plan would be almost worse than to leave the women undisturbed in the body of the city.

Another difficulty is presented in selecting bounds outside of which unfortunate women shall not be permitted to reside or sleep. Necessarily what ever location is selected some inconvenience will result. The answer to this is clear, that the fact that some will be inconvenienced should not deprive the government of the power to protect the immense majority of its citizens from this evil. As said by the Supreme Court of the United States in sustaining a similar ordinance, "The ordinance is an attempt to protect a part of the citizens from the unpleasant consequences of such neighborhods. Because the legislative body is unable to protect all, must it be deprived the power to protect any?"

The city not now having any section which is distinctively appropriate to the residences of these women, there is now no particular section which is because of the fact of existing use, most appropriate for designation. On first blush the section formerly occupied by these women and from which they were removed by injunction might appear the best to be designated but to this there are two inseparable objections. The district was not sufficiently large to contain these women; secondly, it could not be enlarged without involving territory already dedi-

cated to business use or to residences of respectable families and without crossing the most important and commonly used thoroughfares of the city of Houston.

The district selected is considered from all points of view the best selection that could have been made. The property is of little value and would be increased rather than diminished in value by the ordinance. No public school is situated in or near it, nor is there any occasion for school children to pass through it in going to school; it is not situated in any public thoroughfare in general use, and largely the land is vacant and unoccupied by residences and is of little value situated in the bends of the Bayou, and cut up by gullies.

Lastly: The district is sufficiently large to render it unnecessary at any early date in the future to enlarge the same, and thereby damage the residence sections of the city.

The City Attorney informs us that the ordinance prepared is practically identical with the one the city of New Orleans which was held a lawful exercise of the Police Power by the Supreme Court of the United States.

We therefore recommend that the ordinance as prepared to be put into immediate passage.

(signed) James A. Thompson
J. Z. Gaston
Ordinance Committee

Mr. [James] Appleby refused as one of the Ordinance Committee to sign the report and on roll call voted against it. Voting aye, Thompson, Gaston, & [James B] Marmian. The report was adopted. Under suspension of the rules the ordinance was placed on its second reading by caption. Under further suspension of the rules it was placed on its third reading and passed. Voting ay, Thompson, Gaston, Marmian, and Appleby. No negative vote.

It was moved by Alderman Thompson and seconded by Alderman Gaston that the City Attorney be instructed to take proper steps to require all prostitutes residing in the city of Houston and outside of the limits prescribed for their residence to remove from their present residence and that the chief of Police be instructed to the City Attorney all assistance required. Carried.

Council then adjourned.

From:

City Council Minutes, Houston, Book P., pp. 290-294, 30 March 1908, Houston Metropolitan Research Center, Houston Public Library.

APPENDIX TWO

Houston's Districting Ordinance

An Ordinance Colonizing and Segregating Houses of Ill-Fame, and Assignment Houses; Regulating the Same and Prescribing Penalties.

Whereas, The City of Houston is authorized by its charter to colonize and segregate houses of ill-fame, and to regulate same, and

Whereas, At the present time such houses are scattered throughout the body of the City, and in many cases in residence sections and in the neighborhood of the public schools thereby constituting a menace to public order and decency, to the sanctity of the home and to the moral welfare of the young;

Therefore, Be It Ordained by the City Council of the City of Houston:

Section I. From and after the final passage of this ordinance it shall be unlawful for any public prostitute or woman notoriously abandoned to lewdness to occupy, inhabit, live or sleep in any house, room or closet situated without the following limits in the City of Houston, viz.:

commencing with the intersection of the center line of what is designated as Crosby Street on the maps of the Stewart Abstract Company with Buffalo Bayou, at a point about one block west of Heiner Street; thence in a southern direction with the center line of said Crosby Street to intersection with the center line of Hobson Street; thence in a western direction with the center line of Hobson Street to the south of Blocks A and B to intersection with center line of Burton Street; thence in a northern direction with center line of Burton Street to intersection with the extension of the center line of Howard Street; thence west with said extension to the centerline of Howard Street to intersection with center line of what is designated on Stewart Abstract Company's map as Lion Street, said street being called Second Street on Whitty's map of the City of Houston; thence north with center line of Lion Street to intersection with center line of Chambers Street; thence west with the center line of Chambers Street to intersection with the center of what is designated on Stewart Abstract Company's map as Lamb Street, same being designated on the Whitty map as Third Street; thence north with center line of Lamb Street to Buffalo Bayou; thence with Buffalo Bayou to the beginning, as delineated on map of the Stewart Abstract Company.

Sec. II. That it shall be unlawful for any person or persons, whether agent or owner, to rent, lease or hire any house, building or room to any women, or girl, notoriously abandoned to lewdness, or for immoral purposes, outside the limits specified in Section I of this ordinance.

Sec. III. That public prostitutes or notoriously lewd or abandoned women are forbidden to stand upon the sidewalks in front or near the premises they may occupy, or at the alleyway, door or gate of such premises, or to occupy the steps thereof, or to accost, call or stop any person passing by, or to walk up and down the sidewalks, or to stroll about the City Streets indecently attired, or in other respects so as to behave in public as to occasion scandal or disturb or offend the peace and good morals of the people.

Sec. IV. That it shall not be lawful for any lew women to frequent any coffee house, saloon or bar room and to drink therein.

Sec. V. That it shall be unlawful for any parties or party to establish or carry on a house of prostitution or house of assignation without the limits specified in Section I of this ordinance.

Sec. VI. That whenever a house of prostitution or assignation may become dangerous to public morals, whether from the manner in which it is conducted or the character of the neighborhood in which it is situated, the Mayor or City Council may, on such facts coming to his or their knowledge, order the occupant of such house, building or room to remove therefrom within a delay of five (5) days by service of notice on such occupants in person or by posting notice on the door of the house, building or room, to remove therefrom within a delay of five (5) days, and upon such occupant failing to do so, each shall be punished as provided in Section 8 of this ordinance.

Sec. VII. That in the event that the occupants of such house, building or room referred to in Section VI do not remove therefrom after the infliction of the penalty, the Mayor or City Council is authorized to close the same and to place a policeman at the door of such premises to warn away all such parties who shall undertake to enter.

Sec. VIII. That any person or persons who shall violate any of the provisions of this ordinance or who shall disturb the tranquillity of the neighborhood, shall be guilty of an offense, and upon conviction therefor in the Corporation Court shall be fined in any sum not exceeding Two Hundred Dollars (\$200.00) for each offense.

Sec. IX. That each day any person or persons shall continue to violate the provisions of this ordinance shall constitute a separate offense.

Sec. X. All ordinances in conflict herewith are hereby repealed.

Sec. XI. There being a public emergency requiring that this ordinance shall take effect on the day of its introduction and passage, and the Mayor having so requested in writing, this ordinance shall be in full force and effect from and after its passage and approval on this day of its introduction.

Passed March 30th, 1908

Approved this the 30th day of March, A. D. 1908

H. B. Rice, Mayor

MAPS

The Stewart Abstract & Title Company map mentioned in the districting ordinance is a huge map, 78½" X 88½", and is not reproducible. The Rusk school can be found on the right hand side of the 1904 map. Just right of the center of the map is the City Hall--Market Square area of the downtown in the old Hollow. Outlined on the left of the map are the limits of the reservation. Compare street development in the vice district between the 1904 map and the city of Houston 1921 map. All maps used with permission, Houston Metropolitan Research Center, Houston Public Library.

CHAPTER SEVEN

This Social Sore: Closing the Houston Vice District, 1917

"Red light burned later in the vice district of Houston Thursday than usual," began the June 15, 1917, Houston Chronicle. "With the coming of the first signs of day Friday morning they went out, never to burn again."¹ Under a threat of both civil injunctions and criminal prosecutions, the proprietors of the bawdy houses in Houston's municipal vice district closed and the women moved out. Ragtime pianos no longer pounded late into the humid Houston night and the prostitutes and madams of the district no longer practiced their trade in a municipally sanctioned vice district. The events leading to the closing of the district have been almost forgotten. Yet the two leading Houston newspapers--the Chronicle and the Post--provide at least a chronology of the events as well as the general strategy pursued in closing the area.

The months of April, May, and June, 1917, were an exciting time for Houstonians. America had gone to war against Imperial Germany in early April, and one of the first national casualties were those city vice districts that had somehow survived the storm of prewar antivice crusades. Anti-prostitution campaigns were a feature of the public scene in Progressive America, and America's entry into the war brought a heightened sense of urgency to those campaigns. The purity crusaders and sanitary hygienists argued that America's fighting men must be kept pure in body as well as mind.² Since Army and National Guard camps were placed near cities and military bases meant jobs and money to local economies, the military used the threat of avoiding some cities to force closure of vice districts and maintenance of a clean, moral appearance.³

More important in the closing of Houston's district than military pressures were the pressures brought to bear by the county attorney on the city of Houston. A committee of citizens, drawn heavily from the Protestant sects and professional groups, formed the Committee of One Hundred and sought the district's demise. Newspapers

reported their determined efforts, but no papers--personal, public, or administrative--are known to exist from the Committee. None of the county attorney's papers or records can be located. Prostitutes, madams, and vice landlords did not keep or preserve any known materials. None of the city of Houston records, i.e., papers of the mayor, city council, police chief, and police department have been found or catalogued except for the briefest of city council minutes.⁴ Until more pertinent county, city, and personal records are located, only newspapers describe the closing of the Houston vice district.

On April 17, 1917, a subcommittee of the Committee of One Hundred conferred with Harris County Attorney John H. Crooker and began the events which lead to the closing.⁵ This subcommittee of "laymen of Houston churches," which acted as an executive committee, asked Crooker to move quickly to close the district and not to wait on the outcome of a case pending before the Texas Supreme Court on the legitimacy of Houston's vice-districting ordinance.⁶ Criminal prosecutions should be used against the women, they pleaded, if no easier method could be found. Crooker agreed to aid in their efforts but only if a complete survey of vice outside of the district could be made and if the cooperation of the city police force could be gained.

The antivice committee's focus on the county attorney provided one of the twists to the Houston experience. Because the city of Houston had established the district in a 1908 ordinance pursuant to a state statute,⁷ reformers had to find another level other than the city in the decentralized, overlapping structure of American state government with enough power over the same geographical area to close the district.

The reformers turned to the county. In this instance, intra-state federalism--the delegation of a state's power to counties and cities to protect the citizen's health, safety, welfare, and morals--meant that Harris County would assume control and supervision over an area of Houston. This seizure of city power by the county did not go unnoticed. Yet at no time did Houston seek to enjoin or in any manner hinder the county's actions. Throughout april, May, and June 1917, Crooker advised the antivice campaigners to ignore the city ordinance

"which pretend[ed] to legalise the district." If the executive committee followed Crooker's advice, then Harris County would overrule Houston city policy on vice control.

After the April 17 meeting, an unnamed spokesman for the committee, following Crooker's suggestion, said that the Committee of One Hundred had begun its efforts to locate "every [bawdy] house outside of the district where vice is supposed to exist"8 The committee also asked the public to send in letters (even anonymously) with the location of houses suspected of harboring vice.

Another thread running through the story of the closing of the Houston vice district was the question of what to do with the women who lived and worked in the district. After the April 17 meeting, the Chronicle reported that "many plans" existed for the residents of the district. But no paper discussed any particular option. The committee found itself on the horns of a dilemma. Although it wanted the district closed, it hoped to "cause the women as little hardship as possible."9 The committeemen somehow wanted the women who lived in the saloons and bawdy houses to stop their trade without being inconvenienced. Unlike the analogous pattern of events in other cities, Houston experienced no vehement sermons from pulpits or the council chamber against the women. The private committee simply wanted the district closed and its affront to public morals pushed out of sight. In seeking this goal, it virtually apologized to the women for working a hardship upon them. The committee assumed they were to be pitied, helped when possible, and not held responsible for their life. It was widely believed then that prostitutes plied their trade for reasons beyond their control, such as bad family life, the double standard of sexual behavior, the liquor interests, vicious men, and white slavers.10

On April 24, 1917, the executive committee approached the mayor of Houston about closing the district and repealing the city's vice-districting ordinance. Mayor Joseph J. Pastoriza stalled. Elected on April 9 and sworn in on April 17--the same day the executive committee spoke to Crooker--Pastoriza told the committeemen that establishing his administration would take at least sixty days and he planned on doing nothing about the vice district until the end of that time. Al-

though Pastoriza said "I don't want to evade the issue," he did. He suggested that the committeemen send him a letter proposing means to close the area and provide him with information as to whether such closings had improved the moral conditions of other cities. "If we do anything," he said, "we want to really improve moral conditions."¹¹ Although he took no action on the matter, Pastoriza's decision to do nothing actually supported the antivice committee's wishes. Houston acquiesced in whatever action the antivice committee and the county attorney chose to follow.

In their coverage of the April 24 meeting, the newspapers for the first time provided the names of the members of the executive committee. Walter N. Brown, listed in the City Directory for 1917 as manager of Henry C. House, "capitalist," headed both the Committee of One hundred and its executive committee.¹² What qualifications Brown possessed to chair the committees are unknown. Secretary and spokesman for the committee was Anson D. Foreman who also held the position of the executive secretary of the First Baptist Church on Walker Avenue. Other members of the executive committee were Ed. S. Phelps, an attorney in partnership with his brother with offices located in the same building as Walter Brown; Dr. John T. Moore, physician; and Robert Cummins, a civil engineer who roomed at the YMCA. All male, all white, all Protestant, all at least semi-professional; the executive committee fit the mold of the antivice crusaders of the pre-war years.¹³ Only the prohibitionists and the women antivice campaigners were missing from its directory.

In 1917, Houston had a commission form of government and two of its commissioners also attended the meeting with these typical vice reformers and Mayor Pastoriza. Commissioner Halver A. Halverton questioned the committeemen about what was to be done with the women of the district, and secretary Foreman suggested "offer[ing] them employment." Foreman explained that such offers had been made with success in Dallas. Yet after Halverton pressed him about the women's fate, Foreman admitted that in Dallas's case ". . . a small proportion of the women had accepted the preferred work and . . . the others had gone--he knew not where."¹⁴ He also revealed that the closing of

Dallas's district had not ended prostitution in that city although he explained that it had "greatly improved moral conditions." Whether Foreman witnessed Dallas's moral conditions before and after its clean-up in order to make his assessment or whether he knew conditions had improved only through the newspaper reports is not known. Also left uncertain are the fates of the women who left Dallas.

Chairman Brown, having been stymied by Mayor Pastoriza, outlined the two legal options open to the committee for closing the vice district. The first led to the civil courts and involved seeking injunctions against "the property owners from renting their property for immoral purposes." The second led to the criminal courts and involved filing complaints and securing indictments against the proprietors running the individual bawdy houses in the district. County attorney Crooker agreed to aid the committee in the criminal strategy if they chose to pursue it and if the city proved uncooperative with the committee's efforts to close the district. When Pastoriza refused the executive committee's request for action, it was up to the committeemen to decide on the general strategy and specific tactics to follow in shutting down the vice district.

From April 24 to May 10, the newspapers carried no information on the committee's decision. Then from Thursday, May 10, to Wednesday, May 16, stories appeared daily in the Chronicle and twice in the Post. "Vice Committee Ready to Start Closing Move" read the first-page headline of the May 10 Chronicle.¹⁵ The article revealed more of the internal workings of the executive group of the Committee of One Hundred as well as of the friction between the committee and the city.

The committeemen had delivered to Police Superintendent Clarence Brock lists of immoral houses outside the district. Meeting with the committee on Tuesday, May 8, Brock had promised to cooperate in their efforts and asked for a list of immoral houses. Brock had told the committeemen that their detective--publically unnamed--who had worked with the county attorney in gathering evidence on the city's bawdy houses was unwelcome at the police station. As the Chronicle reported the tension, "it developed that while he has been investigating vice conditions the police have been investigating the committee's detec-

tive."¹⁶ The police possessed a "stack of affidavits" about the committee's detective but the committeemen refused to read them and no newspaper account described what the affidavits alleged. So, although the Police Superintendent pledged his willingness to drive out of town the "loafers who stayed about the streets, and presumably lived off the women" and pledged to clear the streets of prostitutes, the police department turned a cold shoulder to the committee's outside detective.

The losses to individual policemen and the police department in possible graft and booty by the closing of the district can never be known. But the district undoubtedly provided some police with income which the committee's action would cut off.¹⁷ Closing the area meant a decrease in income to the police, a result the police did not appreciate and was a reason to hinder the committee's actions.

At one point in the May 10 article Foreman claimed that the committee had been gathering evidence on Houston's vice for a year, but cited no report or statistics to substantiate his statement. Also, the Chronicle reported that county attorney Crooker had instructed his assistant to draw up a blank complaint form against the keepers of the bawdy houses just in case they were needed. The paper said, ". . . the ax was preparing for something . . ." but what was still unknown.¹⁸

On Friday, May 11, the executive committee again met in chairman Brown's office.¹⁹ When the meeting adjourned no one would say if a decision on strategy had been reached. Apparently, however, discussion among executive committee members continued to center on whether to prosecute in the civil or criminal courts. The article noted that W. D. Chesterfield, the committee's "investigator"--who might have been the earlier unnamed detective whom the police investigated--turned over to Crooker his researches on the consequences of abolishing segregated municipal vice districts around the country. The committee released to the press a letter from E. T. Tyra, mayor of Fort Worth, on how that city closed its notorious vice district--Hell's Half Acre--and how much better Fort Worth was for the closing.²⁰ Fort Worth used the civil procedure of injunctions to close its vice area. Unlike Houston, which had a municipal ordinance establishing the

district, Fort Worth's district had existed through tradition so that Fort Worth did not have the same obstacles to closing as Houston.

More information on the meeting appeared in the May 12 Chronicle.²¹ Although none of those attending the meeting on the eleventh would give any details, they let it be known that a decision on how to proceed had been made. Foreman said that no further meetings of the executive committee would be necessary once the plan was put into operation, and he still would not be pinned down as to whether the committee opted for injunctions, criminal prosecutions, or, as was done in Austin, considered giving notice of impending prosecution to the property owners and proprietors of the bawdy houses. The Chronicle published a letter from W. J. Morris, police chief of Austin, describing how Austin served notice to the operators in its district, Guy's Town, to either shut down or leave town; if they did not leave, they faced criminal prosecution.²²

Sunday, May 13, the Chronicle's front-page story on the vice district began with Crooker's secretary, Charles Leach, walking to a mail box at the corner of Fannin and Preston Streets and depositing sixty-four letters.

"See what I did," said Leach, as he dropped the last bunch of letters into the box. "Well, I put the restricted district out of business."
 . . . Just that quietly was the curtain rung down on the long-established vice district of Houston, which is famous all over the country as one of the free and open places of the South.

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Crooker gave the inhabitants of the district until June 15--thirty days--to close up and move out. His letter to the keepers of sixty-four houses notified them that a criminal complaint alleging the running of a disorderly house --the legal nom de plume of a bawdy house--had been filed against them in his office. Crooker would hold the complaints a month before acting on them. If, after that time, the houses were not closed he would initiate criminal prosecutions. If the houses were not closed on June 15 not only would the keepers of the disorderly houses face criminal prosecution but the property owners--unnamed--would face criminal prosecution and a civil proceeding to enjoin the continued use of the houses of immoral purposes.

The executive committee (Brown, Foreman, Moore, Phelps, Cummins, and Westheimer) had gone to Crooker's office in the early afternoon the previous day and signed the complaints, one signature per complaint. The Chronicle printed the names, addresses, and races of all sixty-four keepers who received the letters. for example, the paper listed "Thelma Denton, colored, 807 Lamb," "Aurelia Delgado, Spanish, 332 Hardcastle," and "Ora Marx, white, 1104 Howard." Sixty-three of the keepers were female; "Jack Davis, white, 1114 Howard" was the only male to receive a letter.²⁴

From one viewpoint, Crooker can be accused of intimidating the keepers to close and the women to move; from another, he can be seen as acting leniently towards the district's residents by delaying prosecuting and giving them notice of possible criminal action instead of immediately using wholesale arrests and indictment. Crooker held out the velvet-covered iron hand. Elaborating on his motives and goals, he explained that "the decent thing for the city to do now is to repeal the ordinance which licenses that place out there." In his public statements he said he had no choice but to act to close the district since it appeared in "flagrant violation of the law"--meaning the state statute against keeping a disorderly house--and since "good men," "citizens and taxpayers" had asked him to enforce the law. In reality, Crooker was not as passive a public servant as he would have Houstonians believe. He conferred with and helped give direction to the actions of the executive committee of the Committee of One Hundred. His involvement showed him not to be simply a reactive participant but an initiator of action as he mixed his public office with the private effort against the vice district.

The future of the women continued to concern the executive committee. Chairman Brown assured reporters that "we have made arrangements to take care of every woman and girl in the vice district who wishes care." He went out of his way to deny that the committee wanted to harm the women. "[W]e want to cause no hardship, and will give them a better life over the rough places than any alleged friend they now have." Brown continued, "we regret that this reform must work a hardship on some people, who are more to be pitied than censured."

Despite these words of concern, he had no reservations about the benefits the closing of the district would bring. "What we have done we have done with the belief that it is the best for them and for all of us."²⁵

But how the committee would care for the women was not revealed. Brown said only that "if they will apply to us we will give them a chance." The Houston Post reported that the women would be given "homes" and offered employment.²⁶ The women were not impressed. "Go to h---," said one unnamed woman over the phone when asked about the closing. "Don't you think I know we are going. We don't want no charity." Another woman told a Chronicle reporter she was not going to leave and she held no illusions about the sort of jobs the committee would offer the women. "Give me a job--not a dishwashing job--and I'll take it." Generally, if the papers are to be believed, the inhabitants of the district took the closing in stride. The Chronicle placed the number of women in the district at four hundred and fifty, probably an exaggeration.²⁷ The executive committee, which released the figure, may have deliberately inflated the numbers to make the problem appear worse than it was.

The Chronicle continued its reporting on May 14 by printing rumors. A story circulated that efforts were being made by an unnamed lawyer to solicit money from the vice district's residents to prevent the area's closing. Foreman found the rumor preposterous. "There is no reputable lawyer who would promise the women there that he could save the district," he stated.²⁸ Foreman related a story that in another, unnamed, vice district, the women had raised \$5,000 to prevent the closing, but instead of helping them the lawyer they hired absconded with the money. "There is no chance for them," said another committeeman, "and they have to close, and for their sake they should not spend a lot of money."

Monday's article also cast light on the reasons for the friction between the committee's investigator and Houston's police department. Although Police Superintendent Brock pledged his force to prevent the spread of vice, the coolness between the executive committee and the police continued. In the months before the committee's action began,

the committee's investigator had surveyed the relationship between Houston's vice and police and then recommended that "it would not be worth while to cooperate with the city police in any moral cleanup proposed."²⁹ After his recommendation, the executive committee shifted their efforts from city officials to the county attorney's office.

Houston officials made no public or formal reaction to the county's closing of its vice district. City Solicitor Joseph C. Hutcheson said that if the city planned to defend the city ordinance establishing the district he knew nothing of it nor did he have any communication from the mayor on the matter. Houston's policy was not to have a policy. Let the county take action while the city suffered quietly until the whole unseemly business blew over.

The women, too, seemed resigned to the district's end. On Monday, a few women telephoned the county attorney's office. Some wanted further explanation of the closing notice; others expressed a desire to "quit the business." A few asked if they could go out of business but live where they were. The Chronicle said curtly "that will not be allowed."³⁰ Yet most of the women "took the notice good naturedly and said they knew it was coming all along."

Tuesday, May 15, saw two articles run in the Chronicle on the closing. One focused on the help the churches and women of Houston wanted to offer the inhabitants of the district. The other, an editorial, chided City Hall for its reticent attitude toward the closing. A small meeting of the members of the Committee of One Hundred was held Monday evening and a larger meeting was held Tuesday morning "attended by women of the churches of the city" to discuss what options to offer the women of the district. In an example of "self-help" thinking, the Chronicle reported that "every woman in the district will have held out to her a chance to change her course of life and 'come back' if she desires."³¹ What kind of change doing what kinds of work the church women would not make public "as it would be embarrassing to those who accepted the help that is to be proffered." the church women assured the district's inhabitants that they felt "only kindly" toward them and hoped the women of the district would tell the church

women how best to help them.

The paper described at least one house and madam closing shop. The proprietress had packed her furniture for storage and was preparing to take a long vacation out of state. She said she hoped to return to Houston and make the city her home. As the Chronicle described her, "she is one of the wealthier women of the district, and owns considerable real estate in different sections of the city." Other women of the district were preparing to leave the area as well, the paper reported.³²

"Nothing to say," remained Mayor Pastoriza's position on the closing, even when confronted by a delegation of vice district property owners. They asked for the mayor's position on the closing since the city ordinance "legalized" the district and their investments. The property owners wanted to know what could be done to protect their financial interest. Pastoriza restated his desire to wait sixty days before taking up the matter.³³ The property owners could not have been happy with Pastoriza's position.

The Chronicle's May 15 editorial, "Closing the Segregated Vice District," criticized the mayor's "disquieting apathy and lack of interest" in the closing. Calling the closing a "momentous event in the city's history," the paper also called for greater police enforcement in keeping vice under control in Houston and urged the mayor to issue a statement in support of the closing.³⁴

The "reservation," as the vice district was sometimes called, drew the Chronicle's editorial attention again the next day, May 16.³⁵ It criticized the city for trying to suspend the application of Texas law through a city ordinance setting aside a reservation where bawdy houses could congregate and not be prosecuted. Although nowhere in the city ordinance did it read that the district would suspend or avoid the state law, the law was as good as suspended within the district's boundaries. The Chronicle editorial urged peace officers--"sheriffs and their deputies, constables and their deputies, mayors, marshals, chiefs of police, their deputies and assistants, and policemen of towns and cities"--to ignore the city ordinance and enforce the state law against bawdy houses or be in violation of their oaths. The paper wanted the state law enforced, if necessary, by individual officers

taking matters into their own hands. Like a school teacher scolding third graders, the Chronicle wrote, "No officer has any more right to ignore the law than he has to suspend it or violate it."

No officer took it upon himself to act on the editorial's suggestion. Crooker's letter of warning appeared to be applying enough pressure to insure the smooth closing of the district although a few women did call and ask Crooker if they could close their present establishments and re-open as boarding houses with registers. Crooker expressed surprise at the idea and turned down their request.³⁶

Concern about the location of an Army camp and the Army's official position on cities and vice districts first surfaced on Friday, May 25.³⁷ Rumors circulated in the city that if the government located a "cantment camp" in Houston then the Army would want the vice district open but placed under military control. Anson Foreman was sufficiently concerned about the story to wire the Army commander for the Texas district, General James Parker, in Washington: "Report current here that government will not locate training camp in Houston unless the segregated vice district of Houston, which is doomed to close on June 15, is continued. Please wire at our expense, stating whether this is true." General Parker replied, "No truth in report."

The story of May 25 explained that the federal government wanted ". . . to see the soldiers are surrounded by good moral conditions as well as conditions that will conduce [sic] to their physical comfort." In pursuing such a goal, the Army, before locating a camp, wanted one of two conditions assured by nearby cities: that segregated vice be abolished or, that if the city chose to persist with an open district, then the Army would "attend to the regulation, and not trust it to a city."³⁸ Army regulation meant closing the district.

Foreman took no chances in discrediting the rumor. He also telegraphed Texas Congressman-at-large Daniel E. Garrett asking him to speak to the Army about its policy toward city vice districts. Garrett telegraphed back that he had spoken to the chairman of the Committee on Training Camp Activities and Recreation, Raymond B. Fosdick. Garrett reported that the War Department "does not look with favor upon the location of training camps near any city in which there is an estab-

lished or recognized red light district."³⁹ Foreman's telegrams showed that the rumor had the Army's position on training camps and vice districts absolutely reversed. The Army wanted to avoid cities with vice districts absolutely reversed. The Army wanted to avoid cities with vice districts or see such areas closed.

The May 25 story also shed some light on the earlier rumor of a fund being raised to fight the district's closing. One thousand dollars had indeed been raised by the district's residents, not by the property owners, and given as a retainer to a "large law firm" (unnamed) in Houston to stop the closing. But after reviewing the action taken by the county attorney, the firm returned the money saying the closing could not be stopped. The Chronicle fretted that the women would hire a lawyer or lawyers who would find some way to either stop the closing or slow down the process. "It is not thought, though, that the women will have much trouble in finding lawyers who will take their money, for which they can receive no return."⁴⁰

On the evening of Wednesday, June 6, the Committee of One Hundred held a well-publicized public meeting about the vice district.⁴¹ In cooperation with the Minister's Alliance, the Committee lined up speakers to discuss the closing. Reverend J. Frank Norris of Fort Worth, a noted Texas vice fighter, headlined the speakers and gave a talk entitled "A Winning Fight."⁴² Ministers of local churches also spoke to a "large crowd" in the First Methodist Church at the corner of Main and Clay streets. County attorney Crooker was scheduled to speak but did not return from an Austin business trip in time. At times the meeting strayed from its purpose of discussing the closing of the vice area and degenerated into a mud-slinging event aimed at the mayor and the governor. Walter Brown, chairman of the Committee of One Hundred, reminded the audience that Mayor Pastoriza was a single-taxer and said,

Under the single tax plan they tax dirt. The reservation is the dirtiest place in town, and maybe he expects to tax it out of existence.

"This sally brought forth much laughter," commented the Houston Post.⁴³ Mainly, the vice meeting proved to be nothing more than a show of force

and support for the action initiated by the executive committee of the Committee of One Hundred and the threatened legal action by the county attorney. The meeting added the thunder to Crooker's threatened lightning in his effort to close the vice district.

Brown also told the crowd that the source of the rumor about the Army's policy toward vice districts had been tracked down. It originated, he alleged, from an unnamed man who received funds from a Houston brewery as an "expense account."⁴⁴ Whether this is true or whether it was a counter-rumor may never be known, but the argument that "an interest," particularly a liquor interest, tried to subvert the closing of the district undoubtedly fell on fertile ground.

In an intriguing statement, Judge Sam Streetman, judge of an unknown court and one of the antivice speakers, quoted a Committee of One Hundred report which claimed Houston had four hundred and eighty-three women living in the district and an additional twelve hundred living outside of the district. The numbers of prostitutes the committee estimated and released to the public both in the district and in Houston expanded and grew more threatening the closer the time came for the district's close; this in spite of earlier statement that the women were leaving the city. Yet Streetman gave the impression of a large and immovable corps of prostitutes within the city. Although his figures are probably too high, the number of women actually affected by the closing remains unknown.⁴⁵

Friday, June 15, six o'clock in the morning, nine days after the antivice meeting, Houston's vice district closed. "Red Lights Out; Pianos Hushed; Women Depart," headlined the thirteen-paragraph Chronicle story which provided the most vivid picture of the last hours of the district.⁴⁶ Only a few houses remained open on the evening of the fourteenth. They did a brisk business. Sightseers toured the area and "kept [the] pianos going at full blast." But with dawn, the noise quieted, the houses closed, and moving vans crowded the streets. Those women remaining in the area called Crooker's office to assure him they were closed and several asked for a few days grace in order to move their furniture. Crooker agreed. A spokesman for the Committee of One Hundred reported that "most of the white women and all of the

Mexican and Spanish women, but two, ha[d] left the city." Further, fifty-five of the black women had moved into "various negro settlements in the city" while fifteen white women had moved into other sections of the city. The Chronicle said, "by far the largest number have left the city."⁴⁷

Crooker told reporters that if the city police force continued to cooperate then the closing would continue smoothly. "I expect no charges will need to be filed," said Crooker as he assessed the situation. He promised that Houston's "moral tone" would be improved by removing "this social sore" and, if necessary, court action could still be taken. Crooker had achieved his goal of closing the district by threatened legal action. His gamble of notification backed up by the loaded gun of unfiled complaints against the residents paid off. The threat proved great enough to force compliance; the intimidation worked.

In a five-paragraph report, the Post described the district as a deserted village.⁴⁸ Property owners in the ex-vice district had houses, "substantial structures with comfortable rooms and modern equipment," but no tenants. "It is quite improbable," the Post commented, "that families acquainted with the situation would be willing to risk moving into the section so recently occupied as the restricted district." The property owners needed renters and "talk of renting the houses to negroes is current and it is probable that this will be done." A few women remained in the district Saturday; those that Crooker had granted a little more time to move out and those women were in the process of leaving Houston. Nevertheless and strangely, the Post reported that only twenty percent of the women had actually left the city.

It was clear that the end of the municipally-sponsored, condoned, and tolerated vice district had arrived. Even though the vice area had been shut down, the closing did not end the existence of prostitution, bawdy houses, or saloons in the city. Yet Houston and Harris County could claim to be making great strides towards purity since the city no longer had an area of town devoted to good times and easy women. Because of the county attorney's action, Houstonians appeared to have

been rewarded for doing a "good thing" when Secretary of War Newton Baker--three days before the vice district closed--released word that Houston would receive a National Guard training camp.⁴⁹

Much is still dim about the closing of the district, the Committee of One Hundred, the county attorney's role in the story, the city compliance, the Army's pressures, and the fates of the women who accepted help and those who left.⁵⁰ When and if more records and documents become available, then study of the closing of Houston's vice district will become less a chronology and more an interpretation of the persons, motivations, and events involved in the closing. One result of June 15, 1917, which Houston has lived with since, is that a municipally sanctioned vice district has not again been attempted. The red lights went out, "never to burn again."

Notes

¹Houston Chronicle, June 15, 1917, p. 7.

²David J. Pivar, "Cleansing the Nation: The War on Prostitution, 1917-1921," *Prologue: The Journal of the National Archives*, 12 (Spring 1980), 29, and his *Purity Crusade: Sexual Morality and Social Control, 1868-1900* (Westport, Conn.: Greenwood Press, 1973). City vice districts and their closing have received some attention. See Eric Anderson, "Prostitution and Social Justice: Chicago, 1910-1915," *Social Service Review*, 48 (June 1974), 203; Joel Best, "Keeping the Peace in St. Paul: Crime, Vice, and Police Work, 1869-1874," *Minnesota History*, 47 (Summer 1981), 240; John C. Burnham, "The Medical Inspection of Prostitutes in America in the Nineteenth Century: The St. Louis Experiment and Its Sequel," *Bulletin of the History of Medicine*, 45 (May 1971), 203; John C. Burnham, "The Social Evil Ordinance: A Social Experiment in Nineteenth Century St. Louis," *Bulletin of the Missouri Historical Society*, 27 (April 1971), 203; Jeremy P. Felt, "Vice Reform as a Political Technique: The Committee of Fifteen in New York, 1900-1901," *New York History*, 54 (January 1973), 24; Paul H. Hass, "Sin in Wisconsin: The Teasdale Vice Committee of 1913," *Wisconsin Magazine of History*, 49 (Winter 1965-1966), 138; David C. Humphrey, "Prostitution and Public Policy in Austin, Texas, 1870-1915," *Southwestern Historical Quarterly*, 86 (April 1983), 473; Ivan Light, "From Vice District to Tourist Attraction: The Moral Condition of American Chinatowns, 1880-1940," *Pacific Historical Review*, 43 (August 1974), 367; Roy Lubove, "The Progressive and the Prostitute," *Historian*, 24 (May 1962), 308; John S. McCormick, "Red Lights in Zion: Salt Lake City's Stockade, 1908-1911," *Utah Historical Quarterly*, 54 (October 1975), 131; Elizabeth C. MacPhail, "When the Red Light Went Out in San Diego: The Little Known Story of San Diego's 'Restricted District,'" *Journal of San Diego History*, 20 (Spring 1975), 1; Al Rose, *Storyville New Orleans: Being an Authentic, Illustrated Account of the Notorious Red-Light District* (University, Alabama: University of Alabama Press, 1974); Neil Larry Shumsky and Larry M. Springer, "San Francisco's Zone of Prostitution, 1880-1934," *Journal of Historical Geography*, 7 (January 1981), 71; Neil Larry Shumsky, "Vice Responds to Reform: San Francisco, 1910-1914," *Journal of Urban History*, 7 (November 1980), 31; James Wunsch, "The Social Evil Ordinance," *American Heritage*, 33 (February 1982), 50.

³Historians have paid some attention to the military's efforts on vice control in World War One. For an example such Army pressures, see Garna L. Christian, "Newton Baker's War on El Paso Vice," *Red River Valley Historical Review*, 5 (Spring 1980), 55. For another aspect of Army police, see Fred W. Baldwin, "The Invisible Armor," *American Quarterly*, 16 (Fall 1964), 432.

⁴Trying to research Houston's and Harris County's past is frustrating. Public records have either disappeared or remained "undiscovered" in city warehouses, no one appears to know where. The two best monographs on Houston's history do not mention even the presence of a vice district in the city or the closing of the area elaborated upon here. The best interpretive work is Harold C. Platt's *City Building in the New South: The Growth of Public Services in Houston, Texas, 1830-1915* (Philadelphia: Temple University Press, 1983). A more general, anecdotal history is David G. McComb's *Houston: A History* (Austin: University of Texas Press, 1969, 1981).

⁵Houston Chronicle, April 17, 1917, p. 14. Little is known about Crooker. A Houston Post story on May 20, 1917, p. 6, reported that he had decided not to seek a second term as county attorney and gave a brief background statement on him. He formerly worked as a railroad switchman for the Southern Pacific and studied law in his spare time. He was appointed, then elected, to a Justice of the Peace position from 1912 to 1914. He ran for county attorney in 1914, won, and ran unopposed in 1916.

⁶The Texas Supreme Court ruled against the city ordinance but almost five months after Crooker had effectively closed the area and mooted the Supreme Court case. For the Supreme Court case, see *J. W. Baker v. Sadie Coman et. al.*, 109 Tex. 85, 198 SW 141 (1917); for the Texas Civil Appeals Court ruling see *Sadie Coman et. al v. J. W. Baker*, 179 SW 937 (1915).

⁷For the state statute, see "Disorderly Houses--Defining Same," H.B. 10, *General Laws of the State of Texas Passed at the Regular Session of the Thirteenth Legislature, January 8-April 12, 1907* (Austin: Von Boeckman-Jones Co., 1907), 246-248. Approved April 18, 1907. See the loop-hole, article 362a, paragraph two, "... provided, that the provisions of this article ... shall not apply to, nor be construed as to interfere with the control and regulation of bawds and bawdy houses by ordinances of incorporated towns and cities acting under special charters and where the same are actually confined by ordinance of such city within a designated district of such city." Houston had such a charter and passed its districting ordinance March 30, 1908. The ordinance's title read "An Ordinance Colonizing and Segregating Houses of Ill-Fame, and Assignment Houses; Regulating the same and Prescribing Penalties." See *Charter of the City of Houston and General Ordinances, 1910* (Houston: W. H. Coyle & Co., 1910), 124-127.

⁸*Houston Chronicle*, April 17, 1917, p. 14.

⁹*Ibid.*

¹⁰For recent works on prostitution see Marck Thomas Connelly, *The Response to Prostitution in the Progressive Era* (Chapel Hill: University of North Carolina Press, 1980); John F. Decker, *Prostitutes: Regulation and Control* (Littleton, Colo.: Fred B. Rothman & Co., 1979); Frances Finnegan, *Poverty and Prostitution: A Study of Victorian Prostitutes in York* (Cambridge: Cambridge University Press, 1979); George J. Kneeland, *Commercialized Prostitution in New York City* (New York: Bureau of Social Hygiene, 1913 reprinted Montclair, New Jersey: Patterson Smith, 1969); Paul McHugh, *Prostitution and Victorian Social Reform* (New York: St. Martin's Press, 1980); Ruth Rosen, *The Lost Sisterhood: Prostitution in America, 1900-1918* (Baltimore: Johns Hopkins University Press, 1982); Richard Symanski, *The Immoral Landscape: Female Prostitution in Western Society* (Toronto: Butterworths, 1981); Judith R. Walkowitz, *Prostitutes and Victorian Society: Women, Class, and the State* (Cambridge: Cambridge University Press, 1980); Willoughby Cyrus Waterman, *Prostitution and Its Repression in New York City, 1900-1932* (New York: Columbia University Press, 1932); Charles Winick and Paul M. Kinsie, *The Lively Commerce: Prostitution in the United States in the United States prior to the Entrance of the United States into the World War* (New York: Century Co., 1921 reprinted Montclair, New Jersey: Patterson Smith, 1969).

¹¹*Houston Chronicle*, April 24, 1917, p. 2; *Houston Post*, April 24, 1917.

¹²Biographical information in *Houston City Directory, 1917* (Houston: Press of the Hercules Printing and Book Co., 1917).

¹³Especially see Pivar, *Purity Crusade*, 78-121, 281-287.

¹⁴*Houston Post*, April 24, 1917, p. 5. Dan M. Moody was the other commissioner present at the meeting.

¹⁵Houston **Chronicle**, May 10, 1917, p. 7.

¹⁶Ibid. The same day that the executive committee went to see Brock, Crooker requested that two more city policemen be assigned to his office to better "locate and suppress disorderly houses in the city." Police Superintendent Brock had no immediate reply. **Houston Post**, May 8, 1917, p. 16. Eleven days later, May 19, the **Post** (p. 13) reported that the vice district police force would be doubled from two to four men. Officers Emil Berner and Herman Radke joined Thomas J. Bass and J. Kirksey Irwin, all detectives, in an effort to "stem a possible flood of inmates" from the vice district when it closed.

¹⁷For the best work on the history of Houston's police force, see Louis J. Marchiafava, "Institutional and Legal Aspects of the Growth of Professional Urban Police: The Houston Experience, 1878-1948," unpublished Ph.D. dissertation, Rice University, 1976. His sections on police pay and the fee system of arrests is revealing on how policemen supported themselves.

¹⁸Houston **Chronicle**, May 10, 1917, p. 7. Another name appeared on the executive committee--Sidney Westheimer, president of an undertaking and funeral business.

¹⁹Houston **Chronicle**, May 11, 1917, p. 5.

²⁰Fort Worth closed its district on March 20, 1917, and Tyra said, "I think the people are well pleased with the closing of the district . . ." and I really and truly believe it is closed for all time to come."

²¹Houston **Chronicle**, May 12, 1917, p. 7.

²²For the best work on Austin's "Guy Town," see David C. Humphrey, "Prostitution and Public Policy in Austin, Texas, 1870-1915," **Southwestern Historical Quarterly**, 86 (April 1983), 473; 513 for the closing of the area on October 2, 1913.

For contemporary articles on Texas's vice and its clean-up, see M. J. Exner, "Prostitution and its Relation to the Army on the Mexican Border," **Social Hygiene**, 3 (April 1917), 205; "San Antonio, Texas, Closes its Segregated District," **Social Hygiene**, 1 (September 1915), 629; "Zones of Safety: Texas Cantonment Cities Made Safe to Health and Decency," **Survey**, 38 (July 1917), 349.

²³Houston **chronicle**, May 13, 1917, p. 1. Headline read "Vice District Is Given 30 Days to Die." The **Post**--called the **Daily Post** on Sundays--buried the story on page forty-one. Throughout the months and weeks of the closing the **Post**, the state's most prestigious and widely read newspaper of the time, gave the story only cursory coverage. The **Chronicle**, on the other hand, rigorously pursued the story.

²⁴Breaking down the 63 women keepers by race found 38 white keepers, 22 "colored" keepers, and 3 spanis. Of the 64 total keepers, 57 can be found in the **City Directory** for 1917, seven can not. The addresses given in the **Chronicle** and the addresses in the **Directory** match up. The **City Directory** listed only their name, address, and "c" for colored when applicable but listed no occupation for any of the 57 keepers.

²⁵Houston **Chronicle**, May 13, 1917, p. 11.

²⁶Houston **Daily Post**, May 13, 1917, p. 41.

²⁷Houston **Chronicle**, May 13, 1917, p. 11.

²⁸Houston **Chronicle**, May 14, 1917, p. 3.

²⁹Ibid.

³⁰Ibid.

³¹Houston **Chronicle**, May 15, 1917, p. 7.

³²Ibid.

³³Ibid.

³⁴Houston **Chronicle**, May 15, 1917, p. 4.

³⁵Houston **Chronicle**, May 16, 1917, p. 8.

³⁶Houston **Post**, May 16, 1917, p. 9.

³⁷Houston **Chronicle**, May 25, 1917, p. 6.

³⁸Ibid.

³⁹Ibid.

⁴⁰Ibid.

⁴¹Houston **Chronicle**, June 6, 1917, p. 9; Houston **Post**, June 6, 1917, p. 7. Advance stories appeared in both papers: **Chronicle**, June 3, 1917, p. 23; **Post**, June 3, 1917, p. 43. Follow-up stories appeared on June 7, 1917, **Chronicle**, p. 2; **Post**, p. 5.

⁴²On Norris, see Humphrey, "Prostitution and Public Policy in Austin, Texas," p. 506, and E. Ray Tatum, **Conquest or Failure? A Biography of J. Frank Norris** (Dallas: Baptist Historical Foundation, 1966).

⁴³Houston **Post**, June 7, 1917, p. 5.

⁴⁴Ibid.

⁴⁵Ibid. Numbers in prostitution research are always a problem but Streetman's figures are just too high. According to the 1910 Census, only 239 women lived in the Houston vice district, 55 keepers and 184 women for a women per house ratio of 4.3. With the closing of other vice areas in Texas, Austin and Fort Worth for example, Houston's prostitute population probably exceeded these figures but certainly fell short of Streetman's figure of 1,683. See **United States Census**, 1910, Harris County, Texas, Enumeration district 70, 4th ward, E. G. Norton, enumerator, April 21, 1910. (With thanks to the Center for Research Libraries, Chicago, and the Interlibrary Loan Department, Rice University.)

⁴⁶Houston **Chronicle**, June 15, 1917, p. 7.

⁴⁷Where did the women go? Perhaps to other vice areas to continue plying their trade. Other cities with operating vice areas in June 1917 were Galveston and San Antonio, Texas, and New Orleans, Louisiana. Military authorities did not close Storyville, New Orleans, until November 12, 1917. No work has been done on Galveston's prostitution but see Christian, "Newton Baker's War on El Paso Vice," 55, for Army influence in Texas and Rose, **Storyville, New Orleans**, 1.

Checking the **City Directory** for 1918 for the 64 keepers, only 19 of them could be found: five at the same address and 14 at different addresses. Of the 19, the **City Directory** listed only a few occupations and they were all domestic help: dress maker, nurse, seamstress, cook, and laundress.

⁴⁸Houston **Post**, June 16, 1917, p. 7.

⁴⁹Houston **Post**, June 12, 1917, p. 1.

⁵⁰Mayor Pastoriza and the city of Houston continued their silence about the closing. The district's shut down was the most important event of Pastoriza's brief administration. He died July 9, 1917, twenty-four days after the close of the vice district and three months to the day after his election to office.

CONCLUSION

Lawyers, prosecutors, treatise writers, and judges worked against the social problems of prostitution and bawdy houses from within an American legal tradition. Prostitutes-as-vagrants provided an easy method to control a city's publicly immoral women. Moral reformers criticized the charging of prostitutes with vagrancy and the reformers called the fines the women paid a form of licensing. But in law the prostitute was a petty criminal because of her status as a vagrant. Women practicing prostitution carried the social stigma of being outcasts from respectable society and the legal stigma of being vagrants.

Cities and/or counties decided how and when to control a local prostitution problem because states left such policy decisions to the localities. States set broad statutory guidelines against prostitution or the keeping of bawdy houses but the enforcement of the state law varied from locality to locality and with the discretionary powers of the local police. A question of federalism within states--the division of the powers and duties between the state and its counties and cities--runs throughout late nineteenth-century prostitution control efforts with a continuing sense of, especially in the case law, letting local governments deal with the problem. Localism in applying the law provides a key to understanding vice control in the period.

Further, the real trouble for the law lay in how to prevent the immoral use of property. As the nineteenth century progressed, courts began to look favorably on private nuisance actions to close bawdy houses. But the red-light abatement acts disrupted the chain of precedent and tradition in nuisance law by giving individuals the right to initiate actions against bawdy houses while dropping the requirement for special damages. Somewhat like the initiative and referendum, the Progressive Era reform of the injunction and abatement laws give citizens the power, perhaps the duty, to take control of a local public policy issue--prostitution control.

But did the red-light abatement acts aim simply to close bawdy houses and vice districts or did reformers hope the reform would eradicate prostitution? On a limited scale, the reforms of the injunction

and abatement acts achieved their goal; they did close vice areas and they did close bawdy houses. But the reform failed to strike at the deeper and more difficult problem of prostitution. Prostitution continued in spite of the reform and, with the help of the new technologies of the telephone and the automobile, prostitution assumed new forms to practice the old trade. The reform perhaps worsened the individual prostitute's life since she no longer could live in an area of town recognized as a vice district and live in a bawdy house with other women who helped to provide support and security in a hostile world. Instead, the red-light abatement acts pushed the women out of the relative stability of their houses and vice areas and into the harsher world of hotel rooms and pimps. But the reform eliminated from public sight the moral and social evils of prostitution and bawdy houses. This illusion of the reform of prostitution and improved quality of city life proved enough for the purity reformers to declare the red-light abatement acts a success.

For St. Louis, New Orleans, and Houston vice districts were legal and possible city options, and as the last three chapters indicate citycouncils believed they had the power to district their bawdy houses. A prostitute's status as a vagrant survived the purity onslaught while the red-light abatement acts have fallen into disuse. The closing of city vice districts proved to be one of the lasting contributions of the Progressive Era's clean-up campaigns on the American urban scene. Reformers did, indeed, turn the red light out.

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