Of Fundameutal Justice, Equality and Society's Outcasts: A Comment ou *R.* v. *Tremayne* and *R.* v. *McLean*

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The author examines two recent decisions in the Supreme Court of British Columbia dealing with the *Canadian Charter of Rights and Freedoms* and its effect on the recently enacted section 195.1 of the *Criminal Code* on prostitution. To begin, the author suggests that Canadian legislation has systematically served to oppress the prostitute within society and that the new legislation is no different. He then proposes that the *Charter* ought to guarantee not just the narrower libertarian rights as argued in these cases. Rather, based on a broader interpretation of the fundamental rights as set out in sections 7 and 15 it ought to protect the prostitute against deprivation of personal dignity. Accordingly, it ought to protect against deliberate actions by Parliament which further oppress the prostitute.

L'auteur se penche sur deux récentes décisions de la Cour suprême de la Colombie-britannique traitant de la *Charte canadienne des droits et libertés* et de ses effets sur l'article 195.1 du *Code Criminel*, récemment adopté par le Parlement et consacré à la prostitution. L'auteur suggère d'abord que la législation en matière de prostitution a toujours servi à opprimer les prostitué(e)s dans la société et que la nouvelle législation n'est pas différente. Il propose ensuite que la *Charte* ne se limite pas à garantir les droits libertaires des prostitué(e)s, tel qu'argumenté dans ces deux décisions. S'appuyant sur une interprétation plus large des droits fondamentaux de la *Charte* dans les sections 7 et 15, il suggère que celle-ci devrait protéger les prostitué(e)s contre des privations de dignité personnelle. Elle devrait ainsi protéger contre les actes délibérés du Parlement qui oppriment davantage les prostitué(e)s.

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The decisions of the Supreme Court of British Columbia in *R.* v. *Tremayne* and *R.* v. *McLean*[1] will be a disappointment to those who expect the *Canadian Charter of Rights and Freedoms*[2] to change the condition of oppressed members of our society. *Tremayne* and *McLean* are unlikely, however, to come as a surprise to those "*Charter*-watchers" who have been skeptical about the capacity of liberal, rights-based discourse to effect meaningful social or political change for those who need it most.

These decisions are appeals from two Provincial Court judgments, each of which held certain aspects of the newly enacted soliciting provision, section 195.1 of the *Criminal Code*,[3] to be unconstitutional. In *Tremayne*, Lemiski J. held that the part of paragraph 195.1(1)(c) which makes it an offence to in any manner communicate or attempt to communicate with any person for the purpose of engaging in prostitution violates the constitutional doctrine of "overbreadth". In *McLean*, Libby J. found the reference in subsection 195.1(1) to "in any place open to public view" and the extended definition of "public place" in subsection 195.1(2) to be unconstitutional since the legislation encompassed "far more than its avowed purpose". In reversing these decisions, McKay J. held that there is no constitutional issue of freedom of expression or freedom of association raised by the legislation. He also concluded that we have no independent constitutional doctrine of overbreadth and that the constitution does not require that the effect of a law must match its purpose.

There are two respects in which the judgments of McKay J. in *Tremayne* and *McLean* are disappointing. First, in terms of the outcome, there is a failure to do anything about a law where Parliament has deliberately opted

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[1](May 6 1986), Vancouver CC86 0492 and CC86 0563, rev'g (10 April 1986), Vancouver 68098C (Prov. Ct), Lemiski J. and (17 March 1986), Vancouver 69038C (Prov. Ct), Libby J. [hereinafter *Tremayne* and *McLean*]. Both decisions are being appealed to the British Columbia Court of Appeal.

[2]*Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B of the *Canada Act 1982* (U.K.), 1982, c. 11 [hereinafter *Charter*].

[3]*Criminal Code*, R.S.C. 1970, c. C-34, as am. S.C. 1985, c. 50. The text of s. 195.1 is as follows:

> 195.1(1) Every person who in a public place or in any place open to public view
> (a) stops or attempts to stop any motor vehicle,
> (b) impedes the free flow of pedestrian or vehicular traffic or ingress to or egress from premises adjacent to that place, or
> (c) stops or attempts to stop any person or in any manner communicates or attempts to communicate with any person
> for the purpose of engaging in prostitution or of obtaining the sexual services of a prostitute is guilty of an offence punishable on summary conviction.
> (2) In this section, "public place" includes any place to which the public have access as of right or by invitation, express or implied, and any motor vehicle located in a public place or in any place open to public view.

to deal with the complex problem of prostitution, and particularly street prostitution, by sweeping prostitutes themselves further into a spiral of criminality, violence, vulnerability to control by others and continued societal condemnation. The deliberation with which Parliament chose to deal with street prostitution by making the condition of life of prostitutes even more untenable becomes evident when the new legislation is considered in light of the advice of both the Report of the Special Committee on Pornography and Prostitution: *Pornography and Prostitution in Canada*[4] and the Report of the Committee on Sexual Offences Against Children and Youths: *Sexual Offences Against Children*.[5] Furthermore, government has turned a deaf ear to the submissions made by many concerned community groups, particularly women's groups, to successive Parliamentary committees[6] and in the public forum, urging a more sensitive and sympathetic approach to the condition of prostitutes. The second respect in which these judgments, and presumably the argument upon which they are based, are disappointing is the failure to confront directly the real issues of human dignity and self-worth which lie at the heart of opposition to the new soliciting provision and its predecessors. Instead of dealing with this matter squarely as a problem of equality or of fundamental justice, the judgments focus upon libertarian concerns regarding freedom of expression, freedom of association and vagueness or overbreadth. There is also in both cases a brief discussion of fundamental justice. This appears to be an argument that it would offend principles of fundamental justice to create an offence where there is no "real or apprehended harm". In effect, the argument is that prostitution is a victimless crime.

In this comment I will argue that the real focus of constitutional debate about the soliciting legislation should be upon the prostitute *as victim*, and ultimately, as the victim of Parliament. This debate ought to be cast as an issue of fundamental justice and equality. But, instead of finding a consideration of these basic concerns in *Tremayne* and *McLean*, one comes away from these judgments with a sense that Bob Samek had it right when he commented at the time of the coming into force of the *Charter*: "Although the purpose of the *Charter* is allegedly to entrench the citizens' most basic rights, it has in effect entrenched a patchwork of legal puzzles which will

[4]Vols 1, 2 (Ottawa: Supply and Services Canada, 1985) (Chair: P. Fraser) [hereinafter *Fraser Report*].

[5]Vols 1, 2 (Ottawa: Supply and Services Canada, 1984) (Chair: R.F. Badgley) [hereinafter *Badgley Report*].

[6]Canada, H.C., *Minutes of Proceedings and Evidence of the Legislative Committee on Bill C-49*, Nos 1-8 (19 September - 8 November 1985) (Chair: A. McKinnon); Canada, H.C., *Minutes of Proceedings and Evidence of the Standing Committee on Justice and Legal Affairs*, Nos 79-90 (29 April - 27 May 1982) (Chair: J.-G. Dubois).

provide grist to the lawyers' mill."[7] Moreover, the outcome of these challenges to the new soliciting provisions tends to confirm Professor Samek's pessimistic forecast that the *Charter* is more likely to reinforce prevailing ideology than to strengthen the cause of fundamental rights, a cause which he defines as "a dynamic response to man's condition in the world".[8]

Prostitution is a complex social phenomenon. It has many victims. Property owners are disturbed by street prostitution in their neighbourhoods. Pedestrians are inconvenienced; they are sometimes bodily or verbally assaulted. There is even something pathetic about the customers who resort to buying casual sex. Members of the general community are offended by the spectre of a market in human bodies. The community is justifiably concerned about the maintenance of moral standards generally and about the undermining of values of mutual self-respect. But the people who are most vulnerable are the prostitutes themselves. They begin from a disadvantaged social and economic position. They are subjected to high levels of violence and danger in their work. And ultimately Parliament criminalizes them, labels them as deviant, and thereby subjects them to even greater danger and societal contempt. If there is any ambiguity as regards the status of prostitutes as a socially constructed class, it is clarified by the Parliamentary stamp of disapproval. More than any other factor, it is the law which defines street prostitutes as a class and which stigmatizes them. It is this legislative role in the oppression of prostitutes which I will argue is constitutionally offensive.

The most commonly cited cause for people engaging in prostitution is economic necessity.[9] The majority of prostitutes are women.[10] They often begin practising as prostitutes while they are juveniles; they do not remain in street prostitution beyond their mid-twenties.[11] They come from backgrounds where there is a high incidence of sexual abuse as children.[12] And they incur a high risk of violence on the job, primarily from customers but also from pimps. The practice of prostitution is, in the words of the Fraser Committee, "dangerous" and "dehumanizing".[13] As a representative of the Alliance for the Safety of Prostitutes told the Legislative Committee on Bill C-49: "We see prostitute women as being the least powerful and the most vulnerable by the fact that their profession leaves them wide open to all

[7]R.A. Samek, "Untrenching Fundamental Rights" (1982) 27 McGill L.J. 755 at 769.
[8]*Ibid.* at 786.
[9]*Fraser Report*, *supra*, note 4 at 353 and 376.
[10]*Ibid.* at 371.
[11]*Ibid.* at 372.
[12]*Badgley Report*, *supra*, note 5 at 175-93.
[13]*Fraser Report*, *supra*, note 4 at 378.

forms of violence."[14] An inherent form of violence against prostitutes is the exploitation of their bodies and their sexuality. Potentially more insidious is the deprecation and disdain which they encounter from other members of the community. The most obvious form of violence threatens their physical persons and, ultimately, their lives. Prostitutes were vulnerable to murder[15] before the coming into force of the new section. There is concern that they may now be even more vulnerable as they are forced into less secure neighbourhoods by the new law.[16]

So far from adopting a concerned attitude which gives due regard to the vulnerable situation of these members of our community, the approach taken by Canadian legislators to prostitution has been justifiably labelled by feminist writers as "victim-blaming".[17] From 1869 to 1972, there existed the status offence, applicable by its terms only to women, of being "a common prostitute", who, when found in a public place, was labelled as a criminal if she was not able to give a good account of "*her*self".[18] The patent discrimination in the "Vag C"[19] provision was the subject of criticism by

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[14]*Minutes of Proceedings and Evidence of the Legislative Committee on Bill C-49, supra*, note 6, No. 2 at 5 (22 October 1985).

[15]In Halifax there were three prostitute murders in the year previous to the coming into force of Bill C-49: B. Gorman,"Murder, New Laws: Streets not the Same for Hookers" *[Halifax] Chronicle Herald* (23 December 1985) 1.

[16]Area restrictions imposed as terms of probation orders in Vancouver have been blamed for one prostitute murder. A. Steacy, "Corpse on a Quiet Street" *MacLean's* (15 September 1986) 33. Police in Saskatchewan, Alberta and British Columbia are investigating the strangling deaths of nine prostitutes. Five of these murders occurred between 1981 and 1985. Four of them occurred in 1986, since the coming into force of the new laws. Four other prostitutes in Regina, Edmonton and Vancouver are reported missing. "Nine Hooker Murders in West may be Linked" *[Halifax] Chronicle Herald* (4 October 1986) 12.

[17]See C. Boyle,"Offences Against Women" in *A Feminist Review of Criminal Law* (Ottawa: Supply and Services, 1985) 49 at 54-55.

[18]The offence appeared as s. 175(1)(c) of the *Criminal Code*, R.S.C. 1970, c. C-34, before it was finally repealed in 1972 by S.C. 1972, c. 13, s. 12(1). John P. McLaren in "Chasing the Social Evil: Moral Fervour and the Evolution of Canada's Prostitution Laws, 1867-1917" (1986) 1 Can. J. of Law and Soc. 125 at 152 examines the whole range of Canadian laws dealing with prostitution in the period from 1867 to 1917 and concludes that, even though there was a reform attempt to strengthen the law with respect to the exploitation of prostitutes (though it is to be noted that throughout this period the streetwalker offence "Vag C" was applicable only to women prostitutes):

> It is a permissible, if tentative, conclusion that the Canadian prostitution laws did little or nothing to stop the exploitation of prostitutes, let alone reduce the incidence of prostitution itself. Indeed, the law and its enforcement may in some respects have contributed to exploitation by driving the prostitute into the clutches of pimps. . . . The prostitutes remained the deviants, to be harrassed when and how the law enforcement authorities willed it.

[19]The term "Vag C" is, presumably, derived from the fact that the pre-1972 soliciting provision appeared as paragraph (c) of the general vagrancy provision, s. 175(1), *ibid.*.

the Royal Commission on the Status of Women.[20] One judicial interpretation of this provision considered its purpose to be "to prevent the male public from being solicited on the streets and other public places by prostitutes, but not to prohibit prostitution".[21] At the same time as he proposed the repeal of "Vag C" in 1972, Minister of Justice Otto Lang said, with respect to the repeal of the general vagrancy provision, paragraph 175(1)(a): "Here we have an offence which has been applied differently to the rich and to the poor in our society and we propose to move against this difference in application."[22] The same concern about disparate treatment between rich and poor apparently did not pertain to street soliciting since the much criticized "Vag C" was replaced with a provision making it an offence for prostitutes but, at least according to some interpretations, still not for customers, to "solicit any person in a public place for the purpose of prostitution".[23]

Although the post-1972 section 195.1 was, on its face, gender-neutral as between male and female prostitutes, the vast majority of prosecutions continued to be against women prostitutes.[24] As Christine Boyle has pointed out,[25] even the decision of the Supreme Court of Canada in *Hutt* v. *R.*,[26] widely blamed or credited (depending on one's perspective) for emasculating section 195.1 by imposing a requirement that solicitation be "pressing and persistent", disclosed a continuing assumption that only women are prostitutes. Spence J. said, in illustrating the potential absurdity of a broad interpretation of the provision:

> I suppose that in Vancouver there are hundreds of pedestrians every day who request free rides in automobiles, and it would appear ridiculous and abhorrent to say that every one of them *who was female* and who did so was guilty of soliciting ... .[27] [emphasis added]

Subsequent to the decision in *Hutt*, many police forces across Canada adopted the view that the law was unenforceable and very few charges were

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[20]*Report of the Royal Commission on the Status of Women in Canada* (Ottawa: Information Canada, 1970) (Chair: F. Bird) at 369-71.

[21]*R.* v. *Dubois* (1953), 106 C.C.C. 150 at 154, 17 C.R. 56 (Ont. Mag. Ct).

[22]Canada, H.C., *Debates* at 1699 (27 April 1972).

[23]S.C. 1972, c. 13, s. 15. The provision was held to apply to both prostitutes and customers in *R.* v. *Di Paola* (1978), 43 C.C.C. (2d) 199, 4 C.R. (3d) 121 (Ont. C.A.). The British Columbia Court of Appeal held that the provision applied only to prostitutes in *R.* v. *Dudak* (1978), 41 C.C.C. (2d) 31, [1978] 4 W.W.R. 334.

[24]Canadian Advisory Council on the Status of Women, *Prostitution in Canada*, 1984. This report reproduced a study of prosecutions in Toronto over a four-year period. 70.9 per cent of those charged were women.

[25]C. Boyle & S. Noonan, "Prostitution and Pornography: Beyond Formal Equality" in C. Boyle *et al.*, eds, *Charterwatch: Reflections on Equality* (Toronto: Carswell, [forthcoming]) 225.

[26](1978), [1978] 2 S.C.R. 476, 82 D.L.R. (3d) 95 [hereinafter *Hutt* cited to S.C.R.].

[27]*Ibid.* at 481. See also H.J. Levy, "The Law and Prostitution: The Girls Win Again" (December 1978) 2 Can. Law. 14.

laid. This led to political pressure from articulate and well-organized groups of residents of urban neighbourhoods, notably in Vancouver, but also in other cities across Canada, to rid their neighbourhoods of the nuisance effect of prostitution, and preferably of the prostitutes themselves. This pressure even led to attempts, one successful and one unsuccessful, in Vancouver and Halifax to banish prostitutes from large parts of the city by means of an injunction, ostensibly directed at public nuisance.[28] In Halifax the Attorney-General was even successful in obtaining permission to publicly post the names of forty-seven alleged prostitutes, all women, who were the defendants in the injunction proceedings. The ostensible reason for posting the names was that it was not possible to personally serve the defendants since many had no fixed or known address. The spectre of the government turning prostitutes into victims could hardly be more striking.

In response to the mounting controversy over street prostitution in major centres, the Fraser Committee was appointed. It conducted hearings across Canada and concluded that any move to further criminalize street prostitution "would subvert any attempt to treat prostitution sensitively as a major social problem".[29] The Committee recommended the repeal of section 195.1 of the *Criminal Code* and the amendment of the bawdy-house provisions to allow small numbers of prostitutes to organize their activities out of a place of residence. Moreover, the Committee placed these recommendations for legal reform in the context of a broad commitment to improving the economic and social condition of prostitutes. Accordingly, it was recommended that the federal government, in conjunction with other levels of government in Canada, "strengthen both their moral and financial commitment to removing the economic and social inequalities between men and women and discrimination on the basis of sexual preference".[30] It was further recommended that governments "should ensure that there are adequate social programs to assist women and young people in need".[31] The general approach of the Committee in recommending that governments move toward reduced criminalization of the activities of prostitutes is clearly laid out in the following passage from the Report:

> The approach which the Committee takes stems from its concern to underline the elements of equality, responsibility, individual liberty, human dignity and

[28] *A.G. British Columbia* v. *Couillard* (1984), 42 C.R. (3d) 273, 11 D.L.R. (4th) 567 (B.C.S.C.); *A.G. Nova Scotia* v. *Beaver* (1984), 66 N.S.R. (2d) 419, 31 C.C.L.T. 54 (S.C.T.D.), aff'd (1985), 67 N.S.R. (2d) 281 (S.C.A.D.). See comment by H.W. MacLauchlan, "Criminal Law Meets Civil Law: More than One Way to Skin a Cat" (1985) 42 C.R. (3d) 284, and see J. Cassels, "Prostitution and Public Nuisance: Desperate Measures and the Limits of Civil Adjudication" (1985) 63 Can. Bar Rev. 764.

[29] *Fraser Report*, *supra*, note 4 at 533.

[30] *Ibid.* at 527.

[31] *Ibid.*

> appreciation of sexuality ... . It is our belief that as long as prostitutes continue to be open to prosecution as, for example, the inmates of bawdy houses or for soliciting on the streets, our concern with prostitution will continue to be misdirected and the law will get in the way of more beneficial social strategies. Although we do not in any way favour people pursuing prostitution as a career, we also believe that adults who determine that they want to pursue that lifestyle and do so without engaging in incidental criminal activity should be able to do so with dignity and without harassment. Accordingly, we are of the opinion that the prostitution-related activities of prostitutes should be decriminalized as far as possible.[32]

But, rather than give any effect or credence to these recommendations, the federal government introduced a law making it an offence to do virtually anything in public "for the purpose of prostitution". The most far-reaching of the subsections of the new section 195.1 makes it an offence to in any manner communicate or attempt to communicate with any person for the purpose of engaging in prostitution. When he introduced Bill C-49 to the House of Commons, Minister of Justice John Crosbie made the government's position clear:

> The legislation does not attempt to deal with all of the problems that prostitution creates or with the problems of prostitution generally ... . It only purports to deal with one aspect of the problems that prostitution ean create, which is the nuisance to others created by street soliciting not only by the prostitute but by the customer of the prostitute ... .
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> I hope that if this suggested legislation goes to committee, the legislative committee will deal very promptly with it and report back, because that is what is wanted by the citizens of Vancouver, the Niagara Peninsula and Toronto and all those who want to see their streets given back to the law-abiding citizens.[33]

When the Bill went to legislative committee, the Minister of Justice assured the Committee that the government was "concerned about civil liberties and human rights" and, as evidence of such concern, he cited a provision of the new law, unprecedented in Canadian criminal legislation, for a comprehensive review by a committee of the House of Commons three years after the coming into force of the law. The precise focus of the three-year review was, however, left somewhat ambiguous. It was envisaged in the following way by the then Minister of Justice:

> So if in the next three years, Mr. Chairman, there are any abuses; if it turns out that there are any alarming consequences to this legislation ... if this does not reclaim the streets of this country for the ordinary citizen of this country and for the police, then automatically there is going to be this review. If there is abuse of this legislation by ... police officials of any type, then that evidence

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[32] *Ibid.* at 533-34.

[33] Canada, H.C., *Debates* at 6374 (9 September 1985).

> must come before the House of Commons, and must, within a three-year period.[34]

Judging from this elaboration of the purpose of a three-year review, it is highly doubtful that Mr Crosbie was focusing upon the same concerns about human dignity and equality which underlay the Fraser Committee's recommendations. At best, his concerns must have been about possible excesses in enforcement practices, perhaps along the lines of entrapment. At worst, his statement is but a restatement of the priority of reclaiming the streets "for the ordinary citizen of this country and for the police". As for a sensitive approach to the plight of prostitutes themselves, the Minister of Justice referred to the Bill at various points during Committee deliberations as "anti-hooker legislation". Said the Minister: "We are the federal government. This is the only anti-hooker legislation we have in the hopper. So this hooker is in the hopper."[35] In his appearance before the Senate Committee considering the legislation, Mr Crosbie was again candid about his prognosis for the legislation and about his level of concern for the situation of the prostitute. When asked about increased risks to the prostitutes, he replied:

> Once you make contact with the customer, you are always taking a great risk, and that is an occupational hazard. However, I do not think that this bill increases the hazard. In fact, I would hope that, since the activity would not be so public, there might be some who would not be able to find where the action is and might get diverted into better pursuits.[36]

The contrast between the position of the government on Bill C-49 and the advice given it by the Fraser Committee could not be more striking. The government obviously opted for a quick-fix in response to the complaints of residents' associations and chose to ignore a more sensitive approach, emphasizing the elements of equality, responsibility, individual liberty, human dignity and the appreciation of sexuality, which informed the Fraser Report. There was even a move by government members of the legislative committee to argue against hearing witnesses on the legislation, since it would be "totally superfluous". According to the proponent of that plan: "I think we should rather direct our minds to getting it through promptly, without any witnesses being heard. Then it will be dealt with in the review process, and we will carry on from there."[37]

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[34]*Minutes of Proceedings and Evidence of the Legislative Committee on Bill C-49, supra*, note 6, No. 1 at 19 (10 October 1985).

[35]*Ibid.* at 22.

[36]Canada, H.C, *Proceedings of the Senate Standing Committee on Legal and Constitutional Affairs*, No. 30 at 18 (3 December 1985) (Chair: J. Neiman).

[37]*Minutes of Proceedings and Evidence of the Legislative Committee on Bill C-49, supra*, note 6, No. 1 at 45.

In the end, witnesses were heard with the same approximate representation of women's groups, neighbourhood residents' groups, municipalities, police and civil liberties organizations as had been involved in the debate for several years. Bill C-49 was reported back to Parliament with minor amendments, after a division on party lines in the legislative committee,[38] and was adopted by Parliament, again with a division along party lines. The Bill was approved by the Senate Committee, but not without reservation. The Senate Legal and Constitutional Affairs Committee said:

> We would thus hope that the new offence could be considered as an interim measure, to give our governments — federal, provincial and municipal — a period free of public pressure to consider of whether the issue of public prostitution can be dealt with just as effectively and in a less punitive way, and in a way most suited to the nature of the problem in a particular area.[39]

It is not insignificant that the Senate Committee Report concluded by noting two redeeming features of the legislative exercise which allowed the Senators, on balance, to approve Bill C-49 without amendment. These were the provision for a three-year review which, incidentally, the Senators suggested might begin immediately, and the assurances of the Minister of Justice that further legislation dealing with other aspects of prostitution would be forthcoming.[40]

This review of Canadian treatment of the "prostitution problem", particularly through the latest amendments to section 195.1 of the *Criminal Code*, might be more usefully considered as a study of our treatment of prostitutes. For over a century we labelled only poor women as deviant. Beginning in 1972 we extended the label, at least on its face,[41] to men who are often poor and who suffer the double stigma of a "deviant" sexual orientation. In 1985, we explicitly included customers, almost exclusively male and obviously from a different social class than the vast majority of prostitutes, within the deviant category, although the Minister of Justice continued to describe the bill as "anti-hooker" legislation. What is clear about the 1985 amendment is that it amounted to a rejection of the advice of a thoughtful and informed committee which recommended that prostitutes be treated with some humanity. Not only did the government reject that advice, but it acted contrary to it by adopting a law which can only be

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[38]Opposition to the Bill in the Legislative Committee was led by Svend Robinson (N.D.P.-Burnaby) and Lucie Pépin (Lib.-Outremont).

[39]*Supra*, note 36, No. 35 at 8 (16 December 1985).

[40]No further legislation dealing with prostitution was introduced in the 1st Session of the 33rd Parliament.

[41]See Boyle & Noonan, *supra*, note 25, for a review of the recent process of making all prostitution-related offences gender-neutral. Boyle says: "The trend toward gender-neutrality in legislating and judging is likely to drive whatever discrimination there is underground into enforcement decisions."

described as draconian, and which stops just short of creating a new status offence. Finally, it remains to be seen how evenly balanced the prosecutions between customers and prostitutes will be.

In the face of this systematic legislative policy of condemning one of the most oppressed classes in our society, the challenge for lawyers and courts is to think in constitutional terms about redressing the problem. The essential objection to the new soliciting law, and to its predecessors, is that they not only fail to remedy a critical problem of human dignity, but that they exacerbate the problem. Against the backdrop of the advice given to the government, and of the repeated and articulate submissions by women's and civil liberties groups, it can even be argued that the government has deliberately chosen to worsen the situation of prostitutes.

But what has the constitution to say about legislation which worsens the situation of prostitutes? The law is on its face neutral and does not deny any of the normal procedural advantages given to accused persons. Neither does it impose an unacceptable standard of responsibility, such as absolute liability, which might trigger substantive concerns about fundamental justice. At first glance, then, the legislation does not appear to raise any familiar doctrinal concerns of equality or fundamental justice. But that is the challenge posed by this legislation: to explore the limits of our constitutional guarantees of fundamental justice and equality. Of course, there are other doctrinal matters which are more obvious. Because of the range of activity prohibited by the legislation, particularly communication and attempts to communicate, it is tempting to ignore the issues of equality and fundamental justice and deal with more familiar constitutional issues such as freedom of expression and association, vagueness, overbreadth and status offences. In *Tremayne*, McKay J. rejected a freedom of expression argument, saying that it would "demean the grand concept of freedom of expression"[42] to allow the bargaining for sexual services to be protected for constitutional purposes. Surely it would be more to the point to observe that the constitution itself is demeaned if it can offer nothing more to prostitute women facing a criminal sanction than the opportunity to claim that they have a right to offer their bodies for sale and a right to communicate the offer. The same may be said with respect to the argument that solicitation is protected by the guarantee of freedom of association. The essence of the soliciting legislation is not that we are telling prostitutes with whom they should or should not associate. It is that we are telling them that *we*, as a community, do not want to associate *with them*. It is not to the point to argue that we should permit soliciting as a matter of freedom of expression or freedom of association since the real point is that this speech and this association

[42]*Supra*, note 1 at 10.

are not free at all. Solicitation by prostitutes is the act of desperate members of our community, motivated largely out of economic necessity.

Without denying the potential for the arguments considered in *Tremayne* to ultimately succeed,[43] it is not unreasonable to suggest that they miss the point. What is really offensive about the soliciting legislation is not that it impairs the capacity of a prostitute to enter into a bargain for sexual services. It is that we, as a community, choose to officially label the prostitute as deviant. Moreover, we do so by knowingly creating a legislative scheme which makes life more dangerous for her than it already is. And finally, we adopt this draconian penal legislation as a singular measure in the face of articulate calls for a more caring approach to address the underlying social and economic problems. The real concern, in short, with the soliciting provision is not libertarian; it is communitarian.

But what communitarian values can we find in the constitution? In particular, are there any guarantees which provide a basis for challenging section 195.1 of the *Criminal Code*? One must begin by recognizing that the basic value in the *Charter* is human dignity. This is sometimes the libertarian dignity of the individual and sometimes the group-based concept of dignity of persons relative to their membership in a class. The principal libertarian guarantee of dignity of the individual is to be found in the section 7 promise that everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with principles of fundamental justice. More specific individual rights are the guarantee against unreasonable search and seizure and the guarantee against arbitrary arrest or detention. The principal class-based provision in the *Charter* is section 15; reference can also be had to the language guarantees, to provisions (admittedly weak) respecting aboriginal rights, to the section 27 undertaking to preserve and enhance Canada's multicultural heritage, and to the section 28 guarantee that the rights and freedoms referred to in the *Charter* apply equally to male and female persons.

As an analytical matter, there is no harm in recognizing this classification of libertarian and group-based values. However, interpreters of the

[43]The so-called overbreadth argument is a very compelling one. While "overbreadth" itself is an American term of art, there is an equivalent in Canada in the principles enunciated by Dickson C.J.C. in *R.* v. *Oakes* (1986), [1986] 1 S.C.R. 103, 65 N.R. 87. Since, in order for a limit upon a constitutional right to pass the test of s. 1 of the *Charter*, the legislative means must impair the right or freedom in question "as little as possible" (at 139), it seems highly unlikely that the government can show on the balance of probabilities that s. 195.1 is the least restrictive means of dealing with the problem of street prostitution. This is the argument which was accepted by Lemiski J. in *McLean*, *supra*, note 1; however, a problem is presented by the express holding that neither freedom of expression nor freedom of association was violated in the first place.

Charter must be careful not to treat the classification too rigidly. The *Charter* must be interpreted as a coherent document. These rights, whether inherently individualistic or inherently the rights of groups, must be interpreted in a way which contributes to and is consistent with the overall purpose of the *Charter*. That purpose can be identified as the enhancement of human dignity and, in particular, the protection against governmental acts which threaten our dignity, either as individuals or as members of a group. That is the basic promise of the *Charter*: that government will not treat members of our community without dignity.

There will be occasions when an equality argument will support and inform an argument based on an individualistic claim. For example, if a decision to search is made on the basis of race, it ought to be more difficult to support the reasonableness of the search than if race were not a factor. So too, it ought to be the case that a decision to deprive persons of life, liberty or security of the person will be more closely scrutinized if the deprivation is related to class-membership. If we ever have to engage in a constitutional debate about capital punishment in Canada, surely our concern for the issue of cruel and unusual punishment will be highest where there is an allegation that the penalty is more likely to fall upon certain classes in society than upon others.[44] Conversely, where there is alleged to be a problem of inequality, the claim ought to be more closely scrutinized where the unequal treatment involves the imposition of a penal sanction than where the question is one of distribution of some benefit. The reason for this closer scrutiny is that the equality claim will then be buttressed by recourse to other constitutionally sensitive elements of the state action.[45]

In a constitutional challenge to the soliciting provision, the argument ought to be that sections 7 and 15 of the *Charter*, informed by other provisions, particularly section 28, combine to protect against legislatively based losses of dignity, particularly where the loss of dignity involves a deprivation of liberty or security of the person, and particularly where members of the target group in significant measure share other characteristics which are constitutionally suspect on equality grounds, such as sex, sexual preference and social condition. In short, Parliament cannot deliberately or recklessly

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[44]See, *e.g.*, the following notes, "Constitutional Law — Capital Punishment — Death Penalty as Presently Administered Held Unconstitutional" (1973) 41 Fordham L. Rev. 671; and R.J. Pascucci, E.D. Strauss, G.R. Watchman, "Capital Punishment in 1984: Abandoning the Pursuit of Fairness and Consistency" (1984) 69 Cornell L. Rev. 1129.

[45]In the United States constitutional jurisprudence, there must be a "compelling government justification" for inequalities bearing on fundamental rights. See L.H. Tribe, *American Constitutional Law* (Mineola, N.Y.: The Foundation Press, 1978) at 1002-03. It should be noted, however, that the American jurisprudence extends to the distribution of benefits: *Shapiro* v. *Thompson*, 394 U.S. 618 (1969).

worsen the situation of a group which is already vulnerable. This argument is all the more important in the case of prostitution because the law has already played the predominant role in making prostitutes vulnerable.

Before considering the doctrinal difficulties posed by these arguments, it should be appreciated that, both as a remedial matter and in terms of issues appropriate for consideration by courts, what is ultimately required in response to a challenge to the soliciting provision is not an extraordinary exercise of power by the judiciary. This is not a matter of looking for some affirmative remedy. The courts are not being asked to order Parliament to create for prostitutes the kind of social support system recommended in the Fraser Report. Instead, the remedy is the striking down of constitutionally offensive penal legislation. The Supreme Court of Canada has already struck down soliciting legislation in *Westendorp* v. *R.*[46] The Court effectively struck down the post-1972 soliciting provision through statutory interpretation in *Hutt*.[47] Canadian courts now respond to the kind of criminal justice concerns which underlie opposition to the soliciting provisions, such as, for example, concerns about abuse of process and entrapment.[48] These "remedial" powers of the courts have been developed in response to criminal prosecutions. Prosecutions are the ultimate exercise of power by the state, and they involve courts more intimately than do any other decision-making processes of the state. In the elaboration of the defence of entrapment, the Supreme Court has recognized that the courts cannot supervise the day-to-day operations of law enforcement agencies but that they can at least decline to participate in the prosecution of state-instigated crimes. It is a natural extension of this principle that the courts should decline to complete the criminal process where Parliament has labelled a particular group as deviant and has done so in a manner which violates fundamental justice or equality rights. Since the Supreme Court of Canada has already acknowledged a power to draw the line on penal laws and to engage in substantive review,[49] it ought to be clear that, in remedial terms, the proposal that section 195.1 of the *Criminal Code* be held constitutionally invalid is not a revolutionary one. What remains to be considered is whether, substantively or doctrinally, the argument is likely to succeed.

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[46](1983), [1983] 1 S.C.R. 43, 144 D.L.R. (3d) 259, 32 C.R. (3d) 97.

[47]*Supra*, note 26. In *R.* v. *Heffer* (1969), 11 D.L.R. (3d) 229, 10 C.R.N.S. 103 (Man. C.A.), Dickson J.A. (as he then was) interpreted the vagrancy provision, the companion of "Vag C", in a restrictive fashion.

[48]*Amato* v. *R.* (1982), [1982] 2 S.C.R. 418, 140 D.L.R. (3d) 405; *R.* v. *Jewitt* (1985), [1985] 2 S.C.R. 128, 20 D.L.R. (4th) 651, 47 C.R. (3d) 193.

[49]*Reference re Section 94(2) of the Motor Vehicle Act, R.S.B.C. 1979, c. 288, as amended by the Motor Vehicle Amendment Act, 1982, 1982 (B.C.), c. 36* (1985), [1985] 2 S.C.R. 486, 24 D.L.R. (4th) 536 [hereinafter *Motor Vehicle Reference*].

To return to section 15, there are some significant doctrinal hurdles. Does section 15 apply beyond the stipulated grounds? If so, is status as a prostitute a relevant ground of discrimination? Perhaps most problematic, does the fact that section 195.1 applies also to customers avoid a potential section 15 problem? First, it is now reasonably widely accepted that section 15 applies beyond the stipulated grounds. The language of the section itself supports this view, as does scholarly writing[50] and a developing body of case law.[51] As for the question of whether being a prostitute could be a relevant criterion for section 15 purposes, there have already been indications that courts are prepared to recognize extended classes where concerns for human dignity are considerably less compelling, such as the distinction which is made between lay litigants and litigants with professional counsel on the issue of cost awards.[52] It has also been recognized that a distinction between holders of patents for medicine and holders of patents for other inventions could be a basis for a section 15 challenge.[53] However, care must be exercised in the kinds of distinctions which are given serious treatment within section 15. Otherwise there is a danger of trivializing the guarantee of equality.[54] For example, in *Smith, Kline and French*, Strayer J. said: "[I]n my view there is no magic in the concept of a 'class': it has no definition, provides no standard, but is merely a subjective concept".[55] This view begins with a concept of formal equality, that all distinctions are *prima facie* relevant for purposes of section 15, and that everything then depends on the standard by which the reasonableness of the distinction is assessed.

It would be preferable as an approach to section 15 and to the litigation of equality rights to build into the elaboration of relevant "classes" and the definition of discrimination a purposive touchstone. This accords with the

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[50]A.A. McLellan, "Marital Status and Equality Rights" in A. Bayefsky & M. Eberts, eds, *Equality Rights and the Canadian Charter of Rights and Freedoms* (Toronto: Carswell, 1985) 411 at 431-37; A. Bruner, "Sexual Orientation and Equality Rights" in Bayefsky & Eberts, *supra*, 457 at 459-467; P. Hughes, "Feminist Equality and the Charter: Conflict with Reality?" (1985) 5 Windsor Y.B. Access Just. 39 at 80-81.

[51]*E.g., Smith, Kline & French Laboratories Ltd* v. *A.G. Canada* (1985), [1986] 1 F.C. 274, 24 D.L.R. (4th) 321, 7 C.P.R. (3d) 145 (T.D.) [hereinafter *Smith, Kline & French* cited to F.C.]; *Re Andrews and Law Society of British Columbia* (1985), 22 D.L.R. (4th) 9, 66 B.C.L.R. 363 (B.C.S.C.) [hereinafter cited to D.L.R.].

[52]*McBeth* v. *Dalhousie University* (1986), 72 N.S.R. (2d) 224 at 230-32, 26 D.L.R. (4th) 321 (S.C.A.D.). See a case comment by MacLauchlan in (1986) 10 C.P.C. (2d) 70.

[53]*Smith, Kline & French, supra*, note 51 at 319-21.

[54]See, *e.g.*, the judgment of Taylor J. in *Re Andrews and Law Society of British Columbia, supra*, note 51 at 16 where it is accepted that all discrimination ought to be treated in the same way irrespective of whether it engages one of the specified grounds. The unfortunate but probably inevitable result of such an approach is that a weak test is adopted for all discrimination, the standard being whether the distinction "is irrelevant or if the disadvantage imposed ... clearly goes beyond anything which could be considered reasonable".

[55]*Supra*, note 51 at 319.

general principles of interpretation enunciated by the Supreme Court in dealing with the *Charter*.[56] The equality rights guarantee of the *Charter* was not enacted in a vacuum, nor was it enacted for the purpose of eliminating all distinctions created by the state. Even after the recognition of equality rights in the *Charter*, only certain people will continue to be eligible for student loans and we will still have urban zoning. Again, we must be careful not to trivialize the whole concept of equality by litigating every conceivable instance in which the government makes distinctions. That, after all, is the essence of government, particularly in the contemporary administrative state.

The core of section 15 is human dignity. To begin, the guarantee of equality is made only to "every individual", not, as is the case with other *Charter* provisions, to "everyone" or to "every person". Second, the stipulated grounds are race, national or ethnic origin, colour, religion, sex, age or mental or physical disability. These are all personal characteristics, inherent to our self-perception and to our identity as persons. The guarantee is that the state will not single us out on the basis of one of these characteristics and deny some benefit or protection, or treat us on less than equal terms before and under the law. Surely, if the grounds are to be extended, it ought to be done in cases which are analogous to the stipulated grounds and in which there is some legitimate concern that there will be discrimination based upon a personal characteristic of individuals as members of a class. Accordingly, the two most frequent suggestions for extended grounds are marital status and sexual orientation.[57] Other grounds which are presently covered in human rights legislation in Canada but which do not fall within the explicit or implicit terms of section 15 are "social condition",[58] record of criminal conviction[59] and "source of income".[60]

What is striking about the suggestion that prostitutes ought to constitute a "class" for purposes of section 15 is that they represent the conjunction of many of the sensitive grounds listed in the *Charter* or in similar human rights documents in Canada. Prostitutes share a common "social condition". This criterion has been interpreted under the *Quebec Charter* to refer to the rank, place or class which a person occupies in society, as determined by

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[56]See *R.* v. *Oakes*, *supra*, note 43; *Motor Vehicle Reference*, *supra*, note 49; *R.* v. *Big M Drug Mart* (1985), [1985] 1 S.C.R. 295, 18 D.L.R. (4th) 321; *Law Society of Upper Canada* v. *Skapinker* (1984), [1984] 1 S.C.R. 357, 9 D.L.R. (4th) 161, 53 N.R. 169.

[57]See "Marital Status and Equality Rights" and "Sexual Orientation and Equality Rights", *supra*, note 50.

[58]*Charter of Human Rights and Freedoms*, R.S.Q. c. C-12, s. 10 [hereinafter *Quebec Charter*]. The Newfoundland legislation, *Newfoundland Human Rights Code*, R.S.N. 1970, c. 262, ss 7(1) and 9(1), refers to "social origin".

[59]*Canadian Human Rights Act*, S.C. 1976-77, c. 33, s. 3(1).

[60]*Manitoba Human Rights Act*, S.M. 1974, c. 65, s. 2(1).

birth, education, income, occupation and even, in some societies, productivity.[61] Prostitutes are predominantly women. More importantly, for present purposes, in the eyes of the law they have been predominantly women and were for a long time, according to the law, exclusively so. The minority of prostitutes who are male suffer the alternative stigma of having a deviant sexual orientation. As a group, prostitutes bear a special stigma in society. They not only constitute a socially constructed "class" but their identity as a class is very much a product of the way other members of society have been encouraged by the law to look down on them or exploit them.[62] Accordingly, it is consistent with both the text and the purpose of section 15 of the *Charter* to treat an individual's status as a prostitute as an appropriate ground to trigger the protection of the equality provision.

The interesting question at this point is whether it can be said that prostitutes are discriminated against by section 195.1 in light of the textual neutrality as between prostitutes and customers. It is here that we arrive at the heart of the problem. What is meant by the expression "without discrimination" in section 15? Formal or liberal theories of equality adopt what is, at least on its face, a simple formula. Persons who are similarly situated must be treated in a similar fashion.[63] According to this theory, the essence of discrimination is irrational or unfair *distinction.*[64] The problem with a singularly distinction-based theory of equality is that it does not call into question acts of official oppression *per se.* It only serves as a basis to challenge oppressive treatment if someone else is seen to be unfairly favoured. The argument one is forced to make is according to the formal model: "You can only target group X, if you include group Y, because Y is similarly situated." It does not allow an argument along the lines: "It is time you left X alone, because you have abetted her oppression for too long and now you have gone too far." The basic premise of the formal argument is that the government can oppress X as long as it oppresses Y as well. The premise of the alternative argument is that the government cannot act deliberately or recklessly to undermine the basic dignity of any group.

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[61]This is a translation of a passage from *Commission des Droits de la Personne* v. *Ville de Beauport* (21 August 1981), Quebec 200-02-002939-793 (Que. Sup. Ct) cited in *Commission des Droits de la Personne* v. *Ville de Montréal* (1983), 4 C.H.R.R. D/1444 (Que. Sup. Ct) at D/1445.

[62]For a review of the treatment of prostitution in other societies, see F. Henriques, *Prostitution and Society* (London: MacGibbon & Kee, 1962); J.F. Decker, *Prostitution: Regulation and Control* (Littleton, Colorado: Fred B. Rothman & Co., 1979); V.L. Bullough, *The History of Prostitution* (New York: University Books, 1964); B. Heyl, "Prostitution: An Extreme Case of Sex Stratification" in F. Adler & R.J. Simon, eds, *The Criminology of Deviant Women* (Boston: Houghton Mifflin Co., 1979) 196.

[63]See A. Gutmann, *Liberal Equality* (Cambridge: Cambridge University Press, 1980).

[64]See A. Bayefsky, "Defining Equality Rigbts" in Bayefsky & Eberts, *supra*, note 50, 1.

There are problems for prostitutes who wish to challenge soliciting laws on the basis of formal equality. It is always possible to avoid the issue by gerrymandering the relevant comparison group. The most curious instance of this kind of analysis occurred in a challenge under the *Canadian Bill of Rights*[65] to the pre-1972 "Vag C" provision on the ground that it applied only to women prostitutes. In *R.* v. *Beaulne, Ex parte Latreille*[66] a claim of discrimination based on sex was rejected by Houlden J. who said: "It is not all females who being found in a public place must give a good account of themselves, but only females falling within the class of 'prostitutes and night walkers'."[67] Since the offence did not apply to all women, but only to "prostitutes and night walkers", there was no discrimination on the basis of sex. Now that the offence applies to male prostitutes and to customers, as well as to women prostitutes, the prospect of a successful sex-based challenge has become even more remote.[68] The law, at least on its face, is no longer discriminatory. The same would apply to an argument based on discrimination between prostitutes and customers. It is, however, conceivable that, with weighty evidence of disparate enforcement of the law, a challenge based on unequal administration might be successful. But, in light of a deeply embedded Canadian tradition of deference to prosecutorial discretion, the evidence would need to be overwhelming.[69] Thus, this kind of argument is unlikely to succeed from a practical point of view. More importantly, the argument is misconceived because it begins from the concession that you can prosecute "hookers" as long as you haul in a few customers to legitimate the exercise. The basic point is that prostitution legislation, which is introduced as "anti-hooker" legislation and which must, in any event, be understood in the context of the predecessors of section 195.1 and the general attitude of the law towards prostitutes, cannot now be saved by including customers in the deviant group. It may very well be that customers can still

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[65]S.C. 1960, c. 44, reprinted in R.S.C. 1970, App III.

[66](1970), [1971] 1 O.R. 630, 16 D.L.R. (3d) 657, 2 C.C.C. (2d) 196 (H.C.) [cited to O.R.].

[67]*Ibid.* at 632. See comment on the constitutionality of "Vag C" in L. Smith "Whether Offence of Vagrancy by Common Prostitute Constitutes Discrimination by Sex: *R.* v. *Lavoie*" (1971) 6 U.B.C.L. Rev. 442.

[68]The equality rights challenge to soliciting laws which are either gender-neutral on their face or gender-neutral as applied has not succeeded in United States courts. See, *e.g.*, *Commonwealth* v. *R.*, 374 Mass. 5, 372 N.E.2d 196 (Mass. Sup. Ct. 1977); *People* v. *Superior Court of Alameda*, 19 Cal. 3d 338, 562 P.2d 1315, 138 Cal. Rptr. 66 (Cal. Sup. Ct. 1977). For a review of the American challenges to prostitution laws, see E.F. Murray, "Anti-Prostitution Laws: New Conflicts in the Fight Against the World's Oldest Profession" (1979) 43 Alb. L. Rev. 360 and Boyle & Noonan, *supra*, note 25.

[69]In *R.* v. *Morgentaler* (1985), 52 O.R. (2d) 353, 22 D.L.R. (4th) 641 (C.A.) the Court simply adopted the views of Laskin C.J.C. in *Morgentaler* v. *R.* (1975), [1976] 1 S.C.R. 616, 30 C.R.N.S. 209, 53 D.L.R. (3d) 161, to the effect that any unevenness or disparity in the administration of the law is for the legislature to correct and not for the courts to monitor as an issue of equality before the law or equal protection of the law.

can still be prosecuted and will have to answer for themselves for entirely different and legitimate public policy reasons. However, it is not a legitimate public policy concern for the legislature to abet the oppression of a discrete group in society. Accordingly, section 195.1 ought to be struck down as offending fundamental justice and equality.

At the outset of this comment, I said that a disappointing feature of the *Tremayne* and *McLean* decisions was their failure to break out of formal and technical discourse about *Charter* guarantees. Indeed, it may well have been this kind of formal thinking about constitutional guarantees which prevented counsel from arguing the case in terms of equality or fundamental justice in the first place. I hope I have succeeded in demonstrating how a less formal argument could be developed and, indeed, how such an argument is essential to get to the heart of the real constitutional concerns underlying Parliament's treatment of prostitutes.