The Feminist Defense of the Decriminalization of Prostitution

Frances M. Shaver
RESEARCH CONSULTANT
LAVAL, QUEBEC

Ninety-two percent of Canadians are convinced that prostitution is here to stay (Fraser *et al* 1985:398). At least four different policy approaches to the issue have been suggested: further criminalization, legalization, decriminalization, and a combination of further criminalization and decriminalization.[1] Although there is little consensus among Canadians regarding which approach to take, decriminalization was the option espoused by the majority of the women's groups who appeared before the Fraser Committee.[2] Fortunately, it was also the option reached by the Committee.[3] They recommended that:

> The prostitution related activities of both prostitutes and customers should be removed from the Criminal Code, except insofar as they contravene non-prostitution related Code provisions, and do not create a definable nuisance or nuisances. (Fraser *et al* 1985:534)

The Fraser Report was tabled in the House of Commons on April 23, 1985. No action has been taken on it as yet. Consequently, most of the statutes adopted when the Criminal Code was enacted in 1892 remain in place.[4] (See Box for a short description of the current laws and by-laws which relate to prostitution.)

The feminist position on decriminalization has been strongly voiced and well documented but it bears repeating for it does not represent an unqualified support of prostitution *per se*. This defense of decriminalization is based on two factors: a criticism of the formulation and enforcement of the laws, and an analysis of the underlying social problems that give rise to prostitution. Although other groups defended decriminalization on the former grounds, feminists must be commended for initiating the latter discussion. In all but one or two cases, presentations to the Fraser Committee dealing with the causes of prostitution came from women's groups (Fraser *et al* 1985:351).

There is certainly lots of support for the feminist charge that the laws are hypocritical, discriminatory, and that they perpetuate a double standard of sexuality. In the first place, it is not prostitution that is illegal, but public soliciting for the purpose of prostitution. The less visible forms of prostitution (the escort services, the massage parlours, the brothels, the call girl operations) which account for most of the activity are rarely the object of public concern.[5] In fact, they are also more likely to be tolerated by Canadians; 45 percent find "prostitution in private" to be acceptable while only 11 percent are prepared to tolerate street prostitution (Fraser *et al* 1985:397).

Sixty-two percent of Canadians think the exchange of sex for money is immoral, but the figure drops to 53 percent when sex is exchanged for other benefits (Fraser *et al* 1985:397). Rarely are exchanges involving commodities other than cash singled out for suppression. In fact, fewer Canadians (57 percent as opposed to 90 percent) even think of them as prostitution (Fraser *et al* 1985:396). It seems to be the public nature of the act of prostitution, or rather the public bargaining of sex for money, which is found to be offensive, not the act itself.

The intention of the soliciting section of the Criminal Code was that both males and females would be prohibited from soliciting whether they be trying to buy or trying to sell sexual services. Unfortunately, female prostitutes are much more likely to be arrested and convicted than are either their customers or male prostitutes. This is true even in Ontario where this section has clearly been interpreted by the courts as applying equally to customer and to prostitute (CACSW 1984b:64).

Prostitution by-laws, all clearly worded to apply equally to both buyer and seller (see Box), were enforced in a similar manner. Only 32 percent of the charges laid under the Vancouver by-law and a mere eight percent laid under the Halifax by-law were against male purchasers (CACSW 1984b:59). Given the working of the by-laws, and the fact that transactions are initiated as often by the customer as by the prostitute (Fraser *et al* 1985:384), one would logically expect an equal number of buyers and sellers to be charged. Clearly, it is the act of selling sex which is decried, not the act of buying it.

This same double standard is apparent in the treatment of young female offenders — whatever their offences, they tend to be categorized as promiscuous:

> In the Lower Mainland [of British Columbia] it is estimated that 80 percent of the female juvenile offenders who end up in custody at Willingdon are "charged" under the Juvenile Deliquency Act with being "guilty of sexual immorality". None or virtually none of the young male offenders are so categorized. (Ridington and Findlay 1981:15-16)

Such findings suggest that chastity is still held to be an important female virtue. Promiscuity, on the other hand, is still expected and even valued in men. In the light of such evidence it is difficult to counter feminists' argument that the laws and their enforcement serve only to perpetuate the double standard of sexuality and the socio-economic disadvantages of women.

Feminists' analysis of the underlying social conditions which lead women into prostitution is also well supported. They identify three major factors: the relative poverty of women, the advantageous socio-economic position of men, and the sex role socialization of both sexes. The Vancouver Coalition for a Non-sexist Criminal Code outlined the recruitment process:

> For some women in Canada, prostitution offers an income that would not otherwise be possible. Faced with high levels of unemployment, inadequate training and educational opportunities, inequality in the workplace, and insufficient social services, women choose prostitution as a means of earning an income. Economic pressures like these are exacerbated by social factors. Sex role stereotyping encourages girls and women to view themselves as sexual objects dependent on men (and encourages men to expect impersonal sexual services). In addition, studies show that up to 80 percent of prostitutes were victims of abuse in their childhood. For some women facing these economic and social pressures, prostitution offers a real alternative to criminal activity, welfare, and low-paying menial jobs. (Canada 1982:37)

In other words, prostitution becomes an option for women in a society that endorses sexual bargaining and offers limited options to women.

There is nothing in the description of contemporary prostitution outlined in the Fraser Report (Fraser *et al* 1985) or in the account by the CACSW (1984b) to contradict this analysis. Nor is it peculiar to Canada. Recent studies in England (McLeod 1982), in France (Jaget 1980), and in the United States (James *et al* 1977) have all come to similar conclusions regarding the factors that create and maintain contemporary heterosexual prostitution.

In short, feminists have not defended prostitution, they

have defended prostitutes because they are seen to be women who are, for the most part, struggling to maintain their socio-economic independence in a male dominated world. Feminists do not condone the business of prostitution (arguing that it is both dangerous and degrading); they are prone to accept the stereotypical view of the pimp-prostitute relationship as violent and abusive; and they have very few complimentary things to say about customers. In some cases they have argued that it is the aberrational behaviour of male customers which creates the need for prostitutes and furnishes the conditions in which other males are able to exploit them.[6]

This reluctance to defend the business of prostitution is often grounded in the belief that no woman would "freely" choose to sell her body, and in the hope that the long term social reforms they advocate will one day make it unnecessary. Unfortunately, this has alienated women prostitutes and made it difficult for feminists to fully ally themselves with them. It has also led to neglect by feminists to adequately assess the validity of their own charges against prostitution. This is a situation which needs to be remedied and if there is a defense to be made, it should be strongly voiced. Such a defense is likely to improve not only feminists' chances of working in full alliance with women prostitutes but also the likelihood of attaining a fully egalitarian society.

Footnotes

1. See Chapter 39 of the *Report of the Special Committee on Pornography and Prostitution* (Fraser *et al* 1985) for a discussion of the range and character of these options and Shaver (1985) for an evaluation.
2. Decriminalization was also espoused by "individual prostitutes and prostitute organizations, gay rights organizations, social workers, civil liberties organizations, some [mainline] church groups and a small minority of municipal politicians" (Fraser *et al* 1985:358).
3. The full recommendations of the Fraser Committee are outlined in Chapter 40 of their report.
4. The only major change took place in 1972 when Section 175(1)(c), commonly referred to as "Vag. C", was repealed and replaced by the soliciting section (195.1). Other amendments did no more than add a few peripheral offenses against prostitution related activities and fine-tune the penalties (Backhouse 1984).
5. Street prostitution in Toronto represented only 20 percent of all the prostitution in the city and the figure is probably closer to 5 percent in the winter (BMR 1983). In England it has been estimated as representing 30 percent of the total (McLeod 1982) and in the United States as 10-15 percent of the total (James *et al* 1977).
6. This case was made by Prof. Constance Backhouse and students from the Faculty of Law, University of Western Ontario, in their brief to the Fraser Committee. See Fraser *et al* (1985:520-521) for a brief description of this position.

References

Backhouse, Constance. "Canadian Prostitution Law 1839-1972." In *Prostitution in Canada*. Canadian Advisory Council on the Status of Women. Ottawa, 1984. pp. 7–18.

Bureau of Municipal Research (BMR). *Civic Affairs: Street Prostitution in our Cities*. Toronto: Bureau of Municipal Research, 1983.

Canadian Advisory Council on the Status of Women. "On Pornography and Prostitution." A Brief presented to the Special Committee on Pornography and Prostitution. Ottawa, 1984a.

--------*Prostitution in Canada*. Ottawa, 1984b.

Canada. House of Commons. Minutes of Proceedings and Evidence of the Standing Committee on Justice and Legal Affairs, Issue No. 90:37.

Fraser *et al*. Special Committee on Pornography and Prostitution. *Report of the Special Committee on Pornography and Prostitution*. Ottawa: Department of Supply and Services, 1985.

Jaget, Claude (ed.). *Prostitutes — Our Life*. Bristol, England: Falling Wall Press, 1980.

James, Jennifer, *et al*. *The Politics of Prostitution*. Seattle, Washington: Social Research Associates, 1977.

McLeod, Eileen. *Working Women: Prostitution Now*. London: Croom Ltd., 1982.

Ridington, Jillian and Barb Findlay. *Pornography and Prostitution*. Vancouver: Vancouver Status of Women, 1981.

Shaver, Frances M. "Prostitution: A Critical Analysis of Three Policy Approaches." *Canadian Public Policy* XI, No. 3.

Laws and by-laws relating to prostitution activities

Prostitution *per se* has never been a crime in Canada, however, various activities associated with it are. Activities currently prohibited by the Criminal Code include: soliciting in a public place for the purpose of prostitution (Section 195.1); transporting or directing, or offering to transport or direct, another person to a common bawdy-house (Section 194); keeping, being an inmate of, being found without lawful excuse in and allowing a place to be used for the purposes of a common-bawdy house (Section 193); and procuring and living off the avails of prostitution (Section 195).

The soliciting offence has been severely restricted in scope by the Supreme Court of Canada. In the Hutt case, decided in 1978, the Court ruled that the behaviour of the prostitute had to be "pressing or persistent" in order for it to constitute soliciting for the purposes of Section 195.1. It also indicated that a private car on a public thoroughfare did not constitute a "public place".

"Common bawdy-house", "place" and "public place" are defined in Section 179(1) of the Criminal Code. "Common bawdy-house" means a place that is "kept or occupied, or resorted to by one or more persons for the purpose of prostitution or the practice of acts of indecency". Place includes any place, "whether or not it is covered or enclosed, it is used permanently or temporarily, or any person has an exclusive right of user with respect to it." "Public place includes any place to which the public have access as of right or by invitation, express or implied."

Between 1980-1982 Montreal, Calgary, Vancouver, Niagara Falls and Halifax enacted by-laws dealing with prostitution. The content of the by-laws was quite similar. The first, enacted in Montreal in 1980, made it illegal to remain in a public place for the purposes of prostitution, or to approach others for the same purpose in such a place. (In 1981 it was declared *ultra vires* by the Superior Court of Quebec.) The Calgary by-law enacted in 1981 forbade being, remaining or approaching another person on a street for the purpose of prostitution. It became the model for subsequent by-laws. In the Spring of 1983 the Supreme Court of Canada (Westendorp v. The Queen) found the Calgary by-law to be invalid and *ultra vires* the power of the City of Calgary. Consequently, the Calgary by-law and those modeled after it were withdrawn.

The Westendorp decision has not deterred some municipalities from trying to curtail prostitution activities. Montreal has had a by-law in force since October 1983 which does not mention prostitution but which prohibits anyone from being in a public place to offer services for a price, unless the activity is covered by a city permit. This by-law, which was declared legal by Quebec Superior Court in a decision handed down on July 11, 1984, is generally used against prostitutes. Vancouver requested an interim injunction, declaring the conduct of the West End's prostitutes a public nuisance. It was granted on July 4, 1984 by B.C. Supreme Court Justice Allan McEachern. The constitutional validity of these moves has not yet been challenged.