

PROSTITUTION AND PUBLIC NUISANCE: DESPERATE MEASURES AND THE LIMITS OF CIVIL ADJUDICATION

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This article considers a recent episode in the continuing effort to define an appropriate legal response to the problem of street prostitution. The central issue addressed is whether, given the apparent failure of the criminal law to control public prostitution, there may be some role that can usefully be played by the common law. After an overview of the traditional common law and criminal approaches to the problem, this article examines in detail the recent suggestion that some forms of prostitution might amount to a common law nuisance. The focus throughout is upon the institutional and remedial questions raised by this suggestion. Prostitution is a social problem with which existing legal institutions are ill-equipped to deal. The purpose of this article is not to point to any correct solution, but rather to trace the route by which the law arrived at its current state and to articulate principles which place the legal issues in context. The final sections address the question of whether the common law is capable of expansion to meet the problem of street solicitation and, through an analysis of nuisance law and the inherent limitations of civil adjudication, seek to explore the costs of such an expansion.

Cette article traite d'un récent épisode de la recherche qui se fait actuellement pour trouver une solution appropriée en droit au problème de la prostitution dans les lieux publics. Etant donné l'incapacité apparente du droit pénal à enrayer la prostitution en public il s'agit ici avant tout de savoir si la common law ne pourrait pas jouer un rôle dans cette lutte. Après avoir survolé différentes façons dont la common law et le droit pénal ont traditionnellement abordé le problème, l'auteur examine en détail la suggestion récente selon laquelle certaines formes de prostitution représenteraient une nuisance en common law. Tout au long de l'article, l'auteur s'attache à analyser les difficultés que présentent cette suggestion en ce qui concerne les institutions et les remèdes. La prostitution est un problème social que les institutions juridiques sont actuellement mal équipées à résoudre. Le but de cet article n'est pas de donner une solution finale mais plutôt d'indiquer le chemin suivi par le droit tel qu'il existe actuellement et d'énoncer les principes qui replacent ces questions de droit dans leur contexte. En conclusion, l'auteur se demande si le droit de common law est capable de se développer pour résoudre le problème du racolage et, dans une étude du droit de nuisance et des limites imposées à toute décision de droit civil, analyse le coût d'un tel développement.

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Introduction

While in some societies and at other times prostitution has not been viewed as a problem¹ in this country it is currently perceived as a serious urban dilemma urgently requiring new solutions.² There is, however, no consensus on the appropriate social or legal response. Proponents of prostitution regulation are able to point to a large number of grounds upon which legal intervention is said to be justified. Some of these grounds, such as the suggestion that prostitution generates coincidental crime, encourages drug abuse and spreads venereal disease, are empirically controversial.³ Others, such as the argument that prostitution threatens an essential socio-moral solidarity of the community, or that individuals need to be protected from the temptations and exploitation associated with commercialized sex, are philosophically controversial.⁴ Still others, particularly those dealing with the nuisance aspects of prostitution, are accepted by most as legitimate concerns, yet the form of the required response is controversial; existing legal mechanisms are seen to be either inadequate or overreaching. In most debates about prostitution and the law it is difficult, if not impossible, to separate this trilogy of concerns: empirical questions, ethical controversy, and problems of institutional design all combine to make the issue one of the most confusing and emotional subjects of municipal discourse.

Most commentators agree that, morality aside, public prostitution can amount to a serious public annoyance.⁵ In locations where prostitutes are known to congregate, passers-by are frequently propositioned and, on occasion, accosted either by prostitutes or by "johns" seeking a prosti-

¹ See, for example, the survey in J.F. Decker, *Prostitution: Regulation and Control* (1979).

² The available data on the public perception of prostitution is ambiguous. A recent survey of public attitudes towards prostitution conducted by the Justice Department indicated that only 36% of the total survey population felt that prostitution was a serious problem. It is difficult to draw any conclusions from this response since the survey was national and the problems of prostitution are confined primarily to urban centres. For an analysis of this survey, see Report of the Special Committee on Pornography and Prostitution, *Pornography and Prostitution in Canada* (1985), pp. 395-400; cited hereafter as the Special Committee.

³ *Op. cit.*, footnote 1, at pp. 273-362.

⁴ While the literature on the legal enforcement of morality and the limits of justifiable paternalism is enormous, a useful starting point may be the debate between Hart and Devlin sparked by the report of the Wolfendon Committee, *Report of the Committee on Homosexual Offences and Prostitution* (1957); H.L.A. Hart, *Law, Liberty, and Morality* (1963); P. Devlin, *The Enforcement of Morals* (1965). For a more recent contribution see, D.A.J. Richards, *Sex, Drugs, Death and the Law* (1982).

⁵ See Decker, *op. cit.*, footnote 1; A. Sion, *Prostitution and the Law* (1977); Bureau of Municipal Research, *Street Prostitution in our Cities* (1982); Special Committee, *op. cit.*, footnote 2, pp. 538-543.

tute. Traffic on the roadway is impeded by customers, voyeurs and the curious, and street noises increase and continue late into the night. Shouting and fighting over territory and customers is not uncommon, and public areas are sometimes used to transact business.

The impact of these activities on a neighbourhood are manifold. Property values are depressed as the locale acquires an unsavoury reputation. Local businesses lose customers and fear for the security of their investment and livelihood. Residents feel deprived of the use of public amenities either through fear of harassment or simple distaste. Families are concerned about the effect upon children of living in such a neighbourhood and fear for their security in the belief that prostitution attracts the more disreputable members of society and spawns coincidental crime.

Against these legitimate demands for peace and quiet must be balanced the claims of individuals to a certain amount of freedom to use public areas as they choose. While law enforcement authorities and citizens groups decry the impotence of the present law to keep the peace, others argue that the criminalization of prostitution-related activity is an overly repressive restriction on individual freedom, reacting only to the symptoms of the disease and making criminals out of the true victims.

Citizens groups have been formed in urban centres across the country in an effort to eliminate prostitution from their neighbourhoods. They have sought assistance from the police and from all three levels of government. More recently, these groups have experimented with self-help remedies including citizens patrols and "shame the johns" tactics.⁶ Finally, some have turned to the courts and the common law to explore the possibility whether a more effective remedy to the problem might be found there. This final resort has resulted in a series of divided and often confusing judicial responses.

In July, 1984, in *Attorney-General for British Columbia v. Couillard et al.*,⁷ the Attorney General for British Columbia sought an interlocutory injunction to restrain prostitution-related activity in Vancouver's residential West End. The action was brought against a number of named defendants who were represented by counsel during the hearing of the application. The case was argued before McEachern C.J.S.C. who found, on the basis of affidavit evidence, that the activities of the defendants amounted to a serious public nuisance at common law. Characterizing the matter as an "urban tragedy" he granted an order restraining "anyone

⁶ In Vancouver a citizen's movement known as "Shame the Johns" was formed to patrol the streets and attempt to humiliate customers seeking prostitutes. British Columbia Attorney General Brian Smith is reported to have said that he sought the injunction discussed in this article partly in response to this movement (Vancouver Sun, July 5, 1984).

⁷ (1984), 11 D.L.R. (4th) 567, (1984), 14 C.C.C. (3d) 169 (B.C.S.C.).

having knowledge of the injunction from engaging in or causing a nuisance in the defined residential area'' and in particular from:⁸

1. engaging in any public conduct or activity apparently for the purposes of male or female prostitution, or any public conduct or activity which is calculated by itself or in conjunction with any conduct or activity by another person or persons to cause or contribute to a nuisance;
2. publicly offering themselves or publicly appearing to offer themselves directly or indirectly for the purposes of male or female prostitution by words or without words, or by actions, gestures, loitering or otherwise;
3. using or trespassing upon any public property including streets, lanes, sidewalks, boulevards, parks or school properties for the purposes of male or female prostitution;
4. trespassing upon any private property for the purposes of male or female prostitution;
5. engaging in any other conduct, including:
 - (i) loitering, littering, fighting, screaming, shouting, or swearing;
 - (ii) using insulting, abusive, suggestive or obscene language or gestures;
 - (iii) assaulting, harassing, impeding, obstructing, threatening with violence or otherwise intimidating any person or child;
 - (iv) defecating, urinating or any form of carnal copulation including *fellatio* and sodomy;
 so as to cause or constitute a nuisance.

We customarily think that the control of prostitution is a matter that is properly within the sphere of criminal legislation, and the invocation of the common law of nuisance in these circumstances is novel. However, in the course of his judgment, McEachern C.J.S.C. said:⁹

Public nuisance for the purpose of prostitution has had too long a grasp upon this city and it is time for its dreadful regime to come to an end. If the legislative branch of government has failed in this regard, the common law will not be found wanting.

Several months later, however, in *Stein and Tessler v. Gonzales*,¹⁰ McLachlin J. held that while street prostitution in Vancouver might amount to a public nuisance it did not amount to a private nuisance and local property owners had no standing to bring an action. And across the country, the Nova Scotia Supreme Court refused to grant the Attorney General an injunction to control street prostitution in Halifax. In *Attorney General for Nova Scotia v. Beaver*¹¹ MacIntosh J. questioned the very authority of the Attorney General to control prostitution by way of injunction and suggested that the problem must be left to the legislature and criminal procedure. This decision was upheld by the Nova Scotia Court of Appeal¹² which, while not doubting the constitutional authority of the

⁸ *Ibid.*, at pp. 575 (D.L.R.), 176-177 (C.C.C.).

⁹ *Ibid.*, at pp. 573 (D.L.R.), 175 (C.C.C.).

¹⁰ *Stein and Tessler v. Gonzales et al.* (1984), 14 D.L.R. (4th) 263, 58 B.C.L.R. 110 (B.C.S.C.).

¹¹ *Attorney General for Nova Scotia v. Beaver et al.* (1985), 66 N.S.R. (2d) 419 (N.S.S.C.).

¹² *Attorney General for Nova Scotia v. Beaver et al.* (1985), 67 N.S.R. (2d) 281 (N.S.C.A.).

Attorney General to bring the application, stressed the importance of leaving the criminal law to the legislature and the undesirability of enforcing criminal law by injunction.

All three of these applications were prompted by the perceived failure of traditional legal mechanisms to deal with a pressing social problem. Have traditional legal mechanisms failed and if so is it wise to invoke the doctrine of public nuisance to remedy this failure?

I. The Failure of Public Law

Until 1972 the problem of public prostitution was dealt with under the vagrancy provisions of the Criminal Code.¹³ Section 175(1) read:

Every one commits a vagrancy who . . .

(c) being a common prostitute or nightwalker is found in a public place and does not, when required, give a good account of herself;

This provision, then commonly known as "Vag C", had existed in Canadian penal statutes since 1869. Its repeal in 1972 was the result of both political and legal considerations.

In addition to a general dissatisfaction with vagrancy laws, the section was criticized as being vague, unfair and impossible to enforce.¹⁴ Its language was sexually biased and it offered no solution to the growing problem of male prostitution. The focus on the status of the accused rather than the activity of prostitution was both unfair to the accused and unwieldy for the police in an increasingly large and depersonalized prostitution environment.¹⁵ Finally, requiring the accused to give a "good account" of herself ran the risk of violating the privilege against self-incrimination.¹⁶

It was against this background that the current section 195.1 of the Code was enacted by Parliament.¹⁷ It reads:

Every person who solicits any person in a public place for the purpose of prostitution is guilty of an indictable offence punishable on summary conviction.

This section was drafted in sexually neutral language and eliminated the status of the accused as an element of the offence. Based upon the goal of controlling the public nuisance aspects of prostitution, the new provision

¹³ R.S.C. 1970, c.C-34, s.175.

¹⁴ E.G. Ewaschuk, *Trick or Treat?: The Offence of Soliciting* (1980), 12 *Ottawa L. Rev.* 235. See also, *The Report of the Royal Commission on the Status of Women in Canada* (1970), which criticized the section as a provision used only to regulate the activity of women.

¹⁵ M. Layton, *The Ambiguities of the Law or the Streetwalker's Dilemma* (1979), 27 *Chitty's L.J.* 109.

¹⁶ *R. v. Viens* (1970), 10 C.R.N.S. 363 (Ont. Prov. Ct.).

¹⁷ S.C. 1972, c.13, s.15.

was thought to be less controversial than a ban on prostitution *per se*. By focussing on the activity of soliciting only, the section was intended to address both the problems of fairness and enforcement. However, reflecting the discomfort apparently felt by the courts in dealing with prostitution, the provision has clearly failed to achieve its ostensible promise.

Notwithstanding the sexual neutrality of the language of section 195.1, one of the first problems to arise was that it appeared to some courts that because the dictionary definition of prostitution refers to females, a male could not be guilty of soliciting for the purpose of prostitution.¹⁸ While this interpretation was not universally accepted¹⁹ the issue required a further amendment by Parliament which defined "prostitute" as "a person of either sex who engages in prostitution".²⁰

The second problem was to determine whether the section applied only to soliciting by prostitutes. Most commentators recognize that many of the problems associated with prostitution are caused by customers; the term "curb crawler" for example, has almost become a term of art.²¹ Yet it remains unclear whether the customer can commit an offence under section 195.1. Two courts of appeal have reached opposite conclusions. In *R. v. Dudak*²² the British Columbia Court of Appeal held that the accused, who had approached an undercover female constable seeking her services as a prostitute, could not be convicted of the offence of soliciting. The court reasoned that the customer does not solicit for the purposes of prostitution, but rather for the purpose of satisfying his own sexual desire. On this interpretation the words "every person" in section 195.1 refer only to the prostitute.

In *R. v. Diapola* and *R. v. Palatics*,²³ two appeals heard together, the Ontario Court of Appeal declined to follow *Dudak* and so allowed "every person" to refer to either the customer or the prostitute. Howland C.J.O., speaking for the court, was concerned with the object of section 195.1 and reasoned that the customer is as much a cause of the nuisances that the section seeks to prevent as is the prostitute. To quote at some length from his judgment:²⁴

The aim of the section would appear to be the protection of persons from being subject to certain kinds of solicitation in a public place. Decent men or women who

¹⁸ *R. v. Patterson* (1972), 9 C.C.C. (2d) 364, 19 C.R.N.S. 289 (Ont. Co.Ct.).

¹⁹ *R. v. Obey*, [1973] 3 W.W.R. 382, (1973), 11 C.C.C. (2d) 28, 21 C.R.N.S. 121 (B.C.S.C.).

²⁰ An Act to Amend the Criminal Code, S.C. 1981-82-83, c.125, s.11.

²¹ See, for example, the Wolfendon Report, *op. cit.*, footnote 4, para. 267.

²² [1978] 4 W.W.R. 334, (1978), 41 C.C.C. (2d) 31, 3 C.R. (3d) 68 (B.C.C.A.); see comment by Ewaschuk, *loc. cit.*, footnote 14.

²³ (1978), 43 C.C.C. (2d) 199, 4 C.R. (3d) 121 (Ont. C.A.).

²⁴ *Ibid.*, at pp. 208-209 (C.C.C.), 131-132 (C.R.).

are going to and from their homes, or innocent bystanders, should not be subjected to being importuned by persons seeking sexual intercourse or other sexual gratification. It is an affront to the sense of decency of ordinary citizens . . .

In my opinion s.195.1 is not limited to solicitation by prostitutes . . . s.195.1 applies to "every person who solicits". The conduct of a prospective customer who solicits a prostitute from a car driving along the street and endeavours to bargain with her may be offensive to other pedestrians. Such conduct will be very offensive if the person solicited is not a prostitute, but a woman of good moral character who is upset by the man's sexual advances.

If one accepts that section 195.1 is designed to deal with the nuisance aspects of prostitution and that the customer is as much a cause of the nuisance as is the prostitute, this interpretation may well be desirable. Yet the question of whether customers should be prone to criminal sanctions is one which evokes divided responses. While the interpretation placed on section 195.1 by the Ontario Court of Appeal can be justified by an appeal to the goal of eliminating nuisances, it is, perhaps, debatable in light of the usual narrow interpretation of criminal statutes. A further amendment of the section by Parliament, or a definitive decision of the Supreme Court of Canada will no doubt be equally controversial.²⁵

The difficulties of the current legislation do not end here. Section 195.1 makes solicitation an offence only if it occurs in a "public place". In *Hutt v. The Queen*²⁶ the Supreme Court of Canada determined that a customer's car is not a public place, and while beverage rooms have been held to be public places,²⁷ the hallways of a motel have been excluded.²⁸

The most problematic element of the offence under section 195.1 is the limitation of the offence to solicitation. In *Hutt v. The Queen*²⁹ the Supreme Court of Canada held that the accused must exhibit conduct that is "pressing or persistent" before being guilty of the offence. A mere demonstration of willingness to engage in prostitution is not an offence. To the extent that the legal regulation of prostitution is based upon its nuisance aspects, this approach is entirely reasonable. But the difficulties of enforcement under this interpretation are obvious. Although a prostitute might approach a pedestrian and make clear her intentions, if she takes "no" for an answer then she is not at law soliciting.

Even within the confines of this narrow interpretation, the police tried a new tactic. They would observe a prostitute for an extended period

²⁵ The Criminal Law Reform Act (Bill C-19, 32-33 Eliz. II, 1983-84) proposed the amendment of s. 195.1 by adding a definition of prostitution that includes "obtaining the services of a prostitute".

²⁶ [1978] 2 S.C.R. 476, (1978), 82 D.L.R. (3d) 95, [1978] 2 W.W.R. 247.

²⁷ *Tegstrom v. The Queen*, [1971] 1 W.W.R. 147 (Sask D.C.); *R. v. Garipey*, [1975] R.L. 497 (Que. S.C.).

²⁸ *R. v. Purcell* (1958), 29 C.R. 131 (B.C.S.C.).

²⁹ *Supra*, footnote 26.

of time and count the number of passers-by she would approach. After a time they would send an undercover police constable past the woman. When she approached the constable and made clear her intentions she would be arrested for soliciting. At trial the Crown would argue that although no one offer by the accused was pressing and persistent, the general course of conduct of the accused amounted to pressing and persistent solicitation.

Although some lower courts accepted the "course of conduct" argument it was finally rejected by the Supreme Court of Canada. In *R. v. Whitter* and *R. v. Galjot*,³⁰ two appeals from British Columbia, McIntyre J. declined to make a connection between the earlier approaches by the accused and the final approach to the police officer. Each approach was an independent act directed at one individual. He went on to say:³¹

At most the Crown has shown that the respondents have been plying their trade energetically, but the prior accostings were not related to the charge in respect of the police officers. They may not be described as a series of steps which have a cumulative effect upon the final accosting. They are more fittingly described as a series of alternative steps adopted by the respondents in pursuit of their trade, but in no way directed to, or connected with, the final approach to the police officer and, therefore, lacking any capacity to contribute to the nature of the final approach.

It is therefore clear, to use the words of Moore J. in *R. v. Shanks*,³² that several soft sells do not constitute one hard sell because a number of non-offences cannot make one offence.

The end result (at least in the eyes of the law enforcement agencies)³³ is that section 195.1 has been so restrictively interpreted that it is, except in the most extreme situations, inoperative. With such a high degree of activity necessary before a finding of soliciting can be made, any prostitute, or any customer (if customers are indeed included) can, simply by exercising a minimum of discretion, avoid prosecution and conviction. There is evidence that prostitutes are aware of the "pressing and persistent" requirement and do endeavour to keep their activities within what they perceive to be the technical limitations of the offence.³⁴ The available statistics reveal that prosecutions for street solicitation have steadily declined during the past decade. However, this data is ambiguous.³⁵ The

³⁰ [1981] 2 S.C.R. 606, (1981), 129 D.L.R. (3d) 577, 64 C.C.C. (2d) 1.

³¹ *Ibid.*, at pp. 611 (S.C.R.), 581 (D.L.R.), 5 (C.C.C.).

³² [1980] 2 W.W.R. 164, at p. 172, (1980), 52 C.C.C. (2d) 515, at p. 521 (Alta. S.C.).

³³ The Special Committee on Pornography and Prostitution suggests that the ineffectiveness of s. 195.1 "at least until 1981, had as much, if not more, to do with the dissatisfaction of some police forces with the liberal impulses of the Supreme Court of Canada than with any inherent weakness in the law."; *op. cit.*, footnote 2, p. 423.

³⁴ Layton, *loc. cit.*, footnote 15, at pp. 112-113; see also H. Levy, *The Law and Prostitution: The Girls Win Again* (1978), 2 Can. Lawyer 6:14, at p. 15.

³⁵ Special Committee, *op. cit.*, footnote 2, pp. 421-426.

decline began well in advance of the *Hutt* decision and it is almost impossible to draw causal conclusions which fully account for the loss of faith in the criminal provisions. Nevertheless, a loss of faith there has been.

In response to the apparent failure of section 195.1 there have been a wide variety of suggestions for reform. It has been reported that many chiefs of police favour a return to the Vag C provision, or an amendment of the current section to make soliciting and "loitering" for the purpose of prostitution an offence.³⁶ At one point it appeared that Parliament was prepared to add to section 195.1 a definition of "solicit" which would eliminate the requirement of pressing and persistent conduct. A Bill to this effect was introduced on May 1, 1978 but subsequently died on the order paper.³⁷ These suggestions have all been criticized in some quarters as representing retrograde approaches to a social problem which requires imaginative solutions. The proposed reforms extend the definition of the offence beyond its nuisance-based justification and, it is thought by some, give the police a dangerously wide discretion which, if abused, would be a licence to harass.³⁸

In many centres across Canada local citizens and politicians became frustrated waiting for action from Ottawa. In Toronto, the response for a time was to charge street prostitutes under the loitering provisions of the Criminal Code,³⁹ but after some initial success the courts restricted the applicability of that section.⁴⁰ In Calgary and Vancouver civic by-laws were enacted prohibiting the sale of sexual services on city streets. However, the Supreme Court of Canada struck down the Calgary by-law as unconstitutional. In *Westendorp v. The Queen*,⁴¹ a unanimous court held that the Calgary by-law invaded the exclusive federal authority in relation to criminal law. Although aware of the existing problems regarding prostitution, Laskin C.J.C. rejected the city's argument that the object of the by-law was to control the streets and protect property and concluded:⁴²

³⁶ Levy, *loc cit.*, footnote 34.

³⁷ *Ibid.*, at p. 15. In 1983, the Standing Committee on Justice and Legal Affairs reported on street solicitation and recommended a variety of amendments to s.195.1. These recommendations included, first, a definition of "public place" that would include vehicles and private places open to view; second, the inclusion of customers as "persons" liable to conviction for soliciting; third, a new section making it an offence to offer, or accept an offer to engage in prostitution. See Report of Justice and Legal Affairs Committee in Minutes of the Proceedings of the Justice and Legal Affairs Committee, issue No. 126 (1983).

³⁸ Montreal Association of Women and the Law, Position Paper (1982).

³⁹ R.S.C. 1970, c.C-34, s. 171(1)(c).

⁴⁰ Levy, *loc. cit.*, footnote 34.

⁴¹ [1983] 1 S.C.R. 43, (1983), 144 D.L.R. (3d) 259, [1983] 2 W.W.R. 385. See comment by J.D. Whyte (1983), 32 C.R. (3d) 107.

⁴² *Ibid.*, at pp. 54 (S.C.R.), 267 (D.L.R.), 394 (W.W.R.), 339 (C.C.C.).

However desirable it may be for the municipality to control or prohibit prostitution, there has been an overreaching in the present case which offends the division of legislative powers.

In the face of *Westendorp* the city of Vancouver repealed its by-law two weeks later.⁴³

While the conjoined activities of prostitutes and their customers over a period of time may well amount to a serious public annoyance, the criminal law, by focussing on the activity of the prostitute alone, and then only on individual transactions, would appear incapable of dealing with the nuisance. This is the problem that some provincial Attorneys General have sought to avoid by invoking the common law of nuisance.

In the course of his judgment in *Attorney General for British Columbia v. Couillard*,⁴⁴ MacEachern C.J.S.C. addressed the apparent failings of the criminal law, noting that *Hutt v. The Queen* presented "some practical problems" in the prosecution of soliciting. However, he concluded:⁴⁵

... that does not mean that public misconduct is lawful. It is not, and if it amounts to a public nuisance anywhere in this province, it may be enjoined upon a proper application being made by the Attorney General. Those who would defile our city must understand that in addition to the criminal law, the citizens of this country are protected by the common law which is a statement of the accumulated wisdom of history . . .

The case at bar is a perfect example of how the common law supplements legislation for the protection of the public.

The nature of the relation between legislation and common law in this context is obscure and raises conceptual and institutional difficulties which have never been fully articulated. The following sections address first, the historical derivation of public nuisance doctrine from the criminal law of England and second, the modern scope of Canadian public nuisance law. The conclusion suggests reasons why there should now be more principled limitations on the use of the common law remedy to supplement legislation for the protection of the public.

II. *The Historical Background*

In this century the use of nuisance law to remedy the problems of street prostitution is, to say the least, unusual; but it is not entirely unprecedented. In fact, in earlier times the use of nuisance law to deter petty crime and regulate community disturbances appears to have been common. The law books of past centuries tell a fascinating story of the

⁴³ Vancouver Sun, February 16, 1983.

⁴⁴ *Supra*, footnote 7.

⁴⁵ *Ibid.*, at pp. 573 (D.L.R.), 175 (C.C.C.).

effort to maintain community decency and order through the use of the action for common nuisance.

Actions to preserve the moral fabric and orderly life of the community were widespread and successful. Public swearing and urinating were considered to be nuisances,⁴⁶ as were nudity and indecent exposure.⁴⁷ In one case where the defendant had been observed bathing in the nude, the court said:⁴⁸

The law will not tolerate such an exhibition. Whatever his intention might be, the necessary tendency of his conduct was to outrage decency, and to corrupt public morals.

Disorderly houses and gambling dens were, in certain locales, regularly condemned as nuisances.⁴⁹ Public markets maintained order and cleanliness in the face of the risk that they might be considered nuisances, and puppet shows, fairs and expositions were routinely sent packing if they proved to be an annoyance.⁵⁰ For example, in 1671 a rope dancer was ordered to remove his stage on the basis that his show was an annoyance to the local inhabitants "by reason of the crowd of idle and naughty people that would be drawn thither, and their apprentices inveigled from their shops".⁵¹ Brothels and bawdy houses were common nuisances.⁵² Coke wrote that the bawdy house is "against the law of God" and "the cause of many mischiefs, not only to the overthrow of the bodies, and wasting of their livelihoods, but to the endangering of their soules".⁵³ Indeed, it would appear to be the case that many forms of immoral activity could be enjoined even in the absence of proof of harm, the unhealthy effects of such activities being sufficiently notorious that they were considered *malum in se*. As one nineteenth century writer put it:⁵⁴

⁴⁶ J.H. Baker, *An Introduction to English Legal History* (1979), p. 361. The law appears to have been the same in the U.S.; see, for example, *State v. Taylor* 29 Ind. 517 (1868); *State v. Graham* 3 Sneed (Tenn.) 134 (1855); H.G. Wood, *Nuisances* (2nd ed., 1883).

⁴⁷ *R. v. Crunden* (1809), 2 Campbell 89, 170 E.R. 1091 (N.P.); *R. v. Wellard* (1884), 14 Q.B.D. 63 (Cr. Cas. Rev.).

⁴⁸ *R. v. Crunden*, *ibid*.

⁴⁹ E.H. Pearce, D. Meston, *Law Relating to Nuisances* (1926), pp. 212-234.

⁵⁰ *R. v. Bradford* (1688), Comb. 304, 90 E.R. 493 (K.B.); *Hall's Case* (1671), 1 Ventris 169, 86 E.R. 115 (K.B.); *Walker v. Brewster* (1867), L.R. 5 Eq. 23 (V.C.); *R. v. Carlile* (1834), 6 C & P 636, 172 E.R. 1397 (Cent. Cr. Ct.); *R. v. Moore* (1832), 3 B & Ad. 184, 110 E.R. 68 (K.B.).

⁵¹ *Hall's Case* *ibid* at pp. 169 (Ventris), 115 (E.R.).

⁵² *R. v. Williams* (1711), 1 Salk 384, 91 E.R. 334 (Q.B.); *R. v. Holland* (1882), 46 J.P. 312 (Q.B.D.); see J. Russell, *The Offence of Keeping a Common Bawdy-House in Canadian Criminal Law* (1982) 14 Ottawa L.R. 270.

⁵³ Sir Edward Coke, *Institutes of the Laws of England*, Third part (1798), p. 204.

⁵⁴ Wood, *op. cit.* footnote 41, p. 36.

The experience of all mankind condemns any occupation that tampers with the public morals, tends to idleness and the promotion of evil manners, and anything that produces that result finds no encouragement from the law, but is universally regarded and condemned by it as a public nuisance.

Perhaps significantly, prostitution itself does not appear to have been an offence in the absence of some other accompanying misconduct. As one judge explained:⁵⁵

... the indictment ought to have been for keeping a common bawdy house. But what is charged in this indictment is but solicitation of chastity, which is a spiritual offence, and not inquirable or punishable at common law.

And while the conduct of women in public was subject to judicial scrutiny, the law purported to demonstrate a certain amount of toleration and understanding. For example, in a seventeenth century case where a woman was accused of being a public scold, Chief Justice Holt is reported to have said:⁵⁶

Scolding once or twice is no great matter; for scolding alone is not the offence, but it is the frequent repetition of it to the disturbance of the neighbourhood which makes it a nuisance . . .

The Chief Justice is reported to have suggested that the court reconsider the case in the next term to "see how she would behave herself in the meantime" on the basis that a "ducking would rather harden than cure her; and if she were once ducked, she would scold on all the days of her life".⁵⁷

Perhaps the most common use of public nuisance doctrine was to maintain the order of public thoroughfares and to protect against unreasonable interference with access to the public way. There are numerous cases involving shops, fairs, and public shows which attracted large crowds and interfered with the roadway, or vehicles and construction projects which obstructed the highway.⁵⁸ In fact, while many of the cases described above are replete with the strong language of Victorian morality, it is not unreasonable to maintain that their primary concern was simply the orderly maintenance of public areas.

What may initially strike many readers is the apparent conflation of civil and criminal law reflected in the law of public nuisance and in the *Couillard* decision itself. Historically the distinction between tort and crime is obscure. The roots of both lie in the early efforts of the judiciary

⁵⁵ *R. v. Pierson* (1705), 2 Ld. Raym. 1179, 92 E.R. 291 (Q.B.).

⁵⁶ *R. v. Foxby* (1704), 6 Mod. 213, 87 E.R. 965 (Q.B.).

⁵⁷ *Ibid.*

⁵⁸ *Walker v. Brewster*, *supra*, footnote 45; *R. v. Moore*, *supra*, footnote 45; *R. v. Carlile*, *supra*, footnote 45; *Barber v. Penley*, [1893] 2 Ch. 447 (Ch.D.); *Dwyer v. Mansfield*, [1946] K.B. 437, [1946] 2 All E.R. 247 (K.B.D.); *Hubbard v. Pitt*, [1976] Q.B. 142, [1975] 1 All E.R. 1056, [1975] 2 W.L.R. 254 (C.A.).

to protect the king's peace and to provide an alternative to the sometimes more violent self-help remedies that would exist in the absence of authoritative adjudication.⁵⁹ Public nuisance, as many of the above cases show, was originally a miscellaneous collection of petty criminal offences, many of which can now be found in the Criminal Code.⁶⁰

There was a time when nuisance law conformed more neatly to the traditional categories of legal thought. Private nuisance was the tort of unreasonable interference with private property. Public nuisance was a crime and no more. It was not a part of the civil law and for years the courts denied any private remedy for public nuisance on the grounds that it was a crime.⁶¹ The creation of a civil damages remedy for public nuisance was a late development characterized by most writers as an historical accident⁶² motivated originally by a desire to provide a remedy for personal injuries suffered on the public highway. The reluctance to allow a private action for public nuisance remains powerful today and is reflected in the principle that to maintain an action the plaintiff must prove some special or peculiar damage over and above that suffered by the community at large.⁶³ Nor did injunctive relief become readily available for public nuisance until the early nineteenth century.⁶⁴ Equity took no jurisdiction over crime even at the suit of the Attorney General. Where the nuisance interfered with property the courts only reluctantly granted injunctions, hesitant to allow the normal criminal process to be circumvented by equity. As the defendant argued in one of the leading cases:⁶⁵

⁵⁹ At the same time the courts were developing their public nuisance jurisdiction, they were also fashioning rules to protect persons who might be considered nuisances from the wrath of the community. The most important of these rules was the restriction on the right of private persons to abate public nuisances. Although some earlier cases indicated that the community might take steps to eliminate such a nuisance, later authorities argued that such a position "would warrant acts of violence and barbarity, such as no civilized community could tolerate, and such a condition of anarchy and disorder as would be wholly in subversion of law and the public peace": Wood, *op. cit.*, footnote 49, p. 750.

⁶⁰ See text *infra*, at footnote 69.

⁶¹ For a fuller account of the development of civil remedies for public nuisance, see F.H. Newark, *The Boundaries of Nuisance* (1949), 65 *Law Q. Rev.* 480.

⁶² *Ibid.*; see also W.L. Prosser, W. Page Keeton, *The Law of Torts* (5th ed. 1984), pp. 616 *et seq.*

⁶³ See text *infra*, at footnote 106.

⁶⁴ For historical accounts of the development of the equitable jurisdiction to enjoin nuisances and other crimes, see Z. Chafee, R. Pound, *Cases on Equitable Relief Against Torts* (1924); H.E. Read, *Equity and Public Wrongs* (1933), 11 *Can. Bar Rev.* 73, 158, 249. See also R. Sharpe, *Injunctions and Specific Performance* (1983), pp. 126-138.

⁶⁵ *Attorney-General v. Richards* (1795), 2 *Anst.* 603, at p. 613, 145 *E.R.* 980, at p. 983 (*Exch.*). This was, in fact, the first case in which the Attorney General obtained an injunction against a public nuisance. The court avoided the defendant's argument by treating the nuisance as a purpresture.

As to the question of nuisance, that is a matter completely foreign to the jurisdiction of a court of equity. It is a breach of the general police of the kingdom, and as such is considered a crime, and to be prosecuted in the criminal courts . . . Questions of nuisance are particularly improper to be discussed in equity, because the remedy at law is complete.

As the following section shows, such statements can no longer be made, and traditional categories can no longer accommodate the modern law of public nuisance.

III. *The Modern Law of Nuisance*

Modern Canadian law recognizes three species of nuisance which appear to be related by little more than their common name. Private nuisance is the tort of unreasonable interference with the use and enjoyment of private property. Criminal nuisance is a specific offence contained in the Criminal Code.⁶⁶ Occupying a conceptual netherworld somewhere between private and criminal nuisance is the hybrid "tort" of public nuisance for which civil remedies are available.

The present scope of nuisance law remains largely undefined. Fleming says that "the concept has eventually become so amorphous as well-nigh to defy rational exposition" and that nuisance has become a "catch-all for a multitude of ill-assorted sins", containing the "rag ends of the law".⁶⁷ Prosser justly asserts that "[f]ew terms have afforded so excellent an illustration of the familiar tendency of the courts to seize upon a catchword as a substitute for any analysis of a problem".⁶⁸

Much of the older common law of public nuisance was adopted as the criminal law of Canada and incorporated into the Criminal Code. The offences of indecency, nudity, causing a disturbance and vagrancy all have their roots in the early common law of public nuisance.⁶⁹ The nuisances of keeping a bawdy house or gambling den have similarly been codified as criminal offences.⁷⁰ Some of the more anachronistic nuisance offences were dropped from the code; so, for example, in the 1952 Report of the Revision Committee we are informed that the common scold was no longer to be considered a criminal.⁷¹ What is not clear is whether this ancient offence continues to be a civil nuisance at common law.

⁶⁶ R.S.C. 1970, c.C-34, s.176.

⁶⁷ J.G. Fleming, *The Law of Torts* (6th ed., 1983), p. 378.

⁶⁸ Prosser, Keeton, *op. cit.*, footnote 62, pp. 616-617.

⁶⁹ R.S.C. 1970, c.C-34, s.169 (indecency), s.170 (nudity), s.171 (causing a disturbance), s.175 (vagrancy). On the history and modern scope of these offences, see, D. Price, *Causing a Disturbance* (1977-78), 20 *Crim. L.Q.* 68.

⁷⁰ *Ibid.*, s. 185 (gaming houses), s.193 (bawdy-houses); see Russell, *loc. cit.*, footnote 52.

⁷¹ *Debates of the Senate*, 1952, p. 226, at p. 229.

In addition to the specific offences discussed above, section 176 of the Criminal Code contains the residual offence of common nuisance.⁷² This section, derived from the English Draft Criminal Code is, however, narrowly drawn. The definition of common nuisance is restricted to "unlawful acts" or failures to "discharge a legal duty" and a common nuisance is only a criminal offence when it "endangers the lives, safety or health of the public" or causes physical injury.⁷³ The Imperial Commissioners were well aware of the narrow scope of the offence and in their report stated that their intent had been to:⁷⁴

... draw a line between such nuisances as are not to be regarded as criminal offences. It seems to us anomalous and objectionable upon all grounds that the law should in any way countenance the proposition that it is a criminal offence not to repair a highway when the liability to do so is disputed in perfect good faith. Nuisances which endanger the life, safety, or health of the public stand on a different footing.

The section has been successfully invoked only in a limited number of situations. For example, in *The King v. The Toronto Railway Co.*⁷⁵ the defendant was convicted of a nuisance for operating electric streetcars at night without lights or fenders and a woman was struck and killed. The court held that the defendant had a legal duty to take precautions not to endanger the lives or safety of the public and that it failed in this respect. In the absence of danger, the narrow wording of the section and its subsequent interpretation make it highly unlikely that prostitution could be considered a criminal nuisance.⁷⁶

In this century the criminal law of public nuisance has become more circumspect. Common law criminal offences have been eliminated in this country and the old nuisance offences have either been incorporated into the Criminal Code or have been made obsolete by changing community standards. The question, then, is what remains of the common law of public nuisance? The common law regulation of public activity has, for the most part, been removed to the apparently more appropriate and effective institutions of public law. Civil remedies for nuisances which

⁷² R.S.C. 1970, c.C-34, s.176.

⁷³ *Ibid.*, s. 176(1).

⁷⁴ See H.E. Taschereau, *The Criminal Code* (3rd ed., 1893), s.191. The same point was made in the Canadian debates on the section: see *Debates of the House of Commons*, 1892, vol. II, pp. 3100 *et seq.*

⁷⁵ (1905), 10 C.C.C. 106, 10 O.L.R. 26 (Ont. C.A.); see also *R. v. London* (1900), 32 O.R. 326 (Ont. C.A.); *The Queen v. G.T.R.* (1858), 17 U.C.Q.B. 165; *Re Rex v. County of Lambton* (1926), 30 O.W.N. 290 (Ont. H.C.); *Union Colliery Co. v. The Queen* (1900), 31 S.C.R. 81, 4 C.C.C. 400.

⁷⁶ Two cases in which a prosecution for common nuisance failed because there was no proof of actual danger are: *The King v. Reynolds* (1906), 11 C.C.C. 312 (N.S.S.C.); *The Toronto Railway Co. v. The King*, [1917] A.C. 630, (1917), 38 D.L.R. 537, (1917), 29 C.C.C. 29 (P.C.).

interfere with property have become a vigorous part of the common law; yet it hardly needs to be pointed out that even land use decisions, formerly at the heart of nuisance law, are now left primarily to the public planning mechanisms of environmental regulation, zoning, licencing and municipal by-laws.

The codification of earlier forms of nuisance liability in the Criminal Code did not eliminate public nuisance as a species of civil liability. The scope of the civil remedy is, however, problematic. As one would expect in an age of environmental concern, there has been considerable effort devoted to an analysis of the role that nuisance law might play in the battle for a clean environment.⁷⁷ This scholarship has explored the ability of the common law to control industrial waste, smoke, smells and noise, the relative costs and benefits of judicial regulation of industrial activity and the considerations which should be relevant in designing remedial responses to these problems. The issue that has not been extensively canvassed is the possibility that there may be a broader residual role to be played by the law of public nuisance.

What confounds any analysis of public nuisance is the blurring of the traditional borderline between civil and criminal liability. While its historical roots are located in crime, civil remedies for public nuisance are now well-established. Its "schizophrenic character"⁷⁸ continues to defy any attempt to define precisely the basis of liability for public nuisance or to fit it comfortably within any familiar category of legal thought. It is, however, possible to offer a tentative framework for an analysis of public nuisance which incorporates the following five elements: (1) the character of the defendant's conduct; (2) the nature of the interests protected; (3) the scope of the interference; (4) standing to sue; and (5) the degree of the interference. While the following analysis suggests more questions than answers, it is offered as a useful starting point for determining the scope of the modern law of public nuisance.⁷⁹

A. *The Character of the Defendant's Conduct*

All writers on the subject continue to assert that public nuisance provides a civil remedy in respect of criminal conduct only. Most texts begin with the statement that "public nuisance is a crime",⁸⁰ and Prosser

⁷⁷ J. McLaren, *The Common Law Nuisance Actions and the Environmental Battle—Well Tempered Swords or Broken Reeds?* (1972), 10 *Osgoode Hall L.J.* 505, and *The Law of Torts and Pollution*, in *Law Soc. of Upp. Can. Lectures* (1973), p. 309.

⁷⁸ J. McLaren, *Nuisance in Canada*, in A.M. Linden (ed.), *Studies in Canadian Tort Law* (1968), p. 339.

⁷⁹ The framework developed here is not entirely novel. It draws on most of the literature in the area and, in particular on Prosser, Keeton, *op. cit.*, footnote 62; and O.M. Reynolds, *Public Nuisance: A Crime in Tort Law* (1978), 31 *Oklahoma L. Rev.* 318.

⁸⁰ R. Heuston, R.S. Chambers, Salmond and Heuston on Torts (18th ed., 1981), p. 47; W.V.H. Rogers, Winfield and Jolowicz on Tort (11th ed., 1979), p. 353.

reports that "[n]o case has been found of tort liability for public nuisance which was not a crime".⁸¹ If taken seriously, these statements raise issues that go both to the substantive nature of public nuisance, and to the jurisdiction of the Attorney General to seek a civil injunction. If proof of criminal conduct by the defendant is a precondition to civil liability for public nuisance, the scope of the modern law must be defined and limited by existing criminal legislation.

In jurisdictions in which common law crimes continue to exist, or in which there are broadly worded nuisance statutes,⁸² the statement that nuisance is a crime may be little more than a conclusion that the conduct of the defendant is an offence. However, in this country, where the criminal law has been exhaustively codified, and common law crimes abolished, the criminality requirement might be viewed as a significant restriction on civil liability for public nuisance; for it implies that there is no residual common law jurisdiction to expand public nuisance beyond statutorily defined wrongs. The defendant's liability could only be triggered by established or threatened criminal behaviour, and the preliminary definition of the wrong would be a matter exclusively for the legislature.

This issue arose in *Couillard* where it was argued that as the defendants were not violating any criminal law, the Attorney General had no jurisdiction to seek an injunction. McEachern C.J.S.C. declined to accept that it followed from the mere fact that the defendants' conduct was "lawful" that there were no limitations on their rights to use the streets. He held that the Attorney General "has standing to bring proceedings for enforcing the law within the province",⁸³ and that the rights of the defendants were subject to common law limitations in addition to those imposed by legislation. The question is, if we take seriously the criminality requirement, whether this is an expansion of public nuisance beyond its established boundaries, and, in effect, a resurrection of common law crime.

It is generally accepted that, at least where property rights are not at stake, the courts have no jurisdiction, even at the request of the Attorney General, to enjoin conduct that is neither illegal nor a private wrong.⁸⁴ The question is, whether by framing the action in nuisance, it is possible to avoid this restriction. The answer is not clear, but, once again, the origins of the problem are located in the early history of criminal nuisance.

So long as public nuisance was a common law crime, the question whether injunctive relief could be had for a non-criminal public nuisance

⁸¹ Prosser, *op. cit.*, footnote 62, p. 586, n.60.

⁸² Many states in the U.S. have enacted broad nuisance statutes under which prostitution may be enjoined. See Reynolds, *loc. cit.*, footnote 74; 26 Ninth Decennial Digest (1976-81), pp. 336-340.

⁸³ *Supra*, footnote 7, at pp. 570 (D.L.R.), 172 (C.C.C.).

⁸⁴ *R. v. Odeon Morton Theatres Ltd. and United Artists Corp.* (1974), 45 D.L.R. (3d) 224, [1974] 2 W.W.R. 1 (Man.C.A.).

did not arise. The issue did surface when the criminal law of this country was first codified in 1892. The original code contained a broad definition of common nuisance which included interference with the property or comfort of the public,⁸⁵ but then, as now, the criminal offence was restricted to nuisances which endangered the life, health or safety of the public, or which actually caused personal injury.⁸⁶ It was recognized that the statutory offence excluded those former common law nuisances which were not dangerous, yet the Crown's right to seek a civil remedy in respect of non-threatening nuisances was preserved by section 193 which read:⁸⁷

Any one convicted upon any indictment or information for any common nuisance other than those mentioned in the preceding section, shall not be deemed to have committed a criminal offence; but all such proceedings or judgments may be taken and had as heretofore to abate or remedy the mischief done by such nuisance to the public right.

The intent and effect of these sections was to abolish criminal penalties for common law nuisances which were not dangerous, yet explicitly to preserve the Crown's right to seek a civil remedy in respect of non-criminal nuisances.⁸⁸

By section 8 of the 1953-54 revision of the Criminal Code, common law offences were abolished.⁸⁹ In addition, while the definition of common nuisance still extended to interference with the property or comfort of the public, the new Code omitted any express preservation of the Crown's remedy for such nuisances. The debates in the House of Commons reveal considerable confusion over these changes.⁹⁰ There was a heated exchange over whether the section might apply to the pollution of the North Saskatchewan River given that a conviction required proof of danger to life, health or safety. Some members were unable to understand why the definition of common nuisance was drawn more widely than the offence, and why no criminal remedies were provided for nuisances which interfered with the property or comfort of the public. Prior to the amendments, these members might have been referred to the provision which preserved a civil remedy in respect of such nuisances. Perhaps it was assumed that the Attorney General's jurisdiction to seek this remedy remained intact notwithstanding the amendments. However, the matter was not directly addressed. In short, if the Attorney General's authority to seek an injunction is based upon criminal law enforcement, it becomes a

⁸⁵ The Criminal Code (1892), 55-56 Vict., c.29, s.191.

⁸⁶ *Ibid.*, s.192.

⁸⁷ *Ibid.*, s. 193.

⁸⁸ Read, *loc. cit.*, footnote 64, at pp. 170-172.

⁸⁹ S.C. 1953-54, c.51, s.8.

⁹⁰ Debates of the House of Commons, 1953-54, vol. IV, pp. 3627 *et seq.* and 3651 *et seq.*

difficult question whether there remained after 1954 any jurisdiction to enjoin activities which do not at least threaten a violation of the criminal law.

While reference can be found in the Canadian jurisprudence to the effect that public nuisance is a crime,⁹¹ the issue whether criminal conduct is a necessary condition of civil liability has not been explicitly addressed. Authors and courts continue to pay lip service to the connection between public nuisance and crime, but the analysis of civil liability for public nuisance tends to ignore it entirely. It is simply not clear whether the civil injunction for public nuisance is an ancillary criminal remedy only, or whether public nuisance has become an independent common law wrong.

In the United States it would appear that the concept of "criminal conduct" for the purpose of nuisance liability has been so broadly defined that it has ceased to operate as a significant limitation⁹² and a review of English and Canadian case law leads to the same conclusion. No case has been found in which an action for public nuisance has failed because the defendant's conduct has not been proven criminal. In at least one case there is dicta to the effect that the Attorney General may seek to enjoin a public nuisance, "not because it is declared to be illegal, but because of its character. The act itself may be perfectly legal, and it may be an unfortunate combination of circumstances which constitutes it a nuisance".⁹³ In the absence of a clear criminality requirement it would appear that the jurisdiction of the courts to regulate public conduct is not limited by existing legislation and that there remains a residual common law jurisdiction to define and protect public rights. It therefore becomes necessary to search elsewhere for the boundaries of public nuisance.

B. The Nature of the Interests Protected: Public Rights

While some element of criminal conduct is often said to be a necessary condition of public nuisance liability, it is clear that it is not a sufficient condition. The conduct of the defendant must be shown to interfere with the legally recognized interests of others. Civil remedies for public nuisance are not based upon the criminal character of the defendant's conduct, but rather upon the actual or threatened effect of that

⁹¹ In the case of *Stein et al. v. Gonzales et al.*, *supra*, footnote 10, discussed further below, McLachlin J. states, at pp. 265 (D.L.R.), 112 (B.C.L.R.): "Public nuisance is a criminal offence".

⁹² Reynolds, *loc. cit.*, footnote 79.

⁹³ *Attorney-General for Ontario v. Canadian Wholesale Grocers Association* (1922), 52 O.L.R. 536, at p. 547 (Ont. H.C.), *aff'd*, [1923] 2 D.L.R. 617, (1923), 53 O.L.R. 627, (Ont. App. Div.).

conduct on the "rights of the public". As Turner L.J. stated in *Attorney-General v. Sheffield Gas Consumers Co.*:⁹⁴

It is not on the ground of any criminal offence committed, or for the purpose of giving a better remedy in the case of a criminal offence, that this court is or can be called on to interfere. It is on the ground of injury to property that the jurisdiction of this court must rest; and taking it to rest upon that ground, the only distinction which seems to me to exist between cases of public and private nuisance is this—that in cases of private nuisance the injury is to individual property, and in cases of public nuisance the injury is to the property of mankind.

The language of this case suggests that the interests protected by private and public nuisance alike are proprietary, and there are numerous instances in which the courts have affirmed that the equitable jurisdiction to protect public rights is limited to cases where the defendant's conduct interferes with property.⁹⁵ While this is no longer strictly true, particularly where there is a proven violation of a statute,⁹⁶ it is understandable. The use of the vocabulary of property in public nuisance cases is the result of historical factors and jurisdictional concerns. The Court of Chancery was, historically, a civil court and property rights remain at the heart of modern equity. The availability of injunctive relief for public nuisance is a narrow exception that has been carved out of the general principle that equity has no criminal jurisdiction. Concerned to justify the equitable incursion into crime, and at the same time to prevent public nuisance from blossoming into a general civil remedy against criminal conduct, the courts have sought to limit their jurisdiction by reference to familiar principles, the most natural being the protection of property. Finally, the use of the word "nuisance" to describe two very different forms of action could only be an invitation to import into public nuisance concepts that were developed in private nuisance litigation.

The effort to base public nuisance liability upon established principles of property is not entirely satisfactory. Private property concepts cannot simply be imported into public interest litigation, and the hybrid nature of public nuisance makes impossible any attempt to apply without

⁹⁴ (1853), 3 De. G.M.&G. 304, at p. 320, 43 E.R. 119, at p. 125 (Ch.).

⁹⁵ *Attorney-General v. Wellington Colliery Co.* (1903), 10 B.C.R. 397 (B.C.S.C.); *Robinson v. Adams*, [1925] 1 D.L.R. 359, (1924), 56 O.L.R. 217 (Ont. App. Div.); *Mid West Television Ltd. v. S.E.D. Systems Inc.*, [1981] 3 W.W.R. 560, (1981), 9 Sask R. 199 (Sask. Q.B.); *Attorney-General for Ontario v. Canada Wholesale Grocers Ass'n*, *supra*, footnote 93.

⁹⁶ See, for example, *Attorney-General v. Harris*, [1961] 1 Q.B. 74 (C.A.); *Attorney-General for Ontario v. Grabarchuk* (1976), 67 D.L.R. (3d) 31, 11 O.R. (2d) 607 (Ont. H.C.); *Attorney-General for Alberta v. Plantation Indoor Plants Ltd.* (1982), 133 D.L.R. (3d) 741, [1982] 2 W.W.R. 167, (1982), 65 C.C.C. (2d) 544 (Alta. C.A.). For a complete discussion of the modern scope of injunctive relief for breach of a statute, see Sharpe, *op. cit.*, footnote 64.

modification the principles of private nuisance. As one author has commented:⁹⁷

Public and private nuisances are not in reality two species of the same genus at all. There is no generic conception which includes the crime of keeping a common gaming-house and the tort of allowing one's trees to overhang the land of a neighbour.

Now that the criminality requirement appears not to operate as a significant limitation on nuisance liability, it is crucial that the courts develop a theory of public rights that places principled limitations on their power to restrict the liberty of individuals through the use of civil injunctions. Unfortunately, few courts or authors have attempted to construct a general theory of public rights, offering instead a catalogue of social interests such as health, safety, comfort and morality which may qualify for protection. As a matter of description, these suggestions are too broad. They miss the force that the property analogy has exerted on public nuisance and fail to take seriously the concern to place limits on the availability of injunctive relief. The modern law discloses very few cases where relief has been granted in respect of an interference only with comfort or morality.

Public nuisance remains a remedy in search of a right. While concepts of private property cannot easily be applied, I would suggest that at the core of public nuisance lies a concern to protect the use and enjoyment of public resources and facilities. The vast majority of public nuisance actions, which are not simply based on the widespread interference with private property, concern the pollution of public lands and water,⁹⁸ the obstruction of roads and waterways,⁹⁹ interference with public facilities and the creation of dangerous conditions on public property.¹⁰⁰ Once the court moves out of this core area, it becomes more difficult to base intervention on established nuisance concepts and we move into the far more problematic area of injunctions to enforce the criminal law, or even more controversially, to regulate public conduct that neither violates the criminal law nor interferes with public resources.

⁹⁷ Heuston, *op. cit.*, footnote 80, p. 47.

⁹⁸ *McRae v. British Norwegian Whaling Co. Ltd.* (1929), 12 Nfld. L.R. 274 (Nfld. S.C.); *Fillion v. New Brunswick International Paper Co.*, [1934] 3 D.L.R. 22, (1934), 8 M.P.R. 89 (N.B.C.A.); *Hickey v. Electric Reduction Co. of Canada* (1970), 21 D.L.R. (3d) 368, (1970), 2 N. & P.E.I.R. 246 (Nfld. S.C.); *Cormier et al. v. Blanchard* (1980), 112 D.L.R. (3d) 667 (N.B.C.A.).

⁹⁹ *Newell v. Smith* (1971), 20 D.L.R. (3d) 598 (N.S.S.C.); *Tate and Lyle Industries Ltd. v. Greater London Council*, [1983] 2 A.C. 509, [1983] 1 All E.R. 1159, [1983] 2 W.L.R. 649 (H.L.).

¹⁰⁰ *Mint v. Good*, [1951] 1 K.B. 517, [1950] 2 All E.R. 1159 (C.A.); *Carroll v. Kopic*, [1955] 1 D.L.R. 53, [1954] O.R. 768 (Ont. H.C.).

C. The Scope of the Interference

In order to constitute a "public" nuisance, the activities of the defendant must interfere with the rights of more than just one or two individuals. There are, however, no settled principles defining how widespread the interference must be.

In an early English case, an action for public nuisance failed on the basis that the noise made by the defendant affected only three individuals.¹⁰¹ In *R. v. Schula*,¹⁰² where the defendant was detected making obscene telephone calls to three individuals, a prosecution for public nuisance failed on the same ground. By way of contrast, where seven families were disturbed by the noise of the defendant's speedway, they were found to be a "sufficient number of persons to constitute a class of the public" and an action for common nuisance was successful.¹⁰³

In *Attorney General v. P.Y.A. Quarries*,¹⁰⁴ Romer L.J. defined a public nuisance as one:

which materially affects the reasonable comfort and convenience of life of a class of Her Majesty's subjects. The sphere of the nuisance may be described as the "neighbourhood"; but the question whether the local community within that sphere comprises a sufficient number of persons to constitute a number of persons to constitute a class of the public is a question of fact in each case.

In the same case, Lord Denning said:¹⁰⁵

The classic statement of the difference is that a public nuisance affects Her Majesty's subjects generally, whereas a private nuisance only affects particular individuals. But this does not help much . . . So here I decline to answer the question how many people are necessary to make up Her Majesty's subjects generally. I prefer to look upon the reason of the thing and to say that a public nuisance is a nuisance which is so widespread in its range or so indiscriminate in its effect that it would not be reasonable to expect one person to take proceedings on his own responsibility to put a stop to it, but that it should be taken on the responsibility of the community at large.

D. Who May Sue: The Question of Standing and the Stein Case

Usually it is the Attorney General, in his capacity as guardian of the public interest, who alone may bring an action for public nuisance. He may proceed either *ex officio* or by way of a relator action and his

¹⁰¹ *R. v. Lloyd* (1802), 4 Esp. 200, 170 E.R. 691 (Nisi Prius).

¹⁰² (1956), 18 W.W.R. 453, 115 C.C.C. 382, 23 C.R. 403 (Alta. C.A.); see also, *R. v. Madden*, [1975] 3 All E.R. 155, [1975] 1 W.L.R. 1379 (C.A.).

¹⁰³ *Attorney-General of British Columbia ex rel. Eaton v. Haney Speedways Ltd.* (1963), 39 D.L.R. (2d) 48, at p. 54 (B.C.S.C.).

¹⁰⁴ *Attorney-General ex rel. Glamorgan County Council et al. v. P.Y.A. Quarries Ltd.*, [1957] 2 Q.B. 169, at p. 184, [1957] 1 All E.R. 894, at p. 902, [1957] 2 W.L.R. 770, at p. 780 (C.A.).

¹⁰⁵ *Ibid.*, at pp. 190-191 (Q.B.), 908 (All E.R.), 785 (W.L.R.).

discretion to take action or to grant his fiat is largely immune from review.¹⁰⁶ These restrictive principles, going back to the reluctance of civil courts to entertain private actions for crime, are now said to be designed to avoid a multiplicity of private actions, to exclude intermediaries, and to leave the definition and protection of public rights to the discretion of the appropriate officer of government.

Without the fiat of the Attorney General, a private litigant has standing to enjoin a public nuisance only in limited circumstances.¹⁰⁷ First, the nuisance may interfere not only with public rights, but also with the plaintiff's use and enjoyment of his or her own property, in which case the court may characterize it as a private nuisance and entertain a private action (although there is some dispute whether a nuisance emanating from public property may be a private nuisance).¹⁰⁸ Where the plaintiff cannot prove interference with a private proprietary right, the law is more restrictive. The applicant must satisfy the court that he or she has suffered some special or particular damage over and above that suffered by the community in general. This threshold is, perhaps, particularly high in Canada where some courts have held that the injury suffered by the plaintiff must be different not only in degree, but also in kind from that suffered by other affected individuals and that pure economic loss may not be sufficient to establish special injury.¹⁰⁹ These limitations have been criticized as overly narrow in the context of environmental and public interest litigation.¹¹⁰ However, now that street prostitution has become a candidate for public nuisance, in at least one judge's eyes, the wisdom of these restrictions has been revealed.

Shortly after the order was made in the *Couillard* case, there was a dramatic increase in the amount of prostitution in areas neighbouring Vancouver's West End. The Attorney General took no further action to

¹⁰⁶ *Gouriet v. Union of Post Office Workers et al.*, [1978] A.C. 435, [1977] 3 All E.R. 70, [1977] 3 W.L.R. 300 (H.L.); *Grant v. St. Lawrence Seaway Authority* (1960), 23 D.L.R. (2d) 252, [1960] O.R. 298 (Ont. C.A.); on the question of standing generally, see Law Reform Commission of British Columbia, *Civil Litigation in the Public Interest* (1980).

¹⁰⁷ The issue of standing to sue for public nuisance has been very fully analysed elsewhere; see, for example, W. Estey, *Public Nuisance and Standing to Sue* (1972), 10 Osgoode Hall L.J. 563; McLaren, both works cited, *supra*, footnote 77.

¹⁰⁸ See, for example, *Southport Corp'n. v. Esso Petroleum Co. Ltd.*, [1954] 2 Q.B. 182, [1954] 2 All E.R. 561 (C.A.); [1956] A.C. 218, [1955] 3 All E.R. 864 (H.L.); *Halsey v. Esso Petroleum Co. Ltd.*, [1961] 1 W.L.R. 683, [1961] 2 All E.R. 145 (Q.B.D.); *Cormier et al. v. Blanchard*, *supra*, footnote 92. For a discussion of the issue whether a private nuisance must emanate from private property, see R.A. Buckley, *The Law of Nuisance* (1981), pp. 4-5.

¹⁰⁹ *Fillion v. New Brunswick International Paper Co.*, *supra*, footnote 92; *Hickey v. Electric Reduction Co. of Canada*, *supra*, footnote 98.

¹¹⁰ McLaren, both works cited, *supra*, footnote 77; Law Reform Commission of British Columbia, *op. cit.*, footnote 106.

obtain an injunction in this new area and in *Stein and Tessler v. Gonzales et al.*¹¹¹ two hotel owners applied to the British Columbia Supreme Court for injunctive relief, arguing that their guests were experiencing harassment and discomfort and that the reputation and economic viability of the hotel were in jeopardy. McLachlin J. held that there was no interference with the plaintiffs' own property sufficient to establish a private nuisance and that the damage suffered by the plaintiffs was no different than that suffered by other commercial enterprises in the area. While the plaintiffs might have been able to maintain an action if they could have shown that access to their hotel was impeded¹¹² there was no evidence of this. McLachlin J. apparently accepted that the damage to the plaintiff must be different in kind from that suffered by others, and, following the case of *Hickey v. Electric Reduction Co. of Canada Ltd.*,¹¹³ she concluded that the right to carry on business is a public right and that the "rights which the plaintiffs claim have been infringed are rights which they possess as members of the public, and they have suffered the same damage which any other citizen who exercised those rights would suffer".¹¹⁴

While the large issue of standing is beyond the scope of this paper, several comments should be entered. First, it is unfortunate that McLachlin J. did not address in greater detail why street solicitation around the plaintiffs' hotel might not amount to a private nuisance. There is some authority, discussed in the next section of this article,¹¹⁵ for the proposition that even in the absence of physical interference, prostitution-related activity which diminishes the enjoyment of property might amount to a private nuisance. *Stein* might have provided an opportunity to clarify this point.

McLachlin J. might also have considered the widespread critique of the "special damage" requirement for the purpose of standing. It is difficult to justify a rule, the apparent effect of which is to limit private actions as the nuisance becomes more serious and widespread,¹¹⁶ particularly in a case where the plaintiffs' troubles are due, in part, to a previous injunction granted at the request of the Attorney General. There is some authority in Canada for a more liberal approach to the question of standing,¹¹⁷

¹¹¹ *Supra*, footnote 10.

¹¹² *Hagel et al. v. Municipal District of Yellowknife et al.* (1962), 35 D.L.R. (2d) 110 (N.W.T.C.A.); *Turtle v. Toronto* (1924), 56 O.L.R. 252 (Ont. App. Div.); *Newell v. Smith, supra*, footnote 99.

¹¹³ *Supra*, footnote 98.

¹¹⁴ *Supra*, footnote 10, at pp. 268(D.L.R.), 115 (B.C.L.R.).

¹¹⁵ See text, *infra*, at footnotes 121 to 130.

¹¹⁶ See McLaren, *The Common Law Nuisance Actions, loc. cit.*, footnote 77, at p. 515.

¹¹⁷ *Rainy River Navigation Co. v. Ontario and Minnesota Power Co.* (1914), 17 D.L.R. 850, 26 O.W.R. 752, 6 O.W.N. 533 (Ont. App. Div.); *Rainy River Navigation*

and while the right to carry on business may be a public right, economic interests are increasingly recognized as worthy of protection by the law of tort.¹¹⁸ The Law Reform Commission of British Columbia has gone so far as to recommend that any member of the public should be able to maintain a private right of action in respect of a public nuisance, suggesting that the courts are competent to control frivolous suits and prevent hardship to the defendant through the exercise of their equitable discretion.¹¹⁹ McLachlin J. may, quite correctly, have determined that an injunction would be inappropriate in *Stein*; however, while the decision may be supported by authority, it is unfortunate when rules of standing appear to be used to avoid or disguise a decision on the merits.

E. The Degree of Interference and the Lack of Authoritative Guidance

The degree of interference required to support a nuisance action is a question of fact and there are few guiding principles. The courts have clothed themselves with a wide discretion, apparently unfettered by formal rules and criteria, to determine what is a nuisance on a case by case basis. Thus, in *Sedleigh-Denfield v. O'Callaghan*¹²⁰ Lord Wright said:

It is impossible to give any precise or universal formula, but it may broadly be said that a useful test is perhaps what is reasonable according to the ordinary usages of mankind living in society, or, more correctly, in a particular society. The forms which nuisance may take are protean.

It is thought by most that the boundaries of nuisance cannot be determined by examining forms of conduct alone, and what is "reasonable" will depend upon a host of factors such as the duration of the nuisance, the character of the neighbourhood and standards of the relevant community and, more controversially, the utility of the defendant's conduct. Given the importance of the interests sought to be balanced, particularly where, as in the case of prostitution, the decision will have such an immediate impact upon individual liberty, it is unfortunate that the courts have not articulated more clearly the principles upon which they proceed. The question whether a form of interference is unreasonable remains largely a matter of individual judgment.

Perhaps the only conclusion that can be drawn from the above analysis is that the established principles are vague at best and that their application to the problem of street prostitution is more a matter of individual judgment than the application of legal doctrine. The definition of

Co. v. Watrous Island Boom Co. (1914), 26 O.W.R. 456, 6 O.W.N. 537 (Ont. App. Div.). See the discussion of these cases in McLaren, *ibid.*, at p. 514.

¹¹⁸ *Junior Books Ltd. v. Veitchi Ltd.*, [1983] 1 A.C. 520, [1982] 3 All E.R. 201, [1982] 3 W.L.R. 477 (H.L.); *City of Kamloops v. Nielsen et al.*, [1984] 2 S.C.R. 2, (1984), 10 D.L.R. (4th) 641, 29 C.C.L.T. 97.

¹¹⁹ *Op. cit.*, footnote 106.

¹²⁰ [1940] A.C. 880, at p. 903, [1940] 3 All E.R. 349, at p. 364 (H.L.).

public rights, and the issue of the required scope and degree of the interference raise difficult questions of fact and value which are not easily susceptible of traditional analysis. This alone is good reason for exercising caution before too readily issuing an injunction which has such an immediate and profound impact on the liberty of individuals.

The only direct authority mentioned in *Couillard* was the case of *Thompson-Schwab v. Costaki*,¹²¹ where the plaintiff and defendant lived in adjoining houses, the defendant using her residence for the purpose of prostitution. The plaintiff argued that the activities of the defendant depreciated the value of his property and interfered with his enjoyment of his home. The English Court of Appeal granted an interlocutory injunction, rejecting, at least at the preliminary stage, the defendant's argument that as there was no physical interference with the plaintiff's property there could be no nuisance. Lord Evershed M.R. stated:¹²²

It is true that so far as the evidence in this case goes there is nothing about the activities of the two defendants which is unlawful in the sense of being illegal or criminal; but it does not follow that all their activities should therefore be regarded as free from the risk or possibility that they cause a nuisance, in the proper sense of that term, to a neighbour merely because they do not impinge on the sense—for example, the nose or the ear—as would the emanation of smells or fumes or noises. The test which I adopt for the purpose of this appeal is . . . whether what is being done interferes with the plaintiff in the comfortable and convenient enjoyment of his land, regard being had . . . to the usages in this matter of civilised society, and regard also being had to the character, as proved, of the neighbourhood.

Romer L.J. indicated that a relevant consideration might be the impact of the defendant's activities on the minds of the plaintiff's young family and on the feelings of the plaintiff's visitors. The court refused to go so far as to say that any use of a house for the purpose of prostitution was a nuisance. The order granted, therefore, enjoined the activities of the defendants only insofar as they caused a nuisance, it being left to the later trial to determine the precise level of prohibited activity.

Thompson-Schwab is a case of private nuisance and cannot be taken to establish a public right to be free from prostitution in the absence of property interference.¹²³ The decision is also difficult to reconcile with McLachlin J.'s holding in *Stein v. Gonzales*¹²⁴ that prostitution-related

¹²¹ [1956] 1 All E.R. 652, [1956] 1 W.L.R. 335 (C.A.); followed in *Laws v. Florinplace Ltd.*, [1981] 1 All E.R. 659 (Ch.D.).

¹²² *Ibid.*, at pp. 654 (All E.R.), 338 (W.L.R.).

¹²³ There are more numerous examples in American law of the use of public nuisance to enjoin prostitution. However, none of these cases consider the problem of street solicitation, but rather enjoin the operation of brothels, and are often based on criminal nuisance statutes. See, for example, *State v. Navy*, 123 W. Va. 722, 17 S.E. (2d) 626 (S.C. App. W. Va., 1941); *People ex rel. Dyer v. Clark*, 268 Ill. 156, 108 N.E. 994 (Ill. S.C., 1915); *State ex rel. Wilcox v. Ryder*, 126 Minn. 95, 147 N.W. 953 (Min. S.C., 1914); *City of Chicago v. Festival Theatre Corp.*, 438 N.E. 2d 159 (Ill. S.C., 1982).

¹²⁴ *Supra*, footnote 10.

activities around the plaintiffs' hotel did not amount to a private nuisance; and it is difficult to determine what was the nature of the interference with the plaintiff's property in *Thompson-Schwab* that prompted the Court of Appeal to grant the injunction. It is generally thought that a mere sentiment of annoyance will not be sufficient to establish a private nuisance. For example, in *Shuttleworth v. Vancouver General Hospital*¹²⁵ the British Columbia Supreme Court refused to enjoin the operation of an isolation hospital which the plaintiff feared might spread infection and depreciate the value of his property. The court held that there was no basis in fact for the plaintiff's apprehension of infection and that the depreciation of property values alone was insufficient to establish a nuisance in the absence of some proof of actual danger or interference. To the plaintiff's argument that daily observation of the suffering of the inmates of the hospital would interfere with the comfort of his household, Murphy J. responded that the law "is clear that proof of the existence of objection based on sentiment will not give the plaintiff a cause of action".¹²⁶

In the earlier American case of *Crawford v. Tyrrell*¹²⁷ the New York Court of Appeals granted to the plaintiff an injunction to restrain the operation of a neighbouring brothel. The evidence disclosed that the occupants were boisterous, noisy and fond of indecently exposing themselves at the windows, forms of interference which have long been recognized as private nuisance at common law.¹²⁸ In the course of his judgment, however, Gray J. remarked:¹²⁹

The mere fact of a business being carried on, which may be shown to be immoral and, therefore, prejudicial to the character of the neighbourhood, furnishes, of itself, no ground for equitable interference.

Further support for the view that the mere presence of prostitution does not amount to a nuisance is provided by the judgment of the Supreme Court of Canada in *Westendorp v. The Queen*.¹³⁰ The Calgary by-law under consideration in that case prohibited the presence of persons on the street for the purpose of prostitution, as well as approaching persons on

¹²⁵ [1927] 2 D.L.R. 573, [1927] 1 W.W.R. 476, (1927), 38 B.C.R. 300 (B.C.S.C.).

¹²⁶ *Ibid.*, at pp. 575 (D.L.R.), 478 (W.W.R.), 303 (B.C.R.). See also, *Attorney-General v. Rathmines Hospital Board*, [1904] 1 I.R. 161 (Ir. C.A.). American law on the other hand, may be more generous to property owners in this regard: see, Prosser, Keeton, *op. cit.*, footnote 62, p. 629; *Everett v. Paschall*, 61 Wash. 47, 111 P. 879 (Wash. S.C., 1910).

¹²⁷ 128 N.Y. 341, 28 N.E. 514 (N.Y.C.A., 1891).

¹²⁸ *Christie v. Davey*, [1893] 1 Ch. 316 (Ch. D.); *Halsey v. Esso Petroleum Co. Ltd.*, [1961] 2 All E.R. 145, [1961] 1 W.L.R. 683 (Q.B.D.); *Johnson v. Clinton*, [1943] 4 D.L.R. 572, [1943] O.W.N. 480 (Ont. H.C.). See also Buckley, *op. cit.*, footnote 108, pp. 24-27.

¹²⁹ *Supra*, footnote 127, at pp. 343 (N.Y.), 514 (N.E.).

¹³⁰ *Supra*, footnote 41.

the street for the purpose of prostitution. In the absence of any reference in the by-law to obstruction or interference with property, Laskin C.J.C. characterized as "baffling" the suggestion that it was intended only to suppress a public nuisance.

The presence of unsavoury persons or undesirable business activities in a neighbourhood may be an annoyance to local residents. But in the absence of some real interference or proven illegal activity, it is questionable whether courts should apply the nuisance injunction as a form of aesthetic zoning. There is, as yet, no public right to the preservation of property values and municipal councils are better equipped than courts to regulate the character of neighbourhoods. There can be no justification for excluding persons from the public areas of a neighbourhood merely because of their status, dress or character.

Presumably, the objections of residents of neighbourhoods in which prostitution flourishes are not confined to the mere presence of prostitutes in their neighbourhood.¹³¹ High density public prostitution is often said to be attended by noise, harassment and trespass to private property. If so, and notwithstanding the lack of modern authority, there would appear to be no reason why prostitution-related activities which interfere with public or private property might not, if sufficiently aggravated, amount to a nuisance. An examination of recent case law confirms that activities which attract crowds, cause excessive noise, and interfere with passage over public property continue to be regarded as nuisances.

In *Attorney General of British Columbia v. Haney Speedways Ltd.*¹³² the British Columbia Supreme Court enjoined the operation of a speedway on the basis that large crowds and excessive noise interfered unreasonably with the enjoyment of property of local residents. The evidence in that case showed that the speedway operated on sixteen Sundays per year. The court held that while irritation from noise is "highly subjective" it did, in this case, amount to an "inconvenience materially interfering with the ordinary physical comfort of human existence, according to plain and sober and simple notions obtaining among the people of this province".¹³³

In *Attorney General for Ontario v. Orange Productions Ltd.*¹³⁴ the Ontario High Court granted an interim injunction to restrain an outdoor

¹³¹ The affidavit evidence filed in *Couillard* contained complaints of abuse and harassment of local residents by prostitutes and their customers, foul language, noise, traffic congestion, lost sleep, obscene behaviour, fighting, urination, defecation, the use of underground garages for sex, depressed values and lost tenants. (Vancouver Registry, C84 2812).

¹³² *Supra*, footnote 103.

¹³³ *Ibid.*, at p. 54.

¹³⁴ (1971), 21 D.L.R. (3d) 257, [1971] 3 O.R. 585 (Ont. H.C.).

rock festival. The evidence showed that previous festivals in the defendant's park had been attended by approximately 25,000 persons, that sanitation facilities had been inadequate, that there had been some drug and alcohol related offences, nude swimming and public sex. Neighbours complained of the noise that continued on occasion past midnight, and of trespassers and foul language. There was also evidence of dust, smoke from fires and congested traffic. Wells C.J.H.C. concluded that the festival "was a painful and troublesome experience for all those living in the neighbourhood and was, in fact, a social disaster to those who normally live there".¹³⁵

The harassment of persons¹³⁶ and obstruction of public thoroughfares continue to be considered nuisances at common law. In *Prince George Pulp & Paper Ltd. v. Newell*¹³⁷ the plaintiff succeeded in obtaining an injunction to restrain a non-union picketer from standing on the roadway leading to the plaintiff's premises. The court accepted the evidence that the picketing caused a one and a half mile traffic jam and that the plaintiff's employees failed to report to work. In the court's opinion the activities of the defendant amounted to a nuisance. On the other hand, in *American Traders Co. Ltd. v. Gemini Bootery Ltd.*¹³⁸ the court refused to find that the mere fact that the activities of the defendant caused a crowd to collect amounted to a nuisance. In that case the defendant was a tenant in the plaintiff's shopping centre. The defendant operated an amusement arcade which the plaintiff claimed was excessively noisy and attracted loiterers who littered the premises and vandalized other shops. Hinds Co. Ct. J. held that the noise was not excessive and declined to accept that the problems experienced by other shop owners were all caused by patrons of the defendant's arcade. The judge accepted that the defendant's business did attract some loiterers and that such an activity could constitute a nuisance if "they seriously block or interfere with the passage of people" but "[t]he degree of blockage or interference must be substantial".¹³⁹ He concluded that the degree of interference proved was not sufficient to establish that the defendant had created a nuisance.

¹³⁵ *Ibid.*, at pp. 270 (D.L.R.), 598 (O.R.).

¹³⁶ In *Poole v. Ragen*, [1958] O.W.N. 77 (Ont. H.C.), the plaintiff obtained an injunction to restrain the Toronto Harbour Police from following his craft in the Toronto harbour; and in *Motherwell v. Motherwell* (1976), 73 D.L.R. (3d) 62, [1976] 6 W.W.R. 550, 1 A.R. 47 (Alta. C.A.), the Alberta Court of Appeal held that a series of annoying telephone calls amounted to a private nuisance.

¹³⁷ (1979), 13 B.C.L.R. 171 (B.C.S.C.).

¹³⁸ (1979), 19 B.C.L.R. 83 (B.C. Co.Ct.).

¹³⁹ *Ibid.*, at p. 87. See also *Dwyer v. Mansfield*, *supra*, footnote 58, where Atkinson J. said, at p. 249, "In these days, to suppose that you are suffering a legal wrong because merely half the front of your shop, some feet away, has got a queue of people opposite it, is an absurdity. If there is half the shop left, so that anybody can get in who wants to, to my mind it is nonsense to talk about nuisances"

The degree of interference necessary to establish a nuisance is, of course, a question of fact, and will depend on the nature and frequency of the impugned activity and the character of the neighbourhood. While the above cases indicate that the majority of successful nuisance actions involve very substantial forms of interference, little is to be gained from quarrelling with the interpretation placed on the facts of any particular dispute by the trial judge.

Returning to the problem of prostitution, it might be objected that the activities of a single prostitute could amount to no more than a mild and fleeting annoyance and that it is only the combined activities of a large number of prostitutes and customers that gives rise to the nuisance. Yet, while it may seem unfair to hold responsible only a small number of defendants for the activities of a mob, this would appear to be at least doctrinally justifiable. It is no defence that the defendant is not the sole source of the nuisance.¹⁴⁰ Nor is it a defence, at least in cases of private nuisance, that the activities of the defendant alone would not amount to a nuisance so long as the combined activities of the defendant and others do amount to a nuisance.¹⁴¹ It is also established that the defendant need not be the immediate cause of the nuisance, so long as it can be shown that the activity of the defendant attracts the crowd that is the effective cause of the annoyance. So, for example, in *Lyons, Sons & Co. v. Gulliver*¹⁴² the plaintiff complained that queues in front of the defendant's theatre were obstructing access to his shop. The defendant argued that it could not be made responsible for the activities of a crowd over which it had little control. Cozens-Hardy L.J. stated:¹⁴³

Then it is said by or on behalf of the defendants, "But we are not responsible for what goes on in the streets, it is the duty of the police to keep the streets clear, and if they do not do that, make a complaint to the police, do not attack us for collecting this crowd; we do not want them there; we only invite them in at the time when the doors are open . . ." I am quite content not to do any more than take what Lord Cairns said in the case of *Inchbald v. Barrington* [(1869), 4 Ch. App. 388] that, "There were authorities to shew that the collecting of crowds immediately before a residence, so as to block up the approaches to it, might be a nuisance, and that if the collection of those crowds was to be attributed to the act of a particular individual, that individual might be restrained from the commission of that act,"—that is, quite

¹⁴⁰ *Crossley & Sons Ltd. v. Lightowler*, [1867] L.R. 2 Ch. 478; *McKie et al. v. K.V.P. Co. Ltd.*, [1948] D.L.R. 201 (Ont. H.C.), aff'd [1949] S.C.R. 698, [1949] 4 D.L.R. 497.

¹⁴¹ *Lambton v. Mellish*, [1894] 3 Ch. 163 (Ch.D.); *Pride of Derby and Derbyshire Angling Ass'n Ltd. v. British Celanese Ltd.*, [1952] 1 All E.R. 1326 (Ch.D.), aff'd generally [1953] Ch. 149, [1953] 1 All E.R. 179 (C.A.).

¹⁴² [1914] 1 Ch. 631 (C.A.).

¹⁴³ *Ibid.*, at pp. 641-642. See also *Strand Theatre Co. v. Cahill & Co.* (1920), 61 S.C.R. 100, (1920), 54 D.L.R. 439, [1920] 3 W.W.R. 650; *Johnson v. Clinton*, [1943] 4 D.L.R. 572, [1943] O.W.N. 480 (Ont. H.C.); *Newell v. Izzard*, [1944] 3 D.L.R. 118, (1944), 17 M.P.R. 185 (N.B.S.C.).

irrespective of noise, and quite irrespective of anything improperly done by the defendant in the sense of a matter which was indecent or anything of that kind, but it is a case where a man was carrying on his own lawful business, but doing it in such a way as he must know will, in all probability, in the natural course of events, lead to the obstruction of the street.

These very general principles, when taken together, give the civil courts a broad and flexible jurisdiction to prohibit a wide range of activities. It is difficult, if not impossible, to specify with precision the outer boundaries of this jurisdiction; yet some such effort ought to be made. The legal regulation of street prostitution remains a controversial issue and the restriction of individual liberty demands principled justification. Because the limits of public nuisance are not clearly revealed in the substantive law, the concluding portions of this paper turn instead to an examination of the limitations of civil adjudication and suggests reasons why courts should exercise the greatest caution in responding to the invitation to control street prostitution by way of the nuisance injunction.

IV. *Prostitution and Civil Adjudication*

While the use of a civil nuisance remedy in this situation is relatively novel, it does have some advantages over the traditional legal responses to prostitution. The most powerful critiques of the criminalization of prostitution focus on the impossibility of eradicating commercialized sex, the controversial status of "moral legislation" and the problem of interfering with the autonomy and liberty of those who choose to live their lives in a way frowned upon by the majority. Equally problematic is the use of penal sanctions against persons who are, in many cases, the victims of economic circumstance, social exploitation and hypocritical sexual attitudes.¹⁴⁴ While the common law solution cannot, of course, attack such profound social ills, it may have a limited role to play.

In fixing upon the nuisance aspects of prostitution as the basis of legal intervention, problems concerning the regulation of morality and the prohibition of victimless crimes may be avoided. To the extent that the injunction is based upon the goal of protecting public and private property, it can be justified by an appeal to interests to which the law has traditionally committed itself. That the particular activity interfering with those interests is prostitution is of no real significance and it can be argued that the injunction does not prohibit immorality *per se*. In fact, many critics of criminal prostitution legislation concede that there is a role to be played by nuisance-based regulation.¹⁴⁵ However, while the

¹⁴⁴ For a discussion of the perceived causes of prostitution see, Special Committee, *op. cit.* footnote 2, pp. 351-354. The Special Committee concluded that sexual and economic inequalities were major conditions underlying prostitution and that any sincere reform effort must address these issues (pp. 517-518, 525-530).

¹⁴⁵ See, for example, Decker, *op. cit.*, footnote 1, pp. 348-350, 462-465.

stated basis of this type of regulation may be relatively uncontroversial, the form of the response raises some unsettling questions and is subject to several practical problems.

First, there is the problem of attempting to restrain by injunction the activities of a large number of unorganized persons. The injunction in *Couillard* is directed towards all persons who have notice of it and orders them not to engage in the enumerated prostitution-related nuisances. The difficulties raised by this form of order were considered in *Robinson v. Adams*,¹⁴⁶ where the plaintiff sought an interlocutory injunction to restrain the defendant trade union from exhibiting defamatory notices around the plaintiff's theatres. Middleton J.A. said:¹⁴⁷

The fundamental difficulty of suing a mob cannot be avoided. Any individual guilty of a tortious act can be made answerable in damages, and in many circumstances an injunction can be awarded against him, but where the thing complained of cannot be brought home to any individual, it is hard to see how the person injured can successfully invoke the aid of a Court of justice.

The most obvious problem is simply the practical difficulty of proving that a person who has not been served with the order has knowledge of the injunction. Where the injunction is directed to an organized group such as a trade union, this may not be an insurmountable obstacle, but in the case of prostitutes, the matter is quite different. While many persons may be aware of the injunction through newspapers or informal channels of communication, this knowledge is difficult to prove and, arguably, insufficient to support a later action for contempt. In the absence of the principle that "ignorance of the law is no excuse" it would seem that the impact of the injunction over time will be quite limited.

The Attorney General of British Columbia sought to meet this problem by enlisting the aid of the Vancouver police to post copies of the order in public areas and to personally serve known or suspected prostitutes. This tactic appears to have been successful, at least in the short run. Within six days after the judgment 134 persons had been served with the injunction and it was reported that the streets of the West End were free from prostitution.¹⁴⁸ Whether this state of affairs can last will depend upon whether new entrants will appear to fill the void created by the exodus, and upon the continued willingness of the police to devote resources to "enforcement" of the injunction.

Perhaps a more problematic point is whether, as a matter of principle, a court should direct an order to persons who have not been parties to the action. The remedies available in the civil process are normally directed towards named individuals who have had an opportunity to participate in

¹⁴⁶ *Supra*, footnote 95.

¹⁴⁷ *Ibid.*, at pp. 364 (D.L.R.), 224 (O.L.R.).

¹⁴⁸ Vancouver Sun, July 10, 1984.

the litigation. As Fuller has pointed out, it is the essence of the adversary system that the parties have control of the action and are given the opportunity to present proofs and reasoned arguments.¹⁴⁹ This form of participation imparts to adjudication its authority and legitimacy as a means of social ordering. "Whatever heightens the significance of this participation lifts adjudication towards its optimum expression. Whatever destroys the meaning of that participation destroys the integrity of adjudication itself".¹⁵⁰ Civil remedies will, of course, often affect third parties in significant ways, but it is extremely unusual for those remedies to be aimed explicitly at third parties. When a court undertakes to regulate the conduct of persons who have not participated in the decision, it threatens to overstep its own internal limitations as a rule-making body and, in Paul Weiler's words, fails to "give the parties a meaningful sense of participation in the working out of their own destinies in the solving of their disputes".¹⁵¹ These concerns go to the heart of the adversarial system of dispute resolution and to the appropriate division of labour between the courts and the legislature. Courts have recognized these limitations and have refused to "govern by injunction" the conduct of persons who have not appeared in court. In *Iveson v. Harris*,¹⁵² Lord Eldon said:

. . . the Court has adhered very closely to the principle, that you cannot have an injunction except against a party to the suit . . . The Court has no right to grant an injunction against a person, whom they have not brought, or attempted to bring, before the Court . . .

Modern courts have frequently doubted their jurisdiction to bind by injunction "any person having knowledge of the order" and have only reluctantly framed injunctions in such broad terms.¹⁵³ Nevertheless, injunctions have been granted in the form under consideration, and unnamed parties have been held in contempt for knowingly violating such an order.¹⁵⁴ Proceedings against an unnamed party are sometimes said to be justified not because they are bound by or have broken the injunction, "but because they have so conducted themselves as to obstruct the course of justice in assisting a breach . . .".¹⁵⁵

¹⁴⁹ L.L. Fuller, *The Forms and Limits of Adjudication* (1978-1979), 92 *Harvard L. Rev.* 353.

¹⁵⁰ *Ibid.*, at p. 364.

¹⁵¹ P. Weiler, *Two Models of Judicial Decision-Making* (1968), 46 *Can. Bar Rev.* 406, at p. 413.

¹⁵² (1802), 7 *Ves. Jun.* 251, at p. 257, 32 *E.R.* 102, at p. 104 (Ch.).

¹⁵³ *Marengo v. Daily Sketch and Sunday Graphic, Ltd.*, [1948] 1 *All E.R.* 406 (H.L.); *C.P.R. Co. v. Brady et al.* (1960), 26 *D.L.R.* (2d) 104 (B.C.S.C.). For a general discussion of this issue, see Sharpe, *op. cit.*, footnote 64, pp. 261-262.

¹⁵⁴ *Canada Metal Co. Ltd. v. C.B.C.* (1974), 48 *D.L.R.* (3d) 641, 4 *O.R.* (2d) 585 (Ont. H.C.), *aff'd* (1975), 65 *D.L.R.* (3d) 231, 11 *O.R.* (2d) 167 (Ont. C.A.).

¹⁵⁵ *Marengo v. Daily Sketch and Sunday Graphic, Ltd.*, *supra*, footnote 153, at p. 407.

In some circumstances it makes good sense to conclude that non-parties must be bound by the injunction. For example, where the defendant is a corporate body or a trade union, it acts through its employees, agents and members. The affected individuals are unlikely to have a personal stake in the issue beyond their shared interest which will, in most cases, be effectively represented by the named defendant. To hold that they are not bound by the injunction would allow the order to be easily circumvented. The same considerations apply when there is a danger that a named defendant might entice others to assist in a violation of the injunction. But where the order is aimed at a large body of unorganized individuals the matter is different. In such a case there is no guarantee that the interests of all are identical, nor that their individual interests will be effectively represented.

General prohibitions are usually enacted by legislative bodies whose legitimacy is based upon democratic values such as consent and voter participation. Where the courts take on the task of general regulation through such broadly worded orders there is a very real danger that they will be perceived as legislating without authority, or perhaps worse, acting in response to special interests only. While many may have applauded the actions of the British Columbia Supreme Court, I would suggest that the assumption of such sweeping jurisdiction undermines the ideals of participation and procedural fairness, and, in the long run, can only jeopardize the authority of the court.

The limitations of civil adjudication are further revealed when we recognize that nuisance law often amounts to a form of judicial zoning. In adjudicating a nuisance dispute the court will take into account the character of the neighbourhood and attempt to determine what types of land use are reasonable within a given community. The difficulty is, that unlike municipalities, courts have little information about, and even less control over, the impact that their decisions will have on other neighbourhoods. Nor, as we have seen, are there clear standards available to guide the decision. To borrow again from Fuller's work on adjudication, prostitution is a polycentric problem for which the courts are not well-equipped to deal.¹⁵⁶ Any decision to grant an injunction in favour of one community will have repercussions not only for those subject to the order, but for other communities as well. The narrow focus of the dispute, the circumscribed fact-finding ability of the courts, the limited range of interests allowed to be heard, and the inadequacy of available remedial devices all conspire to ensure that no true "solution" to the problem can be devised through adjudication. To use an evocative term coined in another context, the common law approach to the problem can amount to little more than "squeezing putty".¹⁵⁷

¹⁵⁶ Fuller, *loc. cit.*, footnote 149.

¹⁵⁷ M. Trebilcock, *An Economic Approach to the Doctrine of Unconscionability*, in B.J. Reiter, J. Swan (eds.), *Studies in Contract Law* (1980), 379, p. 404.

The problem arose in the *Couillard* case itself where the defendants entered affidavit evidence to prove that the prostitutes were moving out of the West End of their own accord. Interpreting this as an attempt to evade the authority of the court, McEachern C.J.S.C. said he was "not disposed to secure such portion of the West End at the expense of another portion or of an adjacent area"¹⁵⁸ and offered to extend the geographical ambit of the injunction. This offer was accepted by the Attorney General. Subsequently, the centre of prostitution moved further east and one week after the decision the Vancouver Sun ran the headline: "New Hooker Haven Stirs Fears".¹⁵⁹ The feelings of this new community were summed up by one property owner who said, "The judge was trying to help the residents of the West End. I guess he didn't realize that he was putting the hookers right in our back yard".¹⁶⁰ In *Stein v. Gonzales*¹⁶¹ the Supreme Court refused to grant a further injunction to protect this neighbourhood; and while one must sympathize with the plaintiffs there, it is difficult not to agree with McLachlin J.:¹⁶²

. . . it is doubtful whether this problem—essentially a public one—is best regulated by a series of private suits. The result of granting applications by private citizens to ban activities associated with prostitution in their particular neighbourhood might be to extend the protected area piecemeal without regard to larger policy considerations which may be apparent to those charged with the duty of maintaining the public peace and enforcing public rights.

The problems do not end here. Although the injunction appears to have been temporarily effective in the West End, it is doubtful that civil remedies can have any long-lasting impact upon the problems of prostitution. An examination of the terms of the injunction in *Couillard* reveals that it adds little to the existing law. Most cities have nuisance by-laws which regulate noise; provincial trespass acts exist to protect private property; and the language of the injunction does little more than replicate the provisions of the Criminal Code with respect to indecent acts,¹⁶³ causing a disturbance¹⁶⁴ and soliciting.¹⁶⁵ If these existing laws have proved inadequate to control the nuisance aspects of prostitution, it is difficult to see how an injunction can be any more effective. In the words of one Canadian judge, these statutory provisions are already "an injunction from the highest Court in the land . . . When you have got that, why do you come to this Court for a further injunction".¹⁶⁶

¹⁵⁸ *Couillard*, *supra*, footnote 7, at pp. 575 (D.L.R.), 177 (C.C.C.).

¹⁵⁹ Vancouver Sun, July 12, 1984.

¹⁶⁰ *Ibid.*

¹⁶¹ *Supra*, footnote 10.

¹⁶² *Ibid.*, at pp. 268 (D.L.R.), 115-116 (B.C.L.R.).

¹⁶³ R.S.C. c.C-34, s. 169.

¹⁶⁴ *Ibid.*, s. 171.

¹⁶⁵ *Ibid.*, s. 195.1.

¹⁶⁶ *Attorney-General v. Wellington Colliery Co.*, *supra*, footnote 95, at p. 399.

The injunction does not prohibit absolutely any form of conduct and the acts enumerated in the order are enjoined only in so far as they cause a nuisance. I have argued above that street prostitution *per se* does not amount to a nuisance and, unless the threshold of interference required to prove a nuisance is set at an exceptionally low level, it should still be open to the "smooth operator"¹⁶⁷ to continue soliciting within the proscribed area so long as his or her activities are relatively unobtrusive.

It is, of course, possible, that the injunction in *Couillard* was intended to prohibit the acts enumerated in the order regardless of the nature and degree of annoyance caused. If so, this would seem to expand the order beyond its nuisance-based justification. In respect of those portions of the order which replicate the language of the Criminal Code, it would then become a simple injunction against crime. Where the language of the order differs from that contained in the Code, it would amount to a prohibition of activities which are neither criminal nor nuisances.

To the extent that the language of the injunction deviates from that found in the Code it seems to broaden some of the offences and, in particular, appears designed to avoid the narrow interpretations placed upon the provisions of the Code by previous decisions. For example, the second paragraph of the order enjoins persons from:¹⁶⁸

Publicly offering themselves or publicly appearing to offer themselves directly or indirectly for the purposes of male or female prostitution by words or without words, or by actions, gestures, loitering or otherwise.

This wording appears calculated to overcome the restrictive interpretation placed on section 195.1 by *Hutt*,¹⁶⁹ and it is difficult to see how the behaviour referred to in this paragraph could by itself interfere with the use of public resources so as to amount to a nuisance. Is the smooth operator intended to be caught by this language? If so, this is perhaps the most troubling aspect of the case. Injunctions against criminal activities which are not also nuisances are unusual. Injunctions against activities which are neither criminal nor nuisances are unjustifiable.

The historical reluctance of the courts to enjoin crimes has been described above. As Irving J. said in *Attorney-General v. Wellington Colliery*:¹⁷⁰

This Court does not grant an injunction for the purpose of enforcing moral obligations, nor for keeping people without the range of the criminal law. There usually must be some right—a right of property, or some right at any rate—infringed or likely to be infringed.

The very limited jurisdiction of the courts to issue injunctions to enforce

¹⁶⁷ Layton, *loc. cit.*, footnote 15, at p. 1.

¹⁶⁸ *Couillard*, *supra*, footnote 7, at pp. 575 (D.L.R.), 177 (C.C.C.).

¹⁶⁹ *Supra*, footnote 26.

¹⁷⁰ *Supra*, footnote 95, at pp. 403-404.

criminal law has been reaffirmed on numerous occasions, perhaps most powerfully in the judgment of Middleton J.A. in *Robinson v. Adams*:¹⁷¹

The equitable jurisdiction of a civil Court cannot properly be invoked to suppress crime. Unlawful acts which are an offence against the public, and so fall within the criminal law, may also be the foundation of an action based upon the civil wrong done to an individual, but where Parliament has, in the public interest, forbidden certain acts and made them an offence against the law of the land, then, unless a right to property is affected, the civil Courts should not attempt to interfere and forbid by their injunction that which has already been forbidden by Parliament itself. Much less should the Courts interfere when the thing complained of is not within the terms of the criminal law, although it may rightly be regarded as objectionable or even immoral, for then the civil Courts by injunction are attempting to enlarge and amend the criminal law. Government by injunction is a thing abhorrent to the law of England and of this Province.

These principles, and the values upon which they rest, have been echoed in both the case law and the scholarly commentary upon the subject.¹⁷² While modern courts have assumed a limited jurisdiction to enjoin criminal behaviour, they have done so cautiously, generally restricting their intervention to cases where the defendant is flouting a statute which contains inadequate penalties, or to instances where there is a serious danger to life or limb.¹⁷³ There are good reasons for this caution. First, the use of the civil process threatens to circumvent the due process protections built into the criminal law. The defendant may be deprived of a jury trial. The standard of proof is lower, particularly in interlocutory proceedings where the evidence is entered by way of affidavit and the plaintiff is required to show only a serious issue to be tried.¹⁷⁴ The right to counsel and the availability of legal aid may be more restrictive in civil proceedings, and the threat of the contempt sanction, in effect, increases the penalties specified for the offence by the legislature. There also exists the possibility that the same conduct may be twice penalized, resulting in a form of double jeopardy.¹⁷⁵

¹⁷¹ *Supra*, footnote 95, at pp. 364-365 (D.L.R.), 224 (O.L.R.).

¹⁷² The court "should not use injunctive relief in aid of, or as a substitute for, the criminal law particularly when, as many of the cases suggest, there is no right of property being infringed": *Mid West Television Ltd. v. S.E.D. Systems*, *supra*, footnote 95, at pp. 567 (W.W.R.), 207 (Sask. R.). See also *Barrett v. Harris* (1921), 69 D.L.R. 503, 51 O.L.R. 484 (Ont. S.C.); *Attorney-General for Ontario v. Canada Wholesale Grocers Ass'n*, *supra*, footnote 93; and the discussion in Sharpe, *op. cit.*, footnote 64, pp. 266-289.

¹⁷³ *Supra*, footnote 96.

¹⁷⁴ *American Cyanamid Co. v. Ethicon Ltd.*, [1975] A.C. 396, [1975] 1 All E.R. 504, [1975] 2 W.L.R. 316 (H.L.).

¹⁷⁵ See the extensive discussion of these concerns in *Gouriet v. Union of Post Office Workers*, *supra*, footnote 106; and *Attorney-General for Ontario v. Canada Wholesale Grocers Ass'n*, *supra*, footnote 93. In strict logic, the person who violates an injunction against crime is not subject to double jeopardy, since it is the violation of the court order, and not the statute, for which that person is found in contempt. However, this rather fine

Because the modern public nuisance action is now seldom related to any criminal offence, these problems do not normally arise. In the case of prostitution, however, the criminal overlap cannot be avoided; and these concerns do not simply disappear because the action is framed in public nuisance.

When we move to the possibility that the injunction is aimed at conduct that is neither a nuisance nor criminal, little more needs to be said than to repeat Middleton J.A.'s admonition that "[g]overnment by injunction is a thing abhorrent to the law of England and of this Province".¹⁷⁶ In the absence of an established basis of liability the court can have no jurisdiction. The definition of new public rights and wrongs is pre-eminently a matter which must be left to the legislature. Injunctions are rarely used to enforce the provisions of the Criminal Code. They are never used to amend it.

I do not mean to suggest that the injunction in *Couillard* was intended to extend beyond its nuisance-based justification, nor to prohibit conduct that did not substantially interfere with the use and enjoyment of public areas. However, it would appear that the police and general public both regarded it as a dramatic extension of police powers to combat prostitution. On the day the decision was handed down the Vancouver Sun announced that "Attorney General Brian Smith was given sweeping powers to rid downtown Vancouver of prostitutes", and that he had been "assured the full cooperation of Police Chief Bob Stewart in enforcing the court order".¹⁷⁷ Several days later the same paper ran the headline: "Police Spread Hooker Dragnet", and reported that "[p]rostitutes anywhere in the city, not just downtown Vancouver, are getting the boot from police in the wake of this week's court decision".¹⁷⁸ That the police thought that they had been given new powers by the injunction was confirmed by the officer in charge of the vice squad who is reported to have said, "We're looking for them all over the city", and, "If we make any observation of soliciting for the purpose of companionship, they'll be charged . . . It doesn't have to be for money".¹⁷⁹

These are disturbing perceptions. Prostitution is not necessarily a public nuisance and civil injunctions neither amend the criminal law nor add to police powers.

The concerns discussed here led the Supreme Court of Nova Scotia to deny an injunction against prostitution in downtown Halifax. In *Attor-*

distinction is not likely to be convincing to such a person who may also be convicted for the offence.

¹⁷⁶ *Supra*, footnote 95, at pp. 365 (D.L.R.), 224 (O.L.R.).

¹⁷⁷ Vancouver Sun, July 4, 1984.

¹⁷⁸ Vancouver Sun, July 7, 1984.

¹⁷⁹ *Ibid.*

ney *General for Nova Scotia v. Beaver et al.*¹⁸⁰ MacIntosh J. reasoned that since there is already existing criminal legislation with respect to street solicitation, it would be inappropriate to allow the Attorney General to regulate prostitution by civil procedure. Considering the due process concerns outlined above, MacIntosh J. asked, "why apply to this court where there are already remedies in place in the Criminal Code and provincial laws to most of your problems? A bit more diligence is indicated".¹⁸¹ The court, in fact, went so far as to suggest that the jurisdiction to grant civil injunctions was subject to constitutional limitations and, drawing upon the decision of the Supreme Court of Canada in *Westendorp v. The Queen*,¹⁸² MacIntosh J. held that:¹⁸³

It is of no significance whether a province or a municipality attempts to usurp criminal jurisdiction by way of legislation or injunction. The point is that they are not free to invade federal jurisdiction in these matters by any means.

The court's broad conclusion that "common law cannot be used to usurp the federal jurisdiction in the areas covered by the Criminal Code"¹⁸⁴ will, at first sight, be quite startling to lawyers familiar with the concurrent jurisdiction of the criminal and civil courts over many matters such as theft, assault and trespass. MacIntosh J.'s reliance upon *Westendorp* is also unfortunate. Laskin C.J.C. did not hold in that case that local nuisance-based legislation might not concurrently exist in a field occupied by criminal law. He held simply that the Calgary by-law went too far beyond the object of suppressing a nuisance to fall within a valid sphere of provincial or municipal jurisdiction.¹⁸⁵

Read more narrowly, however, the decision in *Attorney General for Nova Scotia v. Beaver* can be supported by familiar principles. While the jurisdiction of the civil courts to protect public rights is too well established to be subject to constitutional prohibition, the reluctance of the courts to enjoin crime is also well documented. The courts need not abandon this caution merely because the action is framed in public nuisance; and it should remain open to them to decline jurisdiction on the basis that the matter is more properly dealt with by the police and the criminal law process.

It was upon this basis that the Nova Scotia Court of Appeal upheld the decision in *Beaver*.¹⁸⁶ While holding that the provincial Attorney Gen-

¹⁸⁰ *Supra*, footnote 11.

¹⁸¹ *Ibid.*, at pp. 423-424.

¹⁸² *Supra*, footnote 41.

¹⁸³ *Supra*, footnote 11, at p. 423.

¹⁸⁴ *Ibid.*, at p. 425.

¹⁸⁵ Compare *Bedard v. Dawson*, [1923] S.C.R. 681, [1923] 4 D.L.R. 293, [1923] 3 W.W.R. 412, where the Supreme Court of Canada upheld a provincial law against bawdy-houses as a law relating to the use of property.

¹⁸⁶ *Attorney General of Nova Scotia v. Beaver*, *supra*, footnote 12.

eral did have constitutional authority to seek an injunction to enforce the criminal law, Hart J.A. strongly reaffirmed that the final decision whether an injunction will be issued in such circumstances lies with the court. He said:¹⁸⁷

. . . a judge when being asked by an attorney general to grant such an injunction must ask whether it is really necessary in the light of other procedures available to accomplish the same end. He should consider, as well, the dangers of eliminating criminal conduct without the usual safeguards of criminal procedure available to the accused. He should also consider whether the evil complained of should more properly be eliminated by a change in legislation. Only in very exceptional cases where by reason of lack of time or otherwise no other suitable remedy is available should such an injunction be granted to prevent the commission of a crime.

The Court of Appeal also affirmed that an injunction should not be granted if the application is for "an oblique motive". If the court is being asked to do what Parliament has not done—that is, to ban prostitution rather than abate the nuisance—this is an important factor in deciding whether to grant the injunction. If the conduct sought to be enjoined is not criminal it ought not to be enjoined unless clearly wrongful. As McLachlin J. said in *Stein v. Gonzales*, "the granting of an injunction to enjoin conduct which is within the purview of the *Criminal Code*, but not expressly prohibited by the Code is a serious step . . .".¹⁸⁸ It is a step which should be taken only when there is a violation of an established public right. Whether street solicitation is a public wrong independently of the criminal law remains controversial, and the courts should be cautious lest they be perceived to be taking the common law beyond its appropriate boundaries.

Conclusion

Public nuisance is rooted in crime and caution should be exercised before too freely extending common law nuisance doctrines to new situations. Civil remedies were, and continue to be available only in respect of a narrow class of public wrongs. Where the older law was designed to preserve the moral fabric of the community it can be of very little relevance in considering the role of the common law today. It is not open to the courts to resurrect common law crimes through the invocation of nuisance law. Where the liberty of a group of people is to be limited we ordinarily justify this by appeal to some already recognized civil right to which the law has traditionally committed itself; and where such a right is lacking the rule of law requires that the problem be left to legislative determination.

Prostitution is a matter upon which the community is deeply divided. Its causes are difficult to locate, its impact upon society is difficult to define, and its victims include the prostitute herself. It is unlikely that any

¹⁸⁷ *Ibid.*, at p. 293.

¹⁸⁸ *Supra*, footnote 10, at pp. 268 (D.L.R.), 115 B.C.L.R.).

legal response—particularly a repressive one—can provide a solution to a problem which is so deeply rooted in social, attitudinal, sexual and economic conditions. The recently released Report of the Special Committee on Pornography and Prostitution recognizes this fact and many of the Report's recommendations urge social rather than legal reforms.¹⁸⁹ The Committee did not deny that there is a role to be played by law, but rejected draconian responses which get in the way of more promising social strategies. The Report recognized the importance of eliminating the public nuisance associated with street solicitation and recommended the repeal of section 195.1 coupled with amendments to, and clarification of, the nuisance-related provisions of the Code.¹⁹⁰ This approach seems clearly preferable to the more problematic common law response. I have attempted to show that the very open nature of public nuisance law places the civil courts in a perilous position and threatens to impel them into areas ill-suited to civil adjudication. Notwithstanding, and perhaps because of, the current dissatisfaction with the existing legislation, the common law is capable only of a limited and politically contentious response. It is to be hoped that the ongoing public dialogue on the problem of prostitution will produce a result that in some measure alleviates these difficulties.

¹⁸⁹ Special Committee, *op. cit.* footnote 2, pp. 525-530.

¹⁹⁰ *Ibid.*, pp. 530-543. At the time of writing, Bill C-49, An Act to Amend the Criminal Code (33-34 Eliz II, 1984-85), had received first reading. That Bill would repeal the present s.195.1 and replace it with the following rather draconian provisions:

- (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 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.