
Peter C. Hennigan

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Peter C. Hennigan*

San Francisco, September 14, 1915

As the sun began to set over the Pacific, Bascom Johnson, on leave from the American Social Hygiene Association, left his Berkeley apartment at 2248 Blake Street to make the long trip across the San Francisco Bay. Sometimes he was joined by Thomas D. Eliot, but tonight he was alone. Eliot had told him of a place he should visit — 9 Beckett Street. Upon debarking from the ferry, Johnson made his way along Broadway Street in the direction of Chinatown. By now, the fog had rolled in and the temperatures had begun to drop. Like so many other men of his generation Johnson was headed towards the city’s infamous red-light district — the Barbary Coast, which bordered the Chinese Business


2. In its 1915 masthead, the ASHA identified Thomas D. Eliot as “Field Secretary” for the ASHA’s “Western States Division.” Eliot had his offices in the Phelan Building in San Francisco. See Bascom Johnson, The Injunction and Abatement Law, 2 (1915) (ASHA, Legal Reference Files, Box 3, Folder 1: Injunction and Abatement, 1913-31, State Laws, Social Welfare History Archives, University of Minnesota).

3. The Barbary Coast was a thirty-five block region bounded by Stockton, Kearny, Broadway, and Market streets. In the early 1870s, Col. Albert S. Evans provided this memorable description of the area: “Every city on earth has its special sink of vice, crime and degradation, its running ulcer or moral cancer. . . . Speak of the deeper depth, the lower hell, the maelstrom of vice and iniquity—from whence those who once fairly enter escape no more forever—and [San Franciscans] will point triumphantly to the Barbary Coast, strewn end to end with the wrecks of humanity, and challenge you to match it anywhere outside the lake of fire and brimstone.” ALBERT S. EVANS, A LA CALIFORNIA:
Walking along Broadway, he turned left onto Keamey. The sounds and smells of Chinatown filled the heavy night air. As he took a right onto Pacific Street, he was now in the heart of the Barbary Coast. Throngs of people walked up and down the streets enjoying the district’s combustible mixture of sex and other entertainments. Brothels, hot-sheet hotels and gambling dens were intertwined with semi-respectable dance halls, theaters, cabarets and restaurants. As Johnson turned down onto the single block of Beckett Street, passers-by must have assumed that he was either another restless young man looking for sexual pleasure or one of the many middle-class voyeurs who came to the Barbary Coast looking for cheap, visual thrills.

Near the corner of Beckett and Jackson Streets, Johnson stopped in front of the building. A few hours earlier Eliot had been in this same spot staring at a woman in a sleeveless dress, cut very low at the neck and reaching only to her knees. Eliot had told him how the young woman had called out to him, “Won’t you stay dearie? I’ll kiss the baby nice. Love you up nice.” She had motioned to him in “flagrant, indecent gestures,” the streetlights illuminating her painted eyes and cheeks. “What’s your price?” Eliot had asked. “One dollar.” “Are there others in the house?” She had responded indignantly, “How many do you want; ain’t I good enough?” He hadn’t answered her. He had just turned away and headed back to his apartment at 1417B Arch Street in Berkeley.

Now Johnson was staring at two women dressed in a similarly provocative manner. Both had painted cheeks and darkened eyes. Maybe one of them had been the woman who had propositioned Eliot. As he stood there looking at them, they beckoned him: “Come on in dearie. Take one of us. Will give you a fine time. Do it two ways for a dollar.” Like Eliot before him, Johnson spurned their invitations and began the long, cold trip back to Berkeley. The two women thought nothing of Johnson or Eliot. Lots of middle-class people came to the Barbary Coast. Some were customers, some simply came to gawk at the steamy underside of San Francisco.

4. Gunther Barth has argued that the conjunction of Chinatowns with red-light districts functioned as “safety valves of the control system.” Within these parts of town, Chinese immigrants were “liberated . . . briefly from the shackles of work which debt bondage placed on their shoulders . . . [T]he visit to a gambling hall, a brothel, or an opium den added precious hours of freedom” to the lives of indentured immigrants. “In Chinese California they saw themselves momentarily admitted to that life of leisure which in part had motivated them to leave their native village in search of a fortune overseas.” GUNTER BARTH, BITTER STRENGTH: A HISTORY OF THE CHINESE IN THE UNITED STATES 109-10, 126-29 (1964).

5. During the years 1908-10, there were approximately forty resorts, cabarets and saloons in a three block area of Pacific Street. Most of these establishments were driven out of business following enactment of the California Red Light Abatement Act of 1914. Jesse B. Cook Papers, Barbary Coast Resorts, Cabarets and Saloons—1908-1910, available at http://www.sfmuseum.org/hist9/bcoast.html (n.d.).
Sacramento, September 15, 1917

Edwin E. Grant, S. C. Barker and R. Estrada were standing on the 200 block of L Street, less than a quarter of a mile from the riverfront. As they entered the Art Dance Hall the air turned hot and smoky. When their eyes adjusted to the light, they could see thirty to forty women and a large crowd of men. Out of the crowd, two women approached the party. Their names were Ethel and Rose. They asked the men if they wanted liquor. They asked them if wanted sex. It would only cost a dollar and they could have sex right on the premises – in any one of the many curtained booths that lined the Dance Hall.

Later that evening May Dixon approached the men. The scene at the Dance Hall was winding down and she asked them if they wanted to come home with her. Her apartment at 417 ½ K Street was just a few blocks away and they could have sex there for a few dollars.

Bascom Johnson, Thomas Eliot, Edwin Grant, S.C. Barker, and R. Estrada were all foot soldiers in a ground war against America’s red-light districts – a war largely fought by private individuals and Progressive reform organizations. Their mission was to gather information about suspected places of prostitution. Johnson alone boasted that his efforts in California “brought some fifteen or twenty separate suits against houses of prostitution in the old Barbary coast red-light district.” This was not a war against the prostitute, however, but a war against the property owner. Ultimately, the fruits of this investigatory work would be used to gain control over the physical structures in which the women plied their trade. Parcel by parcel, their efforts contributed to the extinguishing of red lights throughout America.

Before 1909 most American cities, including many small ones, had red-light districts. For every (in)famous red-light district such as San Francisco’s Barbary Coast, or New Orleans’ Storyville, there were dozens of local red-light districts in places such as Sioux City, Iowa, Eau Claire, Wisconsin, Waco, Texas and East Grand Forks, Minnesota. Although

11. Stephen G. Sylvester, Avenue for Ladies Only: The Soiled Doves of East Grand Forks, 1887-
laws against prostitution, solicitation and pandering existed, "segregated" red-light districts continued to function with the tacit consent of the police and public. Women who confined their activities to these areas could generally practice their trade free of police interference. Beginning in 1909, however, red-light districts were confronted with a new weapon in the war against prostitution: the "Red Light Abatement" or "Injunction and Abatement" law. The emergence of the Red Light Abatement laws in the Progressive era depended on two parallel historical developments — one cultural, the other legal.

Interest in and support for the new laws was inseparable from a discursive reconceptualization of the prostitute within American society. In the late nineteenth century, the prostitute was conceived of primarily as a "fallen woman" — perhaps deserving of sympathy, but ultimately responsible for her position in life on account of her lax morals. Where the fallen woman lived — in the segregated vice district — demarcated both a literal and cultural boundary line between respectability and degeneracy. In the early twentieth century, however, the prostitute was reconceived as a "white slave" — an innocent, agency-less, pre-sexual (country) girl who had been tricked into a life of prostitution by urban panders. The reconceptualization of the prostitute from "fallen woman" to "white slave" destabilized the category of the prostitute, causing the "respectable" segments of society both to identify with the white slave and to feel obliged to come to her rescue.

The connection between the reconceptualization of the prostitute and the Red Light Abatement laws vividly illustrates how the destabilization of a boundary-defining classification can alter the rationale for segregated residential patterns. In the case of the red-light district, this cross-boundary identification undermined the district's value as a physical and figurative boundary-line separating degeneracy from middle class

12. Critical race feminists and other legal scholars have observed that the prostitute has historically performed a boundary creating function against which the middle class, especially middle class women, could define their own respectability and worthiness. See PATRICIA HILL COLLINS, BLACK FEMINIST THOUGHT: KNOWLEDGE, CONSCIOUSNESS, AND THE POLITICS OF EMPOWERMENT 174-76 (1990); Beverly Balos & Mary Louise Fellows, A Matter of Prostitution: Becoming Respectable, 74 N.Y.U. L. REV. 1220, 1272, 1277-78 (1999).
13. It is important to note that this reconceptualization did not challenge the degeneracy/respectability dichotomy or disrupt the social structures of domination that have historically been associated with society's conception of the prostitute. See Balos & Fellows, supra note 12, at 1269-90. Instead, the reconceptualization of some prostitutes as white slaves merely allowed a set of women that society had previously characterized as "unworthy" to be considered "worthy."
14. See Alex M. Johnson, Jr., How Race and Poverty Intersect to Prevent Integration: Destabilizing Race as a Vehicle to Integrate Neighborhoods, 143 U. PA. L. REV. 1595 (1995) (arguing that racial categories will need to be destabilized to attain the elusive goal of integrated neighborhoods).
In fact, conceptions of respectability became increasingly dependent on the elimination of this boundary-line — through the destruction of the red-light districts — in order to rescue the trapped white slave.

The Red Light Abatement laws began in Iowa and spread to forty-one states by 1919. Doctrinally, the Red Light Abatement laws represented the culmination of a movement that had begun a generation earlier in Kansas and Iowa with the Liquor Abatement laws. Like their liquor law predecessors, the Red Light Abatement laws expanded statutorily who had standing to bring public nuisance actions by eliminating the common law requirement that a private individual show "special injury." This dissemination of standing to the general public created a use-specific "anticommons" such that every citizen within a broadly defined jurisdictional area was given the right to exclude prostitution from a property through public nuisance law. In little more than a decade, these laws had permanently transformed the landscape of urban America in what could be considered the most successful use of public nuisance law in American history. By the early 1920s most of America's red-light districts were gone. By 1952, Galveston, Texas had the distinction of possessing the only red-light district in America.

The communitarian blending of public and private rights in the Red Light Abatement laws provides a counter narrative to the sharp public/private distinction often presumed to have existed in the Lochner era. In contrast to the substantive due process concern of defining and maintaining the boundary line between a constitutionally protected sphere of personal liberty and the police power, the Red Light Abatement laws dissolved this boundary line by intermingling public and private rights. Progressives used public nuisance law to place community needs and norms over the individual rights of property owners such that public harms became private harms, injuries to the community became injuries to the individual, and each citizen became his own attorney-general.

15. Although not entirely analogous, the connection between the destabilization of the prostitute and the elimination of the segregated vice districts lends some support to arguments put forth by critical race theorists that the destabilization of racial categories is the key to ending racial segregation. See id. at 1644-45, 1649-50.

16. Under traditional common law nuisance doctrines, an individual could enjoin a public nuisance in equity only if he had suffered special damages different from those suffered by him in common with the public. If not, actions against public nuisances could be brought only by public officials, such as the attorney-general, in a criminal action. See Section I.A(1)-(2), infra.

17. See Michael A. Heller, The Tragedy of the Anticommons: Property in the Transition From Marx to Markets, 111 HARV. L. REV. 622 (1998) (observing that where multiple owners are given a right to exclude, a resource is prone to underuse). In the case of the Red Light Abatement laws, the right to exclude was limited to a particular use of the property.


Despite the enduring impact that these laws had on the urban fabric of America’s cities, the Progressive era transformations in public nuisance law have been largely ignored in discussions of property law and land use regulation. With the exception of a single book, there has been no sustained discussion of the Red Light Abatement movement (or the Liquor Abatement movement) since the Progressive era. The history of the Red Light Abatement movement that follows is not a “lawyer’s history”: it is not a story about the past strung together to serve an argument about the present. Rather, it is a project of historical restoration. Part I details the transformation of public nuisance law in the late nineteenth and early twentieth century and the impact of liquor legislation in laying the legal groundwork for the Red Light Abatement laws a generation later. Part II examines how the fate of America’s red-light districts was inextricably connected to the social construction of the prostitute. Part III details how the war against the red-light district operated on two different levels. At the local level, groups such as Chicago’s Committee of Fifteen acted as private police forces in a block-by-block ground war against the bawdyhouse. By contrast, the American Social Hygiene Association (“ASHA”) acted as a national legal clearing house for constitutional challenges to the Red Light Abatement laws, tracked state legislation, promoted model laws, and supplied investigators for enforcement of the laws.

Some will find in this examination of the Red Light Abatement laws an optimistic story of how nuisance law can be used to enforce community rights and how the destabilization of boundary-defining classifications can radically alter the psychological and cultural barriers that lead to residential segregation. Others, by contrast, will find a cautionary tale

20. The one legal historian who has tackled the subject is Thomas C. Mackey. In the third chapter of RED LIGHTS OUT: A LEGAL HISTORY OF PROSTITUTION, DISORDERLY HOUSES, AND VICE DISTRICTS, 1870-1917 (1987), Mackey provides a doctrinal analysis of the Red Light Abatement laws and their relationship to the common law of public nuisance. As the first work on the subject, Mackey does an admirable job of charting changes in prostitution laws during the late nineteenth and early twentieth century. Mackey’s focus on prostitution, however, caused him to miss the importance of liquor legislation in the development of the Red Light Abatement laws. See discussion infra Part I.C.


23. A significant amount of this section is based on previously unexamined archival materials from the Social Welfare History Archives at the University of Minnesota and the Progressive era collections at Yale University.

http://digitalcommons.law.yale.edu/yjlh/vol16/iss1/5
about the use of civil remedies to accomplish criminal objectives and the role that hysteria can play in shaping legal change. Whatever conclusions one draws, the overarching themes of this story—the relationship between social control, public and private rights, and land use regulation—remain salient in twenty-first century American society.

I. THE TRANSFORMATION OF PUBLIC NUISANCE LAW

The legal groundwork for the Red Light Abatement laws was paved by the struggle against the other great moral vice of the Progressive era: alcohol. In the thirty years prior to the first Red Light Abatement law, nuisance law underwent a series of transformations that increasingly blurred the distinction between public and private nuisances. These transformations in nuisance doctrine—mostly statutorily driven—added a new level of incoherence to what had already been described as a "wilderness of law." Thus, while treatise writers could still point to something called "the common law of nuisance," much of what was done under nuisance law had little to do with the common law. As discussed in Parts II and III, Progressive reformers would seize upon this erosion of common law principles to transform public nuisance law into a powerful legal weapon for controlling public and private property.

A. The Common Law of Nuisance

The nineteenth and early twentieth century treatises present the common law of nuisance as a coherent and structured doctrine—perhaps too coherent. As discussed more below, the presentation of nuisance law in the treatises is probably best understood as an idealized form rather than an accurate representation of legal reality. Yet, it is important to delineate the contours of this idealized form in order to understand the debates surrounding the transformation of public nuisance law in this period.

(1) Definitions

Doctrinally, the common law distinction between public and private nuisances is straightforward. According to the late nineteenth-century treatise writer Horace Wood, private nuisances were "injuries that result from the violation of private rights, and produce damages to but one or a few persons, so that it cannot be said to be public." In general, private nuisance actions were addressed in equity courts before the chancellor.

25. 1 HORACE WOOD, THE LAW OF NUISANCES, at iii (San Francisco, Bancroft-Whitney 1893).
26. Id. § 14, at 35.
Public nuisances were defined as those that "result from the violation of public rights, and, producing no special injury to one more than another of the people, may be said to have a common effect, and to produce common damage."27 A public nuisance was considered an indictable offense "at law" whose redress must be pursued by criminal prosecution on behalf of the public.28 Public nuisance actions, therefore, entitled defendants to trial by jury. Due to the criminal nature of public nuisances, it was generally held that a "private person may not, of his own motion, abate a strictly public nuisance under any circumstances."29 This criminal/civil distinction between public and private nuisances could be traced to the distinct origins of the two actions.30 Public nuisance was a criminal action to halt and punish depredations against public rights and the king's peace.31 Private nuisance, by contrast, arose from the assize of nuisance,32 which barred interference with enjoyment of property. Thus, private nuisance complemented the assize of novel disseisin,33 which put rightful owners in the possession of their property.34

(2) The "Special Injury" Rule

Until the sixteenth century, common law courts maintained a clear distinction between public and private nuisance actions. Individuals who attempted to bring private actions for public nuisances were rejected on the ground that the public nuisance was a crime and no person could have a remedy in respect of it.35 Had the common law courts managed to maintain this distinction, the history of nuisance law would have been far simpler. However, in 1536, the line separating the two causes of action was breached when it was held in an anonymous case that a private citizen could bring an action on the case for public nuisance where he could show

27. Id. § 14, at 34.
28. JOSEPH JOYCE & HOWARD C. JOYCE, TREATISE ON THE LAW GOVERNING NUISANCES WITH PARTICULAR REFERENCE TO ITS APPLICATION TO MODERN CONDITIONS AND COVERING THE ENTIRE LAW RELATING TO PUBLIC AND PRIVATE NUISANCES § 14, at 22 (1906); 2 HORACE WOOD, THE LAW OF NUISANCES § 674, at 881 (San Francisco, Bancroft-Whitney 1893).
29. 2 WOOD, supra note 8, § 732, at 941. See also id., § 734, at 947 ("No individual, under any circumstances, is justified in abating a purely public injury, and should he attempt the experiment, he would find himself involved in serious consequences.").
32. A write of assize directing a sheriff to summon a jury to view the nuisance premises and do justice. A successful plaintiff was entitled to abate the nuisance and recover damages. BLACK'S LAW DICTIONARY 118 (7th ed. 1999).
33. A writ of assize for a tenant who disseised of land and tenements. Id.
34. Loengard, supra note 30, at 144, 158-59.
35. See F.H. Newark, The Boundaries of Nuisance, 65 L.Q. REV. 480, 483 (1949); William Prosser, Private Actions for Public Nuisance, 52 VA. L. REV. 997, 997 (1966);
that he had suffered "greater hurt or inconvenience than any other man."\textsuperscript{36}

Subsequent generations of treatise writers would refer to this limitation on private public nuisance actions as the "special injury" rule:

\[\text{[A]}n\ \text{individual, in order to be entitled to a recovery from injuries sustained from a public nuisance, must make out a clear case of special damages to himself, apart from the rest of the public, and of a different character, so that they cannot fairly be said to be a part of the common injury resulting therefrom. . . . It is not enough that he has sustained more damage than another; it must be of a different character, special, and apart from that which the public in general sustain, and not such as is common to every person who exercises the right that is injured.}\textsuperscript{37}

When applied to prostitution houses, the special injury rule generally limited who could bring a nuisance action to those adjacent to the offending structure.\textsuperscript{38} Otherwise, the action would have to be brought by indictment as public nuisance.\textsuperscript{39}

The need for the special injury requirement was viewed as more than mere functionalism. The fusion of the two causes of action in the 1536 case had liberated private nuisance law from its original conception as a tort to the plaintiff's enjoyment of his property.\textsuperscript{40} The special injury rule for public nuisances was thought to preserve the line between public and private rights and act as a safeguard against excessive private

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\item \textsuperscript{36} Newark, supra note 35, at 483 (quoting Fitzherbert, J.). Newark contends that this anonymous case set nuisance "on the wrong track" by moving nuisance actions into the realm of personal injuries. \textit{Id}.
\item \textsuperscript{37} 2 WOOD, supra note 8, § 646, at 855. See also JOYCE \& JOYCE, supra note 8, § 14, at 22 ("T]hat which is a public nuisance, and which annoys the public generally or invades its rights, constitutes a private nuisance where an individual, or class of individuals, sustains as such, a special injury as distinguished from that sustained by the public, and redress in such case exists by way of public remedy. If the injury is common to the public and special to none redress must be by criminal prosecution in behalf of the public.").
\item \textsuperscript{38} See, e.g., Crawford v. Tyrrell, 28 N.E. 514, 515 (N.Y. 1891) (affirming plaintiff's right to bring a public nuisance action against a bawdyhouse on account of the plaintiff's special injury from "the indecent conduct of the occupants of the defendant's house, and the noise thereupon, inasmuch as they rendered the plaintiff's house unfit for comfortable or respectable occupation . . . ").
\item \textsuperscript{39} 2 WOOD, supra note 28, § 672, at 880 ("Bawdy house, establishment of, when actionable. – In the case of a bawdy house, it is a public nuisance per se wherever located, and generally, only a proper subject of indictment, yet cases may arise where even that becomes also a private nuisance as to some. As, if it is kept upon a street adjoining the tenements of another, and by reason thereof his tenants leave, and his property is greatly depreciated in value, does he not sustain a special damage, so particular to himself and different from that sustained by the rest of the public as fairly entitles him to an action for damages?"); Crawford v. Tyrrell, 28 N.E. at 515 ("The mere fact of a business being carried on which may be shown to be immoral, and, therefore, prejudicial to the character of the neighborhood, furnishes of itself no ground for equitable interference at the suit of a private person; and, though the use of property may be unlawful or unreasonable, unless special damage can be shown, a neighboring property owner cannot base thereupon any private right of action. It is for the public authorities, acting in the common interest, to interfere for the suppression of the common nuisance.").
\item \textsuperscript{40} Newark, supra note 35, at 483.
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prosecutions. The treatise writers feared that if this line was transgressed, then there would be no meaningful line between public and private law. The "oasis of private rights" so carefully protected by classical legal jurisprudence would become subject to the rule of the mob:

Such a power in the hands of any person who saw fit to exercise it, would be destructive of the best interests of society, and would lay open a large part of our manufacturing and business interests to the mere caprice of the reckless and unprincipled elements that form a part of every community, and instead of making the law a shield against wrong and oppression would convert it into a sword with which to strike down any interest that chance to fall under the ban of any person's displeasure.

(3) Injury to Property/Injury to Persons Distinction

Another principle of the common law of public nuisance was that injunctions would only be granted on the ground of injury to property, and not on the ground of injury to persons. As a result, moral offenses such as gambling and violations of Sunday laws were considered outside the scope of equity jurisdiction. Maintaining this distinction, however, sometimes required some rather tortured logic. For example, in the English case of Crowder v. Tinkler, an injunction was granted to restrain the erection of a coming house to be used in connection with certain powder ills, which stood within two hundred feet of a paper mill occupied by the complainants. Lord Eldon was careful to point out that he granted

41. In the United States, public prosecutions began to replace the system of private prosecutions long before the colonies gained their independence. By the late seventeenth century, state prosecutors were established in some colonies and by the end of the eighteenth century, most states had committed to the concept of public prosecutions. Nevertheless, because of deficiencies in the office of public prosecutor, American citizens continued to prosecute private criminal actions in many locales during the nineteenth century. For example, a study of Philadelphia during this period revealed that many cases were privately prosecuted. See ALLEN STEINBERG, THE TRANSFORMATION OF CRIMINAL JUSTICE: PHILADELPHIA, 1800-1880 (1989); John D. Bessler, The Public Interest and the Unconstitutionality of Private Prosecutors, 47 ARK. L. REV. 511, 517-18 (1994); Robert M. Ireland, Privately Funded Prosecution of Crime in the Nineteenth-Century United States, 39 AM. J. LEGAL HIST. 43, 43 (1995); Joan Meier, The "Right" to a Disinterested Prosecutor of Criminal Contempt: Unpacking Public and Private Interests, 70 WASH. U. L.Q. 85, 102-03 (1992); Sklansky, supra note 21, at 1205-11.


43. 2 WOOD, supra note 28, § 740, at 966-67.

44. JAMES W. EATON, HANDBOOK OF EQUITY JURISPRUDENCE § 289, at 587-88 (1901) ("[I]n cases of private nuisance the injury is to individual property, and in cases of public nuisance the injury is to the property of mankind."). See also 2 WOOD, supra note 28, § 789, at 1157 (noting that equity will not issue an injunction unless the complainant demonstrates "actual injury to the property, or its comfortable enjoyment. . .").

45. 1 JOHN NORTON POMEROY, JR., A TREATISE ON EQUITABLE REMEDIES; SUPPLEMENT TO POMEROY'S EQUITABLE JURISPRUDENCE § 476, at 791-92 (1905).

the injunction only on the ground of injury to property, although it was shown that if the coming mill should explode, great loss of life would probably ensure among the occupants of the paper mill.  

(4) "Courts of equity have no jurisdiction in matters of crime"  

Since the abolition of Star Chamber in 1641, courts of equity have not exercised criminal jurisdiction. In the United States, the abolition of criminal equity was made permanent in the Sixth Amendment, which entitles the accused in criminal prosecutions to a trial by jury. The
practical impact of the abolition of criminal equity meant that as long as the remedy at law was considered adequate to address the plaintiff's injury, equity would not interfere. "A court of equity will not lend its aid for the prevention of wrongs or the protection of rights by the granting of an injunction, if the party aggrieved has a full, complete and adequate remedy at law." When confronted with attempts to revive criminal equity, courts could rely upon a well-developed line of argumentation that had its origins in the historical experience with the Court of Star Chamber:

The objections to 'criminal equity' are that it deprives the defendant of his jury trial; that it substitutes for the definite penalties fixed by the Legislature whatever punishment for contempt a particular judge may see fit to exact; that it is often no more than an attempt to overcome by circumvention the supposed shortcomings of jurors; and that it may result, or induce the public to believe that it results, in the arbitrary exercise of power and in 'government by injunction.'

For a typical public nuisance action, a criminal trial would be considered adequate to address the public wrongs inflicted on the community. Moreover, defendants in such actions could argue that they were entitled to a trial by jury. It was only in the case of special injury—where the injury to the plaintiff was so particularized—that equity would take jurisdiction over a public nuisance claim. Thus, from the perspective of the treatise writers in the late nineteenth and early twentieth century equity courts could grant injunctive relief, but only in civil matters involving the protection of private property rights.

B. Erosion of Common Law Principles

Even before the late nineteenth-century transformations in public nuisance doctrine, there were indications that the actual practice in equity courts did not adhere to the common law model. In 1884, Seymour D. Thompson published an article in the *American Law Review*, arguably

(D. Neb. 1924) ("But there is reason to believe that the simple declaration, 'All crimes shall be tried by jury,' was incorporated in the Constitution of the United States with a very determined purpose to absolutely prevent any court of criminal jurisdiction like that of the Star Chamber Court ever coming into existence in this country.").

52. Eaton, supra note 44, at 567 (1901). See also 2 Wood, supra note 28, § 788, at 1150-51. The rule was more recently stated in *Kramer v. Thompson*, 947 F.2d 666, 673 n.16 (3d Cir. 1991) ("Although law and equity have been merged in most jurisdictions, the adequate remedy rule continues to be cited as a ground for denying injunctive relief....").

53. Commonwealth v. Stratton Finance Co., 38 N.E. 640, 643 (Mass. 1941) (refusing to grant an injunction against defendants for violating Massachusetts interest laws). See also Kwass v. Kersey, 81 S.E.2d 237, 242 (W. Va. 1954) ("An injunction will not lie for the prevention of a crime or illegal or immoral act merely because of its illegality. One reason for the noninterference in such case is the fundamental want of jurisdiction; another is the existence of an adequate remedy at law.").

54. Thompson was joint editor of the *American Law Review* after its merger with the *Southern Law Review* in 1883. Thompson was also the author of several leading texts, including the *Law of Negligence* and a treatise on the law of civil and criminal trials. Erwin C. Surrency, A HISTORY OF
the most influential legal periodical of the nineteenth century, examing several instances where theories of equitable jurisdiction diverged from actual practice. First, Thompson observed that the priority distinction between remedies at law and remedies at equity was frequently breached. In particular, Thompson cited public nuisances as a case where equity took jurisdiction even though the injury was criminal and there was a clear remedy at law. The early nineteenth-century treatise writer and Supreme Court Justice, Joseph Story, provided a historical imprimatur for this breach of the criminal equity prohibition: "In regard to public nuisances the jurisdiction of Courts of Equity seems to be of a very ancient date, and has been distinctly traced back to the reign of Queen Elizabeth. The jurisdiction is applicable not only to public nuisances, strictly so called, but also to purprestures upon public rights and property."

Thompson next took aim at the common law presumption that equity courts only granted injunctive relief for injuries to property, not injuries to persons. In some cases Thompson noted that this general rule had been
strenuously upheld. In other cases, however, equity’s claim of protecting property rights was little more than an overstrained “fiction.”

Thompson found the “injury to property/injury to persons” distinction to be particularly confused in the area of public nuisances. One reason for the confusion was that equity did not always limit itself to hearing cases involving injuries to property. Equity would also hear nuisance cases involving deprivation of health and comfort. Thus, when equity enjoined a factory for producing a noxious stench it could cite discomfort to individuals as grounds for the injunctive relief. But, when equity did not wish to enjoin a dangerous factory that might explode and kill its neighbors, the chancellor could employ the “injury to property/injury to persons” distinction as grounds for refusing injunctive relief. Citing a lack of “adherence to uniform principles,” Thompson noted that the “injury to property/injury to persons” distinction had been “broken into so many important particulars as to leave scarcely any appearance of logic or symmetry.” As evidence for this assertion, Thompson could point to the logical inconsistency of equity granting injunctive relief for stenches and revolutions, but not explosions or conflagrations.

Another point of doctrinal confusion concerned the powers of individuals to abate a public nuisance. To the dismay of treatise writers and legal scholars, some courts had begun to argue that private individuals could abate a public nuisance even if they had not suffered special injury. Although legal scholars such as G. R. Eldridge would deride these court opinions as “reckless statements, and loose expressions,” the refusal of these ideas to wither in the face of established doctrine revealed an underlying frustration with the common law’s public-private distinction.

The shaky foundations of the common law of public nuisance were

60. Thompson, supra note 47, at 605 (citing the case of Crowder v. Tinkler, 19 Ves. Jun. 618, 34 E.R. 645 (1816), where Lord Eldon was careful to point out that he granted the injunction only on the ground of injury to property, although it was established that if the corn mill exploded, the occupants of the paper mill would likely be killed).

61. Id. at 607.
62. Id. at 605-08.
63. Id. at 608.
64. Id. at 608.
65. Id. at 608.
66. Id. at 605.
67. Thompson, supra note 47, at 608. The former were characterized as injuries to property or deprivations of health whereas the latter were considered injuries to persons.
68. 2 WOOD, supra note 28, § 732, at 941.
69. G.R. Eldridge, Abatement of Nuisances, 19 CENT. L.J. 42 (1884).
70. Gunter v. Geary, 1 Cal. 462 (1851), was the case most widely cited for the proposition that any person could abate a public nuisance. See also Eldridge, supra note 69, at 43 n.12 (providing a list of additional cases).
71. Id. at 43.
rattled even further by a wave of statutory legislation in the late nineteenth century. Various interest groups exploited the ambiguities and inconsistencies in public nuisance law that Thompson had observed in 1884. By the time of the first Red Light Abatement law in 1909, public nuisance law had been stretched to include private actions and the scope of injunctive relief had expanded to encompass an increasing number of activities. Critics would argue that these innovations had revived criminal equity. Reformers would contend that these changes had merely removed a common law obstacle to the assertion of a citizen’s collective rights.

The capacity of state legislatures to define statutorily certain places or property as public nuisances, even if they were not nuisances at common law, was settled by the late 1880s. At the state level, most state courts had long held that such statutory declarations were a proper and legitimate exercise of the police power.72 Any constitutional questions raised by the Fourteenth Amendment were settled in *Mugler v. Kansas*,73 when the Supreme Court held that statutorily-defined public nuisances, if created to protect against injuries to the health, morals or safety of the community, did not violate the Constitution.74 By 1893, treatise writers had also acknowledged that a state’s power to define public nuisances statutorily was virtually unlimited so long as the state acted to protect the health and welfare of the community.75

What was probably unanticipated in the 1880s was the extent to which legislatures would use this power to define a broad range of actions as public nuisances. In a 1918 Note entitled “Statutory Declarations of Public Nuisances” the author lists the types of activities that had been pulled under the ever-expanding umbrella of “public nuisance.” These included such disparate “nuisances” as uncapped artesian wells; buildings used for opium smoking, drinking liquor or prostitution; buildings without fire escapes; factories without safety devices; keeping hogs in a city; and camping or planting willow trees alongside highways.76

At the same time that legislatures were expanding equitable jurisdiction over public nuisances, equity courts were increasingly being asked to provide injunctive relief for a wider range of nuisances. Among the most controversial uses of injunctive power was the enjoining of labor strikes under the premise of protecting interstate commerce.77 At the less

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73. 123 U.S. 623 (1887).
74. Id. at 668-70.
75. 2 WOOD, supra note 28, § 733, at 944.
controversial (and sometimes frivolous) end of the spectrum, equitable jurisdiction was invoked to restrain the stealing of oysters, the alienation of a wife’s affections, a disturber of church meetings, and the unwelcome entreaties of a persistent lover. Treatise writers also noted the increased use of injunctions. In 1905, John Norton Pomerory, Jr., added a two volume supplement to his father’s treatise on equity jurisprudence to account for the growth of equitable remedies during his lifetime. Doctrinally, these expanded uses of injunctive relief stretched the common law principles beyond the breaking point. Could it honestly be claimed that equity courts only exercised jurisdiction over injuries to property or that or private individuals could not bring a general public nuisance action? Reflecting on the growth of equitable jurisdiction during the Progressive era, one commentator would remark that equity had been a victim of its own success: having proven itself so effective against injuries to property, litigants naturally turned to equity courts for relief from the social and political maladies plaguing turn-of-the-century American society.

C. Liquor Legislation

At the center of this transformation of public nuisance law was the war over alcohol. Other than prostitution, no vice inflamed the hearts of social reformers in the late nineteenth century more than alcohol. Along the way to the Eighteenth Amendment, temperance advocates sought to bring nuisance doctrine into the struggle against liquor. The cases upholding the constitutionality of these laws provided the legal framework for the Red Light Abatement laws a generation later. Unlike the Red Light Abatement laws, which would be enacted by almost all state legislatures, statutes declaring houses or tenements used for liquor sale to be public nuisances were limited to a small number of

(1909); Charles Kerr, Evolution of the Injunction as an Arm of Government, 10 VA. L. REV. 444, 450 (1924); and Jackson H. Ralston, Government by Injunction, 5 CORNELL L.Q. 424 (1919-20).

78. See Jones v. Oemler, 35 S.E. 375 (Ga. 1900).
80. See Joseph M. Sullivan, Novel Uses of the Writ of Injunction, 64 ALB. L.J. 46 (1902).
81. See id.
82. See 1 POMEROY, supra note 45, at vii ("The two remedies of Receivers and Injunctions have allotted to them more than half the space at my command, as due to the vast importance which they have assumed in very recent years."). Cf. 4 JOHN NORTON POMEROY, EQUITY JURISPRUDENCE AND EQUITABLE REMEDIES § 1349, at 2682-83 (3d ed. 1905) (providing only one paragraph on public nuisance actions).
83. The expansion in equitable jurisdiction led one learned judge to conclude that the modern uses of the writ bore no more resemblance to the ancient uses than the Milky Way bears to the Sun. See George Whitelock, Development of the Injunction in the United States, 45 CHI. LEGAL NEWS 107, 107 (1912-13).
84. Kerr, supra note 77, at 450. See also Zechariah Chafee, Jr., The Progress of the Law, 1919-20: Equitable Relief of Torts, 34 HARV. L. REV. 388, 408 (1920-21) (observing that public nuisances increasingly have only a remote relation to property rights).

http://digitalcommons.law.yale.edu/yjlh/vol16/iss1/5
states, mostly in the Northeast and Midwest.\textsuperscript{85} Although these statutes all varied to some extent, they generally contained the following elements: (1) a statement declaring establishments that sell liquor to be public nuisances; (2) a provision allowing any citizen of the county (or state) to maintain a bill for an injunction, or authorizing the district attorney/attorney general to file the bill; (3) a provision giving jurisdiction to chancery to enjoin the nuisance; and in some cases, (4) a provision giving chancery the power to abate the nuisance by closing the building, followed by the removal and sale (or destruction) of the liquors, vessels, and implements of the trade.\textsuperscript{86}

The constitutionality of these Liquor Abatement laws was immediately challenged in both state and federal courts. Defendants contended that the Liquor Abatement laws exceeded the powers of the legislature and deprived them of property without due process of law. Beneath the surface of these abstract constitutional claims, defendants were objecting to what they perceived to be transgressions of the common law of nuisance. Defendants asserted that the Liquor Abatement laws violated the special injury rule by permitting those not directly affected by the nuisance to bring a public nuisance complaint, as well as by requiring that nuisance actions be limited to invasions of property rights. They also argued that the statutes breached the priority distinction between actions remediable at law and actions remediable at equity. By giving equitable jurisdiction to a matter for which there was an available remedy at law, defendants asserted that the statutes had denied them their right to trial by jury by transferring a criminal matter to an equity court.

At the state court level, the leading cases upholding the Liquor Abatement laws came from two states, Kansas and Iowa. In \textit{State v. Crawford},\textsuperscript{87} perhaps the earliest state Supreme Court decision dealing with a Liquor Abatement law, the defendants' arguments met with mixed success. The court described the case as a "novel proceeding – so novel as

\textsuperscript{85} In 1892, they numbered only eight – Maine, Massachusetts, New Hampshire, Rhode Island, West Virginia, Ohio, Iowa and Kansas. HENRY CAMPBELL BLACK, A TREATISE ON THE LAWS REGULATING THE MANUFACTURE AND SALE OF INTOXICATING LIQUORS § 388, at 391 n.1 (1892). For a survey of every state's liquor laws, see Wm. Church Osborn, \textit{Liquor Statutes in the United States}, 2 HARV. L. REV. 125 (1888-89).

\textsuperscript{86} BLACK, supra note 85, § 388, at 391. In certain respects, the Liquor Abatement laws resemble \textit{qui tam} actions, although no one at the time referred to them as such. Like the \textit{qui tam}, these statutes permitted private citizens to initiate actions to redress public wrongs. Nevertheless, there were important differences. The \textit{qui tam} represented the joinder of two distinct interests, one public and the other private. See Note, \textit{The History and Development of the Qui Tam}, 1972 WASH. U. L.Q. 81, 83, 95. The Liquor Abatement laws, by contrast, marked both the expansion of the concept of "public" and the concomitant dissolution of the line separating public and private interests. The Liquor Abatement laws also lacked the financial inducement of a \textit{qui tam} action. Whereas the \textit{qui tam} allowed private prosecutors to share in criminal penalties or judgments of civil damages, see JERRY L. MASHAW ET AL., ADMINISTRATIVE LAW: THE AMERICAN PUBLIC LAW SYSTEM 1115-17 (4th ed. 1998); Note, \textit{The History and Development of the Qui Tam}, supra, at 83-91, the Liquor Abatement laws only afforded litigants the satisfaction of shutting down saloons and liquor-producing establishments.

\textsuperscript{87} 28 Kan. 726 (1882).
to startle old and experienced practitioners.\textsuperscript{88} Later in the opinion, the court remarked that the proceeding was unique because the matter at issue exceeded the expected boundaries of public nuisance law:

"It has been suggested, however, that this proceeding is novel, simply for the reason that no lawyer of any eminence, or otherwise, has ever before supposed that courts of equity had jurisdiction, under similar circumstances, to suppress or restrain illegal drinking saloons, by the mere remedy of injunction."\textsuperscript{89}

After first determining that illegal drinking saloons had almost always been a nuisance under Kansas law,\textsuperscript{90} the court addressed the two principle objections to the Liquor Abatement laws: (1) that the keeping of an illegal saloon was a criminal offense; and (2) that the statute afforded a plain and adequate remedy - criminal prosecution of the wrong-doer creating the public nuisance.\textsuperscript{91} As for the first objection, the court argued that authorities were split on whether courts of equity could restrain the commission of nuisances that are simultaneously criminal offenses. Ultimately, the court concluded that the weight of authority and reason argued in favor of permitting simultaneous jurisdiction for public nuisances.\textsuperscript{92} "Indeed, the fact that public nuisances, with all their constituent facts, are public offenses, is a very strong reason why courts of equity should take jurisdiction of such nuisances, and suppress and enjoin them, provided, of course, that no other adequate remedy exists."\textsuperscript{93} As for the second objection, the court first considered whether criminal punishment - a remedy at law - would be sufficient to justify limiting equitable jurisdiction. Interestingly, the court held that criminal punishment was not necessarily a sufficient remedy.\textsuperscript{94} Injunctive relief would be needed, the court held, if criminal punishment provided the only alternative remedy.\textsuperscript{95} However, because the Kansas Liquor Abatement law authorized any court (i.e., a law court) to abate and close the saloon, the court held that the remedy at law was sufficient, and hence, equitable jurisdiction could not be justified.\textsuperscript{96} In dicta the court explained that it was reluctant to open the door to injunctive relief because it suspected that the prosecution,\textsuperscript{97} which "has a very great distrust of juries,"\textsuperscript{98} was attempting

\textsuperscript{88} Id. at 729.
\textsuperscript{89} Id. at 731.
\textsuperscript{90} See id. at 731-32 ("As far back as February, 1859, the legislature of the then territory of Kansas enacted that they were nuisances.").
\textsuperscript{91} See id. at 735.
\textsuperscript{92} See id. at 735-36.
\textsuperscript{93} State v. Crawford, 28 Kan. 726, 736 (1882).
\textsuperscript{94} See id. at 737.
\textsuperscript{95} See id.
\textsuperscript{96} See id. at 737-38.
\textsuperscript{97} In this case, the prosecution referred to the state of Kansas and its relator, A.H. Vance, the county attorney of Shawnee County. See id. at 726.
Due the particular wording of the Kansas Liquor Abatement law, the Kansas Supreme Court was able to avoid many of the difficult questions posed by the new law. The watershed case was decided three years later in Iowa. In Littleton v. Fritz the Supreme Court of Iowa eviscerated the traditional common law doctrine of public nuisance.

In Littleton, the plaintiff brought an action under Iowa’s Liquor Abatement law to enjoin and abate the defendant’s maintenance of a saloon in Des Moines. The plaintiff in his petition to the court acknowledged that he had suffered no special injury from the defendant’s saloon. Rather, he was bringing his bill in equity under Section 12 of the Liquor Abatement law, which permitted any citizen of Polk County to bring a public nuisance action on behalf of the citizenry. The defendant not only challenged the standing of the plaintiff, but also challenged whether a court of equity had the power to enjoin a public nuisance. As in State v. Crawford, the defendant in this case claimed that he was entitled to a trial by jury because the matter constituted a criminal prosecution. In short order, the Littleton court dispensed with all of the defendant’s objections. In regard to the special injury rule, the court noted that there were “many other cases which might be cited to show a very great relaxation of the [special injury] rule.” This point hardly mattered, however, since the court held that the legislature always retained the power to determine who had standing in a case:

There can be no doubt that it is within the power of the legislature to designate the person or a class of persons who may maintain actions to restrain and abate public nuisances, and when that is done the action is for all purposes an action instituted in behalf of the public, the same as though brought by the attorney general or prosecutor. . . . The plaintiff is by law made the representative of the public in bringing and maintaining the action.

As to the question of whether an equity court could enjoin a criminal

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98. Id. at 731.
100. Thirty-five years later, the editors of the Columbia Law Review would cite Littleton as the seminal case for the constitutionality of the Injunction and Abatement laws. See Charles S. Ascher & James M. Wolf, Current Legislation: “Red Light Abatement Acts”, 20 COLUM. L. REV. 605, 605-06 (1920) (“Following Littleton v. Fritz, the courts hold that these [Red Light Abatement] laws, like the liquor laws, merely extend the traditional jurisdiction of equity over nuisances.”).
101. 22 N.W. 641 (Iowa 1885).
102. See id. at 642.
103. See id. at 642.
104. See id. at 643.
105. Id. at 644.
106. Id. at 645.
action, the court again deferred to the legislature. Citing State v. Iron Cliffs Co., the court held that the legislature had "unlimited" power to enlarge equitable jurisdiction. Nor did the court object to the legislature's extension of equity jurisdiction to a case where no distinct property right was involved. Similar to Seymour Thompson's analysis of the muddled "injury to property/injury to persons" distinction, the court found this distinction to be incoherent.

The court likewise rejected the common law priority distinction that required actions to be kept out of equity when there was an adequate remedy at law. In State v. Crawford, the Kansas Supreme Court had held that this distinction was still relevant even though it might be possible to entertain equitable jurisdiction in a public nuisance case if it could be demonstrated that the criminal remedy was inadequate. In Littleton, the Iowa Supreme Court side-stepped this issue by focusing on the unique benefits that injunctive relief provided. Unlike a criminal remedy, which punishes past wrong-doing, the court characterized injunctive relief as prospective, "preventive justice." "It stays the arm of the wrong-doer. It does not seek to punish him for any past violations of the law. Its purpose is to prevent a public offense, and suppress what the law declares to be a nuisance." This retrospective/prospective distinction between criminal and equitable actions allowed the court to hold that concurrent jurisdiction for a public nuisance case was consistent with notions of due process. A criminal prosecution provided one type of remedy and an equitable civil action another. The defendant's complaints about the absence of jury trial were moot - the defendant still had the right to a jury trial if he was criminally prosecuted.

The holdings of the Littleton court are emblematic of the confused state of public nuisance law by the mid-1880s. As Thompson had observed, public nuisance doctrine had become so muddled with exceptions and conflicting cases that it was difficult to identify a coherent doctrinal structure. The exceptions, in other words, had begun to swallow the doctrine. Adding to this confusion was an increased legislative role in public nuisance law. Through their police powers, legislatures were statutorily adding categories of nuisances, expanding equitable jurisdiction, and increasing who had standing to bring nuisance

108. See Littleton v. Fritz, 22 N.W. 641, 644 (Iowa 1885).
109. See id. ("[A]nd we may say here that the distinction sought to be made between nuisances where property rights are not involved is very limited, narrow, and not well defined.").
111. Id. at 644.
112. See id. at 644-45.
113. Littleton v. Fritz, 22 N.W. 641, 643-44 (Iowa 1885).
114. Thompson, supra note 47, at 603-05, 608.
complaints. These innovations went largely unchecked because of an increasing judicial deference to legislative action in the field of nuisance law. The Littleton court, for example, provided almost no basis for judicial review of public nuisance legislation:

Questions of policy or expediency in legislation are for the law-making power itself, and courts have no authority to interpose their judgment against that of the legislature, upon the ground that the law in question may be inexpedient, or that some other enactment would better serve to accomplish the desired object.\(^{115}\)

The emergence of an elective judiciary\(^{116}\) may provide a partial explanation for why the Kansas and Iowa courts adopted such a deferential posture towards the Liquor Abatement laws.\(^{117}\) It seems reasonable to assume that judges facing reelection pressures would have been more willing to break with the common law nuisance doctrines in the face of the public's hostility towards liquor establishments. The last quarter of the nineteenth century saw an explosive growth in the temperance movement, especially after the founding of the Women's Christian Temperance Union in 1873.\(^{118}\) Even though women lacked the...

\(^{115}\) Id. at 645. The Iowa Supreme Court held that it would only declare an act of the legislature invalid if "it is plainly, palpably, and beyond doubt repugnant to some provision of the constitution." Id. at 646. Judicial deference was even extended to municipal laws and regulations defining public nuisances. See Eugene McQuillin, Power of Municipality to Declare What Constitutes a Nuisance, 45 CENT. L.J. 487, 490 (1897) ("It is generally held that municipal corporations are prima facie the sole judges on the necessity of ordinances of this character, and courts will not ordinarily review their reasonableness when passed in pursuance of an express grant of power. . . . In determining whether it is reasonable the court should not substitute its discretion for that of the municipal legislature.").

\(^{116}\) Between 1846 and 1912, every state that entered the Union provided for judicial elections, and all but two of the sixteen constitutional conventions held between 1846 and 1860 called for the popular election of both appellate and inferior judges. See Caleb Nelson, A Re-Evaluation of Scholarly Explanations for the Rise of the Elective Judiciary in Antebellum America, 37 AM. J. LEGAL HIST. 190, 190 (1993). The movement to elect judges in partisan elections arose during the presidency of Andrew Jackson from 1829 to 1837. Mississippi became the first state to establish an entirely elective judiciary when it transferred the power to select all state judges from the legislature to the voters in its 1832 constitutional convention. Three states—Vermont, Georgia and Indiana—had partially elective judiciaries prior to 1832. See Steven P. Croley, The Majoritarian Difficulty: Elective Judiciaries and the Rule of Law, 62 U. CHI. L. REV. 689, 716-17 n.83 (1995); Nelson, supra, at 190. Historians have attributed the rise of the elective judiciary to a number of factors, including Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803), Jacksonian democracy, participation in politics by settlers of the western frontier, judicial rulings favorable to creditors, resistance to English common law, and judicial corruption. See Croley, supra, at 717. For historical debates over the motives of the proponents for an elective judiciary, see Kermit L. Hall, The Judiciary on Trial: State Constitutional Reform and the Rise of an Elected Judiciary, 1846-1860, 45 HISTORIAN 337 (1983); and Nelson, supra.

\(^{117}\) Kansas adopted an elective judiciary for appellate and inferior judges when it entered the Union in 1859. When Iowa entered the Union its constitution only provided for the popular election of inferior court judges. In 1857 the Iowa constitution was amended to provide for a three-member Supreme Court elected at large by the people of Iowa for staggered terms of six years, with trial judges also elected by the people. See Hall, supra note 116, at 337 n.2; A Brief History of the Iowa Judicial Branch, available at http://www.judicial.state.ia.us/about/history/brief.asp (2001).

\(^{118}\) The Women's Christian Temperance Union (WCTU) was formed in Chicago in 1873. The WCTU was first led by Annie Wittenmyer, but surged to national prominence under Frances Willard, who took control of the WCTU in 1879. A "potent politician," Willard attracted converts through nationwide speaking tours, and by 1890 the WCTU had 160,000 members. By 1911, with 245,000...
right to vote during the period of the Liquor Abatement acts, their movement for reform exerted pressure on male political culture through lobbying, legislation, and moral suasion. The responsiveness of elected judges to public sentiment has been documented by Jed Handelsman Shugerman in his study of the adoption of *Fletcher v. Rylands.*

Shugerman observed that almost all the states that adopted an elective judiciary in the period after 1846 also adopted *Rylands’* strict liability standard, whereas the federal courts’ appointed life-term judges resisted transforming the common law doctrines in spite of the public outrage over bursting dams.

Nonetheless, the rise of an elective judiciary can only provide a partial explanation for the acceptance of the Liquor Abatement laws by state courts. Massachusetts and New Hampshire—two of the eight states that had enacted Liquor Abatement laws by 1892—were also the only two states to convene a constitutional convention between 1846 and 1860 and retain an appointed judiciary. One suspects that the principal causative agent for the shift in public nuisance doctrines, even in states with appointed judges, was the general force of the temperance movement, especially the growing power of the Women’s Christian Temperance Union in the late nineteenth century.

The distance the *Littleton* court traveled from the common law doctrine of public nuisance can be illustrated in this comparison of the common law doctrine with the holding in *Littleton:*

members, the WCTU was the largest single women’s organization ever. *Nancy Woloch, Women and the American Experience* 333 (2d ed. 1994).

119. Between 1870 and 1890, suffragists convinced eight states to hold referenda on women’s right to vote and lost all eight times. More often, suffragists were unable to convince state legislators even to call for a referendum. *See id.*

120. *See Ruth Bordin, Women and Temperance: The Quest for Power and Liberty, 1873-1900* (1990). Although it may seem counterintuitive that disenfranchised women could exert any meaningful influence on male political culture during this period, historians of late nineteenth and early twentieth American history have argued that the creation of separate female sphere helped mobilize women and gained for them political leverage in the larger society. *See Estelle Freeman, Separatism as Strategy: Female Institution Building and American Feminism, 1870-1930* (Feminist Stud. 512 (1979), reprinted in Kathryn Kish Sklar & Thomas Dublin, *2 Women and Power in American History from 1870* at 12 (1991)). Drawing on the work of Habermas, Sklar has argued that women’s political culture during this period was able to influence male political culture by altering the discourse concerning various social ills that plagued American society. *See Kathryn Kish Sklar, Florence Kelley and the Nation’s Work: The Rise of Women’s Political Culture, 1830-1900* (1995).

121. 159 Eng. Rep. 737 (Ex. 1865), rev’d, 1 L.R.-Ex. 265 (Ex. Ch. 1866), aff’d, 3 L.R.-E & I. App. 330 (H.L. 1868).


123. *See Hall, supra* note 116, at 337-38. The Massachusetts Supreme Court, although appointed, appears to have been sensitive to public sentiment during this period. *See Shugerman, supra* note 122, at 374-75 n.346 (observing that Massachusetts was the first state to adopt *Rylands* even though it had an appointed judiciary).
At the federal level, the liquor interests fared no better. In *Mugler v. Kansas*, the United States Supreme Court rejected the claims of liquor sellers that the Liquor Abatement laws constituted an uncompensated taking of property, and had deprived them of due process of law and the right to a trial by jury. The Court dispensed with the takings claim under what is now called the "nuisance exception to the taking guarantee." The Court rejected the due process claim on the grounds that the statute was a lawful exercise of the state’s police powers and that a court of equity was a proper place to abate a public nuisance. The latter claim was somewhat debatable, since the common law defined public nuisances as criminal actions. In support of this position, however, the Court cited Justice Story’s claim that equity had maintained jurisdiction over public nuisances since the time of Queen Elizabeth. Once the Court had determined that the abatement of liquor sales was not a criminal action, it considered the question of trial by jury to be irrelevant since this mode of trial was not required by suits in equity to abate a public nuisance. Thus, in one decision, the Supreme Court gave its tacit approval to the statutory changes that were sweeping over public nuisance law. After 1887, the determination of the relationship between equity courts and public nuisance law would be left to the state legislatures and state courts. The question that remained to be answered was whether the *Littleton*
conception of that relationship would become the norm or the exception.

D. Critical Reactions and the Progressive Response

This expansion of public nuisance law and injunctive relief did not go unchallenged. Throughout the period of 1885 to 1925, there was a countervailing movement of functionalist and formalist critiques that sought to maintain the structure of the common law of public nuisance. Some of the criticism was simply a resistance to doctrinal innovation by a generation of legal scholars who had been educated that there were certain fundamental legal principles of Anglo-American law: Equity did not exercise criminal jurisdiction, equity only exercised jurisdiction where there was no adequate remedy at law, individuals could not bring public nuisance actions unless they had suffered special injury, and equity courts only granted injunctive relief for injuries to property, not injuries to persons. Consider, for example, this stirring exposition in the Chicago Legal News on the importance of the "adequacy of remedy" as a basis for equity jurisdiction: "The first and most important of these principles, and one which lies at the foundation of the entire jurisdiction by injunction is, that the relief is never granted where the party aggrieved has a full and adequate remedy at law ...." If one believed this was a fundamental principle of the law, it is easier to see why decisions such as Littleton, with its concurrent remedy/concurrent jurisdiction holding, would have provoked such resistance.

Many of the critiques, however, had deeper philosophical objections to the transformation of public nuisance. Of concern to many of these critics was a fear that the recent transformations in public nuisance law had undermined the important safeguard of trial by jury as well as breached the line separating public and private rights. The fear was that individual rights and liberties would be crushed as society moved towards a revival of criminal equity controlled by the masses.

One of the earliest expressions of these criticisms can be found in Justice Field's dissent in Carleton v. Rugg, the Massachusetts Supreme Court decision upholding that state's Liquor Abatement law. Similar to the court in State v. Crawford, Justice Field alleged that the underlying purpose of the statute was to effect a criminal prosecution while avoiding

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128. See, e.g., Rounds, supra note 59 (decrying the Liquor Abatement laws as doctrinal violations of the common law of public nuisance).
129. The Chicago Legal News was a weekly newspaper that began publishing in 1868. It was described as containing "fresh reports and decisions, short and pertinent articles upon topics of present interest, [and] a large quantity of legal advertisements." American Law Periodicals, supra note 55, at 449.
130. J.L. High, Outlines of the Law of Injunction, 7 CHI. LEGAL NEWS 215, 216 (1874-75).
131. 22 N.E. 55 (Mass. 1889).
132. MASS GEN. LAWS ch. 380 § 1 (1887).

http://digitalcommons.law.yale.edu/yjlh/vol16/iss1/5
trial by jury. Without uttering its name, Justice Field accused the majority of resurrecting Star Chamber and its lack of institutional safeguards against judicial tyranny from the grave of Anglo-American legal history:

And, if this can be done, why can it not authorize a court to enjoin any person from doing any illegal or criminal act anywhere within the commonwealth, and to try without a jury any person so enjoined, on a charge of having violated the injunction, and to punish him by fine and imprisonment, without limit, if the court find him guilty. . . . It was not the intention of the constitution that persons should be punished for violating general laws by proceedings in equity, or by a court acting upon its power to fine and imprison except at its own discretion.

Later critics generally followed Justice Field in focusing on the absence of trial by jury and the revival of criminal equity. For example, Henry Schofield feared that the expansion of equitable jurisdiction had ushered in an era of judicial tyranny, "unrestrained by the common sense of the community voiced by twelve good men and true in the jury box." Others feared mob rule if the special injury requirement was abandoned.

In response to these criticisms, Progressive social reformers countered that the common law doctrines had to be jettisoned because criminal public nuisance prosecutions could not provide an adequate remedy at law. The Progressive perception of the remedy at law was that police graft, political corruption, and commercial vice (i.e., liquor and prostitution) interests had conspired to undermine the efficacy of the criminal justice system. The Progressive loss of faith in public institutions is succinctly captured in the following excerpt from one of the first scholarly attempts to explain the transformation in public attitudes

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133. See Carleton, 22 N.E. at 58-60 (Field, J., dissenting).
134. Id. at 60-61. See also Chafee, supra note 84, at 399 (arguing that there must be some limit on the power of the legislature to transfer crimes into equity courts under the title of public nuisance).
135. See, e.g., Robert N. Golding, Constitutional Question Involved in the Abatement and Injunction Sections of the National Prohibition Act, 19 ILL. L. REV. 71 (1924); E.W. Grant, The Abatement of Public Nuisances, 40 CHI. LEGAL NEWS 410 (1908); Edwin S. Mack, The Revival of Criminal Equity, 16 HARV. L. REV. 389 (1903); Henry Schofield, supra note 59.
136. Id. at 33.
137. See Hopkins v. Oxley Stave Co., 83 F. 912, 924-25 (8th Cir. 1897) (Caldwell, J., dissenting) ("But the logical difficulty with this reasoning is that it confers jurisdiction on the mob equally with the Chancellor. Those who justify or excuse mob law do it upon the ground that the administration of criminal justice is slow and expensive, and the result sometimes unsatisfactory. It can make little difference to the victims of short-cut and unconstitutional methods whether it is the mob or the Chancellor that deprives them of their constitutional rights."); Grant, supra note 135, at 411 ("To allow anyone of the public to abate such a nuisance, when he is in no special way incommoded, inconvenienced, or damaged, leaves a naturally dangerous remedy, liable to great abuse.").
138. In the course of writing his 1922 dissertation, Joseph Mayer was given extensive access to
towards segregated vice districts during the late nineteenth and early twentieth centuries:

Corruption or graft is a prolific hindrance to proper law enforcement. Where the mayor of a city or other officials have been elected to office with the aid of 'entrenched interests,' where dishonest and inefficient police or court officers are subject to bribery, where the court rulings or the disposition of cases are made to serve questionable ends, where the public is inert ... corruption and graft are bound to be obstacles to law enforcement.\(^{139}\)

In regard to the specific issue of red-light districts, the Progressives documented how segregated vice districts served to finance public services. For example, in hearings before the Wisconsin State Vice Commission, it was shown that the town of Superior relied upon returns from its red-light district to fund municipal expenses.\(^{140}\) Beyond financial necessity, this alliance of vice interests and city hall was seen as having a corrosive effect on public government:

"Prostitution, like every other criminal activity, goes into politics, intrenches itself behind the unscrupulous precinct and ward leader, and uses every method of bribery, corruption, and intimidation to maintain itself free from interference.\(^{141}\) Regulation and segregation [are] corrupting the civic life of those communities which permit[] them."\(^{142}\)

The police were considered particularly corrupted by the temptations of graft. As Attorney General George Cosson of Iowa once stated, "You

\(^{139}\) See, e.g., id. at 15.

\(^{140}\) See also Frederick W. Betts, History of the Moral Survey Committee of Syracuse, 1 J. SOC. HYGIENE 183, 185 (observing linkages between corrupt political machines and the profits generated from commercialized vice); ASHA, The Segregation of Prostitution and the Injunction and Abatement Law Against Houses of Prostitution (1916) (ASHA, Legal Reference Files, Box 3, Folder 1: Injunction and Abatement, 1913-31, State Laws, Social Welfare History Archives, University of Minnesota) (denouncing municipal disgrace of sharing in the proceeds of prostitution through petty fines). But see Virginia Brooks, Address, 2 VIGILANCE 1, 11 (1912) (alleging that the red-light district depleted the treasury of West Hammond, Illinois, in addition to corrupting its public officials and demoralizing its police force); George Cosson, Why an Injunction and Abatement Law? 16 AM. CITY 44, 44 (1917) (arguing that only an infinitesimal amount of money ever made it into the city treasury because of embezzlement by corrupt police and politicians).

\(^{141}\) Bascom Johnson, Civic Housecleaning, 14 J. SOC. HYGIENE 464, 467 (1928).

\(^{142}\) See also ANNUAL REPORT OF THE COMMITTEE OF FIFTEEN 17 (1920) ("Segregation means graft and corruption among public officials.").
cannot have a segregated vice district without having a corrupted police force."143 In some cases the police were portrayed as helpless victims of the forces of corruption,144 while in others they were viewed as using their positions of power to extort money from the victimized prostitute or illegal liquor sellers.145 As a result of this corruption, the police could not be counted on to pursue vice investigations.146 In Chicago, the Committee of Fifteen documented how its own investigators found evidence of prostitution at a certain building that six policemen had conveniently overlooked: "Were these policemen blind or devoid of reason and logic; . . . were the instructions given in such a way that the men knew that they were not to see or hear or find anything of a questionable nature? Let me leave those questions with you. . . ."147 The Committee of Fifteen

143. Publicity Committee Law Enforcement League, An Ancient Evil: Regulation or Suppression, Bulletin No. 3 (n.d.) (asha, Legal Reference Files, Box 2, Folder 14: Injunction and Abatement, 1911-24, Social Welfare History Archives, University of Minnesota). See also annual report of the committee of fifteen 10 (1916) ("We say unequivocally that without collusion with the police, commercialized vice could not flourish in Chicago.").

144. See clifford W. Barnes, the story of the committee of fifteen of Chicago, 4 J. soc. hygiene 145, 156 (1918) ("Segregation means protected vice, and you can't have protected vice without running the big risk of seeing your law enforcing officials corrupted. The temptation seems too great. The policeman on the beat goes to pieces very quickly after he once takes graft from the vice districts. Grafting off these pitiable creatures is unspeakable, and at that it is but the first step in a career that sinks deeper in infamy very rapidly. The policeman who takes this kind of graft will take graft from pickpockets, thugs, gunmen, and burglars."); ASHA, the segregation of prostitution and the injunction and abatement law against houses of prostitution, supra note 140 ("Is it reasonable to expect the policeman to remain uncorrupted when he is tempted by public toleration of commercialized prostitution to confer illegal privilege by winking at law-breaking?"); ASHA, Segregation of Prostitution (n.d.) (asha, Legal Reference Files, Box 2, Folder 15: Injunction and Abatement, 1925-53, Social Welfare History Archives, University of Minnesota) (repeating same complaint).

145. See annual report of the committee of fifteen 12 (1917) (accusing Chicago policemen of engaging in "official pandering"); the vice commission of Chicago, the social evil in Chicago 29 (1911) (denouncing the "System which makes it easier for the police to accept graft from the tremendous profits reaped from the sale in women's bodies than to honestly do their duty"); clarke, supra note 142, at 3, 5 (asserting that the corruption of the police force through vice was "notorious" and "often led to a system of general 'protection' for criminals of all classes"); Ann Garlin Spencer, state regulation of vice and its meaning, 49 forum 587, 595, 599-600 (1913) (decriing "police terrorism" against prostitutes in segregated vice districts); Graham Taylor, Reviews the situation, 2 vigilance 1, 22 (1912) (noting that police graft from prostitution and liquor sales was treated as a "vested right"); Editorial, The Regulation of Prostitution the Proper Field for the Health Department, 33 medico-legal J. 7, 7 (1916) (citing unofficial monthly $25 per prostitute fee levied on brothels as evidence of "lucrative" police graft); J. Lionberger Davis, Argument in Support of the Injunction and Abatement Bill (Senate Bill Number 14) for the Abolition of Houses of Prostitution in Missouri, 1, 8 (1915) (asha, Legal Reference Files, Box 2, Folder 14: Injunction and Abatement, 1911-24, Social Welfare History Archives, University of Minnesota) (asserting that segregated vice districts have corrupted the police forces and courts, leaving citizens helpless to protect themselves).

146. In response to widespread corruption, one editorial even called for the abolition of the police department. Editorial, Police Graft, 33 medico-legal J. 5, 5 (1916).

147. Annual report of the committee of fifteen 3 (1920). See also the vice commission of Chicago, the social evil in Chicago, supra note 145, at 160 (describing the general lawlessness of the Chicago police department: "[O]fficers on the beat are bold and open in their neglect of duty, drinking in saloons while in uniform, ignoring the solicitations of prostitutes in rear rooms and on the streets, selling tickets at dances frequented by . . . prostitutes; protecting 'cadets,' prostitutes and saloon keepers of disorderly places.").

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likewise accused the police of actively protecting vice interests: "We have found policemen going personally and collecting tribute from women, and giving evidence of their willingness to protect vicious resorts by taking the keepers to the Morals Court to point out certain officers of the law against whom the women should be on guard."

In the unlikely event that public officials actually prosecuted a public nuisance claim against commercialized vice, Progressives countered that the jury system could not be relied upon to return a guilty verdict. Progressives feared jury nullification from jurors who were the recipients of graft, in the employ of commercialized vice interests, or even participants in the vice. Describing the experience in Iowa, Wirt Hallam wrote:

For years [the public authorities] have passed laws and attempted prosecutions, but with little success. Many people regarded the [red-light district] as necessary and inevitable; grand juries would not indict; petit juries would not convict. . . . It was sometimes found that one man on the jury—from prejudice, corruption or a misunderstanding of the nature of his duties—would defeat the laws of the State and the judgment of the other eleven men on the jury.

Some reformers suggested that there should be "schemes" through which "unfit persons" could be kept out of the jury box. Others despaired of reforming the jury system at all.

Legal practitioners and academic scholars who criticized the Injunction and Abatement laws did not actually dispute the Progressive depiction of the criminal justice system. These practitioners and scholars likewise decried the lax enforcement of public nuisance laws, the low standards of juries, the weakness of prosecuting attorneys, and the obscurant technicality of criminal law. They viewed the expansion of equitable jurisdiction as a "sad commentary" on people's faith in the criminal justice system: "[P]eople are becoming afraid of their own institutions; afraid of


149. See Current Topics, 15 CENT. L.J. 441, 441 (1882) (noting unwillingness of juries to convict in liquor cases); Mayer, The Regulation of Commercialized Vice, supra note 138, at 16 ("Common juries reflect the sentiment of the particular local community from which they are drawn; and although the state legislature may pass a very admirable law and judges uniformly uphold it, juries may still hamper enforcement by refusing to convict under it."). But see Golding, supra note 135, at 77 (acknowledging the problem of jury nullification in liquor cases, but countering that this problem has abated with National Prohibition).

150. Hallam, supra note 148, at 112.

151. ANNUAL REPORT OF THE COMMITTEE OF FIFTEEN 7 (1922).

152. See Cosson, supra note 140, at 45 (describing "utter inadequacy" of the jury system based upon his experiences as a county attorney in Iowa).

trial by jury; afraid of the cherished guarantees of civil liberty derived through the Magna Charta and enshrined in their constitutions...."¹⁵⁴

These critics even conceded that equity bench trials might have become more palatable as an increasing percentage of the judiciary was elected.¹⁵⁵

In spite of these concessions, they also believed that the Progressive cure to the social evil problem – abandonment of the special injury rule and the concomitant transfer of criminal prosecutions into equity – was worse than the disease. From the point of view of these critics, the Progressives had simply traded one problem for another. In their desire to rid the nation of the social evil, the Progressives had opened the door to the destruction of individual liberties through criminal equity. Moreover, the Progressives had undercut any possibility of reforming the common law system by circumventing it. "If we were brought face to face with the problem of maintaining order only by means of the criminal courts, though the process might be slow, the final result would be that our criminal prosecutions would be made effective...."¹⁵⁶

The critics’ proposal that the common law of public nuisance be maintained and its institutions reformed was simply untenable to Progressive social reformers. First, Progressive reformers were not interested in "slow" reforms, especially when the Injunction and Abatement laws gave them a powerful – and constitutional – weapon against vice. The struggle against the twin social evils of alcohol and prostitution was a war, and the war was not going to be slowed in order to preserve the doctrines of the common law. Second, the critics’ proposal that the Progressive reformers rely upon the workings of the criminal justice system rested upon a faith in these institutions, a faith no longer shared by many Progressive social reform groups. For Progressives, the continued existence of liquor saloons and red-light districts was proof positive that the contemporary political and legal systems did not work. A large part of the appeal of the Injunction and Abatement laws was that they took power out of the hands of corrupt juries and public officials and transferred it to those whom the Progressives trusted – themselves.

Lastly, and most importantly, critics and Progressives espoused differing notions of law’s socio-political role. The critics’ proposal assumed a shared belief in the importance of the public-private distinction. To the adherents of classical liberal thought, the primary function of law was to preserve a sphere of liberty free from state interference.¹⁵⁷ By contrast, Progressives who promoted and used the Injunction and Abatement laws had a communitarian vision of society. They were not

¹⁵⁴. Whitelock, supra note 83, at 108.
¹⁵⁶. Id. at 403.
¹⁵⁷. HORWITZ, supra note 42, at 11.
concerned with preserving an "oasis of private rights." Rather, the Progressive social reformers were committed to finding a way of imposing community norms on society. Private rights mattered little to the Progressive social reformers if those rights conflicted with the rights of the public.

II. THE RED LIGHT ABATEMENT LAWS

Doctrinally, the Red Light Abatement laws constituted an extension of the transformations that had swept over public nuisance law in the last quarter of the nineteenth century. In practice, as well as in theory, the Red Light Abatement laws were the descendants of the Liquor Abatement statutes a generation earlier. In brief, the Red Light Abatement laws allowed individuals to bring public nuisance actions in equity courts against the operation of places of prostitution, lewdness and assignation. The individual did not have to show special injury to have standing. Rather, standing was conferred jurisdictionally by citizenship in a county, city or state. Initially, an individual could ask for a temporary injunction restraining the property owner from continuing the nuisance. At a later hearing, the court would decide if the evidence warranted a permanent injunction and an abatement of the nuisance. Under an order of abatement, the building was closed for up to one year. The personalty used in conducting the nuisance – pretty much everything in the building – was removed and sold. In some states, the owner was also assessed a $300 "tax". If the owner violated the injunction and abatement order, he could be fined up to $1,000 and imprisoned in the county jail for up to six months. Although advocates of the Red Light Abatement laws stressed that this law was a civil action, it was in fact a form of criminal equity – the privatization of public nuisance prosecutions in chancery courts.

In spite of the doctrinal similarities between the Red Light Abatement laws and the preceding Liquor Abatement statutes, the emergence of these anti-prostitution laws was not a foregone conclusion. The doctrinal transformations in public nuisance law only made the Red Light Abatement laws a theoretical possibility. It would take a discursive shift in the Progressive conception of the prostitute, combined with an awareness of the inadequacies of the common law remedies, to usher in the Red Light Abatement laws.

158. Id.
159. See Letter from George Worthington to Alice L. Wooks (October 13, 1923) (ASHA, Legal Reference Files, Box 2, Folder 14: Injunction and Abatement, 1911-24, Social Welfare History Archives, University of Minnesota); Davis, supra note 145, at 1, 7-8; Bascom Johnson, The Injunction and Abatement Law, 1 J. SOC. HYGIENE 231, 232-33 (1915).
160. Letter from George Worthington to Alice L. Wooks, supra note 159 ("The Injunction and Abatement Law is a civil law and not a criminal law.").
A. From "Fallen Woman" to "White Slave"

The fate of America's segregated red-light districts were intimately connected to Progressive discourses on the prostitute. Throughout the nineteenth century, the prostitute was viewed as a "fallen woman." On the one hand, the fallen woman was viewed as degraded, miserably poor, diseased and intellectually stunted. On the other hand, she also possessed agency – she was as much a victim of her lax morals and willingness to follow a false code of luxury as she was of her bad environment. This conception of the prostitute had important implications for the segregated red-light district.

Historians of urban America have been intrigued by the cognitive disjunction of red-light districts in a society that professed adherence to a code of "civilized morality." As defined by Mark Thomas Connelly, civilized morality consisted of two related propositions: a belief in a unified and responsible self that could (and must) control unruly and base sexual instincts, combined with a faith that societal progress depended on control of one's potentially dangerous sexual drive. Civilized morality supported a code that strictly prohibited premarital sexual relations, proclaimed marriage as the only context for sexual intercourse, and even there, limited sexual relations to reproduction. Given this commitment to marital fidelity and sexual restraint it seems incongruous that the segregated red-light districts should have flourished during this period.

This incongruity is only superficial, since it was through the segregated red-light district – and its array of fallen women – that respectable Americans were able to define and maintain the meaning of civilized morality. As Kai Erikson has observed, every group of people maintains boundaries through negative identification against a despised Other. "Deviant persons", in particular, "often supply an important service to society by patrolling the outer edges of group space and by providing a contrast which gives the rest of the community some sense of their own territorial identity." The red-light district and its inherent Otherness


163. See, e.g., Peter Baldwin, Antiprostitution Reform and the Use of Public Space in Hartford, Connecticut, 1878-1914, 23 J. URB. HIST. 709, 709-710 (1997); Shumsky, supra note 1, at 665-67.


165. Id.

166. KAI ERIKSON, WAYWARD PURITANS, A STUDY IN THE SOCIOLOGY OF DEVIANCE 196 (1966).
provided a bright-line by which the middle-class could discern the difference between acceptable and unacceptable sexual behavior. It provided both a physical and figurative demarcation of respectability.

Key to this boundary formation was the conception of the prostitute as possessing agency. The fallen woman in the bawdyhouse was an Other: a "metaphor" for poorly-made choices and a foil against which respectable women measured their own agency. The fallen woman could be pitied, but she could also be blamed. Whereas the fallen woman had given in to her base desires, the respectable woman outside the red-light district had not. The promiscuity of the fallen woman highlighted the chastity of women who stayed in the private home, while her presence in an unruly slum contrasted with the quiet decorum of the respectable woman's residential neighborhood.

Although the segregated red-light district may have served a useful boundary-defining purpose, it enjoyed an uneasy existence in nineteenth-century society. Just as the red-light district provided a status signifier to those possessing civilized morality, attempts to abolish it could also serve to elevate the status of those possessing pure civilized morality above those who tacitly sanctioned licentiousness. Throughout the nineteenth century these "new abolitionists" sought to shut down red-light districts as part of their crusade to purify America. The general failure of these abolitionist attempts can be traced to several factors. Police graft combined with ineffective laws made it difficult for the new abolitionists to accomplish their goal. Equally important, there existed a countervailing

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166. Shumsky, supra note 1, at 672. See also Gilfoyle, supra note 162, at 92-116 (noting that efforts to define middle class respectability became more pronounced in nineteenth century New York in response to the emergence of a male "sporting" culture that transgressed the boundary line between respectability and criminality by embracing life in the red-light district); Balos & Fellows, supra note 12, at 1228-29, 1272, 1303 (asserting that prostitution has historically marked the boundary between women society labels unworthy/degenerate and those whom society constructs as worthy/respectable).

167. Shumsky, supra note 1, at 671-72.


169. Baldwin, supra note 163, at 709-10.

170. The recent efforts to "clean up" Times Square illustrate how eliminating vice districts can still serve as status signifiers for moral reformers. See Balos & Fellows, supra note 12, at 1288 (observing that the efforts to "clean up" Times Square "demonstrate how our culture continues to police the boundaries between respectable middle-class homes and families and the degenerate streets represented by prostitution and related activities."); see also Harry M. Clor, The Death of Public Morality?, 45 AM. J. JURIS. 33, 44-45 (2000) (citing the "clean-up" of Times Square under Rudolph Giuliani as a "positive sign[ ]" of public morality); George Kannar, Introduction: The First Amendment Revisited, 46 BUFF. L. REV. 393, 398-400 (1998) (describing the "new" Times Square as a zone where middle class pleasures are "sanitized.").

discourse that the segregated vice district was a “necessary evil.” This necessity argument contended that the elimination of the segregated vice district would unleash a parade of horribles on the moral citizens of society. There was a concern that without outlets for male sexuality, pure, virtuous women would become targets for pent-up male sexual aggression. The segregated vice district functioned as a bulwark against this “predatory male” by unleashing his “animal passions” on the immoral fallen woman. As one resident of Connecticut succinctly put it, “To have open houses [of prostitution] means protection for decent women.”

A second concern was that elimination of the red-light district would scatter prostitution into the virtuous quarters of society: “It regulates the women so that they may live in one district to themselves instead of being scattered over the city and filling our thoroughfares with streetwalkers.” Another argument in favor of the segregated red-light district was that it segregated vice generally. Not only did this protect the innocent citizen from the robbers who lived among the wretched in the red-light district, but it also made the job of policing easier: “The segregated district decreases crime by enabling police supervision of a recognized crime center.” As one Arkansas banker remarked, the red-light district was “a necessity like a sewer . . .” The analogy was an apt one. The red-light district, like a sewer, segregated filth and then hid this filth within specially contained areas. Abolishing the districts was akin to abolishing the sewer system—it would allow the pent-up filth of society to seep into virtuous residential neighborhoods.

But if nineteenth-century abolitionists were unsuccessful in eliminating
the red-light district, nor were those who advocated legalizing and regulating them. The one great nineteenth-century experiment with regulating prostitution in the United States occurred in St. Louis, Missouri. In 1870, the St. Louis City Council exploited a loophole in a state law to legislate regulated prostitution. Under its “Social Evil Ordinance,” the St. Louis City Council went farther than any American city in adopting the French or continental system of “reglementation.” The city council turned over the administration of prostitution to the Board of Health, which had the power to issue licenses to both houses and women, as well as the power to appoint six physicians to check the women’s health. As implemented, the St. Louis regulatory system had three elements: required weekly medical inspections, isolation and treatment of infected prostitutes, and strict control over prostitutes’ residences and public behavior. Through licensing fees, the Board of Health paid for women’s medical bills and even bought a house to use as a special “social evil hospital.”

In theory, the reglementation of prostitution could have operated harmoniously within the boundary-forming discourse of civilized morality. As implemented by the St. Louis Board of Health, reglementation only sanitized the worst excesses of the segregated vice “sewer.” The fallen woman still remained an Other – albeit in a slightly less malignant form – against which virtuous civilized men and women could measure their morality. Although the architects of the St. Louis experiment may not have intended to transgress the boundary signifiers of the red-light district, an unintended effect of the Social Evil Ordinance was that it gave St. Louis prostitutes a new sense of respectability and legitimacy. This new-found sense of respectability emboldened the prostitutes to participate in public life outside the red-light district. The peak of visibility (and arguably, public acceptance) was reached in February, 1874, when most of the leading “ladies of the evening” appeared at a Mardi-Gras ball that included leading politicians, businessmen, young ladies and the chief of police. The increasing visibility of the prostitute in civil society heightened anxiety among much of the public who feared the disintegration of social boundaries.

181. MACKEY, supra note 20, at 213; Burnham, supra note 180, at 205.
182. MACKEY, supra note 20, at 213; Sneddeker, supra note 180, at 24-25.
183. See Burnham, supra note 180, at 206; Sneddeker, supra note 180, at 24-25.
184. MACKEY, supra note 2020, at 213; Burnham, supra note 180, at 206-09; Sneddeker, supra note 180, at 24-25.
185. Id. at 29.
186. Id.
187. Id.
a month of the Mardi Gras ball, the St. Louis experiment was over and the red-light district returned to its nebulous state of quasi-illegality.

The failures of both the abolitionists and the St. Louis Social Evil Ordinance are illustrative of the ambiguous position that the prostitute and the red-light district occupied in nineteenth-century society. Although illegal, the existence of the segregated vice district was justified as a "necessary evil." It provided a bulwark against those elements of society that could not be fully controlled — male passion, lustful women, and social parasites. But the red-light district also provided a measuring stick for evaluating female agency. Women who exercised their agency poorly, by following their passions or deceiving themselves, could be located physically within the red-light district. By contrast, the antithesis of the fallen woman, the respectable woman who made moral choices, lived outside its boundaries.

The liminal position of the red-light district in nineteenth-century American society is a reflection of its unsettled status within the Progressive mind. On the one hand, the continued existence of segregated vice districts was anxiety-producing. Within the red-light district was all the passion, vice, and corruption that civil society could not control. It represented a physical locus of anti-civilized morality. On the other hand, the segregated vice district was status-affirming. It provided an Other against which the ethos of civilized morality could define itself. All that the Other was, civilized morality was not — and vice versa. Moreover, the containment of the red-light district within a particularized physical space held out the possibility that the two worlds could remain separate. So long as the boundary-line was assiduously maintained, the world of civilized morality could remain free of contamination. Thus, between the extremes of regulation and abolitionism America's red-light districts enjoyed a precarious existence.

The event that shifted the discourse on the red-light district was the discovery of "white slavery." Beginning in the early 1900s, America awoke to a startling new threat: the "existence" of an international conspiracy to seduce, entrap and ultimately enslave (white) American girls into a life of prostitution. Historian Mark Thomas Connelly has described the indignation and concern over white slavery as "intense, widespread, and often hysterical." The period between 1909 and World War I was a particularly prodigious period for the production of white slave narratives with such graphic titles as Truthful and Chaste Account of the Hideous Trade of Buying and Selling Young Girls for Immoral Purposes, The House of Bondage, and Graphic Accounts of How White Slaves are Ensnared and a Full Exposition of the Methods and Schemes used to Lure

188. CONNELLY, supra note 164, at 115. Chapter six to Connelly's work documents the various media sources that contributed to the white slavery panic in the early twentieth century. See id. at 114-35.
White slavery even made it onto the new medium of film. These lurid and melodramatic narratives served to inflame the nation into what historians and contemporaries have called a "scare" or "hysteria."

Also fanning the flames of the white slavery hysteria were the vice commission reports. Between 1911 and 1916, over thirty-three cities issued reports on the social evil problem in their communities, including such little-known hot-beds of vice as Elmira, New York (1913) and Bay City, Michigan (1914). In general, the vice commission reports lacked the sensationalistic tone of the white slave narratives. What the vice commission reports lacked in hysteria, however, they more than made up for in reams of data and documentation detailing the vast enterprise of commercialized vice. Laid bare before the world were the wages women earned as prostitutes, the aggregate profits of vice districts and the personal histories of the young women. "One can sense, even in the controlled and neutral format, the psychological impact of this material."

Who was the white slave? The white slave narratives paint a portrait of the white slave as an innocent, pre-sexual young girl who had been tricked into a life of prostitution. As Connelly observed in his discussion of the white slave narratives, the description of the white slave's plight were shockingly uniform:

Typically, a chaste and comely native American country girl would forsake her idyllic country home and family for the promise of the

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189. See id. at 114-15 (noting that between 1909 and 1914 that at least twenty-two white slave narratives were published, and that by 1912 Reginald Wright Kauffman's best-selling white-slavery novel, The House of Bondage, was already in its fourteenth edition — only two years after its initial publication); DAVID J. LANGUM, CROSSING OVER THE LINE: LEGISLATING MORALITY AND THE MANN ACT 33 (1994).

190. CONNELLY, supra note 164, at 115; GILFOYLE, supra note 162, at 275; LANGUM, supra note 188, at 33-34.


192. For a list of these cities, see Mayer, The Regulation of Commercialized Vice, supra note 138, at 52. One historian has argued that the vice commission reports were "a manifestation of profound guilt and urban soul-searching, triggered by the realization of the vast and irreversible transformation that the triumph of the industrial city had imposed on traditional American folkways." CONNELLY, supra note 164, at 104.

193. Connelly argues that the vice commissions' reports on the staggering size of commercialized vice fed into Progressive fears about unnatural concentrations of power. See id. at 101-02.

194. See, e.g., REPORT ON THE SOCIAL EVIL CONDITIONS OF NEWARK, NEW JERSEY 156-70 (1913-14); THE VICE COMMISSION OF CHICAGO, THE SOCIAL EVIL IN CHICAGO, supra note 145145, at 69-116.

195. CONNELLY, supra note 164, at 101.

http://digitalcommons.law.yale.edu/yjlh/vol16/iss1/5
city. On the way, or shortly after her arrival, she would fall victim to one of the swarm of panders lying in wait for just such an innocent and unprotected sojourner. Using one of his vast variety of tricks—a promise of marriage, an offer to assist in securing lodging, or, if these were to no avail, the chloroformed cloth, the hypodermic needle, or the drugged drink—the insidious white slaver would brutally seduce the girl and install her in a brothel, where she became an enslaved prostitute. Within five years she would end up in potter’s filed, unless she had the good fortune to be “rescued” by a member of one of the dedicated group fighting white slavery.196

In comparison to her kindred sister, the fallen woman, the white slave lacked agency. The white slave was a pure victim. She was young and innocent. She did not choose a life of prostitution, it was imposed upon her by evil men. One historian has described her as a “romantic object of charity, compassion and sympathetic understanding.”197 And Edwin W. Sims, United States Attorney in Chicago during this period stated, “The characteristic which distinguishes the white slave traffic from immorality in general is that the women who are the victims of the traffic are unwillingly forced to live an immoral life.”198 A typology of the two women reveals their fundamental differences:

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<th>FALLEN WOMAN</th>
<th>WHITE SLAVE</th>
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<tr>
<td>DOMINANT ERA</td>
<td>19th Century</td>
<td>1900-1917</td>
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<tr>
<td>AUTONOMY</td>
<td>Possesses agency</td>
<td>No agency</td>
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<tr>
<td>AGE</td>
<td>Adult woman</td>
<td>Young girl</td>
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<tr>
<td>CHARACTERISTICS</td>
<td>Promiscuous, diseased</td>
<td>Innocent, pre-sexual</td>
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<tr>
<td>PUBLIC CONCEPTION</td>
<td>Common prostitute:</td>
<td>Victim</td>
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<td></td>
<td>immoral, blameworthy,</td>
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<td>lacking respectability</td>
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<td>PUBLIC RESPONSE</td>
<td>Condemnation</td>
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<td>LEGAL RESPONSE</td>
<td>Restriction of prostitution</td>
<td>Mann Act, Red Light</td>
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<td>to segregated districts</td>
<td>Abatement Laws</td>
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Most historians agree that the existence of white slavery was greatly overstated. There is some evidence of coerced prostitution during this period, but very little.199 Or at least not enough to justify the level of

196. Id. at 115-16.
hysteria. One historian has concluded that “[t]he belief in a widespread organization to enslave unwilling prostitutes was at least a gross exaggeration. Prostitution was, of course, a business, frequently involving organization at the local level, but there was no national or international organization.”

In order to explain the hysteria surrounding white slavery, historians have focused on how the prostitution “problem” became a flash point for a series of anxieties that permeated American society at the turn of the century.

One anxiety concerned the generational and familial stresses wrought by the migration of young daughters to urban centers. “The white slave narratives appeared at precisely the time when it was becoming clear that many young women had recently left, or were leaving, the small towns and rural areas for the cities.” Feeding this anxiety was a conception of the city as an illusive trap set carefully for young country virgins. As one Progressive era tract recommended, “The best and the surest way for parents of girls in the country to protect them from the clutches of the ‘white slaver’ is to keep them in the country.”

Along with this fear of urbanism, the vice commissions and other Progressive groups drew a connection between low wages and prostitution. In its findings of fact, the Illinois Senate Vice Committee placed the problem of prostitution clearly on the shoulders of industrial capitalism:

1. That poverty is the principal cause, direct and indirect, of prostitution.

2. That thousands of girls are driven into prostitution because of the sheer inability to keep body and soul together on the low wages received by them.

3. That thousands of girls are forced into industrial employment by the low wages received by their fathers . . .

200. Id. at 450.
201. CONNELLY, supra note 164, at 124. See also LANGUM, supra note 188, at 19 (“Women’s entry into prostitution, especially of innocent American farm girls, seemed to be caused by the city itself.”).
203. FIGHTING THE TRAFFIC IN YOUNG GIRLS, OR WAR ON THE WHITE SLAVE TRADE 70-71 (Ernest A. Bell ed., 1910).
204. See REPORT ON THE SOCIAL EVIL CONDITIONS OF NEWARK, NEW JERSEY, supra note 193, at 156-70; THE VICE COMMISSION OF CHICAGO, THE SOCIAL EVIL IN CHICAGO, supra note 145, at 69-116; Are Low Wages Responsible for Women’s Immorality? 54 CURRENT OPINION 402, 402 (1913); Economic Necessity, 26 VIGILANCE 1, 1 (1913); Wages and Immorality, 27 VIGILANCE 18, 18 (1913). See also Riegel, supra note 199, at 449-50 (describing the economic causation arguments of such Progressive era social reformers as Jane Addams and Emma Goldman).
Connelly has also suggested that this link between "wage slavery" and "white slavery" may have tapped into Progressive fears over "reification" - the necessity in capitalistic society to turn all relationships into relationships between things or commodities. 206

The white slavery scare also captured an increasing anxiety over the racial integrity of the nation. The white slave tracts placed the responsibility for white slavery on immigrants, 207 with eastern and southern European immigrants most often identified as the culprits. 208 Turn-of-the-century Americans feared that the nation, through its lax immigration policies, had unleashed a foreign menace on its innocent young girls.

But perhaps at the center of the white slavery hysteria was an anxiety over public expressions of female sexuality. Historian Kathy Peiss has argued that the massive entrance of young women into the industrial labor pool in the early twentieth century created a distinct working-class culture in which sexual expressiveness was an important dimension. 209 Young women found that dance halls, nickel theaters and amusement parks provided a zone in which they transgress norms of female sexuality and engage in more open heterosocial interactions. 210 The anxieties generated by these transformations in female sexuality are nicely encapsulated in this alarmist report from the Minneapolis Vice Commission:

One of the most disturbing phases of the present situation in Minneapolis, and an alarming social symptom, is the large number of young girls in the streets at night in the down-town sections, and in the business districts of the outlying sections.

The growing looseness of discipline in the home, a certain measure

(1916). See also REPORT OF THE SENATE VICE COMMITTEE, STATE OF ILLINOIS 669 (1916) (Chairman O'Hara: "Do you think low wages, Mr. Swift, has anything to with morality either directly or indirectly?").

206. CONNELLY, supra note 164, at 102.

207. Id. at 48-66; LANGUM, supra note 188, at 18-19; Feldman, supra note 202, at 194-97.

208. One prominent "authority" on the white-slavery panic, Clifford G. Roe, suggested that degenerate southern European cultures were responsible for creating white slavers: "Italians and Greeks have come into prominence in the pandering business . . . . Even the men who are well known dealers in human flesh stand high among their own people . . . . and some have held positions of honor and respect in their religious circles." CLIFFORD G. ROE, THE GREAT WAR ON WHITE SLAVERY 101 (1979). See also Feldman, supra note 202, at 194 (observing that southern Italians and Russian Jews were often connected with the international trade in white slaves).


210. KATHY PEISS, CHEAP AMUSEMENTS: WORKING WOMEN AND LEISURE IN TURN-OF-THE-CENTURY NEW YORK 88-162 (1986) (arguing that dance halls, amusement parks and nickel theaters were arenas in which new social-sexual relations developed).
of independence of the authority of parents, due to the fact that so many young girls are today wage earners, the enticements of the public dance hall and the cheap theater, the lure of the automobile, and finally the contagious love of diversion and excitement that seemingly possesses all elements of society in our cities today, are separately, or in combination, ascribed as the chief reason – Minneapolis Vice Commission.211

The hysteria over white slavery served to defuse the cognitive dissonance between the values of civilized morality and the increasingly open sexuality of America’s young women. It provided a facile explanation for why the daughters of virtuous parents were engaging in “deviant” behavior. And most importantly, the hysteria placed the blame for the enslavement of virtuous women on dark, powerful forces in turn-of-the-century America: foreigners, the corrupting power of urbanism, and wage slavery capitalism.

B. Legal Change and Societal Conceptions of the Prostitute

The reconceptualization of the prostitute as “victim” had profound implications for the red-light district. In contrast to the Otherness of the fallen woman, the white slavery victim shared a common solidarity with those outside of the red-light district. The fallen woman had stood apart from the world of civilized morality and was a creature against whom women could measure their own morality. The white slavery victim, by contrast, needed to be rescued from the vice district and returned to her moral state. The white slave’s victimhood allowed her to transgress the boundary line that separated the vice district from civil society and concomitantly permitted moral citizens to identify with women inside the red-light district. The white slave’s victimhood allowed her to transgress the boundary line that separated the vice district from civil society and concomitantly permitted moral citizens to identify with women inside the red-light district. These psychological movements across the boundary line had an unintended effect – they altered the way civilized society conceived of the segregated vice districts. Instead of defining the parameters of civilized society, the red-light district was now viewed as a pernicious jail in which the white slavery victims were “inmates.”212

Those who operated the “jail” – the white slave traders, pimps and brothel owners – were now the Others against which civilized society would define itself. It is not surprising that the two major pieces of vice reform

211. REPORT ON THE SOCIAL EVIL CONDITIONS OF NEWARK, NEW JERSEY, supra note 193, at 54.
212. See, e.g., Robert McMurdy, The Use of the Injunction to Destroy Commercialized Prostitution, 19 J. CRIM. L., CRIMINOLOGY & POLICE SCI. 513, 514 (1928-29) (“The inmates of the [bawdy]house, seven in number, were American girls, but seventeen years old, and the patrons exclusively Chinese.”); Our Red Light Injunction Law Constitutional, 19 REFORM BULL. 1, 1 (1928) (on file with Social Welfare History Archives, University of Minnesota, ASHA, Legal Reference Files, Box 2, Folder 15: Injunction and Abatement, 1925-53) (“The investigators were openly solicited for immoral purposes by the girl inmates as soon as they entered the house.”).
legislation to come out of the white slave era directly addressed these groups. The Mann Act, passed in 1910, criminalized the white slave trade by making it a federal crime to transport women across state lines for "immoral purposes." 213 The Red Light Abatement laws used public nuisance law to hold property owners accountable for the uses of their buildings. The discursive shift wrought by the white slavery panic signaled the end to the segregated vice district's precarious, quasi-legal position. By the mid-1910s, the continued existence of red-light districts had simply become anathema to many Americans – they were now viewed as the "source of the white slave traffic." 214 Whereas status in the era of the fallen woman had been defined by the boundary line that separated the segregated vice district from civilized society, in the era of the white slave status came to be defined in the struggle to destroy the segregated district. 215

213. LANGUM, supra note 188, at 3.
214. McMurdy, supra note 212, at 516.
215. That a relationship exists between legal change and society’s discourse on the prostitute is supported by a subsequent discursive shift in the social construction of the prostitute that occurred when the United States entered World War I. As with the discursive shift from the fallen woman to the white slave, this discursive shift ushered in another wave of anti-prostitution legislation. As Allan M. Brandt has documented, the federal government became concerned that venereal disease would hamper the effectiveness of the America’s fighting forces. Recent experiences in Texas, where the U.S. Army had mobilized 10,000 soldiers to rebuff border incursions by Francisco "Poncho" Villa, had revealed the potential threat posed by prostitution and venereal disease. With soldiers flocking to the red-light districts of San Antonio, Douglas and El Paso, infection rates among soldiers approached thirty percent. In some camps, as many as 300 soldiers a day applied for chemical prophylaxis treatment to ward off venereal diseases. The response to these concerns was to wage a war against venereal disease, and implicitly, the prostitute. Eleven days after America’s entry into the war, the military created the Commission on Training Camp Activities (CTCA). The CTCA’s Social Hygiene Instruction Division, under the direction of the ASHA, began an "educational" campaign that both promoted sexual abstinence and dramatized the dangers of contact with prostitutes. The prostitute was now reconceptualized as a contagion that threatened the security of the nation. The CTCA pamphlet, Keeping Fit to Fight, warned the troops: "WOMEN WHO SOLICIT SOLDIERS FOR IMMORAL PURPOSES ARE USUALLY DISEASE SPREADERS AND FRIENDS OF THE ENEMY." The pamphlet also included this explicit admonition: "Any man who joins his body with the body of a prostitute or loose girl runs the risk of catching one of these terrible diseases." BRANDT, supra note 191, at 54-61. It was not long before the CTCA used its broad powers to incarcerate the "loose" women who malingered around military bases. The CTCA ultimately imprisoned as many as 30,000 alleged prostitutes without benefit of trial, legal representation, or due process. CONNELLY, supra note 164, at 143. See also John G. Buchanan, War Legislation Against Alcoholic Liquor and Prostitution, 9 J. CRIM. L., CRIMINOLOGY & POLICE SCI. 520, 528 (1918-19) (detailing expenditures to aid states in the establishment of detention camps for the women).

This reconceptualization of the prostitute as a diseased Other provoked a surge of venereal disease legislation throughout the United States. According to George E. Worthington of the ASHA, "The years 1918 and 1919 were banner years for venereal disease legislation." During these two years, the number of states requiring the reporting of venereal disease rose from seventeen to forty-three. Forty-four states required compulsory examination of suspected persons and quarantine of those deemed to be a menace to public health. George E. Worthington, Developments in Social Hygiene Legislation from 1917 to September 1, 1920, 6 J. SOC. HYGIENE 557, 565 (1920).

A fourth major discourse of the prostitute emerged in the 1970s. This discourse embraced a vision of the prostitute as a "sex worker" and argued for the decriminalization of most prostitution laws. See, e.g., Barbara Milman, New Rules for the Oldest Profession. Should We Change our Prostitution Laws? 3 HARV. WOMEN'S L.J. 1 (1980). The sex worker discourse represents a de-moralized version of the
C. Inadequacies of the Common Law

Although the white slave hysteria solidified an emerging consensus that the red-light district had to be eliminated, accomplishing that task proved quite difficult under the existing common law regime. Police graft and political corruption, combined with a sincere fear that elimination of the segregated vice districts would unleash crime on residential areas, meant that abolitionists – for a time at least – did not have the support of public officials in shutting down the red-light districts. Criminal law, even if enforced, often proved inadequate since arresting the prostitute only provided a temporary solution, and it did nothing to shut down the bawdyhouses that were at the heart of the problem.

As for public nuisance actions against bawdyhouses, the case of *Otis v. Bireley* illustrates how difficult it was to bring a public nuisance action

<table>
<thead>
<tr>
<th>Dominant Era</th>
<th>Fallen Woman</th>
<th>White Slave</th>
<th>Disease Spreader</th>
<th>Sex Worker</th>
</tr>
</thead>
<tbody>
<tr>
<td>19th Century</td>
<td>1900-1917</td>
<td>1917-1925</td>
<td>Irrelevant</td>
<td>Possesses agency</td>
</tr>
<tr>
<td>Autonomy</td>
<td>Possesses agency</td>
<td>No agency</td>
<td>Irrelevant</td>
<td>Possesses agency</td>
</tr>
<tr>
<td>Age</td>
<td>Adult woman</td>
<td>Young girl</td>
<td>Irrelevant</td>
<td>Adult Woman</td>
</tr>
<tr>
<td>Characteristics</td>
<td>Promiscuous, diseased</td>
<td>Innocent, pre-sexual</td>
<td>Clever, feeble-minded</td>
<td>Pragmatic</td>
</tr>
<tr>
<td>Public Conception</td>
<td>Common prostitute: immoral, blameworthy, lacking respectability</td>
<td>Victim</td>
<td>Threat to national security</td>
<td>Independent Contractor</td>
</tr>
<tr>
<td>Public Response</td>
<td>Condemnation</td>
<td>Rescue</td>
<td>Incarcerate, Quarantine</td>
<td>Legalize profession</td>
</tr>
<tr>
<td>Legal Response</td>
<td>Restriction of prostitution to segregated districts</td>
<td>Mann Act, Red Light Abatement Laws</td>
<td>Venereal Disease laws</td>
<td>Relaxation of criminal laws</td>
</tr>
</tbody>
</table>

This typology of the discursive shifts in the social construction of the prostitute should not be construed as suggesting that one discourse completely displaced another. Rather, each discursive turn added another layer to the increasingly complex (and confused) conception of the prostitute. Even in the white slave era, vestiges of the fallen woman discourse continued to percolate throughout Progressive literature. Consider, for example, the juxtaposition of these two discourses in the descriptions of prostitutes made by a vice investigator for the City of Newark: “Pervert from choice,” “Easily Led,” “Low ideas, admits all forms of perversion,” “Would be a good woman under different circumstances,” “Vain, hardened, ignorant,” “Foolish and easily led, ignorant,” “Bold, just starting to be a professional.” REPORT ON THE SOCIAL EVIL CONDITIONS OF NEWARK, NEW JERSEY, supra note 193, at 166-67.

In spite of this over-layering effect, in certain periods, social consensus solidified around a dominant (as opposed to a solitary) discourse. And it is during these periods of social consensus that laws concerning prostitution have undergone the greatest transformations. The discourse of the white slavery panic laid the foundation for the enactment of the Red Light Abatement laws and the Mann Act. Likewise, dramatic developments in venereal disease law were connected to the WWI discourse of the prostitute as a “disease spreader.” By contrast, in periods where society has not embraced a dominant conception of the prostitute, transformations in the law of prostitution have been more diffuse and sporadic.

http://digitalcommons.law.yale.edu/yjlh/vol16/iss1/5
under the common law of nuisance. In 1911, a certain Arthur Burrage Farwell – a veteran of battles to enjoin saloons – conceived of the idea of using the writ of injunction as a means of closing Chicago’s principal red-light district.216 With the help of attorney Robert McMurdy and the Chicago Law and Order League,217 Farwell planned his attack against the vice district. Under Illinois law at the time, a nuisance action against a bawdyhouse could be reached only by the proof of sights and sounds.218 In short, the complainant would have to show special injury. Through connections not discussed in the sources, Farwell convinced the owner of the Mid-night Mission, Philo A. Otis, to bring a public nuisance suit against a neighboring bawdyhouse. Conveniently, only six feet separated the two buildings,219 which made it comparatively easy for Otis and his tenants to allege special injury in their Complaint’s Brief:

The two buildings have several of their windows directly opposite each other, so that when the shades in the windows are raised the view from the rooms of the defendant’s building is very plain, especially so at night when there are lights in the rooms. The actions of the prostitute girls in their immoral relations with lewd men are in obtrusively plain sight and the nuisance created by the conditions is unavoidable if complainant’s tenants look out their windows. During the heated season when the windows are open for comfort, the lewd and obscene talk of the men and girls in the defendant’s building is very plainly heard and is very highly objectionable to complainant’s tenants. Complainant’s premises are also damaged in their lawful use by the drunken, boisterous and riotous conduct of the occupants of the premises of the defendants, and by the attempt of dissolute men to enter the premises of the complainant, thinking it to be a house of like character with defendants’ and others in the neighborhood.220

In spite of weeks of careful preparation, the trial before the Illinois Circuit Court proved anti-climactic. The defendants, Shirley L. Bireley and her lessee, Cora Abbott, failed to appear in court, and the chancellor granted a temporary injunction.221

The success against the Bireley property was bittersweet. As the

216. McMurdy, supra note 212, at 514.
218. McMurdy, supra note 212, at 514.
220. Id. at 2; Bill of Complaint at 1, Otis v. Bireley (Ill. Cir. Ct. 1912) (both on file with Social Welfare History Archives, University of Minnesota, ASHA, Legal Reference Files, Box 3, Folder 2: Injunction and Abatement, Cases, 1912-17). Seven “formidable” affidavits were also filed against the defendants. A New Weapon Against Vice, 28 SURVEY 630, 630 (1912).
221. McMurdy, supra note 212, at 514-15.
attorney for the complainant acknowledged, the special injury requirement would make it difficult to repeat the successes of this case. "Probably no other house in the district could have been closed by this means, as evidence of sights and sounds could hardly have been obtained elsewhere. The remedy, therefore, was limited."222 Unless opponents of the red-light district began to move into the district for the express purpose of bringing public nuisance complaints – a proposal that I have never run across – the common law posed formidable obstacles. In theory, public officials should have been bringing public nuisance actions against the bawdyhouses. These houses were per se public nuisances. But graft and concerns about spreading crime to civil society led public officials to resist shutting down the bawdyhouses. Similarly, in theory, individual citizens could bring special injury actions, but few – if any – abolitionists lived in the red-light district, making it virtually impossible to satisfy the common law requirements. The Red Light Abatement law provided a way to escape this dilemma. Similar to the Liquor Abatement laws, the Red Light Abatement laws expanded the concept of "public official" to include every citizen within a statutorily specified jurisdiction. Thus, if public officers would not act, then citizens in their public capacity would. Once again, the common law distinction between public and private collapsed as private individuals assumed the power to enforce public rights and community norms.

D. Why Iowa?

In 1909, an “obscure legislator” 223 named John B. Hammond, with the assistance of the Attorney General, George Cosson,224 secured passage of the first Red Light Abatement law.225 This act became the model for

222. McMurdy, supra note 212212, at 515.

223. Id. at 516. Hammond may have been obscure at the time of the passage of Iowa’s Red Light Abatement law, but he went on to greater things. In 1928 he was Legislative Superintendent of the National Civic League in Washington. Our Red Light Injunction Law Constitutional, supra note 212, at 2.


225. 1909 Iowa Acts ch. 214. Texas had passed a type of Injunction and Abatement law in 1907, but it was considered to have been “somewhat imperfectly incorporated.” WILLOUGHBY CYRUS WATERMAN, PROSTITUTION AND ITS REPRESSION IN NEW YORK CITY, 1900-1931, at 23 n.2 (1932). The continued survival of Texas’ red-light districts up to World War I would seem to support Waterman’s assertion. See Campbell v. Peacock, No. 5521, at I (Tex. Civ. App. 1915) (on file with Social Welfare History Archives, University of Minnesota, Legal Reference Files, Box 3, Folder 2: Injunction and Abatement, Cases, 1912-17) (alleging that the city officials of San Antonio have acquiesced and consented to an informal red-light district); Jane Adams, The Illegal Houses in Our Midst, BULL. No. 2 (n.d.) (on file with Social Welfare History Archives, University of Minnesota, - ASHA, Legal Reference Files, Box 2, Folder 14: Injunction and Abatement, 1911-24) (citing the continued existence of a segregated vice district in San Antonio); Humphrey, PROSTITUTION IN TEXAS: FROM THE 1830S TO THE 1960S, supra note 10, at 31 (noting that the red-light districts of Fort Worth, Houston, El Paso, Galveston, San Antonio and Waco were not shut down until 1917); Humphrey,
subsequent Red Light Abatement laws throughout the United States,\footnote{Prostitution and Public Policy in Austin, Texas, 1870-1915, supra note 179, at 513 (observing that prostitutes were not expelled from Austin's segregated vice district until 1913).} and it was Iowa's United States Senator William S. Kenyon who pushed through Congress the District of Columbia's Red Light Abatement law.\footnote{See, e.g., State ex rel. English v. Fanning, 147 N.W. 215, 217 (Neb. 1914) (noting that procedural provisions of Nebraska's Red Light Abatement statute were taken from the Iowa law); Respondent's Brief at 19, State ex rel. Zabel v. Gregif, 159 N.W. 560 (Wis. 1916) (on file with Social Welfare History Archives, University of Minnesota, Legal Reference Files, Box 3, Folder 2: Injunction and Abatement, Cases, 1912-17) ("The Wisconsin law was copied from the Iowa, Nebraska and Minnesota statutes"); Franklin Hichborn, California's Fight for a Red Light Abatement Law, 1 J. SOC. HYGIENE 6, 7 (1915) ("A bill based upon the Iowa Abatement Law was introduced in the Assembly."); H.S. Hollingsworth, The Iowa Injunction Law, in PROCEEDINGS OF THE NATIONAL CONFERENCE OF CHARITIES AND CORRECTION 236 (1914) ("So signal has been the victory of the Iowa Injunction law that many other states have taken up the issue and patterned bills after it."); Elmer A. Wilcox, Legislation in Iowa Compared with the Law Proposed for the Suppression of Vice in Illinois, 3 J. AM. INST. CRIM. L. & CRIMINOLOGY 926, 926-27 (1913) (noting similarities between Iowa and Illinois statutes, with the exception of the omission of the $300 tax from the Illinois bill); Our Red Light Injunction Law Constitutional, supra note 212, at 2 (asserting that the Iowa Red Light Abatement law has served as the model for forty other states); Law Note, Résumé of Legislation Upon Matters Relating to Social Hygiene Considered by the Various States During 1914, 1 J. SOC. HYGIENE 93, 93-103 (1915) (revealing that the states of Kentucky, Maryland, South Carolina, Virginia, New York and Massachusetts have based their Red Light Abatement laws on the Iowa Injunction and Abatement law). For a counter-argument that Minnesota's Red Light Abatement law provided the model, see infra note 256.} Similar to the state's Liquor Abatement laws,\footnote{Hollingsworth, supra note 226, at 236.} Iowa's Red Light Abatement law declared brothels and their contents to be public nuisances. The statute gave any citizen of any Iowa county, any county attorney, and any society, association or body incorporated under Iowa law, the right to file a petition in a court of equity for a temporary injunction restraining the owner, operator and agent of the brothel from further permitting or maintaining its operation. If the evidence established that the property was being used as a place of prostitution, then a permanent injunction was granted for up to one year and a tax was assessed against the building.

Several factors likely contributed to Iowa being the site of the first Red Light Abatement law. First, it was much more likely that the first Red Light Abatement law would emerge from a state that had already enacted a Liquor Abatement law. Second, Iowa had an elective judiciary. Third, after *Littleton v. Fritz*, there were virtually no constitutional obstacles to the enactment of the Red Light Abatement law in Iowa. In fact, the only challenge to the law was based on a procedural technicality: The Speaker of the House of Representatives never signed the bill.\footnote{Brief for Appellant at 2, State ex rel. Hammond v. Lynch, 151 N.W. 81 (Iowa 1915) (on file with Social Welfare History Archives, University of Minnesota, ASHA, Legal Reference Files, Box 3, Folder 2: Injunction and Abatement, Cases, 1912-17). In Hammond v. Lynch, the Iowa Supreme Court declared that the district of Columbia's Red Light Abatement law was constitutional. See also Ascher & Wolf, supra note 100, at 605 (asserting that the Red Light Abatement laws were "Modelled upon the liquor laws which originated in Iowa. . . .")} And lastly, the
Midwest – specifically Chicago – was at the center of the white slavery hysteria.230 Even before the publication of THE SOCIAL EVIL IN CHICAGO, several Chicago authors were the self-declared and widely recognized “authorities” on the national anti-white slavery campaign.231 Although it is difficult to speculate on the impact of proximity, it seems significant that the first three states to adopt Red Light Abatement states – Iowa (1909), Nebraska (1911), and North Dakota (1911) – were all located in the Midwest.232 It is also worth noting that these three states were less urban and had smaller (and newer) cities. Adoption of the Red Light Abatement laws may have been more palatable in these states in comparison with states with more deeply entrenched red light districts such as Illinois, Louisiana and California.

III. THE WAR AT HOME:

SOCIAL REFORM GROUPS & THE RED LIGHT ABATEMENT LAWS

_Baltimore, December 16-22, 1921_233

It was the week before Christmas and both David Oppenheim234 and

struck down the law as unconstitutionally ratified, but it was quickly re-enacted. This confusion over the constitutionality of the Iowa law may partially explain why the ASHA relied upon Minnesota's Red Light Abatement law for its model. Bascom Johnson, _The Injunction and Abatement Law, supra_ note 159, at 233-34. Another source, however, indicates that Minnesota's version of the Red Light Abatement law, codified as 1913 Minn. Laws, c. 562 § 1, was considered superior to the original Iowa model. Hollingsworth, _supra_ note 226, at 236-37 (“April 26, 1913, the Minnesota Red Light Injunction and Abatement Law was passed by the legislature. While modeled for the major part after Iowa's law, it has some improvements which commend it to other states. Social purity leaders highly endorse it. Suffice to say that Iowa will make the necessary amendments to the law as it now is, and that other states yet unorganized in the crusade against segregated and commercialized vice will adopt a perfect measure.”).

230. CONNELLY, _supra_ note 164, at 114 (noting that Chicago and New York were the epicenters of white slavery literature); Barnes, _supra_ note 144, at 145 (“It was during the summer of 1907 that Chicago was startled out of her usual attitude of indifference toward commercialized vice by a series of shocking revelations, which indicated that our city was the center of a well organized traffic in women, a very real white slavery market.”); see also LANGUM, _supra_ note 188, at 27; Lubove, _supra_ note 197, at 312.

231. LANGUM, _supra_ note 188, at 27; CONNELLY, _supra_ note 164, at 114-35.

232. Both Nebraska and North Dakota also had elective judiciaries. Hall, _supra_ note 116, at 337-38. The first state election of justices to six year terms on the North Dakota Supreme Court occurred in 1889. _The Supreme Court of North Dakota, available at http://www.court.state.nd.us/History (n.d.)._


234. During World War I, the U.S. Government set up the United States Interdepartmental Social Hygiene Board (USISHB) to assist the military in its battle against venereal disease, and by relation, prostitution. The relationship between the USISHB and private Progressive social reform organizations was quite close. In 1920 David Oppenheim had been assigned by the ASHA to investigate vice conditions in Baltimore. Shortly thereafter, he described himself in an affidavit as an employee of the USISHB. Furthermore, although Oppenheim and Nops both worked for the USISHB, the actual lawsuits filed against property owners were submitted by Alan Johnstone, an “Officer of the
Lawrence Nops were away from home. Oppenheim had been in Baltimore for some time. In May, 1920, he had left his home in Rockaway Beach, Long Island. In December, 1921, he had been joined by Nops of Washington D.C. Now both men found themselves standing amidst the noise, heat and smoke of the Folly Cabaret on 731-733 East Baltimore Street. They were discussing the business of the Cabaret with its owner J. H. Nickel and his agent, Charles Sachs. Nickel and Sachs were telling the men that the Cabaret was more than a burlesque theater—it also had a hotel for lodging guests. During the course of their conversations, some of the women in the cabaret came up to Oppenheim and Nops and proposed to take the two men up to the hotel rooms for sex. There was Lucille, a 25-year old peroxide blonde with brown eyes, sharp nose and white teeth. And Ruth, a 26-year old brunette who wore a large black hat and a satin dress with white lace bodice and had a scar on the index finger of her right hand. Some of the women gave the men cards with their phone numbers: "Lorretta – Madison 1419-J"; "Francis – Homewood 380-J."

Sometimes the two men would watch the burlesque shows. There was erotic dancing with women shaking their busts and moving their stomachs and hips in the imitation of sexual intercourse. There was a seduction show where a man induced a woman to drink liquor and then took advantage of her inebriated state by disrobing her. They watched her standing there in "slippers and a thin flesh colored knitted garment that clung to her figure as to imitate a nude woman the breast and crotch of said woman and every line of her figure being visible." The shows lasted for about 2 ½ hours, and all the while women solicited the men for prostitution.

Maryland Social Hygiene Society, Inc. "Proceedings in Injunction and Abatement, 5 MD. SOC. HYGIENE SOC’Y BULL. 1, 3-32 (1922).

235. This description of the burlesque shows comes from a February 1, 1922, visit of David Oppenheim to the Folly Cabaret. See Affidavit of David Oppenheim, supra note 233. One can reasonably assume that these types of shows also would have occurred during Oppenheim’s December visits to the Folly Cabaret. It is important to note that Baltimore’s segregated red-light districts were already closed by the time that Oppenheim and Nops began their investigations. According to a report published by the Society for the Suppression of Vice of Baltimore City, the last remaining houses of the red-light districts were closed on September 12, 1915. THE ABOLITION OF THE RED-LIGHT DISTRICTS IN BALTIMORE 9 (1916) (ASHA, Legal Reference Files, Box 2, Folder 14: Injunction and Abatement, 1911-24, Social Welfare History Archives, University of Minnesota). See also Abraham Flexner, Next Steps in Dealing with Prostitution, 1 J. SOC. HYGIENE 529, 533-34 (1915); Closing a Vice District by Strangulation, 35 SURVEY 229, 229 (1915); Note and Comment, The Abolition of the Red Light Districts in Baltimore, 2 J. SOC. HYGIENE 282, 282 (1916). What Oppenheim and Nops were documenting was a second-wave of prostitution following the official closure of the red-light districts. With the elimination of the bawdyhouse as a site of commercialized sex, the locus of prostitution had switched to dual-use structures such as cabarets, hotels and apartments. The Committee of Fifteen in Chicago observed a similar trend. In its 1925 report, the Committee was fixated on the “cabaret situation.” See ANNUAL REPORT OF THE COMMITTEE OF FIFTEEN 8-9 (1925) ("During the last six months the cabaret situation in Chicago has become more or less alarming. Certain information came to me regarding the immorality in many of the cabarets and I directed a hasty survey which revealed the conditions to be worse than I had anticipated."). By 1929, the Committee’s use of the Injunction and Abatement law was focused primarily on apartments and hotels. See [ANNUAL REPORT OF] THE COMMITTEE OF FIFTEEN 1929 ("Of these 342 resorts closed by
On their last night out, Elizabeth Graff came up to the men and asked them to come to her apartment. They had remembered Elizabeth from the night before when she had solicited them at one in the morning outside the Folly Cabaret. Although they had ignored her entreaties that time, tonight they took the two mile trip with her to her apartment at 1070 West Fayette Street. When they arrived, Elsie Wilson greeted them. Wilson told the men that she owned the building and operated it as a rooming-house for prostitutes. She also informed the men that it would cost them $5 per room and $15 per woman to have sex with Elizabeth and her sister, Alberta.

Most historical accounts of the Progressive struggle against prostitution tend to give scant attention to the Red Light Abatement laws. This comparative silence on the subject is somewhat curious since Progressive social reformers at the time considered it their “most effective weapon” in the war against prostitution. In a survey of city attorneys and librarians in cities of over 30,000 people, over half the respondents listed the Red Light Abatement laws as the most effective measure in the repression of vice. And in 1952, Bascom Johnson considered the laws important enough to rouse him out of retirement, at which point he reminded American society of their effectiveness: “In writing this Inj. & Abat. article it has occurred to me that it would be interesting and important to stress the influence of the existence of such laws in eliminating and keeping closed the Red Light Dists.” In part, this lack of interest in the history of the Red Light Abatement laws may stem from the perception that there is nothing compelling about the story: the laws were passed, they worked, and the red-light districts disappeared. Even Thomas C. Mackey, who wrote the only sustained historical work on the subject, provides only a glimpse of the rich story of the Red Light Abatement laws in his case study of the Houston red-light district. For the most part,
Mackey's work is focused on a legal analysis of the Red Light Abatement laws. The narrow orientation of Mackey's work is the result of two factors: As the first scholarly work on the subject, it was probably necessary that Mackey address the fundamental legal issues presented by the Red Light Abatement laws— their constitutionality and their relationship to existing doctrines such as public nuisance law and vagrancy. Nevertheless, it is important to note that Mackey did not address the connection between the Red Light Abatement laws and the Liquor Abatement laws or the challenge that these laws posed to the classical legal public-private distinction. A second factor affecting Mackey's work is his heavy reliance on legal treatises and case law. Although these sources are singularly important for understanding developments within juristic circles, they offer a relatively thin picture of how these laws interacted with society.

The files of the American Social Hygiene Association provide a richer understanding of the Red Light Abatement laws and their place in American society. These sources, combined with the vice commission reports and the Annual Reports of the Committee of Fifteen, permit a more detailed assessment of the role that Progressive era reform groups played in the promotion, legal defense and enforcement of these laws. The sources also provide an important insight into Progressive era conceptions of property relations.

In spite of the importance of these primary sources to the study of the Red Light Abatement laws, they suffer from several limitations. First, they are not neutral sources. Groups such as the American Social Hygiene Association and the Committee of Fifteen were militantly opposed the red-light districts. Consequently, both their perception of public support for their cause and their depictions of opposing vice interests are probably not representative of a typical person during this period. Similarly, reliance on these sources distorts the debates between the supporters and opponents of the Red Light Abatement laws. For the most part, the "vice interests" are demonized in these sources. Without a balanced set of sources, it is difficult to present an accurate rendering of the opposition and their perspective on the new laws. Second, it is important to remember that reform groups likely engaged in a bit of hyperbole. As the Annual Reports of the Committee of Fifteen illustrate, these groups actively solicited contributions. Given this financial incentive, it is reasonable to assume that documents meant for public consumption overstated the groups' successes and downplayed their failures. And lastly, these sources present a gendered picture of the war against prostitution in the first quarter of the twentieth century. In the late nineteenth century, women's organizations such as the Women's Christian Temperance Union and the

241. See, e.g, ANNUAL REPORT OF THE COMMITTEE OF FIFTEEN 17 (1917) (featuring two pledge cards at the end of the report).
Young Women’s Christian Association were the focal point of the Purity Crusade against red-light districts.\textsuperscript{242} Over the course of the Progressive period, however, these groups were taken over by male leaders.\textsuperscript{243} As a result, a project based upon sources from the American Social Hygiene Association and the Committee of Fifteen presents a male-centered perspective of the war against prostitution.

Despite these source limitations, the two Progressive social reform organizations that are the principal focus of this study present a complementary picture of anti-prostitution efforts during the Progressive era. By analyzing both a local and a national vice reform group, it is possible to perceive the full spectrum of anti-prostitution work during this period—from investigating alleged bawdyhouses to advising state officials on which form of the Red Light Abatement law to adopt.

The Committee of Fifteen in Chicago was incorporated on May 3, 1911 to follow up on the work of the Chicago Vice Commission, the body that had written \textit{The Social Evil in Chicago}.\textsuperscript{244} The focus of the Committee of Fifteen’s work was almost solely local. As discussed below, the Committee waged a long and protracted struggle against both Chicago’s red-light districts and the city’s political machine. By contrast, the American Social Hygiene Association was a national organization based in New York City. Incorporated in 1914, the ASHA resulted from the merger of a leading purity group, the American Vigilance Association, with a leading social hygiene group.\textsuperscript{245} Funded in part by John D. Rockefeller,\textsuperscript{246} the ASHA consisted of five administrative divisions: Public Information and Extension, Educational Measures, Family Relations, Legal and Protective Measures, and Medical Measures.\textsuperscript{247} It was from the Legal and Protective Measures division that the ASHA engaged in a nation-wide effort to monitor, promote and defend the Red Light Abatement laws.

\textbf{A. Ground War in Chicago: The Story of the Committee of Fifteen}

In its charter, the Committee of Fifteen stated that its purpose was “to

\begin{itemize}
\item \textsuperscript{242} LANGUM, \textit{supra} note 188, at 23-24. See generally PIVAR, \textit{supra} note 174.
\item \textsuperscript{243} See, e.g., \textit{ANNUAL REPORT OF THE COMMITTEE OF FIFTEEN I} (1913). All four officers of the Committee of Fifteen were male and only three out of fifty directors were female.
\item \textsuperscript{244} Barnes, \textit{supra} note 144, at 146; \textit{Illinois’ Abatement Law Held Constitutional}, \textit{supra} note 237, at 173.
\item \textsuperscript{245} LANGUM, \textit{supra} note 188, at 23.
\item \textsuperscript{246} Rockefeller was deeply involved in the war against prostitution. He was a major financial contributor to the Committee of Fourteen of New York, the New York Social Hygiene Society, the Bureau of Social Hygiene, and the American Social Hygiene Association. He also served as foreman on a grand jury investigating white slavery in New York City. See GILFOYLE, \textit{supra} note 162, at 305; \textit{DAVID J. PIVAR, WOMEN, PROSTITUTION, AND THE “AMERICAN PLAN,”} 1900-1930, at 119-38 (2002); \textit{WATERMAN, \textit{supra} note 225, at 84-90; The Bureau of Social Hygiene}, 103 \textit{OUTLOOK} 287, 287 (1913).
\item \textsuperscript{247} \textit{WATERMAN, \textit{supra} note 225, at 87.}
\end{itemize}
aid the public authorities in the enforcement of all laws against pandering and to take measures calculated to suppress the 'white slave' traffic.”

During its first three years in existence, the Committee sought to prod city officials into action. For example, in the summer of 1913, the Committee collected evidence of lax police enforcement against five bawdyhouses that were known to harbor young girls. Confronted with a police captain who said he was powerless to close them, the Committee sent a letter to Mayor Harrison demanding an explanation. Without waiting for any further proof, the Mayor ordered the Chief of Police to close the five houses.

It soon became clear, however, that the Committee of Fifteen was actually waging war against the city’s public officials. With each report that the Committee sent to the Mayor listing known bawdyhouses, the implicit allegation of police corruption became stronger and stronger. The refusal of the Mayor to hold the heads of the Police Department accountable for these lapses signaled to the Committee that the Mayor was in the grip of the commercialized vice interests. In the fall of 1913, the Committee sent a widely-published “war note” to the Mayor demanding to know who controlled the city: “The people of Chicago have a right to know whether they are really under the rule of an invisible government which controls the city in the interests of commercialized vice, and whether you, their chief magistrate, intend to take proper action in regard to such matters.” During this time, the Committee put further pressure on the Mayor by submitting more lists of disreputable houses with the knowledge that these lists would be published in the press. The political power struggle between the Mayor, the police and the Committee of Fifteen was never entirely resolved. Instead, the Committee turned to enactment of the Red Light Abatement law as a means of circumventing these recalcitrant public officials.

The struggle to pass Illinois’ Red Light Abatement law took four years. It was only in the last year of the struggle, 1915, that the Committee of Fifteen threw its full weight behind the measure:

During several sessions of the Legislature, attempts were made to

248. Barnes, supra note 144, at 146.
249. ANNUAL REPORT OF THE COMMITTEE OF FIFTEEN 2-3 (1913).
250. Barnes, supra note 144, at 153.
251. Id. at 154.
252. Id. at 152, 154-55 (“The publicity campaign actually seems to have met with some success. In response to seeing their names and properties in the paper “one of the most reputable of the real estate agencies cancelled 38 leases within a few days; another twenty-four, and hundreds, of whom the Committee heard indirectly, took similar action. Several of the large trust companies, handling real estate investments, employed a strong staff of special detectives to investigate their property in different parts of the city, and before the year was up it became almost impossible for a person of questionable character to rent a house or apartment belonging to a reputable owner.”).
253. McMurdy, supra note 212, at 516.
secure the passage of an Injunction and Abatement bill, but without success. A year ago last winter, the Committee decided to take a strong stand in advocacy of the measure and your Superintendent [Samuel P. Thrasher]\(^{254}\) was authorized to do his utmost endeavor to secure the passage of that bill.\(^{255}\)

Not only was the Committee of Fifteen credited with securing the enactment of Illinois’ Red Light Abatement law,\(^{256}\) but it was among the first groups to use it. As a result, Samuel P. Thrasher was the named appellee in the only challenge to the law’s constitutionality.\(^{257}\)

The Annual Reports of the Committee of Fifteen provide a detailed description of how one prominent vice reform organization used the power of the Red Light Abatement law to win the war against segregated vice districts. In its 1916 report, the Committee of Fifteen explicated how the passage of the Injunction and Abatement law had changed their anti-prostitution strategy. Prior to the law’s effective date on July 1, 1915, the Committee of Fifteen had relied upon a shaming policy. The Committee would publish the names of the owners of properties used for immoral purposes in the hopes of either shaming the owners into taking control of the properties or provoking the city officials into action.\(^{258}\) The policy had some success, but it could do little against recalcitrant property owners if city officials refused to act.\(^{259}\) The Injunction and Abatement law changed that dynamic. After July 1, 1915, if owners refused to take measures to end prostitution on their properties, the Committee of Fifteen could file a bill with the court of equity to enjoin the property from further use as a place of prostitution. Not only did the property owner face loss of use of the property for up to one year, but he or she could be fined or taxed, and the contents of the building could be sold to pay court and policing costs.

According to the Annual Reports, an action against a property could involve as many as six steps. An action began with a visit to the property by one of the Committee’s investigators. If the investigator found indications that the property was being used for prostitution, a more

\(^{254}\) Prior to becoming Superintendent of the Committee of Fifteen, Thrasher had been Secretary and General Manager of the Law and Order League of Connecticut for eleven years. He was also the author of the State Police Law of Connecticut. See \textit{ANNUAL REPORT OF THE COMMITTEE OF FIFTEEN} 5 (1913).

\(^{255}\) \textit{ANNUAL REPORT OF THE COMMITTEE OF FIFTEEN} 4 (1917).

\(^{256}\) Barnes, supra note 144, at 155; \textit{Illinois’ Abatement Law Held Constitutional, supra note 237, at 173; The Injunction and Abatement Law Held Valid by the Supreme Court}, 1 (n.d.) (ASHA, Legal and Protective Measures, SW 45, Box 3, Folder 3: Injunction and Abatement, Court Cases, 1918-22, Social Welfare History Archives, University of Minnesota).


\(^{258}\) \textit{ANNUAL REPORT OF THE COMMITTEE OF FIFTEEN} 3 (1916).

\(^{259}\) The Committee of Fifteen stated that “hundreds of houses of prostitution were closed as a result of [the shaming] policy.” \textit{ANNUAL REPORT OF THE COMMITTEE OF FIFTEEN} 3 (1916).
thorough evidentiary investigation would ensue. In some cases, investigators would seek the permission of neighboring apartment dwellers to spy on the activities of reported places of prostitution. For those properties for which there was corroborating evidence of prostitution, an informal notice was sent to the owner informing her that the Committee possessed reports showing that the property was a site of prostitution activity. The policy of informal notification emerged from a 1915 unanimous decision that property owners should have fair notice before any legal action was taken. More than fairness, however, motivated the Committee members. The Committee recognized that it would be a waste of resources – given the laborious and expensive evidentiary record that would have to be established to prevail in an injunction proceeding – to commence with a legal action without giving the property owner an opportunity to rectify the problem. Based upon their experiences in the pre-Red Light Abatement era, the Committee understood that some property owners were simply unaware that their properties were being used for illegal purposes. Knowledge of the situation was sometimes sufficient to provoke the absentee landlord to remove the existing tenants and terminate the building’s use as a site of prostitution. If moral suasion had been sufficient to get these absentee landlords to act prior to July 1, 1915, the Committee had good reason to believe that the legal powers provided by the Red Light Abatement law would be even more persuasive.

As the following charts illustrate, the Committee was correct in its assumptions. Based upon the Committee’s numbers, informal notice was successful in fifty-eight to ninety-three percent of the cases.

261. ANNUAL REPORT OF THE COMMITTEE OF FIFTEEN 3 (1916).
262. Describing the evidentiary burdens facing the Committee if it pursued an Injunction and Abatement action, the Committee wrote:

No one should be misled. It is not so simple as it might seem from reading this brief statement. In the first place, evidence must be obtained, evidence sheets read and analyzed, and the court records checked off, in order to be prepared to meet every denial before action is taken. In every case there are from four to a dozen or more evidence sheets. Assuming that there are but six [injunction proceedings], it would require a careful analysis of more than one thousand reports. In addition to this, new evidence must be obtained after the informal notice is sent. We frequently check off all previous work to ascertain its effectiveness. We are also obliged to obtain additional evidence after the formal notice has been served before application is made for an injunction.

ANNUAL REPORT OF THE COMMITTEE OF FIFTEEN 6-7 (1917).

263. The New York Civic League claimed that it spent “$1,000 in cash for witnesses in gathering evidence and attending various terms of court, for lawyers fees, etc.” in their successful struggle against a single property – the Pastime Hotel. Our Red Light Injunction Law Constitutional, supra note 212, at 2. The Committee of Fifteen also reported that its annual budget had risen from $3,000 in 1911 to $50,000 in 1921. One can assume that investigation work comprised a significant portion of these increased costs. See ANNUAL REPORT OF THE COMMITTEE OF FIFTEEN 13 (1921).
For property owners who were "careless and defiant", the Committee would serve them with "formal notice" as required by the Injunction and Abatement statute:

You are hereby notified that if the nuisance complained of is not by you abated and wholly discontinued within a reasonable time after the expiration of five such days, the undersigned, a citizen and resident of the City of Chicago, will file a petition for a temporary injunction and a bill in equity in the name of the People of the State of Illinois, in a court of competent jurisdiction in Cook County, perpetually to enjoin you and all persons from maintaining or permitting the said nuisance, and from using or permitting to be used said building, apartment, or place in which said nuisance is
maintained, for any purpose for a period of one year.\(^{273}\)

If the property owner persisted in maintaining the property as a public
nuisance, the Committee applied for an injunction to close the building for
up to one year. However, it proved to be an exceedingly rare case in which
the Committee had to pursue injunctive relief against a property owner. In
no year for which we have data was it necessary for the Committee to
pursue more than seven temporary injunctions.

The statistics highlight the massive amount of investigation work
undertaken by the Committee of Fifteen. In 1921, the Committee of
Fifteen was investigating nearly 1,000 properties a month. Admittedly,
many of the Committee’s investigations may have been superficial, but it
appears that the evidentiary gathering investigations were significant
endeavors. It is hard to imagine any organization – especially a private one
– undertaking such a mammoth enterprise.

Aside from the sheer size of the operation, it is worth pondering the
social implications of these statistics. Prior to the Red Light Abatement
laws, the common law afforded property owners a certain zone of privacy,
provided they did not harm their immediate neighbors or the public. With
the Injunction and Abatement law, the citizenry was deputized to fight
prostitution. The “public” – in the form of vice investigators – could now
pierce this zone of privacy. One only has to recall Bascom Johnson
walking the streets of San Francisco’s Barbary Coast or David Oppenheim
and Lawrence Nops lurking in Baltimore’s cabarets to realize that public
rights – at least in the sphere of commercialized vice – had eroded and
buried the oasis of private rights.

The Red Light Abatement laws also represented a staggering transfer of
heretofore public powers to private organizations and private citizens.
Private groups and citizens now had powers coterminous with law-
enforcement officials.\(^{274}\) Not only was the Committee of Fifteen acting as
a private anti-prostitution police force, but the Committee’s efforts were
largely done without the support of city officials. Part of this lack of
cooperation was probably due to the Committee’s public accusations of
police graft.\(^{275}\) By 1919, there was evidence of a growing rift between the
Police Department and Committee. Whereas in the past the Chief of
Police had asked the Committee to serve notices under the Injunction and
Abatement law, by 1919, there were no further requests.\(^{276}\) In its 1920

\(^{273}\) ANNUAL REPORT OF THE COMMITTEE OF FIFTEEN 6 (1917).

\(^{274}\) Bascom Johnson, THE INJUNCTION AND ABATEMENT LAW, supra note 159, at 232 (“While this
law increased the existing power of law-enforcing officials to wipe out such nuisances, it put the same
power into the hands of citizens.”).

\(^{275}\) See, e.g., ANNUAL REPORT OF THE COMMITTEE OF FIFTEEN 9 (1916) (“When policemen,
with and without uniform, calmly watch the vicious orgies take place in these amusement centers
without interfering, the neglect of official duty is painfully evident.”).

\(^{276}\) ANNUAL REPORT OF THE COMMITTEE OF FIFTEEN 8 (1919).
Annual Report, the Committee observed that no public official or employee in the City of Chicago had yet applied for an injunction under the Red Light Abatement law. From the point of view of the Committee, this abdication of responsibility by the city’s public officials justified the Committee’s assumption of public powers:

But why do we need a Committee of Fifteen when we have laws to protect us, specific laws making it a crime to exploit women and to use property for immoral purposes and men elected to public office for the express purpose of enforcing these very laws? The answer is that men fail in their duty, fail because of ignorance, fail because they do not find a public sentiment that compels recognition, fail because of political influence and pressure which keeps them from having the courage of their convictions.

Beginning in 1921, the State’s Attorney office began to reign in this “unofficial law enforcement body.” In February of that year, the State’s Attorney entered into an arrangement with the Committee under which the State’s Attorney would send formal notices to property owners where the evidence collected by the Committee satisfied him that immoral conditions existed. On the one hand, this arrangement lessened some of the work-load on the Committee. On the other hand, the decision to proceed with injunctions now passed through the State’s Attorney office. The experience of the Committee of Fifteen highlights another interesting phenomenon about the Red Light Abatement laws: their effectiveness was not commensurate with their use. On average, the Committee only sought 4.5 temporary injunctions per year. And yet, the Committee of Fifteen repeatedly praised the Injunction and Abatement law as the Committee’s most effective weapon in the war against prostitution. As the statistics suggest, the threat of an injunction, either through informal or formal notice, was enough to convince most property owners to get out of the prostitution business. On the ground, this usually resulted in the eviction of the current tenants, and by default, closed the bawdyhouse. In the Annual Reports, the Committee downplays the coerciveness of this process by presenting numerous letters from property owners and real estate agents thanking the Committee for both alerting them to the problem and helping them evict their immoral tenants. For example, in one letter a Mr. Granert writes, “I have your letter of the 8th inst., and have advised my real estate agent to have premises at . . . vacated at once, as I prefer to have it empty than to have tenants of that

277. ANNUAL REPORT OF THE COMMITTEE OF FIFTEEN 2 (1920).
278. ANNUAL REPORT OF THE COMMITTEE OF FIFTEEN 13 (1921).
280. ANNUAL REPORT OF THE COMMITTEE OF FIFTEEN 13 (1921).
nature." Likewise, the First Trust and Savings Bank thanked the Committee for helping them "get rid of so undesirable a tenant" and then assured the Committee that the Bank was "anxious to comply with the Committee's recommendations at all times." It is quite possible that some property owners were genuinely appreciative of the Committee's efforts, or at least saw the Committee as a cheap means for evicting undesirable tenants. One suspects, however, that the Committee was putting a pleasant spin on a fairly coercive situation. Assuming that the Progressives were right about the vast profits generated by commercialized vice, it is hard to imagine that property owners - who must have been sharing in a portion of those profits - were pleased about the Committee's efforts. Nevertheless, there was little property owners could do about the Committee's unwelcome intrusion into their lives. Since resistance was futile, property owners probably made the best of a bad situation. By cooperating with the Committee property owners realized that they could avoid the total loss of seeing their properties closed for a year under a permanent injunction.

The experience of the Committee of Fifteen also offers perspective on some initial expressions of pessimism about the efficacy of the Red Light Abatement laws. In an article published in 1913, Elmer A. Wilcox remarked that the Iowa law was not used much. Wilcox suggested that a lack of anti-prostitution private organizations might account for the dearth of activity in Iowa. Bascom Johnson, in his job as Assistant Counsel to the ASHA, reached similar conclusions in regard to both Iowa and Nebraska: "It is probably safe to say that the injunction law has been used by the law-enforcing officials in these two States in not more than ten percent of the cases in which raids have been made on buildings in which prostitution was carried on." Johnson cited three reasons for the law's lack of use: lack of cooperation between the Police Departments and the offices of the County Attorney; the failure of the public to conceive of the property owner as an undesirable citizen; and lastly, hostility to the campaign to extinguish the red-light districts. Johnson was careful to note, however, that none of the law-enforcing officials with whom he

281. ANNUAL REPORT OF THE COMMITTEE OF FIFTEEN 8 (1920).
282. ANNUAL REPORT OF THE COMMITTEE OF FIFTEEN 8 (1920).
283. See, e.g., ANNUAL REPORT OF THE COMMITTEE OF FIFTEEN 11 (1918) ("Thanks for letter of fourth instant about No. ____ Street, which has reached me here. I am moving at once to stop evil conditions, but it may perhaps be necessary presently to ask your aid by injunction against tenant.").
284. Wilcox, supra note 226, at 927.
285. Id.
287. Id. at 8-9. Although Johnson perceived hostility to the enforcement of the Red Light Abatement laws, the resistance to these laws apparently never coalesced into an organized movement.
talked thought the Red Light Abatement laws were ineffective or impracticable.\textsuperscript{288}

Johnson based his negative assessment of the law's impact on the records of fifty-two injunction and abatement cases brought before the courts of Des Moines, Omaha and Lincoln. Johnson's figures are reproduced in the following chart:\textsuperscript{289}

<table>
<thead>
<tr>
<th></th>
<th>Des Moines 1909-14</th>
<th>Lincoln 1911-14</th>
<th>Omaha 1911-14</th>
<th>Totals</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Formal Notice: Occupants</strong></td>
<td>10</td>
<td>12</td>
<td>22</td>
<td>44</td>
</tr>
<tr>
<td><strong>Formal Notice: Owners</strong></td>
<td>10</td>
<td>6</td>
<td>28</td>
<td>44</td>
</tr>
<tr>
<td><strong>Temporary Injunction: Occupants</strong></td>
<td>5</td>
<td>11</td>
<td>5</td>
<td>21</td>
</tr>
<tr>
<td><strong>Temporary Injunction: Owners</strong></td>
<td>2</td>
<td>1</td>
<td>5</td>
<td>8</td>
</tr>
<tr>
<td><strong>Permanent Injunction: Occupants</strong></td>
<td>2</td>
<td>8</td>
<td>4</td>
<td>14</td>
</tr>
<tr>
<td><strong>Permanent Injunction: Owners</strong></td>
<td>1</td>
<td>1</td>
<td>4</td>
<td>6</td>
</tr>
<tr>
<td><strong>Property Closed for 1 year</strong></td>
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<td>1</td>
<td>2</td>
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<td>2</td>
<td>1</td>
<td>3</td>
</tr>
<tr>
<td><strong>Violations of Injunction</strong></td>
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<td>1</td>
<td>0</td>
<td>1</td>
</tr>
<tr>
<td><strong>Occupants move out</strong></td>
<td>6</td>
<td>11</td>
<td>23</td>
<td>40</td>
</tr>
</tbody>
</table>

Upon first impression, the numbers do seem to bear out the laments of Wilcox and Johnson. This chart, however, is deceptive because it only accounts for actions that acquired legal formality. Thus, the chart fails to calculate the non-legal impact of the Red Light Abatement laws. As the statistics from the Committee of Fifteen demonstrate, much of the law's effectiveness occurred outside the legal system—through informal notice, the physical presence of investigators on the streets, and probably a growing sense among property owners that the days of the red-light district were numbered.

The development of "fill-in-the-blank" forms also may have made the process of initiating Injunction and Abatement actions easier. In the ASHA files are fill-in-the-blank forms from Hennepin County, Minnesota, Marion County, Indiana and Multnomah County, Oregon.\textsuperscript{290} These forms

\textsuperscript{288} \textit{id.} at 7.  
\textsuperscript{289} \textit{id.} at 4.  
\textsuperscript{290} \textit{MODEL FORMS, DISTRICT COURT, FOURTH JUDICIAL DISTRICT, HENNEPIN COUNTY (c.1918)} (ASHA, Legal and Protective Measures, SW 45, Box 3, Folder 3: Injunction and Abatement, Court Cases, 1918-22, Social Welfare History Archives, University of Minnesota); \textit{MODEL FORMS, IN THE COURT OF MARION COUNTY (1916)} (ASHA, Legal Reference Files, Box 3, Folder 2: Injunction and Abatement, Cases, 1912-17, Social Welfare History Archives, University of Minnesota); \textit{MODEL FORMS, IN THE CIRCUIT OF THE STATE OF OREGON FOR THE COUNTY OF MULTNOMAH (1919)} (ASHA, Legal and Protective Measures, SW 45, Box 3, Folder 3: Injunction and Abatement, Court Cases, 1918-22, Social Welfare History Archives, University of Minnesota).
cover every step in the legal process from the Complaint to the Writ of Temporary Injunction and Abatement. Even if few cases ever reached the point of requiring equitable relief, these forms likely would have facilitated the commencement of legal actions and increased the pressure against property owners.

Indirect evidence also supports the contention that the Red Light Abatement laws had a greater effect than either Johnson or Wilcox suspected. In 1912, John B. Hammond, the author of Iowa’s Red Light Abatement law, related an anecdote between a real estate agent and a tenant to illustrate how the law had impacted the rental market:

I was in a real estate office and a gentleman came in, a stranger, and he asked Mr. Coates, a real estate man, about property he had for rent in Highland Park. “Yes,” he said, “I have that property for rent.” “What do you rent it for?” “Fifteen dollars a month.” “I do not believe I can do any better than that; I believe I will take it.” “What is your name, where do you come from, who do you represent, what is your business?” “My name is John Jones: I am a machinist.” “Can you give me some recommendations from the people you work for down there?” Jones replied: “I am going to pay for my rent in advance. What has that got to do with it?” “Well,” he says, “you see it is this way: That property is located next to a Professor Gordon of the Highland Park College, and if I should be careless and let people in there who had a disorderly house [i.e., a bawdyhouse or saloon] he would have an injunction against me inside of three days. I have got to see that Professor Gordon has decent neighbors.”

The closure of all of Iowa’s red-light districts by 1914 provides a further indication that the state’s Red Light Abatement law was more effective than some had thought. H.S. Hollingsworth, the General Secretary of Associated Charities in Des Moines, credited their closure to the Red Light Abatement law.

The impact of the Red Light Abatement law on the formal legal system was relatively minor. Equity courts were not swamped with thousands of bills for injunctions. To measure effectively the impact of these laws one has to examine how these laws altered, oftentimes coercively, the norms

291. John B. Hammond, Address, 2 VIGILANCE 1, 17 (1912).
292. Hollingsworth, supra note 226, at 236.
293. Some reports probably gave a little too much credit to the Red Light Abatement law. Wirt W. Hallam contended that the impact of the law in Iowa was instantaneous: “The result was that the day after the laws in regard to the social evil went into effect cities which had had open houses of prostitution for fifty years found them closed; and shortly afterward it was claimed that there was not an open house of prostitution in the State of Iowa.” Hallam, supra note 148, at 112-13. One suspects that if the impact of the Red Light Abatement law had been that dramatic, neither Johnson nor Wilcox would have questioned its efficacy.
294. Hollingsworth, supra note 226, at 236.
of property relations. A type of laissez-faire landlordism that had been acceptable prior to the enactment of these laws was no longer tolerated. The ground war against the segregated vice district not only closed the district, but also raised the standards of accountability for property ownership. Appropriately, John B. Hammond expressed this new social norm in the conclusion to his address before the City Council of Chicago: "And today if any man goes down to a real estate man and inquires for property he is inquired of minutely as to what he is going to do with the property. The law holds a property owner responsible for the acts of his tenants."295

B. The ASHA on the Offensive: Promoting the Red Light Abatement Laws

The legal files of the American Social Hygiene Association paint a vivid picture of how the ASHA acted as a self-appointed legal counsel for vice reform legislation during the Progressive period. In regard to the Red Light Abatement law, the legal files reveal how the ASHA monitored, promoted and shaped a state-by-state campaign on behalf of these laws. Contemporary observers credited the ASHA with bringing local vice reform activities under a national umbrella: "With the coordination of these [local] activities in the American Social Hygiene Association, a concerted program of action along educational, medical and law enforcement lines was definitely launched and carried into effect."296 If local groups such as the Committee of Fifteen bore the burden of implementing these laws, it was the ASHA that furnished the centralizing structure for a national war against the segregated vice district.

From early on in its existence, the ASHA developed model laws in order to regularize the state enactment of Red Light Abatement laws. In fact, the first model Red Light Abatement law was published by the ASHA's predecessor, the American Vigilance Association.297 By 1915, the ASHA was promoting its own "Standard Form" of the Red Light Abatement law in the Journal of Social Hygiene.298 Although not explicitly stated in the legal files, the ASHA's development of a standard form appears to have been driven by at least three motivations. First, the ASHA recognized that adherence to a model law could insulate the laws from constitutional challenges. By 1915 the Red Light Abatement laws had faced constitutional challenges in three states - Minnesota,299

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299. State ex rel. Wilcox v. Gilbert, 147 N.W. 953 (Minn. 1914); State ex rel. Robertson v. Lane,
Nebraska and Washington. The challenges involved due process and equal protection claims, assertions of the right to a jury trial, and impairment of the obligation of contracts. In each of these states every section of the Red Light Abatement laws had been upheld, with one exception. In Nebraska, the Supreme Court had struck down the $300 tax provision – section 13 in the ASHA standard form – as a “clear and palpable violation” of the Nebraska constitution. As early as 1914, the editors of the California Law Review were declaring the constitutionality of the laws “well settled.” The ASHA recognized that a standard form based on the Red Light Abatement laws of these states would be able cite to these favorable precedents. Over time, assuming more states declared the ASHA Standard Form constitutional, the weight of precedent would grow even stronger. And this is precisely what happened. In 1920, the constitutionality of Georgia’s Red Abatement Law was challenged. In upholding the constitutionality of the statute, the Supreme Court cited that fact that Georgia’s statute was substantially similar to the statutes in thirty-eight other states, and that seven of these states had already upheld the constitutionality of their respective Red Light Abatement laws. Second, the ASHA wanted to accelerate the passage of the Red Light Abatement laws. By generating a model law, the ASHA saved state legislatures from the laborious task of creating the law from scratch. To expedite passage of the laws, the ASHA recommended that “Before this form is introduced as a bill, it should be carefully examined by an attorney in the state concerned, in order that such changes may be made therein as will bring them into harmony with the legal usage and procedure in that state.” And lastly, the similarities in laws allowed enforcement experiences in one state to be transferred to other states.

In addition to charting periodically the adoption of vice reform laws in each state, the ASHA conducted a national state survey of each state’s

147 N.W. 951 (Minn. 1914).
301. State ex rel. Kern v. Jerome, 141 P. 753 (Wash. 1914). As noted earlier, see supra note 256, there had been no substantive challenge to Iowa’s Red Light Abatement law.
306. See, e.g., George Gould, Laws Against Prostitution and Their Use, 27 J. SOC. HYGIENE 335, 341, 342-43 (1941) (including a visual map of the United States with four different shadings to reflect differing degrees of vice legislation and a chart listing the state-by-state adoption of sixteen different anti-prostitution laws); Bascom Johnson, The Injunction and Abatement Law, supra note 159, at 231 (containing fold-out chart listing the states that adopted the Red Light Abatement law and describing the particular elements of the laws); Worthington, Developments in Social Hygiene Legislation from 1917 to September 1, 1920, supra note 215, at 565 (charting the state-by-state adoption of twenty-three

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Red Light Abatement laws in 1921. The ASHA used its Standard Form, now named “Standard Form No. 3” as a basis for analyzing and critiquing state laws.307 For example, in its analysis of Arizona’s law, the ASHA noted, “The law of this state differs from the model form number 3 in several particulars. The most important difference is that the Arizona law does not contain that portion of section 4 of the standard providing for the issuance of an order restraining the removal of personal property from a building.”308 Kansas’ law was deemed so inadequate that the ASHA recommended passage of a new law based on Standard Form No. 3, or its equivalent, the revised Iowa Abatement Law of 1915.309 In the cases of South Carolina and Utah, the ASHA recommended that the two states delete the notice provision in their Red Light Abatement statutes.310 During the period 1925-53, the ASHA developed a memorandum form for proposed anti-prostitution legislation. By this time, there were eleven different laws against prostitution. The form provided blank spaces to indicate where additional legislation was needed in that respective state.311

Evidence of the ASHA’s role in assisting states in the passage of their Red Light Abatement laws can be gleaned from two letters between the ASHA and the West Virginia Bureau of Venereal Disease. In 1925, the ASHA helped the Bureau of Venereal Diseases in the preparation of the state’s Red Light Abatement law.312 One issue, in particular, appears to
have troubled the West Virginia legislature – the $300 tax provision. To assist the Bureau in defending the tax provision, the Acting Director of ASHA’s Legal Measures Department sent the Bureau a letter. The bulk of this letter consisted of a long excerpt from *State ex rel. Kern v. Jerome*,$^{313}$ the Washington state case upholding the constitutionality of the tax.$^{314}$ In 1931, the tax issue surfaced again. A “Reviser’s Note” to the West Virginia code omitted a portion of the $300 tax section on public policy grounds because it was feared that the tax gave salaried officers a financial stake in the enforcement of the law.$^{315}$ At some point, the ASHA also appears to have abandoned its efforts to defend the controversial tax provision, since it was eventually deleted from the ASHA’s Standard Form.$^{316}$

The ASHA’s national role in the war against commercialized vice received a further boost with the quasi-federalization of anti-prostitution legislation during the First World War. During the war, the law enforcement division of the Commission on Training Camp Activities (CTCA), which was comprised of prominent members of the ASHA,$^{317}$ took it upon itself to harmonize state prostitution laws.$^{318}$ The CTCA was concerned about the absence of a single criminal standard for acts of prostitution. In some states, the male customer could not be prosecuted. In other states, only sexual intercourse “for hire” was considered prostitution. The CTCA used its position as a federal agency to draft the so-called “Vice Repressive Law,” or Standard Form No. 1 and then presented it to the state legislatures for enactment.$^{319}$ The Vice Repressive Law criminalized both parties to the act of prostitution and defined prostitution

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313. 141 P. 753 (Wash. 1914).
317. *See* WATERMAN, *supra* note 225, at 88 (“During the World War the American Social Hygiene Association was an active and effective adjunct to the Military. The men who have been largely responsible for creating and directing the policies of the Association, including Dr. William F. Snow the General Director, were commissioned to administer the educational and repressive program inaugurated by the National Government to protect the enlisted men from venereal infections.”). The Social Hygiene Instruction Division was under the direction of the ASHA’s Dr. Walter Clarke. *See* BRANDT, *supra* note 191, at 61. Other members of the ASHA who served in the CTCA were Lt. Col. William F. Snow, General Secretary of the ASHA, and Major Bascom Johnson, Assistant Counsel of the ASHA. During the war Major Johnson held the title of Director of the Division of Law Enforcement, War Department Commission on Training Camp Activities. *See* Buchanan, *supra* note 215, at 522; *Mayer, The Regulation of Commercialized Vice, supra* note 138, at 9.
as broadly as possible: "[T]he term “prostitution” shall be construed to include the giving or receiving of the body for sexual intercourse for hire, and shall also be construed to include the giving or receiving of the body for indiscriminate sexual intercourse without hire." By 1920, eleven states had adopted the Vice Repressive Law. In 1919, the CTCA drafted a Model Venereal Disease Law, or Standard Form No. 4. It was adopted by sixteen states in 1919 and one state in 1920.

Although the ASHA tried to portray these laws as "the recommendation[s] of the Federal Government," and "publication[s] of the CTCA," the role of the ASHA in their creation is quite clear. The ASHA publicly acknowledged that copies of the Standard Forms could be secured on application to the ASHA's offices in New York City. As early as 1920, the Association was publishing a Social Hygiene Legislation Manual, which included the Standard Forms. The scope of the ASHA's role is further illuminated in an exchange of letters between Dr. Walter Clarke and Bascom Johnson. In the letters, the two heads of the ASHA's legal division debated whether to destroy the Association's stock of 2,810 copies of Standard Form No. 4. That the ASHA would have so many copies of this law provides some indication that the Association anticipated playing a major role in the promotion of the Model Venereal Disease Law. Ultimately, the two men determined that portions of the law had become obsolete in the intervening ten years. All but ten of the

320. Id. at 338.
321. Bascom Johnson, Law Enforcement Against Prostitution from the Point of View of the Public Official, 9 NAT'L MUN. REV. 427, 429 (1920). See also Worthington, Developments in Social Hygiene Legislation from 1917 to September 1, 1920, supra note 215, at 561 (reporting that the law was "passed in ten states and as to some of its provisions in two others.").
322. Id. at 566.
323. Id.
324. Id.
325. Worthington, Developments in Social Hygiene Legislation from 1917 to September 1, 1920, supra note 215, at 563 n.17.
326. Id. at 563 n.17, 566 n.39; Bascom Johnson, Law Enforcement Against Prostitution from the Point of View of the Public Official, supra note 321, at 429 n.1.
327. SOCIAL HYGIENE LEGISLATION MANUAL (1920) (ASHA, Legal and Protective Measures, SW 45, Box 6, Folder 1: Legal Reference Files, Publications, Social Welfare History Archives, University of Minnesota).
328. Letter from Bascom Johnson to Dr. Clarke (July 11, 1929) (ASHA, Legal Reference Files, Box 4, Folder 6: Prostitution, 1912-29, Social Welfare History Archives, University of Minnesota).”
329. See Letter from Dr. Clarke to Bascom Johnson (July 16, 1929) (ASHA, Legal Reference Files, Box 4, Folder 6: Prostitution, 1912-29, Social Welfare History Archives, University of Minnesota) (“It seems to me doubtful whether this is the form of law we want to promulgate, especially pp 4”); Letter from Dr. Clarke to Bascom Johnson (July 17, 1929) (ASHA, Legal Reference Files, Box 4, Folder 6: Prostitution, 1912-29, Social Welfare History Archives, University of Minnesota) (“Yes. I agree to the destruction of No. 4 on ground that parts of it are obsolete.”). Johnson and Clarke were particularly concerned about the administrative scheme laid out in the law. In the original law, the treatment of criminals with venereal disease was placed in the hands of the Health Department. By 1929, both men thought that the responsibility for treatment should be vested in the
copies were ordered destroyed.\textsuperscript{330}

The legal files of the ASHA provide a glimpse of how one private Progressive reform organization was able to impose order on state legislation during this period. Instead of a chaotic diversity of anti-prostitution laws, the ASHA quickly developed standard forms and then shopped these forms to the various state legislatures. States without the standard form were encouraged to adopt it, and states whose laws diverged from the standard form were advised to conform to the model. As a result of the ASHA’s efforts, the Red Light Abatement laws were strikingly uniform across the different states. They were “national” laws in spite of their state origins. The experience of the ASHA illustrates how private groups could “federalize” American law prior to the expansion of federal powers in the 1930s.

C. The ASHA’s Rear-Guard Actions: Defending the Red Light Abatement Laws

The ASHA’s role in nationalizing the Red Light Abatement laws also made the defense of these laws easier. Instead of confronting a multiplicity of different state statutes, the uniformity of the laws allowed for the transfer of legal arguments across state lines. As early as 1915, the ASHA was developing what might be referred to as a “Model Brief” in support of the Red Light Abatement law. The Model Brief not only facilitated defense of the Red Light Abatement laws, but also put pressure on state legislatures to adopt the ASHA Standard Form.

It is important to note that the ASHA did not have a role in the initial constitutional challenges to the Red Light Abatement laws. These early cases from Nebraska, Washington and Minnesota provide a study in contrasts. In the Nebraska and Washington cases, the Supreme Courts of the respective states more or less adopted Iowa case law. In \textit{State ex rel. Kern v. Jerome},\textsuperscript{331} the only cases cited by the Washington Supreme Court are from the unsuccessful challenges to Iowa’s Liquor Abatement law.\textsuperscript{332} Similarly, in \textit{State ex rel. English v. Fanning},\textsuperscript{333} the Nebraska Supreme

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\textsuperscript{330} Letter from Bascom Johnson to Dr. Clarke (July 15, 1929) (ASHA, Legal Reference Files, Box 4, Folder 6: Prostitution, 1912-29, Social Welfare History Archives, University of Minnesota).
\textsuperscript{331} 141 P. 753 (Wash. 1914).
\textsuperscript{332} Curiously, the Washington Supreme Court did not cite \textit{Littleton v. Fritz}, although all the cases mentioned in the case are its progeny.
\textsuperscript{333} 147 N.W. 215 (Neb. 1914).
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Court relied almost entirely on Iowa case law. In response to almost every challenge to the statute, the Nebraska Court responded with a variation of the same mantra, "This point has . . . been considered and determined by the Iowa court." The Minnesota Supreme Court, by contrast, defended the constitutionality of its Red Light Abatement law solely on Minnesota and U.S. Supreme Court cases. Nor did the Brief of the Minnesota Attorney General in State ex rel. Robertson v. Lane cite Iowa case law.

The ASHA Model Brief incorporated both of these strands of argumentation. On the one hand, the Model Brief relied heavily upon Iowa law. Of the thirteen sections in the original ASHA Standard Form, eleven are supported by Iowa cases, with Littleton v. Fritz being the most cited case. Other important Liquor Abatement law cases such as Carleton v. Rugg and Mugler v. Kansas were also included in the Brief. On the other hand, the Model Brief incorporated the two recent Minnesota Supreme Court decisions and provided digests of these cases.

The Model Brief made defense of the Red Light Abatement laws relatively simple. In the pre-adoption phase, proponents of the Red Light Abatement laws could rely on the Brief to counter charges that the laws were unconstitutional. Post-enactment, the Brief provided the backbone for any constitutional challenge to the law. Of course, all this assumed that the state legislature had adopted the ASHA Standard Form. The juxtaposition of the Standard Form alongside the Model Brief may explain some of the ASHA’s success in nationalizing the Red Light Abatement laws. By providing a complete package of both the law and the decisions supporting its constitutionality, the ASHA facilitated the adoption of its own Standard Form in the state legislatures.

The only serious challenge to the constitutionality of the Red Light Abatement laws came in New Jersey. In Hedden v. Hand, a liquor abatement case, the New Jersey Court of Errors and Appeals held that the state’s Injunction and Abatement law was unconstitutional. Relying

335. State ex rel. Robertson v. Lane, 147 N.W. 951 (Minn. 1914); State ex rel. Wilcox v. Gilbert, 147 N.W. 953 (Minn. 1914).
336. Brief for Respondent, State ex rel. Robertson v. Lane, 147 N.W. 951 (Minn. 1914) (on file with Social Welfare History Archives, University of Minnesota, ASHA, Legal Reference Files, Box 3, Folder 2: Injunction and Abatement, Cases, 1912-17).
338. Id. at 241-42. Two other frequently cited cases were Commonwealth v. Howe, 13 Gray (Mass.) 23 (1859) and Davis v. Auld, 53 A. 118 (Me. 1902).
339. Bascom Johnson, The Injunction and Abatement Law, supra note 159, at 241-47. Digests of the Nebraska and Washington cases were also provided.
341. In the months leading up to Hedden there were indications that the New Jersey Courts did not look favorably upon the state’s Red Light Abatement law. In Rundall v. Hill, (N.J. 1918), the Court dismissed an action against a property owner because it considered the evidence to be hearsay. In 1919, the same case returned to court. This time, the court found that the Complainants had failed to establish proof of ownership of the building’s personality. Without such proof, the court held, “[I]t
upon old English cases, the Court, in a sudden departure from trends in public nuisance law, revived the criminal equity concern: "[T]he legislation, in itself, is unconstitutional, in that it attempts to confer upon the Court of Chancery jurisdiction of a subject-matter of a purely criminal character. . . . It is idle to entertain the thought for a single moment that the Legislature can change the nature of an offense by changing the forum in which it is to be tried."342 The Court observed that the Injunction and Abatement law deprived defendants both of their rights to a grand jury presentment and to trial by jury following indictment.343 In a letter to Timothy N. Pfeiffer of the ASHA, the losing attorney, Arthur T. Vanderbilt, ignored the Court's legal reasoning and attributed the surprising outcome of the case to two other factors:

First, the original act applying only to disorderly houses was amended to involve violations of the law concerning intoxicating liquors, and I rather fancy that the amendment stepped upon the toes of a majority of the court; secondly (and this seems to me to be the gist of the opinion) we had to contend with the perennial jealousy of the Supreme Court judges (who make up the majority of the Court of Errors and Appeals) of the growing jurisdiction of the Court of Chancery.344

The ASHA was understandably concerned about the Court's holding in Hedden. Until 1919, there had been a gathering weight of case law supporting the constitutionality of these statutes. Now, opponents of the Red Light Abatement laws could cite an opposing authority. But there was more than just the outcome of the case that worried the ASHA. The counsel for the Complainants-Respondents, Arthur T. Vanderbilt, had relied upon the ASHA Model Brief in his Brief to the Court. The Vanderbilt Brief was a mixture of New Jersey case law combined with citations to the Model Brief. For example, in the section asserting that the Injunction and Abatement law did not violate a defendant's right to trial to

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jury, because this guarantee was inapplicable to actions in equity, Vanderbilt began with citations to New Jersey law and then concluded with the following cases:

See also English v. Fanning, 147 N.W., 215; State v. Gilbert, 147 N.W., 953; Carleton v. Rugg, 149 Mass., 550; State v. Murphy, 71 Vt., 127; State v. Saunders, 66 N.H., 39; State v. Marshall, 100 Miss., 626; Davis v. Auld, supra, 96 Me., 559; Littleton v. Fritz, supra, 65 Ia., 448. 345

Not only are these almost the same cases as those in tenth section of the ASHA Model Brief (only Mugler v. Kansas is omitted because it was cited in the preceding sentence), but they are presented in exactly the same order. 346 Nor are these the only citations to the ASHA Model Brief. In seven different sections of the Brief, Vanderbilt relied upon identical (or nearly identical) citations to the ASHA Model Brief. 347

In the wake of the Hedden decision, then-Major Bascom Johnson

347. Brief for Complainants-Respondents at 4, 8, 11, 12, 13, 14, 24, Hedden v. Hand, 107 A. 285 (N.J. 1919) (on file with Social Welfare History Archives, University of Minnesota, ASHA, Legal and Protective Measures, SW 45, Box 3, Folder 3: Injunction and Abatement, Court Cases, 1918-22); Bascom Johnson, The Injunction and Abatement Law, supra note 159, at 241-42. Vanderbilt relied upon the following seven sections of the ASHA Model Brief:

II. State legislatures have power to declare such places to be nuisances. State vs. Beardsley, 108 Iowa 396. Com. vs. Howe, 13 Gray (Mass.) 26. Am. & Eng. Enc. vol. 21, p. 739.
V. The fact that the law does not require knowledge of the unlawful use on the part of the owner does not render it unconstitutional because the owner of the property is presumed to know the business conducted thereon. Com. vs. Howe, 13 Gray (Mass.); Hodge vs. Muscatine County, 121 Iowa 482; 196 U.S. p. 276; State vs. Gilbert, digested infra, point 7; English vs. Fanning, digested infra, point 5, and cases cited therein.
VI. Legislatures may confer the right to bring such actions upon a private citizen without requiring him to bring special damages. English vs. Fanning, digested infra, point 4; Littleton vs. Fritz, supra; Davis vs. Auld, supra.
VIII. The constitutional requirement of due process of law is fulfilled as to each defendant who is made a party to the suit and receives notice and a hearing. Littleton vs. Fritz, supra; State vs. Jordan, 72 Iowa 377; Danner vs. Hotz, 74 Ia. 389; Shear vs. Green, 73 Ia. 688; English vs. Fanning, digested infra, point 7.
X. Such laws are not unconstitutional as depriving defendants of the right to trial by jury because such constitutional guarantee is "inapplicable to actions based upon equitable causes of action." English vs. Fanning, digested infra, point 2, and cases cited therein; State vs. Gilbert, digested infra, point 3, citing with approval Carleton vs. Rugg vs. Murphy, 71 Vt. 127; Mugger (sic) vs. Kansas, 123 U.S. 623; State vs. Saudes, 66 N.H. 39; State vs. Marshall, 100 Miss. 626; see also Davis vs. Auld, supra; Littleton vs. Fritz, supra.
XII. Such laws are not penal nor do they constitute an attempt to enforce a criminal statute by a civil action. Littleton vs. Fritz, supra; State vs. Gilbert, infra, point 4; Davis vs. Auld, supra.
XIII. The $300 tax is not a penalty but a tax on the business and the imposition thereof by a court of equity does not deprive a party of his property without due process of law. Hodge vs. Muscatine County, 121 Iowa 482, affirmed by U.S. Supreme Court in 196 U.S. 276; State vs. Gilbert, infra, point 4; State vs. Jerome, infra, point 3, but see contra English vs. Fanning, infra, point 3.
Hennigan proposed an ASHA-organized conference with New Jersey backers of the law to see what could be done to solve the New Jersey problem. Johnson suggested either strengthening the criminal law under which public nuisance may be abated or perhaps even sending another trial case through the courts.348 If the conference was held, nothing seems to have come from it.349 New Jersey remained without a Red Light Abatement law for most of the 1920s and 1930s.350

In the end, the ASHA’s concerns over the Hedden decision were unnecessary. No other states followed the New Jersey decision. In fact, the Hedden decision did not even earn the respect of the federal judges in New Jersey. In United States v. Reinking,351 a case upholding an injunction to padlock a house where liquor was illegally sold, the district court judge explicitly repudiated Hedden.352 Nor did the Hedden decision garner much respect within the law schools. The editors of the Columbia Law Review criticized the Hedden opinion for ignoring reality and elevating legal formalism – what the editors derisively referred to as “the technical rules of special damage” – above the health of its own citizens.353 “For although there is an adequate remedy at law in the indictment and criminal abatement, actually, as a matter of common knowledge, this agency has failed.”354

The negative response to Hedden is an indication of how far the common law of public nuisance had traveled over the preceding forty years. Had the Hedden opinion come down in 1880, it likely would have met a more favorable reaction. By 1920, however, adhering to the

349. Timothey N. Pfeiffer was appointed ASHA representative to the proposed conference, but the ASHA legal files do not indicate if the conference was ever held and whether it made any recommendations. Letter from William F. Snow to Timothy N. Pfeiffer (September 15, 1919) (ASHA, Legal and Protective Measures, SW 45, Box 3, Folder 3: Injunction and Abatement, Court Cases, 1918-22, Social Welfare History Archives, University of Minnesota).
350. An internal ASHA memorandum indicates that the holding in Hedden had been whittled away by two cases in the 1930s, State ex rel. State Board of Milk Control v. Newark Milk Co., 118 N.J. Eq. 504 (1935) (upholding constitutionality of a statute conferring on courts equitable jurisdiction to restrain habitual violation of the State Board of Milk Control’s regulations) and State ex rel. Board of Health of Hillside Township v. Mundet Cork Corp., 126 N.J. Eq. 100 (1939) (upholding constitutionality of a statute conferring similar equitable jurisdiction on State and local Boards of Health). The memorandum also cited another serendipitous cause for optimism. Arthur T. Vanderbilt—the counsel for the Complainants-Respondents—was now Chief Justice of the new Supreme Court of New Jersey. See Injunction and Abatement Law in New Jersey (c.1939) (ASHA, Legal Reference Files, Box 3, Folder 1: Injunction and Abatement, 1913-31, State Laws, Social Welfare History Archives, University of Minnesota).
351. 283 F. 855 (D.N.J. 1922).
353. Ascher & Wolf, supra note 100, at 607.
354. Id.
strictures of the common law appeared "[in]sensible" \(^{355}\) and "completely archaic."\(^{356}\) For many lawyers and laws students who had come of age in the post-\textit{Littleton} world there was an expectation that the concept of "public" in a public nuisance action would be construed as broadly as possible and that courts would defer to legislative extensions of equity jurisdiction.\(^{357}\) The rejection of \textit{Hedden} is testimony to the evisceration of the common law of public nuisance in American legal discourse. Public nuisance law still existed, but many now believed that it could (and should) be expanded to include private equitable actions.

\textit{Hedden} ultimately proved to be a curious footnote in the ASHA’s legal war on behalf of the Red Light Abatement law. The \textit{Hedden} opinion was surprising because it came at a time when the ASHA thought the constitutionality of these laws was all but settled. But it also proved to be an opinion that could not turn back the clock on the transformation of public nuisance law. With the exception of \textit{Hedden}, the ASHA’s legal defense of the Red Light Abatement laws proved remarkably successful. With its Standard Form and Model Brief, the ASHA provided a roadmap for quick and easy passage of the Red Light Abatement laws and the defense of their constitutionality. The result was a stunning transformation of the American urban landscape. Whereas most major American cities had red-light districts in 1910, by 1920 almost all of them were gone. The war against the segregated vice district had been won.

\textit{D. Rhetorical Battles}

Progressive era vice reform groups could never have won the war against the segregated vice district without the assistance of state legislatures. But what compelled state legislatures to pass Red Light Abatement laws during second decade of the twentieth century? Clearly, the white slavery panic put pressure on legislatures to do \textit{something} about prostitution. Likewise, the lobbying efforts of groups such as the Committee of Fifteen played a role in securing passage of these laws. Equally significant, however, was a change in attitude about the need for segregated vice districts. In the era of the fallen woman, segregated vice districts were seen as a necessary evil. They provided outlets for male sexuality, kept prostitution from scattering into residential areas and assisted law enforcement by concentrating criminal activity.\(^{358}\) Medical

\(^{355}\) \textit{Id.} at 608 (criticizing \textit{Hedden} as going against "the sensible conclusion of the American courts.").

\(^{356}\) \textit{Injunction and Abatement Law in New Jersey} (c.1939) (ASHA, Legal Reference Files, Box 3, Folder 1: Injunction and Abatement, 1913-31, State Laws, Social Welfare History Archives, University of Minnesota) (commenting on the \textit{Hedden} opinion).

\(^{357}\) \textit{But see} Schofield, \textit{supra} note 59, at 29 (arguing that equity jurisdiction is inappropriate for public nuisance actions).

\(^{358}\) \textit{See supra} Part II.A.
experts argued that a segregated vice district, combined with required medical examinations, could eliminate the threat of venereal disease. During the 1910s proponents of the Red Light Abatement laws launched a rhetorical war against these views. Once the rationales for segregated vice districts were shown to be faulty, it became more palatable to pass legislation that would ensure their destruction.

The CTCA made the most visible and sustained effort to dispel the "male sexual necessity" doctrine. The Commission's campaign sought to characterize the doctrine as a myth and to assure soldiers that continence was compatible with "manhood" and "red-blooded virility." In fact, the CTCA went to the other extreme and argued that sexual activity drained men of their physical strength. "Over-exercise or excitement of the sex-glands may exhaust and weaken a man. . . . The sex feelings are so powerful and the risk so great if they are turned loose, that it is common sense not to play with fire." The debunking of the male necessity myth served two functions in the campaign against the segregated vice district. First, by positing male sexual continence as the norm, the debunking undermined the alleged threat that closing the red-light districts posed to virtuous women. Second, opponents of the red-light districts could now argue that but for the continued existence of these districts, men would not be enticed into debauchery. By reversing the assumptions about male sexuality, the Progressives reconceptualized the red-light district as a "continuous advertisement of vice," a "temptation for somebody's boy" and a "constant lure to young men." "The known existence of a district tolerated by law, the 'mystery' of it to the uninitiated, the ease of access - all these factors are a persistent lure to men. . . ." Instead of being a necessary outlet for sexual activity, the district was now blamed for undermining the normal sexual continence of American's young men.

Critics of the segregated vice district also attacked the notion that what happened in the district could remain segregated from the rest of civilized society. A constant refrain in vice reform literature was that "Segregation

359. Regulation of Prostitution, 33 MEDICO-LEGAL J. 6, 6-7 (1916) (advocating fencing in the red-light district and requiring compulsory examinations for venereal disease and the licensing of prostitutes).
360. One medical officer called the doctrine "a grand old dodge with whiskers on it. . . . When I hear a fellow pulling the old health yarn, I'm inclined to keep him away from my sisters." BRANDT, supra note 191, at 63.
361. Id.
362. Id. at 64.
363. ASHA, The Segregation of Prostitution and the Injunction and Abatement Law Against Houses of Prostitution, supra note 140; ASHA, Segregation of Prostitution, supra note 144.
365. ASHA, Memorandum re New Jersey Injunction and Abatement Act, supra note 176, at 2.
366. ASHA, The Segregation of Prostitution and the Injunction and Abatement Law Against Houses of Prostitution, supra note 140.
does not segregate." The segregation of vice was said to induce the moral and financial corruption of the police, as well as lead to the formation of powerful commercial vice interests which could threaten the political order. Progressives further argued that the segregation of vice did not just isolate crime, but magnified it. Vice reform groups began to describe segregated districts as a "breeding ground for crime," which enabled criminals to organize on a vast scale. Nor did segregation limit the spread of venereal disease as proponents of the segregated vice district had promised. Progressive social reformers charged that "Segregation is disease spreading." They asserted that the European system of regulation and medical inspection was a failure, and had deceived men into a false sense of security. The tragic result was that venereal disease had slithered out from the segregated district and was infecting innocent wives and children.

In response to these criticisms proponents of segregated vice districts contended that closing the red-light districts would lead to the "scattering" of prostitution into civilized quarters of the city. One response from the social reformers was that the empirical evidence did not support this claim. But, social reformers did not always dispute the

367. ANNUAL REPORT OF THE COMMITTEE OF FIFTEEN 16 (1920); Note, The New Vice Crusade in Atlanta, 2 J. SOC. HYGIENE 137, 137 (1916); ASHA, The Segregation of Prostitution and the Injunction and Abatement Law Against Houses of Prostitution, supra note 140; ASHA, Segregation of Prostitution, supra note 144.

368. See supra note 172-77 and accompanying text. See also ASHA, The Segregation of Prostitution and the Injunction and Abatement Law Against Houses of Prostitution, supra note 140.

369. Nor was this claim sheer hyperbole. In California, vice interests launched a massive disinformation campaign in an attempt to defeat the state's Red Light Abatement law. See Mary Roberts Coolidge, California Women and the Abatement Law, 31 SURVEY 739 (1914); Franklin Hichborn, California's Campaign Against Entrenched Vice, 32 SURVEY 430 (1914); Hichborn, California's Fight for a Red Light Abatement Law, supra note 226, at 6; Hichborn, Organization that Backed the California Red Light Abatement Bill, supra note 174; California Red-Light Law Still in Doubt, 33 SURVEY 167 (1914-15).

370. ASHA, The Segregation of Prostitution and the Injunction and Abatement Law Against Houses of Prostitution, supra note 140.


373. ANNUAL REPORT OF THE COMMITTEE OF FIFTEEN 17 (1920).

374. B.P. Aydelott, THE SOCIAL EVIL 11-14 (Cincinnati, Western Tract and Book Society, 1871); THE VICE COMMISSION OF CHICAGO, THE SOCIAL EVIL IN CHICAGO, supra note 145, at 26; Mayer, The Passing of the Red Light District – Vice Investigations and Results, supra note 296, at 198; Dr. W.A. Evans, Address 2 VIGILANCE 1, 6-7 (1912); ASHA, Memorandum re New Jersey Injunction and Abatement Act, supra note 176, at 2; ASHA, The Segregation of Prostitution and the Injunction and Abatement Law Against Houses of Prostitution, supra note 140.


376. Facts About the Redlight Abatement Act, 3 (n.d.) (ASHA, Legal Reference Files, Box 2, Folder 15: Injunction and Abatement, 1925-53, Social Welfare History Archives, University of
charges of scatteration. Instead, they attacked it on environmental justice grounds. Sprinkled throughout the vice reform writings is a concern for the disparate impact of vice districts on the poor and minority groups. The Committee of Fifteen contended that "[t]here is no legal or moral justification for giving consent to the prevalence of vice in one neighborhood and objecting to it in another.... The poorer neighborhoods, which are infested with vicious resorts, are as 'respectable' in many senses as are the districts so often referred to as reputable residential districts."377 Plus, the Committee retorted, the more respectable neighborhoods were in a better position to prevent the inroads of vice anyway.378 The Vice Commission of Chicago alleged that segregation of vice was tantamount to racial discrimination: "The apparent discrimination against the colored citizens of the city in permitting vice to be set down in their very midst is unjust, and abhorrent to all fair minded people. Colored children should receive the same moral protection that white children receive."379 And in hearings before the Senate Committee on Criminal Jurisprudence of Missouri, J. Lionberger Davis framed support for the Red Light Abatement laws in equal protection terms:

This bill is democratic in the broadest sense of the word. It is not paternal. It gives every man the power to protect himself and his home. It will give a new meaning to the old phrase "the equal protection of the law." At present that great guaranty of our state and federal constitution has a hollow ring to the poor and oppressed who are without influence and who must suffer from the grafting politician and the men and women who "segregate" vice among the homes of the poor.380

The rhetorical assault against the segregated vice district offered early twentieth-century American society an alternative vision of the segregated vice district. Advocates of the vice districts had long argued that segregation was necessary to protect civilized society from the baser

Minneapolis) ("From my observation of the effect of the law," writes Assistant District Attorney A.B. Comfort of Tacoma, "I do not think that it causes women to be scattered throughout the residence section of the city any more than under the policy of maintaining a segregated district.").

378. ANNUAL REPORT OF THE COMMITTEE OF FIFTEEN 14 (1917). See also ANNUAL REPORT OF THE COMMITTEE OF FIFTEEN FOR THE YEAR 16 (1920) ("Segregation creates nests of crime usually in the midst of a class of people who, by force of conditions, are perhaps most susceptible to the influences of such surroundings."); ASHA, Memorandum re New Jersey Injunction and Abatement Act, supra note 176, at 2 ("A segregated district is always in that section of a city where the poorer class of people live. It is, therefore, a particular menace to the poor who most easily become the victims of prostitution.").
380. Davis, supra note 145, at 11. See also Rufus S. Simmons, Address 2 VIGILANCE 1, 18-19 (1912) ("The infamous policy of 'segregation' which sets apart a district in the city where the laws against these horrible crimes of lust and murder are not enforced, denies to the poor the equal protection of the laws of the land."); Clarke, supra note 142, at 3, 5 ("There [are] also issues of plain democracy involved. The segregated district [is] almost invariably located in the poorest sections of the city, near the homes of laboring people. Frequently the homes of immigrant laborers [are] flanked on both sides by houses of ill-fame.").
elements. The social reformers, by contrast, constructed a vision of the vice district as a festering cancer on civil society. Given time, this cancer would infect the family, enslave the nation’s daughters, enfeeble its children, and destroy its law enforcement agencies and political institutions. In the era of white slavery, this alternative counter-discourse captured the public’s imagination. The red-light district could no longer be defended, because the arguments in its favor had been knocked down one-by-one. The red-light district would have to be destroyed and the Red Light Abatement laws would give citizens the tools to accomplish the task.

CONCLUSION

By the 1920s, the red-light districts had passed from the American landscape. Nor would they ever return. Of course, prostitution did not disappear, it just became less visible. The bawdyhouse was replaced by the hotel room, the tenement apartment, the roadhouse and the cabaret. Prostitution also became more diffuse. Instead of being concentrated in a particular district, prostitution retreated into what historian Kevin Mumford has described as transient “interzones.” Usually located in African-American neighborhoods, these interzones were “simultaneously marginal and central” areas of cities, which Mumford suggests should be conceptualized as a series of concentric circles, with the most stigmatized vice located in the center.

With the closing of the public red-light districts and the concomitant marginalization of prostitution into African-American communities, the zeal that sustained the Progressive social reformers waned. The white slavery menace had been defeated and America’s (white) daughters had been liberated from the segregated vice district. Given its pedigree, it is somewhat tempting to dismiss the Red Light Abatement movement as simply a bizarre manifestation of the white slavery panic that gripped America in early twentieth century. While it is true that the Red Light

381. See, e.g., the Committee of Fifteen’s increasing preoccupation in the 1920s with massage parlors, immoral “stag” shows, and the “cabaret situation.” See ANNUAL REPORT OF THE COMMITTEE OF FIFTEEN 2-3, 12-14 (1922); ANNUAL REPORT OF THE COMMITTEE OF FIFTEEN 8-10 (1925). The cabaret was a catch-all phrase for speakeasies, roadhouses and “black and tan” cabarets. The latter institution was of particular concern because it “brought bad elements of the white and colored people together under inflammatory conditions and eventually that was certain to bring about a race collision, which might easily have the most terrible consequences.” ANNUAL REPORT OF THE COMMITTEE OF FIFTEEN 12 (1922).
382. See KEVIN J. MUMFORD, INTERZONES: BLACK/WHITE SEX DISTRICTS IN CHICAGO AND NEW YORK IN THE EARLY TWENTIETH CENTURY 19-35 (1997) (tracing the physical movement of red-light districts into Harlem and South Side Chicago during the 1920s).
Abatement laws are inextricably linked to transformations in the social construction of the prostitute during this period, the underlying communitarian conception of property expressed in these laws still resonates.\textsuperscript{385} A theme that runs throughout the Progressive era writings on the Red Light Abatement laws is the need to hold property owners accountable. Proponents of the Red Light Abatement laws rebelled against the idea that property rights entitled the owner to use his or her property in a socially undesirable manner: "[The property owner] can not escape his responsibility for actively or passively permitting the use of his property for the purpose of prostitution, together with the sharing in its proceeds."\textsuperscript{386} To the Progressive mind, property was more than just a bundle of rights, it also was a bundle of obligations. Words such as "duty" are common in Progressive writings on property ownership and reflect this communitarian outlook:

It is [the property owner's] duty to see that his premises are not applied to the unlawful use, and it is equally the right of the law to have him take such action as will prevent their being so used. . . . [T]he law does not protect persons in the ownership of property, and then permit them to absolve themselves from all obligation in respect to the uses to which it is applied. \textit{Ownership carries its duties as well as its benefits}. One of them is to keep the property from a use which is unlawful. It is imposed upon the owner because that is where it ought to rest.\textsuperscript{387}

The Red Light Abatement laws put property owners on notice that they could no longer shirk their "duties" of property ownership.\textsuperscript{388} With

\textsuperscript{385} The merger of public and private rights in the Red Light Abatement law represents an early instance of a self-consciously communitarian conception of property that is advocated by some modern scholars. \textit{See}, e.g., \textsc{Joseph Singer}, \textsc{The Edges of the Field: Lessons on the Obligations of Ownership} (2000); \textsc{Joseph Singer}, \textsc{Entitlement: The Paradoxes of Property} (2000); \textsc{Amitai Etzioni}, \textsc{The Spirit of Community: Rights, Responsibilities and the Communitarian Agenda} (1993); \textsc{Jane B. Baron}, \textsc{The Expressive Transparency of Property}, 102 \textsc{Columbia L. Rev.} 208 (2002); \textit{Justice Philip A. Talmadge}, \textsc{The Myth of Property Absolutism and Modern Government: The Interaction of Police Power and Property Rights}, 75 \textsc{Wash. L. Rev.} 857 (2000).

\textsuperscript{386} George E. Worthington, \textit{Injunction and Abatement Law Against Houses of Prostitution}, 3 \textsc{United League News} 1, 1 (1923). In addition to the Red Light Abatement laws, social reformers also promoted the "Tin Plate" ordinance as a means of ensuring accountability. First enacted in Portland, Oregon, the Tin Plate ordinance required that the front of every building post a "conspicuous plate or sign bearing the name and address of the owner or owners of the building." \textit{The 'Injunction Law' and the 'Tin Plate Ordinance',} 1 (n.d.) (ASHA, Legal Reference Files, Box 2, Folder 15: Injunction and Abatement, 1911-24, Social Welfare History Archives, University of Minnesota). The appeal of the Tin Plate ordinance was two-fold: it established ownership for Red Light Abatement actions and it made public the names of owners. \textit{Id.} (noting that one of the greatest impediments to enforcement of the Injunction and Abatement laws is establishing that the accused is the owner of the property).

\textsuperscript{387} George E. Worthington, \textit{Memorandum of March 29, 1921}, at 2 (ASHA, Legal Reference Files, Box 2, Folder 14: Injunction and Abatement, 1911-24, Social Welfare History Archives, University of Minnesota) (emphasis mine).

\textsuperscript{388} "The owner's ignorance of the past unlawful use of his property does not relieve him of
virtually every member of a jurisdiction empowered to enforce these duties, the laws provided an effective means of enforcing communal obligations.

Although the red lights have long since been extinguished, the Progressive social reformers who promoted the Red Light Abatement laws left behind an alternative conception of property relations. Through a transformation of public nuisance law, Progressive reformers articulated a communitarian vision in which the line separating public and private interests vanished. Whether such a vision has a place in American society today remains an open question. What the history of the Red Light Abatement laws reveals is that when this vision is combined with powerful social forces, public nuisance law can be a potent legal tool for transforming the world in which we live.