Preserving Decency:

The Regulation of Sexual Behaviour in Early Otago 1848-1867

Sarah Carr

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Abstract

When the first settlers departed for Otago from Britain in 1847, the leaders of the settlement envisioned a class based society populated by law abiding, Scottish Presbyterians. The founders had proposed that the settlement be based on the economic and social principles of "systematic colonisation," developed by Edward Gibbon Wakefield during the first half of the nineteenth century. A key feature of these principles was the emigration of young married couples or an equal number of young men and women, who were to have sufficient children to provide the colony with its future source of labour. In addition to these principles the settlement was supported by the Free Church of Scotland, with the expressed desire that emigrants would be selected for their adherence to Presbyterianism, preferably the Free Church. This combination of marriage, procreation and Presbyterianism meant that the settlement was based on strict ideas about the regulation of marriage and sexual intercourse in order to adhere to the Church's teachings about sex and systematic colonisation's principles regarding procreation.

This thesis examines the regulation of sexual behaviour in Otago in light of the various values that influenced its settlement. Consideration is given to the role of the church, its ministers, and the church courts in regulating the celebration of marriage within the settlement, and in punishing illicit sexual behaviour. This thesis also examines the role of secular authorities, including the police and local and supreme courts, in regulating and punishing illegal sexual activities. Finally, more informal methods of regulation are looked at, including the role of members of the community, especially women, in establishing and maintaining standards of behaviour. The findings of this research illustrate the limited effectiveness the church had in regulating behaviour, tensions between church and state when their roles intersected, and the difficulties of imposing a single, accepted sexual morality within the settlement.

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Introduction

In 2013 historian Robert Aldrich called for "more studies of sexual cultures in particular cities or regions, works that bring together, in documentation and analysis, marriage and extra-marital relations, homosexuality and heterosexuality, European and non-European practices and attitudes."[1] Following Aldrich, this thesis offers an archival-based overview and analysis of the range of sexual practices, attitudes and cultures that existed in the colonial settlement of Otago, New Zealand, from the arrival of the first sponsored settlers in 1848, until the introduction of the Offences Against the Persons Act at the end of 1867 (see figure 1.1). A study of a nascent colonial settlement, such as Otago, offers an opportunity to examine the transportation of ideas and ideologies from Britain to its colonies, and the influence of the colonial experience on traditionally held beliefs. In addition to this, the study of sexual behaviour in early Otago has the advantage of drawing attention to the strong religious foundation of the settlement and therefore the role of the church in regulating sexual behaviour, thus addressing recent developments in colonial history and the study of sexuality in New Zealand.

Like Aldrich, I am interested in bringing together a range of sexual behaviours and practices into single analysis in order to offer some insight into the sexual cultures that existed in early Otago. I focus particularly on the range of heterosexual practices in the colony, including the illicit, the 'immoral' as well as sexual crime, including vaginal sex between a man and a woman who are married to each other, adultery (a sexual relationship between an unmarried couple),

[1] Robert Aldrich, "Sex Matters: Sexuality and the Writing of Colonial History," in *Writing Imperial Histories*, ed. Andrew S. Thompson (Manchester: Manchester University Press, 2013), p. 95

fornication (sex between an unmarried man and an unmarried woman), prostitution, rape and sexual assault. These practices are set alongside sodomy (anal sex) and bestiality (a penetrative sexual act between a person and an animal), with a particular focus on the regulation of sexual behaviours: the rules used within a society to define which activities are permissible and which are to be condemned, as well as the infrastructure put in place to monitor activities, enforce the rules and inflict punishments dictated by those rules.

It has been suggested that a "history of sexuality runs the risk of confirming popular fears that academics are capable of ruining even the most simple of pleasures."[2] However, it is the deviant, defiant and 'abnormal' that have dominated scholarship: "as ever, writing about sex… it is the stubbornly perverse, not the humdrum and normative, which captures attention."[3] In this sense, the scholarship of sex and sexuality, especially the history of sexuality, is very closely linked to the scholarship of the regulation of human behaviour, whether the regulation is politically led, socially driven or theologically based.[4] The importance of the regulation and control of sexuality to authorities, especially during the nineteenth century, has meant the survival of evidence which better informs the study of deviance and defiance, than the study of the "normative" for which the evidence is more limited. The deviant, defiant and 'abnormal' captures attention precisely because it was policed, leaving the historian with an available record for its exploration, which is reflected in the subject matter of this thesis.

[2] Stephen Garton, *Histories of Sexuality* (New York: Routledge, 2004), ix.

[3] Lynne Segal, review of *Jews and Sex*, by Nathan Abrams, ed., *Times Higher Education Supplement*, 15 May 2008: 48.

[4] Victoria Harris, "Sex on the Margins: New Directions in the Historiography of Sexuality and Gender," *The Historical Journal* 53 no. 4 (2010): 1087-8.

Examination of the regulation of sexual behaviour during the early decades following the foundation of a new society provides a focal point for the examination of wider issues of society and social change. The first decades following the arrival of the first settlers were both formative and transformative as ideals gave way to reality as the accepted norms of behaviour from Britain were modified to accommodate everyday life within the colony. Studying sexual regulation in one place, such as colonial Otago, helps illuminate the ways in which ideas of morality and acceptable behaviour were developed both by individuals and collectively by communities, how such ideas were transmitted between places, both locally and across considerable distances, and how they were influenced by social and demographic changes within the community at a time when the colony moved from being a source of raw materials, to a network of British outposts, with all the familiar structures and systems in place, replicating Britain's comforts and ideals of "home". By the end of the 1860s, the far flung colonies of empire were well established with responsibility for governing the various provinces of New Zealand becoming centralised with a view to driving a more national agenda.[5]

For the study of sexuality and its regulation, a focus on the Otago settlement offers a number of advantages. Competing systems of social control in Otago situate the colony as a particularly important locality for testing the extent to which religious and secular codes of regulation were effective. Otago was envisioned to be a particular type of colonial society, one established on the social and economic principles of Edward Gibbon Wakefield's system of class based colonisation, known as "systematic colonisation," which included specific reference to gender

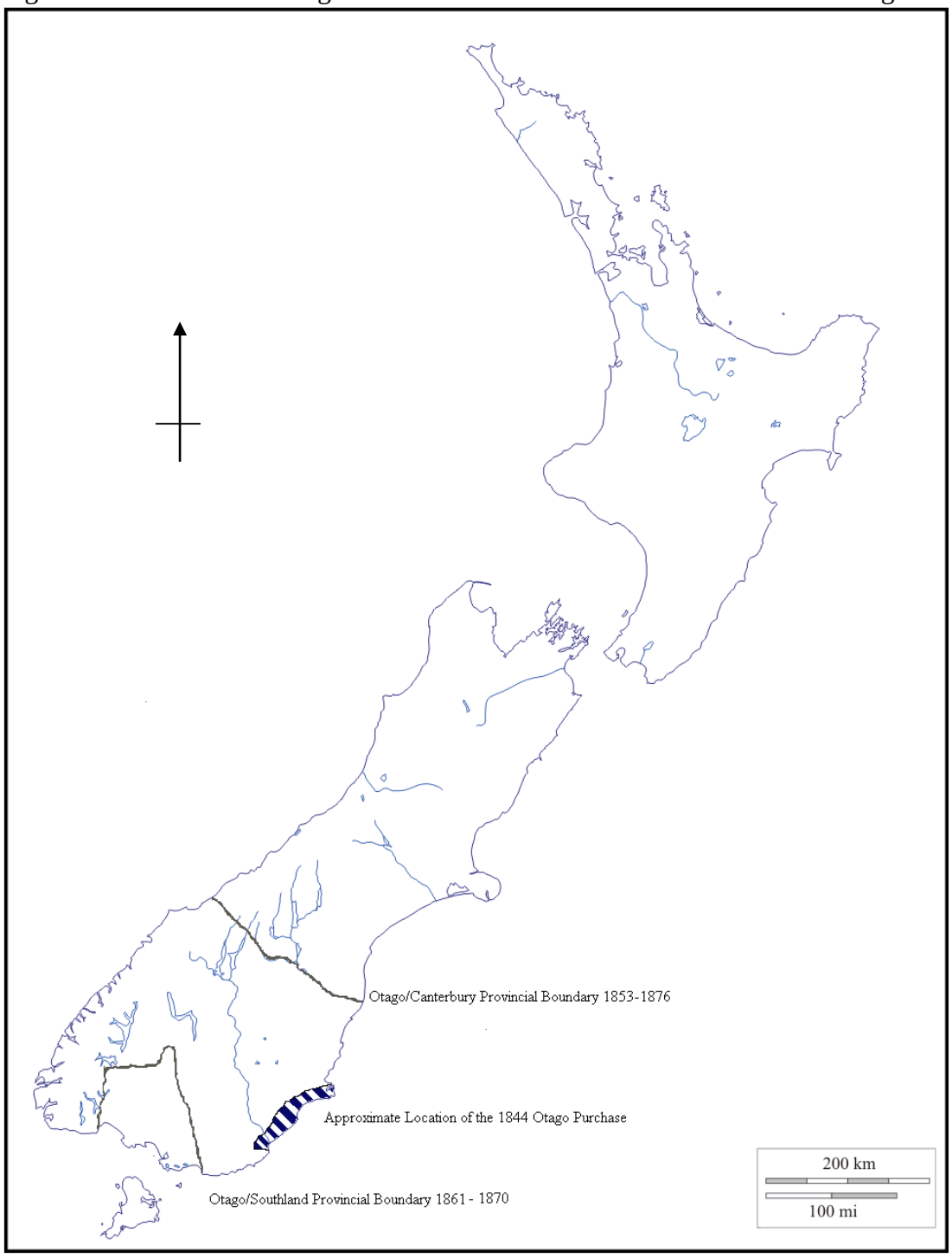
[5] Tony Ballantyne, "The State, Politics and Power, 1769-1893," in *The New Oxford History of New Zealand*, ed. Giselle Byrnes (Melbourne: Oxford University Press, 2009), 117.

relations. This theory included the principle that settlers should be selected to ensure an equal number of men and women, either young married couples or individuals of marriageable age, who would produce five or six children, providing the settlement with a potential workforce and secure its future success. Underlying this principle was the important role played by sexual reproduction. Procreative sex, and its regulation through marriage, was regarded as an important element to ensure the social and economic success of the settlement.

The New Zealand Company, a private colonisation company, purchased the Otago Block from local Ngāi Tahu chiefs in 1844, but the company did not establish the structures for peopling the region. Rather, religion was at the forefront of the establishment of Otago with the involvement of the Presbyterian Free Church of Scotland in appointing the minister and proposing that emigrants were selected on religious grounds so the colony, populated with Free Church Presbyterians, would have a specific Scottish character. The Free Church provided an infrastructure to not only marry the settlement's population but, also, to monitor the sexual behaviour of the members of its congregation. Its adherents were governed by a hierarchy of church courts, known as kirk sessions, made up of members from the congregation. A kirk session would discuss the behaviour of individuals within the congregation, and under the leadership of the Minister, would determine appropriate punishments for any members of the congregation who transgressed against the Free Church's teachings. Such public monitoring would ensure the population of the settlement acted morally, at least in the eyes of the church, and that any deviant behaviour was suitably punished and further lapses deterred.

But the Otago settlement was not established in a vacuum. The colonists arrived in a region where there already existed a small indigenous and mixed-race population, as well as a number of European and American whalers, who had established their own social and sexual codes of behaviour. In a context in which cultural mixing was well underway, Wakefield's ideals were doomed to failure from the beginning. Indeed, by the 1860s the settlement's leaders had failed to achieve most of the principles upon which it was founded, including its exclusive Scottish population, in part because of the discovery of extensive gold fields in 1861, which opened the region to a flood of new culturally diverse migrants. These factors resulted in considerable tensions between the Free Church Presbyterian ideal of the settlement's leaders, and the reality of everyday life for settlers during the first decade of the settlement. The proposed "Scottish character" of the colony also put it at odds politically with the rest of New Zealand for the country was administered from the North Island by a series of Governors appointed by the Colonial Office in London, and the laws and legal infrastructure were based on English precedents. Attempts to regulate sexual behaviour were taking place in the midst of political and economic tension, which created further conflict between the role of the Presbyterian Church in regulating marriage, the involvement of the police and courts in enforcing public order and decency, and the pragmatic approach of the European settlers, and the indigenous and mixed-race populations to managing social relationships and the realities of everyday life.

Fig. 1.1: Location of the Otago settlement and the extent of the Province of Otago



Source: Angela Wanhalla, *In/visible Sight: the Mixed-Descent Families of Southern New Zealand* (Bridget Williams Books, 2009), ii.

Between 1848 and 1867 the first settlers under the systematic colonisation scheme arrived, then single woman immigrants, while the colony's leaders dealt with the discovery of gold in 1861, which brought a sudden influx of mostly male transient diggers that challenged established systems to manage public order and decency within the settlement. Over that period several social regulation systems were competing with each other: whaling communities, indigenous protocols, the Presbyterian Church and the secular authority of the English legal system, all of which are investigated in this thesis. The thesis draws to a close in 1867 when a national Offences Against the Persons Act was introduced and which came into effect at the end of that year. This Act brought together several disparate pieces of legislation including those regulating sexual activities, clarified the definitions of some behaviours and set out specific punishments. As a result, the Act clearly located the regulation of sexual behaviour as a secular matter, outside the authority of the Church.

Socially Constructed Regulation of Sex

Historians of pre-industrial Europe have long recognised the existence of methods for the regulation of a society's "demographic parameters…in such a way that deviations from a central pattern were checked."[6] In other words, the production of children was regulated by means of a socially developed norm which effectively dictated whether people were in a position socially and/or economically to have children, and therefore be sexually active, as the two were inextricably linked. Such methods operated not only to maintain the status quo in relation to available resources, but also to help a society to survive external factors, such as

[6] Ron Lesthaeghe, "On the Social Control of Human Reproduction," *Population and Development Review* 6, no. 4 (December 1980): 528.

war or famine – Thomas Malthus' "positive checks" on population growth.[7] However, this rather generalised assumption about the effectiveness of economics to influence marriage patterns and birth rates, pays little regard to the way that societies functioned in reality. This distinction, between prescription and ideology on one hand and real life situations on the other, forms part of the focus of this thesis.

The main formal method of population control during the early modern period was the regulation of marriage. The study of marriage forms an entire subsection of historical research which contributes to an understanding of the role that marriage has played in Western Europe in the regulation of sex, generally by examining economic factors.[8] Such studies have suggested that there was a "culturally determined moral economy" which regulated age at marriage and, indirectly, fertility levels.[9] However, Stephanie Coontz stresses that historians need to avoid applying generalisations about families to all situations, instead "making more precise distinctions among regions, diverse class or cultural patterns, and situational differences in family life and sexuality."[10] In short, a number of factors associated with marriage and family formation were affected directly or indirectly by class, place, and cultural influences such as religion and traditional customs.

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[7] T. R. Malthus, *An Essay on the Principle of Population* (1872; 1914), i. 14 quoted in Hera Cook, *The Long Sexual Revolution: English Women, Sex and Contraception 1800-1975* (Oxford: Oxford University Press, 2004), 54.

[8] Richard M. Smith, "Fertility, Economy, and Household Formation in England over Three Centuries," *Population and Development Review* 7, no. 4 (December 1981): 595-622; Karl Ittmann, "Family Limitation and Family Economy in Bradford, West Yorkshire 1851-1881," *Journal of Social History* 25, no. 3 (Spring 1992): 547-573; Steve Hindle, "The Problem of Pauper Marriage in Seventeenth-Century England," *Transactions of the Royal Historical Society* 6th Ser., 8 (1998): 71-89; Edward J. Hedican, "What Determines Family Size? Irish Farming Families in Nineteenth-Century Ontario," *Journal of Family History* 31, no. 4 (October 2006): 315-334.

[9] Smith, "Fertility, Economy and Household Formation," 618.

[10] Stephanie Coontz, "Historical Perspectives on Family Studies," *Journal of Marriage and the Family* 62, no. 2 (May 2000): 284.

Although marriage as a social construct predates the Christian Church, it was sanctioned during the early medieval period originally by the Catholic Church, based on the writings of St Augustine, and later also by the Protestant Churches, to provide the foundation for family formation and the regulation of sexual activity throughout the medieval and early modern periods. By adopting and sanctioning marriage, the church hoped to exercise control by regulating who had the right to marry and to whom, when marriages could be conducted, by whom and where, thus, theoretically, avoiding the 'evils' of incest and fornication.[11] Although informed by the scholarship on marriage, this thesis is not an examination of colonial marriage patterns, rather, marriage is a starting point for examining sexual behaviour that transgressed or challenged a valorised institution in the emergent colonial society of Otago.

If the study of marriage has proven too 'humdrum and normative' for many historians, the study of sexuality outside of marriage, including the 'evils' the church hoped to avoid, has not. From the relatively staid concept of co-habitation, through to the 'morally unacceptable' activities of bigamy, adultery and fornication, to the well-researched areas of prostitution and homosexuality, historians have not shied away from examining the diverse nature of human sexuality, especially its regulation.[12] This study uses this traditional link between marriage and family formation to examine the effectiveness of the Free Church in Otago to regulate sexual behaviour through its regulation of marriage. This study also highlights the limitations

[11] John R. Gillis, *For Better, For Worse: British Marriages 1600 to the Present* (Oxford: Oxford University Press, 1985), 18-19.

[12] For example Edward J. Bristow, *Vice and vigilance: purity movements in Britain since 1700* (Dublin: Gill and Macmillan, 1977); Vern L. Bullough and Bonnie Bullough, *Sin, Sickness and Sanity: A History of Sexual Attitudes* (New York: Garland Publishing Inc., 1977); Jeffrey Weeks, *Sex politics and society: The regulation of sexuality since 1800* (London: Longman, 1989); Cook, *The Long Sexual Revolution*; Anna Clark, *Desire: A History of European Sexuality* (New York: Routledge, 2008).

of the Free Church infrastructure and identifies other measures, both formal and informal, which already acted to regulate the sexual behaviour of those sections of the population that did not adhere to the teachings of the Free Church, and to examine how these measures developed as well as their effectiveness.

The Historiography of Sexuality

As noted earlier, the study of sexuality has "tended to define itself by geography or by sub-genre" characterised by a focus on one aspect or activity: for example, homosexuality, prostitution, or birth control.[13] Perhaps the most prolific area of research into the regulation of sexuality has been the study of prostitution. In 1999 Timothy Gilfoyle stated that before 1980 the majority of scholarship around prostitution focused on "ideas, social movements, and campaigns to control or abolish" it, or was "buried" in works "devoted to crime, deviancy, hospitals and public hygiene."[14] Following that date, he suggests that historians have taken a more "empathetic view" of prostitutes and prostitution, situating them within a wider examination of society, culture and work.[15] From his perspective it is a good thing that these works have "rescued prostitution from the literature of deviancy and crime."[16] However, there is still a considerable body of literature which focuses on the social control and criminality of female prostitution, especially within imperial and colonial history, and this thesis draws on those works.[17]

[13] Harris, "Sex on the Margins," 1086-7.

[14] Timothy J. Gilfoyle, "Prostitutes in History: From Parables of Pornography to Metaphors of Modernity," *The American Historical Review* 104, no. 1 (Feb., 1999): 117-8.

[15] Ibid., 120.

[16] Ibid., 120.

[17] Judith R. Walkowitz, *Prostitution and Victorian Society: Women, Class and the State* (Cambridge: University of Cambridge Press, 1980); Philip Howell, "Prostitution and racialised sexuality: the regulation of prostitution in Britain and the British Empire before the Contagious Diseases Acts," *Environment and Planning D: Society and Space* 18 (2000): 321-339; Philip Howell, *Geographies of Regulation: Policing Prostitution in*

Of primary importance to the period under examination was the introduction of legislation in Britain, and later in a number of British colonies, to control the spread of venereal disease which has provided a focus for many historians of prostitution and its regulation. Perhaps the most influential work has been Judith Walkowitz's *Prostitution and Victorian Society: Women, Class, and the State*.[18] Examination of the extensive documentation generated by the passing of the Contagious Diseases Acts enabled Walkowitz to identify two important factors when looking at Victorian prostitutes. Firstly, they had a certain amount of choice to work as prostitutes, and secondly that they tended to stay in the profession for only a few years, generally leaving when they married or established a household through long term co-habitation.[19] The question of agency amongst prostitutes highlights the difficulty in actually understanding the lives of these women when historians are dependent upon archival sources which were written by a group far removed from these women. Nevertheless, much work has been done by Philippa Levine, using the Contagious Diseases Acts of the 1860s to challenge "long-standing and distorted assumptions about prostitution."[20] Characterisations of prostitutes as immoral, of "loose character", lazy or inherently criminal, says Levine, perpetuates the myth of the troublesome "female character."[21] Levine suggests that the archives need to be read with an understanding that the majority of the authors focused on the subjection of women who were "defined by their sexuality, [and] threatened disorder and unruliness."[22] This approach

Nineteenth-Century Britain and the Empire (Cambridge: Cambridge University Press, 2009); Phillippa Levine, ""A Multitude of Unchaste Women": Prostitution in the British Empire," *Journal of Women's History* 15, no. 4 (Winter 2004): 159-163; Philippa Levine, *Gender and Empire* (Oxford: University of Oxford Press, 2004).

[18] Walkowitz, *Prostitution and Victorian Society*.

[19] Ibid., 146-7, 195.

[20] Philippa Levine, "Women and Prostitution: Metaphor, Reality, History," *Canadian Journal of History* 28 (December 1993): 479-494.

[21] Ibid., 483.

[22] Ibid., 494.

of identifying the original purpose of the sources and any inherent bias is relevant to any archival based study of all aspects of human sexuality.

Unlike prostitution, some areas of sexuality have only recently been examined by historians. Although co-habitation, or common-law marriage, has long been recognised as a form of family construction, the majority of standalone historical scholarship on co-habitation dates from the last fifteen years.[23] Likewise, the historical study of infanticide has mostly been undertaken in the last twenty-five years.[24] Other historical research, such as into bestiality, has been heavily influenced by work from non-English speaking countries.[25] Much of the earlier historical examinations of these areas of human sexuality generally formed part of larger studies into the history of marriage, women and crime, or social deviance, stressing the relationship between society, sexuality and its regulation. The validity of such a broad approach should not be discounted as it allows for a more comparative examination of a number of human sexual activities and their regulation, which this study adopts using a range of sources, including theological teachings, state legislation, and case studies of individuals who often held contradictory attitudes towards the regulation of sexual behaviours.

[23] Ginger Frost, "Bigamy and Cohabitation in Victorian England," *Journal of Family History* 22, no.3 (July 1997): 286-306; Ginger S. Frost, *Living in Sin: Cohabiting as Husband and Wife in Nineteenth-Century England* (Manchester: Manchester University Press, 2008).

[24] R. Sauer, "Infanticide and Abortion in Nineteen-Century Britain," *Population Studies* 32, no. 1 (March 1978): 81-93; Lionel Rose, *Massacre of the Innocents: Infanticide in Britain 1800-1939* (London: Routledge and Kegan Paul, 1986); Mark Jackson, *New-Born Child Murder: Women, Illegitimacy and the Courts in Eighteenth-century England* (Manchester: Manchester University Press, 1986); Tony Ward, "The Sad Subject of Infanticide: Law, Medicine and Child Murder, 1860-1938," *Social and Legal Studies* 8, no. 2 (1999): 163-180; Kirsten Johnson Kramar, *Unwilling Mothers, Unwanted Babies: Infanticide in Canada* (Vancouver, University of British Columbia Press, 2005); Anne-Marie Kilday and Katherine D. Watson, "Infanticide, Religion and Community in the British Isles: 1720-1920: Introduction," *Family and Community History* 11, no. 2 (November 2008): 84-99.

[25] Jonas Liliequist, "Peasants Against Nature: Crossing the Boundaries between Man and Animal in Seventeenth and Eighteenth Century Sweden," *Journal of the History of Sexuality* 1, no. 3 (1991): 393-423; Jens Rydström, *Sinners and Citizens: Bestiality and Homosexuality in Sweden 1880-1950* (Chicago: University of Chicago Press, 2003).

The issues of class and gender raised by Walkowitz's and Levine's work on prostitution highlight issues of power, authority and oppression that underlies much of the scholarship about sexuality, especially in colonial settings. One of the more influential works on sexuality in the latter part of the twentieth century has been Michel Foucault's *History of Sexuality*, in which he developed the theories of power and agency.[26] Foucault also proposed that up until the nineteenth century people who committed sexual transgressions were condemned for their actions as opposed to any deviant group that they might be perceived to represent. Some historians have argued against the idea that sexual identities were a nineteenth century invention, using evidence of "sodomites" and "prostitutes" from the early modern period.[27] They suggest that communities of like-minded men developed around homo-social environments and urban areas known for sexual liaisons.[28] However, these labels were generally applied by others within society, such as moral reformers, often with a negative connotation. This suggests that although "otherness" based on sexual activities was created and generally viewed negatively by people within communities, the regulation of the behaviour of these "others" was based on punishing their actions. This, thereby, separated the individuals from their actions. Aside from the label "prostitute," which was in general use in Otago at the time and had a recognised meaning amongst the police and in court, this thesis does not attempt to affix sexual identities to individuals. In early colonial Otago both the judicial system and

[26] Michel Foucault, *The History of Sexuality*, trans., Robert Hurley (New York: Vintage Books, 1988).

[27] Katherine Crawford, *European Sexualities, 1400-1800* (Cambridge: University of Cambridge Press, 2007), 6-7; Anna Clark, "Twilight Moments," *Journal of the History of Sexuality* 14, nos. 1/2 (January/April 2005): 142-3.

[28] Crawford, *European Sexualities*, 7.

the kirk sessions punished people for specific acts of sexual transgression as opposed to punishing individuals for their lifestyles.[29]

Contemporary discussions about sexuality highlight for historians the arguments within societies about knowledge and authority.[30] For early modern England Patricia Crawford identifies two main sources of knowledge which would have informed colonial societies as much as those in Britain, one religious and one medical.[31] This suggests that all members of British society would support one or other of these two sources of knowledge in a conflict over the regulation of sexuality. Within this thesis a further source of knowledge or power is proposed, that of social norms, which could be at odds with both the religious/church based power and the secular/judicial power of the courts. The role of society and its members in creating a means to control or regulate "otherness" in ways that contrast with the teachings of the church or the letter of the law can be seen in situations where individuals adapt their behaviour to the practicalities of everyday existence. This is perhaps most noticeable in studies which look at sexuality in colonial settings.

The historiography around sexuality and its regulation within the wider contexts of imperial and colonial settings has a very recent history beginning with Ronald Hyam's *Britain's Imperial Century* in 1976, in which he "was determined to widen the conventional agenda by including a number of themes which had never before appeared in textbooks about empire."[32]

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[29] Chris Brickell, *Mates and Lovers: A History of Gay New Zealand* (Auckland: Random House New Zealand, 2008), 32, 68-9.

[30] Patricia Crawford, *Blood, Bodies and Families in Early Modern England* (Harlow: Pearson Education Ltd, 2004), 55.

[31] Ibid., 55.

[32] Ronald Hyam, *Britian's Imperial Century, 1815-1914: A Study of Empire and Expansion*, 3rd ed. (Basingstoke: Palgrave Macmillan, 2002), xi.

His focus was mostly on the sexuality of the ruling white males, although he touched on interracial sexual encounters and prostitution.[33] From this early start the study of imperial and colonial sexualities has taken several different paths, including the regulation of sexuality and prostitution in the British Empire, the concepts of power and oppression, examinations of interracial intimacies, as well as remaining contained within broader culturally-inflected studies of empire.

Scholarly work on the regulation of imperial and colonial sexuality, especially prostitution has been developed mostly by Levine, Richard Philips and Philip Howell.[34] Their work highlights how common prostitution was in the colonial setting and the tensions faced by colonial authorities in accepting commercial sex between the colonists and indigenous populations, yet enforcing increasing levels of regulation on these populations.[35] Philips' and Howell's geographical approach to examining "imperial sexual politics" and the mobility of both the men involved in colonisation and some of the women who were prostitutes, "transnational sexual politics", echoes Tony Ballantyne's work, recently collected together in his book *Webs of Empire*.[36] In this work, Ballantyne firmly places New Zealand within a web of interdependence between colonies that run horizontally, in addition to the accepted vertical

[33] Ibid., 281, 291-294.

[34] Levine, "A Multitude of Unchaste Women," 159-163; Richard Phillips, "Imperialism and the regulation of sexuality: colonial legislation on contagious diseases and ages of consent," *Journal of Historical Geography* 28, no. 3 (2002): 339-362; Richard Phillips, "Heterogeneous Imperialism and the Regulation of Sexuality in British West Africa," *Journal of the History of Sexuality* 14, no. 3 (July 2005): 291-315; Richard Phillips, *Sex, politics and empire: A Postcolonial Geography* (Manchester: University of Manchester Press, 2006); Howell, *Geographies of Regulation*; Howell, "Prostitution and racialised sexuality," 321-339.

[35] Levine, "A Multitude of Unchaste Women," 162.

[36] Phillips, *Sex, politics and empire*; Richard Phillips, "Histories of Sexuality and Imperialism: What's the Use?" *History Workshop Journal* 63 (2007): 137- 154; Howell, "Prostitution and racialised sexuality"; Tony Ballantyne, *Webs of Empire: Locating New Zealand's Colonial Past* (Wellington: Bridget Williams Books, 2012).

metropole-colony relationship between Britain and its colonies.[37] Such a web of relationships is important for understanding how colonists and colonial authorities acquired and created knowledge, and how that knowledge was controlled by factors such as class, race and gender and religion. This model has informed how the evidence available in Otago has been examined. Where possible, the background of individuals who appeared before the kirk sessions or secular courts has been traced to try to isolate some of the experiences or knowledge that could have influenced their opinions.

Imperialism and colonialism encouraged contact between the imperial body and the indigenous population, the coloniser and the colonised, thus pushing race and culture into the forefront of studies concerned with colonial sexuality. The development of scholarship around interracial intimacies highlights the polarity in much historical research around cross-cultural contact. A significant amount of work on contact between Britain and indigenous populations has focused on conflict.[38] In contrast a growing body of work from Canadian, Australian and, more recently, New Zealand historians has focused on contact as a more intimate activity between individuals. Work on the often quoted "tense and tender ties" of interracial intimacies and marriage was pioneered in Canada during the 1980s by Jennifer Brown, Sylvia Van Kirk, and Jean Barman, in their work on fur-trade societies of the late eighteenth and early nineteenth centuries, followed by Adele Perry who examined the intersections between race and gender in mid-nineteenth century settler society.[39] More recently, Ann McGrath and Inga Clendinnen,

[37] Ballantyne, *Webs of Empire*, 14.

[38] See for example Martin Daunton and Rick Halpern, ed., *Empire and others: British encounters with indigenous peoples, 1600-1850* (London: UCL Press, 1999); Julie Evans, et al., *Equal subjects, unequal rights: Indigenous peoples in British settler colonies, 1830-1910* (Manchester: University of Manchester Press, 2003).

[39] Jennifer S. H. Brown, *Strangers in blood: Fur-Trade company families in Indian country* (Vancouver: University of British Columbia, 1980); Sylvia Van Kirk, *Many Tender Ties: Women in Fur-Trade Society, 1670-1870* (Norman OK: University of Oklahoma Press, 1983); Jean Barman, "Taming Aboriginal Sexuality:

amongst others, have examined intermarriage in the earlier years of Australia's colonisation.[40] McGrath has highlighted the importance of recognising how indigenous communities regulated the sexual behaviour of their members, who could also be subject to coloniser or imperial means of regulation.[41] These studies show that sexual relations between individuals formed a not inconsiderable part of the relationship between Europeans and indigenous peoples at the edge of the empire and that the rules governing these relationships had as much to do with the nature of the colony as with the people within them. In a settlement such as Otago these relationships became one of the acceptable forms of family formation although over time they became subject to British forms of marriage regulation as shall be discussed in Chapter 2.

There existed an entrenched idea of European racial superiority, which came to the forefront during the nineteenth century. This period marked the height of the British Empire and British influence worldwide. The success of this empire was founded on industrialisation, military and naval strength, religious conviction and a wholehearted belief in racial superiority. In sexual terms, these perceptions espoused the domination of European colonists over the native and half native populations, the condemnation of men who had married native women for not keeping the purity of the superior race, the condemnation of men who had sex with other men, as they would not have children to ensure the future of the colony, and the condemnation of

Gender, Power, and Race in British Columbia, 1850-1900," *BC Studies* 115/116 (Autumn/winter 1997/98): 237-266; Adele Perry, *On the Edge of Empire: Gender, Race and the Making of British Columbia, 1849-1871* (Toronto: University of Toronto Press, 2001).

[40] Ann McGrath, "Consent, Marriage and Colonialism: Indigenous Australian Women and Colonizer Marriages," *Journal of Colonialism and Colonial History* 6, no. 3 (2005); Inga Clendinnen, *Dancing with Strangers: Europeans and Australians at First Contact* (Cambridge: Cambridge University Press, 2005).

[41] McGrath, "Consent, Marriage and Colonialism."

male masturbation as the spilling of the seed needed for the creation of future generations.[42] Suzanne Williams Milcairns has highlighted the perceived threat that men who stepped aside from the norm posed to the stability of European cultural identity.[43] This threat from "white-men-gone-native" challenged the concept that white men were superior. These men were recognised as having sexual relationships with the indigenous population, and domestic environments which related more to place, convenience, business and cultural influence with indigenous populations, than to established imperial norms or recognised environments "at home". Milcairns suggests that these relationships, in addition to being a perceived threat, were also a fascination for Europeans. Such men were able to "indulge in pleasures, particularly those that were explicitly denied in [their] home society."[44] In order to be able to maintain control and racial superiority, it became important for the British to regulate sexual behaviour and encounters.[45] As a result of these concerns and perceptions, the imperial hierarchy developed very definitive ideas of what was sexually unacceptable which encompassed prostitution, same sex relationships, and sexual relationships with indigenous populations. These ideas of unacceptable behaviour formed the background against which the whalers of Otago were measured by the settlers from Britain, and, as examined in Chapter 3, informed their reactions to the mixed-race families and their activities.

[42] Thomas W. Laqueur, *Solitary Sex: A Cultural History of Masturbation* (New York: Zone Books, 2003), 177, 255; Stevan Eldred-Grigg, *Pleasures of the Flesh: Sex and Drugs in Colonial New Zealand 1840-1915* (Wellington: AH and AW Reed Ltd, 1984), 47-8.

[43] Susanne Williams Milcairns, *Native Strangers: Beachcombers, Renegades and Castaways in the South Seas* (Auckland: Penguin, 2006), 31.

[44] Ibid., 37.

[45] Philippa Levine, "Sexuality, Gender, and Empire," in *Gender and Empire*, ed. Philippa Levine (Oxford: Oxford University Press, 2005), 136-7.

Regulating the behaviour of European women, regarded as the moral centre of civilised society, was perceived as especially essential to successful colonial settlement; an issue much studied in feminist scholarship.[46] Ann Laura Stoler has firmly placed European women at the forefront of the tension between Colonial Office aspirations and the reality of everyday life in the empire.[47] The arrival of European women in the colonial setting coincided with, although it did not cause, a decrease in interracial socialising and an increase in the perception of sexual threats to European women by colonised men.[48] Colonial officials were constantly aware of the threat posed to white superiority by unprotected women – those without a male protector, be it father or husband – who, in "straitened circumstances" might turn to prostitution.[49] In predominantly European settlements, women were "custodians of family welfare and respectability and dedicated and willing subordinates to and supporters of men."[50] In Otago's case, the moralising role of European women formed a key feature of Wakefield's systematic colonisation.[51] It influenced how women who stepped outside this role were perceived by both

[46] Kirsten McKenzie, *Scandal in the Colonies: Sydney and Cape Town 1820-1850* (Melbourne: University of Melbourne Press, 2004), 105; Marilyn Lake, "Frontier Feminism and the Marauding White Man, Australia, 1890s-1940s," in *Nation, Empire, Colony: Historicizing Gender and Race*, eds. Ruth Roach Pierson and Napur Chaudhuri (Bloomington: Indiana University Press, 1998), 97; Angela Woolacott, *Gender and empire* (Basingstoke: Palgrave Macmillan, 2006); Claire Midgley, ed., *Gender and imperialism* (Manchester: University of Manchester Press, 1998); Tony Ballantyne and Antoinette Burton, "Introduction: Bodies, Empires, and World Histories," in *Bodies in Contact: Rethinking Colonial Encounters in World History* (Durham, N.C. and London: Duke University Press, 2005), 4-5.

[47] Ann Laura Stoler, *Carnal Knowledge and Imperial Power* (Berkeley: University of California Press, 2002), 55-57.

[48] Ann Laura Stoler, "Carnal Knowledge and Imperial Power: Gender and Morality in the Making of Race," in *Carnal Knowledge and Imperial Power: Race and the Intimate in Colonial Rule*, ed. Ann Laura Stoler (Berkeley: University of California Press, 2002), 59-60; Jane Haggis, "White women and colonialism: towards a non-recuperative history," in *Gender and imperialism*, ed. Clare Midgley (Manchester: Manchester University Press, 1998), 45.

[49] Stoler, "Carnal Knowledge and Imperial Power," 61.

[50] Ibid., 61.

[51] Edward Gibbon Wakefield, "A View of the Art of Colonization With Present Reference to the British Empire; In Letters Between a Statesman and a Colonist: Letter XXIV," in *The Collected Works of Edward Gibbon Wakefield*, ed. M.F. Lloyd (Auckland: Collins, 1969), 840.

secular and ecclesiastical courts, as well as the wider society, as shall be seen in the case studies that form the second half of this thesis.

The Historiography of Colonial New Zealand and Otago

Fundamental to any understanding of sexual behaviour in past societies is the need to address not only gender, race, class and religion, but also the specifics of place, which this thesis addresses by drawing attention to the relationship between religion, the state, and the regulation of sexuality in one colonial location. It should be noted that the study of sexuality within New Zealand is relatively small, nevertheless it shares some of the characteristics of international scholarship, notably in the turn towards studies of colonialism through race and gender in recent years. There has also been a tendency to focus on the twentieth century, with studies of the colonial period rare and studies of indigenous practices in the colonial period even rarer.[52] New Zealand's history of colonial sexuality falls into a number of areas: studies of interracial marriage and 'half-caste' children;[53] studies of missionaries and their attitudes;[54] studies of homosexuality in the early decades of the colony;[55] and examinations of the colonial family,[56]

[52] Ngahuia Te Awekotuku, "He Reka Anō – same-sex lust and loving in the Māori world," in *Outlines: Lesbian and Gay Histories of Aotearoa*, ed. Alison J. Laurie and Linda Evans (Wellington: Lesbian and Gay Archives of New Zealand, 2006), 6-9; Hirini Kaa, "Sex, Sin and Salvation: Māori Morality Through a Christian Lens," *Te Pouhere Korero* 6 (2012): 27-34.

[53] Barbara Brookes, "Taking Private Life Seriously: Marriage and Nationhood," *History Compass* 1 (2003):1-4; Angela Wanhalla, "Transgressing boundaries: a history of the mixed descent families of Maitapapa Taieri, 1830-1940" (PhD diss., University of Canterbury, Christchurch, 2004); Damon Salesa, "Race Mixing: A Victorian Problem in Britain and New Zealand, 1830s–1870s" (PhD diss., Oxford University, 2000); Emily V. Owen, "Intermarriage: Its Role and Importance Within Early New Zealand Shore Whaling Stations" (MA diss., Massey University, Palmerston North, 2007); Kate Stevens, "'Gathering Places': The Mixed Descent Families of Foveaux Strait and Rakiura/Stewart Island, 1824-1864" (BA(Hons) diss., University of Otago, Dunedin, 2008); Wanhalla, *In/visible Sight*.

[54] Judith Binney, "Whatever Happened to Poor Mr Yate?" *New Zealand Journal of History* 9, no. 2 (1975): 111-125; J.M.R. Owens, *Prophets in the Wilderness: The Wesleyan Mission to New Zealand 1819-1827* (Auckland: Auckland University Press, 1974).

[55] Brickell, *Mates and Lovers*, Chapter 1.

[56] Erik Olssen and Andree Levesque, "Towards a History of the European Family in New Zealand," in *Families in New Zealand Society*, ed. Peggy G. Koopman-Boyden (Wellington: Methuen, 1976), 1-26; Erik Olssen, "Families and the Gendering of European New Zealand in the Colonial Period 1840-80," in *The*

with prostitution and the Contagious Diseases Act (1869), and abortion the focus of much historical interest.[57]

There has been a tradition within New Zealand of focusing on the masculine frontier,[58] in part due to the proportionally higher number of men, resulting in what Charlotte Macdonald refers to as "the abundance of men [forming] part of a national narrative."[59] This gender imbalance has also formed the basis of a number of studies of colonial New Zealand. Its impact has been assessed with regard to the influence it had on gender relations, social problems and the creation of a perceived male dominated society.[60] Macdonald's *A Woman of Good Character* focuses on the need for domestic servants as more of an overriding concern to colonists, than the need to overcome the gender imbalance for reasons of population growth or to avoid the perceived vices posed to many men. Although these studies have included examinations of the formation of families, the link between gender balance and the regulation of marriage and sexual behaviour has tended to be dominated by statistical preoccupations.[61]

Gendered Kiwi, ed. Caroline Daley and Deborah Montgomery, (Auckland: University of Auckland Press, 1999), 37-62.

[57] Charlotte Macdonald, "'The Social Evil': Prostitution and the Passage of the Contagious Diseases Act (1869)," in *Women in History: Essays on European Women in New Zealand*, ed. Barbara Brookes, Charlotte Macdonald and Margaret Tennant (Wellington: Allen & Unwin NZ, 1986), 13-34; Caroline Daley, "Puritans and Pleasure Seekers," in *Sexuality Down Under: Social and Historical Perspectives*, ed. Allison Kirkman and Pat Maloney (Dunedin: University of Otago Press, 2005), 49 & 51.

[58] Jock Phillips, *A Man's Country? The Image of the Pakeha Male - A History* (Auckland: Penguin, 1987, revised ed. 1996); Miles Fairburn, *The Ideal Society and its Enemies: the Foundations of Modern New Zealand Society 1850-1900* (Auckland: Auckland University Press, 1989).

[59] Charlotte Macdonald, "Too Many Men and Too Few Women: Gender's 'Fatal Impact' in Nineteenth-Century Colonies," in *The Gendered Kiwi*, ed. Caroline Daley and Deborah Montgomery (Auckland: Auckland University Press, 1999), 18.

[60] Charlotte Macdonald, *A Woman of Good Character: Single Women as Immigrant Settlers in Nineteenth-century New Zealand* (Wellington: Allen & Unwin, 1990); Macdonald, "Too Many Men and Too Few Women"; Olssen and Levesque, "History of the European Family"; Olssen, "Families and the Gendering of European New Zealand"; David Thomson, "Marriage and Family on the Colonial Frontier," in *Disputed Histories: Imagining New Zealand's Pasts*, ed. Tony Ballantyne and Brian Moloughney (Dunedin: Otago University Press, 2006), 119-142 .

[61] Macdonald, "Too Many Men," 32-3.

In 2003 Caroline Daley called for a broader approach to the writing of New Zealand's sexual histories, to include all members of a community or society if possible and to hear the voices of ordinary people in addition to those in authority.[62] Despite this suggested broad approach, Daley did not include the influence of religion and focused mostly on twentieth century New Zealand, overlooking the formative years of the nineteenth century. In response to Daley's suggestion, whilst also addressing its limitations, this thesis investigates the widest possible community base to include previously marginalised or overlooked groups or individuals and sexual behaviours. To achieve this both ecclesiastical and secular sources have been examined, as well as more informal personal responses to activities such as the use of diaries. Furthermore, a broad spectrum of sexual behaviours are analysed, including bestiality, which has not previously been examined in New Zealand history.

To date much of the scholarship on sexuality in New Zealand has been secular in focus, overlooking the influence of religion in establishing sexual morality in colonial communities. As indicated earlier, religion has been an important influential cultural factor in the regulation of sexual behaviour in European societies. Indeed it has been argued that "sexuality is perhaps the sphere where Christianity has most profoundly influenced human behaviour. In all areas of the world where it held sway, Christian thinking imposed itself on every aspect of sexual life, from regulations of marriage to proper coital positions."[63] Considerable research has been undertaken on how the Scottish church tried to enforce a specific moral ideal on congregations

[62] Daley, "Puritans and Pleasure Seekers," 62.

[63] Jenny Jochens, "The Illicit Love Visit: An Archaeology of Old Norse Sexuality," *The Journal of the History of Sexuality* 1, no. 3 (1991), 357.

and what steps were taken to punish transgressors, especially for sexual transgressions.[64] This work on the Presbyterian Church in Scotland has provided a model for the examination of sexual regulation in Otago. The infrastructure of the church was built on networks of knowledge and communication between parishes that could be as far apart as Scotland and New Zealand or Canada. This strong network ties into Tony Ballantyne's theory of a colonial web of interdependence between colonies, in this instance linked specifically to the workings of the Presbyterian Church throughout the Empire.[65] Hilary Carey's recent book on the role of churches in the British Empire highlights the importance of international networks to how the churches functioned.[66] The importance of religion to the foundation of both Otago and Canterbury has resulted in a small but significant body of scholarship which has assessed the impact of religion on the cultural and political development of New Zealand and its constituent settlements. The influence of Presbyterianism in New Zealand, and especially Otago, has been examined by Peter Matheson in a number of works which have focused on the growth of the church as an aspect of Christian religion within New Zealand.[67] Rosalind McLean and Alison

[64] Kenneth M. Boyd, *Scottish Church Attitudes to Sex, Marriage and the Family 1850-1914* (Edinburgh: John Donald Publishers Ltd., 1980); Rosalind Mitchison and Leah Leneman, *Sexuality and Social Control, Scotland 1660-1780* (Oxford: Basil Blackwell, 1989); Leah Leneman and Rosalind Mitchison, "Clandestine Marriage in the Scottish Cities, 1660-1780," *Journal of Social History* 26, no. 4 (Summer 1993): 845-861; Leah Leneman and Rosalind Mitchison, *Sin in the City: Sexuality and Social Control in Urban Scotland 1660-1780* (Edinburgh: Scottish Cultural Press, 1998); Rosalind Mitchison and Leah Leneman, *Girls in Trouble: Sexuality and Social Control in Rural Scotland 1660-1780* (Edinburgh: Scottish Cultural Press, 1998); Margo Todd, "Profane Pastimes and the Reformed Community: The Persistence of Popular Festivities in Early Modern Scotland," *The Journal of British Studies* 39, no. 2 (April 2000): 123-156; Margo Todd, *The Culture of Protestantism in Early Modern Scotland* (New Haven: Yale University Press, 2002); Margo Todd, review of *The sinners of Cramond. The struggle to impose godly behaviour on a Scottish community, 1651-1851*, by Alison Hanham, (Edinburgh: John Donald, 2005), *Journal of Ecclesiastical History* 57, no. 4 (October 2006): 784-5.

[65] Ballantyne, *Webs of Empire.*

[66] Hilary M. Carey, *God's Empire: Religion and Colonialism in the British World, c. 1801-1908* (Cambridge: Cambridge University Press, 2011).

[67] Peter Matheson, "1840-1870: The Settler Church," in *Presbyterians in Aotearoa 1840-1900* ed. Dennis McEldowney (Wellington: The Presbyterian Church of New Zealand, 1990), 15-42; Peter Matheson, "Presbyterianism," in *The Farthest Jerusalem: Four Lectures on the Origins of Christianity in Otago* (Dunedin: Faculty of Theology and Hocken Library, University of Otago, 1993); Peter Matheson, *The Finger of God in*

Clarke have also examined Presbyterianism by looking at the role the church played in the beliefs of the residents of Otago and New Zealand.[68] Historians of religion in New Zealand have also touched briefly on the importance of gender in assessing the impact of religion.[69] However, there are still opportunities to further develop this work, for as John Stenhouse has argued, "many features of local society and culture…including gender roles and relations…cannot adequately be understood" without reference to religious beliefs and values.[70] In his chapter in *The New Oxford History of New Zealand*, Stenhouse suggests that the religious beliefs of settlers and the lack of them need to be examined if historians are to truly understand the forces that were at work within society:

> Integrating religion with secular history also illuminates the centripetal, or centre-seeking, forces at work within society that knit together families, churches, local communities and nation, and connect New Zealand with the wider world. Religious (and secular) people, communities and traditions brought peace, connections and integration as surely as difference and dissension.[71]

He also recognises that their views of religion, both positive and negative, were one of many cultural traditions that settlers brought with them to New Zealand and continued to shape

the Disruption 1843-1993 (New Zealand: The Presbyterian Church of Aotearoa New Zealand Synod of Otago and Southland, 1993).

[68] R. R. McClean, "Scottish piety: the Free Church settlement of Otago, 1848-1853," in *Building God's Own Country: Historical Essays on Religions in New Zealand*, ed. John Stenhouse and Jane Thomson (Dunedin: University of Otago Press, 2004); Alison Clarke, "A Godly Rhythm: Keeping the Sabbath in Otago 1870-90" (PGDipArts diss., University of Otago, Dunedin, NZ, 1999); Alison Clarke, "Feasts and Fasts: Holidays, Religion and Ethnicity in Nineteenth Century Otago" (PhD diss., University of Otago, Dunedin, NZ, 2003); Alison Clarke, "Heavenly Visions: Otago Colonists' Concepts of the Afterlife," *Journal of Religious History* 30, no. 1 (Feb. 2006): 2-17; Alison Clarke, *Holiday Seasons: Christmas, New Year and Easter in Nineteenth-Century New Zealand* (Auckland: Auckland University Press, 2007).

[69] John Stenhouse and Jane Thomson, eds., *Building God's Own Country: Historical Essays on Religions in New Zealand* (Dunedin: University of Otago Press, 2004).

[70] John Stenhouse, "Introduction," in *Building God's Own Country*, 11.

[71] John Stenhouse, "Religion and Society," in *The New Oxford History of New Zealand* ed. Giselle Byrnes (Melbourne: Oxford University Press, 2009), 329.

society long after the colonial era.[72] For example, Stenhouse notes the churches' generally conservative stand towards sexuality during the later decades of the twentieth century.[73] Despite these references to the churches' attitude towards sexuality, and some work on religion and gender, there has yet to be an examination of how sexual cultures unfolded in particular regions or cities of New Zealand. This dissertation offers an opportunity to undertake such a task looking particularly at the role that the Free Church played in regulating sexual behaviour in Otago, which mirrors the work of Leah Leneman and Rosalind Mitchison on Scotland during the early modern period and the work of Lynne Marks in nineteenth century Upper Canada.[74] It also highlights the limitations of theologically based regulation in the diverse settlement that Otago developed into.

Religion, ethnicity, class and gender, informed how individuals perceived others around them, but also provided common bonds of understanding and a shared sense of community. This is not to suggest that there was one single community to which all settlers belonged, for as people moved into or out of an area the nature of the community changed, and as a result its underlying belief systems may have been relatively fluid. Building on this idea of impermanence and fluidity, this thesis also argues that a settlement such as Otago was made up of a number of communities each of which was influenced differently by patterns of migration. The views and beliefs of the members of each community were determined by dominant cultural traditions for that group of people, and these groups were not mutually exclusive, for settlers

[72] Ibid., 329.

[73] Ibid., 351, 353.

[74] Lynne Marks, "No Double Standard?: Leisure, Sex, and Sin in Upper Canadian Church Discipline Records, 1800-1860," in *Gendered Pasts: Historical Essays on Femininity and Masculinity in Canada*, eds. Kathryn McPherson, Cecilia Morgan and Nancy M. Forestell, 48-64 (Toronto: University of Toronto Press, 1999).

could feel part of several communities at once. For example, a middle aged Presbyterian woman married to a labourer in North East Valley could belong to a community of working class families living in the same area, a community of the First Church congregation, and a community of women who provided each other with support locally. Their dominant cultural traditions relate very much to the place of origin of their members and may perhaps reflect similar communities throughout Britain and its colonies, making them part of a wider network of communities with shared values or beliefs, but specific to the location of Otago. The establishment of Otago therefore provides a complex environment in which to examine the interrelatedness of religion, class, gender, race and place through reaction to and the regulation of sexual activities, specifically those that were not intended to be procreative – including, but not necessarily limited to, prostitution, sex between men or sex between women, sex outside of marriage, sodomy, bestiality, sexual assault and rape. I have used the terms "procreative" and "non-procreative" to differentiate between sexual acts undertaken either with the intention of producing children or not, even if conception was a possible outcome of the act, for example prostitution or rape. It was because some of these activities had the potential to result in illegitimate children that they were perceived as specifically problematic.

This thesis makes a significant and distinctive contribution to the understanding of the role that the regulation of sexual behaviour had in colonial settings, especially in relation to religion. It not only broadens the picture provided by existing scholarship into the politics and society within Otago, but also engages the study of the early settlement with research internationally that examines and highlights the disjuncture between ideals and colonial realities.[75] In the

[75] For example Perry, *On the Edge of Empire*, 7; Richard Charles Mills, *The Colonization of Australia (1829-42): The Wakefield Experiment in Empire Building* (London: Dawsons, 1968); Tom Brooking, "The

context of colonial studies, the research engages with recent reconsiderations of Wakefield's impact on colonization, by adding a further dimension to existing scholarship.[76] In relation to the study of social history, this research uses Otago as a point of reference to examine the regulation of sexual behaviour and the role of culture, economics and marriage, and doing this in light of perceived changes in sexual norms during the middle of the nineteenth century.[77] However, its most significant contribution is in the examination of the regulation of a number of sexual behaviours by competing religious and secular authorities and the interrelatedness of sexual regulation to wider concepts of public decency and order, both informed by Christian ideals and values.

Methodology

In their work on the role of the church in regulating sexual behaviour in early modern Scotland, Leneman and Mitchison drew upon kirk records. I am reliant on similar records. The survival of many of the early Kirk Session Minute Books for Otago has been a key factor in being able to undertake the research while the increasing availability of on-line resources such as national and regional newspapers as well as increased access to court records held by Archives New Zealand have been important in enabling a close study of sexual behaviour in a small society such as colonial Otago. Despite the increase in the availability of sources, there has been difficulty in building up large numbers of examples for the behaviours that have been investigated. Some instances, such as infanticide, have been restricted to a small number of

Great Escape: Wakefield and the Scottish settlement of Otago," in *Edward Gibbon Wakefield and the Colonial Dream: A Reconsideration* (Wellington: The Friends of the Turnbull Library, 1997), 129.

[76] Rebecca Durrer, "Propagating the New Zealand ideal," *The Social Science Journal* 43 (2006), 173-183; Raewyn Dalziel, "Men, Women and Wakefield," in *Edward Gibbon Wakefield and the Colonial Dream: A Reconsideration* (Wellington: The Friends of the Turnbull Library, 1997), 77-86; Ged Martin, *Edward Gibbon Wakefield: Abductor and Mystagogue* (Edinburgh: Ann Barry, 1997).

[77] Cook, *The Long Sexual Revolution*; Clark, *Desire*, 13.

indicative cases. The specific benefits and limitations of different sources are examined in more detail in Chapter 3. This has allowed a greater scope to discuss the influences upon the sources in how they were compiled and used, and by whom.

Structure

The thesis is divided into two sections. The first section provides the contextual background to the establishment of the Otago settlement where I explore the history of Otago from the initial concept of a Scottish settlement in New Zealand, to the arrival of settlers and the first thirty years of settlement. They include an examination of the origins, occupations, lifestyles and beliefs of the local populations from the mixed-race relationships prior to 1848, to the settlers of the 1850s and 1860s in order to determine the nature of the communities within Otago. The second contextual chapter outlines the infrastructure that was in place from 1848 to regulate the sexual behaviour of the population, including the formal processes of the church, secular courts and police, and any informal social processes. The availability of evidence and its limitations is examined for both the church and secular court sources, highlighting the growing role that the secular courts had in regulating behaviour during the 1850s, leading up to the 1860s when concerns over public disorder resulted in new laws which regulated and punished 'abnormal' sexual behaviour.

Section two focuses on a series of case studies of different sexual behaviours. It opens with an examination of the regulation of marriage and what happened when the accepted conventions around marriage were broken or ignored, including sex outside of marriage. Marriage was one area of social regulation where the church felt it had complete oversight. Tensions between

the church and secular authorities arose even before the arrival of the first settlers with the introduction of the 1847 Marriage Ordinance. How the church attempted to retain authority over the sacrament of marriage is examined by looking at cases of irregular marriage, cohabitation, adultery and bigamy and the punishments that were given to couples by the church. This chapter also examines instances where the church was unable to enforce its authority over couples who ignored accepted conventions, to see what actions the wider community took, if any, against these couples. The second analysis chapter looks at the outcomes of illicit sexual activities, illegitimacy and infanticide, and examines the response of the church and wider community to illegitimate children and their place within the settlement. It also looks at cases of infanticide which were punishable under law by the secular authorities, examining them in light of recent international research into infanticide to look for common patterns. In the final set of chapters, the church and state regulation of sexual behaviour is examined along thematic lines, by analysing the response to and punishment of different types of 'non-procreative' sexual activity – including sodomy and bestiality, sexual assault and rape, and prostitution. Although conceived as sinful by the church, these activities were under the authority of the courts and police to regulate. Evidence from legal records illustrate how members of the wider community perceived these activities through their statements as witnesses or their deliberations as members of juries.

In early Otago, the church exerted a limited authority over the regulation of sexual behaviour amongst the settlers, whilst, the principles of systematic colonisation, which played a significant part in the early conception of the settlement, did not even survive the departure of the first ship and played almost no role in how the settlement was developed. Although the

colony was conceived along very strict principles for the selection of settlers, with their behaviour dictated by the teachings of the Free Church of Scotland, to be monitored and enforced by its infrastructure of kirk session courts, the reality of the settlement resulted in the secular courts and police having a greater role in monitoring and enforcing sexual behaviour. Despite having authority over sexual behaviour, it was of little concern to the secular officials within the colony until after the discovery of gold in 1861. At this point concern over public order and decency, especially within Dunedin, resulted in the introduction of legislation that clearly defined unacceptable sexual behaviour and stipulated punishments for transgression. As a result, acceptable sexual behaviour was defined under law as opposed to the teachings of the Free Church, despite there being a common background in Christian doctrine. The courts and police were able to enforce a model of acceptable sexual behaviour on a wider segment of the population than the church. Nevertheless, there were still sections of the population who did not fit this model, and were unable or unwilling to conform to it.

Chapter 2

The Settlement of Otago

> The General Assembly have very great pleasure in the prospect of the speedy establishment of the Scotch Colony of New Edinburgh in New Zealand, consisting of members of the Free Church, and with every security for the colonists being provided with the ordinances of religion and the means of education in connection with this Church. Without expressing any opinion regarding the secular advantages or prospects of the proposed undertaking, the General Assembly highly approve of the principles on which the settlement is proposed to be conducted, in so far as the religious and educational interests of the colonists are concerned, and the Assembly desire to countenance and encourage the Association in these respects.[1]

Although planned as a 'Scotch Colony' populated by members of the Free Church, those who arrived as part of the Free Church settlement were not establishing a new colony in a completely empty landscape. Before permanent settlers arrived from 1848 Europeans had frequented the Otago coast line during the 1790s as sealers, and later whalers, living alongside or with Ngāi Tahu and contributing to the development of a mixed-race community. This chapter provides the context for the establishment of Otago as a colony through examination of the background to the Free Church settlement, developed in Scotland during the 1830s and 1840s, as well as the mixed-race community that grew up during the same period within Otago. Examination of the Free Church plans identifies the principles and ideals that provided the foundation for the establishment of a Scottish settlement. In contrast, examination of the mixed-race community highlights the realities faced by the people already settled in the area. The chapter not only contrasts the ideals of the Scottish leaders with the realities of early Otago, but it also illustrates the different types of communities that co-existed and the multiple layers

[1] *Minutes of the General Assembly of the Free Church of Scotland*, 3 June 1845, quoted in John McGlashan, *The following is a brief narrative of the origin and early history of the Church and colony of Otago*, MS-0463/020, Hocken Library, University of Otago, Dunedin.

of social regulation, governance and authority that were already present in the Otago settlement. Free Church ideals were difficult to put in place in a region with already established communities formed out of economic exchange with high levels of cultural and social mixing. Acknowledging this is fundamental to understanding the limitations faced by the church and secular leaders in implementing their authority, and why the church and state were often in conflict over how to regulate sexual behaviour.

The Origins of the Otago Settlement

The Otago scheme was the brainchild of Scottish politician George Rennie. His vision was the establishment of a class based Scottish-Presbyterian settlement in New Zealand, founded on the principles of Edward Gibbon Wakefield. Most historians of Otago agree that the period in which the Otago scheme was developed was one of considerable upheaval and this had an impact on the ideals underpinning the settlement.[2] The 1830s and 1840s were marked by the threat of revolution in Europe, wide-spread famine in Ireland and Scotland, and high unemployment and urban over-crowding. Rennie saw colonisation as a way to overcome the issues of unemployment and destitution among the working class.[3] But he saw the need for improvements in Wakefield's systematic colonisation, and proposed specific improvements in the preparations that should be made within a settlement before the emigrants even set sail.[4] Rennie recommended that a new settlement should be established on the east coast of the Middle Island of New Zealand around Port Cooper, modern day Christchurch. The first step

[2] A. H. McLintock, *The History of Otago: the Origins and Growth of a Wakefield Class Settlement* (Dunedin: Otago Centennial Historical Publications, 1949), 149; Erik Olssen, *A History of Otago* (Dunedin: John McIndoe, 1984), 31-2; Tom Brooking, *And Captain of their Souls: an Interpretative Essay upon the Life and Times of Captain William Cargill* (Dunedin: Otago Heritage Books, 1984), 24-7.

[3] Brooking, *And Captain of their Souls*, 29.

[4] Ibid., 28.

should be the laying out of a town by surveyors and engineers, "complete with roads, wharf, sheds for goods and spacious barracks to receive the emigrants."[5] The next step would be the construction of a church and school, as well as the clearing of land, by a small number of agricultural labourers, to be sown with suitable crops or stocked with sheep and cattle.[6] Once these preparations were complete, only then should settlers follow, balanced as to numbers of capitalists and labourers as prescribed by Wakefield's model of systematic colonisation.

Although Rennie's original proposal was published in the *Colonial Gazette* in August 1842, it was not until July 1843 that the Scottish nature of the settlement was emphasised and the support of the Presbyterian Church sought.[7] Unfortunately, this coincided with the Disruption of 1843, when approximately a third of Presbyterians broke away from the Established Church of Scotland over the rights of lairds and landowners to appoint ministers.[8] Following their leader, Dr Thomas Chalmers, these Presbyterians established the Free Church. The new church harked back to Calvinist traditions of self-discipline within its congregations, and the importance of godliness and morality to overcome social problems.[9] This insistence by Free Church members on the separation of church and state was later to influence how the Free Church leaders viewed the involvement of government and the courts in the regulation and punishment of sexual behaviour in early Otago. These men felt the secular bodies were undermining the church's role in setting and maintaining morality, which led to tension and

[5] McLintock, *The History of Otago*, 159.
[6] Ibid., 159.
[7] Brooking, *And Captain of their Souls*, 32.
[8] Brooking, *And Captain of their Souls*, 33; R. R. McClean, "Scottish piety: the Free Church settlement of Otago, 1848-1853," in *Building God's Own Country: Historical Essays on Religions in New Zealand*, ed. John Stenhouse and Jane Thomson (Dunedin: University of Otago Press, 2004), 21.
[9] Olssen, *History of Otago*, 32.

personal animosity between the Scottish leaders and the government appointed secular officials of Otago.

It was Wakefield who suggested to Rennie that he should approach the newly established Free Church of Scotland seeking support for his colonial scheme.[10] The Free Church agreed to support the scheme, but insisted on the religious exclusiveness of the settlement, in return for providing a minister and a teacher.[11] In 1842 Rennie had been joined by Captain William Cargill, a retired soldier, in developing and promoting the scheme. It was after the Disruption that the Reverend Thomas Burns joined Rennie and Cargill. Burns had been one of the 474 ministers to leave the Established Church and strictly supported the exclusive Free Church nature of the proposed colony. It was not long before Burns was criticising Rennie as "anti-Free Church" for wanting to keep education and the church separate in the new colony.[12] Over the next two years Rennie came in for considerable criticism of his leadership and (in)action, both from Burns and increasingly in the press, including the *Colonial Gazette* and the *New Zealand Journal*.[13] Eventually, Rennie stepped down in October 1845, effectively ensuring the proposed exclusivity of the Free Church settlement under Cargill and Burns.

The ideals of a self-regulating community in Otago had its origins in Calvin's Geneva of the sixteenth century in which both the civil government and the church authorities worked together in a "democratic theology" to regulate the moral behaviour of the population as

[10] Brooking, *And Captain of their Souls*, 33.
[11] Ibid., 33.
[12] Ibid., 34.
[13] Ibid., 36-40.

defined by the principles of the Calvinist church.[14] Under Burns, who has been described as "a man of strong evangelical principles, zealous, fervent and intense…[with] sombre orthodoxy, earnest piety and moral prejudices…"[15] the settlement was to be peopled with adherents of the Free Church. Such a community would undertake to self-regulate the behaviour of its members because they would all "have individually and collectively internalised 'correct' patterns of thought and activity, which they regard as legitimate, 'natural', 'moral', even inevitable."[16] These patterns of behaviour were those that the church authorities had deemed to be acceptable, based on Calvinist doctrine. The church also had a well-established infrastructure of courts to reinforce these behaviours and punish any transgressions. This doctrine and infrastructure was brought to Otago under Burns' leadership, and the resulting colony was expected, by its founders at least, to be a utopia of exclusively Scottish Free Church settlers in an agrarian class based society.[17] The scheme was never a success and much has been written regarding the failure of the Otago settlement to live up to the ideals of its founders.[18]

[14] McLintock, *The History of Otago*, 149-50.

[15] Ibid., 175.

[16] Richard S. Hill, *Policing the Colonial Frontier: The Theory and Practice of Coercive Social and Racial Control In New Zealand, 1767-1867* Part I, *The History of Policing in New Zealand, Volume One* (Wellington: V. R. Ward, Government Printer, 1986), 2.

[17] *Copy of the Resolutions of the General Assembly of the Free Church of Scotland relating to the Settlement of Otago*, 29 May 1845, MS-0439/124, Hocken Library, University of Otago, Dunedin.

[18] McLintock, *The history of Otago*; Olssen, *History of Otago*; Tom Brooking and Jennie Coleman, eds., *The heather and the fern: Scottish migration & New Zealand settlement* (Dunedin: Otago University Press, 2003); E. N. Merrington, *A Great Coloniser: The Revd. Dr Thomas Burns* (Dunedin: The ODT and Witness Newspapers Co Ltd, 1929); McClean, "Scottish piety"; Raewyn Dalziel, "Men, Women and Wakefield," in *Edward Gibbon Wakefield and the Colonial Dream: A Reconsideration* (Wellington: The Friends of the Turnbull Library, 1997), 77; Tom Brooking, "The Great Escape: Wakefield and the Scottish settlement of Otago," in *Edward Gibbon Wakefield and the Colonial Dream: A Reconsideration* (Wellington: The Friends of the Turnbull Library, 1997), 123-132; Tai-Sook Lee, "Edward Gibbon Wakefield and Movement for Systematic Colonization, 1829-1850" (PhD diss., University of California, Berkeley, 1986).

As a result of the principles and ideals upon which Otago was to be founded, the regulation of sexual behaviour was centred on the role of the church in providing the doctrine, which defined appropriate behaviour, and the infrastructure of church courts to enforce punishments for transgressions. The involvement of the congregation in policing behaviour illustrates the very public nature of this method of regulation in that even the most private of activities could be subject to a very public punishment.

The Principles of Wakefield's Systematic Colonisation

Wakefield published his theory of systematic colonisation anonymously in 1829 as *A Letter from Sydney,* which purported to be a letter from a colonist in New South Wales that identified the problems faced by the Australasian colonies.[19] In the appendix to the letter, Wakefield articulated nine articles of systematic colonisation and outlined the reasoning behind them. The majority of the articles focus on the ideal economic situation within a systematic colony – the price of land, the level of tax, the use of funds raised from the sale of waste land, and the supply of labour. Wakefield's principles were based on 'recreating' an agricultural society which retained the hierarchical class structure of pre-industrial Britain. The sustainability of the colony required a balance between capitalists and labourers, men and women, and an emphasis on the settlement of families. Alongside high fixed land prices, these elements were designed to ensure that the more undesirable elements of society – large groups of single men attracted by cheap land – would be excluded. The principles were designed to help establish sustainable well organised settlements quite rapidly. The key to this was selling land to settlers

[19] Lee, "Edward Gibbon Wakefield," 10-12.

before they set out, so the money could be used to provide funds to assist the immigration of a sustainable 'labouring class' including both men and women.[20]

Of the nine articles one, Article VI, relates specifically to the type of emigrants a colony should select:

> That, in the selection of Emigrants, an absolute preference be given to young persons, and that no excess of males be conveyed to the colony free of cost.[21]

Wakefield stipulates in his explanation that emigrants should be either 'young' married couples or 'young' people of marriageable age in equal numbers. Although he does not define 'young' it can be suggested that it would be accepted to mean early or mid-20s, as the age at which people could marry without parental permission was 21 in England. Wakefield identifies two reasons for this within his explanation. Firstly, young married couples would populate a colony in sufficient numbers to ensure its sustainability.[22] Secondly, by paying for the passage of one couple, the colony would benefit from the labour of their children and grandchildren at no extra cost.[23] For these reasons a gender-balanced population was essential to the successful implementation of systematic colonisation. In the body of *A Letter from Sydney*, Wakefield suggested that the greater proportion of men to women within the Australian colonies had resulted not only in "open, naked, broad-day, prostitution", but:

> …that the frequency of early corruption has already established a general license of manners; that mothers are not ashamed to sell their own daughters, even before the young creatures know what chastity means; that husbands make a market of their

[20] Ibid., 24, 32.
[21] Edward Gibbon Wakefield, "A Letter from Sydney: Appendix," in *The Collected Works of Edward Gibbon Wakefield*, ed. M.F. Lloyd (Auckland: Collins, 1969), 180.
[22] Ibid., 180-1.
[23] Ibid., 181.

> wives; that early prostitution occasions barrenness; and that the origin of all this evil – the inequality of the sexes – is partly maintained by the evil itself. [24]

An equal number of men and women would avoid the vices prevalent in colonies where the number of men greatly outnumbered the women. Of the reasons that Wakefield provides for this article, the explicit ones have an economic basis, but there is an overriding implicit moral foundation. This moral foundation is perhaps a bit ironic considering that Wakefield developed his theory, not in Sydney, but whilst in Newgate Prison, serving a three year sentence for abducting the fifteen year old daughter of wealthy Macclesfield merchant.

The impact of an imbalanced sex ratio had been long recognised and European imperial powers tried to address the issue from the beginning of colonial settlement.[25] France, for example, began to send single women of marriageable age to New France in 1663, to provide wives for settlers, at the request of the Intendant of New France. At the time the ratio was six men for every European woman, and the majority of those women were nuns. Known as '*les filles du roi'* – the King's daughters – most of the approximately 800 women sent to New France were of humble origins, and to support their settlement in the new world they received free transportation and monetary support of up to 100 *livres*. The scheme operated for ten years and, in conjunction with financial incentives for men to marry and have large families, and penalties for those who did not, was a factor in tripling the population of New France within fifteen years.

[24] Wakefield, "A Letter from Sydney," 138.

[25] Adele Perry, ""Fair ones of a purer caste": White women and colonialism in nineteenth-century British Columbia," *Feminist Studies* 23, no. 3 (Fall 1997), 503-504.

The impact of an uneven sex ratio has been assessed by Marcia Guttentag and Paul Secord.[26] Within colonial settlements, the imbalance was generally in favour of men. Guttentag and Secord suggest that it would be likely that young adult women would therefore be valued highly by the society – single women for beauty and glamour, and married women as wives and mothers.[27] These assumptions need to be assessed in light of who controlled the political, economic and legal structures in the society.[28] Within Britain and its empire these structures were controlled by men. Guttentag and Secord argue that in such a society, with a male dominated power structure and an undersupply of women, it may be expected that men espouse traditional roles for women, and that societal norms would reinforce stability and monogamy in marriage, and virginity in unmarried women, while devaluing promiscuity for women.[29]

This attitude appears to have been prevalent in nineteenth century colonial settlements and informed the development of Wakefield's principles. Wakefield, for instance, used the example of prostitution in Australia to illustrate the need for gender balance.[30] The gender imbalance in Australia dated to the beginning of British settlement. With the establishment of the penal colony an almost entirely homo-social colony was created, with a ratio of six men for every one woman.[31] The authorities saw this imbalance as a threat to the colony's stability - the few European women were subject to unwanted sexual attention, and sodomy was perceived to be rife amongst the convicts.[32] Although liaisons with Aboriginal women took

[26] Marcia Guttentag and Paul F. Secord, *Too Many Women? The Sex Ratio Question* (Beverley Hills: Sage Publications, 1983).
[27] Ibid., 19.
[28] Ibid., 26.
[29] Ibid., 24.
[30] Wakefield, "A Letter from Sydney," 138.
[31] Raelene Frances, "The history of female prostitution in Australia," in *Sex Work and Sex Workers in Australia*, ed. R. Perkins, et al. (Sydney: University of New South Wales Press, 1994), 28-29.
[32] Ibid., 29-30.

place, they tended to lead to racial tensions.[33] The solution proposed was the transportation of convict women to fill the gap but this was not successful in removing the gender imbalance, and although transportation may have reduced the threats that were originally perceived, prostitution became institutionalised.[34] In this example Wakefield explicitly linked gender balance to a settlement with high moral standards.

The Importance of Procreative Sex

Within the theory of systematic colonisation, Wakefield identified the importance of the institution of marriage in providing a sustainable labour force for the colony:

> A thousand emigrants of all ages might not, at the end of twenty years, increase the Colonial population by more than that number. As many might die as would be born, and, if there were an excess of males, the number might, at the end of twenty years, be much less than a thousand. But five hundred young couples, supposing that each couple rear six children, and that in twenty years half of the original emigrants be dead, would in that short period, increase the Colonial population by three thousand five hundred souls.[35]

In this excerpt, he also highlighted the importance of heterosexual procreative sex within marriage to sustain population growth.[36]

Wakefield based his sexual economics on labouring emigrants producing sufficient off-spring to provide sufficient labourers for future generations of capitalists. His expectation was that the labouring classes would have five or six children per family. Wakefield proposed this shortly after fertility rates in Britain reached their zenith, so an expectation of six children

[33] Ibid., 29-30.
[34] Ibid.; Anne Summers, *Damned Whores and God's Police*, 2nd ed. (Sydney: Penguin Books, 1993), 313.
[35] Wakefield, "A Letter from Sydney: Appendix," 181.
[36] Ibid., 181.

would not have seemed unreasonable.[37] In fact, research has suggested that the size of colonial families frequently was considerably larger.[38]

There were a number of factors which could influence the number of children that a couple had, including class, age at marriage, and frequency of sexual intercourse.[39] Wakefield referred to the labouring classes, with no specific reference to age, so long as the individuals were either a young married couple or single people of 'marriageable age' in equal proportions.[40] The frequency of sexual intercourse was not a factor which would have concerned Wakefield, in part because factors influencing women's fertility were not clearly understood before the twentieth century.[41] What was understood, was that certain sexual acts were not intended to be procreative, prostitution for example, or could not be procreative, such as sodomy, and masturbation. With the focus on procreation, any sex that did not lead to children would have been looked upon negatively.

The Importance of the Regulation of Sex

With sex being necessary to the success of colonies, but only in the married state and only if it produced sufficient children to meet the labour needs of the colony, not only was the selection of emigrants very important, but also the regulation of the married state and sex. It has been

[37] Hera Cook, *The Long Sexual Revolution: English Women, Sex and Contraception 1800-1975* (Oxford: Oxford University Press, 2004), 38.

[38] David Thomson, "Marriage and Family on the Colonial Frontier," in *Disputed Histories: Imagining New Zealand's Pasts*, ed. Tony Ballantyne and Brian Moloughney (Dunedin: University of Otago Press, 2006), 120-1.; Charlotte Macdonald, *A Woman of Good Character: Single Women as Immigrant Settlers in Nineteenth Century New Zealand* (Wellington: Allen & Unwin, 1990).

[39] Cook, *Long Sexual Revolution*, 38.

[40] Edward Gibbon Wakefield, "A View of the Art of Colonization With Present Reference to the British Empire; In Letters Between a Statesman and a Colonist," in *The Collected Works of Edward Gibbon Wakefield*, ed. M. F. Lloyd (Auckland: Collins, 1969), 968.

[41] Cook, *Long Sexual Revolution*, 18.

suggested that during early modern history in Europe, sex outside of marriage was perceived as corrupting, economically unproductive, and potentially evil, therefore it had to be regulated.[42] The history of the regulation of sex and marriage in Europe provided the background for their regulation within the colonial setting.

The prevailing sexual norms amongst Europeans during the late eighteenth century and the early part of the nineteenth century promoted monogamous relationships between men and women based on the family unit. Marriage had become the accepted means to contain and regulate sexual experience.[43] However, not everyone conformed to the accepted norms of behaviour, resulting in tensions between the ideals as expressed by the Christian churches and middle-class reformers, and the reality of people's behaviours and desires. This tension was exacerbated by the fact that men had more sexual freedom than women, resulting in unequal attitudes towards male and female sexual behaviour. Despite the existence of prostitution and a certain level of recognition that male sexual freedom required its existence, the prostitutes themselves were often despised and vilified by society generally.[44] Same-sex activities between men were criminal offences, and the laws governing such specifically non-procreative sex gradually got tighter during the eighteenth and nineteenth centuries.[45] The biggest distinction in sexual norms has been perceived to be between the classes, with the upper and

[42] Katherine Crawford, *European Sexualities, 1400-1800* (Cambridge: University of Cambridge Press, 2007), Chapter 1; Anna Clark, *Desire: A History of European Sexuality* (New York: Routledge, 2008), Introduction.

[43] Crawford, *European Sexualities*, 1.

[44] Judith Walkowitz, *Prostitution and Victorian Society: Women, Class and the State* (Cambridge: University of Cambridge Press, 1980), 2-5.

[45] Clark, *Desire*, 136-7;

lower classes being the most flexible in attitude, while the emergent middle class was more rigid.[46]

All these factors of church based emigration, gender balance, procreative sex and middle-class attitudes towards the regulation of sexual behaviour informed the ideological framework built into the proposed Otago settlement. This proposal included no consideration of the realities of existence for the indigenous population in Otago and the small group of Europeans, Australians and Americans who were already settled in the area.

Regulation of Marriage and Sex in Otago Before 1848

The early period of European-Indigenous contact in Otago does not conform to the generalised idea of coloniser/colonised contact, which is exploitative Europeans with political and economic superiority over an oppressed indigenous population, as defined by much historiography of early interaction.[47] The few early Europeans were not colonisers, they tended to operate outside the imperial infrastructure of large scale, company-based resource extraction, and as such were on the edge of the imperial web. What was created during this early period of contact, although technically definable as resource extraction on "the intimate frontier", does not mirror the definition and scope of these frontiers as suggested by Stoler.[48]

[46] Crawford, *European Sexualities*, Chapter 1; Clark, *Desire*, 5.

[47] This dichotomy has been undermined by recent work on gender in the empire although Ann Laura Stoler has suggested that anthropologists amongst others have accepted this dichotomy as a given, see Ann Laura Stoler, "Rethinking Colonial Categories: European Communities and the Boundaries of Rule," in *Carnal Knowledge and Imperial Power: Race the Intimate in Colonial Rule* (Berkeley: University of California Press, 2002), 23; Daiva Stasiulis and Nira Yuval-Davis, "Introduction: Beyond Dichotomies – Gender, Race, Ethnicity and Class in Settler Societies," in *Unsettling Settler Societies: Articulations of Gender, Race, Ethnicity and Class*, eds. Daiva Stasiulis and Nira Yuval-Davis (London: Sage Publications, 1995), 3.

[48] Ann Laura Stoler, "Tense and Tender Ties: The Politics of Comparison in North American History and (Post) Colonial Studies," *The Journal of American History* 88, no. 3 (December 2001).

As a result, the society created during this early period does not necessarily reflect the normative practices of either the wider European or Māori societies, but is a construct of its specific environment, including elements of both.

The beginning of land based European-Indigenous contact in Otago developed out of maritime whaling and sealing in the last decade of the eighteenth century and the first decade of the nineteenth century. The majority of this resource extraction was based out of Australian ports, although Americans were also involved from about 1800.[49] There is evidence that whalers were establishing whaling stations as semi-permanent settlements on land from the early 1830s (Figure 2.1).[50] During his travels around New Zealand between 1839 and 1844, Edward Jerningham Wakefield noted that it was likely that the first whaling settlements in the south dated from about 1827, and were made up of both sailors and escaped convicts from the penal colonies of New South Wales and Van Diemen's Land (Tasmania).[51]

These stations provided a base for processing whale oil, in addition to a home for seasonal whalers. Despite the dangers inherent in whaling, the stations were initially very successful, mostly due to an increasing international demand for oil. Their proximity to Māori settlements encouraged strong links with the local Ngāi Tahu, including the involvement of Ngāi Tahu

[49] Olssen, *History of Otago*, 12.

[50] Edward Jerningham Wakefield, *Adventure in New Zealand from 1839 to 1844 with some account of the beginning of the British colonization of the Islands*, ed. Sir Robert Stout, (Christchurch, Wellington and Dunedin, NZ; Melbourne and London: Whitcombe and Tombs Ltd., 1908); Ian Church, *Opening the manifest on Otago's Infant Years: Shipping Arrivals and Departures, Otago Harbour and Coast 1770-1860* (Dunedin: Otago Heritage Books, 2001); Olssen, *History of Otago*, 14; Rhys Richards, *Murihiku Re-viewed: A revised history of Southern New Zealand from 1804-1844* (Wellington: Lithographic Services, 1995), 49

[51] E. J. Wakefield, *Adventure in New Zealand*, 225 & 227.

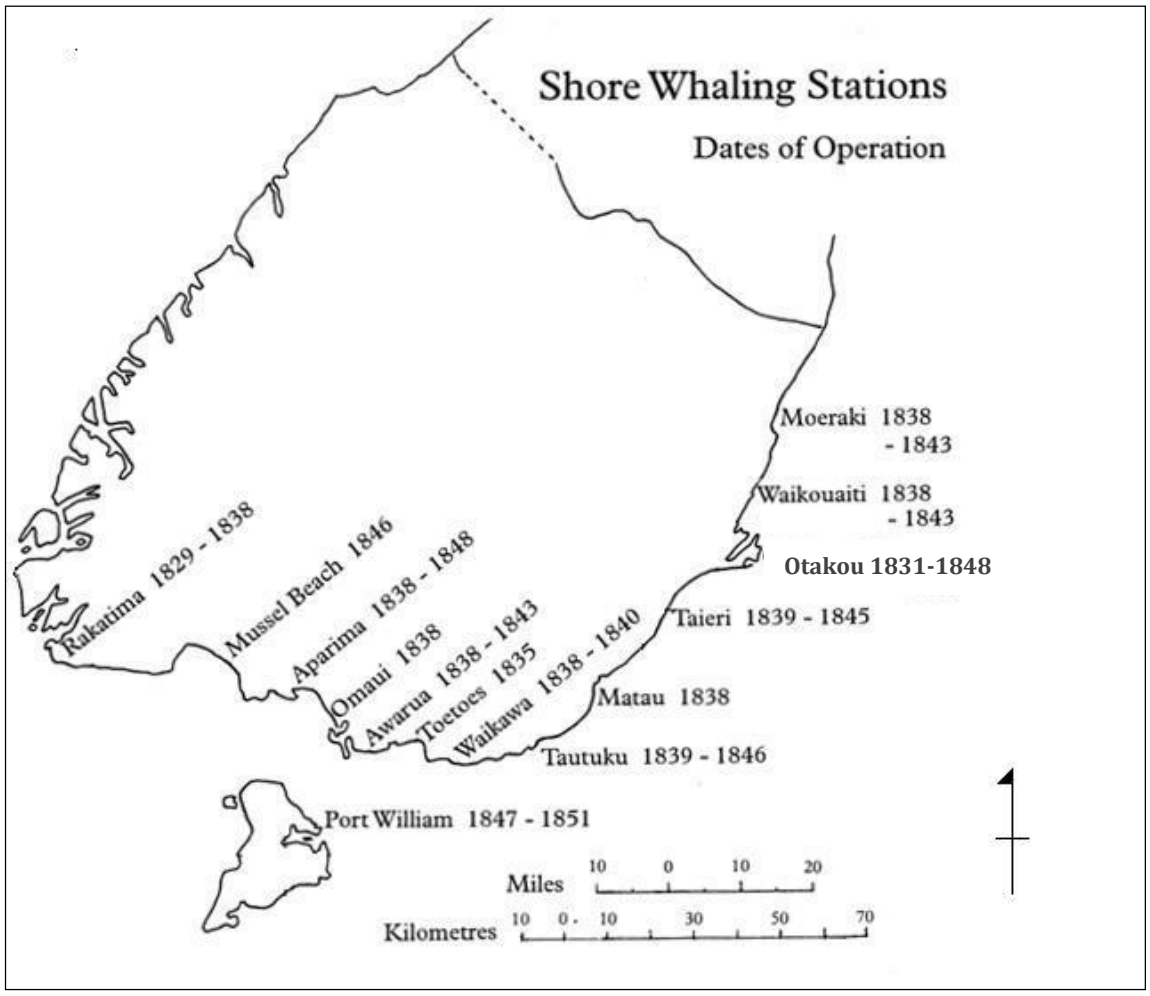
men in whaling activities and women in 'marriages of convenience' with European whalers.[52] It appears to have been quite usual for these men to have co-habited with Ngāi Tahu women.[53] While it has been suggested that there was a considerable degree of dependence on Ngāi Tahu by the whalers,[54] it is not possible to determine whether there was any exploitation of the Europeans through their wives by other Ngāi Tahu, or vice versa. Lack of sources make it difficult to illuminate what sort of regulation of behaviour was used, although with the limited number of European men it certainly would have been possible for Ngāi Tahu to have used their own codes of behaviour when dealing with the Europeans.

[52] E J Wakefield, *Adventure in New Zealand*, 35-6; Olssen, *History of Otago*, 24; Richards, *Murihiku Re-visited*, 62 & 65.

[53] David Haines, ""In Search of the "Whaheen": Ngai Tahu Women, Shore Whalers, and the Meaning of Sex in Early New Zealand," in *Moving Subjects: Gender, Mobility, and Intimacy in an Age of Global Empire*, ed. Tony Ballantyne and Antoinette Burton (Urbana: University of Illinois Press, 2009), 50, 55.

[54] Ibid., 50, 55.

Fig. 2.1: Map showing Whaling Stations in Southern Murihiku c.1830-50.



Source: Richards, *Murihiku Re-viewed*, 53; Wanhalla, *In/visible Sight*, 23.

The most successful station during the 1830s was at Otakou, at the end of Otago Peninsula, which was owned and operated by a family of Sydney merchants, the Wellers.[55] In addition to whale products, the Weller brothers broadened their options by investing in flax and potatoes grown by local Ngāi Tahu. The station at Otakou, along with Johnny Jones' station at Waikouaiti, became focal points for Māori contact with the whalers along the coast. Ngāi Tahu women were drawn to the whaling stations, relocating to live with their seasonal spouses.[56] Edward Weller, one of the brothers who owned the station, was based at Otakou and, whilst stationed there, twice 'married' Ngāi Tahu women, daughters of local chiefs. However, by 1840 the price for whale oil had collapsed, causing bankruptcies and the closure of many stations. As a result a large number, although not all of the marriages of convenience, ended. When Edward Weller left Otakou he left his Ngāi Tahu family behind him. Such actions suggest codes of behaviour that were more influenced by the realities of the situation than any defined by European norms or Christian teachings.

In addition to these whaling 'settlements' a number of individuals had settled in Otago, either as a result of voluntarily jumping ship or being abandoned as part of earlier sealing or whaling expeditions.[57] Unlike other imperial forays based on resource extraction, such as the North American fur-trade, sealing and whaling involved individual ships sometimes working together for a trader or merchant, as opposed to established hierarchical companies. As a result, in Otago there was no externally imposed regulation of European-indigenous sexual relations, nor were there company-led economic reasons for creating alliances with one family or tribe

[55] Olssen, *History of Otago*, 16.
[56] Haines, "In Search of the "Whaheen"," 55.
[57] Olssen, *History of Otago*, 7; Church, *Opening the manifest*; see table 2.1 below.

over another. Many of the interracial relationships that developed were built around individual Europeans and their dependence upon Māori for the knowledge needed to survive in pre-colonial Otago. As a result, an extensive community of mixed-raced families and half-caste children grew up around the whaling stations. Erik Olssen has suggested that it is likely that 'no other tribe in New Zealand was so extensively intermarried with and involved in Pakeha society' as Ngāi Tahu.[58]

Although whaling was the main economic focus within the region, the potential for agriculture was soon realised. Some farming had occurred on an ad hoc basis in conjunction with whaling stations, at Otakou and Moeraki, but the first agrarian settlement in Otago, sponsored by Sydney merchant, whaling station owner, and ship owner, Johnny Jones, was established at modern day Karitane, 25 kilometres north of Dunedin harbour, in 1840.[59] Despite initial difficulties, this settlement, known as Waikouaiti, was relatively successful and Jones was able to assist the later Free Church settlers with his experience and produce. However, they did not necessarily approve of his lifestyle, in part because he was Methodist, but also due to the perceived immorality of the whalers and other settlers at his settlement. Even allowing for an element of poetic licence, it appears that the majority of the whalers were ex-convicts or labouring men who were more suited to a rough frontier existence than to the drawing rooms of Sydney.

In addition to the early settlers brought out by Johnny Jones, records indicate that a good number of men arrived, having deserted their posts on board whaling or trading vessels. Given

[58] Olssen, *History of Otago*, 24.
[59] Ibid., 18.

that before 1848 nearly 290 ships were recorded at the harbour, with another 60 recorded along the Otago coast, there was the potential for a sizeable and culturally mixed population base.[60] Ian Church's research into the early shipping of Otago highlights the various opportunities for crew members to jump ship, and provides the names of many of the earliest European, American and Australian settlers (Table 2.1). The first record of European/Australian settlement at Otago is an unverified report of the desertion of most of the crew of the barque *Clarence* at Otago in 1829.[61] Two years later, in 1831, the Weller brothers of Sydney had established their whaling station at Otakou, and regular trade between Otago and Sydney was begun.

Evidence suggests that a number of these men remained in the area. For example, James Walker 'One-eyed Jimmy' and James Saunders 'Jimmy the Needle', off the *Mary and Elizabeth* in 1834, were both resident at Waikouaiti in the 1840s.[62] Individual cases such as these show that there was an established if transient population already at Otago when the Free Church settlers arrived in 1848. This population fluctuated with the demand for whale products, but Burns' visitations in the early years of the Free Church settlement demonstrate that some of these people had been in Otago for a number of years.

[60] Church, *Opening the manifest*, 13.
[61] Ibid., 23.
[62] Frank Tod, *Whaling in Southern Waters* (Dunedin: F. Tod, 1982), 120 & 122.

Table 2.1: Shipping to Otago 1833-9 which added to the population

Year	**Ship and number of people involved**
1833	3 crew of the *Amity* deserted at Otago
1834	10 crew of the *Mary and Elizabeth* deserted – including George Davis "Big George", James Walker "One-Eyed Jimmy", George Edwards, William Thomas, and James Saunders "Jimmy the Needle" (*GF 189-90)*
1835	30 men brought out by *Lucy Ann* 'none but Europeans' to remain at Otago for whaling
1836	Wellers' station at Otago was employing 85 men, three quarters of them were European; Jones employing 39 men (*GF 234-5*).
1836	*Micmac* landed J. Hughes, W. I. Haberfield, J. Thompson, P. 'Sivatt', J. Knox, R. Burn and 6 Māori at Moeraki
1837	*Henry Freeling*, Sydney to Otago with 48 men for Wellers
1837	*Magnet* to Waikouaiti taking Thomas Jones, J. Hughes with servant, T. Chaseling, Puna his wife, 'John' Loane and wife, 'John' Hoare and wife, John Robinson, Peter 'Charlott', William Kerr, Thomas Rogers, W. Russell, and 5 New Zealanders to Johnny Jones' station
1838	Desertion of Jean Morrel and Victor 'Hobe' [?Victor Auguste Pierre Hooley] from *Faune* (*GF 313fn*)
1838	American whaler landed several families from Western Australia to settle in New Zealand – the *Gratitude* landed Mr & Mrs Cheyne and 2 children, Mr & Mrs Skinner and child, Townshend, Robinson and Williams at the Neck 13-14 October. Picked up by *Magnet* 23-24 February 1839
1839	*Magnet* to Waikouaiti with '36' men for whaling, including J. Wakefield, M. Stephens, H. Rogers, P. Williams, C. Price, C. Rolley, P. Watson, D. Abbott, B. Johnson, J. Jones, E. Wilson, D. McLean, E. Hendrick, J. Hall, E. Palmer, J. Williams, J. Winch, H. Moore, J. Crocan [?Crocome], B. Blomer, J. McGaa, H. Dumerick, R. Catterige, R. Hanca, J. McDonald, W. McLaughlin, J. Johnson, D. Rannaker, S. Smith, W. Brown, T. Newcombe and P. Byrne

Source: Church, *Opening the manifest*; Ian Church, *Gaining a Foothold*, (Dunedin: Friends of the Hocken Publications, 2008), page numbers in brackets on the table.

The majority of the people living within the Otago block at the beginning of 1848 were other than the ideal expected by the founders of the settlement. This "otherness" may have related to class or nationality or beliefs, or non-adherence to social practices such as the creation of sexual relationships and domestic environments which related more to the place, convenience, business or cultural influence with the indigenous population, than to established British norms or recognised environments 'at home'. In her work on fur-trade era Canada Sylvia Van Kirk

has suggested that the emergent fur-trade society was a hybrid of both European and First Nations elements that resulted in a "distinctive, self-perpetuating community." [63] This resultant community had its own systems for regulating sexual and marital behaviour which reflected the European origins of the traders and the indigenous norms of their wives and partners. Such a model of society provides an example of how settlements and colonies based on resource extraction, as in southern New Zealand, fused elements of behaviour and adapted to suit the environment of the colony or settlement. The structure and regulation of these communities bore little relation to the accepted norms of contemporary Western Europe and highlight how different the reality could be from the colonial ideal.

A close look at the details from Burns' visitation helps with reconstructing the make-up of the community that had existed in Otago prior to the arrival of the Free Church settlement. Burns provides short histories for several pre-1848 settlers, including their relationships with Ngāi Tahu women, marriages and the number of their children. Burns' first visitation dates from September 1848 to February 1849, in which he identifies these men who had been in New Zealand for between eight and eighteen years, including Simon McKenzie, Matthew Hamilton, Thomas Ashwell, John Williams, [-] Milne, William Russell, James Wybrow, Edwin Palmer, William Palmer, William Low, James McKenzie, William Perkins, George Williams. In several cases, the men were married to their Māori partners by the Reverend Johann F. H. Wohlers, a Lutheran appointed by the North German Missionary Society.[64] Some of the men

[63] Sylvia Van Kirk, *Many Tender Ties: Women in Fur-Trade Society, 1670-1870* (Norman, OK: University of Oklahoma Press, 1983), 14.

[64] Kate Stevens, "'Gathering Places': The Mixed Descent Families of Foveaux Strait and Rakiura/Stewart Island, 1824-1864" (BA(Hons) diss., University of Otago, Dunedin, 2008), Appendix A.

had been married more than once or had more than one partner in succession.[65] None of them appear to have been involved in relationships with more than one Māori woman at any one time, but several had left wives behind in England.

The earliest to arrive in New Zealand was Matthew Hamilton, in 1830. Burns' entry for him reads:

> Barracks No. 2; #31:
> Matthew Hamilton from Greenock in 1821. Whaling out from London – went on board a Spanish Man of War – left at the Manillas [sic] – came to Hobart Town 1829 – to N.Z. 1830 – Cloudy Bay – Akaroa – married to young Māori woman (unwell), ch[ildren] Jane 8, Margaret 6, Thomas 11 (last two at Akaroa).

Of the others, Simon McKenzie and Thomas Ashwell are also at the settlement, living in the Barracks. McKenzie is listed as a widower with two children, his native wife having died; Ashwell, from Harlow in England, had left England in 1830 and had been a castaway for some time before arriving in Sydney in 1832. He presumed that the wife he had left behind in England was dead, and was living with a Māori woman, Pota, by whom he had five children. The other men are listed as part of the Ngāi Tahu village on the Taieri. According to Burns' census, the European men in the village outnumbered Ngāi Tahu and half-caste men.

There are a number of official records of marriages between Māori women and European men. These records show that there was a gradual introduction of European based regulation of marriage and sex into New Zealand. Prior to 1842, New Zealand was subject, in theory, to Hardwicke's Marriage Act of 1754 as that applied to the colonies. In 1842 it was found that

[65] Ibid., Appendix A.

marriages had been celebrated which would not be legal under the Marriage Act, so an Ordinance was passed by the Legislative Council which stated that:

> All marriages heretofore solemnized and all marriages hereafter to be solemnized by any minister of any Christian denomination, who had not or shall not have received Episcopal ordination, are and shall be as good and valid to all intents and purposes as if the said minister solemnizing the same had received such ordination.[66]

This Ordinance removed the need, under the Marriage Act, for the marriage to be solemnised by a minister of the Church of England, thus providing greater denominational freedom to New Zealand. This flexibility lasted until 1 January 1848, when a new Ordinance for regulating marriages came into effect.

The records kept by missionaries give an indication of the number of men involved in relationships with Māori women. Records indicate that 140 men married local women and had children, and more may have lived with local women without producing children.[67] In 1844 it was suggested that as many as two-thirds of young Māori women were living with Europeans in Canterbury and Otago.[68] Surviving records indicate that the missionaries who solemnised marriages between settlers and Māori implied recognition of Māori marriage norms, but also required an active defence of Christian marriage through the development of a local liturgy and legal definitions of marriage. Some missionaries, such as Bishop Selwyn, talked to applicants, refusing to marry those unwilling to conform to Christian principles. Selwyn's journal from 1844 illustrates his approach to formalising long term relationship through

[66] An Ordinance to render certain Marriages valid, 5Vic:11 21 February 1842, *Ordinances of New Zealand 1841-53.*

[67] Atholl Anderson, *Race Against Time: The early Maori-Pakeha families and the development of the mixed-race population in southern New Zealand* (Dunedin: Hocken Library University of Otago, 1991), 3.

[68] Frederick Tuckett quoted in Atholl Anderson, *The Welcome of Strangers: An Ethnohistory of southern Maori AD1650-1850* (Dunedin: University of Otago Press, 1998), 194.

marriage. He spent considerable energy in convincing the European men of the sinful state of their lives, and explaining the nature of Christian marriage to the Māori women.[69] In three instances Selwyn appears emphatic in refusing to marry couples. One of the men was living with two women, and another man was "kino'd" by the woman he had been living with.[70] The third case involves a young man named Watson. Having, between 19 January and 10 February, married no less than 23 European men to their Māori partners, Selwyn advised Watson to reconsider marriage to a Māori woman of "no religion or education" as he would then not be able to enjoy "the higher privileges of the married state".[71] Whether Watson had not been involved in the relationship for any length of time is not clear, but the reason for Selwyn's advice can only be speculated upon. It appears from his journal that Selwyn was pragmatic about solemnising long term relationships and baptising the resulting children, perhaps to make the best of a bad situation. Where he does not conduct a marriage it is not so much for pragmatic as religious or moral reasons.

The Reverends James Watkin and Charles Creed, who occupied a mission station at Johnny Jones' farm at Waikouaiti, kept a record of the marriages that they conducted between 1840 and 1850. Appendix A contains a number of men who also appear in the early shipping lists and later with their wives and/or children in Burns' visitations. Between 1840 and the arrival of the Free Church settlers in April 1848, Watkin and Creed conducted 114 marriages, of which, at least 33 were marriages between European men and Māori women. A good number

[69] Transcription of extract from journal of Bishop Selwyn, 19 January 1844, 29 January 1844, 5 February 1844, 6 February 1844, MS-0440/008, Hocken Library, University of Otago, Dunedin.

[70] Selwyn, 7 February 1844; Angela Middleton, *Two Hundred Years on Codfish Island (Whenuahou): From cultural encounter to nature conservation* (Invercargill: Department of Conservation Southland Conservancy, 2009), 32.

[71] Selwyn, 11 February 1844.

of these marriages occurred some time after the relationships were established and coincided with the baptism of the couples' children. Creed provides examples of this in one of his letters to the Wesleyan Missionary Society's General Secretary in London:

> [28 September 1845] In the afternoon I married a European and a native woman and baptised their three children. In the evening I preached again to the Natives and afterwards had service with two Europeans.
> [5 October 1845] Immediately I had closed the Native service, the Europeans, ten or twelve in number, assembled; they had come over from the other side of the Port. I preached to them from John 3:16. I afterwards married three of them to the native women with whom they have been living many years. I also baptised three children belonging to one of them.[72]

Creed's letters are suggestive of a pragmatic approach to his mission, although there is no indication that he was as thorough in his examination of potential couples as Bishop Selwyn. In this approach the local missionaries were acting in a way that missionaries in other colonial outposts would have recognised and emulated.[73] However, the views that Creed expressed in his letters regarding the whalers, suggests that he did not fully approve of the interracial relationships that he was regularising, in part due to the "wicked example of the Europeans" and their potential negative influence on the Māori population.[74]

By the 1870s there were 187 'half-caste' children living in Otago and Southland, who were descendants of these early sealers, whalers and traders.[75] The evidence from government investigations into land claims suggests that this small group of mixed descent children tended

[72] Rev. Charles Creed to the General Secretary of the Wesleyan Missions, 23 December 1845, Transcript of letters from Rev. Charles Creed, Waikouaiti, to the General Secretary of the Wesleyan Missions, London 1844-1851, MS-0440/017, Hocken Library, University of Otago, Dunedin.

[73] Adele Perry, "The Autocracy of Love and the Legitimacy of Empire: Intimacy, Power and Scandal in Nineteenth-Century Methakahtlah," *Gender and History* 16, no. 2 (August 2004), 268.

[74] Rev. Charles Creed to the General Secretary of the Wesleyan Missions, 8 August 1846.

[75] *Appendix to the House of Representatives* 1876, G-9, 'Half-Caste Claims in the South and Stewart Island'.

to intermarry or marry Māori, very few marrying post-1848 Free Church settlers.[76] This however, has been contradicted by suggestions made by Wohlers and by the work of Atholl Anderson into the marriage trends of pre-1848 mixed descent families.[77] Anderson has found that only male mixed race children intermarried with other mixed race children or with Māori, whereas the mixed race women often married Europeans.[78] Wohlers, writing to Tuckett, contrasts the situation of the half-caste women with their lives as children:

> The half-cast girls, of which we have a great many in the Straits, and which mostly are considered beauties, are fast getting married to young European settlers. Some of these halfcasts [sic] whom I have known, when children, in dirty rags, now, as Mrs So and So, on Sundays sweep about in silk dresses. The halfcast [sic] young men will be obliged to marry Māori girls.[79]

The size of the group was not sufficient to create a self-perpetuating subculture as had happened in fur trade Canada.[80] As a result, this group interacted with their wider Ngāi Tahu community while functioning within the essentially British settlement that grew up after 1848.

Creed found the work he did difficult, especially as he felt the Europeans amongst whom he ministered were devoid of morals and setting a 'wicked example'. He hoped that with proposed settlement at Dunedin "a different influence will be exerted on the minds of the natives and that a stop may be put to the loose and in many instances outrageous conduct of some of the Europeans."[81] However, his expectations were not met:

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[76] *Appendix to the House of Representatives* 1876, G-9, 'Half-Caste Claims in the South and Stewart Island'; Stevens, "Gathering Places", Appendix B highlights the interconnection of the mixed-race families in the region.

[77] Rev. J.F.H. Wohlers to Frederick Tuckett , 16 August 1856, Letters from Rev. J.F.H. Wohlers to Frederick Tuckett 1848-1856, PC-0049, Hocken Library, University of Otago, Dunedin; Anderson, *Race Against Time*, 9.

[78] Anderson, *Race Against Time*, 9.

[79] Wohlers to Tuckett 1848-1856, 16 August 1856.

[80] Van Kirk, *Many Tender Ties*, 14.

[81] Rev. Charles Creed to the General Secretary of the Wesleyan Missions, August 8 1846.

> In addition to the trying position in which the Natives are placed by the great influx of Europeans to their various localities there are men who call themselves Europeans and claim the name of Christian, who themselves are deeply sunk in evil practices and the most abominable wickedness: these men, reproved by the superior conduct of the New Zealand[ers], strive in every way to induce them to give up their religion and live as they themselves are living. And not infrequently the seductive glass of "grog" is given as an additional motive to join them in their sins. This is not a solitary case, but men of unsteady character are found in almost every native village, throughout the length of the Island. Under such circumstances what can we expect from a people who are only beginning to "see men as trees walking"…Perhaps there is no other part of the circuit so much exposed to the attacks of evil as Waikouaiti. For many years it was a centre from which whaling parties were supplied with the means of carrying on the whaling; and at the close of the season many Europeans would assemble here for the purpose of drunkenness and riotous proceedings. It might with great propriety have been styled the place "Where Satan's seat is". And since the whaling has been given up, the seeds of evil so abundantly sown year after year, have not failed to spring up to the great detriment of religion. Many of our young men have been more or less connected with the whalers; and have proved themselves to be apt imitators of the wicked practices of these degraded Europeans.[82]

Otago from 1848

It was into this environment of mixed-raced families that the first settlers off the *John Wickliffe* and the *Philip Laing* found themselves in March and April 1848. The first two ships brought nearly 350 settlers, including a number of infants born at sea, who arrived with little idea of what to expect and with leaders who saw themselves as the new Pilgrim Fathers, building a New Jerusalem in an empty wilderness.[83] In the words of Peter Matheson:

> The irony…is not just the transplantation of a Scottish culture to a landscape conceived of as empty, and barren of any indigenous values worthy of a moment's consideration. It is…the transplantation of a confident sub-culture, that of the aspiring middle-class in Lowland Scotland. The contempt for the Māori is paralleled by that for the whalers and sealers and for the Gaelic tradition itself.[84]

[82] Ibid., September 4 1851.
[83] Brooking, *And Captain of their Souls*, 69.
[84] Peter Matheson, "Presbyterianism," in *The Farthest Jerusalem: Four Lectures on the Origins of Christianity in Otago* (Dunedin: Faculty of Theology and Hocken Library, University of Otago, 1993), 60.

These cultural aspirations coloured how Cargill and Burns viewed their tasks, their fellow settlers and those who were in Otago before them. They assumed a common acceptance of the moral principles of the Free Church among the settlers that would guide their actions and provide them with a common understanding of 'sin.' Moral suasion would positively influence the behaviour of the settlers, and temptation to sin would be removed if the balance of settlers was ensured and the sanctity of the family was respected.

These views were not, however, commonly held. The principles of systematic colonisation built upon a framework of Free Church morality faced a number of challenges even before the first settlers arrived. Burns found himself at odds with the "moral laxity" displayed on board the *Philip Laing* by some of the passengers.[85] Equally, Cargill "fell out" with David Garrick, an investor and English solicitor on board the *John Wickliffe*.[86] None of the preparations originally proposed by Rennie in August 1842 had been undertaken and the settlers were faced with constructing their own barracks. The earliest weeks were difficult, especially as the winter was particularly harsh, and a small number of settlers went to Wellington in May. However, the first settlers were soon joined by more, twelve from the *Victory* in early July, approximately 160 from the *Blundell* in mid-September and over 50 from the *Bernicia* in December. Burns, in particular, was very positive about the high moral character amongst the passengers of the *Blundell* in contrast to those he had travelled out with.[87]

[85] Reverend Thomas Burns' Diary 1848-1851, 5 February 1848, C017, Otago Settlers Museum, Dunedin.

[86] Brooking, *And Captain of their Souls*, 54.

[87] McClean, "Scottish piety," 23.

The key demographic principles that systematic colonisation stipulated were that settlers should be selected to ensure a balance between men and women, with an emphasis on young married couples, families or single men and women in equal numbers. Wakefield had suggested that, in addition to the economic benefits of young married couples to the foundation of a colony, the moral considerations would ensure that each female colonist had a 'special protector' with responsibility for household duties, and that the men would be too busy establishing themselves to be diverted by "dissolute habits."[88] The presence of the women would ensure that the men would not have to be distracted by household cares that would make them less productive in their sphere of work. However, the main role of the women was to provide the moral compass for the colony. The shipping lists provide an ideal source of information to look at how effectively these principles were met in the early settlement.

It has been suggested that despite the age of its leaders, Otago was essentially a young settlement. Of the 3800 Europeans in Otago in 1856 less than 160 (4.2%) were fifty years of age or older.[89] The first two ships list 56 single men between 14 and 53, 19 single women between 10 and 50, and 64 married couples with up to six children aged between newly born and 22.[90] The majority of the single men (66%) were in their late teens or twenties at the time of their embarkation. Nearly half of the married couples (47%) were in their twenties and the number of children per couple increased with the age of the wife (Table 2.2). These figures show that the majority of the earliest settlers did fit at least one of the demographic principles of systematic colonisation – young married couples or couples with young families.

[88] Wakefield, "Art of Colonization : Letter LXII," 972.
[89] Matheson, "Presbyterianism," 56.
[90] Passenger Arrivals at Port Chalmers, New Zealand, 1848-1851, www.ngaiopress.com/drhocken.htm.

Table 2.2: Number of Married Couples and their children by age of wife on first ships

Age of wife	Number of couples	Couples with no children	Couples with 1 child	Couples with 2 children	Couples with 3 children	Couples with 4 children	Couples with 5 children	Couples with 6 children
<20	1	1	0	0	0	0	0	0
20-29	30	10	9	9	2	0	0	0
30-39	16	4	1	0	3	4	2	2
40-49	10	1	0	2	1	2	1	3
50+	2	0	0	0	1	0	1	0
No age	5	1	1	1	0	2	0	0
Total	64	17	11	12	7	8	4	5

Source: Passenger Arrivals at Port Chalmers, New Zealand, 1848-1851, *Philip Laing* and *John Wickliffe*, www.ngaiopress.com/drhocken.htm.

Unfortunately, the number of single men was disproportionately high in relation to the number of single women, even allowing for the number of single women of marriageable age who travelled out as part of their family.

The other demographic factor in systematic colonisation is the class of the settlers, indeed the scheme was often referred to as a "class settlement."[91] From its inception, the scheme struggled to find sufficient 'capitalists' or investors to purchase large blocks of land within the settlement.[92] An analysis of the listed occupations from the shipping lists of the first five ships (Table 2.3) indicates that the majority of the settlers were from humble, hardworking backgrounds, and formed the labouring class of the new settlement.[93]

[91] McClean, "Scottish piety," 22.
[92] Ibid., 22-3.
[93] Passenger Arrivals at Port Chalmers, New Zealand, 1848-1851, www.ngaiopress.com/drhocken.htm; McClean, "Scottish piety," 23.

Table 2.3: Settler numbers by occupation level 1848

Class of Occupation[94]	**Number of Settlers**
Working class unskilled (unemployed, labourers, servants, shop assistants, merchant seamen) Skilled tradesmen	133
Lower Middle Class: Clerical, shopkeepers, commercial travellers, farmers, merchant marine commanders, artists, musicians, actors	37
Gentry, Professional, Employers: Managerial, Employers, Professionals, Army Officers, Independent, Titled	9
Unspecified	31
Wives and Unmarried women (not servants)	118
Children	233
Total	561

Source: Passenger Arrivals at Port Chalmers, New Zealand, 1848-1851, *Philip Laing* and *John Wickliffe*, www.ngaiopress.com/drhocken.htm.

Of the 210 passengers who identified an occupation on embarkation, 133 can be classified as working class (63%), either as unskilled labourers and servants, or as skilled tradesmen. Most of the capitalists, who formed the professional class, were English and Anglican, a fact that worried Cargill and Burns.[95] The ready capital had not been forthcoming from Free Church investors, opening the doors for English investors. The fact that these English investors soon formed a small minority of government appointed officials within the settlement increased tensions between the Free Church ideal and the reality of the settlement.

[94] Occupations by class as per A. James Hammerton, *Cruelty and companionship: conflict in nineteenth-century married life* (London: Routledge, 1992), 104 Table 4.1.

[95] McClean, "Scottish piety," 22-3.

Matheson suggests that the Free Church in Scotland was essentially a middle-class church that had little to offer working-class people "frowning on their amusements, and hauling their young couples over the coals."[96] However, it does not appear that the early, mostly working class, settlers of Otago were disillusioned or poorly served by the Free Church. The largely working class nature of the settlement continued throughout the 1850s, especially amongst those who attended the Free Church. Analysis of the baptismal records for the First Church to the end of 1859 (Table 2.4) shows that the occupations of the fathers were mostly of the labouring class. However, it needs to be noted that the sacrament of baptism was very important in the Presbyterian Church, so parents who were not necessarily communicants of the Free Church would often get Burns to baptise their children. Indeed, only Roman Catholics and committed Anglicans tended to wait for a visit from a priest of their own church to have their children baptised.[97]

[96] Peter Matheson, "1840-1870: The Settler Church," in *Presbyterians in Aoteraroa 1840-1900* (Wellington: The Presbyterian Church of New Zealand, 1990), 19.

[97] McClean, "Scottish piety," 27.

Table 2.4: Occupations of fathers, First Church baptisms 1848-1859.

Occupation	**Number**
Labourer/Servants	172
Farmer/Agriculturalist/Shepherd/Ploughman/Gardeners	116
Skilled Craftsmen – Mason/Sawyer/Shoemaker/Tailor/Blacksmith/Carpenter/ Painter/Builder/Bricklayer/Miller/Cabinet Maker/Tinsmith/Shingle Splitter/ Candle maker/Ironmonger/Joiner/Boat Builder/Draper/Printer	185
Merchant/Shop Keeper/Bookseller/Druggist/Baker/Butcher/Hotel Keeper	62
Minister/Teacher/Government Official/Solicitor/Constable/Night Watch/Banker	33
Landowner/Settler	78
Other – Whaler/Dance Master/Boatman/Ships Captain/Māori	50
Total	696

Source: First Church Baptisms 1848-1859.

As the settlement slowly grew over the next five years, the majority of immigrants continued to be working class. Although the earlier settlers' lifestyles and domestic arrangements initially disturbed Burns, by 1851 he was claiming that these undesirables had either moved on or were so awed by the morality of the Free Church settlers to have copied their example.[98] However, Cargill and Burns had not been able to establish their idealised settlement. The landscape had not been entirely empty of the indigenous Māori. There was a small group of earlier settlers whose experience had proved important during the first year of settlement. Even amongst the settlers there was a persistent group of English capitalists whose political influence was a thorn in the side of Cargill's leadership. In this atmosphere the likelihood of the Free Church providing the sole moral compass for a community of self-regulating Scots with high moral characters looked limited at best.

[98] *Otago Witness*, 20 December 1851, letter to the editor from 'A Settler of the First Party'.

Conclusion

During the early part of the nineteenth century the dependence of Europeans upon Māori knowledge to survive resulted in contact between the two groups. Sexual encounters formed part of the contact, some of which led to longer term 'marriages', which were regulated by Māori norms, somewhat influenced by the transience of the European men. Following the formal annexation of New Zealand by Great Britain in 1840, formal regulation was introduced nationally through legislative ordinances and locally by the work of missionaries. The close contact that had developed in Otago between Europeans and Ngāi Tahu resulted in the development of a hybrid community where Māori norms had prevalence in a practical sense over the more ceremonial European regulation through marriage and baptism. It was into this community that the Free Church leaders sought to establish their utopia in 1848.

By the end of the 1850s the population of Otago included a diverse range of people – the indigenous Ngāi Tahu, early sealers and whalers, their mixed-race descendants, Scottish settlers and English colonists. Although the principles of systematic colonisation were not achieved, the underlying assumptions of morality, based on Christian doctrine and traditional attitudes towards the role of women, were part of the baggage that the settlers brought with them. However, such attitudes were not necessarily common to everyone within the community. This settlement with its hierarchies of class, race, gender and religion provides an opportunity to examine the attitudes and ideas of an eclectic group towards an everyday practice such as sex, and its relationship with ideals of decency, morality and public order. Fundamental to this examination is the question of who had responsibility for the regulation

of behaviour within the new colony. The differences between Scottish and England traditions and the realities of existence in Otago brought church and state authorities into conflict over their respective roles.

Chapter 3

Church, State and Society: Infrastructure for the Regulation of Sexuality in Otago

> In essence, then, law is a means towards 'order', and important issues to be ascertained are what at any given time and place constitutes the prevailing official definition of order, whose interests the aggregated components of that definition primarily serve, and how this is done.[1]

The nature of the foundation of Otago as a joint venture between the New Zealand Company and the Lay Association of the Free Church of Scotland, meant that the regulation of behaviour was undertaken by two slightly differing bodies within the colony. The framework provided by the Free Church regulated and punished the behaviour of communicants of the church. The colony was also governed and regulated by a system of laws which were based on English Criminal and Common Law.[2] This chapter outlines the formal infrastructure in place to regulate the sexual behaviour of Otago settlers, focusing on the role of the kirk as an ecclesiastical body and the state in the form of the police and courts. It examines the tensions between church and state and illuminates the existence of more informal methods for regulation such as social sanctions. Such an examination highlights how differences in religion, class and ethnicity inform approaches to regulation and to the perception of what is socially unacceptable behaviour. It also suggests that although the settlers may have had a sound idea of what was right and wrong, their responses to 'unacceptable' behaviour in others was influenced by their experiences and may not have always conformed to commonly held attitudes.

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[1] Richard S. Hill, *Policing the Colonial Frontier: The Theory and Practice of Coercive Social and Racial Control in New Zealand, 1767-1867*, Part 1, *The History of Policing in New Zealand, Volume One* (Wellington: V. R. Ward, Government Printer, 1986),13.

[2] Peter Spiller, Jeremy Finn and Richard Boast, *A New Zealand Legal History* (Wellington: Brooker's Ltd., 1995), 75 & 102-3.

The existence of two different regulatory structures was the result of the differing political structures that developed within England and Scotland from the Reformation to the eighteenth century. These structures resulted in considerable differences in the roles of the respective churches in maintaining order amongst the populations. In England, law and order was a state responsibility. The focus of the church in England was religious education and the support of the poor, in contrast to the situation in Scotland, where social order was the responsibility of the congregation. Although there were similarities between what was perceived as morally unacceptable by the church and criminal by the state, the level of punishment and the judgements made could vary considerably for the same behaviour. Added to this was the potential that the leaders of the Otago settlement held a Free Church suspicion of state authority arising from its origins in 1843 as "an act of defiance to the state that had disrupted the proper relations between the secular state and the Christian community."[3] The authorities of the Free Church settlement took for granted the kirk's strength to maintain regulation within a community of immigrants, who had been selected according to moral and religious criteria. The 'laws' under which Otago was to be governed were, like those of early modern Scotland and elsewhere, "written by men who presumed a simple, easily disciplined society, in which moral behaviour was the only problem."[4] However, this did not take into consideration the struggles for survival during the period of establishment and the mixed nature of that society.

[3] Peter Matheson, *The Finger of God in the Disruption 1843-1993* (New Zealand: The Presbyterian Church of Aotearoa New Zealand Synod of Otago and Southland, 1993), 8.

[4] Deborah A. Symonds, *Weep Not for Me: Women, Ballads, and Infanticide in Early Modern Scotland* (University Park: University of Pennsylvania, 1997), 6.

Church Based Regulation of Behaviour

The regulation of sexuality has its foundations in Christian doctrine. There was considerable discourse and debate during the twelfth and thirteenth centuries about what acts were sinful, and how to define and punish them.[5] A number of surviving treatises examine sexual acts in relation to the concept of procreation. The Christian Church developed a hierarchy of acceptability and sinfulness. Virginity was the highest level and those who were celibate were perceived to be closest to God. There was an expectation that God's representatives on earth would be celibate, although in reality this was not always the case. It was recognised that celibacy was not something that everyone could achieve, and for those people sex was permitted and not perceived to be sinful so long as it was within marriage and motivated by the desire to produce children.[6] All other sexual acts, such as sex outside of marriage, sex between men or between women, masturbation and bestiality, were sinful to varying degrees. It was considered a venial sin if the motive of sex within marriage was to prevent oneself from committing a worse sin out of sexual desire, such as masturbation. Sexual intercourse within marriage was a mortal sin if only for pleasure or the result of excess desire.[7] Within marriage the worst sin was sex against nature, for example non-vaginal sex. Outside of marriage the vice of sexual excess (*luxuria*) was one of the seven capital vices and included fornication, adultery, incest, deflowering, abduction and vice against nature – sodomy or bestiality.[8] The church monitored and punished transgressions through the mechanism of the confessional,

[5] For a detailed examination see Mark Jordan, *The Invention of Sodomy in Christian Theology* (Chicago: University of Chicago Press, 1997).

[6] Augustine, quoted in Jordan, *Invention of Sodomy*, 95-6.

[7] Jordan, *Invention of Sodomy*, 95.

[8] St Thomas Aquinas, quoted in Jordan, *Invention of Sodomy*, 142-4.

penitences and church courts. This hierarchy formed the basis of the Christian Church's regulation of sexual acts throughout the later middle ages and early modern period.

This hierarchy of sexual sin and its regulation also informed the conscience of much of the society of mid-nineteenth century Britain, even if some of the more extreme views of celibacy had been marginalised during the Reformation. All non-marital sexual activity, originally perceived as sinful and regulated by church authorities, became secular crimes as western European societies, especially England, moved towards secularisation. However, Scotland lacked a strong state hierarchy or infrastructure for much of the early modern era. The formal system of social regulation was based on a Calvinist dogma founded on the importance of the individual congregation.[9] The congregation itself had responsibility for maintaining order and discipline amongst its community members. To support this, a hierarchy of church courts was established. The lowest level of the hierarchy was the kirk sessions, made up of the parish ministers and a number of elders, which had responsibility for parish business, including disciplinary cases, education and poor relief. Above the kirk session was the presbytery, to which all local ministers were associated, as were the elders, from 1689.[10] The presbytery had control of the penalty of lesser excommunication – the removal of communion from an offender. Disputed cases were often referred from the kirk session to the presbytery for a ruling. As a result, there was consistency in the treatment of offenders and the punishments handed out for various offences between kirk sessions, especially from 1707 with the introduction of *The Form of Process in the Judicatories of the Church of Scotland with relation*

[9] Rosalind Mitchison and Leah Leneman, *Girls in Trouble: Sexuality and Social Control in Rural Scotland 1660-1780* (Edinburgh: Scottish Cultural Press, 1998), 5.

[10] Mitchison and Leneman, *Girls in Trouble*, 7; Leah Leneman and Rosalind Mitchison, *Sin in the City: Sexuality and Social Control in Urban Scotland 1660-1780* (Edinburgh: Scottish Cultural Press, 1998).

to Scandals and Censures.[11] At the top of the hierarchy was the synod whose main role was to reinforce the authority of the lower courts.[12] However, the synod also had control of the sentence of great excommunication, which cut the offender off from all contact with anyone outside his or her own household, and prohibited movement outside the parish.[13]

With the church having responsibility for social regulation of behaviour, including sexual behaviour, the prevailing morality was based on a strict Calvinist dogma. Margo Todd has argued that in addition to maintaining morality, the system of kirk discipline played an important role in ensuring the stability of the family unit and avoiding the problems of poverty associated with bastardy and single parent households.[14] Mitchison and Leneman's work on sexuality and social regulation in rural Scotland between 1660 and 1780, shows the church held very strong views regarding any sexual contact outside the sanctity of marriage, and heavily punished anyone guilty of fornication or ante-nuptial fornication.[15] The strength of the church's networks ensured that offenders would be traced and punished, even after a number of years. Discipline tended to be in the form of a number of public appearances in sackcloth. Offenders sat on a 'stool of repentance' before the congregation, and a fine would be imposed equally on both partners.[16] The number of appearances was increased for the severity of the offence, from three for simple fornication to 26 for adultery, 39 for relapse in adultery, or a

[11] Kenneth M. Boyd, *Scottish Church Attitudes to Sex, Marriage and the Family, 1850-1915* (Edinburgh: John Donald Publishers Ltd., 1980), 9.

[12] Mitchison and Leneman, *Girls in Trouble*, 9.

[13] Ibid., 7.

[14] Margo Todd, *The Culture of Protestantism in Early Modern Scotland* (New Haven: Yale University Press, 2002), 266, 291.

[15] Mitchison and Leneman, *Girls in Trouble*.

[16] Todd, *The Culture of Protestantism*, 178.

whole year for incest.[17] However, due to the types of evidence that were admissible[18] - an illegitimate child for fornication, a child born within nine months of marriage for ante-nuptial fornication, or witnesses to the act – the records of the church courts provide little information about religious regulation of other forms of non-procreative sex, such as homosexuality.[19]

These structures of social regulation began to break down in the late eighteenth century, with kirk sessions moving away from public appearances as punishment and the frequent acceptance of money 'for the poor' instead of public punishment for offences.[20] However, a large proportion of ministers and elders were unhappy about these moves and continued to use the structures of social regulation of the church.

Scotland lacked the settlement features of the English Poor Law system; however, the regulation of marriage was no less strict. Regular marriage, as agreed by church and state, involved the "proclamation of banns in the parish churches of the couple on three consecutive Sundays, followed by the exchange of consents in the church 'in the face of the congregation'."[21] For a couple to be free to marry they had to be not already married, physically capable of consummating the marriage, not be within the prohibited degrees of affinity and be of age – fourteen for boys and twelve for girls. It was possible for a couple to be married in the eyes of the law, but not in the eyes of the church.[22] These 'irregular' marriages occurred when a couple followed the tradition of freely declaring that they married

[17] Mitchison and Leneman, *Girls in Trouble*, 17.
[18] Leneman and Mitchison, *Sex in the City*, 3, note 2.
[19] Todd, *The Culture of Protestantism*, 295.
[20] Leneman and Mitchison, *Sex in the City*, 35.
[21] Mitchison and Leneman, *Girls in Trouble*, 40.
[22] T. C. Smout, "Scottish Marriage, Regular and Irregular 1500-1900," in *Marriage and Society: Studies in Social Marriage History*, ed. R. B. Outhwaite (Europa Publications Ltd, 1981), 205.

each other.[23] This could include a declaration of marriage, a promise of marriage before witnesses, and 'by habit and repute', whereby a couple who had been living together were regarded publicly as married. Therefore the irregularity was in the mode of the marriage occurring, not in the state of marriage.[24] The church was not happy to recognise these irregular marriages without credible witnesses when considering cases of discipline, but recognised that the public declaration of adherence by the couple to each other as a married couple carried more weight than documentary evidence which could be forged.[25]

The original leaders of the Otago settlement adhered to the structures of the Church of Scotland, both Established and Free. As a result, they brought with them existing structures for monitoring morality amongst the communicants of the church. It has been suggested that even before the first settlers arrived in Otago, Burns "ran his ship like a floating theocracy", enforcing strict discipline amongst the passengers.[26] Within a year of arriving, the first kirk session was established following the completion of the church in December 1848, and the first communion in January 1849. The Kirk Session for the First Church met for the first time in May 1849, following the election of Elders, on April 26, to support the work of Burns. Despite this early introduction of established kirk structures, the system had limitations as it was only applicable to those who were full communicants, adherents of the church, and those who approached to join the church. People who did not wish to answer to the kirk sessions for their behaviour could join other churches and have the ordinances of baptism, marriage and

[23] Mitchison and Leneman, *Girls in Trouble*, 40.
[24] Ibid., 53.
[25] Ibid., chapter 4.
[26] Tom Brooking. "Burns, Thomas – Biography," The Dictionary of New Zealand Biography, Te Ara - the Encyclopedia of New Zealand, last modified 1 September 2010, http://www.teara.govt.nz/en/biographies/1b52/1.

burial carried out by local missionaries, such as Creed who began to hold services in the gaol in early 1849. Members of the community outside of the Free Church could not be punished by the kirk, although they could be publicly censured. This was not so much of a problem in Scotland, with a relatively homogenous population, sharing common religious beliefs and well developed networks between parishes and presbyteries, but in a settlement such as Otago its sphere of influence was limited.

The main source of information about the regulation of the non-criminal activities and its effectiveness is the kirk session minutes, for they served as the ecclesiastical courts in Otago. The survival of these records for the period under examination has been relatively good for the majority of the early parishes in Otago, most being complete from their foundation.[27] Most notably, however, the early Session minute books for Knox Church, established in May 1860, have not survived. The earliest surviving Session minutes for Knox Church date from July 1887. An examination of the surviving session minutes from Otago for the period from 1849 to 1865 suggests that there was a focus on ensuring the reputation of the church, the morality of the congregation, and the morality of the individual concerned, sometimes in that order of precedence reflected in the wording of entries such as "…rumours affecting their character and conduct as members of this Church"[28] and "for certain acts of which they have been guilty wholly inconsistent with their profession as Members of this Church"[29]. Whether the kirk session dealt with the morality of the congregation, appears to depend on the incumbent

[27] Missing Presbyterian Church Records for New Zealand are listed at: http://www.presbyterian.org.nz/archives/lostarchivesrecords.htm.

[28] Port Chalmers Kirk Session Minutes, 7 May 1860, Presbyterian Church of Aotearoa New Zealand Archives, Dunedin.

[29] Ibid., 5 November 1860.

minister and the nature of the Elders, as much as the perceived morality or immorality of the congregation itself.

As mentioned, the first Kirk Session was established in 1849 and it covered the entirety of the Otago settlement. East Taieri was the next parish to be established in 1854 following the arrival of Reverend William Will, with the Kirk Session's first meeting in that year. Only one other parish, Port Chalmers, was established prior to 1860. This third Free Church parish and its Kirk Session were established in 1858 with a communion roll of only 28. The disciplinary focus of each of these sessions is quite different. Port Chalmers and East Taieri both focused strongly on intemperance and its ramifications within the community. First Church discipline cases during the period are dominated by ante-nuptial fornication and fornication. Several activities punished by the kirk (Table 3.1), such as adultery, drunkenness and selling liquor without a licence, were also punishable under New Zealand law, highlighting a possible area of conflict between the secular and ecclesiastical authorities.

The total number of discipline cases was low in relation to the overall population of the settlement. This was in part due to the large number of non-communicants who could easily avoid its punishment. Based on the statistics that Burns recorded in his visitation at the end of 1851, the population of the settlement totalled 1908 adults, 376 (19.7%) being communicants of the First Church, 1128 (59.1%) other Presbyterians, 221 (11.6%) Episcopalians, and 183 (9.5%) other denominations.

Table 3.1: Number of discipline cases by year by type 1849-1865

Type of Discipline	**1849**	**1850**	**1851**	**1852**	**1853**	**1854**	**1855**	**1856**	**1857**	**1858**	**1859**	**1860**	**1861**	**1862**	**1863**	**1864**	**1865**	**Total**
Ante-nuptial fornication			1	1	1		1		1			2	4	5	6	13	6	41
Fornication*				1	1	1	2	1		2		2	2	3	2	5	5	27
Adultery												1						1
Irregular marriage									1				1					2
Drunkenness			1		1		1	2				3				1	4	13
Selling Liquor w/o licence												2						2
Unbecoming behaviour							1				1	4	3					9
Working on Sabbath															1			1
Non-attendance										1	1				1		7	10
Total			2	2	3	1	5	3	2	3	2	14	10	8	10	19	22	106

* Fornication includes sexual activity between an unmarried man and woman who did not subsequently marry.

Source: First Church Minutes of Sessions, Vol 1, 26 April 1849 – 21 September 1879, Port Chalmers Kirk Session Minutes, East Taieri Presbyterian Church Minutes of Sessions, West Taieri Presbyterian Church Minutes of Sessions, Andersons Bay Presbyterian Church Minutes of Sessions, Tokomairiro Presbyterian Church Minutes of Sessions, Palmerston Presbyterian Church Minutes of Sessions, Presbyterian Church of Aotearoa New Zealand Archives, Dunedin.

As a source for early Otago, Burns' visitation records provide evidence of the composition of the wider community and highlights instances where settlers were following a different moral code than the First Church adherents. Visitations were undertaken by ministers to ensure that "every household and family was using the correct prayers daily and living in a godly manner."[30] Burns used his visitation record as an ongoing census of the community, listing all the members of a household, their religious affiliation, and occasionally offering comments on

[30] Todd, *The Culture of Protestantism*, 312.

irregular or extra-marital arrangements. There has been some discussion about the accuracy of reports made at the time by Burns.[31] A close examination of the figures provided by Burns and reported officially in the *Otago Witness* in February 1851, suggests that he exaggerated the number of Free Church Presbyterians and under reported other Presbyterians.[32] For example, the report that Burns sent to the Moderator of the Presbytery of Edinburgh of the Free Church of Scotland in June 1851 stated that the population of the settlement was approximately 1600, including 1100 Presbyterians, mostly Free Church, 61 independents who join in worship at First Church, between 15 and 20 Wesleyan Methodists, 11 Roman Catholics and 230 Episcopalians.[33] Burns' own records in his visitation in fact show that the majority of the Presbyterians were not communicants of the Free Church. It appears that Burns interpreted the religious affiliation of the Presbyterians in a way that reflected the most glory on the Free Church within Otago.

In this vein, the following table illustrates the large number of non-communicants recorded in Burns' visitations (Table 3.2). During Burns' visitation of 1850-1, only one part of Dunedin had more First Church communicants than other Presbyterians. In all other areas, communicants were outnumbered by other denominations by as many as four to one.

[31] Brooking, *And Captain of Their Souls*, 90.
[32] Ibid., 90.
[33] Copy of letter from Revd. Burns to the Moderator of the Presbytery of Edinburgh of the Free Church of Scotland recorded in the Kirk Session Minutes for First Church, June 1851, First Church Minutes of Sessions, Vol 1, 26 April 1849 – 21 September 1879, Presbyterian Church of Aotearoa New Zealand Archives, Dunedin.

Table 3.2: Population by Denomination 1848-1855

Denomination	**1848/9**	**1850/1**	**1851/2**	**1852/3**	**1854**	**1855**
Free Church Adults	}734	322	376	413	325	375
Free Church Children*		295	338	377	393	395
Presbyterian		1043	1128	1317	1150	1154
Episcopalian	96	230	221	285	263	310
Wesleyan	19	15	23		27	15
Catholic	7	11	18	36	2	11
Independent	-	61	38	32	20	29
Other/None^	14	85	104	82	55	63

* Includes children between four and twelve
^ Includes the Māori population in 1850/1
Source: Visitations of Reverend Thomas Burns 1848-1858, Presbyterian Church of Aotearoa New Zealand Archives, Dunedin.

One possible reason for the low number of communicants within Otago is indicated by Alison Clarke's research into keeping the Sabbath. She suggests that many adherents to the Presbyterian Church felt themselves to be unworthy of the blessing of communion.[34] As a result it would not have been unusual for only a third of the Presbyterian population to be full communicants of the church.

The statistics also illustrate that there were other religious influences within the settlement, some of which were the result of the activities of a number of missionaries who had lived in the area prior to 1848. Johnny Jones had applied in 1839 for a missionary attached to the Wesleyan Missionary Society to be stationed at Waikouaiti.[35] James Watkin was appointed to

[34] Alison Clarke, "The Presbyterian way of life in nineteenth-century New Zealand," paper presented to the Presbyterian Research Network, Dunedin, 15 October 2009.

[35] A. H. McLintock, *The History of Otago: the origins and growth of a Wakefield class settlement* (Christchurch: Capper Press, 1975), 118.

the post, arriving in May 1840. In the same year the Catholic Vicar Apostolic of Western Oceania, Jean Baptiste François Pompallier arrived in Akaroa and preached in whaling stations down the east coast.[36] Four years later, the Anglican Bishop Selwyn made a tour of the South Island, making contact with converted Māori, including a number at Moeraki.[37] Also, in 1844, Watkin was succeeded as Wesleyan missionary at Waikouaiti by the energetic and enthusiastic Creed. The boat that brought Creed to Waikouaiti also brought Wohlers, to establish a mission station at Ruapuke. Watkin, Creed and Wohlers were all involved in preaching to both Europeans and Māori, carrying out baptisms and marriages, and converting the local population to their various doctrines. Therefore, by 1848, a number of religious influences were established amongst the settlers, whalers, and indigenous population in the Otago colony.

The high number of non-Free Church settlers also indicates that the emigrants were not restricted wholly to adherents of the Free Church, as had been envisaged by Burns. Amongst the passengers on the first ships were other Presbyterians, Episcopalians and Wesleyan Methodists. The processes by which the Otago authorities attempted to control the selection of emigrants also highlight an attempt at social control and regulation. Originally envisaged as a "scheme of the people of the [Free] Church", from the outset there were insufficient capitalists from within the Free Church to purchase land.[38] Despite this, attempts were made to manage the selection of assisted immigrants to ensure that Scottish labourers "of good

[36] McLintock, *The History of Otago*, 122.

[37] Transcript of Bishop Selwyn's register of Baptism and Marriages 1844, MS-0440/009, Hocken Library, University of Otago, Dunedin; Transcription of extract from journal of Bishop Selwyn 1844, MS-0440/008, Hocken Library, University of Otago, Dunedin.

[38] Copy of the pamphlet of the Lay Association of the Free Church of Scotland including resolutions of the Association, 'Address to the People of Scotland' promoting the colony, and a map of Otago Harbour, MS-0439/129, Hocken Library, University of Otago, Dunedin.

character" were given priority.[39] It was important to the founders of the colony that the settlers shared a common religious belief in the Presbyterian Church of Scotland. This was not only due to the desire for a wholly "Scotch" settlement, but was founded on the idea that a shared morality is what holds society together and protects it from harm.[40] During these early years the recruitment of immigrants was in the hands of John McGlashan, Secretary to the Association of the Lay Members of the Free Church of Scotland (Otago Association) until the Otago Association ceased operations in May 1853.[41] By the early 1850s the religious restrictions placed on the selection of immigrants were an issue of considerable political debate within Otago.[42] For several reasons the number of immigrants remained low during the first five years of the settlement's history, including the selection restrictions, Otago's reputation for 'petty strife' and the inability of would-be emigrants to secure even a proportion of the passage money. After 1853, immigration agents were appointed and rules governing the selection of immigrants were developed by the Provincial Council.

The Provincial Council passed a bill for promoting immigration to Otago late in 1854 which effectively saw the end of religious restrictions. The rules of December 1854 regarding the selection of immigrants, for the recently appointed immigration agents in Scotland and London, stipulated that:

1. The agents shall carefully satisfy themselves that the parties are of sound mind and body, healthy, skilful in their calling, of industrious habits, and good moral character. The certificates of their possessing these qualifications to be transmitted along with them.

[39] McLintock, *The History of Otago*, 343.
[40] C. L. Ten, "Enforcing a Shared Morality," *Ethics* 82, no. 4 (July 1972): 322.
[41] McLintock, *The History of Otago*, 343-348.
[42] *Otago Witness*, 13 August 1853.

2. Parties producing letters from kinsfolk or friends in Otago, and whose names are also on the list sent home, if found qualified as above, to have a preference over all other applicants.
3. A preference also to be given to married couples, families, of otherwise qualified as above.
4. In general, selection to be made in such way as that there shall be an equal number of both sexes. Young unmarried females, not members of families, to be placed under the guardianship of the heads of a family or matron.
5. Each party of immigrants to be selected with a view to the supply of the kinds of labour in demand in the settlement, as the agents shall be advised.[43]

In addition, the Council appointed an agent to entice immigrants from Australia, specifically Melbourne where unemployment was high.

Although these rules have moved away from the selection of immigrants based on religious affiliation, the underlying role of the family and good moral character remained central to the recruitment of settlers to Otago. They also reinforce a theocratic approach to maintaining moral control, with the family as the main unit of regulation within a Christian moral vision, albeit with strong Calvinist overtones. The gender balance, if achieved, would remove a number of sexual temptations, further reinforcing a shared Christian view of morality.

Notwithstanding the apparent separation of church and state in regulating the moral behaviour of settlers, in the early years of the settlement, the kirk session occasionally requested the help of the Justices of the Peace to ensure that the Sabbath was kept as a day of worship and rest. After one particular incident when a local butcher drove several bullocks into Dunedin on a Sunday, shooting one of them during the evening, the Resident Magistrate issued a warning

[43] Rules to be Observed by the Agents for Otago, in Regard to Immigration, 28 December 1854, AAAC 701/D500/2/e/86, Archives New Zealand, Dunedin.

that such activities would result in charges being laid.[44] Following the devolution of governance to the provinces in 1853, the Provincial Superintendent, William Cargill, was not above making use of the civil authorities to push moral issues. Chief Constable John Shephard became Cargill's mouthpiece in, for example, "enjoining [the Port Chalmers constable] to suppress drinking, working and shooting on Sundays."[45] By the late 1850s Cargill and Burns were again making use of the civil police to 'rectify' the "free intermixing of sexes which was believed to be the result of cramped steerage conditions on the way out."[46]

Regardless of the expectations of the Free Church authorities and the active involvement of the kirk sessions in attempting to impose a moral order, the state had the ultimate authority to define what constituted a crime within Otago. As Richard Hill has succinctly expressed this point:

> The notion of 'the King's peace' incorporates the capacity of the state alone to define what actions, including 'victimless' activities conducted in privacy, constitute greater or lesser breaches of or threats to the desired modes of order and regularity and thereby to the existing or desired social order and its relations of production.[47]

Thus the sexual behaviour of the settlers in Otago was always going to be regulated first and foremost by the laws of the land, which were enforced by the police, with punishments for breaches handed out by the courts.

[44] *Otago Witness*, 13 September 1851.
[45] Hill, *Policing the Colonial Frontier*, 496.
[46] Ibid., 498.
[47] Ibid., 18.

Secular Regulation of Behaviour

In 1848 the Otago settlement was administered politically from Wellington under Edward J. Eyre, Lieutenant-Governor of the Province of New Munster, and from Auckland under Sir George Grey, Governor of New Zealand.[48] Issues of state administration were handled by these two Englishmen and their appointees within Otago. Under the establishment of the province of New Munster in 1846, which administratively included the southern half of the North Island, as well as all of the South Island and Stewart Island, the Lieutenant-Governor was given responsibility for, amongst other powers, the establishment and maintenance of a Constabulary Force, appointment of Sheriffs, regulation of prisons, establishment of Resident Magistrates' Courts and "to make special provision for the administration of Justice in certain cases", to make provision "for the safe custody of, and prevention of offences by persons dangerously insane, and for the care and maintenance of persons of unsound mind", for regulating marriages and the registering of births, deaths and marriages.[49] These powers remained with the Lieutenant-Governor until the establishment of separate provinces under the 1852 New Zealand Constitution Act, which transferred a number of these powers to the Provincial Councils, with the exception of the regulation of marriages and the process and punishment of felonies under New Zealand laws.[50] In addition, the Provincial Superintendents were given the responsibilities of the Lieutenant-Governor detailed in the Constabulary Force Ordinance of 1849, which also detailed the penalties imposed for a number of summary offences including drunkenness (up to 48 hours imprisonment or a fine between five and

[48] Proclamation Dividing the Colony into Provinces, Under the Charter of 1846, 10 March 1848, *The Ordinances of New Munster, AD 1849, and of the Province of Nelson Passed in the first eleven Sessions of the Provincial Council AD 1853-AD 1863, to which are added, extracts of Imperial Act and Charter and Instructions, &c., Constituting and defining Province of New Munster, and The Imperial Acts Relating to the Constitution of New Zealand* (Nelson: 1864), x-xi.

[49] Empowering Ordinance 1849 Session 1, No. 5 (New Munster).

[50] 15 & 16 Vict., c. 72; Empowering Ordinance 1854 Session 1, No. 6A (Otago).

twenty shillings), exposing the person (up to two months imprisonment with hard labour or a fine of up to ten pounds), disorderly conduct, and using profane, indecent or obscene language, singing a similar song or ballad, or drawing or showing a similar picture or book (a fine of up to forty shillings).[51] Such a political structure, with ultimate authority in the hands of the Governor of New Zealand in Auckland and the Lieutenant-Governor in Wellington for the first five years of the Otago settlement, firmly placed the regulation of certain sexual behaviours under the control of the civil authorities of New Zealand. These behaviours were often those perceived as summary offences under the law, such as sexual activities in public places which was deemed to be indecent exposure, and the sale or exhibition of pornographic material. However, it also included the regulation of marriage, which the kirk saw as being within its own remit of authority, especially considering the slightly differing attitudes towards what constituted lawful marriage under English and Scottish laws. The tensions inherent in this political structure did not take long to surface after the arrival of the first settlers in Otago.

The need to ensure law and order was recognised by the New Zealand Company at least a year prior to any settlers leaving Britain, with a request that the Governor appoint Captain Cargill as a Justice of the Peace prior to his departure, however this was not done, and he was not sworn in as a Justice of the Peace until after the arrival of the first settlers.[52] As part of the preparation for the arrival of the first settlers, the New Zealand Company had also requested that Governor Grey provide some form of state enforcement of law and order.[53] Hill has suggested that the Lieutenant-Governor, Edward Eyre, was "more concerned with asserting

[51] Constabulary Force Ordinance 1849 Session 1, No. 9 (New Munster).

[52] Niels Riensborg, "The Dunedin Gaol and the Administration of Justice in Otago 1840-1865" (BA diss., University of Otago, Dunedin, NZ, 1987), 9.

[53] Hill, *Policing the Colonial Frontier*, 298.

from the beginning state power against the pretensions to temporal power of the settlement's Free Church of Scotland leaders."[54] Included in Eyre's steps to ensure the power of the state was the appointment of a police force from outside the settlers, whom he perceived as being "too close to the Free Church and its leadership."[55] Within weeks of the arrival of the *Philip Laing*, a police force arrived from Wellington consisting of a sergeant, a corporal and three privates under the supervision of Alfred Rowland Chetham Strode, Sub-Inspector of Police for Otago. Eyre perceived Strode to be a trustworthy and "reliable instrument of state policy."[56] One of Strode's first duties was to swear in a Bench of Magistrates for Otago, which included, in addition to himself as lead Justice of the Peace, an English solicitor, David Garrick, C.H. Kettle, who was the New Zealand Company's surveyor, Dr Robert Williams, and Cargill. Educated and relatively well off, these men were the core of the capitalists of the colony. Initially, the police force and trappings of judicial infrastructure were welcomed by the settlers who were concerned by the existing population of sealers and whalers.

The immigrants from the *Philip Laing* and *John Wickliffe* benefited from the experience and produce of the first settlers, including Johnny Jones, but did not necessarily approve of his background or Methodist beliefs. However, their deepest approbation was reserved for the whalers. Even fifty years after the establishment of Dunedin, the establishment viewed these earlier settlers with distain:

> Many of the men in the numerous whaling ships that frequented the coast were the very off-scourings of society. They had fit associates in the waifs and strays that drifted, like scum, from the penal Colonies of New South Wales and Tasmania. Together they constituted one of the best equipped regiments in the hosts of evil. They introduced the vices and diseases of older lands among the Natives. They supplied them also with

[54] Ibid., 298.
[55] Ibid., 299.
[56] Ibid., 298.

> fiery liquor and strong tobacco, and led them on to excesses that proved speedily ruinous alike to soul and body. Two-thirds at any rate of the younger women lived with such men, and were dragged down to lower levels of heathenism than their ancestors had known.[57]

It is not surprising that the colonists perceived these earlier settlers as rough and immoral. Indeed, government officials in Wellington had been made aware of the unruly body of whalers by the police and Resident Magistrates in Akaroa as early as 1846.[58] Cargill suggested that there were general concerns regarding unlicensed squatting and the sale of spirituous liquors.[59] These concerns may not have been misplaced, as the majority of the earliest "criminals" were whalers or sailors, charged with drunkenness, desertion and other minor offences.

Within seven months of arrival the settlement had a gaol, albeit a flimsy weatherboard hut that became the butt of jokes,[60] and by the end of 1848 the police force had grown to seven. The need for this level of law enforcement seems strange for a colony with such a small population and the leaders' adherence to a church based system of social regulation. Looking back in 1898, Reverend William Bannerman recorded that "the only job the police had was to round up sailors who had been hooked by the eyes of a beautiful immigrant girl or who were looking for a different Captain."[61] Although coloured by the passage of time, such a statement illustrates the essentially law abiding nature of the early settlement which is borne out by the evidence of early convictions. The majority of the early offenders within the settlement, aside from the whalers and sailors, were working class men, charged with being drunk and

[57] James Chisholm, *Fifty Years Syne* (Dunedin: J Wilkie & Co., 1898), 6.
[58] Hill, *Policing the Colonial Frontier*, 263.
[59] Riensborg, "The Dunedin Gaol", 15; Hill, *Policing the Colonial Frontier*, 299.
[60] Charles Thatcher, *'Life on the Goldfields': an entertainment*, ed. Robert H. B. Hoskins (Christchurch: School of Music, University of Canterbury, 1996), 75.
[61] Reverend William Bannerman, 'Address', 1898, Otago Settlers' Museum Archives, Dunedin.

disorderly. The Return of Prisoners in the Gaol of Dunedin for the period September to December 1851 listed a total of nine prisoners, five for drunkenness, one for drunkenness and theft, one for desertion and two for debt. Four of them were Scottish and professed adherents of the Free Church, if not members.[62] With so little to do in policing the settlement, the police themselves became an unruly element creating disorder by "drinking, gambling and quarrelling."[63]

Despite early satisfaction with Strode and his police force, the concentration of administrative responsibilities in the hands of a few English capitalists, especially Strode, and the problems resulting from an under worked police force began to cause unrest. Of the appointed Justices of the Peace, only Cargill was Scottish, and the others formed part of the opposition to Cargill's leadership as the New Zealand Company's Agent for Otago. This unrest was further exacerbated by the establishment of an expensive Supreme Court in 1850 which was seen as unnecessary for such a small community with little serious crime. Already by 1850 a portion of the population, the majority of whom were English capitalists, had been identified by Cargill and Burns as opponents of class colonization, with little sympathy for the hopes of the settlement and prejudiced against the nationality and religion of the Scottish settlers.[64] This group became known as the "Little Enemy" and were characterised by their links with Governor Grey. Strode, as Grey's representative in Otago, was a target of the press, which openly delighted in identifying him as the source of all discord in the settlement.[65] The fact

[62] Journal of Henry Monson, Gaoler, 1851-1861, PC-0076, Hocken Library, University of Otago, Dunedin.
[63] Hill, *Policing the Colonial Frontier*, 301.
[64] McLintock, *The History of Otago*, 258-260.
[65] *Otago Witness*, 3 July 1852.

that much of the administrative powers were in the hands of so few was "gall and wormwood to the Free Churchmen."[66] However, the difficulties inherent in such an arrangement are clearly illustrated by an incident in 1851:

> On one occasion a complaint concerning the alleged misconduct of the police had been referred to Strode, as Sub-Inspector of Police, who, however, in his capacity of Resident Magistrate, decided the case, being in fact accused, accuser and judge. When complaint was made to Sir George Grey concerning this somewhat unorthodox procedure, he, of course, referred it back to his chief official at Otago who thereupon called a meeting of his close associates on the Bench and pronounced the charges groundless.[67]

This situation, the contempt that the court was viewed with,[68] and the lack of any serious crime hampered the effectiveness of the judiciary in regulating the moral behaviour of the settlers.

One of the expressed intentions of the Free Church settlers was to achieve self-government, including the ability to pass Ordinances suitable to the character of their settlement. In 1848 the laws of New Zealand were in essence the laws of England as opposed to those of Scotland, where the majority of the settlers were presumed to come from.[69] In addition to this, the laws were enforced by the mostly English police and Magistrates' Bench. Local Ordinances were passed by the Legislature of New Munster. Such Ordinances took into consideration the needs of more populous settlements further north, leaving Dunedin feeling quite isolated. As a result, the trappings of state authority, including the police and courts, were perceived with animosity by the majority of the Free Church settlers.[70] It was not until October 1853 that control of the

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[66] McLintock, *The History of Otago*, 258.

[67] Ibid., 259-260.

[68] *Otago Witness*, 2 October 1852; Elsie Locke, *The Gaoler* (Palmerston North: Dunmore Press, 1978), 49.

[69] The application of the laws of England as at 14 January 1840 to the adminstration of justice in New Zealand "so far as such laws were applicable to the circumstances thereof" was enshrined by the English Laws Act of 1858, 21 & 22 Vict. no. 2.

[70] Hill, *Policing the Colonial Frontier*, 384.

police became a local responsibility with the establishment of Provincial Councils and a modicum of self-governance in New Zealand. One of the early steps that the Provincial Council took with regard to the policing of Otago was to cut the number of officers, replacing the Armed Police Force with a locally appointed force of four constables headed not by Strode, but by John Shepherd, a farm manager, who reported to the Provincial Superintendent.[71] The Provincial Ordinances throughout the 1850s show that the number of serving officers in Otago, including Invercargill, to have been cut back to as low as five in 1855,[72] increasing by one a year each of the following two years.[73] In 1858 the return for the Police Department lists the Chief Constable, three constables for Dunedin, two night watchmen, one constable for Port Chalmers, one for Invercargill and one for Campbelltown [Bluff].[74] It was not until 1859 that the level of policing substantially increased with the addition of seven additional constables, one each for Dunedin, and Riverton and five for "rural districts", as well as an additional night watchman.[75] Despite the Provincial regulation of the levels of policing, and the appointment of local constables, the laws which they enforced continued to be English in origin and the special character of the settlement had little reinforcement from the Ordinances passed by the Provincial Council which focused on the solvency and stability of the settlement.

Throughout the 1850s, under provincial authority, criminal behaviour in Otago continued the trend set in the first year of the settlement, with a focus on drunkenness amongst the general

[71] Ibid., 492-3.
[72] Appropriating Ordinance 1856, No. 8 (Otago).
[73] Appropriating Ordinance 1856-7, No. 11 (Otago); Appropriating Ordinance 1857-8, No. 20 (Otago).
[74] Appropriating Ordinance 1858 (No. 2), Session VII, No. 33 (Otago).
[75] Appropriating Ordinance 1859, Session VIII, No. 34 (Otago).

population and sailors deserting their ships. The annual returns for the gaol for 1852-1854 illustrate the consistency in convictions during this early period (Table 3.3).

Table 3.3: Types of Convictions 1852-1854

Year	Drunk or Drunk and Disorderly	Drunk & Theft or Vandalism	Deserting Ship	Stealing	Assault	Other*	Total
1852	12	4	7	3	1	3	30
1853	6	4	9	4		2	25
1854	21	1	23		2	4	51

*Other includes insulting magistrate, debt, lunatic, absconding apprentice and riot.
Source: Journal of Henry Monson, Gaoler, 1851-1861, PC-0076, Hocken Library, University of Otago, Dunedin.

As the population of Otago increased in the latter part of the 1850s, drunkenness "and related disturbances in the street" had increased noticeably.[76] Shepherd's police force had increased to seven non-commissioned officers and eleven privates in an attempt to maintain public order in Dunedin, Invercargill, Port Chalmers, Campbelltown, Oamaru and Riverton. Shepherd also had oversight of the Gaol, Hospital and Immigration Barracks. The focus of their policing continued to be dealing with drunkenness and absconding sailors, although the courts had more cases of a summary nature to deal with.

The discovery of gold in 1861 and the resultant sudden increase in the population led the Provincial Council to bring in a new police force. Led by St John Branigan and based on the

[76] Hill, *Policing the Colonial Frontier*, 498.

mounted Irish Constabulary, the majority of the new force had served in the Victorian goldfields in Australia. It also saw the introduction of a range of Ordinances aimed at maintaining public order and decency, whilst hoping to deter the more criminally minded of the new population. Prior to 1861 the majority of Provincial Ordinances focused on the infrastructure of the settlement – cemeteries, education, roads and streets, and livestock. After the middle of 1861 it is clear that steps were taken quickly to attempt to regulate the incomers through increased policing and legislation. There is evidence of the establishment of a separate Gold Fields Police Department, in addition to an increase in the number of ordinary police.[77] Furthermore, a separate Water Police was established to patrol the harbour and Port of Otago.[78] Total spending on the police increased from £987 in 1856/7 to £18745 in 1862/3, the majority on salaries. With regard to licencing behaviour, the Council introduced a Licensing Ordinance, the first since the 1841 Licensing Ordinance of the Legislative Council of New Zealand (amended in 1844 and 1851), a Criminals' Ordinance, and a Vagrant Ordinance before the end of the year.[79] From the increase in summary convictions from 2903 in 1860 to 3490 in 1861, 6371 in 1862, 9296 in 1863 and 11357 in 1864, it appears that these Ordinances were well used.[80] These ordinances suggest that the Provincial Council had to become actively involved in regulating the behaviour of the general population in a way that it had not had to do during the previous decade.

[77] Appropriation Ordinance (No, 2) 1861, Session XII, No. 45 (Otago).
[78] Water Police Ordinance 1861, Session XIII, No. 59 (Otago).
[79] Licencing Ordinance 1861, Session XIII, No. 56 (Otago); The Criminals' Ordinance 1861, Session XIII, No. 60 (Otago); Vagrant Ordinance 1861, Session XIII, No. 62 (Otago).
[80] Hill, *Policing the Colonial Frontier*, 632.

By its nature, the study of state regulation of behaviour is dependent for sources and evidence upon the records of the police and courts. These records were created when people acted in a way that was illegal, having been defined as such by government statute at the local, regional or national level. There has been considerable discussion as to the validity or reliability of such sources in the study of sexuality.[81] Firstly, these sources were limited by the context in which they were created. Secondly, they focused on individuals who stepped outside the legal norms of behaviour, irrespective of whether these norms were perceived to be acceptable to the majority of the population. Finally, the information provided as evidence in court cases was coloured by the perceptions of the participants themselves.

Surviving court records from 1860s Otago usually provide a transcript of the evidence presented in court with regard to a specific case, as well as witness statements, the indictments, prior to a case going to court. The transcripts are generally a verbatim record of the evidence provided by the witnesses under questioning, but it was usual for the actual questions asked not to be included. For some cases the Judge's notebook survives, providing not only his notes of the evidence but occasionally his thoughts regarding reliability of the witnesses and their evidence, especially any discrepancies he identified. As such, these appear to be treasure troves for the historian. However, the episodes that are described become standalone incidents "shorn of the participants' motives and understandings of those acts and without reference to their lives beyond the moment in which the act took place."[82] Furthermore, the concepts of

[81] See for example Stephen Robertson, "What's Law Got to Do with It? Legal Records and Sexual Histories," *Journal of the History of Sexuality* 14, Nos. 1/2 (January/April 2005): 161-185; Shani D'Cruze, *Crimes of outrage: Sex, violence and Victorian working women* (London: UCL Press, 1998); Karen Dubinsky, *Improper Advances: Rape and Heterosexual Conflict in Ontario, 1880-1920* (Chicago: University of Chicago Press, 1993).

[82] Robertson, "What's Law Got to Do with It?" 162.

respectability, what was admissible as evidence, and the nature of the language used in court limited what could and could not be discussed by certain witnesses, specifically women. Combined with the recording of the testimony by a third, always male, person, and the limitations of such evidence become evident. These records need to be seen in the light of how they were created, by whom and for what purpose. Putting them to other purposes, without allowing for these limitations, can restrict their value.

By their nature, criminal proceedings shed little light on the sexuality of ordinary people.[83] The focus of these proceedings on those who are caught transgressing against the established rules can suggest that the majority of people tended to adhere to these rules. However, it is fundamental that the courts only dealt with those who were caught. The proceedings also provide little insight into how ordinary people perceived what was sexually acceptable. The law defined what was illegal in the minds of those who wrote the laws, those who felt that the state had a role in regulating the moral behaviour of the wider community and had authority to "assert legal hegemony over 'private' matters."[84] As such, the law only became involved when someone had stepped outside the bounds of "normal" behaviour and, furthermore, been caught doing so. With regard to a number of criminal behaviours, such as homosexuality or sexual assault, the number of cases may not have accurately reflected the actual number of incidents within the community.[85] This may have been due to people not reporting incidents that they witnessed or were involved in, either due to concerns about public appearances or disinterest

[83] Ibid., 163.
[84] Dubinsky, *Improper Advances*, 4.
[85] D'Cruze, *Crimes of outrage*, 2.

in the activities of others. Examples of such attitudes will be examined in more detail in later chapters in the context of the sexual behaviours being analysed.

Not everyone who appeared in the witness stand was happy to do so, nor did they all agree that the acts being tried were immoral, despite being illegal. Scholars who have looked at the "agendas of power" in court records suggest that witnesses were coerced to testify, would say what they thought the court wanted to hear, or lie to protect themselves or their associates.[86] Close examination of the narratives provided as evidence needs to look at the context in which these statements are made, the motives and understandings of the witnesses, the language which is used, all with an understanding that "not all narratives are equally true."[87] Historians need to be aware of a gender based double censoring process occurring in the narratives: "[male] officials wrote down what they elicited in response to their questions, and women were careful what they said before the male court officials."[88] As Stephen Robertson has suggested, focusing on the construction of a narrative from court evidence obscures or omits the influence of the legal system at work, and the role of the attorneys, judges, and other members of the court hidden by the creation of a simple story.[89] Such interpretations negate the influence that these members of the court had on directing the presentation of evidence and ultimately how the crimes were presented in the court.

[86] Robertson, "What's Law Got to Do with It?" 162.

[87] Yvonne Galloway-Brown and Rona Ferguson, "Introduction: Twisted Sisters: Women, Crime and Deviance in Scotland Since 1400," in *Twisted Sisters: Women Crime and Deviance in Scotland Since 1400*, ed. Yvonne Galloway-Brown and Rona Ferguson (East Linton, Scotland: Tuckwell Press, 2002), 5.

[88] Patricia Crawford, *Blood, Bodies and Families in Early Modern England* (Harlow: Pearson Education Ltd., 2004), 68.

[89] Robertson, "What's Law Got to Do with It?"168-170.

Within Otago the various Acts and Ordinances of Provincial and Legislative Councils, and of both New Zealand and British governments, provide a definitive source for the infrastructure of the regulation of criminal behaviour. These Acts and Ordinances defined, albeit loosely, what behaviour was deemed criminal and how those convicted of these behaviours were to be punished. Despite such clearly outlined processes, the way in which the legislation was interpreted and enforced locally depended very much on the perceptions of the enforcement officers. It was the role of the courts to adjudge the guilt of people charged with activities that broke the law. The pre-conceived ideas and personal biases of judges and juries clearly influenced the outcomes of trials during this period. Sentences handed out to convicted criminals, often terms of imprisonment, were designed to act as a deterrent to crime within the settlement. The records of the Resident Magistrates' Court (from 1857) and Supreme Court (from 1858) provide details of how stringently the laws were applied in Otago, by the severity of the sentences handed out. Alongside the courts, the police formed the enforcement arm of the judiciary by arresting perpetrators and maintaining social regulation. However, Richard Hill argues they had a certain amount of discretionary power in enforcing the law. "Study after study of policing past and present has demonstrated that the individual constable wields, at the interface with the public, a vast amount of 'discretion' to act as he/she sees fit in order to contain potential or actual behaviour labelled as deviant."[90]

The final part of the judicial infrastructure was the gaol, in which most convicted criminals served their sentences. The laws were, in theory, applicable to everyone unlike the moral controls of the kirk. However the court could be seen to have provided a parallel to the kirks

[90] Hill, *Policing the Colonial Frontier*, 22.

in the informal sermons that judges often made when handing down sentences or discharging a prisoner. In these speeches, the judges often cautioned the prisoner as to their conduct. In their opening remarks to Grand Juries, at the commencement of the Supreme Court sittings, Judges often talked in a general way about the levels of crime within the colony and the responsibilities incumbent upon the leaders of the community to ensure the crime was minimised, such as in this 1862 case:

> …there is another side of the picture to which it is my duty to direct your attention – viz., to the great increase of crime, cause by the rapid influx of a large mining population. Little more than three months have elapsed since the last gaol delivery, and yet the calendar before me exhibits 41 offences… It is the natural consequence of the enormous addition which the population of the Province has received from the Australian colonies… My object, therefore, gentlemen, in calling your attention to the increase in crime is not to censure or discourage, but to remind you that prosperity like yours has its duties and responsibilities as well as it advantages – in short, to impress upon you the importance now, at the commencement of your career, of establishing your institutions upon broad and enduring foundations.[91]

These 'sermons' were generally printed in full by the newspapers, whose coverage of the court trials provides an additional source less limited by legal structures.

Newspaper reports of trials occasionally provide a broader context for a trial than the court records. Whereas the court records were the script of the trials, the newspaper reports capture their drama. This is not to say that the newspaper reports were straightforward and unbiased in their reporting.[92] The language used in newspapers during the mid-nineteenth century tended to be emotive, flowery, melodramatic and flamboyant.[93] One editorial from early 1862 regarding a case that was being heard in the Supreme Court stated:

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[91] *Otago Daily Times*, 9 May 1862.

[92] Joseph Baumgartner, "Newspapers as Historical Sources," *Philippine Quarterly of Culture and Society* 9, no. 3 (September 1981): 256-258.

[93] D'Cruze, *Crimes of outrage*, 173.

> A case that almost reads like a page from a romance, occupied the attention of the Court the whole day yesterday…. Is this extraordinary case to end here? Justice and public morality alike forbid it. We do not say with whom the blame lies, but the prosecution was evidently shockingly got up. We do not understand how it was that the Judge did not direct a prosecution for perjury; had he done so, and the case were entrusted to the Detective Police, the necessary witnesses would soon be forthcoming, and the mystery in which, at present, the case is enshrouded, be dispelled.[94]

The reports often reflected the biases of not only their writer, but also the newspaper's editor, as this example shows. Editors appear to have felt comfortable questioning the actions of the police and the decisions of the courts, in addition to attacks on political figures.

Tony Ballantyne has identified newspapers as central to New Zealand's political culture, with public opinion "articulated through and shaped by editorials, newspaper reportage, letters to the editor, private correspondence, sermons, committee meetings and pamphlets."[95] In Otago there were considerable biases amongst the various newspapers, either for or against the settlement's civic and ecclesiastical leaders.

The first paper, the *Otago News*, was established in December 1848 with the expressed aims of maintaining standards of fairness and impartiality.[96] Although the editor, Henry Graham, did attempt to stick to these principles, he was perceived to have sided with the "Little Enemy" in an editorial discussing the New Zealand Company's policies regarding wages and hours of work for labourers.[97] By December 1850, the *Otago News* had ceased to be printed. It was replaced in 1851 by the *Otago Witness*, which became "the official organ of the Free Church

[94] *Otago Daily Times*, 17 January 1862.
[95] Tony Ballantyne, "The State, Politics and Power, 1769-1893," in *The New Oxford History of New Zealand*, ed. Giselle Byrnes (Melbourne: Oxford University Press, 2009), 108-9.
[96] McLintock, *The History of Otago*, 275.
[97] Ibid., 276.

party, its principles were declared to be in harmony with the scheme of the Otago settlement, evangelical in religion, maintaining the rights and privileges of local self-government…"[98] However, this situation did not last long after the establishment of the Provincial Council, when the editor, William Cutten, began to openly attack Cargill and the rest of the Executive. Cutten had served as Provincial Secretary for a short period, but his resignation in 1854 led to an acrimonious falling out, which was played out in the columns of the *Otago Witness* for three years.

In December 1856, a third newspaper was launched in opposition to the *Otago Witness*. The *Otago Colonist* began by attacking the *Witness* in its first issue, whilst claiming to dedicate itself to "an unflinching advocacy of the principles of civil and religious liberty, to a truthful representation of all discussions of public measures, and to an enlightened criticism of all public acts, in a spirit of impartiality, manliness, and honesty."[99] The *Witness* continued to be the more popular newspaper in Otago. In an attempt to curtail the attacks by the *Witness*, the Provincial Executive, as a successful exercise of political expedience, granted a number of printing contracts to Cutten. By June 1857 the position of the two papers had changed with the *Witness* supporting the Provincial government, whilst the *Colonist* openly attacked Cutten for being a government "pensioner".[100] The *Colonist* continued as the government's opponent until it was incorporated into the *Daily Telegraph* in January 1863. The *Telegraph* itself was in existence for a short period, ceasing operations in April 1864. The other major newspaper during this period was the *Otago Daily Times*, established in November 1861 as New Zealand's

[98] Ibid., 283.
[99] Ibid., 367.
[100] Ibid., 370.

first daily newspaper. It was set up by Julius Vogel, who had arrived in Dunedin from Victoria in October 1861 and the publisher of the *Witness*, William Cutten. Vogel used the *Daily Times* to promote the idea that the press could change public opinion, attempting to overcome the entrenched negative opinions of the settlers towards the recently arrived gold miners.[101] Politically, Vogel was supportive of provincialism; however, he was not supportive of the Free Church clique that had traditionally led Otago, a view that on occasion had put him at odds with the Superintendent, especially following Vogel's election to the Provincial Council in June 1863.

There were two further journalistic publications that provide slightly more biased impressions of the situation in Otago during the period under examination. In February 1864, the erstwhile teacher and local moralist, James G S Grant launched the *Saturday Review*. Grant had a reputation in Otago for strongly worded letters to the various newspapers, verbose speeches at public meetings, and an inflated self-opinion.[102] The *Saturday Review* reflected Grant's reputation, with open attacks on the Provincial Government's policies, and assaults on the morality of the citizens of Dunedin.[103] Marked by libellous generalisations, the *Saturday Review* suggested that Dunedin was governed by self-serving politicians and populated by lazy middle-class capitalists, and down trodden, over worked labourers. Grant used the *Review* as a vehicle to complain about his many perceived injustices at the hands of the provincial authorities. However, there are sections of the journal that drew attention to issues that were of common concern during the mid-1860s, including immigration, public spending and

[101] Raewyn Dalziel, "Vogel, Julius – Biography," The Dictionary of New Zealand Biography, Te Ara - the Encyclopedia of New Zealand, last modified 4 July 2012, http://www.teara.govt.nz/en/biographies/1v4/1.

[102] Olive Trotter, *Dunedin's Spiteful Socrates: James Gordon Stuart Grant* (Dunedin, 2005).

[103] Ibid., 70-2.

policies. On the other side of the spectrum the *Dunedin Punch* began publication in May 1865. *Punch* often undertook to satirise political and social events, and as such can reveal much about the society that published it.[104] These shifting loyalties and political posturing amongst the newspaper editors illustrates how careful the latter need to be used as a source of information. Despite these issues, they are nevertheless an essential source for tracing public discourse about sexual behaviour in colonial Otago.

In addition to the newspapers, the journal of gaoler Henry Monson provides a comprehensive source of information about the nature of the crimes committed between 1851 and 1861. Not only did Monson include the names of people brought to the gaol, but notes whether they were discharged or sentenced and for how long. From 1853 he provided a copy of the annual return of prisoners which included a summary of prisoners' country of birth, status within the colony and level of education. Occasionally he also provided comments on the prisoners' character or history within the colony. Such a wide-ranging source of information about criminality in early Otago adds an extra dimension to the history of the settlement.

The role of the police in punishing disorderly behaviours raises the question of public and private spaces. Many sexual activities that the authorities sought to regulate occurred in private spaces – homes, stables, tents – yet both secular and, even more especially, church officials assumed their authority included oversight of private activities. Ordinances that were introduced to police behaviour were very explicit about where they were enforceable:[105]

[104] Thomas Milton Kemnitz, "The Cartoon as a Historical Source," *The Journal of Interdiscipinary History* 4, no. 1 (Summer 1973): 82.

[105] Vagrant Ordinance 1861, AAAC D500 701 Box 8/f/68, Archives New Zealand, Dunedin.

- Any person wilfully exposing to view in any street, road, thoroughfare, highway, or public place, or who shall expose, or cause to be exposed, to view in any window or other part of any shop or other building, situate in any street, road, thoroughfare, highway, or public place, any obscene book, print, picture, drawing or representation.
- Any person wilfully or obscenely exposing his person in any street, road, or public highway, or in the view thereof, or in any place of public resort.
- Any person found by night without lawful excuse (the proof of which excuse shall be on such person) in or upon any dwellinghouse [sic], warehouse, coachhouse, stable, or outhouse, or in any inclosed [sic] yard, garden, or area, or in or on board any ship or other vessel when lying or being in any port, harbour, or place within the said Province.
- Any suspected person or reputed thief frequenting any river, canal, navigable stream, dock, or basin, or any quay, wharf, or warehouse near or adjoining thereto, or any street, highway, or avenue, leading thereto, or any place of public resort or any avenue leading thereto, or any street, highway, or place adjacent, with intent to commit felony.

This Vagrant Ordinance from Otago introduced in 1861 illustrates the extent to which authorities would go to ensure that all places that could be perceived as public spaces were included.

Understanding why certain behaviours were perceived as disorderly must take place and space into account because as Katharine Kittredge has suggested they draw attention to the "visible disruption of the social order."[106] If an activity could be seen it could be witnessed, judged and punished, but by occurring in a public space it could also disrupt and disturb. In contrast, private acts could be perceived as out of sight and therefore hidden. Yet the concept of the masculine public sphere of activity as being separate from the feminine private sphere of activity has been firmly dispelled.[107] Shani D'Cruze has shown how women and their activities

[106] Katharine Kittredge, "Introduction: Contexts for the Consideration of the Transgressive Antitype," in *Lewd and Notorious: Female Transgression in the Eighteenth Century*, ed. Katharine Kittredge (Ann Arbor: University of Michigan Press, 2003), 3.

[107] Tony Ballantyne and Antoinette Burton, "Postscript: Bodies, Genders, Empires: Reimagining World Histories," in *Bodies in Contact: Rethinking Colonial Encounters in World History,* ed. Tony Ballantyne and Antoinette Burton (Durham NC: Duke University Press, 2005), 416.

could be very public.[108] Likewise the private could become public through a woman testifying during a trial for sexual assault. These ideas of public and private spheres, which are permeable and interrelated, need to be looked at in relation to the idea of networks. Spheres tends to be too enclosing, whilst networks suggests outreach, connection and mobility of cultures, ideas and knowledge.[109] These cultures and knowledge would have included the ways in which people perceived the behaviour of others, and the steps they would have taken as individuals or communities to express disapproval. These steps made up the informal processes which regulated behaviour within the settlement.

Social Regulation of Behaviour

Against the background of formal regulation of behaviour, either through the kirk sessions or the secular courts, the community also had an informal process of social control that could include a range of social sanctions against transgressors. These informal processes could be as damaging to the individuals involved as any formal actions, especially in a small, newly formed colony where settlers would have depended upon their neighbours for support during difficult times. Such sanctions would have been the result of collective prejudices or opinions of the members of the community. Where there was a shared prejudice amongst the community members, the chance of the community coming together to impose a collective sanction on certain behaviours would have been increased. However, it was also possible for the wider community or individuals within it to aid or support offenders. The reaction of individuals to the activities of others would have related to their own experiences, their gender,

[108] D'Cruze, *Crimes of Outrage*.

[109] Tony Ballantyne, "On Place, Space and Mobility," in *Webs of Empire: Locating New Zealand's Colonial Past* (Wellington: Bridget Williams Books, 2012), 264-282.

ethnic or regional origin, class background and education, informed by widely held ideas relating to the roles of men and women.

It appears that social sanctions, such as ostracism or undermining a person's character or respectability, were the purview of female members of the community. Due to the localised nature of many women's domestic duties, they were more aware of the activities of their neighbours than men, and often made the time to discuss these activities with other women. Such a female based, social network could have provided the basis of social self-policing of morals. However, women themselves were cast into specific roles within societies, based primarily on class, which would have influenced their perceptions of other people's activities.

Feminist historians have, in the past, explored "the ways in which perceptions and responses to female criminality make explicit contradictions inherent in patriarchal definitions of femininity."[110] This stresses the fact that "femininity" was an idea constructed by the "patriarchal" element of society – those men in positions of authority, such as church and social leaders, who promulgated specific roles for women – as a result those that transgressed against this idea were "unwomanly." Such a view suggests a perception, at least during the nineteenth century, of an antithetical nature to all women – either "good" or "bad." Jan Robinson has identified this "madonna/whore duality" as having a well-entrenched history in western societies.[111]

[110] Charlotte Macdonald, "Crime and Punishment in New Zealand, 1840-1913: a Gendered History," *New Zealand Journal of History* 23, no. 1 (1989): 6.

[111] Jan Robinson, "Canterbury's Rowdy Women: Whores, Madonnas and Female Criminality," *Women's Studies Journal* 1, no. 1 (August 1984): 7.

During the early nineteenth century there was an assumption, illustrated by the work of theorist Malthus, that men and women had different moral capacities, and ideally the role of women was to exercise moral virtue.[112] According to Malthus moral restraint "does not at present prevail much among the male part of society", but that "women pass a considerable part of their lives in the exercise of this virtue."[113] Previously, at various times in early modern Europe, women had been perceived as wanton, lustful and corrupting, and often portrayed as such in popular literature.[114] Religious teachings represented women as "unruly beings whose sexuality needed to be controlled so that they would bear only legitimate children."[115] However, by the middle of the eighteenth century, Enlightenment thinking had recast women as morally pure, benevolent and self-sacrificing, and moreover lacking in sexual needs.[116] This did not wholly replace the view that women were sexually unruly, but this attitude became associated more with working class women.

In Wakefield's concept of systematic colonisation, specifically in *The Art of Colonization* (1849), he outlines women's moral role in the development of colonial settlement:

> Women are more religious than men…in every rank the best sort of women for colonists are those to whom religion is a rule, a guide, a stay, and a comfort. You might persuade religious men to emigrate, and yet in time have a colony of which the morals and manners would be detestable; but if you persuade religious women to emigrate, the whole colony will be comparatively virtuous and polite.[117]

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[112] Gail Reekie, *Measuring Immorality: Social Inquiry and the Problem of Illegitimacy* (Cambridge: Cambridge University Press, 1998), 51.

[113] Thomas Malthus, "An Essay on the Principles of Population," in *The Works of Thomas Robert Malthus*, Vol. II, ed. E.A. Wrigley and David Souden (London: William Pickering, 1986), 315.

[114] Ruth Perry, "Colonizing the Breast: Sexuality and Maternity in Eighteenth Century England," in *Forbidden History*, ed. John C Fout (Chicago: University of Chicago Press, 1992), 113-4.

[115] Ibid., 116.

[116] Ibid., 115-6.

[117] Edward Gibbon Wakefield, "A View of the Art of Colonization with Present Reference to the British Empire; In Letters Between a Statesman and a Colonist," in *The Collected Works of Edward Gibbon Wakefield*, ed. M. F. Lloyd (Auckland: Collins, 1969), Letter XXIV 840.

He states that the success of a colony depends on having appropriate religious provisions and an equal number of women emigrating as men.[118] He identifies the best types of female colonists as being those to whom "religion is a rule, a guide, a stay and a comfort."[119] He suggests that the 'evils' found in colonies in which the men greatly outnumbered the women could be completely avoided.[120] This point is not as anachronistic as it may first appear in light of the date of the founding of Otago. Although *The Art of Colonization* was published after Otago was settled in 1848, Wakefield was articulating a belief about the role that women should play in colonial settlements, which had begun to gain prominence initially through the work of missionary wives and European women in frontier colonies during the early part of the nineteenth century.[121]

Wakefield was not alone in this view amongst his contemporaries and a number of historians have looked at the role women were expected to play, as "fair ones of a purer caste."[122] Anne Summers has suggested this ideal of "God's Police" was an accepted descriptive for what women were perceived to be doing, without a realisation of the realities of their lives.[123] This adherence to the moral influence of women has yet to be fully examined within the establishment of the Otago colony, in light of the principles upon which it was founded.

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[118] Ibid., 840.

[119] Ibid., 840.

[120] Ibid., Letter LXII 972.

[121] Adele Perry, ""Fair ones of a purer caste": White women and colonialism in nineteenth-century British Columbia," *Feminist Studies* 23, no. 3 (Fall 1997); Ann Laura Stoler, "Carnal Knowledge and Imperial Power: Gender and Morality in the Making of Race," in *Carnal Power and Imperial Knowledge: Race and the Intimate in Colonial Rule*, ed. Ann Laura Stoler (Berkeley: Universityof California Press, 2002).

[122] Perry, "Fair ones of a purer caste"; Marilyn Lake "Frontier Feminism and the Marauding White Man, Australia, 1890s-1940s," in *Nation, Empire, Colony: Historicizing Gender and Race*, ed. Ruth Roach Pierson and Napur Chaudhuri (Bloomington: Indiana University Press, 1998), 97-8; Charlotte Macdonald, *A Woman of Good Character: Single Women as Immigrant Settlers in Nineteenth Centur New* Zealand (Wellington: Allen & Unwin, 1990), 17; Angela Woollacott, *Gender and Empire* (Basingstoke: Palgrave Macmillan, 2006), 97-8.

[123] Anne Summers, *Damned Whores and God's Police,* 2nd ed. (Sydney: Penguin Books, 1993), 357.

Historians have examined how some sectors of nineteenth century society had a more fluid concept of "the feminine" that was subject to change as authority was imposed on a society whose members contested or resisted that authority.[124] Included in this is the research of Walkowitz on prostitution and the acceptance of prostitutes within some communities, and that of Anna Clark on "twilight" sexuality which suggests that, within some sectors of society, the concept of feminine did not exclude prostitutes or women who did not measure up to middle-class ideas of womanhood.[125] In her work on early nineteenth century Montreal, Mary Anne Poutanen warns against uncritically accepting contemporary generalisations about women who did not equate to the middle class ideal, such as the suggestion that all vagrant women were prostitutes.[126] Although vagrancy laws were used to regulate public behaviour they could encompass a wide range of people whose public actions attracted the attention of the police, but that did not necessarily mean they were criminal or deviant.

Although Wakefield espoused a view that a colony could be self-regulating through the presence of sufficient women with strong religious principles, this view seems to be at odds with the idea of women gossiping about their neighbours' infidelities. These conflicting images of the role of women in social regulation of behaviour highlight the unreliability of informal methods of moral policing. Wakefield and Burns could see a role for pious women

[124] Mary Anne Poutanen, "The Homeless, the Whore, the Drunkard, and the Disorderly: Contours of Female Vagrancy in the Montreal Courts, 1810-1842," in *Gendered Pasts: Historical Essays in Femininity and Masculinity in Canada*, ed. Kathryn McPherson, Cecila Morgan and Nancy M. Forestell (Toronto: University of Toronto Press, 2003), 30; D'Cruze, *Crimes of Outrage.*

[125] Judith R. Walkowitz, *Prostitution and Victorian Society: Women Class and the State* (Cambridge: Cambridge University Press, 1980); Anna Clark, "Twilight Moments," *Journal of the History of Sexuality* 14, nos. 1/2 (January/April 2005): 158-159.

[126] Poutanen, "The Homeless, the Whore, the Drunkard, and the Disorderly," 30.

in supporting the aims of a male led class settlement. However, such women were perhaps not as numerous as both men would have liked, and their actions would not have always been acceptable to the majority of the community. It has been suggested that social sanctions, and publicly led moral policing resulted in strong feelings within the community against Burns' rigid morality.[127] For example, the actions of his wife, Clementina, in ostracising an unmarried couple on board the *Philip Laing*, the details of which are examined in Chapter 4, resulted in lifelong enmity between Burns and John Carnegie, one of the early leaders of the "Little Enemy".

These perceptions of women's roles in colonial environments were based on a middle-class ideal which did not always translate into any sort of reality for other classes. When examining the literature on the history of sexuality, there is considerable discussion around middle-class morality and working-class reality. The middle-class ideal of the domestic madonna mother figure as the pinnacle of a woman's life was often at odds with working class women whose lives took them outside the home for work. These women were characterised as outspoken and rough, and their involvement in work outside the home undermined their role as homemaker and mother figure. Carol Smart has suggested that such a strict separation needs to be re-assessed in light of changing nineteenth-century constructions of the female body as inherently dangerous.[128] If the female body was perceived as corrupting, irrespective of class, then the middle class ideal was the male response in creating a role for women which contained them in a clearly defined and controllable area, minimising the effect of their bodies by

[127] McLintock, *The History of Otago*, 273.

[128] Carol Smart, "Disruptive bodies and unruly sex: The regulation of reproduction and sexuality in the nineteenth century," in *Regulating womanhood: Historical essays on marriage, motherhood and sexuality*, ed. Carol Smart (London: Routledge, 1992), 24.

removing women from contact with others outside the home. Some upper working-class women may also have aspired to the middle-class ideal of womanhood. These generalisations, however, need to be examined in light of the space and place that these women occupied. In settler societies the need for most women to do their own domestic work left them with little time to emulate such an image.

Despite this changing attitude towards women's bodies and female sexuality, the underlying tension between middle and working-class morality raises the issue of the double standards that seem to be inherent in the historical study of sexuality – the double standards of class and gender.[129] The basis of the sexual double standard, which incorporates elements of both class and gender, is the idea that sexual relations before or outside marriage are a slight, but pardonable offence for men or members of the working or upper classes, indeed even expected behaviour, but for women or the middle class was an irredeemable failing.[130] The double standards inherent in the perceptions of differing patterns of sexual behaviour for different classes or genders could affect how sexual activity was regulated and transgressions punished but this differed as to the point of view and relative position of the person making the judgement, and could be influenced by the audience to whom the judgement is made. As Michael Mason has commented, "observers leapt too readily to adverse conclusions about the sexual morality of the working class on the strength of certain appearances."[131] Within the research on sexual regulation there appears to have been a fluidity of sexual norms amongst differing classes of people in Western Europe. For example, Polly Morris identifies a specific

[129] Erwin J. Haeberle, *The Sex Atlas* (New York: The Continuum Publishing Company, 1983), online edition www2.hu-berlin.de/sexology/ATLAS_EN/index/html.

[130] Keith Thomas, "The Double Standard," *Journal of the History of Ideas* 20, no. 2 (April 1959), 195.

[131] Michael Mason, *The Making of Victorian Sexuality* (Oxford: Oxford University Press, 1994), 157.

plebeian sexual culture in her study of incestuous marriage in eighteenth century rural Somerset.[132] The fact that the sexual and marital irregularities formed part of the pattern of social and family life, and made use of the church's rites to solemnize the marriages and baptise the children suggests a high level of community acceptance.[133] People outside of these communities may judge the sexual and marital irregularities differently.

The gender double standard is equally as complex. From the middle of the eighteenth century it appears that the majority of Western European cultures valued the chastity of women and girls while continuing to allow men comparative sexual freedom. Regulation of this norm has, in the past, been accomplished through strict punishments for females who transgress, including occasionally death. Erwin Haeberle suggests that the basis of these norms can be found in patriarchal societies with a strong sense of women as property.[134] In English Common Law the double standard pre-dates the Norman Conquest and was firmly entrenched up to the first half of the twentieth century. Keith Thomas suggests that its development in England was a product of historical circumstances, and as a result the double standard should not be assumed to be universal in all human societies.[135]

The double standard not only set the norms for sexual behaviour in men and women, but also the way that women who did not conform, such as prostitutes, were perceived and treated as opposed to the men who were their clients.[136] This is perhaps best illustrated through the

[132] Polly Morris, "Incest or Survival Strategy? Plebeian Marriage within the Prohibited Degrees in Somerset, 1730 – 1835," in *Forbidden History*, ed. John C. Fout, 139-169 (Chicago: University of Chicago Press, 1992).
[133] Ibid., 168.
[134] Haeberle, *The Sex Atlas*.
[135] Thomas, "The Double Standard," 206.
[136] Ibid., 198.

Contagious Diseases (CD) Acts which were introduced in Britain in the 1860s and in New Zealand in 1869, although only enacted in Auckland and Christchurch.[137] Under the CD Acts a woman could be identified as a 'common prostitute' and subjected to regular internal examinations. If there was evidence of sexually transmitted diseases, she would be sent to a secure or 'lock' hospital for up to nine months.[138] The onus was on the woman to prove her innocence and respectability.[139] Under the Acts there was no policing of men who used prostitutes, thereby reinforcing the double standard.[140] The Acts had been introduced in Britain to control the spread of sexually transmitted diseases amongst the army and navy, particularly in garrison towns. In New Zealand the Act was a reaction to a perceived increase in prostitution and concern about the behaviour of young women in Christchurch.[141] Prostitutes were seen as the cause of the spread of disease, making them a public focus for regulation. The Acts, however, would never have succeeded without regular genital inspections of the clients, as the men were equally responsible for the spread of disease as the prostitutes. Walkowitz reiterates the reinforcement of the double standard through the Acts, because they "justified male sexual access to a class of 'fallen' women and penalised women for engaging in the same vice as men."[142] The double standard could be justified because the women had lost their virtue and must therefore have lost their self-respect.[143] Walkowitz suggests that the Acts helped create a classification of 'sexual deviant' women who were outside the class structure of society.[144]

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[137] Macdonald, *A Woman of Good Character*, 187.
[138] Walkowitz, *Prostitution and Victorian Society*, 2.
[139] Macdonald, *A Woman of Good Character*, 184.
[140] Charlotte Macdonald, 'The 'Social Evil': Prostitution and the Passage of the Contagious Diseases Act (1869),' in *Women in History: Essays on European Women in New Zealand*, ed. Barbara Brookes, Charlotte Macdonald and Margaret Tennant (Wellington: Allen & Unwin NZ, 1986), 13.
[141] Ibid., 19.
[142] Walkowitz, *Prostitution and Victorian Society*, 3.
[143] Ibid., 3.
[144] Ibid., 5.

The Acts imposed the sexual double standard on the labouring or working classes, who may have had other sexual norms, but lacked the authority to have these norms generally accepted or become society's norms. These Acts can been seen as a way that middle-class men with authority, imposed their own definition and perception of acceptable sexual behaviour upon a powerless majority, in an attempt to regulate and control a structure (prostitution) which maintained the status quo (the gender double standard). Nevertheless, this sexual double standard was not universally accepted, as is illustrated by the debates around the introduction of the CD Act in New Zealand in 1869, when the Premier, William Fox, suggested that the act should apply to men, and the non-introduction of the Act into Otago in 1876.[145]

Despite Wakefield's principles of systematic colonisation being essentially economically based, it is difficult to overlook the assumptions that he made with regard to gender balance in relation to the selection of emigrants and their supposed fertility. As a result the centrality of procreative sex to the success of his theories becomes evident. With marriage as the only acceptable place for procreative sex to occur, the importance of marriage and its regulation is also emphasised. In order for marriages to retain this importance, all other sexual activity had to be strictly regulated. Wakefield also emphasised the importance of the moral and civilising role of women within the colonial environment. These essentially middle-class opinions were founded on a widely held sexual double standard. This double standard was based on specific ideas of class and gender differences, which influenced how sexual behaviour was perceived

[145]Andree Levesque, "Prescribers and Rebels: Attitudes to European Women's Sexuality in New Zealand, 1860-1916," in *Women in History: Essays on European women in New Zealand*, ed. Barbara Brookes, Charlotte Macdonald and Margaret Tennant (Wellington: Allen & Unwin, 1986); Macdonald, "The "Social Evil"; Macdonald, *A Woman of Good Character*, 185; Heather Lucas, "'Square Girls': Prostitutes and Prostitution in Dunedin in the 1880s," (BA (Hons) diss., University of Otago, Dunedin, 1985), 21.

and regulated. The introduction of these middle-class social perceptions into a colonial setting signifies a changing attitude towards the role of the empire. Such attitudes highlight a shift from the empire as the source of raw materials, to an outpost of Britain with all the familiar structures and systems in place.

Conclusion

Law and order was perceived by the governing authorities of New Zealand to be a secular issue, with a clear separation between the roles of church and secular authorities. The steps that the Lieutenant-Governor took in 1848 to establish and re-enforce the role of the state in enforcing judicial authority with respect to Otago illustrate this perception clearly. Despite the plans of the Free Church authorities, the infrastructure of the kirk within Otago was too limited and expectations of the wider community self-policing the morals of its members never took hold. Their various origins and religious beliefs and affiliations influenced how members of Otago's colonial society viewed sexual behaviours. Not all or even a majority would have espoused a strong Free Church affiliation. The mixing of Scottish and English regulatory structures has been shown to have created tensions between the ideals of Cargill and Burns on the one hand, and the realities of Strode and the secular authorities on the other. In some instances informal social sanctions could have been effective in guiding behaviour, such as public discussions of intemperance in the local newspapers, but were unlikely to have a strong impact.

Section II

Cases of Sexual Transgression in Early Otago

Chapter 4

Scandalous Carriage: Pre-marital Sex, Fornication and Adultery

Throughout early modern Western history marriage was regarded as the legitimate place for sex, and sex as legitimate only for the means of procreation. In England this was encapsulated in the marriage service from the Book of Common Prayer (1662):

> …the causes for which Matrimony was ordained. First, it was ordained for the procreation of children….Secondly, it was ordained for a remedy against sin, and to avoid fornication…[1]

Indeed, the consummation of a relationship through sexual intercourse was required to make a marriage legitimate in legal terms, and according to ecclesiastical law, once a marriage had been consummated it could not be annulled. Furthermore, the regulation of marriage legitimated sexual activity within marriage in order to produce children.[2] However, this has not meant that marriage, and therefore sex, were accessible to all. Marriage has often been highly regulated by church, state and communities, thereby effectively restricting sexual activities and procreation.[3]

This chapter concentrates on the regulation of heterosexual sexual activities outside of marriage by the church authorities of Otago, the courts and legal infrastructure of New Zealand, and the wider community of settlers. These behaviours include pre-marital sex, irregular marriage, co-habitation, bigamy, adultery, and fornication, the majority of which were non-

[1] The Marriage Service from the Book of Common Prayer (1662).

[2] St. Augustine of Hippo, "The Excellence of Marriage," in *Love, Sex and Marriage in the Middle Ages: A Sourcebook*, ed. Conor McCarthy (London: Routledge, 2004), 32.

[3] R. B. Outhwaite, "Introduction: Problems and Perspectives in the History of Marriage" in *Marriage and Society: Studies in the Social History of Marriage*, ed. R. B. Outhwaite (London: Europa Publications Ltd, 1981), 1.

criminal and therefore fell outside the jurisdiction of the secular courts. Despite being non-criminal, these activities were judged by the leaders of the Otago community to undermine the moral fibre of the community and thus in need of regulation. It is possible that although the behaviours examined in this chapter undermined the concept of patriarchal family structures, the focus of their regulation was more on the preservation of social order during the earliest years of the settlement than the punishment of immorality, which foreshadows the approach of secular authorities to the regulation of sexual behaviour during the 1860s.

In Western European history the result of the act of marriage has essentially been the establishment of a basic economic unit – the basic building block of society - which served a number of purposes, including the production of children, cementing alliances with other families, and ensuring the continuation of family wealth through inheritance.[4] With these multiple purposes, who could enter into marriage was highly regulated by contemporary society, resulting in what Clark has referred to as "the sexual economy": the structures that determined who could afford to marry, who could afford to have sexual relationships and who "had to exchange sexual services for survival."[5] Hera Cook has argued that, in nineteenth century England at least, there was a clear connection between the economy, represented by food prices and employment patterns, and the formation of households through marriage and the production of children, whereby economic uncertainty resulted in a decrease in household formation.[6] Ron Lesthaeghe has argued that the mechanisms that existed for regulation, such as punishments for illicit sexual activity, were built on social and economic considerations of

[4] Anna Clark, *Desire: A History of European Sexuality* (New York: Routledge, 2008), 5.
[5] Ibid., 4-5.
[6] Hera Cook, *The Long Sexual Revolution: English Women, Sex and Contraception 1800-1975* (Oxford: Oxford University Press, 2004), 18.

resource allocation and appropriation: the need to provide for those without a family, such as unmarried mothers and illegitimate children, put considerable strain on the available resources within a society.[7] This economic focus had implications for the regulation and punishment of sexual activities outside the framework of marriage. Not only were these activities which undermined the family unit they also, as a result, undermined the concept of systematic colonisation, which had the family unit as its basic building block, and the hierarchical order of society as a whole. They also reflected the "evils" of older colonies, such as prostitution, sexual predation and the sale of women into prostitution, which Wakefield had identified in his *A Letter from Sydney*.[8] These evils, which Wakefield claimed were caused by a gender imbalance in favour of men, suggest the failure to ensure the emigration of even numbers of men and women of marriageable age and families.

The study of marriage in all its forms has provided historians with a rich field that has resulted in considerable scholarship.[9] Similarly, the role of sexual intercourse in marriage, or indeed outside of marriage has also proved a fruitful area of research.[10] Of relevance to this study is

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[7] Ron Lesthaeghe, "On the Social Control of Human Reproduction," *Population and Development Review* 6, no. 4 (December 1980): 531.

[8] Edward Gibbon Wakefield, "A Letter from Sydney," in *The Collected Works of Edward Gibbon Wakefield*, ed. M. F. Lloyd (Auckland: Collins, 1969), 138.

[9] For the history of marriage see for example Margaret Cole, *Marriage: Past and Present* (London: J.M. Dent & Sons, 1938); Lawrence Stone, *The Family, Sex and Marriage in England, 1500-1800*(London: Weidenfeld and Nicolson, 1977); R. B. Outhwaite, ed., *Marriage and Society: Studies in the Social History of Marriage* (London: Europa Publications Ltd, 1981); Lawrence Stone, *Road to Divorce* (Oxford: Oxford University Press, 1990), Chapters 2 -5.

[10] A few relevant examples include Peter Laslett, Karla Oosterveen and Richard M Smith, eds., *Bastardy and its Comparative History* (London: Edward Arnold, 1980); Kenneth M. Boyd, *Scottish Church Attitudes to Sex, Marriage and the Family, 1850-1915* (Edinburgh: John Donald Publishers Ltd., 1980); Andrew Blaikie, *Illegitimacy, Sex and Society: Northeast Scotland, 1750-1900* (Oxford: Clarendon Press, 1993); Richard Adair, *Courtship, illegitimacy and marriage in early modern England* (Manchester: Manchester University Press, 1996); Leah Leneman and Rosalind Mitchison, *Sin in the City: Sexuality and Social Control in Urban Scotland 1660-1780* (Edinburgh: Scottish Cultural Press, 1998); Rosalind Mitchison and Leah Leneman, *Girls in Trouble: Sexuality and Social Control in Rural Scotland 1660-1780* (Edinburgh: Scottish Cultural Press, 1998); Ginger S. Frost, *Living in Sin: Cohabiting as Husband and Wife in Nineteenth-Century England* (Manchester: Manchester University Press, 2008).

the work by Christopher Smout, Leneman and Mitchison on the history of marriage in Scotland who have looked at where it differed from England, the role of the church in regulation of sexual intercourse outside of marriage and the punishment of transgressors of the church's regulations.[11] The majority Scottish settlers in Otago would have recognised the forms of marriage as practised in Scotland, as opposed to those of England which formed the basis of the New Zealand Ordinances regulating marriage. This basic difference in something so fundamental to family formation contributed to the inherent tensions between the regulation of behaviour that the Free Church leaders felt was their responsibility, and the secular authority that a small number of the English capitalists had been given by the Governor. Over the period we see the regulation of illicit sexual intercourse and its outcomes on occasion shift from a moral issue dealt with by the kirk sessions to a criminal matter for the secular courts.

Within Otago the kirk tried to ensure that it had the most influence in matters of marriage, by trying to have the majority of ministers in the colony who were permitted to celebrate marriages ordained by the Free Church. Although there were two ordained ministers in Otago before 1848, Creed (Methodist) and Wohlers (Lutheran), with the first Church of England minister, Reverend John Fenton, arriving in 1852, by March 1854 Burns had been joined in Otago by Reverend Will and Reverend William Bannerman, both Free Church ministers. Furthermore, the kirk made use of the session courts to punish irregular marriages, couples

[11] T. C. Smout, "Scottish Marriage, Regular and Irregular 1500-1900," in *Marriage and Society: Studies in Social Marriage History*, ed. R. B. Outhwaite (London: Europa Publications Ltd., 1981), 204-236; Leah Leneman and Rosalind Mitchison, "Clandestine Marriage in the Scottish Cities, 1660-1780," *Journal of Social History* 26, no. 4 (Summer 1993): 845-861; Leneman and Mitchison, *Sin in the City*; Mitchison and Leneman, *Girls in Trouble*.

who had had sexual intercourse prior to their marriage, and those individuals who had broken their marriage vows.

Despite the importance placed on ensuring the morals of the community, the regulation and punishment of such activities as ante-nuptial fornication and irregular marriage by the church authorities was limited to only those members of the community who were communicants and adherents of the church. As a result, the authority of the church was restricted to approximately a third to a half of the settlers in the first decade of the settlement, and only a fraction of the population after 1861. As pre-marital sex, fornication and illegitimacy, were non-criminal, the secular authorities, who had a wider remit of influence, had no interest in the punishment of offenders, whatever the personal opinions of the individuals concerned.

Ante-Nuptial Fornication

The birth of a child within nine months of a marriage was seen by the church as proof of the sin of ante-nuptial fornication, or pre-marital intercourse. By focusing on such an obvious physical sign of immorality the church could show that it was exercising control over the sexual behaviour of its congregation.[12] In Scotland, from the seventeenth century, the church adopted a process of demanding consignation money from every couple "who put up their names to be proclaimed for marriage" with the money returned if no child was born within nine months of the marriage.[13] It is possible that this process worked to reduce the instances of ante-nuptial fornication because research by Mitchison and Leneman suggests that, in Scotland, the number

[12] Boyd, *Scottish Church Attitudes*, 10-11.

[13] Rosalind Mitchison and Leah Leneman, *Sexuality and Social Control, Scotland 1660-1780* (Oxford: Basil Blackwell, 1989), 158; Leneman and Mitchison, "Clandestine Marriage in the Scottish Cities," 847.

of pregnancies that were the result of pre-marital intercourse was very low, approximately five per cent of all births in the second half of the eighteenth century.[14] Despite this low level of frequency and the mild punishments given out, the kirk session of the First Church of Otago spent a high percentage of its time looking into cases of ante-nuptial fornication.

Of the 106 surviving instances of discipline undertaken by the kirk sessions of Otago between 1849 and 1865, 48 (45%) related to the sin of ante-nuptial fornication. An examination of the session minutes indicates that, although relatively common, this was not perceived as a major sin. The practice of consignation money does not appear to have been introduced within Otago. Instances generally came to the notice of the session when baptism was requested for a child born within nine months of a marriage. The couple may have been suspended from church privileges for a short while, during which time the Minister would speak to them of their sin. The couple would then appear before the kirk session, confess their guilt, show due penitence for the sin and express a desire to be readmitted to the church. The session, usually in the form of the Minister, would rebuke them, then absolve them from "the scandal of their sin" and formally restore them to the privileges of the church. These were generally the lowest forms of punishment. Baptism of the resulting children was never withheld on the basis of the sin of ante-nuptial fornication alone. From the point of view of the sessions concerned as a marriage had occurred and the couple freely confessed their guilt and accepted admonition, and as the sin could not be repeated because the couple had been married, there would be nothing gained from further punishment. In almost all cases both parties appeared before the Session and were disciplined together. This suggests an even approach to punishment with no indication

[14] Mitchison and Leneman, *Sexuality and Social Control*, 165.

of a gender based double standard with women being considered morally weaker or more at fault.

It is difficult to identify trends or distinguishing features about the individuals punished for ante-nuptial fornication. Close analysis of the individual cases shows that both unmarried and previously married individuals were involved, some of whom had children from previous marriages. However it appears that age may have been a slight factor. It could be suggested, from the evidence, that couples who were found to have engaged in pre-marital sex may have had at least one partner, usually the bride, who was younger than the average for individuals whose marriages were recorded in the First Church registers between 1848 and 1870. Of the 48 cases, ages were recorded for 43 individuals while a further 19 were listed as "full age" and two, both brides, were identified as "minors". Twenty two per cent of the individuals were aged below 21 whereas only seven per cent of the First Church sample was of a similar age (Table 4.1).

Table 4.1: Age at Marriage for couples guilty of ante-nuptial fornication compared to all First Church Marriages.

Age at marriage	Guilty of ante-nuptial fornication	All First Church Marriages
<21	22% (n=14)	7% (n=40)
21-28	42% (n=27)	55% (n=327)
>28	6% (n=4)	31% (n=184)
FA	30% (n=19)	7% (n=39)
Total	100% (n=64)	100% (n=590)

Source: Marriage Registers, First Church of Otago 1848-1870, Hocken Library, University of Otago, Dunedin

Analysis of these marriages has shown that in only one case were both the bride and groom under 21 and the other 12 minor aged individuals were all brides. In the cases where an age

has been given for the groom the age gap between bride and groom varies from four to eleven years. None of these grooms, however, had been previously married, and their occupations ranged from carpenter and mason to settler, so class and occupation appear to have no relevance.

A closer examination of the 48 cases highlights an interestingly relaxed attitude towards pre-marital sex in some settler families. There are several instances when members of the same family are disciplined for either ante-nuptial fornication or fornication. For example, two of the daughters of Charles Robertson, merchant of Dunedin and a full communicant of First Church, were disciplined by Burns: Margaret in 1853 for ante-nuptial fornication and her older sister Jessie in 1852 for fornication with an Elder of the First Church who was lodging in her father's house. Similarly, two of the daughters of Robert Duckworth, also a full communicant, were disciplined: Elizabeth in 1857 for ante-nuptial fornication, and Margaret in 1867 for fornication. Another daughter, Agnes, had a child three months after her marriage in 1858, although she was not punished as her child was not baptised in the Presbyterian Church. In neither of these instances does it appear that the daughters were publicly punished by the families. Jessie Robertson continued to live in her father's house until her marriage in April 1853, when she was married at home. Robert Duckworth hosted the weddings of both of his pregnant daughters and applied for the baptism of his illegitimate grandchild "promising if the request is granted [to] bring the child up as one of his own children."[15] This perhaps suggests that private attitudes were fairly relaxed, despite public adherence to the church's discipline.

[15] Andersons Bay Presbyterian Church Minutes of Session, 2 June 1868, Presbyterian Church of Aotearoa New Zealand Archives, Dunedin.

There are also a couple of instances when a man has been cited for both fornication and ante-nuptial fornication. Charles McQuorrie is examined later for his irregular marriage which came to light when he and his wife, Jessie, were cited for ante-nuptial fornication in May 1861. In 1862 he was also identified as the father of a still born child born in 1860. Depending on the date that his marriage took effect from, which is impossible to determine, this case of fornication may actually have been a case of adultery. In the second case Robert Lochore applied to be taken on church discipline for both offences at the same time. It appears that he was the acknowledged father of a child born in 1859 to an unmarried woman who requested admission to the church in 1862. The following year the Session found Lochore guilty of ante-nuptial fornication. It was noted in the minutes that the "Session had concerns about his moral behaviour."[16] The case was referred to the Moderator to deal with, who reported back in August 1863 from which the Session found that "if nothing objectionable appeared in Robert's conduct, both [he and his wife should] appear at the next session" to be admonished, absolved and restored to the privileges of the church.[17] From this it could be suggested that, although absolved from his sins, having such a poor reputation with the kirk session may have meant that any future back sliding would have resulted in more severe punishment. In essence the session would have had their eyes on his behaviour. Despite these cases, no one who had been punished for ante-nuptial fornication in one marriage was accused again in any subsequent marriages.

[16] Tokomairiro Presbyterian Church Minutes of Session, 3 June 1863, Presbyterian Church of Aotearoa New Zealand Archives, Dunedin.

[17] Ibid., 25 August 1863.

A negative view of pre-marital sex is perhaps ironic because these activities contributed to the success of a community founded on Wakefield's systematic colonisation by increasing the potential for a productive population base. The timing of couples' sexual activity in relation to their marriage was irrelevant to their ability to either contribute to the viability of the settlement or have children who could continue to do the same. This is especially true for Scottish settlers for whom pre-marital intercourse appears to have been a traditionally accepted form of betrothal. This attitude may have prevailed with some early settlers, such as the Duckworth and Robertson families. However, the moral principles that the settlement had been founded on appear to have been given greater priority by Burns, as the religious leader of the community. Punishments for ante-nuptial fornication appear to have been undertaken to ensure the moral tone of the settlement and to reinforce the kirk's authority over the sacrament of baptism.

Irregular Marriages

Traditionally, marriage was a secular arrangement between two individuals, their families and occasionally their wider communities. From the late Roman period the forms of marriage generally depended upon the idea of mutual consent between the two parties.[18] During the Middle Ages, this form of marriage was accepted by the church with the added proviso that once a marriage had been consummated – that sexual intercourse had occurred – it could not be annulled.[19] Since the Reformation, Protestant churches throughout Europe had tried to assert their authority over the celebration of marriage, by introducing the need for banns of marriage – notice of an intent to marry read in the parish churches of both parties three times

[18] Boyd, *Scottish Church Attitudes*, 47.
[19] Ibid., 47.

before the marriage could occur - and stipulating the need to be married in public, at a specified time, at noon on a Sunday.[20] This resulted in two forms of marriage being accepted: marriage by consent was recognised legally, although referred to as 'irregular' due to the lack of ceremony, whereas ecclesiastically a 'regular' marriage had to be by consent and in front of witnesses at the parish church.[21] Within Britain this continued until the introduction of Hardwicke's Marriage Act, passed in 1753. This Act, which was enforced in England and Wales, stipulated that for a marriage to be legal, it "had to be carried out in a very specific, circumscribed manner."[22] In a major change from the previous prescriptions, the Marriage Act required parental permission for individuals under the age of 21, the reading of banns in the parish church(es) of both individuals for three weeks prior to the intended ceremony, and the celebration of the marriage service in a parish church of the Church of England, in the presence of witnesses in order for a marriage to be legal.[23] Special Licences could be issued to allow a marriage to be conducted anywhere and residential requirements for the issuing of a license were strict. Falsifying of licences was a capital offence.[24] However, the Act did not extend to Scotland, where the law continued to recognise a variety of irregularly initiated marriages, including mutual consent, private written promise, verbal acknowledgement before witnesses, and habitually living together as a married couple.[25] Such Scottish marriages were also recognised as legally valid in England, even under the Act. Quakers, Jews and the royal family

[20] Ibid., 49.

[21] Boyd, *Scottish Church Attitudes*, 49; Leah Leneman, "The Scottish Case That Led to Hardwicke's Marriage Act," *Law and History Review* 17, no. 1 (Spring 1999): 162 & 163.

[22] Leneman, "Scottish Case," 161; E. A. Quin and C. J. O'Neill, "Cohabitation in New Zealand: Legal and Social Aspects," *University of Waikato Department of Sociology Working Paper* No. 21 (1984): 6.

[23] Leneman, "Scottish Case," 168.

[24] R. B. Outhwaite, *Clandestine Marriage in England, 1500-1850* (London: The Hambledon Press, 1995), 123.

[25] Anne Cameron, "The Establishment of Civil Registration in Scotland," *The Historical Journal* 50, no. 2 (2007): 391.

were also exempt from the act.[26] This resulted in the continuation of a two tier system of marriages within Britain.[27] The long history of differing approaches to marriage by secular and ecclesiastical authorities resulted, by the nineteenth century, in considerable tension between them over who had ultimate oversight and regulation of the married state.

In New Zealand, the regulation of marriage followed the English model as defined by Hardwicke's Marriage Act of 1753. The first Marriage Ordinance was introduced in 1842, very shortly after the first settlers arrived in the colony, and stipulated who could carry out the ceremony and which days of the week marriages were permitted. A number of further Ordinances were passed, including the Marriage Bill passed by the Legislative Council in 1847, which gave the privilege of performing marriage ceremonies to a limited number of religious sects, therefore removing the privilege that marriages could be solemnized by any minister of any Christian denomination that had been conferred by the 1842 local Ordinances.[28] This issue raised protests at the time by members of the Legislative Council in light of the Free Church settlement, but although noted in the minutes, the protests did not change the Bill.[29]

Under New Zealand law, therefore, irregular marriages were those marriages that did not conform to the Marriage Ordinance until 1847 or the Marriage Act after its introduction, or

[26] Outhwaite, *Clandestine Marriages*, 124.
[27] Smout, "Scottish Marriage," 204-210.
[28] 11 Victoria 7, An Ordinance for regulating Marriages in the Colony of New Zealand, 28 September 1847.
[29] 'Copy of a Letter from TC Harington, Esq., to Earl Grey' and 'Extract from the New Zealand Government Gazette, dated Auckland Friday 7 October 1847: Journal of the Proceedings of the Legislative Council, Tuesday 28 September 1847', in *British Parliamentary Papers on New Zealand Vol 8: 1852* NZ8:1852 (570), Papers Relating to the New Zealand Company, No. 48, 87-89.

were not carried out by an approved officiating minister. There were several instances in the surviving records of Otago where couples were identified as irregularly married. Steps were taken by the church in the early years of the settlement to 'regularise' these marriages, in part to reassert the church's role in sanctioning marriage. Given the principles that the settlement was founded upon, and the ideals of its founders, it is perhaps sobering that the first two examples were identified by Burns on board the first emigrant ship, the *Phillip Laing*.

On 2 February 1848, Burns wrote in his diary of having officiated at the marriage of William Jaffry and Margaret Hunter, originally of the parish of Mid Calder, Scotland whose marriage banns had been proclaimed in their parish church prior to emigrating to Otago. The copy of the proclamation of Banns in Burns' diary shows that the couple followed the traditional Scottish practice of declaring themselves married in front of witnesses:

> In the hurry caused by the extremely short interval that elapsed been [sic] the resolution to marry and go to Otago and the day fixed (20th November) for the sailing of the ship they had previously made a declaration between Witnesses in Edinburgh that they were married persons. This they had done in the apprehension that this Extract of the proclamation of Banns could reach them at Greenock only after the ship had sailed.[30]

The couple involved had done their best to be married under the auspices of the Church of Scotland, and resorting to a more traditional form of marriage was the best they could do at the time. There is no indication from Burns' diary of any steps taken on his behalf to admonish the couple for irregular marriage, but the delay between the sailing of the ship in November and the marriage in February may have been due to him speaking to the couple to ensure that they were aware of the seriousness of their 'sin' of irregular marriage. There is no indication

[30] Reverend Thomas Burns' diary 1847-48, 2 February 1848, C017, Otago Settlers' Museum, Dunedin.

of any sanctions against the couple either by Burns, as the church's representative, or by the wider ship-board community.

The other early example is considerably more complicated and involves sanctions by both the minister and the wider ship-board community. Burns reported in his diary that prior to leaving Greenock he had been made aware that "there was something irregular" in the marriage of Mr and Mrs Carnegie, two cabin passengers. Mr Carnegie had been advised to speak to Burns prior to his departure, but it was not until after he had announced that the ordinance of the Lord's Supper was to be celebrated in Otago after arrival, did Mr Carnegie approach him about celebrating his marriage "ecclesiastically."[31] Even prior to this, on February 6th, the Captain of the ship had advised Mr Carnegie that if his wife came to the table for the meal, the passengers "would rise up and leave the table." Again, on February 7th, the Captain told Mr Carnegie that "if he brought Mrs C[arnegie] to the table to dinner any more…the ladies would all rise and leave the Cabin." Burns also notes that "now nobody speaks to them." It appears that these sanctions were the result of both Mrs Burns' impression that Mrs Carnegie "was not a proper person" and from Mr Carnegie's conversations following the Jaffry marriage on February 2nd, when "it became apparent that they never had been married at all…"[32] From this it appears that the wider community, led by women, took steps to sanction the behaviour of the Carnegies before Burns, and that these sanctions were not only immediate and strictly enforced, but were of a sort that could be applied to anyone within the community irrespective of membership of the church. Following discussions with Mr Carnegie, Burns indicated that he castigated Mr Carnegie:

[31] Ibid., 9 February 1848.
[32] Ibid., 9 February 1848.

> After severely remonstrating with him on the great impropriety of his conduct – I said to him in answer to his renewed importunity that I would marry them – that I did not say that I would not comply with his request – but I would like first to see some evidence of his and Mrs C[arnegie]'s coming to a more correct mode of thinking as to their past conduct and present situation.[33]

As to their past conduct, it appears that despite claiming to have had a civil service of marriage, Mr Carnegie had "no document of any kind to show that he and Mrs C[arnegie] had been married according to any form whatever civil or ecclesiastical."[34] Prior to departure for Otago they had co-habited together for three months in Edinburgh without the knowledge of his family. Although Burns does not state his disapproval, it is clear from his diary that he did not approve of Mr Carnegie's actions specifically. From the source it is not possible to determine how much the couple considered the attitude of the other passengers towards themselves, nor the reasons behind this attitude but it appears that Mr Carnegie was somewhat defiant as on February 18th he attempted to challenge the community-imposed sanctions by advising the Captain of his intention to bring Mrs Carnegie to the dinner table, and he asked the Captain to advise the other Cabin passengers. Burns reports the incident in language couched with religious overtones:

> …after pointing out to him (Mr C[arnegie]) that by doing what he proposed he would compel the whole of the other Cabin passengers to rise and leave the table – that the proper course for him to pursue was for him and Mrs C[arnegie] quietly and penitently to bear the humiliating circumstances of the [sic] position by coming on board without any form of marriage civil or ecclesiastical having been observed between Mrs C[arnegie] and him…that I thought the only atonement he could make for the insult he had offered to the Cabin passengers was his submitting to the seclusion for a time of Mrs C[arnegie] and himself from the Cabin table.[35]

It appears that the Carnegies did continue to suffer their seclusion, eventually giving in to the pressure of the sanctions because they agreed to be married by Burns on April 3rd on board

[33] Ibid., 9 February 1848.
[34] Ibid., 9 February 1848.
[35] Ibid., 18 February 1848.

ship. Later, during his visitations, Burns noted that the Carnegies declined to attend the Free Church services having promised the Anglican Bishop to attend his chapel when it was built.[36] It also appears that the actions of Mrs Burns on board ship did considerable damage to Carnegie's opinion of Burns following their arrival, as Carnegie became one of his more vocal critics.[37]

The contrast between these two cases could not be greater. The Jaffrys were not subject to any sanctions because of the proclamation of Banns undertaken by their own parish minister prior to their departure. In contrast, the Carnegies were the subject of gossip prior to their departure, they had been secretive about their relationship, with informal sanctions imposed by the Captain on behalf of the community at the instigation of its female members. The sanctions that Burns could impose were limited to the ordinances of the church: baptism, marriage, burial, and the Lord's Supper. By withholding marriage, Burns would have compounded the situation and condoned the continuation of their co-habitation. Burns appears to have made use of the community-imposed sanctions to ensure their good behaviour and their right to the ordinance of marriage.

In the other three cases of irregular marriage recorded in the kirk session minutes, in 1857 and 1861, the ordinance of baptism for children was withheld temporarily until the couples involved were rebuked for the irregularity and absolved of their sin.[38] In the first case John

[36] Visitations of Reverend Thomas Burns 1848-1858, 18 September 1848, Presbyterian Church of Aotearoa New Zealand Archives, Dunedin.

[37] A. H. McLintock, *The History of Otago: the origins and growth of a Wakefield class settlement* (Christchurch: Capper Press, 1975), 241-2, 267-8.

[38] First Church Minutes of Sessions, Vol 1, 26 April 1849 – 21 September 1879, 9 September 1857, 27 May 1861 and 1 July 1861, Presbyterian Church of Aotearoa New Zealand Archives, Dunedin.

McGlashan junior married Emma Sutton, in 1855, in the presence of the Registrar of marriages for the province of Otago and according to the forms prescribed by the Marriage Act 1854 of New Zealand. In his visitation of 1856, Burns identifies the couple as "John McGlashan and Widow Sutton, his wife", suggesting that he recognised their marriage as valid.[39] The irregularity from Burns' perspective arose from the lack of solemnising in the presence of any officiating minister and the lack of any religious form or ceremony. However, once the couple was rebuked by the kirk session, Burns did baptise their daughter and later a second daughter in 1860. There is no record of the couple regularising their marriage by undertaking a religious ceremony of marriage in the Presbyterian, Anglican or Wesleyan Methodist records of Otago.

The second case recorded in the session minutes passes quickly over the nature of the marriage to the fact of their confession of ante-nuptial fornication. The couple, Charles and Jessie McQuorrie, "declared [themselves] to be married, but not by an officiating minister."[40] There is a record of their civil marriage in 1860,[41] and it appears that Jessie may have been married before as the session records her as Jessie Turnball or Johnston. Their discipline for ante-nuptial fornication came in May 1861, nearly 18 months following the birth of their first child. It may well have been that the irregularity of their marriage was not discovered until they requested baptism for their daughter. However, their daughter did receive baptism a week before they were absolved from their sin, and four later children were also baptised in the First Church.

[39] Visitations of Revd. Burns, November 1856.
[40] First Church Minutes of Sessions, 27 May 1861
[41] https://www.bdmhistoricalrecords.dia.govt.nz/

The final case of irregular marriage provides very few details beyond the name of the husband, Alexander Wilson, and the fact that he was rebuked and absolved, in 1861.[42] As in the McGlashan case, there is no record of him having had a religious ceremony of marriage. However, there is also no record of him having had a civil service of marriage in New Zealand either.

The McGlashan case highlights that there were several processes that could be followed in order to be legally married, so long as the marriage followed the forms prescribed by the Marriage Act of New Zealand. In addition to the registrar of marriages for the province, by 1854 there were six approved officiating ministers for the province of Otago: Burns, Will and Bannerman of the Free Church of Scotland, Fenton and Reverend Henry Johnston of the Church of England and Wohlers of the Lutheran Church. Irregular marriage was more of a sin than a crime, and only for members of the Free Church of Scotland who were subject to the authority of the kirk session. Its sinfulness lay in the undermining of the authority of the church to regulate the activities of its members in deciding who was deserving of receiving the ordinance of marriage. The concern that Burns expresses with regard to the Carnegie case reflects the seriousness of the case in light of the embryonic state of the settlement and the need for the Free Church to reinforce its authority on all the settlers.

Co-habitation

Co-habitation relates specifically to couples living together in the same manner as a married couple, without being married, as opposed to individuals who were involved in occasional

[42] First Church Minutes of Sessions, 1 July 1861.

extra-marital sexual activities. John Gillis has suggested that co-habitation was the favoured option for English and Welsh couples who were unable to marry under Hardwicke's Marriage Act and were unable to afford either marriage by licence or a Scottish irregular marriage, especially those who had previously been married but could not afford an expensive divorce.[43] Clark has argued that co-habitation was more likely to occur amongst the poor and labouring classes,[44] but Ginger Frost's extensive research into co-habitation in nineteenth century England shows that the middle classes were also involved and despite some familial condemnation and social ostracism, co-habiting couples continued to live within their communities.[45]

Under English law there was no legal penalty against co-habitation and indeed some co-habiting couples were recognised as married by judges by proof of reputation.[46] In this sense co-habitation could be seen as a form of irregular marriage, however, these relationships had no status, no legal recognition and partners had no legal rights to the property of the other partner.[47] Despite this lack of legal standing, there was little deterrent within the settlement as the church was not in a position to hand out punishments to these couples because those people who were identified in Otago as co-habiting were outside the restrictions of the congregation. Although the actual number of couples co-habiting was quite small, their existence, which undermined the traditional definition of marriage, offers a perspective for examining the norms

[43] John R. Gillis, *For Better, For Worse: British Marriage 1600-the Present* (Oxford: Oxford University Press, 1985), 196-224.

[44] Anna Clark, *Women's Silence Men's Violence: Sexual Assault in England 1770-1845* (London: Pandora Press, 1987), 10.

[45] Frost, *Living in Sin*, 59-67, 96-108, 225.

[46] Ibid., 11.

[47] Quin and O'Neill, "Cohabitation in New Zealand," 14.

of marriage.[48] As Lynn Abrams has suggested such couples illustrate the tension "between middle-class family ideology and moral codes, and the exigencies of everyday life or survival among the rural and urban lower classes" that would have been prevalent in early Otago.[49]

From the surviving records, it appears that Burns had a mixed attitude towards co-habiting couples. On his visitations he identified co-habiting couples as "living in adultery"; however, analysis of the instances suggests that he uses these words only in cases where he disapproved of the couple's behaviour or attitude. For instance there are examples of unmarried couples living together, but he makes no negative comment in his visitation records. Likewise, with regard to the whalers and other long term Otago residents and their Māori wives, Burns acknowledges when couples were married by Wohlers, Creed or Watkin, but makes no negative comments about those who were not. An analysis of the regulation of individuals' behaviour through the kirk sessions shows that there is a clear distinction between those couples co-habiting and individuals who are guilty of the sin of adultery or fornication.

The first instance of co-habitation that Burns identifies was in October 1848, when he lists John Logan, sawyer, "living together in fornication" with Elizabeth Graham.[50] Evidence from shipping lists show that Elizabeth Graham arrived in Otago in 1848 on board the *Philip Laing* as a servant, while John Logan appears to have been resident at Otakou prior to 1848.[51] In the record of his visitation of December 1849, Burns notes that they are still living together "John

[48] Frost, *Living in Sin*, 2.

[49] Lynn Abrams, "Concubinage, cohabitation and the law: Class and gender relations in nineteenth-century Germany," *Gender and History* 5, no. 1 (1993): 82.

[50] Visitations of Revd. Burns, 3 October 1848.

[51] Passengers Arriving at Port Chalmers 1848-1851 – Philip Laing, http://www.ngaiopress.com/lainglst.htm ; *Otago Witness*, 17 March 1898, 65.

Logan and Elizabeth Graham, not married", but adds no comment.[52] By 1851 Logan was working as a sawyer on a section in the east harbour. Elizabeth had married Hugh Cameron in March 1850 and they were listed in the visitation of December 1850 as living in North East Valley.[53] There is no evidence to suggest that either of them received negative sanctions from the community, plus it is likely that Burns officiated at Elizabeth's marriage to Hugh Cameron as it is recorded in the rolls of the First Church.

The second instance is recorded by Burns in December 1849. In this case he notes that George Houghton and Ann Miles were an unmarried couple living together, but makes no comment. It is a mystery as to how they arrived in Otago because they are not listed on the passenger lists for 1848 and 1849, although Burns believes Ann arrived with the Fuller family on board the *Ajax*, in 1849.[54] A year later they were still living together near the Commercial Inn in High Street. Marriage records for the First Church show that they eventually married in October 1852. There is nothing to suggest why they delayed marriage for three years, although there was obviously no permanent impediment to their marriage.

These first two cases illustrate an informal attitude towards the church's view of the sanctity of marriage amongst even the earliest settlers of Otago. They also suggest that the realities of their situation and the need for single women to have a "protector" in a society without social safety nets may have resulted in individuals making use of traditional forms of marriage by

[52] Visitations of Revd. Burns, 25 December 1849.
[53] Ibid., 17 December 1850.
[54] Passengers Arriving at Port Chalmers 1848-1851, http://www.ngaiopress.com/all-g-m.htm; Visitations of Revd. Burns, 11 December 1849.

repute, even temporarily, in order to create some sort of stability within the upheaval of settling in to colonial life.

The upheaval and transience of early colonial life which may have led some people to use a less regular form of family formation than marriage, is highlighted by a number of cases of desertion. By 1854 at least three women had been deserted by their husbands since their arrival in Otago, and one man by his wife. In the cases of these women, they were living with other men at the time of Burn's visitation, all with illegitimate children. Traditionally, in Scotland, a person who deserted their spouse could be excommunicated if they did not return and live with their spouse as husband and wife.[55] Despite this, it was relatively easy for a man or woman to walk away from family responsibilities, so long as they went somewhere where the church would be unlikely to trace them. This left the deserted partner unable to remarry or live with someone else without being charged with adultery. In Scotland the deserted partner could depend upon their family for support. However, in a colonial settlement, these support networks often did not exist and a law for divorce was not introduced until 1867, so in order to survive women may have had to find a new partner.

In the case of the deserted man, from the evidence it is not clear whether Thomas Hawkins' wife had recently left him when Burns did his visitation in December 1849. As the Hawkins were settlers brought to Otago by Johnny Jones on the *Magnet* in 1840, it is possible that Mrs Hawkins had returned to Sydney some years earlier, although she is recorded as being in Otago

[55] Mitchison and Leneman, *Girls in Trouble*, 43.

in 1844.[56] Unlike the women, Hawkins is not identified as co-habiting in the visitations, suggesting that he was living on his own. This illustrates the role that gender played in whether a settler was dependent on others for their economic stability. As a man, Hawkins did not have to create a new economic family unit when his wife left, he could choose to be self-sufficient, unlike a woman who would need a male "protector" for long term stability.

The first recorded case of a woman being deserted in Otago was Mary Ann Archibald, nee Pearson, whose husband, Alexander, went to Sydney sometime in 1852. They had originally come over to Otago, with two or three children, on the *Mariner* arriving in June 1849.[57] The passenger lists suggest that Alexander may have been originally from Australia.[58] In 1850, Burns lists them as communicants of the First Church, living in the Stafford Street/Walker Street area with two children. In December 1851, he lists them as living in Town District V with one child, still communicants. The following year Burns' entry reads:

> Anne Pearson, wife of Alexander Archibald who is gone to Sydney, is living with [sic] adultery with John Williams a native of Barbadoes, 1 child by him.[59]

John Williams, also known as Black Bill, arrived in Otago most likely in the 1840s. In Burns' visitation of 1849 he is listed as living in Northeast Valley with a Ngāi Tahu woman and three children. Archibald and Williams are again listed as living together in 1854 and 1855 with two illegitimate children. By 1856 it appears that Archibald had been deserted for a second time as she is listed with three children, but that Williams had gone to Sydney. In addition to living in a manner most likely to offend society, both had fallen foul of the law. Both of them

[56] Edward Shortland, "Journal – Notes kept while in the Middle Island November 1843 and 4-21 January 1844," PC-0024, Hocken Library, University of Otago, Dunedin.
[57] Passengers Arriving in Port Chalmers 1848-1851, http://www.ngaiopress.com/all-a-f.htm.
[58] Passengers Arriving in Port Chalmers 1848-1851 – *Mariner*, http://www.ngaiopress.com/marnrlst.htm.
[59] Visitations of Revd. Burns, 18 December 1852.

were charged in 1853 over the death of Williams' Ngāi Tahu wife Te Au Wahine but discharged.[60] Archibald was also charged with breaking the peace in 1855, but was able to pay the 5/- fine.[61] This suggests that she was in no way destitute.

Resident Magistrate's Court records and newspaper reports from the time show that by the end of 1861 Archibald was living in a derelict building earning her living by prostitution, as will be discussed in more detail in Chapter 8.[62] Thus, despite being one of the original settlers and initially at least a member of the First Church congregation, when her husband left for Sydney, there was no network in place to support Archibald and her children within the community, and as her second relationship ended she became completely marginalised.

The second case of desertion is that of Martha Brown, formerly Stewart, née Pollard, a widow living at the Heads of Harbour with her three daughters, following the drowning death of her husband in January 1850.[63] It is possible that the Stewarts were resident at Otakou before 1848, as there is a Mr and Mrs Stewart with two daughters in a list of pre-1848 residents published in 1898.[64] Between the visitation in January and the end of 1851 she married a Mr Brown, who then left her and moved to Nelson before the end of the year.[65] There is no record in the First Church records of this marriage, but Burns notes in his entry that although he calls her "Martha Pollard, widow Stewart," her husband's name was Brown and he was "now in

[60] Journal of Henry Monson, Gaoler, 1851-1861, 12-14 March 1853, PC-0076, Hocken Library, University of Otago, Dunedin.
[61] Ibid., 28 January 1855.
[62] *Otago Daily Times*, 20 December 1861.
[63] Visitations of Revd. Burns, 9 January 1851.
[64] *Otago Witness*, 17 March 1898, p. 65; *Evening Star - Otago Jubilee Edition*, 23 March 1898.
[65] Visitations of Revd. Burns, 16 December 1851.

Nelson."[66] In the 1853 visitation for Port Chalmers, Burns lists her as living with William Rochford, and again notes that her husband was living in Nelson.[67] Although not mentioned in earlier visitations, in both the 1853 and 1854 visitations, Burns identifies her three children as having been fathered by three different men, although there is no surviving evidence for this claim. This suggests that Martha Stewart had fallen, in Burns' perception, from a widow who remarried to an adulterer with loose habits. Unlike Mary Ann Archibald, Stewart was not part of the settler community, but lived within the pre-1848 settlement at Otakou. It appears that within this small community there was more support for widows and deserted wives, as Stewart was not the only one to remarry following the death of a husband.[68]

The third woman was Isabella Henry, née Grant, who arrived in Otago on the *Ajax* in January 1849 aged 23.[69] On February 26, 1849 she married James Henry, aged 26 and in August 1852 their daughter, Isabella was born.[70] However by 1854 James Henry was in Nelson and Isabella is noted in the visitation of that year as separated from her husband and having two "adulterous" children by Charles Hopkinson, who was living at Goodwood.[71] Hopkinson has been identified as a Swede who arrived in Otago in 1840, licensee of the Commercial Inn during 1850 and 1851, and was involved in developing a run holding north of Dunedin in the 1850s and 1860s.[72] Although not co-habiting at the time of the visitation, their relationship was of a sufficient length to produce two children.

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[66] Ibid., 16 December 1851.
[67] Ibid., 16 February 1853, 27 October 1854.
[68] *Otago Witness*, 3 January 1906, Page 49; *Evening Star – Otago Jubilee Edition*, 23 March 1898,
[69] Passengers Arriving in Port Chalmers 1848-1851 – *Ajax*, http://www.ngaiopress.com/ajaxlist.htm.
[70] First Church Marriage Register, Hocken Library, University of Otago, Dunedin.
[71] Visitations of Revd. Burns, 2 November, 1854.
[72] *Otago Witness*, 17 March 1898, 65.

In all three of these cases there is evidence to suggest that at least one member of each couple was in Otago before 1848, during a time when partnerships had a fluidity that suited individual requirements. It appears that those "white" women who had been part of this earlier community were supported by its members to a greater extent than the society of 1848 settlers did for their own. The small number of couples involved makes it hard to draw comparisons with Frost's work on co-habitation in England, in which she argues that despite numerous disadvantages, individuals were still willing to co-habit during the nineteenth century in face of sometimes considerable pressure to conform.[73] She identifies the involvement of mostly working class couples who faced an impediment to marriage, the general acceptance of their communities and families, and an inconsistent response by courts.[74] In Otago it is clear that all the individuals were working class and generally the impediment to them remarrying was the survival of a spouse who had left them. There is little evidence of any punishments inflicted on co-habiting couples although they may have been marginalised by some sections of the community. However, it appears that some of these couples were already on the margins of the community, especially those who had been in Otago prior to 1848.

Bigamy

Whereas co-habitation could be seen as marriage by repute outside the law, bigamy, the remarriage of an individual who had a living spouse, involved a marriage ceremony and was against the law. From the fifteenth century the churches of Europe began to prosecute bigamy heavily, in part as a crime against the Christian sacrament of marriage.[75] Sara McDougall also

[73] Frost, *Living in Sin*, 231.
[74] Ibid., 225, 227, 232,
[75] Sara McDougall, *Bigamy and Christian identity in late medieval Champagne* (Philadephia: University of Pennsylvania Press, 2012), 138.

suggests that the severe punishments against bigamy reflected a concern about Christians being exposed to polygamy, especially in Muslim countries, during the age of exploration.[76] Bigamy was made a criminal offence in England in 1603, and carried the death penalty until the 1790s, when the penalty was changed to transportation for seven years.[77] It should be noted that bigamy was not a felony under English law if it could be proved that the first marriage was contracted when one party was under the age of consent.[78]

Despite these deterrents and the need for one of the wives or husbands to initiate a prosecution at their own expense, it appears that court cases for bigamy were not unusual: in 1845 *The Times* of London recorded 45 bigamy prosecutions from the local county courts, the assizes.[79] Like co-habitation, bigamy was not unusual in England during the nineteenth century, and was sometimes seen as a more acceptable form of family formation.[80] Divorce was prohibitively expensive and hard to procure, especially for the middle and working classes.[81] Economics and property rights generally meant that abandoned women would remarry in order to support themselves and their children. A colony, such as New Zealand, which was so far removed from Britain provided individuals with an opportunity to leave behind an unhappy marriage and start afresh with a new relationship. However, as Allen Horstman has suggested "news usually spread in even the most distant corner of the world."[82]

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[76] Ibid., 141.

[77] Samuel Pyeatt Menefee, *Wives for Sale* (Oxford: Basil Blackwell, 1981), 15; Stone, *Road to Divorce*, 143.

[78] Katherine Crawford, *European Sexualities, 1400-1800* (Cambridge : University of Cambridge Press, 2007), 151.

[79] Stone, *Road to Divorce*, 142-3; Allen Horstman, *Victorian Divorce* (London: Croom Helm, 1985), 41.

[80] Frost, *Living in Sin*, 91.

[81] Stone, *Road to Divorce*, 2, 4; Horstman, *Victorian Divorce*, 41; Ginger Frost, "Bigamy and Cohabitation in Victorian England," *Journal of Family* History 22, no. 3 (July 1997): 286.

[82] Horstman, *Victorian Divorce*, 30.

There are four instances of bigamous marriages occurring in Otago during the period under examination. One of them only comes to light in the kirk session minutes and this case did not come to court. The other three were court cases, two of which were associated with other crimes, one for theft and one for assault.

The first of the court cases for bigamy was heard at the Resident Magistrate's Court in Waikouaiti at the beginning of May 1864. The *Otago Daily Times* summarised the case as follows:

> It appears that about a month since, a devoted couple arrived here from the Dunstan and were married soon after by the Rev. A. Dasant. They took up their quarters near the town. About three weeks after doing so, they were apprehended upon the information of a storekeeper from the Dunstan, who claimed the fair one as his wife, and the man whom she had married was his servant. He charged them of robbing him of £130 cash, 11 oz. of gold; also a gold ring and a watch. The husband stated that he left his home on business leaving his wife and servant in charge. On returning, he found the door nailed up, and all his valueables [sic] gone. He traced the pair to Waikouaiti and at once gave them into custody. The watch has been identified and the male prisoner was wearing the lost ring. The case was remanded until the 8th of May for further evidence.[83]

The case was heard in the June 1864 sitting of the Supreme Court in Dunedin, where the charges of bigamy against Caroline Beavis or Launder and robbery against Walter Alfred Crouch were tried separately. The trial of Beavis highlights the difficulty facing the colonial police and courts in securing sufficient admissible evidence under law to prove a case of bigamy. Most of the arguments of the defence lawyer related to the admissibility of a certificate "purporting to be an examined copy of the register of marriages…showing a

[83] *Otago Daily Times*, 3 May 1864.

marriage on the 23rd August 1853, between John Launder and Caroline Beavis."[84] Although the Judge accepted the certificate as evidence – citing an English Act which had been adopted in New Zealand - in his summing up of the case he left the final decision to the jury. He asked them "to decide whether there was anything in the other evidence confirmatory of identification." The jury members "were at liberty to doubt the validity of the certificate if they saw reason to do so" and to say "whether they had reasonable doubt that the prisoner was the person named in the certificate."[85] The jury found Beavis guilty but recommended to mercy as they felt that she had been led by Crouch. In sentencing the judge sentenced her to two years imprisonment, which he referred to as a "substantial punishment" but without the penal servitude that could have been imposed.[86]

In this case, Beavis had claimed that she had been under age at the time of her marriage to Launder so considered it was illegal.[87] According to the Otago Police Gazette, Beavis was born in 1834, which confirms that she would have been underage if married before 1855.[88] However, to have been married in the parish church of Portsea, Southampton, as suggested by the marriage certificate produced in court, the forms of the marriage under Hardwicke's Marriage Act would have required parental permission and the proclamation of banns or the issuing of a special licence. All these would have validated the marriage. This case suggests that after "nearly 14 years of marriage," which included eight years in America and nearly six in Otago, Beavis may have seen an opportunity to leave Launder, claiming to their maid that

[84] Ibid., 3 June 1864. Examination of the marriage records of the relevant parish in England suggests a date of 1850 for the marriage, which is supported by witness testimony provided during the trial.
[85] Ibid., 3 June 1864.
[86] Ibid., 4 June 1864.
[87] Ibid., 3 June 1864.
[88] *Otago Police Gazette*, November 1861-January 1868, 1 February 1866, 10.

she "could not put up with his ill-usage."[89] These events mirror how Lawrence Stone has suggested the norms for elopement occurred in Britain during the early modern period:

> Some wives who were battered, mistreated, merely neglected decided to carve out a new life for themselves and eloped with a lover, sometimes taking with them a considerable quantity of household goods…These elopements commonly occurred after ten to fifteen years of marriage, when either the wives could no longer endure their ill-treatment or had fallen in love with someone else. Often the two went together.[90]

The only court case for bigamy that involved a male bigamist was not associated with any other crime. Public attention was raised by two people living in Queenstown who do not appear to have any links to the husband or either of his two wives. This suggests an element of social involvement in regulating people's behaviour. Like the Launder/Beavis case the trial focused as much on the admissibility of evidence as on the evidence itself. The defence lawyer, when addressing the jury, stressed that in cases of bigamy both marriages needed to be proved to have occurred lawfully.[91] A question was raised about the validity of the marriage certificate provided to prove the first marriage. The defence lawyer objected to the certificate produced as it was not signed and certified as a copy of the original marriage entry. The Judge did not appear comfortable with the document but felt that the case needed to be heard and all the evidence of witnesses considered.[92] The evidence of the witnesses could confirm co-habitation as husband and wife, despite suggestions that the man, Johnston, had claimed that he had not married his first wife. According to one of the witnesses, the wife's sister Ann, Alexander John Johnston was married to Jane Ellen Jones in Liverpool in November 1855 and afterwards

[89] *Otago Daily Times*, 3 June 1864.
[90] Stone, *Road to Divorce*, 142.
[91] *Otago Daily Times*, 9 December 1864.
[92] Ibid., 9 December 1864.

for four months the married couple lived with her parents, brothers and sisters in Liverpool.[93] In 1860 Alexander travelled to Dunedin, later sending for his wife. They lived in North East Valley with their children. Then in April 1864 he married Brigit Maria Flannagan in Invercargill. It appears that he may have been living in Queenstown at this time. There was no question as to the validity of the second marriage because the minister who solemnised the ceremony appeared as a witness. It could be suggested that the judge was partially in agreement with the objections of the defence lawyer towards the evidence, because he suspended sentencing when the jury found Johnston guilty. He then reserved the case for the Court of Appeal to determine whether the evidence to convict Johnston had been sufficient.[94] Johnston was released on bail of £100 with two sureties of £50. It took the Court of Appeal nearly a year to sustain the conviction, but when Johnston was called for sentencing he had disappeared. This case came to court in the same year as the previous case and both illustrate how convictions were dependent upon proof of marriage, but that the juries were willing to accept a combination of documents of questionable admissibility and evidence of co-habitation over a sustained period to prove marriage.

The final court case for bigamy arose from a charge of assault and included the suggestion of wife sales and led to a further civil case for *criminal conversation* - or '*crim. con.*' as it was commonly referred to – an action for trespass issued by the husband for damages against the seducer of his wife.[95] In December 1853 Henry Smeeth married Mary Tripp in London before sailing to Victoria, Australia, in June 1854. It appears that she left him within a year of arriving

[93] Ibid., 9 December 1864.
[94] Ibid., 13 December 1864.
[95] Stone, *Road to Divorce*, 233.

in Australia and although, according to his evidence, Smeeth attempted to get her to return to him several times over the next few years, they did not live together for more than a few days. In 1863 he found a reference to his wife in the *Melbourne Leader* in relation to a case Fitzgerald *v.* Doyle for assault. In the article it referred to the wife of Doyle having been transferred to David Nesbit, also known as "Scotch Jock" for a consideration of £150, having married Doyle sometime after leaving her husband. The article further stated that the couple had gone to New Zealand, so Smeeth followed them, in his words, "to get her back." The alleged assault occurred when Smeeth tried to talk to Mary in Nesbit's presence.[96] The case of assault was dismissed by the Magistrate, but Smeeth followed up with a *crim. con.* case against Nesbit for £500 and charged Mary with bigamy for marrying John Doyle in Hobart in October 1862. The bigamy case was heard in the Resident Magistrate's court in June 1864, but after several adjournments while witnesses arrived from Melbourne, the case was dismissed on 28th June without the witnesses arriving.[97] The *crim. con.* case was heard in the June 1864 sitting of the Supreme Court and the *Otago Daily Times* summarised the case:

> The Civil Session of the Supreme Court was commenced yesterday, before His Honor [sic] Mr. Justice Richmond. The first case, Smeeth v. Nesbit, was one of *crim. con.* The facts were almost revolting; and the case was stopped in deference to the opinion of the Judge, who declared that it was a disgrace to the solicitor who brought it into Court. Verdict for the defendant, who is the well-known "Scotch Jock".[98]

The newspaper coverage of the three trials makes it clear that the Magistrates and Judges felt that Smeeth was attempting to get what money he could by following Mary to New Zealand. The comments from the bench, especially in the *crim. con.* trial, belittle Smeeth's evidence and suggest that there was no case to answer for and no compensation due for the loss of his

[96] *Otago Daily Times*, 21 May 1863.
[97] Ibid., 15 June 1864, 23 June 1864, 30 June 1864.
[98] Ibid., 22 June 1864.

wife's society and services as helpmeet and partner, when she had left him eight years previously.[99] Unlike the previous two cases, where there were questions about the admissibility of marriage certificates as opposed to the validity of the charge, in this case the actions of Smeeth in allowing his wife's desertion to go on for eight years before bringing a suit against any of her partners undermined his case.

Unlike the other cases of bigamy, the one found in the kirk sessions was much more straightforward. It is also the only case in which the previously married partner had left their first spouse in Britain and made a new start in Otago. In August 1863 Robert Edward Bell Gallon, aged 51, a carpenter resident in Dunedin married 31 year old Elizabeth Reid. Unfortunately, Robert's first wife was still alive and living in England. This fact came to light in early 1866:

> The Moderator stated that in consequence of some remarks made in the session at the previous meeting relative to the marriage of Mrs Gallon, a member of the congregation, he had called on Mrs Gallon and ascertained from her and her husband that at the time of their marriage he had a wife living in England and who, so far as is known, is still alive.[100]

It is unclear from this extract whether Mrs Gallon had been aware at the time of her marriage that her husband was still married. Despite bigamy being illegal, the church undertakes the regulation of the case as opposed to the state, and Mrs Gallon is faced with punishment for adultery:

> …the session requested the Moderator and Elder of the district to work on Mrs Gallon to point out to her that her present relation to Mr Gallon is one of adultery and that she must either separate from him or be excluded from all Church privileges.[101]

[99] Ibid., 21 May 1863, 15 June 1864, 22 June 1864, 23 June 1864, 30 June 1864.

[100] East Taieri Presbyterian Church Minutes of Session, 3 April 1866, Presbyterian Church of Aotearoa New Zealand Archives, Dunedin.

[101] Ibid., 3 April 1866.

Mrs Gallon conceded to the request of the Session and separated from her husband in June. Later that year letters arrived from England confirming that the first Mrs Gallon was still alive, but had remarried. There is no evidence that Mr Gallon was ever charged for bigamy in the courts. He died in Dunedin in 1876.

As these cases highlight, it is possible that other bigamous marriages existed at the time, but which did not come to light either due to the distances involved between Otago and former homes, or to disinterest on the part of the individuals involved to raise the issue. For those found guilty of bigamy, the harshest penalty was two years imprisonment with hard labour. This put it on a level with the sentences for manslaughter and uttering forged cheques.[102] In New Zealand, individuals were not legally able to remarry until the introduction of the Divorce and Matrimonial Causes Act introduced in New Zealand in 1867, and then only if the husband could prove adultery or the wife aggravated adultery. This double standard was not removed until the 1898 Divorce Act, which also introduced desertion for five years. Cases for bigamy were still coming up in New Zealand courts during the 1870s and into the twentieth century. This suggests that the leniency which Frost has argued was developing in Britain towards bigamous marriages within both communities and law enforcement circles was not necessarily reflected in Otago.[103]

Adultery

In England the 1650 Adultery Act made adultery a capital offence for men and women. Despite this, men generally only served jail terms. Punishment of women guilty of adultery

[102] *Otago Daily Times*, 5 September 1864.
[103] Frost, "Bigamy and Cohabitation in Victorian England."

was more severe due to the nature of legitimacy norms – all children born to a married woman were accepted as the children of her husband so long as he was not absent for extended periods of time – and property inheritance. There was a fear, especially amongst propertied classes, that a wife's illegitimate child could inherit a family's property, to the exclusion of any legitimate children.

By the nineteenth century adultery was seen as a civil as opposed to criminal charge, and was one of the reasons that could be used as the basis for a person to seek a divorce under the British Matrimonial Causes Act 1857. New Zealand introduced its own Matrimonial Causes Act in 1867 which contained the same grounds for divorce as the English law – adultery by the wife or adultery and some other legally defined cruelty or desertion by the husband - reflecting the civil status of adultery. Although social sanctions frequently had a more immediate impact, adulterous women could legally lose custody of their children, and property rights were often raised in court.[104]

Despite this acknowledgement of the existence of adultery and its location as a civil issue, it was still seen as a rejection of marriage and an attack on family values. During the early modern period in some parts of Britain, communities practised several informal means of expressing censure for adultery. These activities, often referred to as 'rough music', 'skimmington', or 'riding the stang', frequently involved humiliation and drew public attention to adulterous couples.[105] These informal rituals were used within communities to express hostility or mockery towards individuals whose behaviour broke or trespassed against

[104] Frost, *Living in Sin*, 103-4.
[105] Menefee, *Wives for Sale*, 17-18.

community norms.[106] Such rituals involved "raucous, ear-shattering noise, unpitying laughter, and the mimicking of obscenities" as well as the parading of effigies, and occasionally the riding of the victim, or their proxy, on a pole or a donkey.[107] Edward Palmer Thompson documents a number of rituals from across Britain which were employed against people who had been found guilty of adultery, whether officially through ecclesiastical and civil authorities, or unofficially through a private grievance being made public.[108] The use of such rituals illustrates that adultery could be seen as a serious transgression within some communities, irrespective of how severely it was punished by civil or ecclesiastical courts.

Considerable research exists on the double standard inherent in the legal regulation of adultery.[109] Under Roman law, which influenced much of later European legislation, only women could commit adultery.[110] The special attention that women's adultery received under law was related to the securing of property rights and inheritance and the use of marriage as a means of regulation. Ursula Vogel proposes that such regulation meant that adultery was legally "at a strategic intersection of private and public law."[111] Essentially, although it was the property rights of a private individual – specifically a man's sexual rights over his wife - adultery could strike at social and public good, through its overt rejection of the institution of marriage. The situating of adultery within middle and upper class ideas of property and

[106] E.P. Thompson, *Customs in Common* (London: The Merlin Press, 1991), 467; Stone, *Road to Divorce*, 3.

[107] Thompson, *Customs in Common*, 469.

[108] Ibid., chapter 8, specifically 471, 477, 478, 492, 493, 506, 514 and 532-3.

[109] For example see Ursula Vogel, "Whose property? The double standard of adultery in nineteenth-century law," in *Regulating Womanhood: Historical Essays on Marriage, Motherhood and Sexuality*, ed. Carol Smart (London: Routledge, 1992); Stone, *Road to Divorce*; Carol Smart, *The Ties that Bind: Law, Marriage and the Reproduction of Patriarchal Relations* (London: Routledge, 1984); Horstman, *Victorian Divorce*; Keith Thomas, "The Double Standard," *Journal of the History of Ideas* 20, no. 2 (April 1959): 195-216.

[110] Vogel, "Whose property?" 148.

[111] Ibid., 149.

inheritance may not have had the same relevance for lower class and immigrant settlers. Cases of adultery in Otago before 1868 provide an opportunity to measure how much the middle class ideal of "respectability" within marriage was fundamental to the Free Church settlers and the wider mixed community.

In the surviving records from Otago the terms adultery and fornication are used interchangeably, however there was a distinct difference. This section looks exclusively at cases of adultery, which for the purposes of this study is defined as "an act of sexual intercourse between a married person and someone other than the legitimate spouse" when the legitimate spouse is still alive, whether living with the married person or not.[112] There are three main sources for cases of adultery in early Otago. The surviving kirk session minutes record one case of adultery addressed by the sessions. For the wider community Burns' visitations act as a census of the settlement and he clearly records illegitimate children some of whom were the results of adulterous relationships. There are also two references to adulterous relationships in the court reporting in the *Otago Daily Times* and *Otago Witness*.

The single case of adultery from the kirk session minutes involved a Deacon of West Taieri Church, William McDiarmid, in 1860. Although he compeered, or appeared in front of the kirk session, voluntarily and "made a solemn profession of repentance" which the Session believed to be sincere, the Session members referred the case to the presbytery for advice.[113] As a result, McDiarmid was rebuked both by the session and then later by the presbytery before

[112] Ibid., 148.

[113] West Taieri Presbyterian Church Minutes of Session, 17 March 1860, Presbyterian Church of Aotearoa New Zealand Archives, Dunedin.

being removed from office, absolved of the scandal and restored to full communion.[114] In this case, the baptism records for the parish have not survived so it is not clear what evidence was brought forward, although the birth of a child would have been the most likely. It is possible that McDiarmid was punished because of his standing in the church as a Deacon. However, it is difficult to generalise regarding how seriously the church viewed adultery on the basis of one case.

Within the wider community Burns' visitation lists several illegitimate or 'natural' children each year, living either with their mothers or her family, or boarded out with other families. Their situations will be examined in the next chapter; however, analysis of the backgrounds of the mothers suggests that the majority were the result of liaisons between unmarried individuals. Many of these children are identifiable from cases of fornication punished by the kirk sessions, which had occurred prior to the mothers arriving in Otago. There were a small number who were the result of adulterous relationships, but there do not appear to be more than one or two born each year. It is pure supposition to try to identify individual children as the product of adultery without specific evidence to back up the assumption.

There are several references to adultery in the coverage of both the Resident Magistrate's Court and the Supreme Court trials in the local newspapers. These references relate to criminal trials for bigamy or civil cases for *criminal conversation* - or '*crim. con.*' The majority of *crim. con.* cases in Otago are linked to accusations of bigamy as opposed to adultery. However, there is one case brought before the civil session of the Supreme Court in January 1864 which related

[114] Ibid., 24 April 1860.

to adultery. Unlike the nineteenth century British cases of *crim. con.*, where men were less likely to seek or receive a substantial financial pay out, the evidence in this case clearly shows that the plaintiff, William Robertson, was seeking considerable damages.[115] It is possible that he was seeking the very considerable amount of £500 as a means of punishing the defendant, John Dowling for his actions. The move in Britain away from the "acceptance of money for a wife's dishonour" is not reflected in the summing up of Mr Justice Richmond:

> …seeing that, as the law stood here, a husband had no other means than an action of *crim. con.* By which to punish an adulterer, it ought not to be an objection that the plaintiff was seeking compensation in pounds, shillings, and pence.

Nor is it reflected in the verdict returned by the Jury with damages of the full asking amount.[116] In this case the jury had sympathy with Robertson. It may be possible that the middle-class ideal of a woman as a moral companion, which influenced Wakefield's thoughts about the role of women in colonial settings, held considerable relevance for the members of the jury. As such the jury may have viewed the loss of the companionship of his wife and her role as "helpmeet" within his household, through the adulterous actions of Dowling, would require considerable recompense for Robertson.

The newspaper coverage of court business also included occasional oblique references to adultery. These references generally come from the evidence provided in cases for criminal crimes, including assault, rape and murder. One of these oblique references found in the *Otago Witness* in 1860 appears at the end of a report on cases heard in the Resident Magistrate's

[115] Stone, *Road to Divorce*, 297.
[116] Stone, *Road to Divorce*, 297; *Otago Daily Times* 8 January 1864.

Court.[117] As with many of the newspaper reports involving "immoral" behaviour the details need to be gleaned from what is left unsaid:

> There was a case on the police charge sheet, in which a man and woman were concerned, who had been found in one of the rooms of the Commercial Inn in such circumstances as to justify their being given in charge. The case must have been so very indelicate that it could not bear the light of the Court-house, as his Worship very properly heard and adjudicated the case in his office. We understand that some suspicion attaches to the female above alluded to, as being concerned in the robbery at Mr. Adam's store. The marks on her person which were supposed to have been received from coming in contact with broken glass, are now believed to have been the effects of a chastisement inflicted by a married woman for taking improper liberties with her husband.[118]

Here, the wife took matters into her own hands to ensure that the other woman was suitably punished. It is impossible to know what sort of punishment she inflicted on her errant husband, but the wife's actions suggest that she felt the need to defend her own rights over her husband's sexuality. It also appears that no resulting case of assault was brought against the wife, indicating that her victim did not lay charges of assault and nor did the police pursue the matter themselves.

Another case, which was dismissed in the Supreme Court sittings in January 1863, was for the rape of a woman patient in the Dunedin Hospital.[119] The judge dismissed the case saying "he had not the faintest shadow of a doubt that the prosecutrix had been a consenting party."[120] The evidence for adultery came from the prosecutrix's evidence that "she had told the prisoner that she was a single woman, and he told her he was a married man before the offence was committed."[121] No record of a marriage for the man has yet to be found, so the only suggestion

[117] *Otago Witness*, 24 March 1860, 3.
[118] Ibid., 24 March 1860, 3.
[119] *Otago Daily Times*, 30 January 1863.
[120] Ibid., 30 January 1863.
[121] Ibid., 30 January 1863.

of adultery is the word of the prosecutrix, who may have used it as a means of discrediting the prisoner. As the original charge of assault was dismissed in part due to the character of the prosecutrix being undermined by her actions, her accusations of adultery may have been disregarded for a similar reason.

Despite the judges' views and the damages awarded to Robertson in his civil case, other sections of Otago's society regarded adultery as a private matter between the individuals concerned. The use of violence within working class society, which will be examined in more detail in Chapter 7 in relation to sexual assaults, points to the willingness of some members of the community to seek redress for insults through less formal means than the church or the law. The contrast between the case involving Robertson, being awarded £500 for his wife being seduced and the example of the affronted wife assaulting her husband's lover illustrates the different ways that people within the same community approached their spouse's adulterous behaviour. It may also reflect a double standard in the way the law would "reward" a man financially, but would have been less likely to do the same for a woman. Those cases that came to court also illustrate how differently the victims of adultery were viewed: the cuckolded husband is to be commiserated, while the wife who took the law into her own hands would have been perceived as disorderly even if justified in her actions.

The other instance of adultery found within the evidence of a trial for another crime, came from the trial of William Jarvey for the murder of his wife in 1864.[122] Captain Jarvey had been in Tasmania prior to basing himself in Dunedin, in 1862, while operating a shipping vessel

[122] Ibid., 16 March 1865.

between Dunedin and Melbourne. His family, including his wife Catherine, daughters Elizabeth, Charlotte, and an unnamed younger daughter, and sons Andrew, England and Frank, remained in Tasmania until early in 1864, when Jarvey sent sufficient money for them to join him in Dunedin. Unfortunately, following their arrival, the family faced a number of tragedies. Jarvey's second daughter Charlotte died in July aged 15, probably of scarlet fever. Then on September 26th Catherine Jarvey, who was five months pregnant, died of what was later shown to be strychnine poisoning. Both the reported words of Jarvey's wife prior to her death – "Oh! William Jarvey! You have killed your Catherine. You have killed your Catherine for another with a big hat and a cloak" - and the arrival of Margaret Little in the Jarvey household after the funeral of Catherine Jarvey suggest that an adulterous relationship between William Jarvey and Margaret Little may have been one of the motives behind the murder of Catherine. In her evidence, Elizabeth Jarvey suggested that when Margaret Little was resident in the Jarvey household as the new housekeeper, Jarvey visited her room at night, and had been, by popular repute, well known to him prior to his family's arrival from Tasmania earlier in 1864.[123] In the Judge's summing up of the second trial, the Crown linked the murder to the intimacy between Jarvey and Margaret Little:

> …the motive shadowed out – it is not much more than that – desire to get rid of an annoying encumbrance, an ailing and jealous wife, perhaps not a very fit or attractive object for the prisoner's passion; his intimacy with Miss Little; and her introduction as housekeeper.[124]

The argument for Jarvey being involved in an adulterous relationship could be further strengthened by evidence suggesting that he had previously had an "intrigue" with a servant girl.[125] There was also a suggestion that he had also fathered a number of illegitimate children

[123] Ibid., 16 March 1865
[124] Ibid., 15 September 1865.
[125] Ibid., 15 September 1865.

whilst living in Tasmania, several of whom died suspiciously.[126] However, the evidence as presented in court does not prove adultery in this case, but shows that the residents of Dunedin were aware of adultery happening within the community.

From the surviving evidence it seems that although adultery was uncommon it did occur even in the earliest years of the settlement. However, it appears that there was little church authorities could do to police this behaviour, which highlights the limitations of the kirk sessions as a means of regulating the sexual behaviour of a diverse community. There is no surviving evidence that the wider community actively condemned adulterous couples despite adultery being 'morally unacceptable' and grounds for divorce under English and later New Zealand law. However, in individual cases offended spouses appear to have imposed punishment, either through the courts by suing for damages through a *crim. con.* case or privately by taking the law into their own hands.

Conclusion

The need for the church authorities to punish these activities was based on the idea that these individuals had acted outside the accepted bounds of morality. If these activities became widely accepted within the community, the Free Church principles upon which the settlement had been founded would have been undermined as would the kirk's role in regulating marriage. Ante-nuptial fornication and irregular marriage were essentially limited and unrepeatable sins in the eyes of the kirk sessions and the individuals concerned were easily admonished. Co-

[126] 'The Jarvey Trial, 1865', An Encyclopaedia of New Zealand, ed. A. H. McLintock, originally published in 1966. Te Ara - the Encyclopedia of New Zealand, last modified 13 March 2002. http://www.TeAra.govt.nz/en/1966/trials-notable/3.

habitation was different in that the individuals involved were generally outside the congregation of the church and so the church authorities were unable to inflict direct punishment on the couples. In the cases of co-habitation examined here some of the individuals involved were on the edges of the community, either by race or by reason of being in Otago before 1848, and there is no evidence that the wider community imposed any sanctions on them, unlike the experiences of the Carnegies on the outbound voyage. Bigamy was a criminal activity; however, it appears that people were still willing to remarry illegally. Travelling to escape an unhappy or inconvenient marriage did not necessarily mean that settlers were able to avoid prosecution. Bigamists appear to have been treated harshly in Otago when convicted, unlike the trend in Britain toward lenience that Frost has identified.[127] A similar harshness seems to have applied to adulterers when a civil case was brought to court. It appears that traditional opinions about the immorality of bigamy and adultery influenced the workings of the criminal, civil and church courts. However, the wider community appears to have been less concerned in punishing these behaviours, leaving it up to the individuals involved to seek redress.

The members of the wider community appear to have made decisions about their relationships and family construction based on a number of factors that were specific to their own situations, irrespective of the principles of the settlement or the church. Despite this, marriage sanctioned by the church continued to be the most acceptable mode of family formation. Even individuals who had previously co-habited sought to regularise their relationship through a marriage ceremony, thereby re-enforcing the centrality of marriage as the norm within the community.

[127] Frost, "Bigamy and Cohabitation in Victorian England."

Chapter 5

Punishable Outcomes: Illegitimacy and Infanticide

There were a number of reasons why the birth of an illegitimate child was perceived as immoral. Illegitimacy has been seen as the visible result of a number of related crimes, such as adultery, bigamy, affinal incest, and prostitution, and could lead to further criminal behaviour, such as infanticide or concealment of birth. It also placed an economic burden on a community through the support required for an infant that lacked a stable home, therefore was more severely punished when economic conditions deteriorated.[1] However, the punishment for bastardy tended to fall most heavily on the woman.[2]

This chapter examines the recorded instances of illegitimacy and infanticide within Otago to determine how these outcomes of general illicit sexual behaviour were perceived within the settlement and how they were punished. There were significant differences between illegitimacy and infanticide, but considerable links. Although there was nothing criminal in the birth of an illegitimate child, that child had no legal position which could result in economic hardships and social exclusion. On the other hand infanticide – the wilful murder of a newly born child - was illegal and until 1803 was a capital crime in England with the onus for proving innocence placed on the woman. Significantly, research from Britain suggests that the majority of infanticide cases related to illegitimate children.[3]

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[1] Katherine Crawford, *European Sexualities, 1400-1800* (Cambridge: University of Cambridge Press, 2007), 169.

[2] G. R. Quaife, *Wanton Wenches and Wayward Wives: Peasants and Illicit Sex in Early Seventeenth Century England* (London: Croom Helm, 1979), 225.

[3] Mark Jackson, *New-born Child Murder: Women, Illegitimacy and the Courts in Eighteenth-century England* (Manchester: Manchester University Press, 1986).

Illegitimacy

Illegitimate children were stigmatised from birth as no man's child – *fillius nullius* – which meant that the father had no legal duty under common law to provide maintenance for the child.[4] Also under common law this status did not change even if the parents married later, therefore the child had no right of inheritance. The birth of an illegitimate child was a key indicator that a couple had been involved in illicit sexual activity and was the prime evidence used by the kirk sessions in finding guilt in cases of adultery and fornication.[5] The literature around illegitimacy and the punishment of illicit sexuality is considerable.[6] As Peter Laslett has stated "illegitimacy has been called a social problem for the last two centuries and a moral problem from time immemorial."[7] The birth of an illegitimate child is proof of a woman's fall from the moral ideal and a man's failure to do his duty by her. It also highlights that the principle of sexual intercourse as acceptable only as part of marriage was being ignored by sections of the population. Furthermore, it also shows "a breach of the social conventions which supported this rule and by which society regulated population in accordance with the

[4] Peter Spiller, Jeremy Finn and Richard Boast, eds., *A New Zealand Legal History*, 2nd ed. (Wellington: Brookers Ltd., 2001), 96.

[5] Rosalind Mitchison and Leah Leneman, *Sexuality and Social Control, Scotland 1660-1780* (Oxford: Basil Blackwell, 1989), 135-6.

[6] For example Andrew Blaikie, *Illegitimacy, Sex and Society: Northeast Scotland, 1750-1900* (Oxford: Clarendon Press, 1993); Richard Adair, *Courtship, illegitimacy and marriage in early modern England* (Manchester: Manchester University Press, 1996); Peter Laslett, Karla Oosterveen and Richard M. Smith, ed., *Bastardy and its Comparative History* (London: Edward Arnold, 1980); Mitchison and Leneman, *Sexuality and Social Control*; Leah Leneman and RosalindMitchison, *Sin in the City: Sexuality and Social Control in Urban Scotland 1660-1780* (Edinburgh: Scottish Cultural Press, 1998); Rosalind Mitchison and Leah Leneman, *Girls in Trouble: Sexuality and Social Control in Rural Scotland 1660-1780* (Edinburgh: Scottish Cultural Press, 1998).

[7] Peter Laslett, "Introduction: comparing illegitimacy over time and between cultures," in *Bastardy and its Comparative History*, ed. Peter Laslett, Karla Oosterveen and Richard M. Smith (London: Edward Arnold, 1980), 1.

economic openings, so that marriage … was restricted to those who could expect to support a family in an accepted way."[8]

The surviving kirk session minutes record 27 cases of fornication and one case of adultery that were addressed by the Sessions, for which the main evidence would have been the birth of an illegitimate child. In addition to these, Burns' Visitations act as a census of the settlement and he records illegitimate children. These sources provide evidence showing that the structure of society based on young married couples and families as espoused in the Wakefieldian scheme did not keep out the 'evils' of other colonies. Even amongst the earliest settlers, there was evidence of fornication as one shipboard diary records the birth of an illegitimate child on board the *Mariner* during its first voyage to Otago in 1849.[9]

For the sin of fornication, the ordinance of baptism would often be withheld until the session was satisfied that the parent applying for baptism was willing to show penitence, amend their ways in future, and join or be readmitted to the church. The process sometimes took a number of months, if not more than a year, from application to baptism. In some cases, both parties could be punished by the withholding of the Lord's Supper, even when one party was a member of a different congregation. In 1852, one unmarried woman confessed herself as guilty of fornication and that the father of her child, a former resident of Dunedin, had recently gone to Sydney. At the time the case was considered, the session instructed the clerk to transmit a copy of the minutes of the case to the Reverend Alex Salmond, Minister of the Free Church of

[8] Mitchison and Leneman, *Sexuality and Social Control*, 1.

[9] Diary of Andrew Boyes on board *Mariner*, 6 May 1849, C185, Otago Settlers Museum Archives, Dunedin.

Scotland in Sydney, "to be by him communicated to his Kirk session or to the Kirk session of any other congregation in that Colony where it may be known that [the man concerned] is asking for Church privileges."[10] Despite the time and effort put in by the Minister and Elders in dealing with cases, there were instances when applicants were unable to satisfy the Minister of their reformation. An examination of the kirk session minutes suggests that the church was most concerned with the sexual morality of unmarried members of the congregation. This is evident from the amount of time and communication that was put towards cases of fornication, as opposed to ante-nuptial fornication. It appears that there may have been an acceptance that young couples may have engaged in pre-marital sex, but so long as they were married and repented of the sin, punishments meted out were not severe. The church was not welcoming to people of 'loose' sexual morals, who were not willing to repent and change their conduct in future. As a result, the members of the kirk session would spend considerable time in determining the true repentance of applicants to the church who had been guilty of fornication.

Of the 27 fornication cases the majority relate to unmarried women, with only one involving a widow. Unlike ante-nuptial fornication, where both partners would be subject to rebuke, in instances of fornication it was generally the woman who faced punishment by the church. The church had dealings with the men in only five of the 27 cases, mostly because a large number of the cases involved single women who gave birth to illegitimate children while on the voyage to Otago or shortly after arrival, or whose partners had left Otago. Of the five cases, only two involved both partners coming forward together seeking baptism for their illegitimate

[10] First Church Minutes of Session, Vol 1, 26 April 1849 – 21 September, 1879, 13 August 1852, Presbyterian Church of Aotearoa New Zealand Archives, Dunedin.

children.[11] In the remaining cases, the male partner was rebuked after being identified as the father of an illegitimate child or "the partner in sin," although one of the men confessed himself guilty of fornication, but denied being the father.[12] One of these men confessed his guilt to the Moderator but failed to appear before the Session when summoned on three separate occasions, resulting in a further censoring ten years later when he applied for membership of the church.[13] This suggests that, in the eyes of the church, fornication was sufficiently serious to merit follow up over a number of years or considerable distance, as in the case of the man who went to Sydney.

The majority of the women who were rebuked for fornication went on to marry within the community. Of the remaining women there is no record of marriages for 11 of them, although two of those were known to have left Otago, and another one is identified in Burns' visitations of 1856 and 1858 as being married.[14] For some of these women Burns' visitations provide evidence that their illegitimate children became part of their new families. For example, in April 1853 Jessie Robertson, aged 20, married widower David Hutcheson, at her father's home in Dunedin. The previous year Jessie had given birth to a son, William Henry, whose acknowledged father, William Elliot, was residing in Sydney. In the visitations of 1854, 1855 and 1856, the family is shown as living together in North East Valley. Likewise, Sarah Fleming, who gave birth to a daughter in January 1854, shortly after arriving in Otago, is shown

[11] Palmerston Presbyterian Church Minutes of Session, 8 December 1864, Presbyterian Church of Aotearoa New Zealand Archives, Dunedin; First Church Minutes of Session, 4 April 1864.

[12] Tokomairiro Presbyterian Church Minutes of Session, 14 July, 1865, Presbyterian Church of Aotearoa New Zealand Archives, Dunedin ; East Taieri Presbyterian Church Minutes of Session, 16 April 1861, Presbyterian Church of Aotearoa New Zealand Archives, Dunedin.

[13] First Church Minutes of Session, 22 October, 1855; East Taieri Presbyterian Church Minutes of Session, 19 November 1855, 3 December 1855, 7 December 1855, 9 December 1855, 15 October 1865.

[14] Visitations of Reverend Thomas Burns 1848-1858, November 1856, November 1858, Presbyterian Church of Aotearoa New Zealand Archives, Dunedin.

in 1858 as having married and living with her husband and illegitimate daughter who had been boarded out with another family in the visitations of 1855 and 1856.[15] For other women, such as Jessie Peterson and Margaret Shand, their parents accepted the illegitimate child into their families. Jessie's son Cornelius Henry Todd, born in 1855, is listed as part of his maternal grandmother's household in the visitations of 1856 and 1858.[16] Similarly, Margaret's daughter Jane, born on board *The Maori* during the voyage to Otago in 1852, is listed as part of her grandfather's household in the visitation of 1852.[17] In one later case the church made it a requirement of baptism that the child was brought up by the maternal grandparents, perhaps because the grandfather, Robert Duckworth, had applied for baptism on behalf of his daughter, Margaret, and made the promise to "bring the child up as one of his own".[18] For some unspecified reason this case was referred to the presbytery for advice, which is unusual for a case of fornication. There is no record of the advice provided by the presbytery, who referred the case back to the session.[19] Although outside the timeframe of this study, this case came to light because two of Margaret's older sisters were guilty of ante-nuptial fornication ten years previously, which may be why the case was referred to the presbytery.

The surviving evidence for Otago shows that the discipline handed out by the kirk sessions of the colony was no more successful in deterring cases of fornication than the church in Scotland had been, in spite of the steps taken by the kirk sessions.[20] Indeed a considerable number of discipline cases had occurred after a single woman had been pregnant on leaving Scotland.

[15] Ibid., November 1858.
[16] Ibid., November 1856 & November 1858.
[17] Ibid., 23 December 1852.
[18] Andersons Bay Presbyterian Church Minutes of Session, 2 June 1868, Presbyterian Church of Aotearoa New Zealand Archives, Dunedin.
[19] Ibid., 21 August 1867 & 18 September 1867.
[20] Blaikie, *Illegitimacy, Sex and Society*, 185.

Despite the strictness with which cases were punished, there did not appear to be a lingering social stigma attached to women who had borne illegitimate children, as they often married within the community and their children were accepted as part of their new families. Women who lacked a family support network to help raise their children often boarded them out with other families while they worked as domestic servants. This suggests a very practical approach by families and neighbours to the realities of the lives of single women within the settler community, irrespective of the teachings of the church. However, not all women may have felt part of these networks, which may in part explain instances of infanticide in Otago.

Infanticide

Infanticide was a crime which undermined the perception of motherhood as idealised by the Victorians. How could a woman murder a vulnerable child, especially if that woman was the child's own mother? Recent scholarship has done much to examine the social, economic and legal reasons behind, and reactions to, occurrences of infanticide in early modern western cultures with some prominence given to the moral panic surrounding baby farming in the second half of the nineteenth century.[21] The topic has not been overlooked by New Zealand historians looking at sex, crime and gender, although here too baby farming and specifically

[21] For example see Peter C. Hoffer and N.E.H. Hull, *Murdering Mothers: Infanticide in England and new England 1558-1803* (New York: New York University Press, 1981); Lionel Rose, *Massacre of the Innocents: Infanticide in Great Britain 1800-1939* (London: Routledge & Kegan Paul, 1986); Jackson, *New-born Child Murder*; Deborah Symonds, *Weep Not for Me: Women, Ballads, and Infanticide in Early Modern Scotland* (University Park: University of Pennsylvania, 1997); Anne-Marie Kilday, "Maternal Monsters: Murdering Mothers in South West Scotland, 1750-1815," in *Twisted Sisters: Women, Crime and Deviance in Scotland since 1400*, ed. Yvonne Galloway-Brown and Rona Ferguson (East Linton, Scotland: Tuckwell Press, 2002), 156-179; Mark Jackson, ed., *Infanticide: Historical Perspectives on Child Murder and Concealment, 1550-2000* (Aldershot: Ashgate, 2002); Hilary Marland, *Dangerous Motherhood: Insanity and Childbirth in Victorian Britain* (Basingstoke, England: Palgrave Macmillian, 2004); Anne-Marie Kilday and Katherine D. Watson, "Infanticide, Religion and Community in the British Isles: 1720-1920: Introduction," *Family & Community History* 11 no. 2 (2008); Anne-Marie Kilday, ""Monsters of the Vilest Kind": Infanticidal Women and Attitudes to Their Criminality in Eighteenth-Century Scotland," *Family & Community History* 11, no. 2 (2008): 100-115.

the case of Minnie Dean overshadows other women's actions.[22] Bronwyn Dalley's chapter in *The Gendered Kiwi* examines two high profile cases from the 1880s and 1890s in light of contemporary perceptions of morality, sexuality and social dangers. Alison Clarke has examined instances of infanticide in nineteenth century New Zealand in her recent book on childbirth.[23] Considerable work on infanticide in Otago between 1850 and 1900 has also been undertaken by Fabia Fox in her undergraduate dissertation.[24] These authors have shown that the situation in New Zealand reflected what was happening in Britain at the same time, in that unmarried mothers were perceived as sexually and morally dangerous, medical evidence was used primarily to determine whether a child had been born alive, juries were not happy to convict in cases of infanticide, and there was an understanding of the economic reasons why some mothers would commit infanticide. Fox has suggested that any differences were due to the colonial nature of the settlement and the immigrant status of many of the women.[25]

Infanticide can be defined as causing the wilful death of a child immediately after or within a few days of birth, usually by the mother.[26] Throughout the early modern period this crime was closely associated with women and more specifically with unmarried women.[27] In England it was a capital crime until 1803, with the burden of proof of innocence resting with the mother,

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[22] Bronwyn Dalley, "Criminal Conversations: Infanticide, Gender and Sexuality in Nineteenth-Century New Zealand," in *The Gendered Kiwi*, ed. Caroline Daley and Deborah Montgomerie (Auckland: Auckland University Press, 1999), 68; Lynley Hood, *Minnie Dean: Her Life and Crimes* (Auckland: Penguin Books, 1994).

[23] Alison Clarke, *Born to a Changing World: Childbirth in Nineteenth-Century New Zealand* (Wellington: Bridget Williams Books, 2012), Chapter 8.

[24] Fabia Fox, "'Murder to Conceal Her Sin': Infanticide in Otago, 1850-1899" (BA diss., University of Otago, 2010).

[25] Ibid., 39.

[26] Tony Ward, "The Sad Subject of Infanticide: Law, Medicine and Child Murder," *Social and Legal Studies* 8, no. 2 (June 1999): 164.

[27] J.R. Dickinson and J.A. Sharpe, "Infanticide in early modern England: The Court of Great Sessions at Chester, 1650-1800," in *Infanticide: Historical Perspectives on Child Murder and Concealment, 1550-2000*, ed. Mark Jackson (Aldershot: Ashgate, 2002), 35-6.

as opposed to the need for the state to prove guilt.[28] Another unusual feature was the focus on illegitimate children - it was felt that legitimate babies were not at risk.[29] In Scotland the law stretched to include the concealment of a pregnancy, even in cases where a body was not found but a birth was suspected.[30] Unmarried mothers and their illegitimate children were in a precarious position during the nineteenth century particularly because of the very real sense of shame attached to illegitimacy.[31] Kirsten Kramar has argued that infanticide was arguably consistent with broader morality, since the women killed their babies "to hide the shame of their ex-nuptial sexual activity and to protect the infant from living a life stigmatized by illegitimacy."[32] In relation to this it is likely the strict disciplinary actions of the kirk against illicit sexual activity had some effect on the perceptions of young women brought up within the influence of the church. Although it is impossible to make any definitive statements, it could be suggested that, to some women at least, concealment and infanticide were lesser sins than being found to have engaged in illicit sexual activity.

The economic situation of women has a part to play in explaining why women may have felt driven to conceal their pregnancies and/or murder their babies. During the nineteenth century women's wages were considerably lower than men's. This was in part due to the assumption that women's sphere was the home, not the workplace. Until their marriage, they were part of their father's household, after which they were part of their husband's. Therefore, so it may

[28] Carol Smart, "Disruptive bodies and unruly sex: The regulation of reproduction and sexuality in the nineteenth century," in *Regulating Womanhood: Historical essays on marriage motherhood and sexuality*, ed. Carol Smart (London: Routledge, 1992), 16.

[29] Rose, *Massacre of the Innocents*, 1-2.

[30] Ibid., 2.

[31] Kirsten Johnson Kramar, *Unwilling Mothers, Unwanted Babies: Infanticide in Canada* (Vancouver: University of British Columbia Press, 2005), 7.

[32] Ibid., 7.

be reasoned, they would have no need to support themselves. Unfortunately, the realities of existence, both in Britain and its colonies, meant that a large number of women had to go out to work. For example, analysis of the 1851 Census of England and Wales has shown that in that year just under half of all women aged over 10 were in paid employment.[33] Furthermore, there were more women than men, and with men marrying later or not at all, the marriage prospects for a large proportion of the female population were poor, with 41% in England and 48% in Scotland between the ages of 20 and 40 being spinsters.[34] Thus, in Britain, the economic realities required a large number of women to support themselves on wages that were barely above starvation levels. Anything that would increase this burden or which made them unable to work often made their situation desperate. Added to this in England the Poor Law reforms of 1834 and 1844 made it virtually impossible for unmarried mothers to either get financial assistance from the state or to ensure maintenance from the fathers, meant some women resorted to killing or abandoning their babies.

This complex web of social, legal and economic factors which developed in Britain up to the nineteenth century heavily influenced the way infanticide was perceived in Otago as the majority of the settlers came from Britain, bringing their laws, beliefs and prejudices with them. Concern regarding the rates of infanticide in Britain was building during the 1850s and 1860s, and the discussions were followed by the press in New Zealand, often reprinted in full sensationalist detail.[35] However, there is a considerable difference between the newspaper reports of the cases from Britain, which included full histories of the individuals involved and

[33] Rose, *Massacre of the Innocents*, 15.
[34] Ibid., 17.
[35] *Otago Daily Times*, 8 March 1862; *Otago Daily Times*, 25 November 1862; *Otago Witness*, 18 April 1863; *Otago Witness*, 28 January 1865.

details of the crimes, and the coverage of the few local cases, which were often limited to names of the women involved and a few basic details of the crime. It was more usual for the papers to report details from inquests on babies who had been found dead.

In addition to the three cases for infanticide or concealment of birth for Otago, there were several inquests into the deaths of babies following the discovery of their bodies or their deaths shortly after birth. Often, in instances where a body was discovered, it was impossible to trace the mother, so the inquests resulted in an open verdict and no further action could be taken against the mother for either concealment or infanticide. As with most infanticide and concealment cases in Britain, in almost all instances where a baby died in suspicious circumstances in Otago, the mother was unmarried.

The first case of infanticide in Otago occurred in September 1863 when the badly decomposed body of a baby was found in the Church of England cemetery in Dunedin.[36] The body had been wrapped in a petticoat and left between two graves about three feet from the path that divided the English part from the Scottish part of the cemetery. During the inquest, the surgeon who examined the body stated that the baby had not been born alive and was probably not more than six months gestation.[37] From the way that the mother left the body in a public place wrapped in a petticoat, it appears that she was anxious to keep both her pregnancy and the death of the child secret, even though the body was left somewhere where it would be discovered. In this case it is the concealment of the pregnancy that makes her actions a criminal

[36] *Otago Witness*, 2 October 1863; *Otago Daily Times*, 30 September 1863.
[37] *Otago Witness*, 2 October 1863; *Otago Daily Times*, 30 September 1863.

offence. However, with no identifying items left with the body, the authorities could do nothing to punish the mother.

Unfortunately, the second case, dating from January 1864, also provides very little information regarding the situation of the mother, although her identity is known. The entry in the Tuapeka Police Diaries for 3 January 1864 reads:

> Sergeant Thompson on today apprehended a woman named Mary Ann Mahony charged on suspicion of having on the night of the 1st January murdered her female illegitimate child aged about 14 days.[38]

There is no evidence to show that this case made it to trial.

The third case from 1865 was ignored by the Grand Jury when it came to trial in September of that year. Catherine Lyons had been living in Central with her brother for about six months prior to being arrested on suspicion of having concealed the birth of a child. In this case there was no evidence of a baby, no body having been found, but medical evidence suggested the birth of a child, although it was not clear if it had been full term.[39] Witnesses, including friends and neighbours all felt that she was pregnant, although her brother did not agree. According to one witness, she had admitted to being pregnant but was afraid that her brother would turn her out. The putative father was a man on the West Coast, previously of the district, who had written to her including offers of marriage. However, according to witnesses, she did not intend to keep the baby. Her defence was that she had only been in the district for five months

[38] Tuapeka Police Diaries 25 April 1863 – 24 January 1864, 3 January 1864, DAKT D390/Box 1, Archives New Zealand, Dunedin.

[39] Resident Magistrates' Court DAAC/D256/253, Trial 21, Catherine Lyons, 1865, Archives New Zealand, Dunedin.

and three weeks and it was impossible for her to have been guilty in such a short time.[40] This case highlights the role that gossip, rumour and the community could have in questioning a woman's character and making her sexual behaviour a matter of public discussion, even without any noticeable physical evidence of pregnancy.

That infanticide was predominantly a female crime is clearly illustrated in the case of Margaret McPherson, who was charged with concealing the birth of her child at the end of March 1865. Of the five cases under consideration, this is the only one with a considerable amount of surviving evidence. McPherson, aged 24, had been a passenger on board the *St Vincent* which arrived in Dunedin from Glasgow on 24th March 1865. Sometime that night McPherson gave birth to a child in the Immigration Depot, assisted by one of her fellow passengers, Mary Scott, who was subsequently charged with aiding and abetting the concealment. There was no evidence to show that the baby had been born alive. It is unclear who gave information about the concealment to the police, although it may have been another fellow passenger, Mary Macgregor, who was the primary witness having provided some assistance to McPherson and Scott during the night and upon their departure from the Depot in the morning. The evidence provided by Macgregor at the trial suggests that she was as involved in the concealment as the two prisoners, even suggesting that they dispose of the body somewhere on their journey after leaving the depot.[41] McPherson's immigrant status within the community is clear and her support network was limited to the two women who assisted her during the night. Between them the women agreed not to seek medical assistance, although they had discussed it. McPherson claimed at her trial that she had been seen by the doctor on board the *St Vincent*,

[40] Ibid.
[41] *Otago Daily Times*, 3 April 1865; *Otago Witness*, 8 April, 1865.

but he had not told her she was pregnant and she, herself, had not been aware of the fact.[42] There was considerable public interest at the initial trial in the Resident Magistrates' Court with "the Court was densely crowded during the day."[43] Mr Justice Richmond,

> …warned the jury against undue sympathy with the prisoners. He had some doubt, at first, whether the charge of concealment of birth could be sustained, seeing that the occurrence took place in what might be called a public dormitory. But there seemed to have been no communication to any person as to what was going on, except to Mary M'Gregor; and if the jury believed that that communication was intended as a means towards keeping from the world at large a knowledge of the birth, then it would be quite competent for the jury to convict the prisoners.[44]

An examination of the wording of this speech suggests that the Judge himself had doubts about the charge and was willing to voice them to the jury. Ironically, three months later, the same Judge presided over the case against Catherine Lyons for concealment, which was "ignored" by the Grand Jury.[45] In his opening remarks to the jury, Mr Justice Richmond stated that concealment was not a grave crime, classing it alongside larceny, burglary and making a false declaration under the Marriage Act.[46] In this it is not clear if he was reflecting his own views or those of the wider community, but such statements would have been pounced on by contemporaries in Britain, who were in the midst of a public-outcry over the instances of infanticide and the weakness of the law against the crime.[47] One writer claimed "It has been said of the police, with too much truth, that they think no more of finding the dead body of a child in the street than of picking up a dead cat or dog."[48] Justice Richmond's comments about

[42] *Otago Daily Times*, 3 April 1865.
[43] Ibid., 3 April 1865.
[44] *Otago Witness*, 10 June 1865.
[45] *Otago Daily Times*, 2 September 1865.
[46] Ibid., 9 September 1865.
[47] Hilary Marland, "Getting away with murder? Puerperal insanity, infanticide and the defence plea,'' in *Infanticide: Historical Perspectives on Child Murder and Concealment 1550-2000*, ed. Mark Jackson (Aldershot: Ashgate Publishing Ltd., 2002), 169-170.
[48] Mrs Baines, *Journal of Social Science*, 1866, quoted in Marland, "Getting away with murder?" 169.

the severity of concealment as a crime appear do mirror the supposed attitude of the police in Britain at the same time.

The last case occurred in October 1865 when a coroner's inquest was held after a baby was found dead the morning after it had been born.[49] Medical evidence, presented at the inquest, suggested that it had been born alive. The details from the newspaper report are limited to the fact of an adjournment to allow the mother time to recover, showing that the identity of the mother was known. The report of the inquest shows that the jury was happy to accept the suggestion that the mother was unconscious following the birth and that there was no doctor or midwife in attendance.[50] With the lack of medical evidence to show how or by what means the baby had died, the jury could acquit the mother of any wrong doing, reflecting the humanitarian approach to coroners' inquests into suspicious infant deaths that developed in response to the harsh laws against infanticide.[51]

In addition to these cases of concealment or infanticide, there are several other instances which show the community's awareness of infanticide occurring or having been committed. The earliest reference to suspected infanticide in Otago dates from August 1852 when an inquest was held following the death of a six month old baby.[52] The mother had died in childbirth and the child had been placed out to nurse with Mrs McPhee, a widow who had a slightly older baby of her own. According to the newspaper report of the inquest, there was a rumour that

[49] *Otago Witness*, 6 October 1865; *Otago Daily Times*, 4 October 1865.
[50] *Otago Police Gazette*, November 1861-January 1868, 1 November 1865.
[51] Jackson, *New-Born Child Murder*, 15.
[52] *Otago Witness*, 14 August 1852.

the fostered child had "not met with its death from natural causes".[53] It is unclear as to why such a rumour had begun or what the basis for it was. It could have been connected to the view that Mrs McPhee was, at this time, not a wholly respectable figure, as her own child had been born out of wedlock. As such it is possible that she was an 'easy' target for slander that questioned her moral standards, with the death of the child under her care providing an opportunity for elements of the community to further attack her character. However, the medical evidence provided at the inquest proved that the child had died of "morasma", or severe protein deficiency.[54] Furthermore, the witnesses at the inquest who appeared in support of Mrs McPhee were her neighbours, all women, which suggests that other women in the community came together to support her against the suggestion that she had harmed the child.

The stigma which could be attached to a married woman being charged with infanticide can be inferred from the findings of an inquest into the death of an infant in August 1863. The newspaper coverage of the inquest was typically succinct:

> An inquest was held before Dr Samuels, Coroner of Gold Fields, on Friday, the 14th inst., at the Bridge Inn Hotel, Waitahuna, on the body of an infant daughter of Mr H. Ditart, who was born under somewhat peculiar circumstances on the 14th inst. After hearing the evidence of Mrs Woual, Mrs Hickie, Dr Nahey and Mr Ditart, the father of the deceased infant, the following verdict was returned by the jury:- "That the infant was still-born;" and a rider was added exonerating any person from blame in the matter.[55]

This report leaves much unsaid, but the words "born under somewhat peculiar circumstances" were used in other newspaper reports of inquests into the deaths of infants at or shortly after birth where infanticide was strongly suspected.[56] It is possible that the coroner and the jury

[53] Ibid.
[54] Ibid.
[55] *Otago Daily Times*, 26 August 1863.
[56] For example *Otago Witness*, 6 October 1865.

were sufficiently uncomfortable with a charge of infanticide against a married woman that they were willing to be persuaded by the witnesses that the child was stillborn. This reflects the findings of juries in Britain at the time that were shying away from convictions for infanticide.[57] This case may also reflect an increased medicalisation of the crime of infanticide which was occurring from the middle of the nineteenth century with the introduction of the plea puerperal insanity.[58]

In her work on the use of puerperal insanity as a defence plea, Hilary Marland has found a number of nineteenth century surveys that suggested that about ten per cent of women in lunatic asylums had been admitted for some form of puerperal insanity.[59] Likewise, Clarke has suggested a figure of about eight per cent of women admitted to asylums in the 1880s and 1890s in New Zealand.[60] Although the records for the Dunedin Lunatic Asylum and Seacliff Asylum are not complete for this period, it is possible to identify a number of women who were admitted for "puerperal mania" from 1864, including several who were admitted on a number of occasions.[61] This illustrates awareness within the community of the difficulties faced by some women as a result of childbearing, including on their mental state, irrespective of their marital status and economic situation.

With the limited number of cases to examine and the even more limited amount of information available about the situations of the women involved, it is impossible to make any comments

[57] Marland, "Getting away with murder?" 170.
[58] Ibid., 173.
[59] Ibid., 175, n. 27.
[60] Clarke, *Born in a Changing World*, 208.
[61] Seacliff Asylum – Admission Register 1863-1893, DAHI 19990 D264 100/1, Archives New Zealand, Dunedin.

with regard to the role of either church or state in deterring the crimes of infanticide and concealment. During the period under investigation there is only one criminal conviction. This low rate of conviction reflects the findings of Fox's work on Otago– out of the 68 cases that she identified between 1850 and 1900 only 15 convictions for concealment resulted, and Clarke's study of New Zealand – out of 98 cases between 1861 and 1899 only one resulted in a murder conviction.[62]

The economic realities were recognised by the authorities in Otago:

> The prospect of want, or the actual pressure of circumstances, leads numbers so situated to rush into crime rather than to endure privation; and the offence will take form and shape according to the education, and associations, and status of the offender.[63]

In 1846 the colonial government introduced the Destitute Persons' Act to provide support for destitute families and illegitimate children.[64] However, this Act did not provide any form of state or parish relief as the onus for support was put on members of the extended family within the colony and the putative father of any illegitimate children. Therefore, unmarried women without family or partners had no source of support within the settlement, forcing them to be self-sufficient in order to survive. Following the gold rush and the sudden considerable increase in the population in Otago, the need to provide relief was recognised. In 1862 the Dunedin Benevolent Institute was opened to provide housing to destitute members of the community, including "no fewer than 10 children being boarded out".[65] By the end of its third

[62] Fox, "Murder to conceal her sin," 36; Clarke, *Born to a Changing World*, 231-2.
[63] *Otago Witness*, 3 June 1865.
[64] 10 Vict. No. 9.
[65] J. A. Torrance, "Public Institutions," in *Picturesque Dunedin: or Dunedin and Its Neighbourhood in 1890*, New Zealand Text Collection (Dunedin: Mills, Dick and Co, 1890), 187-192, http://www.nzetc.org/tm/scholarly/tei-BatPict-t1-body1-d9-d1.html.

year of operation the Institute supported 592 individuals, 27 men, 133 women and 432 children, mostly from families affected by illness or death.[66]

The small number of cases highlights that the cases of infanticide and concealment of birth which did result in prosecutions were possibly only a small proportion of the total number that occurred.[67] The cases in Otago are important for being indicative of the generally sympathetic way the courts and community perceived these women, and what steps, if any, the wider community was willing to take to punish them. The moral panics associated with infanticide and baby farming which were prevalent in Britain during this period were not mirrored in newspaper coverage of the few cases of infanticide that came to light within the settlement. It appears that the social stigma attached to unmarried pregnancy and motherhood as well as a certain amount of social isolation and the economic situation of many single women had a greater impact on their thoughts and actions than the legal deterrents against infanticide.

Conclusion

There appears to have been considerable difference in the approaches taken by the kirk sessions, the secular courts and the wider community to the punishment of the outcomes of illicit sexual activity. The kirk sessions were diligent in following up on cases of fornication that resulted in an illegitimate birth, using well established networks of communication between the various presbyteries and parishes, even over considerable distances and the passage of time. The withholding of baptism, the most important sacrament in the Presbyterian Church, was a means of securing repentance from members of the church for whom baptism

[66] Ibid., 191.
[67] Dickinson and Sharpe, "Infanticide in early modern England," 43.

of their children held considerable meaning. The courts, on the other hand, although enforcing strict laws could show a certain amount of sympathy or compassion towards infanticidal mothers through the interpretation of evidence made by the juries or the directions provided by the judges.

The cases of illegitimate births within Otago show that the unmarried mothers were rarely stigmatised by the wider community, despite a number of them facing punishment by the kirk sessions. The majority of women who had been disciplined did go on to marry within the community and their illegitimate children were accepted by their husbands. Others were able to rely on their families or neighbours to provide child care whilst they worked to support their child. It is probably an important factor that many of these women were working class, and were supported by other working class families. However, there was a middle-class stigma attached to unmarried motherhood, which some women would have been aware of within their communities or families in Britain and which they brought with them as part of their cultural baggage. Such a stigma as well as economic considerations, a sense of social isolation, and more recently recognised mental stresses associated with childbirth may have led some unmarried mothers to commit infanticide. The moral panics over the rate of illegitimacy and suspected wide spread infanticide, which occurred in Britain during the middle of the nineteenth century do not appear to have of concern to the settlers of Otago.

Chapter 6

Unnatural Vices – Sodomy and Bestiality

The acts of sodomy and bestiality were completely outside the remit of the kirk authorities to regulate. Both were classified as criminal behaviour under common law and, as such, fell under the jurisdiction of the secular authorities. However, they were also prohibited by the Bible and were considered to be amongst the worst of sins. These "sins" are the focus of this chapter precisely because they provide examples of the kinds of activities that the founders of the Otago settlement were hoping to exclude in the new settlement, both in the sense that they were the types of "evils" that could be found in the worst of the old world as well as older colonial settlements, and because they did nothing to contribute to the success of the colony in light of the principles on which it was founded.[1]

Sodomy and bestiality were perceived as 'unnatural' acts in that they were alleged to go against the laws of nature – sex being an act between a man and a woman to ensure the procreation of children. As Mark Jordan has shown, the definition of sodomy throughout the medieval and early modern period was not fixed.[2] This lack of clarity in what has been meant by the term historically, has not been helped by sodomy being referred to as the crime "that cannot be

[1] Netta Murray Goldsmith, *The Worst of Crimes: Homosexuality and the Law in Eighteenth Century London* (Aldershot: Ashgate Pub. Ltd., 1998), 9; Stevan Eldred-Grigg, *Pleasures of the Flesh: Sex and Drugs in Colonial New Zealand 1840-1915* (Wellington: A. H. and A. W. Reed Ltd., 1984), 49.

[2] Mark Jordan, *The Invention of Sodomy in Christian Theology* (Chicago: University of Chicago Press, 1997); H. G. Cocks, *Nameless Offences: Homosexual Desire in the Nineteenth Century* (London and New York: I. B. Tauris Publishers, 2003), 17.

mentioned." This has resulted in the term being used to describe a number of different activities. Sodomy is generally accepted to refer to a range of activities which have included masturbation, sex between men or between women, between a person and an animal, or between a man and woman in such a way that conception was impossible.[3] As such the term sodomy could include almost all non-procreative sex, but its accepted definition tends to be much narrower. Sodomy is used within this thesis to denote specifically the act of anal sex between men. Other forms of sexual activity between men were not classified as sodomy in legal terms. Although the term could potentially be used to refer to sexual activity between women, the law was generally ambiguous about the possibility of women engaging in sexual activity together and was not illegal under English law. As a result there were no records found referring to sex between women in early Otago. The English term "buggery" is used interchangeably in the archive sources with both "sodomy" and "bestiality". For the sake of clarity, in this thesis sexual activity involving only men is referred to as "sodomy" and sexual activity involving a man or woman and one or more animals is referred to as "bestiality". The terms "homosexual" and "homosexuality" have deliberately been avoided in connection to the regulation of sexual activity within the colony, as they were not first used until 1869 in German and 1892 in English, and they often refer more to the concept of same-sex relationships and identity than to the sexual act.[4]

[3] Katherine Crawford, *European Sexualities, 1400-1800* (Cambridge: University of Cambridge Press, 2007), 156.

[4] Matt Cook, ed., *A Gay History of Britain: Love and Sex Between Men Since the Middle Ages* (Oxford: Greenwood World Publishing, 2007), 108; Sean Brady, *Masculinity and Male Homosexuality in Britain, 1861-1913* (Basingstoke: Palgrave Macmillan, 2005), 10.

The laws that punished sodomy and bestiality in nineteenth century New Zealand were based on Henry VIII's Act of 1533 which made buggery with man or beast a capital offence:[5]

> Forasmuch as there is not yet sufficient and condign punishment appointed and limited by the due course of the Laws of this Realm for the detestable and abominable Vice of Buggery committed with mankind or beast: It may therefore please the King's Highness with the assent of the Lords Spiritual and the Commons of this present parliament assembled, that it may be enacted by the authority of the same, that the same offence be from henceforth adjudged Felony and that such an order and form of process therein to be used against the offenders as in cases of felony at the Common law. And that the offenders being hereof convict by verdict confession or outlawry shall suffer such pains of death and losses and penalties of their good chattels debts lands tenements and hereditaments as felons do according to the Common Laws of this Realme [sic]. And that no person offending in any such offence shall be admitted to his Clergy, And that Justices of the Peace shall have power and authority within the limits of their commissions and Jurisdictions to hear and determine the said offence, as they do in the cases of other felonies. This Act to endure till the last day of the next Parliament.

Although originally enacted until the end of the next parliament, the law was re-enacted three more times under Henry and then made permanent in 1541. This Act was refined under Edward VI, in 1548, with the slight amendments that lands and goods were not forfeit and the rights of wives and heirs were safeguarded.[6] It was then repealed by Mary, but reinstated again under Elizabeth I in 1562 as it had been in 1533. English law remained in force in New Zealand until the 1867 Offences Against the Person Act, when the death sentence was replaced with life imprisonment for a minimum of ten years for conviction of the act or two years for an attempt.[7] Despite sodomy being a capital crime, there is no evidence that any man was executed in New Zealand under this Act, although a death sentence was given to John Gere in

[5] 25 Hen. 8, c.6; 32 Hen. 8, c. 3.

[6] H. Montgomery Hyde, *The Love That Dared Not Speak Its Name: A Candid History of Homosexuality in Britain* (Boston: Little, Brown, 1970), http://www.fordham.edu/halsall/pwh/englaw.asp.

[7] 2/3 Ed. 6, c.29; 1 Mar. st 1, c. 1, s. 3; 5 Eliz. c. 17; 31 Vict. 5.

1867 when he was found guilty of bestiality. This sentence was later commuted by the Governor to penal servitude for life.[8]

What was the reason for such strict legislation? It has been suggested that the obsession with punishing all forms of sex that were perceived to be against nature and non-procreative that has been found in Western cultures has its foundation in a combination of Greek philosophy and a Jewish fear of Greek thinking that were embraced by early Christians.[9] As a result, Western Christian cultures developed prohibitions against sexual acts between men and between men or women and animals that were articulated in the Bible, not only in Leviticus, but also in the story of Sodom and Gomorrah. The Christian Church constructed an interpretation of the destruction of the cities of Sodom and Gomorrah that did not necessarily reflect the initial meaning behind the story.[10] It has been suggested that the original punishment brought down by God was for the sin of pride, however, early Church Fathers re-interpreted it as part of the incorporation of "Greek concepts about nature and Jewish fears of Greek thought".[11] The result was the creation of a "catch-all category of sin" and widespread condemnation and punishment of sodomy and bestiality throughout Europe.[12]

Despite the prohibition of sex between men and the monitoring of any irregular sexual activity between the sexes, by the early modern era several Western societies, especially England, were structured in such a way as to encourage homo-social groupings, from public schools, through

[8] *Otago Daily Times*, 22 October 1867.
[9] Vern L. Bullough and Bonnie Bullough, *Sin, Sickness and Sanity: A History of Sexual Attitudes* (New York: Garland Publishing Inc., 1977), 10, 16, 20 & 39.
[10] Ibid., 39.
[11] Ibid., 39.
[12] Ibid., 39.

the army and navy, to men's clubs.[13] This led to situations where young men were segregated into single-sex worlds without access to women. It has been suggested that in such circumstances almost all males had sexual relations with other males, based on an age structured system of passive adolescent boys and active older men.[14] Although the evidence for the existence of such a system is limited, it appears to have had tacit approval, even if such approval was only based on 'turning a blind eye'.[15] It should also be noted that the policing of same-sex sexual activity by governments and other authority groups has never been consistent or systematic, despite legislation.[16] In Britain, during the eighteenth and nineteenth centuries, increases in arrests for sodomy seemed to happen "by accident", mostly as a result of changes in policing of ordinary offences,[17] although there were occasions when arrests tended to coincide with moral panics, especially after high profile instances, such as the Boulton and Park trial of 1871. These men had been arrested in April 1870 at the Strand Theatre, London, dressed as women. They were subsequently charged with committing buggery, inducing and inciting others to commit buggery, and outraging public decency and corrupting public morals by appearing in public places disguised as women.[18] Their defence, that they did it for a "lark" was successful in leading to their acquittal. The trial excited considerable public interest and exposed the private lives of several public figures including politicians and peers to intense examination. The wider anxiety about sexual morality that occurred during the latter part of

[13] Goldsmith, *The Worst of Crimes*, 11.

[14] Randolph Trumbach, "The Heterosexual Male in Eighteenth Century London and his Queer Interactions," in *Love, Sex, Intimacy and Friendship Between Men, 1550-1800*, ed. Katherine O'Donnell and Michael O'Rourke (Basingstoke: Palgrave Macmillan, 2003), 100-1.

[15] Ibid., 101-3.

[16] Cook, *A Gay History of Britain*, xii.

[17] H. G. Cocks, "Secrets, Crimes and Diseases, 1800-1914," in *A Gay History of Britain: Love and Sex Between Men Since the Middle Ages*, ed. Matt Cook (Oxford: Greenwood World Publishing, 2007), 110.

[18] Neil McKenna, *Fanny and Stella: The Young Men who Shocked Victorian England* (London: Faber and Faber, 2013), 35.

the nineteenth century resulted in the introduction in 1885 of the Labouchere Amendment that prohibited the majority, if not all sexual acts between men.

Sexual encounters with animals appear to have been prevalent in rural agricultural settings at various times in Western history.[19] According to Rydström sexuality in rural, predominantly agricultural regions encompasses a more diverse set of factors when compared to urban sexuality.[20] Firstly, people had a greater familiarity with a range of animals than in urban settings. Secondly, the division of labour generally meant that children were given responsibility for tending farm animals.[21] Liliequist argues that bestiality was one form of sexual relief that post-pubescent boys practised specifically in agricultural areas.[22] However, pre-pubescent boys have also been found to be having sex with animals, suggesting that other factors were at work. Evidence from Swedish bestiality trials of the seventeenth and eighteenth centuries implies that young boys often learned about bestiality from older boys.[23] It has been argued then that bestiality formed part of the sexual education and experiences of boys in agricultural areas of Europe, as much as it was a form of sexual relief for older youths and possibly older men.

Although bestiality was punished alongside sodomy under legislation, and both were mentioned in the same context in the Bible, few scholars have examined these two activities

[19] Jens Rydström, *Sinners and Citizens: Bestiality and Homosexuality in Sweden 1880-1950* (Chicago: University of Chicago Press, 2003), 7-8.

[20] Ibid., 7.

[21] Jonas Liliequist, "Peasants Against Nature: Crossing the Boundaries between Man and Animal in Seventeenth and Eighteenth Century Sweden," *Journal of the History of Sexuality* 1, no. 3 (1991): 413.

[22] Ibid.," 412.

[23] Ibid.," 413-4.

together.[24] It may be possible to suggest that a similarity between sodomy and bestiality could be constructed if both activities are looked at in the light of what was considered the sexual 'norm' in ancient Athenian society. The concept that adult male citizens of Athens could, and were expected to penetrate social inferiors, which could include women, boys, foreigners and slaves.[25] As Rupp states, this privilege of "elite men to penetrate anyone other than their equals lingered on into early modern Europe."[26] It would not be difficult to suggest, then, that a man who penetrates an animal, his social and natural inferior, is continuing a sexual tradition that had its origin in classical antiquity. The difference between whom or what is penetrated may have been due to availability of sexual partners, age and/or sexual experience.

The concept of penetration is also important because the majority of European laws against sodomy and bestiality did not include women. There were exceptions to this, such as Sweden where a "handful" of women were prosecuted under the law.[27] However, to many in positions of authority, both religious and secular, a sexual act required a penis.[28]

In this chapter court cases that involved sodomy or bestiality are examined against trends found in other parts of Western culture at the same time. The relative involvement of the local kirk, the secular judiciary and the role of the wider community in punishing these activities is examined in light of the roles that they play in regulating the sexual activities of members of the community. It may be expected that as these activities could be perceived as fostering

[24] Rydström, *Sinners and Citizens*, 7-8 & 30.
[25] Leila J. Rupp, "Towards a Global History of Same-Sex Sexuality," *Journal of the History of Sexuality* 10, no. 2 (April 2001): 288.
[26] Ibid., 289.
[27] Rydström, *Sinners and Citizens*, 3.
[28] Rupp, "Towards a Global History of Same-Sex Sexuality," 297.

disorderly behaviour and actively undermining the morals of the community, the kirk and members of the community would be very active in their punishment. However, the evidence suggests that there was no one overriding attitude of condemnation towards men who had sex with other men or with animals.

Sodomy

> Go! I shall waste no words upon you. You are sentenced to be imprisoned, and kept to hard labour for the term of two years. I trust that the gaoler will use every means within his power to prevent your associating with the other criminals under his charge. I do also trust that the authorities of this place will take such steps as shall prevent this man, who is a disgrace to humanity, from walking about the town and becoming the talk of children of the rising generation who should not, if possible, know that such abominations are possible.[29]

For Judge Johnston to express such sentiments so vehemently, he must have not only held very strong views about sodomy personally, but have been confident that such views were shared by the gentlemen of the jury and the wider community. Although this sentence was passed in Nelson in 1863, it seems reasonably safe to suggest that the colonial elite of New Zealand would have been comfortable with the stand that Judge Johnston had taken, and the appropriateness of the sentence. The view that such a crime should be nameless and that the young should be protected from the knowledge of its existence was "deeply embedded in English legal and cultural tradition and could be traced all the way back to St. Paul."[30] The legal fraternity of colonial New Zealand continued this tradition.

Much of the scholarly work on same-sex activities in nineteenth century New Zealand has focused on the cases of missionaries such as William Yate, a Church Missionary Society

[29] Judge Alexander James Johnston, Nelson Supreme Court, *R v. Edward Wilson* 16 January 1863, *Nelson Examiner and New Zealand Chronicle*, 17 January 1863, 3.

[30] Cocks, "Secrets, Crimes and Diseases," 113.

missionary stationed in the Bay of Islands between 1828 and 1834, and novelist Samuel Butler (1835-1902) of Christchurch.[31] There has also been a focus on the emergence of a homosexual culture in New Zealand, with Chris Brickell's work on male same-sex relations opening the doors to a wealth of sources and evidence previously overlooked or underutilised, including the visual and the re-reading of court records.[32] However, there has been a tendency to look for the homosexual or for an embryonic homosexual culture, thereby overlooking individual instances of sodomitic activity between men who were not necessarily sexually attracted to other men and would not have considered themselves as 'homosexual', but were seeking sexual release where they could find it.[33] To contemporaries sodomy was perceived to be a sexual act that any man could be capable of doing.[34] It was this belief that caused fear amongst authorities. If it was true then situations where large numbers of single men lived together without female company made authorities worry that the men would resort to anal sex with other men as a means of relieving their sexual frustrations. This fear was evident in British images of the penal colonies in Australia, and heavily influenced the transportation of women.[35]

[31] Chris Brickell, *Mates and Lovers: A History of Gay New Zealand* (Auckland: Random House New Zealand, 2008); Chris Brickell, "The emergence of a gay identity," in *Sexualtity down under: social and historical persepectives*, ed. Allison Kirkman and Pat Moloney (Dunedin: University of Otago Press, 2005), 64-5; Judith Binney, "Whatever Happened to Poor Mr Yate?" *New Zealand Journal of History* 9, no. 2 (1975): 111-125; Phil Parkinson, "'A most depraved young man': Henry Miles Pilley, the New Zealand missionary," in *Outlines: Lesbian and Gay Histories of Aotearoa*, ed. Alison J. Laurie and Linda Evans (Wellington: Lesbian and Gay Archives of New Zealand, 2005).

[32] Brickell, *Mates and Lovers*.

[33] One exception is Brickell, *Mates and Lovers* in which he does discuss a number of these cases, 34-47.

[34] Alan Bray, "Homosexuality and the signs of male friendship in Elizabethan England," *History Workshop* 29 (1990): 2.

[35] Kirsty Reid, "The Horrors of Convict Life: British Radical Visions of the Australian Penal Colonies," *Cultural and Social History* 5, no. 4 (October 2008): 481-495.

Instances of sodomy, as sexual acts that came to the attention of authorities in Otago were punished under the laws against buggery. Due to the generally private nature of same-sex sexual activity, scholars have relied on trial records and press publications, where available, to make visible the history of sodomy.[36] There is an inherent weakness in a focus on the police and court records as the cases that came to light were less likely to involve two consenting partners, who could if discrete keep their activities hidden from view. Although this in itself is interesting to note, because it suggests that sexual activity between men was lightly policed, it means that historians are likely to get a partial view of sex between men in past societies. The police and courts generally only came into the picture when the act was forced upon a man or boy, if one of the partners later denounced the other, or when a third party becomes suspicious enough to investigate.[37] As a result the seven cases examined here provide only a limited view of sodomy in early Otago.

One factor, although not unique to Otago, that had a considerable impact on the size of the male population, the creation of homo-social groupings and the potential for same-sex sexual activity to occur was the discovery of gold in 1861. Goldfields were male dominated environments. Evidence from the Californian goldfields appears to show that men took on female roles, not just domestically such as cooking and cleaning for other men within their working partnership, but also including as dance and sexual partners for other diggers.[38] This

[36] George E. Haggerty, "Male Love and Friendship in the Eighteenth Century," in *Love, Sex, Intimacy and Friendship Between Men 1550-1800*, ed. Katherine O'Donnell and Michael O'Rouke, (Basingstoke: Palgrave Macmillan, 2003), 71.

[37] Chris Brickell, "Sex, space and scripts: negotiating homoeroticism in history," *Social and Cultural Geography* 11, no. 6 (September 2010): 597-8; Eldred-Grigg, *Pleasures of the Flesh*, 50.

[38] J. D. Brothwick, *Three Years in California* (Edinburgh 1857), 320-1 quoted in Stevan Eldred-Grigg, *Diggers, Hatters and Whores: The Story of New Zealand's Gold Rushes* (Auckland: Random House New Zealand, 2008), 22 note 33.

casual use of men as sexual partners has been called "situational homosexuality" and refers to men seeking sexual and emotional companionship from other men because women were a limited commodity.[39]

Although the exact number of men who arrived in Otago in the years immediately after the discovery is unclear, it is claimed that as many as 85,000 men arrived in 1862 alone.[40] The resultant sex imbalance was as high as 944 eligible bachelors over the age of fifteen for every 100 spinsters aged between fifteen and forty in Otago.[41] Such a high number of males meant that opportunities for heterosexual encounters, whether casual, commercial or more enduring were very limited, and men had to find sexual partners where they could, whether among prostitutes or with other men. The number of prostitutes has been put at 300 in Dunedin in 1864, with much smaller numbers in the gold field towns.[42] For some men, female domestic partners were almost completely unavailable. The Chinese diggers who arrived in Otago from 1866 were unable to bring their wives with them due to Imperial law forbidding Chinese women to travel.[43] Although they also made use of prostitutes, they were reputed to be "addicted" to sodomy.[44] Such a view, however, may have merely reflected contemporary anti-Chinese prejudice. Unlike Europeans, the Chinese were tolerant of sexual acts between men, which were allowed by imperial laws.[45] As a result of these factors, the potential for same-sex sexual acts in Otago was high. However, only seven cases of sodomy or attempted sodomy came to court in Otago between 1860 and the introduction of the Offences Against the Person

[39] Robert Aldrich, *Colonialism and Homosexuality* (London: Routledge, 2003), 57.
[40] Eldred-Grigg, *Diggers, Hatters and Whores*, 103.
[41] Eldred-Grigg, *Pleasures of the Flesh*, 12.
[42] J. G. S. Grant, *Saturday Review*, 14 May 1864, 80.
[43] Eldred-Grigg, *Pleasures of the Flesh*, 12; Eldred-Grigg, *Diggers, Hatters and Whores*, 441.
[44] Eldred-Grigg, *Diggers, Hatter and Whores*, 444; Eldred-Grigg, *Pleasures of the Flesh*, 15, 47.
[45] Eldred-Grigg, *Pleasures of the Flesh*, 47.

Act at the beginning of 1868, and there is no evidence that any of them resulted in a conviction.[46]

If the number of men was so high and the potential for same-sex sexual acts was similarly high, why were there no convictions for sodomy in Otago? Firstly, the majority of men who had sex with their "mate" did so, presumably, in private and by mutual consent. Their activities could be hidden from the law, and other men would have to have been bothered enough by their activities to get involved and report them.[47] Secondly, as has been suggested by Stevan Eldred-Grigg, a large number of arrests for sodomy or attempted sodomy resulted in an acquittal.[48] Thirdly, the lack of convictions may perhaps be due to the requirement for considerable evidence to secure one. There were strict rules regarding the admissible evidence to prove a charge of sodomy which included proof of both penetration and emission of semen.[49] As a result few prosecutions were successful and it was more likely that the charge would be for attempted sodomy, as under English common law any attempt to commit a crime counted as a crime in itself.[50] It was also likely that a conviction would be easier to secure if the accused was charged with a lesser crime, such as assault or using obscene language.[51]

This desire to avoid laying a charge for sodomy which would be most likely to fail is perhaps best illustrated in a case from May 1862 that appeared before the Resident Magistrate under

[46] Dunedin Supreme Court, Dunedin Magistrate's Court, … Records, 1851-1967, DAAC/D247/, Archives New Zealand, Dunedin; Supreme / High Court, Dunedin ... [and] Magistrate's / District Court, Dunedin …, 1849-1992, DAAC/D256/, Archives New Zealand, Dunedin.

[47] Brickell, *Mates and Lovers*, 35.

[48] Eldred-Grigg, *Pleasures of the Flesh*, 50.

[49] Goldsmith, *The Worst of Crimes*, 34.

[50] Cocks, "Secrets, Crimes and Diseases," 110.

[51] Cocks, *Nameless Offences*, 55-6.

the Vagrancy Ordinance. The accused in this instance, Hamil Strangsmoatt, had been charged with having used profane, indecent and obscene language, as opposed to any charge relating to sodomy. The arresting officer stated that he and another officer had been attracted to a noise on George Street near the Octagon between eight and nine in the evening:

> On reaching the place he found a number of persons assembled and upon investigating the cause of such a concourse of people, was informed that the accused had been found with a boy under questionable circumstances; and while the conversation was going on, the prisoner uttered foul language.[52]

In this instance, it appears that the only offence that the police were witness to was the use of foul language, although it is obvious that members of the crowd were possibly in a position to provide evidence against the accused for a more serious offence. The newspaper report refused to provide details stating that they were "of such a gross and atrocious character as to preclude publicity".[53] Despite the evidence of the police, the Resident Magistrate dismissed the case; however, the arresting officer stated that he would be laying further charges under a different section of the Vagrant Act. Whether he did or not is unclear as Hamil Strangsmoatt made no further appearances in the Dunedin Resident Magistrate's Court.

Strangsmoatt's case, although limited in scope and information does suggest there was an element within the community who did not approve of a man being "found with a boy under questionable circumstances". In addition to any general disapproval of sexual activities between men, there may have been other factors at play. It may be that the key word is "found" as the activity taking place was obviously at least semi-public. It may also be that either the difference in ages between Strangsmoatt and the boy, or the age of the boy himself was of a

[52] *Otago Daily Times*, Resident Magistrate's Court, 9 May 1862.
[53] Ibid.

nature to cause general offence. However, the police chose to use a lesser charge under the Vagrancy Act against the accused, that of having used profane, indecent and obscene language. As H. G. Cocks has suggested "prosecutions for vagrancy had the advantage of being susceptible to summary jurisdiction and therefore avoided some of the problems associated with sending homosexual offences to higher courts."[54]

The need for considerable evidence and reliable witnesses is illustrated in the case of Alexander Ross, alias Clark, which was heard at the Supreme Court in June 1864. Ross was arrested after having attempted to have anal sex with a thirteen year old stable hand at a hotel in Macclaggan Street. The evidence presented in court by one of the witnesses appears to be sufficient to suggest that a conviction for an attempt at sodomy could have been made:

> …about 5 minutes before 1, I saw the Prisoner and … the cook, come into the same room where I was and the boy Pendry. There are 5 beds altogether in the room. Prisoner pointed to a bed alongside the one Pendry was laying in and said this bed will do for me... The cook then went out ... Prisoner then sat on the bed smoking his pipe for sometime [sic], when I heard him say to the boy "I like you". The boy was awake at this time ... The boy said "for what". Prisoner then said to the boy "I am very fond of you". Prisoner then undressed himself and said to the boy "I am going to sleep alongside of you". The boy said "No! If you come into my bed I will kick you out". Prisoner said "I'll only come into bed for a couple of minutes and will cuddle you up". By this time prisoner got off his bed and knelt on the floor towards the boy's bed. The next thing I heard prisoner tell the boy was that he would buy him a suit of clothes. He then asked the boy if he had a father. The boy said yes and that he was in Dunedin. Prisoner then told the boy that if he would behave himself that he would take him to Canterbury to his public house. The candle was out at this time, but by the light from a skylight immediately over the boy's bed I saw prisoner lift the clothes and get into the boy's bed. The next thing I heard him tell the boy to go over. About 3 minutes after this I heard the boy say "Oh! Oh! You are hurting me". I heard prisoner reply "Hush! Hush!" I then heard the boy say "if you don't get off I'll sing out".[55]

[54] Cocks, *Nameless Offences*, 55.

[55] Regina v. Alexander Ross, alias Clark, DAAC/D256/250/Trial 18, 1864, Archives New Zealand, Dunedin.

The key feature of this case is the reliability of the witnesses as opposed to the nature of their evidence. On the face of it the evidence appears to confirm the guilt of the prisoner. However, as Netta Goldsmith has suggested the biases of the judge as well as the appearance of the witnesses could heavily influence the jury's perception of the reliability of their evidence.[56] The key witness in this case was the victim of the alleged assault, Mark Pendry. By his own admission his father had kicked him out for "bad behaviour" and he was working as a stable boy "amongst the hotels of Dunedin", while living in a house "confessedly not of a high character".[57] The judge was quoted in the newspaper as not being able to "conceive any life more likely to corrupt, than that to which this boy was left, whether by his own fault or his misfortune".[58] Pendry admitted that the accused offered to take him to Canterbury with him and buy him new clothes.[59] It also appears that money changed hands with the prisoner handing Pendry 5/-, but it is unclear as to when this happened and why. Pendry claimed he was given it the next day and asked "not to say anything about it".[60] The other witness claimed it was immediately after the sodomy attempt.[61] This suggests the possibility that Pendry had agreed to some form of contact.

The other major witness was sharing the bedroom with the accused and the victim. He was a "coloured man" called Thompson who worked as a shoe black. In his summing of the evidence the judge spent some time focusing on the witness's race instructing the jury that it was not relevant to the case:

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[56] Goldsmith, *The Worst of Crimes*, 41.
[57] *Otago Witness*, 11 June 1864.
[58] Ibid.
[59] Judge Richmond's Notebook Criminal Cases 1864, DAAC 21216 D437/860, Archives New Zealand, Dunedin.
[60] Ibid.
[61] Ibid.

> His Honor, in summing up, said he would first invite the jury to consider the character of the witnesses…Then consider the character of the black man. God forbid that color should weigh with him. It did not in the least. As he had remarked in a previous case that day, many men of the negro [sic] race were living here as respectable and highly worthy citizens in their own spheres.[62]

In colonial Otago race could be a factor in how a jury judged the reliability of a witness.

The judge's main concern with this witness was that he had "been almost privy to an act of the same kind on a previous occasion, without informing the authorities or any body else".[63] Having admitted as much, "evidently without the slightest notion of the way in which he was blackening his character," had undermined his character more than his ethnicity had. The evidence from the previous instance was that it was by mutual consent, so he had said nothing.[64] In this case, he became involved as more than a witness to the act when he felt that the boy was not consenting. After the accused left the room he went to report the incident to the landlord.[65] The landlord, John Crouch, was the final witness in the case. His character was also suspect as he had recently been charged with keeping a disorderly house.[66] Here individuals reacted differently to same-sex sexual acts. Some men were content to allow consenting partners the privacy they needed, in effect 'turning a blind eye', but this did not sit well with other parts of the community, to whom sodomy was an act against nature.

In beginning his summing up with an examination of the character of the witnesses before looking at the evidence, the judge in the case of Ross, alias Clark, appears to be undermining

[62] *Otago Witness*, 11 June 1864.
[63] Ibid.
[64] *Otago Witness*, 11 June 1864; Judge Richmond's Notebook Criminal Cases 1864.
[65] *Otago Witness*, 11 June 1864.
[66] Judge Richmond's Notebook Criminal Cases 1864.

the case against the accused. He does comment on discrepancies between the evidence of the two witnesses, and between statements made in Court and previously at the Resident Magistrates' Court.[67] The judge had a very strong opinion of the case, which was influenced by his low opinion of the witnesses:

> On the whole he did not conceal – it was not his duty as a judge to conceal – his opinion of the case, as it was his duty as much to protect the innocent as to punish the guilty. True, it was for the jury alone to acquit or condemn; but it appeared to him there was a very strong shade of doubt cast upon the testimony by the consideration both of the character of the witnesses and of the discrepancies in the evidence itself.[68]

The jury returned immediately with a not guilty verdict.

The reporting of this case against Ross, alias Clark, has shown that there was not a single attitude towards sodomy that was acceptable to all members of the community. Thompson was happy to accept that some men had sex with boys or other men, so long as both partners were consenting. The judge on the other hand felt that all sodomy was against nature, and that Thompson was almost as culpable as a convicted sodomite by admitting to having previously witnessed a similar act without "informing the authorities."[69] There are two points about this case which are notable. Firstly, the defendant was charged with indecent assault in 1868 in Oamaru, but the case, which involved a man not a boy, was dismissed after the Grand Jury returned "no bill". He is the only one in this sample of cases to be charged more than once. Secondly, in 1867 a "coloured man" called Edward Robson was charged with attempted sodomy, but the case was dismissed in the Resident Magistrates' Court for lack of evidence. The man, whom Thompson had referred to having previously witnessed in "an act of the same

[67] *Otago Witness*, 11 June 1864.
[68] Ibid.
[69] Ibid.

kind" during his evidence in the Ross case, was also a coloured man called Edward Robson, and may have been the same person as the man, Robson, charged in 1867.[70]

One of the other cases further illustrates this flexibility of opinion within the broader community. Early in March 1862 Arthur Symons or Simmons was charged by Thomas Edwards of assaulting him "for the purposes of perpetrating an unnatural offence".[71] As reported in the newspaper Symons had been given a double bed to share with Edwards at the Shamrock Hotel in Wetherston's Gully, all the single beds being occupied.[72] Such sharing of beds was not unusual in hotels and boarding houses at the time. After they went to bed Symons attempted to commit the offence:

> [Edwards] immediately got out of bed, and declared he would not sleep with him. On complaining to the landlord, the latter said the man was drunk, and did not know what he was doing, and he had better pass it over.[73]

The excuse that the accused was drunk appears to have been regarded as an acceptable reason for his actions. However, the landlord, John Outram also stated that if "the prisoner was in the habit of committing such an offence he will attempt the same on some future occasion."[74] This suggests that he may have been aware men were having sex with other men on the goldfields, if not necessarily in his hotel.

It appears that Edwards would have taken Outram's advice to ignore what had happened. However, a week later Symons again asked for a bed and upon the men's retiring together

[70] Judge Richmond's Notebook Criminal Cases 1864.
[71] *Otago Daily Times*, 14 March 1862.
[72] Ibid., 12 March 1862.
[73] Ibid., 12 March 1862.
[74] Regina v. Symons, DAAC D256/245, Trial 63, 1862, Archives New Zealand, Dunedin.

Symons tried to "assault" Edwards. In this instance, Edwards "got out of bed and was giving the prisoner a sound thrashing, when Mr Outram asked him to desist" as there were two police outside and he should be handed over to them.[75] The newspaper report of Outram's evidence suggests that on the second occasion he was less willing to overlook Symons' 'foibles', as he claims to have gone immediately for the police.[76] On this occasion all the witnesses stated that Symons was sober, so did not have the excuse of drunkenness.[77]

In this case it appears that there were suspicions about Symons' character. Edwards stated in his evidence that another man refused to share a bed with him as he was "a low life character".[78] During the second occasion, Edwards admitted that he "remained quiet in order to see what the prisoner will do".[79] This could be construed as either an attempt by Edwards to secure evidence against Symons, by acting as a passive recipient, up to a point at least, or acceptance of Symons' attentions so long as they were restricted to "handling [his] privates"[80]. Outram's suggestion, after the first attempt, that he may try again in the future shows an awareness of sexual acts between men being repeated by some men as opposed to being one-off activities. There is no evidence that the witnesses were accepting of same-sex sexual activities in this case – Edwards was an unwilling partner, Symons was not under the influence of alcohol, and the hotel may have been too public a place. No conviction against Symons has yet been traced in this case. The case was scheduled to be heard by the Supreme Court first in May then in October 1862, but neither of the local newspapers contains details of the case for those sessions

[75] *Otago Daily Times*, 12 March 1862.
[76] Ibid., 12 March 1862.
[77] Regina v. Symons.
[78] Ibid.
[79] Ibid.
[80] Ibid.

of the court. Archives New Zealand holds the witness depositions only. Symons is not listed in the surviving Otago Police Gazettes amongst discharged prisoners.

No matter how accepting parts of the community were of same-sex sexual activities, accusations of sodomy appear to have been taken very seriously, especially when they proved unfounded. Mr Justice Richmond was quoted as stating "falsely to make such a charge is an offence second only to the offence itself".[81] Two cases that came to the Supreme Court between 1860 and 1868 were returned "no bill" against the accused, a further five cases were discharged at the Resident Magistrates' Court for lack of evidence. There is little evidence from four of these cases, against Arthur Fowler in January 1863, William Chard in August of the same year, Joseph Gregory in November 1866, and Edward Robson in September 1867, beyond the name of the accused and in Fowler's case also that of his accuser.[82] The fifth case from 1864, against Alfred Marsh, raised very strong feelings locally against the accuser.

The case against Marsh was thrown out as a "no bill" by the Grand Jury at the June 1864 sitting of the Supreme Court. Marsh had been working as a waiter at a hotel in Port Chalmers, having been seriously injured in an explosion whilst working as a steward on board a ship in July 1863. On an evening in March 1864 he was accused of having got into a bed that was already occupied:

> …he pulled my shirt up and tried to have connexion with me, when I awoke I found one of his hands on my thigh and the other one on my privates. I tried to get away from him but he pulled me back twice. I got out of bed. He said "where are you going", I replied "to get a policeman". He said "you are a young man and so am I, and I should not think you would wish to injure me in that way". There were four other men sleeping

[81] *Otago Daily Times*, 4 June 1864.

[82] Regina v. Arthur Fowler, DAAC D256/435/ep, 1863, Archives New Zealand, Dunedin; *Otago Daily Times*, 21 August 1863; *Otago Daily Times*, 5 September 1867.

> in the same room. I awoke them. The prisoner remained in my bed. I went outside and gave information to the constable on duty.[83]

In response Marsh claims to have gone up to bed and slept soundly until his accuser woke the other men in the room. There was some discussion as to the "ownership" of the bed. It appears that Marsh tended to sleep in the same bed each night. His accuser suggested that Marsh offered him the bed "as he should not require it."[84] Marsh, on the other hand, claimed that his accuser appeared to have selected the bed himself:

> …when I got into the room this young man was sitting on the bed which I always sleep in. I did not intend to go into that bed. When he complained of the bugs being so troublesome I said I could sleep in it if he couldn't. I then got into bed and knew nothing more about it…[85]

This discussion of beds and who slept where highlights the way that hotel rooms and sleeping arrangements could be conducive to sexual activity between men. Shared beds were not unusual in working class environments during the nineteenth century, and hotels and boarding houses would have had several beds in a room. Brickell has stated that "hoteliers across the province [of Otago] booked two male strangers in together whenever beds were short."[86] As a result the sharing of beds may have encouraged some men to "make the most of the opportunities."[87]

The importance of character, social status and respectability within society, even for a man accused of sodomy, appears to have influenced how he was perceived by the wider community.

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[83] Regina v. Alfred Marsh, DAAC/D256/250/Trial 13, 1864, Archives New Zealand, Dunedin.
[84] Ibid.
[85] Ibid.
[86] Brickell, *Mates and Lovers*, 38.
[87] Ibid., 38.

The newspaper coverage of the Marsh trial in the Port Chalmers Resident Magistrates' Court, which was held behind closed doors, was very supportive of the accused:

> The accused, who has hitherto borne an excellent character, had been acting for sometime [sic] as waiter at the Port Chalmers Hotel, his previous employment having been that of steward on the ship *Electric*, on board of which vessel he was some months ago seriously hurt by a gunpowder explosion. The accuser is a man who was employed in the Government surveying boat. Had he remained in the port, he would probably have been subjected to some serious personal violence, the feelings of a number of the inhabitants acquainted, being very strong against him.[88]

This report implies considerable sympathy and support for Marsh. It is impossible to suggest why the charge had been made against Marsh, nor why he was committed to trial at the Supreme Court. Mr Justice Richmond suggested that charges such as these were laid for the purpose of extortion.[89] After such a charge it could be very difficult to redeem one's character. Marsh may indeed have suffered in this way as he was charged in 1865 with being a stowaway in company with a former soldier named William Thompson.[90] Why he felt the need to leave Dunedin is unclear, but it appears that he lacked the funds to pay for his fare.

From the cases that have been examined a number of conclusions can be made about the men involved. Firstly, in the majority of these cases the man who initiated the sexual acts appears to have been the dominant partner. This may have been due to the relative ages of the man who initiated the act and his "partner". In two of the instances the "partners" were boys, although the age of the boy in the Strangsmoatt case is unknown. Symons, Marsh and their accusers were "young men". Secondly, the sexual activities that these men were charged with having initiated were limited to handling their partner's genitals and attempting anal

[88] *Otago Daily Times*, 29 March 1864.
[89] Ibid., 4 June 1864.
[90] *Otago Police Gazette*, November 1861 – January 1868, 1 June 1865, prisoner discharges.

penetration. However, in the Symons case, on the second occasion he offers to fellate Edwards, indicating that offering oral sex may have been an approach taken by some men looking for male sexual partners.[91] Thirdly, it appears that most of the men involved, both participants and witnesses, were working class men. The men in the Symons case were mostly miners. Alfred Marsh was working as a waiter at a Port Chalmers hotel, Mark Pendry was an itinerant stable boy in Dunedin, and William Chard was a cook at an accommodation house in Tokomairiro. Alexander Clarke, alias Ross, appears to be more middle than working class for he was in a position to initiate contact by offering employment and money. However this may have been part of the persona that he used to secure partners. Despite these general points the one overriding factor in all the sodomy cases that have come to light in Otago prior to the introduction of the Offences Against the Person Act in 1868 is that the sodomy cases that came to trial resulted in the defendant being acquitted.

This high rate of acquittal may suggest a number of things, including a difficulty in securing sufficient evidence to secure a conviction and no firmly held opinion within the community towards men who sought out other men for sex. As a number of the cases were returned 'no bill' by Grand Juries, it may be possible to suggest that the members of these juries were keen not to have sodomy discussed in a public court room – reflecting the opinion of Judge Johnson quoted at the beginning of this section that the rising generations should not know that such abominations existed.[92]

[91] Regina v. Symons.

[92] Judge Alexander James Johnston, Nelson Supreme Court, *R v. Edward Wilson* 16 January 1863, *Nelson Examiner and New Zealand Chronicle*, 17 January 1863, p. 3.

Bestiality - *Offensa cujus nominatio crimen est*

> When John Cole was acquitted of bestiality in January 1863 he burst into tears. The charge against him, that he "…did feloniously, wickedly and against the order of nature attempt carnally to know a certain female dog and then with the said female dog feloniously did attempt to commit and to perpetrate the abominable crime of buggery…",[93] could have resulted in a death sentence if he had been found guilty of the act of bestiality.

The case against John Cole, a store man, was based on the evidence of a single witness, another store man with whom he shared quarters and who claimed he saw Cole "on his knees holding the back part of the dog in his hands" and on pushing Cole away saw "his trousers were open and his penis in a state of erection."[94] The validity of evidence in cases where there is only one witness was often an issue mentioned by Supreme Court Judges in their addresses to Grand Juries in Otago at this time.[95] These cases could come down to whose evidence was more believable in the eyes of the jurors. Although in this case it is difficult to determine what factors led the jurors to believe the prisoner over his accuser, the sympathetic reporting by the court reporters may suggest that Cole was more personable:

> John Cole, a very decent looking young fellow, was indicted for having committed an unnatural crime at the Dunstan. The only witness was G. W. Smith, late storeman with Patterson, at the Dunstan, in whose service the prisoner also was. The prisoner alleged that the charge had been trumped up to gratify malice. If time was allowed, he could get an unexceptionable character from the mayor of Geelong and other gentlemen in that town; in which he (the prisoner) had parents, five brothers and sisters, a young wife, whom he has left not four months ago, and an infant son.[96]

This newspaper report paints a portrait that elicits a sympathetic response from readers. Here is a decent young family man, not long in Otago, well respected in his hometown of Geelong, who has been maliciously accused of a 'vile' crime. Specific details of the crime were left out

[93] Regina v. Cole, DAAC/D245/247/Case 144, 1863, Archives New Zealand, Dunedin.
[94] Ibid.
[95] For example see *Otago Daily Times* 5 December 1865, 6 December 1870, 5 September 1871.
[96] *Otago Daily Times,* 28 January 1863.

of the report, encasing bestiality in a silence that stands in complete contrast to the detailed reporting of other sexual crimes.

During the third quarter of the nineteenth century, court trials in Dunedin were reported in detail by the local newspapers providing not only a source of information about the evidence put forward in the case, but also insights into the community's views of crime and criminal behaviour, especially for high profile and well attended cases. However, the few bestiality cases which came to court are the exception to this. Between 1848 and 1871 only six cases of bestiality were tried in the Supreme Court of Otago. Of these cases, in only the acquittal of Cole and the trial of George Ennis did the newspaper report of the trial extend to more than two sentences. Unusually for the time, there were no details provided about the nature of the crime beyond the ubiquitous words "unnatural offence" or "bestial crime". This contrast is often made more striking by the reporting of other cases heard at the same time and reported in the same columns, including assault, rape and infanticide, which are full of the details of the actual crimes, including physical injuries, and lengthy quotes from witness statements.[97]

A potential reason for this silence relates to the nature of the crime and how it has been viewed by Western societies since the early medieval period. Bestiality became perceived so negatively that its very name was censured: "that unmentionable vice", "a sin too fearful to be named", "among Christians a crime not to be named".[98] It was feared that spreading

[97] For example see *Otago Daily Times,* 3 September 1867.

[98] Piers Beirne, "On the Sexual Assault of Animals: A Sociological View," in *The Animal Human Boundary*, ed. Angela N. H. Creager and William Chester Jordan (Rochester, NY: University of Rochester Press, 2002), 197.

information about this crime would lead to a spread in its practice.[99] However, this negative view was not always the case, with Joyce Salisbury arguing that sexual intercourse with animals may have been one expression of human sexuality for as long as animals have been domesticated.[100] Evidence from classical mythology and art, as well as early European folklore, suggests that bestiality may have once been celebrated as a means that gods used to interact with humans.[101] However, the Bible contains a clear prohibition against bestiality that has become deeply embedded in Judeo-Christian societies:

> Neither shalt thou lie with any beast to defile thyself therewith: neither shall any woman stand before a beast to lie down thereto: it is confusion.[102]

The punishment for such a sin which has informed the development of much of European laws against sodomy and bestiality also comes from Leviticus:

> And if a man lie with a beast, he shall surely be put to death; and ye shall slay the beast. And if a woman approach unto any beast, and lie down thereto, thou shalt kill the woman, and the beast: they shall surely be put to death; their blood shall be upon them.[103]

Such strictures within the Bible led early Christian church leaders to equate bestiality with homosexuality in the hierarchical ranking of sins, both being sodomical practices.[104] The Council of Ancyra in AD314 introduced strict penances for bestiality, although these did not go as far as imposing the death penalty. It has been suggested that equating bestiality with homosexuality reflected a change in the way people looked at animals, as early Christian theologians found it difficult to preserve the distinction between humans and animals in light

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[99] Rydström, *Sinners and Citizens*, 64.

[100] Joyce E. Salisbury, *The Beast Within: Animals in the Middle Ages* (New York: Routledge, 1994), 84; Andrea M. Beetz, "Bestiality/Zoophilia: A Scarcely Investigated Phenomenon Between Crime, Paraphilia and Love," *Journal of Forensic Psychology Practice* 4, no. 2 (2004): 2 & 4.

[101] Salisbury, *The Beast Within*, 85; Beirne, "On the Sexual Assault of Animals," 196.

[102] Leviticus 18:23.

[103] Leviticus 20: 15-16.

[104] Salisbury, *The Beast Within*, 91.

of sexual acts.[105] Originally viewed as primarily property and a source of food, the deed of bestiality suggested that animals could become people's partners in an "unnatural" act.[106] However, this did not mean that animals were perceived as equal to humans in the eyes of medieval people; the boundary between humans and animals was clearly defined by the Bible.[107]

The Christian prohibition of bestiality and the punishment for transgression was founded on the belief in a God-given order of the universe or 'natural order', and the maintenance of a clear distinction between humans and animals.[108] God created man in his own image and gave him the ability to reason, something that animals lack. Animals provided man with food and clothing, this was their purpose, and man ruled over the animals in the divine hierarchy. Thus, through the roles that God gave man and animals at creation a clear distinction was created. The person who destroyed the boundary between humans and animals through a sexual act with an animal "lost his claim to human-ness".[109] Such an act was a sin against God and nature, and often a crime against the law of the land.

This belief was so entrenched that it informed the wording of the Supreme Court indictments for the cases heard in the Otago Supreme Court during the period under investigation. For example the indictment for the Cole case is rigidly worded:

> The Jurors for our Lady the Queen upon their oath present that John Cole on the Nineth [sic] day of January in the year of our Lord one thousand eight hundred and sixty three

[105] Ibid., 91.
[106] Ibid., 90-1.
[107] 1 Cor. 15:39; Isaiah 31:3.
[108] Liliequist, "Peasants against Nature," 393.
[109] Erica Fudge, *Perceiving Animals: Humans and Beasts in Early Modern English Culture* (Urbana: University of Illinois Press, 2000), 136.

> with a certain Bitch did feloniously wickedly and against the Order of Nature had a venereal affair and then feloniously wickedly and against the Order of Nature carnally knew the said Bitch and then feloniously wickedly and against the Order of Nature with the said Bitch did commit and perpetrate that detestable and abominable crime of buggery (not to be named among Christians) against the form of the statute in such case made and provided and against the Preach of our Lady the Queen, her Crown and dignity.[110]

The indictment mentions the "Order of Nature" three times, thereby reiterating how severe a crime, which undermined the boundary between humans and animals, was perceived by the legal system, at least. In the indictment bestiality was framed as a crime against God, nature and the Queen's laws.

The concept of the Natural Order formed one of the three main beliefs that were fundamental to the Christian censure of bestiality. The other two were that sexual intercourse was only for procreative purposes, and that sexual unions between humans and animals could result in offspring which were the work of the Devil.[111] There is a strong interrelatedness about these three beliefs. That sexual intercourse has only one purpose, the creation of children, was a fundamental belief of Christian morality. Therefore, sexual activities in which "the emission of seed" occurs but procreation is not possible, such as bestiality, would be a sin against nature. However, if it were possible for cross-species procreation to exist, the resulting offspring would blur the line between humans and animals, undermining the Natural Order. The belief that bestiality could result in monstrous offspring found popular support in Europe during the twelfth century, and was found in accusations of bestiality into the eighteenth century.[112]

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[110] Regina v. John Cole – an attempt to commit bestiality, 26 January 1863, DAAC/D256/435/ek – Indictment, Archives New Zealand, Dunedin.

[111] Beirne, "On the Sexual Assault of Animals," 198; John M. Murrin, ""Things Fearful to Name", Bestiality in Early America," in *The Animal Human Boundary* ed. Angela N. H. Creager and William Chester Jordan (Rochester, NY: University of Rochester Press, 2002), 117.

[112] Salisbury, *The Beast Within*, 95; Fudge, *Perceiving Animals*, 136; Erica Fudge, "Monstrous Acts: Bestiality in Early Modern England," *History Today* 50, no. 8 (August 2000): 24-5.

As a result of such beliefs bestiality became perceived as the most grievous of sins because the perpetrator had forgotten his or her own humanity.[113] From the thirteenth century, in Christian countries, bestiality was no longer perceived as just a sin, but could be punished as a secular crime, therefore linking the church and the state in abhorrence of the act.[114] Although courts tended to be more preoccupied with prosecuting homosexuality, by the sixteenth century, in England as well as other European countries, bestiality was a capital crime.[115]

Existing historical scholarship has generally focused on the social control of homosexuality or witchcraft - both of which have often been linked with bestiality - or the persecution of animals.[116] Studies of early modern England, Colonial America, early modern, and nineteenth and twentieth century Sweden, and nineteenth and twentieth century Australia have identified a number of key features of prosecutions for bestiality.[117] Firstly, those accused of bestiality, in cases that have come to court, have overwhelmingly been young males from rural areas, and often these young men are from marginalised populations.[118] Secondly, criminal prosecutions have been very rare events, with the notable exception of 17th and 18th century Sweden, and when prosecutions were successful, especially in the nineteenth and twentieth centuries, judges often appeared to be reluctant to apply the maximum penalties.[119]

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[113] Salisbury, *The Beast Within*, 99.

[114] Rydström, *Sinners and Citizens*, 2.

[115] Fudge, "Monstrous Acts," 21; A. D. Harvey, "Bestiality in late-Victorian England," *Journal of Legal History* 21, no. 3 (2000): 85.

[116] Beirne, "On the Sexual Assault of Animals," 196, 208-9.

[117] Fudge, *Perceiving Animals*; Fudge, "Monstrous Acts"; Murrin, "Things Fearful to Name"; Liliequist, "Peasants against Nature"; Rydström, *Sinners and Citizens*; Anne-Marie Collins, "Woman or Beast? Bestiality in Queensland, 1870-1949," *Hecate* 17, no. 1 (1991).

[118] Beirne, "On the Sexual Assault of Animals," 209; Collins, "Woman or Beast?" 37.

[119] Beirne, "On the Sexual Assault of Animals," 209; Collins, "Woman or Beast?" 37; Harvey, "Bestiality in late-Victorian England," 85.

It has been argued by scholars that the profile of offenders, who were mainly young rural males, was explained by easy access to animals and a lack of opportunity for more 'natural' outlets for their sexual needs.[120] Generally, it has been assumed that these acts were one-off events based on curiosity and opportunism. Anne-Marie Collins' work on Queensland between 1870 and 1949 supports the concept that it was a young man's offence, although due, perhaps, to increasing urbanisation almost half of offenders in her study resided in urban or semi-urban areas.[121] This, she argues, cannot be explained by a problem of heterosexual starvation.[122] It would be unlikely that young men in semi-urban or urban areas would have found themselves unable to access female sexual companionship, even if they had to pay for the service. A. D. Harvey, on the other hand, in a study of late-Victorian English cases, argued that "bestiality was characteristically a crime not of the young as such but of those unable to obtain alternative sexual outlets."[123] Jens Rydström's work on nineteenth and twentieth century Sweden supports this hypothesis as the majority of perpetrators in cases that he has studied indicate that they either had not had sexual intercourse with a woman or did not have 'access' to women for sex.[124]

The fact that surveillance was occasionally being used, in Europe as well as colonial settings including New Zealand, to secure a prosecution[125] suggests that the crimes were not always opportunistic or one-off events. Police were often tipped off to the crime by owners of animals

[120] Collins, "Woman or Beast?" 36-7.
[121] Ibid., 37.
[122] Ibid., 37.
[123] Harvey, "Bestiality in late-Victorian England," 87.
[124] Rydström, *Sinners and Citizens*, 62-3.
[125] Collins, "Woman or Beast?" 38.

which suffered repeated suspicious injuries, and a stakeout of the animals was used to catch repeat offenders *in flagrante delicto*.[126] This is also supported by the fact that in Collins' study several of the defendants indicated that they had either observed the practice themselves or had previously "made use of animals."[127] However, the defences often put forward in court seem to contradict this, as most denied the act or claimed they were drunk, with notable references to "the opportunity for sex there for the taking".[128] Rydström's work on nineteenth and twentieth century Sweden also indicates that bestiality was generally explained as an opportunistic substitute for intercourse with a woman, often when the perpetrator was drunk.[129] The Swedish authorities were very concerned to find out about where perpetrators learned about the act, anxious that knowledge of the crime could spread its practice.[130] It was believed that it was a learned behaviour as opposed to a 'natural' urge.[131] The court records which supplied the details that Harvey, Collins and Rydström have used can only provide certain information and only in the words used by the court. The language of the court, including witness statements, were shaped by the lines of questioning used by the judges and lawyers, resulting in a certain gloss of acceptability to the shaping of cases. For example, questions were shaped by concerns about the spread of the idea of bestiality and thus tended to focus on how perpetrators found out about the practice rather than why they had done it. The defences used by the perpetrators would have taken into consideration society's response, as bestiality could be seen not only as extremely objectionable, but perpetrators as unmasculine.[132]

[126] Ibid., 38.
[127] Ibid., 38.
[128] Ibid., 39.
[129] Rydström, *Sinners and Citizens*, 61-2.
[130] Ibid., 63.
[131] Ibid., 63.
[132] Rydström, *Sinners and Citizens*, 65; Collins, "Woman or Beast?" 38.

Despite the number of cases that have come to court across the studies that have been undertaken to date, there are a number of reasons why the occurrences of bestiality were likely to be underreported. As with the majority of sexual acts, bestiality was a private act. Those who practised it would hope not to be witnessed and often took steps to ensure privacy, such as seeking seclusion or keeping an eye out for possible witnesses.[133] Furthermore, the animals who were the unwilling partners in these acts had not the means to complain. The fear of a community's reaction or shame at being caught made a number of perpetrators run away from threatened punishment.[134] It has also been suggested that, at least in colonial New England, the matter may have been kept quiet between the perpetrator and witness(es), so long as they were all men, especially if the perpetrator was seen to be remorseful.[135] This contrasts with Jonas Liliequist's work on seventeenth and eighteenth century Sweden, where it appears that the sexual double standard was no protection and men would turn in other men even if the punishment was death.[136] It should be noted that prosecutions were low in most Western countries, with the exception of Sweden. For New Zealand I have been able to identify fifteen cases tried between 1840 and 1869.[137]

It is against this contextual background of sin and silence that the six cases in Otago need to be examined. The foundation of Otago under the auspices of the Free Church of Scotland and on the principles of systematic colonisation as examined in Chapter 2, meant that condemnation of bestiality would have been doubly entrenched, firstly as a sin in the eyes of

[133] Rydström, *Sinners and Citizens*, 61.
[134] Fudge, *Perceiving Animals*, 137.
[135] Murrin, "Things Fearful to Name," 139.
[136] Liliequist, "Peasants against nature," 397; Murrin, "Things Fearful to Name," 117.
[137] New Zealands Lost Cases website http://www.victoria.ac.nz/law/nzlostcases/search_cases.aspx. It should be noted that this website does not list all cases.

the church and secondly as an act that undermined the success of the community through the "unnecessary spilling of seed".

It has already been shown that the societal construct of silence found in contemporary Christian societies strongly influenced the non-reporting of court cases dealing with bestiality in Otago. However, this does not mean that the newspapers provide no relevant information. Although the newspaper reports give little detail of the actual crimes, they do provide an account of the Judges' addresses to the Grand Juries at the opening of the Supreme Court sittings. In these addresses the Judges took the opportunity to comment on the nature of the crimes, the number of cases and their relative severity, and some of the pertinent legal points that may bear on the cases. It is also possible to determine not only the Judges' stated or public opinion towards the crimes, but also an indication of how they expected the community, as represented by the Jury members, to perceive them as well. For example, in the case of George Henry, from 1865, the Judge commented to the Grand Jury:

> There is also a case of bestiality, a very disgusting case, which we must take cognisance of, however much it may harm our feelings.[138]

In this, the Judge sympathises with the Jury that they will be hearing evidence which they would rather not, regarding a crime which was not only 'unnatural' but 'abominable,' however, for the sake of justice and the right of law, the facts had to be heard. There is an explicit assumption that they would find the details disgusting. Similarly the code of silence regarding bestiality is reflected in the addresses by the Judges in the cases of James Hutchings (1870), George Ennis (1868), and Thomas States (1871):

[138] *Otago Daily Times*, 5 December 1865.

> There is also a case for unnatural offence. Upon that you will hear quite enough, and we shall hear quite enough, and I shall therefore make no comment.[139]
>
> The only other case was one of bestiality, upon which the less he said, the better.[140]
>
> Another case of an aggravated nature I shall not expatiate upon. Thomas States is charged with committing an unnatural crime. You will hear the particulars of the case, and I therefore need not offend your ears by given you the story twice over.[141]

This second comment was made directly after providing considerable detail about a case of infanticide, which it may be suggested could be perceived as a more serious crime, the details of which more disturbing to public sensibilities. These three comments taken together, as well as the complete lack of a comment by the Judge in the cases of John Cole in 1863 and John Gere in 1867, illustrate that the Judges in Otago were unwilling to expose the details of the crime to the public.

In the case of George Ennis, in 1868, the Judge used the sentencing as an opportunity to explain to the offender how his actions harmed not only himself, and his family to the disgust of the community. This address by the Judge was fully reported in the newspaper and illustrates the strong feelings the Judge had:

> The Judge: It is too frequently the case, when heavy punishment has to be inflicted, that the prisoner's family suffer very greatly. Twelve months ago, I must have caused sentence of death to be recorded against you. That sentence, however, has, for some years past, not been carried out; the punishment substituted being imprisonment for life. But the law has recently been altered; and the sentence for such a crime as that of which you have been convicted, maybe penal servitude for life – cannot be less than penal servitude for ten years. The jury have recommended you to mercy, on the ground of their common sympathy with the infirmities of human nature; but there should be some specific ground stated, when such a recommendation is made. I will not, however, pass upon you the highest sentence of the law, for I will hope that you may be brought to repent of this disgusting crime. The sentence of the Court is, that you be

[139] Ibid., 6 December 1870.
[140] Ibid., 2 September 1868.
[141] Ibid., 5 September 1871.

> kept to penal servitude for 10 years – which, I repeat, is the lowest sentence I can pass for such a crime.[142]

The Judge is clear about the severity of the crime and the need for due punishment to be handed down. Under the introduction of the Offenses Against the Person Act in 1867, bestiality was no longer a capital crime, but conviction carried a sentence of between ten years penal servitude and life.[143] However, it is interesting to note that the jury's recommendation to mercy was based on sympathy for the "infirmities of human nature".[144] This suggests that the feelings of disgust that the Judge expected of them were tempered by a realisation that some men are more likely to succumb to temptation of some form and allowances should be made for them. In light of the jury's recommendation the Judge handed down the lowest sentence possible.

Information about these cases comes primarily from the court records, especially depositions, except in the Ennis case where the records have been lost, and the only surviving references are in the Judge's notebook and the newspaper report of the trial. Aside from the court records there is no surviving evidence of any form of social regulation, either formal such as sermons, or informal such as verbal attacks or social exclusion of perpetrators within the community. This makes it difficult to say specifically how the greater part of the Otago community felt about bestiality. What the evidence from the court records does suggest is that the Judges, juries, police and most of the witnesses viewed this crime severely. As a result, it may be possible to suggest that the accusation of bestiality itself says something about the expectations of the accuser that such an accusation will be taken seriously by the authorities due to the severity of the crime. Unfortunately this may have resulted in false accusations being made

[142] Ibid., 3 September 1868.
[143] 31 Vict. 5, s. 38.
[144] *Otago Daily Times*, 3 September 1868.

for malicious reasons, and Judges did warn of possible ill feeling between the accuser and the accused.[145]

A key feature of accusations of bestiality is the difficulty in securing a conviction. This was in part due to the strict rules regarding admissible evidence and the need to secure reliable witnesses. Under the English 1828 Offences Against the Person Act it was required that proof of penetration had occurred, although the earlier provision requiring proof of the "emission of seed" was removed.[146] Securing a reliable witness was often a problem if the defendant took steps to hide his actions. In the cases that came to court in Otago, the accused appears to have tried to ensure privacy for the act. Hutchings was reported as having first tried to drive the cow into a gully and then regularly looked around as if making sure he was not seen.[147] Gere had got the mare into a cutting that could not have been seen from either river or road unless a witness stood on a rock above the cutting.[148] States actually barred himself into the stables in an attempted to secure privacy.[149] In the other three cases, Cole was accused of attempting the crime during the night and both Ennis and Henry were seen in the stables very early in the morning.[150] This desire for seclusion indicates that the accused in each instance was aware that the activities were not acceptable within their community and more open to prosecution of some kind, perhaps than other sexual acts.

[145] Ibid., 5 December 1865.
[146] 9 Geo.4 c.31.
[147] Regina v. Hutchings, DAAC/D256/260/Case 4, 1870, Archives New Zealand, Dunedin.
[148] Regina v. Cole.
[149] Regina v. States, DAAC/D256/261/Case 4, 1871, Archives New Zealand, Dunedin.
[150] Regina v. Cole; Regina v. Henry, DAAC/D256/255/Case 13, 1865, Archives New Zealand.

Despite the steps taken by the defendants, there were available witnesses in the cases that came to court. The number of witnesses in each of the cases varies from one to three. The role that these witnesses played in providing information and what they said about the cases can illustrate how bestiality may have been perceived by members of the wider community. Bestiality was a capital crime at this time, but to secure a conviction for the act as opposed to an attempt, actual penetration needed to have occurred. Several of the witnesses prevaricate over the issue of whether they were able to see penetration. A number mention that the accused went through the motions as if having connections with the animal,[151] had their trousers unbuttoned and open, but they could not confirm whether they had seen "his person", his penis, in contact with the animal.[152]

In two of the cases, those against Gere and States, the primary witnesses actively sought out other witnesses to the crime. Gere was spotted by two employees of the Bank of New South Wales based in Clyde, and they called another resident of Clyde to witness Gere's activities in the cutting near the town. In this instance they did not interrupt Gere, but continued to watch until he had finished his activities, although one of the bank employees, Edmund Campbell stated that he turned away "immediately I saw what was up" suggesting that he did not want to be seen to be interested.[153] William Spruce, the first witness in the States case, stated that "it was for his [Spruce's] own protection that he went for a witness".[154] The cross questioning of the witnesses during the trials may suggest why he felt he needed this protection, as the recorded responses suggest that the defence counsel may have tried to undermine the

[151] Regina v. States.
[152] Regina v. Henry.
[153] Regina v. Gere, DAAC/D256/255/Case 13, 1867, Archives New Zealand, Dunedin.
[154] Regina v. States.

witnesses' credibility or motivation. Both witnesses in the States trial stated that they were on good terms with the accused and had never been on bad terms.[155] These statements from witnesses support a belief held by judges, lawyers, witnesses and others in the community that accusations might conceivably be made for malicious reasons.

In several but not all the cases, the witnesses went almost immediately to the police. In the Gere case, the witnesses state that they saw him about half past four in the afternoon and they went to the police at a quarter to five, with Gere being arrested shortly afterwards as he was leading the horse up the road.[156] Ennis appeared to still be buttoning up his trousers when he was arrested, still in the stables.[157] States was arrested between midnight and one in the morning, only a few hours after being interrupted in the act by William Spruce and John Matheson.[158] This suggests that the witnesses had no doubts about the severity of the crime and the need to bring it to police attention. There were no attempts at covering up the crimes by the witnesses, as there had been in examples from Colonial America.

In contrast, in both of the cases against Cole and Henry, the single witness appears to have been slightly reluctant to prosecute. In the Henry case, his employer offered him money and told him to leave.[159] This would have been an acceptable solution for the employer as he could then ignore what had occurred and not have it come to public attention. In his statement the employer, Mr Cameron, stated that he did not send for the police at the time he tried to pay off

[155] Ibid.
[156] Regina v. Gere.
[157] Judge's Note Book – Criminal Cases, J. Chapman 1868-70, DAAC/21218/D437/879/4, Archives New Zealand, Dunedin.
[158] Regina v. States.
[159] Regina v. Henry.

Henry, although he claims that he intended to send word.[160] The witness to the activity, Donald Cameron, initially told his employer, Mr Cameron before going to the police.[161] In the Cole case, the witness George Smith stated:

> I did not give information to the Police – I made the constable promise not to say anything about it if I told him anything. I did not wish to prosecute the accused as I am going to Sydney…The constable came to me I believe from what he said that he had heard something of it before.[162]

This statement suggests an element of police surveillance, the police working from some previously received credible information, something that is central to the case against Hutchings as the single witness was a police officer who had been provided with some information and undertook to watch the boy's activities. It appears that Hutchings had been seen, at least acting suspiciously, over a period of two weeks and there was sufficient concern for the police to put a constable on special duty in order to collect evidence for a prosecution.[163] In this instance the constable watched Hutchings from the time he arrived in the gully with the cows until he left. What is noteworthy in this case is Hutchings' perseverance. He made seven attempts to have intercourse with the cow, but was not successful on any of them.[164] He singled out one cow for the attempts, following her around the gully and ignoring the others in the herd. Both the surveillance and Hutchings' perseverance suggest that in this instance, bestiality was not a one-off occurrence nor was it opportunistic. An element of planning and forethought by Hutchings is suggested by the evidence.

[160] Ibid.
[161] Ibid.
[162] Regina v. Cole.
[163] Regina v. Hutchings.
[164] Ibid.

The actions of the majority of the witnesses in seeking out other potential witnesses and quickly going to the police suggests that once the witnesses were involved in the situation, they were unable or unwilling to ignore what they had seen. They also appear to have been very much aware of the potential for their reliability as witnesses to be called into question, as well as potentially their character and respectability, hence the need to have others to verify their statements.

Although bestiality was a capital crime, in only one case was the sentence of death handed down. John Gere was initially given the death sentence in September 1867; however, the Judge's notebook states that although guilty, a death sentence should not be recorded.[165] It is not clear why the Judge felt this, however this case came to court only one month before the Offences Against the Person Act was passed, removing the death sentence for a conviction of bestiality. The Judge was more than likely aware of the impending law change, and felt comfortable pre-empting the change. Gere's death sentence was commuted to penal servitude for life a month later by the Governor, after the law change came into effect, and Gere was eventually released from prison in October 1873. This case dates about fifteen years before the work undertaken in Britain to reduce prison sentences for men found guilty of bestiality, but it foreshadows the early releases handed out there.[166] Ennis was also found guilty, but sentenced to penal servitude for 10 years. He served most of his sentence, being released in June 1875.[167] In the other cases the men were found guilty of the lesser crime of the attempt

[165] Judge's Note Book – Criminal Cases, J. Chapman 1867-68, DAAC 21218/D437/878 3, Archives New Zealand, Dunedin.

[166] Harvey, "Bestiality in late-Victorian England," 86.

[167] George Ennis record of discharge from goal, Otago Nominal Index, June 1875, http://marvin.otago.ac.nz/oni/details.php?recid=434743.7.

of bestiality, which carried a sentence of two years imprisonment with hard labour. Both Henry and States received the full sentence, while Hutchings was sentenced to six months due to his age; he was 16 at the time of his arrest and the jury made a recommendation to mercy on account of his youth.[168]

Only the Hutchings case file states the age of the offender, but it is possible to calculate the ages of most of the other men. Henry was 33 at the time of his arrest, Gere was 25 and both Ennis and States were 38. There is no record of Cole's age or date of birth, however, as he was referred to in the press as a young man, it is likely that he would have been in his 20s, probably late 20s as he was married with an infant son. Of these men, only Gere would really have fit with the suggested profile of offenders found in other studies – young men in rural situations. However all of the men, with the exception of Hutchings, were living in rural situations when charged. The evidence from Otago appears to support the theory of Harvey and Rydström that offenders were more likely to be marginalised persons without access to other sexual outlets. Only Ennis claimed to have a family, although it has not been possible to determine whether he was indeed married and if he had children.[169] Henry and States were both cooks at accommodation houses in more rural parts of Otago – Tokomairirio and Switzers respectively, Ennis was a labourer in West Taieri, and Gere was a labourer in Clyde. Henry was "a coloured man", originally from the West Indies, and States was from France.[170] Their ethnicity and origins may have made them more marginalised in a region dominated by British

[168] Indictments Supreme Court Dunedin, December 1870 Sittings, DAAC/D256/436, Archives New Zealand, Dunedin.

[169] An online search for New Zealand Births and Marriages has resulted in no records matching George Ennis.

[170] *Otago Police Gazette*, 1861-1868; *Otago Police Gazette*, 1871-1877.

men. Even after the end of the gold rush when the gender imbalance became less extreme, these men may still have found it difficult to find female companionship, especially in more rural districts.

Little evidence has been found to suggest what happened to these men after they were released from prison. Following his acquittal John Cole continued to reside in Manuherikia and appears on the electoral roll for 1865-66.[171] None of the others appear on the electoral rolls for Otago. There have also been no marriage or death records found for any of the others. As a result it is not possible to say whether they resettled back into the communities that they had lived in prior to their arrests, or whether they felt that it would be better to start afresh elsewhere.

The six cases from Otago provide a range of examples that reflect the findings of other international studies. The profile of offenders suggests that they were more likely to be men in rural areas without access to other sexual outlets, perhaps through marginalisation. However, the number of cases is low in comparison with other crimes. It may be possible to suggest that the occurrences were underreported, as it appears that some witnesses were prepared to not go to the police if the offender left. This, in conjunction with two of the juries requesting mercy in sentencing the offenders, could be taken as evidence that the Otago community, as represented in the witnesses and jurors, perceived the crime as not as severe as the sentences implied and that there was some sympathy with human fallibility. Overall, in the details of the six cases, it is possible to see a range of reactions to bestiality, including instances of depending on single witnesses for evidence, attempts to pay off the perpetrator to

[171] John Cole, Electoral Roll 1865-6, Otago Nominal Index http://marvin.otago.ac.nz/oni/details.php?recid=23549.18.

get him to leave, as in the Henry case, when his employer offered him money and told him to leave,[172] animosity between the accused and the witness, police surveillance, and even voyeurism.

Conclusion

Following the discovery of gold in 1861 Otago faced an influx from a large number of mostly single young men, resulting in an inflated gender imbalance of over nine men for every woman of marriageable age. As a result marriage for a large number of men was unlikely or impossible and sexual encounters were opportunistic and may have involved other men, or possibly animals. Until the 1867 Offences Against the Person Act, sex between men or between a man and an animal were capital crimes, punished under the same sixteenth century law. The prohibitions against such activities had their foundation in the development of the early Christian Church and were articulated in the Bible. Despite this, the church appears to have been silent about these activities. Furthermore, there was no single fixed attitude towards either sodomy or bestiality within the wider Otago community, with some people being willing to turn a blind eye to activities that did not impact upon them personally. It may have also been a reaction to the severity of the law which resulted in this avoidance.

Due to a number of factors very few cases of either sodomy or bestiality came to court in the first twenty or twenty-five years after the first settlers arrived. The laws against sodomy and bestiality were particularly harsh and the evidence required to secure a conviction meant that it was sometimes easier for the police to lay lesser charges under the Vagrancy Act. As noted

[172] Regina v. Henry.

in the examples examined in this chapter, the number and reliability of the witnesses could be severely questioned, undermining the case for the prosecution. There was the potential for false accusations to be made, which could be hard to defend, permanently damaging a person's reputation and standing in the community. Furthermore, there was no one single opinion amongst the community regarding those who were involved in sodomy or bestiality. In the cases that came to court the male recipients of approaches for sexual activities were often insulted, but not universally so. Witnesses and those not directly involved felt able to attempt to ignore the activities. This fact may in part explain the low number of cases. Only those really insulted by other men's activities would bother to report them. As Brickell has suggested "unwanted attention was usually dealt with informally" rather than resorting to the police.[173] Even when cases came to court and despite the opinions stated by judges, juries could express sympathy for human fallibility through finding men not guilty or guilty of a lesser offence.

Of the three elements within the local community that regulated sexual behaviour, sodomy and bestiality were almost wholly punished by the secular judiciary. There is no evidence that the local kirk was directly involved in any punishment of those suspected of committing these activities. However this did not limit the church's influence in general with regard to these activities. The basis for the laws against both acts was founded upon Christian teachings against 'unnatural' sexual activities. These teachings also informed and heavily influenced the opinions held by many settlers in Otago, especially the more conservative elements found in positions of authority. These opinions were reiterated by the judges in their summing up of the cases they heard. Indeed these speeches made by the judges could be seen as informal

[173] Brickell, *Mates and Lovers*, 38.

sermons delivered by the judiciary in a way that mirrored the formal sermons delivered on Sundays by the church's ministers.

Chapter 7

Sexual Assault and Rape

> Virility seems necessary to give a man that consciousness of his dignity, of his character as lord and ruler, of his importance…. It is a power, a privilege of which the man is, and should be, proud.[1]

William Acton suggests that men were justified in using their virility to reinforce their position in society, even if it was expressed in sexual violence against women and children. However, Acton's ideas were not universally, or even generally, accepted by his contemporaries.[2] Despite this there was no generally accepted view of rape as a serious crime during the nineteenth century. Carolyn Conley has suggested that judges "often viewed sexual assaults as little more than regrettable lapses of self-control."[3] Several New Zealand historians have suggested that violence was a "by-product of colonial masculinity" often linked to the consumption of alcohol.[4] Indeed, Olssen and Levesque suggested "among the lower strata, even perhaps among the middling classes, violence was endemic".[5]

The question could be asked why look at sexual violence and rape when studying regulation of sexual behaviour? Although sexual violence and rape have at their core a concept of

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[1] William Acton, *Prostitution considered in its moral, social and sanitary aspects…*, quoted in Carolyn A. Conley, *The Unwritten Law: Criminal Justice in Victorian Kent* (Oxford: Oxford University Press, 1991), 91.

[2] Carolyn A. Conley, "Rape and Justice in Victorian England," *Victorian Studies* 29, no. 4 (Summer, 1986): 532 & 536.

[3] Ibid., 91.

[4] Graeme Dunstall, "Frontier and/or cultural fragment? Interpretations of violence in colonial New Zealand," *Social History* 29, no 1 (February 2004): 67-8; Erik Olssen and Andree Levesque, "Towards a History of the European Family," in *Families in New Zealand*, ed. Peggy Koopman-Boyden (Wellington: Methuen Publications NZ, 1978), 3; Jock Phillips, *A Man's Country? The Image of the Pakeha Male – A History* (Auckland: Penguin Books, 1987), 58-9.

[5] Olssen and Levesque, "History of the European Family," 3.

violence and coercion, the act itself was traditionally perceived as a sexual act and defined as such, 'unlawful carnal knowledge', by law.[6] It has also been portrayed under common law as criminal behaviour by one man against the property of another, be it wife, sister or daughter, and as such was subject to regulation. Instances of sexual violence also provide an opportunity to focus on issues of gender and class in the examination of public perceptions of respectability, and the role that a woman's character had in defining her morality: as having loose morals and who corrupt men, or innocent victims of circumstance. Either way, the character, social status and respectability of both the victim and the attacker were closely examined by members of the judiciary, the jury and by the print media.

The acceptance of violence in nineteenth century New Zealand may have been due to a number of reasons, including social training of women and children encouraging them to submit to violence, the legal position of men as head of household and family, and the sanctioning of physical force as a means of enforcing a man's authority over his wife and children.[7] In fact, by legal definition, the act of rape could not occur between a man and his wife.[8] The idea that a wife intrinsically consented to sex with her husband was founded on a statement in *History of the Pleas of the Crown* by Sir Mathew Hale (1609-1676): "The husband cannot be guilty of a rape committed by himself upon his lawful wife, for by their mutual matrimonial consent and contract the wife hath given herself up in this kind unto her husband which she cannot

[6] Jan Jordan, "The Disputed Terrain Between Sex and Rape," in *Sexuality Down Under: social and historical perspectives*, ed. Allison Kirkman and Pat Moloney (Dunedin: University of Otago Press, 2005), 166.

[7] Stevan Eldred-Grigg, *Pleasures of the Flesh: Sex and Drugs in Colonial New Zealand 1840-1915* (Wellington: A. H. and A. W. Reed Ltd., 1984), 52.

[8] Eldred-Grigg, *Pleasures of the Flesh*, 52; Joanna Bourke, *Rape: A History from 1860 to the Present* (London: Virago Press, 2007), 307.

retract."[9] Sexual aggression was perceived as "normal, healthy, and inevitable" during the nineteenth century.[10] There are limitations with these reasons why violence was accepted, as the majority relate to a man's relationship with his wife and children and his role within his own household. What about cases of sexual assault and rape that occurred outside the family unit? How was this type of violence and the men who perpetrated it perceived within society?

Sexual assault and rape were dealt with under law, with the church having no formal role in punishment. Indeed the church in Otago was quiet on the subject. Rape was not a distinct and separate sexual crime in early modern Europe, rather sexual violence against women was perceived as a property crime against either their father or husband.[11] However, English law specified abduction (generally referring to abduction or forced confinement with non-consenting sex) as a capital offence in 1557. It was during the seventeenth century that rape became a sexual crime. Karen Dubinsky's study of sexual assault in nineteenth century Ontario demonstrates that the modern fear of rape is considerably different from the fear that assault held for women in other periods in history.[12] In the early modern period, rape and sexual assault were property crimes, but by the nineteenth century they were crimes against the person which could call into question the moral character of the victim.[13] For women, fear about "moral standing eclipsed concerns about physical safety."[14] Under English Law rape – "the

[9] Hera Cook, *The Long Sexual Revolution: English Women, Sex and Contraception 1800-1975* (Oxford: Oxford University Press, 2004), 2, n. 3.

[10] Conley, "Rape and Justice in Victorian England," 532; Conley, *The Unwritten Law*, 91.

[11] Katherine Crawford, *European Sexualities, 1400-1800* (Cambridge: University of Cambridge Press, 2007), 152.

[12] Karen Dubinsky, *Improper Advances: Rape and Heterosexual Conflict in Ontario, 1880-1920* (Chicago: University of Chicago Press, 1993).

[13] Anna Clark, *Women's Silence Men's Violence: Sexual Assault in England 1770-1845* (London: Pandora Press, 1987), 5-6.

[14] Dubinsky, *Improper Advances*, 15.

carnal knowledge of a woman forcibly and against her will"[15] where the woman was not his wife - was a capital offence until 1841, as was carnal knowledge of a girl under the age of ten.[16] The key points of the definition of rape were that the attack was forcible and without her consent. However, how much violence was needed to make the attack forcible and how much resistance was required to prove that the woman did not consent was not quantified in the law and therefore open to interpretation by judge and jury.[17] According to Conley "though the law itself did not mention physical injury, most judges and juries assumed that anything less than a violent struggle implied that the act had not been against the will of the woman".[18] Convictions for rape were notoriously difficult to secure due to the evidence required and the close examination of the character of the victim, the perception that somehow the victim brought it upon herself.[19]

As a result, medical evidence came to play an important role in prosecution cases to prove the extent of injuries sustained from the violence inflicted. After 1828 convictions were very much reliant on medical evidence proving penetration only; it was not necessary for the man to emit semen for rape to have occurred.[20] As with many sexual acts, sexual assaults tended to be private so the role of medical evidence was very important in cases where the other evidence was limited to the word of the accuser, invariably but not always a woman, against that of the accused, invariably a man. Unlike other crimes where the evidence of more than one witness

[15] 18 Eliz. I, c. 7.
[16] 4 Geo.4 c.31; 4 & 5 Vict., c. 56 (Eng.); Clark, *Women's Silence*, 6.
[17] Conley, "Rape and Justice in Victorian England," 520.
[18] Ibid., 524.
[19] Dubinsky, *Improper Advances*, 23.
[20] 4 Geo.4 c.31, section XVIII.

was necessary to secure a conviction, sexual violence trials could result in a conviction based on the evidence of a single witness:

> In that case, the question of whether an offence had been committed depended exclusively upon the testimony of the woman; but crimes of this description were very seldom seen; and the evidence of one witness, if believed, was not only sufficient to justify a Grand Jury in finding a true bill in such a case, but was sufficient to justify a Petite Jury in convicting. Of course, it was necessary that the Petite Jury should watch with care the evidence of the woman, as she gave it in Court; and it was always desirable that there should be some testimony to corroborate her – something that should at least show, if not by direct circumstances of corroboration, that she was the witness of truth.[21]

These words of a Supreme Court Judge in Dunedin from 1867 clearly articulate the difficulties these cases presented to juries. Despite the use of medical evidence and the ability to convict based on the evidence of one witness, it appears that convictions for rape were hard to secure in nineteenth century Otago, with a large number of cases ending with convictions for the lesser crimes of attempted assault or common assault, or acquittal.

Historical research into sexual assault and rape forms a considerable body of work. The majority of earlier research from the nineteenth and early part of the twentieth centuries created and perpetuated a number of myths surrounding both the victims and the perpetrators of sexual assaults. As Joanna Bourke has suggested "criminologists, jurists, psychologists and sociologists have attempted to 'make sense' of sexual violence".[22] However, the majority of these experts were members of the white, heterosexual, male elite that "monopolised the definition of sexual abuse."[23] These early researchers had suggested amongst other things that it would be almost impossible to rape a resisting woman, that it was impossible to rape a child,

[21] *Otago Daily Times*, 3 September 1867.
[22] Bourke, *Rape*, 413.
[23] Ibid., 413.

that the majority of rape allegations are false, and women cause themselves to be raped by their actions.[24] They also stigmatised certain groups of men as more likely to be involved in sexual violence against women, including racial minorities and immigrants, adolescent delinquents, and unemployed or vagrant men.[25] Much of these assumptions were commonly held during the nineteenth century and informed the way police, member of juries and the wider community viewed the victims of sexual assault.

More recent works of scholarship have focused on the victimisation and oppression of women at the hands of men, thereby creating new assumptions around the impact of sexual assaults on women, and to a much lesser extent on men. These assumptions inform the thinking of modern scholars and can colour how historians perceive these crimes in other periods.[26] In order to minimise the impact that modern assumptions could have, it is necessary to focus on the evidence provided by the victims, the language that they use, as well as their actions in bringing a case against an attacker – whether they lay the charges themselves or seek help from their families or friends, who make the accusations on their behalf. This evidence, including the language and actions, could be seen as very place specific as it would have been informed by the culture and society of the victim. During the nineteenth century class, work and respectability were important elements of a woman's identity, thus would have influenced how she would have interpreted and talked about an assault.[27] Equally they would have shaped

[24] Bourke, *Rape*, Chapter 2 "Rape Myths," 21-50; Stephen Robertson, "Signs, Marks, and Private Parts: Doctors, Legal Discourses, and Evidence of Rape in the United States, 1823-1930," *Journal of the History of Sexuality* 8, no. 3 (January 1998): 346, 350-363.

[25] Bourke, *Rape*, 92-6, 121-9, & 134-5.

[26] Garthine Walker, "Rereading Rape and Sexual Violence in Early Modern England," *Gender and History* 10, no. 1 (April 1998): 2.

[27] Bourke, *Rape*, 407 & 425; Shani D'Cruze, *Crimes of outrage: Sex, violence and Victorian working women* (London: UCL Press, 1998), 138; Conley, "Rape and Justice in Victorian England," 526.

perceptions of her reliability.[28] The fact that a woman was bringing a charge of sexual assault against a man immediately made her character questionable.[29]

It is impossible to know how widespread these crimes were in Otago, in part because the reporting of these crimes was subject to social stigmas surrounding the implied disgrace of being a victim of sexual assault or rape. As one mother of a victim stated at the trial of her daughter's attacker, "I did not like to apply to a Medical man, being anxious if possible to keep secret the disgrace."[30] This comment bears out research by Clark and Dubinsky on sexual assault and rape in England and Canada during the same period, where the moral character of the victim was often questioned and moral standing was seen as more important than any issue of physical safety.[31] The stigma against reporting instances of sexual assault and rape appears to stand in opposition to how communities and society punished crimes. Punishments for crimes were designed to act as a deterrent. However, if the crimes were not being reported and the perpetrators were not being punished, there would be little deterrent. Another potential reason for the low reporting of sexual assaults, especially amongst the working-class, may relate to Eldred-Grigg's assertion that physical violence was an accepted part of the culture.[32] D'Cruze's work on working class women and violence suggests that there was a deeply embedded tradition of conflict within working class communities in Britain which both men and women took for granted.[33] Working class emigrants may have brought these traditions with them along with all their other cultural baggage.

[28] D'Cruze, *Crimes of outrage*, 148.
[29] Conley, "Rape and Justice in Victorian England," 536.
[30] Regina v. John Golberg, DAAC/D256/246, Trial 112, 1863, Archives New Zealand, Dunedin.
[31] Clark, *Women's Silence Men's Violence*; Dubinsky, *Improper Advances*.
[32] Eldred –Grigg, *Pleasures of the Flesh*, 52.
[33] D'Cruze, *Crimes of outrage*, 64 & 77.

One other reason why the reporting of sexual assaults was limited during this period, especially amongst Māori, is revealed in the reporting of a case from 1867 in which the victim was a 12 year old Ngāi Tahu girl. When asked by the Magistrate about a delay in bringing the case to court, the victim's mother stated "that in such cases, they held a preliminary inquiry in a Māori Court, before which Court the prisoner had been summoned to appear, and in consequence of the decision arrived at, the case was brought before the Resident Magistrate."[34] This suggests that the local Ngāi Tahu population maintained their own processes and procedures for policing and punishing instances of sexual violence within their own communities, allowing them to define acceptable levels of violence and established suitable punishments.[35] Such an approach did not preclude them making use of the judicial system in cases that crossed racial boundaries.

The majority of the surviving evidence for sexual assaults and rapes in Otago comes from the Resident Magistrates' Court and Supreme Court records and related material of the times, such as judge's notebooks. As the records for the Supreme Court in Dunedin date from 1860 at the earliest, most of the surviving evidence comes from after this date. Some additional evidence for earlier cases heard in the Resident Magistrate's Court during the first decade of the settlement has been found in local newspaper coverage of the court proceedings. These reports can provide an indication of the editors' biases and the judges' reported biases towards certain behaviours and individuals involved in the cases, but it was not unusual for the reports to omit

[34] *Otago Daily Times*, 15 June 1867.

[35] Angela Wanhalla, "Interracial Sexual Violence in 1860s New Zealand," *New Zealand Journal of History* 45, no.1 (2011), 72.

details in order not to offend their readers, so it can be difficult to ascertain the specifics of some cases.

Thirty cases of indecent assault, sexual assault, rape, attempted sexual violence, and assault with intent to commit a rape have been identified for the period 1848 to the end of 1867 (see Appendix B). The age of the victim was a major factor in how the attacks were perceived by the judges and jury members, and the importance placed on various types of evidence. Twelve of the cases relate to assaults on those under 15, six of these are known to have been under the age of 10, a further one is listed as "child". One of the remaining cases relates to a girl aged 15 and the others to adult women. Two of the cases never made it to court. Although warrants were issued for the arrest of the accused in both cases, no arrests were made. There is one further case of civil damages for attempting to take "improper liberties" with the plaintiff's wife.[36]

Although no longer punishable by death, indecent and sexual assaults of girls under the age of ten were perceived by judges, juries and the general public as being particularly repugnant. The statements made by the judge prior to sentencing in one of the relevant cases suggest the strength of feeling that such crimes could elicit:

> No person who heard the evidence…could have any doubt whatever that you have committed the brutal crime (for I cannot use any lighter word) of tampering with this poor little child. To my mind there is no offence of which a man can be guilty, which is so brutalising, so cruel, so inhuman, as that of which you have been convicted…There are some few offences for which the law imposes whippings as well as imprisonment; and I am only sorry that it does not allow it in this case. Whipping would be the best possible punishment for a man of such debased and degraded feelings as yourself.[37]

[36] *Otago Daily Times*, Resident Magistrates' Court, Wrigley v. Dorman, 24 January 1863.
[37] *Otago Witness*, 4 March 1865.

Although whippings were not imposed, the punishments for being found guilty of carnal knowledge of a girl under ten could be severe. For example, in January 1863, John Golberg was sentenced to eight years penal servitude for the carnal abuse of a six year old girl, although the judge suggested that the period could be shortened for good behaviour.[38] It appears that this indeed happened as he was discharged after only two years in January 1865.[39] In two further cases, in March 1865 and August 1867, John Morrison and Andrew Scott were both sentenced to the maximum penalty of two years with hard labour for common assault on a seven year old girl and assault with intent to commit a rape on an eight year old girl.[40] The difference between these two cases and the Golberg case is that in the latter the medical evidence suggested that penetration had occurred, whilst in the case against Morrison the doctor found that the membranes were still intact, indicating that the assault could not be defined as rape, and in the Scott case, the victim's father interrupted the assault.

Unlike other cases where the victims were older, there is no suggestion that the social standing of the family, their moral character, or the actions of the victims were even mentioned. This is despite the concerns of the mother quoted earlier, who wished to keep the attack secret.[41] In each of these cases the victims were examined – despite concerns regarding the admissibility of evidence from young children[42] - as were their families, but it appears that the evidence was used to corroborate the finding of any medical examinations, as indicated by the summing up of the judge in the Golberg case:

[38] *Otago Daily Times*, 22 January 1863.
[39] *Otago Police Gazette* November 1861 – January 1868, February 1865.
[40] *Otago Witness*, 4 March 1865; *Otago Daily Times*, 3 September 1867.
[41] Regina v. John Golberg.
[42] *Otago Daily Times*, 3 September 1867.

> The vital point was whether the jury could believe the evidence of the child Mary Ann Mitton [older sister of the victim] as to what she saw; if they thought they could, the medical evidence would be so far corroborative, as it afforded a presumption that the offence had been committed.[43]

Despite the importance placed on the medical evidence such corroboration was necessary as it is clear that different doctors could have differing opinions regarding the possibility of a child being raped:

> I do not believe from the examination I made that penetration was effected. I do not think it possible to have been from the tender age of the child.[44]

In this case from 1857 the child was ten years of age, four years older than the victim in the Golberg case where another doctor found the hymen ruptured and stated that in his opinion rape had been committed.[45]

The reporting of these cases in the newspapers focused on the comments of the judges and the age of the children involved, often with a suggestion of innocence, the more so if the assault occurred in or around their family home. Unlike the author of *Rape in Children and in Young Girls* (1913), who condemned working class mothers for failing to protect their daughters, the mothers were not vilified for being away from home on short errands.[46] In the 1861 case against James Dalton, the mother was at the well getting water, when her six year old daughter was assaulted in their house on Stuart Street.[47] In the 1863 case against John Golberg, the newspapers did not comment about the mother being away in Dunedin having left her younger children in the care of their older sister at their tent in Waikouaiti.[48] The comments of the

[43] Ibid., 21 January 1863.
[44] Resident Magistrate's Criminal Case Files 1857-1861, DAAC/D256/244, 9 May 1857, Archives New Zealand, Dunedin.
[45] Regina v. John Golberg.
[46] Bourke, *Rape*, 127.
[47] *Otago Witness*, 30 March 1861.
[48] *Otago Daily Times*, 21 January and 22 January 1863.

judges were reported in full, reinforcing the attitudes of the judiciary regarding the immorality of these acts and emphasizing their opinions regarding men who assault young girls. Such comments could be perceived as informal sermons to the wider community regarding the sexual behaviour of its members, underpinning what the judges felt should be commonly held views and values within the community.

Sexual assaults on girls under the age of ten appear to have been particularly reviled by judges and the wider community. The cases from Otago illustrate that penalties were particularly harsh, with the maximum sentence for an attempted assault of two years with hard labour being used more than once, and the longest sentence given to anyone convicted of rape – eight years – being handed out to a man found guilty of raping a six year old girl. This supports the findings of research done on cases in Europe throughout the Early Modern Period.[49] Unlike attacks on older girls and women, there is no evidence that the moral or social standing of the victims and their families were particularly scrutinised. The statements of the victims, where used, and their families were only used to corroborate the medical evidence. This approach provides a strong contrast to the cases which involved older victims.

A number of studies have identified the importance of the physical resistance by the victims as being a key factor in whether their stories were believed.[50] This is supported by the evidence presented in the courts in all the cases in this study relating to assaults on girls over the age of

[49] Dubinsky, *Improper Advances*, 23; Clark, *Women's Silence*, 42 & 48-9; Georges Vigarello, *A History of Rape: Sexual Violence in France from the 16th to the 20th Century*, trans. Jean Birrell (Cambrige: Polity Press, 2001), 166.

[50] Dubinsky, *Improper Advances*, 23; Clark, *Women's Silence*, 28-9 & 96; Diane Miller Sommerville, *Rape and Race in the Nineteenth Century South* (Chapel Hill: University of North Caroline Press, 2004), 55; Vigarello, *History of Rape*, 39-42; Conley, "Rape and Justice in Victorian England," 524.

ten and women. The following example from the case against John Christie in September 1863 highlights the defence put up by the victim:

> I struggled with him for some time and screamed out…I tried to resist him as much as ever I was able but he was too strong for me. I was not well at the time. When I screamed out he told me to be quiet or he would kill me…I was struggling with him for about half an hour. I screamed a great deal.[51]

In another case from the same year, the victim who was under 15 years of age was able to resist her attacker long enough for her screams to be heard:

> I immediately pushed the person away and called Mrs P [the landlady]…I again called for Mrs P. I resisted the Prisoner in every way I could… I put my hands to prevent him from accomplishing his purpose, I repeatedly told him to leave the bed and pushed him off me three times.[52]

It is clear from these examples that there was an expectation the victim would do everything in their power to resist an assault. Any suggestion that she did not resist or fight off her attacker could leave her open to accusations of complicity.

It was also important that the struggles or screams were overheard, thereby providing further witnesses to the assault.[53] For the girl in the example above, the landlady heard her cries and her attacker was caught in her bed and handed over to police.[54] Likewise the screams of one fifteen year old victim were overhead by the local Free Church Minister, Will:

> I heard screams about a quarter of a mile from my house…I listened particularly and looked in the direction whence the screams proceeded, and for some time could see nothing. I afterwards saw two persons, male and female, apparently struggling together. I sent my man sometime afterwards to see what was the matter.[55]

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[51] Regina v. John Christie, DAAC/D256/248, Trial 213, 1863, Archives New Zealand, Dunedin.

[52] Regina v. R. Fletcher alias "James Logg", DAAC/D256/247 Trial 180, 1863, Archives New Zealand, Dunedin.

[53] Vigarello, *History of Rape*, 41-2.

[54] Regina v. R. Fletcher alias "James Logg".

[55] *Otago Witness*, 11 June 1859.

A witness with such social standing, who could corroborate the statement of the victim as to the struggles that she put up against her attacker, could almost ensure a conviction for assault. The other key factors in all the cases involving victims over the age of 10 were evidence relating to the moral character of the victim and their actions during and after the assault.[56] A number of cases heard in Otago courts resulted in either a not guilty verdict or the dismissal of the case before all the evidence had been heard. In each of these cases the moral character of the woman, her sobriety, or her actions during the supposed assault were closely examined and found wanting in the eyes of the juries concerned. In one case the *Otago Daily Times* reported:

> The revelations were of such a disreputable character that the charge was withdrawn by the Crown prosecutor. The jury by consent returned a verdict of not guilty, and the prisoner was discharged.[57]

This was despite the case having been through the local Resident Magistrate's Court where the prisoner had been committed to trial at the Supreme Court. In the committal trial the surviving evidence shows that the victim had been expected to defend her behaviour and actions during the assault:

> I did all in my power to resist him but the penetration was complete. I tried to scream, but could not raise my voice from ill-health…the prisoner remained in bed with me all night and had connections with me again in the morning. I resisted this time also, but did not attempt to scream. He was lying partly across me the whole night, I could not get him out he was so drunk. During…the evening I did not hold out any inducements for him to come into my berth.[58]

The consumption of alcohol, in this case two glasses of brandy by the victim during the evening brought her character into question.

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[56] Dubinsky, *Improper Advances*, 24; Clark, *Women's Silence*, 67-9.
[57] *Otago Daily Times*, 8 December, 1863.
[58] Regina v. John Kinnear, DAAC/D256/249, Trial 28, 1863, Archives New Zealand, Dunedin.

Similarly in another case where the accused was found not guilty, the victim reiterated several times that she was sober, but did admit to having had some whisky:

> The prisoner and his mother …came to purchase some trowsers [sic] of me. The woman proposed to have a drop of beer. I said I did not care for beer. She then suggested whisky, to which I agreed. Prisoner's mother gave him a shilling, and I gave him another, and a bottle, to fetch the whisky. I swear I did not say the bottle would be known at the Commercial. I have sent Mrs. Oxley's little girl for spirits, but not many times. I gave one glass to the prisoner, another to his mother, and took a half one to myself…We were all sober. I never gave him any encouragement to come to the house…He returned again in the evening. I was quite sober.[59]

In contrast, the prisoner's mother stated that the victim suggested having a drink:

> I went to the house of the prosecutrix one afternoon in the month of December last. I went to purchase a pair of trowsers [sic]. Prosecutrix asked me what I would take, and I said a glass of beer. She said she should prefer whisky, as she was used to that liquor. We each gave the boy a shilling and he went and fetched the whisky. Prosecutrix took a glass herself, and gave my son and me two each, and then asked if we would take more, which I refused. Prosecutrix took two small glasses herself. The remainder of the whisky was poured into a tumbler…The tumbler was not emptied before I left the house.[60]

Evidence of sobriety was sufficiently important for the Crown prosecutor to address it in his summing up. His address was brief and contended that the prosecutrix had no motive to bring a false charge and that there was no evidence of the "insinuation that she was not sober at the time".[61]

The role of alcohol in undermining the character of some victims of sexual assault contrasts to the use of alcohol to defend the actions of some of the men who perpetrated the assaults. A number of the prisoners used the excuse that they were drunk or had been drinking prior to the alleged assaults:

[59] *Otago Witness*, 11 June 1859.
[60] Ibid.
[61] Ibid.

> Mr Howarth, on behalf of the prisoner, addressed the jury. He was willing on behalf of his client, to admit the minor charge of a common assault. He had been at a sale at the Taieri on the day in question, and the prisoner had partaken too freely of spirits, and although it was no legal excuse, he hoped the jury, as men of the world, would take all the circumstances into consideration.[62]

In another case the defence not only suggested that the victim had been drinking during the evening with the accused, but that the accused was drunk at the time.[63] Finally, one prisoner in defending himself read "a fairly composed statement", in which he did not deny that he made an attempt, but used the excuse that "he was inflamed with drink taken in the prosecutrix's shanty."[64] Each of these examples illustrate a double standard in society:

> On the one hand, the consumption of alcohol is viewed as making women *more* responsible for their own rape: by choosing to get drunk, women are deliberately increasing their risk and should be prepared to face the consequences. On the other hand, male consumption of alcohol is viewed as making them *less* responsible for their actions: by choosing to get drunk, men increase the chance of inappropriate behaviour and should *not* therefore be required to pay the price for their actions.[65]

Such a double standard illustrates the difficulty that all women faced in having their cases examined fairly, and is one reason why successful prosecutions for sexual assault may have been relatively unusual.

Other cases, where alcohol was not a factor, but which resulted in not guilty verdicts lacked much in the way of convincing evidence and the acquittals were often achieved as a result of close examinations of the actions of the victims. One case from January 1863 was the supposed rape of a patient in the Dunedin Hospital. The evidence presented in court by the victim suggested that she was unable to complain of the alleged assault until several days after the

[62] Ibid.
[63] *Otago Daily Times*, 4 June 1863.
[64] *Otago Witness*, 4 March 1865.
[65] Bourke, *Rape*, 57.

event due to "being too weak to speak."[66] However, the attending doctor said that "although she was still feverish, she was able to sit up and talk, and even walk" on the day after the event and that "she had not complained of the prisoner assaulting her until some days after the offence was alleged to have been committed."[67] The presiding judge dismissed the case believing she had been a consenting party.

Another case, also from January 1863, was brought against a police constable, by a woman in the Oamaru lock-up under charge for larceny. She claimed that the constable entered her cell about 11pm and "in spite of her resistance and entreaties, accomplished his purpose" and then later in the night came back twice more "and repeated the offence."[68] Her evidence that she resisted him was contradicted by one of the gaol warders:

> Sergeant May…said that he had overheard the prosecutrix telling some of the other female prisoners that…she did not resist. She made a regular joke of the affair among the female prisoners.[69]

Her actions after the alleged assault also may have undermined her evidence. Instead of immediately accusing her attacker, she appears to have carried out her usual duties. In the morning after the alleged assault, she got up and got breakfast for the prisoner and the sergeant, she also saw the magistrate and had conversations with two other women, but did not say anything to any of them about the assault. It was not until she spoke to the sergeant after dinner that she mentioned anything that occurred during the previous night.[70] In addition to the lack of convincing evidence, perceptions of the woman's character counted against her. Two days

[66] *Otago Daily Times*, 30 January 1863.
[67] Ibid.
[68] Ibid.
[69] Ibid.
[70] Ibid.

after the alleged assault she was imprisoned for three months for larceny, a fact that may have been known to the jurors during the trial.

The actions, or inactions, of one victim in February 1867 nearly undermined the prosecution's case against assailants in two separate cases involving the same woman. Even before the cases came under consideration by the Grand Jury, the Judge, Mr Justice Chapman, went into some detail regarding the length of the delay between the attacks and the reporting of them:

> In all such cases, almost, the jury had to depend upon the evidence of the complaining person; and in most cases of felony, the evidence of a single witness was sufficient, if the jury believed it. But it was always desirable that, if possible, such evidence should be corroborated in some way; and one thing which it was always desirable should be shown was, that the complainant, as soon at least as she came into contact with another woman, had stated what had happened. The words so used could not be given in evidence; but the fact of the statement of what had happened was important as corroborative evidence. That evidence was wanting here. The complainant arrived at Anderson's House on a Friday evening; and she said nothing to Mrs Anderson about having been assaulted. The explanation she gave was, that there were shepherds about the house. But she remained several days without making any complaint; and during those days, she surely might have found opportunity for private conversation with Mrs Anderson, notwithstanding the presence of shepherds in the house. At length, a portion of the headdress of a woman, which was found on the road, by one of the men, was brought into the house. Then, the complainant said the article was hers; and she made a statement to Mrs Anderson as to having been assaulted by two men. This delay in complaining no doubt threw slight suspicion upon the woman's testimony; but it was for the Grand Jury, looking at all the circumstances, to say whether there was sufficient to warrant the men being called upon to answer to the charge of committing the offence.[71]

Despite this "slight suspicion" that the Judge held against the victim – and such statements could be perceived as leading - there was sufficient evidence for the Petite Jury to convict both men of common assault.

[71] *Otago Witness*, 8 June 1867.

These cases illustrate how important the character and actions of the victim were in firstly having their stories believed and then in providing sufficient admissible evidence to secure a conviction. Women who did not appear to have put up sufficient resistance, either by screaming or fighting off their attacker, and those who did not immediately seek help were less likely to be perceived as victims as opposed to consenting partners. Furthermore, women whose lifestyle, living arrangements or sobriety could be called into question were more likely to have been perceived as being the type of woman who brought these things upon themselves. As a result their claims were taken less seriously, and prosecutions and convictions of their attackers harder to secure.

This perception that the victims of sexual crimes were morally loose was enshrined in the laws designed to punish their attackers. In several cases, including the 1859 case against John Christie for rape, and the 1863 case against James Logg, alias R Fletcher, for indecent assault, the judges spent some time going into the points of law surrounding their use of force. For an assailant to be found guilty of indecent assault they needed to be "determined to accomplish his purpose [and] to do so at all risks…at all events, and under all circumstances."[72] Examination of the victim and her behaviour was commonly used to determine whether she was in any way consenting:

> The crime of attempting to commit a rape is not constituted, if a man enters the room of a woman with intent to induce her to yield – not by using force or fraud – and desists when he finds that her will is opposed, and that she will not consent. It is necessary for the crime that he should use violence against her wishes. Or there may be rape, although not against the will of the woman; if she has been stupefied by any liquor or drug, or if she be sleeping, so that the will is dormant.[73]

[72] Ibid., 11 June 1859.
[73] *Otago Daily Times*, 4 June 1863.

This occurred in all the cases examined in this study, as well as in courts in Canada and Britain at the same time, which were required by law to determine the will of the victim. Despite this legal necessity, the approach of the male dominated courts was an attack on the moral character and virtue of the female victims.

In January 1865 John King was charged with having raped Margaret Fox, a storekeeper at Waikouaiti. On being arrested, King told the arresting officer "that he had assaulted her and that he had gone to her place since the occurrence and begged her pardon and that she had forgiven him and that he thought it was all over."[74] From the Judge's notes the victim chose not to press charges after King apologised to her in the constable's presence.[75] King conducted his own defence and, as the newspaper report states, he cross examined the prosecutrix "with a view to show that she encouraged him at first and made nothing like a real resistance at any time."[76] King's defence stated that she had provided him with drink initially and then asked him for reparation before he left her in the form of a written promise to marry her.[77] Despite this unusual evidence, the fact that King did not deny the assault and the evidence that the victim sustained considerable bruising and was ill for some time afterwards, resulted in him being found guilty and sentenced to 18 months with hard labour. This sentence was considerably longer than the previous cases most likely due to the level of violence reportedly used, which was missing in the other cases.

[74] Regina v. John King, DAAC/D256/252, Trial 14, 1865, Archives New Zealand, Dunedin.
[75] Judge's Notebook, Criminal Cases, J. Chapman, DAAC 21218 D437/876, 241, 1865, Archives New Zealand, Dunedin.
[76] *Otago Witness*, 4 March 1865.
[77] Ibid.

Although the morality and sobriety of the victims of sexual assault was open to question, within Otago, their attackers were not similarly judged outside the courtroom. As Bourke has suggested, there was a certain characterisation surrounding rapists in the nineteenth century that focused on the poor, immigrants, marginalised men and racial outsiders.[78] The lack of such characterisation in Otago may have been due in part to the variety of men involved in the assaults. There appears to have been no "typical" man who was accused of carrying out sexual assaults. The ages of these men ranged from youths of about 15 or 16 to older men in their 40s and 50s. Their occupations included a clerk, mariners including ship's master, labourers, a police officer, a night-watchman, and gold miners. Only one of the accused men, the black American John King, could be classed as a racial outsider. Few of them had criminal records and only King was charged with the crime twice – he had an outstanding warrant against him for an assault with intent to rape in Christchurch in 1864 when he was arrested for rape in 1865 at Waikouaiti - although both Kinnary and Maloney, guilty of the 1862 assault and rape at Wetherstones, appear to have been repeat offenders. The local newspaper reports of these cases do not mirror the "monstrous" language used in British newspapers at this time to describe the perpetrators of sexual violence. In most cases the reports are factual, providing information such as age or occupation. It could be suggested that such reporting, especially if the men are quoted directly, would do more to suggest uncouthness, lack of education, or loose morals than any descriptions of them as "monstrous" criminals. For example, the report of the trial of Andrew Scott in September 1867, showed him to be partial to drinking brandy, rowdy when drunk, and of limited education.[79] His inability to conduct a focused defence is contrasted with the reporting of the King trial in 1865, in which the *Otago Witness* reported that "the prisoner

[78] Bourke, *Rape*, 95, 121, & 124.
[79] *Otago Daily Times*, 3 September 1867.

read a fairly composed statement in his own defence…not denying that he made an attempt, but saying that he was inflamed with drink."[80] This evidence suggests that there was no specific person that was feared as the perpetrator of these assaults. Instead age, class, occupation, religion, criminal record or race played a role in the sentencing of those found guilty.

The role that the background of the men had in sentencing is illustrated by the longest sentence for assault with intent to commit rape handed down in Otago. This was two years with hard labour, the maximum available sentence, given in May 1862 to Thomas Davis, the captain of the schooner *Flying Squirrel*, for an attack on a married woman who had purchased passage to Hobart Town on the schooner.[81] Despite the defendant's solicitor attempting to question the virtue of the victim, the Judge, Mr. Justice Gresson, remarked in his summing up that "the imputations against the virtue of the prosecutrix were amply refuted by her laudable and significant conduct, in so frequently escaping from the prisoner."[82] In passing sentence, Justice Gresson stated that the crime was compounded by the position of authority that Davis had as captain of the ship and the duty that he had undertaken to transport the victim to Hobart, and aggravated by the defence that was used in suggesting the victim was a willing participant:

> Under all the circumstances, I deeply regret that the law does not empower me to pass upon you a heavier sentence: you have, very fortunately, not succeeded in the full accomplishment of your brutal purpose; but the sentence of the Court for your crime is, that you be imprisoned, and kept to hard labor [sic], in H. M.'s common gaol at Dunedin for the period of two years. If I could sentence you, legally, to a longer term, I would do so.[83]

[80] *Otago Witness*, 4 March 1865.
[81] *Otago Daily Times*, 21 May 1862.
[82] Ibid.
[83] Ibid.

Sentences for rape were considerably longer than those for assault or attempted rape, with the minimum being four years penal servitude.[84] In one case in 1863, where the jury recommended mercy due to the age of the defendant, who was 15 or 16 at the time of the assault, the Judge sentenced him to the minimum of four years in the belief that his youth meant that he was unconscious of the severity of the crime:

> I exceedingly regret that it is not in my powers to sentence you to one better suited to your years than that which the law provides, but I shall award to you the lowest term of penal servitude which it allows, and I only trust that your confinement in gaol may lead you to such true repentance that by your conduct his Honor the superintendent may be led to shorten the period of your punishment. The sentence of the Court is that you be kept in gaol for the period of four years.[85]

He did not serve the full sentence because by October 1866 he was facing a charge of horse stealing.[86] This assumption that a youth of 15 or 16 would be unaware of the severity of his actions suggests a level of hopeful naivety by the jury members, but was not unusual,[87] and even by the judge who stated, in passing sentence, that he could scarcely believe that Christie was conscious of the gravity of the offence.[88] The recommendation of mercy by the jury and the comments of the judge were despite the defendant having threatened to kill his victim if she did not keep quiet.[89]

The surviving notes from this case show that there was a concern amongst some, that such attacks could become more common within the colony. Mr McGlashan, as prosecutor, told the jury that there was a necessity for "the law being rigidly carried out, as from the peculiar

[84] Ibid., 19 September 1863.
[85] Ibid., 19 September 1863.
[86] John Christie, arrest for stealing a horse, 1866, Otago Nominal Index, http://marvin.otago.ac.nz/oni/details.php?recid=365434.16.
[87] Conley, "Rape and Justice in Victorian England," 532-3.
[88] *Otago Daily Times*, 19 September 1863.
[89] Regina v. John Christie.

circumstances of the colony, the absence of the males of a family, and other causes, such crimes might become frequent."[90] It appears from the number of cases that were brought to court following the discovery of gold, that sexual assaults did increase as the population of the settlement exploded. Of the total number of cases for which there is evidence of them being brought to court between 1848 and 1867, four pre-dated the discovery of gold and 24 occurred between the beginning of 1862 and the end of 1867. However, the majority of the cases that came to court occurred within Dunedin or its environs, with only a small number being referred to the Dunedin Supreme Court from the gold fields.

One of these cases resulted in the longest sentence for rape of an adult given during the period under examination, seven years, in a case that was notorious at the time for the violence involved. In August 1862 a man and a woman were attacked while walking down a road near Wetherstones in the Gabriel's Gully goldfield. The man was left unconscious on the side of the road with a broken arm whilst the woman was raped by the three men involved. In the subsequent trials, the victim was very closely examined as to her previous character and sobriety at the time of the attack.[91] The fact that the attack occurred on the gold fields left the victim open for considerable cross examination as one of the detectives in the case stated:

> He had heard statements about Mrs Smith's character; but he knew nothing about her. Females on the diggings were generally suspected of being loose, but Mrs Smith was not more talked of than others.[92]

The defence solicitor argued that due to the nature of the charge – rape was hard to prove and harder to defend – and given his position as advocate for the prisoners, that "from common

[90] *Otago Witness*, 11 June 1859.
[91] Regina v. Malony, Brogan and Kinnary, DAAC/D256/245-246, Trial 97, 1862, Archives New Zealand, Dunedin; *Otago Daily Times*, 24 October 1862.
[92] *Otago Daily Times*, 21 October 1862.

repute as to her character" the defendant regarded "what had passed as an ordinary occurrence."[93] The defence offered evidence that the victim was not married at the time of the assault, although she had subsequently married the man she was co-habiting with, and that previously she had co-habited with a married man.[94] Despite these attempts to attack the character of the witness, the Judge dismissed this evidence in his summing up as he considered the medical evidence strongly corroborative of the victim's story.[95] Given the seriousness of the assaults the Judge was "willing to pass only such a sentence as would be likely to deter others from such a crime and so protect society from such ruffianism."[96] Although he could have been imprisoned for life, Brogan received a sentence of six years penal servitude. Of the other two defendants, Malony, also received six years each for the rape and a further six years for aiding and abetting Brogan in his rape of the victim, whilst Kinnary received six years for aiding and abetting Malony's act of rape. Both of these men had been identified as principals in another rape case which had not been prosecuted, at the merciful forbearance of the Crown, and although the Judge did mention this, he was clear that the fact was not taken into consideration in determining the sentences given.[97] Brogan served four and a half years, and Maloney and Kinnary nearly nine years of the total sentences of 13 years each, which included one year and seven years respectively for assaulting the victim's male companion.[98] Given the severity and brutality of the attacks the Judge identified the protection of society in general and the role of the law to deter 'ruffianism' as being the primary concern in determining these sentences.

[93] Ibid., 24 October 1862.
[94] Ibid., 21 October 1862.
[95] Ibid., 24 October 1862.
[96] Ibid., 27 October 1862.
[97] Ibid., 27 October 1862.
[98] *Otago Police Gazette*, November 1862.

One final case worth noting took the form of a civil case in which a husband sought damages from a neighbour for taking improper liberties with his wife. There was no corresponding criminal case. This case provides an opportunity to examine a localised example of sexual tensions between neighbours and the sexual liaisons people were willing to contemplate so long as they were not caught. The plaintiff, Mr Wrigley, lived next door to the defendant, Mr Dorman, and they were obviously on good terms with each other as neighbours. However, Dorman appears to have found Mrs Wrigley attractive and was willing to risk good relations with his neighbour for a chance liaison with the wife:

> Evidence was tendered to the effect that the plaintiff being in straitened circumstances, Mrs Wrigley had asked Dorman for the loan of £12, but he did not lend the money, saying he would have to ask his wife, who was a jealous woman. On the following day, when her husband was out, Dorman came to the house and insulted her by indecent expressions and conduct, and actually partially undressed himself in her presence, and offered her money, which she indignantly refused. Defendant denied *in toto* the assertion of Mrs Wrigley, and…insisting in calling Mr Barton [appearing for the plaintiff] into the witness-box…but Mr Barton damaged the defendant's cause, by proving that he (Dorman) had said to him that Mrs Wrigley had consented to receive his improper attentions if only her husband was out of town. His Worship was induced to regard this statement as confirmatory of the plaintiff's story.[99]

There was little evidence that Mrs Wrigley was a willing participant, apart from what was provided by Mr Barton, the council for Mr Wrigley, based on the defendant's claims that his advances would not be entirely unwelcome, illustrated by the fact that he was willing to go so far as to partially undress. Little is known about the respective situations of the families involved however, the award of £20 would have relieved the Wrigleys' immediate financial needs. It may be possible that Dorman was framed by the Wrigleys based on their knowledge

[99] *Otago Daily Times*, 24 January 1863.

of his attraction to Mrs Wrigley. Such actions are not unheard of and cannot be entirely dismissed, but in this instance any such suggestion is merely supposition.

Although at times instances of sexual violence were perceived as "regrettable lapses of self-control"[100] or "outbursts of youthful exuberance"[101], there were members of the community who took an active role in deterring such attacks or protecting the women who were the victims. This occurred only when such attacks moved into the public arena, but not all members of the same community reacted the same way. The most obvious example is the case against Thomas Davis, master of the *Flying Squirrel*, in May 1862. During Davis' attack on Emma Lindsay, the steward and two of the sailors actively tried to protect her, whereas the mate was seen not to go to her assistance, although she called out for him.[102] Likewise in the King case, the victim Margaret Fox, went for help from her nearest neighbours, two brothers, after being assaulted by King, but one of them "did not go when asked because my brother would not let me."[103] These contrasting reactions reflect contemporary attitudes towards sexuality, respectability and power. They highlight that there was no single accepted attitude towards sexual violence, which was sometimes shaped by an element of wanting to avoid any public involvement in someone else's problems.

Conclusion

Cases of sexual violence in Otago between 1848 and 1867 predominantly involved the Pakeha population, and are unlikely to be representative of all instances of sexual violence within the

[100] Conley, "Rape and Justice in Victorian England," 532.
[101] Ibid., 535.
[102] *Otago Daily Times*, 14 February 1862, and 21 May 1862,
[103] Judge's Notebook, Criminal Cases, J. Chapman, 1865.

settlement. From the available evidence, the sexual assault and rape cases that did come to trial were of a spontaneous or opportunistic nature and, much to the disgust of several judges, involved a high proportion of attacks on children. Despite the nature of sexual violence, the law was perceived to require some very invasive lines of investigation into the actions of the victims, before, during and after the assaults, reinforcing a perception within society that to be a victim of a sexual attack was shameful. The morality, sobriety and social position of the victims influenced not only whether their evidence was perceived as believable, but whether their case was likely to result in a conviction. In passing sentence in these cases, judges focused on the role of law to deter such attacks and to ensure the protection of members of the society, whilst still taking the age and social position of the perpetrator into consideration. The nature of the legal process, the male dominated courts, and the perception that 'good' women did not talk about sex undermined the effectiveness of the law in deterring sexual violence. These attitudes suggest strong traditional views towards the role and place of women within the community, which although not excusing sexual violence, questions the morality of women who become its victims. These women were perceived to have transgressed boundaries and put them in situations where the inherent 'unruly' nature of their female sexuality had exposed them to sexual advances. The onus was on the victims to show how they conformed to traditional views of the moral female ideal.

Chapter 8

Prostitution: Women at odds with the moral ideal

> Fanny Markie was charged with the offence of soliciting prostitution. The girl made a mistake in speaking to a constable in mufti, who, instead of acceding to her blandishments, took her to the station house. [1]

Luckily for Fanny she was discharged due to her quiet behaviour upon arrest. As the reporter pointed out, the ordinance under which she was charged was designed to deal with riotous behaviour, a key feature of the regulation of prostitution in early Otago. This incident from New Year's Eve 1863 is the only time that Fanny appears in the annals of Otago's prostitutes, suggesting either that she was not a regular street walker or that she soon found a less public way of making a living. Nevertheless she was only one of a large number of women who found themselves on the wrong side of the law for trying to make a living by prostitution in Otago.

In *A Letter from Sydney* Wakefield described prostitution as the "greatest evil of all" and attributed its widespread existence to "a great disproportion between the sexes".[2] Imperialist thinking and policies accepted prostitution as a lesser evil than would result in homo-social colonial settings if prostitution was banned.[3] Men left to their own devices may resort to masturbation, sodomy, or even bestiality. Therefore a few 'loose women' could save these

[1] *Otago Daily Times*, 5 January 1864.

[2] Edward Gibbon Wakefield, "A Letter from Sydney," *The Collected Works of Edward Gibbon Wakefield*, ed. M.F. Lloyd (Auckland: Collins, 1969), 138.

[3] Philippa Levine, ""A Multitude of Unchaste Women": Metaphor, Reality, History," *Canadian Journal of History* 28 (December 1993): 159-160.

men from themselves. However, if each man within a colony had a wife at his side, he would be preserved from not only sexual deviance, but also the evil influence of prostitution. The principles upon which the Otago settlement was founded suggested that prostitution would not need to exist if there was a balance between the sexes.

Such an assumption could be seen as an oversimplification of the realities of sex and sexual relations between men and women. Evidence can be found throughout history of the existence of prostitution and its widespread acceptance in a large number of cultures,[4] although not all.[5] It has been argued that the growth of prostitution during the nineteenth century was the result of increased urbanisation and consumerism.[6] The relatively late age of marriage, increased mobility of working class men and women, low rates of pay for women and limited employment opportunities, combined with a view that prostitution was an acceptable form of short term employment for women, all shaped the changing patterns of commercial sex after 1800.[7] At the same time there was an increased concern amongst the middle class about the danger posed by female sexuality, especially that of young working class women.[8] Paralleling these anxieties was an increasing push towards the state regulation of prostitution throughout Europe, the British Empire and America in the second half of the nineteenth century.[9]

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[4] Leah Lydia Otis, *Prostitution in Medieval Society: The History of an Urban Institution in Languedoc* (Chicago: University of Chicago Press, 1985), 2, 12-13; Nils Johan Ringdal, *Love for Sale: A World History of Prostitution,* trans. Richard Daly (New York: Grove Press, 2004), 6-7; Vern L. Bullough, *The History of Prostitution* (New York: University Books, 1964), 31-2, 45-6, 67-8, 76-7, 88-90.

[5] Timothy J. Gilfoyle, "Prostitutes in History: From Parables of Pornography to Metaphors of Modernity," *The American Historical Review* 104, no. 1 (Feb. 1999): 119.

[6] Ibid., 135.

[7] Ibid., 135.

[8] Judith R. Walkowitz, *Prostitution and Victorian society: Women, Class and the State* (Cambridge: University of Cambridge Press, 1980), 3-4.

[9] Walkowitz, *Prostitution and Victorian society*; Gilfoyle, "Prostitutes in History"; Philip Howell, *Geographies of Regulation: Policing Prostitution in Nineteenth-Century Britain and the Empire* (Cambridge: Cambridge University Press, 2009), 1-11.

Why look at prostitution at all? How does it relate to the regulation of sexual behaviour? It could perhaps be suggested that prostitution represents a form of sexual behaviour that was highly visible. It has also traditionally been the most publicly regulated. The middle of the nineteenth century marks a time when the regulation of prostitution was at its height within Britain and its empire. Furthermore, issues of the role of women within society, the social fear of primarily working class female sexual promiscuity, and labour issues which were the result of the shortage of female domestic servants within New Zealand coalesced during the 1860s in debates around the sponsored immigration of single women and the introduction of the Contagious Diseases Acts.

This chapter examines the processes introduced within Otago to regulate the behaviour of women deemed to be prostitutes, public nuisances or who represented the public face of disorderly behaviour. Although not all disorderly women were prostitutes, concerns regarding public order and decency, especially after the 1861 gold rush, resulted in many young women facing a short time in gaol charged with vagrancy or having no visible or lawful means of support. In contrast to the Magdalene Institutes of Scotland and England there was no attempt in Otago to officially reform these women, who were not necessarily welcomed by the Otago Benevolent Institute founded in 1862. The regulation of prostitution in Otago reflects social concerns over public order and middle class attitudes towards working class female sexuality, both of which were informed by "heavily gendered and discriminatory practices" of previous centuries.[10]

[10] Roger Davidson, *Dangerous Liaisons: A Social History of Venereal Disease in Twentieth Century Scotland* (Atlanta, Georgia: Editions Rodopi B. V., Amsterdam, 2000), 11.

One of the first questions that seems to arise in any study of prostitutes or prostitution is what these terms meant to contemporary commentators or moral reformers. Who was considered a prostitute was very much in the eye of the beholder: "Young women who dressed and behaved immodestly, unmarried mothers, mill girls, socialists, and young women who had no apparent means of support were all liable to be accused of prostitution by one commentator or another."[11] However, Barbara Littlewood and Linda Mahood argue that it would be wrong to assume that the 'prostitute' was a "simple, observational category," rather it was a characterisation created in part by contemporary discourses and the processes introduced to regulate their behaviour.[12] Reformers and commentators focused invariably on the working class woman, regarding her as the most in danger of falling into prostitution and in need of sexual regulation.

The English laws that provided the basis for New Zealand did not prohibit the selling of sexual favours, so long as prostitutes did not publicly solicit business.[13] This did not mean that prostitutes were able to work free from regulation and punishment. Prostitutes were subject to legal punishment in England from the Vagrancy Act of 1744, as they were grouped alongside disorderly persons, rogues and vagabonds, the perception being that prostitutes consorted with thieves and were not above petty theft themselves.[14] However, the application of the Act in

[11] Barbara Littlewood and Linda Mahood, "Prostitutes, Magdalenes and Wayward Girls: Dangerous Sexualities of Working Class Women in Victorian Scotland," *Gender and History* 3, no. 2 (June 1991): 162.

[12] Ibid., 163.

[13] Stevan Eldred-Grigg, *Pleasures of the Flesh: Sex and Drugs in Colonial New Zealand 1840-1915* (Wellington: A. H. and A. W. Reed Ltd., 1984), 31.

[14] Clive Emsley, *Crime and Society in England, 1750-1900* (London: Longman, 1987), 67.

reality excluded streetwalkers, much to the concern and dismay of moral reformers.[15] It was not until 1824 that streetwalkers and common prostitutes were directly included in the vagrancy laws.

During the eighteenth century and into the early nineteenth century, attempts were made in Europe to clean up city streets, as part of a wider move towards public order and decency.[16] In continental Europe these attempts often resulted in the licensing of prostitutes as opposed to the suppression of prostitution.[17] In England a stricter approach was taken. The Vagrancy Act of 1822 gave police the power to arrest prostitutes and streetwalkers who could not give a "satisfactory account of themselves," classifying them as "idle and disorderly persons."[18] Anyone arrested under this Act was liable for up to one month's hard labour. The 1822 Act was consolidated in the 1824 Vagrancy Act, which defined the offence as "wandering in the Public streets or Public Highways, or in any Place of public Resort, and behaving in a riotous or indecent Manner."[19] However, as Bristow points out, enforcement was subject to the witness appearing in court themselves to corroborate police evidence, and to judicial interpretations of 'annoyance' and 'indecent manner'.[20] This 1824 Act was in place in Otago until the introduction of the Vagrant Ordinance of Otago in 1861 which was introduced after the discovery of gold and the sudden influx of men seeking their fortune in the gold fields. This was followed by the 1866 New Zealand Vagrant Act, modelled on the Otago Ordinance.[21]

[15] Edward J. Bristow, *Vice and vigilance: purity movements in Britain since 1700* (Dublin: Gill and Macmillan, 1977), 53.

[16] Cocks, *Nameless Offences: Homosexual Desire in the Nineteenth Century* (London: I.B. Tauris Publishers, 2003), 56.

[17] Eldred-Grigg, *Pleasures of the Flesh*, 32; Howell, *Geographies of Regulation*, 5-11.

[18] Cocks, *Nameless Offences*, 56.

[19] Ibid., 56.

[20] Bristow, *Vice and vigilance*, 54.

[21] 30 Vict. No. 10.

Under this national legislation it was a crime for a person "having no visible lawful means or insufficient lawful means of support … [and who did] not give a good account of his means of support to the satisfaction of [a] Justice."[22] Any person convicted could face a sentence of up to three months, with or without hard labour, as could any "habitual drunkard" who had been convicted of drunkenness three times within the previous year and any "common prostitute" who behaved in a "riotous or indecent manner" in any public place. The key feature of this legislation with regard to prostitutes is the condemnation of specific behaviours within a public space.

This legislation had its limitations for those who sought to police prostitutes. As one magistrate put it: "Prostitution, although contrary to the laws of God, unfortunately was not contrary to the laws of man, and a woman could not be stated to have no visible means of support if she was a prostitute."[23] Despite this a large number of women who were reputed prostitutes, or believed to be prostitutes, were imprisoned for having no visible or lawful means of support. The majority of other charges brought against prostitutes in Otago related to drunken and disorderly behaviour, using obscene language, and occasionally indecent behaviour or frequenting a disorderly house. Unlike in Britain where attempts to police prostitution led to the introduction of the Contagious Diseases Acts of 1864, 1866, and 1869,[24] legislation was never introduced in Otago to regulate, inspect and lock up prostitutes, despite the introduction of a Contagious Diseases Act in New Zealand in 1869.[25] It appears that the Provincial Government did not see the value in invoking the legislation:

[22] Ibid.
[23] A. C. Strode, Resident Magistrate, quoted in *Otago Daily Times*, 31 May 1864.
[24] 27 & 28 Vict., c. 85; 29 Vict., c. 35; 31 & 32 Vict., c. 80; 32 & 33 Vict., c. 96.
[25] 32 & 33 Vict., 52.

> I am directed to inform you that the Provincial Government of Otago state that, after careful consideration, they are of opinion that it would be inexpedient to have the 'Contagious Disease Act, 1869', brought into force in that Province, and that the probable advantages to be gained are far more than counterbalanced by the positive objections.[26]

The *Otago Daily Times*, which printed this letter, felt that the Provincial Government, as a result of prejudice and "profound ignorance" was doing irreparable harm to the community by not invoking the law in Otago.[27] Despite these strongly held opinions, there appears to have been little vocal support in Otago for the Acts. This does not mean that no steps were taken in Otago against prostitutes. In 1869 the Provincial Council's By-law Committee introduced a measure designed to suppress "houses of ill fame."[28] As Heather Lucas has suggested, it appears that "the City Fathers believed that the enforcement of by-laws, and the use of provisions in the Vagrant and Police Offences Acts, were adequate to deal with the problem".[29]

Charlotte Macdonald has pointed out there were considerable differences in the objectives of the legislation of Britain and that of New Zealand under their respective Contagious Diseases Acts.[30] The British legislation was introduced in response to a "virtual epidemic" of venereal disease within the British Army and was only applied to certain ports and garrison towns.[31] In New Zealand the legislation was initiated by a prominent group from Christchurch with the purpose of suppressing prostitution.[32] However, it was packaged as an attempt to maintain

[26] Mr Cooper, Under-Secretary to the Colonial Secretary, quoted in *Otago Daily Times*, 27 May 1876.
[27] *Otago Daily Times*, 27 May 1876.
[28] Heather Lucas, "'Square Girls': Prostitutes and Prostitution in Dunedin in the 1880s" (BA(Hons) diss., University of Otago, Dunedin, 1985), 21.
[29] Ibid., 21.
[30] Charlotte Macdonald, "The 'Social Evil': Prostitution and the Passage of the Contagious Diseases Act (1869)," in *Women in History: Essays on European Women in New Zealand*, ed. Barbara Brookes, Charlotte Macdonald and Margaret Tennant (Wellington: Allen & Unwin NZ, 1986), 13-34, 15-16.
[31] Macdonald, "The 'Social Evil'", 15; Howell, *Geographies of Regulation*, 15-16.
[32] Macdonald, "The 'Social Evil'", 16.

"social decency" by "repressing public disorder."[33] At the root of the legislation was an assumption that the programmes of assisted immigration for young women introduced in 1862, had led to an increase in the number of prostitutes across the colony, but most especially in Canterbury.

Unlike in Canterbury, there does not appear to be any major concern within Otago regarding prostitution, if the editorials of the local newspapers can be seen as a valid barometer of community concern. Instead intemperance, which was often described in newspapers as a "social evil", and the impact of drunkenness on the family gained attention during the 1860s. In Otago newspapers this term "social evil" appears to have been exclusively used to describe intemperance, as opposed to in other regions, like Canterbury, where it was used to describe prostitution. Only at one point does prostitution become a topic of debate. In 1863 the election for the position of Provincial Superintendent came at a time when a large number of single women were being sponsored to emigrate from Britain to Otago. It was suggested by one of the candidates, John Hyde Harris, that many of these women, unable to find employment, under fed and forced to live in the overcrowded Immigration Barracks, were becoming prostitutes in order to survive.[34] The government took considerable exception to the claims and published figures showing the number of sponsored immigrant women who had become prostitutes. Of the 622 sponsored female immigrants to arrive in Otago between 19 November 1862 and 13 February 1863, the government identified eight who were living as prostitutes and

[33] *Otago Daily Times*, 3 November 1869.
[34] John Hyde Harris, quoted in *Otago Daily Times*, 16 March 1863.

three more living as "*clandestinaires*", most of them having been prostitutes prior to their departure from Britain.[35]

What initiated the debate was the arrival in February of an immigration ship from London with over 100 females under the leadership of Maria Rye, an advocate for the emigration of middle class women. Unfortunately, the ship arrived at about the same time as over 2000 miners from Australia, somewhat stretching the resources of the settlement. The Provincial Government found themselves under attack by Miss Rye for the condition of the Immigration Barrack and the lack of support for immigrant women.[36] Hyde Harris took advantage of this attack and used it in his election campaign, claiming that "the ranks of prostitution in this city have been weekly recruited from the Immigration Barrack."[37] Although Hyde Harris deployed this issue to attack what he saw as government incompetence, nevertheless the Miss Rye incident illustrates that there were a number of established brothels – sufficient to merit a Police Brothel Surveillance Report - that were recognised as such by early 1863.

The role of the kirk in policing prostitution in Otago was limited. Historically, it has been suggested, the church was deeply ambivalent towards prostitution.[38] Although prostitution embodied the worst of illicit sexual activity, being outside of marriage and not intended for procreation, it was tolerated as a necessary evil by the church, saving men from worse depravity.[39] Thomas Aquinas, whose teachings provided the basis of much of modern

[35] *Otago Daily Times*, 25 March 1863; it is unclear as to what the term 'clandestinaires' was referring to.
[36] Marion Diamond, *Emigration and Empire: The Life of Maria S. Rye* (New York: Garland Publishing, 1999), 104.
[37] John Hyde Harris, quoted in *Otago Daily Times*, 16 March 1863.
[38] Tony Henderson, *Disorderly Women in Eighteenth Century London: Prostitution and Control in the Metropolis, 1730-1830* (Pearson Educational Ltd, Harrow: 1999), 82.
[39] Ibid., 82.

Christianity's attitudes towards sexuality, likened prostitution to sewage: "prostitution in the cities is like the toilets of the palaces. Take them away and the palaces will be destroyed by the stench and putrefaction."[40] While Wakefield felt that a gender imbalance was the cause of widespread prostitution, historians have argued that societies were forced to accept the idea of prostitution in order to maintain a balance between the sexual freedom of men and the chastity of women.[41] The recognition of the need for prostitution has been reiterated throughout western history. St Augustine, Thomas Aquinas and Bernard Mandeville, for instance, condoned prostitution.[42] During the Middle Ages, the Catholic Church became active in the regulation of prostitution through the owning of brothels and the taxing of the income generated.[43] However, the Reformation led to a stricter view of prostitution in Protestant countries, as it was seen to be closely linked to the hedonistic lifestyle led by many Catholic clergy.[44] This did not see the end of prostitution, but it was the end of the church's role in actively regulating it. However, in Scotland the church was more active in punishing prostitutes. Roger Davidson has suggested that the tradition of the kirk and wider community disciplining sexual behaviour resulted in the kirk sessions taking a very strict stand against women who were seen as not conforming to the church's laws of morality.[45] During the sixteenth century this could result in the kirk sessions ordering women to be executed, especially if they were suspected of witchcraft and suffering from venereal disease.[46] Work by Leneman and Mitchison on the role of the kirk in regulating sexuality in eighteenth century

[40] Thomas Aquinas, quoted in Ringdal, *Love for Sale*, 153.

[41] Wakefield, *A Letter from Sydney*, 138; Keith Thomas, "The Double Standard," *Journal of the History of Ideas* 20, no. 2 (April 1959): 197.

[42] Thomas, "The Double Standard," 197-8.

[43] Ringdal, *Love for Sale*, 154; Fergus Linnane, *Madams: Bawds & Brothel-Keepers of London* (Stroud: Sutton Publishing, 2005), 3.

[44] Ringdal, *Love for Sale*, 176.

[45] Davidson, *Dangerous Liaisons*, 8-11.

[46] Ibid., 8.

urban Scotland shows that the kirk felt that most prostitutes were beyond redemption, and they were often referred to the civil magistrates in order to be banished.[47]

In Otago there is no evidence that the kirk was involved in disciplining anyone for prostitution. The role of the church authorities appears to have been limited to expressing strong opinions regarding the efforts of the civil authorities. For example a report from a committee of the Presbyterian Synod in 1872, which was printed in the *Otago Daily Times*, stated that it was the determination of the Synod to "resist any attempts at unscriptural and demoralising legislation with regard to contagious diseases."[48] This parallels the role that the kirk played in Scotland in defining the "moral climate of Scottish civil society."[49] Aside from such vocal opinion pieces, the kirk appears to have been unable to take any effective direct action against prostitution or individual women, perhaps due to their limited influence with these women.

Prior to the passage of the Vagrancy Ordinance in 1861, there are few surviving sources that record the existence of prostitutes in Otago outside of the journal of gaoler Henry Monson. In April 1861 Monson refers to one woman as a "notorious prostitute", suggesting that she had a reputation as a prostitute within the community.[50] She was also described as "notorious" by the *Otago Daily Times* in December 1861.[51] This woman, Jane Stewart, first appears in Monson's journal on April 9, 1860, having been committed to gaol for 48 hours for the offence of drunkenness. From this point she is hardly out of gaol, recorded as being committed for

[47] Leah Leneman and Rosalind Mitchison, *Sin in the City: Sexuality and Social Control in Urban Scotland 1660-1780* (Edinburgh: Scottish Cultural Press, 1998), 30-1.

[48] *Otago Daily Times*, 13 January 1872.

[49] Davidson, *Dangerous Liaisons*, 11.

[50] Henry Monson Journal 1851-1861, 27 April 1861, PC-0076, Hocken Library, University of Otago, Dunedin.

[51] *Otago Daily Times*, 10 December 1861.

drunkenness a total of 12 times before Monson's journal finishes on June 22, 1861.[52] During this period her husband, Thomas, was serving 12 months imprisonment with hard labour for assaulting a constable. Towards the end of his sentence, Thomas accused his wife of having "undue freedom allowed her with the male prisoners of the Gaol."[53] Monson refers this accusation to the Visiting Justices, but does not record any outcome. It appears that when not a prisoner, Jane Stewart was in the habit of living in the gaol. Although discharged from prison on August 29, 1860, having served a nine day sentence for drunkenness, she lived at the gaol from September 1 until after December 17, when Monson records in his journal that he had written to the Superintendent requesting that money be made available to provide necessary clothing:

> May it please your Honor to consider the position, condition and circumstance of Jane Stewart who had been now under my charge since the 1st of September. I am lead to fear that from predisposition and fixed habit as well as from weakness of mind no hope of reformation can be affected. She also has during the above period suffered from convulsions and epileptic fits but more especially when spoken to sharply. She then goes into hysterics so that there is a great difficulty on all points to manage such a subject. She is also destitute of all necessary clothing in fact destitution is to be her irrevercible [sic] future doom…

Although it is not clear how old Jane Stewart was at this time, the 1869 Brothel Surveillance Return lists a Jane Stewart, aged 28, working in a brothel off Walker Street amongst a number of other women aged between 18 and 44, the majority described as "of low drunken habits."[54]

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[52] Monson Journal; in his entry of 27 April 1861 recording his letter to the Superintendent responding to the Visiting Justice's report concerning the incident at the gaol on 16 April 1861 involving Jane Stewart, Monson states that she has been in his custody "some 20 times".

[53] Ibid., 16 March 1861.

[54] *Evidence presented to Select Committee on Social Evil*, AEBE/18507/LE1/62/1869/12, Archives New Zealand, Wellington.

Jane Stewart does not appear to have been the first woman to turn to prostitution while without a male "protector". Sometime after her husband left her, Mary Ann Archibald resorted to prostitution. Again the source is Henry Monson, who recorded in his journal on January 26, 1852:

> At 10pm, having just retired to rest, I was called up by a knocking at the Yard Gate, it was a woman, who said that her name was Archibald that she had leave from Mr Strode to obtain a lodging for the night, and that so I must take her in and let her sleep. My reply was "this is no House of Refuge and unless you have a note from him giving me instructions for your admission here". She said I have been looking for some of the Police, but as yet cannot find any of them, or they should have brought me here; well then" said I to her "you can stay there in the Station, until some of them come in from Town. She remained in the station when about 11pm one of the young policemen came, (and first of all to his shame had connections with her) then he went into Town for drink, and for to tell the other young men who were in number two more, besides one of them a married man; to the credit of the married one (Mr Findlater) he found out their object and then he would not leave then until she had been properly locked up in one of the cells. At 7am I let her out and sent her away before the police had risen. When reprimanding her conduct, she laughed, called me a fool and a man of no courage or feeling for a woman.[55]

Although it is not clear whether the policeman paid for sex, it is clear that he thought she would be willing to have sex with the other policemen, possibly in return for the night's lodging. Other sources of information from the earliest years of the settlement, such as Burns' visitation records, do not specifically identify any women as prostitutes, nor is there evidence of any women being excluded from the community for prostitution. What the activities of Mary Ann Archibald and Jane Stewart do show is that some women did resort to prostitution if their husband or partner was overseas or in prison for an extended period of time, illustrating the extent that Otago was a family dominated society in which women were dependent upon men, whether husbands or fathers, for survival. There were few options open to women if they were deserted by their husbands, even temporarily, as there were few support networks in place.

[55] Monson Journal, 26 January 1852.

In Otago the year 1861 marks a bit of a watershed with regard to prostitution and the regulation of "loose women". By July 1861 hopeful miners began to pour into Otago from Australia and later further afield as news of the gold strike spread. In their wake were the women that had provided sexual services in other gold rushes or who were following their partner from rush to rush. The imbalance between men and women in Otago had favoured men since the arrival of the first settlers, but the sudden influx of thousands of mostly single men and very few women resulted in up to nine men for every woman over the age of fifteen. Such numbers of men suggests that business would have been brisk for Dunedin's prostitutes.

Although it is impossible to say how many women were involved in prostitution at any one time, it has been estimated that in 1864 Dunedin played host to about 300 full-time prostitutes.[56] We should be cautious here because the source of this information is the *Saturday Review*, a weekly journal set up by one-time pedagogue James Gordon Stuart Grant, whose strict moralising did not always reflect the realities of working-class life in Dunedin.[57] One historian has suggested that "the streets of the colony thronged with an army of whores,"[58] but the surviving police Brothel Surveillance reports do not support this claim nor Grant's number of 300. What can be confirmed is that there were opportunities for women willing or forced to work as prostitutes in Otago from 1861, that the activities of these women were closely

[56] J. G. S. Grant, *Saturday Review*, 14 May 1864, 80, quoted as "200" in Erik Olssen and Andree Levesque "Towards a History of the European Family in New Zealand," in *Families in New Zealand*, ed. Peggy Koopman-Boyden (Wellington: Methuen Publications NZ, 1978), 5; also cited as "200" in Eldred-Grigg, *Pleasures of the Flesh*, 39.

[57] Olive Trotter, *Dunedin's Spiteful Socrates: James Gordon Stuart Grant* (Dunedin, 2005).

[58] Eldred-Grigg, *Pleasures of the Flesh*, 29.

policed and as a result the number of females arrested for petty crimes and felonies in Dunedin from 1861 increased.

With the sudden and sizeable increase in the population, the Provincial Government introduced a Vagrant Ordinance in October 1861 as a measure to "control the lower elements" of society,[59] and as a result the conviction of women for drunkenness and vagrancy increased. The Ordinance imposed punishments of up to three months imprisonment, with or without hard labour, for "Any person having no visible lawful means or insufficient lawful means of support," for being convicted of drunkenness three times within a year, using indecent or profane language, or for being the occupier of a house "frequented by reputed thieves or persons who have no visible lawful means of support."[60] The Ordinance also specifically mentions "common prostitutes", and imposes a gaol sentence of up to three months for any convicted of behaving riotously or in an indecent manner. Penalties of up to six months, with or without hard labour, were imposed on "any person wilfully or obscenely exposing his person in any street, road, or public highway, or in the view thereof, or in any place of public resort", thereby putting them alongside housebreakers, gamesters and petty thieves.[61] It should be noted that although the pronouns "he" and "his" are used throughout, the ordinance applied to women as well.[62]

[59] Niels Reinsborg, *The Dunedin Gaol and the Administration of Justice in Otago 1840-1865* (BA diss., University of Otago, Dunedin, 1987), 132.

[60] Vagrant Ordinance 1861, clause 1 & 3, AAAC D500 701 Box 8/f/68, Archives New Zealand, Dunedin.

[61] Ibid., clause 2.

[62] Ibid., clause 15.

Between 1861 and 1867, 84 women have been identified as having been charged with vagrancy, drunkenness, disorderly conduct, using obscene language and being the occupier or keeper of a disorderly brothel in Otago. As Macdonald has suggested "it would be seriously misleading…to interpret all such cases as prostitution-related."[63] Of these 47 were only charged once suggesting that they were more likely to have been "vagrant" – destitute, unemployed, and possibly drunk – than actively involved in prostitution. A closer examination of the conviction records, brothel reports, and newspaper coverage of the criminal courts has shown that, although a proportion of them had no links to prostitution, several of these women with single convictions appear to have been well known prostitutes or brothel keepers who were listed, for example, on the Dunedin Brothel Surveillance Return, June 1869.[64] Of the other women with multiple convictions, there was a core of approximately ten women whose large number of appearances in court and reputations suggest "career" prostitutes. The differentiation between the women with a few convictions and those with more than nine or ten, suggests that there were two types of prostitutes in Otago, the itinerant or temporary prostitute, such as Fanny Markie who opened this chapter, and the career or full-time prostitute. The itinerant were more likely to take up prostitution as a means of overcoming an economic crisis or short period of unemployment, returning to more "socially acceptable" forms of work when they became available.[65] The career prostitute earned their living principally from the proceeds of prostitution, and occasional theft.[66] A number of these women may have started out as itinerant prostitutes who found the pay and hours better than more legitimate work, or

[63] Charlotte Macdonald, "Crime and Punishment in New Zealand, 1840-1913: A Gendered History," *New Zealand Journal of History* 23, no. 1 (1989): 13.

[64] *Evidence presented to Select Committee on Social Evil*.

[65] Walkowitz, *Prostitution and Victorian society*, 14; Gilfoyle, "Prostitutes in History," 121.

[66] Walkowitz, *Prostitution and Victorian society*, 14-5.

struggled to find other work.[67] This 'hierarchy' of prostitution mirrors the findings of Walkowitz, and suggests that for some working class women a period as a prostitute did not permanently damage their reputation or standing within their community.

A flexible morality in which women's temporary involvement in prostitution was accepted challenges the idea of a single widely accepted morality based on middle class ideals of female sexuality. The communities of which these women were a part formed a section of the wider settlement that was willing to ignore or overlook the formal processes for regulating public order, where different standards of behaviour were tolerated. In Otago, after 1861, this section of the community became a visible feature of the settlement with the use of tents to house miners and their followers in the area of Walker and Stafford Streets. Many of the women associated with prostitution lived and worked in this tented community, often claiming that they earned a respectable income through taking in washing or doing needlework.[68] Home to a very mobile and fluid population, whilst being in very close proximity to the centre of the town, this community developed its own norms and standards of behaviour which were at odds with both the middle class ideologies of acceptable behaviour and female sexuality. Respectability and public order, which featured as a major concern for middle class residents of Dunedin, did not necessarily influence the actions of these women and their associates.

The importance of differing class attitudes towards female sexuality are illustrated by the contemporary concern about assisted female immigration. At times during the period of

[67] It is not the purpose of this thesis to examine the reasons why women became prostitutes in Otago. The international scholarship around this question is extensive.

[68] *Otago Witness*, 12 July 1862.

assisted female immigration from 1862, there was an assumption generally expressed in New Zealand that these single women were disorderly and their arrival was leading to an increase in prostitution and vice.[69] This perception was expressed primarily by newspaper editors, reflecting, and informing middle class attitudes within the community. Initial work on the women charged with vagrancy, disorderly conduct and habitual drunkenness between 1861 and 1867 in Dunedin, does not wholly support this perception.

The peak of assisted female immigration into Otago during this decade was between October 1862 and April 1863.[70] Even before the end of this period, concerns were being raised regarding the character of the women arriving.[71] However, it is not entirely clear whether the women involved in prostitution in Otago can be directly linked to the female immigration programme. An examination of the convictions under the Vagrant Ordinance 1861 and Vagrant Act 1866, suggests that the peak of female "vagrancy" does not coincide with the peak of female immigration (see Figure 8.1). Furthermore, of the ten known "career" prostitutes, three were known to be in Dunedin before the first assisted female immigrants arrived in October 1862. A further one is known to have come directly from Melbourne, and another likely to have come from Adelaide. Therefore at least half of these women had not been assisted immigrants.

Several of the repeat offenders – women charged more than once under the Vagrant Ordinance - especially those who were arrested before 1865, had been attracted to Otago by the gold

[69] Charlotte Macdonald, *A Woman of Good Character: Single Women as Immigrant Settlers in Nineteenth Century New Zealand* (Wellington: Allen & Unwin, 1990), 173-5.

[70] Ibid., 6.

[71] *Otago Daily Times*, March 27 1863; *Otago Witness*, March 28 1863.

rushes, either following their partners or of their own accord. These women had links with Tasmania or Victoria, and are likely to have spent time in the gold fields of Australia. It appears that as many as 20 of the 84 women were in Otago before the assisted female immigration programme began early in 1862.[72] The first group of female immigrants to arrive under the Otago provincial government scheme arrived on the *Jura* on 6 October 1862.[73] This suggests that any of these women charged prior to that date would not have been part of this programme. Thirteen women fall into this category, in addition to another who is known to have come directly from Australia, most likely in 1863. In total about 25 of the 84 women were not part of the assisted female immigration programme, including a number of the most notorious repeat offenders of the decade.

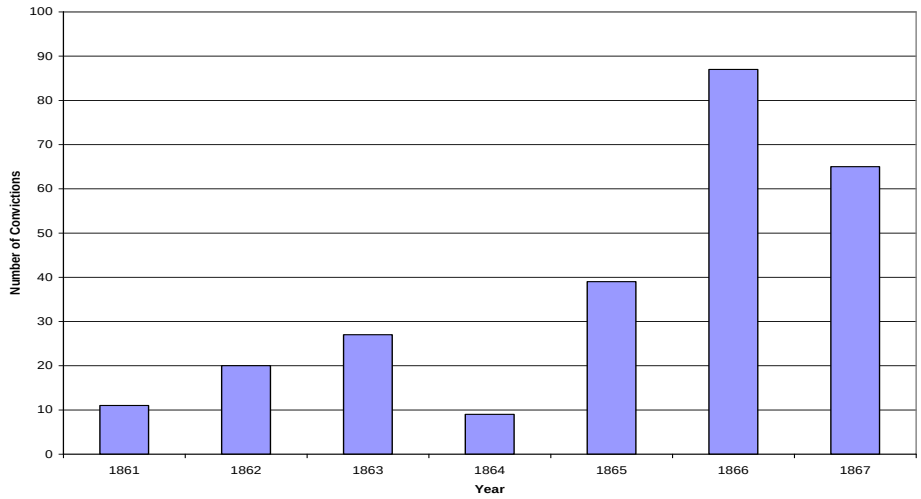

Fig. 8.1: Convictions of Women under Vagrant Ordinance 1861 and Vagrant Act 1866[74]

Convictions peaked after the middle of the decade, with a large number of women being charged only once, which does not appear to support the assertions that the assisted female

[72] "Dunedin Gaol Nominal Index" compiled by W. Morris, Archives New Zealand, Dunedin; Val Maxwell "Settlers to Otago pre-1861; Immigration from Victoria micro-fiche."

[73] Macdonald, *A Woman of Good Character*, 26.

[74] *Otago Police Gazette*, November 1861 – January 1868.

immigration programme was leading to an increase in vice and prostitution in Otago. However, the Brothel Surveillance Return 1869 for Dunedin noted that

> The ranks of prostitutes in Dunedin are principally recruited from the periodical arrival of Government Immigrants, a large proportion of the prostitutes in the foregoing list having adopted their present depraved life shortly after landing here, the interval in most of their cases has been only a few months, and in others, but a few days.[75]

This is rather ironic considering the statements made by the Provincial Government during the John Hyde Harris election campaign of March 1863, discussed earlier. However, the statement may reflect the attitudes of the senior police towards these women as opposed to the reality of how they actually came to Otago.

For the period between November 1861 and December 1867, the Otago Police Gazette provides an indication of the types of crimes under the legislation against vagrancy, committed by women in Otago, and the relative sentences given. It should be noted that from about May 1867 the Police Gazette began to amalgamate minor offences, including drunkenness and disorderly conduct, and provided only the number of arrests made as opposed to listing those apprehended and what they were charged with. This was in part a result of an increase in the number of arrests for these crimes, but it means that the figures for 1867 cannot be taken as complete and are only indicative of an increase in arrests. However, it can be suggested that during the period up to December 1867 a total of 258 known convictions were made, the majority related to vagrancy (170), including no lawful or visible means of support, with a small proportion for habitual drunkenness (32) and using obscene or indecent language (33). However from 1866 the number of convictions for disorderly conduct, including indecent conduct and indecent exposure began to increase (see Figure 8.2) and from 1867, disorderly

[75] *Evidence presented to Select Committee on Social Evil*.

conduct convictions began to replace vagrancy. In Central Otago, however, vagrancy continued to be the charge most used.

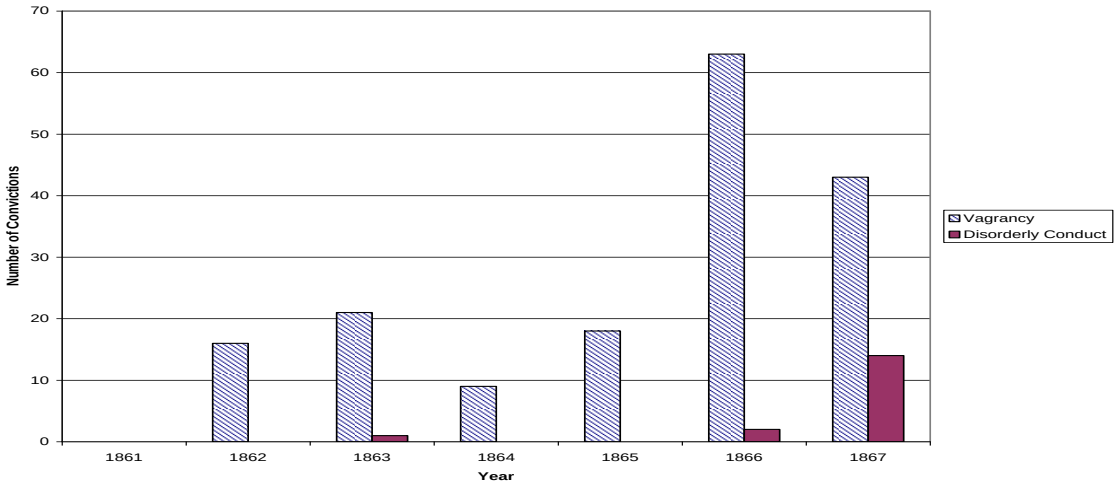

Fig. 8.2: Number of Convictions for Vagrancy and Disorderly Conduct 1861-1867[76]

Sentences for disorderly conduct were generally lower than those for vagrancy. Most women charged with disorderly conduct received sentences of between 7 days and 1 month imprisonment, with the mean being 14 days. Women charged with vagrancy tended to receive longer terms of imprisonment, generally 1 to 3 months, although the range was from 24 hours to one extreme of 6 months for no visible means of support. There is no evidence that any formal attempts were made to reform these women. Once they had served their sentences they were released back onto the streets, often to reoffend within days if not hours. This suggests a focus on punishing the women for their actions and activities, preferably in a way that removed them from the public sphere. On occasion it was suggested that a particularly disorderly woman should be sent to another province or even to Australia as a means of removing her

[76] *Otago Police Gazette*, November 1861 – January 1868.

from Dunedin.[77] Attempts at moving the women on or removing them from public gaze appears in a report of a Resident Magistrate's Court hearing from 1867:

> Disorderly Houses – Kate Macdonald, Mary Ann Anderson, and Mary Anne Sutton, was [sic] charged with being the owners and occupiers of houses of ill fame. The Inspector [of Nuisances] stated that his instructions were not to press the cases if the defendants would remove from Walker Street, where they were a source of constant annoyance to the inhabitants and to passengers, to some less public place. Macdonald promised to remove by Monday, and the cases against the other defendants were adjourned for a week, to give them an opportunity of obtaining other houses.[78]

These were not the only cases that came to court, with two further cases reported in September 1867, four more in October, one in November and one in December. Only the December case did not result in dismissal as the accused claimed to be married, therefore "could not be held as the keeper and occupier with the meaning of the Act" and the case was deferred.[79] It appears that these cases came about following the passing of a by-law by the city council of Dunedin to control public nuisances, including brothels.[80] The reporting of these cases clearly indicate that the concern of the Inspector of Nuisances was to remove the women from their premises that they were using as brothels and move them on. Once they had found other accommodation, they were no longer regarded as a public nuisance.

The removal of prostitutes raises the issue of place and mobility. Once in Dunedin, most of the women appear to have remained in and around the city. The majority of the women who worked as prostitutes who came to the attention of the police in the Central Otago gold fields came from Australia, having worked in the Victorian gold fields previously, as their names,

[77] Anne Hutchinson, "Weldon, Barbara 1829-1837? – 1882," *Dictionary of New Zealand Biography*, updated 7 July 2005 URL: http://www.dnzb.govt.nz/.

[78] *Otago Daily Times*, 14 September 1867.

[79] Ibid., 23 December 1867.

[80] Ibid., 20 November 1867.

such as "Ballaarat Jemima", "Sydney Liz", "Melbourne Liz" and "Sydney Kate" often testified.[81] It appears that these women from Australia were less likely to be charged under the Vagrant Ordinance and Vagrant Act, though whether this was because they tended to be less visible is unclear. In addition to these women who travelled across the Tasman, there was some localised mobility as women from Dunedin travelled into Central Otago. Four women were arrested in Dunedin as well as in central districts for similar crimes during the decade. A further sixteen women are only known to have been charged in central districts. A very small number of women followed the gold miners to the West Coast after gold was discovered there. To date only three women have been confirmed as having been charged in both locations. One of them was forcibly sent by the Resident Magistrate to the West Coast to remove her from Dunedin.[82] Why or how the other two travelled to the West Coast is unknown. My data indicates that up to 80% of women with criminal records did not venture further from the centre of Dunedin than North Dunedin or Caversham.

In addition to the women involved directly in prostitution, there were a number of others, such as "bullies" – pimps, lovers or bouncers[83] - and brothel keepers who lived off the proceeds of prostitution, as well as theatres and boarding houses that benefited from the custom of prostitutes. Under the Vagrant Ordinance and Vagrant Act, bullies and brothel keepers could be charged with having no visible lawful means of support, or being occupiers of houses "frequented by reputed thieves or persons who have no visible lawful means of support," but because prostitution was not illegal, living from its proceeds was not a chargeable offence.[84]

[81] *Otago Daily Times*, 29 January 1862; *Gabriel's Gully Jubilee*, Dunedin: *Otago Daily Times*, 1911, 37.
[82] Hutchinson, "Weldon, Barbara."
[83] Gilfoyle, "Prostitutes in History," 132.
[84] Vagrant Ordinance 1861, clause 1.

In most cases brothel keepers were charged with keeping a "disorderly house" and cases came to court if a customer was robbed or fights broke out. In July 1862 Martha McIntyre, alias Hall, was charged with keeping a disorderly house after a client complained to a constable that he had been robbed while in the house. The local Inspector of Nuisances called the establishment "one of the most disreputable brothels in town."[85] The Magistrate felt that there was clear evidence that McIntyre kept a "common brothel" but although he stated that he was going to make an example of her case, he only imposed a gaol term of two months with hard labour, a month less than the maximum sentence available. The robbery that led to this conviction was perpetrated by one of the "bullies" of the brothel, not by one of the prostitutes. It appears that while prostitutes working on their own, out of their own tents or houses, were often involved in robbing clients, thefts in brothels were just as likely to be perpetrated by the bullies who lived off the women.[86] However, there appear to have been occasions when men may have made accusations of theft against prostitutes with no evidence. During one trial against a brothel keeper in March 1863 the defence lawyer suggested that such accusations were becoming common:

> It was getting too common for men to go to these houses, and then to trump up stories of having been robbed, only with a view of robbing the unfortunate girls. The prevalence of the "social evil" must be lamented; but these women and girls were not to be put beyond the pale of all law.[87]

In this case, it appears that the police were a bit heavy handed in trying to retrieve money from a brothel keeper that a man claimed to have had stolen from him in her brothel. The Magistrate stated that if the man was robbed it served him right, however he was not willing to overlook

[85] *Otago Witness*, 12 July 1862.

[86] For examples of thefts by bullies see *Otago Daily Times*, 24 September 1863, *Otago Witness*, 12 July 1862.

[87] *Otago Daily Times*, 11 March 1863.

the offence against public order that the brothel represented, especially as the brothel keeper herself had a bad reputation.

> Public order and decency must be protected from such women as the prisoner. She was notoriously one of the vilest of her class – a perfect pest to the community; and he should send her to gaol for two months, there to be kept at hard labour.[88]

Despite this attitude, not all brothel-keepers came before the courts. The 1869 Brothel Surveillance Report identifies at least two "elegantly furnished", higher class establishments that catered to "Squatters, Businessmen", and other upper-middle class settlers.[89] There was a commonly held assumption that such brothels were able to "buy-off" the police to avoid trouble.[90] There is no evidence to suggest that this did happen in Dunedin. What it illustrates is that Dunedin was able to maintain a hierarchy of brothels, and presumably prostitutes that operated across classes. The majority of prostitutes appear to have lived and worked either independently or sharing a house with a small number of other women, as opposed to in formal brothels, especially in the smaller communities of Otago. This mirrors the structure of brothels and prostitutes that existed in Britain during the nineteenth-century.[91]

Not all men who lived off the prostitutes worked as their bullies. Some men gaoled for vagrancy were nuisances to the prostitutes. In one case, a prostitute paid George Baker £4 "to get rid of him."[92] These men were disliked by the authorities who showed them little sympathy and no respect. In the Resident Magistrate's Court in January 1863 Charles James Baker, who was in gaol serving a three month sentence for vagrancy, applied for financial relief. His

[88] Ibid.
[89] *Evidence presented to Select Committee on Social Evil*.
[90] Donald Thomas, *The Victorian Underworld*, (London: John Murray (Publishers), 1998), 6.
[91] Walkowitz, *Prostitution and Victorian society*, 23-5.
[92] *Otago Daily Times*, 27 October 1863.

application was refused: "the man's character was notorious as a vagrant in the worst sense of the term, as never doing any work, and as living on the prostitution of women."[93] However, the law occasionally was more lenient. In May 1865 when Francis Baynham was charged with having no visible lawful means of support, having been living in a brothel for two years and doing no work. Mr Strode, the Magistrate discharged him, commenting that "the fact of a man living in a brothel was an offence against the laws of God, but not against the laws of man."[94]

Following the discovery of gold, the significant increase in the population it brought into the city brought an increase in theatres and public and official concerns over the perceived morality of the performances. Theatres were widely associated with moral laxness. It does not appear that they were places that respectable women would be seen, despite performances being advertised and reviewed regularly in the local newspapers. Theatres provided prostitutes with somewhere warm and dry to tout for business. The Licenced Theatres Ordinance, passed in December 1862, prohibited "offensive" performances and set penalties for "any common prostitutes or persons of notoriously bad character" being permitted to assemble in theatres, with the penalty for conviction set at no more than £20.[95] However, prostitutes continued to frequent theatres:

> Allan McGuire was charged by the police with having no lawful visible means of support… He was in the constant habit, by day and night, of frequenting the lowest brothels in town, and was generally to be found in company with women of abandoned character… Detective Weale had also seen him nightly in and about the Theatre, in bad company, from whence he accompanied prostitutes to Cafes at the close of the performance.

[93] Ibid., 28 January 1863.
[94] Ibid., 3 May 1865.
[95] Eldred-Grigg, *Pleasures of the Flesh*, 5; Licensed Theatres' Ordinance 1862, Otago Ordinances Session XVI, No. 108, Archives New Zealand, Dunedin.

The close links between theatres and brothels in Dunedin is illustrated by the concentration of these establishments within an area that later became known as "the Devil's Half-Acre" alongside ex-Chinese miners, opium dens, hotels, and boarding houses. This area was a triangle of land centred on Walker Street (now Carroll Street) and bounded to the east by Princes Street and Dunedin's central business district, to the south west by Maitland Street and the Town Belt, and to the north west by Maclaggan Street (see Figure 8.4). This area had originally been the centre of settlement in the late 1840s and early 1850s, and continued to be adjacent to the town's central business district around the Exchange. During the early 1860s the upper sections of High Street, Stafford Street and Walker Street developed into a tent community to house the incoming miners, and was characterised by a very mobile and transient population (see Figure 8.3). This area also housed the highest number of identifiable brothels in Dunedin during the 1860s. Close examination of this photo shows a number of tents and temporary timber huts built on empty ground between the upper sections of High Street and Stafford Street across the high ridge of land to the centre-left of the photo. The streets themselves are fronted with hotels and shops in more permanent structures.

The development of this area from one of settlement to a haven for prostitutes and drunks came about in part because of its close proximity to the jetty which was the point of entry to Dunedin. As miners arrived to go to the gold fields, the number of hotels rapidly increased, with most hotels and pubs established within easy walking distance of the jetty, on Princes Street and along Maclaggan Street, especially where it joins Rattray Street. This is also where most of the theatres and concert halls were located. Dunedin lacked any theatres until February 1862 when a temporary arrangement was made to use the horse bazaar attached to the Provincial

Hotel.[96] Within a couple of weeks, the Commercial Hotel also made similar arrangements.[97] Throughout the early 1860s several hotels opened concert halls and theatres which were heavily advertised in the local papers in conjunction with the hotels. These establishments highlight the very close links between the hotels and theatres in Dunedin. Theatres and theatre goers quickly developed a reputation for disorderly behaviour. In one case of assault against a police constable the prosecutor stated "that it was the custom of many people to repair to the Theatre where they did just as they pleased…"[98] The theatres and hotels provided prostitutes with places to look for clients before taking them back to their rooms on adjacent streets.

Most brothels were located in thoroughfares between the main streets, or in yards behind hotels. Unlike the majority of the hotels and theatres, the brothels tended to be further away from Dunedin's business centre, congregating in the underdeveloped areas towards Maitland Street that housed the miners during their temporary stay in Dunedin. As tents gave way to more permanent structures the brothels appear to have remained. Newspaper reports of court appearances refer to the upper parts of Stafford Street and the alleys off Stafford Street and Walker Street as being the locations of most notorious brothels.

[96] *Otago Witness,* 15 February 1862.
[97] Ibid., 15 March 1862.
[98] *Otago Daily Times,* 3 May 1862.

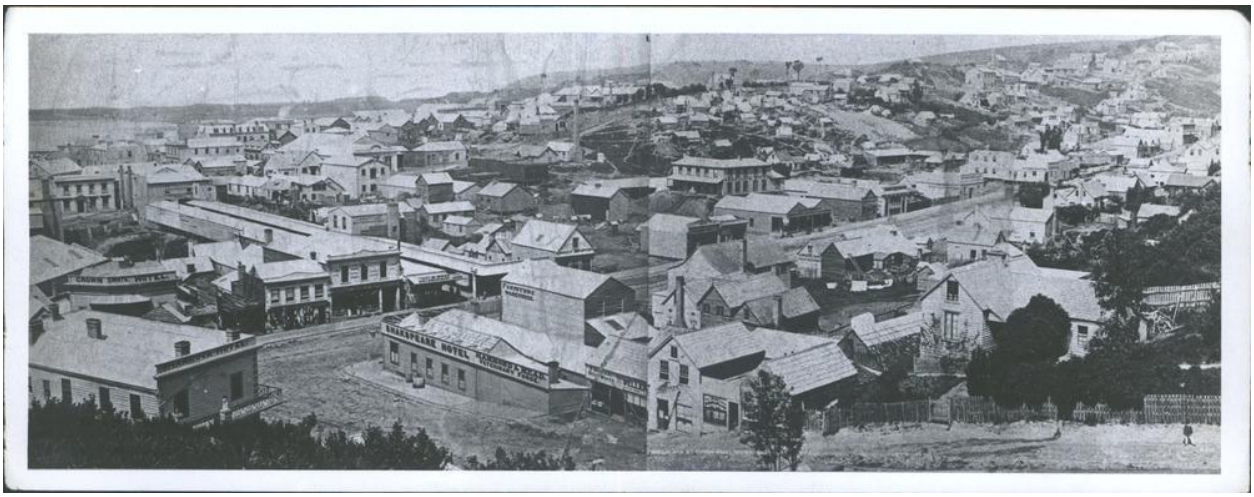

Fig. 8.3: Dunedin from Bell Hill looking south, c. 1861, 0518_01_006A , Hocken Collections, Dunedin.

Fig. 8.4: Dunedin south of the Octagon 1865 showing hotels, pubs, brothels and theatres



Key:

Boundary of the area later known as the Devil's Half Acre

Hotels and Pubs operating during the 1850s where known

Hotels and Pubs operating during the 1860s where known

Theatres and concert halls operating during the 1860s

Approximate location of brothels

Police Stations

Source: Frank Tod, *Pubs Galore: History of Dunedin Hotels 1848-1984* (Dunedin: Historical Publications, 1984); Harnett & Co *Map of Dunedin 1865*, Hocken Library, University of Otago, Dunedin; Riemann's *Map of Dunedin 1869*, Hocken Library, University of Otago, Dunedin; Dunedin City Block Maps 1888, Hocken Library, University of Otago, Dunedin; *Otago Daily Times.*

As the main source of information about disorderly women, newspaper coverage of committals provides a source of information about the prostitutes that may be omitted from more official records. They can also provide a feel for how the wider community perceived these women. For example, Mary Anne Archibald, who appears to have turned to prostitution as early as 1852, was charged in December 1861 with no visible means of support under the Vagrant Ordinance. The coverage in the *Otago Daily Times* highlights the sort of life she was living thirteen years after arriving in Otago as one of the first settlers:

> In the Police Court yesterday, Mary Anne Archibald was charged under the Vagrancy Ordinance with not having any lawful or visible means of subsistence. This unfortunate woman has been convicted of drunkenness, obscene language, etc, about fifteen times in the last two months and since the [removal of the] old Survey Office (in which she and another woman of the name of Allen have for some time past been living), she and her child have been sleeping in the streets. The police stated that her child and those of Allen's were often without food for days together while their mothers were either drunk or in gaol and that there was no place where they could obtain refuge or relief. Archibald had a little child, about 5 years of age with her and his worship said that it was impossible that he could commit the mother and leave the child to starve. The police therefore laid a similar information against the child and they were both committed to gaol for 2 months.[99]

The information contained in the newspaper report provides a more complete picture of the life that she was leading than any list of her convictions would, demonstrating that some women were not completely isolated. In this case two women lived together, providing a type of support for each other which has parallels with Walkowitz's findings that prostitutes formed a supportive female subculture, often working in twos or threes.[100]

The other woman cited in the report was Mary Ann Allen or Allan, who became perhaps one of the best known of Otago's prostitutes of the 1860s. Born around 1819 in Ireland, Mary

[99] *Otago Daily Times,* 20 December 1861.
[100] Walkowitz, *Prostitution and Victorian Society*, 201.

arrived in Dunedin sometime late in 1860 or early in 1861. Prior to her arrival she had lived in Tasmania, where she met and married Peter Allen.[101] Peter was a ticket of leave holder, meaning that he had been transported to Tasmania as a convict, but had served his sentence of 15 years. Shortly after their arrival, Peter became the first person in Dunedin to be charged with murder.[102] Found not guilty of murder, but of the lesser charge of manslaughter, Peter was sentenced to three years hard labour. Mary was left destitute with two or three children. Her solution was to turn to petty theft and prostitution. In April 1861 she was committed to gaol for six weeks with hard labour for indecency.[103] This was the first of over 100 committals for vagrancy, disorderly conduct, larceny, drunkenness, and no visible means of support over the next 10 years. By the end of 1861 Mary had made a number of court appearances for being drunk, using obscene language and finally, on 20 December, for having no visible or lawful means of subsistence. On 9 July 1862, once again charged with having no visible or lawful means of support, she "stated that she had friends in Tasmania, and wishes she was there."[104] The Resident Magistrate hearing the case stated that he would obtain a passage for Mary and her three children to Tasmania, after she served 14 days for the offence. However, it appears that Mary changed her mind as on 25 July she was back in court. The *Otago Witness* reported the case as follows:

> The notorious Mrs Allen was brought before the bench, charged with having no visible lawful means of support. It appears she had only been out of gaol a day or two, and had already been importuning passers-by for alms, she being intoxicated at the time. His Worship stated that, on a previous occasion when Mrs. Allen was brought before him, she had expressed a wish to go to her friends in Tasmania, upon which he had

[101] Aaron Braden, *Southern People: A Dictionary of Otago Southland Biography,* ed. Jane Thomson (Dunedin: Longacre Press in association with the Dunedin City Council, 1998), 5.
[102] Bill Martin, *Dunedin Gaol: A Community Prison Since 1851* (1998), 54-5.
[103] Monson Journal, April 22 1861.
[104] *Otago Witness,* 12 July 1862.

> obtained a passage for herself and children, when she refused to go. His Worship sentenced the prisoner to three months' imprisonment with hard labour.[105]

Over the next twenty years Mary was before the courts in Dunedin and Central Otago for vagrancy, disorderly conduct, drunkenness and theft. It appears that Peter disappeared shortly after his release from prison in 1864. Many of the women whom Mary was arrested with early in the 1860s disappear from the record about 1864, although one was later arrested in Hokitika in 1865 for being drunk. Mary did not travel that far. During the 1870s she spent a considerable amount of time in the Chinese Camp in Lawrence where at least two of her daughters married Chinese men.[106] In 1885 Mary made her last court appearance, aged over 60 when it was determined that she should be sent to Seacliff Asylum. The observations made at the time of her admission indicate a very disturbed mind:

> …She will stand in a corner for hours at a time doing nothing, headless of everything. If called to duty she will do, but when left alone she immediately returns to her corner and there remains seemingly unconscious of all around until again stirred up by someone.[107]

Mary died on 13 March 1886, after a year at Seacliff Asylum. Despite this wealth of details about her life, there are few opportunities to hear her voice in the records and all of those instances are second hand, coming through the writing of men – newspaper reporters and the doctors at Seacliff.

The newspaper coverage of the court cases in which Otago's prostitutes appear provides a barometer of how the community may generally have perceived these women. The first

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[105] Ibid., 26 July 1862.

[106] Ng, James *Windows on a Chinese Past* Volume 1 (Dunedin: Otago Heritage Books, 1993), 256 and 292. note 198; Ng James *Window on a Chinese Past* Volume 2 (Dunedin: Otago Heritage Books, 1995), 278 note 46c.

[107] Mary Allen Statutory Papers, Seacliff Asylum Admissions, DAHI D266/14/1834, Archives New Zealand, Dunedin.

example quoted at the start of this chapter is almost light hearted and jocular in how it portrays a young girl who had strayed slightly, but was really well conducted and quiet.[108] In contrast Mary Ann Archibald was "unfortunate" in the coverage of her trial from December 1861. The report provides a partial list of her previous misdemeanours, states that she lived on the streets, and that her child was often neglected. She comes across as a woman who had fallen a long way from the ideal of femininity and motherhood, reflecting the nineteenth century fascination with the 'Magdalene' image.[109] However, the harshest criticism is reserved for the women who are identified as "notorious prostitutes", such as Mary Allen, Barbara Weldon or Anne Dunbar, who were "well known to police."

The majority of newspaper reporting which involved prostitutes was linked to their appearances in the Resident Magistrates or Supreme Courts. The court reporters reflected the strength of feeling expressed by the Magistrates and Judges in their coverage of the trials. One example from November 1863 illustrates that there must have been concern within the community regarding the number of brothels operating in the Stafford Street area:

> Emily Armstrong, a young girl, was charged with being guilty of using obscene language at 10 minutes to 4 this morning, in a brothel in Stafford Street. This was another of the quarrelsome and depraved females residing at the upper end of Stafford street [sic]. She assured the Bench that the constable told her she was "a nice young lady," and then took her into custody. The Magistrate said she was also a notorious character. She had frequently appeared at this Court as principal or witness, in squabbles wherein disgusting language was the cause of complaint. Fine 40s and costs, or 4 days' imprisonment.[110]

However, it was not unusual for the reporters not to bother making any comment:

[108] *Otago Daily Times*, 5 January 1864.
[109] Littlewood and Mahood, "Protitutes, Magdalenes and Wayward Girls," 171.
[110] *Otago Daily Times*, 27 November 1863.

> Assault – Maria Brown v. Margaret Porter. This case arose out of a dispute between two brothel keepers in Stafford Street. Defendant was fined 1s and costs.[111]

The language used to describe the women and their activities – "notorious", "indecent", "disruptive", "obscene" – highlights the focus on the importance of good character and public decency for women within the community.

Newspaper reports, court records and occasional hospital and asylum admissions provide the framework to examine the lives of a number of Dunedin's career prostitutes in a way that is impossible to do for the women who occasionally sold sexual favours. This serves as a reminder that these records were constructed by men for purposes other than the preservation of these women's experiences.[112] This is an issue that faces many studies of nineteenth century prostitution, which, by the nature of the subject, must be informed by the fragmentary sources available. Many of these sources embody the double standards of gender and class.

Conclusion

Unlike the regulation of prostitution that was introduced in Britain during the 1860s which focused on regulating the prostitutes to stop the spread of venereal disease, or its regulation in Argentina and Russia as a means of controlling women outside the traditional family structures who were perceived as "allegorical threats to the nation,"[113] the legislation that was used in Otago focused on maintaining public order and decency. As a result prostitutes were classed alongside petty thieves and vagabonds. There is no direct evidence that the commonly held opinion that prostitution was a "necessary evil" influenced the politicians or police in Otago.

[111] Ibid., 25 December 1863.
[112] Gilfoyle, "Prostitutes in History," 139.
[113] Ibid., 122.

Their attitude towards these women was informed by the middle class male constructed ideologies regarding female sexuality. The courts punished these women for defying middle class norms, with no recognition that prostitution could be a legitimate vocational status for working class women. However, the regularity with which the police undertook surveillance reports of the brothels and the recognition of Dunedin's red-light district, "the Devil's Half-Acre," with its own police station to maintain order, implies an acceptance of the inevitability of prostitutes within the settlement.[114] This acceptance did not stretch to an acceptance of the women, who were subjected to the regulation of the courts through local ordinances. The evidence from Otago suggests that prostitution was overlooked by the church authorities whilst not heavily policed by the civil authorities, although certain women made regular court appearances. More concern was shown for maintaining public order and decency than for reforming streetwalkers and stopping them from plying their trade.

[114] Lucas, "Square Girls."

Chapter 9

Conclusion

When examining the regulation of sexual behaviour in the past it is impossible to find one model of regulation, one sexual 'norm' into which everyone would fit:

> Rather than negating earlier ideas, layer piled on layer. Sexuality of hierarchy, of denial, of gender difference – none went away. Old sexualities did not die, but instead were folded into succeeding and competing ones. Added to each specific historical place and time were issues of class, marital status, profession or occupation, biological sex, and gender. And incoherencies added up as well.[1]

In essence, Katherine Crawford is saying that sexual morality has to be understood as a construct in which ideas and ideologies were adopted and adapted, building a new morality that included aspects of what had been before as opposed to entirely superseding it. It is indeed true that societies have ways of rewarding those who act in accordance with the society's norms whilst punishing those who transgress. However, it is not necessarily true that transgressors are met with social censure in all instances. The way that a community as a whole constructs its sexual norms and standards, and thereby perceives those who transgress against them is in part a reflection of the perceptions of the individuals who are in a position of power. However, not all members of the community necessarily agree with or follow these norms and standards.

Otago did not, and never could have, a single overriding attitude towards sexual behaviour. Tony Ballantyne has argued for the importance of positioning New Zealand's colonial

[1] Katherine Crawford, *European Sexualities, 1400-1800* (Cambridge: University of Cambridge Press, 2007), 236-7.

settlements within a web of networks of communication, transportation and information sharing.[2] This thesis argues that these networks led to the development of a multi-layered interpretation of decency and order that resulted in different sectors of the community having varying attitudes towards the acceptability of various forms of sexual behaviour. Such attitudes were informed by the life experiences of the community's members as well as their race, gender, religious affiliation, and their class. These layers of interpretation ebbed and flowed as the society was formed and transformed by events both within the colony and in other regions. Differing attitudes came to have a greater or less prominence as the members of the colony responded to the realities of establishing the colony, the initial years of hardship and political division, increasing stability and then upheaval associated with the discovery of gold. From 1861 state involvement in policing social behaviour increased, as seen through increased numbers of police on the beat and increased funding for police. Laws were introduced, first locally and then nationally which redefined specific behaviours as criminal. By the end of the 1860s the strict religious and social principles of the colony's foundation had been overtaken by a broad concern for public decency, order and respectability.

The Otago settlement was established based on the economics of systematic colonisation and its desire for an equal number of men and women, on the concept of the married state as both an economic unit and a moral right, on the regulation of sex through marriage, both by the state and by the church, and on the expectation that marriage resulted in the production of children and the control of vice. These principles, the founders believed, would result in a godly society

[2] Tony Ballantyne, "On Place, Space and Mobility," in *Webs of Empire: Locating New Zealand's Colonial Past* (Wellington: Bridget Williams Books, 2012).

based around the church.[3] Indeed it has been claimed that early Otago "remained one of the most law-abiding and crime-free settlements in the history of colonisation."[4] The evidence of the prison returns for the first decade of the settlement does support this statement, with little serious crime especially amongst the settlers.[5]

Despite this claim, the establishment of a colony based on Wakefield's principles of systematic colonisation and the principles of the Free Church of Scotland did little to exclude the 'evils' of older colonies, such as the prostitution that Wakefield had graphically illustrated in *A Letter from Sydney*. The effect of Wakefield's principles was short lived, and the influence of the church was limited. The regulation of sexual behaviour within the settlement in many ways superseded these principles through the introduction of English laws within New Zealand. To Arthur C. Strode, the other Justices of the Peace and the police constables, behaviour that broke the law was punished by the law, and the principles upon which Otago was founded formed no part of how the law operated.

The demographics of the settlement illustrate the limited effect that the kirk sessions would have had in regulating behaviour within the wider community even prior to the discovery of gold. Individuals' reactions to sexual transgressions were influenced by their religious persuasion and the strength of their affiliation, tempered by their own personal experiences. The sizeable number of Scottish settlers would have been familiar and comfortable with the

[3] John McKean, "The Road to Secularisation in Presbyterian Dunedin: the first fifty years of the Otago Settlement," *Presbyterian Historical Society of New Zealand 1991 Annual Lecture* (Dunedin 1993), 2-3.

[4] Tom Brooking, "The Great Escape: Wakefield and the Scottish settlement of Otago," in *Edward Gibbon Wakefield and the Colonial Dream: A Reconsideration* (Wellington: The Friends of the Turnbull Library, 1997), 129.

[5] Journal of Henry Monson, Gaoler, 1851-1861, PC-0076, Hocken Library, University of Otago, Dunedin.

teachings of the Free Church and its stand on immorality. However, the realities of colonial life may have changed their adherence to the church's punishments of certain sexual behaviours. For some their beliefs would have been strengthened, while others may have found other issues had greater priority. The focus of the church authorities became the punishment of sexual activity amongst single members of the community, leaving more "deviant" behaviours to the secular courts. The lack of any comment on several of these sexual behaviours by the church or its officials, could lead one to believe that its leaders were unconcerned. However, I would suggest that the focus of kirk sessions on drunkenness (Table 3.1) showed a practical approach to dealing with a problem that was more detrimental to the 'morality' of the settlement, where the church could be more effective in influencing or controlling behaviour.

For those outside the community of the church, their views towards sexual behaviour would have been influenced by their origins and experiences. Many individuals would have developed their own opinions which may have been flexible and fluid, and would have influenced how they perceived their own actions as well as those of others around them. These individualised reactions can be seen in the way people reacted to certain behaviours, including the inaction of the mate onboard the *Flying Squirrel* in the assault case against Thomas Davis, or how they gave evidence in court cases, such as the shoeblack, Thompson, in the sodomy case against Ross, alias Clark. They also played a role in how juries interpreted evidence and judges handed down sentences to those found guilty. Ideals of social position, appearance and character influenced people's perceptions of those accused of sexual transgressions and those who accused them. As a result these ideals influenced the workings of the judicial system

through the judges and members of the juries, the actions of the police in maintaining public order and the attitudes of the wider population towards the more obvious examples of sexual transgression, including single mothers and prostitutes.

Despite the emergence of diversity within the way settlers could perceive sexual behaviour, the centrality of marriage to the formation of families and its role as the location for procreative sex continued to be accepted by the majority of the community members. However, due to the gender imbalance, economic hardship or personal inclination not everyone within the community was able to marry, or indeed wanted to. There were also people within the community, including men who had been in Otago before 1848 or the large groups of miners who arrived after 1861, who had a different attitude towards sexual behaviour. Some people, such as prostitutes, engaged in sexual activities which were deemed by the majority to be disorderly or criminal, and others who did not condemn these activities, even if they were illegal, such as the shoeblack, Thompson.

The male constructed middle-class moral attitudes, based on Christian teaching, were also fundamental to the moral role that was beginning to be prescribed for women within colonial settings. However, there is little to suggest that women had an overriding role within the community in ensuring a standard of moral behaviour, despite the actions of Mrs Burns and other cabin class women on board the *Philip Laing*. In some instances women were the perpetrators of or willing participants in the criminal behaviour which has been examined. The need for an increase in the number of women immigrants into the settlement to counteract the large number of single men who arrived after the discovery of gold in 1861 opened the doors

to more "undesirable" women, including prostitutes, and ex-convicts from Australia. Laws which were created to regulate the public behaviour of the miners applied equally to women and resulted in a proportion of them making regular court appearances. The major concern for police and secular authorities appears to have been for public order and decency.

This research has examined the various roles that the church, the police and secular courts, and the wider community within Otago had in regulating the sexual behaviour of members of the community. It places colonial Otago within the broader network of colonial historiography, especially that which examines the regulation of sexual behaviour. It closes gaps in the existing literature relating to theories of population control and the importance of gender balance within Wakefield's scheme of systematic colonisation. It also examines new fields of scholarship in the examination of sexual behaviour in New Zealand by addressing bestiality, which has hitherto been overlooked. It also broadens the existing research into families in New Zealand, allowing further work to be done on the role of co-habitation, illegitimacy and remarriage to the formation of families outside of the traditional European settler family model.

Through the use of diverse sources, including kirk session minutes, marriage and baptism records, court records, and newspaper reports, this thesis has shown that the church in Otago did not have the remit to control or regulate the sexual behaviour of the members of the community. The focus of the ministers was very much on ensuring the authority of the church over the sacraments of marriage and baptism, and the standing of the church within the community. Certain sexual behaviours, including infanticide, sodomy and bestiality, were outside their remit, as they were regulated by various secular ordinances and acts. As the

community became more diverse and the population expanded other behaviours traditionally under the church, such as adultery, were punished through criminal and civil court actions. The key point is that these behaviours continued to be regulated in some form by not only the formal methods of the church and courts, but also through informal community based sanctions. This indicates that for some sections of the community the sexual behaviour of its members continued to remain an issue that needed regulation.

Appendices

Appendix A
European and Mixed-Race Marriages officiated by Watkin and Creed to Dec. 1847

Date	Individuals Married	Habitation	By Whom
Jan 27 1841	James Spencer and Meri Kauri	of Bluff	by Watkin
Aug 14 1843	Thomas Chaseling to Mary Puna	of Waikouaiti	by Watkin
Aug 30 1843	Thomas Tandy to Meria Manaha	"	"
"	Charles Murray to Maraia Tuaitekura	"	"
Dec 13 1843	Simon Mackenzie to Mary Huapati	of Otakou	"
"	Patrick Burke to Mary Waiwehi	"	"
"	James Fowler to Maria Phiharo	"	"
"	John Murray to Sarah Auaroa	"	"
Mar 4 1844	Lewis Acker to Mary Pi	of Kairikau	"
Mar 5 1844	James Forster to Ann Tariwhati	"	"
Mar 14 1844	George Longland to Elizabeth Jane Todd	Of Waikouaiti	"
June 25 1844	Joseph Crocome to Arapera Raureka	"	"
"	Thomas McLaughlin to Mara	"	"
Aug 9 1844	Leonard Stone to Waimoana	"	by Creed
Aug 10 1844	Elisha Apes to Punahere	"	"
"	Robert Mackintosh to Werero	"	"
"	James Stephens to Tarahape	"	"
Aug 15 1844	Emanuel Gomes to Pukutahi	"	"
Sep 5 1844	James Edwin Lloyd to Hinekoau	"	"
Apr 16 1845	William Bennet to Potete	of Moeraki	"
Sep 28 1845	Matthew Hamilton to Tewarerauaruhi	Of Akaroa	"
Sept 29 1845	George Field to Tauware	"	"
Oct 5 1845	William Railler to Hinekokoraki	of Port Levy	"
"	Thomas Stickle to Hinetohea	"	"
"	Timothy Holley to Hineramutumtu	"	"
Nov 10 1845	James Brown to Tipare	of Otakou	"
Dec 30 1845	William Harper to Meri Pakinui	of Moeraki	"
Jan 24 1846	James McKay to Ann Newton	of Waikouaiti	"
Feb 9 1846	Richard Sizemore to Betsy Palmer	"	"
Jul 28 1846	Neil Gilmour to Sarah Ann Best	"	"
Sept 17 1846	John Howell to Koronaki (Caroline Brown)	of Jacobs River	"
"	Thomas Brereton Hutchinson Watson to Heahea	"	"

“	Thomas Hardy to Korehe	“	“
Dec 24 1846	James Rickus to Korako	of Otakou	“
Mar 29 1847	Andrew Moore to Hinekoau Lloyd	of Waikouaiti	“
Aug 30 1847	Robert Brown to Jane Palmer	“	“
Sept 27 1847	William Isaac Haberfield to Tete	of Moeraki	“
Dec 14 1847	James Hoad to Mary Ann Ellis	of Matanaka	“

Source: Wesleyan Registers of Marriages, Hocken Library, University of Otago, Dunedin.

Appendix B: Sexual Assault Cases in Otago 1848-1867

Case	Date	Age of Victim	Charge	Outcome	Penalty
William Wright	Dec 1848	6	Indecent Assault	Guilty	3 Months HL
James Watson	July 1855	6	Assault with Intent	Discharged	
Mark Turner	May 1857	10	Indecent Assault		
John Hislop	June 1859	15	Assault with Intent	Guilty	9 Months HL
Edmund Smith	June 1859	Adult	Assault with Intent	Acquitted at District Court	
James Dalton	March 1861	5	Indecent Assault	Acquitted at District Court	
Thomas Davis	May 1862	Adult	Assault with intent	Guilty	2 years HL
M. Brogan	Aug 1862	Adult	Rape and Assault	Guilty	6 years PS
J. Malony			Rape and Assault	Guilty	6 years PS for aiding rape; 6 years HL for rape; 1 year HL for aiding assault
P. Kinnary			Rape and Assault	Guilty	7 years PS for rape; 6 years PS for aiding rape
Jones Patterson alias John Wilson alias John M Hartley	Sept 1862	?	Indecent Assault	Warrant Issued, no record of arrest made	
James McKay Drummond	Nov 1862	5	Indecent Assault	Committed for Trial at Supreme Court	
John Golberg	Jan 1863	6	Rape	Guilty	8 years PS
Patrick Finnigan	Jan 1863	Adult	Rape	Acquitted at Resident Magistrates' Court	
Wrigley vs Dorman	Jan 1863	Adult	Civil case – taking liberties	Found for plaintiff	£20 plus costs
Thomas Kavanagh	Jan 1863	Adult	Rape	Acquitted at Resident Magistrates' Court	
James Logg alias R Fletcher	April 1863	10-15	Assault with Intent	Guilty	6 Months HL
John Christie	Sept 1863	10-15	Rape	Guilty	4 Years PS
John Kinnear	Dec 1863	Adult	Rape	Charge withdrawn by Crown prosecutor	
John Morrison	Feb 1865	7	Assault with Intent	Guilty	2 years HL
John King	March 1865	Adult	Assault with intent	Guilty	18 months HL
James Dennis	Apr 1865	?	Assault with intent	Warrant Issued	
James Lloyd alias Morgan Davis	Aug 1866	?	Attempt	Guilty common assault	4 months HL

Case	Date	Age of Victim	Charge	Outcome	Penalty
Patrick McCann	Nov 1866	?	Attempted Rape	Guilty	2 months HL
John Wilson alias "Scotch Jock"	Nov 1866	?	Attempted Rape	Discharged	
James Anderson	Apr 1867	Adult	Assault with Intent	Guilty indecent assault	1 month HL
James Trans	Apr 1867	Adult	Assault with intent	Guilty common assault	3 months HL
Martin Halloran alias Wallis alias O'Halloran	May 1867	Adult	Assault with intent	Acquitted	
Henry Hudson	June 1867	12	Rape	Acquitted	
Andrew Scott	Aug 1867	8	Indecent Assault	Guilty	2 years HL
NZ Jack	Sept 1867	Child	Indecent assault	Acquitted	
William Anderson	Oct 1867	?	Indecent Assault	Acquitted	
John Gindley	Nov 1867	?	Attempted Rape	Acquitted	

Source: *Otago Police Gazette*; Court Papers, Archives New Zealand, Dunedin; *Otago Daily Times*; *Otago Witness*; *Otago News*

Bibliography

Primary Sources:

Leviticus 18:23.

Leviticus 20: 15-16.

The Marriage Service from the Book of Common Prayer (1662).

Birth, Death and Marriage Historical Records New Zealand: www.bdmhistoricalrecords.dia.govt.nz/.

Dunedin City Council Public Registers – Cemeteries Database URL: http://www.dunedin.govt.nz/facilities/cemeteries/cemeteries_search.

Passenger Arrivals at Port Chalmers, New Zealand, 1848-1851, www.ngaiopress.com/drhocken.htm.

Otago Nominal Index, online version - http://marvin.otago.ac.nz/oni/details.php?recid=365434.16 .

New Zealand's Lost Cases website http://www.victoria.ac.nz/law/nzlostcases/search_cases.aspx.

Archives New Zealand, Dunedin

"Dunedin Gaol Nominal Index" compiled by W. Morris.

Dunedin Lunatic Asylum Records:

DAHI/D266/14/1834 Mary Allen Statutory Papers, Seacliff Asylum Admissions.

DAHI/19825/D264 Box 1/b Dunedin Lunatic Asylum Provincial Surgeon's Daily Reports, 1863-1882.

DAHI/19827/D264 Box 1/a Dunedin Lunatic Asylum Keeper's Journal, 1863-1864.

DAHI/19827/D264 Box 2 Dunedin Lunatic Asylum Keeper's Journal, 1864-1867.

DAHI/19850/D266 Box 1 Seacliff Mental Hospital Statutory Admission Papers 1863-1868.

DAHI/19850/D266 Box 2 Seacliff Mental Hospital Statutory Admission Papers 1868-1869.

DAHI/19850/D266 Box 3 Seacliff Mental Hospital Statutory Admission Papers 1869-1872.

DAHI/19956/D264 Box 37 Seacliff Mental Hospital Medical Casebooks, 1868-1882.

DAHI/19990/D264 Box 100/1 Seacliff Asylum – Admission Register 1863-1893.

DAHI/19990/D264 Box 100/1 Dunedin Lunatic Asylum Register of Removals, Discharges and Deaths, 1868-1885.

DAHI/20104/D264 Box 93 Dunedin Lunatic Asylum Register of Patients, 1863-1868.

DAHI/20105/D264 Box 94 Seacliff Mental Hospital Patient Admission Registers, 1868-1885.

Dunedin Supreme Court Records:

DAAC/D256/436 indictments Supreme Court Dunedin, December 1870 Sittings.

DAAC 21216 D437/860 Judge Richmond's Notebook Criminal Cases 1864.

DAAC 21218 D437/876 Judge's Notebook, Criminal Cases, J. Chapman.

DAAC/21218/D437/879/4 Judge's Note Book – Criminal Cases, J. Chapman 1868-70.

DAAC 21218/D437/878/3, Judge's Note Book – Criminal Cases, J. Chapman 1867-68.

DAAC/D256/245-246, Trial 97 Regina v. Malony, Brogan & Kinnary.

DAAC/D256/246, Trial 112 Regina v. John Golberg 1863.

DAAC/D256/248, Trial 213 Regina v. John Christie 1863.

DAAC/D256/247, Trial 180 Regina v. R. Fletcher alias "James Logg" 1863.

DAAC/D256/249, Trial 28 Regina v. John Kinnear 1863.

DAAC/D256/250, Trial 18 Regina v. Alexander Ross, alias Clark 1864.

DAAC/D256/250, Trial 13 Regina v. Alfred Marsh 1864.

DAAC/D256/252, Trial 14 Regina v. John King 1865.

DAAC/D256/255/Case 13 Regina v. Gere 1867.

DAAC/D256/255/Case 13 Regina v. Henry 1865.

DAAC/D256/260/Case 4 Regina v. Hutchings 1870.

DAAC/D256/247/Case 144 Regina v. John Cole 1863.

DAAC/D256/435/ek – Indictment, Regina v. John Cole – an attempt to commit bestiality, 26 January 1863.

DAAC/D256/261/Case 4 Regina v. States 1871.

DAAC D256/245, Trial 63 Regina v. Symons.

DAAC/D256/245-246, Trial 97

DAAC D256/435/ep, Regina v. Arthur Fowler

Resident Magistrate's Criminal Case Files 1857-1861:

DAAC/D256/244, 9 May 1857.

DAAC/D256/253, Trial 21, Catherine Lyons 1865.

Rules to be Observed by the Agents for Otago, in Regard to Immigration, 28 December 1854, AAAC 701/D500/2/e/86.

Tuapeka Police Diaries 25 April 1863 – 24 January 1864, DAKT D390/ Box 1.

Archives New Zealand, Wellington

Evidence presented to Select Committee on Social Evil, AEBE/18507/LE1/62/1869/12.

Hocken Library, Dunedin

Copy of the pamphlet of the Lay Association of the Free Church of Scotland including resolutions of the Association, 'Address to the People of Scotland' promoting the colony, and a map of Otago Harbour, MS-0439/129.

Copy of the Resolutions of the General Assembly of the Free Church of Scotland relating to the Settlement of Otago 29 May 1845, MS-0439/124.

Dunedin City Block Maps 1888.

Journal of Edward Shortland: Notes kept while in the Middle Island, November 1843 & 4-21 January 1844, PC-0024.

Journal of Henry Monson, Gaoler, 1851-1861, PC-0076.

Letters from Rev. J.F.H.Wohlers to Frederick Tuckett 1848-1856, PC-0049.

Map of Dunedin 1865 Harnett & Co.

Map of Dunedin 1869 Riemans.

Marriage Registers, First Church of Otago, 1848-1870.

Martin, William. 'A Pioneer's Reminiscences', MS-0205.

Minutes of the General Assembly of the Free Church of Scotland, 3 June 1845, quoted in John McGlashan, *The following is a brief narrative of the origin and early history of the Church and colony of Otago*, MS-0463/020.

Partial Index to Typescript of Wesleyan Registers Held at Hocken Library Dunedin (compiled by June McDougall, 1983).

Transcript of letters from Rev. Charles Creed, Waikouaiti, to the General Secretary of the Wesleyan Missions, London 1844-1851, MS-0440/017.

Transcript of Bishop Selwyn's register of Baptism and marriages 1844, MS-0440/009.

Transcription of extract from journal of Bishop Selwyn 1844, MS-0440/008.

Val Maxwell "Settlers to Otago pre-1861; Immigration from Victoria micro-fiche".

Otago Settlers Museum Archives, Dunedin

Diary of Andrew Boyes on board *Mariner*, 6 May 1849, C185.

Reverend William Bannerman, 'Address', 1898.

Reverend Thomas Burns' Diary 1848-1851, C017.

Publications

Acton, William. *Prostitution considered in its Moral, Social, and Sanitary Aspects, in London and other Large Cities and Garrison Towns. With proposals for the control and prevention of its attendant evils.* 2nd ed. London: John Churchill and Sons, 1870.

Gabriel's Gully Jubilee. Dunedin: Otago Daily Times, 1911.

Malthus, Thomas. 'An Essay on the Principles of Population' (1826). In *The Works of Thomas Robert Malthus*. Vol. II. Edited by E.A. Wrigley and David Souden. London: William Pickering, 1986.

St. Augustine of Hippo. "The Excellence of Marriage." In *Love, Sex and Marriage in the Middle Ages: A Sourcebook*. Edited by Conor McCarthy. London: Routledge, 2004.

Selwyn, George Augustus. *A Charge, Delivered to the Clergy of the Diocese of New Zealand, at the Diocesan Synod, in the Chapel of St John's College, on Thursday September 23 1847*. London: Francis & John Rivington, 1850. www.enzb.auckland.ac.nz/document/1847-1851._Selwyn,_G._A._New_Zealand .

Shortland, Edward. *The Southern Districts of New Zealand: A Journal with Passing Notices of the Customs of the Aborigines*. London: Longman, Brown, Green and Longmans, 1851.

Thatcher, Charles. *'Life on the Goldfields': an entertainment*. Edited by Robert H. B. Hoskins. Christchurch: School of Music, University of Canterbury, 1996.

The Ordinances of New Munster, AD 1849, and of the Province of Nelson Passed in the first eleven Sessions of the Provincial Council AD 1853-AD 1863, to which are added, extracts of Imperial Act and Charter and Instructions, &c., Constituting and defining Province of New Munster, and The Imperial Acts Relating to the Constitution of New Zealand. Nelson: 1864.

Torrance, J. A. "Public Institutions" in *Picturesque Dunedin: or Dunedin and Its Neighbourhood in 1890*. New Zealand Text Collection. Dunedin: Mills, Dick and Co, 1890. http://www.nzetc.org/tm/scholarly/tei-BatPict-t1-body1-d9-d1.html

Wakefield, Edward Gibbon. "A View of the Art of Colonization With Present Reference to the British Empire; In Letters Between a Statesman and a Colonist." In *The Collected Works of Edward Gibbon Wakefield*. Edited by M.F. Lloyd, 753-1040. Auckland: Collins, 1969.

Wakefield, Edward Gibbon. "A Letter from Sydney." In *The Collected Works of Edward Gibbon Wakefield*. Edited by M.F. Lloyd, 93-185. Auckland: Collins, 1969.

Wakefield, Edward Jerningham. *Adventure in New Zealand from 1839 to 1844 with some account of the beginning of the British colonization of the Islands*. Edited by Sir Robert Stout. Christchurch, Wellington and Dunedin, NZ; Melbourne and London: Whitcombe and Tombs Ltd., 1908.

Government Ordinances

25 Hen. 8, c.6

32 Hen. 8, c. 3.

2/3 Ed. 6, c.29;

1 Mar. st 1, c. 1, s. 3;

5 Eliz. c. 17;

18 Eliz. I, c. 7.

4 Geo.4 c.31;

4 Geo.4 c.31, section XVIII.

4 & 5 Vict., c. 56 (Eng.).

5 Vict. No. 11 'An Ordinance to render certain Marriages valid', 21 February 1842

10 Vict. No. 9

11 Victoria 7, An Ordinance for regulating Marriages in the Colony of New Zealand [28 September 1847].

15 & 16 Vict., c. 72

27 & 28 Vict., c. 85

29 Vict., c. 35

30 Vict. No. 10

31 Vict. 5.

31 & 32 Vict., c. 80

32 & 33 Vict., 52.

32 & 33 Vict., c. 96.

Appropriating Ordinance 1856, No. 8 (Otago)

Appropriating Ordinance 1856-7, No. 11 (Otago);

Appropriating Ordinance 1857-8, No. 20 (Otago)

Appropriating Ordinance 1858 (No. 2), Session VII, No. 33 (Otago).

Appropriating Ordinance 1859, Session VIII, No. 34 (Otago).

Appropriation Ordinance (No, 2) 1861, Session XII, No. 45 (Otago)

Constabulary Force Ordinance 1849 Session 1, No. 9 (New Munster)

Empowering Ordinance 1849 Session 1, No. 5 (New Munster)

Empowering Ordinance 1854 Session 1, No. 6A (Otago)

English Laws Act of 1858, 21 & 22 Vict. no. 2

Licensed Theatres' Ordinance 1862, Otago Ordinances Session XVI, No. 108.

Licencing Ordinance 1861, Session XIII, No. 56 (Otago);

The Criminals' Ordinance 1861, Session XIII, No. 60 (Otago);

Vagrant Ordinance 1861, Session XIII, No. 62 (Otago).

Water Police Ordinance 1861, Session XIII, No. 59 (Otago)

Newspapers and Periodicals

Nelson Examiner and New Zealand Chronicle, 17 January 1863

Otago Daily Times 1861-1870

Otago Evening Star, Otago Jubilee Edition, March 23.1898.

Otago News 1848-1850

Otago Witness 1851-1870

Saturday Review 1864-1871

Presbyterian Church of Aotearoa New Zealand Archives, Dunedin.

Andersons Bay Presbyterian Church Minutes of Session

East Taieri Presbyterian Church Minutes of Session

First Church Minutes of Sessions, Vol 1, 26 April 1849 – 21 September 1879

Palmerston Presbyterian Church Minutes of Session

Port Chalmers Kirk Session Minutes

Tokomairiro Presbyterian Church Minutes of Session

Visitations of Reverend Thomas Burns 1848-1858

West Taieri Presbyterian Church Minutes of Session.

Official Publications

Appendix to the House of Representatives 1876, G-9, 'Half-Caste Claims in the South and Stewart Island'.

British Parliamentary Papers on New Zealand Vol 8: 1852 NZ8:1852 (570), Papers Relating to the New Zealand Company, No. 48

Otago Police Gazette, November 1861 – January 1868; 1871-1877.

Secondary Sources:

Abrams, Lynn. "Concubinage, cohabitation and the law: Class and gender relations in nineteenth-century Germany." *Gender and History* 5, no. 1 (1993): 81-100.

Adair, Richard. *Courtship, illegitimacy and marriage in early modern England.* Manchester: Manchester University Press, 1996.

Aldrich, Robert. *Colonialism and Homosexuality*. London: Routledge, 2003.

Aldrich, Robert. "Sex Matters: Sexuality and the Writing of Colonial History." In *Writing Imperial Histories*, edited by Andrew S. Thompson, 74-99. Manchester: Manchester University Press, 2013.

Anderson, Atholl. *Race Against Time: The early Māori-Pakeha families and the development of the mixed-race population in southern New Zealand.* Dunedin: Hocken Library University of Otago, 1991.

Anderson, Atholl. *The Welcome of Strangers: An Ethnohistory of southern Māori AD 1650-1850*. Dunedin: University of Otago Press, 1998.

Ballantyne, Tony. "The State, Politics and Power, 1769-1893." In *The New Oxford History of New Zealand*, edited by Giselle Byrnes, 99-124. Melbourne: Oxford University Press, 2009.

Ballantyne, Tony. *Webs of Empire: Locating New Zealand's Colonial Past*. Wellington: Bridget Williams Books, 2012.

Ballantyne, Tony. "On Place, Space and Mobility." In *Webs of Empire: Locating New Zealand's Colonial Past*, 264-282. Wellington: Bridget Williams Books, 2012.

Ballantyne, Tony and Antoinette Burton. "Introduction: Bodies, Empires, and World Histories." In *Bodies in Contact: Rethinking Colonial Encounters in World History,* edited by Tony Ballantyne and Antoinette Burton, 1-15. Durham, N.C.: Duke University Press, 2005.

Ballantyne, Tony and Antoinette Burton, "Postscript: Bodies, Genders, Empires: Reimagining World Histories." In *Bodies in Contact: Rethinking Colonial Encounters in World History,* edited by Tony Ballantyne and Antoinette Burton, 405-423. Durham, N.C.: Duke University Press, 2005.

Ballantyne, Tony and Antoinette Burton, eds. *Bodies in Contact: Rethinking Colonial Encounters in World History.* Durham N.C.: Duke University Press, 2005.

Ballantyne, Tony and Antoinette Burton, eds. *Moving Subjects: Gender, Mobility, and Intimacy in an Age of Global Empire*. Urbana: University of Illinois Press, 2009.

Barman, Jean. "Taming Aboriginal Sexuality: Gender, Power, and Race in British Columbia, 1850-1900." *BC Studies* 115/116 (Autumn/winter 1997/98): 237-266.

Baumgartner, Joseph. "Newspapers as Historical Sources." *Philippine Quarterly of Culture and Society* 9, No. 3 (September 1981): 256-258.

Beetz, Andrea M. "Bestiality/Zoophilia: A Scarcely Investigated Phenomenon Between Crime, Paraphilia and Love." *Journal of Forensic Psychology Practice* 4, no. 2 (2004): 1-36.

Beirne, Piers. "On the Sexual Assault of Animals: A Sociological View." In *The Animal Human Boundary,* edited by Angela N. H. Creager and William Chester Jordan, 193-227. Rochester, NY: University of Rochester Press, 2002.

Binney, Judith. "Whatever Happened to Poor Mr Yate?" *New Zealand Journal of History* 9, no. 2 (1975): 111-125.

Blaikie, Andrew. *Illegitimacy, Sex and Society: Northeast Scotland, 1750-1900.* Oxford: Clarendon Press, 1993.

Bourke, Joanna. *Rape: A History from 1860 to the Present.* London: Virago Press, 2007.

Boyd, Kenneth M. *Scottish Church Attitudes to Sex, Marriage and the Family, 1850-1915*. Edinburgh: John Donald Publishers Ltd., 1980.

Braden, Aaron. *Southern People: A Dictionary of Otago Southland Biography*, edited by Jane Thomson. Dunedin, N.Z.: Longacre Press in association with the Dunedin City Council, 1998.

Brady, Sean. *Masculinity and Male Homosexuality in Britain, 1861-1913*. Basingstoke: Palgrave Macmillan, 2005.

Bray, Alan. "Homosexuality and the signs of male friendship in Elizabethan England." *History Workshop* 29 (1990): 1-19.

Brickell, Chris. "The emergence of a gay identity." In *Sexuality down under: social and historical perspectives*, edited by A Kirkman and P Moloney, 63-79. Dunedin: University of Otago Press, 2005.

Brickell, Chris. *Mates and Lovers: A History of Gay New Zealand.* Auckland: Random House New Zealand, 2008.

Brickell, Chris. "Sex, space and scripts: negotiating homoeroticism in history." *Social and Cultural Geography* 11, no. 6 (September 2010): 597-613.

Bristow, Edward J. *Vice and vigilance: purity movements in Britain since 1700*. Dublin: Gill and Macmillan, 1977.

Brookes, Barbara, Charlotte Macdonald and Margaret Tennant, eds. *Women in History: Essays on European Women in New Zealand*. Wellington: Allen & Unwin NZ, 1986.

Brookes, Barbara. "Taking Private Life Seriously: Marriage and Nationhood." *History Compass* 1 (2003):1-4.

Brooking, Tom. "The Great Escape: Wakefield and the Scottish settlement of Otago." In *Edward Gibbon Wakefield and the Colonial Dream: A Reconsideration*, 123-132. Wellington: The Friends of the Turnbull Library, 1997.

Brooking, Tom. *And Captain of their Souls: An Interpretive Essay Upon the Life and Times of Captain William Cargill*. Dunedin: Otago Heritage Books, 1984.

Brooking. Tom. "Burns, Thomas – Biography." The Dictionary of New Zealand Biography, Te Ara – The Encyclopedia of New Zealand. Last modified 1 September 2010. http://www.teara.govt.nz/en/biographies/1b52/1.

Brooking, Tom, and Jennie Coleman, eds. *The heather and the fern: Scottish migration & New Zealand settlement.* Dunedin: Otago University Press, 2003.

Brown, Jennifer S. H. *Strangers in blood: Fur trade company families in Indian country*. Vancouver: University of British Columbia Press, 1980.

Bullough, Vern L. *The History of Prostitution*. New York: University Books, 1964.

Bullough, Vern L. and Bonnie Bullough. *Sin, Sickness and Sanity: A History of Sexual Attitudes*. New York: Garland Publishing Inc., 1977.

Cameron, Anne. "The Establishment of Civil Registration in Scotland." *The Historical Journal* 50, no. 2 (2007): 377-395.

Carey, Hilary, M. *God's Empire: Religion and Colonialism in the British World, c. 1801-1908*. Cambridge: Cambridge University Press, 2011.

Chisholm, James. *Fifty Years Syne*. Dunedin: J Wilkie & Co., 1898.

Church, Ian. *Opening the manifest on Otago's Infant Years: Shipping Arrivals and Departures, Otago Harbour and Coast 1770-1860*. Dunedin: Otago Heritage Books, 2001.

Church, Ian, ed. *Gaining a Foothold: Historical records of Otago's eastern coast, 1770-1839*. Dunedin: Friends of the Hocken Publications, 2008.

Clark, Anna. *Women's Silence Men's Violence: Sexual Assault in England 1770-1845*. London: Pandora Press, 1987.

Clark, Anna. "Twilight Moments." *Journal of the History of Sexuality* 14, nos. 1/2 (January/April 2005): 139-160.

Clark, Anna. *Desire: A History of European Sexuality*. New York: Routledge, 2008.

Clarke, Alison. "A Godly Rhythm: Keeping the Sabbath in Otago 1870-90." PGDipArts diss., University of Otago, Dunedin, NZ, 1999.

Clarke, Alison. "Feasts and Fasts: Holidays, Religion and Ethnicity in Nineteenth Century Otago." PhD diss., University of Otago, Dunedin, NZ, 2003.

Clarke, Alison. "Heavenly Visions: Otago Colonists' Concepts of the Afterlife." *Journal of Religious History* 30, no. 1 (February 2006): 2-17.

Clarke, Alison. *Holiday Seasons: Christmas, New Year and Easter in Nineteenth Century New Zealand*. Auckland: Auckland University Press, 2007.

Clarke, Alison. "The Presbyterian way of life in nineteenth-century New Zealand." Paper presented to the Presbyterian Research Network, Dunedin, 15 October 2009.

Clarke, Alison. *Born to a Changing World: Childbirth in Nineteenth-Century New Zealand*. Wellington: Bridget William Books, 2012.

Clendinnen, Inga. *Dancing with Strangers: Europeans and Australians at First Contact*. Cambridge: Cambridge University Press, 2005.

Cocks, H. G. *Nameless Offences: Homosexual Desire in the Nineteenth Century*. London: I. B. Tauris Publishers, 2003.

Cocks, H. G. "Secrets, Crimes and Diseases, 1800-1914." In *A Gay History of Britain: Love and Sex Between Men Since the Middle Ages*, edited by Matt Cook, 107-144. Oxford: Greenwood World Publishing, 2007.

Cole, Margaret. *Marriage: Past and Present*. London: J.M. Dent & Sons, 1938.

Collins, Anne-Marie. "Woman or Beast? Bestiality in Queensland, 1870-1949. *Hecate* 17, no. 1 (1991): 36-42.

Conley, Carolyn A. "Rape and Justice in Victorian England." *Victorian Studies*, 29, no. 4 (Summer, 1986): 519-536.

Conley, Carolyn A. *The Unwritten Law: Criminal Justice in Victorian Kent*. Oxford: Oxford University Press, 1991.

Cook, Matt, ed. *A Gay History of Britain: Love and Sex Between Men Since the Middle Ages*. Oxford: Greenwood World Publishing, 2007.

Cook, Hera. *The Long Sexual Revolution: English Women, Sex and Contraception 1800-1975*. Oxford: Oxford University Press, 2004.

Coontz, Stephanie. "Historical Perspectives on Family Studies." *Journal of Marriage and the Family* 62, no. 2 (May 2000): 283-297.

Crawford, Katherine. *European Sexualities, 1400-1800*. Cambridge: University of Cambridge Press, 2007.

Crawford, Patricia. *Blood, Bodies and Families in Early Modern England*. Harlow: Pearson Education Ltd, 2004.

Creager, Angela N. H. and William Chester Jordan, eds. *The Animal Human Boundary*. Rochester, NY: University of Rochester Press, 2002.

Daley, Caroline and Deborah Montgomerie, eds. *The Gendered Kiwi*. Auckland: Auckland University Press, 1999.

Daley, Caroline. "Puritans and Pleasure Seekers." In *Sexuality Down Under: Social and Historical Perspectives*, edited by Allison Kirkman and Pat Maloney, 47-62. Dunedin: University of Otago Press, 2005.

Dalley, Bronwyn. "Criminal Conversations: Infanticide, Gender and Sexuality in Nineteenth-Century New Zealand." In *The Gendered Kiwi*, edited by Caroline Daley and Deborah Montgomerie, 63-85, Auckland: Auckland University Press, 1999.

Dalziel, Raewyn. "Men, Women and Wakefield." In *Edward Gibbon Wakefield and the Colonial Dream: A Reconsideration*, 77-86. Wellington: The Friends of the Turnbull Library, 1997.

Dalziel, Raewyn. "Vogel, Julius – Biography." The Dictionary of New Zealand Biography, Te Ara – The Encyclopedia of New Zealand. Last modified 4 July 2012. http://www.teara.govt.nz/en/biographies/1v4/1.

Daunton, Martin, and Rick Halpern, eds. *Empire and others: British encounters with indigenous peoples, 1600-1850*. London: UCL Press, 1999.

Davidson, Roger. *Dangerous Liaisons: A Social History of Venereal Disease in Twentieth century Scotland*. Atlanta, Georgia: Editions Rodopi B.V., Amsterdam, 2000.

D'Cruze, Shani. *Crimes of outrage: Sex, violence and Victorian working women*. London: UCL Press, 1998.

Diamond, Marion. *Emigration and Empire: The Life of Maria S. Rye*. New York: Garland Publishing, 1999.

Dickinson, J.R. and J.A. Sharpe. "Infanticide in early modern England: The Court of Great Sessions at Chester, 1650-1800." In *Infanticide: Historical Perspectives on Child Murder and Concealment, 1550-2000*, edited by Mark Jackson, 35-51. Aldershot: Ashgate, 2002.

Dubinsky, Karen. *Improper Advances: Rape and Heterosexual Conflict in Ontario, 1880-1920*. Chicago: University of Chicago Press, 1993.

Dunstall, Graeme. "Frontier and/or cultural fragment? Interpretations of violence in colonial New Zealand." *Social History* 29, no 1 (February 2004): 59-83.

Durrer, Rebecca. "Propagating the New Zealand ideal." *The Social Science Journal* 43 (2006): 173-183.

Eldred-Grigg, Stevan. *Pleasures of the Flesh: Sex and Drugs in Colonial New Zealand 1840-1915*. Wellington: AH and AW Reed Ltd, 1984.

Eldred-Grigg, Stevan. *Diggers, Hatters and Whores: The Story of New Zealand's Gold Rushes*. Auckland: Random House New Zealand, 2008.

Emsley, Clive. *Crime and Society in England, 1750-1900*. London: Longman, 1987.

Evans, Julie, et al. *Equal subjects, unequal rights: Indigenous peoples in British settler colonies, 1830-1910*. Manchester: University of Manchester Press, 2003.

Fairburn, Miles. *The Ideal Society and Its Enemies: the Foundations of Modern New Zealand Society 1850-1900*. Auckland: Auckland University Press, 1989.

Foucault, Michel. *The History of Sexuality*, translated by Robert Hurley. New York: Vintage Books, 1988.

Fox, Fabia. "'Murder to Conceal Her Sin': Infanticide in Otago, 1850-1899." BA(Hons.) diss., University of Otago, 2010.

Fout, John C. ed. *Forbidden History: The State, Society and the Regulation of Sexuality in Modern Europe*. Chicago and London: University of Chicago Press, 1992.

Frances, Raelene. "The history of female prostitution in Australia." In *Sex Work and Sex Workers in Australia*, ed. R. Perkins, et al, 27-52. Sydney: University of New South Wales Press, 1994.

Frost, Ginger. "Bigamy and Cohabitation in Victorian England." *Journal of Family History* 22, no.3 (July 1997): 286-306.

Frost, Ginger S. *Living in Sin: Cohabiting as Husband and Wife in Nineteenth-Century England*. Manchester: Manchester University Press, 2008.

Fudge, Erica. *Perceiving Animals: Humans and Beasts in Early Modern English Culture*. Urbana: University of Illinois Press, 2000.

Fudge, Erica. "Monstrous Acts: Bestiality in Early Modern England." *History Today* 50, no. 8 (August 2000): 20-25.

Galloway-Brown, Yvonne & Rona Ferguson. "Introduction: Twisted Sisters: Women, Crime and Deviance in Scotland Since 1400." In *Twisted Sisters: Women Crime and Deviance in Scotland Since 1400*, edited by Yvonne Galloway-Brown & Rona Ferguson, 1-9. East Linton, Scotland: Tuckwell Press, 2002.

Galloway-Brown, Yvonne & Rona Ferguson, eds. *Twisted Sisters: Women Crime and Deviance in Scotland Since1400.* East Linton, Scotland: Tuckwell Press, 2002.

Garton, Stephen. *Histories of Sexuality*. New York: Routledge, 2004.

Gilfoyle, Timothy J. "Prostitutes in History: From Parables of Pornography to Metaphors of Modernity." *The American Historical Review* 104, no. 1 (February, 1999): 117-141.

Gillis, John R. *For Better, For Worse: British Marriages 1600-the Present*. Oxford: Oxford University Press, 1985.

Goldsmith, Netta Murray. *The Worst of Crimes: Homosexuality and the Law in Eighteenth Century London*. Aldershot: Ashgate Pub. Ltd., 1998.

Guttentag, Marcia and Paul F. Secord. *Too Many Women? The Sex Ratio Question*. Beverley Hills: Sage Publications, 1983.

Haeberle, Erwin J. *The Sex Atlas*. New York: The Continuum Publishing Company, 1983. Online edition www2.hu-berlin.de/sexology/ATLAS_EN/index/html.

Haggerty, George E. "Male Love and Friendship in the Eighteenth Century." In *Love, Sex, Intimacy and Friendship Between Men 1550-1800*, edited by Katherine O'Donnell and Michael O'Rouke, 70-81. Basingstoke: Palgrave Macmillan, 2003.

Haggis, Jane. "White women and colonialism: towards a non-recuperative history." In *Gender and imperialism*, edited by Clare Midgley, 45-75. Manchester: Manchester University Press, 1998.

Haines, David. "In Search of the "Whaheen": Ngāi Tahu Women, Shore Whalers, and the Meaning of Sex in Early New Zealand." In *Moving Subjects: Gender, Mobility, and Intimacy in an Age of Global Empire*, edited by Tony Ballantyne and Antoinette Burton, 49-66. Urbana: University of Illinois Press, 2009.

Hammerton, A James. *Cruelty and companionship: conflict in nineteenth-century married life*. London: Routledge, 1992.

Harris, Victoria. "Sex on the Margins: New Directions in the Historiography of Sexuality and Gender." *The Historical Journal* 53, no. 4 (2010): 1085-1104.

Harvey, A. D. "Bestiality in late-Victorian England." *Journal of Legal History* 21, vol. 3 (2000): 85-88.

Hedican, Edward J. "What Determines Family Size? Irish Farming Families in Nineteenth-Century Ontario." *Journal of Family History* 31 (2006): 315-334.

Henderson, Tony. *Disorderly Women in Eighteenth Century London: Prostitution and Control in the Metropolis, 1730-1830*. Pearson Educational Ltd, Harrow: 1999.

Hill, Richard S. *Policing the Colonial Frontier: The Theory and Practice of Coercive Social and Racial Control In New Zealand, 1767-1867*. Part I, *The History of Policing in New Zealand, Volume One*. Wellington: V. R. Ward, Government Printer, 1986.

Hindle, Steve. "The Problems of Pauper Marriages in Seventeenth Century England." *Transactions of the Royal Historical Society* 6th Series, 8 (1998): 71-89.

Hoffer, Peter C. and N.E.H. Hull. *Murdering Mothers: Infanticide in England and New England 1558-1803*. New York: New York University Press, 1981.

Hood, Lynley. *Minnie Dean: Her Life and Crimes*. Auckland: Penguin Books, 1994.

Horstman, Allen. *Victorian Divorce*. London: Croom Helm, 1985.

Howell, Philip. "Prostitution and racialised sexuality: the regulation of prostitution in Britain and the British Empire before the Contagious Diseases Acts." *Environment and Planning D: Society and Space* 18 (2000): 321-339.

Howell, Philip. *Geographies of Regulation: Policing Prostitution in Nineteenth-Century Britain and the Empire*. Cambridge: Cambridge University Press, 2009.

Hutchinson, Anne. "Weldon, Barbara 1829-1837? – 1882." The Dictionary of New Zealand Biography, Te Ara – The Encyclopedia of New Zealand. Last modified 1 September 2010. http://www.teara.govt.nz/en/biographies/1w11/1.

Hyam, Ronald. *Britain's Imperial Century, 1815-1914: A Study of Empire and Expansion*. 3rd ed. Basingstoke: Palgrave Macmillan, 2002.

Hyde, H. Montgomery. *The Love That Dared Not Speak Its Name: A Candid History of Homosexuality in Britain*. Boston: Little, Brown, 1970.

Ittman, Karl. "Family Limitation and Family Economy in Bradford, West Yorkshire 1851-1881." *Journal of Social History* 25, no. 3 (Spring 1992): 547-573.

Jackson, Mark. *New-born Child Murder: Women, Illegitimacy and the Courts in Eighteenth-century England*. Manchester: Manchester University Press, 1996.

Jackson, Mark. ed. *Infanticide: Historical Perspectives on Child Murder and Concealment, 1550-2000*. Aldershot: Ashgate, 2002.

Jochens, Jenny. "The Illicit Love Visit: An Archaeology of Old Norse Sexuality." *The Journal of the History of Sexuality* 1, no. 3 (1991): 357-392.

Jordan, Jan. "The Disputed Terrain Between Sex and Rape." In *Sexuality Down Under: Social and Historical Perspectives*, edited by Allison Kirkman and Pat Moloney, 165-182. Dunedin: University of Otago Press, 2005.

Jordan, Mark. *The Invention of Sodomy in Christian Theology*. Chicago: University of Chicago Press, 1997.

Kaa, Hirini. "Sex, Sin and Salvation: Māori Morality Through a Christian Lens." *Te Pouhere Korero* 6 (2012): 27-34.

Kemnitz, Thomas Milton. "The Cartoon as a Historical Source." *The Journal of Interdisciplinary History* 4, no. 1 (Summer 1973): 81-93.

Kilday, Anne-Marie. “Maternal Monsters: Murdering Mothers in South West Scotland, 1750-1815.” In *Twisted Sisters: Women, Crime and Deviance in Scotland since 1400*, edited by Yvonne Galloway Brown and Rona Ferguson, 156-179. East Linton, Scotland: Tuckwell Press, 2002.

Kilday, Anne-Marie. “’Monsters of the Vilest Kind’: Infanticidal Women and Attitudes to Their Criminality in Eighteenth-Century Scotland.” *Family & Community History* 11, no. 2 (2008): 100-115.

Kilday Anne-Marie and Katherine D. Watson. “Infanticide, Religion and Community in the British Isles: 1720-1920: Introduction.” *Family & Community History* 11, no. 2 (2008): 84-99.

Kirkman, Allison, and Pat Moloney, eds. *Sexuality down under: social and historical perspectives*. Dunedin: University of Otago Press, 2005.

Kittredge, Katharine. “Introduction: Context for the Consideration of the Transgressive Antitype.” In *Lewd and Notorious: Female Transgression in the Eighteenth Century*, edited by Katharine Kittredge, 1-17. Ann Arbor: University of Michigan Press, 2003.

Kittredge, Katharine, ed. *Lewd and Notorious: Female Transgression in the Eighteenth Century*. Ann Arbor: University of Michigan Press, 2003.

Koopman-Boyden, Peggy. ed. *Families in New Zealand*. Wellington: Methuen Publications NZ, 1978.

Kramar, Kirsten Johnson. *Unwilling Mothers, Unwanted Babies: Infanticide in Canada*. Vancouver: University of British Columbia Press, 2005.

Lake, Marilyn. “Frontier Feminism and the Marauding White Man, Australia, 1890s-1940s.” In *Nation, Empire, Colony: Historicizing Gender and Race*, eds. Ruth Roach Pierson and Napur Chaudhuri, 94-105. Bloomington: Indiana University Press, 1998.

Laqueur, Thomas W. *Solitary Sex: A Cultural History of Masturbation.* New York: Zone Books, 2003.

Laslett, Peter. “Introduction: comparing illegitimacy over time and between cultures.” In *Bastardy and its Comparative History*, edited by Peter Laslett, Karla Oosterveen and Richard M. Smith, 1-70. London: Edward Arnold, 1980.

Laslett, Peter, Karla Oosterveen and Richard M. Smith. eds. *Bastardy and its Comparative History*. London: Edward Arnold, 1980.

Laurie, Alison J. and Linda Evans. *Outlines: Lesbian and Gay Histories of Aotearoa*. Wellington: Lesbian and Gay Archives of New Zealand, 2005.

Lee, Tai-Sook. "Edward Gibbon Wakefield and Movement for Systematic Colonization, 1829-1850." PhD diss., University of California, Berkeley, 1986.

Leneman, Leah and Rosalind Mitchison. "Clandestine Marriage in the Scottish Cities, 1660-1780." *Journal of Social History* 26, no. 4 (Summer 1993): 845-861.

Leneman, Leah and Rosalind Mitchison. *Sin in the City: Sexuality and Social Control in Urban Scotland 1660-1780*. Edinburgh: Scottish Cultural Press, 1998.

Leneman, Leah. "The Scottish Case That Led to Hardwicke's Marriage Act." *Law and History Review* 17, no. 1 (Spring 1999): 161-170.

Lesthaeghe, Ron. "On the Social Control of Human Reproduction." *Population and Development Review* 6, no. 4 (December 1980): 527-548.

Levesque, Andree. "Proscribers and Rebels: Attitudes to European Women's Sexuality in New Zealand 1860-1915." In *Women in History: Essays on European Women in New Zealand*. Edited by Barbara Brookes, Charlotte Macdonald and Margaret Tennant, 1-12. Wellington: Allen & Unwin NZ, 1986.

Levine, Philippa. "Women and Prostitution: Metaphor, Reality, History." *Canadian Journal of History*, 28 (December 1993): 479-494.

Levine, Philippa. ""A Multitude of Unchaste Women": Prostitution in the British Empire." *Journal of Women's History* 15, no. 4 (Winter 2004): 159-163.

Levine, Philippa, ed. *Gender and Empire*. Oxford: University of Oxford Press, 2004.

Levine, Philippa. "Sexuality, Gender and Empire." In *Gender and Empire*, edited by Philippa Levine, 134-155. Oxford: University of Oxford Press, 2004.

Liliequist, Jonas. "Peasants Against Nature: Crossing the Boundaries between Man and Animal in Seventeenth and Eighteenth Century Sweden." *Journal of the History of Sexuality* 1, no. 3 (1991): 393-423.

Liliequist, Jonas. "Peasants against Nature: Crossing the Boundaries between Man and Animal in Seventeenth and Eighteenth-Century Sweden." In *Forbidden History: The State, Society and the Regulation of Sexuality in Modern Europe*, edited by John C Fout, 57-88. Chicago and London: University of Chicago Press, 1992.

Linnane, Fergus. *Madams: Bawds & Brothel-Keepers of London*. Stroud: Sutton Publishing, 2005.

Littlewood, Barbara and Linda Mahood. "Prostitutes, Magdalenes and Wayward Girls: Dangerous Sexualities of Working Class Women in Victorian Scotland." *Gender and History* 3, no. 2 (June 1991): 160-175.

Locke, Elsie. *The Gaoler*. Palmerston North: Dunmore Press, 1978.

Lucas, Heather. "'Square Girls': Prostitutes and Prostitution in Dunedin in the 1880s." BA (Hons) diss. University of Otago, Dunedin, 1985.

Macdonald, Charlotte. "The 'Social Evil': Prostitution and the Passage of the Contagious Diseases Act (1869)." In *Women in History: Essays on European Women in New Zealand*, edited by Barbara Brookes, Charlotte Macdonald and Margaret Tennant, 13-34. Wellington: Allen & Unwin NZ, 1986.

Macdonald, Charlotte. "Crime and Punishment in New Zealand, 1840-1913: A Gendered History." *New Zealand Journal of History* 23, no.1 (1989): 5-21.

Macdonald, Charlotte. *A Woman of Good Character: Single Women as Immigrant Settlers in Nineteenth Century New Zealand*. Wellington: Allen & Unwin, 1990.

Macdonald, Charlotte. "Too Many Men and Too Few Women: Gender's 'Fatal Impact' in Nineteenth Century Colonies." In *The Gendered Kiwi*, edited by Caroline Daley and Deborah Montgomery, 17-35. Auckland: University of Auckland Press, 1999.

McCarthy, Conor. ed. *Love, Sex and Marriage in the Middle Ages: A Sourcebook*. London: Routledge, 2004.

McClean, R. R. "Scottish piety: the Free Church settlement of Otago, 1848-1853." In *Building God's Own Country: Historical Essays on Religions in New Zealand*, edited by John Stenhouse and Jane Thomson, 21-31. Dunedin: University of Otago Press, 2004.

McDougall, Sara. *Bigamy and Christian identity in late medieval Champagne*. Philadelphia: University of Pennsylvania Press, 2012.

McGrath, Ann. "Consent, Marriage and Colonialism: Indigenous Australian Women and Colonizer Marriages." *Journal of Colonialism and Colonial History* 6, no. 3 (2005): http://muse.jhu.edu/journals/journal_of_colonialism_and_colonial_history/v006/6.3mcgrath.html.

McKean, John. "The Road to Secularisation in Presbyterian Dunedin: the first fifty years of the Otago Settlement." *Presbyterian Historical Society of New Zealand 1991 Annual Lecture* (Dunedin 1993).

McKenna, Neil. *Fanny and Stella: The Young Men Who Shocked Victorian England*. London: Faber and Faber, 2013.

McKenzie, Kirsten. *Scandal in the Colonies: Sydney and Cape Town 1820-1850*. Melbourne: University of Melbourne Press, 2004.

McLintock, A.H. *The History of Otago: the origins and growth of a Wakefield class settlement.* Christchurch: Capper Press, 1975.

McNab, Robert. *Murihiku: A History of the South Island of New Zealand and the Islands Adjacent and Lying to the South, From 1642 to 1835*. Wellington: Whitcombe & Tombs Ltd, 1909.

McNab, Robert, ed. *Historical Records of New Zealand*, Vol II. Wellington, 1914.

McPherson, Kathryn, Cecilia Morgan, and Nancy M. Forestell, eds. *Gendered Pasts: Historical Essays on Femininity and Masculinity in Canada*. Toronto: University of Toronto Press, 1999.

Marks, Lynne. "No Double Standard?: Leisure, Sex, and Sin in Upper Canadian Church Discipline Records, 1800-1860." In *Gendered Pasts: Historical Essays on Femininity and Masculinity in Canada*, eds., Kathryn McPherson, Cecilia Morgan, and Nancy M. Forestell, 48-64. Toronto: University of Toronto Press, 1999.

Marland, Hilary. "Getting away with murder? Puerperal insanity, infanticide and the defence plea." In *Infanticide: Historical Perspectives on Child Murder and Concealment, 1550-2000*, edited by Mark Jackson, 168-192. Aldershot: Ashgate, 2002.

Marland, Hilary. *Dangerous Motherhood: Insanity and Childbirth in Victorian Britain*. Basingstoke, England: Palgrave Macmillan, 2004.

Martin, Bill. *Dunedin Gaol: A Community Prison Since 1851*. Dunedin: Bill Martin, 1998.

Martin, Ged. *Edward Gibbon Wakefield: Abductor and Mystagogue*. Edinburgh: Ann Barry, 1997.

Mason, Michael, *The Making of Victorian Sexuality*. Oxford: Oxford University Press, 1994.

Matheson, Peter. “1840-1870: The Settler Church.” In *Presbyterians in Aotearoa 1840-1900*. Edited by Dennis McEldowney, 15-42. Wellington: The Presbyterian Church of New Zealand, 1990.

Matheson, Peter. “Presbyterianism.” In *The Farthest Jerusalem: Four Lectures on the Origins of Christianity in Otago*, 53-62. Dunedin: Faculty of Theology and Hocken Library, University of Otago, 1993.

Matheson, Peter. *The Finger of God in the Disruption 1843-1993*. New Zealand: The Presbyterian Church of Aotearoa New Zealand Synod of Otago and Southland, 1993.

Menefee, Samuel Pyeatt. *Wives for Sale*. Oxford: Basil Blackwell, 1981.

Merrington, E. N. *A Great Coloniser: The Revd. Dr Thomas Burns*. Dunedin: The ODT and Witness Newspapers Co Ltd, 1929.

Middleton, Angela. *Two Hundred Years on Codfish Island (Whenuahou): From cultural encounter to nature conservation*. Invercargill: Department of Conservation Southland Conservancy, 2009.

Midgley, Clare. *Gender and imperialism*. Manchester: Manchester University Press, 1998.

Milcairns, Susanne Williams. *Native Strangers: Beachcombers, Renegades and Castaways in the South Seas*. Auckland: Penguin, 2006.

Mills, Richard Charles. *The Colonization of Australia (1829-42): The Wakefield Experiment in Empire Building*. London: Dawsons of Pall Mall, 1968 [1915].

Mitchison, Rosalind and Leah Leneman. *Sexuality and Social Control, Scotland 1660-1780*. Oxford: Basil Blackwell, 1989.

Mitchison, Rosalind and Leah Leneman. *Girls in Trouble: Sexuality and Social Control in Rural Scotland 1660-1780*. Edinburgh: Scottish Cultural Press, 1998.

Morris, Polly. “Incest or Survival Strategy? Plebeian Marriage within the Prohibited Degrees in Somerset, 1730 – 1835.” In *Forbidden History*, edited by John C. Fout, 139-169. Chicago: University of Chicago Press, 1992.

Murrin, John M. ““Things Fearful to Name”, Bestiality in Early America.” In *The Animal Human Boundary*, edited by Angela N. H. Creager and William Chester Jordan, 115-156. Rochester, NY: University of Rochester Press, 2002.

Ng, James. *Windows on a Chinese Past*. Volume 1 Dunedin: Otago Heritage Books, 1993.

Ng, James. *Windows on a Chinese Past*. Volume 2 Dunedin: Otago Heritage Books, 1995.

O'Donnell, Katherine and Michael O'Rourke. eds. *Love, Sex, Intimacy and Friendship Between Men, 1550-1800*. Basingstoke: Palgrave Macmillan, 2003.

Olssen, Erik. *A History of Otago*. Dunedin: McIndoe, 1984.

Olssen, Erik. "Families and the Gendering of European New Zealand in the Colonial Period 1840-80." In *The Gendered Kiwi*, edited Caroline Daley and Deborah Montgomery, 37-62. Auckland: University of Auckland Press, 1999.

Olssen, Erik and Andree Levesque. "Towards a History of the European Family in New Zealand." In *Families in New Zealand*, edited by Peggy Koopman-Boyden, 1-26. Wellington: Methuen Publications NZ, 1978.

Otis, Leah Lydia. *Prostitution in Medieval Society: The History of an Urban Institution in Languedoc*. Chicago: University of Chicago Press, 1985.

Outhwaite, R. B. "Introduction: Problems and Perspectives in the History of Marriage." In *Marriage and Society: Studies in the Social History of Marriage*, edited by R. B. Outhwaite, 1-16. London: Europa Publications Ltd, 1981.

Outhwaite, R. B. ed. *Marriage and Society: Studies in the Social History of Marriage.* London: Europa Publications Ltd, 1981.

Outhwaite, R. B. *Clandestine Marriage in England, 1500-1850*. London: The Hambledon Press, 1995.

Owen, Emily. "Intermarriage: Its Role and Importance Within Early New Zealand Shore Whaling Stations." MA Diss. Massey University, Palmerston North, 2007.

Owens, J.M.R. *Prophets in the Wilderness: The Wesleyan Mission to New Zealand 1819-1827*. Auckland: Auckland University Press, 1974.

Parkinson, Phil. "'A most depraved young man': Henry Miles Pilley, the New Zealand missionary." In *Outlines: Lesbian and Gay Histories of Aotearoa*, edited by Alison J. Laurie and Linda Evans, 19-23. Wellington: Lesbian and Gay Archives of New Zealand, 2005.

Perry, Adele. ""Fair ones of a purer caste": White women and colonialism in nineteenth-century British Columbia." *Feminist Studies* 23, no.3 (Fall 1997): 501-524.

Perry, Adele. *On the Edge of Empire: Gender, Race and the Making of British Columbia, 1849-1871*. Toronto: University of Toronto Press, 2001.

Perry, Adele. "The Autocracy of Love and the Legitimacy of Empire: Intimacy, Power and Scandal in Nineteenth-Century Metlakahtlah." *Gender and History* 16, no. 2 (August 2004): 262-288.

Perry, Ruth. "Colonizing the Breast: Sexuality and Maternity in Eighteenth Century England." In *Forbidden History*, edited by John C Fout, 107-138. Chicago: University of Chicago Press, 1992.

Phillips, Jock. *A Man's Country? The Image of the Pakeha Male – A History*. Auckland: Penguin Books, 1987, revised edition 1996.

Phillips, Richard. "Imperialism and the regulation of sexuality: colonial legislation on contagious diseases and ages of consent." *Journal of Historical Geography* 28, no. 3 (2002): 339-362.

Phillips, Richard. "Heterogeneous Imperialism and the Regulation of Sexuality in British West Africa." *Journal of the History of Sexuality* 14, no. 3 (July 2005): 291-315.

Phillips, Richard. *Sex, politics and empire: A Postcolonial Geography*. Manchester: University of Manchester Press, 2006.

Phillips, Richard. "Histories of Sexuality and Imperialism: What's the Use?" *History Workshop Journal* 63 (2007): 137-154.

Pierson, Ruth Roach, and Nupur Chaudhuri, eds. *Nation, Empire, Colony: Historicizing Gender and Race*. Bloomington: Indiana University Press, 1998

Poutanen, Mary Anne. "The Homeless, the Whore, the Drunkard, and the Disorderly: Contours of Female Vagrancy in the Montreal Courts, 1810-1842." In *Gendered Pasts: Historical Essay in Femininity and Masculinity in Canada*, ed. Kathryn McPherson, Cecila Morgan, and Nancy M. Forestell, 29-47. Toronto: University of Toronto Press, 2003.

Quaife, G. R. *Wanton Wenches and Wayward Wives: Peasants and Illicit Sex in Early Seventeenth Century England*. London: Croom Helm, 1979.

Quin, E. A. and C. J. O'Neill. "Cohabitation in New Zealand: Legal and Social Aspects." *University of Waikato Department of Sociology Working Paper* No. 21 (1984).

Reekie, Gail. *Measuring Immorality: Social Inquiry and the Problem of Illegitimacy*. Cambridge: Cambridge University Press, 1998.

Reid, Kirsty Reid. "The Horrors of Convict Life: British Radical Visions of the Australian Penal Colonies." *Cultural and Social History* 5, no. 4 (October 2008): 481-495.

Richards, Rhys. *'Murikiku' Re-viewed: A revised history of Southern New Zealand from 1804 to 1844*. Wellington: Lithographic Services, 1995.

Riensborg, Niels. "The Dunedin Gaol and the Administration of Justice in Otago 1840-1865." BA diss., University of Otago, 1987.

Ringdal, Nils Johan. *Love for Sale: A World History of Prostitution*, translated by Richard Daly. New York: Grove Press, 2004.

Robertson, Stephen. "Signs, Marks, and Private Parts: Doctors, Legal Discourses, and Evidence of Rape in the United States, 1823-1930." *Journal of the History of Sexuality* 8, no. 3 (January 1998): 345-388.

Robertson, Stephen. "What's Law Got to Do with It? Legal Records and Sexual Histories." *Journal of the History of Sexuality* 14, no. 1/2 (January/April 2005), 161-185.

Robinson, Jan. "Canterbury's Rowdy Women: Whores, Madonnas and Female Criminality." *Women's Studies Journal* 1, no. 1 (August 1984): 6-25.

Rose, Lionel. *Massacre of the Innocents: Infanticide in Great Britain 1800-1939*. London: Routledge & Kegan Paul, 1986.

Rupp, Leila J. "Towards a Global History of Same-Sex Sexuality." *Journal of the History of Sexuality* 10, no. 2 (April 2001): 287-302.

Rydström, Jens. *Sinners and Citizens: Bestiality and Homosexuality in Sweden 1880-1950*. Chicago: University of Chicago Press, 2003.

Salesa, Damon. "Race Mixing: A Victorian Problem in Britain and New Zealand, 1830s-1870s." PhD Diss. Oxford University, 2000.

Salisbury, Joyce E. *The Beast Within: Animals in the Middle Ages*. New York: Routledge, 1994.

Sauer, R. "Infanticide and Abortion in Nineteen-Century Britain." *Population Studies* 32, no. 1 (March 1978): 81-93.

Segal, Lynne. Review of *Jews and Sex*, by Nathan Abrams, ed. *Times Higher Education Supplement*, 15 May 2008: 48.

Smart, Carol. *The Ties that Bind: Law, Marriage and the Reproduction of Patriarchal Relations*. London: Routledge, 1984.

Smart, Carol. "Disruptive bodies and unruly sex: The regulation of reproduction and sexuality in the nineteenth century." In *Regulating womanhood: Historical essays on marriage, motherhood and sexuality*, edited by Carol Smart, 7-32. London: Routledge, 1992.

Smart, Carol. ed. *Regulating womanhood: Historical essays on marriage, motherhood and sexuality*. London: Routledge, 1992.

Smith, Richard M. "Fertility, Economy, and Household Formation in England over Three Centuries." *Population and Development Review* 7, no. 4 (December 1981): 595-622.

Smout, Christopher. "Aspects of sexual behaviour in nineteenth-century Scotland." In *Bastardy and its Comparative History*, edited by Peter Laslett, Karla Oosterveen and Richard M. Smith, 192-216. London: Edward Arnold, 1980.

Smout, T. C. "Scottish Marriage, Regular and Irregular 1500-1900." In *Marriage and Society: Studies in Social Marriage History,* edited by R. B. Outhwaite, 204-236. London: Europa Publications Ltd, 1981.

Sommerville, Diane Miller. *Rape and Race in the Nineteenth Century South*. Chapel Hill: University of North Caroline Press, 2004.

Spiller, Peter, Jeremy Finn, Richard Boast, eds. *A New Zealand Legal History.* 2nd ed. Wellington: Brookers Ltd, 2001.

Stasiulis, Daiva and Nira Yuval-Davis. "Introduction: Beyond Dichotomies – Gender, Race, Ethnicity and Class in Settler Societies." In *Unsettling Settler Societies: Articulations of Gender, Race, Ethnicity and Class*, edited by Daiva Stasiulis and Nira Yuval-Davis, 1-38. London: Sage Publications, 1995.

Stasiulis, Daiva and Nira Yuval-Davis, eds., *Unsettling Settler Societies: Articulations of Gender, Race, Ethnicity and Class*. London: Sage Publications, 1995.

Stenhouse, John, and Jane Thomson, eds., *Building God's Own Country: Historical Essays on Religions in New Zealand*. Dunedin: Oxford University Press, 2004.

Stenhouse, John. "Introduction." In *Building God's Own Country: Historical Essays on Religions in New Zealand*, edited by John Stenhouse and Jane Thomson, 9-18. Dunedin: Oxford University Press, 2004

Stenhouse, John. "Religion and Society." In *The New Oxford History of New Zealand*, edited by Giselle Byrnes, 323-356. Melbourne: Oxford University Press, 2009.

Stevens, Kate. "'Gathering Places': The Mixed Descent Families of Foveaux Strait and Rakiura/Stewart Island, 1824-1864." BA(Hons) Diss. University of Otago, Dunedin, 2008.

Stoler, Ann Laura. "Tense and Tender Ties: The Politics of Comparison in North American History and (Post) Colonial Studies." *The Journal of American History* 88, no. 3 (Dec. 2001): 829-865.

Stoler, Ann Laura. *Carnal Knowledge and Imperial Power: Race and the Intimate in Colonial Rule*. Berkeley: University of California Press, 2002.

Stoler, Ann Laura. "Rethinking Colonial Categories: European Communities and the Boundaries of Rule." In *Carnal Knowledge and Imperial Power: Race and the Intimate in Colonial Rule*, edited by Ann Laura Stoler, 22-40. Berkeley: University of California Press, 2002.

Stoler, Ann Laura. "Carnal Knowledge and Imperial Power: Gender and Morality in the Making of Race." In *Carnal Knowledge and Imperial Power: Race and the Intimate in Colonial Rule*, edited by Ann Laura Stoler, 41-78. Berkeley: University of California Press, 2002.

Stone, Lawrence. *The Family, Sex and Marriage in England, 1500-1800*. London: Weidenfeld and Nicolson, 1977.

Stone, Lawrence. *Road to Divorce: England 1530-1987*. Oxford: Oxford University Press, 1990.

Summers, Anne. *Damned Whores and God's Police*. 2nd edition. Sydney: Penguin Books, 1993.

Symonds, Deborah A. *Weep Not for Me: Women, Ballads, and Infanticide in Early Modern Scotland*. University Park: University of Pennsylvania, 1997.

Te Awekotuku, Ngahuia. "He Reka Ano – same-sex lust and loving in the ancient Māori world." In *Outlines: Lesbian and Gay Histories of Aotearoa*, edited by Alison J. Laurie and Linda Evans, 6-9. Wellington: Lesbian and Gay Archives of New Zealand, 2005.

Ten, C. L. "Enforcing a Shared Morality." *Ethics* 82, no. 4 (July 1972): 321-329.

"The Jarvey Trial, 1865." An Encyclopaedia of New Zealand, edited by A. H. McLintock, originally published in 1966. Te Ara - the Encyclopedia of New Zealand. Last modified 13 March 2012. http://www.TeAra.govt.nz/en/1966/trials-notable/3.

Thomas, Donald. *The Victorian Underworld*. London: John Murray (Publishers), 1998.

Thomas, Keith. "The Double Standard." *Journal of the History of Ideas* 20, no. 2 (April 1959): 195-216.

Thomson, David. "Marriage and Family on the Colonial Frontier." In *Disputed Histories: Imagining New Zealand's Pasts*, edited by Tony Ballantyne and Brian Moloughney, 119-142. Dunedin: Otago University Press, 2006.

Thompson, Andrew S. *Writing Imperial Histories*. Manchester: University of Manchester Press, 2013.

Thompson, E.P. *Customs in Common*. London: The Merlin Press, 1991.

Tod, Frank. *Whaling in Southern Waters*. Dunedin: F. Tod, 1982.

Tod, Frank. *Pubs Galore: History of Dunedin Hotels 1848-1984*. Dunedin: Historical Publications, 1984.

Todd, Margo. "Profane Pastimes and the Reformed Community: The Persistence of Popular Festivities in Early Modern Scotland." *The Journal of British Studies* 39, no. 2 (April 2000): 123-156.

Todd, Margo. *The Culture of Protestantism in Early Modern Scotland*. New Haven: Yale University Press, 2002.

Todd, Margo. Review of *The sinners of Cramond. The struggle to impose godly behaviour on a Scottish community, 1651-1851*, by Alison Hanham. Edinburgh: John Donald, 2005. *Journal of Ecclesiastical History* 57, no. 4 (October 2006): 784-785.

Trotter, Olive. *Dunedin's Spiteful Socrates: James Gordon Stuart Grant*. Dunedin, 2005.

Trumbach, Randolph. "The Heterosexual Male in Eighteenth Century London and his Queer Interactions." In *Love, Sex, Intimacy and Friendship Between Men, 1550-1800*, edited by Katherine O'Donnell and Michael O'Rourke, 99-127. Basingstoke: Palgrave Macmillan, 2003.

Van Kirk, Sylvia. *Many Tender Ties: Women in Fur-Trade Society, 1670-1870*. Norman, OK: University of Oklahoma Press, 1983.

Vigarello, Georges. *A History of Rape: Sexual Violence in France from the 16th to the 20th Century*, translated by Jean Birrell. Cambridge: Polity Press, 2001.

Vogel, Ursula. “Whose property? The double standard of adultery in nineteenth-century law.” In *Regulating Womanhood: Historical Essays on Marriage, Motherhood and Sexuality*, edited by Carol Smart, 147-165. London: Routledge, 1992.

Walker, Garthine. “Rereading Rape and Sexual Violence in Early Modern England.” *Gender and History* 10, no. 1 (April 1998): 1-25.

Walkowitz, Judith R. *Prostitution and Victorian Society: Women, Class and the State*. Cambridge: University of Cambridge Press, 1980.

Wanhalla, Angela. “Transgressing boundaries: a history of the mixed descent families of Maitapapa Taieri, 1830-1940.” PhD Diss. University of Canterbury, Christchurch, 2004.

Wanhalla, Angela. *In/visible Sight: The Mixed-Descent Families of Southern New Zealand*. Wellington: Bridget Williams Books, 2009.

Wanhalla, Angela. “Interracial Sexual Violence in 1860s New Zealand.” *New Zealand Journal of History* 45, no. 1 (2011): 71-84.

Ward, Tony. “The Sad Subject of Infanticide: Law, Medicine and Child Murder.” *Social and Legal Studies* 8, no. 2 (June 1999): 163-180.

Weeks, Jeffrey. *Sex politics and society: The regulation of sexuality since 1800*. London: Longman, 1989.

Weeks, Jeffrey. *Making Sexual History*. Cambridge: Polity Press, 2000.

Woollacott, Angela. *Gender and empire*. Basingstoke: Palgrave Macmillan, 2006.