

## Reconceptualizing Vagrancy and Reconstructing the Vagrant: A Socio- Legal Analysis of Criminal Law Reform in Canada, 1953–1972

PRASHAN RANASINGHE \*

This article explores significant reforms to the vagrancy section of the *Criminal Code* during the mid-to-late twentieth century. By locating the reforms within their unique social, political, and economic climates, I examine how they reconceptualized the offence of vagrancy and concomitantly reconstructed the vagrant as a social problem. The reforms played a seminal role in reducing the number of vagrancy offences, eventually leading to the demise of vagrancy in the criminal law. Yet, while the “vagrant” ceased to exist in the law, the law still continues to preserve vestiges of the vagrant in a highly gendered manner.

Cet article analyse les réformes considérables apportées à la section concernant le vagabondage figurant dans le Code criminel, telles qu’elles ont eu lieu au cours du milieu et de la fin du vingtième siècle. En situant ces réformes dans leurs climat social, politique, et économique particuliers, j’examine ainsi la façon dont elles ont reconceptualisé l’infraction de vagabondage et en même temps reconstitué le vagabond comme un problème social. Les réformes ont rempli un rôle important sur le plan de la réduction du nombre d’infractions de vagabondage, ce qui a finalement entraîné la disparition du vagabondage dans le droit pénal. Pourtant, tandis que le “vagabond” a cessé d’exister dans le droit, celui-ci continue à préserver des vestiges du vagabond, d’une manière fortement centrée sur le sexe.

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\* Assistant Professor, Department of Criminology, University of Ottawa. I am deeply indebted to the three anonymous reviewers and Professor Benjamin J. Richardson, the Editor-in-Chief of the *Osgoode Hall Law Journal*, who provided very helpful and constructive comments and suggestions as to how I might improve the article. I am also grateful to Melanie Knight, Matthew Light, Jim Phillips, and Mariana Valverde who read an earlier version of this article and provided invaluable feedback. Any errors remain my own.

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**THE IMPORTANT AND EXTENSIVE ROLE** that vagrancy law played historically in regulating a variety of people and behaviours in the Western world has been well documented. Most studies, however, focus heavily on the United Kingdom (in particular, England)<sup>1</sup> and the United States.<sup>2</sup>

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1. For the most comprehensive examination in cross-national perspective, see C. J. Ribton-Turner, *A History of Vagrants and Vagrancy and Beggars and Begging* (London: Chapman and Hall, 1887). See also Sir James Fitzjames Stephen, *A History of the Criminal Law of England* (London: MacMillan, 1883) vol. 3 at 266-75. For socio-historical studies, see generally A.L. Beier, *Masterless Men: The Vagrancy Problem in England 1560-1640* (New York: Methuen and Co., 1985); Frank Aydelotte, *Elizabethan Rogues and Vagabonds* (New York: Barnes & Noble, 1967); John Pound, *Poverty and Vagrancy in Tudor England* (London: Longman Group, 1971); Paul A. Slack, "Vagrants and Vagrancy in England, 1598-1664" (1974) 27 *Econ. Hist. Rev.* 360; Laura Sagolla Croley, "A Working Distinction: Vagrants, Beggars and the Laboring Poor in Mid-Victorian England" (1995) 18 *Prose Stud.* 74; Rachel Vorspan, "Vagrancy and the New Poor Law in late-Victorian and Edwardian England" (1977) 92 *Eng. Hist. Rev.* 59; and Nicholas Rogers, "Policing the Poor in Eighteenth-Century London: The Vagrancy Laws and their Administration" (1991) 24 *Histoire Sociale – Social History* 127.
  2. See Forrest W. Lacy, "Vagrancy and Other Crimes of Personal Condition" (1953) 66 *Harv. L. Rev.* 1203; Caleb Foote, "Vagrancy-Type Law and its Administration" (1956) 104 *U. Pa. L. Rev.* 603; Rollin M. Perkins, "The Vagrancy Concept" (1958) 9 *Hastings L.J.* 237; and William O' Douglas, "Vagrancy and Arrest on Suspicion" (1960) 70 *Yale L.J.* 1. For socio-historical studies, see Jeffrey S. Adler, "A Historical Analysis of the Law of Vagrancy" (1989) 27 *Criminol.* 209; "Vagging the Demons and Scoundrels: Vagrancy and the Growth of St.

Very little has been written about its effect in Canada, and these writings focus exclusively on the nineteenth and early twentieth centuries.<sup>3</sup> The criminal law, however, underwent profound changes in both form and substance during the mid-to-late twentieth century. One aspect of these changes addressed the vagrancy provisions in the *Criminal Code* (the *Code*) that were reformed on two separate occasions: first, during the 1953–1954 legislative session, and second, during the 1972 session. What resulted was a significant reduction in the number of vagrancy offences. The demise of vagrancy law has not been subjected to a detailed examination and this article attempts to fill that void.<sup>4</sup> In doing so, I explore the way these reforms reconceptualized vagrancy and reconstructed the vagrant as a social problem.

In speaking of the reconceptualization of vagrancy, I refer to the ways that vagrancy as a legal category underwent profound changes. One example can be found in the changes made to the constitution of the offence and the evidentiary

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Louis, 1830-1861" (1986) 13 J. Urb. Hist. 3; and Sidney L. Haring, "Class Conflict and the Suppression of Tramps in Buffalo, 1892-1894" (1976) 11 Law & Soc'y. Rev. 873.

3. See David Bright, "Loafers are not going to Subsist upon Public Credulence: Vagrancy and the Law in Calgary, 1900-1914" (1995) 36 Labour/Le Travail 37; Jim Phillips, "Poverty, Unemployment, and the Administration of Criminal Law: Vagrancy Laws in Halifax, 1864-1890" in Philip Girard & Jim Phillips, eds., *Essays in the History of Canadian Law: Nova Scotia* (Toronto: The Osgoode Society, 1990) vol. 3 at 128; and James M. Pitsula, "The Treatment of Tramps in Late Nineteenth-Century Toronto" (1980) 15 Hist. Papers/Communications Historiques 116. There is, however, a considerable amount of literature on prostitution. See Constance Backhouse, "Nineteenth-Century Canadian Prostitution Law: Reflections of a Discriminatory Society" (1985) 18 Histoire Sociale – Social History 387; John P.S. McLaren, "Chasing the Social Evil: Moral Fervour and the Evolution of Canada's Prostitution Laws, 1867-1917" (1986) 1 C.J.L.S. 125 [McLaren, "Chasing the Social Evil"]; John P.S. McLaren, "The Canadian Magistracy and the Anti-White Slavery Campaign 1900-1920" in W. Wesley Pue & Barry Wright, eds., *Canadian Perspectives on Law and Society: Issues in Legal History* (Ottawa: Carleton University Press, 1988) 329 [McLaren, "Anti-White Slavery Campaign"]; and E. Nick Larsen, "Canadian Prostitution Control Between 1914 and 1970: An Exercise in Chauvinist Reasoning" (1992) 7 C.J.L.S. 137.
4. For an exception, see Todd Gordon, "The Return of Vagrancy Law and the Politics of Poverty in Canada" (2004) 54 Can. Rev. Soc. Pol'y 34 at 37-40; *Cops, Crime and Capitalism: The Law-and-Order Agenda in Canada* (Halifax: Fernwood Publishing, 2006) at 81-82. His treatment of the subject, however, is too cursory to do full justice to the complexities associated with these reforms.

requirements necessary for conviction.<sup>5</sup> In describing the vagrant as a social problem, I refer to the myriad ways that he or she was conceived as problematic by contemporaries, be it because of indigence, indolence, inebriety, or criminality.<sup>6</sup> Thus, in exploring the reconceptualization of vagrancy in law, I pay attention to the concomitant discursive reconstruction of the vagrant as a social and cultural figure.

In this article, I use the terms “vagrancy” and “vagrant(s).” However, it bears mentioning that there are (dis)similarities and (dis)connections in the meanings of these terms as they existed in law, when compared both linguistically and sociologically. Vagrancy was not an offence under law in the general sense of that term, as it is understood in both respects. An accused was not charged with or convicted of vagrancy, but of an enumerated offence within the vagrancy section of the *Code*. It was only at the point when guilt was established that the label attached itself to the person; that is, only then did one become a “vagrant.” At the same time, it was necessary to rely on the linguistic meanings of particular words as they related to the vagrancy section of the *Code*—for example, “public,” “wandering,” “apparent means of support,” or “common prostitute”—for the judiciary to make sense of the lawmakers’ intentions and resolve the legal ambiguities. In other words, there is fluidity in the meanings of these terms given that they crisscross the legal, linguistic, and sociological fields. Thus, while in the rest of this article I use the terms “vagrancy” and “vagrant(s)” without quotations marks, their (dis)similarities and (dis)connections within these fields are important to keep in mind, for their meanings vary depending upon the lens through which they are viewed.

This article unfolds in six parts. Part I locates vagrancy legislation in a historical context. Parts II and III are devoted to the first wave of reforms to the vagrancy section of the *Code* during the 1953–1954 legislative session. To that end, Part II explores the impetuses behind these reforms, and Part III explores the manner in which these reforms were carried out. Parts IV and V are devoted to the second wave of reforms to the vagrancy section of the *Code* during the 1972 session. Part IV explores the impetuses behind these reforms and Part V focuses on the manner in which these reforms were meted out. Part VI recapitulates the discussion advanced, focusing on the significance of the two waves of reform, including the state of the law and the social and cultural figure of the vagrant as it currently stands.

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5. See Part II, below.

6. See Part I, below.

## I. VAGRANCY LAW IN HISTORICAL PERSPECTIVE

There is a wealth of literature on the history of English vagrancy and vagrancy law.<sup>7</sup> For present purposes, it will suffice to highlight several important aspects as they relate to the Canadian context, to locate the (dis)continuities between the past and the time under consideration here.

First, Canadian vagrancy legislation was closely modeled upon its English predecessors. According to Constance Backhouse, the first piece of vagrancy legislation can be traced to legislation that was passed in Halifax, Nova Scotia in 1759. She suggests that *An Act to amend and make more effectual the laws relating to rogues, vagabonds, and other idle and disorderly persons, and houses of correction*<sup>8</sup> served as a model for *An Act for regulating and maintaining a House of correction or Work-House within the Town of Halifax*.<sup>9</sup> Secondly, a defining feature of English vagrancy law was its eclecticism, or what A.L. Beier calls its “protean”<sup>10</sup> character. Under the category of vagrancy, a variety of concerns ranging from labour, crime, popular morality, entertainment and leisure, religion, and public health were addressed. One example can be found in *An Act for the Punishment of idle and disorderly Persons, and Rogues and Vagabonds* that contains three classes of vagrancy—an idle or disorderly person; a rogue and vagabond; and an incorrigible rogue—each enumerating specific offences.<sup>11</sup> The eclecticism of English vagrancy law was directly transplanted into the first vagrancy law in Canada<sup>12</sup> and continued to be a defining characteristic of subsequent legislation.<sup>13</sup>

It also bears mentioning that English vagrancy legislation was characterized by its mixture of punishment and welfare. Licences or certificates to wander public spaces in search of alms were granted to particular persons thought to be in need of relief: the impotent poor, the lame and disabled, the sick, disbanded soldiers, and

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7. See *supra* note 1.

8. *Vagrancy Act, 1744* (U.K.), 17 Geo. II, c. 5.

9. Backhouse, *supra* note 3 at 389. See also Philips, *supra* note 3 at 129.

10. Beier, *supra* note 1 at 4.

11. (U.K.), 1824, 5 Geo. IV c. 83, ss. 3-5. This *Act* repealed all prior vagrancy statutes [*Rogues and Vagabonds*].

12. Backhouse, *supra* note 3 at 388-99.

13. See *infra* note 51 and accompanying text.

university scholars, for example.<sup>14</sup> This was true of Canadian vagrancy legislation as well. For example, those who were deemed to be “deserving objects of charity”<sup>15</sup> were granted permission to move about in public spaces in search of alms. There was, however, a deep-seated suspicion that unwarranted largesse would only breed further idleness and crime. Therefore, poor relief was to be provided alongside the threat of punishment to ensure that only those deemed “deserving” were relieved.<sup>16</sup>

The eclecticism of vagrancy law sheds insights into the myriad ways that contemporaries viewed the vagrant as a social problem. First, vagrants were characterized as “indolent, lazy [and] worthless fellows,”<sup>17</sup> who would rather spend their days in idleness than work to earn a living. The terms “rogues in

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14. This is true of all English vagrancy statutes that were passed until 1824, when this practice was terminated. In summarizing this shift, Scott L.J. notes that:

The Vagrancy Act of 1824 differs little from the long string of earlier Acts in the Legislature’s attitude to the class of idle and disorderly persons except that it is simply a punishment Act, and not, as the earlier Acts were, partly a punishment Act and partly an Act for the relief of the poor.

See *Ledwith v. Roberts* (1937), 3 All E.R. 232 at 275 (C.A.). The reference to the 1824 Act is to *Rogues and Vagabonds*, *supra* note 11.

15. *An Act respecting Vagrants*, 1869, c. 28, s. 1 [*An Act respecting Vagrants*]. For the importance of charity and its relation to punishment, see Richard B. Splane, *Social Welfare in Ontario, 1791-1893: A Study of Public Welfare Administration* (Toronto: University of Toronto Press, 1965); Rainer Baehre, “Paupers and Poor Relief in Upper Canada” (1981) 16 *Historical Papers* 57; Brereton Greenhous, “Paupers and Poorhouses: The Development of Poor Relief in Early New Brunswick” (1968) 1 *Histoire Sociale – Social History* 103; Stephen A. Speisman, “Munificent Parsons and Municipal Parsimony: Voluntary vs Public Poor Relief in Nineteenth Century Toronto” (1973) 65 *Ont. Hist.* 33 at 37-41; and David R. Murray, “The Cold Hand of Charity: The Court of Quarter Session and Poor Relief in the Niagara District, 1828-1841” in Pue & Wright, *supra* note 3 at 179.
16. See Baehre, *ibid.* at 67-70. According to Baehre, by the 1820s, there was a distinction drawn between the “deserving” and “undeserving” poor in social and policy circles, and by the 1830s, the moral character of the intended recipient was closely scrutinized. For a discussion of the pauper list, see Murray, *ibid.* at 181. See also Greenhous, *ibid.* This distinction closely parallels that drawn in England between the “sturdy” and the “impotent” beggar.
17. Legislative Assembly, “Report of the Commissioners Appointed to Enquire into the Prison and Reformatory System of the Province of Ontario” in *Ontario Sessional Papers 1891*, vol. 23 (Toronto: Warwick & Sons, 1891) at 721. The quotation is by William Stark, Inspector of Detectives of the Toronto Police Force, who gave testimony before the Commission; the entire Report contains numerous other examples such as this.

idleness” and “worthless drunkards” were frequently used in reference to them.<sup>18</sup> Second, many, if not all vagrants were regarded as habitual criminals who resorted to crime. The term “professional criminal”<sup>19</sup> was often used to label prostitutes and tramps who were thought not to be in genuine need, but simply waiting for the right opportunities to engage in more serious, and profitable, crime. As well, indolence and inebriety—often regarded as the chief characteristics of the poor—were seen as the “parents of crime.”<sup>20</sup> Third, many vagrants were viewed as “morally depraved” or “outcasts.”<sup>21</sup> The nineteenth-century Canadian viewed the criminal as intemperate, illiterate, and prone to self-destruction, belonging to a “self-perpetuating class” of citizens without fixed abode.<sup>22</sup> This attitude was especially so with respect to prostitutes.<sup>23</sup> Even where vagrants were not seen as a direct threat to the social and moral order, they were still viewed by the general public as an indirect threat.<sup>24</sup> Either directly or indirectly then, vagrants were perceived as being heavily problematic to the well-being of the nation.

Finally, and though only peripherally relevant here, it bears mentioning that Canadian vagrancy legislation operated both as criminal legislation, enacted by the federal government, and as quasi-criminal law, enacted by the provinces or municipalities. Prior to Confederation in 1867, vagrancy was addressed by municipalities and provinces.<sup>25</sup> After Confederation, the federal government sought

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18. J. Jerald Bellomo, “Upper Canadian Attitudes towards Crime and Punishment (1832-1851)” (1972) 64 *Ont. Hist.* 11 at 12-13. English vagrancy legislation equated vagrants with rogues in two classes of its legislation: “rogue and vagabond” and “incorrigible rogue”; see *Rogues and Vagabonds*, *supra* note 11 and accompanying text. *An Act respecting Vagrants* did not contain these categories; rather, it used the one phrase “loose, idle or disorderly person or vagrant.” See *supra* note 15, s. 2.
  19. T. Thorner & N. Watson, “Patterns of Prairie Crime: Calgary, 1875-1939” in Louis A. Knafla, ed., *Crime and Criminal Justice in Europe and Canada*, rev. ed. (Waterloo: Wilfrid Laurier University Press, 1985) 219 at 226.
  20. Bellomo, *supra* note 18 at 14.
  21. *Ibid.* at 12-13.
  22. Harvey J. Graff, “Crime and Punishment in the Nineteenth Century: A New Look at the Criminal” (1977) 7 *J. Interdisc. Hist.* 477 at 482.
  23. Backhouse, *supra* note 3; McLaren, “Chasing the Social Evil,” *supra* note 3; and Larsen, *supra* note 3.
  24. Bright, *supra* note 3 at 41.
  25. For a discussion of vagrancy legislation in Nova Scotia, see Philips, *supra* note 3 at 129.

to consolidate existing criminal legislation during the first stages of the codification project. *An Act respecting Vagrants* was enacted in 1869 and was the first piece of national legislation attending to vagrancy.<sup>26</sup> Thus, post-Confederation vagrants were subject to legislation enacted at all levels of government.<sup>27</sup>

## II. THE IMPETUSES BEHIND CRIMINAL LAW REFORM IN THE 1950s

Given that it was heavily grounded upon and driven by the common law, Canadian criminal law post-Confederation continued to reflect the law of England, both in form and in substance. Beginning in 1869, the federal government sought to consolidate previously existing colonial legislation by enacting a series of statutes for this purpose.<sup>28</sup> However, as historian Desmond Brown has shown, these initiatives did not go far enough to ensure that the law ceased to exist in piecemeal form.<sup>29</sup> In 1891, nearly twenty-five years after Confederation, further steps were taken to consolidate the law. These later initiatives resulted in Canada's first *Criminal Code*, which was enacted in 1892.<sup>30</sup>

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26. *An Act respecting Vagrants*, *supra* note 15.

27. Philips, *supra* note 3 at 130. See *e.g.* Bright, *supra* note 3 at 48. Here, Bright references a 1912 city of Calgary bylaw. Generally, the "separation of powers" doctrine was not violated where the objectives of the provinces or municipalities related to matters of a local nature. In these cases, provinces or municipalities could rely on their "police powers" to attend to these matters. See *Ex Parte Ashley* (1898), 8 C.C.C. 328 (Qc. Sup. Ct.) [*Ex Parte Ashley*]. With respect to vagrancy legislation, see *R. v. Munroe* (1911), 19 C.C.C. 86 (Ont. C.A.) [*Munroe*]; *Presseau v. Paquette, Recorder's Court of Montreal, Montreal and Attorney-General of Quebec* (1952), 101 C.C.C. 256 at 260 (Qc. Sup. Ct.) [*Presseau*]. In *Presseau*, the court held that a city of Montreal bylaw designed to enhance the circulation of pedestrian traffic was within the scope of municipal powers. Two exceptions to the "separation of powers" doctrine are when the provincial or municipal law overwrites the substance of federal legislation or where the local legislature seeks to deal with matters concerning public morals. See generally *Ex Parte Ashley* at 334-35; *Attorney-General for Ontario v. Koynok et al.* (1940), 75 C.C.C. 100 (Ont. Sup. Ct.).

28. Alan W. Mewett, "The Criminal Law, 1867-1967" (1967) 45 Can. Bar Rev. 726.

29. See Desmond H. Brown, *The Genesis of the Canadian Criminal Code of 1892* (Toronto: The Osgoode Society, 1989) c. 5 at 92ff.

30. See *ibid.*, c. 6 at 119-48. See also Graham Parker, "The Origins of the Canadian Criminal Code" in David H. Flaherty, ed., *Essays in the History of Canadian Law*, vol. 1 (Toronto: University of Toronto Press, 1981) at 249.

The 1892 *Code*, however, contained several shortcomings, including numerous inconsistencies and ambiguities. It was also unduly verbose and was generally thought to be archaic.<sup>31</sup> Exacerbating these problems, the *Code* was still not the sole source of criminal law. The myriad federal legislation preserved in the Schedule as well as the common law of each province served to form the entire spectrum of the criminal law.<sup>32</sup> These problems made it clear to members of Parliament that the *Code* required betterment. While the *Code* was consolidated in 1906 and again in 1927,<sup>33</sup> these modifications did little to alleviate such problems. In the late 1930s there were further calls for revising the *Code*. In April of 1938, for example, the Archambault Commission recommended that a “complete revision of the Criminal Code should be made at once.”<sup>34</sup> However, since lawmakers were preoccupied with the looming world war, and would be so occupied for nearly seven more years during it, the Commission’s recommendations languished for over a decade. It was only after peace had been secured that lawmakers turned their attention to domestic matters such as the criminal law.<sup>35</sup>

In 1949, the Liberals sought sweeping reforms to the criminal law. To a large extent, this was a response to the persistence of John Diefenbaker and the Conservatives who had repeatedly called for reform during the two preceding years.<sup>36</sup> In February of that year, Stuart Garson, the Minister of Justice, announced the appointment of The Royal Commission on Revision of Criminal Code, which was ordered to:

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31. A. J. MacLeod & J. C. Martin, “The Revision of the Criminal Code” (1955) 33 Can. Bar Rev. 3 at 3. For further discussions of the shortcomings of the *Code*, see Brown, *supra* note 29 at 152-57.
  32. Alan W. Mewett & Morris Manning, *Mewett & Manning on Criminal Law*, 3d ed. (Toronto: Butterworths, 1994) at 6.
  33. Don Stuart, *Canadian Criminal Law: A Treatise*, 4th ed. (Toronto: Thomson Carswell, 2001) at 3.
  34. Royal Commission of Canada, *Report of the Royal Commission to Investigate the Penal System of Canada* (Ottawa: J. O. Patenaude, 1938) at 358. The Commission was appointed in 1936 to inquire into the Canadian penal system, owing to a fallout that was sparked by a demonstration led by the inmates of the Kingston Penitentiary in protest against abuse. When the protest turned riotous within the prison walls, the militia was called in to intervene and the evidence in its wake has shown not just poor treatment of prisoners, but also the wilful attempt to kill at least one prisoner on a particular occasion.
  35. Brown, *supra* note 29 at 156.
  36. *Ibid.* at 158.

- (a) revise ambiguous and unclear provisions;
- (b) adopt uniform language throughout;
- (c) eliminate inconsistencies, legal anomalies or defects;
- (d) rearrange provisions and Parts;
- (e) seek to simplify by omitting and combining provisions;
- (f) with the approval of the Statute Revision Commission, omit provisions which should be transferred to other statutes;
- (g) endeavour to make the Code exhaustive of the criminal law; and
- (h) effect such procedural amendments as are deemed necessary for the speedy and fair enforcement of the criminal law.<sup>37</sup>

The terms of reference under which the Commission was appointed suggest that its mandate was strictly to address the *form* of the law, and not its substance.<sup>38</sup> The Commission, in other words, was tasked with “housekeeping”; that is, to tidy, arrange, unify, and simplify the law. Despite these terms of reference, the Commission made several substantive recommendations. It submitted its final report to the Minister of Justice on 22 January 1954, attaching a draft bill that had been debated in the House of Commons during the 1953–1954 legislative session.<sup>39</sup> The revised *Code* came into effect in 1955.<sup>40</sup>

#### A. PROSPERITY AND STABILITY IN THE LATE-1940s AND 1950s CANADA

Many of the reforms to the vagrancy section of the *Code* were a reflection of the social and economic climate of that time. The late 1940s and 1950s were certainly far removed from the turmoil and uncertainty that enveloped the nation during the dark and grim days of the Depression and World War II. The defining features of these years are well described by words such as “boom,” “growth,” “progress,” “prosperity,” and “stability.”<sup>41</sup> However, the emergent prosperity and stability were both fragile and slow in the making, which meant

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37. Royal Commission of Canada, *Report of the Royal Commission on the Revision of Criminal Code* (Ottawa: Government of Canada, 1954) at 3-4.

38. MacLeod & Martin, *supra* note 31 at 3.

39. *Ibid.* at 8-9.

40. *An Act Respecting the Criminal Law, 1953-1954*, 1954, c. 51, s. 1 [*Respecting the Criminal Law*].

41. Doug Owsram, “Canadian Domesticity in the Postwar Era” in J.L. Granatstein & Peter Neary, eds., *The Veterans Charter and Post-World War II Canada* (Montreal & Kingston: McGill-Queen’s University Press, 1998) 205 at 213-14; Joy Parr, “Household Choices as Politics and Pleasure in 1950s Canada” (1999) 55 *Int’l Lab. & Working-Class Hist.* 112 at 113-14.

that a “generalized wariness of excess,” as Joy Parr describes, governed the deliberations of Canadians who were still nervous about their well-being and welfare.<sup>42</sup> Doug Owram echoes these sentiments when he talks about the relation between prosperity and the memories of the not-too-distant past:

The depression did not return, but we must be careful not to use the benefit of hindsight to telescope history. For several years after the war ... prosperity always seemed fragile. ... Even as it became apparent that prosperity was the dominant pattern, the memories of recent years remained. There was, indeed, something of a paradox in the postwar period. Although this was, overall, one of the most prosperous periods in Canadian history, only gradually did policy makers and the public overcome the wartime fear that the slightest misstep would recreate disaster.<sup>43</sup>

All of this, however, is not to understate the recovery that was well underway. The post-war rebuilding saw the birth of the modern welfare state. Beginning with unemployment insurance in 1941 (though its seeds can be traced back to the 1920s), family allowances in 1945, and Old Age Security in 1951, various social programs were developed to ensure the well-being of Canadians.<sup>44</sup> In all, social expenditure grew from 50 dollars per capita in 1947 to 135 dollars per capita by 1960.<sup>45</sup> The economy was on its way to recovery as well, evinced by the relatively low level of unemployment<sup>46</sup> and the steadily growing Gross National Product, which rose from 21 billion dollars in 1951 to 39 billion dollars by 1961.<sup>47</sup>

It is worth highlighting that the social programs of the 1950s were to be delivered to the public as a matter of *right*, rather than as a matter of charity,<sup>48</sup>

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42. Parr, *ibid.* at 114.

43. Owram, *supra* note 41 at 212-13.

44. James Struthers, “Family Allowances, Old Age Security, and the Construction of Entitlement in the Canadian Welfare State, 1943-1951” in J.L. Granatstein & Peter Neary, eds., *The Veterans Charter and Post-World War II Canada*, *supra* note 41, 179 at 188-89, 191.

45. Parr, *supra* note 41; K. A. H. Buckley & M. C. Urquhart, *Historical Statistics of Canada*, 2d ed. (Toronto: MacMillan, 1965) at B270; and F. H. Leacy, *Historical Statistics of Canada*, 2d ed. (Ottawa: Statistics Canada and Social Science Federation of Canada, 1983) at A1, D113, 120, F75, F83, H50.

46. See Daniel Kubat & David Thornton, *A Statistical Profile of Canadian Society* (Toronto: McGraw-Hill Ryerson, 1974) at 141-42, 145-46.

47. Parr, *supra* note 41 at 113.

48. Struthers, *supra* note 44.

as in previous times.<sup>49</sup> When addressing the House of Commons in 1944, Prime Minister William Lyon Mackenzie King stated that “the new order is not going to have things done as charity. What is to be done will be done as a matter of right.”<sup>50</sup> Thus, prosperity and stability were tied not only to material well-being, but also to certainty in the legal realm. However, the guarantee of social welfare had to be earned; it was not to be provided indiscriminately, as was believed to be the case with the way charity was administered. This shift, as will become apparent, is significant in making sense of many of the changes to the vagrancy offences.

### III. VAGRANCY LAW REFORM IN THE 1950s

As of 1953, the vagrancy section in the *Code* contained ten offences.<sup>51</sup> The reforms undertaken during the 1953–1954 legislative session led to a reduction in

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49. See *supra* notes 14–26 and accompanying text.

50. *House of Commons Debates*, (25 July 1944) at 5335 (Hon. James Allison Glen, K.C.) [emphasis added].

51. *An Act respecting Vagrants*, *supra* note 15, contained eight offences (these are a product of my counting and separating as they were unnumbered in the statute). The *Act* underwent minor amendments on two separate occasions, both pertaining to clarifying the punishment. See *An Act to amend ‘An Act respecting Vagrants’*, 1874, c. 43; *An Act to remove doubts as to the power to imprison with hard labour under the Act respecting Vagrants*, 1881, c. 31. See also *An Act respecting Offences against Public Morals and Public Convenience*, 1886, c. 157 [*Public Morals and Public Convenience*]. This Act was enacted largely to safeguard young girls and women, whom it was believed, were forced into prostitution both at home and abroad. One section contained a verbatim description of *An Act respecting Vagrants*. See *Public Morals and Public Convenience*, s. 8. The 1886 Act expanded the number of vagrancy offences in two ways. First, several earlier offences were split, making them into distinct offences. Secondly, one new offence was created: “[The] discharging of firearms, or by riotous or disorderly conduct in any street or highway, wantonly or maliciously disturb[s] the peace and quiet of the inmates of any dwelling house near such street or highway” (s. 8(g)). This brought the total number of offences to twelve. Section 8 of this Act was transplanted verbatim into the vagrancy section of the 1892 *Criminal Code*. See *Criminal Code*, S.C. 1892, 55–56 Vict., c. 29, ss. 207, 208 [*Criminal Code 1892*]. Other important amendments, discussed below, occurred between 1906 and 1951. See *infra* notes 52, 58–62 and accompanying text. Another notable amendment, that is peripherally relevant here, occurred in 1915. Two offences of prostitution—keeping a disorderly house, bawdy-house, or house of ill-fame, and the frequenting of such places—were removed as offences of vagrancy and inserted into a separate section of the *Code*, which carried up to two years in prison. See *Revised Statutes of*

the number of offences by half, and took place in two ways. First, five offences were reclassified and relocated in different sections of the *Code*. Secondly, four offences underwent a “facelift,” which involved re-writing and fine-tuning their legal phraseology. One offence, which was added shortly before these reforms, was not modified.<sup>52</sup> The sum effect of these reforms was twofold. Firstly, the offence of vagrancy was reconceptualized from a status offence to an offence of behaviour. Secondly, and relatedly, the ways in which the vagrant was perceived as a social problem underwent significant changes. I begin with a schematic discussion of each of these reforms and then explore their significance.

#### A. RECLASSIFICATION

The following five offences were removed from the vagrancy section of the *Code*:

- (b) being able to work and thereby or by other means to maintain himself or family, wilfully refuses or neglects to do so;
- (c) openly exposes or exhibits in any street, road, highway or public place, any indecent exhibition;
- (d) loiters on any street, road, highway or public place, and obstructs passengers by standing across the footpath, or by using insulting language, or in any other way;
- (e) by discharging firearms, or by riotous or disorderly conduct in any street or highway, wantonly disturbs the peace and quiet of the inmates of any dwelling-house near such streets or highway;
- (f) tears down or defaces signs, breaks windows, or doors or door plates, or the walls of houses, roads, or gardens, or destroys fences.<sup>53</sup>

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*Canada*, 1906, c. 146, s. 238(j),(k) as rep. by *Statutes of Canada*, 1915, c. 5, s. 7. See McLaren, *Anti-White Slavery Campaign*, *supra* note 3 at 331. McLaren explains that these amendments were an effort to get tough on procurers of prostitutes, especially given the “white slavery panic” that swept the nation during this time. See also Mariana Valverde, *The Age of Light, Soap and Water: Moral Reform in English Canada, 1885-1925* (Toronto: McClelland & Stewart, 1991) at 88-89.

52. An amendment in 1951 made it an offence for any person convicted of a particular enumerated offence to loiter in a specifically listed public space, namely, a school ground, play ground, public park or bathing area. See *Statutes of Canada*, 1951, c. 47, s. 13. The specific offences enumerated were: s. 292(a) indecent assault on a female, s. 293 indecent assault on a male, s. 301(1) sexually assaulting a girl under the age of fourteen, s. 301(2) sexually assaulting a girl between the ages of fourteen and sixteen, and s. 302 attempting to sexually assault a girl under the age of fourteen. *Criminal Code*, R.S.C. 1927 14-15 George V. c. 36 [*Criminal Code 1927*].

53. *Criminal Code 1927, ibid.*, ss. 238 (b), (c), (e), (g), (h).

However, these remained as criminal offences. For example, the fourth provision, pertaining to causing disturbance, incorporated several earlier vagrancy provisions, such as: loitering and obstructing persons in public places; indecent and open public exposure; and disturbing the peace and quiet of occupants of a dwelling house by discharging firearms. This section read as follows:

Every one who:

- (a) not being in a dwelling house causes a disturbance in or near a public place,
  - (i) by fighting, screaming, shouting, swearing, singing or using insulting or obscene language
  - (ii) by being drunk, or
  - (iii) by impeding or molesting other persons;
- (b) openly exposes or exhibits an indecent exhibition in a public place
- (c) loiters in a public place and in any way obstructs persons who are there; or
- (d) disturbs the peace and quiet of the occupants of a dwelling house by discharging firearms or by other disorderly conduct in a public place, is guilty of an offence punishable on summary conviction.<sup>54</sup>

Similarly, the section relating to indecent exhibition, trespassing at night, and common nuisance also preserved several earlier vagrancy offences as criminal offences.<sup>55</sup>

That these offences remained in the *Code* should not mask the significance of this shift. Firstly, the stigma attached to, and associated with, being a “loose, idle or disorderly person or vagrant” no longer applied to these offences, which meant that those convicted of these offences no longer carried the additional baggage of being labelled a vagrant.<sup>56</sup> Secondly, these offences were now offences of action, rather than status, which meant that both a guilty act and a guilty mind were necessary requirements to secure a criminal conviction. This not only served to enhance due process and fairness, but also made conviction a more onerous task for the prosecution.<sup>57</sup>

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54. *Criminal Code*, S.C. 1953-1954, 2 Eliz. 2, c. 51, s. 160 [*Criminal Code 1953-1954*].

55. *Ibid.* ss. 158, 162, 165.

56. See Part III(C), below.

57. *Ibid.*

## B. FACELIFTS

The vagrancy section was also reformed through “facelifts” to four offences, which involved editing their legal phraseology. First, the offence of

not having any visible means of subsistence, is found wandering abroad or lodging in any barn or outhouse, or in any deserted or unoccupied building, or in any car or wagon, or in any railway carriage or freight car, or in any railway building, and not giving a good account of himself, or who, not having any visible means of maintaining himself, lives without employment<sup>58</sup>

was re-written to read: “not having any apparent means of support is found wandering abroad or trespassing and does not, when required, justify his presence in the place where he is found.”<sup>59</sup> This offence was added to the vagrancy section in 1906,<sup>60</sup> in response to the growing numbers and visibility of the poor. Often referred to as “hoboes,” this group of people resorted to barns, outhouses, railway stations, and railway cars for warmth, lodging, and transportation.<sup>61</sup> However, due to the economic recovery and prosperity that was well underway, the post-Depression period witnessed declining numbers and visibility of hoboes.<sup>62</sup> As a result, it appears that by the 1950s, this provision was of limited relevance.

While the above amendment was a response to the changing social and economic climate of its time, these conditions alone do not fully explain the legal shifts that were taking place. Wandering and trespassing were left intact as offences of vagrancy, yet the *places* where they were prohibited were no longer specified. While the verbosity which plagued this offence was significantly improved, virtually any space, be it public or private, was now

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58. *Criminal Code 1927*, *supra* note 52, c. 36, s. 238(a).

59. *Ibid.* See also *Criminal Code 1953-1954*, *supra* note 54, s. 164(1)(a).

60. *Criminal Code 1927*, *ibid.*, s. 238(a). This was not a new offence as such, but an expansion of an older one. Ironically, this was exactly what lawmakers sought, given the *Code*'s terse description of the offence. See *Criminal Code 1892*, *supra* note 51, s. 207(a), which read: “Not having any visible means of maintaining himself lives without employment.”

61. For an interesting US study of hoboes, see Nels Anderson, *The Hobo: The Sociology of the Homeless Man* (Chicago: The University of Chicago Press, 1923).

62. However, given the limited survey data, it is hard to verify the extent of vagrancy during this period. See Helen Boritch & John Hagan, “Crime and the Changing Forms of Class Control: Policing Public Order in ‘Toronto the Good,’ 1859-1955” (1987) 66 *Soc. Forces* 307. Boritch and Hagan demonstrate a general decline in the number of arrests for “public order” offences from the 1920s onwards.

made off-limits to a person without “apparent means of support.” Despite improvements in the social and economic climate, lawmakers were still of the opinion that the acts of wandering and trespassing were significant enough to be dealt with as offences of vagrancy. As a result, the scope of the section widened considerably.

The offence of begging also underwent a facelift. That offence, which read:

[Anyone who] without a certificate signed, within six months, by a priest, clergyman or minister of the Gospel, or two justices, residing in the municipality where the alms are being asked, that he or she is a deserving object of charity, wanders about and begs, or goes about from door to door, or places himself in any street, highway, passage or public place to beg or receive alms<sup>63</sup>

was re-written as: “begs from door to door or in a public place.”<sup>64</sup> Again, though the verbosity of the offence was markedly reduced, the scope of the offence was significantly expanded. Begging was now wholly prohibited, for the first time in the history of Canadian vagrancy law. Furthermore, the logic and precedent which guided earlier vagrancy legislation, in terms of granting particular groups licences or certificates to wander the streets and beg for alms, was eliminated. Lawmakers believed that since employment was now more readily available and other forms of support, stemming from the welfare system, were publicly accessible, this provision would be redundant.<sup>65</sup> Having shed this aspect of its character, Canadian vagrancy law was now strictly concerned with, and designed for, punishment.

The offence of “having no peaceable profession or calling to maintain himself by, for the most part supports himself by gaming or crime, or by the avails of prostitution,”<sup>66</sup> was the third to undergo a facelift. It was re-written, less verbosely, as follows: “supports himself in whole or in part by gaming or crime and has no lawful profession or calling by which to maintain himself.”<sup>67</sup> The reform to this particular offence was unique because it also incorporated elements of reclassification. The portion pertaining to “living on the avails of prostitution”

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63. *Criminal Code 1927*, *supra* note 52, s. 238(d).

64. *Ibid.*; *Criminal Code 1953-1954*, *supra* note 54, s. 164(1)(b).

65. See *supra* notes 15-16, 48-50, and accompanying text.

66. *Criminal Code 1927*, *supra* note 52, s. 238(j).

67. *Ibid.* See also *Criminal Code 1953-1954*, *supra* note 54, s. 164(1)(d).

was removed as an offence of vagrancy and relocated in the section dealing with “Disorderly Houses, Gaming and Betting.”<sup>68</sup>

Finally, the offence of “being a common prostitute or night walker, wander[ing] in the fields, public streets or highways, lanes or places of public meeting or gathering of people, and [not giving] a satisfactory account of herself,”<sup>69</sup> was rewritten to read, “being a common prostitute or night walker is found in a public place and does not, when required, give a good account of herself.”<sup>70</sup> Here again, while the verbosity of the offence was reduced, its scope expanded significantly. A common prostitute or night walker could now be called upon to “give a satisfactory account of herself” in virtually any space, whether it be public or private.<sup>71</sup>

### C. FROM “BEING” VAGRANT TO “COMMITTING” VAGRANCY

In many ways, the above reforms addressed the numerous ambiguities surrounding important aspects of vagrancy law. Just how problematic the law was is appreciable in the comments of Justice Galt’s summary of the offence as it stood in late 1920s: “It seems curious that such an offence as vagrancy should require nine separate provisions occupying nearly two pages of the Cr[iminal] Code in order to define it.”<sup>72</sup> Prior to the reforms, it was in the courts where many of

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68. *Criminal Code 1955*, *supra* note 54, s. 168(1)(b). For a comprehensive overview of this offence in historical context, see J. Stuart Russell, “The Offence of Keeping a Common Bawdy-House in Canadian Criminal Law” (1982) 14 *Ottawa L. Rev.* 270.

69. *Criminal Code 1927*, *supra* note 52, s. 238(i).

70. *Criminal Code 1927*, *ibid.* See also *Criminal Code 1955*, *ibid.*, s. 164(1)(c).

71. At least discursively, this was an expansion in the scope of the provision, though it appears that in practice, policing extended into private spaces even before this amendment. See *R. v. Thomas* (1949), 96 C.C.C. 129 (Ont. Co. Ct.) [*Thomas*]. In this case, a common prostitute was watched by constables while in public, and then followed into a hotel. After locating the room in which the accused was with her client, and concluding that sexual intercourse had taken place, one constable followed the accused as she left the hotel and began questioning her, while the other escorted the client outside to question him. See also McLaren, “Chasing the Social Evil,” *supra* note 3 at 332-33 (discussing the public-private divide, or the lack thereof, in relation to prostitution). But see *R. v. Dubois* (1953), 106 C.C.C. 150 at 153 (Magistrate’s Ct.). It was held that a woman could only be asked to give a satisfactory account of herself when in public, not when confronted in a hotel room, because that meant that she was no longer wandering. This was regardless of the fact that the first element of the offence, that she was a common prostitute, had been satisfied. See generally, Part III(C), below (regarding the ambiguities and inconsistencies surrounding the law).

72. *R. v. Rosenfeld* (1928), 50 C.C.C. 305 at 306 (Man. K.B.) [*Rosenfeld*].

these deficiencies were addressed. Judges settled discrepancies associated with the constitution of the offence by ruling that it was not “vagrancy,” in the broad sense, that constituted the offence. Instead, it was the particular enumerated offence within the vagrancy section that constituted the offence.<sup>73</sup> To charge a person broadly with vagrancy, Chief Justice Hunter wrote, is akin to “charg[ing] a man generally with being a thief,” because the accused is “entitled to know under what sub-section he was charged.”<sup>74</sup> This rule was followed to the letter in later rulings, providing the law with some stability and uniformity.<sup>75</sup> The courts were also critical when the information provided in the commitment failed to specify the manner in which the accused contravened the particular offence.<sup>76</sup> To simply re-state the offence verbatim, as outlined in the subsection, was insufficient; how the accused contravened the particular subsection needed to have been spelled out clearly, and in detail.<sup>77</sup> This rule, however, was not uniformly applied, leaving the law unsettled and prone to miscarriages of justice.<sup>78</sup>

Thus, the impetus behind the reforms was a strong desire to make the law clear, precise, and consistent in its application—which is exactly what the Royal Commission was originally tasked with. The most significant reform to the criminal law as a whole was the abolishment of all common law offences.<sup>79</sup> The

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73. See *R. v. Keeping* (1901), 4 C.C.C. 494 (N.S.S.C.); *R. v. McCormack* (1903), 7 C.C.C. 135 (B.C. S.C.) [*McCormack*].

74. *McCormack*, *ibid.* at 136.

75. See *R. v. Harkness* (1906), 12 C.C.C. 54 at 55 (Qc. K.B.) [*Harkness*]; *R. v. St. Armand* (1915), 25 C.C.C. 103 at 104 (Ct. of the Sessions of the Peace) [*St. Armand*]; *R. v. Code* (1908), 13 C.C.C. 372 at 378 (Sask. S.C.) [*R. v. Code*]; *R. v. Jackson* (1917), 29 C.C.C. 352 at 364 (Ont. S.C.) [*Jackson*]; *R. v. Sheehan* (1908), 14 C.C.C. 119 at 120 (B.C. S.C.) [*Sheehan*]; *Rosenfeld*, *supra* note 72 at 306; and *R. v. Washington* 1935 65 C.C.C. 106 at 108-09 (B.C. Co. Ct.).

76. See *R. v. Leconte* (1906), 11 C.C.C. 41 (Ont. C.A.) [*Leconte*]; *Harkness*, *ibid.* at 55; *R. v. Code*, *ibid.* at 378; *St. Armand*, *ibid.* at 105; and *Jackson*, *ibid.* at 371-80, Maagee J.A. & Clute J., dissenting.

77. *R. v. Harris* (1908), 13 C.C.C. 393 at 395-403 (Y. Terr. Ct.) [*Harris*]; *R. v. Leroy* (1940), 73 C.C.C. 288 (Alta. S.C.) [*Leroy*].

78. *Leconte*, *supra* note 76; *Re Effie Brady* (1913), 21 C.C.C. 123 at 127-28 (Alta. S.C.) [*Brady*] (holding that to describe how the accused contravened the section in the words of the section itself is sufficient). See also *Jackson*, *supra* note 75 at 95. Here Rose J. (in one of the majority opinions) noted that the failure to specify the offence “is not to vitiate the count.”

79. See *Respecting the Criminal Law*, *supra* note 40, s. 1.

key substantive reform to emerge with regard to vagrancy was its re-conceptualization from an offence of status to one of action.

The vagrancy section of the *Code* as it existed prior to 1953 read: “Every one is a loose, idle or disorderly person or vagrant who”<sup>80</sup> committed a particular enumerated offence within the section. The offence was, in other words, that of *being* vagrant. The reforms led to a re-writing which stated: “Every one *commits* vagrancy who ...”;<sup>81</sup> this discursive shift signalled that vagrancy had become an offence of action, not status. In explaining this shift, opposition MP Davie Fulton noted that “what is being done now is changing the offence from one of being to one of doing ... previously the offence was one of being a loose, idle or disorderly person, or vagrant. Now the offence is specifically made that of doing something.”<sup>82</sup> This shift is true of all vagrancy offences, save for being a common prostitute or night walker (commonly referred to as “Vagrancy C”), which remained as such until its repeal in 1972.<sup>83</sup> The exception suggests that whereas particular persons, such as beggars, were thought to be less problematic, common prostitutes and night walkers were still considered to be grave threats to the social and moral order, similar to how they were perceived in the nineteenth and early twentieth centuries. In addition, due process and fairness were significantly extended to other “vagrants,” such as beggars, but not to common prostitutes and night walkers, which highlights the gendered nature of vagrancy law.

This can be appreciated by exploring the concerns that occupied the time and effort of lawmakers during these debates. These concerns related to two offences: first, the failure to justify one’s presence when found wandering at large without apparent means of support (commonly referred to as “Vagrancy A”);<sup>84</sup> and second, though to a far lesser extent, supporting oneself in whole or in part by gaming or crime and having no lawful profession or calling to maintain one’s self.<sup>85</sup>

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80. *Criminal Code 1927*, *supra* note 52, s. 238.

81. *Criminal Code 1953-1954*, *supra* note 54, s. 164(1) [emphasis added].

82. *House of Commons Debates*, No. 1 (19 February 1954) at 2271 (Hon. L. René Beaudoin) [*Debates*, 19 February 1954].

83. See *infra* notes 112-15 and accompanying text.

84. *Criminal Code 1927*, *supra* note 52, ss. 238(a), 238(i). See also the revised offence in *Criminal Code 1953-1954*, *supra* note 54, s. 164(1)(a).

85. *Criminal Code 1927*, *ibid.*, ss. 238(j), 238(i). See also the revised offence in *Criminal Code 1953-1954*, *ibid.*

As they stood prior to these reforms, the elements required for conviction under the vagrancy section were complex and depended on the specific offence.<sup>86</sup> As a whole, what was crucial was that the accused was a “loose, idle or disorderly person or vagrant.”<sup>87</sup>

Determining whether an accused met this standard required probing into the general or moral *character* of the accused—that is, his or her disposition. This was accomplished by examining whether the accused’s *lifestyle* showed a clear pattern or course of conduct that was “loose, idle or disorderly or vagrant.”<sup>88</sup> As John Diefenbaker, the leader of the Opposition, explained, being “loose, idle or disorderly or vagrant” entailed “a state of mind that must ... [have been] continuing.”<sup>89</sup>

A hallmark of the criminal law is that a commission of a crime is said to occur only when both the *actus reus* and the *mens rea* are present. This was not a requirement, however, with regard to vagrancy. Here, the necessary intention or guilty mind was said to be evident where the accused had bad disposition or character, which was to be gauged through his or her “course of conduct.”

This concerned lawmakers deeply, but its consideration was by implication only. The focus was not explicitly on the act or guilty mind, but rather on character, and that too, for the specific offences named above. What concerned the

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86. For example, three elements were necessary to convict a woman for being a common prostitute: first, that she was a prostitute; second, that she was wandering in public; and third, that she failed to give a satisfactory account of herself. See *Harris, supra* note 77; *R. v. Pepper* (1909), 15 C.C.C. 314 (K.B.) [*Pepper*]; *Brady, supra* note 78 at 1; *Jackson, supra* note 75 at 100; and *Thomas, supra* note 71. “Vagrancy A” required three elements as well: first, that the accused was wandering abroad; second, that the accused lacked apparent means of support; and third, that the accused failed to give a satisfactory account of himself. See *R. v. Konkin* (1949), 95 C.C.C. 373 at 375 (B.C. C.A.).

87. See *R. v. Bassett* (1884), 10 P.R. 386 at 390 (Ont. C.A.) [*Basset*]; *R. v. Kneeland* (1903), 6 C.C.C. 81 at 87 (Qc. K.B.) (holding that the offence relating to causing a disturbance (s. 207(f)) does not apply “to persons of good character”); *R. v. Royal* (1924), 44 C.C.C. 317 at 318 (B.C. S.C.) [*Royal*]; *R. v. Law* (1924), 42 C.C.C. 123 at 124 (Winnipeg Police Ct.) [*Law*] (holding that a “respectable citizen” cannot be convicted for causing a disturbance and incommoding passengers, under s. 238(f)); and *R. v. Fleury* (1933), 60 C.C.C. 32 at 33-34 (Ont. S.C.) [*Fleury*].

88. *Debates*, 19 February 1954, *supra* note 82 at 2268-71, 2277-80. See also *Bassett, ibid.* at 390; *Munroe, supra* note 27 at 12; *Royal, ibid.* at 318; *Fleury, ibid.* at 33-34; and *R. v. Oiseberg et al.* (1931), 56 C.C.C. 386 (Man. C.A.).

89. *Debates*, 19 February 1954, *ibid.* at 2270.

Opposition about Vagrancy A was the way the proposed changes were drafted. Originally, a portion of this change was drafted in this way: “Every one commits vagrancy who (a) not having any apparent means of support (i) lives without employment.”<sup>90</sup> The words “lives without employment” became a concern precisely because of the proposed omission pertaining to the phrase “loose, idle or disorderly person or vagrant.” The government was of the opinion that this omission would make Vagrancy A strictly an offence of action. The Opposition, however, argued that the omission would make unemployment itself sufficient to convict, since the character of the accused would no longer be accounted for, and there existed a commonly held belief that the unemployed were inherently criminal. While the unemployment-criminality nexus was not commonly accepted as fact as it was during the eighteenth and nineteenth centuries, there is evidence that many continued to equate criminality with the unemployed. For example, the lifestyle of vagrants was equated with “devious methods” or “criminal work,” and their disposition was equated with a “criminal character.”<sup>91</sup> In describing the vagrant’s character, for example, the Minister of Justice explained that:

[a vagrant] *presumably* lives by devious methods which are not apparent on the surface. ... In other words, it is where a man is idle, living without visible means of support and yet living ... [T]he mere fact that he is able to live, *presumably by illegal methods which cannot be proven*, will constitute vagrancy.<sup>92</sup>

Comments such as these exacerbated the concerns of the Opposition, leading Diefenbaker to conclude that these changes would simply amount to a “passport to jail because of poverty.”<sup>93</sup>

The Opposition was striving for clarity in these proposed changes, which was understandable, given the ambiguities, uncertainties, and inconsistent application of the law. Diefenbaker explained his concerns in the following manner:

I find it difficult to understand why so many changes were made in the vagrancy section ... . I think that [this change] is widening the law of vagrancy to too great an extent. In an endeavour to unify [the *Code*], the law of vagrancy will now cover

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90. *Ibid.* at 2269

91. *Ibid.* at 2268, 2278. See *supra* notes 17-24 and accompanying text for a discussion of the unemployment-criminality nexus as it was believed to exist in the eighteenth and nineteenth centuries.

92. *Ibid.* at 2268 [emphasis added].

93. *Ibid.* at 2270.

anyone who, not having any apparent means of support, lives without employment. I believe this goes too far.<sup>94</sup>

Another Opposition member, Fulton, echoed similar sentiments:

[Y]ou have taken out the words, “loose, idle or disorderly person”, and therefore all you have to prove is that he lives without employment. My point is that, having taken out those words, it will no longer be necessary to prove the consistent pattern, because it was owing to the inclusion of those words that the courts came to the conclusion that you had to prove a pattern in order to establish vagrancy. ... *All you are going to have to prove [now] is that he lives without employment, and then he is automatically a vagrant.*<sup>95</sup>

The government took seriously these concerns by repeatedly noting that unemployment, by itself, was insufficient to establish vagrancy. The Minister of Justice explained that the phrase “loose, idle or disorderly person” was removed because of the need to fine-tune the provisions in the *Code*. “One of the purposes in the drafting of this new consolidated code” he argued, “was to condense what over the course of some 60 years had become a pretty voluminous and wordy document.”<sup>96</sup> He went on to state: “Since one of the main purposes in redrafting the consolidated code was to get away from this voluminous and archaic language, the ... royal commission employed just the one term ‘vagrancy’ in this section.”<sup>97</sup> He made it clear that “merely being without employment does not constitute the [vagrancy] offence. The offence is this course of conduct.”<sup>98</sup> In an attempt to assure the Opposition that this would be the basis upon which a conviction would be successful, he went on to say that “in every instance [court cases] were decided by a course of conduct, and they will continue to be decided by a course of conduct when referring to the gentleman as a vagrant.”<sup>99</sup>

This was indeed true. Often the courts held the following to be irrelevant in gauging the character of the accused: that the person was from out of town and unknown to authorities, or unemployed “on one day or more”;<sup>100</sup> or that

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94. *Ibid.* at 2269.

95. *Ibid.* at 2281 [emphasis added].

96. *Ibid.* at 2271.

97. *Ibid.* at 2272.

98. *Ibid.* at 2277.

99. *Ibid.* at 2278.

100. *Basset*, *supra* note 87 at 389.

the accused maintained himself without lawful profession.<sup>101</sup> Similarly, failing to accept available work on the grounds that it would hinder the possibility of finding better work did not show the character of that person to be disreputable.<sup>102</sup> In fact, evidence of previous employment was sufficient to show a reputable or satisfactory character.<sup>103</sup> In sum, unemployment was only relevant where the accused “live[d] by trickery and cheating and by preying upon other men.”<sup>104</sup>

In all of these cases, it was the character of the accused that was crucial in determining innocence or guilt. That this would no longer be a point of consideration gravely concerned the Opposition. In addition, there were many aspects related to this offence that were unclear. On one occasion, the fact that an accused was unable to justify his presence after being arrested for wandering “without apparent means of support” was interpreted as indicative that he was a “loose, idle or disorderly person or vagrant.”<sup>105</sup> In other cases, what constituted having visible means of maintenance was narrowly interpreted: income received through prostitution was disregarded,<sup>106</sup> and so was the money gained from begging.<sup>107</sup> Thus, where money was received through disreputable means or from a temporary source, an accused was found to not possess any visible means of maintenance. Yet, in at least one instance, money received through gambling was taken as a sign that the accused had visible means of maintenance.<sup>108</sup>

In an effort to placate and reassure the Opposition, and perhaps recognizing many of the inconsistencies with the application of the law, the Minister of Justice stated that the government was willing to reinstate the phrase “loose,

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101. *R. v. Riley* (1898), 2 C.C.C 129 at 129-30 (Qc. Q.B.) [*Riley*].

102. *Fleury*, *supra* note 87 at 33-34.

103. See *R. v. Collette* (1905), 10 C.C.C. 286 at 286-87. (Ont. H.C.).

104. *Riley*, *supra* note 101 at 130.

105. *R. v. Kolenczuk* (1914), 23 C.C.C. 265 (Sask. Sup. Ct.). However, the prisoner was discharged because the commitment failed to describe an offence (at 265-66).

106. *R. v. Cyr (Alias Waters)* (1917), 29 C.C.C. 77 at 88 (Alta. S.C.). Prostitution was said to be unlawful, and not “honest and reputable,” and therefore “subject to condemnation by the ordinary moral standards of the community.”

107. *Munroe*, *supra* note 27. It appears that this was because the accused did not have a signed certificate allowing him to beg. Yet, the court also ruled that “[b]egging is stamped as being a disreputable mode of life” because a “man who makes a living by begging ... is not regarded as a person who maintains himself by honest work or other lawful means” (at 87-88).

108. *Sheehan*, *supra* note 75.

idle or disorderly person.”<sup>109</sup> In the end, however, this change failed to materialize because both the government and the various opposition parties spent considerable time haggling over exactly where to place the phrase within the section.<sup>110</sup> While only speculative, this raises an interesting possibility that, had the parties agreed upon a way to include this phrase, Vagrancy A would have remained an offence of status. However, the Opposition was successful in persuading the government to remove the phrase “lives without employment” in Vagrancy A,<sup>111</sup> which ensured that unemployment itself would not constitute the offence.

The detailed attention that lawmakers paid to Vagrancy A, and to a lesser extent, the related offence discussed above, suggests a strong commitment toward clarifying the proposed changes and establishing certainty in the new law. The fact that it was largely Vagrancy A that was scrutinized in this way, is informative and sheds light on the ways the vagrant was perceived as a social problem. At least discursively, unemployment was no longer viewed as a grave threat to social order, nor were the unemployed necessarily viewed as habitual criminals. Unemployment was a reflection of the inability to find work, as opposed to the recalcitrance towards work.

Yet, the offence of being a common prostitute or night walker (Vagrancy C) was not the subject of such concern. Prostitutes and night walkers were still caught by the law based largely, if not solely, on their status, and they were viewed similarly to how they had been regarded during the nineteenth and early twentieth centuries. Like Vagrancy A, Vagrancy C was subject to the same ambiguities and inconsistent applications. While the courts sought to rectify these issues,<sup>112</sup> widespread problems still prevailed.<sup>113</sup> As *Harris* explains, even more troubling was the fact that common prostitutes and night

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109. *Debates*, 19 February 1954, *supra* note 82 at 2272.

110. *Ibid.* at 2272-75.

111. *House of Commons Debates*, No. 1 (15 March 1954) at 3005 (Hon. L. René Beaudoin); See *Criminal Code 1953-1954*, *supra* note 54, s. 164(1)(a).

112. In many instances, following the rule of other vagrancy offences, convictions were quashed or the defendant discharged on the grounds that no offence was described in the commitment. See *Harris*, *supra* note 77; *Pepper*, *supra* note 86; *Leroy*, *supra* note 77; and see also *Larsen*, *supra* note 3 at 149-54.

113. See *Brady*, *supra* note 78.

walkers were classified as a different type of vagrant. While the law provided prostitutes and night walkers

as much right to walk in the streets as any other person, provided they are not so walking for immoral purposes ... [it] limit[ed] the right of this class of people to walk in the streets, inasmuch as any police officer, knowing what their character is, may accost them and demand an explanation which he is not at liberty to demand of any other citizen.<sup>114</sup>

The broad reach of the offence made being a common prostitute or night walker a unique vagrancy offence, and illustrates the gendered nature of vagrancy law.<sup>115</sup>

#### IV. THE IMPETUSES BEHIND CRIMINAL LAW REFORM IN THE 1970s

The reforms undertaken in the early 1970s were concerned with the substance of the law and in particular, with its appropriate function and purpose in a free and democratic society. This had become an important point of consideration in academic and political thinking beginning in the 1960s. The seeds of this concern were sowed in the United Kingdom in the late 1950s, when the *Report of the Committee on Homosexual Offences and Prostitution* (also termed the “Wolfenden Report”) unequivocally stated that the criminal law should not be utilized to address private activities between consenting adults, regardless of how immoral these might be, or perceived to be.<sup>116</sup> The Wolfenden Report concerned itself with:

- (a) the law and practice relating to homosexual offences and the treatment of persons convicted of such offences by the courts; and

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114. *Harris*, *supra* note 77 at 396-97 [emphasis added]. See also *Pepper*, *supra* note 86.

115. The cases reported post-1954 are informative. See *e.g. R. v. Fiddler* (1964), 46 W.W.R. 676 (B.C. Co. Ct.). In this case, the British Columbia County Court continued to follow in the same line of reasoning as had earlier cases, by focusing on—and heavily scrutinizing—the accused’s “course of conduct” in order to gauge her character. See *Larsen*, *supra* note 3; see also *infra* notes 139-45, 160-77 and accompanying text.

116. U.K., The Committee on Homosexual Offences and Prostitution, *The Wolfenden Report* (London: Her Majesty’s Stationary Office, 1963).

- (b) the law and practice relating to offences against the criminal law in connection with prostitution and solicitation for immoral purposes.<sup>117</sup>

Its most significant recommendation was for homosexual relations between consenting adults to be decriminalized, a groundbreaking recommendation at that time. The sphere of “private morality” should not be the business of the criminal law, the Committee noted, unless public order—pertaining to indecency, offensive and injurious matters, exploitation and corruption, for example—is jeopardized.<sup>118</sup> Following this line of reasoning, the Wolfenden Report recommended the regulation, rather than decriminalization, of street prostitution, because it was considered “*deplorable* in the eyes of moralists ... and ... the great majority or ordinary people.”<sup>119</sup>

The significance of these recommendations is illustrated in the 1960s debate between Lord Patrick Devlin and the noted Oxford legal philosopher, H.L.A. Hart.<sup>120</sup> This famous debate served as a microcosm of the broader concerns about the appropriate function and uses of the criminal law. While it would be incorrect to say that this issue was directly responsible for the reforms undertaken in the 1970s, it played a significant role in spearheading reform, or, at least, bringing to light the need for dialogue regarding the law.

A good example of this can be found in the vagrancy ordinances that existed in the United States during the 1970s. While vagrancy ordinances had been deprecated in academia since about the mid-twentieth century,<sup>121</sup> and on several

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117. *Ibid.* at para. 1.

118. *Ibid.* at para. 13

119. *Ibid.* at para. 225 [emphasis added]. See also Joe Phoenix, “Governing Prostitution: New Formations, Old Agendas” (2007) 22 C.J.L.S. 73 at 77-80.

120. For a useful overview, see Basil Mitchell, *Law, Morality, and Religion in a Secular Society* (London: Oxford University Press, 1967).

121. See John Lisle, “Vagrancy Law; Its Faults and their Remedy” (1914) 5 J. Crim. L. & Criminology 498; Arthur H. Sherry, “Vagrants, Rogues and Vagabonds—Old Concepts in Need of Revision” (1960) 48 Cal. L. Rev. 557; Gary V. Dubin & Richard H. Robinson, “The Vagrancy Concept Reconsidered: Problems and Abuses of Status Criminality” (1962) 37 N.Y.U.L. Rev. 102; and Anthony G. Amsterdam, “Federal Constitutional Restrictions on the Punishment of Crimes of Status, Crimes of General Obnoxiousness, Crimes of Displeasing Police Officers, and the Like” (1967) 3 Crim. L. Bull. 205.

occasions successfully challenged in the courts,<sup>122</sup> it was not until the 1970s when this matter was definitively resolved in the United States. The landmark case is *Papachristou et al. v. City of Jacksonville*<sup>123</sup> in which the US Supreme Court struck down a Jacksonville, Florida vagrancy ordinance because it was void for vagueness and “plainly unconstitutional.”<sup>124</sup> It gave two reasons. Firstly, the ordinance failed to provide persons of ordinary intelligence with fair and clear notice that their contemplated conduct was prohibited by law.<sup>125</sup> Secondly, it effectively gave police “unfettered discretion, [which] permits and encourages an arbitrary and discriminatory enforcement of the law.”<sup>126</sup> In striking down the ordinance, the Court spoke against the capricious and arbitrary use of the law to harass the poor and other minorities. It rearticulated the importance of the rule of law, “the great mucilage that holds society together,”<sup>127</sup> to set limits on the appropriate uses of the law in similar ways that the Wolfenden Report had done some fifteen years earlier.

While it is not clear whether and to what extent the rulings in the US courts had any bearing on these legal shifts occurring in Canada,<sup>128</sup> it requires underscoring that it was precisely during this period that the concerns over vagrancy legislation were resolved definitively in both countries. To some extent, this was because of the concerns that had arisen regarding the appropriate uses of the criminal law in a free and democratic society. In the Canadian context, two additional factors played an influential role in criminal law reformation, one having a direct bearing on vagrancy law.

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122. See “The Growth of Disorder” in Catherine M. Coles & George L. Kelling, *Fixing Broken Windows: Restoring Order and Reducing Crime in Our Communities* (New York: Simon & Schuster, 1996) 38 at 49-60; Garry Stewart, “Black Codes and Broken Windows: The Legacy of Racial Hegemony in Anti-Gang Civil Injunctions” (1998) 107 *Yale L.J.* 2249 at 2262-63.

123. 92 S. Ct. 839 (1972).

124. *Ibid.* at para. 171.

125. *Ibid.* at para. 1.

126. *Ibid.* at para. 170.

127. *Ibid.* at para. 171.

128. The parliamentary debates and case law are silent as to what was taking place in the United States.

### A. LIBERTY AND SOCIAL JUSTICE: THE POLITICAL PHILOSOPHY OF PIERRE TRUDEAU

Pierre Trudeau has been described “as the most extraordinary thinker to ever become Prime Minister of Canada,”<sup>129</sup> and has “more than any other person influenced the course of Canadian history in the twentieth century.”<sup>130</sup> In 1967, when Trudeau was the Minister of Justice, he introduced a *Divorce Reform Bill* and other amendments to the *Code*, including the decriminalization of homosexuality and abortion.<sup>131</sup> These reforms were the beginning of what Trudeau had in mind, which he promoted under the banner—which has now become a famous dictum that is synonymous with Trudeau himself—that “the state has no place in the bedrooms of the nation.”<sup>132</sup> Echoing the major conclusions of the Wolfenden Report, Trudeau’s philosophy sought to redraw the boundaries of the state, inclusive of the criminal law. This became the cornerstone upon which Trudeau’s policies would be shaped when he became Prime Minister in 1968.

The law and lawmaking, as Trudeau noted in a speech that he delivered in 1968, “is a way to improve the lot of flesh and blood of human beings.”<sup>133</sup> This involved maximizing freedom, what Trudeau named as “the most important value of a just society,”<sup>134</sup> but in a way that was sensitive to the needs of the people. Thus, in Trudeau’s vision, liberty, and social justice were inextricably

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129. John L. Hiemstra, *Trudeau’s Political Philosophy: Its Implications for Liberty and Progress* (Toronto: Institute for Christian Studies, 1983) at 1.

130. James Bickerton, Stephen Brooks & Alain-G. Gagnon, *Freedom, Equality, Community: The Political Philosophy of Six Influential Canadians* (Montreal & Kingston: McGill-Queen’s University Press, 2006) at 119.

131. Stephen Clarkson & Christina McCall, *Trudeau and our Times: The Magnificent Obsession* (Toronto: McClelland & Stewart, 1990) vol. 1 at 107.

132. Interview of Pierre Elliott Trudeau (21 December 1967) *Trudeau’s Omnibus Bill: Challenging Canadian Taboos*, CBC Digital Archives, online: <[http://archives.cbc.ca/politics/rights\\_freedoms/topics/538/](http://archives.cbc.ca/politics/rights_freedoms/topics/538/)>.

133. Jacques Hébert, “Legislating for Freedom” trans. by Patricia Claxton in Thomas S. Axworthy and Pierre Elliott Trudeau, eds., *Towards a Just Society: The Trudeau Years* (Markham, Ontario: Viking, 1990) at 147, citing *Trudeau* (Ottawa: Deneau Publishers, 1984).

134. Pierre Elliott Trudeau, “The Values of a Just Society” trans. by Patricia Claxton in Thomas S. Axworthy & Pierre Elliott Trudeau, eds., *Towards a Just Society: The Trudeau Years*, *ibid.* at 357.

linked. Based on these values, the criminal law was to be reserved for serious problems, not to police popular morality or sin. For example, after introducing bills to decriminalize homosexuality and abortion Trudeau stated:

I believe that the criminal code amendments are good because they try to instill in our legal concept that there is a difference between sin and crime, and it is not the business of the lawmaker or of the police to check sin. This is a problem for each person's conscience, or his Priest, or his God, but not for the police.<sup>135</sup>

Trudeau's philosophy explicitly distinguished between crime and morality, in the same way that the Wolfenden Report had done. The separation of the two would become an important foundation for undertaking future criminal law reform.

## B. THE ROYAL COMMISSION ON THE STATUS OF WOMEN

The *Report of the Royal Commission on the Status of Women in Canada*<sup>136</sup> (the "Report") was, in many ways, directly responsible for the reformation of vagrancy legislation in the early 1970s. The Commission was convened in February of 1967, while Trudeau was still the Minister of Justice. During Trudeau's time in government, many groups in Canada who had hitherto been provided little access to voice their opinions and concerns were now provided with this opportunity.<sup>137</sup> Where women were concerned, this was especially the case; in the "Trudeau years," women's rights were significantly expanded and progress was made in building upon the platform that suffragists such as Nellie McClung had fought for in the early twentieth century. A good example of this was the appointment, in 1971, of a Minister who was to be responsible for the status of women and a Status of Women Coordinator, with the aim of developing a coherent policy for women based on their needs and interests.<sup>138</sup>

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135. Quoted in Hébert, *supra* note 133 at 145.

136. Royal Commission of Canada, *Report of the Royal Commission on the Status of Women* (Ottawa: Crown Copyrights, 1970) [*Report on the Status of Women*].

137. Hébert, *supra* note 133 at 132.

138. *Ibid.* at 133. The Law Reform Commission of Canada was also formed at this time, in June of 1971. The Commission was required to "prepare and submit to the Minister [of Justice] from time to time detailed programs for the study of particular laws or branches of the law with a view to making recommendations for their improvement, modernization and reform." See The Law Reform Commission of Canada, *The First Research Program of the Law Reform*

The Commission was ordered to “inquire into ... the status of women in Canada ... to ensure for women equal opportunities with men in all aspects of Canadian society”<sup>139</sup> The Report unequivocally highlighted the unequal status of women in Canadian society, especially as it related to the way they entered and were processed through the Criminal Justice System: “young [and marginalized] girls who move from rural areas to the urban centres [are often] alone and without money ... and ill-equipped to find a job. In many cases, they are picked up by the police on vagrancy charges and may consequently acquire the stigma of a criminal record.”<sup>140</sup> The Report also stated that “[w]omen are increasingly convicted of ‘crimes without victims.’ These are offences where, if any harm is caused, it is to the offender herself and not directly to others.”<sup>141</sup> Prostitution was the offence highlighted for discussion and criticism. The “[p]roblems raised by the law dealing with prostitutes deserve special attention,” the Report noted, and added: “[p]rostitution itself is not a crime ... prostitutes are controlled by the vagrancy provisions of the Criminal Code.”<sup>142</sup> The Report highlighted the problems associated with the way women were charged, as well as the fact that this practice was inherently gendered. The Commission noted that the vagrancy provision pertaining to prostitution failed to “respect the liberty of the individual to move about in freedom. Furthermore it opens the door to arbitrary application of the law by the police and it favours setting up traps, sometimes using police officers as *agents provocateurs* to arrest so-called prostitutes.”<sup>143</sup>

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*Commission of Canada* (Ottawa: Information Canada, 1972) at 5. Specifically, with regard to the criminal law, the Commission was tasked with examining “the types of conduct that should be made subject to the criminal law; the analysis of the objectives to be obtained by the imposition of criminal sanctions; the finding of alternative techniques for regulating conduct without resorting to the criminal law ... .” See *The Law Reform Commission of Canada, The First Annual Report of the Law Reform Commission of Canada, 1971-1972* (Ottawa: Government of Canada, 1972) at 8. It is not clear whether the recommendations of the Commission impacted the reforms to vagrancy legislation, though it would appear that this was not the case, given that the first reports were tabled after the reforms had come into effect.

139. *Report on the Status of Women*, *supra* note 136 at ix.

140. *Ibid.* at 314.

141. *Ibid.* at 366.

142. *Ibid.* at 369.

143. *Ibid.* at 370 [emphasis in original].

Thus, the members of the Commission wrote that they were “concerned about the use of vagrancy in the criminal law ... to regulate the activity of women prostitutes,”<sup>144</sup> and called for the cessation of this practice. In so doing, the Report explicitly stated that many of the activities considered “criminal” during the time under consideration should not properly fall within the domain of the criminal law. This was a point that was forcefully and repeatedly taken up later by parliamentarians during the legislative debates:

[T]he criminal law in Canada is built upon a nineteenth century philosophy of the role of punishment in the control of anti-social behaviour. Behaviour that was considered a threat to society in the nineteenth century and accordingly subjected to the criminal law and its sanctions is not necessarily, in the mid-twentieth century, the kind of behaviour that should be subject to criminal sanctions.<sup>145</sup>

## V. VAGRANCY LAW REFORM IN THE 1970s

As of 1955, the vagrancy section of the *Code* contained five offences:

Every one commits vagrancy who

- (a) not having any apparent means of support is found wandering abroad or trespassing and does not, when required, justify his presence in the place where he is found;
- (b) begs from door to door or in a public place;
- (c) being a common prostitute or nightwalker is found in a public place and does not, when required, give a good account of herself;
- (d) supports himself in whole or in part by gaming or crime and has no lawful profession or calling by which to maintain himself; or

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144. *Ibid.* at 371.

145. *Ibid.* at 365. The recommendations in the *Report on the Status of Women* also focussed on the provision relating to having “no apparent means of support.” The Commission was clearly of the opinion that this particular provision was more adverse to women than men because it was

directed at the homeless and transient, both male and female, who have no apparent means of support and cannot justify their presence in the place in which they are found. Even though they have committed no offence, many young girls are arrested and charged with vagrancy, simply because they do not have homes or money or because there is no place to send them for the night. It is relatively easy for homeless men to find shelter in hostels in most large cities but there are a few hostels for women (at 365).

This was yet another example of the gendered nature of vagrancy legislation.

- (e) having at any time been convicted of an offence under a provision mentioned in paragraph (a) or (b) of subsection 1 of section 661, is found loitering or wandering in or near a school ground, playground, public park or bathing area.<sup>146</sup>

A person convicted under this section would be “guilty of an offence punishable on summary conviction.”<sup>147</sup>

Three offences were decriminalized in 1972,<sup>148</sup> namely: wandering in public without apparent means of support (Vagrancy A), begging, and being a common prostitute or night walker (Vagrancy C).<sup>149</sup> Thus, as of 1973, the vagrancy section read:

Every one commits vagrancy who

- (a) supports himself in whole or in part by gaming or crime and has no lawful profession or calling by which to maintain himself; or
- (b) having at any time been convicted of an offence under a provision mentioned in paragraph 689(1)(a) or (b), is found loitering or wandering in or near a school ground, playground, public park or bathing area.<sup>150</sup>

At the time of writing, these offences can still be found in the *Code*,<sup>151</sup> though the latter offence has been rendered inoperative through judicial interpretation.<sup>152</sup>

146. *Criminal Code 1953-1954*, *supra* note 54, s. 164(1.) For discussion pertaining to section (e), see *supra* note 52.

147. *Ibid.*, s. 164(2).

148. *Criminal Law Amendment Act*, S.C. 1972, c. 13, s. 12.

149. While prostitution was decriminalized, solicitation for the purposes of prostitution was enacted as a criminal offence in the same Bill. See *Criminal Law Amendment Act*, *ibid.*, s. 15; see also *infra* notes 160-81 and accompanying text.

150. *Criminal Code*, R.S.C. 1970, c. C-34, s. 175(1) (d), (e) [*Criminal Code 1970*].

151. *Criminal Code*, R.S.C. 1985, c. C-46, s. 179(1) (a), (b) [*Criminal Code 1985*].

152. *R. v. Heywood* (1994), 3 S.C.R. 761. Writing the majority opinion for the Court, Justice Cory noted that “[t]here can be no question that [the impugned section] restricts the liberty of those to whom it applies” (at para. 45). This restriction, he explained, violated principles of fundamental justice; namely, the protections afforded under section 7 of the *Charter* with regards to life, liberty, and security, and could not be saved under a section 1 analysis. To a large extent, this was because the section was overly broad, in four related ways: first, with respect to its geographical ambit; second, with respect to its prescription of a lifetime prohibition without the possibility of review; third, with respect to its enumeration of a large group of people; and finally, with respect to its application to the accused without prior notice (see paras. 55-68).

These reforms reconceptualized vagrancy in important ways, though what is also significant is the particular *ways* in which these reforms took place. Broadly conceived, the vagrant was no longer considered a threat to the social and moral order of the nation. Thus, the criminal law was deemed inappropriate to attend to the potential concerns posed by these three classes of vagrants. As MP John Gilbert explained:

[M]any of the offences mentioned in the code are not criminal in the real sense of that word. I have in mind offences such as vagrancy ... [and] prostitution. ... Surely they do not belong in the Criminal Code. I think it is time that we realized that the origin of many of these ... problems are social rather than criminal in nature.<sup>153</sup>

According to MP Andrew Brewin, these changes were concerted efforts to “make ... the criminal law modern, up to date, compassionate and remedial,” which would require “repeal[ing] ... those provisions dealing with vagrancy and prostitution” which were “long overdue.”<sup>154</sup> Concerns about justice were also a feature of these reforms; MP Gilbert asserted that “Canada need[ed] a more contemporary criminal law, one which [would be] credible, enforceable, flexible and compassionate.”<sup>155</sup> Specifically, the uneven application of the law between different classes of persons was repeatedly raised. According to the Minister of Justice, Otto E. Lang, “changes are necessary in order to try in some way to attain greater fairness in our law as applied to the privileged and to those who are less privileged, to the rich and to the poor.”<sup>156</sup> This, according to MP David Macdonald, required drawing a “distinction between morality and the law,” given that “it is not possible to impose one uniform moral code on a country anymore.”<sup>157</sup>

These issues reflected many of those raised in the Wolfenden Report about the appropriate role and function of the criminal law. As well, these concerns bear close resemblances to the political philosophy of Trudeau. The following words of the Minister of Justice could easily have been spoken by Trudeau himself:

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153. *House of Commons Debates*, No. 4 (27 April 1972) at 1703 (Hon. Lucien Lamoureaux, MP) [*Debates*, 27 April 1972]. There were exceptions, but these were aberrations and did not sway the views of most politicians, regardless of party affiliations; see *e.g.* the comments of MP Marcel Lambert, 28 April 1972 at 1725 [*Debates*, 28 April 1972], and MP Douglas Hogarth, 1 May 1972 at 1775 [*Debates*, 1 May 1972].

154. *Debates*, 28 April 1972, *ibid.* at 1724.

155. *Debates*, 27 April 1972, *supra* note 153 at 1703.

156. *Ibid.* at 1699.

157. *Debates*, 2 May 1972, *supra* note 153 at 1815.

In all of these moves to amend the law we have been conscious of the view that there is an important distinction between law and morality, that not everything which some of us may regard as wrong or undesirable need be included within the prohibitions of the law. The law does not have to interfere in everything that is regarded as wrong: it need not be overzealous in this regard.<sup>158</sup>

It is not the case, however, that these offences were thought to be unproblematic. What was problematic was the reliance on the criminal law to deal with matters that municipalities or provinces would be better equipped to address, given their local or parochial nature. In addition, given the belief that these matters were not so grave to the national interests, the criminal law was deemed too punitive a measure to rely on. With respect to begging in particular, the Minister of Justice stated:

[T]he sections dealing with vagrancy here are being repealed as really being too vague for the purposes of the criminal law. With respect to the vagrancy offence of begging, it is not considered that this is a proper matter to continue as part of the criminal law. We believe that if legislation is needed in this regard, it would be best to have it by way of municipal bylaw or provincial legislation.<sup>159</sup>

With respect to the offence of prostitution, what transpired is complicated. Facially, the concerns about justice, including the consistent application of the law and the separation of law and morality, were extended to prostitution as well. Unlike begging, however, the legislators believed that the criminal law should continue to regulate prostitution. This was because it was not the law itself that was said to be the problem, but the particular ways in which it was deployed. Thus, the same Bill that decriminalized prostitution also enacted a new offence: anyone “who *solicits* any person in a public place *for the purpose of prostitution* is guilty of an offence punishable on summary conviction.”<sup>160</sup> This offence decoupled prostitution from morality, though it justified the use of the criminal law by constructing prostitution as a “social nuisance.”

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158. *Debates*, 27 April 1972, *ibid.* at 1699. Compare this quote with that of Trudeau’s statement regarding the decriminalization of homosexuality and abortion. *Supra* note 135 and accompanying text.

159. *House of Commons Debates*, Minutes of the Proceedings and Evidence on Justice and Legal Affairs, May 9 at (5)35.

160. *Criminal Law Amendment Act*, *supra* note 148, s. 15 [emphasis added]; *Criminal Code*, R.S.C. 1970, *supra* note 150.

To locate the significance of decriminalizing prostitution, a brief discussion of what transpired after is in order.<sup>161</sup> A few years after coming into effect, the “soliciting law” was challenged in court. In a landmark ruling, the Supreme Court of Canada interpreted the word “solicit” to be synonymous with the act of accosting or importuning in a manner that is pressing or persistent.<sup>162</sup> In other words, to contravene the law, a prostitute would have to solicit in a manner that was deemed pressing or persistent. It appears that this ruling severely hindered the ability of the police to lay charges because they believed the law was now unclear and thus, unenforceable.<sup>163</sup> While the data does not necessarily corroborate it, the perception was that this led to a proliferation of street prostitution across the country.<sup>164</sup> The government responded to these concerns by setting up two committees to explore the problem of prostitution and provide recommendations.<sup>165</sup> Though they disagreed somewhat, both the Badgley

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161. This discussion is not intended to explore the post-1972 responses to prostitution in detail, but to highlight the significance of decriminalization.

162. *R. v. Hutt* (1978), 2 S.C.R. 476 at para. 17 [*Hutt*].

163. To compound this problem, the Court also ruled that a private vehicle, where the appellant solicited an undercover police officer, was not a public space within the meaning of the legislation. See *ibid.* at para. 6.

164. See John Lowman, “Prostitution in Canada” in Margaret A. Jackson & Curt T. Griffiths, eds., *Canadian Criminology: Perspectives on Crime and Criminality*, 2d ed. (Toronto: Harcourt Brace and Co., 1995) 333 at 345 [Lowman, “Prostitution in Canada”]. Lowman suggests that while the number of charges for soliciting declined significantly after *Hutt*, this decline had begun in 1975. See also John Lowman, “Street Prostitution” in Vincent F. Sacco, ed., *Deviance: Conformity and Control in Canadian Society* (Scarborough: Prentice-Hall, 1988) 54 at 80-82 [Lowman, “Street Prostitution”]. In “Street Prostitution,” the decline in charges is discussed in more detail, using Vancouver as an example. See also Monique Layton, “The Ambiguities of the Law or the Streetwalker’s Dilemma” (1979) 27 *Chitty’s L.J.* 109 at 113-16 (suggesting that the various rulings pre-*Hutt* tended to problematize the very meaning of the word “solicit,” thereby causing uneasiness among the police.) Regardless, charges had begun to diminish before the *Hutt* ruling in Vancouver. In Toronto, however, it seems that the “soliciting law” was frequently enforced until the early 1980s. See Lowman, “Street Prostitution” at 80.

165. See The Committee on Sexual Offences Against Children and Youth, *Sexual Offences Against Children* (Ottawa: Department of Supply and Services, 1984). This Committee was appointed in 1981 and was commonly referred to as the “Badgley Committee.” See also The Special Committee on Pornography and Prostitution, *Pornography and Prostitution in Canada* (Ottawa: Department of Supply and Services, 1985). This Committee was appointed in 1983 and was commonly referred to as the “Fraser Committee.”

Committee and the Fraser Committee agreed that a “unilateral implementation of a law outlawing prostitution”<sup>166</sup> should not be implemented. In fact, the Fraser Committee was explicit in its position that a meaningful solution to prostitution—for both prostitutes and residents—could not materialize until the law prescribed, rather than proscribed, specific public spaces where prostitutes could legally work.<sup>167</sup> However, the government ignored this key recommendation, opting instead to repeal the “soliciting law” and enact a new offence that criminalized communication for the purposes of prostitution. This offence, generally referred to as the “communicating law,” reads:

Every person who in a public place or in any place open to public view

- (a) stops or attempts to stop any motor vehicle,
- (b) impedes the free flow of pedestrian or vehicular traffic or ingress to or egress from premises adjacent to that place, or
- (c) stops or attempts to stop any person in any manner communicates or attempts to communicate with any person

for the purpose of engaging in prostitution or of obtaining the sexual services of a prostitute is guilty of an offence punishable on summary conviction.<sup>168</sup>

The “communicating law” was explicitly concerned with addressing the twin problems which plagued the “soliciting law,” relating to the ambiguity of the offence and by extension, the difficulties with enforcement. The new law continued in the tradition of the “soliciting law” which had defined prostitution as a “social nuisance.” In fact, the “communicating law” not only reaffirmed this, but did so by inscribing a more expansive reach than its predecessor. First, the new law covered not just prostitutes, as did the “soliciting law,” but also those who sought to purchase sexual services—that is, prostitutes’ clients. Indirectly, this addition attended to one of the concerns that the Royal Commission had raised some fifteen years before about the vagrancy

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166. Lowman, “Street Prostitution,” *supra* note 164 at 92. For a good overview of these recommendations, see also Deborah H. Brock, *Making Work, Making Trouble: Prostitution as a Social Problem* (Toronto: University of Toronto Press, 1998) c. 4, 6 at 60-74, 101-16.

167. John Lowman, “Prostitution Law in Canada” (1989) 23 *Comparative L. Rev.* 12 at 25.

168. *Criminal Code*, S.C. 1986, c. C-34, s. 195.1(1). The offence is now found in s. 213.1(1)(c); see *Criminal Code 1985*, *supra* note 151, c. C-46. See also Brock, *supra* note 166 at 66-72 (discussing in great detail the similarities and differences between what the Fraser Committee recommended with respect to s. 195(1) and what eventually materialized in the government bill).

provision pertaining to prostitution—that the clients of prostitutes were not held liable for the purchase of sexual services.<sup>169</sup> The addition was driven primarily by the desire to provide law enforcement with the necessary tools to attend to street prostitution, one aspect of that now being the ability to target the consumers of sex.<sup>170</sup> Secondly, and relatedly, the new law covered not only communication for the purposes of prostitution or obtaining sexual services, but also any attempt aimed at such purposes. Together, these additions served in many ways both to clarify the law, and ease the burdens associated with law enforcement. In so expanding the scope of the provision, the “communicating law” further inscribed and reaffirmed the notion that prostitution constituted a “social nuisance,” thereby justifying the use of the criminal law to attend to this matter.<sup>171</sup>

There is wide agreement that prostitution is indeed a social nuisance, and poses great inconveniences to residents.<sup>172</sup> However, it is the ways that prostitution has been attended to that have come under severe scrutiny and criticism. The “soliciting law” and the later “communicating law” have been the subject of deprecation, derision, and disdain in academic circles, notably for valuing property and norms of civility at the expense of the interests and needs of the women who work as prostitutes.<sup>173</sup> While prostitution remains ostensibly legal, virtually every aspect associated

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169. *Report on the Status of Women*, *supra* note 136 at 369-70.

170. Brock, *supra* note 166 at 75-78.

171. In 1990, the Supreme Court held that the “communicating law” was constitutionally sound. See *Reference re. ss. 193 and 195.1(1)(c) of the Criminal Code (Man)* (1990), 1 S.C.R. 1123 [*Prostitution Reference*]. Dickson C.J.C., who wrote the majority opinion for the Court, noted that the public display of the sale of sexual services is a social nuisance that poses a variety of concerns to passersby and bystanders and that the eradication of it via the criminal law was a pressing and substantial concern. Interestingly, the dissenting opinion of Wilson J. noted that prostitution was indeed a social nuisance, which as she saw it however, did not require the punitive measures afforded by the criminal law, and the reliance on this means rendered the law constitutionally suspect.

172. This is true even of many feminists who otherwise call for the decriminalization of prostitution. See Dianne Martin, “Prostitution Bill C-19: Reforming the Criminal Law” (1984) 16 *Ottawa L. Rev.* 400 at 401; Frances M. Shaver, “Prostitution: A Critical Analysis of Three Policy Approaches” (1985) 11 *Can. Pub. Pol’y* 493 at 500. See also Wilson J.’s dissenting opinion in *Prostitution Reference*, *ibid.*

173. Lowman, “Street Prostitution,” *supra* note 164 at 91; Martin, *ibid.*; Shaver, *ibid.*; and Layton, *supra* note 164.

with it is illegal. As a result, the “soliciting law” was, and the current “communicating law” is, said to be discriminatory, hypocritical, and contradictory.<sup>174</sup>

I do not intend to minimize the problems associated with the post-1972 efforts to address prostitution, though these problems should not be used to mask the significance of decriminalization. According to Justice Spence’s summary of the vagrancy phase and the post-vagrancy phase of addressing prostitution, Vagrancy C “made it an offence for such a common prostitute to be in a public place even if absolutely immobile and silent unless she could give a good account of herself, [whereas the “soliciting law”] requires the person to solicit.” He concluded that this shows how “Parliament wished to require *some acts* on the part of the person which could contribute to *public inconvenience*.”<sup>175</sup> As such, discursively, prostitutes and night walkers<sup>176</sup> were no longer subject to the law based solely on their status, nor did they have to “give a good account”<sup>177</sup> of themselves that was subject to the caprice of a police officer. In that sense, these reforms went some distance in enhancing justice and due process. As well, whereas the old legislation “applied only to common prostitutes and night walkers,” the “soliciting law” applied to “every person.”<sup>178</sup> The expansion of the law to include male prostitutes (or “hustlers”) is significant in that the problem was no longer about prostitutes—a term that is intended to refer to women—but about prostitution in general.

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174. In particular, the hypocrisy of the law has been pointed to repeatedly by commentators. See Lowman, “Prostitution in Canada” *supra* note 164 at 354. He refers to this as “a policy of backdoor criminalization.” See also Shaver, *ibid.* at 494 (speaking of “the double standard of sexual morality”).

175. *Hutt*, *supra* note 162 at 20 [emphasis added].

176. The terms “common prostitute” and “night walker” were first explicitly defined in common law in 1949 and their definitions are illustrative of pejorative connotations associated with this group of people. See *Thomas*, *supra* note 71 at 131 (where “‘common’ means available to all sundry (with certain limitations) or at least more than one, in the conduct of her ‘old profession’”). Furthermore, a common prostitute need not be wandering in public—a characteristic that only applies to the night walker or street walker, “who is a person who solicits, and I cannot conceive of a night-walker who is not a common prostitute” (at 132). Both terms are anachronistic and in disuse in the law. The term prostitute still applies, but is expanded to include “a person of either sex who engages in prostitution.” See *Criminal Code 1985*, *supra* note 15, c. C-46, s. 197(1).

177. *Criminal Code 1953-1954*, *supra* note 54, s. 164(1)(c).

178. *Hutt*, *supra* note 162 at 20.

This is much more than a semantic distinction. The “soliciting law” constructed prostitution as a problem of “public inconvenience” or “social nuisance,” rather than a moral concern. In that sense, it was not the prostitute that was of concern, nor was it *she* who required regulation; it was the *activities* surrounding prostitution. The comments of MP Grace MacInnis highlight these very concerns: “[the] investigations of the commission showed real sex discrimination in the vagrancy section ... many of the so-called prostitutes were not arrested for prostitution at all, but for vagrancy. Men were never picked up for vagrancy, and consequently there was discrimination in the code.”<sup>179</sup> According to her, the fact that this inconsistency was addressed “is a very welcome change,”<sup>180</sup> and illustrates the efforts to make the law gender neutral. It is true that the “soliciting law” did not hold liable the men who solicited women for sex, despite being a point of consideration in the Report and the debates.<sup>181</sup> It would take some thirteen more years for this to materialize in the “communicating law.” Yet, the decriminalization of prostitution itself was momentous, and should not be overlooked. At a minimum, it attempted to rectify many of the problems associated with the earlier legislation—especially with regard to its gendered character. What this meant was that on the one hand, the social and cultural figure of the vagrant virtually ceased to exist in the criminal law. Yet, on the other hand, the vestiges of the vagrant—in particular, the prostitute—continued to exist through the reconstruction of prostitution as a social nuisance.

## VI. CONCLUSION

In this article, I have examined two waves of reform to the vagrancy section of the *Criminal Code*, showing how each wave reconceptualized vagrancy and concomitantly reconstructed the vagrant as a social problem. In so doing, I have traced the different processes through which these reforms took place, locating them within the social, political, and economic climate of their time.

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179. *Debates*, 27 April 1972, *supra* note 153 at 1708; See also *Debates*, 28 April 1972, *supra* note 153 at 1721.

180. *Debates*, 27 April 1972, *ibid.*

181. *Report on the Status of Women*, *supra* note 136 at 369-70. See also the comments of MP Douglas Hogarth: “If we are going to deal with prostitution in any way, shape or form, those who participate should be just as guilty as those who are prostitutes.” See *Debates*, 1 May 1972, *supra* note 153 at 1775.

The reforms undertaken in the mid-1950s were driven by a desire to address the technicalities of the law, though the substantial material changes that resulted drastically reshaped the nature of vagrancy. In the main provision, half of the vagrancy offences were reclassified and relocated within different sections of the *Code*. Save for one, all the remaining offences underwent facelifts that involved fine-tuning their legal phraseology. While the verbosity of these offences was dramatically reduced, in many instances, the scope of the law significantly expanded. The overall effect of these changes was a reconceptualization of vagrancy from an offence of status to one of behaviour. With this shift as well, the vagrant was reconstructed in important ways. Whereas in the eighteenth and nineteenth centuries idleness and laziness were viewed as evidence of disrepute, depravity, and criminality, the 1950s gave birth to an era when unemployment was not overly threatening to the social and moral order. Common prostitutes and night walkers, however, continued to be viewed as such, evinced in the offence of Vagrancy C, which remained a status offence, and highlights the gendered nature of vagrancy even in the 1950s.

The reforms undertaken in the 1970s led to the virtual demise of vagrancy—save for the two remaining offences in the *Code*—which were driven by the concerns over the appropriate uses of the criminal law. Discursively, the social and cultural figure of the vagrant ceased to exist in law, certainly as it stood in the preceding centuries, and even as it existed in the 1950s. The vagrant was no longer the habitual criminal who required the strong arm of the criminal law. If anything, he or she was a local problem, and not a threat to national interests. Ostensibly, this was also true of the common prostitute and night walker, who now ceased to exist in law both as a vagrant and a moral problem. In fact, perhaps for the first time, vagrancy law was gender neutral, given that the reforms sought to enhance equality and justice. Yet, the very fact that prostitution was recast as a social nuisance, still requiring the strong arm of the criminal law, preserved the vestiges of the vagrant as *she* existed in the criminal law.