skid-row and disturbing, by their presence, the sensibilities of residents of nicer parts of the community, or (b) suspected criminals with respect to whom the authorities do not have enough evidence to make a proper arrest or secure a conviction on the crime suspected.

Vagrancy statutes are however, couched in equivocal terms. As such, they may be applied at one time or another to any and every citizen, law-abiding or lawless. This is where the danger of their application lies. For example, university students are notorious for living without apparent means of support. The greater danger lies, however, more in groups that have traditionally been an anathema to law enforcement officers, the so-called "hippies" who tend to inhabit the larger urban centres of Canada. This group, too, lives without apparent means of support and yet contrary to popular belief infrequently presents any real danger to public order or peace.

• (4:40 p.m.)

What is involved here is a life style outside the customary life style of Canadian society. Unlike those in the general milieu, people in this secondary culture do not have to have means of support or justification for their presence in order to be accepted by others in society. But the vagueness of section 164 allows selective and discriminatory enforcement against just such a minority without any proof of particular harm. I do not intend to fault the police for this. Any time there is an opportunity for abuse it is natural for abuse to result.

This has not been simply my own analysis. It is that also of Ronald Crenshaw, writing in the South Dakota Law Review in the spring of 1970, of Gary Dubin and Richard Robinson in the January, 1962, edition of the New York University Law Review, of Raymond Nimmer in Judicature, volume 54, August-September, 1970, of William Sydney Davis, Jr., in volume 35 of the Tennessee Law Review, of the editors of the Washington University Law Quarterly, and of Cliff Nelson and Ray Steele in the January, 1970, issue of the Osgoode Hall Law Journal.

There are those who will argue that the American vagrancy laws are different from those in Canada. I can only say that they are correct, at least in one sense. The wording of the legislation does differ from jurisdiction to jurisdiction. But—and this is far more important—all vagrancy laws have a common origin, common purpose and a common pattern of enforcement. Others will say that the 1953-54 amendments to the Criminal Code did away with the concept of status criminality and replaced it with conduct criminality, meaning that a vagrant is no longer arrested simply for "being" a particular kind of person but only for "doing" something proscribed by law. In technical, legal theory those who take issue in this manner are probably correct.

The then Minister of Justice, Hon. Mr. Garson, argued to this effect in the 1953-54 session, is found at page 2274 of *Hansard*. In fact, however, such an argument is statute semantics. In practice the offences consist not in doing, but in being. You have only to look at section 164(1) of the Criminal Code. As far as I am concerned, the gravamen of the offence in subsection (1)(c) is "being a prostitute". Anyone else found in a public place does not have to give a good account of himself or herself.

Even under subsection (1)(a) there is an additional requirement that the individual must have no apparent means of support. Thus, under subsection (1)(c) the particular conduct is proscribed only if the individual involved is a common prostitute. Surely, where the essential element of the offence is status, then the crime is itself a crime of status. In this particular subsection of the act there is an additional distasteful hypocrisy. Most Canadians believe that prostitution is an offence. It is not. The Minister of Justice quoted correctly during debate of the Criminal Code amendments in the 1953-54 session, at page 2286 of *Hansard*, as follows:

> The mere fact that a woman is a prostitute, however, does not make her a vagrant—

Prostitution in Canada is completely legal. Only if all the constituent elements of section 164 (1)(c) are met—I hesitate to use the word "satisfied"—does it become a crime. Thus, we have the odd case of a naked prostitute who is found not guilty because her policeman client had not asked her to give a good account of herself before he arrested her. If, as some people assert, subsection (1)(c) is intended as a public health measure, it would be better to establish regulations outside the Criminal Code. If not, then I would suggest, without being in favour of such a move, that prostitution itself be proscribed. This discussion is, however, peripheral to the subject matter of the bill now before the House, which seeks the repeal of subsections (1)(a) and (1)(b) of section 164 of the Criminal Code.

There is some history to vagrancy and it is important to realize that all vagrancy statutes owe their origin to the Statutes of Labourers passed in England in 1349 and 1350 confining the labouring population to stated places and fixing wages at specific rates, largely because of the shortage of labour engendered by the black plague and the increasing transient nature of the population followingt he enclosure laws.

This original rationale later gave way to the "probable criminal" theory, and thus to economic and status criminality. The justification for the original vagrancy law, as carried over now in its application, was threefold: first the Protestant ethic dictated that work was necessary for the preservation of society; therefore the vagrancy laws encouraged the idle and the indigent to engage in productive activity and thereby to contribute to the general social and economic welfare. In this way vagrants were discouraged from becoming dependent on public assistance or charity. Second, the state had a right to recognize social sensibilities and to protect the decent citizens of the community from contact with undesirable elements of the general population. Third, since idleness was conducive to criminality, vagrancy laws prevented crime.

The problem, of course, is that the laws originating in this rationale have now become embodied in the Criminal Code. The vagrancy concept operates on a theory of suspicion causation and ignores actual causation. But in