

# Fearing the Mirror: Responding to Beggars in a "Kinder and Gentler" America

By MICHAEL M. BURNS\*

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\* Professor of Law, Nova University Law Center; J.D., University of California Hastings College of the Law, 1974. I am indebted to, among others, Jack Kornfield, Kenneth Karst, Linda Hirshman, Kevin Phillips, Anthony Rose, Robert Clinton, and Frances Moore Lappe for their thoughtful contributions to the literature bearing on this subject. In addition, I wish to thank my research assistants, Michael Koller and Kimberly Rommel-Enright, for their painstaking and scholarly work and my colleague John Sanchez for his sound editorial suggestions.

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## I. Introduction

This business of walk past the poor and write a check when you get home is a yuppie transaction of the cleanest kind. It lets us anesthetize our conscience.

Jonathan Kozol, author of *Rachel and Her Children*.<sup>1</sup>

No other activity better exemplifies the tension in American society between the values of independence and the values of community—the American schizophrenia of the individual work ethic and the self-made man competing with our oft-buried compassion for a fellow traveller—than our responses to beggars in the streets. To give or not to give: few of us have a simple answer. Rather, the internal dialogue is confused and complicated. Will a hand-out really help? Will he spend it on booze? Is it my responsibility? Is it the “right” thing to do? There are so many of them—how can I possibly make a dent? For many of us, compassion fatigue is setting in, and empathy is turning into frustration.<sup>2</sup>

Trained as lawyers, we tend to frame our personal responses to beggars in terms of legal rights and responsibilities (an intellectual process that may distance us further from meaningful solutions). If our system of justice recognizes neither a right to beg nor a duty to help, our guilty conscience may be eased as we scurry by the outstretched hands. For not only do our laws reflect our nation’s social values, but the judiciary’s imprimatur on those laws serves as a guidepost for those of us wallowing in conflict and indecision. A judge’s ruling that officialdom may sweep the streets clean of beggars gives us permission to ignore their individual pleas and, instead, to write a check to our favorite charity. When a judge rules that an individual has no right to ask the public for financial help, certain assumptions necessarily underlie such a ruling: that everyone is an island, that help can be found through other channels, that the beggar

1. Nancy R. Gibbs, *Begging: To Give or Not To Give*, TIME, Sept. 5, 1988, at 68, 70.

2. See Isabel Wilkerson, *Shift in Feelings on the Homeless: Empathy Turns into Frustration*, N.Y. TIMES, Sept. 2, 1991, at A1.

is not deserving, or perhaps that the public has an overriding right to be free from a collective guilty conscience.

This Article focuses on our responses to beggars and what our responses say about us as a society. First, however, it may be necessary to explain the widespread presence of beggars, especially for those of us whose daily routine does not involve receiving face-to-face pleas for money, food, or help of some kind. Part II is entitled "Who Are These Beggars and Why Are There So Many of Them?"

Society's response to beggars can be measured as much by our personal reactions on the streets as by the laws we enact. Part III offers anecdotal testimony to the wide-range of personal responses to beggars, followed by common law, legislative, and judicial responses to "the problem."

Discussing such human suffering within the limitations of rights analysis and with an over-reliance on legalistic distinctions seems wholly inadequate. "Thinking like a lawyer," at its worst, obscures the deeper, more painful, but necessary process of personal and societal self-examination. Yet certain legal questions, when stripped of their polished veneer, speak to truth. Three questions invite particular attention in Part IV:

1. Can begging possibly constitute protected speech (or, Do the voices of beggars serve any worthwhile purpose)?
2. Isn't begging for oneself distinguishable from solicitation by organized charities (or, Isn't checkbook charity the more civilized approach)?
3. Aren't there compelling governmental interests to justify bans on begging (or, Aren't we entitled to sweep the streets clean of any reminders of our failures)?

Seventeen years ago, writing in this journal, I noted the "severe social costs resulting from economic segregation."<sup>3</sup> At that time, I did not fully appreciate the poverty of conventional legal discourse in the context of a class society, nor the extent of our culture's psychological resistance to creating a jurisprudence of inclusion. Part V offers some thoughts about our increasingly polarized society, our inclination toward fear and disassociation, and the ultimate futility of avoiding the mirrors of our discontent.

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3. Michael M. Burns, *Class Struggle in the Suburbs: Exclusionary Zoning Against the Poor*, 2 HASTINGS CONST. L.Q. 179, 180 (1975).

## II. Who Are These Beggars and Why Are There So Many of Them?

### A. Who Are These Beggars?

We are witnessing a phenomenon unlike anything our people have experienced since the Great Depression of the 1930s. Estimates of the mounting numbers of homeless Americans run from 650,000 to as high as 3 million.<sup>4</sup> Equally alarming, the homeless whom we find on doorstoops, in subways, and under bridges, comprise no single type of person, no single subculture. "There is only homelessness, an archetypal state of transiency, poverty and isolation latent, to varying degrees, in every human being."<sup>5</sup> Men and women and entire families, "pushed over the edge by a combination of bad luck and government indifference, . . ."<sup>6</sup> find themselves abandoned on the street.

Those who resort to begging on the street come from every social stratum—"suburban housewives to Ph.D.'s, health care professionals to dope-smoking teenagers, war veterans . . . to former heads of companies."<sup>7</sup> For some, their poverty is only temporary, but most remain part of a permanent underclass. Their average age appears far younger than in days past; the average age and ethnicity of the homeless (who presumably are well-represented in the population of street beggars) has shifted dramatically over the last generation. A 1960 survey of Philadelphia's skid row revealed that only 25% were under the age of 45, and only 13% were minorities; by 1988, however, 86% were under 45, and 87% were minorities.<sup>8</sup>

Today's beggars are victims of government policies, private practices, and social trends that have produced this entrenched underclass, "cut off by walls of discrimination, illiteracy, hopelessness, and, perhaps worst, lack of education for participation in the community."<sup>9</sup> Often they are products "of broken and abusive homes, or were squeezed between rising prices and stagnant wages, or were forgotten by an impenetrable bureaucracy."<sup>10</sup> For those who have lost their homes, the reasons

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4. Mark Matousek, *The Crucible of Homelessness*, COMMON BOUNDARY, Sept./Oct. 1991, at 12, 13-14.

5. *Id.* at 13.

6. Alexander Wohl, *Gimme Shelter: Lawyering for the Homeless*, A.B.A. J., Aug. 1990, at 58.

7. Matousek, *supra* note 4, at 14.

8. Sarah Ferguson, *Us vs. Them: America's Growing Frustration with the Homeless*, UTNE READER, Sept./Oct. 1990, at 50, 53.

9. Linda R. Hirshman, *The Virtue of Liberality in American Communal Life*, 88 MICH. L. REV. 983, 1012 (1990).

10. Gibbs, *supra* note 1, at 71.

are equally varied:

[I]llness, layoff, accident, theft, natural disaster, substance abuse, imprisonment, divorce, abandonment, sexual abuse, rent increase, trauma, racism, sexism, ageism, homophobia, mental illness—a litany, in other words, of exactly the conditions members of our society contend with every day of their lives. . . . In short, . . . ‘the sum total of our dreams, policies, intentions, errors, omissions, cruelties, kindnesses, all of it recorded, in flesh, in the life of the street.’<sup>11</sup>

Yet our tendency is to distinguish ourselves, to distance ourselves as far as possible, from people of the street. One timeworn way to accomplish this end is to perpetuate the statistically disproven myth that beggars are all “crazy.”<sup>12</sup> “The label of mental illness places the destitute outside the sphere of ordinary life,” writes Jonathan Kozol. “It individualizes an anguish that is essentially ‘general’ both in its genesis and manifestation.”<sup>13</sup>

## B. Distribution of Wealth

Few would disagree that, on an immediate level, the single greatest cause of the growing ranks of beggars on our streets and subways and in our doorways is the “desperate shortage of affordable housing.”<sup>14</sup> From

11. Matousek, *supra* note 4, at 14 (quoting Peter Marin, *How We Help and Harm the Homeless*, HARPER’S MAG., Jan. 1987, at 36, 40).

12. “[The] fallacy . . . of pervasive mental illness among homeless individuals . . . must be laid to rest. . . . [W]ith the exception of alcohol and drug use, the most frequent illnesses among . . . the homeless [appear to be] . . . trauma, upper respiratory disorders and limb disorders, with mental illness trailing fourth (at 16 percent).” Matousek, *supra* note 4, at 14.

13. *Id.*

Once we shatter the illusion of some separate, sad-eyed bugaboo called The Homeless, we can properly examine the unique geography of this inner state. . . . [T]he seeds of homelessness [appear to be] . . . laid in childhood and are closely aligned with issues of mistrust, family dysfunction, low self-worth and alienation. Sadly, this developmental factor is compounded by the fact that children are the fastest growing contingent in the homeless population. (Since 1968, the number of minors living in poverty has grown by three million.) Regardless of whether this nurture-and-shelter deprivation is actual or symbolic, it often results in a crippling insecurity, as child psychologist Robert Coles found while working with homeless children. “When cut loose from a particular place, children are not only literally homeless, but also psychologically set adrift,” Coles has written. Asked to draw themselves, his juvenile subjects depicted stick figures without features, without sun, without sky or ground beneath their feet. “These were people literally suspended in air,” Coles concludes.

*Id.* As for homeless adults, their moorings are hardly any more secure. *Id.*

14. According to Patrick Murphy, Director of the Police Policy Board of the U.S. Conference of Mayors and former New York City Police Commissioner, “It’s an entire social structure. Without proper housing, there is little hope for a solution.” Laurence Zuckerman, *Can You Spare a Dime—For Bail?*, TIME, Jan. 11, 1988, at 33. “[T]here is widespread agreement that private generosity would not solve the problem. The main flaw in public policy, advocates for the homeless say, is that emergency shelters and soup kitchens do nothing about the root

1980 to 1988, the federal housing budget was slashed from \$33 billion to \$13 billion. "Forced to choose between housing and food, many of these families were soon driven to the streets," explains Kozol. "[F]or many of them, homelessness is just one paycheck away."<sup>15</sup> As one senior housing planner has observed, "Once you fall out of the housing market, you're sliding down a greased pole."<sup>16</sup> Professor Curtis Berger condemns the utter failure, in our courts and in our legislatures, to confront this problem.

In the United States, we have neither embraced a domestic constitutional right to housing, as have such western democracies as Sweden and the Netherlands, nor do we now profess that our citizens have 'the fundamental right, regardless of economic circumstances, to enjoy adequate shelter at reasonable costs,' as does our neighbor Canada. Moreover, we have not authorized our government to take 'extraordinary steps' to alleviate any housing shortage, as has Germany. "In none of these countries, nor in any other western democracy, with the exception of Great Britain (whose current government shares this government's political vision), does the extent of homelessness even begin to approach the dimensions of our own."<sup>17</sup>

To fully comprehend these shocking conditions of homelessness and street begging, we must recognize it as part of a larger societal portrait depicting enormous wealth disparity, deepening class divisions, and for children especially, the lack of any meaningful "equal opportunity." The reign of Ronald and Nancy Reagan (as yet perpetuated by George Bush, though symbolically tempered by Barbara Bush) has been "an ostentatious celebration of wealth, the political ascendancy of the richest third of the population and a glorification of capitalism [and the] free market[ ] . . . ."<sup>18</sup> The eighties were an orgy of conspicuous consumption and

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causes of homelessness—poverty, lack of affordable housing and a changing economy that has eliminated entire classes of well-paying, low-skilled jobs." Wilkerson, *supra* note 2, at A10, col. 4.

15. Gibbs, *supra* note 1, at 71. A recent Economic Policy Institute study reported that 27 million households were "unable to meet their nonshelter needs at even a minimum level of adequacy" due to high housing costs. Forty-seven percent of our nation's poor renters pay more than 70% of their income for shelter. Forty-two percent of renters and 22% of homeowners were reported to be "shelter poor." Michael E. Stone, *One-Third of a Nation: A New Look at Housing Affordability in America*, ECON. POL'Y INST. (1990).

16. Gibbs, *supra* note 1, at 71 (quoting Joe Carreras, S. Cal. Ass'n of Gov'ts).

17. Curtis Berger, *Beyond Homelessness: An Entitlement to Housing*, 45 U. MIAMI L. REV. 315, 334-5 (1990-91) (footnote omitted).

18. KEVIN PHILLIPS, *THE POLITICS OF RICH AND POOR: WEALTH AND THE AMERICAN ELECTORATE IN THE REAGAN AFTERMATH* xvii (1990). Reagan's post-Presidency behavior has been equally ostentatious, cashing in on public service to a degree unlike any other President in history. See HAYNES JOHNSON, *SLEEPWALKING THROUGH HISTORY: AMERICA IN THE REAGAN YEARS* (1991).

credit card purchasing, by our government as well as by individuals, of dramatic tax reductions for the rich, and of deregulation of corporate America, "all indulged in with the greatest recklessness while beggars filled the streets and the average family's real disposable income declined toward a dimming future."<sup>19</sup> As the income gap has widened, the United States has developed "one of the sharpest cleavages between rich and poor" among Western nations.<sup>20</sup> By disproportionately taxing the working class, filling regulatory agency posts with those critical of regulation, and massively increasing defense spending at the expense of human services, we have fostered a nation of haves and have-nots and spawned an underclass unheard of in modern civilized society. "[N]o other democratic country," charges Senator Daniel Patrick Moynihan, "takes as large a portion of its revenue from working people at the lower ends of the spectrum and as little from persons who have property or high incomes."<sup>21</sup>

Income disparity figures tell a sad, some would say obscene, story. During the 1980s, the income share of the top 20% grew to more than 50% of that earned by all Americans.<sup>22</sup> The wealthiest 10% of America's families have amassed nearly 68% of U.S. family net worth.<sup>23</sup> On an individual basis, the wealthiest 1% earned 8.1% of that earned by all Americans in 1981; by 1986, the percentage earned had risen to 14.7%.<sup>24</sup> The IRS reports that the wealthiest 1.6% of Americans own more than 28% of our nation's personal wealth, and these holdings exceed our entire gross national product.<sup>25</sup>

The average CEO was paid forty times more than the average blue-collar worker in 1985, but by 1988 he (and a very occasional she) took home ninety-three times more.<sup>26</sup> From 1981 to 1988, the net worth of the Forbes 400 richest Americans nearly tripled.<sup>27</sup> While the after-tax incomes of America's richest families—the top 1%—increased nearly 75% from 1977 to 1987, the poorest residents' after-tax incomes fell more than 10%.<sup>28</sup> The 2.5 million people at the top of the income scale

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19. PHILLIPS, *supra* note 18, at 4.

20. *Id.* at 8.

21. *Id.* at 80.

22. *See id.* at 12. "Capital gains were so concentrated at the top that their inclusion boosted the top quintile's share from 46.1 percent under the standard computation to a huge 52.5 percent. Federal and state taxes brought it down to 50 percent." *Id.*

23. *Id.* at 11.

24. *Id.* at 12.

25. *Rich Own 28% of Pie, IRS Says*, MIAMI HERALD, Aug. 23, 1990, at 1C.

26. PHILLIPS, *supra* note 18, at 180.

27. *Id.* at 166.

28. *Id.* at 14.

have almost as much money as the 100 million people who live in families that earn less than \$27,000 a year. This disparity “is in sharp contrast to 1977, when families in the under \$27,000 class had twice the share of the national wealth as those at the very top.”<sup>29</sup>

By every measure, the very rich were the primary beneficiaries of the Reagan era. Reducing or eliminating income taxes has always been a priority for libertarians and capitalists, but for Ronald Reagan it became “a personal preoccupation.”<sup>30</sup> Though simply an “amiable dunce”<sup>31</sup> in the eyes of some, President Reagan and his advisors managed to lower the top personal tax bracket from 70% to 28% in only seven years.<sup>32</sup> For those with inherited wealth, estate taxes were cut, as was taxation of unearned income, so the idle rich benefitted as well.<sup>33</sup>

The mythological “trickle-down” effect of Reaganomics, reflecting the views that industrialist Andrew Mellon expressed more than a century ago,<sup>34</sup> proved to be an empty promise. The Reagan economic agenda “produced one of the quickest and most regressive redistributions of wealth in U.S. history.”<sup>35</sup> The hundreds of thousands of homeless are graphic evidence of our polarized economy, as are the street beggars holding their hands out to fellow Americans. And, not surprisingly, racial minorities have fared worst of all.<sup>36</sup>

For the financially secure, government has come to be seen primarily as a protector of property rights—beyond that, an illegitimate, bloated and oftentimes annoying bureaucracy. The well-off simply don’t

29. Ramon G. McLeod, *Gulf Widening Between Rich and Poor in U.S.*, S.F. CHRON., July 29, 1991, at A4.

30. PHILLIPS, *supra* note 18, at 76.

31. JOHNSON, *supra* note 18, at 447 (quoting Clark Clifford).

32. PHILLIPS, *supra* note 18, at 76.

33. *Id.* at 67.

34. FRANCES MOORE LAPPE, *REDISCOVERING AMERICA’S VALUES* 77 (1989). “The prosperity of the middle and lower classes depends on the good fortune and light taxes of the rich.” *Id.*

35. PHILLIPS, *supra* note 18, at 74 (quoting former Texas Agriculture Commissioner Jim Hightower).

36. Nineteen eighty-seven figures indicate that the income of the average black family (\$18,098) was only 56.1% of the average white family’s income, the greatest disparity in more than twenty years. PHILLIPS, *supra* note 18, at 207. Comparative average incomes of black and white neighborhoods within the same city can be even more disturbing. In Miami, for example, the per capita income of upscale South Grove is almost ten times that of Little Haiti. MIAMI HERALD, Oct. 30, 1991, at 1B, 2B (summarizing the City of Miami’s Comprehensive Housing Affordability Strategy report). Even more disturbing in the long run is the recent Census Bureau report that the average white household has ten times as much wealth as the average black household. Wealth reflects generations of differences in earnings, investments, and inheritance; thus, the enormous economic gulf between blacks and whites is likely to endure far into the future, even if the income disparity is reduced in the decades ahead. Robert Pear, *Rich Got Richer in 80’s; Others Held Even*, N.Y. TIMES, Jan. 11, 1991, at A1.



need most government services; they can buy their own. At a time when “the top fifth of working Americans took home more money than the other four-fifths put together,”<sup>37</sup> we are experiencing what Robert B. Reich calls the “secession of the successful,”<sup>38</sup> those who are securely ensconced above the shifting tides of the economy.

The secession is taking several forms. In many cities and towns, the wealthy have in effect withdrawn their dollars from the support of public spaces and institutions shared by all and dedicated the savings to their own private services. As public parks and playgrounds deteriorate, there is a proliferation of private health clubs, golf clubs, tennis clubs, skating clubs and every other type of recreational association in which costs are shared among members. Condominiums and the omnipresent residential communities dun their members to undertake work that financially strapped local governments can no longer afford to do well—maintaining roads, mending sidewalks, pruning trees, repairing street lights, cleaning swimming pools, paying for lifeguards, and notably, hiring security guards to protect life and property.<sup>39</sup>

Members of different classes rarely even live in proximity to one another. Entire communities can be identified merely by name as belonging to one class or another. And in our major cities, self-contained, ultra modern building complexes provide residents with all their business, shopping and entertainment needs under one roof “without risking direct contact with the outside world.”<sup>40</sup> As for private security guards, they now outnumber police officers in the United States.<sup>41</sup>

During the past decade, federal aid to the cities has been reduced dramatically. While well-to-do cities, towns, and suburbs have been able to carry the added financial burdens without much difficulty, lower income communities, “faced with the twin problems of lower incomes and greater demand for social services,”<sup>42</sup> are struggling to survive. This growing inequality in community services has become an all-too-familiar pattern. In Philadelphia, for example, where

the city tax rate . . . is about triple that of communities around it, the suburbs enjoy far better schools, hospitals, recreation and police protection. Eighty-five percent of the richest families in the

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37. Robert B. Reich, *Secession of the Successful*, N.Y. TIMES, Jan. 20, 1991, § 6 (Magazine), at 16, 42.

38. *Id.* at 16-17.

39. *Id.* at 42.

40. *Id.* at 44.

41. Ayn Rand, who once observed that the “only proper function of a government is to . . . protect . . . the individual from physical violence,” AYN RAND, *CAPITALISM, THE UNKNOWN IDEAL* 40 (1946), would be pleased to know that, with respect to the truly deserving, government need no longer even provide these police services.

42. Reich, *supra* note 37, at 44.

greater Philadelphia area live outside the city limits, and eighty percent of the region's poorest live inside. The quality of a city's infrastructure—roads, bridges, sewage, water treatment—is likewise related to the average income of its inhabitants.<sup>43</sup>

Perhaps the most disheartening and damaging aspect of our increasingly divided society is the maintenance of a dual school system—a private one for the children of the upper and upper middle classes, and a public one for the offspring of the working class and the unemployed. Our federal government has effectively washed its hands of the problem by reducing its contribution to the costs of primary and secondary education to little more than 6%; and state and local governments have been hard pressed to pick up the slack. Not surprisingly, states with a higher concentration of wealthy residents can buy better quality. For example, in 1989, the average public school teacher in Arkansas earned \$21,700; in Connecticut, \$37,300.<sup>44</sup> This disparity is equally dramatic within most states, correlating closely with the average income of school district's residents. For example, the average pupil expenditure in New York City in 1987 was \$5,500, while in the affluent suburbs of Great Neck and Manhasset the figure was more than \$11,000 and, in the wealthiest districts in the state, \$15,000.<sup>45</sup> In Texas, school district expenditures range from a high of \$19,300 per year, per pupil, to a low of \$2,100 per year.<sup>46</sup> In a wealthy suburb of Dallas, Highland Park High School students "enjoy a campus with a planetarium, indoor swimming pool, closed-circuit television studio and state-of-the-art science laboratory. Highland Park

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43. *Id.*

44. *Id.*

45. JONATHAN KOZOL, *SAVAGE INEQUALITIES* 83-84 (1991).

46. Reich, *supra* note 37, at 44-45. One would be mistaken to conclude that the disparities fall simply along racial lines. Consider, for example, three white Boston suburbs located within minutes of one another. While most residents within each town earn about the same as their neighbors, the disparity of income between towns is substantial.

Belmont, northwest of Boston, is inhabited mainly by symbolic analysts and their families. In 1988, the average teacher in its public schools earned \$36,100. Only three percent of Belmont's 18-year-olds dropped out of high school, and more than eighty percent of graduating seniors chose to go on to 4-year college.

Just east of Belmont is Somerville, most of whose residents are low-wage service workers. In 1988, the average Somerville teacher earned \$29,400. A third of the town's 18-year-olds did not finish high school, and fewer than a third planned to attend college.

Chelsea, across the Mystic River from Somerville, is the poorest of the three towns [and is now facing bankruptcy]. Most of its inhabitants are unskilled, and many are unemployed or only employed part-time. The average teacher in Chelsea, facing tougher educational challenges than his or her counterparts in Belmont, earned \$26,200 in 1988, almost a third less than the average teacher in the more affluent town just a few miles away. More than half of Chelsea's 18-year-olds did not graduate from high school, and only ten percent planned to attend college.

*Id.*

spends about \$6,000 per year to educate each student . . . almost twice that spent per pupil by towns of Wilmer and Hutchins in Southern Dallas County.”<sup>47</sup>

Court challenges have been brought nationwide to address these inequities, but with mixed results.<sup>48</sup> Concerned judges and legislators know that they must strike a careful balance: Even if state contributions are equalized among school districts, vast differences in property values—and thus local tax revenues—will continue to produce enormous inequities. On the other hand, if courts order an extreme “Robin Hood” system, whereby wealthy school districts effectively subsidize poorer ones, or if they impose a cap on teacher salaries, affluent parents may simply abandon the public school system.<sup>49</sup> Increasingly, we are hearing the view that “[p]oor children of all colors are . . . surplus baggage, mistakes that should never have happened [and that] . . . attempts to educate the lower orders are doomed to fail.”<sup>50</sup> Ultimately, we must ask whether we care about children other than our own.<sup>51</sup>

As Americans, we do not like to regard our nation as a class society. This denial consumes enormous energy, and stories of hard working individuals who “pull themselves up by their bootstraps” have become a staple of contemporary mythology. The nomination of Justice Clarence Thomas to the United States Supreme Court unfolded as a ripe occasion for such drama. Or consider Hollywood movies that reflect our cultural attitudes. These movies “perpetuate the myth that there are no classes in America,” observes Benjamin DeMott.<sup>52</sup> We have “an ignoble tradition of evading social facts—pretending that individual episodes of upward mobility obviate grappling with the hardening socioeconomic [sic] differences in our midst. . . . [A]t their worst, these films are driven by near-total dedication to a scam—the maddening, dangerous deceit that there

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47. *Id.*

48. See Michael M. Burns, *Lessons from the Third World: Spirituality as the Source of Commitment to Affirmative Action*, 14 VT. L. REV. 401, 401 n.2 (1990).

49. Even those with humble beginnings may oppose equalization. “There’s no point to coming to a place like this, where schools are good, and then your taxes go back to the place where you began.” KOZOL, *supra* note 45, at 127-28.

50. Andrew Hacker, *Why the Rich Get Smarter*, N.Y. TIMES, Oct. 6, 1991, § 7 (Book Review), at 7.

51. ‘You cannot issue an appeal to conscience in New York today,’ a black school principal . . . [said]. ‘So you speak of violence and hope that it will scare the city into action.’ But even that tactic has not stirred suburban taxpayers, most of whom live well away from the war zones and, if anything, prefer to pay for bigger prisons than for better schools.

*Id.*

52. Benjamin DeMott, *In Hollywood, Class Doesn’t Put Up Much of a Struggle*, N.Y. TIMES, Jan. 20, 1991, § 2, at 1.

are no classes in America.”<sup>53</sup> This delusion of a meritocracy, in which “social strata are evanescent and meaningless,”<sup>54</sup> serves an important purpose:

It encourages the middle-class—those with the clearest shot at upward mobility—to assume, wrongly, that all citizens enjoy the same freedom of movement that they enjoy. And it makes it easier for political leaders to speak as though class power had nothing to do with the inequities of life in America. (“Class is for European democracies or something else,” says George Bush. “It isn’t for the United States of America. We are not going to be divided by class.”)<sup>55</sup>

While legislators and judges were pursuing an individualistic, libertarian course, social scientists uncovered and confirmed the existence of a permanent underclass, “impervious to changes in the economic structure” and “in a state of near total . . . social isolation.”<sup>56</sup> America’s challenge for the twenty-first century must be to address the widening gulf between rich and poor, the perpetuation of poverty from one generation to the next. In the eyes of our own people, to say nothing of the rest of the world, can we ever become, once again, a society “whose members have abiding obligations to one another”?<sup>57</sup>

### C. Social Darwinism on the Rise

How obscene must the disparity be to awaken us from our slumber? Is it not enough that “across the street from the White House the homeless are sleeping in Lafayette Square,”<sup>58</sup> that “within the shadow of the Capitol . . . a third of the children are poor, . . . an infant is less likely to see his first birthday than is a baby born in Cuba or Jamaica, . . . [and] some 1,300 children will spend tonight in homeless shelters?”<sup>59</sup> Is it not

53. *Id.* at 22.

One favorite story line stresses discovery: people who think firm class lines exist come to discover, by the end of the tale, that they’re mistaken; everybody’s really the same. . . .

A second familiar story line involves upendings: characters theoretically on the social bottom shake the cages of characters who try to use their position to humiliate those below. The top dogs are so stupid they don’t realize that socioeconomic power only lasts for a second and that they can be overcome by any intrepid underling. . . . [S]nobs are undone . . . .

*Id.* at 22.

54. *Id.*

55. *Id.*

56. Hirshman, *supra* note 9, at 1021 (footnote omitted).

57. Reich, *supra* note 37, at 45.

58. Tom Wicker, *Let ‘Em Eat Cake*, N.Y. TIMES, July 26, 1990, at A19.

59. William Raspberry, *No Victory Parades for the War on Poverty*, MIAMI HERALD, Oct. 1, 1991, at 21A.

enough that "32 million Americans are living in poverty [and] . . . 39 percent of them are children under 18. . ."760

America's poverty rate is double that of every continental European country.<sup>61</sup> Our poverty is "deeper, wider and longer-lasting," and our remedial efforts are "the least effective in the industrial world. . . ."<sup>62</sup> Although one-third to two-thirds of Western Europe's households were lifted out of poverty through generous and effective policies, our policies lifted hardly a single household out of poverty.<sup>63</sup> "It's simple," says one economist, "we choose to tolerate a lot more poverty than do some countries."<sup>64</sup>

The policies of Reaganomics, which have helped to transform hundreds of thousands of Americans into beggars while policymakers are paying lunch tabs equivalent to many families' weekly incomes, could not have been effectuated without public support. We have a tradition of conceptualizing poverty as a problem of individuals. Those of us who are white, privileged civil libertarians are often blind to issues of class politics and group rights. The values of individual achievement and unbridled competition, so touted by the Social Darwinists of each generation, are taking a firmer hold. Even those of us who regard ourselves as social democrats and/or as "products of the 1960s" often attribute our mid-career comforts to little more than individual talent and effort. The *laissez faire* philosophies of Herbert Spencer and William Graham Sumner are enjoying a renewed popularity.<sup>65</sup>

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60. Wicker, *supra* note 58, at A19.

61. Katherine McFate, *Poverty, Inequality and the Crisis of Social Policy*, JOINT CENTER FOR POL. AND ECON. STUD. 1 (1991).

62. Raspberry, *supra* note 59, at 21A.

63. McFate, *supra* note 61, at 29 (Figure 3).

64. Jason DeParle, *In Debate on U.S. Poverty, 2 Studies Fuel an Argument on Who is to Blame*, N.Y. TIMES, Oct. 29, 1991, at A20.

65. In Sumner's words:

Millionaires are a product of natural selection, acting on the whole body of men to pick out those who can meet the requirements of certain work to be done . . . . It is because they are thus selected that wealth—both their own and that entrusted to them—aggregates under their hands . . . . They may fairly be regarded as the naturally selected agents of society for certain work. They get high wages and live in luxury, for the bargain is a good one for society. There is the intensest [sic] competition for their place and occupation. This assures us that all who are competent for this function will be employed in it, so that the cost of it will be reduced to the lowest terms.

WILLIAM SUMNER, *THE CHALLENGE OF FACTS & OTHER ESSAYS* 90 (1914). Will and Ariel Durant echo a similar view:

Since practical ability differs from person to person, the majority of such abilities, in nearly all societies, is gathered in a minority of men. The concentration of wealth is a natural result of this concentration of ability, and regularly recurs in history. The rate of concentration varies . . . with the economic freedom permitted by morals and

Most of us subscribe to a paradigm that equates freedom and individual autonomy, that celebrates "individual integrity and expression, giving rise to the concept of inalienable human rights laid out in the founding documents of our nation."<sup>66</sup>

This heavy emphasis on individual achievement . . . is manifest in our capitalist society through the promotion of competitive behavior over cooperation and through a Social Darwinist view of nature. . . . Competition has been seen as the driving force of the economy and of [our adversary system of justice], as well. . . . [T]he ladder of hierarchy, which reflects a morality centered on individual rights and noninterference, has provided the framework for our legal system, [and often of our social policies as well].<sup>67</sup>

Our Bill of Rights simply defines "zones of autonomy, of noninterference"<sup>68</sup>; it is a document reflecting "the view from the ladder; safety from aggression [is] to be found not in connection with others but in rules reinforcing separation and non-interference."<sup>69</sup> We seek to ensure "that individuals are minimally circumscribed and constrained by society."<sup>70</sup> Thus, community is regarded as little more than "an artificial implant, necessary only to subdue humanity's essentially antisocial nature."<sup>71</sup> The essence of being human is thought to be self-centeredness and competitiveness, and any attempts to "produce" equality are, in the view of Oliver Wendell Holmes, "merely idealizing envy."<sup>72</sup> With limited government and a free market, the deserving will prosper, and trickle-down benefits will improve the lot of the lowliest. Frances Moore Lappe explains:

[I]ndividuals must be left free to pursue their own private interests, out of which spontaneously will emerge a workable whole. In other words: Tend to the parts, and the whole will take care of itself. Certainly that process of conscious, group decision-making toward common goals, usually called 'politics,' is always suspect. By all means, it must be kept outside our economic lives, that sanctuary of individual, private decision-making.<sup>73</sup>

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the laws. Despotism may for a time retard the concentration; democracy, allowing the most liberty, accelerates it.

WILL DURANT & ARIEL DURANT, *THE LESSONS OF HISTORY* 55 (1968).

66. LAPPE, *supra* note 34, at 7.

67. Michael M. Burns, *The Law School as a Model For Community*, 10 NOVA L.J. 329, 350 (1986).

68. Kenneth L. Karst, *Woman's Constitution*, 1984 DUKE L.J. 447, 486 (1984).

69. Burns, *supra* note 67, at 350 (quoting Karst, *supra* note 68, at 486) (footnotes omitted).

70. *Id.*

71. *Id.*

72. 2 HOLMES-LASKI LETTERS 942 (M. Howe ed. 1953).

73. LAPPE, *supra* note 34, at 10.

Without question, our celebration of individual autonomy has produced an admirable track record of personal achievement and respect, in certain arenas, for individual rights. These Western contributions to the progress of civilization are enormously significant. And yet, we must ask whether we have allowed our assumptions about human nature to "osify"<sup>74</sup> and to impede our development as a people and as a culture. In the pursuit of material well-being, we have allowed to develop pervasive "feelings of powerlessness, separateness, and fear."<sup>75</sup> Confirming the popular jokes about "shopping as therapy," our pursuit of excessive wealth reflects an anxiety about the state of our lives. As discussed below, we may achieve a more comfortable balance by attempting to incorporate values of relationship and inclusion often associated with Eastern philosophies.

### III. Responding to Beggars

#### A. Our Personal Responses

##### 1. *Internal Dialogues*

Certain forms of compassion, certain kinds of giving, are especially difficult. For me, and for most others I know, deciding whether to give money to someone on the streets of Miami or San Francisco or New York is almost always complicated and uncomfortable. We "live in cities full of appalling contrasts: the verminous tenements rub up beside the million-dollar developments; the high-rises tower over the ghettos."<sup>76</sup> We experience particular difficulty when we trip over a beggar living in a cardboard box as we leave a restaurant, where we may have just spent more on a meal than some people earn in a week, and then claim that we cannot spare some change. Sometimes I give, often I don't. I feel helpless, guilty, at times resentful. I may cross the street to avoid face-to-face contact with someone who is begging. Many among us simply avoid having to see such misery by moving to the suburbs, where poor people rarely go and the daily reminders are few. Indeed, most Americans live in economically segregated neighborhoods, so it is easier to ignore the problem altogether.

All sorts of rationalizations come to mind when I am faced with someone begging on the street. "Giving her my spare change won't really make any difference"; "He'll just buy more liquor with the money"; "I already gave to my favorite charity, and they'll make sure the money

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74. LAPPE, *supra* note 34, at 11.

75. *Id.*

76. Gibbs, *supra* note 1, at 70.

goes to those who really deserve it"; "People choose to live on the street—poverty is their own fault"; "I work for my money—why can't he?"; "Maybe he is one of those beggars I read about who makes a lucrative business out of this"; "Maybe this child has just been rented out by some professional to play on my emotions"; "Maybe I'm being taken advantage of"; and so on: the internal dialogue is endless. Father Robert Drinan comments on his own conflicting responses to beggars, admitting to his own "attitude of disdain, and even disgust"<sup>77</sup>:

I feel cowardly and unchristian when I avoid or hustle by a beggar on the street. I feel even worse if the beggar is a woman. I know I have a racist streak in me when I pay more attention to a white panhandler than to a black one. Overall, I feel I am bruising the beggars when I scorn their pleas. And I am not entirely convinced that I am helping them in the long run when I deny them the money they beseech.<sup>78</sup>

For many beggars, days are spent in isolation despite the urban bustle about them. Passersby routinely ignore them with eyes averted, a few hurl verbal insults, and even those who hastily drop a coin or two frequently avoid eye contact or an exchange of words. Beggars are surprised, sometimes frightened, if anyone actually touches or attempts to converse with them. After talking with a journalist, one beggar remarked, "This is the longest conversation I have had in several years."<sup>79</sup>

We are more inclined to give when a child is involved. Statistics indicate that women with children are the most successful beggars, followed by disabled persons. Given the state of the economy, we are inclined to listen sympathetically when one young mother explains that she is no longer embarrassed to ask strangers for money: "Compared to what others do, this is dignified. I'm not robbing people on the corner or selling my ass. I'm not going to sell drugs, and I'm not going to steal. What other choice do I have?"<sup>80</sup> If a beggar appears obviously emaciated and in fragile condition, we are apt to give freely. "It doesn't matter if her story is true or not," explains one subway passenger. "Her body tells the story." Another rider who gives her a dollar says, "I've been on the subways long enough to know who is real."<sup>81</sup>

On another day, in another mood, we may decide to give, but only on our own terms—a kind of controlled (and controlling) giving where

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77. Robert F. Drinan, *Brother, Can You Save a Dime, a Home, Respect?*, NAT'L CATH. REP., March 30, 1990, at 14.

78. *Id.*

79. Edward Barnes, *Beggars: They are our Most Public Citizens, Living and Dying Before our Eyes, But Who are They?*, LIFE, Nov. 1988, at 77.

80. *Id.* at 79.

81. *Id.* at 82.



we retain the power. In order to ensure that the tangible evidence of our benevolence is not abused or dissipated, we may offer to buy a beggar a sandwich rather than give money. "More often than not I'm turned down," reports one donor.<sup>82</sup> "However, I feel that in this way I am helping those who truly need and want help and not supporting someone's dependency."<sup>83</sup> Others who come across panhandlers often recommend carrying small items of food to give away; or they may prefer to give coupons, available from local government or a private charity, and redeemable for transportation, a meal, shelter, laundry, or a hot shower.<sup>84</sup>

Yet, on still other days, we may not be at all receptive to the wretched sideshow of beggars polluting our space. "A dirty smelling, disgusting person with his or her hand out is the last person I want in my face after a busy day in the office," explains an executive secretary. "I'm sorry that they are destitute, but I work hard to pay for my ride on the subways and deserve something a little more civilized."<sup>85</sup> Sick and tired of feeling guilty, we may find ourselves thinking, "Get a job, dammit." Supporting a beggar, says one passerby, "mocks the work ethic, fosters dependence, corrodes individual dignity and compounds the problem: the more handouts, the more hands are out."<sup>86</sup> For some of us, handouts are downright un-American. One businessman expresses a sentiment shared by many:

I have never given a red cent to a panhandler, and I never will . . . .  
I won't give anybody anything, but I will help somebody go  
through a trash can to pull out cans and claim the nickel deposit.  
People need to know that they have to work to get what they  
need.<sup>87</sup>

Too often our reluctance to give is also tied up with our fear of being conned. We are suspicious that many panhandlers are actually hustlers. *National Review* editor John O'Sullivan believes that "many beggars are frauds with adequate funds, [so] we have no reason to assume that any particular beggar is poor."<sup>88</sup> Former Mayor Ed Koch urged New Yorkers to stop giving to panhandlers because many "just don't want to

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82. Ed Wojcicki, *Give to Beggars for Christ's Sake*, U.S. CATH., Apr. 1989, at 14, 20 (quoting from a letter from Larry Effler, Knoxville, TN).

83. *Id.*

84. See Ira Eisenberg, *Berkeley's Answer to Begging*, N.Y. TIMES, Sept. 19, 1991, at A27.

85. Calvin Sims, *Some Police Skeptical of Any Plans to Roust Beggars*, N.Y. TIMES, May 12, 1990, at 25, 26.

86. Gibbs, *supra* note 1, at 70.

87. *Id.*

88. John O'Sullivan, *Justice Goes Begging; Judge Leonard Sand Rules that Begging is Free Speech*, NAT'L REV., Feb. 19, 1990, at 8.

work for a living.”<sup>89</sup> “I’ve come to the point where they’re all pros until proved otherwise,” says a Chicago priest. “We have been taken so many times.”<sup>90</sup>

Compounding our fear of being taken advantage of is fear for our physical safety—on darkened streets, perhaps, or in cavernous subways, “the city’s roaring underworld, where beggars play off the tight, visceral fear of riding the trains.”<sup>91</sup>

On the downtown N train to Brooklyn, a lanky, sallow-faced man in his early thirties sends a shudder through the cars as he grabs for the vertical bars to steady himself. “I have AIDS and no one helps me,” he hectors the wincing riders. “I have no protection at all. My insurance has run out. Nobody will hire me. Please, help me!” On the crowded car there is no way out, and the passengers often feel trapped into giving. “People who beg in the subway thoroughly intimidate me,” says . . . one woman. “I don’t believe their stories, and some of them appear to be able-bodied and capable if only they were not on drugs.”<sup>92</sup>

Yet, for all the evidence that some beggars may be slick operators of a sort, even they are operating out of acute and undeniable needs. “People beg because they need money, period,” argues Carol Fennelly of the Community for Creative Non-Violence in Washington. “You can’t get rich begging; you can’t even get comfortable.”<sup>93</sup> And it is hardly helpful to tell beggars to go get jobs that do not exist or for which they do not have the remotest chance of being hired, or to go to soup kitchens or shelters that are either inadequate or actively feared. A survey conducted by the U.S. Conference of Mayors revealed that the demand for emergency shelter increased 24% in 1989 and that 22% of those seeking emergency shelter were turned away for lack of space.<sup>94</sup> In addition, many of the homeless are no longer willing to stay in shelters; too often, the facilities are dirty, the conditions dangerous, and the treatment abusive.<sup>95</sup> Judge Harriet Franklin explains:

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89. Priscilla Painton, *Shrugging Off the Homeless*, TIME, Apr. 16, 1990, at 14.

90. Gibbs, *supra* note 1, at 71.

91. *Id.* at 74.

92. *Id.*

93. *Id.* at 68.

94. Mitchell Rich, *Mayors Report Surge in Emergency Food, Shelter Requests*, WASH. POST, Dec. 20, 1990, at A17.

95. Thomas Morgan, *Fear and Dependency Jostle in Shelters*, N.Y. TIMES, Nov. 4, 1991, at A2, A13. Consider the testimony of one homeless man given in a Washington, D.C. lawsuit:

Q: Why don’t you stay in the shelters at Blair and Pierce?

A: They’re filthy. The security officers disrespect me, and additionally, their toilets and showers are filthy with urine and feces . . . I been attacked several times. I been robbed of my things.

With few exceptions, homeless single persons who sleep on the street, in abandoned cars and buildings, in doorways, on park benches, etc., do not do so by choice. If there were safe, clean and accessible shelter for them, they would take advantage of it without hesitation, willingly complying with any applicable rules and regulations.<sup>96</sup>

Understandably, many of the most needy decline to enroll for welfare and other entitlement programs, preferring to fend for themselves on the streets, rather than developing a "dependency mentality" and suffering "the degradation of long welfare lines and condescending caseworkers."<sup>97</sup>

Street beggars may be rude and insolent, self-abusive, and unwilling to seek the treatment they obviously need, but that does not give us "a license to dismiss" these individuals with whom we share the sidewalk.<sup>98</sup> The fact that we as Americans have institutionalized our approach to every social problem affords a most comforting (and deceptive) rationalization for ignoring panhandlers. "How much better it would be to teach a person to fish so that he or she eats for a lifetime, rather than to give the person a fish to eat for a day," writes Catholic scholar Ed Wojcicki, "but not every moment is a teachable moment."<sup>99</sup>

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Q. In the fall of 1988, what was the condition of . . . of the bathrooms?

A. [M]ost of the toilets was condemned because they were flooded and had feces in them, and on the floor, and the others have feces on it, and the tiles and the floor was always wet with urine, and at Pierce the conditions was the same, the urine running into the showers. . . .

Q. What were the beds at Blair School like in the fall of 1988?

A. The beds were filthy. They full of lice. The covers was filled with lice, and nothing but one blanket and the beds very close. You can barely walk through them, and you never get the same bed.

Wohl, *supra* note 6, at 58 (testimony of Michael Atchison, homeless man, *Atchison v. Barry* (D.C. Sup. Ct. No. 88-CA-11976)).

96. *Id.* (Judge Harriet Franklin, Supplemental Findings of Fact, *Atchison v. Barry*, Jan. 12, 1989).

97. Ferguson, *supra* note 8, at 54. "All too often, services and events are developed by white, middle-class people," says Mike Neely, a 41-year old Vietnam vet who founded the Homeless Outreach Project in Los Angeles after sleeping on the streets for 18 months. "But when you look out there, the majority of the homeless are black or brown and have never been middle class and are never gonna be." *Id.* at 55. Author Peter Marin observes:

Every government program, almost every private project, is geared as much to the needs of those giving help as it is to the needs of the homeless. Go to any government agency or, for that matter, to most private charities, and you will find yourself enmeshed, at once, in a bureaucracy so tangled and oppressive, or confronted with so much moral arrogance and contempt, that you will be driven back out into the streets for relief.

Marin, *supra* note 11, at 47.

98. Wojcicki, *supra* note 82, at 14.

99. *Id.*

The dilemma remains complex and confusing—and immediate. Perhaps the best response is the simplest one: give what we can, guided by our innate sense of compassion rather than by our fears, our skepticism, and our urges to judge. Every time we walk away from an importuning hand, do we risk becoming a little harder, a little tougher, a little less like the persons we would like to be?<sup>100</sup>

## 2. *Who Gives (a Damn)?*

Information regarding those who give to panhandlers is largely anecdotal, but suggests that minorities, women and those least able to afford it are most generous.<sup>101</sup> During this recession, for example, the very wealthy are most likely to reduce their contributions or to stop giving altogether, while “people with less participate more because they are much closer to knowing what it feels like to lose a home or a job.”<sup>102</sup> Observes one sociologist, “There is some sense that giving will somehow help you at a later point if you need it—like a form of insurance.”<sup>103</sup>

For those of us who can best afford to give, writing a check to an acceptable charity seems to be the preferred method. To say that we are helping those most in need, however, may not be entirely accurate. The great bulk of checkbook charity is not even intended to help the poor. Studies reveal that most of charitable giving by those in the top income tax bracket is not directed to social services for the poor, but rather “to the places and institutions that entertain, inspire, cure, or educate wealthy Americans—art museums, opera houses, theaters, orchestras, ballet companies, private hospitals and elite universities.”<sup>104</sup> Nor are the wealthy particularly generous. The figures for 1990 demonstrate that Americans with incomes under \$10,000 gave an average of 5.5% of their earnings to charity, while those earning over \$100,000 gave only 2.9%.<sup>105</sup> The very wealthy—those earning more than \$500,000—gave

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100. Gibbs, *supra* note 1, at 71. See Marcia Ann Gillespie, *And the Man Cried I'm Hungry!*, Ms., Jan. 1988, at 32, 33.

101. “Blacks are generous, young women are generous,” observes Washington panhandler Lawrence Freedman. “When these panhandlers come through the subway cars,” says New York psychiatrist Ester Levin, “the men on the train seem to say, ‘You’ve got to help yourself, pal,’ while the women tend to identify with them.” Gibbs, *supra* note 1, at 73. Reportedly, four times as many women give as do men. “People driving Jaguars, they give you fifty cents and tell you not to buy booze,” says one female panhandler. “You go to a black neighborhood, it’s no big deal for them to give you \$2, \$3, \$5, or \$20 for that matter. They’re more receptive to being poor.” Gibbs, *supra* note 1, at 73.

102. *The Empathy Factor*, NEWSWEEK, Jan. 13, 1992, at 23 (quoting Virginia Hodgkinson, vice-president for research at Independent Sector in Washington, D.C.).

103. *Id.*

104. Reich, *supra* note 37, at 43.

105. *Id.*

an average of \$47,432 in 1980, but after the 1986 tax code revisions reduced the benefits of charitable giving, gave an average of \$16,062 in 1988.<sup>106</sup> Corporate philanthropy is apparently following the same general pattern.<sup>107</sup>

Our personal sense of stability in the world, however, is more revealing with respect to who gives to beggars on the street, than is race or gender or class. At one extreme, one may give freely and democratically: "If he's desperate enough to ask, it's not my business how he spends it." At the other extreme, one may never give because, says one New Yorker, "she suspects every beggar is making a fool of her. To give, she feels, is to be taken."<sup>108</sup> These extremes do not fall along liberal-conservative lines, nor do they depend on the size of one's bank account. Rather, our responses to beggars reflect our "degree of suspicion of the world and safety in it, [our] reflexive response to the unexpected and unwelcome."<sup>109</sup> As will be discussed in Part V below, "like public clocks that drive compulsives to check their watches, beggars make us check our inner dials of plenitude or neediness, well-being or instability. The readings determine whether and what we give."<sup>110</sup>

## B. Governmental Responses

### 1. Common Law

#### a. Duty to Render Assistance

"Deeply rooted in the common law, and based upon that extreme individualism typical of Anglo-Saxon legal thought, is the doctrine that a person owes no duty to aid another in distress, and, more specifically, that in the absence of some special relationship, he owes no duty to render assistance to one for whose initial injury he is not liable."<sup>111</sup> Thus, for example, "[t]he expert swimmer, with a boat and a rope at hand, who sees another drowning before his eyes, is not required to do anything at all about it, but may sit on the dock, smoke his cigarette, and watch the man drown."<sup>112</sup> We may hope that citizens will become good

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106. *Id.*

107. *Id.*

108. Lynne S. Schwartz, *Beggaring Our Better Selves*, HARPER'S MAG., Dec. 1991, at 62, 63.

109. *Id.*

110. *Id.*

111. Jonathan M. Purver, Annotation, *Duty of One Other Than Carrier or Employer to Render Assistance to One for Whose Initial Injury He is Not Liable*, 33 A.L.R. 3D 301, 303 (1970) (citations omitted).

112. W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 56, at 375 (5th ed. 1984).

samaritans when motivated by a higher law or by their conscience. But, the good samaritan cannot rightfully claim that title if forced to act by legal mandate.<sup>113</sup>

Beginning with Professor James Barr Ames's oft-cited article<sup>114</sup> published in 1908, numerous commentators have severely criticized the amorality of the common law rule.<sup>115</sup> Following the example of twelve European countries<sup>116</sup> whose laws require that those witnessing a person in serious peril must undertake reasonable assistance, Vermont and Minnesota have imposed on their citizenry an affirmative duty of safe rescue; a duty to rescue when there is no danger to the rescuer.<sup>117</sup> No cases have arisen under the Vermont statute, and the Minnesota statute was only peripheral to a recent decision finding a duty to rescue where a host relationship existed.<sup>118</sup>

Arguably, imposing a legal duty to rescue, even if it is narrowly defined and infrequently enforced, might make such behavior more desirable to citizens.<sup>119</sup> One commentator has cited a study and surveys in Europe and the United States suggesting that people who believe that they are subject to a legal duty to rescue will view inaction more harshly than people who believe that the law does not require rescue.<sup>120</sup> If appeals to morality are not enough, perhaps the carrot-and-stick approach,

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113. As Linda R. Hirshman explains, *see* Hirshman, *supra* note 9, this scheme of minimal duties under the law reflects a traditional reading of John Locke, rather than the modestly affirmative approach of John Rawls, which suggests a "natural duty" of low-risk "mutual aid," JOHN RAWLS, *A THEORY OF JUSTICE* 114-15 (1971), or the more extreme position of contemporary utilitarian Peter Singer, which requires that "if it is in our power to prevent something bad from happening, without thereby sacrificing anything of comparable moral importance, we ought, morally, to do it." Peter Singer, *Famine, Affluence and Morality*, 1 PHIL. & PUB. AFF. 229, 231 (1972).

114. James Barr Ames, *Law and Morals*, 22 HARV. L. REV. 97, 113 (1908).

115. *See* Mary R. White, Comment, *The Duty to Rescue*, 28 U. PITT. L. REV. 61 (1966); Comment, *Assumed Duty*, 32 A.T.L. L.J. 696 (1968); and Note, *The Failure to Rescue: A Comparative Study*, 52 COLUM. L. REV. 631 (1952).

116. Czechoslovakia, Denmark, France, Germany, Hungary, Italy, Netherlands, Norway, Portugal, Rumania, Russia, and Turkey. *See* Aleksander W. Rudzinski, *The Duty to Rescue: A Comparative Analysis*, in *THE GOOD SAMARITAN & THE LAW* (James M. Ratcliffe ed., 1966).

117. VT. STAT. ANN. tit. 12, § 519 (1973); MINN. STAT. § 604.05 (1990).

118. *Tiedeman v. Morgan*, 435 N.W.2d 86 (Minn. Ct. App. 1989).

119. Marc A. Franklin, *Vermont Requires Rescue: A Comment*, 25 STAN. L. REV. 51, 58 (1972).

120. *Id.* at 58 n.51 (quoting Harry Kaufmann, *Legality and Harmfulness of a Bystander's Failure to Intervene as Determinants of Moral Judgment*, in *ALTRUISM AND HELPING BEHAVIOR: SOCIAL PSYCHOLOGICAL STUDIES OF SOME ANTECEDENTS AND CONSEQUENCES* (J. Macaulay & L. Berkowitz eds., 1970)).

since it serves to influence civic conduct, is worth our consideration.<sup>121</sup>

But even the legal imposition of a generalized duty of safe rescue would likely not apply to the plight of beggars on the street. Professor Marshall Shapo explains:

[When] the plaintiff's peril is one of slow death, and . . . defendant's failure to expend energies to save him is no more than part of a generally lackadaisical attitude . . . of society . . . , as a matter of tort theory as well as philosophy, the determination of causation would become impractical. In the case of one dying of starvation, the difficulty lies only partly in the problem of trying to fix responsibility at a given point in time. It inheres more profoundly in the fact that the failure of one passerby to give him money or food is inseparable not only from the inaction of scores of others but also from that of society itself. Though the tragedy is not lessened, diffusion makes it virtually impossible to fix responsibility except politically.<sup>122</sup>

In a practical, legal, and technical sense, Shapo's conclusion is unsailable. But as argued throughout this paper, laws serve larger, long-range purposes. A society seeking to strike some balance between rugged individualism and community responsibility may well need to consider legislation that reflects communitarian values despite problems of conventional categorization and proper pigeonholing.

b. *Necessity Defense*

As noted above, the common law fails to impose a duty to render aid to those desperately in need of food and shelter; it also effectively precludes the use of the necessity defense by beggars when they have been charged with violating legislative bans on begging.<sup>123</sup>

The defense of necessity, also referred to as the choice of evils doctrine, has developed over many years in the common law of England and the United States. This doctrine is based on the premise that sometimes an individual may have to choose between violating the letter of the law and complying with the law while producing a much greater harm. If the harm resulting from compliance is greater than that which would result from noncompliance, the individual, by virtue of the necessity defense, is justified in not complying with the law.<sup>124</sup> The necessity defense

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121. For arguments against imposing such a duty, see William M. Landes & Richard A. Posner, *Salvors, Finders, Good Samaritans and Other Rescuers: An Economic Study of Law and Altruism*, 7 J. OF LEGAL STUD. 83, 91-92 (1978).

122. MARSHALL S. SHAPO, *THE DUTY TO ACT: TORT LAW, POWER, & PUBLIC POLICY* 68 (1977) (citations omitted).

123. See *infra* notes 142-72 and accompanying text.

124. See WAYNE R. LAFAVE & AUSTIN W. SCOTT, *CRIMINAL LAW*, § 5.4 (2d ed. 1986). [hereinafter LAFAVE & SCOTT].

makes legitimate conduct that "promotes some value higher than the value of literal compliance with the law."<sup>125</sup>

Fearing abuse of the doctrine, American courts narrowly restricted the use of the necessity defense. Today, the following criteria are generally accepted as the elements of the defense: (1) the defendant must have acted with the intention of avoiding the greater harm; (2) the actor honestly and reasonably believed that his or her actions were necessary to avoid the greater harm; (3) the actor had no reasonable, legal alternative means of avoiding the threatened harm; (4) the actor was without fault in bringing about the situation calling for the choice of evils; and (5) the harm the actor sought to avoid is greater than the harm created by the criminal offense committed.<sup>126</sup>

Often the courts will exclude the defense before trial by holding that the defendant has been unable to raise an issue of fact under one or more of the elements of the defense.<sup>127</sup> As a result, juries are prohibited from even considering the defense. Cases where the defense has been permitted and has ultimately prevailed (necessity excused the conduct) include a policeman speeding in an emergency,<sup>128</sup> a doctor performing an abortion on a young rape victim whose life was endangered,<sup>129</sup> and a parent withdrawing her children from school because of their ill health despite compulsory attendance laws.<sup>130</sup>

Recently, the doctrine of necessity was employed in political protest cases involving, for example, the Vietnam War, the use of nuclear power

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125. GLANVILLE WILLIAMS, *CRIMINAL LAW* § 229 (2d ed. 1961). Historically, the necessity defense could only be used when the harm to be caused, or the predicament, was created by natural forces such as a storm or fire. For example, a severely storm damaged ship was justified in entering a port in violation of the embargo laws, *The William Gray*, 29 F. Cas. 1300 (C.C.D.N.Y. 1810) (No. 17,694), and sailors were justified in mutiny once their ship had become unseaworthy, *United States v. Ashton*, 24 F. Cas. 873 (C.C.D. Mass. 1834) (No. 14,470). More recently, courts have been willing to recognize harm that emanates from human sources as well as natural sources. For example, prison inmates have been permitted to raise the necessity defense in cases of escape to avoid imminent and serious threats of death or assault from other prisoners. See *People v. Lovercamp*, 118 Cal. Rptr. 110 (Ct. App. 1974). However, there is some case law that states that "[w]hen the harm emanates from a human source, the harm must be unlawful before the necessity defense can be used." *City of Akron v. Detwiler*, No. 14385, slip op. at 2 (Ohio App. July 5, 1990), *aff'd*, 565 N.E.2d 602 (Ohio 1990).

126. See LAFAYE & SCOTT, *supra* note 124, at 445. Commentators and courts sometimes invoke a sixth element: 6) the legislature has not made a statutory pre-determination of values for the situation confronting the actor. See Arlene D. Boxerman, *Commentary, The Use of the Necessity Defense by Abortion Clinic Protesters*, 81 J. CRIM. L. & CRIMINOLOGY 677 (1990). See also MODEL PENAL CODE § 3.02 (1962).

127. Steven M. Bauer & Peter J. Eckerstrom, Note, *The State Made Me Do It: The Applicability of the Necessity Defense to Civil Disobedience*, 39 STAN. L. REV. 1173 (1987).

128. See *State v. Gorham*, 188 P. 457 (Wash. 1920).

129. See *Rex v. Bourne*, 1 K.B. 687 (1938).

130. See *State v. Jackson*, 53 A. 1021 (N.H. 1902).



and nuclear weapons, intervention in El Salvador, and the practice of abortion.<sup>131</sup> Most of these cases arise when protesters are arrested for trespassing, and they attempt to use the necessity defense to justify their conduct. In the vast majority of cases, the courts, finding one or more requisite elements lacking, did not allow the jury to consider the defense. For example, in a case involving the burning of draft board records, the court determined that it would be unreasonable for the defendant to assume that his actions would have any significant deterrent effect upon the supposed ills that he hoped to remedy—that is, on the immediate risk to life and health engendered by the waging of the Vietnam War.<sup>132</sup>

Today, many states have codified the necessity defense, and most of these statutes incorporate elements similar to those found in the common law.<sup>133</sup> Here, too, the courts have generally not permitted the defense to be presented. For example, in *Andrews v. People*,<sup>134</sup> protestors at a nuclear weapons factory in Colorado were arrested for obstructing a roadway. The court relied on the applicable statute, requiring the defendant to establish that the crime committed was necessary to prevent an imminent injury, that no viable or reasonable alternatives existed, and that a causal connection linked the harm sought to be prevented and the actions used to abate the harm. In this case, the court concluded that there was no proof (1) that there was a specific, definite, and imminent injury about to occur; (2) that the protest was necessary to bring about the termination or prevention of the harm they were protesting; and (3) that other

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131. See *United States v. Simpson*, 400 F.2d 515 (9th Cir. 1972); *Linnehan v. State*, 454 So.2d 625 (Fla. Dist. Ct. App. 1984); *Andrews v. People*, 800 P.2d 607 (Colo. 1990); *People v. Jarka*, No. 002170 (Lake County Ct., Ill.); *Moses v. State*, 814 S.W.2d 437 (Tex. Ct. App. 1991).

132. *United States v. Simpson*, 460 F.2d 515 (9th Cir. 1972). See also *United States v. Kroncke*, 459 F.2d 697 (8th Cir. 1972) (protesting at Selective Service office); *Linnehan v. State*, 454 So. 2d 625 (Fla. Dist. Ct. App. 1984) (protesting at nuclear weapons plant); *United States v. Kabat* 797 F.2d 580 (8th Cir. 1986) (protesting at nuclear weapons plant); and *United States v. Schoon*, 939 F.2d 826 (9th Cir. 1991) (protesting at the IRS against U.S. involvement in El Salvador).

133. For example, in *People v. Alderson*, 540 N.Y.S.2d 948 (N.Y. Crim. Ct. 1989), a case involving protestors at the New York City Department of Health, the court cited P.L. § 35.05(2) and enunciated four requisite elements: (1) the actor must reasonably believe that his conduct is necessary to avoid the evil; (2) the harm to be prevented must be imminent; (3) there must be no alternative options available to the defendants; and (4) the action taken by defendants must be reasonably designed to prevent the threatened harm. Applying these elements, the court found that the defendants could not employ the necessity defense when they entered the Department to “discuss” the recent report on AIDS cases in New York. The court found that there was no emergency, that the action was not reasonably designed to accomplish the end, and that there were alternatives available. *Id.*

134. 800 P.2d 607 (Colo. 1990) (en banc).

alternatives were futile.<sup>135</sup>

Only rarely have the courts allowed the necessity defense in political protest cases. In *People v. Jarka*,<sup>136</sup> the defendants were arrested at the Great Lakes Naval Base in Illinois while protesting U.S. government involvement in Central America. The judge allowed the necessity defense after counsel argued that the defendants' actions were justified as an effort to stop the government action.<sup>137</sup>

During the past several years, the necessity defense has been raised by abortion clinic protestors, who contend that they have trespassed in order to prevent an immediate harm, the murder of unborn children. They argue that the causal link is much weaker in other protest cases; for example, protesting outside a nuclear weapons plant is unlikely to lessen the likelihood of nuclear war. However, the courts have not been quick to embrace this argument, noting instead that abortion is legal under *Roe v. Wade* and that, therefore, there is no harm to avoid.<sup>138</sup>

Most recently, the necessity defense emerged in the context of homelessness. In New York, a man was arrested for trespassing in an abandoned apartment building where he had sought shelter during a

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135. *Id.* at 610-11.

136. No. 002170 (Lake County Ct., Ill.).

137. See also *Massachusetts v. Caldira*, where defendants, including Abbie Hoffman and Amy Carter, were arrested for trespassing and disorderly conduct stemming from a protest at the University of Massachusetts against CIA involvement in Central America. In pretrial negotiations, the defense and prosecution struck a deal whereby the prosecutor would try the defendants as one group and the defense would concede that the defendants defied police orders, and, in exchange, the defense would be allowed to plead the necessity defense. During the trial, the defendants argued that the crimes they committed were of far lesser harm than those being committed by the CIA in Central America. In his jury instructions, the judge told the panel that they could acquit the defendants if the jury believed that the defendants acted out of a belief that their protest would help stop the clear and immediate threat of public harm. Three hours later the defendants were acquitted. See Rick Hornung, *Necessity, Is it the Mother of Acquittals?*, 9 NAT'L L.J., May 4, 1987, at 6.

138. In *Moses v. State*, 814 S.W.2d 437 (Tex. Ct. App. 1991), for example, defendants were arrested for trespassing outside an abortion clinic in Austin. The court relied on a Texas necessity defense statute which has similar elements to the common law defense. The court stated that the predicate requirement for invoking the defense is that the harm the actor assertedly seeks to prevent must first be an illegal harm. Because there was no evidence that the procedures being performed at the clinic were outside the boundaries of *Roe v. Wade*, the protestors were precluded from using the necessity defense. See also *Allison v. City of Birmingham*, 580 So. 2d 1377 (Ala. Crim. App. 1991). "[I]t is unreasonable to believe that one must commit an act of criminal trespass in order to prevent an activity that is legal and constitutionally protected." *Id.* at 1382 (citing *State v. Horn*, 377 N.W.2d 176, 180 (Wis. 1985), *aff'd*, 407 N.W.2d 854 (Wis. 1987)). While the vast majority of courts have rejected the use of the necessity defense in the abortion protest cases, an occasional lower court has allowed the defense. See *Ohio v. Rinear*, No. 78CRB-3707 (Hamilton County Mun. Ct. 1978) (prosecution dropped after court ruled it would allow defense to go to jury). Unfortunately, these decisions are unreported, and the reasoning of the court cannot be adequately analyzed.

night of very bad weather. The defense attorneys planned to use the necessity defense, but the prosecution withdrew the charges.<sup>139</sup> In a pending Florida case, *Pottinger v. City of Miami*,<sup>140</sup> defense attorneys hope to use the necessity defense on behalf of homeless people who are harassed and arrested for conduct such as sleeping, urinating, and bathing in public, which is necessary for their very existence.

There is insufficient free shelter for these thousands who are too poor or ill to secure shelter for themselves. . . . Therefore, [they] . . . have no choice but to live, and to engage in those acts necessary to maintain life upon the public streets, sidewalks, alleys and parks within the City of Miami.<sup>141</sup>

If the necessity defense were offered to the criminal charge of violating a begging prohibition, a court would be required to invoke the five common law elements of the defense or their statutory equivalents. The harm the beggar hopes to avoid is deteriorating health or starvation. The beggar believes that begging will avoid the harm. The harm to be avoided is greater than the harm committed. The two remaining elements, however, are troubling: they require (1) no fault on the part of

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139. *People v. Pierce*, No. 13765-89 (Nassau County Dist. Ct., 1990) (verified by conversation with Professor Alan Levine, Hofstra University School of Law, who was defense attorney in case).

140. *Pottinger v. City of Miami*, No. 88-2406 (S.D. Fla. filed Dec. 23, 1988).

141. Plaintiff's Memorandum in Opposition to Defendant City of Miami's Motion to Dismiss or for Summary Judgment, *Pottinger v. City of Miami* (No. 88-2406) at 1. In our increasingly privatized society, there are fewer and fewer places where the homeless are allowed to be. Were the libertarian fantasy—eliminating public property altogether ("Sell the Streets," Jeremy Waldron, *Homelessness and the Issue of Freedom*, 39 *UCLA L. REV.* 295, 300 (1991))—to come true, the impact on the homeless would be catastrophic for there would be literally no place where they would be allowed to be. To the extent that our society retains some property for common use, we save the homeless from this catastrophe. But even this safety net is developing gaping holes as our legislators increasingly restrict the kind of behavior permitted on sidewalks, in subways, and in parks.

What is emerging . . . is a state of affairs in which a million or more citizens have no place to perform elementary human activities like urinating, washing, sleeping, cooking, eating, and standing around. Legislators voted for by people who own private places in which they can do all these things are increasingly deciding to make public places available only for activities other than these primal human tasks. The streets and subways, they say, are for commuting from home to office. They are not for sleeping, sleeping is something one does at home. The parks are for recreations like walking and informal ball-games, things for which one's own yard is a little too confined. Parks are not for cooking or urinating; again, these are things one does at home. Since the public and private are complementary, the activities performed in public are to be the complement of those appropriately performed in private. This complementarity works fine for those who have the benefit of both sorts of places. However, it is disastrous for those who must live their whole lives on common land. . . . [I]t is one of the most callous and tyrannical exercises of power in modern time by a (comparatively) rich and complacent majority against a minority of less fortunate fellow human beings.

*Id.* at 301-02.

the actor in bringing about the situation, and (2) an absence of reasonable, legal alternative means of avoiding the harm. These are factual questions involving the particular condition of the beggar and the practical availability of necessary social services — an opportunity ripe for a Brandeis brief addressing the causes of poverty in the Reagan-Bush era and the inadequacy of emergency service band-aids.

## 2. *Legislative Bans & Regulations*

If one finds the common law's failure to come to the aid of the neediest among us dispiriting, one may feel more disturbed that twenty-eight states and numerous municipalities prohibit begging in one form or another.<sup>142</sup> Bans or restrictions on begging have a storied history, but they, and laws aimed in various ways at the homeless, are enjoying a recent

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142. Twenty-eight states (including the District of Columbia) prohibit begging in some form. Six states prohibit loitering for the purpose of begging: ALA. CODE § 13A-11-9(a)(1) (1982); ARIZ. REV. STAT. ANN. § 13-2905(A)(3) (1989); ARK. CODE ANN. § 5-71-213(a)(3) (Michie 1987); COLO. REV. STAT. § 18-9-112(2)(a) (1986); DEL. CODE ANN. tit. 11, § 1321(4) (1987); N.Y. PENAL LAW § 240.35(1) (McKinney 1983). Four states prohibit begging as disorderly conduct: CAL. PENAL CODE § 647(c) (West 1983) (accosting persons for purpose of begging); HAW. REV. STAT. § 711-1101(1)(e) (1985) (impedes or obstructs people for purpose of begging); MICH. COMP. LAWS ANN. § 750.167(1)(h) (West 1990); N.C. GEN. STAT. § 14-444(a)(5) (1982) (begging while intoxicated). Eight states prohibit begging as vagrancy: KAN. STAT. ANN. § 21-4108(e) (1988) (prohibition on deriving support from begging); LA. REV. STAT. ANN. § 14:107(3) (West 1986) (prohibition of able bodied persons begging *except* bona fide organizations); MASS. GEN. LAWS ANN. ch. 272, § 66 (West 1988); MINN. STAT. ANN. § 609.725(4) (West 1987); MISS. CODE ANN. § 97-35-37(g) (1972); NEV. REV. STAT. ANN. § 207.030(1)(d), (e) (Michie 1987) (accosts persons or goes house to house); VT. STAT. ANN. tit. 13, § 3901 (1989); WIS. STAT. ANN. § 947.02(4) (West 1988) (derives part of support from begging). One state prohibits begging as a tramp: MASS. GEN. LAWS ANN. ch. 272, § 63 (West 1988). Three states prohibit begging in specific places: D.C. CODE ANN. § 9-110 (1981) (on Capitol grounds); GA. CODE ANN. § 50-9-9(b) (Michie 1982) (on state controlled property); N.J. STAT. ANN. § 32: 1-146.6(1)(d) (West 1989) (on Port Authority property). Ten states have regulations on children begging: CAL. LAB. CODE § 1308 (West 1983); IDAHO CODE § 44-1306 (1990); ILL. ANN. STAT. ch. 23, para. 2351 (Smith-Hurd 1989); KY. REV. STAT. ANN. § 201.090(2) (Michie/Bobbs-Merrill 1981); LA. REV. STAT. ANN. § 14:92.1 (West 1986); MASS. GEN. LAWS ANN. ch. 272, § 58 (West 1988); MO. ANN. STAT. § 294.043 (Vernon 1983); NEV. REV. STAT. ANN. § 609.210(1) (Michie 1987); N.Y. ARTS & CULT. AFF. LAW § 35.07(1)(c) (McKinney 1983); R.I. GEN. LAWS § 11-9-1(a) (1989). Three states prohibit begging to purchase alcohol: ALASKA STAT. § 04.16.020(b) (1986); CAL. PENAL CODE § 303(a) (West 1983); FLA. STAT. ANN. § 562.131(2) (West 1989).

Of these twenty-eight states, four also give the power to local governmental bodies to regulate begging: ARK. CODE ANN. § 14-54-1408 (Michie 1987); ILL. ANN. STAT. ch. 24, para. 11-5-4 (Smith-Hurd 1989); N.J. STAT. ANN. § 40:48-1 (West 1989); N.C. GEN. STAT. § 160A-179 (1982). Furthermore, eleven additional states give the power to local governmental bodies to regulate begging: IND. CODE ANN. § 36-1-3-4 (Burns 1981) (case law interpretation that statute includes begging in powers delegated to local bodies); MONT. CODE ANN. § 7-32-4304 (1989); NEB. REV. STAT. §§ 14-102(23), 15-257, 16-229 (1987); N.H. REV. STAT. ANN. § 47:17(XIII) (1990); N.D. CENT. CODE § 40-05-01(43) (1989); OHIO REV. CODE ANN. § 715.55(B) (Anderson 1989); S.D. CODIFIED LAWS ANN. § 9-29-10(1981); UTAH CODE

resurgence in popularity in the aftermath of the Reagan years. Seattle has enacted an ordinance, subsequently upheld by the courts, making "aggressive begging" a crime.<sup>143</sup> Minneapolis now forbids any person to "grab, follow, or engage in conduct which reasonably tends to arouse alarm or anger in others . . . ."<sup>144</sup> Portland has enacted a similar "pedestrian interference" law.<sup>145</sup> New York's transit authority has banned panhandling in the subway system (and has survived constitutional challenges).<sup>146</sup> As part of its whitewashing campaign for the 1996 Olympics, Atlanta made it a crime to panhandle in a manner that causes a "reasonable person to fear imminent bodily harm" or "in close proximity" to a person who has said No.<sup>147</sup> Motorists in many cities have been feeling intimidated by the onslaught of "windshield washers" at stoplights; in Miami, these entrepreneurs now face a fine and jail time.<sup>148</sup> Officials concede that the ordinances are difficult to enforce but are useful as threats. Says Seattle Police Captain Jim Deschane, "We still have some incidents, but the number and the amount of aggression and intimidation are way down . . . ." <sup>149</sup>

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ANN. § 10-8-51 (1990); WASH. REV. CODE ANN. § 35.22.280(34) (West 1987); W. VA. CODE § 8-21-10 (1990); WYO. STAT. § 15-1-103(a)(xvii) (1990).

143. SEATTLE, WA., MUN. CODE § 12A.12.015(c)(A) (1) (1987) (Seattle Pedestrian Interference Ordinance); *Seattle v. Webster*, 802 P.2d 1333 (Wash. Ct. App. 1990), *cert. denied*, 111 S.Ct. 1690 (1991).

144. MINNEAPOLIS, MINN., CHARTER AND CODE OF ORDINANCES tit. 15, § 385.65 (1988) (Interference with Pedestrian or Vehicular Traffic).

145. PORTLAND, OR., CITY CODE § 14.24.040 (1984) (quoted in Anthony J. Rose, Note, *The Beggar's Free Speech Claim*, 65 IND. L. J. 191, 215 n.121 (1989)).

146. *Young v. New York City Transit Auth.*, 729 F. Supp. 341 (S.D.N.Y. 1990), *rev'd in part, vacated in part*, 903 F.2d 146 (2d Cir. 1990), *cert. denied*, 111 S.Ct. 516 (1990); M.T.A. Regulations, Port Authority of New York and New Jersey Rules, and New York State Penal Code § 240.35 (l).

147. ATLANTA, GA., CODE OF ORDINANCES § 17-3006 (1991).

148. DADE COUNTY, FLA., ORDINANCE § 21-36.1 (effective Feb. 1989).

149. Gibbs, *supra* note 1, at 74. In addition to crackdowns on panhandlers, the homeless generally have been feeling the assault. In 1990, Santa Barbara forbade people without homes to sleep on sidewalks or beaches or in parking lots, thus leaving them to sleep on a public lot "where they are out of sight of downtown boutiques." Wilkerson, *supra* note 2 at A1. And one downtown plaza is being rebuilt to remove the seats, which are thought to invite the homeless. "Our goal is to make things as uncomfortable for them as we can so they can move on," said Pete Gherini, president of the Santa Barbara Chamber of Commerce. "When you look at these characters sitting out in the middle of the day when everybody else is working just to survive, you don't get a lot of sympathy." *Id.* See also Mike Davis, *Afterword—A Logic Like Hell's: Being Homeless in Los Angeles*, 39 UCLA L. REV. 325, 330 (1991). Many cities are installing metal armrests on downtown benches ("bum-proofing") to prevent people from sleeping, or eliminating public restrooms, "of which there are precious few in America," Waldron, *supra* note 141, at 311. The University of California has built volleyball courts in People's Park, Jonathan Rabinovitz, *People's Park Struggle Resumes After 20 Years*, N.Y. TIMES, Apr. 24, 1989, at 12, and the tent city in New York's Tompkins Square Park has been cleared under a massive 24 hour police presence. Nick Ravo, *Tompkins Sq. Skirmish at Symbolic*

### 3. *Judicial Responses to Bans and Regulations*

The dearth of cases addressing the constitutional rights of beggars is attributable, as one court observed, "to this particular segment of society not having the ability or wherewithal to pursue the challenge."<sup>150</sup> Only five cases appear to occupy the field: *Ulmer v. Municipal Court for the Oakland-Piedmont Judicial District*,<sup>151</sup> *C.C.B. v. State*,<sup>152</sup> *Young v. New York City Transit Authority*,<sup>153</sup> *Seattle v. Webster*<sup>154</sup> and *Blair v. Shanahan*,<sup>155</sup> arising in, respectively, California, Florida, New York, Washington, and again in California.

In *Ulmer*, the California Supreme Court upheld a statute that banned accosting passersby for the purpose of begging,<sup>156</sup> yet that permitted passive begging as well as solicitations by recognized charities.<sup>157</sup> "Begging and soliciting for alms do not necessarily involve the communication of information or opinion," reasoned the court.<sup>158</sup> Thus, the regulation of such conduct bore "no necessary relationship"<sup>159</sup> to First Amendment freedoms. The court summarily dismissed the argument that begging is constitutionally protected and, as one commentator has

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*Tents*, N.Y. TIMES, July 9, 1989, at 24. Architects for public and private buildings are being asked to eliminate street-level ledges, to design planters taller than "sitting" height, to avoid creating "nooks and crannies", to provide for fences around open spaces, to reduce shrubbery so that no one can sleep out of view, and to do whatever possible to insure that those without homes move on to the next block. *Making Homeless Feel Not at Home*, S.F. CHRON., Aug. 1, 1991, at A1.

In Fort Lauderdale, a city commissioner suggested rat poison as a topping for local garbage to discourage foraging. A member of the Los Angeles County Board of Supervisors advocated placing the homeless on a barge in Los Angeles Harbor. In El Paso, four billboards of unknown sponsorship sprang up: "Please Don't Give To Beggars - They Cause Traffic Problems." El Paso representative Ed Elsey has received complaints that some panhandlers scratch cars with rocks or spit on the windshield if drivers refuse to give. "They are becoming more aggressive," says Elsey. "It's time for the city to get involved." Gibbs, *supra* note 1, at 74. In short, an enormous amount of time and money is spent moving people around like so much furniture.

150. *C.C.B. v. State*, 458 So. 2d 47 (Fla. Dist. Ct. App. 1984).

151. 127 Cal. Rptr. 445 (Ct. App. 1976).

152. 458 So. 2d at 47.

153. 729 F. Supp. 341 (S.D.N.Y. 1990), *rev'd in part, vacated in part*, 903 F.2d 146 (2d Cir. 1990), *cert. denied*, 111 S. Ct. 516 (1990).

154. 802 P.2d 1333 (Wash. 1990) (en banc), *cert denied*, 111 S.Ct. 1690 (1991).

155. 775 F. Supp. 1315 (N.D. Cal. 1991).

156. CAL. PENAL CODE § 647(c) (West 1987) ("accost[ing] other persons in any public place or in any place open to the public for the purpose of begging or soliciting alms").

157. The court explained that the statutory prohibition was not intended to include "the blind or crippled person who merely sits or stands by the wayside . . . [or] the Salvation Army worker who solicits funds for charity on the streets at Christmas time . . . ." *Ulmer v. Municipal Court for the Oakland-Piedmont Judicial Dist.*, 127 Cal. Rptr. 445, 446 (Ct. App. 1976).

158. *Id.*

159. *Id.*

accurately noted, "provided no analysis of applicable precedent which could be useful in seriously addressing the issue."<sup>160</sup>

In *C.C.B.*, a Florida appellate court struck down a Jacksonville begging ban,<sup>161</sup> rejecting as inadequate the city's interests in controlling "undue annoyance on the streets" and in preventing "the blocking of vehicle and pedestrian traffic."<sup>162</sup> The court declared that "a total prohibition of begging or soliciting alms for oneself is an unconstitutional abridgment of the right to free speech . . . . No compelling reason justifies that total abridgement. Protecting citizens from mere annoyance is not a sufficient compelling reason to absolutely deprive one of a first amendment right."<sup>163</sup>

In addition, the *C.C.B.* court was troubled by the statutory distinction drawn between soliciting contributions on one's own behalf, which was absolutely prohibited, and soliciting contributions on behalf of a charitable organization, which was permitted. The court decried the unequal treatment of "those who seek welfare and sustenance for themselves, by their own hand and voice rather than by means of the muscle and mouths of others. We have learned through the ages that 'charity begins at home,' and if so, the less fortunate of our societal admixture should be permitted, under our system, to apply self help."<sup>164</sup>

In *Young*, the Second Circuit reversed a widely publicized and highly controversial trial court opinion that struck down the New York City Transit Authority's absolute ban on panhandling in the city's subways.<sup>165</sup> A 2-to-1 appeals majority concluded that begging was more

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160. *Seattle v. Webster*, 802 P.2d 1333, 1342 (Wash. 1990) (en banc) (Utter, J., dissenting), *cert. denied*, 111 S. Ct. 1690 (1991). Arguably, *Ulmer* has been overruled by virtue of that court's subsequent decision in *Alternatives for Cal. Women, Inc. v. County of Contra Costa*, 193 Cal. Rptr. 384, 391, n.7 (Ct. App. 1983), and by virtue of the *Village of Schaumburg v. Citizens For a Better Env't*, 444 U.S. 620, 632 (1980) and its progeny, *Riley v. National Fed'n of the Blind of N.C.*, 487 U.S. 781, 784 (1988); *Maryland v. Munson Co.*, 467 U.S. 947 (1984). For discussion, see Plaintiff's Memorandum of Points and Authorities in Opposition to Defendants' Motion for Summary Adjudication at 12-13, *Blair v. Shanahan*, 775 F. Supp. 1315 (N.D. Cal. 1991).

161. JACKSONVILLE, FLA., MUN. ORDINANCE 330.105 (19—) ("It shall be unlawful . . . for anyone to beg or solicit alms in the streets or public places of the city or exhibit oneself for the purpose of begging or obtaining alms."), *quoted in C.C.B. v. State*, 458 So. 2d 47, 48 (Fla. Dist. Ct. App. 1984).

162. *C.C.B. v. State*, 458 So. 2d at 48.

163. *Id.* at 50.

164. *Id.* at 48.

165. *Young v. New York City Transit Auth.*, 729 F. Supp. 341 (S.D.N.Y. 1990), *rev'd in part, vacated in part*, 903 F.2d 146 (2d Cir. 1990), *cert. denied*, 111 S.Ct. 516 (1990). Subsequently, a new suit was brought in New York state court challenging the same ban against begging in the subways but under free speech protections under the state constitution. The case, *Walley v. New York City Transit Auth.*, No. 91-177, was dismissed by the trial court on

conduct than speech and that begging did not convey a sufficiently particularized message that subway riders would be likely to discern. The court also determined that whatever message the beggars did convey (the need for money) fell outside the scope of protected First Amendment speech. Finally, the court found no fault with the Transit Authority's uneven treatment of "charitable solicitations" and "begging," finding the former to be protected speech and the latter not.

Although the majority concluded that only a legitimate interest was necessary to justify the ban, it found that the government had a compelling interest in providing riders with a "reasonably safe, propitious and benign"<sup>166</sup> means of transportation. The court found that the regulation was content-neutral, served legitimate government interests, and was totally unrelated to the suppression of free expression.<sup>167</sup> In addition, "ample alternative channels" remained available to the beggars, said the majority.<sup>168</sup> Much of Judge Meskill's vehement dissent echoed Judge Sand's trial court opinion; Part IV of this Article discusses portions of their arguments.

In *Seattle v. Webster*,<sup>169</sup> the Supreme Court of Washington reversed lower court rulings that declared Seattle's aggressive begging statute unconstitutionally vague and overbroad. The high court majority found that the ordinance did not sweep the relevant constitutionally protected freedoms within its prohibition such that the ordinance was substantially overbroad. In so concluding, the opinion devoted not a single sentence to whether begging constitutes protected speech. In a lengthy dissent, Justice Utter reviewed the *Ulmer*, *C.C.B.*, and *Young* opinions and found begging to be protected speech, either as charitable solicitation or as commercial speech, subject only to the usual time, place, and manner restrictions.

Most recently, in *Blair v. Shanahan*, federal district Judge William H. Orrick found that California's begging ban (the same statute upheld in *Ulmer*)<sup>170</sup> unconstitutionally infringed on First Amendment rights. Disagreeing with the *Young* majority, the court reasoned that "begging implicates the very speech interest present in charitable solicitation

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the grounds that the state constitution did not prohibit the city from passing ordinances banning begging in the subway. The case is on appeal.

166. *Young*, 903 F.2d at 158.

167. *Id.* at 152-64.

168. *Id.* at 160 (quoting from *Ward v. Rock Against Racism*, 491 U.S. 781, 802 (1989)).

169. *Seattle v. Webster*, 802 P.2d 1333 (Wash. 1990) (en banc), *cert. denied*, 111 S.Ct. 1690 (1991).

170. CAL. PENAL CODE § 647(c) (West 1987); see text of statute, *supra* note 156.



cases;<sup>171</sup> in addition, Judge Orrick found *Young* to be factually distinguishable:

Subway passengers, unlike city pedestrians, have no way to escape a beggar's presence. Moreover, the subway, unlike city streets, is not a public forum. Thus, proscribing begging in the subway could be viewed as a reasonable time, place, and manner restriction on the beggar's right to speech.<sup>172</sup>

The court concluded that the state must demonstrate that its content-based infringement of free speech in a public forum is necessary to serve a compelling state interest, a requirement that California could not satisfy.

#### 4. *Reliance on Affirmative Duties Provided in State Constitutions and Local Statutes*

Opinions of the Supreme Court during the past twenty years have made it absolutely clear that the United States Constitution imposes no affirmative duty whatsoever on government to provide for those in need. "Welfare benefits are not a fundamental right, and neither the State nor Federal government is under any sort of constitutional obligation to guarantee minimum levels of support."<sup>173</sup> Fundamental to the Court's current jurisprudence is the understanding that the federal constitution is "a restraint on governmental conduct and not . . . the source of an affirmative governmental duty . . ."<sup>174</sup> As Judge Richard Posner explains, the Constitution is "a charter of negative liberties; it tells the state to let people alone; it does not require the federal government or the state to provide services . . ."<sup>175</sup>

Given this uncharitable posture, claims proffered on behalf of beggars and/or the homeless, like so many civil rights claims these days, may have their best chance for success when predicated on state constitutional law. The Montana Constitution, for example, imposes on the legislature the affirmative duty to provide economic, social, and rehabilitative services to those persons needing the aid of society.<sup>176</sup> And

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171. *Blair v. Shanahan*, 775 F. Supp. 1315, 1322 (N.D. Cal. 1991).

172. *Id.* at 1322, n.5.

173. *Lavine v. Milne*, 424 U.S. 577, 585, n.9 (1976) (quoting *Dandridge v. Williams*, 397 U.S. 471 (1970)).

174. Daan Braveman, *Children, Poverty and State Constitutions*, 38 EMORY L.J. 577, 589 (1989).

175. *Bowers v. DeVito*, 686 F.2d 616, 618 (7th Cir. 1982). The abortion funding cases also exemplify this constitutional interpretation: "[T]he Constitution tells the state that it cannot unduly intrude on the woman's right to choose; it does not, however, obligate the state to make available the funds that may be necessary to enable the woman to exercise that right." Braveman, *supra* note 174, at 591.

176. MONT. CONST. art XII, §§ 1, 3 (1987).

in Washington D.C., advocates for the homeless had a brief window of opportunity after the passage in 1984 — but before the repeal in 1990 — of a referendum guaranteeing “health-maintaining and accessible overnight shelter space offered in an atmosphere of reasonable dignity to all homeless persons. . . .”<sup>177</sup>

As Professor Daan Braveman has reported, the constitutions of twenty-two states contain provisions bearing on aid to the poor and needy.<sup>178</sup> These measures fall into three categories: (1) statements of principle regarding care of the less fortunate; (2) authorization of state and local governments to provide for the poor and for the health of citizens; and (3) affirmative obligations on the state to care for the needy and to protect the health of citizens.<sup>179</sup> A state has the responsibility to “justify independent assessments of the constitutional obligation to the poor”<sup>180</sup> and not “blindly adhere to the [U.S.] Supreme Court’s interpretations.”<sup>181</sup> A review of appellate decisions in these twenty-two states, however, reveals a dearth of actions brought under state constitutional provisions to aid the poor and needy.

Notable exceptions are Montana and New York, where claims based on state constitutional provisions have met with some success. In *Butte Community Union v. Harris*, the Montana Supreme Court declared unconstitutional a law that distinguished between the availability of public aid to able-bodied people with children and those without children.<sup>182</sup> The Butte County Community Union brought an action against the state claiming that a provision of its general assistance program that allowed for only two months worth of aid for able-bodied people without children was in violation of the state’s affirmative duty to aid the poor.<sup>183</sup> Article XII of Montana’s constitution states: “The legislature shall provide such economic assistance and social and rehabilitative services as may be necessary for those inhabitants who, by reason of age, infirmities, or misfortune may have need for the aid of society.”<sup>184</sup> Although it recognized the state’s legitimate interest in conserving the state’s treasuries, the Montana Supreme Court gave great weight to the state’s affirmative duty

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177. D.C. CODE ANN. § 3-605 (Supp. 1986) (repealed 1990). The District’s failure to comply with the mandate was challenged in *Atchison v. Barry*, No. 88-CA-11976 (D.C. Sup. Ct. 1989). After a consent decree was incorporated into the court order and after numerous contempt citations for noncompliance, some additional shelter space was provided.

178. Braveman, *supra* note 174, at 595.

179. *Id.* at 595-96.

180. *Id.* at 596.

181. *Id.* at 596-97.

182. 745 P.2d 1128 (Mont. 1987).

183. *Id.* at 1129.

184. MONT. CONST. art. XII, §§ 1, 3 (1987).

to aid the poor and raised the level of judicial scrutiny to protect the interests of the poor.<sup>185</sup> The court recognized that its view regarding rights to public welfare was more generous than that of the United States Supreme Court when interpreting the federal constitution: "We will not be bound by decisions of the United States Supreme Court where independent state grounds exist for developing heightened and expanded rights under our state constitution."<sup>186</sup>

Like Montana, New York has wielded its constitutional mandate to provide for the needy through public assistance and establish public shelters for the homeless.<sup>187</sup> In *Tucker v. Toia*, the issue before the court was whether public assistance could be denied to one class of minors but not another.<sup>188</sup> Instead of relying on the federal Due Process and Equal Protection Clauses, the New York Court of Appeals ruled that the law violated the state's constitution and reasoned that the state's purpose could not be achieved "by methods which ignore the realities of the needy's plight and the State's affirmative obligation to aid all its needy."<sup>189</sup>

*Callahan v. Carey*<sup>190</sup> was a class-action suit on behalf of the homeless of New York City to compel the city to provide a sufficient number of beds for all homeless persons seeking shelter. The New York Supreme Court granted a temporary injunction, requiring the city to provide additional beds for the homeless in existing shelters based on a recognized right to shelter under the state's constitution as well as state statutes and

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185. *Butte*, 745 P.2d at 1133.

The legislature, in determining where sacrifices, are necessary, should regard "welfare benefits grounded in the constitution itself are deserving of great protection." (citations omitted). The State may legitimately limit its expenditures for public assistance, public education or any other program even-handedly applied. It may not limit its expenditures by the expedient of eliminating classes of eligible individuals from public assistance without regard to their constitutionally grounded right to society's aid when needed, through misfortune, for the basic necessities of life. We do not hereby declare that inhabitants have a constitutional right to public assistance. We do declare that the legislature, in performing its duty under Art. XII, § 3(3), must not act arbitrarily between classes of entitled persons.

*Id.*

186. *Butte Community Union v. Lewis*, 712 P.2d 1309, 1313 (Mont. 1986).

187. "The aid, care and support of the needy are public concerns and shall be provided by the state and by such of its subdivisions, and in such manner and by such means, as the legislature may from time to time determine." N.Y. CONST. art. XVII, § 1.

188. 371 N.E.2d 449, 451 (N.Y. 1977).

189. *Id.* But see *Matter of Bernstein v. Toia*, 373 N.E.2d 238 (N.Y. 1977) (Court of Appeals upheld a regulation which put a cap on housing grants even where the petitioner was aged and debilitated and could not walk up stairs nor afford ground floor housing, reasoning that the state's constitutional mandate to aid the poor only provided that no person be excluded from receiving aid, but the legislature has broad discretion to determine the sufficiency of such aid).

190. No. 79-42582, slip op. at 5 (Sup. Ct. N.Y. County Dec. 5, 1979).

municipal codes.<sup>191</sup> The parties finally settled the case with a consent decree requiring the city to continue to comply with the court's previous injunction.<sup>192</sup> Unfortunately, a consent decree cannot serve as legal precedent; thus, the decision may have provided relief for the plaintiffs, but it does not serve to provide any constitutional right to shelter.

Notwithstanding these modest victories, most courts have not viewed similar state constitutional mandates as carrying much weight.<sup>193</sup> Legislatures have wide discretion to determine who receives aid and how much, and courts review such legislation under a highly deferential standard.<sup>194</sup> In addition, many states further undermine their constitutional mandates by enacting contradictory antibegging or vagrancy statutes.<sup>195</sup>

#### IV. Rights Analysis as Camouflage

##### A. The Limitations of Rights Analysis and Legalistic Distinctions

Do people have the right to beg? Do they have a right to eat out of garbage cans? Do they have a right to sleep on the streets? The mere questions are offensive. And even if we agree that there is such a right to beg, it is analogous to letting them eat cake.

The debates we engage in as lawyers—consumed with questions of abstract jurisprudential principle and legalistic distinctions—often serve to obscure deeper, more painful questions calling for societal examination and self-examination. Wedded, as a culture, to a pervasive individualistic ethic and, in our legal system, to an objective, restrained concept of judicial review that removes us from context, we fail inevitably to meaningfully address problems of the marginalized poor. Redistributive claims on behalf of the underclass will never be heard unless we shelter the restrictive mold of rights analysis and acknowledge the poverty of conventional legal discourse. As observed elsewhere,<sup>196</sup> attempts to decide cases allegedly on the basis of neutral rules and principles after analyzing generalized abstractions of human dramas filter out the very elements of a case that would help a judge understand perspectives and

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191. *Id.*

192. *Id.*

193. *See, e.g.,* *Warrior v. Thompson*, 449 N.E.2d 53, 58 (Ill. 1983) (deferring to legislature in drafting welfare laws and stating there was no legal obligation to support the poor in spite of Illinois constitutional mandate to "eliminate poverty and inequality").

194. *See, e.g.,* *Pyke v. Department of Social Servs.*, 453 N.W.2d 274, 276-77 (Mich. App. 1990) (stating that the standard for legislation providing aid to needy will be rational basis), *appeal denied*, 437 Mich. 1019 (1991).

195. *See, e.g.,* CONN. GEN. STAT. ANN. § 53-336 (West 1958) (repealed 1971).

196. *See* Burns, *supra* note 67; Karst, *supra* note 68.

behavior beyond his or her experience.<sup>197</sup> Indeed, our legal culture dismisses the particular human context as antithetical to objective decision making. In the field of First Amendment jurisprudence,

[J]udicial opinions embodying conceptualistic, categorical analyses reflect under-the-table definitional balancing. Legal outcomes depend on whether the speech is placed in or out of the category, on what pigeonhole of law is determined to apply. In the process, free speech values tend to be minimized or ignored; government interests tend to be emphasized and exaggerated.<sup>198</sup>

Likewise, the Court's treatment of equal protection claims requires that huge quantities of high-powered legal energy are expended in persuading courts to use higher or lower "levels of scrutiny," that is, to demand greater or lesser degrees of justification in support of legislative classifications. This whole tedious process of argumentation and opinion-writing is an exercise in rationalization.<sup>199</sup>

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197. See KENNETH L. KARST, *BELONGING TO AMERICA: EQUAL CITIZENSHIP AND THE CONSTITUTION* 238 (1989).

198. C. Thomas Dienes, *The Trashing of the Public Forum: Problems in First Amendment Analysis*, 55 *GEO. WASH. L. REV.* 109, 110 (1986).

199. KARST, *supra* note 197, at 138. An analysis of beggars as a suspect class for equal protection purposes is beyond the scope of this paper. Yet the issue is an extremely important one. Attempts to measure the poor against the accepted criteria for suspect class status (history of societal discrimination, political powerlessness, and immutability) have consistently failed. This failure speaks volumes to the attitudes and prejudices that have produced such a divided society. The skeptic within each of us is inclined to ask: Have the poor really been discriminated against as a class? Even if an argument can be made that they have, are they suffering from a condition, like race or sex, that is beyond one's control? Are beggars politically powerless? Are they really excluded from the political process? Is their condition truly immutable? If today's Horatio Alger, Clarence Thomas, can lift himself up, why can't all the others?

Regarding the requisite history of societal discrimination, Americans have generally viewed beggars with disdain. "[P]overty is slightly disreputable, and being on welfare is somewhat more disreputable . . . [and] the 'hard core' of demoralized and immoral poor, is further along on a range of disrepute." Rose, *supra* note 145, at 198 n.46 (quoting David Matza, *Poverty and Disrepute*, in *CONTEMPORARY SOCIAL PROBLEMS* 620 (Robert K. Morton & Robert A. Nisbet eds., 2d ed. 1966)).

The invidiousness of the discrimination suffered by the homeless is borne out by . . . history, including enactments which have their roots in middle-age England. . . . A shortage of agricultural laborers in England was caused by The Black Death of 1348 and the abolition of serfdom. The Statutes of Laborers (aka Poor Laws) were passed in the year 1349 to prevent workers from relocating in the search of improved conditions. The statute also prohibited wage increases. . . . Vagrancy laws were the criminal counterpart to the Statutes of Labourers. Indeed, beggars were at times branded on their face, mutilated, whipped, committed to slavery, and even killed for being vagrants. [Vagrancy laws were] . . . subsequently imported by settlers to the colonies.

Brief of Amicus Curiae for ACLU of Washington at 19-20, *Seattle v. Webster*, 802 P.2d 1333 (Wash. 1990) (No. 23372-6-I).

Regarding the second element, political powerlessness, one can argue that beggars lack meaningful access to the political arena. If they cannot afford a post office box or do not have a permanent address, they are not permitted to register to vote in most jurisdictions. Politi-

The United States, like all colonial powers, has a sorry history of treating indigenous groups, as well as other minority groups, on the basis of their group affiliation. Time and again, parties have asked the Supreme Court to address such discrimination. Yet, by its reluctance to recognize group rights, and by imposing severe roadblocks to individual rights claims, the Court has effectively left the decisionmaking to majoritarian politics. And then, "when majoritarian politics produces an affirmative action program, the inevitable argument against the program's constitutionality is that it abandons a principle of 'individual merit' in favor of a group remedy."<sup>200</sup> The painful irony is "[h]eads, we win; tails, you lose."<sup>201</sup>

For many of us, the most "forthright acknowledgement of the role of extreme individualism in American public life"<sup>202</sup> is the Supreme Court's infamous decision in *San Antonio School District v. Rodriguez*,<sup>203</sup> upholding school financing disparities in Texas. The decision demonstrates that, "in this Lockean context, where most extremes of wealth and poverty with all their attendant social consequences are accepted as normal,"<sup>204</sup> current constitutional theories will never serve as effective tools in forging a society of true equal opportunity. As Kenneth Karst reminded us, "[o]ur devotion to individualism inclines us to assume that

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cians need not worry about hearing their voices at election time. Just as "the homeless are politically powerless inasmuch as they lack the financial resources necessary to obtain access to many of the most effective means of persuasion," *Clark v. Community for Creative Non-Violence*, 468 U.S. 288, 304 n.4 (1984) (Marshall, J., dissenting), the same could be said for the overlapping population of beggars.

The "immutability" prong of suspect class analysis asks whether one is able to change one's condition—in the case of poor people, whether they are able to, and are expected to, raise themselves up by their bootstraps. If we were in their boots, we would; because they don't, they are at fault and unworthy, and we can disassociate ourselves. Yet studies demonstrate the existence of a permanent underclass in American society facing generation after generation of hopeless poverty. See Hirshman, *supra* note 9.

Furthermore, the economic conditions which have produced unemployment and a severe shortage of affordable housing

are beyond the control of most people and bear no relationship to [one's] . . . ability . . . to contribute to society . . . Employers are . . . reluctant to hire individuals who have lived for days or weeks on the street in the only set of clothes they own. Sufficient beds, showers, clothes, and laundry facilities are unavailable to help the homeless return to mainstream society. . . . In sum, the discrimination against the homeless is invidious and [their condition] immutable.

Brief of Amicus Curiae for ACLU of Washington at 20-21, *Seattle v. Webster*, 802 P.2d 1333 (Wash. 1990) (No. 23372-6-I); see also Inez Smith Reid, *Law, Politics and the Homeless*, 89 W. VA. L. REV. 115, 135-142 (1986).

200. KARST, *supra* note 197, at 158.

201. *Id.*

202. Hirshman, *supra* note 9, at 1020.

203. 411 U.S. 1 (1973).

204. Hirshman, *supra*, note 9, at 1020.

individual destinies are self-made and makes us unready to recognize harms that people suffer because they are members of groups.”<sup>205</sup> Reigning constitutional orthodoxy provides relief only to individual plaintiffs “who can demonstrate that particular harms have been caused by particular acts of misconduct by particular government officials who intended the harms.”<sup>206</sup> Because it is impossible to squarely blame any individual for another individual’s poverty—because claims on behalf of victims of systemic discrimination “can only be made at the level of the group”<sup>207</sup>—judicial relief for the marginalized poor remains elusive. “[E]ither we use group remedies for past discrimination, or we give up the pretense that a remedy is what we seek.”<sup>208</sup>

Euro-American concepts of individual liberty do not readily accept notions of group rights. We accept as fundamental the proposition that the autonomous individual precedes, and exists separate and apart from, the artificial construct of organized society. Individual rights are entitled, therefore, to full protection from governmental intrusion; stated alternatively, “[r]ights are legal constructs that limit state action.”<sup>209</sup> Inevitably “the basic and most dominant western themes about rights pit the individual *against* the state.”<sup>210</sup>

As discussed below, we must make a dramatic and necessary shift to envision humans, to experience ourselves, as inherently social creatures.<sup>211</sup> Individual rights and group rights are not antithetical but complementary concepts. “[A]n individual’s right to autonomy is not a right *against* organized society, as it is in western thought, but a right one has *because* of one’s membership in the family, kinship and associational webs of the society.”<sup>212</sup> We need to entertain a broader, richer, more inclusive concept of human rights.

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205. KARST, *supra*, note 197, at 148.

206. *Id.* at 139. Many have criticized the Supreme Court’s preoccupation with the conscious intent of the actor while minimizing the effect on the victim. *See generally* Charles R. Lawrence III, *The Id, the Ego, and Equal Protection: Reckoning with Unconscious Racism*, 39 STAN. L. REV. 317 (1987). In addition, Catharine MacKinnon’s observation about the law’s treatment of rape has application here: “From whose standpoint, and in whose interest, is a law that allows one person’s conditioned unconsciousness to contraindicate another’s experienced violation?” Catharine A. MacKinnon, *Feminism, Marxism, Method and the State: Toward Feminist Jurisprudence*, 8 SIGNS: J. OF WOMEN IN CULTURE & SOC. 635, 654 (1983).

207. KARST, *supra* note 197, at 139 (quoting C. Thurow, *A Theory of Groups and Economic Redistribution*, 9 PHIL. & PUBL. AFF. 25 (1979)).

208. *Id.* at 151.

209. Robert N. Clinton, *The Rights of Indigenous Peoples as Collective Group Rights*, 32 ARIZ. L. REV. 739, 740 (1990).

210. *Id.* at 741.

211. *See* discussion *infra* Part V.

212. Clinton, *supra* note 209, at 742.

Notwithstanding this critique of rights theory, the need remains to accommodate our advocacy to the current parameters of individual rights jurisprudence — at least until the rules are changed. With this in mind, we can proceed to ask whether begging constitutes protected speech.

## B. Does Begging Constitute Protected Speech?

Contemporary commentators have addressed the free speech rights of beggars,<sup>213</sup> as well as the applicable values underlying the First Amendment.<sup>214</sup> For our purposes, it may be useful to briefly consider (1) whether begging promotes First Amendment values; (2) whether begging constitutes symbolic speech; and finally (3) whether begging constitutes charitable solicitation or, alternatively, commercial speech, which is accorded somewhat less protection in our hierarchy of values.

### 1. Promoting First Amendment Values

The first function of free speech has often been described as the promotion of knowledge, the formulation of enlightened opinion, and the discovery of truth through healthy competition in “the marketplace of ideas.”<sup>215</sup> Discovering truth—or, in less absolute terms, making intelligent choices—depends on “open channels of communication.”<sup>216</sup> A second and related function of free expression is to improve society through a more involved and informed electorate.<sup>217</sup> Free speech necessarily enhances our system of self-government and representative democracy, and it serves to check “the abuse of power by public officials.”<sup>218</sup>

213. Rose, *supra* note 145. See also Charles Feeney Knapp, *Statutory Restriction of Panhandling in Light of Young v. New York City Transit: Are States Begging Out of First Amendment Proscriptions?*, 76 IOWA L. REV. 405 (1991).

214. See Helen Hershkoff & Adam S. Cohen, *Begging to Differ: The First Amendment and the Right to Beg*, 104 HARV. L. REV. 896 (1991).

215. See generally MELVILLE B. NIMMER, NIMMER ON FREEDOM OF SPEECH: A TREATISE ON THE THEORY OF THE FIRST AMENDMENT §§ 1.02-1.04 (1984).

216. *Id.* § 1-7.

217. *Id.* §§ 1-44 to 1-46.

218. Vincent Blasi, *The Checking Value in First Amendment Theory*, 1977 AM. B. FOUND. RES. J. 521, 527. Given the gross imbalance of power and influence within American society, and the ability of some interests to “buy” more speech in the “market” than others, this “image of Truth and Falsehood in mortal combat will strike many as a romantic illusion,” NIMMER, *supra* note 215, § 1-10, as an impossibly naive pipe dream. Those who have witnessed the Holocaust in Europe, the virtual genocide of native American Indians in the United States, or the recent surge of hate speech on campus may not be prepared to readily accept the inevitable triumph of truth in the marketplace of ideas. Critics may well say that the “‘power of a thought to get itself accepted in the competition of the market’ merely proves what a majority believes, not that the majority is correct.” NIMMER, *supra* note 215 (quoting Abrams v. United States, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting)). And, in the context of hate



Professor Melville Nimmer reminds us that

[u]ltimate power is reposed in the people because to place it elsewhere is too dangerous. [But] [f]rom this it is not necessary to pretend that 'the people' also possess ultimate wisdom . . . . [Free speech is not] so much a way of expressing the wisdom people have, as it is a way of enabling them to get wisdom.<sup>219</sup>

And given that our democratic system of government depends on the ability of the individual to decide wisely, that individual must be "fully apprised of the competing merits of a controversy."<sup>220</sup>

The assumption contained in these first two functions is that we become more knowledgeable and enlightened and more able to wisely govern ourselves if we are exposed to opinion and arguments on all sides of any issue. We believe that "the proper remedy for 'false' or 'bad' speech lies not in its suppression, but rather in the opportunity to hear more speech, which answers or corrects the speech which preceded it."<sup>221</sup> Progress means education so that we don't repeat the mistakes of history. And if we are to avoid these mistakes, if we are to avert evil counsel, we must educate ourselves with "more speech, not enforced silence."<sup>222</sup>

Begging is speech that serves each of these functions. While graphically portraying the plight of the poor in our nation, begging also serves to counter the apparent view of the Reagan and Bush administrations that poverty is an isolated and often chosen condition.

Silencing the beggar will not alleviate her problems—it will only hide them from public view. Society will neither perceive nor correct social and political ills if the evidence of their existence is suppressed. If one premise of the First Amendment is a commitment to facilitating social issues as a means towards their solution, then extending First Amendment protection to the beggar's implicit communication is justified. It is best for the public welfare, as well as for the policies of the Constitution, to resist "[t]he eternal temptation . . . to arrest the speaker rather than to correct the condi-

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speech on campus, the effect may well be to silence minority voices, rather than to promote counter-speech, and to reinforce the isolation of traditionally excluded groups. See Mari J. Matsuda, *Public Response to Racist Speech: Considering the Victim's Story*, 87 MICH. L. REV. 2320 (1989). Yet, conventional wisdom continues to paraphrase Winston Churchill's description of democracy, that "truth determination by the competition of the market is the most frustrating, least accurate and most dangerous method, except for every other." NIMMER, *supra* note 215, § 1-12.

219. NIMMER, *supra* note 215, § 1-13, (quoting RONALD STEEL, WALTER LIPMAN AND THE AMERICAN CENTURY 40 (1980)).

220. *Eisenstadt v. Baird*, 405 U.S. 438, 457 (1972) (Douglas, J., concurring).

221. NIMMER, *supra* note 215, § 1-42.

222. *Id.*

tions about which he complains.”<sup>223</sup>

If we are concerned with the communicative content of speech under First Amendment analysis, we must acknowledge that poor people themselves can best and most poignantly convey their own plight, for their mere presence conveys a painful and disturbing message. “Every time a destitute person asks for change or extends a cup, he or she conveys the uncomfortable, disturbing idea that in the midst of staggering wealth there live people who lack the means to live.”<sup>224</sup> As District Court Judge Leonard Sand noted in *Young v. New York City Transit Authority*:

The simple request for money by a beggar or panhandler cannot but remind the passerby that people in the city live in poverty and often lack the essentials for survival. Even the beggar sitting in Grand Central Station with a tin cup at his feet conveys the message that he and others like him are in need. While often disturbing and sometimes alarmingly graphic, begging is unmistakably informative and persuasive speech. . . . Indeed, it is the very unsettling appearance and message conveyed by the beggars that gives their conduct its expressive quality.<sup>225</sup>

A further aspect of this knowledge and truth function is the promotion of self-knowledge through the process of introspection that virtually every passerby experiences—except, perhaps, those among us who have become hopelessly calloused. “The beggar’s words may provide some listeners with an occasion for self-inquiry. Their thoughts may range from guilt over the degree to which they are complicit in the beggar’s impoverished state to fear that they themselves may one day be destitute.”<sup>226</sup>

A third function of free speech is the promotion of individual self-expression and the development of individual potential—what some have described as the achievement of self-realization.<sup>227</sup> This function may be served along with the previously listed functions, or it may exist totally independently. That is, even if a speaker’s audience is absolutely unper-

223. Rose, *supra* note 145, at 200-06 (quoting *Houston v. Hill*, 482 U.S. 451, 465 n.15 (1987) (citing *Younger v. Harris*, 401 U.S. 37, 65 (1971) (Douglas, J., dissenting))).

224. Douglas H. Lasdon, et al., *What Homeless Beggars Must Keep Telling Us*, N.Y. TIMES, Feb. 11, 1990, at E24.

225. *Young v. New York City Transit Auth.*, 729 F. Supp. 341, 352, 358 (S.D.N.Y. 1990), *rev’d in part, vacated in part*, 903 F.2d 146 (2d Cir. 1990), *cert denied*, 111 S. Ct. 516 (1990). Not everyone would agree, of course. In reversing Judge Sand, Appellate Judge Frank Altimari characterized begging in the subway as “nothing less than assault, creating in the passengers the apprehension of imminent danger.” *Young*, 903 F.2d at 158. As far as being persuasive, argues one commentator, “that persuasion consists mainly of an implied threat of violence if a donation is not given. It is thus not so much ‘free speech’ as blackmail.” John O’Sullivan, *Justice Goes Begging*, NAT’L REV., Feb. 19, 1990, at 8.

226. Hershkoff & Cohen, *supra* note 214, at 899.

227. THOMAS I. EMERSON, *THE SYSTEM OF FREEDOM OF EXPRESSION* 6 (1970).

suaded, or ignores or reacts hostilely to the speaker, the speaker may still experience the inner satisfaction of speaking out on an issue that is important to the speaker. Even if our letter to the President or letters to the editor are largely ignored, we enjoy a certain therapeutic and cathartic satisfaction. Justice Brennan described free speech as “intrinsic to individual dignity,”<sup>228</sup> and Justice Marshall added that free speech serves “not only the needs of the polity but also those of the human spirit—a spirit that demands self-expression.”<sup>229</sup> If we refuse to allow beggars to make their pleas, we forbid them to experience the self-respect that necessarily flows from free expression.<sup>230</sup>

A fourth function of free speech has been described as that of a “safety valve.”<sup>231</sup> Government and society must afford avenues for letting off steam, or else we play into the hands of revolution. Men and women who feel disenfranchised, who feel victimized by society, are less inclined to resort to violence to achieve their goals if they are free to express themselves about their goals.<sup>232</sup> The freedom of expression, which may allow for divisiveness in the short run, will contribute to social stability in the long run. By permitting the entire spectrum of speech and ideas, the system co-opts or incorporates so as to diffuse dissent.<sup>233</sup>

The fifth, and final, function to be served by free expression is what Hershkoff and Cohen describe as the “engagement value.”<sup>234</sup> In a society where the poor have been stigmatized and isolated, where the vast majority of those more fortunate seek every avenue to avoid reminders of the suffering in our midst, face-to-face contact with beggars forces connection and relationship on one level. Solicitations on behalf of the poor, whether by mail or by sanitized, middle-class agents on the street, may yield revenue but do not promote any sort of direct engagement.

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228. *Herbert v. Lando*, 441 U.S. 153, 183 n.1 (1979) (Brennan, J., dissenting).

229. *Procunier v. Martinez*, 416 U.S. 396, 427 (1974) (Marshall, J., concurring), *overruled* by *Thornburgh v. Abbott*, 480 U.S. 401 (1980).

230. Hershkoff & Cohen, *supra* note 214, at 903.

231. NIMMER, *supra* note 215, § 1-53 to 1-54.

232. *Id.* “Those who are resentful because their interests are not accorded fair weight, and who may be doubly resentful because they have not even had a chance to present those interests,” Kent Greenawalt, *Speech and Crime*, 1980 AM. B. FOUND. RES. J. 647, 672, are likely to explode in frustration and anger and, perhaps, violence.

233. Orderly, incremental, evolutionary social change—that is, a balance between stability and change—is the product of this safety-valve function. Sixty-five years ago, Justice Brandeis reminded Americans that “it is hazardous to discourage thought, hope and imagination; that fear breeds repression; that repression breeds hate; that hate menaces stable government; that the path of safety lies in the opportunity to discuss supposed grievances and proposed remedies . . . .” *Whitney v. California*, 274 U.S. 357, 375 (1927) (Brandeis, J., concurring).

234. Hershkoff & Cohen, *supra* note 214, at 912-16.

The beggar's appeal attempts to build a human relationship with an individual listener. . . . [S]he speaks directly to her listeners and attempts to evoke a human response. The immediacy of her appeal breaks down the wall between speaker and listener and engages her interlocutor in a social interaction. Sociologists call this kind of encounter "a relationship wedge." Its power lies in the fact that "once an individual has extended to another enough consideration to hear him out for a moment, some kind of bond of mutual obligation is established, which the initiator can use in turn as a basis for still further claims." The listener may fight the bond's formation: he may pretend not to hear or avert his gaze. But the encounter inevitably draws together two individuals who are otherwise separated by difference.<sup>235</sup>

The engagement may produce a reaction immediately or at some time in the future: "the listener may give the beggar money, he may give money to the next beggar he sees, he may donate to an organized charity, he may volunteer time at a soup kitchen, or he may vote for different candidates in the next election."<sup>236</sup> The engagement may also be positive or negative—one of empathy or one of antipathy. Either way, a relationship has been forged; at least the beggar has been included in a dialogue of sorts, not simply ignored and rendered invisible as unworthy of "belonging to America."<sup>237</sup>

Hershkoff and Cohen's engagement function "recognizes the importance of the relationship that forms between speaker and listener. . . . Begging is speech that attempts to engage mainstream listeners with the reality of life on the margins of society. The need for such speech is considerable."<sup>238</sup> The authors conclude with a passage from a *New York Times* story on the newspaper's "Neediest Cases Fund" appeal:

David Reid of Manhattan donated \$1,200, part of which came from his brother's family in Britain, who visited New York City last summer. "I could not adequately explain to my eight year old nephew the beggars on the street and in the subways . . .," he wrote. "How do you explain this aspect of America, the richest country in the world?" That is the question that beggars pose to their listeners every time they beg.<sup>239</sup>

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235. *Id.* at 913 (quoting E. GOFFMAN, *BEHAVIOUR IN PUBLIC PLACES* 122 (1963)).

236. *Id.* at 914.

237. See KARST, *supra* note 197, at 238.

238. Hershkoff & Cohen, *supra* note 214, at 915.

239. *Id.* at 915-16 (quoting Marvin Howe, *Scenes of Poverty and Despair Prompt Gifts to the Neediest*, N.Y. TIMES, Jan. 23, 1989, at D11).

## 2. *Symbolic Speech*

Although most beggars voice their particular request in some fashion ("Brother, can you spare a dime?"), others silently convey the same message with head bowed and a cup or hand extended. While some beggars engage in dialogue about the larger social conditions they represent, most convey this message symbolically through their presence.

The principle that protected speech embraces the nonverbal has stood for more than six decades.<sup>240</sup> In addition to spoken and written words, symbolic expression is included under the umbrella of protected speech.<sup>241</sup> The doctrine of symbolic speech was applied recently and definitively in *Texas v. Johnson*.<sup>242</sup> The United States Supreme Court in *Johnson* reiterated the two-part test enunciated in *Spence v. Washington*,<sup>243</sup> asking (1) whether the beggar intended to convey a particularized message, and (2) whether the likelihood was great that the hearers would understand the message. The beggar conveys a painful social message, clearly understood by virtually every passerby.

While the beggar's speech amounts, on the surface, to a mere request for funds, her appeal necessarily includes a communication of far greater import. Her entire person speaks of poverty and suffering; she is tangible evidence of failure, be it her own or society's. She is living testament to a shortage of emergency shelter space, under-funded alcohol and drug abuse programs, and the lack of sufficient low-income housing. She can be said to represent the underclass and all it must endure: prejudice, discrimination, violence, and exploitation. She evidences society's unwillingness to care adequately for its marginal members.<sup>244</sup>

Begging, even when done in silence, is a form of speech. Consider *Matter of Haller*,<sup>245</sup> an 1877 case addressing the application of a New York statute to a beggar crawling along Wall Street. Although the issue in *Haller* was whether silent begging constituted "soliciting charity," the court's observations are useful for our purposes in determining whether begging constitutes speech:

The deaf and dumb man, real or pretended, who stands with a placard on the breast, and with extended hat or hand, is a solicitor of charity as completely as though he spoke to the passers by. And so is everyone whose diseased or crippled condition appeals to sympathy, if he places himself in a position to attract attention, or

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240. See *Stromberg v. California*, 283 U.S. 359 (1931).

241. See *Shuttlesworth v. Birmingham*, 394 U.S. 147 (1969).

242. 491 U.S. 397 (1989).

243. 418 U.S. 405, 409-11 (1974).

244. Rose, *supra* note 145, at 205.

245. 3 Abb. N. Cas. 65 (N.Y. 1st Dep't 1877).

passes along the street, calling attention by sign, act or look to his unhappy condition, and receives from those who observe him the charity which he is obviously seeking.<sup>246</sup>

Having concluded that begging constitutes expressive conduct, we must pursue the symbolic speech analysis under *Johnson* and *United States v. O'Brien*. If we determine that the state's regulation is related to the suppression of free speech, we are faced with a content-based regulation requiring strict judicial scrutiny. If the state's regulation is found to be unrelated to the suppression of free speech, the regulation may stand if (1) limitations on First Amendment rights are only incidental, and (2) the government's interest in regulating the nonspeech element is sufficiently important.<sup>247</sup> Either way, we must evaluate the state's interests, which are discussed in Part IV.C below.

### 3. *Charitable Solicitation or Commercial Speech?*

Does begging constitute "charitable solicitation," which has been afforded full First Amendment protection, or is it commercial speech, which receives less than full, albeit substantial, protection? All protected speech may be subject, of course, to reasonable time, place, and manner restrictions. But banning speech from public sidewalks is presumptively unconstitutional in light of our law's firmly entrenched respect for streets as the classic public forum.<sup>248</sup>

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246. *Id.* at 67.

247. See *United States v. O'Brien*, 391 U.S. 367 (1968); *Texas v. Johnson*, 491 U.S. 397 (1989).

248. "Wherever the title of streets and parks may rest, they have immemorially been held in trust for the use of the public and, time out of mind, have been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions." *Hague v. C.I.O.*, 307 U.S. 496, 515 (1939).

Speech in the traditional public forum receives the greatest constitutional protection in part because the forum is often a speaker's last resort. Because it provides the least expensive channel for communication, the "poorly financed causes of little people" require unrestrained access to the traditional public forum. Without free admission, those with "access to more elaborate (and more costly) channels of communication" would monopolize public discussion by drowning out the other speakers.

Rose, *supra* note 145, at 204 (footnotes omitted).

"[W]e have repeatedly referred to public streets as the archetype of a traditional public forum. . . . No particularized inquiry into the precise nature of a specific street is necessary. . . . [O]rdinance[s] must be judged against the stringent standards we have established for restrictions on speech in traditional public fora . . . ." *Frisby v. Schultz*, 487 U.S. 474, 480-81 (1988).

"Sidewalks, of course, are among those areas of public property that traditionally have been held open to the public for expressive activities and are clearly within those areas of public property that may be considered, generally without further inquiry, to be public forum property." *United States v. Grace*, 461 U.S. 171, 179 (1983). Exceptions have been recognized, e.g., a "postal sidewalk . . . does not have the characteristics of public sidewalks traditionally open to expressive activity." *United States v. Kokinda*, 110 S. Ct. 3115, 3121 (1990).

The United States Supreme Court has made it clear that charitable appeals for funds involve a variety of speech interests that deserve the protection of the First Amendment.<sup>249</sup> These include “communication of information, the dissemination and propagation of views and ideas, and the advocacy of causes . . . .”<sup>250</sup> Nearly thirty years ago, the Court reminded us that “our cases have long protected speech even though it is in the form of . . . a solicitation to pay or contribute money.”<sup>251</sup> More recently, Justice Scalia noted that the Court has held “the solicitation of money by charities to be fully protected as the dissemination of ideas.”<sup>252</sup> Even professional fundraisers, whose representation as agents of a charity may be wholly commercial, are entitled to full First Amendment protection.<sup>253</sup>

The Court has yet to address whether beggars engaged in self-help are entitled to the same constitutional protection as organizations that solicit on their behalf—why professional fundraisers, but not beggars should be permitted to “rattle a cup full of change as one passes by.”<sup>254</sup> As noted above, the dearth of cases addressing the constitutional rights of beggars may well stem from the fact that beggars generally lack “the ability or wherewithal to pursue the challenge.”<sup>255</sup> To date, a federal court of appeal<sup>256</sup> and two state supreme courts<sup>257</sup> have upheld legislation affording less protection to those soliciting on their own behalf, while one federal district court<sup>258</sup> and one state appellate court<sup>259</sup> have found such a distinction unconstitutional. Case law dealing with charitable solicitation reveals two primary rationales for affording First Amendment protection to charities and their representatives. First, “solicitation is characteristically intertwined with informative and perhaps persuasive speech seeking support for particular causes or for particular views on

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249. See *Village of Schaumburg v. Citizens For a Better Env't*, 444 U.S. 620, 632 (1980). See also *Maryland v. Munson Co.*, 467 U.S. 947 (1984); *Riley v. National Fed'n of the Blind of N.C.*, 487 U.S. 781, 784 (1988).

250. *Village of Schaumburg*, 444 U.S. at 632.

251. *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964).

252. *Riley*, 487 U.S. at 803 (Scalia, J., concurring).

253. *Id.*

254. *Young v. New York City Transit Auth.*, 903 F.2d 146, 168 (2d Cir. 1990) (Meskill, J. dissenting), *cert. denied*, 111 S. Ct. 516 (1990).

255. *C.C.B. v. State*, 458 So. 2d 47, 48 (Fla. Dist. Ct. App. 1984).

256. *Young*, 903 F.2d at 148.

257. *Ulmer v. Municipal Court of Oakland-Piedmont Judicial Dist.*, 127 Cal. Rptr. 445 (Ct. App. 1976); *Webster v. Seattle*, 802 P.2d 1333 (Wash. 1990), *cert. denied*, 111 S. Ct. 1690 (1991).

258. See *Blair v. Shanahan*, 775 F. Supp. 1315 (N.D. Cal. 1991).

259. *C.C.B.*, 458 So. 2d at 48.

economic, political, or social issues . . . .”<sup>260</sup> Second, “without solicitation the flow of such information and advocacy would likely cease.”<sup>261</sup> Without effective fundraising, charities simply cannot survive. Direct face-to-face solicitation may be all that small, less mainstream charities can afford. As the Supreme Court has repeatedly stated, without First Amendment protection, their very existence may be jeopardized.

Applying the first rationale to individual beggars, we must acknowledge, as discussed above, that the mere presence of a beggar seeking alms conveys a painful and disturbing message about the plight of that individual and of society. The beggar’s presence and plea for help speak volumes “on economic, political or social issues . . . .”<sup>262</sup> The beggar is living testimony to the social condition—is the condition.<sup>263</sup> As Judge Orrick explains in *Blair*,

[a] request for alms clearly conveys information regarding the speaker’s plight. Begging gives the speaker an opportunity to spread his views and ideas on, among other things, the way our society treats its poor and disenfranchised. And in some cases, a beggar’s request can change the way the listener sees his or her relationship with and obligations to the poor.<sup>264</sup>

The second rationale, which acknowledges the dependence on funds for continued survival, applies with even greater urgency to individual beggars. Among the hundreds of thousands of beggars on our city streets, few have any realistic choices, can take advantage of alternative means of survival, or have any alternative sources of support. Human beings do not beg for fun, or as part of a get-rich-quick scheme, but rather, because they have no other way. And the less adept among them die in our doorways. Judge Meskill, dissenting in *Young*, injects a dose of realism into the usual theoretical and overly legalistic discussion:

In the seclusion of a judge’s chambers, it is tempting to assume that beggars could obtain jobs and spend their free time distributing leaflets or buttonholing passersby in the subway to further the cause of the homeless and poor. The record in this case, however, permits no such speculation. Plaintiff Young . . . , for example, . . . solicits money in the subway so that he can buy food, medicine and other essentials, and take the subway to the Bronx, where he sometimes earns enough money unloading trucks to rent a room for the night. He receives no public assistance. Plaintiff Walley, who is fifty years old, . . . solicits donations because he is unable to find work. If he sleeps in a shelter, he receives reduced public assistance

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260. *Village of Schaumburg v. Citizens for a Better Env’t*, 444 U.S. 620, 632 (1980).

261. *Id.*

262. *Id.*

263. *See* Rose, *supra* note 145, at 209.

264. *Blair v. Shanahan*, 775 F. Supp. 1315, 1322-23 (N.D. Cal. 1991).



of \$21.50 every two weeks. Plaintiff Gilmore's solicitation also is the result of her need for food and medical treatment. To suggest that these individuals, who are obviously struggling to survive, are free to engage in First Amendment activity in their spare time ignores the harsh reality of the life of the urban poor.<sup>265</sup>

A much harsher view is expressed by Judge Meskill's colleague, Judge Altimari, writing for the 2-1 majority. He finds that "organized charities serve community interests by enhancing communication and disseminating ideas," whereas begging "amounts to nothing less than a menace to the common good."<sup>266</sup> Quoting Justice Rehnquist, he proffers that "in the Western tradition virtue is best served when it reflects an 'ordered charity.'<sup>267</sup> Yet the irony of permitting secondary, sanitized begging and not primary begging is obvious. It reflects charity in its most patronizing form. Not only do we prefer to give to, but we also afford more rights to, organizations operated by those of our own social class who will funnel our contributions (after deducting overhead costs) for use in a prescribed manner. "Some paradox of our natures leads us," observes Lionel Trilling, "when once we have made our fellow men the objects of our enlightened interest, to go on to make them the objects of our pity, then of our wisdom, ultimately of our coercion."<sup>268</sup>

Some argue that begging is nothing more than commercial speech and, accordingly, should receive the somewhat lower level of constitutional protection that case law dictates.<sup>269</sup> Regarding charitable solicitations, the Supreme Court has "rejected that approach and squarely held, on the basis of considerable precedent, that charitable solicitations 'involve a variety of speech interests . . . that are within the protection of the First Amendment,' and therefore have not been dealt with as 'purely commercial speech.'<sup>270</sup> Commercial speech relates to the sale of goods and services, whereas charitable solicitation "does more than inform private economic decisions."<sup>271</sup> Once again, the finding of a legally significant similarity between institutional and individual solicitation depends on whether begging is also found to include "a variety of speech issues," as discussed above.

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265. *Young v. New York City Transit Auth.*, 903 F.2d 146, 165-66 (2d Cir. 1990) (Meskill, J., concurring in part, dissenting in part), *cert. denied*, 111 S. Ct. 516 (1990).

266. *Young*, 903 F.2d at 156.

267. *Id.*

268. *Epigraph to GERTRUDE HIMMELFARB, POVERTY AND COMPASSION: THE MORAL IMAGINATION OF THE LATE VICTORIANS* (1991) (quoting Lionel Trilling).

269. *See Central Hudson Gas & Elec. v. Public Serv. Comm'n*, 447 U.S. 557 (1980) (holding commercial speech less protected by the Constitution than other forms of expression).

270. *Riley v. National Fed'n of the Blind of N.C.*, 487 U.S. 781, 787-88 (1988) (citing *Village of Schaumburg v. Citizens for a Better Env't*, 444 U.S. 620, 632 (1980)).

271. *Village of Schaumburg*, 444 U.S. at 632.

Even if commercial speech analysis is appropriate,<sup>272</sup> the *Central Hudson* standards still require (1) a substantial governmental interest for restricting begging, and (2) a restriction that is no more extensive than is necessary to serve that interest. Thus, however begging is to be categorized, we must examine and evaluate the proffered state interests.

### C. What Exactly Are We Protecting Passersby (Ourselves) From?

Depending on the context in which a begging case arises—complete bans or partial restrictions, sidewalks or subways—differing levels of scrutiny may be invoked, and the public interest may need to be compelling or, alternatively, merely substantial or important.<sup>273</sup>

Proponents of begging bans may offer a variety of public interests to justify their “out-of-sight, out-of-mind” approach to this social condition. Interests include the prevention of (1) harassment, intimidation and threats to the physical safety of passersby;<sup>274</sup> (2) annoyance, discomfort, and inconvenience;<sup>275</sup> and (3) invasions of privacy. Arguably, a fourth interest, the prevention of fraud, could be proffered. The “sob stories” offered by some beggars may be generously embellished or wholly untrue. Nevertheless, the vast majority of beggars to whom passersby render aid demonstrates an undeniable and desperate need; thus, an absolute ban, which would sweep within its coverage the truthful pleas of “legitimate” beggars, would be unconstitutionally overinclusive. Furthermore, existing criminal laws forbidding the receipt of money through fraud are perfectly adequate remedies. While any one of these interests might be sufficient to justify reasonable time, place, and manner restrictions under certain facts, more severe restraints enacted pursuant to these interests should not withstand careful judicial scrutiny.

In the *Young* case, Judge Altimari concluded that the subway begging ban “advances substantial governmental interests . . . because a majority of the subway’s daily passengers perceive begging . . . to be

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272. Commercial speech is afforded First Amendment protection on the theory that the information provided by advertising is indispensable to the proper allocation of resources in a free enterprise system . . . [and] to the formation of intelligent opinions about how that system ought to be regulated or altered. . . . [B]eggars also influence individual and collective decisions about the allocation of resources.

*Seattle v. Webster*, 802 P.2d 1333, 1343 (Wash. 1990) (Utter, J., concurring and dissenting), cert. denied, 111 S. Ct. 1690 (1991).

273. See *Perry Educ. Ass’n v. Perry Local Educator’s Ass’n*, 460 U.S. 37, 45-46 (1983).

274. *Young v. New York City Transit Auth.*, 903 F.2d 146, 156 (2d Cir. 1990), cert. denied, 111 S. Ct. 516 (1990); *Blair v. Shanahan*, 775 F. Supp. 1315, 1324 (N.D. Cal. 1991).

275. *C.C.B. v. State*, 458 So. 2d 47, 48 (Fla. Dist. Ct. App. 1984); *Ulmer v. Municipal Court of Oakland-Piedmont Judicial Dist.*, 127 Cal. Rptr. 445, 447 (Ct. App. 1976); *Blair v. Shanahan*, 775 F. Supp. 1315, 1324 (N.D. Cal. 1991).

'intimidating,' 'threatening,' and 'harassing'. . . . [B]egging in the subway often amounts to nothing less than assault, creating in the passengers the apprehension of imminent danger."<sup>276</sup> For some, the grimy, subterranean environment distinguishes the subway from the open-air streets above. "Underground, at least," pronounces a *New York Times* editorial, the "right to beg is overridden by everyone's right to use the subway in peace."<sup>277</sup>

Prevention of assault is, of course, an entirely legitimate public purpose. But begging bans are legislative overkill. All jurisdictions have laws and regulations against assault and related crimes. The New York Transit Authority, for example, may still prohibit conduct that has "the reasonably intended effect of annoying, alarming or inconveniencing others, or otherwise tends to create a breach of the peace,"<sup>278</sup> that "interfere[s] with the provision of transit service or obstruct[s] the flow of [the] traffic . . . ,"<sup>279</sup> or that "causes or may tend to cause harm or injury to any person . . . ."<sup>280</sup> Furthermore, begging is prohibited on subway cars and within twenty-five feet of any token booth.<sup>281</sup> Thus, even without the absolute ban at issue in *Young*, "begging in the subway system is still strictly regulated."<sup>282</sup> And, as the court in *Blair* observed, officials "have at their disposal a plethora of content-neutral statutes with which the population at large may be protected from a threatening conduct."<sup>283</sup>

The *Young* majority observed that many subway passengers, while experiencing individual beggars as intimidating and threatening, do not feel intimidated by representatives of organized charities. But "[t]o the extent the public feels harassed by beggars because of the immediacy of their plight and the poignancy of their message, the First Amendment forbids protecting the public from harassment."<sup>284</sup> As Justice Stewart declared in *Coates v. Cincinnati*, "mere public intolerance or animosity cannot be the basis for abridgement of [speech]."<sup>285</sup> "Aggressive beg-

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276. *Young*, 903 F.2d at 158.

277. N.Y. TIMES, Jan. 31, 1990, at A26.

278. 21 N.Y.C.R.R. 1050.7(i).

279. 21 N.Y.C.R.R. 1050.6(a).

280. *Id.*

281. 21 N.Y.C.R.R. 1050.6(c)(1).

282. Letter from Douglas A. Lasdon, et al., attorneys for Legal Action Center for the Homeless, to the Editor, N.Y. TIMES, Feb. 11, 1990, at E24.

283. *Blair v. Shanahan*, 775 F. Supp. 1315, 1324 (N.D. Cal. 1991) (citing, among others, CAL. PENAL CODE §§ 211 (robbery), 240 (assault), 242 (battery), 415(1) (challenging to a fight), 415(2) (disturbing another by loud noise), 415(3) (use of offensive words), and 647c (willful and malicious obstruction of thoroughfares and public places) (West 1985)).

284. *Seattle v. Webster*, 802 P.2d 1333, 1343 (Wash. 1990) (Utter, J., dissenting), *cert. denied*, 111 S. Ct. 1690 (1991).

285. *Coates v. Cincinnati*, 402 U.S. 611, 615 (1971).

ging," if the term can ever be properly defined,<sup>286</sup> may well constitute an assault. The mere discomfort of passersby, however, should not be sufficient. Often, the very presence of beggars on the street disturbs our conscience, and we would prefer to simply sweep them away. Perhaps the New York Court of Appeals said it best in *Fenster v. Leary*<sup>287</sup> when, in the process of striking down a vagrancy statute, it referred to "unfortunates, whose only crime, if any, is against themselves, and whose main offense usually consists in their leaving the environs of skid row and disturbing *by their presence* the sensibilities of residents of nicer parts of the community . . . ."<sup>288</sup> The issue is much like that of prohibiting status crimes.<sup>289</sup>

Banning begging to prevent annoyance is a content-based prohibition if it is banned because local authorities have determined that begging is more annoying to citizens than other types of messages. Downtown merchants are often concerned that the presence of beggars, will "contaminate the sterility of store displays that seek to entice an affluent clientele"<sup>290</sup> and will drive away well-heeled customers—an argument made at an earlier time regarding Title II of the 1964 Civil Rights Act, when white merchants were required to open their doors to black customers. While local authorities may enforce reasonable time, place, and manner restrictions to prevent undue annoyance of residents,<sup>291</sup> our appreciation of First Amendment values would never permit such an interest to survive heightened scrutiny.<sup>292</sup>

Speech may be provocative and disturbing, but "is nevertheless protected against censorship or punishment, unless shown likely to produce a clear and present danger of a serious substantive evil that rises far above public inconvenience, annoyance, or unrest."<sup>293</sup> Preserving the rights of free expression requires "a certain measure of sacrifice,"<sup>294</sup> a generous dose of tolerance, a tougher skin. Mere annoyance is the price we pay to live in society. Recall Justice Douglas's oft-quoted reminder

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286. See, e.g., SEATTLE, WA. MUNICIPAL CODE § 12A.12.015(A)(1).

287. 229 N.E.2d 426 (N.Y. 1967).

288. *Id.* at 430; see also *Alegata v. Commonwealth*, 231 N.E.2d 201, 207 (Mass. 1967) (quoting *Fenster*).

289. See, e.g., *Robinson v. California*, 370 U.S. 660 (1962), where the Supreme Court held unconstitutional a statute making it a criminal offense for a person to be addicted to narcotics—for the mere status of addiction absent any irregular behavior.

290. Brief of Amicus Curiae for ACLU at 16, *Seattle v. Webster*, 802 P.2d 1333 (Wash. 1990) (No. 23372-6-I).

291. See *ACORN v. City of Frontenac*, 714 F.2d 813, 817 (8th Cir. 1983).

292. Rose, *supra* note 145, at 218.

293. *City of Houston v. Hill*, 482 U.S. 451, 461 (1987) (quoting *Terminiello v. City of Chicago*, 337 U.S. 1, 4 (1949)), *cert. denied*, 483 U.S. 1001 (1987).

294. Rose, *supra* note 145, at 218.

that “a function of free speech under our system of government is to invite dispute. It may indeed best serve its high purpose when it induces a condition of unrest, creates dissatisfaction with conditions as they are, or even stirs people to anger.”<sup>295</sup>

Proponents of begging bans might also offer privacy interests as a justification for restricting speech. Privacy interests *have* outweighed speech interests, but only in the context of intrusions into the home, such as door-to-door solicitation<sup>296</sup> and sound trucks,<sup>297</sup> or other narrow circumstances involving a “captive audience.”<sup>298</sup> When Paul Robert Cohen strolled around the courthouse with “Fuck the Draft” emblazoned on the back of his jacket, Justice Harlan rejected the “captive audience” argument.<sup>299</sup> He noted that those objecting “could effectively avoid further bombardment of their sensibilities simply by averting their eyes,”<sup>300</sup> a task even easier for pedestrians who feel that sidewalk beggars are invading their privacy.<sup>301</sup>

## V. Fearing the Mirror: The Importance of Connection and Compassion in an Increasingly Polarized Society

### A. Our Spiritual Malaise

The dominant American paradigm—the free market and the primacy of individual rights—has yielded an economic condition whereby thousands of beggars are dumped onto our streets, and it has prompted an unseemly legal debate over whether the poor should be permitted to grovel in public. Arguably, a libertarian ethic run rampant has polarized our society as never before, a “zero-sum” mythology has created desperate competition, fostering a climate of distrust and disassociation in almost every walk of life. We are a culture out of balance. When measuring values of individualism against communitarianism—what’s good for me versus what’s good for the community—studies demonstrate that the United States ranks at the far end of the individualistic side of

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295. *Terminiello*, 337 U.S. at 4.

296. *Hynes v. Mayor of Oradell*, 425 U.S. 610 (1976).

297. *Kovaks v. Cooper*, 336 U.S. 77 (1949).

298. *Rowan v. Post Office Dept.*, 397 U.S. 728, 744 (1970).

299. *Cohen v. California*, 403 U.S. 15, 21 (1971).

300. *Id.* at 21.

301. If we regard verbal harassment by protestors at family planning clinics to constitute protected speech, we also must protect a beggar with his hand out. See *In Federal Way Family Physicians, Inc. v. Tacoma Stands Up for Life*, 721 P.2d 946 (Wash. 1986), where the Washington Supreme Court vacated an injunction that restricted the use of derisive and arguably intimidating language hurled at visitors to a medical clinic. The court found “no compelling State interest in insulating” physicians, staff members, and patients from protestors who were screaming the words “killers” and “murderers.”

the spectrum.<sup>302</sup> The individualism of previous generations in the United States was tempered by a respect for the community, but over the past forty years dramatic changes have occurred.<sup>303</sup> In the 18th century, “[t]he Lockean ideal of the autonomous individual was . . . embedded in a complex moral ecology that included family and church on the one hand and on the other a vigorous public sphere in which economic initiative, it was hoped, grew together with public spirit.”<sup>304</sup> But in recent decades, our defining concerns have shifted from “production to consumption, from the future to the immediate, from sacrifice to greed, from the public interest to self-interest, from quality to quantity, and from long term to short term.”<sup>305</sup> Our harshest critics contend that few Americans perceive our ultimate goal as community service, as leaving the world a better place than when we arrived. Rarely, some argue, do we regard earning a wage or turning a profit as merely a means to an end—as a way to support oneself so as to be able to devote one’s energies to greater social goals. Rather, we are experiencing a spiritual malaise, turning ourselves into “relentless market maximizers”<sup>306</sup> and undermining our commitments to self-cultivation, family, and community.

Our responses to beggars can serve as a barometer for the condition of our individual lives. “They line the crazed streets, a serpentine fun-house mirror, confounding us, giving us our images *in extremis*, distorting our best instincts, exaggerating our worst.”<sup>307</sup> I give when I feel secure in the world, secure enough to peer into the mirror; “[w]hen I feel neglected, abused, invisible, unloved, and surly—a bit like a beggar myself—I resist.”<sup>308</sup> Beggars force me to look at my life—its richness and its emptiness—and to wonder whether, absent material comforts, it is any more “significant” than theirs.

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302. See Hazel Rose Markus & Shinobu Kitayama, *Culture and Self: Implications for Cognition, Emotion, and Motivation*, 98 PSYCHOLOGICAL REV. 224 (1991); Harry C. Triandis, et al., *Multimethod Probes of Individualism and Collectivism*, 59 J. PERSONALITY & SOC. PSYCHOL. 1006 (1990).

303. As I noted several years ago, “[g]one, or at least in hibernation, has been that commitment to community which once provided a balance to the radical individualism that so worried Alexis de Tocqueville when he first examined American life in the 1830’s.” Burns, *supra* note 67 at 351.

304. Robert N. Bellah et al., *Breaking the Tyranny of the Market*, TIKKUN July/Aug. 1991, at 31.

305. Georgie Ann Couyer, MIAMI HERALD, Sept. 1, 1990, at 33A (summarizing a poll by Daniel Yankelovitch comparing American values in 1950 and 1990).

306. Bellah et al., *supra* note 304, at 31.

307. Lynne Sharow Schwartz, *Beggaring Our Better Selves*, HARPER’S MAG., Dec. 1991, at 62, 67.

308. *Id.*

Our collective response to beggars is also a barometer for our societal condition. Generalized fear—fear of people and things different, fear of change, of new rules, of loss of property and person, of a changing world order with no guarantee of a better tomorrow—has produced higher fences and greater isolation. Sociologist Richard Sennett observes that contemporary design often reflects a “fear of exposure.”<sup>309</sup> The dominant theology has become one of insuring security and privacy. Money buys space—space to keep others away. For those of means, community centers and corner stores are no longer regarded as necessary or particularly desirable.<sup>310</sup> We oppose higher taxes (although our tax rate remains far lower than most European countries) for community services; “not in my backyard” is the increasingly popular battle cry against proposals for half-way houses, low- and moderate-income housing projects, homeless shelters and the like.

When we speak of personal and professional development, especially as males, we tend to assign greatest value to individual achievement and financial independence, relegating or delegating to others the time-consuming, less lucrative, less glamorous tasks of the “social worker.” Solutions to problems of morality and justice are found in a hierarchy of abstract rules, devoid of human context and laden with potential for apathy and indifference. The morality of rights, which differs from the morality of responsibility in its emphasis on separation rather than connection, considers primarily the individual rather than the relationship. Yet, if we are to recover our equilibrium, as individuals and as a society, we might do well, to paraphrase Carol Gilligan, to learn to balance the ladder of hierarchy with the web of connection.<sup>311</sup> If we are to respond adequately—judicially, legislatively, and personally—to the beggars among us, we might contemplate a new paradigm (or recapture a very old one) in which we acknowledge our common ground and in which personal contact is not wholly displaced by checkbook charity.

Images of the American West, both real and imagined, have served to exemplify our culture in a wide range of contexts for more than a century. Our less-than-generous responses to street beggars, for example, whether in New York or Cheyenne, too often reflect an overly simplified half-truth that rugged individualism wholly captures the “spirit of the

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309. RICHARD SENNETT, *THE CONSCIENCE OF THE EYE: THE DESIGN AND SOCIAL LIFE OF CITIES* 19 (1991).

310. To the contrary, the planned community of Columbia, Maryland has sought to stem the tide of isolation in numerous ways, including prohibitions against private swimming pools and home mail delivery so as to encourage neighborly contact at the community pool and at the post office.

311. See generally Burns, *supra* note 67, at 339-340.

West.” Today environmentalists, Native Americans, ranchers, and developers, while battling over the future of the frontier, seek to rediscover and redefine fundamental values. Novelist Wallace Stegner, having described the West as “the native home of hope,”<sup>312</sup> writes: “When [the West] fully learns that cooperation, not rugged individualism, is the quality that most characterizes and preserves it, then it will have achieved itself and outlived its origins. Then it has a chance to create a society to match its scenery.”<sup>313</sup> The same could—and must—be said for our urban landscape and the thousands of beggars who populate its tracks and trails.

### B. Connection and Compassion

There are those among us who would regard as a sign of weakness the proposition that we are all essentially social creatures, only able to fulfill our potential in relationship to one another. Yet, none other than Adam Smith concluded that each individual’s sense of self-worth is wholly embedded within society.<sup>314</sup> Whatever our station in life, we share the basic human need to be regarded with respect, sympathy, and approval.<sup>315</sup> “[O]nce the enveloping social context is perceived as an inextinguishable extension of one’s self,” writes Frances Moore Lappe, “it is impossible to think in terms of trade-offs between society’s well-being and the individual’s unfettered pursuit of happiness. The health of the social whole is literally vital to a socially constituted individual’s well-being.”<sup>316</sup>

Viewed in this context, government can no longer be perceived as a necessary evil designed to control our less noble impulses. Likewise, the market economy and the acquisition of material goods become mere tools subordinated to the achievement of our socially defined needs. One such need is for justice, but not the very limited concept of justice as merely a negative mandate serving to control humankind’s antisocial tendencies. Rather, “[J]ustice derives from our capacity for identifying with each other’s pain and from our innate need for community. We most fear injustice because it threatens to tear apart community.”<sup>317</sup> Rather than defining freedom in the context of property rights and individual

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312. WALLACE STEGNER, *THE SOUND OF MOUNTAIN WATER* 38 (First Bison Book Prtg. 1985).

313. *Id.*

314. ADAM SMITH, *THE THEORY OF MORAL SENTIMENTS* pt. 2, sec. 2, ch. 3, at 85 (D.D. Raphael & A.L. Macfie eds., 1982).

315. *Id.* at pt. 1, sec. 3, ch. 2, at 50-51.

316. LAPPE, *supra* note 34, at 13.

317. *Id.*



autonomy, we find that ultimately freedom is a matter of inclusion within society. Because our deepest needs are socially defined, the greatest injustice is exclusion from society. Adam Smith reminds us that the harshest pain is that of the poor person who feels pushed "out of the sight of mankind."<sup>318</sup> This experience of not belonging is central to the experience of beggars on our streets. Deprived of community, they fall into isolation and a desperate state of grief. "Above and beyond the basic human needs of food and shelter, most people on the street are yearning for a spiritual connection to others. Everybody on the face of the earth deserves to have at least one person care about them that isn't paid to do it."<sup>319</sup> Our deepest fear as human beings is that our death will not matter to anyone.

Our need for justice might better manifest itself in a jurisprudence of inclusion. This paradigm shift recognizes that "human beings cannot live without work because it fulfills a need to partake in community life."<sup>320</sup> And freedom does not mean the freedom to acquire goods and power, but rather the freedom to "develop ourselves through interaction with others."<sup>321</sup> Freedom is the fulfillment of our quest for community, an irrepressible force fundamental to our human nature. Robert Nisbet explains:

The quest for community will not be denied, for it springs from some of the powerful needs of human nature—needs for a clear sense of cultural purpose, membership, status, and continuity. Without these, no amount of mere material welfare will serve to arrest the developing sense of alienation in our society . . . .<sup>322</sup>

Indeed, the nearly insatiable consumerism of our culture suggests that materialism has become "a replacement for [our] unfulfilled need to develop our innate gifts—whether they are physical, intellectual, spiritual, or artistic."<sup>323</sup> The freedom to develop individual talents toward a common enterprise is not, then, competition for a finite number of brass rings. Rather, "[s]eeing freedom as the mutual expansion of horizons belies the whole notion of zero-sum."<sup>324</sup>

The widely read Vietnamese scholar, Thich Nhat Hanh, observes that "there is no such thing as the individual . . . the individual is made of

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318. SMITH, *supra* note 314, at pt. 1, sec. 3, ch. 2, at 51.

319. Matousek, *supra* note 4, at 15 (quoting Fred Karnas, executive director of the National Coalition for the Homeless).

320. LAPPE, *supra* note 34, at 14.

321. *Id.*

322. ROBERT A. NISBET, *THE QUEST FOR COMMUNITY* 73 (1953).

323. LAPPE, *supra* note 34, at 14.

324. *Id.* at 15.

non-individual elements.”<sup>325</sup> He speaks of the interconnectedness of all things, the principle of nonduality. In contrast to the idea that “I am my brother’s keeper,” for example, one might say that “I *am* my brother.”<sup>326</sup> Yet most of us do not really know how to experience being part of the whole, that peak experience of connection. These moments are rare and fleeting, at best. Usually we experience our selves, our thoughts, and our feelings as separate from others—what Einstein called “the optical delusion of consciousness.”<sup>327</sup> This serves as an individual prison cell, says Thich Nhat Hanh; our task must be to free ourselves by widening our circle of experience, of understanding, of compassion to embrace all creatures and all of nature.<sup>328</sup>

To experience this connection, one must be willing to become engaged. Living with passion empowers people to noble action. In his call for a true participatory democracy, Robert Bellah urges us to overcome despair, cynicism, and apathy by “paying attention to” the institutions that support us—echoing John Dewey’s notion of psychic fulfillment through civic involvement.<sup>329</sup> As lawyers, as teachers, as citizens, as leaders, as parents we act from a place of ultimate responsibility of caring and of love. Engagement is concentration, is identification, is connection, is passion. And, as social creatures, that passion is directed toward the community as compassion.

Truly compassionate action first requires, in my view, a healthy level of self-acceptance. Self-acceptance is to be without anxiety about nonperfection—to accept ourselves “as is,” acknowledging our “dark side”—our selfishness, our pettiness, our ugliness, our violence, our meanness. Unfortunately, most Americans experience their theological beliefs as largely guilt-based, and guilt tends to produce denial and repression, hardly the ingredients for heart-felt compassionate action. Repressing our dark side produces a judgmentalness that ensures disassociation and breeds a self-righteousness that serves no one.

A second prerequisite to compassionate action is sincere respect for those to whom we lend a hand. Not pity, not paternalism, not condescension, but true respect and compassion for a fellow traveler who is suffering. The familiar phrase “as cold as charity” reminds us of the numerous possibilities for self-deception when we give to others—the “temptation to impose our own ideas and standards from a position of

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325. Jack Kornfield, Taped Lecture (available from author).

326. NANCY WILSON ROSS, *BUDDHISM, A WAY OF LIFE AND THOUGHT* 52 (1980) (emphasis added).

327. Kornfield, *supra* note 325.

328. *Id.*

329. *See generally* ROBERT BELLAH ET AL., *THE GOOD SOCIETY* 254-86 (1991).

patronage.”<sup>330</sup> Respect is seeing the godliness in another person—“perceiving the superficiality of positions of moral superiority,” writes David Brandon.<sup>331</sup> “The other person is as good as you. However untidy, unhygienic, poor, illiterate and blood-minded he may seem, he is worthy of your respect. He also has autonomy and purpose.”<sup>332</sup> Pity is not to be confused with compassion. Pity may appear like compassion, but it sets one apart, manifesting distance, not connection.

Respect also entails honoring the wishes and preferences of the persons we are helping—being willing to relinquish control and not impose our agenda for solving their suffering. As for beggars, most of us have fantasized a Pygmalion-style rescue at one time or another. “We are moved either to ‘redeem’ [them] or to punish them,” writes Peter Marin. “[A]lmost every one of our strategies for helping [them] is simply an attempt to rearrange the world cosmetically, in terms of how it looks and smells to us.”<sup>333</sup> Thus, to the extent that our efforts reflect “little more than the passion for control,”<sup>334</sup> we must learn to let go of our agenda.

At the risk of confusing my message with Thomas Monaghan’s patronizing comments on the challenges of being poor,<sup>335</sup> there is a “soulful dimension” to life on the street worthy of our attention and respect.

No matter how stark and difficult street life is, it can offer a commensurate potential for awakening. . . . [T]here is something extremely “brave, radical and authentic” about succumbing to homelessness. When despair does not overtake the individual, life

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330. KEN JONES, *BUDDHISM AND SOCIAL ACTION: AN EXPLORATION, IN THE PATH OF COMPASSION* 65, 70 (F. Eppsteiner ed. 1988).

331. DAVID BRANDON, *ZEN IN THE ART OF HELPING* 59 (1976).

332. *Id.*

333. Marin, *supra* note 11, at 48 (emphasis omitted).

334. *Id.*

335. In a speech to business executives at Madonna College in Livonia, Michigan, Domino’s Pizza founder, Thomas Monaghan, offered his views on the poor:

To me one of the most exciting things in the world is being poor. Survival is such an exciting challenge. There was a study done about 20 years ago, I think at Harvard, which said that the average family of four could live on \$68 a year . . . . Now today that might be \$250 or \$300, but when we see these people in lines in supermarkets with all these food stamps, buying potato chips and snack foods and ice cream, I mean give me a break! *That’s* poverty?

Now you’re probably wondering how you can live on \$68 a year. The first thing you do is go to the Farm Bureau and buy a hundred-pound bag of powdered milk, like they feed the calves—there’s nothing wrong with it; it tastes just like regular milk when you put a little water in it. That would probably last you the better part of a year. While you’re at the farm bureau you buy yourself a bushel of oats or wheat or corn, and you mash that stuff up. What you’re eating isn’t all that tasty—it kind of tastes like cornmeal mush—but it’s healthy. And you grow some vegetables, and you get a few vitamin pills to supplement your diet. . . . Oh gosh, I’d love to talk to all these people who say they can’t get by.

Thomas Monaghan, *The Thrill of Poverty*, *HARPER’S MAG.*, Aug. 1990, at 22.

*in extremis* yields a spirituality of survival and transcendence, and beings of extreme wisdom and poetry . . . [M]any people who visit our shelter are highly sensitive and artistic. Often, they are more aware of sights and sounds than many of us who are wrapped up in our lives. We forget to see and hear. They take the time because that's all they have.

[T]his loss of shelter is not unlike the existential shock suffered by the spiritual seeker who realizes, in a moment of grace, that beyond the parentheses of his earthly life, the artifice of house and name, he stands naked and alone in the universe. . . [W]hile "home is a place to call our own . . . the need for it reflects our discomfort at being on the Earth in the first place." Avoiding this "deep experience of homelessness," which is required by certain spiritual disciplines, can prevent us from discovering our true purpose as incarnated beings.<sup>336</sup>

Jonathan Kozol urges us to see people of the street "not as faulty, deficient human beings, but as metaphors of the fragility of life for all of us, as epiphanies. Only then, . . . will we not be able to drive them away."<sup>337</sup>

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While living in Sri Lanka, I was confronted with begging just as I have been in American cities, but with an added twist to my confused and complicated internal dialogue: "Maybe I'm being exploited as a rich-looking foreigner." And so my resistance continued. Yet during my first few days in Colombo, one of my Sri Lankan colleagues, Daphne Perera taught me a lesson, and I'm sure she remembers nothing of it. Daphne was helping me get oriented to Colombo—helping me open a bank account, get a driver's license and so on. As we walked on the street, she opened her purse, simply as a matter of course, and gave to a beggar. After several such occasions, I asked her about it. I don't recall her precise words but, for her, it was a very simple act, no fanfare, without all the convoluted, internal conversation. In fact, it never would have occurred to her not to give. And I thought to myself, "What am I so at-

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336. Matousek, *supra* note 4, at 14-17. In a monologue entitled "Nickie" from "Ladies" by Eve Ensler:

It's what happens to you when you live without walls for too long. It all runs together like raw scrambled eggs. Each part of you bleeds into the other. Your emotions are like your things, shoved into one goddamn cheap Woolworth bag. You don't even know what's in the bag after a while and you stop caring. All you know is it's heavy and you've got to take it everywhere you go, cos there's no place that wants it. No place that will let you keep it there. And one night you just say fuck it, fuck the bag and you leave it. And when you go out you come back after two days and it's gone. You act like you're really pissed off. Who did it. Who took my fucking bag. It's got everything. But deep down you're relieved cos it's gone, and after that you're gone too in a way, and it feels better. Kind of.

*Id.* at 17.

337. *Id.* at 16.

tached to? Why must I be so protected, so defensive? Why deny the pain and suffering that is part of me? Why deny the connection? Why make it all so complicated?"

We are dealing with human beings who have lost their way. The way back depends on our compassion . . . . Perhaps within us there is a specter of [suffering] . . . that haunts us and blinds us to the plight of the less fortunate. By recognizing the[ir] needs . . . , we come face to face with our own fears and insecurities and the realization that we are inextricably bound to each other.<sup>338</sup>

To be sure, my irregular habits of giving on the streets have not changed significantly. I still don't know what to do. But the internal dialogue is slowing down. And it seems more natural to give than to withhold.

## VI. Conclusion

Our streets are teeming with beggars as never before; the gulf between the rich and poor in our country has widened dramatically in recent years; legislators enact repressive legislation at a frenetic pace, and many say our common law and constitutional law are powerless to respond. A jurisprudence of individual rights confines itself to negative proscriptions and declines to encompass affirmative duties. As if to leave no doubt that our nation has lost its course, some of our presumably better brains—lawyers, judges, and academics—blinded by libertarian ethics and an overly legalistic professional culture, engage in scholarly debate as to whether the desperately needy may beg. Is this another one of Robert Bork's abstract "intellectual feast[s]"<sup>339</sup> perhaps?

Debating whether our Constitution recognizes the "right" to beg need not consume all our waking hours. More than 200 years ago, Samuel Johnson observed that "[a] decent provision for the poor is the true test of civilization."<sup>340</sup> Today, Judge Leonard Sand is surely correct when he reminds us that the "true test of one's commitment to constitutional principles is the extent to which recognition is given to the rights of those in our midst who are the least affluent, least powerful and least welcome."<sup>341</sup> The civilized response to the reality of begging is not to make it criminal. Begging constitutes protected speech, takes place in a public forum and deserves the greatest judicial protection. "Legislators

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338. Letter from Mitzie Pizzo, U.S. CATHOLIC, Apr. 1989, at 19-20.

339. *Hearings on the Nomination of Robert H. Bork to be Associate Justice of the Supreme Court of the United States*, U.S. Senate, 100th Cong., 1st Sess. 720 (1987).

340. JAMES BOSWELL, *THE LIFE OF SAMUEL JOHNSON* 227 (Doubleday & Co., Inc. 1946).

341. *Young v. New York City Transit Auth.*, 729 F. Supp. 341, 360 (S.D.N.Y. 1990), *rev'd in part, vacated in part*, 903 F.2d 146 (2d Cir. 1990), *cert. denied*, 111 S. Ct. 518 (1990).

cannot, consistent with the first amendment, stifle the message of suffering.”<sup>342</sup> Despite our desire for an out-of-sight, out-of-mind solution, panhandling prohibitions will not make beggars disappear. “Criminalization may be expedient,” writes Anthony Rose, “but it cannot be justified on the basis of preventing annoyance and preserving middle-class property values.”<sup>343</sup>

America’s paupers should not be forced to give up their right to belong—their right not to be ignored, marginalized, and discarded—simply because we are reluctant to confront the mirror of our discontent.

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342. Rose, *supra* note 145, at 228.

343. *Id.*