

Articles

Controlling Chronic Misconduct in City Spaces: Of Panhandlers, Skid Rows, and Public-Space Zoning

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I. INTRODUCTION

To the bewilderment of pedestrians in the 1980s, panhandlers, aimless wanderers pushing shopping carts, and other down-and-out individuals appeared with increasing frequency in the downtown areas of the United States.¹ During the same period, in an apparent paradox, the Skid Rows of most U.S. cities were in sharp decline. While New Yorkers were encountering more panhandlers in their subway system, their city's most famous Skid Row—the Bowery—was fading from view.² While the number of homeless campers occupying Palisades Park in Santa Monica rose, fifteen miles away, Los Angeles's Skid Row east of Spring Street was losing population.³

By the early 1990s, the increased disorderliness of the urban street scene had triggered a political backlash. Commentators began to report that the urban

1. See CHRISTOPHER JENCKS, *THE HOMELESS at v* (1994) [hereinafter JENCKS, HOMELESS] (visible street poverty started to increase in late 1970s and worsened during 1981 recession); WILLIAM H. WHYTE, *CITY: REDISCOVERING THE CENTER* 49 (1988) (in author's estimate, incidence of begging in midtown Manhattan doubled between 1980 and 1987). On the onset of street homelessness, see generally BRENDAN O'FLAHERTY, *MAKING ROOM: THE ECONOMICS OF HOMELESSNESS* 32–40 (forthcoming 1996).

2. The Bowery Skid Row dates from 1872–1873, when its first mission and cheap lodging house opened. HOWARD M. BAHR, *SKID ROW: AN INTRODUCTION TO DISAFFILIATION* 31–32 (1973). In 1949, the Bowery had 47 lodging houses with a total of 11,219 beds. Most of these were gone by 1980. In 1993, 11 lodging houses remained; these houses had some 2400 beds, many of them unrented. O'FLAHERTY, *supra* note 1, at 145, 178. By the mid-1990s, with the dwindling or disappearance of such institutions as gin mills, flophouses, public baths, and cheap restaurants, the Bowery's traditional Skid Row culture was barely detectable at street level. See Michael T. Kaufman, *Last Call Sounds for Last Gin Mill on the Bowery*, N.Y. TIMES, Dec. 25, 1993, § 1, at 33.

3. More than half of the single-room occupancy (SRO) units in downtown Los Angeles were demolished between 1970 and 1985. PETER H. ROSSI, *DOWN AND OUT IN AMERICA: THE ORIGINS OF HOMELESSNESS* 182 (1989) (citing 1987 study by Hamilton, Rabinowitz & Alschuler, Inc.). The Los Angeles Skid Row endures partly because the city's Community Redevelopment Agency in the mid-1980s began to encourage the development and concentration of low-rent housing there. See Edward G. Goetz, *Land Use and Homeless Policy in Los Angeles*, 16 INT'L J. URB. & REGIONAL RES. 540, 544–45 (1992).

On the Santa Monica situation before and after the crackdown in 1994, compare Sarah Lubman, *Change of Heart: Santa Monica Grows Hostile to the Homeless Who Consider It Home*, WALL ST. J., Nov. 9, 1992, at A1 (quoting 18-year resident: "I used to have picnics in the park. I don't do that anymore.") with Nancy Hill-Holtzman, *Two Arrested for Sleeping in Palisades Park Under New Ban*, L.A. TIMES, May 12, 1994, at 4.

populace was suffering from “compassion fatigue.”⁴ Even in the nation’s most liberal cities, mayoral candidates campaigned for greater control of street misconduct, and city councils passed crackdown ordinances. In New York, San Francisco, Washington, D.C., and countless other cities, these legal measures, coupled with a general hardening of pedestrians’ attitudes, began to reduce the incidence of disorderly behavior in public spaces.⁵ In 1994 alone, voters in Berkeley, Santa Monica, and Santa Cruz—three of the most politically liberal municipalities in California—compelled their local officials to take steps to limit street disorder.⁶

This Article describes the evolution from the Skid Row of the 1950s, to the unruly sidewalks of the 1980s, to the emphatic backlash of the 1990s, and seeks to explain this course of events. The Article’s primary mission, however, is normative. ACLU attorneys, poverty lawyers, and pro bono departments of large law firms have been challenging crackdown ordinances on constitutional grounds, generating an explosion of reported cases on the regulation of public spaces.⁷ This unprecedented level of legislative and judicial attention to issues of misbehavior in public spaces makes it timely to explore the appropriate social controls that pedestrians, religious leaders, police officers, legislators, and others should place (and, in the case of judges, allow to be placed) on users of streets, sidewalks, and parks.

These open-access public spaces are precious because they enable city residents to move about and engage in recreation and face-to-face communication. But, because an open-access space is one everyone can enter, public spaces are classic sites for “tragedy,” to invoke Garrett Hardin’s famous metaphor for a commons.⁸ The media are quick to report the gravest problems of the streets, such as armed robberies, drug trafficking, and drive-by

4. Although “compassion fatigue” has become the phrase of the moment, “disorder fatigue” might be more descriptive. At the same time that voters were supporting street-control measures, large majorities were telling pollsters that they would support the imposition of higher taxes specifically to increase government spending on aid to the homeless. See NATIONAL LAW CTR. ON HOMELESSNESS AND POVERTY, *THE RIGHT TO REMAIN NOWHERE 2* (1993) [hereinafter *RIGHT TO REMAIN NOWHERE*] (citing results of *Business Week/Harris Poll* in *BUS. WK.*, Nov. 1, 1993, at 35). A poll respondent could plausibly envisage that increased financial aid to the homeless would reduce levels of street misconduct.

5. See, e.g., *Greater Cincinnati Coalition for the Homeless v. City of Cincinnati*, 56 F.3d 710, 714 (6th Cir. 1995) (citing evidence that Cincinnati’s enforcement of anti-begging ordinance had dramatically reduced panhandling); Robert M. Spector, *Vouchers for Panhandlers: Creative Solutions to an Old Problem*, 3 *HYBRID: J.L. & SOC. CHANGE* (forthcoming 1996) (manuscript at 52–56, on file with author) [hereinafter Spector, *Vouchers for Panhandlers*] (after police in New Haven systematically began to arrest panhandlers soliciting alms near Yale University in summer of 1994, incidence of begging dropped); Alan Finder, *Change Found in Subways: Panhandling Is Down*, *N.Y. TIMES*, Mar. 19, 1995, at 37 [hereinafter Finder, *Panhandling is Down*] (New York City Transit Authority crackdown reduced incidence of aggressive and annoying panhandling).

6. On anti-panhandling and related measures in these three cities in 1994, see NATIONAL LAW CTR. ON HOMELESSNESS AND POVERTY, *NO HOMELESS PEOPLE ALLOWED* 10–12, 16–21, 36–39 (1994) [hereinafter *NO HOMELESS PEOPLE ALLOWED*].

7. On the ACLU’s involvement, see Charlotte Allen, *The ACLU Against the Cities: Challenges to Urban Civility*, *CITY J.*, Spring 1994, at 40, 40–47.

8. Garrett Hardin, *The Tragedy of the Commons*, 162 *SCI.* 1243, 1244 (1968).

shootings. This Article focuses on problems that by comparison seem trivial: chronic street nuisances. Chronic street nuisances occur when a person regularly behaves in a public space in a way that annoys—but no more than annoys—most other users, and persists in doing so over a protracted period. Two hypothetical examples of street nuisances recur during the analysis that follows. The first involves a panhandler, by assumption a mild-mannered one, who repeatedly stations himself on a sidewalk in front of a particular restaurant. The second involves a mentally ill bench squatter who, morning after morning, wheels a shopping cart⁹ full of belongings to a bench in a downtown plaza, stretches out a sleeping bag on the bench, and dozes there intermittently until dark. The street behavior in both cases is assumed to result in a net decrease in the use of these public spaces.¹⁰ Because the panhandler's presence inhibits pedestrians, the sidewalk is less used and the restaurant's business suffers;¹¹ although the bench squatter himself contributes to the daytime population in the plaza, the average headcount falls because fewer pedestrians wish to linger there.¹²

Chronic street nuisances pose practically knotty and normatively perplexing questions about the management of public spaces. Most courts have held that a city can prohibit more aggravated nuisances, such as *aggressive* panhandling¹³ and *overnight* sleeping in parks not designated for camping.¹⁴ Conversely, there is universal agreement that every person, no matter how scorned, is entitled, assuming he behaves himself, to walk on every public sidewalk and to sit on every bench in every public park. The examples of protracted panhandling and bench squatting fall in the baffling normative terrain that lies between these easier cases.

9. *But cf.* CAL. BUS. & PROF. CODE § 22435.2 (West 1987) (criminalizing possession of shopping cart away from premises of retail establishment that provided it).

10. *But cf. infra* text accompanying notes 96–97 (on shortcomings of focus on headcounts).

11. *See infra* note 71 and accompanying text.

12. *See infra* notes 82–85 and accompanying text.

13. *See, e.g.,* City of Seattle v. Webster, 802 P.2d 1333 (Wash. 1990) (rejecting battery of constitutional attacks on ordinance intended to limit aggressive begging and obstruction of sidewalks), *cert. denied*, 500 U.S. 908 (1991). Panhandling is seldom aggressive. *See* RIGHT TO REMAIN NOWHERE, *supra* note 4, at 41 (San Francisco sting operation targeted at aggressive panhandlers resulted in few arrests because most panhandlers were polite); Brandt J. Goldstein, *Panhandlers at Yale: A Case Study in the Limits of Law*, 27 IND. L. REV. 295, 319–21 (1993) [hereinafter Goldstein, *Panhandlers at Yale*] (lucid panhandlers consciously and strategically adopt respectful attitudes toward pedestrians).

14. *See, e.g.,* Clark v. Community for Creative Non-Violence, 468 U.S. 288 (1984) (rejecting argument that First Amendment entitled protesters to sleep overnight in tents in Lafayette Park across street from White House); United States v. Musser, 873 F.2d 1513 (D.C. Cir.) (affirming conviction for one night's bedding down on pallet in Lafayette Park), *cert. denied*, 493 U.S. 983 (1989); People v. Davenport, 222 Cal. Rptr. 736 (App. Dep't Super. Ct. 1985) (rejecting constitutional attack on Santa Barbara ordinance that prohibited nighttime sleeping in public parks and on public beaches), *cert. denied*, 475 U.S. 1141 (1986); *cf.* Boggs v. New York City Health & Hosp. Corp., 523 N.Y.S.2d 71 (App. Div. 1987) (sustaining involuntary hospital commitment of mentally ill woman who lived on public sidewalk in front of Manhattan restaurant), *appeal dismissed*, 520 N.E.2d 515 (N.Y. 1988). A government, of course, may decline to exercise this power. *See* Maureen Dowd, *America's Front Lawn*, N.Y. TIMES, Jan. 15, 1995, § 6 (Magazine), at 18 (describing chronic residents of Lafayette Park).

Most of the legal scholars who have written on street misconduct have come at the topic from one of three angles: hyper-egalitarianism, free speech libertarianism, and criminal defense. Each of these is a pertinent, but overly narrow, perspective.

Commentators with a hyper-egalitarian outlook single-mindedly aim at redistributing wealth, status, and opportunity to the poorest at hand—in this context, to a street person whose misbehavior has annoyed other pedestrians.¹⁵ For example, hyper-egalitarian analysts apparently would excuse, on grounds of poverty and duress, a destitute panhandler who aggressively hassled a pensioner.¹⁶ This exclusive stress on distributive justice is criticized below, in part because surveys suggest that street disorder annoys low-income pedestrians as much as anyone.¹⁷

First Amendment scholars have produced a large literature on freedom of speech in public spaces.¹⁸ These writers would first ask whether, say, a request for money constitutes “speech.” If they were to conclude that it does, they would proceed to the intricacies of “public forums,” “time, place, and manner” regulation, and related First Amendment issues. This literature, while insightful, self-consciously gives priority to the communicative aspects of street behavior and downplays its other features, including its effects on the liberties of other street users.

Finally, criminal law specialists have addressed issues of police control of street behavior. A chronic street nuisance may fit the definition of an infraction such as vagrancy, loitering, or disorderly conduct. Many criminal law scholars

15. See, e.g., Allan C. Hutchinson, *Les Misérables Redux: Law and the Poor*, 2 S. CAL. INTERDISCIPLINARY L.J. 199 (1993) (asserting law's incompetence in dealing with needs of poor).

The authors of two articles published in the early 1990s in the *Harvard Law Review*, then one of the most politically correct of student-managed law journals, appear to have shared this perspective. In the first, ACLU attorneys staunchly defend the First Amendment rights of panhandlers. See Helen Hershkoff & Adam S. Cohen, *Begging to Differ: The First Amendment and the Right To Beg*, 104 HARV. L. REV. 896 (1991). Hershkoff and Cohen pay no serious attention to the interests of other street users, including the poor, women, and the elderly. See, e.g., *id.* at 903–04 (discussion of “self-realization” that considers only rights of beggars, with no regard to self-realization prospects of, say, elderly people whom beggars might scare off streets).

Two years later, the Harvard editors published a second article (which does not cite Hershkoff and Cohen's article), which calls for vigorous legal regulation of wolf whistles and other sexual harassment of women by strange men in public spaces. See Cynthia Grant Bowman, *Street Harassment and the Informal Ghettoization of Women*, 106 HARV. L. REV. 517 (1993). Bowman argues that the state has a compelling interest in policing the streets to protect the liberty interests of female pedestrians. As it happens, there is evidence that panhandlers disproportionately target women. George Wilson, *Exposure to Panhandling and Beliefs About Poverty Causation*, 76 SOC. & SOC. RES. 14, 16 (1991) [hereinafter Wilson, *Exposure to Panhandling*].

A hyper-egalitarian would agree with the conclusions of both of these *Harvard Law Review* articles because both favor the most “subordinated” party at hand—destitute panhandlers, not ordinary pedestrians; women, not men.

16. See, e.g., Hutchinson, *supra* note 15, at 215. Apparently, a street person is perceived as living under circumstances disabling enough to excuse what otherwise would be culpable. For criticism of recognition of a duress defense against prosecution for street misconduct, see *infra* text accompanying notes 98–106.

17. See *infra* notes 118–19 and accompanying text.

18. See, e.g., Hershkoff & Cohen, *supra* note 15; sources cited *infra* notes 21, 346, 350, 369.

have focused more on deterring police misconduct than on controlling individuals who disturb the peace. For example, Caleb Foote's landmark article on vagrancy law stressed issues of vagueness and excessive police discretion.¹⁹ Because criminal sanctions are but one of many possible forms of social control,²⁰ authors who narrow their focus to police enforcement tend to underappreciate other sources of order on the street.

Notable and forceful advocates of controls on street misconduct are relatively more prominent in the literature beyond the law reviews.²¹ Urbanologist Jane Jacobs and criminologist Wesley Skogan have both stressed that maintaining the invitingness of streets, sidewalks, and parks is essential to the viability of an urban neighborhood.²² The well-known "broken windows" thesis of James Q. Wilson and George L. Kelling also sounds this theme. Wilson and Kelling assert that the persistence of a minor disorder not only disturbs a neighborhood on its own account, but also, like an unrepaired broken window, signifies that social controls are attenuated at that locale. Passersby, sensing this diminished control, become prone to committing additional, perhaps more serious, criminal acts.²³ According to Wilson and Kelling, unchecked street misconduct thus has a multiplier effect.

A specialist in property law approaches the issue of street order as a problem not of speech or of crime, but of land management. Many lawmakers and scholars have treated municipal lands as an undifferentiated mass. City spaces, however, are highly diverse in character and are subject to hugely varied demands. A central normative thesis of this Article is that a city's codes of conduct should be allowed to vary spatially—from street to street, from park

19. Caleb Foote, *Vagrancy-Type Law and Its Administration*, 104 U. PA. L. REV. 603 (1956); see also William O. Douglas, *Vagrancy and Arrest on Suspicion*, 70 YALE L.J. 1 (1960) (on use and misuse of vagrancy statutes); Foote, *supra*, at 643–47 (describing procedural travesties). *But cf.* Rollin M. Perkins, *The Vagrancy Concept*, 9 HASTINGS L.J. 237, 250–61 (1958) (laudatory assessment of vagrancy law).

20. See *infra* text accompanying notes 141–80.

21. To date, the most conspicuous outlier among law review articles has been Robert Teir, *Maintaining Safety and Civility in Public Spaces: A Constitutional Approach to Aggressive Begging*, 54 LA. L. REV. 285 (1993). Teir is associated with the American Alliance for Rights and Responsibilities.

22. JANE JACOBS, *THE DEATH AND LIFE OF GREAT AMERICAN CITIES* (1961) [hereinafter JACOBS, *DEATH AND LIFE*]. Jacobs begins what is perhaps the most influential book ever written on cities with three chapters on the functions of sidewalks, stating:

The bedrock attribute of a successful city district is that a person must feel personally safe and secure on the street among all these strangers. He must not feel automatically menaced by them. A city district that fails in this respect also does badly in other ways and lays up for itself, and for its city at large, mountain on mountain of trouble.

Id. at 30. Skogan sets out his views in WESLEY G. SKOGAN, *DISORDER AND DECLINE: CRIME AND THE SPIRAL OF DECAY IN AMERICAN NEIGHBORHOODS* (1990), and similarly notes that "[v]isible physical and social disruption is a signal that the mechanisms by which healthy neighborhoods maintain themselves have broken down. If an area loses its capacity to solve even seemingly minor problems, its character becomes suspect." *Id.* at 48.

23. James Q. Wilson & George L. Kelling, *Broken Windows: The Police and Neighborhood Safety*, ATLANTIC MONTHLY, Mar. 1982, at 29, 31–32. Mayor Giuliani's police commissioner is an unabashed proponent of the thesis. See William J. Bratton, *The New York City Police Department's Civil Enforcement of Quality-of-Life Crimes*, 3 J.L. & POL'Y 447, 448–50 (1995).

to park, from sidewalk to sidewalk. Just as some system of “zoning” may be sensible for private lands, so may it be for public lands.²⁴

A more general normative thesis, seemingly embraced by the Berkeley voters who in 1994 approved a crackdown ordinance in an advisory referendum,²⁵ is that destitute street users have not only rights, but also responsibilities to behave themselves.²⁶ Few urbanites seek an antiseptic city—a Singapore or a replica of Disneyland’s Main Street.²⁷ However, if city dwellers cannot enjoy a basic minimum of decorum in downtown public spaces, they will increasingly flee from those locations to cyberspace, suburban malls,²⁸ and private walled communities.²⁹ While one must admire the forcefulness with which legal advocates for street people have represented some of the poorest, least powerful, and most ostracized of citizens, one must also weigh the consequences of these advocates’ constitutional arguments for the future of American cities.

A preview of the body of the Article is in order. Part II draws first on the law-and-economics literature on property rights to analyze a public space as an open-access territory where users are prone to create negative externalities, and then sharpens the concept of a chronic street nuisance. With a bow to Jane Jacobs and others with a sociological perspective, Part III reviews the large cast of actors—for example, not only the police, but also merchants, pedestrians, and vigilantes—who can help discipline miscreants on the streets. To introduce evidence of the potential of various social-control systems, Part IV sketches the history of street disorder in the United States, with some stress on the rise and fall of Skid Row. This historical overview depicts how judges constitutionalized much of street law beginning around 1965. Part V compares the informal zoning of public sidewalks (for example, the old Skid Row system) with the formal zoning, by city ordinance, of spatially differentiated

24. In the case of both private and public lands, this zoning need not necessarily be carried out by municipal officials. See *infra* text accompanying notes 311–28.

25. On December 8, 1994, the Berkeley City Council passed an ordinance identical to Measure O, an advisory measure that voters had approved on November 8, 1994. Elaine Herscher, *Berkeley Council Oks Curbs on Panhandling*, S.F. CHRON., Dec. 9, 1994, at A23. In the teeth of Ronald Reagan’s presidential landslide in 1984, Walter Mondale garnered 83% of the vote in Berkeley. Gerard De Groot, *People’s Park, Berkeley, California*, HIST. TODAY, July 1993, at 62.

26. See generally AMITAI ETZIONI, *THE SPIRIT OF COMMUNITY: RIGHTS, RESPONSIBILITIES, AND THE COMMUNITARIAN AGENDA* (1993) (criticizing increase in rights and decrease in responsibilities rhetoric in contemporary society); MARY ANN GLENDON, *RIGHTS TALK: THE IMPOVERISHMENT OF POLITICAL DISCOURSE* 76–108 (1991) (urging greater legal stress on responsibilities); Linda C. McClain, *Rights and Irresponsibility*, 43 DUKE L.J. 989 (1994) (evaluating irresponsibility critique of increase in rights rhetoric).

27. See ALLAN B. JACOBS, *GREAT STREETS* 4, 8–9 (1993) [hereinafter JACOBS, *GREAT STREETS*] (suggesting that, while street should be safe, it should also function as space for social encounters that are not always pleasant).

28. In general, the private owner of a regional shopping mall has greater authority over the use of its common areas than a city has over the use of open-access public lands. Private owners, however, are also constrained to some degree. See Curtis J. Berger, *Pruneyard Revisited: Political Activity on Private Lands*, 66 N.Y.U. L. REV. 633, 633–37, 678–90 (1991).

29. See Edward J. Blakely & Mary Gail Snyder, *Fortress Communities: The Walling and Gating of American Suburbs*, LANDLINES (Cambridge, Mass.), Sept. 1995, at 1, 3.

rules of public conduct. Part VI analyzes the principal federal constitutional issues that public-space zoning and related municipal restrictions on chronic beggars and bench squatters might pose, and demonstrates that judicial decisions have tended to encourage cities to formally zone their public spaces. Part VII compares the merits of an informal zoning system and official public-space zoning; it argues that a city's first-best approach is to be informal—that is, to employ trustworthy police officers and to give them significant discretion. I conclude with a lament about the excessive federal constitutionalization of street law, which has inhibited cities from devising localized solutions to the management of downtown spaces.

II. CHRONIC NUISANCES IN PUBLIC SPACES

In large cities in the United States, governments own as much as 45% of the developed land area and allocate most of these public lands for use as streets and highways.³⁰ In a society that not only accepts, but exalts, private property in land, why does one observe so much open-access land? The basic reason is that private firms cannot feasibly collect tolls from entrants who use spaces for no more than a few moments.³¹ As a result, market forces alone cannot supply an adequate number of transportation corridors such as streets and sidewalks. Nor can markets readily provide, in downtown areas, squares and parks for pedestrians to use briefly for gathering and relaxation.

Democratic ideals provide another rationale for public spaces. Mass gatherings and mixings occur more frequently where there are numerous sites that all can enter at no charge. To socialize its members, any society, and especially one as diverse as the United States, requires venues where people of all backgrounds can rub elbows. In Carol Rose's memorable phrase, there must be sites for "the comedy of the commons."³² For a romantic, the ideal is to have some spaces that replicate the Hellenic agora or the Roman forum. A liberal society that aspires to ensure equality of opportunity and universal political participation must presumptively entitle every individual, even the humblest, to enter all transportation corridors and open-access public spaces.³³

30. John H. Niedercorn & Edward F.R. Hearle, *Recent Land-Use Trends in Forty-Eight Large American Cities*, 40 *LAND. ECON.*, at 105, 106 (1964); see also JACOBS, *GREAT STREETS*, *supra* note 27, at 6 (in U.S. cities, public rights-of-way constitute 25% to 35% of developed land). Some government lands, such as sewage treatment plants and school facilities, are limited-access.

31. For a fuller discussion, see Robert C. Ellickson, *Property in Land*, 102 *YALE L.J.* 1315, 1381–87 (1993).

32. See Carol Rose, *The Comedy of the Commons: Custom, Commerce, and Inherently Public Property*, 53 *U. CHI. L. REV.* 711, 768–71, 774–81 (1986).

33. There inevitably are disputes over *what* spaces must be open to all. See, e.g., *Evans v. Newton*, 382 U.S. 296, 301–02 (1966) (Equal Protection Clause forbids racial discrimination by private trustees whom Georgia court had appointed to operate park that served public functions).

A. *The Tragedy of the Agora*

A space that all can enter, however, is a space that each is tempted to abuse. Societies therefore impose rules-of-the-road for public spaces. While these rules are increasingly articulated in legal codes, most begin as informal norms of public etiquette.³⁴

Rules of proper street behavior are not an impediment to freedom, but a foundation of it. As Chief Justice Hughes put it, the regulation of public spaces “has never been regarded as inconsistent with civil liberties but rather as one of the means of safeguarding the good order upon which they ultimately depend.”³⁵ These rules are comparable to the use of Roberts’ Rules of Order in a meeting. As Alexander Meiklejohn and Harry Kalven, two First Amendment stalwarts, have stressed, constraints such as Roberts’ Rules actually enhance the flow of speech by curbing disruptive tactics.³⁶ Similarly, to be truly *public*, a space must be orderly enough to invite the entry of a large majority of those who come to it.³⁷ Just as disruptive forces at a town meeting may lower citizen attendance, chronic panhandlers, bench squatters, and other disorderly people may deter some citizens from gathering in the agora.

William H. Whyte, one of the most creative observers of the urban scene, convincingly asserts that the downtowns of many central cities have “[t]oo much empty space and too few people.”³⁸ In his pursuit of the commendable goal of drawing more pedestrians back downtown, however, Whyte proceeds to imply that cities should exert *no* controls on “undesirables,” including beggars and aggressive eccentrics.³⁹ In his words:

The biggest single obstacle to the provision of better spaces is the undesirables problem. They are themselves not too much of a problem. It is the actions taken to combat them that is the problem.

34. On the sociology of sidewalks, see, e.g., Ralph B. Taylor et al., *Block Crime and Fear: Defensible Space, Local Social Ties, and Territorial Functioning*, 21 J. RES. IN CRIME & DELINQ. 303 (1984).

35. *Cox v. New Hampshire*, 312 U.S. 569, 574 (1941).

36. See ALEXANDER MEIKLEJOHN, *POLITICAL FREEDOM* 24–28 (1960); Harry Kalven, Jr., *The Concept of the Public Forum: Cox v. Louisiana*, 1965 SUP. CT. REV. 1, 23–25 (“Speech has always been dependent on some commitment to order and etiquette.”). But see Hershkoff & Cohen, *supra* note 15, at 901–02 (arguing that presence of beggars on streets contributes to “town meeting” functions of public spaces).

37. The importance of participation in civic discourse is stressed in Frank Michelman, *Law’s Republic*, 97 YALE L.J. 1493, 1495–96, 1505–06 (1988), and Cass R. Sunstein, *Beyond the Republican Revival*, 97 YALE L.J. 1539, 1555–56 (1988). For more venerable sources, including Aristotle and Hannah Arendt, see Bowman, *supra* note 15, at 520–21 n.14.

N.J. CONST. art. I, para. 18, reflects the same classical vision of the polis: “The people have the right freely to assemble together, to consult for the common good, to make known their opinions to their representatives, and to petition for redress of grievances.” Remarkably, one judge construed this vision of collective deliberation as a bar on a library’s efforts to control a patron whose behavior and body odor were driving away other users. See *Kreimer v. Bureau of Police*, 765 F. Supp. 181, 196–97 (D.N.J. 1991) (Sarokin, J.), *rev’d*, 958 F.2d 1242 (3d Cir. 1992). For more on this litigation, see *infra* notes 367, 460.

38. WHYTE, *supra* note 1, at 6.

39. See *id.* at 25, 55, 156–64.

Out of an almost obsessive fear of their presence, civic leaders worry that if a place is made attractive to people it will be attractive to undesirable people. So it is made defensive. There is to be no loitering . . . and . . . no eating, no sleeping. So it is that benches are made too short to sleep on, that spikes are put in ledges⁴⁰

Whyte's view of street life is overly romantic. He fails to discuss crime, aggressive panhandling, squeegee men, graffiti, and the other forms of street disorder that deeply concern most urbanites. In many public spaces, especially ones less dense than midtown Manhattan (Whyte's main focus), the arrival of true "undesirables" may trigger an exodus that results in a net loss of street users overall. Because bringing back pedestrians is Whyte's main objective, he should not ignore the difficult problem of identifying the sorts of "undesirables"—surely muggers and armed robbers, for example—whose presence would impair progress toward that objective.⁴¹ This Article seeks to confront that issue not with the easy cases of muggers and robbers, but with the hard ones of panhandlers and bench squatters.

B. *The Concept of a Chronic Street Nuisance*

What, if anything, should a society do when an individual perpetrates a *chronic street nuisance*? This category, as I define it, refers to behavior that (1) violates community norms governing proper conduct in a particular public space (2) over a protracted period of time (3) to the minor annoyance of passersby. Protracted, nonaggressive panhandling and bench squatting are paradigm examples.

At first blush, a chronic street nuisance seems too minor a matter to be worth *anyone's* attention, much less that of municipal authorities. An individual victimized—even the word seems too strong—by this sort of behavior experiences only a minor level of vexation, and usually only for an instant. The encounter will generally not elicit comment, much less official complaint, from a pedestrian. By contrast, an arrest for breach of the peace typically involves behavior anomalous enough to provoke a buzz of conversation among those who witnessed it.

40. *Id.* at 156.

41. Whyte is mystified that downtown civic leaders, businessmen, and retailers are preoccupied with street misbehavior, and regards them as uninformed. *See id.* at 156–58. Because those individuals all have a stake in revitalizing central cities, a more plausible interpretation is that they concur with more clear-eyed observers, such as Jane Jacobs and Wesley Skogan, who recognize that disorder itself can cause a streetscape to lose pedestrians. *See supra* text accompanying notes 21–23.

Allan Jacobs, another respected urbanologist, generally shares Whyte's obliviousness to the need for social controls in public spaces. Jacobs's discussion of the decline of Market Street in San Francisco makes no mention of the spiraling misbehavior along that street in the 1980s. *See JACOBS, GREAT STREETS, supra* note 27, at 88–92.

Perhaps it is not surprising, then, that the crackdown ordinances of the 1990s generally have targeted, not chronic street nuisances, but single acts of disorderly conduct, such as an aggressive solicitation, the act of lying down on a busy sidewalk, or an instance of overnight sleeping in a park. Indeed, the criminal justice system generally responds to troubling *incidents*, not to courses of conduct over time (with some exceptions, such as racketeering). A number of practical reasons explain this pattern. An incident is far more likely to produce a complaining witness who will agitate for prosecution. Evidence is easier to gather when the facts at issue involve behavior within a short time frame.⁴² Furthermore, risks of discriminatory enforcement probably are higher when police and prosecutors target chronic offenders.⁴³

Because the criminal justice system now focuses primarily on troubling incidents—on the spikes on the graph of street disorder—the *ambient* levels of street disorder are likely higher than optimal. A few street people disproportionately create an ambience of urban disorder: For example, a small number of regulars account for both most panhandling⁴⁴ and most bench squatting.⁴⁵ Although crackdown ordinances do not on their face address the chronic behaviors that contribute to excessive ambient levels of disorder, it is plausible that many pedestrians, who tolerate minor episodic street nuisances as part of the hustle-and-bustle of the streets, would favor devising means for

42. For this reason, even if the residents of a city were mainly concerned about chronic street nuisances, a city attorney might advise a city council only to target particular incidents.

43. One difficulty is providing a satisfactory legal definition of “chronic.” This basically involves choosing between a rule and a standard, a pervasive legal dilemma discussed *infra* text accompanying notes 460–61.

Some pertinent statutes employ a vague but flexible adjectival standard, such as “chronic,” “repeated,” or “inveterate.” *Cf.* CAL. PENAL CODE § 647(2) (West 1872) (repealed 1961) (punishing as vagrant “every beggar who solicits alms as a business”); *id.* § 647(11) (repealed 1961) (punishing as vagrant “every common drunkard”).

Judges might hold that due process requires that legal norms against chronic misconduct be articulated more precisely as “rules,” on the theory that a rule limits police discretion and provides better notice to potential defendants. Such decisions might lead local legislators to approve ordinances that contain rather arbitrary numerical breakpoints such as “three days in a row,” or “an average of over ten hours a week for a four-week period.”

44. *See* Goldstein, *Panhandlers at Yale*, *supra* note 13, at 299, 314, 317 (in New Haven’s York district in 1991–1992, the dozen chronic panhandlers typically outnumbered transients by about four-to-one at any point in time; nine of these regulars had worked that area for more than one year, and averaged four days a week, five hours per day); Melinda Henneberger, *On Patrol Against Subway’s Panhandlers*, N.Y. TIMES, Jan. 16, 1994, at 23 (N.Y.C. transit police estimate that about 50 panhandlers regularly work subway trains; while with journalist, patrol officers recognized all panhandlers they encountered).

Because the police tend to regard dealing with violent crime as their top priority, patrol officers commonly are tougher on unfamiliar transients than on chronic street people whom they know to be peaceable. *See* LEONARD BLUMBERG ET AL., SKID ROW AND ITS ALTERNATIVES 64 (1973) (discussing Philadelphia); Goldstein, *Panhandlers at Yale*, *supra* note 13, at 345–46 (in New Haven, regular panhandlers ally with police against transients).

45. In 1986, workers for an outreach program for the mentally ill in Central Park and the Upper West Side tallied their monthly contacts with people who (as a journalist put it) “day after day, unless they wander elsewhere for a time, are on a bench or sidewalk, or perched on a rock in the park.” In an average month, the staff was in contact with 479 regulars, but only 120 persons whom they saw just once. Daniel Goleman, *To Expert Eyes, City Streets Are Open Mental Wards*, N.Y. TIMES, Nov. 4, 1986, at C1.

controlling chronic miscreants. The gravamen of the pedestrians' grievance is the protractedness of the offense.⁴⁶

1. *Harms of Chronic Street Misconduct in General*

For four interrelated reasons, the harms stemming from a chronic street nuisance, trivial to any one pedestrian at any instant, can mount to severe aggravation.⁴⁷ First, because the annoying act occurs in a public place, it may affect hundreds or thousands of people per hour. (Contrary to what some might assert, views of offensive street conduct cannot be avoided simply by turning one's eyes.⁴⁸) Second, as hours blend into days and weeks, the total annoyance accumulates. Third, a prolonged street nuisance may trigger broken-windows syndrome.⁴⁹ As time passes, unchecked street misconduct, like unerased graffiti and unremoved litter, signals a lack of social control. This encourages other users of the same space to misbehave, creates a general apprehension in pedestrians, and prompts defensive measures that may aggravate the appearance of disorder. For example, designers of a downtown office building who anticipate bench squatting may place spikes in building ledges. These spikes then serve as architectural embodiments of a social

46. The positive relationship between duration and severity of offensiveness is noted in RESTATEMENT (SECOND) OF TORTS § 821B(2)(c) (1979) (on identification of public nuisance). See also 2 JOEL FEINBERG, THE MORAL LIMITS OF THE CRIMINAL LAW: OFFENSE TO OTHERS 35 (1985) (severity of offense to others turns in part on its duration).

47. There have been few academic studies about the sorts of street conduct that disturb, how much they disturb, and how the level of harm varies with the passage of time. An exception is SKOGAN, *supra* note 22, at 20–50 (report of results of field research in total of 10 neighborhoods in Chicago, Philadelphia, and San Francisco).

48. This issue appears only to have been discussed in cases involving views of inanimate objects, as opposed to persons. The Supreme Court has held that a city's interest in aesthetics may entitle it to control the placement of billboards on private lands and of posters on public lands. See sources cited *infra* notes 385–86. These decisions recognize that it is often impossible for a pedestrian to turn away from a sight either because he must maintain a particular line of vision to navigate, or because (as in the case of film violence) the sight registers before he can avoid it. See *Packer Corp. v. Utah*, 285 U.S. 105, 110 (1932) (Brandeis, J.) (“The radio can be turned off, but not so the billboard or street car placard.” (quoting *State v. Packer Corp.*, 297 P. 1013, 1019 (Utah 1931))). In the language of First Amendment doctrine, street sights pose a mild form of the “captive viewer” problem. See *Lehman v. City of Shaker Heights*, 418 U.S. 298, 306–07 (1974) (Douglas, J., concurring). Justice Brennan had less sympathy for those seeking to prevent expression offensive to passersby in public spaces; he believed viewers could simply look away. *Id.* at 320 (Brennan, J., dissenting); see also *Cohen v. California*, 403 U.S. 15, 21 (1971) (Harlan, J.) (“Those in the Los Angeles courthouse could effectively avoid further bombardment of their sensibilities simply by averting their eyes.”).

Regulation of views of persons is more legally complex than regulation of views of objects such as billboards. On the one hand, persons tend to be more intrusive presences because they can speak and move. On the other hand, the regulation of personal appearance is potentially deeply threatening to individual liberty, and may be a pretext for discrimination based on unalterable status. See *infra* text accompanying notes 98–106, 329–451.

49. See *supra* text accompanying note 23. For evidence consistent with the broken-window theory, see SKOGAN, *supra* note 22, at 65–75. Skogan contrasts that theory with Emil Durkheim's view that deviancy enhances the solidarity of nondeviants. *Id.* at 66.

unravelling, accentuating the broken-windows signal.⁵⁰ Fourth, some chronic street offenders violate informal time limits. In open-access public spaces suited to rapid turnover, norms require individual users to refrain from long-term stays that prevent others from exercising their identical rights to the same space. These norms support government time limits on the use of public parking spaces and campsites. They also underlie informal cutoff points on the use of, say, a drinking fountain on a hot day, a public telephone booth in a crowded airport, or a playground basketball court.⁵¹ The longer an individual panhandles or bench squats, the more likely pedestrians will sense that he is disrespecting an informal time limit.⁵² Even street performers and solicitors for charities, commonly well received when they first arrive at a public space, may eventually wear out their welcomes.

In the case of a mild-mannered panhandler or bench squatter, the graph of damage caused over time may be U-shaped. On first arrival, a new panhandler or bench squatter in a downtown plaza may make the regular users of the space apprehensive. After some time has passed, familiarity may allay these users' worst apprehensions, and the regular users may adapt to some degree to the newcomer's presence. Eventually, however, the marginal damage per period of time may turn upward. Observers may be increasingly annoyed that the street person is not only overusing scarce public space, but apparently has not sought out employment, family assistance, or public aid.⁵³ As columnist Ellen Goodman has discerned, the phrase "compassion fatigue" expresses the sentiment that "enough's enough."⁵⁴

50. See WHYTE, *supra* note 1, at 156. A proliferation of bench squatters similarly tends to lead to the elimination of amply sized benches. See *id.* at 117; Alan Finder, *Benches Removed from Subway Stations*, N.Y. TIMES, Feb. 28, 1990, at B1; Goetz, *supra* note 3, at 545 (L.A. bus benches redesigned to prevent them from being used for sleeping). The breakdown in social control is also causing developers to eliminate ground-level public atriums and plazas from their designs. Joan Lebow, *U.S. Cities' Physical Structure May Wane in Bid to Bar Vagrancy, Architect Warns*, WALL ST. J., May 26, 1989, at B3A. Zoning provisions governing the Upper East Side of Manhattan used to encourage developers to provide open plazas; these bonus provisions were then eliminated: "Planners want an uninterrupted wall of buildings because they say public plazas have attracted drug users and crime." James C. McKinley, Jr., *Zoning Changes Reduce Size of East Side Projects*, N.Y. TIMES, Feb. 10, 1994, at B3.

51. Academic norms similarly constrain a student from talking at excessive length in class or remaining for too many years in graduate study.

52. Cf. JACOBS, *GREAT STREETS*, *supra* note 27, at 300 (implying that police should enforce time limits on bench squatters).

53. Cf. *infra* note 62 (Rousseau's loss of patience with boy beggar).

54. Ellen Goodman, *Swarms of Beggars Cause "Compassion Fatigue"*, NEW HAVEN REG., Aug. 4, 1989, at A9.

2. Chronic Panhandling

The foregoing list of the harms of chronic street nuisances is general, and ignores the benefits of these purposeful street activities.⁵⁵ A more focused look at panhandling and bench squatting can address these shortcomings.

a. Benefits of Panhandling

Panhandlers and at least some of their donors benefit from begging.⁵⁶ The magnitude of these benefits depends on the opportunity costs incurred if the panhandling were to cease and both panhandlers and donors had to resort to their next best substitutes.

Consider the extent of a panhandler's loss from a prohibition on, say, cadging in the subway. This loss would depend on the utility he could obtain from, say, begging above ground, collecting cans and bottles, pursuing public assistance, or landing a job. The costs of anti-begging measures in a well-trafficked spot therefore fall particularly heavily on the most skillful panhandlers, who can garner as much as twenty dollars per hour tax-free.⁵⁷ If he had employment options, an ordinary beggar, who takes in more in the range of two dollars to ten dollars per hour,⁵⁸ would likely lose less than these professionals.⁵⁹

Some donors undoubtedly take affirmative pleasure in satisfying a request for a handout.⁶⁰ The magnitude of the losses sustained by almsgivers

55. Although cost-benefit analysis provides a fruitful perspective on issues of street disorder, it fails to account for nonutilitarian considerations such as liberty, privacy, equality, and distributive justice. These and other additional normative considerations are discussed *infra* text accompanying notes 96–127, 329–451.

56. Like any person who appears in public, an ordinary panhandler also conveys a number of unintended political messages. Because these messages are unintended, First Amendment law rightly accords them little weight. See *infra* text accompanying notes 354–60.

57. See WHYTE, *supra* note 1, at 49 (estimating that “professional blind beggars” on Fifth Avenue take in at least an average of \$100–\$150 per day); Nicholas Dawidoff, *The Business of Begging*, N.Y. TIMES, Apr. 24, 1994, § 6 (Magazine), at 34, 40, 41 (describing two panhandlers who daily take in \$200 each on New York City subway and spend most of it on narcotics).

58. The fragmentary sources on panhandlers' receipts suggest that, in the early 1990s, most were obtaining donations at roughly this rate. See O'FLAHERTY, *supra* note 1, at 82, 85–86 (stating that earnings of most daytime street people, such as panhandlers and can collectors in Manhattan, amount to less than minimum wage, and median panhandler in survey had reported income during prior week of \$32.50 on best day, and \$2.50 on worst day); Goldstein, *Panhandlers at Yale*, *supra* note 13, at 314, 317 (estimating that at Yale, middle range was \$20 to \$50 per five-hour day); Philip Hager, *Weighing the Costs of Accosting*, CAL. LAW., Feb. 1994, at 35, 36 (citing 1992 Berkeley study finding that median panhandler took in \$16 in eight-hour day). The panhandlers at Yale regarded their activity as far more remunerative than gathering and returning cans, and also were generally “uninterested in working at the minimum wage.” Goldstein, *Panhandlers at Yale*, *supra* note 13, at 303; see also *id.* at 323 n.92. On the apparent decline in beggars' receipts over the course of the first half of the 1990s, see *infra* note 300.

59. If a beggar were permanently disabled, his best use of time might be the pursuit of Supplemental Security Income benefits. See *infra* note 122 and accompanying text.

60. In 1991–1992, panhandlers in the York district adjacent to Yale reported that 10%–20% of pedestrians were inclined to give to them. Goldstein, *Panhandlers at Yale*, *supra* note 13, at 324. Yale students were far more likely than others to give. *Id.* A 1994 survey of Yale Law students, with a response

frustrated by a ban on chronic panhandlers would turn on the quality of the almsgivers' other alternatives for being charitable. In some cities, opponents of panhandling have attempted to mitigate these losses by devising alternative ways in which altruistic pedestrians can satisfy charitable impulses.⁶¹

The matter is complex, however, because many donors who give alms report deep ambivalence about their gifts. Some regular donors even alter their routes to avoid an encounter with a known beggar;⁶² these almsgivers would be unlikely to complain if this opportunity to give vanished.

Some opponents of restrictions on begging assert that the most prevalent religions in the United States unswervingly support the propriety of begging and of giving to beggars.⁶³ This claim is at least misleading, if not untenable. While leading religious texts do urge donors to *initiate* the giving of aid and comfort to the poor, none of them encourages the needy to *ask* for alms by begging. Islam, for example, urges donors to proffer alms to needy persons;⁶⁴ but it also exhorts the poor and hungry not to beg or otherwise publicize their need.⁶⁵ The Torah asks farmers to leave small amounts of grain and grapes for the destitute to gather on their own, a policy that demands that a poor person engage in self-help.⁶⁶ Although the New Testament includes a number of references to street beggars, none of its passages explicitly describes or endorses a donor responding to an outstretched hand with the transfer of *material aid*.⁶⁷ Paul's Epistles, which stress the importance of self-support,⁶⁸

rate of 31%, indicated that 57% sometimes gave either cash or vouchers to panhandlers. Robert M. Spector, *New Haven Cares: The Voucher Concept 84 & n.258, 108* (Dec. 31, 1994) (unpublished manuscript, on file with author).

61. See NO HOMELESS PEOPLE ALLOWED, *supra* note 6, at 100, 103 (on placement of "parking meters" in downtown areas of Memphis and Nashville into which pedestrians can place coins as donations to homeless-aid organizations); *infra* notes 168-69 and accompanying text. To provide a more satisfying outlet for altruistic pedestrians, O'Flaherty suggests that the government officials should consider encouraging the Salvation Army to augment its street solicitations. See O'FLAHERTY, *supra* note 1, at 293-94 (arguing that result would be fewer street nuisances and perhaps more money for service programs).

62. Several law students who are consistently generous to panhandlers have informed me that they occasionally cross a street to escape the moral dilemma that an encounter would pose for them. For a poignant description of this feeling, see JEAN-JACQUES ROUSSEAU, *REVERIES OF THE SOLITARY WALKER* 93-94 (Peter France trans., Penguin Books 1979) (1782). After first taking pleasure in regularly giving to a crippled boy who begged, Rousseau found these transfers "somehow transformed into a sort of duty which [he] soon began to find irksome . . . [I]n the end [he] unthinkingly adopted the habit of making a detour when [he] approached this obstacle." *Id.*

63. See, e.g., Hershkoff & Cohen, *supra* note 15, at 899 n.17.

64. See, e.g., 3 Qur'an 17:27 (Surah Al-Fatihah & Surah Al-Baqara trans., 1988).

65. See, e.g., 1 *id.* 2:274. *But cf.* 1 *id.* 2:178. "The Holy Prophet [Muhammad] greatly disapproved of begging and there are diverse sayings of his to that effect." 1 *id.* at 342 (commentary). See also the commentary in 3 *id.* at 1428 ("Help may sometimes be denied to a seemingly needy person when it is feared that the giving of it would have an adverse effect upon him; for instance, he may be a professional beggar or may be addicted to some bad habit.").

66. See, e.g., *Leviticus* 19:9-10. For discussion, see Robert C. Ellickson & Charles DiA. Thorland, *Ancient Land Law: Mesopotamia, Egypt, Israel*, 71 CHI.-KENT L. REV. (forthcoming 1995) (manuscript at 37-38, on file with author). While the Hebrew Bible contains many passages expressly sympathetic to the poor, it makes no mention of street beggars.

67. The Synoptic Gospels of the New Testament strongly urge donors to initiate transfers of gifts and services to the poor. See, e.g., *Matthew* 19:21, 25:35-43; *Mark* 10:21; *Luke* 14:13 (New Rev. Standard Version). These passages support the operation of soup kitchens and shelters. See generally HARRY

speak explicitly to the contrary. Nor does any passage in the Bible excuse poor persons from complying with the rules that generally govern behavior in public spaces.

b. *Harms of Panhandling*

Most passersby regard even episodic panhandling as at least a minor annoyance.⁶⁹ Survey results indicate that many pedestrians react negatively to panhandlers.⁷⁰ Merchants, who have an incentive to accurately discern customers' tastes, generally regard panhandling as bad for business.⁷¹ When being panhandled, a pedestrian of ordinary sensibility may feel some combination of: aggravation that his privacy has been disturbed, resentment that the panhandler's plea has a high probability of being fraudulent,⁷² and fear.

In addition, panhandling may unintentionally worsen race relations in cities where panhandlers are disproportionately black. The results of an experimental study indicate that a black panhandler's actions tend to reinforce pedestrians' negative stereotypes about blacks and to make them less supportive of causes

MURRAY, DO NOT NEGLECT HOSPITALITY: THE CATHOLIC WORKER AND THE HOMELESS (1990) (asserting that giving shelter and food to homeless is ancient tradition that has recently been neglected).

Several New Testament passages also indicate the propriety of satisfying a request for a medical cure. *The Book of Mark* and *The Book of Luke* report that when the blind beggar Bartimaeus, sitting by a roadside, cried out to Jesus for mercy, Jesus asked, "What do you want me to do for you?" When Bartimaeus answered, "let me see again," Jesus restored his sight. *Mark* 10:46–52; *Luke* 18:35–43; see also *John* 9:1–11. It is not obvious what Jesus would have done had Bartimaeus asked for shekels. See *Acts* 3:1–10 (reporting how Peter cured beggar of lameness).

The account of Lazarus, the poor man "carried away by the angels" after death, conceivably supports the legitimacy of begging. But while the King James translation identifies Lazarus as a "beggar," the most widely accepted modern translation, the New Revised Standard Version, does not. Compare *Luke* 16:19–23 (King James) with *Luke* 16:19–23 (New Rev. Standard Version).

68. 1 *Thessalonians* 5:14 (New Rev. Standard Version) ("[A]dmonish the idlers . . ."); 2 *id.* 3:10–12 (New Rev. Standard Version) ("Anyone unwilling to work should not eat.").

69. The leading scholars of street disorder include panhandling among urban nuisances. See SKOGAN, *supra* note 22, at 21 (panhandling is seen as "minor annoyance[.]"); Wilson & Kelling, *supra* note 23, at 29–30 ("[W]e tend to overlook or forget another source of fear—the fear of being bothered by disorderly people. Not violent people, nor, necessarily, criminals, but disreputable . . . people: panhandlers, drunks, addicts, rowdy teenagers, prostitutes, loiterers, the mentally disturbed."). For an evocative discussion of the psychological discomfort a panhandler may trigger in pedestrians, see Michael M. Burns, *Fearing the Mirror: Responding to Beggars in a 'Kinder and Gentler' America*, 19 HASTINGS CONST. L.Q. 783, 797–802 (1992).

70. *Young v. New York City Transit Auth.*, 903 F.2d 146, 149–50 (2d Cir.) (citing George Kelling study of adverse reaction of subway riders to panhandlers), *cert. denied*, 498 U.S. 984 (1990); James N. Baker, *Don't Sleep in the Subway*, NEWSWEEK, June 24, 1991, at 26 (referring to 1991 public opinion poll commissioned by San Francisco Attorney's Office in which one-fourth of respondents stated that they shopped less often in San Francisco because they had been "turned off by panhandlers").

71. DAVID A. SNOW & LEON ANDERSON, DOWN ON THEIR LUCK: A STUDY OF HOMELESS STREET PEOPLE 161 (1993) (shop owners on drag adjacent to University of Texas campus in Austin "are convinced that . . . panhandlers scare off potential customers"); Goldstein, *Panhandlers at Yale*, *supra* note 13, at 331–33 (many Yale-area merchants regard panhandlers as bad for their businesses); see also *infra* text accompanying notes 166–69 (on activities of merchants' associations).

72. See *infra* note 361.

that would benefit blacks as a group.⁷³ This might be one reason why black politicians in cities such as Atlanta and Washington, D.C., for example, have supported anti-panhandling measures.⁷⁴

A pedestrian who encounters a familiar chronic panhandler is not likely to be fearful because (by assumption) the beggar is someone known to be unaggressive. In other respects, however, the encounter may be more annoying than an encounter with an unfamiliar panhandler. A pedestrian who sees a regular panhandler is likely to become increasingly irked that the supplicant has not sought aid from charities and welfare agencies better able than pedestrians to appraise desert.⁷⁵

A chronic panhandler also annoys because he unintentionally signals social breakdown on a number of fronts.⁷⁶ First, a regular beggar is like an unrepaired broken window—a sign of the absence of effective social-control mechanisms in that public space.⁷⁷ Second, the activity of begging, unlike many other forms of street nuisance behavior, is likely to signal erosion of the work ethic. All human societies attempt, in various fashions, to induce their members who are capable of work to pull an oar.⁷⁸ Judged by Kant's Categorical Imperative, begging is a morally dubious activity; if everyone were to try to survive as an unproductive person living off the charity of others, all would starve. A pedestrian who sees an apparently employable person begging may sense the degeneration of one of the most fundamental social norms.⁷⁹

73. David Rosenfield et al., *Effect of an Encounter with a Black Panhandler on Subsequent Helping for Blacks: Tokenism or Confirming a Negative Stereotype?*, 8 PERSONALITY & SOC. PSYCHOL. BULL. 664 (1982). "Research has shown that part of the whites' stereotype of blacks is that blacks are lazy and lacking in ambition and industriousness." *Id.* at 669 (footnote omitted).

74. See *infra* text accompanying note 341.

75. See *supra* note 53 and accompanying text; see also Christopher Edley, Jr., *Season's Seethings: I Am Not a Point of Light*, LEGAL TIMES, Dec. 18, 1989, at 26 (referring to his own application of "bizarre exhaustion-of-administrative-remedies principle").

Edley, a Harvard Law professor, regards the multitude of beggars in Harvard Square as indicative of the inadequacies of government social-welfare programs. *Id.* More plausibly, it suggests the generosity of local welfare efforts. In the 1990s, panhandling has been most common in Berkeley, New York, San Francisco, Washington, D.C., and other cities that have relatively *expansive* social-welfare programs. It appears that taxpayers willing to support relatively generous welfare programs are also relatively more inclined to give to panhandlers. Panhandlers have no trouble recognizing these realities. The high incidence of beggars in Harvard Square therefore says little or nothing about the relative destitution of the Cambridge poor, but much about the relative generosity of Harvard pedestrians and voters. This point was well understood in the late nineteenth century. "Beggars increase in number in proportion to the means provided for their relief." C.G. Tiedeman, *Police Control of Dangerous Classes, Other Than by Criminal Prosecutions*, 19 AM. L. REV. 547, 567 (1885).

76. For fuller discussion of the various inferences that pedestrians may draw, see *infra* text accompanying notes 354–60.

77. "The unchecked panhandler is, in effect, the first broken window." Wilson & Kelling, *supra* note 23, at 34; see also *supra* text accompanying notes 22–23.

78. See Robert C. Ellickson, *The Untenable Case for an Unconditional Right to Shelter*, 15 HARV. J.L. & PUB. POL'Y 17, 20–24, 32–34 (1992) [hereinafter *Untenable Case*].

79. For clues that the work ethic indeed is in decline, see CHRISTOPHER JENCKS, RETHINKING SOCIAL POLICY: RACE, POVERTY, AND THE UNDERCLASS 150 (1992) [hereinafter JENCKS, RETHINKING] (reporting that proportion of heads of poor households under age 65 who did not work all year and were not excused from work by disability or enrollment in school rose from 12.3% in 1968 to 21.8% in 1987). This trend, however, may also reflect a drop in demand for unskilled labor.

Doubtless this is why writers from Plato onwards have been particularly harsh on beggars as opposed to, say, street drunks.⁸⁰

3. *Chronic Bench Squatting*

For several reasons, pedestrians may regard chronic bench squatting as less annoying than chronic panhandling. The chronic bench squatter is far more likely to be genuinely mentally ill or disabled, and therefore deserving of empathy. Unlike panhandling, the act of bench squatting also does not in itself flagrantly affront the work ethic or involve an intrusion on privacy.

Like panhandling, bench squatting is an activity that involves benefits as well as costs. How much benefit does a mentally ill bench squatter obtain from an entitlement, say, to spend daylight hours sleeping on a bench in Lafayette Park across from the White House? As in other contexts, the magnitude depends on the quality of the bench squatter's next best alternatives. These might include: squatting in another public locale better suited to long-term stays; cycling among a number of public places (including Lafayette Park); spending more daylight hours indoors (perhaps in a board-and-care facility, a drop-in center, a rented apartment, or a relative's home); and voluntarily initiating institutionalization. Because the first alternatives listed are close substitutes, the benefits of an entitlement to bench squat in a particular location such as Lafayette Park are apt to be small. Whether a prohibition on chronic bench squatting in 95% of a downtown area would be highly burdensome would depend on how satisfactory the sites in the remaining 5% would be.⁸¹

Because of the paucity of research on bench squatting, little is known about pedestrians' reactions to the practice.⁸² The most flagrant examples involve offenses to a number of the senses. A man who sits in a well-trafficked space amid shopping carts full of junk, who stinks with body odor, and who urinates publicly into plastic jugs, is likely to trigger frequent complaints to the police.⁸³ A woman who sleeps on a busy sidewalk, who smells of feces, and who shouts obscenities⁸⁴ certainly engages in offensive behavior, and may also engender fears of crime and communicable disease.⁸⁵ More commonly, the cues of disorderliness are primarily visual. Even a person who squats for only one day may be resented for doing things, such as sleeping for hours and storing personal effects, that are regarded as inherently

80. See *infra* text accompanying notes 182–85.

81. See *infra* text accompanying notes 307–09.

82. The chronicle of a particular bench squatter in the Lincoln Park neighborhood of Chicago is brilliantly and sympathetically recounted in Jeffrey Zaslow, *Jim's Saga: Homeless Man Haunts a Gentrified Enclave, Baffling Its Residents*, WALL ST. J., Dec. 1, 1986, at 1.

83. See *id.*

84. See *Boggs v. New York City Health & Hosp. Corp.*, 523 N.Y.S.2d 71, 73–74 (App. Div. 1987).

85. See Zaslow, *supra* note 82, at 1.

improper for the public space in question. Subways are not for prolonged sleeping, and neither is Bryant Park in midtown Manhattan.

As this discussion suggests, the magnitude of pedestrians' harms from bench squatting increases with the inelasticity of pedestrian demand for the space in question. The spectacular and unrivaled views from Lafayette Park and Palisades Park, for example, make them suitable for quick tourist stops and brief romantic strolls. However decorous his behavior at any instant, a *chronic* bench squatter in a congested space that is designed for rapid turnover may be an egregious violator of an implicit time limit.⁸⁶ A retired executive who wishes to read the whole of Proust should not be permitted to sequester the public bench with the best view of the White House.

C. *A Recommended Doctrinal Definition of a Chronic Street Nuisance*

The varied enforcers of street norms, including nonstate entities,⁸⁷ can benefit from having a test for identifying chronic street misconduct. Law, particularly the traditional law of public nuisances, suggests some formulations that any of these enforcers could use.⁸⁸

1. *A Proposed Prima Facie Case*

Public-nuisance law, a stepchild of the far more analyzed private-nuisance law,⁸⁹ deals in part with pervasive harms, usually minor at any instant, that persist for a long duration to the injury of the general public.⁹⁰ Unless a

86. See *supra* text accompanying notes 51–54. Some judges appear oblivious to this point. See *Streetwatch v. National R.R. Passenger Corp.*, 875 F. Supp. 1055, 1063–64 (S.D.N.Y. 1995) (holding Amtrak abridged rights to travel of persons arrested for hanging out for too long in Penn Station).

87. See *infra* text accompanying notes 141–69.

88. The Coase Theorem offers the reminder that it conceivably would be possible for victims of a nuisance to bribe the offender to cease. For example, a restaurateur might bribe a chronic panhandler to move to another location. While the Coasian insight is invariably thought-provoking, a legal system has two sound reasons for choosing to entitle the public to be free of, say, nuisance panhandling, rather than to entitle panhandlers to ply their trade. First, as a matter of corrective justice, the violation of social norms should not become an avenue for profit. Second, post-Coasian analysis requires attention to asymmetries in transaction costs. When the vast majority of members of a community honor a norm prohibiting certain behavior, it is administratively cheaper to punish the few violators of the norm than to reward the many in compliance with it. More concretely, if a restaurateur had to buy off would-be panhandlers, many destitute people might flock to the restaurant to negotiate a deal of this nature. An advantage of deterring substandard behavior with penalties is that fewer transactions need be closed. See Robert C. Ellickson, *Alternatives to Zoning: Covenants, Nuisance Rules, and Fines as Land Use Controls*, 40 U. CHI. L. REV. 681, 728–33 (1973) [hereinafter *Alternatives to Zoning*].

89. For examination of the kindred private-nuisance doctrines that apply to disputes among private landowners, see, e.g., *id.* at 719–61; Richard A. Epstein, *Nuisance Law: Corrective Justice and its Utilitarian Constraints*, 8 J. LEGAL STUD. 49 (1979).

90. See RESTATEMENT (SECOND) OF TORTS § 821B(1) (1979): “A public nuisance is an unreasonable interference with a right common to the general public.” According to the *California Civil Code*, a nuisance is “[a]nything which is . . . offensive to the senses . . . or unlawfully obstructs the free passage or use, in the customary manner, of . . . any public park, square, street, or highway.” CAL. CIV. CODE § 3479 (West 1970). According to the Code, a *public* nuisance “affects at the same time an entire community or

member of the public has suffered special injury, a public nuisance typically is remediable solely by public officials, who may seek abatement orders or imposition of (usually minor) criminal penalties.⁹¹ Public-nuisance doctrine properly pays heed to both the value of the annoying activity to its sponsor and the magnitude of the harm to the public.⁹²

a. *The Proposal*

The following test (for lawyers, *prima facie* case) can serve to identify the gravamen of the offense: *A person perpetrates a chronic street nuisance by persistently acting in a public space in a manner that violates prevailing community standards of behavior, to the significant cumulative annoyance of persons of ordinary sensibility who use the same spaces.* This is a strict-liability test, like that for a public nuisance; there is no required element of negligence or wrongful intent.⁹³ A strict-liability test is readily administrable, a distinct advantage in light of the many actors who engage in social control of street behavior. The proposed standard is also democratic, because virtually everyone is a street user and helps shape street norms through highly diffuse

neighborhood, or any considerable number of persons." *Id.* § 3480.

The *Model Penal Code* attempts to shoehorn public-nuisance infractions into the crime of disorderly conduct, which rarely shares the durational feature of a nuisance. See MODEL PENAL CODE § 250.2 cmt. 2 (1985). True to the temper of the 1970s, see *infra* text accompanying notes 236–46, the comments that follow § 250.2 seem far more focused on the risk of police misconduct than on the risk of offensive street behavior.

91. See RESTATEMENT (SECOND) OF TORTS § 821C(1) (1979) (on special injury); *id.* § 821C(2)(b) (on actions by public officials to abate public nuisances); W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 90 (5th ed. 1984) (describing how state can seek court order to abate or initiate criminal prosecution).

92. See 2 FEINBERG, *supra* note 46, at 5–10, 25–49 (drawing on nuisance law to inform analysis of problems of public offense). *But see* Harlon L. Dalton, "Disgust" and Punishment, 96 YALE L.J. 881, 901–09 (1987) (reviewing Feinberg) (arguing that reactions of disgust are culturally derived and therefore should be beyond reach of criminal law).

93. See Robert Abrams & Val Washington, *The Misunderstood Law of Public Nuisance: A Comparison with Private Nuisance Twenty Years After Boomer*, 54 ALB. L. REV. 359, 367–74 (1990) (standard of liability in public-nuisance action is strict); see also RESTATEMENT (SECOND) OF TORTS § 821B cmts. c & e (1979) (advocating strict liability for activity declared to be public nuisance by statute).

Instead of being judged by a strict-liability test, individual patterns of street behavior might be subjected to cost-benefit analysis, such as the Learned Hand formula for negligence articulated in *United States v. Carroll Towing Co.*, 159 F.2d 169, 173 (1947). See RICHARD A. POSNER, *ECONOMIC ANALYSIS OF LAW* 163–67 (4th ed. 1992). If the street behavior were to cease, would pedestrians value their gains more than the street person would disvalue having lost the opportunity to engage in it? A decisive drawback of this negligence approach is that actual attempts to quantify costs and benefits tend to be either fanciful, unacceptably costly to carry out, or both.

In economics, cost-benefit analysis involves application of the Kaldor-Hicks criteria. See *id.* at 13–15. Especially because many panhandlers and bench squatters are destitute, the outcome of a Kaldor-Hicks calculation may turn on how the entitlements are originally allocated. On the general point, see Richard S. Markovits, *Duncan's Do Nots: Cost-Benefit Analysis and the Determination of Legal Entitlements*, 36 STAN. L. REV. 1169, 1188–98 (1984) (discussing indeterminacy in cost-benefit analysis).

and pluralistic social processes.⁹⁴ That there is little variation in the tastes for street order between, for example, rich and poor, and black and white, should help reassure those worried about possible biases in the approach.⁹⁵

b. *The Inadequacy of an "Effect on the Street Headcount" Test*

Alternatively, the test for the existence of a street nuisance might be whether the conduct at issue results in a net decrease in the population in the public space in question.⁹⁶ Because the street person himself would be adding one to the headcount, the question would be whether his behavior was displacing *more* than one other person, on average.

Although this "headcount test" has some rough-and-ready appeal, it has both practical and conceptual shortcomings. Except in extreme cases, convincing proof of both trends in headcounts and the causes of those trends would be impossible to acquire; in a bustling public space, far too much is going on. In addition, the headcount test ignores the effects of chronic street misconduct on the amount of inframarginal surplus that various users of public spaces obtain. Pedestrians might continue to use a Lafayette Park because they lack any good substitute for it, even though it has become far less pleasurable. Panhandlers tend to locate themselves at spaces with few substitutes—at transit stops, theater entrances, university bookstores—precisely to exploit this "captive pedestrian" phenomenon. Finally, the headcount test does not take into account how long the occupants of a particular space have been there. In places such as Lafayette Park that are suited to rapid turnover, a short-term user can be expected to gain more utility per minute than a long-term user would, but the headcount test would treat the two different sorts of users identically.⁹⁷

c. *Only Acts, Not a Status, Can Create a Nuisance*

The proposed legal definition of a chronic street nuisance requires a voluntary course of action such as protracted panhandling or day-after-day bench squatting. Both classical-liberal ideals and the Constitution demand that the law of street nuisances regulate a person's choices, not some unalterable

94. Feinberg rightly warns against blanket imposition of the standards of the hypersensitive. 2 FEINBERG, *supra* note 46, at 33–34. *But cf. infra* text accompanying note 310 (provision of Green Zones for the delicate).

95. *See infra* note 118.

96. Carl Goldfarb & Joseph Tanfani, *Fight Rages Over Business Plans for Bayfront Land*, MIAMI HERALD, May 4, 1992, at 1B (only homeless and police officers frequent Bicentennial Park in downtown Miami); *cf. supra* note 3 (some residents of Santa Monica stopped picnicking in the city's Palisades Park when bench squatters took over there).

97. *See supra* text accompanying notes 51–54.

status.⁹⁸ In particular, it is impermissible to criminalize either the status of poverty or the status of homelessness (lack of regular access to a permanent dwelling). To take advantage of this legal doctrine, some advocates for street people have striven to characterize municipal crackdown ordinances that purportedly target behavior as actually targeting status.⁹⁹

Many advocates sincerely believe that street people are so constrained by economic and social circumstances that they lack real choices.¹⁰⁰ Most (although not all) social-welfare professionals hold the view that poor people always act under duress; according to this view, society should not “blame” poor people or, under an extreme formulation, ask them to bear any responsibilities.¹⁰¹ While no one’s will is fully free, virtually all of us have some capacity for self-control. Legal and ethical systems therefore properly subscribe to the proposition—or salutary myth—that an individual is generally responsible for his behavior. This policy, at the margin, helps foster civic rectitude.

To treat the destitute as choiceless underestimates their capacities and, by failing to regard them as ordinary people, risks denying them full humanity. Street people daily face fundamental decisions about where to eat, sleep, and pass time.¹⁰² More than persons living lives structured by families and employers, a street person must individually craft a daily routine.

Begging, for example, is an option, not an inevitability. Only a small percentage of disabled and destitute individuals engage in panhandling.¹⁰³ Brandt Goldstein found that most panhandlers at Yale had consciously weighed alternatives, including holding a low-status, minimum-wage job.¹⁰⁴ There is

98. See MODEL PENAL CODE § 2.01 (1985) (stating that “voluntary act” typically is prerequisite for criminal culpability); *infra* text accompanying notes 443–51 (on status crimes).

99. See, e.g., NO HOMELESS PEOPLE ALLOWED, *supra* note 6, at 6 (construing municipal efforts to control street misconduct as “impulse to criminalize poverty”). As the court noted in *Streetwatch v. National R.R. Passenger Corp.*, 875 F. Supp. 1055, 1066 (S.D.N.Y. 1995) (Motley, J.):

Defendants contend that the court should either concur in their labeling of the homeless as a criminal class or give weight to a perceived public interest in avoiding the aesthetic discomfort of being reminded on a daily basis that many of our fellow citizens are forced to live in abject and degrading poverty. The court cannot endorse either of these proposals.

100. See, e.g., Donald E. Baker, Comment, “Anti-Homeless” Legislation: Unconstitutional Efforts To Punish the Homeless, 45 U. MIAMI L. REV. 417 (1990–91) (arguing that a number of defenses protect homeless from criminal prosecution for sleeping in streets or parks); David M. Smith, Note, *A Theoretical and Legal Challenge to Homeless Criminalization as Public Policy*, 12 YALE L. & POL’Y REV. 487 (1994) (arguing that status of being homeless should constitute duress defense in event of criminal prosecution for “survival” activities); Letter from Maria Foscarinis to author (July 30, 1995) (on file with author) (embracing view that legal system should first “correct the conditions which contribute to or require” street misconduct before it seeks to correct misconduct itself).

101. See RICHARD W. WHITE, JR., RUDE AWAKENINGS: WHAT THE HOMELESS CRISIS TELLS US 169–88 (1992) (describing this ideology and demonstrating its pervasiveness).

102. On the resourcefulness and resilience of Austin street people, see SNOW & ANDERSON, *supra* note 71, at 313–16.

103. See ROSSI, *supra* note 3, at 109 (20.6% of homeless in Chicago study had received income from “handouts” during prior month); Spector, *Vouchers for Panhandlers*, *supra* note 5, at 20 (citing Santa Barbara survey reporting that only 7% of users of city shelters panhandled).

104. See *supra* note 58.

abundant evidence that chronic beggars premeditate how to increase the alms they receive.¹⁰⁵ Bench squatters also have many choices about where to be,¹⁰⁶ and plenty of time to move from place to place. In sum, panhandling and bench squatting are acts, not statuses.

2. *Defenses Available to Those Who Cause Chronic Street Nuisances*

Most commentators on street law stress the goal of limiting abuses not by street people, but by police officers.¹⁰⁷ The appropriate goal is to minimize the net costs of abuses by both. A variety of doctrines can safeguard street people from police misconduct. An important one—the inclusion of an “act” requirement in the *prima facie* case—has been mentioned. The recognition of a variety of affirmative defenses is also appropriate.¹⁰⁸ Part VI, which focuses on some constitutional dimensions of street law, identifies and discusses the appropriate scope of several constitutionally grounded defenses. The main ones are equal protection (to bar discrimination on the basis of race or some other suspect classification), freedom of speech, and freedom of travel.

Because street people (and especially bench squatters) disproportionately suffer from mental illness, the issue of the availability of an insanity defense arises.¹⁰⁹ Significant portions of premier urban places such as Lafayette Park, Central Park, and Palisades Park in effect have been converted from spaces for general public use into outdoor mental wards whose ambiances repel many would-be entrants. While the disorderly mentally ill surely have a right to chronically occupy *some* public spaces, it is absurd to allow them to monopolize the best urban parks to the exclusion of so many other users.¹¹⁰ Several legal policies have combined to lead to the current impasse. Traditionally, the insanity defense has been available in all criminal proceedings. This implies that police officers cannot invoke the formal criminal justice system to compel the disorderly mentally ill either to behave themselves or to “move along” to other locations.¹¹¹ Beginning in the 1960s, the legal system also made the involuntary civil commitment of the mentally ill extremely difficult.¹¹² As a result, social workers also rarely are able to direct mentally disabled bench squatters to relocate from the agora to a remoter haven of less value to the ordinary pedestrian.

105. See sources cited *supra* notes 57–58.

106. See *supra* text accompanying note 81.

107. See sources cited *supra* note 19.

108. Cf. *Alternatives to Zoning*, *supra* note 88, at 748–61 (on defenses in private-nuisance cases).

109. On the general issue, see MODEL PENAL CODE §§ 4.01–.09 (1985).

110. See *infra* text accompanying notes 301–28 (on “zoning” of public spaces).

111. The development of § 1983 law since the 1960s has likely made the police more respectful of this constraint. See *infra* text accompanying notes 260–67.

112. See *infra* text accompanying notes 254–59. The exceptions involve extreme facts, such as those in *Boggs v. New York City Health & Hosp. Corp.*, 523 N.Y.S.2d 71 (App. Div. 1987). See *supra* note 14.

In short, the legal system formally permits only the most extreme responses to a mentally ill person who misbehaves in public: either involuntary civil commitment to an institution, or no constraints at all. Expanding the range of permissible legal responses would spare all involved from the application of one of these extremes. Institutionalization involves a drastic loss of freedom.¹¹³ At present, when a mentally ill woman chronically ruins the peace of a busy Manhattan sidewalk,¹¹⁴ officials cannot simply compel her to relocate to another public space where she would cause far less harm. She herself might prefer that outcome to bearing the risk of involuntary commitment.

A legal rule that prohibited a person from raising the insanity defense against a “move along” order or a prosecution for a minor criminal infraction in a public space therefore might actually enhance the liberties of the mentally ill, and also promote the freedom of ordinary pedestrians to use prime public spaces. This doctrinal reform would probably only formalize what already occurs. In practice, the insanity defense commonly is not available to those cited for driving under the influence or violating traffic rules.¹¹⁵ Similarly, one doubts if mental illness actually operates to excuse persons prosecuted for infractions such as aggressive panhandling or illegally sleeping overnight in a public park. On this issue, the law in action may be both different and sounder than the pure theory of criminal responsibility.

D. *Distributive Justice and the Destitute*

Most beggars and bench squatters are economically and socially destitute.¹¹⁶ For observers concerned primarily with distributive justice, extreme poverty might furnish another defense against prosecution of chronic street misbehavior—indeed a sufficient reason for siding with a disorderly street person in *any* policy context.¹¹⁷ This is an ill-considered position. To

113. For this reason, I generally applaud the deinstitutionalization movement. See Stephen J. Morse, *A Preference for Liberty: The Case Against Involuntary Commitment of the Mentally Disabled*, 76 CAL. L. REV. 54 (1982).

114. See *Boggs*, 523 N.Y.S.2d 71.

115. *State v. Ungerer*, 621 N.E.2d 893 (Ohio Ct. App. 1993) (affirmative defense of not guilty by reason of insanity is not available to defendant charged with violating traffic laws); *State v. Maguire*, 717 P.2d 226 (Or. Ct. App. 1986), *aff'd by equally divided court*, 736 P.2d 193 (Or. 1987) (driving while under influence of intoxicants is strict-liability crime, and statutory defense of lack of capacity is not available). *But cf.* *State v. Olmstead*, 800 P.2d 277 (Or. 1990) (amended Oregon statute makes insanity defense available to defendant accused of driving while intoxicated and without license, even though both are strict-liability offenses). A person found guilty except for insanity commonly is subject to a variety of noncriminal sanctions. See, e.g., OR. REV. STAT. § 809.410(23) (1993) (person who, but for insanity defense, would have been guilty of traffic offense shall have driving privileges immediately suspended).

116. See *infra* notes 190–98.

117. See *supra* text accompanying notes 15–16. Supporters of this view commonly invoke the following quotation from Anatole France: “[The poor] must labour in the face of the majestic equality of the laws, which forbid rich and poor alike to sleep under the bridges, to beg in the streets, and to steal their bread.” ANATOLE FRANCE, *THE RED LILY* 91 (Winifred Stephens trans., Dodd, Mead & Co. 1927) (1894).

favor the poorest may disadvantage the poor, who are as unhappy with street disorder as the rest of the population.¹¹⁸ Because residents of poor urban neighborhoods tend to make especially heavy use of streets and sidewalks for social interactions,¹¹⁹ they have an unusually large stake in preventing misconduct there.

Furthermore, even if the redistribution of wealth were the primary policy objective, protecting perpetrators of street misconduct from legal regulation might not be the best way of achieving it. Law-and-economics scholars have reached a growing consensus that wealth redistribution is almost invariably better accomplished through broad-based welfare and taxation programs than through the fine-tuning of low-level legal rules.¹²⁰ Lawmakers would be unwise to abandon otherwise appropriate rules-of-the-road simply to provide aid to street people. If redistribution is to be carried out, families, charities, and welfare agencies know far more than judges about who is deserving of aid. Judges should rebuff advocates' efforts to sacrifice street law on the altar of income redistribution.

For many observers, the increased outlays for welfare programs since the 1960s make this hardheaded conclusion easier to stomach. In the United States, the percentage of GNP allocated to federal means-tested benefits roughly tripled between 1965 and 1975 and remained at the higher level at least

This sentence appears in a novel, embedded in a lengthy monologue delivered by the character M. Choulette, a 50-year-old Bohemian poet and drunkard whose "violent prose and savage mien were affectations." *Id.* at 6, 27–29, 94.

Many legal rules in practice primarily affect a small portion of the population. For example, law in its "majestic equality" also imposes estate taxes that only the very wealthy are compelled to pay, and requires both urbanites and ruralites to comply with regulations on crop-dusting. It is instructive to treat Choulette's lament as a pleading invoking the Equal Protection Clause. According to that body of doctrine, proof of disproportionate impact on the poor (or any other group) is not sufficient to state a claim for relief; Choulette would also have to show that the legislature was motivated by discriminatory intent, and that the legitimate objectives the legislature was pursuing were not weighty enough to justify the disproportionate impact on the complaining group. Attorneys for the homeless are highly unlikely to prevail on an equal protection theory when challenging a restriction on outdoor sleeping or begging. *See supra* notes 13–14, 69–86 and accompanying text; *infra* notes 335–38, 395–401 and accompanying text. In general, a person concerned with broad questions of distributive justice should consider the impact of the entire system of laws, not narrow statutes in isolation.

118. *See* SKOGAN, *supra* note 22, at 56 (reporting +.88 correlation in assessments of street disorder among higher- and lower-income respondents, and +.87 correlation between blacks and whites). Rawls's Difference Principle accords particular concern to the "least advantaged members of society." JOHN RAWLS, *A THEORY OF JUSTICE* 76–80 (1971). A devotee of this principle might be willing to sacrifice the welfare of the many poor for the benefit of a few of the poorest (a category into which bench squatters are more likely than panhandlers to fit).

119. *See* GERALD D. SUTTLES, *THE SOCIAL ORDER OF THE SLUM* 73–83 (1968) (describing Addams area of Chicago).

120. *See* A. MITCHELL POLINSKY, *AN INTRODUCTION TO LAW AND ECONOMICS* 119–27 (2d ed. 1989); Louis Kaplow & Steven Shavell, *Why the Legal System is Less Efficient than the Income Tax in Redistributing Income*, 23 J. LEGAL STUD. 667, 667–77 (1994). Although these authors focus on private law rules, their conclusions can be extended to encompass criminal law rules as well. There are, to be sure, dissenters. *See, e.g.*, Guido Calabresi, *The Pointlessness of Pareto: Carrying Coase Further*, 100 YALE L.J. 1211, 1223–27 (1991) (distributional issues can never be avoided unless one is willing to make interpersonal comparisons of utility); Eric A. Posner, *Contract Law in the Welfare State*, 24 J. LEGAL STUD. 283 (1995) (defending restrictive contract law on ground that it helps deter excessive borrowing).

through the early 1990s.¹²¹ Although many social-welfare programs are aimed at families and the elderly, single street people may qualify under several significant ones. For example, an impoverished schizophrenic bench squatter or other totally disabled person is eligible for federal cash benefits under either the SSDI or SSI programs.¹²² In some states, even an *employable* panhandler may qualify for General Assistance checks.¹²³ During the 1980s in particular, governments and charities significantly increased in-kind aid to the homeless. Between 1984 and 1988, the bed capacity of emergency shelters nationwide is estimated to have jumped from 100,000 to 275,000.¹²⁴ The Stewart B. McKinney Homeless Assistance Act of 1987¹²⁵ introduced new federal programs for street people and boosted funding for soup kitchens and other services. Although the total number of people in the various "homeless" categories¹²⁶ undoubtedly rose during the 1980s, levels of aid apparently grew even faster.¹²⁷

E. Why "Homeless" Tends to Be a Misleading Label

The previous paragraph includes several references to the "homeless." This term is commonly applied to all poor people—including those who reside in

121. Federal outlays under major means-tested programs (excluding veterans pensions) increased from 0.53% of GNP in 1965 to 1.67% in 1975. Between 1975 and 1989, the percentage fluctuated between a low of 1.62% (1979) and a high of 1.86% (1983). A new peak of 1.95% was reached in 1990. GENE FALK & RICHARD RIMKUNAS, 1992 BUDGET PERSPECTIVES: FEDERAL SPENDING FOR THE SOCIAL WELFARE PROGRAMS tbl. 5.4 (Cong. Res. Serv. Rep. 91-280 EPW, Mar. 22, 1991).

122. These are the Social Security Disability Insurance program and the means-tested Supplemental Security Income program. In 1992, 3.5 million disabled workers were receiving SSDI benefits, and another 5.6 million individuals were receiving SSI benefits. See BUREAU OF THE CENSUS, U.S. DEP'T OF COMMERCE, STATISTICAL ABSTRACT OF THE UNITED STATES 1994, at 373, 376 (1994) [hereinafter STATISTICAL ABSTRACT 1994].

123. For a discussion of the Illinois program, see ROSSI, *supra* note 3, at 191-93 (stressing low level of benefits). Seven of the twelve regular panhandlers at Yale received General Assistance benefits; three of the seven also received food stamps. Goldstein, *Panhandlers at Yale*, *supra* note 13, at 309-10. In 1993, 80% of the residents at the Sunshine, the largest of the remaining Bowery lodging houses, were receiving public assistance. Alexander Kadvan, *The Bowery Lodging House: The Forgotten Housing of the Poor 40* (May 14, 1993) (unpublished manuscript, on file with author).

124. OFFICE OF POLICY DEV. & RESEARCH, U.S. DEP'T OF HOUS. & URBAN DEV., A REPORT ON THE 1988 NATIONAL SURVEY OF SHELTERS FOR THE HOMELESS 2 (1989) [hereinafter NATIONAL SURVEY OF SHELTERS].

125. Pub. L. No. 100-77, 101 Stat. 482 (1987). On the evolution of this legislation, see Maria Foscarinis, *Beyond Homelessness*, 12 ST. LOUIS U. PUB. L. REV. 37 (1993). Because many McKinney Act programs are highly particularized, they are ripe for being folded into block-grant programs.

126. See *infra* text accompanying notes 132-36.

127. Nationwide expenditures by shelter operators increased fivefold between 1984 and 1988. See NATIONAL SURVEY OF SHELTERS, *supra* note 124, at 17. The homeless population grew at a slower rate. Christopher Jencks estimates that the number of single adults sleeping in public places rose from 86,000 in March 1980 to 144,000 in March 1990. See JENCKS, HOMELESS, *supra* note 1, at 17. According to Jencks, the number of single adults sleeping in shelters rose from 35,000 to 118,000 over the course of the same decade. *Id.* For the hypothesis that the increased supply of relatively high-quality shelters during the 1980s itself caused much of the increase in the shelter population, see Robert C. Ellickson, *The Homelessness Muddle*, PUB. INTEREST, Spring 1990, at 45, 45-46, 50-52 [hereinafter *Homelessness Muddle*].

permanent dwellings—who chronically make heavy use of the streets. Because the term often crops up in litigation and policy discussions, I conclude this part with some linguistic housekeeping on the differences between the “homeless” and “street people.”

The nouns customarily used to describe down-and-out street people have moved with the spirit of the times. Before the 1980s, street people were usually saddled with a negative label, such as “vagrant,” “derelict,” “bum,” “drifter,” or “beggar.”¹²⁸ In the 1980s, activists encouraged journalists and scholars to relabel street people as the “homeless,”¹²⁹ a term that had been used with reference to street people only sparingly during prior decades.¹³⁰ In the mid-1980s, the universal adoption of the term “homeless”¹³¹ helped engender more empathy for street people. Whenever possible in this Article, however, I refer to “street people” (or “panhandlers” or “bench squatters”), not to the “homeless.” “Homeless” is an unduly ambiguous word and implies policy solutions that are inapt.

Ordinary speakers tend to attach the “homeless” label to individuals whose lives meet at least one of three quite different criteria:¹³² persons who spend the night in an emergency shelter;¹³³ persons who spend the night on the “streets” (e.g., in vehicles, railroad stations, parks, and other spaces not

128. See, e.g., Foote, *supra* note 19, at 604 (article published in 1956 that refers to “bums”).

129. See *infra* text accompanying notes 270–72. The history of *Callahan v. Carey*, the key test case on the right to shelter in New York, suggests that Robert Hayes and his fellow advocates consciously sought to bring about this linguistic change. The trial judge’s opinion makes clear that the plaintiffs’ lawyers and experts had consistently employed the term “homeless” when referring to their clients. Although Judge Tyler occasionally uses that term on his own initiative, he generally refers to the Bowery men as “derelicts.” *Callahan v. Carey*, No. 79-42582 (N.Y. Sup. Ct. Dec. 5, 1979), reprinted in N.Y. L.J., Dec. 11, 1979, at 10. By contrast, the 1981 consent decree that settled *Callahan* (by effectively requiring New York City to provide shelter to destitute men on demand) consistently refers to the plaintiffs as “homeless.” *Callahan v. Carey*, No. 42582/79 (N.Y. Sup. Ct. Aug. 26, 1981) (“Final Judgment by Consent”). On this consent decree, see Mark Malone, Note, *Homelessness in a Modern Setting*, 10 FORDHAM URB. L.J. 749, 769–73 (1982).

130. On the changing historical usage of the word “homelessness,” see O’FLAHERTY, *supra* note 1, at 9–11 (“homelessness used to refer to a sociological status rather than a housing market condition”).

131. A search of the DIALOG database revealed that the number of articles in the *New York Times* containing the term “homeless” or “homelessness” increased tenfold during the 1980s, from 148 articles in 1980; to 976 in 1985; to 1564 in 1990 (over four per day). The number dipped to 1376 in 1994.

132. Members of the first two groups lack regular access to a permanent dwelling and thus meet the conventional scholarly definition of homelessness. According to the most careful estimates that apply the scholarly definition, the number of homeless Americans at a given point in time ranged from roughly 250,000 to 400,000 during 1985–1990, a peak period. JENCKS, HOMELESS, *supra* note 1, at 16–17; ROSSI, *supra* note 3, at 81. During the Bush and Clinton administrations, officials of the Federal Department of Housing and Urban Development commonly used a point-estimate of 600,000, a figure derived from research by Martha Burt. See, e.g., *Money to Aid Homeless*, N.Y. TIMES, July 13, 1995, at B9 (reporting statement by HUD Secretary Henry G. Cisneros). For criticism of this figure, see JENCKS, HOMELESS, *supra* note 1, at 146 n.11. The Clinton administration also publicized flow estimates that count the number of different persons who met the scholarly definition of homelessness at any point in time over a period of years. See Jason DeParle, *Report to Clinton Sees Vast Extent of Homelessness*, N.Y. TIMES, Feb. 17, 1994, at A1. These flow estimates, which are much larger, indicate that most individuals who have the experience of lacking regular access to a permanent dwelling have it only fleetingly.

133. In March 1990, about 45% of homeless single adults, and 98% of members of homeless families with children, were sleeping under roof in emergency shelters. JENCKS, HOMELESS, *supra* note 1, at 17.

designed for residential use);¹³⁴ and panhandlers, daytime bench squatters, squeegee men, can collectors, and other active “street people.” To be sure, the members of all three groups share a number of attributes. They tend to be destitute, socially isolated, and at most episodically employed. They also tend to be heavy users of public spaces.

Nevertheless, the composition of these three groups overlaps far less than is popularly thought. For example, although pedestrians may assume that a panhandler sleeps in a shelter or on the streets, studies indicate that, in most cities (but seemingly not in New York), a large majority of panhandlers have “regular access to a permanent dwelling” and thus fail to meet the scholarly definition of the homeless.¹³⁵ Conversely, only a small fraction of the street and shelter homeless engage in panhandling.¹³⁶

The label “homeless” also has fostered misguided policies. The word implies that the problems of the people so labeled can be solved with bricks-and-mortar—with “housing, housing, housing,” as Robert Hayes and other advocates were still saying in the late 1980s.¹³⁷ By the early 1990s, there was broad agreement that this policy response was largely off target,¹³⁸ and the new mantra became “therapy, therapy, therapy.” Brendan O’Flaherty persuasively argues that the new policy fix is no better than the old. Singling out persons labeled “homeless” for special benefits and burdens tends to entrap them in a marginal status. O’Flaherty would treat them like everyone else, not as members of a special class.¹³⁹

134. These “street homeless”—perhaps 100,000–150,000 persons nationwide at any point—are almost exclusively single adults. They commonly sleep in relatively sheltered places, such as vehicles, bus stations, all-night movie theaters, and abandoned buildings. Some street persons use outdoor sites under bridges and in parks and entryways, more commonly in warm weather than in cold. See ROSSI, *supra* note 3, at 63 (estimating that number of homeless “[o]n streets or in public places” in Chicago fell by roughly 62% between early fall 1985 and mid-winter 1986).

135. See Goldstein, *Panhandlers at Yale*, *supra* note 13, at 308 (relating that 8 of 12 chronic panhandlers regularly lived in conventional dwellings); Spector, *Vouchers for Panhandlers*, *supra* note 5, at 59–60 (reporting that 12 of 14 Yale regulars resided in conventional housing); Jon Hilkevitch, *Evanston Fights Panhandlers—with a Smile*, CHI. TRIB., May 27, 1994, at 1, 19 (informal survey by Evanston police of Evanston panhandlers revealed that 29 of 36 had permanent addresses and were not homeless); see also Cynthia R. Mabry, *Brother Can You Spare Some Change?—And Your Privacy Too?: Avoiding a Fatal Collision Between Public Interests and Beggars’ First Amendment Rights*, 28 U.S.F. L. REV. 309, 325 n.110 (1994) (citing sources that identify beggars who were not homeless). But see O’FLAHERTY, *supra* note 1, at 94 (measured by scholarly definition of homelessness, 81% of 74 panhandlers surveyed in Manhattan had been homeless the night before). There is little published evidence about where daytime bench squatters spend their nights or, for that matter, about street people in general. See *id.* at 81 (“Not even the most basic facts are known . . .”).

136. See *supra* note 103.

137. See *infra* note 294.

138. See *infra* notes 288–95 and accompanying text.

139. O’FLAHERTY, *supra* note 1, at 277–78, 297–98. In light of its shortcomings, the label *homeless* may decline in use as the 1990s progress.

III. THE MANY SOURCES OF STREET ORDER

If a perpetrator of a chronic street nuisance were deemed an appropriate target for a sanction, who should apply the punishment? Although “legal centralists”¹⁴⁰ think first of the state, another enforcer often would be preferable. An individual’s behavior toward another person can be constrained by: first-party controls that the individual imposes on himself; second-party controls that the other person applies; and third-party controls administered by either (a) unofficial onlookers, (b) private organizations, or (c) the state.¹⁴¹ The suitability of the candidates varies with the information they possess about street behavior, and with their incentives and capacities to act on that information. When making street law, legislators and judges should be aware of the full panoply of enforcers and be sensitive to the relative aptitude of each.

A. *Internalized Norms of Street Etiquette*

Much orderly behavior is self-generated. Parents, teachers, religious leaders, and others strive to induce young people to internalize norms, including informal rules of proper conduct in public places.¹⁴² A person who has internalized a norm will usually comply with it to avoid guilt feelings. Most people avoid chronic panhandling and bench squatting because they would feel ashamed of themselves for doing it.¹⁴³

In the United States, the socialization of the young is much more haphazard than in, say, Japan. Researchers find that American street people disproportionately have spent their childhoods with severe disadvantages, including a lack of socialization to mainstream norms.¹⁴⁴ These disadvantages might include an absent father, an abusive and neglectful mother, stints in foster homes, and residency in a neighborhood in the grip of an underclass subculture. As adults, street people are disproportionately destabilized by

140. Having attributed authorship of this phrase to others, I use this opportunity to acknowledge that John Griffiths coined “legal centralism” in an unpublished paper written in 1979. See Marc Galanter, *Justice in Many Rooms: Courts, Private Ordering, and Indigenous Law*, 19 J. LEGAL PLURALISM 1, 1 n.1 (1981).

141. This taxonomy is derived from ROBERT C. ELLICKSON, *ORDER WITHOUT LAW* 123–36 (1991) [hereinafter *ORDER WITHOUT LAW*].

142. On the importance of teaching children self-control, see James Q. Wilson, *What to Do About Crime*, COMMENTARY, Sept. 1994, at 25, 32–33. *But cf.* JAMES Q. WILSON, *THE MORAL SENSE* 5–13 (1993) [hereinafter *WILSON, MORAL SENSE*] (contending that much of morality is innate).

143. See SNOW & ANDERSON, *supra* note 71, at 159–60 (some Austin street people were too prideful to beg); *id.* at 341 n.16 (citing Tucson study in which panhandlers had repeatedly stated that practice was “embarrassing”). While some of the street people at Yale felt that panhandling damaged their pride, a few reported that they would regard a minimum-wage job in a fast-food restaurant as even more demeaning. Goldstein, *Panhandlers at Yale*, *supra* note 13, at 304–05, 318–19.

144. See *infra* text accompanying notes 197–206.

mental illness, substance abuse, and stints in prison.¹⁴⁵ The life histories have infinite variety and are never entirely bleak.¹⁴⁶ Indeed, most street people have a sense of pride¹⁴⁷ and control themselves remarkably well, especially given their disadvantaged backgrounds. Many, however, will not necessarily comply with social norms of behavior without some form of external constraint.

B. *Pedestrians' Self-Help Defenses*

A pedestrian bothered by a street nuisance may exercise self-help against the perpetrator. While walking by an unaggressive chronic panhandler, for example, a pedestrian at minimum could decline to give alms—a response that, if universal, would discourage panhandling by making it fruitless. A pedestrian's affirmative self-help reactions might conceivably include, in order of escalating severity and controversy: avoiding eye contact after being accosted; coldly staring back; frowning; speaking reprovably; pushing the extended palm away; spraying mace; and throwing a punch.¹⁴⁸ In many social contexts, self-help, when rendered promptly and in proper amounts, is one of the most indispensable and effective methods of social control.¹⁴⁹ When excessive, however, as surely any of the physical retaliations just mentioned would be, an act of self-help can aggravate a dispute and even trigger a continuing feud.¹⁵⁰

A chronic street nuisance is a nearly intractable social problem largely because an affected pedestrian is highly unlikely to do anything in response to it. The amount of damage from a single act of panhandling or bench squatting is typically insignificant; for a given onlooker, the harm can become substantial only after it has accumulated over time.¹⁵¹ A pedestrian who unilaterally attempts to enforce social norms during a particular encounter on the street bears all the risks of a confrontation with the street person, but ineluctably shares the prospective benefits of nuisance abatement with all other users of the same public space. The private costs of pedestrian self-help far exceed the private benefits. As economists would say, public order is a "public good," and an almost pure one at that.¹⁵²

145. See *infra* text accompanying notes 211–16, 225–29.

146. See ROSSI, *supra* note 3, at 1–8 (profiles of 10 homeless persons).

147. See *supra* note 143.

148. See Goldstein, *Panhandlers at Yale*, *supra* note 13, at 325–26 (pedestrians commonly ignore panhandlers' entreaties, but only occasionally verbally chastise them).

149. ORDER WITHOUT LAW, *supra* note 141, at 143–44.

150. *Id.* at 211–29.

151. See *supra* notes 42–86.

152. For an introduction to this concept, see RICHARD A. MUSGRAVE & PEGGY B. MUSGRAVE, PUBLIC FINANCE IN THEORY AND PRACTICE 49–55 (5th ed. 1989).

C. *Third Parties That Police the Streets*

Jane Jacobs wisely recognizes that the legal-centralist perspective fails to capture the primary sources of street order:

The first thing to understand is that the public peace—the sidewalk and street peace—of cities is not kept primarily by the police, necessary as police are. It is kept primarily by an intricate, almost unconscious, network of voluntary controls and standards among the people themselves, and enforced by the people themselves. . . . No amount of police can enforce civilization where the normal, casual enforcement of it has broken down.¹⁵³

This “intricate network” involves the wide variety of third parties identified below.¹⁵⁴

1. *Individual Champions of the Public*

It is possible for a bystander to intervene to prevent a street person from annoying another sidewalk user.

a. *Pedestrians*

For a number of related reasons, a casual sidewalk user is unlikely to interpose himself to protect others from chronic street misbehavior. The central point, again, is that street order is a public good. Unless a spontaneous helper were to be rewarded with honor and self-pride, for example, a citizen benefactor would bear burdens far in excess of the benefits he would personally garner by enforcing street norms.

Various features of chronic street nuisances also contribute to bystander inaction. First, the instantaneous harm is slight: While the sight of an aggressive panhandler grabbing at an elderly person might trigger a heroic rescue, the familiar sight of a panhandler extending a cup simply is not an adequate stimulus. Second, psychologists have found that intervention is more likely to be forthcoming from a solitary onlooker than from a person who knows that many others are simultaneously observing the scene.¹⁵⁵ Third, all

153. JACOBS, *DEATH AND LIFE*, *supra* note 22, at 31–32.

154. For a sophisticated discussion of how merchants, police, pedestrians, and panhandlers informally regulate panhandling, see Goldstein, *Panhandlers at Yale*, *supra* note 13, at 326–51.

155. See, e.g., Axel Fransen, *Group Size and One-Shot Collective Action*, 7 *RATIONALITY & SOC'Y* 183 (1995); B. Latane & S. Nida, *Ten Years of Group Size and Helping*, 89 *PSYCHOL. BULL.* 308 (1981); Wilson & Kelling, *supra* note 23, at 38. This is sometimes referred to as the “Kitty Genovese” effect, after an incident involving 38 bystanders who did nothing to stop a murder. See WILSON, *MORAL SENSE*, *supra* note 142, at 36. It is conceivable, of course, that even though the probability of any particular onlooker

else equal, an onlooker is more likely to protect an acquaintance than an unknown person. For all these reasons, a pedestrian in a public space bustling with strangers will usually not intervene spontaneously to abate a minor nuisance.¹⁵⁶ How often has a New York commuter countered a subway panhandler's monologue by, for example, starting a chant of "Just say 'no'"?

Nonetheless, Jane Jacobs properly emphasizes the influence of informal social controls on street behavior.¹⁵⁷ It is noteworthy that *an orderly user of a public space routinely evaluates not only disorderly people but also other orderly people who could enforce norms there*. Someone reluctant to chastise a panhandler may be willing to frown at an almsgiver. A pedestrian reluctant to monitor the streets may be willing to praise those who do. As a more extended example, suppose a chronic panhandler accosts three college sophomores entering a restaurant together. One of the three gives him a dollar, the second does nothing, and the third mutters, "Get a job." The trio's ensuing conversation inside the restaurant might well affect what each of them would do when next encountering a panhandler. The tenor of these sorts of conversations eventually affects responses to street nuisances and ultimately the amount of disorder in public places.¹⁵⁸

b. *Owners and Occupiers of Abutting Land*

Many private third parties have stronger incentives to monitor public spaces than ordinary pedestrians do. Landlords and tenants of street-level properties tend to be especially attentive because the external benefits of greater street civility are capitalized into the value of their assets. For example, a restaurateur with a multi-year lease would want to shoo away sidewalk panhandlers who had chronically annoyed his patrons. His landlord would share this interest. Commercial leases commonly entitle the landlord to a percentage of the tenant's gross income, and, in any event, the landlord would be concerned about rent levels in postlease years. Small wonder that streetfront

taking action would decline with group size, the probability of *someone* acting would increase. See, e.g., Fransen, *supra*, at 198 (reporting experimental results of this sort).

156. Architectural and social variables may affect the amount of informal monitoring. See OSCAR NEWMAN, DEFENSIBLE SPACE: CRIME PREVENTION THROUGH URBAN DESIGN 51-117 (1972) (how designers can extend informal private realms into public spaces); Ralph B. Taylor et al., *Attachment to Place: Discriminant Validity, and Impacts of Disorder and Diversity*, 13 AM. J. COMMUNITY PSYCHOL. 525, 539-40 (1985) (social diversity is correlated with both weaker neighborhood attachments and perceptions of greater disorder).

157. See *supra* text accompanying note 153.

158. On diffuse social enforcement of norms, see ORDER WITHOUT LAW, *supra* note 141, at 236-39.

merchants earned Jane Jacobs's glowing admiration as "eyes upon the street."¹⁵⁹

2. Organizations That Enforce Street Decorum

Various associations other than the police may have an interest in enforcing street norms. An urban university has a strong stake in social control within its entire neighborhood. The University of Chicago's efforts in Hyde Park are a notable example in this vein.¹⁶⁰ Managers of governmental proprietary agencies, if motivated to increase revenues and enhance consumer satisfaction, are likely to fight disorder within their open-access facilities. For example, after a long period of inaction, the New York City Transit Authority began policing against panhandling in its subways and also placed a poster in each subway car urging commuters not to give.¹⁶¹

Local religious institutions and nonprofit community groups may also intervene. The Salvation Army and rescue missions—central institutions in Skid Rows before the 1980s—sought to reform "sinners" through temperance and religious conversion.¹⁶² In several cities where begging has been prevalent, community groups have organized programs that enable almsgivers to offer panhandlers vouchers instead of cash.¹⁶³ The Guardian Angels (Red Berets) envision themselves as a force of citizen benefactors who patrol public spaces. Enforcement of street norms can also occur through organized private

159. JACOBS, *DEATH AND LIFE*, *supra* note 22, at 35–37. One study found that owner-operators of stores are more vigilant than the employees of absentee owners. See Goldstein, *Panhandlers at Yale*, *supra* note 13, at 331–35.

Relatedly, persons who regularly use a particular sidewalk have a greater interest in enforcing order than occasional users do. Indeed, unaggressive chronic panhandlers may aid in police efforts to curb boisterous transients. *Id.* at 345–46. Most chronic panhandling, however, occurs in well-trafficked locations, where there are likely to be numerous other eyes upon the street. A chronic panhandler is therefore unlikely to make a *net* contribution to street order.

160. See SKOGAN, *supra* note 22, at 173 (University's role in achieving "high levels of order" in Hyde Park).

161. See *Young v. New York City Transit Auth.*, 903 F.2d 146 (2d Cir.), *cert. denied*, 498 U.S. 984 (1990); Dawidoff, *supra* note 57, at 36 (reproduction of that which urged, in part, "Give to the charity of your choice, but not on the subway"); Finder, *Panhandling is Down*, *supra* note 5, at 46.

162. See EDWARD H. MCKINLEY, *MARCHING TO GLORY: THE HISTORY OF THE SALVATION ARMY IN THE UNITED STATES* (1980); WILLIAM MCSHEEHY, *SKID ROW 17–33* (1979) (discussing rescue missions). *But cf.* Reginald W. Bibby & Armand L. Mauss, *Skidders and Their Servants: Variable Goals and Functions of the Skid Row Rescue Mission*, 13 J. SCI. STUDY RELIGION 421, 430–31 (1974) (noting that majority of mission patrons regard most "converters" as frauds and most mission leaders as predominantly interested in making money). On the fate of the missions, see *infra* text accompanying notes 273–75.

163. In 1994, voucher programs were underway in Berkeley, Los Angeles, New Haven, Portland (Oregon), and a handful of other cities. See Spector, *Vouchers for Panhandlers*, *supra* note 5, at 27–48. Typically, a panhandler can redeem vouchers with a participating local merchant in return for food and other selected commodities. When initiated, voucher programs tend to be supported by unlikely allies: those who hope to increase total transfers to panhandlers, and those who want to quell panhandling. *Id.* at 8–9.

violence of an undesirable sort. For instance, some gangs of teenagers get their kicks by rolling drunks, mugging panhandlers, and setting fire to the street homeless.¹⁶⁴

Most pertinently, residents of a neighborhood may form organizations for the specific purpose of governing public spaces. Familiar examples are residential block associations and groups such as "Friends of the Park."¹⁶⁵ In commercial districts, where panhandlers most commonly congregate, merchants' associations are key players. A voluntary merchants' association, such as a Chamber of Commerce chapter, may face a free-rider problem and consequently be ineffective at providing public goods. One solution to the free-riding problem is formation of a Business Improvement District (BID), a government-approved organization empowered to levy assessments on all landowners within district boundaries.¹⁶⁶ Although BIDs also engage in sanitation and business promotion, the control of disorderly street people has emerged as one of their central functions.¹⁶⁷ Some have hired outreach workers to offer social services to the chronically homeless. Harking back to a late-nineteenth-century tradition,¹⁶⁸ an increasing number of merchants'

164. See Clifford Krauss, *Five Youths Are Held in the Fiery Death of a Homeless Man*, N.Y. TIMES, Aug. 4, 1995, at A1 (describing gang whose youthful members hurt homeless people to relieve boredom); Richard Pérez-Peña, *Youths Injure Two Sleeping Homeless Men*, N.Y. TIMES, Dec. 4, 1993, at 25 (most assaults on homeless are thought to be committed by persons under age 20). Half of the panhandlers Goldstein interviewed had been mugged during the previous year; one sometimes took a taxicab home at night to avoid attack. Goldstein, *Panhandlers at Yale*, *supra* note 13, at 306, 316.

165. See SKOGAN, *supra* note 22, at 125–57 (discussing role of community organizations in stemming disorder); George W. Liebman, *Devolution of Power to Community and Block Associations*, 25 URB. LAW. 335, 357–62 (1993) (discussing role of community associations in law enforcement). For an introduction to the literature on block organizations, see generally Donald G. Unger & Abraham Wandersman, *Neighboring and Its Role in Block Organizations: An Exploratory Report*, 11 AM. J. COMMUNITY PSYCHOL. 291 (1983).

166. See Lawrence O. Houstoun, Jr., *Betting on BIDs*, URB. LAND, June 1994, at 13, 16 (estimating number of BIDs in U.S. and Canada at 1000); Thomas J. Lueck, *Business Districts Grow at Price of Accountability*, N.Y. TIMES, Nov. 20, 1994, at A1 (New York City alone has 33 BIDs, with 30 more in the works). BIDs are descendants of the venerable special-assessment district.

167. See, e.g., John King, *Businesses Go on the Offensive—Reclaiming the City's Streets*, S.F. CHRON., Dec. 28, 1993, at A1, A4 (describing BID that paid for uniformed, nonpolice patrols near Union Square). The typical BID spends about 20% of its budget on security operations, which may include a force of uniformed patrol officers. Houstoun, *supra* note 166, at 13, 17. For statutory authorization of these activities, see, e.g., CAL. STS. & HIGH. CODE § 36613 (West Supp. 1995) (listing "security" as a BID activity); N.Y. GEN. MUN. LAW § 980-c(c)(5) (McKinney Supp. 1995) (similar).

One of the best-known BIDs is the Grand Central Partnership in Midtown Manhattan, described in Alan S. Oser, *Spreading the Gospel of Improvement Districts*, N.Y. TIMES, Oct. 31, 1993, § 10, at 8. The Partnership became embroiled in controversy when the Coalition for the Homeless put forward several former Partnership workers, themselves homeless persons, who alleged that they had been organized into "goon squads" to intimidate and beat street people whom the Partnership wished to relocate. The Partnership's leader among its outreach workers denied these charges. In a report commissioned by the Partnership, Robert Hayes, a founder of the Coalition for the Homeless, called the goon squad charges "fanciful" and "reek[ing] of demagoguery." See James Traub, *Street Fight*, NEW YORKER, Sept. 4, 1995, at 36, 40. The Partnership, however, subsequently instituted a number of reforms. See Bruce Lambert, *Grand Central Partnership Limits Help for Homeless*, N.Y. TIMES, Nov. 6, 1995, at B3.

168. See Amy Dru Stanley, *Beggars Can't Be Choosers: Compulsion and Contract in Postbellum America*, J. AM. HIST. 1265, 1293 (1992) (nineteenth-century reformers distributed cards exhorting pedestrians not to give to beggars).

associations appeal to pedestrians to refrain from giving cash to panhandlers (a strategy that First Amendment scholars would refer to as “more speech”).¹⁶⁹

3. *The Police*

Members of close-knit social communities commonly are able to dispense with government peacekeepers. Indeed, police departments were unknown in the United States prior to the mid-nineteenth century.¹⁷⁰ Today, because large cities are far from close-knit, even Jane Jacobs would acknowledge that police officers play an essential role in monitoring downtown spaces.¹⁷¹ In these social environments, other types of enforcers simply are unable to provide enough of the public good of street order.¹⁷²

In the latter half of the nineteenth century, urban police forces concentrated much of their effort on controlling street misconduct, which in that era was associated with “the dangerous class.” Beginning around the turn of the century, however, police officers and prosecutors began to regard fighting violent crime as more important than dealing with disorderly behavior.¹⁷³ Particularly in the years after 1965–1975, a decade that witnessed both a jump in violent crime and a legal revolution that eviscerated street law, police officers’ concern with minor misbehavior in public spaces plunged.¹⁷⁴ The 1990s backlash may signal the end of this period of relative inattention.¹⁷⁵

A conscientious foot-patrol officer strives to develop relationships with street people, partly to protect them from crime.¹⁷⁶ To control someone

169. See Timothy Egan, *In Three Progressive Cities, Stern Homeless Policies*, N.Y. TIMES, Dec. 12, 1993, at 26 (on Portland (Oregon) BID’s employment of “guides” who encourage pedestrians to give vouchers, not cash, to panhandlers); Patt Morrison, *Uneasy Street*, L.A. TIMES MAG., Jan. 2, 1994, at 6 (trailers shown in Los Angeles movie houses encourage viewers to make donations to charities that aid homeless, but not to homeless themselves); Robert L. Rose, *Evanston Decides How to Handle Its Panhandlers: With Kid Gloves*, WALL ST. J., Aug. 1, 1994, at B1 [hereinafter Rose, *Evanston Decides*] (City of Evanston’s paid “interveners” urge persons whom they observe contributing to beggars to give instead to social-service providers listed in brochure); cf. RIGHT TO REMAIN NOWHERE, *supra* note 4, at 68 (on “Cincinnati Cares” program that asks merchants to display canisters into which passersby can drop coins in lieu of giving to panhandlers). See generally Spector, *Vouchers for Panhandlers*, *supra* note 5, at 10–27.

170. See ERIC H. MONKKONEN, *POLICE IN URBAN AMERICA 1860–1920*, at 24 (1981).

171. See *supra* text accompanying note 153.

172. But cf. Bruce L. Benson, *Are Public Goods Really Common Pools? Considerations of the Evolution of Policing and Highways in England*, 32 ECON. INQUIRY 249 (1994) (historical examples of private production of public order).

173. See MONKKONEN, *supra* note 170, at 129–47.

174. See SKOGAN, *supra* note 22, at 85–89; Dawidoff, *supra* note 57, at 40 (many New York transit police are unenthusiastic about arresting panhandlers in subway cars); see also Goldstein, *Panhandlers at Yale*, *supra* note 13, at 339–40, 349 (finding that New Haven police in 1990s regard violence and drugs as more attention-worthy than panhandling, but occasionally do make arrests for disorderly conduct).

175. See *infra* text accompanying notes 285–300.

176. Egon Bittner, *The Police on Skid-Row: A Study of Peace Keeping*, 32 AM. SOC. REV. 699, 708–09 (1967); see also Goldstein, *Panhandlers at Yale*, *supra* note 13, at 346–47.

creating a temporary disturbance in a public space, an officer is apt first to try informal methods, and to use arrest for public nuisance only as a last resort. Unlike a disturber of the peace, the perpetrator of a chronic street nuisance is highly unlikely to provoke any onlooker into making a report to the police.¹⁷⁷ Because patrol officers are habitual street users, however, they themselves witness continuing violations of street norms and can keep mental records on the protractedness of offenses.

If armed with a traditional public-nuisance statute or a more particularized statute or ordinance aimed at chronic street misconduct, in practice a police officer would be inclined to invoke this statutory authority, not as a ground for making an arrest, but as the basis for a verbal warning or request to move along.¹⁷⁸ Nothing more should be necessary in the overwhelming majority of cases. If a street person were to ignore this warning, the next step might be a citation. Recidivists eventually would risk a few nights in jail.¹⁷⁹ A city attorney might even seek an injunction that ordered an inveterate offender not to resume the chronic pattern of begging, bench squatting, or other offense.¹⁸⁰

In some contexts, police officers are less suited than others to enforce street decorum. Given central-city pay scales, patrol officers tend to be relatively costly “eyes on the street” compared to eyes in the informal sector. Many police forces also have officers who are corrupt, capricious, and sadistic. As the next parts demonstrate, the risk of police misconduct led to several decades of judicial hostility to the enforcement of vagrancy laws, to the eclipse of informally policed Skid Rows, and, in some cities, to the creation of officially designated safe zones for disorderly people.

177. See *supra* text accompanying notes 155–59.

178. See *Streetwatch v. National R.R. Passenger Corp.*, 875 F. Supp. 1055, 1057 (S.D.N.Y. 1995) (describing Amtrak’s rules for police enforcement in Penn Station, which require warning followed by five-minute cooling-off period prior to arrest or ejection); cf. Daniel L. Koffsky, Note, *Orders to Move On and the Prevention of Crime*, 87 YALE L.J. 603 (1978) (focusing on suspicious conduct that portends more serious crime).

179. The New York City Transit Authority police generally follow this sequence when dealing with subway panhandlers. See Finder, *Panhandling is Down*, *supra* note 5, at 46; see also Wilson & Kelling, *supra* note 23, at 35 (function of old vagrancy law was to enable police officer to remove disorderly person after informal methods had failed).

180. For authorization of this remedy, see SANTA MONICA, CAL., MUN. CODE § 4.08.093 (1995) (authorizing issuance of “stay away” orders to repeat violators of park-closing ordinance). Cf. *People ex rel. Gallo v. Acuna*, 40 Cal. Rptr. 2d 589 (Ct. App.), review granted, 899 P.2d 66 (Cal. 1995) (partially sustaining preliminary injunction against public-nuisance activities in four-block neighborhood by gang members). These orders might be enforced by means of criminal contempt proceedings. For a good introduction to the many constitutional issues that this remedial approach poses, see Christopher S. Yoo, Comment, *The Constitutionality of Enjoining Criminal Street Gangs as Public Nuisances*, 89 NW. U. L. REV. 213 (1994).

IV. A BRIEF HISTORY OF STREET DISORDER AND SKID ROWS

Although historical sources on everyday street life are fragmentary at best, it appears that an urban society invariably has an underclass whose members disproportionately misbehave in public places.¹⁸¹ Plato urged the banishment of beggars;¹⁸² John Locke favored whipping panhandlers under age fourteen and sentencing older ones to hard labor;¹⁸³ Karl Marx was famously scornful of the *lumpenproletariat*.¹⁸⁴ One of the most comprehensive studies of begging, a portion of Henry Mayhew's four-volume *London Labour and the London Poor*, appeared in 1862; in it Mayhew painstakingly categorized alms-seekers and deplored the indolence of "those who will not work."¹⁸⁵ Although there is less historical material about sleeping in public places than about begging, it is highly probable that a destitute urban American of the nineteenth century "slept rough" more frequently than did his counterpart in the late twentieth century.¹⁸⁶

Ever since the great cities of the United States sprouted in the mid-nineteenth century, levels of street misconduct have waxed and waned. For example, after experiencing rampant disorder in the aftermath of the Civil War, city governments responded in the 1870s by beefing up police forces and social welfare programs.¹⁸⁷ The turbulent Great Depression years eventually ebbed into the unusually orderly 1950s.¹⁸⁸ If the crackdowns of the 1990s continue, the late 1980s are likely to be seen in retrospect as another peak in disorder.

181. See Teir, *supra* note 21, at 292-301 (reviewing several millennia of history of regulation of begging). The ancient Greeks debated the definition of unacceptable public behavior and the problems associated with the suppression of offensive speech or conduct. See *Loper v. New York City Police Dep't*, 802 F. Supp. 1029, 1030-31 (S.D.N.Y. 1992), *aff'd*, 999 F.2d 699 (2d Cir. 1993). On the history of anti-begging legislation in the United States, see sources cited *infra* notes 240-387.

182. 2 PLATO, LAWS bk. XI, at 465 (E. Capps et al. eds. & R.G. Bury trans., G.P. Putnam's Sons 1926) ("There shall be no beggar in our State; . . . he shall be driven across the border by the country-stewards, to the end that the land may be wholly purged of such a creature.")

183. See MAURICE CRANSTON, JOHN LOCKE: A BIOGRAPHY 424-25 (1957).

184. The "dangerous class," the social scum, that passively rotting mass thrown off by the lowest layers of old society, may, here and there, be swept into the movement by a proletarian revolution; its conditions of life, however, prepare it far more for the part of a bribed tool of reactionary intrigue.

Karl Marx & Friedrich Engels, *The Communist Manifesto* (1848), in KARL MARX: SELECTED WRITINGS 221, 229 (David McLellan ed., 1977).

185. 4 HENRY MAYHEW, LONDON LABOUR AND THE LONDON POOR 23-27 (Dover Publications 1968) (1861-62).

186. This statement is based on the rising incomes of poor persons over the course of the past century. For data on the trend since 1960, see sources cited *infra* note 196.

187. See MONKKONEN, *supra* note 170, at 80-81, 84-85 (arrests for violent crime and vagrancy-type offenses peaked around 1870); SKOGAN, *supra* note 22, at 6 ("marked decline" in drunkenness and vagrancy beginning after 1870). *But cf.* Stanley, *supra* note 168, at 1269, 1273-74 (high incidence of begging in U.S. cities in 1870s prompted reformers to adopt variety of measures against it).

188. See JEROME H. SKOLNICK & JAMES J. FYFE, ABOVE THE LAW: POLICE AND THE EXCESSIVE USE OF FORCE 218 (1993) (1940s and 1950s were period of "unparalleled public safety. Social disorder was minimal.").

Two variables primarily determine the level of street misbehavior at a given time: the relative size of the noninstitutionalized underclass (whose members are largely responsible for street nuisances); and the strictness of the system of social controls that governs public spaces.

A. *Trends in the Size of the Urban Underclass*

Some scholars object to the term *underclass*; a larger number debate how to define it.¹⁸⁹ As used here, the term denotes persons afflicted with *both* extreme *economic poverty* and extreme *social poverty*.

The potential relationship between economic poverty and chronic street nuisances is straightforward. Only a destitute person is likely to risk being stigmatized as a beggar or to use a site as unsatisfying as a plaza bench for napping and storage.¹⁹⁰ Measured by the most accurate price deflator (CPI-X1), the percentage of the U.S. population below the official poverty line varied little between 1968 and 1991, standing at 12.2% in 1970, 11.5% in 1980, and 12.1% in 1990.¹⁹¹ The trend in official poverty, however, is not necessarily indicative of the trend among the poorest 1% of the population, an income bracket in which street people are disproportionately located. Little can be said with confidence about trends in the economic status of the most destitute people during the latter half of the twentieth century.¹⁹² The increase in the proportion of men aged twenty-five to fifty-four who are both poor and jobless for an entire year sounds a discouraging note.¹⁹³ On the other hand, means-tested spending for the disabled and homeless has risen significantly since 1970,¹⁹⁴ and the underground economy has also grown,

189. Michael H. Schill, *Race, the Underclass, and Public Policy*, 19 LAW & SOC. INQUIRY 433, 433–37, 438 n.6 (1994) (book review), provides a succinct introduction to these debates. See also Ronald B. Mincy, *The Underclass: Concept, Controversy, and Evidence*, in CONFRONTING POVERTY 109, 122–32 (Sheldon H. Danziger et al. eds., 1994) [hereinafter CONFRONTING POVERTY] (discussing various approaches to defining underclass).

190. See ROSSI, *supra* note 3, at 104–16 (reporting extreme poverty of Chicago homeless); Goldstein, *Panhandlers at Yale*, *supra* note 13, at 300–05 (on joblessness and poverty of panhandlers). But cf. O'FLAHERTY, *supra* note 1, at 132–35, 149–54, 209 (doubting link between prevalence of poverty and prevalence of street and shelter homelessness).

191. Sheldon H. Danziger & Daniel H. Weinberg, *The Historical Record: Trends in Family Income, Inequality, and Poverty*, in CONFRONTING POVERTY, *supra* note 189, at 18, 26–27 col. 3.

Nevertheless, scholars across a broad ideological spectrum agree that the incidence of “latent” or “pretransfer” poverty rose somewhat after 1970. See, e.g., CHARLES MURRAY, LOSING GROUND 64–65 (1984); Danziger & Weinberg, *supra*, at 26–27 col. 5. Murray believes that the welfare state’s perversities are largely responsible for this backsliding. Others stress that job markets have increasingly disadvantaged those with few skills. See Mincy, *supra* note 189, at 117; Kevin M. Murphy & Finis Welch, *Industrial Change and the Rising Importance of Skill*, in UNEVEN TIDES: RISING INEQUALITY IN AMERICA 101, 130–32 (Sheldon Danziger & Peter Gottschalk eds., 1993).

192. All commentators agree that inequality between rich and poor has increased in the United States since the early 1970s. The issue at hand, however, is not the trend in inequality, but in the absolute (inflation-adjusted) incomes of the poorest Americans.

193. JENCKS, RETHINKING, *supra* note 79, at 154–55 (between 1963 and 1987, proportion of whites in this situation increased from about 1% to about 2%, and of blacks, from just under 4% to about 7%).

194. See *supra* text accompanying notes 121–27.

which means that the officially reported incomes of the poor are increasingly understated.¹⁹⁵ Consumption-based measures of welfare, which take all these missing factors into account, suggest, if anything, a steady lessening in extreme economic poverty since 1960.¹⁹⁶

Trends in social poverty are another story. As used here, *social poverty* denotes a person's comparative lack of supportive family and friends.¹⁹⁷ A child born into a one-parent household in an anomic neighborhood starts life in social poverty. A child raised in such an atmosphere—say, by an unmarried, crack-addicted mother in a neighborhood where “street values” predominate—faces a higher risk of homelessness and is unlikely to internalize norms against being a nuisance on the streets.¹⁹⁸ In addition, an adult who succumbs to severe substance abuse may alienate those who were previously close. A socially impoverished adult, who has few intimates to fall back on when tough economic or emotional times arrive, becomes a prime candidate to become a panhandler or bench squatter.¹⁹⁹

Social poverty in the United States has been worsening apace.²⁰⁰ As in many other nations, the number of poor children growing up in one-parent households has ballooned.²⁰¹ “In 1960, 20 percent of all black children were

195. See Rudy Fichtenbaum, *The Productivity Slowdown and the Underground Economy*, 28 Q.J. BUS. & ECON., Summer 1989, at 78, 78. *But cf.* Morton Paglin, *The Underground Economy: New Estimates from Household Income and Expenditure Surveys*, 103 YALE L.J. 2239, 2249 (1994) (estimating that underground economy fell from 10.2% of Gross Domestic Product in 1984 to 8.1% in 1992).

196. Daniel T. Slesnick, *Gaining Ground: Poverty in the Postwar United States*, 101 J. POL. ECON. 1, 27–34 (1993). Some of the most interesting data can be found in Susan E. Mayer & Christopher Jencks, *Recent Trends in Economic Inequality in the United States: Income Versus Expenditures Versus Material Well-being*, in POVERTY AND PROSPERITY IN THE USA IN THE LATE TWENTIETH CENTURY 121, 149–77 (Dimitri B. Papadimitriou & Edward N. Wolff eds., 1993). Regrettably, Mayer and Jencks's data end in the early 1980s. They report trends in the material well-being of households in the *poorest decile* of the population (not among the poorest 1% of individuals). By all measures, households in that decile gained in material wherewithal from 1960 to 1983. For example, the proportion residing in housing with full bath facilities increased from 54% in 1960 to 80% in 1970, to 92% in 1980, and to 94% in 1983. *Id.* at 156–57, 162.

O'Flaherty notes that the decline in the number of low-quality lodging houses in cities such as Chicago, Newark, and New York during 1970–1990 suggests a drop in the number of destitute individuals. O'FLAHERTY, *supra* note 1, at 138–47.

197. For a more expansive set of criteria and a more varied set of trends, see JENCKS, *RETHINKING*, *supra* note 79, at 143–203.

198. See Robert T. Zozus & Melvin Zax, *Perceptions of Childhood: Exploring Possible Etiological Factors in Homelessness*, 42 HOSP. & COMMUNITY PSYCHIATRY 535 (1991) (children growing up in emotionally impoverished households are predisposed to later homelessness). On the handicaps of growing up in an underclass neighborhood, see Schill, *supra* note 189, at 439–40; Elijah Anderson, *The Code of the Streets*, ATLANTIC MONTHLY, May 1994, at 81.

199. On social poverty among the homeless, see ROSSI, *supra* note 3, at 165–77 (detailing fragility of ties to family and friends); SNOW & ANDERSON, *supra* note 71, at 259–65 (noting that Austin street people were conspicuously lacking in family support). On the poverty and social isolation of shopping bag women, a group analogous to bench squatters, see ANNE-MARIE ROUSSEAU, *SHOPPING BAG LADIES: HOMELESS WOMEN SPEAK ABOUT THEIR LIVES* (1981).

200. See, e.g., WHITE, *supra* note 101, at 88–92, 245–64.

201. The number of related children living in poor, female-headed family households rose from 4.7 million in 1970 to 8.0 million in 1992. Compare BUREAU OF THE CENSUS, U.S. DEP'T OF COMMERCE, *STATISTICAL ABSTRACT OF THE UNITED STATES 1977*, at 454 (1977) with *STATISTICAL ABSTRACT 1994*, *supra* note 122, at 478.

living in fatherless families. By 1985, the figure was 51 percent.²⁰² All else equal, a child who grows up in a mother-only household is more likely to drop out of high school and the workforce, have a child while a teenager, and give birth out of wedlock.²⁰³ Of the nine panhandlers whom Brandt Goldstein interviewed on streets near Yale, none reported having lived with a father during childhood.²⁰⁴ Perhaps more alarming than the single-parent statistics is the fact that about two million children are now being raised in "zero-parent households" headed by nonparental relatives, foster parents, or others.²⁰⁵

Because illegitimacy tends to recur in succeeding generations, a rise in out-of-wedlock births tends to exacerbate social poverty as time passes. If there have been two consecutive generations of absent fathers, a child at most can know one grandparent, the maternal grandmother. If this traditional mainstay of the poor household were to fall ill, move away, or otherwise be unable to act as a caretaker, the grandchild's upbringing would be especially perilous.²⁰⁶

As a consequence of this explosion in social poverty, the population of the underclass in the United States grew significantly after 1970.²⁰⁷ John Kasarda, one of the first scholars to publish an analysis of relevant 1990 census data, has defined a "distressed" city neighborhood as one characterized by high levels of poverty, unemployment, female-headed households, and public assistance beneficiaries.²⁰⁸ He found that the population of these sorts of neighborhoods increased from roughly 1.0 million in 1970, to 4.9 million in 1980, and to 5.7 million in 1990.²⁰⁹

In and around the 1980s, two apparently ephemeral social trends helped boost the size of the underclass in the age groups primarily responsible for

202. JENCKS, RETHINKING, *supra* note 79, at 130 (citing figures from BUREAU OF THE CENSUS, *Marital Status and Living Arrangements, March 1985*, in CURRENT POPULATION REPORTS, Series P-20, No. 410, at 71 (Government Printing Office, 1986)). The proportion of white children living in fatherless households rose from 9% in 1970 to 18% in 1990. Calculated from BUREAU OF THE CENSUS, U.S. DEP'T OF COMMERCE, STATISTICAL ABSTRACT OF THE UNITED STATES 1992, at 55 (1992) [hereinafter STATISTICAL ABSTRACT 1992]; see also Irwin Garfinkel & Sara McLanahan, *Single-Mother Families, Economic Insecurity, and Government Policy*, in CONFRONTING POVERTY, *supra* note 189, at 205, 210 (of all families with children, the proportion headed by single mothers rose from 8% in 1960 to almost 25% in 1990). The percentages of children born out of wedlock are higher still. For those trends, see JENCKS, RETHINKING, *supra* note 79, at 192-94.

203. Garfinkel & McLanahan, *supra* note 202, at 207.

204. Seven said that no father had been present; two refused to discuss their families. Goldstein, *Panhandlers at Yale*, *supra* note 13, at 300.

205. See STATISTICAL ABSTRACT 1994, *supra* note 122, at 66 (in both 1970 and 1993 about 3% of children under 18 years old were living with neither parent); see also Irving Piliavin et al., *Tracking the Homeless*, FOCUS, Winter 1987-88, at 20, 22 (38% of homeless in Minneapolis sample had experienced some form of out-of-home care as children, about 10 times the rate to be expected from a representative U.S. sample).

206. For a gripping narrative that illustrates this risk, see William Finnegan, *Out There* (pts. 1 & 2), NEW YORKER, Sept. 10, 1990, at 51; Sept. 17, 1990, at 60.

207. See sources cited in Mincy, *supra* note 189, at 128 (discussing 1970-1980 trends).

208. John D. Kasarda, *Inner-City Concentrated Poverty and Neighborhood Distress: 1970 to 1990*, 4 HOUSING POL'Y DEBATE 253, 256 (1993).

209. *Id.* at 263.

chronic street misconduct. First, street people fall disproportionately within the twenty-five-to-forty-four age group.²¹⁰ The huge Baby-Boom generation began to mature into this age group around 1975–1985, roughly when pedestrians were beginning to notice more disorderly people.

Second, the trend toward greater drug abuse, particularly the crack epidemic that began in the mid-1980s,²¹¹ also adversely affected street order. In 1990, about half of all persons arrested in large U.S. cities tested positive for cocaine.²¹² Substance abusers disproportionately seek to raise cash by drug dealing, prostitution, and begging.²¹³ Christopher Jencks estimates that about one-third of homeless single adults use crack fairly regularly.²¹⁴ Between 50% and 75% of homeless persons have at least one alcohol, drug, or mental disorder.²¹⁵ For many street people, a drug addiction may aggravate a preexisting mental illness.²¹⁶

There are two additional indications of steadily worsening social poverty among adult males, who constitute a large majority of the street population.²¹⁷ Most street males of the 1980s were born in and around the 1950s, before the sharp increase in the incidence of fatherless households. For many of them, the key social change was thus not the decreased likelihood of fatherly guidance, but rather the declining probability of having the stabilizing influence of a marriage. The rate of street homelessness among single men is at least twenty times, and perhaps as much as sixty times, the rate among married men.²¹⁸ In 1970, only 11.3% of men aged thirty to forty-four were

210. In Chicago, 56.6% of the street homeless were found to be between 25 and 44 years of age; by comparison, 37.7% of Chicago's entire adult population fell within this age bracket. ROSSI, *supra* note 3, at 121.

211. See ALICE S. BAUM & DONALD W. BURNES, *A NATION IN DENIAL: THE TRUTH ABOUT HOMELESSNESS* 20–23 (1993); JENCKS, *HOMELESS*, *supra* note 1, at 41–48. *But see* O'FLAHERTY, *supra* note 1, at 248–62 (effect of crack on incidence of homelessness was small at most). Alcohol abuse appears not to have risen in the United States during recent decades. See JENCKS, *HOMELESS*, *supra* note 1, at 41.

212. JENCKS, *HOMELESS*, *supra* note 1, at 43.

213. See Dawidoff, *supra* note 57, at 52 (many, perhaps most, panhandlers in New York City subway system are substance abusers); Goldstein, *Panhandlers at Yale*, *supra* note 13, at 305 (majority of panhandlers interviewed had chemical dependencies); Rose, *Evanston Decides*, *supra* note 169 (most Evanston panhandlers are drug or alcohol addicts).

214. JENCKS, *HOMELESS*, *supra* note 1, at 43; see also Kaufman, *supra* note 2, at 34 (latest Bowery arrivals are younger male crack addicts, who "appear to have lived their whole lives on the margins, without much memory of family or friendship").

215. See Pamela J. Fischer & William R. Breakey, *The Epidemiology of Alcohol, Drug, and Mental Disorders Among Homeless Persons*, 46 AM. PSYCHOLOGIST 1115 (1991) (comprehensive review of scores of studies). Up to 25% suffer from both alcohol and mental disorders. *Id.* at 1116. "Men are more likely to be singly diagnosed alcoholics, whereas women are more likely to have a sole mental disorder . . ." *Id.* Little is known about how the population of panhandlers and bench squatters differs in these respects from the larger homeless population.

216. The most alarming data come from a California study finding that a majority of homeless substance abusers were addicted to *both* drugs and alcohol, and that three-quarters of those with serious mental disorders abused substances as well. See GEORGES VERNEZ ET AL., *REVIEW OF CALIFORNIA'S PROGRAM FOR THE HOMELESS MENTALLY DISABLED* 18 (1988).

217. See ROSSI, *supra* note 3, at 117–18 (81.8% of persons in Chicago street sample were male).

218. Rossi's sources suggest that on the order of 90% of homeless adults are not currently married. *Id.* at 129–31. Of his Chicago *street* sample, 96.6% were not currently married. *Id.* at 129. About 70% of

not currently married.²¹⁹ By 1991, this percentage had almost tripled to 29.5%.²²⁰ This sharp trend away from marriage combined with the maturation of the Baby Boomers to produce a staggering increase in the absolute size of the reserve army of potential street males. In 1970, there were 1.9 million unmarried males aged thirty to forty-four.²²¹ By 1980, the number had more than doubled to 3.9 million.²²² By 1991, it had more than doubled again to 8.8 million.²²³ The erosion of the institution of marriage between 1970 and 1991, a topic little discussed in the pertinent literature, helps explain the concomitant rise of homelessness and street disorder.²²⁴

Finally, in step with the increase in the population of unmarried males, the number of federal and state prisoners ballooned from 196,000 in 1970, to 316,000 in 1980, and to 740,000 in 1990.²²⁵ This trend may have reduced violent street crime by incapacitating more offenders. On the other hand, it also may have increased the number of street people. State-prison inmates have a median age of about 30.²²⁶ The median age of homeless persons is higher, in the late 30s.²²⁷ The increase in incarceration brought in its wake a jump in the number of prisoners being released at an age when they were ripe for becoming homeless.²²⁸ On release, these individuals, handicapped by low job skills, adverse prison influences, and likely employer discrimination, become prime candidates for the street.²²⁹ By getting tough on violent crime and drug offenses in the 1970s, the United States may have increased levels of minor street misconduct in the 1980s and 1990s.

B. *Fluctuations in the Strength of Social Controls*

At the same time that the underclass was burgeoning, many social controls were being relaxed. Those who carried out this liberalization intended to

the adult males in the most relevant age group *are* married. The disproportionately high rate of homelessness among unmarried men can be calculated from these figures.

219. Calculated from BUREAU OF THE CENSUS, U.S. DEP'T OF COMMERCE, STATISTICAL ABSTRACT OF THE UNITED STATES 1971, at 32 (1971) [hereinafter STATISTICAL ABSTRACT 1971].

220. Calculated from STATISTICAL ABSTRACT 1992, *supra* note 202, at 43.

221. Calculated from STATISTICAL ABSTRACT 1971, *supra* note 219, at 32.

222. Calculated from BUREAU OF THE CENSUS, U.S. DEP'T OF COMMERCE, STATISTICAL ABSTRACT OF THE UNITED STATES 1981, at 38 (1981).

223. See STATISTICAL ABSTRACT 1992, *supra* note 202, at 43.

224. Jencks examined trends in marriage rates from 1969 to 1989 among men aged 21–64 and asserts that the rate fell sharply only among affluent men. See JENCKS, HOMELESS, *supra* note 1, at 51–55. *But see* JENCKS, RETHINKING, *supra* note 79, at 133 (proportion of black men aged 30–44 living with a wife fell from 77% in 1960 to 64% in 1980).

225. STATISTICAL ABSTRACT 1994, *supra* note 122, at 215.

226. *Id.*

227. ROSSI, *supra* note 3, at 121.

228. For trends in prison releases, see O'FLAHERTY, *supra* note 1, at 265 tbl. 14-2.

229. See *id.* at 265–66. Slightly over 40% of the homeless report having spent time in either jail or prison. ROSSI, *supra* note 3, at 165. How the street population differs in this respect is not known.

reform the less forgiving social-control regime then in place, two centerpieces of which were state mental institutions and, more to the point, Skid Rows.

1. *The 1950s: Informally Policed Skid Rows*

First appearing in latter half of the nineteenth century, Skid Row neighborhoods were characterized by a concentration of single-room-occupancy apartment buildings, cubicle hotels, and other cheap lodging houses that catered mostly to single men. These residences were interspersed with enterprises—such as taverns, pawnshops, and rescue missions—that served the destitute and disaffiliated. Skid Rows typically arose in decaying areas near downtown transportation nodes, locations that helped employable residents find work as day laborers. Skid Row neighborhoods peaked in population and vitality around 1880–1920, when they served as temporary homes for “tramps” and “hobos”—itinerant workingmen mostly in the twenty-to-forty age group.²³⁰ As the demand for casual laborers slackened after 1920, the populations of Skid Rows started to tumble, a trend that has continued since. By the 1950s, Skid Rows were no longer important employment centers, and functioned more as long-term enclaves for aging (mostly white) alcoholics and others at the social margin.²³¹

Scholars of Skid Row have paid only passing attention to the institution's place in the system of urban street order. These neighborhoods, along with closely related Red Light Districts, were areas where a city relaxed its ordinary standards of street civility. In Skid Row, for example, moderate public drunkenness was likely to be tolerated, not only by the other down-and-out residents, but also by the police.²³² By contrast, the same level of inebriation elsewhere downtown was much more likely to get an alcoholic in trouble. In the 1950s, a cop on the beat might unhesitatingly tell a “bum” panhandling or bench squatting in the central business district to “move along.”²³³ A bum on a Skid Row sidewalk would never hear this message because he was

230. For a careful and colorful depiction of the Omaha Skid Row during this period, see John C. Schneider, *Skid Row as an Urban Neighborhood, 1880–1960*, 9 *URBANISM PAST & PRESENT* 10, 11–13 (1984).

231. For more expansive discussions, see BAHR, *supra* note 2; CHARLES HOCH & ROBERT A. SLAYTON, *NEW HOMELESS AND OLD* (1989); ROSSI, *supra* note 3, at 17–33.

232. This is not to say that the police never made arrests for public disorder in Skid Row. They frequently did, partly to protect the arrested persons from predation and exposure to the elements. See Bittner, *supra* note 176, at 711–12. Even as late as the 1970s, many police departments were still sweeping Skid Rows of street drunks. See *infra* note 451 (on Los Angeles practices). The essential point is that the police's informal rules for street behavior were much more permissive in Skid Row than in the central business district.

233. One can only conjecture how often nightsticks were used to enforce these orders. One source, citing no authority, associates police violence on behalf of public order with the period before, not after, World War II. See Wilson & Kelling, *supra* note 23, at 33.

exactly where the cop wanted him.²³⁴ In this way, the 1950s police officer helped to informally zone street disorder into particular districts.²³⁵

2. 1965–1975: A Constitutional Revolution

Especially in the period between 1965 and 1975, judges, including the Justices of the Supreme Court, made dozens of constitutional rulings that swept away the preexisting legal code of the streets.²³⁶ The judicial decisions eviscerated state and local regulations governing mild forms of public disorderliness. The criminal prohibitions at issue, many of which had descended from centuries-old English statutes, had provided grounds for over half the arrests in large cities at least as far back as the Civil War.²³⁷ Although legislators were also involved in street-law reforms between 1965 and 1975, more often than not they were reacting to judicial initiatives.

The courts' nationalization and liberalization of street law received little criticism at the time. The statutes and ordinances that the judges were annulling had long been disproportionately enforced against poor people and members of racial minorities. In the mid-1960s, many police departments were lily-white and heavily staffed with officers who were insensitive, and sometimes brutal, in handling vagrants and nonwhite arrestees. At the time,

234. See O'FLAHERTY, *supra* note 1, at 270–72 (in 1950s and 1960s, New York police gave street people much leeway to beg in Bowery because “if you were a bum, it was your place” (quoting Richard Kopperdahl)); JAMES Q. WILSON, *VARIETIES OF POLICE BEHAVIOR* 147 (1968) (“When the famous [Albany, N.Y.] ‘Gut’ was flourishing, a large number of arrests for intoxication were required to maintain some semblance of order and, more important, keep the carousers from leaving the area to annoy the ‘decent people’ elsewhere in the city.”). Foote quotes a magistrate’s statement to a Philadelphia vagrancy defendant: “What are you doing in this part of town? You stay where you belong; we’ve got enough bums down here without you.” Foote, *supra* note 19, at 606; see also Bittner, *supra* note 176, at 704 (police had implicit duty to contain Skid Row); Foote, *supra* note 19, at 604–05, 631–32 (describing periodic campaigns during 1950s to clear vagrants and habitual drunkards from Philadelphia’s city center); Schneider, *supra* note 230, at 17 (“The police were clearly more tolerant of certain behavior on skid row than they were elsewhere . . .”). As late as 1991, the Los Angeles police were reported still to have an affirmative policy of attempting to contain the down-and-out to the Skid Row area east of Spring Street. See Goetz, *supra* note 3, at 545.

235. American history is replete with analogous efforts to sequester the mentally ill in confined locales: workhouses, poorhouses, and jails in Colonial times; large rural asylums during the nineteenth century. See LELAND V. BELL, *TREATING THE MENTALLY ILL: FROM COLONIAL TIMES TO THE PRESENT* (1980); ALBERT DEUTSCH, *THE MENTALLY ILL IN AMERICA* (1949).

236. Some state supreme courts were at the leading edge of the reform movement. See, e.g., *Parker v. Municipal Judge*, 427 P.2d 642 (Nev. 1967) (Las Vegas vagrancy ordinance denied due process because it criminalized status of poverty); *Fenster v. Leary*, 229 N.E.2d 426 (N.Y. 1967) (New York vagrancy statute violated Due Process Clause).

237. See MONKKONEN, *supra* note 170, at 103 (in 1880, 62.5% of arrests in 18 large cities were for “drunkenness, drunk and disorderly, suspicion, vagrancy, or corner lounging”); SKOGAN, *supra* note 22, at 89 (in 1960, 52% of all nontraffic arrests in U.S. were for drunkenness, disorderly conduct, vagrancy, and suspicion; by 1985, this percentage had fallen to 16%).

In 1884–1885 in Boston, drunkenness alone was the basis for over half the total of 28,932 arrests. The figures in other selected arrest categories were: common beggars (7), disorderly (514), idle and disorderly (214), insane (275), and vagrancy (250). ROGER LANE, *POLICING THE CITY: BOSTON 1882–1885*, at 232–34 (1967). One source reports that New York City recorded over a million arrests for vagrancy in 1877, a suspiciously high figure. See Stanley, *supra* note 168, at 1280.

opinion leaders were more willing to give wide discretion to a Justice interpreting the United States Constitution than to a patrol officer making a street arrest.²³⁸ In addition, a judicial decision that stressed the interests of the disadvantaged reflected the temper of the time, an era when Congress was passing major civil rights laws and tripling the percentage of GNP spent on federal aid to low-income persons.²³⁹

a. *Vagrancy*

English vagrancy statutes, initially enacted in the fourteenth century to control wages and prevent idleness, had evolved by the time of the American Revolution into a hodge-podge of controls on minor public offenses, including begging and sleeping in the open.²⁴⁰ In the 1950s, every state had some sort of vagrancy law.²⁴¹ These laws were left in constitutional tatters after 1972, when the Supreme Court decided *Papachristou v. City of Jacksonville*.²⁴² The case involved the Jacksonville police's arrest of Papachristou, a white female riding in an automobile with black males, for violating the city's remarkably overbroad vagrancy ordinance. Justice Douglas, writing for a unanimous Court, held that the ordinance violated the Due Process Clause because it had been too vague to apprise citizens of what was forbidden and had conferred too much discretion on police officers.

Instead of explaining why Jacksonville should not have been able to obtain a conviction on the particular facts of *Papachristou* itself (seemingly not a difficult task), Justice Douglas devoted much of his opinion to a general critique of street controls. Exalting "lives of high spirits," he quoted the titles of Walt Whitman's *Song of the Open Road* and Vachel Lindsay's *I Want to Go Wandering*.²⁴³ Douglas's ideal, it appeared, was a world full of rights. Responsibilities, a 1990s notion,²⁴⁴ were not on his radar screen. Although the Jacksonville ordinance had targeted "habitual loafers" among other innocents, it had also aimed at "thieves," "pickpockets," "drunkards," and

238. This may no longer be true. A Gallup Organization survey conducted in March 1994 asked respondents whether they had a "great deal/quite a lot" of confidence in certain institutions. Some 55% of the people polled accorded the police this level of trust. The Supreme Court attracted this degree of support from 42%. The bottom-ranked institution was the "criminal justice system," which tallied 15%. *International Comparisons*, AM. ENTERPRISE, Sept./Oct. 1994, at 92.

239. See *supra* text accompanying note 121.

240. See MODEL PENAL CODE § 250.6 cmt. 1, at 383-86 (1980); see also sources cited *infra* note 387. Jeffrey S. Adler, *A Historical Analysis of the Law of Vagrancy*, 27 CRIMINOLOGY 209 (1989), provides an extensive bibliography.

241. See Foote, *supra* note 19, at 609.

242. 405 U.S. 156 (1972). Two preceding decisions from the state courts are cited *supra* note 236.

243. *Papachristou*, 405 U.S. at 164. Douglas's opinion echoes many of the themes he sounded a dozen years before in Douglas, *supra* note 19. Perhaps because he himself "rode 'the rods'" in his youth, *id.* at 4, his article praises "men of the open road . . . the heroes of much of our great literature," *id.* at 2. In Douglas's eyes, the archetypal street person was an adventurous and casually employed hobo, not a chronic panhandler or bench squatter.

244. See *supra* note 26 and accompanying text.

“beggars.” Justice Douglas nonetheless assumed the police would apply the ordinance improperly: “Those generally implicated by the imprecise terms of the ordinance—poor people, non-conformists, dissenters, idlers—may be required to comport themselves according to the life-style deemed appropriate by the Jacksonville police and the courts.”²⁴⁵ The message was clear: What the police might intend as the maintenance of basic civility in public spaces, many Justices would interpret as the suppression of high spirits in favor of drab conformity.²⁴⁶

b. *Public Drunkenness*

Public inebriation was a crime in England as early as 1606,²⁴⁷ and during the century prior to 1965 it was one of the most common grounds for arrest in American cities.²⁴⁸ In the mid-1960s, attorneys began to argue that the conviction of a chronic alcoholic for being drunk in public would constitute a status crime in violation of the Cruel and Unusual Punishment Clause of the Eighth Amendment.²⁴⁹ In 1966, two federal appeals courts agreed.²⁵⁰ Two years later, in *Powell v. Texas*,²⁵¹ the Supreme Court came within one vote of affirming this broad doctrine. The splintered *Powell* majority implied, more narrowly, that at least a *homeless* person could invoke the Eighth Amendment defense because he lacked a private place to drink.²⁵² These judicial decisions helped prompt legislatures to decriminalize public inebriation and to increase funding for medical and detoxification services.²⁵³

c. *Disorderly Conduct Stemming from Mental Illness*

The federal courts were also key players in the movement to deinstitutionalize the mentally ill. In 1971, the seminal lower-court decision in

245. *Papachristou*, 405 U.S. at 170.

246. See Robert C. Post, *Reconceptualizing Vagueness: Legal Rules and Social Orders*, 82 CAL. L. REV. 491, 496–98 (1994) [hereinafter Post, *Reconceptualizing Vagueness*] (interpreting *Papachristou* as holding that Jacksonville police could not constitutionally seek to enforce “middle-class virtues” on streets).

247. David Whitford, *Despite Decriminalization Drunks Still Clog Our Nation’s Jails*, CORRECTIONS MAG., Apr. 1983, at 31, 31.

248. See *supra* note 237.

249. On this doctrine, see *infra* text accompanying notes 443–51.

250. *Easter v. District of Columbia*, 361 F.2d 50 (D.C. Cir. 1966); *Driver v. Hinnant*, 356 F.2d 761 (4th Cir. 1966).

251. 392 U.S. 514 (1968).

252. See *infra* text accompanying notes 447–51.

253. See, e.g., CAL. PENAL CODE § 647(ff) (West Supp. 1995) (added 1971) (providing for protective custody, not criminal prosecution, of persons found drunk in public); CONN. GEN. STAT. § 19a-126c (1995) (enacted 1974) (similar). In New Haven in the early 1990s, indigent inebriates discovered on the street were not arrested but rather transported by ambulance to a hospital emergency room. The Yale-New Haven Hospital took in about 2800 drunks in 1993, at a total public cost of \$900,000. Abram Katz, *Indigent Drunks Tax Hospitals*, NEW HAVEN REG., Jan. 23, 1994, at A1. WHITE, *supra* note 101, at 57–83, provides an inside look at detoxification programs for alcohol and drug abusers.

*Lessard v. Schmidt*²⁵⁴ held that a person faced with involuntary commitment is constitutionally entitled to all of the rights of a criminal defendant, including a timely hearing, counsel (for the indigent, at state expense), trial by jury, and an evidentiary standard of proof beyond a reasonable doubt. In 1975, the Supreme Court held in *O'Connor v. Donaldson*²⁵⁵ that an involuntarily institutionalized mental patient who was a danger neither to himself nor others had a prima facie claim for damages against a superintendent who had failed to release him. Partly as a result of this line of decisions, involuntary civil commitment, even of mentally ill persons with a history of violence, became rare in the United States.²⁵⁶

Between 1955 and 1990, the rate of mental hospitalization per 100,000 adults in the United States plummeted by 90%.²⁵⁷ Much of the drop occurred during the latter portion of this period, when more troubled patients began avoiding institutional confinement. For example, the number of in-house patients under the age of sixty-five in New York state psychiatric centers fell from 24,800 in 1973, to 13,700 in 1980, to 11,300 in 1990.²⁵⁸ In theory, the new outpatients were to be stabilized with psychotropic medications. In practice, some of the most severely ill ended up bench squatting amid shopping bags and shopping carts.²⁵⁹

d. *Liability of Officials and Governments for Constitutional Violations*

O'Connor illustrates why police officers and hospital staff increasingly paid attention to constitutional rulings. Although 42 U.S.C. § 1983, originally part of the Civil Rights Act of 1871, had long provided for legal remedies against persons who violated federal constitutional rights under color of state law, § 1983 actions did not flower until the 1960s.²⁶⁰ In a watershed decision

254. 349 F. Supp. 1078 (E.D. Wis. 1972), *vacated*, 414 U.S. 473, *on remand*, 379 F. Supp. 1376 (E.D. Wis. 1974), *vacated*, 421 U.S. 957 (1975), *on remand*, 413 F. Supp. 1318 (E.D. Wis. 1976).

255. 422 U.S. 563 (1975).

256. See JENCKS, HOMELESS, *supra* note 1, at 31–32.

257. *Id.* at 138. An overview of the deinstitutionalization movement may be found in *id.* at 21–40.

258. O'FLAHERTY, *supra* note 1, at 230 tbl. 12-1 (numbers rounded off). Interpretation of these data is tricky because during the same time period there was a sharp rise in the populations of prisons, nursing homes, and other institutions that house some mentally ill persons. Stressing these substitutions, O'Flaherty argues that the effects of deinstitutionalization have been much exaggerated. *Id.* at 226–47.

259. It is estimated that over 40% of the homeless in the New York City subway system, an analogous landing spot, are mentally ill. See George L. Kelling & Catherine M. Coles, *Disorder and the Court*, PUB. INTEREST, Summer 1994, at 57, 60. Most surveys find that at least 20% to 30% of homeless individuals are afflicted in this way. See Fischer & Breakey, *supra* note 215, at 1122.

260. PETER H. SCHUCK, SUING GOVERNMENT: CITIZEN REMEDIES FOR OFFICIAL WRONGS 47–51 (1983) (on evolution of § 1983). Because federal statisticians lump all civil rights suits in a single category, scholars have had difficulty pinpointing trends in the number of § 1983 actions. None would dispute, however, that the number has increased manifold since 1960. See *id.* at 199–201; cf. Theodore Eisenberg & Stewart Schwab, *The Reality of Constitutional Tort Litigation*, 72 CORNELL L. REV. 641, 665–66 (1987) (finding increase, but not explosion, in numbers of constitutional tort actions from 1975 to 1984).

in 1961, *Monroe v. Pape*,²⁶¹ the Supreme Court held that § 1983 afforded relief to the victim of a government official even when the official had been acting *without* government authorization.²⁶² Subsequent Court decisions entitled plaintiffs to ground damage actions directly on the Federal Constitution²⁶³ and severely restricted municipal immunities from liability for § 1983 damages.²⁶⁴ After the legal revolution was over, an officer enforcing an ordinance against begging or sleeping in public faced a real prospect of being personally sued for damages.²⁶⁵ Although cities generally indemnified officers, especially ones who had acted in good faith,²⁶⁶ such cases still posed a major aggravation for the defending officers. The enhanced risk of government tort liability also provided heads of municipal police departments and state mental-health agencies with a handy excuse for being lenient with persons prone to chronic street misconduct.²⁶⁷

e. *The Revolution in Retrospect*

Much of what the courts accomplished between 1965 and 1975 is laudable. An institutionalized individual should be entitled to pursue a procedure for release, and the police should not harass a person in a downtown location simply because he is shabbily dressed. Nevertheless, like Justice Douglas, many judges at the time seemed blind to fact that their constitutional rulings might adversely affect the quality of urban life and the viability of city centers.²⁶⁸ It is one thing to protect unpopular persons from wrongful confinement; it is another to imply that these persons have no duty to behave themselves in public places. In addition, federal constitutional rulings are one of the most centralized and inflexible forms of lawmaking. In a diverse and dynamic nation committed to separation of powers and federalism, there is

261. 365 U.S. 167 (1961).

262. *Id.* at 172.

263. *Bivens v. Six Unknown Named Agents*, 403 U.S. 388 (1971).

264. *Monell v. Department of Social Servs.*, 436 U.S. 658 (1978).

265. *See, e.g.*, *Blair v. Shanahan*, 795 F. Supp. 309 (N.D. Cal. 1992), *aff'd*, 38 F.3d 1514 (9th Cir. 1994) (former panhandler's § 1983 claims against five officials and city for unconstitutional arrest settled by city for \$4000); *RIGHT TO REMAIN NOWHERE*, *supra* note 4, at 55–56, 58 (64 campers wrongfully arrested at Santa Ana civic center settled with city for about \$400,000); *infra* note 367. Some 200 to 300 § 1983 damage actions are filed each year against the City of Los Angeles Police Department, mostly without success. SKOLNIK & FYFE, *supra* note 188, at 200–04 (claiming developments in § 1983 law have significantly reduced police violence).

266. *See generally* SCHUCK, *supra* note 260, at 85–88 (discussing wide variety of state and local indemnification policies); Project, *Suing the Police in Federal Court*, 88 YALE L.J. 781, 810–12 (1979) (discussing municipal insurance and indemnification policies).

267. *See, e.g.*, *supra* note 256 and accompanying text (on deinstitutionalization of violent mental patients).

268. There is disagreement about how much effect these sorts of rulings ultimately had on police behavior. Many are skeptical of the influence of formal law. *See, e.g.*, O'FLAHERTY, *supra* note 1, at 267–74; Goldstein, *Panhandlers at Yale*, *supra* note 13, at 351–55. *But cf.* SKOLNIK & FYFE, *supra* note 188, at 200–05 (Supreme Court decisions probably reduced police violence significantly).

much to be said for giving state and local legislative bodies substantial leeway to tailor street codes to city conditions, and for giving state judges ample scope to interpret the relevant provisions of state constitutions. During the period from 1965 to 1975, too many federal judges were disinclined to leave much decisionmaking to others.

3. *The 1980s: Popular Embrace of the Homeless*

The relaxation of legal controls between 1965 and 1975 became far more momentous when, especially in the 1980s, pedestrians eased the informal standards of behavior they applied to other street users.²⁶⁹ This shift in attitudes toward street people was an aspect—indeed the culmination—of a larger ideological shift. During the period from 1960 to 1990, the American zeitgeist strongly supported bringing previously marginalized groups into the social mainstream. After the stunning success of the original civil rights movement, which had addressed the exclusion of racial minorities, the nation moved on to address the situation of women, homosexuals, and the disabled.

By around 1980, the tide favoring social inclusion had reached one of the most traditionally ostracized groups, the “derelicts” and “bums” who had previously been concentrated within Skid Rows and who were becoming more visible on downtown streets. As early as the late 1970s, articulate advocates such as Robert Hayes and Mitch Snyder were beginning to persuade judges, journalists, and other commentators to apply an alternative label—the “homeless”—to these individuals.²⁷⁰ The new label stuck, and it began to influence how pedestrians reacted to the beggars and bench squatters they encountered. The term “homeless” tended to transform a person previously scorned as a “bum” into a blameless victim worthy of alms. By the mid- and late 1980s, public expressions of empathy for down-and-out Americans blossomed as never before.

Conventional party politics also helped fuel the homelessness issue during the 1980s. Critics of the Republican President, Ronald Reagan, sought to demonstrate that his administration had been cruelly cutting back on welfare benefits.²⁷¹ Popularizing a label that characterized street people as victims helped foster the perception that they were casualties of Reaganite policies.

269. Equating this historical period with the 1980s is a convenient, if rough, simplification.

270. See *supra* notes 128–31 and accompanying text. These events and the history of the cause are recounted in WHITE, *supra* note 101, at 221–42.

271. See, e.g., FRED BLOCK ET AL., THE MEAN SEASON: THE ATTACK ON THE WELFARE STATE 24 n.20 (1987) (Reagan administration’s “cuts forced hundreds of thousands deeper into poverty”). On the inaccuracy of this cutback charge in the context of federal housing assistance, see *infra* note 295 and accompanying text.

Countless Hollywood celebrities and journalists in the national media took up the homelessness cause.²⁷²

The zeitgeist of inclusion also influenced leaders of religious bodies, merchants' associations, universities, and other organizations involved in street order. During the 1950s, Protestant fundamentalist rescue missions were key institutions on Skid Rows. Managers of these missions attempted, not very effectively, to convert "sinners" from antisocial lifestyles. During the mid-1980s, many of these missions were squeezed out²⁷³ as numerous moderate, middle-class congregations became involved in operating soup kitchens and shelters for the homeless.²⁷⁴ Parishioners of these middle-class churches commonly viewed their guests not as sinners to be reformed, but as victims of the structural forces of American society.

These new churchly initiatives helped move street people out of Skid Row and into other downtown areas. While the fundamentalist rescue missions had been located in Skid Row, the middle-class churches were typically situated elsewhere. Members of some charities also appear to have sought to draw street people to locations that would make extreme poverty more conspicuous.²⁷⁵ In San Francisco and Santa Monica, for example, social activists chose the grounds of the municipal civic center as a main site for distributing free meals.²⁷⁶

272. See WHITE, *supra* note 101, at 221–42 (on journalistic bias and the anti-Reagan impetus); S. Robert Lichter, *Media's Typical Homeless Are Anything But*, WALL ST. J., Dec. 14, 1989, at A22 (reporting study that found advocacy bias in coverage of homelessness by television and weekly news magazines between 1986 and 1989).

273. In Manhattan, the number of residents living in traditional missions is estimated to have declined by about 90% between 1949 and 1990. O'FLAHERTY, *supra* note 1, at 47 tbl. 4-1.

274. Between 1984 and 1988, the nation's total number of shelters for the homeless increased from 1900 to 5400. NATIONAL SURVEY OF SHELTERS, *supra* note 124, at 2. In 1988, religious groups were operating about one-third of the private shelters. *Id.* at 18.

275. This predilection has helped increase the number of street people at the epicenters of universities. For example, in 1977, a Yale Divinity School student spearheaded the opening of the oldest and largest of the existing soup kitchens in downtown New Haven; in 1979, this soup kitchen moved to Christ Church, across the street from the Yale Co-op, the university's main bookstore. Joan E. Neal, *New Haven Soup Kitchens 5*, 11 (May 15, 1989) (unpublished manuscript, on file with author). In 1982, Stewart Guernsey, a Harvard Divinity seminarian, helped open the first of the existing soup kitchens near Harvard; it was located at Christ Church Episcopal, a hundred yards west, and within eyesight, of Harvard Yard. Telephone interview with James Stewart, Director of First Church Shelter (Dec. 11, 1995).

276. See NO HOMELESS PEOPLE ALLOWED, *supra* note 6, at 32 (on City of San Francisco's arrest, over course of 13 months, of over 350 individuals associated with organization Food Not Bombs for distributing food at Civic Center Plaza); Nancy Hill-Holtzman, *Santa Monica Enforces a New Policy Toward Homeless People*, L.A. TIMES, June 19, 1992, at B9 (from 1989 to 1992, FAITH, a private charity, provided as many as 300 free meals every weekday on lawn of Santa Monica City Hall). The direction of causation is of interest in these situations. Do the patrons follow the food providers, or vice versa? In downtown New Haven in the early 1990s, at least six different religious institutions provided evening soup-kitchen services each week on a rotating basis, with the expectation that hungry patrons would learn where to go on a particular evening for a free meal. See *Downtown Evening Soup Kitchen*, Fact Sheet (Aug. 1994) (unpublished, on file with author). The success of this format indicates that a food provider has considerable power to draw the destitute to a location of the provider's choice.

A charity that uses food to draw the hungry to the steps of city hall is engaging in symbolic political speech (although the diners themselves typically are not). *Clark v. Community for Creative Non-Violence*, 468 U.S. 288, 293–99 (1984), grants a government authority to restrict symbolic political speech that

In sum, as the homelessness cause crested during the 1980s, both pedestrians and intermediary organizations significantly relaxed their informal policing of street misconduct. For the Skid Rows in many cities, this was a finishing blow. Skid Rows had been losing population since the 1920s.²⁷⁷ During the 1970s, more relaxed police practices, greater federal disability benefits, fear of younger and violence-prone newcomers,²⁷⁸ and, in some instances, urban renewal projects²⁷⁹ had contributed to the continuing exodus from these neighborhoods. As concern for the homeless prompted pedestrians and organizations to be more tolerant of disorderly behavior in the city center during the 1980s, the last significant strand in the noose snapped. Street people who previously had been informally confined to Skid Row were now able to make chronic use of the busiest downtown areas. Many of them did. By 1990, in New York, Chicago, and many other large cities, the legal and social revolutions of the previous decades had so completely burst the bounds of Skid Row that only traces of it remained.²⁸⁰

A decline in racial prejudice also contributed to the increase in street people in downtown locations, but from a source other than Skid Row. A large majority of the residents of the 1950s Skid Rows were whites, most of whom were virulently prejudiced against blacks.²⁸¹ Aware of the hostility of these whites, and of the risk of encountering racist police officers, during the 1950s many destitute blacks understandably were chary of spending much time in public places outside black neighborhoods. The softening of white hostility toward blacks during and after the civil rights movement of the 1960s seems to have allayed the reservations many underclass blacks had previously harbored about becoming chronic users of downtown spaces.²⁸² In any event, the panhandlers and street homeless who began appearing in American downtowns after 1980 were disproportionately black.²⁸³ No fact better

displants other users from a prime civic location as long as the government provides ample alternative channels for that speech. *See also* *McHenry v. Agnos*, No. 92-15123, 1993 WL 8728 (9th Cir. Jan. 19, 1993) (rebuffing First Amendment arguments advanced on behalf of Food Not Bombs program); *infra* note 415 and accompanying text.

277. *See supra* notes 230-31 and accompanying text.

278. Racial animus also may have been involved. The young arrivals tended to be black, the older residents, white. *See* Barrett A. Lee, *The Disappearance of Skid Row*, 16 URB. AFF. Q. 81, 97-98 (1980); David Levinson, *Skid Row in Transition*, 3 URB. ANTHROPOLOGY 79, 86 (1974) (older white Bowery residents feared young black newcomers would "jackroll" (rob) them).

279. Compare HOCH & SLAYTON, *supra* note 231, at 114-23, 172-98 (stressing role of urban renewal) with JENCKS, HOMELESS, *supra* note 1, at 61-74 (skeptical assessment of link between loss of SRO units and rise of homelessness).

280. *See supra* text accompanying notes 2-3. The last of Chicago's cubicle hotels were demolished in 1980. *See* ROSSI, *supra* note 3, at 182 n.3.

281. *See* DANIEL B. BOGUE, SKID ROW IN AMERICAN CITIES 269 (1963) (reporting on Chicago); HOCH & SLAYTON, *supra* note 231, at 97-98.

282. In contrast to the 1950s, by 1984 most SRO hotels in Chicago were racially integrated, except those on the mostly black South Side. *See* HOCH & SLAYTON, *supra* note 231, at 260.

283. Goldstein, *Panhandlers at Yale*, *supra* note 13, at 300 (most Yale-area panhandlers are black males between ages of 25 and 45); Dawidoff, *supra* note 57, at 34-35 (photographs of 30 New York subway panhandlers indicate that close to two-thirds are nonwhite). These proportions are generally in line

demonstrates the success of the post-1960 inclusionary zeitgeist. Brendan O'Flaherty states the point this way:

In 1940 or 1960, a black man would have been risking serious bodily harm or even death if he tried to sleep all night in Grand Central Terminal or on Park Avenue. That hundreds of African-Americans were doing so in 1990 is something of a tribute to the NYPD.²⁸⁴

4. *The 1990s: Backlash*

The easing of social controls during the 1980s occurred at the same time that deinstitutionalization of the mentally ill, family breakdown, the crack epidemic, and other forces were contributing to the steady growth of the urban underclass.²⁸⁵ The streets of U.S. cities, hit with this forceful combination of punches, became more unruly than at any time since the Great Depression.

By about 1990, many city dwellers had concluded that things had gone too far.²⁸⁶ The nation in effect had run an experiment that had elevated the liberties of misbehaving street people over the rights of conventional users of public spaces. By the early 1990s, it had become plain that the experiment had failed. Like the dangers of cocaine, the importance of preventing street disorder had been learned the hard way—through experience. In the 1990s, the abiding concern with controlling street misconduct—a concern that prevails among members of all racial and income groups²⁸⁷—resurfaced with a vengeance.

The advocates' shortsighted political strategy (what Richard White would later call "lying for justice"²⁸⁸) added to the intensity of the backlash.²⁸⁹ Throughout most of the 1980s, Hayes, Snyder, and others had succeeded in persuading many members of the press to portray the homeless as "just like you and me," as if most Americans were only a paycheck away from the streets. This portrayal was recklessly false.²⁹⁰ Homeless people suffer from an exceptionally high incidence of mental illness and substance abuse,²⁹¹ and tend to have far less social capital, not to mention economic capital, to fall back on when misfortune strikes.²⁹² In addition, the advocates impaired their

with the racial composition of the urban underclass. In 1990, "distressed" urban neighborhoods in the 100 largest central cities—that is, neighborhoods categorized by severe economic and social poverty—contained populations that were 67.7% non-Hispanic black and 19.6% Hispanic. Kasarda, *supra* note 208, at 263.

284. O'FLAHERTY, *supra* note 1, at 274. O'Flaherty also laments that so many black people have to exercise this newfound "right." *See id.*

285. *See supra* notes 181–229.

286. *See* Isabel Wilkerson, *Shift in Feelings on the Homeless: Empathy Turns into Frustration*, N.Y. TIMES, Sept. 2, 1991, at A1, A10.

287. *See supra* note 118 and accompanying text.

288. WHITE, *supra* note 101, at xii, 3–20.

289. *See Homelessness Muddle*, *supra* note 127, at 45.

290. *See* BAUM & BURNES, *supra* note 211, at 15–16; WHITE, *supra* note 101, at 9–16.

291. *See supra* notes 211–16 and accompanying text.

292. *See supra* notes 190 & 199 and accompanying text.

credibility when they exaggerated the number of homeless persons as much as tenfold,²⁹³ implausibly claimed homelessness was almost entirely due to an inadequate supply of low-rent housing,²⁹⁴ and inaccurately implied that spending on housing subsidies for the poor had been slashed during the 1980s.²⁹⁵

In the late 1980s, journalists began publishing more accurate accounts of the homelessness problem.²⁹⁶ In 1989, in a column entitled *Swarms of Beggars Cause "Compassion Fatigue,"* Ellen Goodman concluded, "Today at least, this tourist, walking from one block to another, one cup to another, one city to another wants to join in a citizens' chorus: 'Enough's enough.'"²⁹⁷ By the 1990s, New York magazines were running stories deeply hostile to panhandlers.²⁹⁸ By that time, most Hollywood celebrities had dropped homelessness as yesterday's issue and moved on to other causes.

Politicians were quick to discern the electorate's reformed willingness to hold an individual responsible for his behavior in public. In the early 1990s, mayoral candidates who had campaigned partly on a platform of street order—Frank Jordan in San Francisco and Rudolph Giuliani in New York—won elections in two of the nation's most liberal cities. Former havens for street people, such as Washington, D.C., Santa Monica, San Francisco, and even far-left Berkeley and Santa Cruz, all joined the crackdown movement by passing anti-panhandling measures.²⁹⁹

293. See, e.g., Robert Hayes, *Litigating on Behalf of Shelter for the Poor*, 22 HARV. C.R.-C.L. L. REV. 79, 82 (1987) (asserting existence of two or three million homeless Americans). Compare *id.* with sources cited *supra* note 132 (scholarly studies estimating existence of 250,000 to 600,000 homeless Americans).

294. See, e.g., Hayes, *supra* note 293, at 83–86. Hayes has repeatedly asserted that the solution to the problems of the homeless can be summed up in three words: "housing, housing, housing." Celia W. Dugger, *Gambling on Honesty on the Homeless*, N.Y. TIMES, Feb. 17, 1992, at B1.

295. On actual trends in federal funding of housing subsidies, see JENCKS, HOMELESS, *supra* note 1, at 94–98 (criticizing misleading statements of Center for Budget and Policy Priorities and Low Income Housing Information Service).

Some influential refutations of various of the advocates' positions mentioned in this paragraph are BAUM & BURNES, *supra* note 211; JENCKS, HOMELESS, *supra* note 1; ROSSI, *supra* note 3; and WHITE, *supra* note 101. But cf. Brendan O'Flaherty, *An Economic Theory of Homelessness and Housing*, 4 J. HOUSING ECON. 13 (1995) (arguing that reduction in population of middle-class households in central cities affected housing markets in manner that contributed to homelessness of 1980s).

296. Examples of this franker journalism include Barry Bearak, *Waiting to Die at the AIDS Hotel*, L.A. TIMES, July 25, 1992, at A1; Jay Mathews, *Rethinking Homeless Myths*, NEWSWEEK, Apr. 6, 1992, at 29; David Whitman, *Shattering Myths About the Homeless*, U.S. NEWS & WORLD REP., Mar. 20, 1989, at 26; and Celia Dugger's many articles for the *New York Times*.

297. Goodman, *supra* note 54, at A9.

298. See, e.g., Dawidoff, *supra* note 57; Pete Hamill, *How to Save the Underclass—and Ourselves*, NEW YORK, Sept. 20, 1993, at 34.

299. Developments in these and other cities are conveniently summarized in RIGHT TO REMAIN NOWHERE, *supra* note 4, and NO HOMELESS PEOPLE ALLOWED, *supra* note 6. Of the 16 cities tallied in RIGHT TO REMAIN NOWHERE, *supra* note 4, at xi tbl. II, 12 had taken some action in 1993 to control begging; 12 had carried out "sweeps" of public places; 10 had imposed restrictions on sleeping; and 4 had attempted to control sitting. *Id.* NO HOMELESS PEOPLE ALLOWED, *supra* note 6, at vii tbl. I, identifies "anti-homeless" policies adopted in 1994 by 39 cities and counties, more than double the number identified the previous year; 26 of these localities had approved anti-panhandling ordinances.

Finally, just as the election of Ronald Reagan had helped boost the homelessness issue into prominence, Bill Clinton's election in 1992 contributed to its fall from favor. With a Democrat in the White House, partisans of that party got less mileage out of portraying street people as helpless victims of insensitive government policies.

The 1990s backlash may lead to the resurrection of many of the informal street norms suspended during the 1980s. If so, pedestrians will increasingly ignore and rebuff panhandlers, and in so doing reduce the incidence of cadging.³⁰⁰ Business Improvement Districts will step up security efforts and campaigns against giving to panhandlers. Religious congregations will notice a decline in the number of volunteers for programs for the homeless.

Most significantly, cities can be expected to continue to adopt ordinances that authorize their police forces to curb street misconduct. Many of these ordinances are likely to impose rules-of-the-road that vary from public space to public space. The balance of this Article develops its chief normative thesis: Judges should generally refrain from construing federal constitutional clauses to deny cities the capacity to spatially differentiate their street policies.

V. THE INFORMAL AND FORMAL ZONING OF PUBLIC SPACES

Some scholars,³⁰¹ judges,³⁰² and advocates apparently believe that provisions of the Federal Constitution tightly and uniformly constrain city policies in *all* open-access public spaces. This monolithic conception is reflected in Justice Roberts's famous dictum in *Hague v. CIO*:

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. Such use

300. The few available scraps of evidence indicate that the hourly incomes of panhandlers fell between 1990 and 1995 as the backlash deepened. See Finder, *Panhandling is Down*, *supra* note 5, at 46 (one subway panhandler's report that his former income of \$100 a day had been roughly halved); Douglas Martin, *Free Speech, but They'd Prefer the 2 Cents*, N.Y. TIMES, Oct. 4, 1992, at 39 (anecdotal reports that Manhattan beggars took in significantly less in 1992 than in 1991); *News From the Underground*, CITY J., Spring 1994, at 9 (one N.Y. beggar's report that people were giving less than before).

301. See Kalven, *supra* note 36. After eloquently showing that in some circumstances constraints on expression actually serve the cause of free speech, Kalven proceeds to overlook that truth and criticizes the Court for sympathizing with police efforts to control a crowd of 2000 parading in front of a courthouse. He moves too readily from the unimpeachable premise that Louisiana should have had to permit the parade to occur somewhere, to the conclusion that it had to allow the parade in one of the few locations where it might lead to perceptions of mob justice.

Jeremy Waldron also succumbs to the notion that all open-access spaces have to be governed by an identical regulatory regime. Waldron analyzes bans on sleeping as if they invariably apply citywide. See Jeremy Waldron, *Homelessness and the Issue of Freedom*, 39 UCLA L. REV. 295 (1991).

302. Justice Brennan was one of the staunchest proponents of the monolithic view. See, e.g., *United States v. Kokinda*, 497 U.S. 720, 742-43 (1990) (Brennan, J., dissenting) (unqualified statement that public parks, streets, and sidewalks are suited for use as central gathering places). *But cf. infra* note 378.

of the streets and public places has, from ancient times, been a part of the privileges, immunities, rights, and liberties of citizens.³⁰³

Justice Roberts's sweeping characterization of the uses of streets and public places is descriptively false. For example, most cities treat *street pavements* primarily as transportation corridors, and thus give transportation functions priority over citizens' efforts to use those pavements for parades, gatherings, solicitations of drivers, and other speech activities that interfere with traffic flows. Justice Roberts's broad dictum is also suspect as a statement of constitutional doctrine; the municipal priorities just mentioned have long been held not to violate the First Amendment.³⁰⁴

Charles Tiebout has indicated the theoretical advantages of enabling people of disparate tastes to "vote with their feet" among local governments that offer distinct packages of public goods and taxation policies.³⁰⁵ Consumer sovereignty is also served by the provision of an array of physical and social environments within a single political unit. Manhattan is interesting partly because of the striking variations among its neighborhoods—Wall Street, Greenwich Village, Chinatown, the Theater District, Harlem, and so on. This part contrasts informal and formal methods of "zoning" public spaces to add to the richness and diversity of urban life.

A. *A Hypothetical Division of City Public Spaces into Red, Yellow, and Green Zones*

As a mental experiment, imagine that it would be desirable for a city to have three codes, of varying stringency, governing street behavior. Borrowing from the system of traffic signals, let's call these codes Red, Yellow, and Green. Each of the city's public spaces would be assigned to a zone paired with just one of these colors. (Who is to do this zoning will be addressed shortly.) As with a traffic signal, Red would signal extreme caution to the ordinary pedestrian; Yellow, some caution; and Green, a promise of relative

303. 307 U.S. 496, 515 (1939). At a relatively early point in his judicial career, Justice Holmes declared, quite discordantly with *Hague* and contemporary First Amendment law, that a government has complete discretion in controlling its public spaces and can "forbid public speaking in a highway or public park." *Commonwealth v. Davis*, 39 N.E. 113, 113 (Mass. 1895).

304. *See, e.g., Cox v. New Hampshire*, 312 U.S. 569, 575–76 (1941) (permit requirement for street parade is valid time, place, and manner restriction); *ACORN v. St. Louis County*, 930 F.2d 591, 595–97 (8th Cir. 1991) (traffic ordinance that barred persons standing in roadway from soliciting charitable contributions from vehicle occupants did not violate First Amendment); *Xiloj-Itzep v. City of Agoura Hills*, 29 Cal. Rptr. 2d 879, 879–89 (Ct. App. 1994) (city may prohibit day laborers from soliciting work from those driving by).

305. Charles M. Tiebout, *A Pure Theory of Local Expenditures*, 64 J. POL. ECON. 416 (1956) (foundational analysis of economic justifications for spatial diversity in local government policies). The post-Tiebout literature is reviewed in WILLIAM A. FISCHER, *REGULATORY TAKINGS* 255–69 (1995).

safety.³⁰⁶ It must be stressed that these color codes are chosen with an eye to pedestrians of ordinary tastes, not to those inclined to engage in nuisance behavior. This usage is consistent with the phrase "Red Light District," which connotes disorderliness to an ordinary citizen, but not necessarily to a brothel patron.

In Red Zones (say, 5% of a city's downtown area), normal standards for conduct in public spaces would be significantly relaxed.³⁰⁷ The rule would hardly be "anything goes," of course; even in these places, violence to person or property, for example, would be subject to sanction. But many sidewalk behaviors that would be considered disorderly in the rest of the city would not violate Red-Zone rules-of-the-road. In these relatively rowdy areas, a city might decide to tolerate more noise, public drunkenness, soliciting by prostitutes, and so forth. More pertinently for the topic at hand, chronic panhandling and bench squatting would be permitted in a Red Zone. Red Zones, in short, would be designed as safe harbors for people prone to engage in disorderly conduct.

Yellow Zones would comprehend, say, 90% of a city's downtown public spaces. The city's civic center, plazas, central business district, and other principal agoras would be placed under this large umbrella. The applicable code of conduct would aim to make a Yellow-Zone space serve as a lively mixing bowl. As mentioned,³⁰⁸ a city would have to walk a fine line to achieve this objective. On the one hand, the city could not control its Yellow-Zone spaces so tightly that the flamboyant and eccentric would be kept out; on the other hand, it would have to curb street misbehavior enough to make the great majority of citizens willing to enter these spaces without hesitation. A Yellow Zone's rules of public decorum therefore would be stricter than a Red Zone's rules. There would be constraints on excessive noise, drunkenness, and other disorderly conduct. For present purposes,³⁰⁹ let's assume that *chronic* (but not episodic) panhandling and bench squatting—permitted in a city's Red Zones—would be prohibited in its Yellow Zones.

Green connotes unusually pleasant environmental conditions. In Green Zones, the remaining 5% of downtown, social controls would be tailored to create places of refuge for the unusually sensitive: the frail elderly, parents

306. These designations assume that social order is a unidimensional condition. Anyone bothered by this simplification should imagine a more elaborate zoning system.

307. It would also be possible to vary regulations according to time of day. For instance, a neighborhood commercial strip might be governed by "Yellow" rules during daylight hours, but by "Green" rules after dark, when even episodic panhandling may put off pedestrians.

308. See *supra* text accompanying notes 32–37.

309. Different cities could make different determinations. For example, while a Las Vegas might choose to allow episodic panhandling in its Yellow Zones, a St. Petersburg, Florida, might choose to ban that activity in those locations (constitutional doctrine permitting). The basic idea is that even in a St. Petersburg, a Yellow Zone would require a pedestrian to use a degree of street smarts.

with toddlers, unaccompanied grade-school children, bench sitters reading poetry. To accomplish this goal, the Green-Zone code would be relatively strict in its regulation of mildly disruptive activities such as radio playing, walking a dog, leafleting, and street performances.³¹⁰ Let's also suppose that even *episodic* panhandling and bench squatting would be banned in these locations. A large Green Zone would offer real respite from the ordinary hurly-burly of the streets. A city might also create scattered pockets of refuge, perhaps around all bus stops.

To summarize: Under the hypothetical regime, *chronic* panhandling and bench squatting would be permitted only in 5% of downtown public spaces (the Red Zones), but *episodic* panhandling and bench squatting would be permitted in 95% of downtown public spaces (all but the Green Zones).

B. *Alternative Zoners of Public Spaces*

A city government could zone its public spaces top-down in the manner that it zones private spaces: by means of an official map that designates zones and an ordinance text that articulates the rules-of-the-road that apply in the various districts. The Skid Rows of the 1950s are a reminder, however, that the zoning of public spaces can also occur bottom-up.

1. *Informal Zoning*

Members of a close-knit group who repeatedly make use of an open-access public space often are able to control misconduct there without direct help from the state.³¹¹ They do this by developing and enforcing social norms to deter an entrant into a space from using it in a way that would unduly interfere with the opportunities of other members. City dwellers, recognizing the crazy-quilt physical character of urban spaces and the myriad demands of pedestrians, tend to vary their informal norms from public place to public place. Profanity may be improper on the shuffleboard court, but not on the handball court. Panhandling may be seen as wrong on sidewalks near school grounds, but not on Skid Row. In a large urban park, specialized subgroups may sort themselves out spontaneously—kite flyers on the hill, soccer players on the open field, parents with toddlers near the sandbox—and enforce varying

310. Cf. *Davenport v. City of Alexandria*, 710 F.2d 148, 149–50 (4th Cir. 1983) (en banc) (involving city ordinance that banned street performances (such as plaintiff's bagpipes playing) on sidewalks of central business district, but not in other public spaces).

311. On the possibilities and limitations of spontaneous order, see generally ORDER WITHOUT LAW, *supra* note 141, and sources cited therein.

rules of conduct for each of these subspaces.³¹² In the same way, the residents of an urban neighborhood may be able to apply different informal rules of civility to different sidewalks.

In open-access spaces thronged with strangers, however, free-riding is apt to afflict the informal sector.³¹³ When this occurs, a hybrid social-control system may develop, under which police officers, without any legislative authorization, enforce informal neighborhood rules of conduct.³¹⁴ Police officers help create informal Green Zones, for example, when they are tougher on street nuisances in public spaces near elementary schools. Conversely, casual police practices can help turn Skid Rows into unofficial Red Zones.³¹⁵ For example, as early as 1868, the New York police informally exempted the Bowery from a citywide Sunday-closing law; in the 1920s, they exempted it from the full rigors of Prohibition.³¹⁶

2. *Municipal Zoning*

At first blush, the formal zoning of public spaces may seem an offbeat, even bizarre, idea. However, cities routinely differentiate their application of rules-of-the-road in this fashion. Consider the municipal laws that govern conduct on *street pavements*. In a large city, these pavements range from narrow local streets to major arteries. City officials, recognizing the differences among these public spaces, vary the applicable speed limits and parking regulations. A narrow cul-de-sac becomes, so to speak, a Green Zone usually safe for tricycle riders, while an interstate highway functions as a Red Zone where motorists can expect to encounter disorderly eighteen-wheelers. These spatial variations in traffic rules are wholly uncontroversial. It is manifest that a circulation system functions better if traffic rules are not monolithic but rather tailored to different sites.

The administrators of public parks commonly use a similar approach. They design and control special subzones for use as tot-lots, picnic areas, playing fields, and so on.³¹⁷ In effect, New York City has set aside the Sheep

312. On the spontaneous spatial sorting of people with different tastes, see THOMAS C. SCHELLING, *MICROMOTIVES AND MACROBEHAVIOR* 137–55 (1978).

313. See *supra* text accompanying notes 148–56.

314. See SKOGAN, *supra* note 22, at 166–67.

315. See *supra* notes 232–35 and accompanying text.

316. Kenneth T. Jackson, *The Bowery: From Residential Street to Skid Row*, in *ON BEING HOMELESS: HISTORICAL PERSPECTIVES* 69, 75 (Rick Beard ed., 1987).

317. See, e.g., ALBERT J. RUTLEDGE, *A VISUAL APPROACH TO PARK DESIGN* 82–84 (1981) (example of how landscape architect might anticipate user preferences when designing park containing bocci green, basketball court, and children's playground).

Meadow in Central Park as a Green Zone.³¹⁸ Signs posted within that fenced area read in their entirety:

Sheep Meadow

Open April–October. Closed when wet.

This area is reserved for quiet enjoyment. The following are not allowed:

Team sports. Ball playing. Bike riding.
Skates. Glass bottles. Dogs.³¹⁹

A few cities have experimented with officially designating Red Zone parks as safe harbors for unusually disorderly activity. Zurich's failed experiment with Needle Park, where the enforcement of drug laws was relaxed, is an example.³²⁰ Dallas, Jacksonville, and Orlando have designated specific sections of certain public parks as safe zones where the street homeless can bed down outdoors without fear of arrest.³²¹

City zoning of sidewalks also has ample precedent. Governments create Green Sidewalks when they impose especially stringent noise and activity restrictions on sidewalks near schools, hospitals, courthouses, and other facilities that house individuals of delicate sensibility.³²² Some crackdown ordinances have established small patches of Green Sidewalk by prohibiting begging within a few yards of, say, an automated teller machine or mass transit stop.³²³ In 1989, Atlanta seriously considered designating much of its downtown business district a "Hospitality Zone" (roughly, a Yellow Zone) in order to attract tourists and conventioners.³²⁴

Some sidewalk zoning is only quasi-official. For instance, Santa Monica has prominently posted along its Third Street Promenade, a hugely successful

318. Frederick Law Olmsted and Albert Vaux, the original designers of Central Park, contemplated that it would have specialized physical spaces—"Playground," "Arboretum," "Flower Garden," and so on. Perhaps because police forces were then in their infancy, these designers make no mention of issues of social control in describing their vision of the Park. See *LANDSCAPE INTO CITYSCAPE: FREDERICK LAW OLMSTED'S PLANS FOR A GREATER NEW YORK CITY* 74–88 (Albert Fein ed., 1968) (reproducing 1858 document by Olmsted and Vaux).

319. Sign observed by author, Nov. 5, 1994. Litigation involving the Sheep Meadow is cited *infra* note 466.

320. See Robert Guskind, *Needle Park's Gone, Addicts Aren't*, 24 NAT'L J. 2315 (on Zurich's decision to end experiment with tolerating drug use in particular park). On the eclipse of a similar, but de facto, drug haven, see De Groot, *supra* note 25, at 62 (describing reactions to University of California's construction in 1992 of volleyball courts in People's Park in Berkeley).

321. Orlando has erected a minimalist pavilion with a heated floor and a capacity of up to 700. RIGHT TO REMAIN NOWHERE, *supra* note 4, at 85; see also *id.* at 72–73 (Dallas open-air shelter with heated floors); *id.* at 76 (Jacksonville's plans for pavilion); cf. NO HOMELESS PEOPLE ALLOWED, *supra* note 6, at 45–46 (Fort Lauderdale's approval of "tent city" safe zone in downtown parking lot).

322. See *infra* text accompanying notes 372–78.

323. See, e.g., Panhandling Control Act of 1993, D.C. Act 10-98, §§ 3(b)–(c), cited in RIGHT TO REMAIN NOWHERE, *supra* note 4, at 117 (ban on begging within 10 feet of ATM and at mass transit stops); SAN FRANCISCO, CAL., MUNICIPAL CODE, pt. II, ch. 8, § 121, cited in NO HOMELESS PEOPLE ALLOWED, *supra* note 6, at 33 & n.126 (prohibition of loitering within 30 feet of ATM).

324. RIGHT TO REMAIN NOWHERE, *supra* note 4, at 28–29.

pedestrian mall, signs that list the street misconduct that the municipal code bans in all public spaces: “abusive solicitation,” “solicitation in outdoor dining areas, public parking structures, and near Automated Teller Machines,” “leaving property on sidewalk in excess of ten minutes,” and so on.³²⁵ While these rules were not specifically tailored to the location, the postings signal that Santa Monica’s enforcement would likely be unusually assiduous at the Promenade—effectively transforming it into a Yellow Zone. Quasi-official Red Sidewalks have existed in cities such as Amsterdam, Hamburg, and (at one time) Boston. These cities each affirmatively designated a specific district as a center for adult entertainment, with the implication that police officers were to relax some ordinary rules of public decorum there.³²⁶

A city might move beyond these patchwork measures to a comprehensive system of Red, Yellow, and Green Zones.³²⁷ Signs listing the applicable rules of conduct could be posted to educate the public about what was permitted where. After the citizenry had come to understand these differences, a city could use simple color codes to inform users how a particular space had been designated.³²⁸

325. Sign observed by author, July 7, 1995.

326. Many European cities have official Red-Light Districts: the *walletjes* of the Netherlands, Hamburg’s *Reeperbahn*, and Zurich’s *Niederdorf-Bellevue*. On Boston’s failed experiment with a “combat zone” in the 1970s, see 2 FEINBERG, *supra* note 46, at 43; Norman Marcus, *Zoning Obscenity: Or, the Moral Politics of Porn*, 27 BUFF. L. REV. 1, 2–4 (1978).

327. I am a skeptic of the wisdom of zoning private lands, partly because many municipalities employ conventional zoning to segregate households by economic class. See *Alternatives to Zoning*, *supra* note 88, at 703–05. One might ask how I could possibly contemplate the zoning of public spaces, even if only as a second-best measure. See *infra* text accompanying notes 462–66.

One distinction is that private land-use disputes tend to arise in more intimate social environments, where alternatives to municipal zoning are feasible. Conventional zoning ordinances govern many private land-use decisions, such as sideyard setbacks, that have highly localized effects. When externalities are so localized, the handful of long-term neighbors involved in the dispute are apt to be able to work out their own resolution of it without the aid of public regulators. Urban open-access spaces, by contrast, are used by large numbers of strangers. In addition, in some contexts developers can impose covenants to regulate uses on private lands. When public spaces need governance, this alternative source of control is not available. Indeed, a government that zones its public spaces is in many ways analogous to a developer imposing covenants on a subdivision. Ideally, both are seeking to make their lands more valuable.

Another distinction is that many provisions of conventional zoning ordinances prohibit landowners from mimicking land uses that are normal in the municipality. For example, suburbanites living on quarter-acre lots may impose a five-acre minimum lot-size requirement on undeveloped land. Conventional zoning therefore tends to be horizontally inequitable. See Robert C. Ellickson, *Suburban Growth Controls: An Economic and Legal Analysis*, 86 YALE L.J. 385, 419–24 (1977). By contrast, municipal regulation that restricts subnormal street behavior is fully consistent with horizontal equity. Cf. *Alternatives to Zoning*, *supra* note 88, at 729–30 (asserting that land uses should be deemed common law nuisances only if they are unusually deleterious to neighbors).

328. How, if at all, might the location of these public-space zones be coordinated with conventional municipal zoning decisions? At one extreme, the two systems could be entirely integrated; for example, all sidewalks adjacent to lands in industrial zones might be automatically designated “Red.” Conversely, the public-space zones could be designated on an independent overlay map. Partly because police officers and citizens are unlikely to be aware of the boundaries of conventional zones, the overlay approach, which is far more flexible, seems generally superior.

Once the Red, Yellow, and Green Zones had been established, individual citizens might spontaneously enforce the varying rules of decorum. A pedestrian in a Yellow Park might be more likely to tell a chronic panhandler to desist. Or, to revert to a prior example, if three sophomores were to have been panhandled as a group in a Green Zone, the fact they had been in that zone might affect how each reacted to the others' responses to the alms seeker.

VI. THE FEDERAL CONSTITUTIONAL RIGHTS OF INDIVIDUALS WHO CHRONICALLY MISBEHAVE IN PUBLIC SPACES

Both informal and formal systems for zoning public spaces pose significant federal constitutional issues, although of somewhat different sorts. *Papachristou* highlights the significant due process dimensions of the informal zoning approach.³²⁹ However, advocates for street people usually challenge explicit ordinances, not informal practices. An extraordinary number of legal authorities bear on the legality of official public-space zoning. Because public order is the stuff of mayoral campaigns, one might suppose that judicial review of municipal decisions would mainly involve application of local or state legal norms—for example, provisions in municipal charters, state statutes, or state constitutions. As in so many other fields of law, however, advocates have made the heavy artillery of the Federal Constitution their primary mode of attack, and most judges have acquiesced in this nationalization of the issues.

Each term, the Supreme Court typically renders several decisions that touch on the balance between individual and majority rights in the use of public streets, sidewalks, and parks. These precedents enable attorneys who challenge municipal restrictions on street behavior to invoke a wide array of federal constitutional clauses. For example, in a leading case, *Pottinger v. City of Miami*,³³⁰ a class action brought on behalf of Miami's street people, the plaintiffs' complaint invoked four different amendments to the United States Constitution, as well as the unenumerated federal constitutional rights of privacy and travel.

Ordinary pedestrians are not parties in these cases, and they are also unlikely to appear as witnesses. Typical is *Pottinger*, which pitted street people against city officials. Despite the best efforts of city attorneys, this lineup of parties creates a risk that a judge assigned to a street-law case will have a one-sided impression of the liberty issues at stake. For example, panhandlers who make a downtown space uninviting conceivably may infringe on other

329. See *supra* text at notes 240–46; *infra* note 459. The due process issues are particularly salient when police officers enforce informal neighborhood rules of conduct. See *supra* text accompanying notes 313–16.

330. 810 F. Supp. 1551 (S.D. Fla. 1992), *remanded for limited purposes*, 40 F.3d 1155 (11th Cir. 1994).

pedestrians' privacy,³³¹ right of travel, "right to be left alone,"³³² and ability "peaceably to assemble"³³³ in an agora. The characterization of pedestrian interests in the prior sentence is not meant to imply a recommendation that a judge hold that a pedestrian has a federal constitutional right to inviting public spaces. The point, rather, is that the rules of street law affect the liberty interests of all who are mobile, many of whom may not be before the court.³³⁴

This part focuses on three federal constitutional issues that public-space zoning against chronic street misconduct would raise most sharply: panhandlers' freedom of speech; and bench squatters' right of travel and immunity from prosecution for status. In general, the emerging case law on these three issues is encouraging cities to engage in the official zoning of public space.

Another important constitutional issue warrants attention at the outset. Government efforts to treat persons by category may run afoul of the Equal Protection Clause. Because neither poverty nor homelessness is a "suspect classification,"³³⁵ the principal legal question would be de facto discrimination by race. Between 1970 and 1990, the population of street people in many downtowns went from disproportionately white to disproportionately black.³³⁶ A crackdown ordinance, even if racially neutral on its face, would be vulnerable to an equal protection challenge if city legislators had harbored racial animus when adopting the ordinance or if officials had administered it in a racially discriminatory fashion.³³⁷

This issue is strikingly absent in street-law litigation. Although racial tensions unquestionably pervade American life, the *Pottinger* advocates and

331. See *Loper v. New York City Police Dep't*, 802 F. Supp. 1029, 1042-45 (S.D.N.Y. 1992), *aff'd*, 999 F.2d 699 (2d Cir. 1993); see also 2 FEINBERG, *supra* note 46, at 22-24.

332. See *Olmstead v. United States*, 277 U.S. 438, 478 (1928) (Brandeis, J., dissenting) (objecting to introduction of evidence officials had obtained by wire-tapping telephone conversations); see also *FCC v. Pacifica Found.*, 438 U.S. 726, 748 (1978) (stressing right to be left alone in one's home); cf. *Pro-Choice Network v. Schenk*, 67 F.3d 377, 394 (2d Cir. 1995) (en banc) (Winter, J., concurring) (propounding principle that "the First Amendment does not, in any context, protect coercive or obstructionist conduct that intimidates or physically prevents individuals from going about ordinary affairs").

333. U.S. CONST. amend. I.

334. Cf. Richard A. Posner, *Free Speech in an Economic Perspective*, 20 SUFFOLK U. L. REV. 1 (1986) (suggesting how free speech doctrine might be attuned to both harms and benefits of speech); Frederick Schauer, *Uncoupling Free Speech*, 92 COLUM. L. REV. 1321 (1992) (focusing on who should have to "pay" for rights to free speech).

335. See, e.g., *Harris v. McRae*, 448 U.S. 297, 323 (1980) (poverty is not suspect classification); *Dandridge v. Williams*, 397 U.S. 471, 485 (1970) (judging statute that affected class of AFDC recipients according to "reasonable basis" standard); *Johnson v. City of Dallas*, 860 F. Supp. 344, 355-57 (N.D. Tex. 1994) (homeless do not constitute suspect or quasi-suspect class for equal protection purposes), *rev'd on other grounds*, 61 F.3d 442 (5th Cir. 1995); *City of Seattle v. Webster*, 802 P.2d 1333, 1340-41 (Wash. 1990) (rejecting assertion that Seattle "pedestrian interference ordinance" violated equal protection rights of class of homeless persons), *cert. denied*, 500 U.S. 908 (1991).

336. See *supra* text accompanying notes 281-84.

337. See *Arlington Heights v. Metropolitan Hous. Dev. Corp.*, 429 U.S. 252 (1977); *Washington v. Davis*, 426 U.S. 229 (1976).

other attorneys for street people, who typically show no hesitation in making a scattershot constitutional attack, rarely plead that a crackdown policy is racially discriminatory.³³⁸ For a variety of reasons, in most cities this charge would be difficult to prove. Partly because the effects of alcoholism, drug addiction, and mental illness are colorblind, even in the 1980s and early 1990s, whites constituted a significant fraction of panhandlers, bench squatters, and other downtown street people.³³⁹ The timing of the crackdowns also does not suggest a racial motive; while black street people had begun to increase in number in the early 1980s, many cities did not start their crackdowns until a decade later. More probative still, many of the cities that implemented street-control programs in the early 1990s could not plausibly be regarded as hotbeds of anti-black animus.³⁴⁰ In Atlanta and Washington, D.C., for example, blacks dominate local politics.³⁴¹ The likes of Berkeley, Evanston, and Seattle are hardly known for racist virulence.³⁴² In general, white prejudice against blacks has been in decline since 1960;³⁴³ indeed, it was this decline that enabled more street blacks to go downtown in the 1970s and 1980s.³⁴⁴ Pedestrians' concerns about street disorder span all centuries, social classes, and races.³⁴⁵ While advocates and judges must be alert to evidence of racial discrimination, they should also recognize that a city can have entirely legitimate reasons for attempting to stem misconduct in public spaces.

A. Panhandlers' Freedom of Speech

Controls on panhandling raise numerous subissues in the increasingly baroque architecture of First Amendment doctrine.³⁴⁶ Indeed, in the first half

338. In *Tobe v. City of Santa Ana*, 892 P.2d 1145, 1150 n.1 (Cal. 1995), the plaintiffs eventually abandoned their only equal protection argument, which was that Santa Ana had discriminated against the *homeless* as a class. *But cf.* *Streetwatch v. National R.R. Passenger Corp.*, 875 F. Supp. 1055, 1066–67 (S.D.N.Y. 1995) (plaintiffs had not proved allegation that Amtrak had enforced anti-loitering policies in Penn Station in racially discriminatory fashion).

339. See JENCKS, *HOMELESS*, *supra* note 1, at 22 (stating that surveys find somewhat less than half of all homeless adults are black); ROSSI, *supra* note 3, at 123 (stating that 28.9% of members of Chicago street sample self-reported as white, and 55.6% as black).

340. *Cf.* Marlies Simons, *In France's Fabled South, a Plague of Panhandlers*, N.Y. TIMES, Aug. 22, 1995, at A4 (describing how twelve cities in southern France have instituted bans on panhandling after experiencing influxes of (presumably white) panhandlers from northern and eastern Europe).

341. On street-control initiatives in these cities, see NO HOMELESS PEOPLE ALLOWED, *supra* note 6, at 40–43, 55–57; RIGHT TO REMAIN NOWHERE, *supra* note 4, at 27–34, 116–26.

342. Developments in these localities are described *supra* note 25 (Berkeley); *supra* note 169 (Evanston); and in RIGHT TO REMAIN NOWHERE, *supra* note 4, at 107–15 (Seattle).

343. See, e.g., HOWARD SCHUMAN ET AL., RACIAL ATTITUDES IN AMERICA: TRENDS AND INTERPRETATIONS 71–138 (1985) (reporting time trends in white responses to survey questions).

344. See *supra* text accompanying notes 281–84.

345. See *supra* text accompanying notes 118, 181–88.

346. There are numerous law review articles on this issue. Some observers are inclined to decide all speech issues in favor of panhandlers. See, e.g., Hershkoff & Cohen, *supra* note 15; Nancy A. Millich, *Compassion Fatigue and the First Amendment: Are the Homeless Constitutional Castaways?*, 27 U.C. DAVIS L. REV. 255 (1994). Commentators who stress the community interest in public control of misconduct tend to argue that begging is not protected speech under the First Amendment. See sources cited

of the 1990s, various lower courts effectively prevented enforcement of Berkeley, San Francisco, and New York City anti-panhandling ordinances on the basis of freedom of speech.³⁴⁷ Although the Supreme Court has yet to decide a begging case, it has held that the First Amendment covers a charity's efforts to solicit contributions.³⁴⁸ The Court therefore is likely to agree with the judges who have held that an individual's solicitation of alms falls within the ambit of the First Amendment.³⁴⁹ Although there are credible arguments to the contrary,³⁵⁰ the following discussion assumes, for purposes of analysis, that ordinary panhandling does involve enough "speech" or "expressive conduct" to bring the First Amendment into play.³⁵¹

1. *Commercial or Political Speech?*

The Supreme Court's precedents safeguard political speech the most and pornography the least. Commercial speech has received only slightly more protection than pornography.³⁵² There are reasons to suppose that the Court, were it ever to review a begging case, would categorize begging as commercial speech. Ordinarily, a panhandler's intended message is wholly transactional, namely, "I would like you to give me money." A beggar essentially invites a pedestrian to enter into an exchange. If the exchange were to be completed, the beggar would receive alms, and the donor would receive the feeling of satisfaction that commonly follows an act of generosity.

Advocates for street people have attempted to elevate panhandling to the status of political speech. They assert that a destitute beggar's pleas, even if

infra note 350. Cynthia Mabry stands out for her serious regard for the interests of *both* street people and ordinary pedestrians. See Mabry, *supra* note 135. However, although she rightly distinguishes the legal regimes appropriate for street pavements, sidewalks, parks, and other areas, she somewhat underestimates the utility of further legal distinctions within each of these categories. See *id.* at 330–36.

347. Berkeley Community Health Project v. City of Berkeley, No. C 95–0665 CW, 1995 WL 293899, at *4–7 (N.D. Cal. May 5, 1995) (granting preliminary injunction against enforcement of Berkeley's anti-solicitation ordinance, primarily on basis of Liberty of Speech Clause of California Constitution); Blair v. Shanahan, 775 F. Supp. 1315, 1322–25 (N.D. Cal. 1991) (declaring California statute prohibiting accosting for purpose of begging to violate First Amendment, thereby deterring San Francisco from enforcing statute), *rev'd & remanded*, 38 F.3d 1514 (9th Cir. 1994), *cert. denied*, 115 S. Ct. 1698 (1995); Loper v. New York City Police Dep't, 999 F.2d 699 (2d Cir. 1993) (enjoining city's enforcement of state anti-begging statute).

348. See Village of Schaumburg v. Citizens for a Better Env't, 444 U.S. 620, 633 (1980), *followed in*, e.g., International Soc'y for Krishna Consciousness v. Lee, 505 U.S. 672, 677 (1992).

349. See, e.g., Blair, 775 F. Supp. at 1324. Even one of the most skeptical judicial opinions, Young v. New York City Transit Authority, 903 F.2d 146, 153–157 (2d Cir.), *cert. denied*, 498 U.S. 984 (1990), ends up assuming *arguendo* that begging involves "expressive conduct." *But see* Ulmer v. Municipal Court, 127 Cal. Rptr. 445, 447 (Ct. App. 1976) (holding that First Amendment does not cover accosting to solicit money).

350. See Fay Leoussis, *The New Constitutional Right to Beg—Is Begging Really Protected Speech?*, 14 ST. LOUIS U. PUB. L. REV. 529 (1995); Jonathan Mallamud, *Begging and the First Amendment*, 46 S.C. L. REV. 215, 216, 230–35 (1995); Teir, *supra* note 21, at 321–24.

351. I also assume that ordinary bench squatting is *not* expressive conduct. See *infra* note 420 and accompanying text.

352. A leading case on the protected, but secondary, status of commercial speech is Central Hudson Gas & Electric Corp. v. Public Service Commission, 447 U.S. 557, 562–63 (1980).

entirely self-centered, unintentionally convey additional information about social and economic conditions, namely the existence of extreme economic and social poverty.³⁵³

It is true that someone who encounters an ordinary panhandler may be spurred to political thoughts that the panhandler had no intent to provoke. Advocates for street people might imagine that panhandling will cause passersby to reflect on (1) the inadequacies of welfare benefits; or (2) the evils of capitalism. This would be wishful thinking on their part. The two leading field studies on the subject suggest that panhandlers' most powerful unintended messages are hardly left-liberal ones. Rather, these studies show that passersby are provoked into thinking (3) that poverty is caused by individual irresponsibility, not structural forces;³⁵⁴ and, when the panhandler is black, (4) that the stereotype that blacks are lazy is true.³⁵⁵ Perhaps a panhandler's most emphatic unintended messages are (5) that "broken windows" are not being repaired at the locale in question,³⁵⁶ and (6) that the work ethic is in decline.³⁵⁷ The essential point is that the ordinary panhandler does not intend to communicate on *any* of these six political topics, but simply to close a commercial transaction.

Judges should reject the advocates' position that ordinary panhandling is political speech. To trivialize the First Amendment in this way risks undermining its legitimacy.³⁵⁸ If the advocates' theory were accepted, the most activist portions of First Amendment law would bear on the niceties of municipal street codes. If neutrally applied, the theory would promote *all* commercial sidewalk speech to political speech. Every solicitor who hails a passerby imparts information about social conditions. A pedestrian learns something about the drug problem when a dealer whispers an offer. An octogenarian wearing a sandwich board advertising a restaurant conveys a bit of information about the financial resources of the elderly. The experience of buying an ice-cream cone from an immigrant street vendor may influence a purchaser's views on immigration policy. A teenager who tucks handbills for tanning salons under the windshield wipers of parked cars can be seen as publicizing the virtues (or vices) of a market economy.

As these examples imply, only a sidewalk speaker who consciously intends to communicate a message on a political topic should be regarded as a political

353. See, e.g., Hershkoff & Cohen, *supra* note 15, at 898-901.

354. "[T]he more respondents are panhandled, the more likely they are to regard poverty as a function of personal choice," and therefore to lessen their sympathy toward the poor. Wilson, *Exposure to Panhandling*, *supra* note 15, at 16.

355. See *supra* note 73 and accompanying text.

356. See *supra* notes 23, 49-50, 77 and accompanying text.

357. See *supra* text accompanying notes 78-80.

358. The immediate push for a Flag Desecration Amendment after the Court's decision in *Texas v. Johnson*, 491 U.S. 397 (1989), shows that this is not a fanciful concern.

speaker.³⁵⁹ For example, a beggar whose verbal pitch regularly includes a lament about the stinginess of a city's General Assistance policies warrants the most robust First Amendment protection.³⁶⁰ The ordinary panhandler does not.

In addition, panhandlers are notoriously prone to engage in fraud³⁶¹ and duress.³⁶² As the Court has noted in a related context, hurrying pedestrians victimized by these sorts of solicitors' practices are unlikely to stop to complain to authorities.³⁶³ The Court's decisional law on commercial speech has stressed the legitimacy of the state's interest in regulating the exchange process to prevent a party from engaging in misconduct that would reduce the likelihood that the other party would gain from the proposed trade. The Court's classification of ordinary begging as commercial speech would have the merit of bringing these subdoctrines into play.³⁶⁴ If panhandling were so classified, for example, the prevalence of fraud and duress would more easily justify the imposition of some sort of permit system for panhandlers.³⁶⁵

359. See *Spence v. Washington*, 418 U.S. 405, 410–11 (1974) (protecting unconventional flag display on account of "intent to convey a particularized [political] message"); *White House Vigil for the ERA Comm. v. Clark*, 746 F.2d 1518, 1539–40 (D.C. Cir. 1984) (act of leaving package on sidewalk, not intended as form of communication, is not expressive conduct); Peter Meijjes Tiersma, *Nonverbal Communication and the Freedom of "Speech,"* 1993 Wis. L. REV. 1525, 1552–62 (differentiating communication-by-conduct from inference-from-conduct and concluding communicative conduct must have meaning and intent). Tiersma applies his analytic approach to the homeless in *id.* at 1576.

360. On whether the level of First Amendment protection is to be elevated when commercial speech is intertwined with fully protected speech, see, e.g., *Board of Trustees v. Fox*, 492 U.S. 469, 474–75 (1989) (holding that Tupperware parties are commercial speech despite some teaching of home economics); *Bolger v. Youngs Drug Prods. Corp.*, 463 U.S. 60, 67–68 (1983) (classifying pamphlets advertising contraceptive devices as commercial speech).

361. On beggars' time-honored resort to fraud (and, in extreme instances, self-maiming), see 4 MAYHEW, *supra* note 185, at 401–31 (fraud), 431–33 (self-maiming) (London in 1860s); Kenneth L. Kusmer, *The Underclass in Historical Perspective: Tramps and Vagrants in Urban America, 1870–1930*, in ON BEING HOMELESS: HISTORICAL PERSPECTIVES 21, 28–30 (Rick Beard ed., 1987); Stanley, *supra* note 168, at 1270–71 (reporting assessments of observers in late-nineteenth-century United States); Davidoff, *supra* note 57, at 36, 41, 52 (noting that many New York subway panhandlers of 1990s had told author "monstrous lies"). In a speech in 1877, Francis Wayland included a poem on the subject:

He tells you of his starving wife,
His children to be fed,
Poor little, lovely innocents,
All clamorous for bread—
And so you kindly help to put
A bachelor to bed.

Stanley, *supra* note 168, at 1270. Wayland was then serving as the Dean of the Yale Law School. *Id.*

362. The problem of duress is addressed in the proliferating municipal ordinances that criminalize aggressive panhandling.

363. *International Soc'y for Krishna Consciousness v. Lee*, 505 U.S. 672, 684 (1992) (discussing solicitation within airport terminal buildings).

364. See, e.g., *Ibanez v. Florida Dep't of Business & Professional Regulation*, 114 S. Ct. 2084, 2088 (1994) (false, deceptive, or misleading commercial speech may be banned altogether); *Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n*, 447 U.S. 557, 563 (1980) (protection for commercial speech is dependent on informational value of such speech).

365. See *C.C.B. v. State*, 458 So. 2d 47, 50 (Fla. Dist. Ct. App. 1984) (dictum) (while city may not ban begging entirely, it may regulate beggar's freedom of speech by means of "narrowly drawn permit system"). Wilmington, Delaware, has adopted an ordinance that requires panhandlers who wish to ply their trade for more than five days a year to apply for a permit, which is granted without fee. *Begging in*

2. *Permissible Regulation of Time, Place, and Manner*

The Supreme Court's First Amendment doctrine, to the dismay of many critics,³⁶⁶ currently involves an elaborate taxonomy of public places. The Court confers the greatest protections on speech in a "traditional public forum."³⁶⁷ Perhaps influenced by Justice Roberts's overly broad dictum in *Hague*, Justices commonly assert in the broadest terms that streets, sidewalks, and parks—presumably *all* of them—fit into this classification.³⁶⁸ Taken literally, this approach would turn the First Amendment into a battering ram that would require a typical city to apply a single, monolithic set of rules to the close to 45% of its area devoted to open-access public uses.³⁶⁹

Examined more closely, however, Supreme Court precedents give a city considerable scope to differentiate controls on speech through "time, place, and manner" regulations. According to a leading case, *Perry Education Ass'n v. Perry Local Educators' Ass'n*, time, place, and manner regulation of speech in a traditional public forum must be content neutral and "narrowly tailored to serve a significant government interest, and leave open ample alternative channels of communication."³⁷⁰ How would the hypothetical official Red-Yellow-Green zoning of panhandling³⁷¹ fare under *Perry*?

a. *Alternative Channels of Communication*

The hypothetical ordinance would impose its greatest "place" restrictions on speech in Green Zones, where it would prohibit even single instances of

Wilmington Now Is by Permit Only, NEW HAVEN REG., Feb. 23, 1995, at A2; cf. *Friedrich v. City of Chicago*, 619 F. Supp. 1129 (N.D. Ill. 1985) (on Chicago's permit system for street performers). See generally *Forsyth County v. Nationalist Movement*, 505 U.S. 123 (1992) (on permit systems and fees for speaking in public places).

366. See *United States v. Kokinda*, 497 U.S. 720, 741-42 & n.1 (1990) (Brennan, J., dissenting) (citing academic critics of Court's public forum doctrine).

367. One of the most publicized cases on public civility, *Kreimer v. Bureau of Police*, 958 F.2d 1242 (3d Cir. 1992), involved a library's efforts to control a malodorous and obnoxious patron. Reversing the trial judge, the appellate court held that the interior of a public library was a "designated," as opposed to a traditional, public forum, and that the library's rules governing noise and body odor were reasonable time, place, and manner restrictions. Prior to losing this action for declaratory relief, Kreimer had settled his damages claim against the library for \$80,000. See Robert Hanley, *Library Wins in Homeless-Man Case*, N.Y. TIMES, Mar. 25, 1992, at B8.

368. See, e.g., *United States v. Grace*, 461 U.S. 171, 177 (1983); *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 45 (1983) ("streets and parks" are "quintessential" traditional public forums).

369. Compare *Grace*, 461 U.S. at 179 (presuming that all sidewalks in Washington, D.C., warrant same regulatory regime) with *Burson v. Freeman*, 504 U.S. 191, 215-16 (1992) (Scalia, J., concurring) (some streets and sidewalks have not traditionally been used as public forums) and Robert C. Post, *Between Governance and Management: The History and Theory of the Public Forum*, 34 UCLA L. REV. 1713, 1793 n.294 (1987) (arguing that contrary to Court's broad characterization, some parks, such as federal wilderness preserves, are not traditionally used as public forums).

370. 460 U.S. at 45. As mentioned, *infra* text accompanying notes 402-03, the goals of content neutrality and narrow tailoring are inherently in tension.

371. See *supra* text accompanying notes 306-10.

panhandling. Would leaving 95% of the public spaces in a downtown area open to episodic panhandlers provide them with ample alternative channels? In practice, most Justices, thankfully, have recognized that public spaces are too diverse to be treated with *Hague*-like uniformity. In a scattering of decisions seldom analyzed as a group, the Supreme Court has allowed exceptionally strict controls, even on political speech, in narrowly selected public spaces where peacefulness is essential. These decisions sustained special speech restrictions on public sidewalks adjacent to delicate land uses³⁷² such as schools,³⁷³ courthouses,³⁷⁴ embassies,³⁷⁵ polling places,³⁷⁶ medical facilities,³⁷⁷ and private homes.³⁷⁸ Banning episodic panhandling in Green Zones should similarly survive First Amendment challenge.

Yellow-Zone restrictions, which would result in the prohibition of chronic panhandling in 95% of downtown, would have a far greater impact on total begging activity. Chronic practitioners account for most panhandling.³⁷⁹ Alms are undoubtedly easier to solicit in a highly trafficked and relatively safe central business district than in an unruly Red Zone.³⁸⁰ Nevertheless, that public-space zoning would significantly reduce the total incidence of begging is not necessarily constitutionally fatal³⁸¹ (assuming that begging even counts as speech). Over First Amendment objections, courts have allowed cities to limit speech, especially less-protected categories of speech, to a subset of

372. It is inconceivable that the Court would uphold especially stringent speech restrictions on sidewalks near prime mixing-bowl spaces such as sports stadiums and convention centers. *Cf. Carreras v. City of Anaheim*, 768 F.2d 1039 (9th Cir. 1985) (Free Speech Clause of California Constitution protects charitable solicitations at these spots).

373. *See Grayned v. City of Rockford*, 408 U.S. 104 (1972) (sustaining First Amendment challenge to ordinance aimed at limiting noise near schools).

374. *See Cox v. Louisiana*, 379 U.S. 559 (1965) (statute barring picketing with intent to interfere with administration of justice near state courthouse is valid on its face). *But cf. United States v. Grace*, 461 U.S. 171 (1983) (holding that First Amendment entitled solitary protesters to leaflet and hold signs on sidewalk immediately in front of Supreme Court).

375. *Boos v. Barry*, 485 U.S. 312 (1988) (sustaining ban on congregation of three or more people on sidewalks within 500 feet of embassy of foreign government).

376. *Burson v. Freeman*, 504 U.S. 191 (1992) (5–3 decision) (upholding statutory restriction on political campaigning within 100 feet of entrance to polling place).

377. *Madsen v. Women's Health Ctr., Inc.*, 114 S. Ct. 2516 (1994) (6–3 decision) (affirming injunction creating 36-foot no-protest zone on public lands around abortion clinic).

378. *Frisby v. Schultz*, 487 U.S. 474 (1988) (6–3 decision) (affirming suburb's restrictions on picketing by anti-abortion protesters outside of doctor's house).

It is worth noting that Justice Brennan dissented in most of the decisions cited in this sentence that were decided during his tenure. Yet even this staunchest of proponents of a monolithic law of public spaces has occasionally suggested the permissibility of spatial differentiation in controls. *See Members of the City Council v. Taxpayers for Vincent*, 466 U.S. 789, 830 (1984) (Brennan, J., dissenting) ("I have no doubt that signs posted on public property in certain areas . . . could contribute to the type of eyesore that a city would genuinely have a substantial interest in eliminating.").

379. *See supra* note 44.

380. *See Goldstein, Panhandlers at Yale, supra* note 13, at 315–16 (panhandlers seek out locations where most pedestrians will feel safe).

381. For example, a ban on picketing in front of an abortionist's home, sustained in *Frisby*, 487 U.S. 474, reduces the amount of speech that right-to-life advocates can address to physicians who perform abortions. Without expressly acknowledging this effect, the *Frisby* majority found that "the ordinance preserves ample alternative channels of communication . . ." *Id.* at 482–84.

locations—for example, symbolic camping to designated sites,³⁸² picketing to nonresidential areas,³⁸³ nude bathing to specific beaches,³⁸⁴ commercial billboards and adult uses to commercial and industrial zones,³⁸⁵ and posting of signs to private lands.³⁸⁶

The outcomes of two highly publicized cases in New York City largely turned on the issue of alternative venues for panhandling. Although anti-begging statutes date back to the eighteenth century³⁸⁷ and are in force in numerous states and cities,³⁸⁸ they have only recently been subjected to First Amendment challenge. In *Young v. New York City Transit Authority*,³⁸⁹ a panel of the Second Circuit, stressing that beggars had alternative venues above ground, reversed the district court and sustained a blanket prohibition on begging in the New York City subway system.³⁹⁰ In *Loper v. New York City Police Department*,³⁹¹ however, a different panel of the Second Circuit enjoined the city's enforcement of a New York state penal statute³⁹² that criminalized remaining or wandering about in a public place for the purpose of begging. Interpreting the statute as a ban on begging (presumably even episodic begging) throughout the city, the *Loper* court held that it violated the First Amendment because it left no channels open for panhandling.³⁹³

The hypothetical public-space zoning ordinance is, of course, much less stringent than the anti-begging statute struck down in *Loper*. The Red-Yellow-Green ordinance would leave open 5% of city spaces for unlimited panhandling, and allow any particular individual to occasionally panhandle in an additional 90%. Many face-to-face channels for expressing the message, "I would like you to give me money," would be preserved. In addition, even in the restricted zones, a destitute person could deliver this message in numerous

382. See *Clark v. Community for Creative Non-Violence*, 468 U.S. 288 (1984).

383. *Frisby*, 487 U.S. 474.

384. Cf. *Craft v. Hodel*, 683 F. Supp. 289, 291 (D. Mass. 1988) (mem.) (First Amendment does not shield politically motivated nude bathing at Cape Cod Seashore National Park).

385. See, e.g., *City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41, 53 (1986) (allowing city to limit adult theatres to zones comprising about five percent of city's land area); *Metromedia, Inc. v. City of San Diego*, 453 U.S. 490, 503–12 (1981) (plurality opinion) (while ban on purely commercial billboards in noncommercial zones does not violate First Amendment, general ban on billboards is unconstitutional).

386. *Members of the City Council v. Taxpayers for Vincent*, 466 U.S. 789, 817 (1984).

387. See *Loper v. New York City Police Dep't*, 802 F. Supp. 1029, 1032 (S.D.N.Y. 1992) (tracing New York's anti-begging statute back to 1788), *aff'd*, 999 F.2d 699 (2d Cir. 1993); Leoussis, *supra* note 350, at 543 (describing anti-begging laws of late eighteenth century). On the fresh batch of anti-begging statutes that Northern states enacted in 1866–1885, see Stanley, *supra* note 168, at 1273–80.

388. See Hershkoff & Cohen, *supra* note 15, at 896 n.5; Millich, *supra* note 346, at 333–36.

389. 903 F.2d 146, 160 (2d Cir.), *cert. denied*, 498 U.S. 984 (1990).

390. See *also* *People v. Schrader*, 617 N.Y.S.2d 429 (Crim. Ct. 1994) (holding this ban on subway begging did not abridge freedom of speech provisions of New York Constitution).

391. 999 F.2d 699 (2d Cir. 1993).

392. N.Y. PENAL LAW § 240.35(1) (McKinney 1989).

393. *Loper*, 999 F.2d at 705; see *C.C.B. v. State*, 458 So. 2d 47, 50 (Fla. Dist. Ct. App. 1984) (invalidating Jacksonville's total ban on begging as violation of First Amendment and state constitutional provision); see *also* *Schad v. Borough of Mount Ephraim*, 452 U.S. 61, 75–77 (1981) (striking down ordinance prohibiting live entertainment throughout borough).

other ways, for example, by applying in person to the many charities and public-welfare agencies that consider appeals for financial aid, posting written pleas for aid on public bulletin boards, or perhaps by incorporating a face-to-face plea for alms into an explicitly political message.³⁹⁴

b. *The Significance of the Government Interest*

Part II reviewed in some detail the many reasons why a city might wish to control chronic street nuisances in general, and panhandling in particular.³⁹⁵ Cities must mend “broken windows”³⁹⁶ or risk losing residents, workers, and shoppers to the suburbs. City attorneys should stress that harms from chronic panhandling not only accumulate as time passes, but tend to become more aggravated over time, as pedestrians sense that the protractedness of the behavior itself indicates a breakdown in the system of social control.

The Supreme Court itself has adverted to the legitimacy of several specific governmental interests in controlling panhandling. First, recognizing that even nonaggressive face-to-face solicitation is intrusive, the Court has held that a city has greater room to regulate solicitation in public forums than to regulate other manners of speech.³⁹⁷ Compared to, say, leafleting, solicitation is seen as more disruptive of traffic flows because pedestrians must halt to consider and complete transactions.³⁹⁸ In addition, to quote Justice O’Connor, “[a]s residents of metropolitan areas know from daily experience, confrontation by a person asking for money . . . is more intrusive and intimidating than an encounter with a person giving out information.”³⁹⁹ Unlike the offer of a handbill, a spoken plea carries an implicit request for eye contact and an oral response. This intrudes more on a pedestrian’s privacy and, because the act is more aggressive, creates a more plausible fear of physical danger.⁴⁰⁰ Among its many other interests, in short, a city has a legitimate concern in protecting the rights of its pedestrians to be left alone.⁴⁰¹

394. See *supra* text accompanying notes 353–60.

395. See *supra* text accompanying notes 30–112.

396. See *supra* text accompanying notes 23, 49–50, 70–72, 77.

397. See *International Soc’y for Krishna Consciousness, Inc. v. Lee*, 505 U.S. 672, 684–85 (1992) (First Amendment protects leafleting, but not solicitations, within airport terminal buildings).

398. See *Heffron v. International Soc’y for Krishna Consciousness, Inc.*, 452 U.S. 640, 665 (1981) (Blackmun, J., concurring and dissenting).

399. *United States v. Kokinda*, 497 U.S. 720, 734 (1990) (plurality opinion).

400. On the weight of these governmental interests, compare the views of Judge Orrick in *Blair v. Shanahan*, 775 F. Supp. 1315, 1324–25 (N.D. Cal. 1991) (public interest in avoiding “annoyance” insufficient to justify regulation of accosting by beggars), *rev’d and remanded on other grounds*, 38 F.3d 1514 (9th Cir. 1994), *cert. denied*, 115 S. Ct. 1698 (1995), with *People v. Zimmerman*, 19 Cal. Rptr. 2d 486, 488–89 (App. Dep’t Super. Ct. 1993) (declining to follow Orrick’s holdings in *Blair*).

401. See *supra* note 332 and accompanying text.

c. *Narrow Tailoring: Of Street Performers and Solicitors for Charities*

Like the maxims of equity, basic First Amendment doctrines tend to run in contradictory pairs. *Perry*, for example, requires that speech restrictions be narrowly tailored to avoid the vice of "overbreadth."⁴⁰² At the same time, another First Amendment doctrine insists that speech regulation be content neutral, which often forces a government to regulate speech in larger swaths than it would otherwise prefer.⁴⁰³ With this pair of doctrines at his disposal, Justice Brennan could readily conclude that virtually any municipal speech regulation that came before him violated the First Amendment.

One of the liveliest issues in panhandling law is whether the First Amendment permits a municipality to prohibit panhandling while allowing other forms of cash solicitation. In *Young v. New York City Transit Authority*, for example, both the district court judge and Judge Meskill of the Second Circuit, who concurred in part and dissented in part, concluded that New York's subway-system regulations, which banned begging but permitted solicitations by charitable organizations and artistic performers, in effect involved illegal content discrimination.⁴⁰⁴ Federal district judges have found the Berkeley and San Francisco anti-panhandling programs to be unconstitutional for analogous reasons.⁴⁰⁵

The basic issue in these cases is whether the First Amendment prevents a city from permitting commercial speech (or expressive conduct) that has neutral or good side effects while simultaneously barring commercial speech that has bad side effects. Street performers who please the multitudes tend to attract more pedestrians to public spaces.⁴⁰⁶ No wonder William H. Whyte loves them. By contrast, panhandlers and other chronic street miscreants tend

402. For example, a blanket ban on begging might be challenged as an overly broad method of preventing fraud and duress by alms-seekers. *Cf. supra* text accompanying notes 361–65. A classically overbroad ordinance was involved in *Board of Airport Commissioners v. Jews for Jesus, Inc.*, 482 U.S. 569, 570, 577 (1987) (unanimous decision striking down regulation banning all "First Amendment activities" at airport).

403. *See, e.g., R.A.V. v. City of St. Paul*, 505 U.S. 377, 391 (1992) (invalidating ordinance aimed at aggressors acting on one or more of narrow set of discriminatory motivations).

404. *See* 903 F.2d 146, 168 (2d Cir. 1990) (Meskill, J., concurring in part and dissenting in part); 729 F. Supp. 341, 352–59 (S.D.N.Y. 1990) (Sand, J.). The circuit court majority, however, rejected this position. *See* 903 F.2d at 154–57, 160–62.

405. *See Berkeley Community Health Project v. City of Berkeley*, 1995 WL 293899, at *6 (N.D. Cal. May 5, 1995) (California Constitution's Liberty of Speech Clause bars city from prohibiting solicitations for cash while permitting other speech); *Blair v. Shanahan*, 775 F. Supp. 1315, 1325–26 (N.D. Cal. 1991), *aff'd in part, dismissed in part and remanded*, 38 F.3d 1514 (9th Cir. 1994), *cert. denied*, 115 S. Ct. 1698 (1995).

406. A city may have legitimate reasons for regulating aspects of street performances that disrupt traffic or annoy ordinary pedestrians and neighbors. *See Davenport v. City of Alexandria*, 748 F.2d 208, 209–10 (4th Cir. 1984) (holding that city's total ban on street performances on downtown sidewalks violated First Amendment, even though city allowed performances in eight downtown parks and plazas by permit); *Friedrich v. City of Chicago*, 619 F. Supp. 1129, 1147–48 (N.D. Ill. 1985) (some aspects of permit system for street performers were too restrictive).

unintentionally to reduce pedestrian traffic.⁴⁰⁷ Similarly, while both street performers and solicitors for charities personify the work ethic, panhandlers personify the *erosion* of that ethic.⁴⁰⁸ At least when speech and religion are not at issue, constitutional doctrine generally allows a city to use its police powers to encourage good activities⁴⁰⁹ and to discourage bad ones.⁴¹⁰ Indeed, a hallmark of good government is the capacity to make this distinction.

First Amendment jurisprudence, on the other hand, properly focuses on protecting minorities from majoritarian oppression.⁴¹¹ Compared to political, artistic, and religious expression, however, panhandling involves an extremely low grade of speech (if it involves speech at all). Apart from the gains from trade that it brings, does ordinary panhandling ever contribute to an individual's self-expression and self-realization?⁴¹² Or help propagate a message that tends to be undersupplied?⁴¹³

As argued above, ordinary panhandling at most is a form of commercial speech.⁴¹⁴ Supreme Court precedents provide cities wide scope to distinguish among different categories of low-value speech. *Renton v. Playtime Theaters, Inc.* sustained an ordinance that involved content discrimination (in that instance, against adult films) on account of the adverse neighborhood effects of theaters that show such films.⁴¹⁵ The Court has permitted Puerto Rico to allow some of the island's noncasino gambling operations to engage in on-island advertising, but to deny that right to casino owners, whose activities the Commonwealth saw as less connected to the island's roots.⁴¹⁶

407. See *supra* notes 69–72 and accompanying text.

408. See *supra* text accompanying notes 78–80.

409. See, e.g., *Penn Cent. Transp. Co. v. City of New York*, 438 U.S. 104 (1978) (sustaining city's landmarks preservation law against federal takings challenge).

410. See, e.g., cases cited *supra* notes 382–86.

411. See, e.g., *Texas v. Johnson*, 491 U.S. 397 (1989) (First Amendment protects politically motivated flag desecration); *Cohen v. California*, 403 U.S. 15 (1971) (First Amendment protects political vulgarity on jacket); cf. *Goldstein v. Town of Nantucket*, 477 F. Supp. 606 (D. Mass. 1979) (town cannot let merchants' opinions control who can obtain permit to sing in streets).

412. This conception of the purpose of the First Amendment is featured in, e.g., MARTIN H. REDISH, *FREEDOM OF EXPRESSION: A CRITICAL ANALYSIS* 9–40 (1984) (First Amendment serves value of "individual self realization"); STEVEN H. SHIFFRIN, *THE FIRST AMENDMENT, DEMOCRACY, AND ROMANCE* 140–69 (1990) (advocating celebration of dissent and "romantic" view of First Amendment goals).

413. This basic understanding of the First Amendment is advanced in Daniel A. Farber, *Free Speech Without Romance: Public Choice and the First Amendment*, 105 HARV. L. REV. 554 (1991). Farber asserts that commercial speech, unlike political speech, tends *not* to be undersupplied, because it is less of a "public good" in the economist's sense. *Id.* at 562–68. By this reasoning, there is no First Amendment basis for protecting a beggar's communication of "I would like you to give me money," as opposed to "Look what the American system has made me do." *But cf. id.* at 567 (charitable solicitation on behalf of homeless is public good that tends to be undersupplied).

414. See *supra* text accompanying notes 346–65.

415. 475 U.S. 41, 47–49 (1986). This precedent, which stresses the disposition of patrons to misbehave, would tend to support a city's efforts to regulate where charities distribute free meals. See also *supra* notes 275–76 and accompanying text.

416. See *Posados de Puerto Rico Ass'n v. Tourism Co.*, 478 U.S. 328, 342–43 (1986); see also *R.A.V. v. City of St. Paul*, 505 U.S. 377, 420–22 (1992) (Stevens, J., concurring) (reviewing Court precedents that sustain various forms of content discrimination); *Penn Advertising v. Mayor of Baltimore*, 63 F.3d 1318, 1325–26 (4th Cir. 1995) (upholding, against First Amendment challenge, ordinance prohibiting use of

These sorts of precedents free a federal judge from engaging in exacting review of many of the minor categorical distinctions that are inevitably found in municipal street codes. Many different sorts of commercial solicitors—vendors, performers, charities, panhandlers—may wish to use the streets. Each group affects the quality of street life in different ways. It is hard to fathom why courts should construe the First Amendment to bar city regulators from distinguishing among these broad commercial groups according to the nature of the side effects of their presence. Another basic constitutional value is federalism, which is hardly promoted when federal judges actively second-guess the contents of state and local street codes.⁴¹⁷

B. *Bench Squatters' Constitutional Rights*

In the early 1990s, advocates initiated lawsuits to establish the rights of the street homeless to camp *overnight* in certain public spaces in downtown areas of large cities. The trial judge in *Pottinger v. City of Miami*⁴¹⁸ and the intermediate appellate court in *Tobe v. City of Santa Ana*⁴¹⁹ (the two leading cases) ruled that the U.S. Constitution indeed requires a city to allow a bench squatter to sojourn in some public place. First Amendment issues were not central in either *Pottinger* or *Tobe* because bench squatting typically is too passive to constitute “expressive conduct.”⁴²⁰ Rather, the advocates’ early successes in both cases mainly turned on the right of travel and the right to be free from prosecution for a status crime.

billboards in certain locations to advertise cigarettes). *But cf.* *Edenfield v. Fane*, 113 S. Ct. 1792, 1796 (1993) (striking down restriction on CPAs’ solicitation of new business); *City of Cincinnati v. Discovery Network, Inc.*, 113 S. Ct. 1505, 1514–15 (1993) (holding that because all newsracks are “equally unattractive,” city’s interest in aesthetics did not justify regulation that permitted dispensing of conventional newspapers, but not commercial handbills, from newsracks situated on public property).

417. *See infra* text accompanying notes 470–73; *cf.* Posner, *supra* note 334, at 10–11, 19 (arguing that municipal restrictions on speech are less worrisome than state or federal restrictions).

418. 810 F. Supp. 1551 (S.D. Fla. 1992) (Atkins, J.), *remanded for limited purposes*, 40 F.3d 1155 (11th Cir. 1994).

419. 27 Cal. Rptr. 2d 386 (Ct. App. 1994), *rev’d*, 892 P.2d 1145 (Cal. 1995).

420. A leading case on expressive conduct is *United States v. O’Brien*, 391 U.S. 367 (1968) (sustaining government prohibition on draftcard burning, conduct that Court regarded as mixing “speech” and “non-speech” elements). Significantly, draftcard burning is an intentional act of symbolic speech, while bench squatting typically is not. *See* *Whiting v. Town of Westerly*, 942 F.2d 18, 21–22 (1st Cir. 1991) (routine overnight sleeping in vehicle does not involve expressive conduct). Someone who sleeps repeatedly on a bench with the conscious intent of conveying a political message might conceivably obtain First Amendment protection. *See, e.g., Clark v. Community for Creative Non-Violence*, 468 U.S. 288, 293 (1984) (assuming without deciding that politically motivated sleeping is expressive conduct for purposes of First Amendment); *Whiting*, 942 F.2d at 21–22 (similar); *United States v. Gilbert*, 920 F.2d 878, 883–85 (11th Cir. 1991) (similar).

1. *Freedom of Travel*

In the abstract, the federal constitutional right of travel⁴²¹ might entitle a destitute person to sojourn in: (1) all city spaces; (2) most city spaces (perhaps all except those in Green Zones); (3) a few city spaces (say, just those in Red Zones); or (4) none at all.

While advocates for street people can be expected to press for (1) or (2), most judges wisely have concluded that (3) and (4) are the only conceivable constitutional mandates.⁴²² A city has a number of legitimate reasons for regulating chronic squatting in a well-trafficked space.⁴²³ A street person in New York City surely should not have the privilege of bedding down in the Children's Zoo in Central Park or on every street or sidewalk.⁴²⁴ A public space is no longer openly accessible when one individual is using it all the time. An unfettered right to squat almost anywhere, with priority given to those arriving first in time, would create a land rush on a city's choicest spots.

At the very most, the federal constitutional right of travel requires a city to permit a destitute individual to enter all open-access public spaces when alert,⁴²⁵ and camp and bench squat at a few public locations that the city has plausibly selected for that use.⁴²⁶ This outcome would permit a city to keep most of its public spaces inviting for ordinary pedestrians, while providing the

421. For a discussion of the right to travel and its application to the street homeless, see Paul Ades, *The Unconstitutionality of "Antihomeless" Laws: Ordinances Prohibiting Sleeping in Outdoor Public Areas as a Violation of the Right to Travel*, 77 CAL. L. REV. 595, 605-23 (1989). Freedom of travel can be invoked either as an implicit constitutional right or as a fundamental interest that triggers strict scrutiny under the Equal Protection Clause. While the Supreme Court has never ruled that a municipal measure that burdens *intrastate* movement can impinge on the federal right of travel, several lower federal courts have so held. See *Lutz v. City of York*, 899 F.2d 255, 267-68 (3d Cir. 1990) (ruling that Due Process Clause of Fourteenth Amendment protects right to travel through city's public spaces); *King v. New Rochelle Mun. Hous. Auth.*, 442 F.2d 646, 647-48 (2d Cir.), *cert. denied*, 404 U.S. 863 (1971) (holding that Equal Protection Clause forbids city from imposing five-year residency requirement for eligibility for public housing).

422. Even some of the staunchest advocates for the rights of the homeless might settle for outcome (3). Harry Simon, for example, writes:

Whether or not arrests of the homeless for sleeping in public penalize exercise of the right to freedom of movement depends on the breadth of official restrictions [W]hen a city announces . . . that homeless individuals may not lodge on public land anywhere within the city, the effect . . . may be exceptionally severe.

Harry Simon, *Towns Without Pity: A Constitutional and Historical Analysis of Official Efforts To Drive Homeless Persons from American Cities*, 66 TUL. L. REV. 631, 654 (1992).

423. See *supra* text accompanying notes 47-54, 81-86.

424. New York City, had it wanted to, should have been entitled to prohibit the chronic squatting on the busy Manhattan sidewalk described in *Boggs v. New York City Health & Hosp. Corp.*, 523 N.Y.S.2d 71, 72-73 (App. Div. 1987), *appeal dismissed*, 520 N.E.2d 515 (N.Y. 1988).

425. A right to enter does not necessarily imply a right to sit, even for only a short period. See *Roulette v. City of Seattle*, 850 F. Supp. 1442, 1447-48 (W.D. Wash. 1994) (holding that Seattle ordinance regulating sitting on public sidewalks did not abridge federal constitutional right to travel).

426. Influenced by *Tobe v. City of Santa Ana*, 27 Cal. Rptr. 2d 386 (Ct. App. 1994), *rev'd*, 892 P.2d 1145 (Cal. 1995), the City Attorney of Santa Monica advised the city to open a new 100-person shelter before evicting transients camping in city parks. See *Homeless Shelter Ok'd as Step Toward Clearing Parks*, L.A. TIMES, Mar. 30, 1994, at B2.

destitute with ample channels for sojourning.⁴²⁷ The leading decisions all indicate that no more is required of a city. In *Clark v. Community for Creative Non-Violence*,⁴²⁸ for example, the Supreme Court sustained a National Park Service restriction on the establishment of campsites along the Mall and in Lafayette Park.⁴²⁹ As mentioned, these Washington venues are prime national gathering places. The Court's decision enabled park administrators to ensure that many different groups could rotate rapidly through the spaces without having to deal with entrenched squatters. The *Clark* majority noted that the National Park Service had provided ample camping sites at other downtown locations.⁴³⁰

Pottinger,⁴³¹ a high-water mark in the advocates' campaign to plead the right of travel, was a class action brought to prevent the Miami police from arresting and ousting homeless individuals squatting in Lummus and Bicentennial Parks and under I-395 overpasses. Judge Atkins, the federal district judge, held in part that Miami's practice infringed upon the plaintiffs' fundamental rights of travel.⁴³² "The evidence overwhelmingly shows that plaintiffs have no place where they can be without facing the threat of arrest."⁴³³ Judge Atkins, however, provided only a spatially limited remedy. He ordered the parties to agree on at least two public areas, located near service centers that cater to the homeless, that could function as "safe zones" for them.⁴³⁴ In effect, *Pottinger* held that the federal right to travel required Miami officially to designate several public-space Skid Rows—if you will, Red Zones.

In *Tobe*, however, the California Supreme Court held otherwise. There, advocates were challenging the anti-sleeping and anti-camping policies of Santa Ana, a city of about 300,000 in Orange County.⁴³⁵ At one point, 275

427. This outcome would satisfy the concern that a person be legally able to exist somewhere. *See, e.g.*, Waldron, *supra* note 301.

428. 468 U.S. 288 (1984).

429. *Id.* at 299.

430. *Id.* at 295. Laurence Tribe has argued that the judges deciding *Clark* should have delved deeply into fundamental questions of the distribution of wealth and power. *See* Laurence H. Tribe, *Constitutional Calculus: Equal Justice or Economic Efficiency?*, 98 HARV. L. REV. 592, 600-01 (1985). Frank Easterbrook responded by questioning whether the conferral of sleeping rights in parks is the right way to accomplish redistribution. *See* Frank H. Easterbrook, *Method, Result, and Authority: A Reply*, 98 HARV. L. REV. 622, 626 (1985); *see also supra* text accompanying notes 116-27 (supporting Easterbrook's skepticism).

431. *Pottinger v. City of Miami*, 810 F. Supp. 1551 (S.D. Fla. 1992), *remanded for limited purposes*, 40 F.3d 1155 (11th Cir. 1994).

432. *Id.* at 1578-81.

433. *Id.* at 1580.

434. *Id.* at 1584. Two years later, the "safe zones" were still not operational. *See Pottinger*, 40 F.3d at 1157. This stalemate was an upshot of Judge Atkins's granting the plaintiffs veto power over the City of Miami's selection of these locations. Given the enormously diverse demands on city public spaces, a judge who orders the creation of safe zones should give city officials ample discretion over where to locate them.

435. *Tobe v. City of Santa Ana*, 892 P.2d 1145, 1165 (Cal. 1995). Judge Atkins's constitutional reasoning in *Pottinger* also was rejected, across the board, in *Joyce v. City & County of S.F.*, 846 F. Supp.

persons had been sleeping in tents at the city's Civic Center.⁴³⁶ The plaintiffs' attorneys pointed to internal memoranda that evidenced an explicit municipal policy of driving homeless people out of Santa Ana. Reversing the trial court, the California Court of Appeal struck down the city's anti-camping ordinance for abridging, among other constitutional rights, the right of travel. According to the intermediate court, Santa Ana "might ban 'camping' in select locations with a properly drafted ordinance, but it may not preclude people who have no place to go from simply living in Santa Ana. And that is what this ordinance is about."⁴³⁷

On appeal, the Supreme Court of California reversed the appeals court decision in *Tobe* and dealt the freedom-of-travel theory the heaviest possible blow. It declined even to entitle the campers to *Pottinger*-style Red Zones, which Santa Ana presumably would have sought to locate on sites other than its Civic Center. Instead, the court stated flatly that "[t]here is no . . . constitutional mandate that sites on public property be made available for camping to facilitate a homeless person's right to travel, just as there is no right to use public property for camping or storing personal belongings."⁴³⁸ In sum, while *Pottinger* provided interpretation (3), *Tobe* rendered interpretation (4).

The California Supreme Court's decision in *Tobe* should not, however, be read as a prod to cities to restrict street people's rights to the federal constitutional limit. Even in the absence of federal constitutional compulsion, most counties⁴³⁹ and large cities,⁴⁴⁰ especially, can be expected to provide *some* public spaces for indigent campers and bench squatters. Rather, the California Supreme Court's implicit and invaluable message in *Tobe*—one that the court of the nation's most populous state was magnificently situated to deliver—was that the time had come to largely *defederalize* constitutional litigation over the particulars of municipal street law.

The *Pottinger* litigation illustrates the wisdom of this message. Even though *Pottinger* stops far short of establishing an unrestricted right to camp,

843, 864 (N.D. Cal. 1994) (denying preliminary injunction to halt San Francisco's Matrix Program, which restricted camping, inebriation, and aggressive panhandling in public places, and allegedly thereby jeopardized street people's life-sustaining activities).

436. Alicia Di Rado, *Santa Ana Oks Law Barring Homeless from Setting Up House at Civic Center*, L.A. TIMES, Dec. 21, 1993, at B9.

437. *Tobe v. City of Santa Ana*, 27 Cal. Rptr. 2d 386, 395 (Ct. App. 1994), *rev'd*, 892 P.2d 1145 (Cal. 1995). The challenged ordinance had barred camping in all the city's "streets," "parking lots," and "public areas." *Id.* at 389–90 n.3.

438. *Tobe*, 892 P.2d at 1165.

439. The California Supreme Court observed in *Tobe* that a California statute affirmatively requires counties to provide aid to the indigent. *Id.* at 1165–66 n.18.

440. Even a judge who had ruled that a large city had a duty to create safe zones for indigent campers might exempt small suburbs and towns from that constitutional obligation. The division of duties among central cities and suburbs poses a "fair share" issue similar to the one encountered in exclusionary zoning law. At times, New Jersey law has exempted certain localities from fair-share zoning duties or enabled them to satisfy some of their obligations through payments to central cities. For an introduction to the fair-share debate, see JESSE DUKEMINIER & JAMES E. KRIER, PROPERTY 1105–30 (3d ed. 1993).

even its recognition of a right to sleep in a few city-approved places threatens to embroil judges in policy details that are beyond their institutional competence. Because a squatter in a public space makes heavier demands on public land resources than does the ordinary citizen, a right to sojourn at no charge is a species of welfare right. Both the U.S. Supreme Court and the state supreme courts have rightly been chary of constitutionalizing the fiercely controverted field of welfare law.⁴⁴¹ A city's public-campsite policies entail decisions on, among other matters: (1) locations; (2) the quantity and quality of facilities and services; (3) admissions policies; (4) length-of-stay policies; and (5) whether an individual's continued stay is to be conditioned on compliance with work assignments or department rules.⁴⁴² After *Pottinger*, Miami's decisions on all these fronts had federal constitutional dimensions. While these cases involved overnight camping, a judicial decision recognizing a federal constitutional right to bench squat would be a tar baby of comparable proportions.

2. *The Eighth Amendment Ban on Criminalizing Status*

Advocates for homeless street people have had some success with a closely related constitutional theory. The Supreme Court has held that the Eighth Amendment's prohibition on cruel and unusual punishment bars prosecution for a mere status, for example, being a drug addict.⁴⁴³ The normative basis for this doctrine is that having a condition one cannot alter should not by itself make one guilty of a crime. Advocates argue that destitute individuals have no control over their homelessness, extreme poverty, mental illness, or whatever, and therefore must be immune from punishment on account of an unalterable status.⁴⁴⁴ They therefore might argue that the Eighth Amendment would bar a city from arresting a bench squatter who had chronically occupied a plaza bench.⁴⁴⁵

Like the freedom-of-travel precedents, however, the status-crime decisions at most confer a federal constitutional entitlement to access to spatially limited safe havens. True, lower court opinions in *Pottinger* and *Tobe* (both later reversed) did invalidate the Miami and Santa Ana ordinances for criminalizing the status of homelessness; but even those opinions stressed that the defendant cities had provided *no* public place where a homeless person could bed down

441. See, e.g., *Dandridge v. Williams*, 397 U.S. 471 (1970) (applying deferential standard of review to federal AFDC program); *Moore v. Ganim*, 660 A.2d 742 (Conn. 1995) (declining to construe provisions of state constitution as establishing right to minimum subsistence).

442. *Untenable Case*, *supra* note 78, provides an introduction to the welfare rights debate and defends the conditioning of welfare benefits to promote work incentives.

443. *Robinson v. California*, 370 U.S. 660, 666-67 (1962).

444. See *supra* text accompanying notes 98-106.

445. Some advocates for street people appear to agree that it takes a citywide ban to create a status crime. See *supra* note 422.

without fear of arrest.⁴⁴⁶ Similarly, in *Powell v. Texas*,⁴⁴⁷ by a 5–4 margin the Supreme Court declined to reverse the conviction of a chronic alcoholic whom the Austin police had arrested for violating a statute against being found drunk “in any public place.”⁴⁴⁸ The majority held that this was not a status crime because Mr. Powell had committed “acts” by drinking and then taking himself into a public area.⁴⁴⁹ In other words, Austin, Texas, did not have to permit Mr. Powell to wander at will throughout its downtown in an inebriated condition. Justice White’s concurring opinion in *Powell* states that a city is constitutionally obliged to provide a compulsive alcoholic with *some* site where he would be safe from criminal prosecution.⁴⁵⁰ Presumably, a Skid-Row Red Zone in Austin where public drunkenness was permitted would be enough.⁴⁵¹

VII. THE RELATIVE MERITS OF INFORMAL AND MUNICIPAL ZONING OF PUBLIC SPACES

This review demonstrates that federal constitutional law is indirectly encouraging cities to bring back Skid Rows, but in a form far more official than the 1950s version. By designating particular districts where minor street misconduct would be decriminalized, a city would be providing “alternative channels” for First Amendment expression.⁴⁵² If the right of travel or the Eighth Amendment requires a large city to provide indigent individuals with safe havens for camping, drinking, and bench squatting, these zones would satisfy that obligation. No doubt partly on the advice of city attorneys, Orlando, Dallas, Jacksonville, and other cities have begun to set up official Red Zones for the destitute.⁴⁵³

The constitutional revolution in street law that occurred between 1965–1975 was aimed largely at limiting police discretion. While police misconduct is unquestionably a serious and legitimate concern, it is worth considering whether informal zoning is in some respects superior to the formal zoning approach that the courts currently seem to be forcing on cities.

446. *Pottinger*, 810 F. Supp. at 1561–65; *Tobe*, 27 Cal. Rptr. 2d at 393–94; see also *Johnson v. City of Dallas*, 860 F. Supp. 344 (N.D. Tex. 1994), *rev'd on other grounds*, 61 F.3d 442 (5th Cir. 1995).

447. 392 U.S. 514 (1968).

448. *Id.* at 517.

449. *Id.* at 533–37.

450. *Id.* at 551–52.

451. In practice, Skid Rows are not entirely safe harbors for alcoholics. *Sundance v. Municipal Court*, 729 P.2d 80 (Cal. 1986) (per curiam), rebuffed a shotgun constitutional attack on the Los Angeles Police Department’s practice of making sweeps to arrest drunks in the Los Angeles Skid Row. The statute at issue did not criminalize simply being drunk in public, however, but rather the acts of endangering the safety of oneself or others or of interfering with a public way. *Id.* at 83 n.4.

452. Cf. Norman Siegel, *Homelessness: Its Origins, Civil Liberties Problems and Possible Solutions*, 36 VILL. L. REV. 1063, 1081 (1991) (describing New York Civil Liberties Union position favoring city designation of specific park areas as sleeping sites for homeless).

453. See *supra* note 321.

Questions of comparative institutional competence can be investigated through conventional tools of policy analysis. The Skid Row system was a hybrid that entailed unofficial police enforcement of informal norms that varied from neighborhood to neighborhood. Formal city zoning of public spaces is more thoroughly governmental because it directs the police to adhere to detailed municipal directives. Neither of these two systems is obviously superior to the other.⁴⁵⁴

One yardstick for an institution's performance is its capacity to make optimal rules—in this context, the various street codes and boundary lines for zones. For example, is “city hall” or “civil society” better at locating a Skid Row and deciding what can go on there? In a city that formally zoned public spaces, politicians would have to draw numerous boundary lines, some at the subblock level. Experience with conventional municipal zoning of private lands indicates that this might prove to be a capricious process, dominated by warring special interests.⁴⁵⁵ Politicians might distribute Green Zones as pork-barrel. Neighborhood groups could be expected to fight against Red-Zone designations nearby.⁴⁵⁶ If a poor minority neighborhood were targeted with more than its share of these unruly places, its residents understandably might perceive environmental racism at work. Official safe zones also tend to stigmatize the destitute users who go there and may conceivably violate constitutional rights of other citizens.⁴⁵⁷

On the other hand, loosely knit social groups such as downtown pedestrians and merchants are often ineffectual norm makers and, when they do overcome their free-rider problems, may treat minorities and outsiders more viciously than a city would. Informal rulemakers also cannot produce a code as detailed as a government's. Normmakers, for example, are likely to be incapable of establishing specific hours and time limits for activities in public spaces.

Another yardstick of institutional competence is administrative efficiency. The Skid Row system granted patrol officers great discretion to divine neighborhood norms and to administer casual sanctions to enforce them. Until recent decades, in doing this, the police took advantage of the plasticity of “public nuisance,” “disorderly conduct,” and other broad legal definitions of obnoxious street behavior.⁴⁵⁸ This was a flexible and cheap system. It was

454. On the comparative advantages of formal and informal police practices, see JEROME H. SKOLNICK, *JUSTICE WITHOUT TRIAL: LAW ENFORCEMENT IN DEMOCRATIC SOCIETY* (3d ed. 1994). On the relative competencies of governments, informal social forces, and hybrids of the two, see generally *ORDER WITHOUT LAW*, *supra* note 141, at 249–58.

455. See *Alternatives to Zoning*, *supra* note 88, at 701–05.

456. Anticipating this, Jencks has proposed that the new cubicle hotels he favors be located in nonresidential areas of downtowns. JENCKS, *HOMELESS*, *supra* note 1, at 116–17.

457. For example: Grievants may allege that due process was not observed when the boundaries were drawn; landowners adjacent to Red-Zone spaces may assert that their property has been “taken”; nonwhites may claim the influence of racial motives in violation of the Equal Protection Clause.

458. See MODEL PENAL CODE § 250.2 cmt. 1 (1980).

also vague and discretionary, shortcomings that led the Supreme Court to try to shut it down.⁴⁵⁹

The efficient pursuit of street decorum is inherently in tension with protecting unpopular people from arbitrary police actions. Street law presents the familiar dilemma of choosing between standards and rules.⁴⁶⁰ Compared to standards, rules promise to limit discretion and provide better notice of what is illegal. But rules commonly involve higher administrative costs than standards, are less flexible, may in fact lead to individually unjust results, and tend to be manipulated or even ignored in application.⁴⁶¹

In light of the wide diversity of public places and pedestrian behaviors, there is much to be said for standards in street law. Indeed, if it could be achieved, the first-best solution to the problem of street misconduct would be the maintenance of a trustworthy police department, whose patrol officers would be given significant discretion in enforcing general standards against disorderly conduct and public nuisances.⁴⁶² Certain administrative reforms could contribute to this end. Selection, training, and supervision methods can be shaped to help make police officers more trustworthy agents of constitutional values.⁴⁶³ The continuing racial integration of police forces should tend to cure some of the racist aspects of the Skid Row system of the 1950s. In some contexts, community-based policing, which assigns a particular officer to a particular neighborhood, might make a beat-patrol officer more averse to gaining a reputation for capriciousness and excessive violence.

459. See *supra* text accompanying notes 236–46. After *Papachristou*, drafters of anti-panhandling ordinances have had to be careful to adopt language that limits an enforcing officer's discretion and apprises street people of the behaviors that are barred. For examples of drafters' efforts to avoid this constitutional pitfall and others, see Mabry, *supra* note 135, at 338 n.202 (excerpts from District of Columbia Panhandling Control Act of 1993); Teir, *supra* note 21, at 333–37 (model panhandling-control ordinance). Crackdown measures have mostly survived attacks mounted on grounds of vagueness. See, e.g., *Kreimer v. Bureau of Police*, 958 F.2d 1242, 1266–68 (3d Cir. 1992); *City of Seattle v. Webster*, 802 P.2d 1333, 1338–39 (Wash. 1990) (en banc), *cert. denied*, 500 U.S. 908 (1991). But see *Ledford v. State*, 652 So. 2d 1254, 1256–57 (Fla. Dist. Ct. App. 1995); cf. *Streetwatch v. National R.R. Passenger Corp.*, 875 F. Supp. 1055, 1059, 1062–63 (S.D.N.Y. 1995) (holding, for purposes of granting a preliminary injunction, Amtrak's anti-loitering rules for Penn Station to be unconstitutionally vague). For appraisals of the concerns that underlie the vagueness doctrine, see John C. Jeffries, Jr., *Legality, Vagueness, and the Construction of Penal Statutes*, 71 VA. L. REV. 189 (1985); Post, *Reconceptualizing Vagueness*, *supra* note 246.

460. On the general issue, see Isaac Ehrlich & Richard A. Posner, *An Economic Analysis of Legal Rulemaking*, 3 J. LEGAL STUD. 257 (1974); Duncan Kennedy, *Form and Substance in Private Law Adjudication*, 89 HARV. L. REV. 1685, 1687–89 (1976); *Symposium: Void for Vagueness*, 82 CAL. L. REV. 487–554 (1994). On this conundrum in the context of public order, see *Kreimer*, 958 F.2d at 1268 (holding that library rules barring "offensive" and "nuisance" activity were not too vague to comport with due process); *Kelling & Coles*, *supra* note 259, at 69–71.

461. See Goldstein, *Panhandlers at Yale*, *supra* note 13, at 355–58 (arguing that regardless of formal legal regime, police officers' customs primarily determine street people's rights in practice).

462. The degree of discretion to afford individual police officers is, of course, one of the abiding issues in criminal law. The vices of discretion are stressed in, for example, Joseph Goldstein, *Police Discretion Not to Invoke the Criminal Process*, 69 YALE L.J. 543, 586 (1960) (concluding that police officer should not have discretion not to enforce law).

463. See Wilson & Kelling, *supra* note 23, at 35.

Many observers understandably regard a street regime premised on trustworthy police officers as unrealistic. In some cities, it unquestionably is.⁴⁶⁴ In these locales especially, the official zoning of public spaces—which elsewhere would be a second-best approach—may be the best that lawmakers can do.

Having pushed cities in the direction of formal public-space zoning, judges should not strictly scrutinize the policies of municipalities that have accepted this invitation. Courts generally yield to municipal decisions that regulate private land uses.⁴⁶⁵ If federal judges would be deferential toward the City of Berkeley's decisions over where private landowners can operate, say, book stores, churches, and copycenters, should they not also be deferential to Berkeley's decisions about where people can chronically beg and squat on the public sidewalk?⁴⁶⁶

VIII. CONCLUSION

Unchecked street misconduct creates an ambience of unease, and for some, of menace. Pedestrians can sense that even minor disorder in public spaces tends to encourage more severe crime. City dwellers who perceive that their streets are out of control are apt to take defensive measures. They may use sidewalks and parks less, or favor architectural designs that discourage leisurely stays in public spaces. In particular, they may relocate to more inviting locales.⁴⁶⁷ As modes of travel and communication improve, individuals have ever greater choices.⁴⁶⁸ Shoppers can switch to enclosed malls, employers can move to suburban industrial parks, and universities can shift activities to satellite branches.

464. See SKOLNIK & FYFE, *supra* note 188. Judges should not premise their street-law decisions, however, on the assumption that all police officers are like those in the nation's most venal departments. Why should a Minneapolis be denied discretion because the force in New Orleans is untrustworthy?

465. See, e.g., cases cited *supra* note 385.

466. *But see* Berkeley Community Health Project v. City of Berkeley, No. C 95-0665 CW, 1995 WL 293899 (N.D. Cal. May 5, 1995) (enjoining enforcement of anti-solicitation ordinance and much of anti-sitting ordinance).

In practice, the Supreme Court has itself tended to be deferential to government administrators' zoning of public spaces. See, e.g., *Ward v. Rock Against Racism*, 491 U.S. 781 (1989), an unsuccessful First Amendment challenge to New York City's efforts to create specialized areas within Central Park. To protect the Sheep Meadow, which in the Court's words the city had designated as "a quiet area for passive recreations like reclining, walking, and reading," *id.* at 784, the Court held that the city was entitled to regulate the sound equipment and staffing at its nearby bandshell. See also *Heffron v. International Society for Krishna Consciousness, Inc.*, 452 U.S. 640 (1981), in which the Court spurned a First Amendment challenge to a Minnesota rule confining the distribution of printed matter and the solicitation of funds to certain areas within the state fairgrounds.

467. *Cf.* *Bowman*, *supra* note 15, at 520, 539, 541-42 (arguing that street harassment of women limits their willingness to use streets).

468. The innovations in telecommunications that enable people to use electronic devices to shop, send documents, and hold conferences increasingly threaten the traditional role of the central business district.

Since about 1965, federal constitutional decisions have limited the power of cities to control panhandling, bench squatting, public drunkenness, and other minor street nuisances. By allowing the denizens of Skid Rows to spend more time in the central business district, these decisions contributed to the demise of Skid Rows. These constitutional rulings, in combination with the attenuation of informal social controls and the increase in the size of the urban underclass, also made American downtowns much more disorderly.

The future of downtowns will turn significantly on the interaction of two social trends. The continuing rise of social poverty—for example, the escalating numbers of one-parent households, unmarried adult males, and convicted felons released from confinement without marketable skills—may portend more disorderly streets. The 1990s backlash, on the other hand, signals that cities, merchants, and pedestrians will increasingly reassert traditional norms of street civility. It would be rash to predict which of these opposing forces will prove to be stronger.⁴⁶⁹

The uncertain evolution of the constitutional law of the streets also clouds the future. In a handful of cases in the first half of the 1990s, federal district judges struck down ordinances and statutes that cities such as Berkeley, New York, and San Francisco used to police street misconduct.⁴⁷⁰ That courts are aggressively second-guessing the policies of cities as historically tolerant as these three demonstrates that federal constitutional doctrine has become far too restrictive.

Disorderly people are not the only citizens with liberty interests at stake in these instances. Street law must also attend to the privacy and mobility interests of pedestrians of ordinary sensibility, not to mention the rights of the unusually delicate. Because demands on public spaces are highly diverse, city dwellers have historically tended to differentiate their rules of conduct for specific sidewalks, parks, and plazas. Some neighborhoods, like traditional Skid Rows, have been set aside as safe harbors for disorderly people. Other sites, like tot-lots, have been allocated as refuges for persons of delicate sensibility. A constitutional doctrine that compels a monolithic law of public spaces is as silly as one that would compel a monolithic speed limit for all streets.

The reconciliation of individual rights and community values on the streets is a profoundly difficult problem. For a problem so intractable, a pluralistic legal approach is advisable. Judges should refrain from using the generally

469. There is reason to suppose, however, that the strength of social controls is a more significant variable than the incidence of economic and social poverty. The relatively prosperous Mid-Atlantic and Pacific regions, with a total of only 30.9% of the low-income men in the United States in 1989, had 68.8% of the Census Bureau's S-Night tally of the street population. O'FLAHERTY, *supra* note 1, at 154 tbl. 7-9. What distinguished New York, San Francisco, and the other panhandling meccas of the 1980s was not the depth of their economic and social poverty, but rather the weakness of their social-control systems. *See also supra* note 75.

470. *See supra* note 347 and accompanying text.

worded clauses of the United States Constitution to create a national code that denies cities sufficient room to experiment with how to grapple with street disorder.⁴⁷¹ The California Supreme Court's decision in *Tobe* is a refreshing sign that judges increasingly are recognizing this truth.⁴⁷²

Justice Hugo Black, concurring in the Court's refusal to hold the hoary crime of public drunkenness to be a violation of the Eighth Amendment, stated it well:

It is always time to say that this Nation is too large, too complex and composed of too great a diversity of peoples for any one of us to have the wisdom to establish the rules by which local Americans must govern their local affairs. The constitutional rule we are urged to adopt is not merely revolutionary—it departs from the ancient faith based on the premise that experience in making local laws by local people themselves is by far the safest guide for a nation like ours to follow.⁴⁷³

Judges should not prevent the residents of America's cities from preserving the vitality of their downtowns.

471. Municipal experiments might also include fostering the creation of BIDs, *see supra* notes 166–69, encouraging pedestrians not to give to panhandlers, *see supra* notes 161, 169, and improving outreach services to street people. The basic point is that a city might rationally choose to include the imposition of criminal sanctions for street misconduct as part of its policy mix. *See supra* text accompanying notes 170–80.

472. *See supra* text accompanying notes 435–40.

473. *Powell v. Texas*, 392 U.S. 514, 547–48 (1968).