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The Expressive Liberty of Beggars

Why it matters to them, and to us

By Arthur Schafer



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Introduction

It is morally perplexing that in 21st century Canada it could be a punishable offence for one person to say to another, peacefully, in a public place, “I’m in trouble and need help.” Yet that is the effect of City of Winnipeg Bylaw No. 128/2005.¹ Other Canadian and American cities have enacted similar legislation, and a fast-growing body of jurisprudence in both Canada and America testifies to the fact that the criminalization² of panhandling has become a kind of battleground. On this battleground, a clash occurs between competing values: social “hygiene” vs. freedom of expression; middle class discomfort vs. underclass economic need; commercial interest of downtown business owners vs. beggars’ right to plead for subsistence.

Of course, if a panhandler’s request for help were made in an aggressive or intimidating manner, then liberty-limiting legislation would be much less controversial. In Canada, the Criminal Code expressly prohibits demanding money with menaces. This prohibition, backed by sanctions, would be accepted by most people as a proper use of coercive state power.

The essence of the argument advanced in this report will be that restrictions of peace-

ful panhandling constitute an illegitimate use of state power.

Put simply, my contention is that peaceful beggars should *not* be turned into criminals. That’s because non-aggressive begging involves the kind of expressive communication between people that a free and democratic society should seek to protect rather than restrict. Freedom of expression is a fundamental human right — one that should be infringed only in exceptional circumstances. It follows that any law which restricts the expressive liberty of beggars should be viewed *prima facie* as a violation of human rights.

There is a substantial body of empirical evidence in support of the intuitively obvious hypothesis that beggars are a seriously marginalized group in our society: almost always poor and frequently homeless, often suffering from extremely poor health, mental illness, and alcohol or drug addictions, with few social supports and even fewer opportunities to make their plight known to their fellow citizens.³ For this reason, it is comparatively easy to adopt a “we/they” perspective on issues involving panhandlers — a perspective in which “we” are the legitimate members of society while “they” are

little better than social outcasts. Quite simply, this perspective is not ethically defensible. Panhandlers have as much right as middle-class citizens to dignified treatment. The very sub-title of this paper, with its sharp dichotomy between “them” and “us,” runs the risk of conveying, inadvertently, the message that beggars are mere specimens, pinned and wriggling on a hook, rather than participants in the project we call building Canadian society.

If members of the underclass are not recognized as having an important contribution to make to the formation of public opinion, then not only are they robbed of a basic right of citizenship, but everyone else in society is also robbed of potentially important information. Some would argue that the very poor have an especially important contribution to make to the so-called free marketplace of ideas. Critical scrutiny of ideas is an enterprise that requires the widest possible contribution from those with differing experiences and alternative perspectives. When the expressive liberty of the poor and homeless is censored, excluded, or otherwise marginalized, then the advancement of knowledge for everyone is prejudicially affected. Autonomous citizens should not easily settle for such a limitation on their ability to formulate *for themselves* their view on such matters.

Indeed, the beggar’s generally downtrodden position in society makes a denial of his expres-

sive liberty especially problematical. Since the free marketplace of ideas (like the free marketplace of commodities) tends to produce massive inequalities in access to expressive forums, special heed must be paid to the expressive needs of those who cannot easily make their voices heard. A liberal democratic society which values the rational autonomy of all its members must work diligently to protect norms of mutual recognition and respect in communication.⁴

It is also worth noting that in Canada panhandlers tend to be recruited, disproportionately, from First Nations’ communities and from the ranks of other visible minorities. In consequence of the racial and other prejudice still widespread in Canadian society, it is common for members of these communities to have suffered serious discrimination in education, housing, employment, and other spheres of life. Drastic inequalities in life opportunities for First Nations people and visible minorities constitute an important part of the setting within which the great Canadian panhandling debate is currently being played out.

Thus, when issues of social policy are being discussed and debated by the community, it is of the highest importance that the privileged classes are not denied opportunities to hear and to take seriously the voice of the poorest and most oppressed members of society.

A preliminary problem

Prevention of harm is a legitimate function of government. But we should not readily concede to our government(s) the authority to prevent harm by controlling people's access to information.⁵ Respect for the rational autonomy of citizens, on which democratic society is founded, entails that every citizen reserves for himself or herself the right to assess the evidence and weigh the widest possible range of arguments in deciding what to believe and what policies to favour or oppose.

Consider: It is legitimate for municipal governments to promote such goals as the efficient passage of automobiles along the city's streets, the clean and tidy appearance of those streets, and the safe passage of pedestrians along the city's sidewalks. But now consider how we should react if a municipal government, in pursuit of these legitimate objectives, were to ban political demonstrations on the ground that they would interfere with the efficient flow of traffic, or if it were to ban political posters and leaflets on the grounds that they cause mess and debris on the streets, or if it were to outlaw political gatherings of more than five people because such meetings might lead to unruly behaviour. Such

policies, though aimed at promoting legitimate public goals, should be regarded as intolerable in a free and democratic society because they would substantially reduce the opportunities for citizens to engage in public discourse with one another. If the government wishes to limit or negate the freedom of expression of some of its citizens, then it can do so justifiably only if it can show that the good to be promoted is supremely important and the means adopted — viz., the silencing of expressive liberty — is both necessary and sufficient to achieve this good. Moreover, it must show that the good consequences of such liberty-limiting behaviour significantly outweigh the bad.⁶

It has been conceded that promoting the safe and efficient passage of pedestrians along downtown sidewalks is a legitimate goal of municipal governments. But if an attempt is made to restrict the right of peaceful beggars to solicit help from pedestrians, then there is a burden of proof on government to show that the presence of peaceful panhandlers on the sidewalks is likely to cause a significant threat to passersby or a significant obstruction of pedestrians as they go about their business. The government must also show, with

credible evidence, that the proposed restrictions will actually promote such goals as pedestrian safety and efficiency of movement.

The government must also demonstrate that there is no alternative, less liberty-restricting means of achieving the same (admittedly legitimate) goals, and that the good which will be promoted by such measures will likely outweigh

the harm. This last point is especially significant when those whose liberty it is proposed to restrict are vulnerable and marginalized, lacking money for such basic needs as food and shelter, and when the restriction on their freedom of expression allows them few, if any, alternative ways to communicate their message to their fellow citizens.

Is peaceful begging legitimately categorized as “expression”?

What counts as “expression” (or “speech”) for the purpose of invoking the doctrine of freedom of expression?⁷ By analyzing this question we will gain a more precise understanding of the scope encompassed by the right to free expression.⁸

Some critics argue that begging is not an expressive activity and that, in consequence, it should not attract the special protection we accord to free speech.⁹ They view the beggar as engaged, essentially, in a commercial transaction whereby s/he is attempting to obtain the means to deal with poverty or homelessness, or perhaps to buy booze or drugs. Other critics point out that most beggars do not advocate any political ideology; they don’t advance, at least not by intention, any abstract political or social argument. Thus, they can scarcely be said to make a conscious contribution to the free marketplace of ideas.¹⁰

The view that begging should be thought of as a commercial activity is defensible, at least up to a point. Beggars are conveying a desire to receive money. The beggar is soliciting money and in return is offering good-will but nothing of commercial value. Even staunch critics, however, would be hard-pressed to deny that the beg-

gar is also seeking to express or communicate something important about his life situation. The panhandler is communicating something important about what our society is like for those at the very bottom of the heap. Panhandlers communicate — whether through speech or via an outstretched hand and raggedy appearance — a message about dire poverty, unemployment, substance abuse, mental illness, and homelessness. The panhandler also communicates a powerful message about the failure of government housing and employment policies, the lack of treatment facilities for the mentally ill and for people addicted to alcohol or drugs. As a result of their encounter with beggars, some pedestrians may come vividly to apprehend that, because of limited opportunities and inadequate social service support systems, some members of society are unable to maintain themselves at a level of minimal decency.

Homeless people with multiple problems ranging from poor health to lack of education and skills have very few means of engaging with their fellow citizens.¹¹ Newspaper op-ed pieces, letters-to-the-editor, articles in popular magazines, contributions to radio talk-shows, publica-

tion of books or even pamphlets: none of these is a realistic option for people who are desperately poor, homeless, distressed, mentally ill, addicted, or, more likely, suffer from some combination of these socially disabling impediments.

Clearly, beggars are seeking relief of their immediate personal needs (including, in some cases, the need for cigarettes, booze or drugs to which they are addicted). By means of their begging activity, panhandlers are communicating information about — and an appeal for relief of — their immediate personal needs. As critics note, panhandlers do not generally engage pedestrians in an abstract discussion of political or social theory. That's true enough. But would anyone want to claim that the doctrine of freedom of expression should not apply to personal speech? Why would society insist that I have a fundamental right publicly to solicit help for famine relief in Africa, say, but a lesser right or no right at all to solicit help for myself or my family when I am desperately in need of such help?

Moreover, direct appeals for help often enable panhandlers to engage in dialogue with their fellow citizens. This dialogue may raise important questions about such interrelated issues as poverty, homelessness, unemployment, mental health and addiction services, social solidarity, and the strength and limits of our obligation to be “our brother's keeper.” It is thus no exaggeration to claim that panhandling represents an important form of “political speech,” both for the beggar and for the person to whom his appeal is addressed.

Because some pedestrians find the beggar's message disturbing, it is easy to overlook the fact that passersby are entitled to hear the message and to make up their own mind about the issues raised. A National Public Radio broadcast in the United States, hosted by Neal Conant, offers some important illustrations of this point.¹² Conant begins the broadcast by observing that, when a panhandler asks us for money, “It's sometimes heart-wrenching, sometimes bothersome, some-

times maddening, sometimes all three.” He notes that the beggar's appeal may force us to wrestle with ourselves: “If we give something, will the money be used for food or for alcohol or drugs? Are you helping out a neighbour down on his or her luck, or helping to sustain an unhealthy and unproductive lifestyle?” “Maybe I should give it to them to make me feel better.”¹³

One of Conant's guests, Sister Scullion, claims that there is something morally important about responding to a direct personal appeal for help, something which is absent when one responds to a charitable organization on behalf of people in need:

But I think it's that personal element that when you meet another human being and they asked you for something, that you respond to them, because it's affirming the dignity of each person and that we're both adults, we're both human beings. And if another person needs or wants to talk to me, I can talk to them, and it's like a back-and-forth. It's a relationship thing. So I think we do need to respond to one another personally in a direct way.

Sister Scullion goes on to relate a comment made to her by a man strolling on the street:

We're each other's mirrors, and how we look at each other is how we see ourselves.

She glosses this man's comment with a comment of her own:

So in seeing another human being there, that's an important message to give, as opposed to just being disgusted or not even seeing people there at all; they've become invisible to us on some level.

Another caller to the show, John, relates an incident in which he and his daughter had stepped out of a coffee shop, to be greeted by a panhandler who had just ridden up on a bicycle. The panhandler spoke to them: “If I can just tell

you my story; it'll just take a minute." John continues the story:

And my daughter reached for her purse and I reached for my wallet, and we both said, 'We don't have time.' We each gave him a dollar and we had to hurry on about our business...[but, after thinking about the incident] I now have far more questions than I do answers. Did I deprive the man of his dignity because he didn't get to tell his story, or did we simply just save him the time and give him a couple of dollars? Did we have a relationship with him? Did we do the right thing? Should we have given to charity? I have far more questions than answers after the incident.

Needless to say, if peaceful panhandling is banned or severely restricted by legislation, the plight of the panhandlers and others on the margins of society may well become invisible to the comfortable middle-class majority.

Some of us welcome being discomfited by peaceful beggars, while others most decidedly do not. Some pedestrians stop to engage the beggar in dialogue. Others cross the street to avoid any direct personal encounter with a beggar. Nevertheless, all of us are entitled to choose whether and how to respond to the plight of those struggling fellow human beings who seek our assistance by means of a supplicating hand. Sweeping them under a coercive legal carpet violates *our* informational rights as well as *their* expressive rights.

The doctrine of freedom of expression

The classic defence of free expression is found in Chapter 2 of a short book published in 1869 by the British philosopher John Stuart Mill: *On Liberty*. Mill's famous argument is, at its core, consequentialist. He does not deny that the expression of opinion can cause harm to others, even serious harm. But Mill passionately defends freedom of expression on the grounds that, in the long run and overall, censorship would (almost) always have much worse consequences than free speech. In other words, expression ought to be stringently protected primarily because the (extrinsic) value of free speech is so great that protecting and fostering it will almost always yield more benefit than harm. Contrariwise, restricting any view or banning it will almost always yield the reverse — more harm than good.

Mill claims that the advancement of knowledge is the principal benefit of protecting free expression. He argues that truth emerges from the competition of ideas in an intellectually open marketplace:

...the peculiar evil of silencing the expression of an opinion is that it is robbing the human race; posterity as well as the

existing generation: those who dissent from the opinion, still more than those who hold it. If the opinion is right, they are deprived of the opportunity of exchanging error for truth; if wrong, they lose, what is almost as great a benefit, the clearer perception and livelier impression of truth, produced by its collision with error.¹⁴

For Mill, it goes without saying that all of us are prone to error. We are human beings, after all, and so our judgment is fallible. However, in a society which protects freedom of expression, including the freedom of marginalized or despised minorities to express ideas which challenge the prevailing attitudes, values and beliefs, the resulting competition of ideas will ensure that rational men and women possess the means of correcting their errors. A dogmatic person who possesses the truth can easily lose it; a rational person who is in error has a compass, in critical reasoning, whereby s/he can discover the error and correct it.

Even those who defend more censorship than Mill would allow usually concede that freedom of expression is a vital part of any society which

purports to be free and democratic. It follows that there should be a heavy burden of proof on those who favour censorship. Before censoring anyone, society must demonstrate: first, that the expression to be censored is causing harm to others. Mill calls this the *Harm Principle*. And,

second, for censorship to be defensible it must be shown that in the circumstances it is likely to yield more benefits than costs, more good than harm, more happiness than misery. Philosophers label this the *Consequentialist Principle*.

The case for stringent protection of expressive liberty

It is worth rehearsing carefully some of the reasons why we do not and should not, in a free and democratic society, tolerate censorship of political speech.

As Mill rightly observes, governments generally tend to view criticism directed at their actions or policies as highly misleading, if not outright false and malicious. Allow any government to censor speech which it sees as “false or misleading,” and one will very quickly find that all criticism of that government has been consigned to Siberia, along with the critics who were brave enough to speak out negatively against their rulers. In short, governments are easily offended by criticism and tend, in consequence, to be untrustworthy when it comes to regulating expression. Since panhandlers symbolize the failure of government policies with respect to housing, job training, employment, poverty, mental illness, and substance addiction, the eagerness of governments to “disappear” panhandlers, at least from prominent public locations, is to be expected — but not, on that account, to be thought morally acceptable.

What is true of governments is no less true of other élites in society, whether economic or

educational, military, or medical. Whatever abstract commitment to freedom of expression people may profess, when their own ox is being gored they often experience a sudden flash of insight into the virtues of silencing “false” and “misleading” criticism. Thus, once it is recognized as a requirement of democratic citizenship that citizens must be permitted access to a full range of views to aid their deliberation, it follows that a powerful barrier must be erected against all forms of political censorship. The free marketplace of ideas needs to be stringently protected against encroachments from either governments or other powerful élites. Since panhandlers do not have significant access to the marketplace of ideas in any manner other than that expressed by their appearance and activities (including begging) in the public forum of our downtown areas, their access to such traditional forums of expression ought to be rigorously safeguarded against erosion.

This justification for stringent protection of political speech appeals to the need for citizens to engage in thoughtful and well-informed deliberation on matters of public importance. If a mischief-maker cries “fire” in a crowded thea-

tre, there is simply no time for people to assess whether the information is accurate and how best to respond, so everyone is compelled to rush to the exits with, sometimes, tragic results. When one is dealing, however, with a non-emergent situation and when there is, therefore, time to expose through discussion the truth or the falsity of competing claims, then, in the famous words of Justice Brandeis, “the remedy to be applied is more speech, not enforced silence.”¹⁵

More specifically, how can citizens reach a balanced and judicious position on social issues — for example, the debate between those who favour low taxes versus those who favour better public services — if laws such as the City of Winnipeg’s anti-panhandling by-law prevent pedestrians from hearing for themselves appeals for help from the downtrodden of our society? If members of the public rarely encounter direct evidence of the personally destructive effects of homelessness, poverty, unemployment, and substance abuse, then it becomes easier for politicians to ignore these profoundly important social realities.

Stringent protection for expressive liberty may also be justified by appeal to the importance of individual self-expression: the right of autonomous individuals to express their own views on matters of public concern. It is difficult to imagine any self-expression more important to an individual than the right to plead for help, in a peaceful and unthreatening manner, from the fellow members of one’s society. By speaking to others about one’s situation, one is also, in a sense, “bearing witness” to one’s views and to one’s perspective on life. The need to express oneself to one’s fellow citizens and potentially to

influence their thought and conduct is closely allied to liberty of conscience.¹⁶ Both directly and indirectly, the presence of the panhandlers on our streets is expressing an important viewpoint about human welfare, the quality of life “enjoyed” by some of our fellow citizens, and our mutual obligations as members of the same society.

The fundamental interests promoted by stringent protection of free expression thus include the *informational interest* citizens have in being able to discover important truths, the *deliberative interest* citizens have in being able to consider a range of points of view in order to reach a reasonable and balanced conclusion based on all the relevant evidence (rationality), and the *expressive interest* which autonomous individuals, including those who lack resources, have in being able to participate at least to some extent in the process of democratic decision-making.¹⁷

In sum, freedom of expression deserves stringent protection both because it is a precondition of democratic politics and because it is an intrinsically important aspect of human fulfillment. As we have seen (above), stringent protection of free expression is associated closely with a number of important values, including such values as participatory democracy, the advancement of knowledge, and individual self-expression or intellectual autonomy. Granted, there is a perspective from which begging can be viewed as a form of “commercial” speech. But the above arguments are intended to demonstrate that begging is more than mere commercial speech. The conclusion to which the arguments of this section point is that begging should be seen as having much greater affinity to political speech than to mere commercial solicitation.

Balancing the costs of panhandling against the benefits

Direct and indirect costs of panhandling

It would be near-sighted not to recognize that the liberty of panhandlers to make their pitch on busy downtown streets carries with it certain costs, some of them direct, some indirect. In other words, to put the point crudely, speech is often not *free*.

Consider a situation in which panhandling occurs but is entirely pacific. Imagine a beggar on the sidewalk, near a bus stop, bank, or ATM, head bowed, with an upturned hat in front of him for donations. Even such a passive individual will be perceived as threatening by some passersby. This feeling of threat might be described as a *direct* cost, as would the discomfort or squeamishness felt by some middle-class shoppers upon encountering beggars or other so-called street people. Encounters with homeless people — who often look bedraggled and disheveled and who may not have had recent opportunity to bathe or shave — can be shocking or even disgusting to the sensibilities of some middle-class pedestrians.

If there are more than a few panhandlers in a particular urban neighbourhood, their mere presence may drive potential shoppers away,

towards the nearest suburban shopping mall. For downtown merchants and for all those who care about the quality of public spaces in the downtown core of our cities, this represents an *indirect* cost. The deterioration of the downtown itself — as businesses close down or move out, buildings acquire plywood sheets instead of glass windows, and exterior walls sport graffiti — should also be counted as an indirect cost. Without the continuous bustle of commercial and other activity, a city's urban hub can experience precipitous decline. These “environmental” costs, as they might be labelled, potentially result from the cumulative effect of many instances of panhandling once a critical threshold has been passed.

Having conceded that a profusion of beggars in the downtown area has the potential to contribute to a deterioration of the downtown, one ought to keep in mind that the downtowns of many large Canadian cities seem to flourish despite the presence of many more panhandlers than would be encountered in smaller cities such as Winnipeg and Victoria. It would be naïve to attribute the woes of downtown merchants exclusively, or even primarily, to panhandling. We

are dealing with what social scientists refer to as a multi-factorial problem, and there doesn't appear to be much evidence in support of the view that panhandling is *a* major factor, let alone that it is *the* major factor causing the deterioration of, say, Winnipeg's downtown.

Vancouver and Toronto, to take two prominent Canadian examples, have much more panhandling activity occurring in their downtown districts than Winnipeg does, but this has not prevented the downtowns of these cities from achieving enviable success. One may speculate that, unlike Winnipeg, these other cities have actively promoted their city centre as a place where urban dwellers will want to live. Downtown condo developments are thick on the ground. Thus, any potential negative impact resulting from the presence of panhandlers is much diluted because there are large numbers of people on the streets at all hours, pursuing a wide range of activities. Effective mass public transportation is another factor which is a beneficial presence in some cities. Its absence in Winnipeg may be a more decisive contributing factor to the decline of Winnipeg's downtown than is the presence of a relatively small number of peaceful beggars. Moreover, even in Winnipeg, one can point to other shopping areas, such as Osborne Village, which manage to thrive notwithstanding the presence of peaceful panhandlers.

Let us suppose, however, if only for the sake of argument, that we had good evidence in support of the hypothesis that peaceful panhandling is contributing in an important way to deterioration in the downtown area of some Canadian cities. Suppose also that begging is to be considered expressive activity. Finally, suppose that expressive activity — “free speech” — is ac-

cepted as an absolute value. Well, if free speech is an absolute value, then it trumps other values in every circumstance.

If, on the contrary, free speech does *not*, at least not in all circumstances, trump every other value, then we must engage in a process of balancing the harms and benefits associated with permitting peaceful begging against the harms and benefits of criminalizing peaceful begging.

In my view, we ought to concede that freedom of expression is not an *absolute* value. Nevertheless, as has been argued at length in this Report, expressive liberty, especially when it consists of political speech, deserves the highest level of protection consistent with other important and sometimes competing values. The discomfort or offense caused to some middle-class people by their encounters with peaceful beggars may generate calls to outlaw begging; but, as we have seen, the criminalization of peaceful begging drastically undermines the right of poor and/or homeless people to enjoy fair opportunities to communicate their plight to their fellow citizens and to engage them in dialogue.

Once it is recognized that the doctrine of freedom of expression is the essential means whereby society recognizes the importance of such values as truth, knowledge, rationality, and individual autonomy, then it becomes clear that the liberty of beggars to ask for help should outweigh the interest of other pedestrians to avoid a nuisance. Bear in mind also that governmental, business, and other élites in our society arguably have open to them a range of alternative, less-liberty-restricting means for resolving (or at least ameliorating) the problems generated by panhandling.

The burden of proof: On whom does it fall?

As we have seen, those who propose significantly to restrict the expressive liberty of peaceful beggars must bear the burden of proof. That is, they must show, with credible empirical evidence, *both* that panhandling causes more harm than good *and* that imposing coercive restrictions on the liberty of panhandlers will solve the problem and will do so in a way that is the least liberty-invasive means available to achieve this objective.

Here's the challenge for advocates of a policy which criminalizes peaceful panhandling. They have to demonstrate with reliable evidence that 1) peaceful panhandling causes serious social harm; that 2) criminalization of such peaceful panhandling will reduce or eliminate this putative harm, and that 3) no other less liberty-invasive means are available to achieve the same objective. Finally, they must demonstrate 4) that the overall good which will be produced by violating the expressive freedom of panhandlers is likely significantly to outweigh the harm which will be caused to peaceful panhandlers, to pedestrians who wish to interact with them, and to society generally. A policy of coercive legislation against peaceful panhandlers will be warranted only if all of these claims can be justified.

Each of these propositions will now be considered, in turn.

The harm caused by peaceful panhandling

i) public safety issues

The safety of pedestrians is often invoked by those who seek to restrict panhandling in the vicinity of instant teller machines or bus stops. One would obviously want to protect pedestrians in such locations; but, then, one would want to protect pedestrians against aggressive demands whether or not such demands are made near a bank machine or bus stop. It is clearly the purpose of the Criminal Code to provide just such general protection. If the provisions of the Criminal Code against demanding money with menaces were properly enforced, there is no reason to believe that cities would require additional ordinances to protect citizens from harassment by aggressive beggars.

It should be stressed that anti-poverty activists do not defend menacing street conduct. Rather, they challenge city administrations who claim

that the Criminal Code, if properly enforced, would be inadequate to the task of defending pedestrians against harassment or threat. The City of Winnipeg, for example, when passing its new anti-panhandling by-law, nowhere saw fit to explain why the relevant Criminal Code provisions against demanding money with menaces are inadequate to deal with aggressive begging in the City. We already have the laws we need to deal with aggressive panhandlers, or with people who are intoxicated from drugs or alcohol in a public place.

The Manitoba Association of Rights and Liberties [MARL], in a presentation to the City of Winnipeg, addressed a key assumption made by those favouring the new anti-panhandling by-law, *viz.*, that if a request for money is made in a certain kind of location, one in which the pedestrian is “captive,” then the request becomes threatening merely by virtue of the location:

The report [prepared by the City’s Administration] recommends that the way to respond to concerns about panhandling is to define certain locations as inherently threatening... In a series of locations such as bank machines and bus stops, people may feel threatened because they cannot reasonably avoid solicitation.¹⁸

The MARL brief then points out, quite reasonably, that:

If someone approaches you at a bus stop to ask for directions or to ask for time, do you feel threatened? We would argue that there is nothing inherently threatening in approaching someone at a bus stop in a peaceful manner and asking for help. Even if the help sought takes the form of a request for money, this by itself does not make the request threatening.

And they continue:

At a bank machine, if someone is standing too close to you when you are using the machine, you are likely to feel threatened whether they make a request of you or not. In fact, this may seem more threatening than someone sitting quietly outside the bank machine with a sign asking for donations.

The mere location is not what makes some circumstances threatening. It continues to be the behaviour or the manner in which the solicitation is made.

In other words, many of the new anti-panhandling by-laws popping up in cities across Canada appear to be aimed at all panhandlers, aggressive and peaceful alike. When one notices how many bus stops, bank machines, parking lots, and other panhandling-forbidden locations are to be found in most city downtown areas, one realizes that it would be comparatively easy for a panhandler whose behaviour is entirely unthreatening nevertheless to run afoul of one of these restrictions. By littering the downtown area with “no go” zones for panhandling, these by-laws give police discretion to arrest people whose primary offence is to be homeless and poor.

In sum, one may conclude that, if Winnipeg by-law 128/2005 and other similar by-laws across Canada are truly aimed at aggressive beggars, then they are redundant. If, however, as many anti-poverty advocates believe, they are really aimed at peaceful beggars, then their true goal is to clear poor, disheveled, smelly people out of the sight, sound and smell of squeamish pedestrians and anxious merchants. Whether *this* questionable goal should be pursued by criminalizing peaceful panhandling is the issue to which we next turn.

ii) panhandling is seriously anti-social

Those who favour the criminalization of peaceful panhandling often support their case with the claim that all panhandling, peaceful as well

as aggressive, should be seen as seriously anti-social behaviour.

Some of those who advocate using coercive legislation against peaceful panhandlers appeal to the “broken windows” hypothesis. They invoke an insight attributed to urbanologist Jane Jacobs: that the health and viability of a neighbourhood is dependent upon the attractiveness of its sidewalks, streets, and public spaces.¹⁹ Ms. Jacobs’ writing inspired both the influential article “Broken Windows”²⁰ and its sequel “Fixing Broken Windows.”²¹ The central theme of these articles is that, if one eliminates what some sociologists label “low-level street disorder,” one can thereby prevent more serious crime and thus prevent the radical deterioration of neighbourhoods. Begging, even peaceful begging, is seen as part of an anti-social bundle of behaviours — a bundle containing such other unattractive elements as teenage rowdiness, graffiti on walls, aggressive public drunkenness, sleeping on benches, and public urination.

According to the “broken windows” hypothesis, beggars are identified as a prime source of the sort of “urban chaos” that leads subsequently to more serious crime. The primary solution favoured by “broken window” theorists relies on police action to restore good order by ridding neighbourhoods of panhandlers and other “undesirables.”

I analyzed the empirical evidence in favour of the “broken windows” hypothesis in an earlier report on panhandling, prepared for the Caledon Institute of Social Policy.²² There was no good empirical evidence in support of the hypothesis.

Kelling and Coles, the authors of *Fixing Broken Windows*,²³ famously contend that beggars are a prime source of the kind of “urban chaos” in which crime is alleged to flourish. They argue that the police should be employed to restore good order by ridding neighbourhoods of panhandlers and other “undesirables.” The theory was put into practice by Mayor Rudy Giuliani

in New York City, and when the crime rates in New York subsequently declined it seemed obvious to many social commentators that the New York experience provided empirical support to the Kelling and Coles’ hypothesis.

Reality, alas, is much too messy to permit such easy social science “proof.” For one thing, there are too many confounding variables. Thus, as social critics were quick to point out, crime measurement is a notoriously imprecise business. Police administrators and officers — the official crime score keepers — are able, almost at will, to inflate or deflate the crime rate. When a police force is attempting to make the case for increased spending on staff or equipment, crime rates conveniently “rise;” when the force is attempting to demonstrate the effectiveness of its current measures, crime rates conveniently “fall.”²⁴

Equally significant, there is always a risk, as we seek to interpret rising or falling crime rates, that we will commit the fallacy of mistaking coincidence for causality. Thus, for example, if the crime rates in New York happen to fall *after* a vigorous policy of enhanced street policing, many people will incautiously infer that the crime rates fell *because* of the enhanced policing. But if it happens also to be the case that crime rates fell as much (or perhaps to an even greater extent) in other cities in which policing was not enhanced, then a prudent person would be compelled to consider other possible causes for the fall in crime: say, increased employment rates, improved race relations, or demographic shifts (especially a reduction in the number of young men, who constitute the pool from which most anti-social behaviour originates).

That’s why it would be unwise to rely on a claim, such as that made by Kelling and Coles, that the criminalization of panhandling and other disorderly street behaviours provides a workable formula for urban crime reduction.

Since there is no good evidence to support the view that legal coercion against so-called low-level street disorder results in reduced crime rates in

those cities which have adopted this approach (compared to other comparable cities which have not adopted it), it seems unwarranted to rely upon the broken windows hypothesis as justification for employing coercive measures against the mere presence of panhandlers.

iii) the city planning “hygiene” argument: panhandling as a public nuisance

The city hygiene argument, unlike the broken windows hypothesis, does not focus on an alleged slippery slope towards serious criminal activity. Instead, it contends that communities need to regulate public spaces in order to prevent or minimize chronic street nuisance. If panhandlers proliferate in our city centres, then a point will be reached when shoppers increasingly desert the city centre for the suburbs. Without shoppers, the downtown core soon becomes a slum.²⁵ Thus, even if we discount the broken windows hypothesis, the social hygiene argument claims that the presence of street people, including peaceful beggars, creates an ambience of disorder which annoys or upsets pedestrians to such an extent that it drives them out of the downtown. Based on reasoning of this sort, the voice of the business community is often prominent in the choir of those calling for more coercive legislation against panhandlers.

Assessing the Arguments Against Peaceful Panhandling

It should be acknowledged that peaceful panhandling sometimes causes problems for the rest of the community and, in particular, for entrepreneurs in the city centre. Many pedestrians, perhaps a majority, experience their encounters with beggars as socially negative.

However, even if one concludes that begging is on balance a socially negative phenomenon, it does not follow that it would be either prudent or morally right to use legal coercion to

prevent panhandlers from asking pedestrians for assistance.

As I expressed the point in *Down and Out in Winnipeg and Toronto*:

...defending the right to peaceful panhandling is not the same as arguing that panhandling is desirable. Rather, the question is: Are the negative aspects of panhandling so seriously harmful as to justify legal interventions that may contravene other fundamental social values? Critics of anti-panhandling legislation argue as the core of their case that there is a very real danger that the cure (i.e., legal coercion) will be worse than the disease (passive panhandling).²⁶

Our society faces a multiplicity of serious social problems. As mentioned earlier, these social problems include homelessness, unemployment, poverty, untreated mental illness and substance abuse. Though many individuals who suffer from these problems never engage in panhandling activity, those who panhandle tend overwhelmingly to fall into one or more of these categories of deprivation.

The “street people” whose presence in our downtown is so upsetting to merchants and to some pedestrians are not only drawn disproportionately from the ranks of the very poor, the severely disadvantaged and the acutely oppressed, but they also suffer from “social poverty.” That is, they lack a supportive network of family and friends.²⁷

Panhandlers can sometimes be induced, when legal coercion is employed against them, to shift their begging from one location to another, from one neighbourhood to another. But unless their social situation changes in some way, they will be back, sooner rather than later, to those locations where they have previously enjoyed success. The cost of extra policing, court costs, and prison costs, will likely be found burdensome, and enforcement, as a result, may become lax.

Thus, even if it is accepted that peaceful panhandling causes more harm than good, and even if one ignores the moral cost of violating the panhandler's right to expressive liberty, it is doubtful that coercive legislation against peaceful panhandlers will achieve its goal of eliminating entirely, or even reducing substantially, the number of panhandlers in busy downtown areas. Further, even if begging activity were temporarily to decline, it is not at all obvious that there would be

more than a temporary decrease in the number of "street people" who frequent these areas. Their mere presence, even if none of them ever solicits money from pedestrians, is likely to pose exactly the same "deterrent" effect on potential downtown shoppers. There is therefore good reason to doubt that coercive legislation, such as the City of Winnipeg By-law No. 128/2005, will do the job at all, let alone that it will do it well and in a morally defensible manner.

Conclusion

Reliance on legal penalties is not the best alternative available to deal with the problem of peaceful panhandlers in the downtown areas of Winnipeg or any other big Canadian city. That is, there are alternatives which will more effectively achieve the objective being sought — a pedestrian-friendly environment — and will achieve this objective without serious violation of such fundamental human rights as the right to freedom of expression.

The better alternatives might be labeled “bottom-up” solutions, in contrast to the “top-down” solution of coercive legislation. It is beyond the scope of this report to explore in detail these less coercive but potentially much more effective solutions. What they have in common, however, is a focus on efforts to counteract the deprivation that fuels social problems such as panhandling. The problems associated with street disorder in general and peaceful panhandling in particular could be reduced to the status of a minor and very occasional nuisance if Canadian cities were willing seriously to consider such measures as: improving welfare benefits for the indigent, appropriate housing and social services, better availability of addictions treatment for street peo-

ple, services and shelter for the mentally ill, and a bevy of re-training and employment opportunities to give people the means to become self-sufficient. Additional measures will be needed to assist young street people, including access to recreational facilities and exposure to positive role models.

In short, if we value civility in our public spaces, society must be prepared to invest in people and their needs. At present, we have excluded a number of groups from the mainstream of society: the homeless, unemployed, mentally ill, and inner-city teenagers (in particular, Aboriginal youth and immigrant children). Not surprisingly, the excluded have opted out of mainstream morality.²⁸

Many promising initiatives along these lines have been tried, with some success, in Winnipeg and elsewhere, despite the lack of adequate funding: drug outreach workers, food banks, core-area youth recreational facilities, and homeless shelters. Literacy education and job training are also important. If significant resources were invested in what I am calling “bottom-up” programs of this sort, they might, cumulatively,

ameliorate if not entirely solve some of our most important social problems.

None of these bottom-up approaches is a “magic bullet.” All are expensive — though possibly less expensive than hiring more police and building more prisons. All will take some time

to show significant results; but they hold out the prospect of dealing with the underlying causes of street-disorder problems, and dealing with them in ways that are respectful of such values as individual dignity, free expression, and individual liberty.

Notes

¹ A By-law of the City of Winnipeg to amend the Obstructive Solicitation By-law No. 7700/2000.

² I am employing the phrase “criminalization of conduct” in a broad sense to refer to any legislation which makes the designated conduct an offence punishable by fine or imprisonment.

³ Carter, Tom. (1998). *Panhandling: Do municipal by-laws effectively address the problem?* Report prepared for the National Anti-Poverty Organization legal challenge to the City of Winnipeg Anti-Panhandling By-Law (2000); Addictions Foundation of Manitoba (1992, 1993, 1996), *Change for the Better Program. Statistical Reports*. Winnipeg.

⁴ Cass Sunstein, *Democracy and the Problem of Free Speech* (New York: Free Press), 1993; Elizabeth S. Anderson, “The Democratic University: The Role of Justice in the Production of Knowledge”, *Social Philosophy and Policy*, 1995.

⁵ Thomas Scanlon, “A Theory of Freedom of Expression,” *Philosophy and Public Affairs*, vol.1 (1972), pp.204-26.

⁶ In Canadian jurisprudence these philosophical requirements have come to be known as “the Oakes test. R. v. Oakes, [1986] 1 SCR 103] 26 DLR (4th) 200.

⁷ The American Bill of Rights prefers the language of “free speech”, while the Canadian Charter of Rights and Freedoms employs the phrase “freedom of expression”.

⁸ The Supreme Court of Canada gives its answer to this question in R. v. Keegstra (1990) 3 S.C.R. 697.

⁹ See, e.g., the discussion of this point in: H. Hershoff and A. S.Cohen, “Begging to differ: the first Amendment and the Right to Beg”, 104 Harvard Law Review 896.

¹⁰ *Young*, 729 F. 2nd. (1990). Writing for the majority, Judge Altimari concluded that since the only purpose of begging is to ask for money, beggars are not entitled to the protections of the doctrine of freedom of expression.

¹¹ I am not claiming that all panhandlers are homeless; nor am I claiming that all panhandlers are poor. The empirical evidence available suggests, however, that almost all panhandlers are poor and that very many of them are also homeless.

¹² Neal Conan, National Public Radio, “Talk of the Nation” from Washington ...

¹³ *loc. Cit.*

- 14** John Stuart Mill, *On Liberty* (Illinois: Crofts Classics), Chapter 2, ed. Alburey Castell, 1947. For a contemporary version of this argument see, e.g., L.W.Sumner, *The Hateful and the Obscene: Studies in the Limits of Free Expression* (Toronto: University of Toronto Press). See also: Nat Hentoff, *Free Speech for Me, but Not for Thee* (New York: Harper-Collins, 1992); and Jonathan Rauch, *Kindly Inquisitors* (Chicago: University of Chicago Press, 1993).
- 15** *Whitney v. California*, 274 U.S. 357, 375-376, 377 (1927) (concurring).
- 16** Cohen, *op. cit.*, p. 224.
- 17** *Ibid.*, p. 216.
- 18** *loc. Cit.*
- 19** Jane Jacobs, *The Death and Life of Great American Cities*, 1961.
- 20** Kelling and Wilson, 1996.
- 21** Kelling and Coles, 1996.
- 22** Arthur Schafer, *Down and Out in Winnipeg and Toronto: The Ethics of Legislating Against Panhandling*, Caledon Institute of Social Policy, 1998.
- 23** George L. Kelling and Catherine M. Coles. (1996). *Fixing Broken Windows: restoring order and reducing crime in our communities*. New York: Martin Kessler Books.
- 24** David Burnham. (1966). *Above the Law: Secret Deals, Political Fixes, and Other Misadventures of the U.S. Department of Justice*. New York: Scribener.
- 25** For elaboration of this argument see Schafer : *op. cit.*, p.4-6.
- 26** *Ibid.*, p.6.
- 27** Christopher Jencks. *Rethinking Social Policy, Race, Poverty and the Underclass*. Cambridge, Mass: Harvard University Press. (1992)
- 28** Schafer, *op. cit.*, p.12.

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