

The expressive liberty of beggars – why it matters to them, and to us

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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.ⁱ 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 criminalizationⁱⁱ of panhandling has become a kind of battleground. On this battleground, a clash is occurring 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, intimidating, menacing, or threatening manner then liberty-limiting legislation would be much less controversial. In Canada, the Criminal Code currently 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 gravamen of the argument advanced in this Report will be that restrictions of peaceful panhandling, of the sort contained in several Canadian municipal bylaws, including the above-mentioned City of Winnipeg Bylaw, constitute an illegitimate use of state power.

There are many ethically weighty arguments in support of the view that peaceful beggars should *not* be turned into criminals. I will focus primarily on the argument that, properly understood, begging involves the kind of expressive communication between people that a free and democratic society should seek to protect rather than to infringe. Since freedom of expression is generally recognized, in Canada as well as in all other liberal democratic societies, to be a fundamental human right - one which should be infringed only in extraordinary and 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. Whether such a violation can ultimately be justified - by the claim that this form of censorship is *necessary* to promote important social goals and that the good which such censorship will allegedly produce is likely to outweigh substantially the acknowledged harm – is a question which will be explored later in this Report.

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 ill 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.ⁱⁱⁱ 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. Although this is a common way of conceptualizing the matter, it is clearly not ethically defensible. Panhandlers have as much right as upstanding middle class citizens to insist on being treated with respect for their dignity as persons. When we are considering the morally important category “beings entitled to respect”, panhandlers should count as “we”, not “they”. The very title of this Report, with its sharp dichotomy between “them” and “us” runs the risk of conveying, inadvertently, the message that some of our fellow citizens, categorized as “beggars”, are specimens, pinned and wriggling on a hook, rather than equal participants in the project we call building Canadian society.

If members of the underclass, including the unemployed, the homeless, and the poorest of the poor 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 robbed of the opportunity to make up their own minds based on full information and rational reflection. In other words, even the very poor have an important potential contribution to make to the marketplace of ideas. Some would argue that they have an especially important contribution to make. The 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 expressive liberty by the state even more problematical, from the moral point of view, than would be a similar denial of freedom of expression to individuals from more privileged backgrounds. Beggars are fully entitled to participate in public debate about the issues which affect all of us generally but the poor in particular. 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 suffer from a severe shortage of resources for inquiry. A liberal democratic society which values the rational autonomy of its members must work diligently to protect norms of mutual recognition and respect in communication.^{iv}

It is 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 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

Before addressing the doctrine of freedom of expression and the underlying arguments which give it compelling force, a preliminary issue must be raised: When a beggar asks a pedestrian for assistance - whether through speech, a written message or through symbolic gesture, (such as a hat or hand extended in a begging manner), should we think of this conduct as essentially communicative? If the answer we return to this question is affirmative then a secondary question arises: If begging counts as expression does it also deserve the highest kind of social and legal protection which we think proper for political speech or does it, on the contrary, fall within a special category of less-protected speech?

It is important to keep in mind that not all speech counts as expression for purposes of the doctrine of freedom of expression. We could, for example, justifiably punish individuals for deliberately launching a lethal avalanche by the sound of their voice, even if the shout which caused the avalanche consisted of words expressing a political viewpoint - "*Vivre le Quebec libre*", for instance. By a similar logic, it would be legitimate to silence political opinions if those opinions were uttered very loudly in a hospital intensive care ward. Such silencing of opinion should not be thought of as censorship. It does not

violate anyone's right to freedom of expression if we restrict his/her liberty in this way, so long as it is the circumstances and manner of utterance rather than the content of the views uttered which attracts restriction.

This way of putting the matter is oversimplified, however, and stands in need of some qualification. We concede to our government(s) the authority to restrict the liberty of citizens only when such restriction is reasonably necessary to prevent significant social harms. But we do not, or should not, readily concede to our government(s) the authority to prevent these harms by controlling people's access to information.^v The rational autonomy of citizens entails that every citizen reserves the right to assess the evidence and weigh the arguments for his/her beliefs.

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

goals and interests, should be regarded as intolerable in a free and democratic society because they would substantially reduce the opportunities of citizens to engage in public discourse with each other. If the government of a free and democratic society 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., 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.^{vi}

It is a clearly legitimate goal of municipal governments to promote safe and efficient passage of pedestrians along the sidewalks of our downtown neighbourhoods. But if a government attempts to restrict the right of peaceful beggars to solicit help from pedestrians, there is a burden of proof on that government to show that the mere 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 that such restrictions will in reality promote the goals of pedestrian safety and efficiency of movement, 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”?

In this section I address the issue: What counts as “expression” (or “speech”) for the purpose of invoking the doctrine of freedom of expression?^{vii} By analysing this question we will gain a more precise understanding of the scope encompassed by the right to free expression.^{viii}

Just as not all speech counts as expression for purposes of the doctrine of freedom of expression, so not all expression takes the form of speech or publication. Expression can include, for example, the display of symbols or the refusal to display symbols. In certain circumstances, flying a flag (or refusing to fly a flag) can be an expressive means by which to manifest one’s political allegiances or moral values. In the 1960s and perhaps beyond, dressing as a “hippy”, with long hair (for a man) and Bohemian clothing was one commonly understood way for (mostly young) people to communicate a set of anti-materialistic values. When Spain, under the rule of Fascistic dictator Generalissimo Franco banned men from displaying long hair and wearing beads this restriction was clearly recognizable as being contrary to both the letter and the spirit of the doctrine of free expression even though the ban was against clothing and long hair rather than targeted at spoken or written words.

For these sorts of reasons the broad phrase “freedom of expression”, as used in the Canadian Charter of Rights and Freedoms is more appropriate than the somewhat narrower meaning typically conveyed by the phrase “freedom of speech”. By the term “expression”, as used in the phrase “freedom of expression”, is meant “any act of communicating any meaning, whether by spoken or written words or by non-verbal symbolic means”. It should also be noted that although the content of the expression is typically informational/cognitive it could instead (or as well) be emotional, attitudinal or non-cognitive in some other way.

One of the key questions to be addressed, as we approach the question of whether it is legitimate to restrict the liberty of peaceful panhandlers, can be phrased as follows: When a beggar solicits money or other forms of help from passersby, is s/he engaging in the kind of speech which is encompassed by the doctrine of freedom of expression? When a beggar utters such words as “Please help me, I’m unemployed and need money for food” should this be viewed as protected speech under the doctrine of freedom of expression? If the beggar simply holds out her hand expectantly for money, should this count as protected expression?

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.^{ix} 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 beggar do not advocate any political ideology; they don’t

advance, at least not by intention, any abstract political or social view or argument. Thus, they can scarcely be said to make a conscious contribution to the free marketplace of ideas.^x

The view that begging activity should be thought of as a kind of commercial transaction is defensible, at least up to a point. The beggar is conveying the desire to receive money. The beggar is soliciting money and in return is offering good will but nothing of commercial value. Even the critics, however, would be hard-pressed to deny that the beggar is *also* seeking to express or communicate something important about himself and his life situation. The panhandler is, both directly and indirectly, conveying a message. He, or sometimes she, is communicating to the members of public with whom he has contact, in almost the only way available to him/her, something important about what our society is like for those at the very bottom of the heap. The panhandler communicates – 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 powerfully, albeit indirectly, a 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 the message that: because of severely limited socio-economic opportunities and inadequate social service support systems, some people are unable to maintain themselves at a level of decency that most of society takes for granted.

A homeless person, an impoverished person, with multiple problems ranging from poor health to lack of education and skills, has very few alternative means of engaging with his or her fellow citizens.^{xi} Newspaper Op Ed pieces, letters-to-the-editor, articles in popular magazines, contributions to radio talk-shows, publication of books or even pamphlets: none of these is a viable or realistic option for people who are desperately poor, homeless, distressed, mentally disturbed, addicted, or suffer from some combination of these socially disabling impediments.

By means of their begging activity, panhandlers are communicating information about and an appeal for relief of their immediate personal needs. Typically, their message is a particular one. That is, as critics are wont to point out, 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? Should people not expect that the state will guard and protect their right to appeal to their fellow human beings, publicly, for help? 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?

The panhandler's appeal for help, as we have seen, is a direct personal appeal. But it is also something more than a personal appeal. Panhandling enables the beggar to engage in dialogue with his or her fellow citizens., This kind of dialogue typically raises, even if only indirectly, politically 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”, in the widest sense of this phrase, both for the beggar and for the person to whom his appeal is addressed.

This point is graphically made by Daniel Cohen when he writes:

By his tattered self-presentation in the public domain, and his supplication of passersby for assistance, the beggar’s anomalous condition of dire want informs onlookers about, or at least suggests to them, the existence of social ...disorder, and may disorient, or awaken from undesired complacency all who witness that soul’s miserable penurious state. That is to say, in addition to his conscious, particular message of want, the beggar conveys, however indirectly, an underlying message about society, and about life.^{xii}

One conclusion which follows from this line of reasoning: Any interpretation of the doctrine of free expression which sees it as offering protection only to speech of a formally ideological nature should be rejected as excessively narrow and stunted.

Whatever the explicit intentions of those who panhandle, and these may be more subtle and complex than some middle class spectators are easily willing to allow, they indisputably convey (to pedestrians) important messages of a social and political nature.

When the French author Anatole France famously observed that the law, in its majestic equality, forbids the rich as well as the poor to sleep under bridges, to beg in the streets, and to steal bread^{xiii}, he could easily have added, in the same spirit, that the law protects the free speech rights of beggars as well as powerful elites to broadcast their views in the mass media or publish them in books, popular and scholarly. The heavy irony of Anatole France's comment highlights the fact that to people who are homeless and/or impoverished, to people whose personal resources^{xiv} are as limited as are their financial resources, possession of the sacred right to freedom of expression may not in practice amount to very much if they are not allowed to address their message to directly to others in highly frequented public places.

Thus, there is a strong claim to be made that (i) the panhandler's activity should be categorized as "political speech" and that, in consequence, (ii) we should acknowledge that the panhandler has a fundamental right to express this message and, equally, that passersby have a fundamental right to hear it and to formulate their own personal response.

Since some pedestrians find the beggar's message disturbing, unsettling or even, as the case will sometimes be, unpleasant, 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 and the response which is appropriate for them to make. A National Public Radio broadcast in the United States, hosted by Neal Conant, offered some important illustrations of this

point.^{xv} Mr. Conant begins the broadcast by observing that when a panhandler asks us for money “It’s sometimes heart-wrenching, sometimes bothersome, sometimes maddening, sometimes all three.” He notes that the beggar’s appeal stimulates us to wrestle with ourselves, to engage in an internal debate: “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”.^{xvi}

One of the guests on this radio show, Sister Scullion, claims that there is something morally important about responding to a direct personal appeal for help from a person in need of assistance, something which is absent when one responds to a more general appeal made by 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, like, the dignity of each person and, you know, that we’re both adults, we’re both, you know, human beings. And if another person needs or wants to talk to me, I can talk to them and, you know, 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, you know, an important message to give, as opposed to just being disgusted or, you know, 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 in a way that other social interaction is not restricted then the plight of the panhandlers and, indeed, the very existence of people who hover on the margins of hunger and, more generally, on the margins of society, may well become truly 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

Some key questions

Very few Canadians would dissent from the view that freedom of expression is a fundamentally important moral right. By describing freedom of expression as a “right” one is conveying the claim that there is a space, defined by the right in question, within which the individual should be free to pursue his interests or projects without interference from society or government.

Most would also agree, however, that freedom of expression, though fundamentally important, falls short of being an absolute value. In other words, the right to express oneself freely is a right which may, in certain circumstances, legitimately be infringed or limited. In this section, I address such questions as: Why is expressive liberty accepted (at least in liberal democratic cultures) as a fundamental right? What values are promoted by respect for expressive liberty and what are the costs when this liberty is abridged? What values (potentially) compete with free expression? How much weight should we assign to the value of free expression compared to other competing rights or worthwhile social goals? Do competing values sometimes override freedom of expression and, if so, in what circumstances? What criteria should be employed to settle a conflict between, let us say, the expressive liberty of beggars, on the one hand, and the “comfort level” of pedestrians or merchants in the downtown of a city frequented by beggars, on the other? In the course of addressing questions such as these, the discussion will attempt to answer both the broader question “What are the morally defensible limits of the right to free expression?” and the more concrete question “Is the criminalization of peaceful panhandling (by municipal governments) morally legitimate?”

Speech is by no means “free” – it is capable of causing harm to others

By challenging our deeply held convictions, controversial speech can disturb our psychological equilibrium. By persuading us to accept false beliefs, what we hear and read can lead us astray and may cause harm, even serious harm, to us and to others. We may be led by the opinions we encounter to vote for the wrong political party, to support

an unjust war or to follow a life path that is less-than-fulfilling. Any or all of these choices could result in great harm to us or even, if many people are led astray, to society.

An essential feature of the doctrine of freedom of expression, however, is that it singles out for special protection a class of acts – expressive acts - which are claimed to be generally immune from restriction, even if they can be shown to cause harm of one kind or another.

The classic defence of the doctrine of freedom of expression

The philosophical literature on freedom of expression is vast and various, but the classic development and defence of this doctrine is that found in Chapter Two of a short essay 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 defends freedom of expression on the grounds that in the long run and overall censorship would (almost) always have much worse consequences than freedom. 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, while restricting or banning it will almost always yield the reverse – more harm than good.

The advancement of knowledge is claimed by Mill to be 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.^{xvii}

Mill's argument here is that, since none of us is infallible, those who employ censorship inevitably run the risk that the view they are silencing may be true. Moreover, even views which are largely false may nevertheless contain some important pieces of the truth which would be lost if they were silenced. The advancement of knowledge is a defining element, perhaps *the* defining element of a progressively developing civilization. The growth of knowledge makes possible the defeat of ignorance, prejudice and superstition which, in turn, makes it possible for individuals to lead safer, longer, happier and more self-fulfilling lives. Censorship always carries with it the risk that it will cost us the loss of valuable truths.

Equally important, some would argue *more* important, the clash of ideas in a free marketplace of ideas forces all of us to question the evidence for our beliefs and assumptions. The faculty of critical rationality is seen by Mill as hugely important, both for its own sake and for what it makes possible. Only through a process of critical reasoning can we move from stifling dogmatism – “it’s true because I say so or because we insist that it is true” – to rationality – “it’s true on a balance of probabilities because we have weighed all the evidence we could assemble and have tested our hypotheses as rigorously as we could test them”. Mill argues in *On Liberty* that we are entitled to be confident in the truth of our beliefs only to the extent that we have held them out for all to hear or read and have invited any who care to challenge their veracity to do so. Only ideas which are capable of withstanding such critical scrutiny, only ideas which survive the test of criticism from all who are willing to issue a challenge, are worthy of belief. Even then, hypotheses should be held in a provisional and tentative manner since it is always possible that future evidence or argument will emerge which counts against the truth of the hypothesis. Society has an exigent need for inquiring intellects if it is going to progress. Censorship stifles rather than promotes the spirit of intellectual inquiry.

As Mill eloquently puts the point:

Complete liberty of contradicting and disproving our opinion is the very condition which justifies in assuming its truth for purposes of action...and on no other terms can a being with human faculties have any rational assurance of being right.^{xviii}

For Mill, it goes without saying that all of us are prone to error. We are human beings, after all, and so our judgement 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.

Although Mill sometimes writes as if he views freedom of expression as (virtually) an absolute value, his overall orientation to the doctrine of free expression could best be described as a cost-benefit approach.^{xix} That is, Mill's arguments all appeal, ultimately, to a kind of utilitarian calculus of benefits and harms. Thus, notwithstanding his staunch defence of freedom of expression, Mill is compelled to admit that there are exceptions, albeit rare, when speech might legitimately be prohibited or punished; that is, he is forced to admit that there are circumstances, albeit few in number, in which censorship can be justified. The narrow circumstance in which Mill is willing to allow censorship of expressive liberty would be a case in which a speaker incites others to riotous behaviour; but, it should be noted, Mill allows punishment only if the incitement is immediately followed by the anti-social (riotous) behaviour.

Even those who defend censorship in wider range of cases (than those which Mill allows) usually concede that freedom of expression is such a vital part of any society which purports to be free and democratic that there should be a heavy burden of proof on those who favour censorship. Before society could be justified in silencing any person who wishes to communicate with his fellow citizens society must demonstrate: first, that the expression to be censored is causing harm to others, which Mill calls the *Harm Principle* and, second, that interfering with freedom of expression is likely in the circumstances in question to yield more benefits than costs, more good than harm, more happiness than misery. Philosophers label this the *Consequentialist Principle*.

In other words, the *onus probandi* rests on those who advocate the suppression of free speech. They must demonstrate that censorship in this or that particular circumstance is both necessary to prevent significant harm and that it is likely to produce much more good than harm. I will discuss these points in some detail later in the Report.

CORE VS. MARGINAL FORMS OF EXPRESSION

The principal question addressed in this section concerns a claim, by some philosophers and jurists, that not all forms of expression are equally entitled to stringent protection against abridgement. That is, the claim is sometimes made that certain forms of expression are of merely secondary importance and may legitimately be infringed in a way that would not be permissible for kinds of expression which are of primary importance.

With respect to the issue of whether it is morally legitimate to criminalize peaceful panhandling: Once it is conceded that begging is expressive activity, should we then qualify this concession by insisting that begging is not in its essence the kind of expression to which the doctrine of freedom of expression is meant to apply? Putting this question in another way: Should we think of panhandling as a paradigm case of free expression, comparable to (or a sub-species of) political expression or, contrariwise, should we think of it as a merely peripheral, marginal or subordinate kind of expression and therefore less deserving of stringent protection than political speech?

Advocates of the doctrine of freedom of expression typically defend a strong (though less than absolute) presumption against regulations which restrict expression. The burden of proof on those who wish to restrict freedom of expression is generally thought to be highest when that expression is political in nature. But in the case of other, non-political, categories of speech, those we might label “peripheral” to democratic governance or individual fulfillment, the protection offered may be less robust. As noted earlier, even J. S. Mill stops short of defending freedom of expression as an *absolute* value. Thus, Mill was willing to make an exception to his anti-censorship position for speech which falls within the category of “incitement” (to immediate riotous behaviour). Others would submit additional candidates to the list of exceptions, that is, additional categories which should enjoy a lesser degree of protection against being silenced: examples frequently given include private libel, and commercial speech, such as advertising. Hence, many advocates of the doctrine of freedom of expression nevertheless support truth-in-

advertising legislation which restricts corporations from disseminating false or deceptive advertising messages.

CONTENT-NEUTRAL RESTRICTIONS ON SPEECH

It is widely accepted, even among staunch defenders of free speech, that restrictions of liberty which are *content-neutral* are less objectionable than restrictions which are aimed at a particular subject matter or a particular viewpoint. That is, defenders of freedom of expression take particular exception to censorship which seeks to regulate or restrict the *content* of expression, whether viewpoint or subject matter. The classic American statement of this concern occurs in *Police Department of Chicago v. Mosley*, 408 U.S. 92, 95-96 (1972), where Justice Marshall writes:

Above all else, the First Amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter, or its content.^{xx}

By contrast, when a government restricts expression *not* because of its message but, rather, because it is being communicated noisily in the intensive care ward of a hospital, then the restriction may well be permissible. This having been said, however, we should not lose sight of the fact that so-called *content-neutral* restrictions on free speech can sometimes place an especially heavy burden on groups with severely limited resources with which to convey their views. Thus, as noted earlier, restrictions on political

demonstrations, parades, leafleting and placards on the street and panhandling on the sidewalks could effectively shut down most or all of the opportunities which certain marginalized groups in society have to influence their fellow citizens. As a matter of basic *fairness*, all citizens, including those whose economic and/or social position is significantly sub-standard, are entitled to enjoy reasonable opportunities for expression.

As the philosopher Joshua Cohen puts the point:

The requirement of fair access supports a strong general presumption against content-neutral regulations that have substantially disparate distributive implications – when, as with regulations on the distribution of handbills, or on the use of parks and sidewalks, they work to disproportionately burden those who otherwise lack the resources to get their message out.^{xxi}

Cohen doesn't specifically consider anti-panhandling legislation. But where, as in the case of Winnipeg's by-law No. 128/2005, the legislation would have the effect of curtailing severely the expressive opportunities of beggars, who are mostly drawn from the least privileged strata of our society, we can see that his argument militates against anti-panhandling bylaws because their practical effect is discriminatory against the most disadvantaged.

Let us return, for a moment, to the distinction between core cases of expression, which ought to be stringently protected, and marginal cases, whose expression might be legitimately curtailed in certain circumstances. Consider, as an illustrative example, false or misleading commercial advertising. Most Canadians accept, and some accept with enthusiasm, governmental restrictions on false or misleading commercial advertising. But there would be very much less tolerance for any attempts by government to restrict political speech which was alleged to be false or misleading. 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.

THE CASE FOR STRINGENT PROTECTION OF EXPRESSIVE LIBERTY

As Mill notes, governments generally tend to view criticism, whether offered of their policies or of their performance in office, as being highly misleading if not outright false. Give any government the power and authority to censor speech which the government sees as “false or misleading” and one will very quickly find that all criticism of the 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 accepted or thought morally acceptable.

What is true of governments is no less true of other elites in society, whether religious elites or economic, military, educational, artistic or medical elites. 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 have access to a full range of views and information 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 elites. 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. It will be recalled that, according to Mill, truth and rationality are both key values protected by freedom of expression. If a mischief-maker cries “fire” in a crowded theatre, 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.”^{xxii} How can anyone discover which ideas and general policies are overall best if laws such as the City of Winnipeg’s anti-panhandling by-law prevent pedestrians from hearing for themselves appeals for help which the downtrodden of our society wish to raise? If members of the public rarely encounter direct evidence of the personally destructive effects of such phenomena as homelessness, poverty, unemployment, and substance abuse then it becomes easier for participants in political debates – for example, the debate between those who favour low taxes versus those who favour better public services – to ignore these profoundly important social realities.

Stringent protection for expressive liberty is also 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, to hear the views of others, and to make up their own minds. It is difficult to imagine any self-expression more profoundly important to an individual than the right to plead for help, in a peaceful and unthreatening manner, with one’s fellow members of society. At the same time, it should not be overlooked that by speaking out 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.^{xxiii} 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 reach a reasonable and balanced conclusion based on all the relevant evidence (rationality) and the *expressive interest* which autonomous individuals, including those who are homeless, unemployed and possessed of few resources, have in being able to participate at least to some extent in the process of democratic decision-making.^{xxiv}

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 species 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.

SINCE FREEDOM OF EXPRESSION IS NOT AN *ABSOLUTE* VALUE, THE COSTS OF PANHANDLING HAVE TO BE BALANCED 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 down-town 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*. Speech has consequences, some of which are beneficial but some of which are (either actually or potentially) harmful.

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 as they go about their shopping or other business. 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 such individuals 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 indirect costs. In this way, a city's urban hub can suffer decline. It should be noted that these costs are not generated by any particular beggar exercising his or her right to freedom of expression. These "environmental" costs, as they might be labeled, 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 potentiality to contribute to 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 Winnipeg. 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 is *the* major factor causing the deterioration of Winnipeg's downtown.

Vancouver and Toronto, to take two prominent Canadian examples, have much more panhandling activity occurring in their downtown districts than Winnipeg experiences, 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 other activities. Effective mass public transportation is another factor which is present in some other 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 the problems of Winnipeg's downtown area. Even if such evidence existed, the negative costs of panhandling would not be morally significant for those who accept free speech as an absolute value. That is, if it were accepted that begging is expressive activity which should be accounted protected speech, and if free speech is an absolute value, then the social costs listed above, even if they were proven, would simply not matter.

I would argue, however, that if good evidence exists to show that panhandling has negative social consequences on the City's downtown then this would be morally relevant. It would matter because the value of free speech does *not* in all circumstances trump every other value. *Pace* Mill, in his absolutist mode, the doctrine of freedom of expression is neither absolute nor inviolable.

It is the argument of this Report that, although it is not an absolute value, freedom of expression, especially when it consists of politically expressive 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 the criminalization of peaceful begging drastically undermines the right of poor and/or homeless people to enjoy fair opportunities for expressive liberty. If, as I have argued, 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 the liberty of beggars to ask for help should clearly outweigh the interest of other pedestrians to avoid offence. It should also be borne in mind that governmental, business, and other elites in our society have open to them a range of alternative, less-liberty restricting means for resolving (or at least ameliorating) such problems as may be generated by panhandling activity.

THE BURDEN OF PROOF: ON WHOM DOES IT FALL?

One important conclusion which follows from the above argument is that those who propose significantly to restrict the expressive liberty of peaceful beggars must satisfy 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 in a way that is the least liberty-invasive means available to achieve this objective.

Thus, advocates of a policy which criminalizes peaceful panhandling have to demonstrate with reliable evidence (i) that peaceful panhandling causes serious social harm and they must also demonstrate that (ii) criminalization of such peaceful panhandling will reduce or eliminate this putative harm and that (iii) no other less liberty-invasive means are available to achieve the same ends and that (iv) 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. If and only if the advocates of such coercive legislation can demonstrate all of these claims will they have adequately justified their position. Each of these points will now be considered, in turn.

The harm caused by peaceful panhandling

i) public safety issues

The safety of pedestrians is a value invoked by those who seek to restrict the liberty of panhandlers. For example, the current Mayor of Winnipeg, Mr. Sam Katz, in defence of his Amendments to the Obstructive Solicitation By-law No. 7700/2000, states that:

You should be able to use the bank machine any time you want and you should be able to wait at the bus stop any time you want and you should be able to do it without having to tolerate aggressive panhandling.^{xxv}

It is difficult to disagree with this statement, except perhaps to criticize it for being too weak. Surely one would want to protect pedestrians against aggressive demands for money whenever and wherever they are victimized by threatening demands for money, and not simply when they happen to be using a bank machine or waiting for a bus. However, 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 they require to be supplemented by (redundant) city ordinances.

In passing By-law No. 128/2005, the Mayor, the Administration, and the City Council all apparently believed that this new by-law was needed to protect Winnipeg pedestrians against aggressive panhandling. They must have believed, in other words, that the Criminal Code, as supplemented by the previous City of Winnipeg anti-panhandling by-law, was insufficiently effective. Unfortunately, they offer no evidence whatsoever in support of this proposition. As the Manitoba Association of Rights and Liberties [MARL] point out in their Presentation to the Standing Committee on Protection and Community Services:

In its report, the administration [of the City of Winnipeg] indicates that in the years since Council adopted the current Obstructive Solicitation By-law that obstructive solicitation has continued to be a concern. It cites a 2002 Downtown Biz survey in which members identify panhandling as a problem and a similar survey the following year rated panhandling as the issue that most needs to be dealt with. In neither case is aggressive panhandling identified as the problem.^{xxvi}

Neither MARL nor the National Anti-Poverty Association [NAPO] nor any other opponent of the new City of Winnipeg Obstructive Solicitation By-law defends aggressive panhandling or other kinds of anti-social street conduct. Indeed, no one, no one at all, defends aggressive panhandling. But the City of Winnipeg nowhere explain why the relevant Criminal Code provisions against demanding money with menaces together with the previous obstructive solicitation by-law are inadequate to deal with aggressive begging in the City. Similarly, there already exist laws to deal with people who are intoxicated by drugs or alcohol in a public place.

The MARL presentation also addresses a highly dubious 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 in 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.^{xxvii}

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, the new by-law is appears 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 the downtown area, 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, the by-law gives police discretion to arrest and courts the discretion to punish with fines or imprisonment people whose primary offence is to be homeless, poor, smelly and of a disheveled appearance.

Now, it is possible, as the City’s Administration claims, that there has been a problem in the recent past with police enforcement of the Criminal Code^{xxviii} provisions against aggressive demands for money. But, if the problem was one of police enforcement then the solution would evidently lie in the direction of improving police enforcement rather than passing a new by-law that is at best redundant and at worst a completely unnecessary attack against peaceful panhandlers.

In sum, one may conclude that if By-law 128/2005 is aimed at aggressive beggars, then it is clearly redundant. If it is aimed at peaceful beggars then its true purpose is to clear poor, disheveled, smelly homeless 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 criminalizing peaceful panhandling often support their case with the claim that all panhandling, peaceful as well as aggressive, is a seriously anti-social activity.

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.^{xxix} Ms. Jacobs’ writing inspired both the influential article “Broken Windows”^{xxx} and its sequel “Fixing Broken Windows”^{xxxi}. 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 such 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” which leads subsequently to a flourishing of more serious

crime. The primary solution favoured by “broken window” theorists relies on police action to restore good order by coercively ridding neighbourhoods of panhandlers and other “undesirables”.

I analysed the empirical evidence in favour of the “broken windows” hypothesis in an earlier Report on panhandling, prepared for the Caledon Institute of Social Policy.^{xxxii} At that time there was no good empirical evidence in support of the hypothesis.

Kelling and Coles, the authors of *Fixing Broken Windows*^{xxxiii}, famously argue that beggars are a prime source of the kind of “urban chaos” in which crime flourishes. The theory argued that the police should be employed to restore good order by coercively ridding neighbourhoods of panhandlers and other “undesirables”. The theory was put into practice by Mayor 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”. There are simply 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 a case for increased spending on staff or equipment, crime rates conveniently “rise”; when the force is attempting to demonstrate the effectiveness of its measures, crime rates conveniently “fall”.^{xxxiv}

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 one 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).

From this it follows that it would be unwise to relay on a claim, such as that offered by Kelling and Coles, that the criminalization of panhandling and other “disorderly street behaviours” provides a panacea 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 employ coercive measures against the mere presence of panhandlers.

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

The city hygiene argument 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 what planners label “street disorder”, by which phrase is meant chronic street nuisance. If panhandlers proliferate in our city centres then a point will be reached when shoppers increasingly desert the city for the suburb. Without shoppers, the downtown core soon becomes a slum. ^{xxxv} Thus, even if we discount the broken windows hypothesis, discussed above, 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 and is, in consequence, bad for business. For this reason, 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).^{xxxvi}

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, they also suffer from “social poverty”. That is, they lack a supportive network of family and friends.^{xxxvii}

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, prison costs, will 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. 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 down-town 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.

Better alternatives

There are better alternatives 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 is a focus on efforts to counteract the deprivation that fuels social problems such as panhandling. The problem of peaceful panhandling, together with the problem of street disorder, could be reduced to the status of a minor and very occasional nuisance if the City 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 people, 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. ^{xxxviii}

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” programmes 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 still more police and building still more prisons. All will take some time to show significant results; but they hold out the prospect of dealing with the underlying causes of the so-called street-disorder problem, and dealing with them in a way which is respectful of such values as individual dignity, free expression, and individual liberty.

CONCLUSIONS

It has been accepted in this discussion that some harm is caused to society by panhandling even when the panhandling activity is peaceful or non-aggressive.

It has been acknowledged that there is reasonable disagreement as to the extent of the harm caused by peaceful panhandling, with some taking the view that it is a mere

nuisance while others claim that it may be serious enough to warrant additional coercive legislation.

It has been argued that peaceful panhandling is a communicative activity which should properly be seen as part of free expression. Freedom of expression has been characterized as a fundamental human right; but, though a fundamentally important right in a society that sees itself as “free and democratic”, it is not absolute and can sometimes be overridden by other weighty values.

It has been argued, following the consequentialist approach of John Stuart Mill, and closely paralleled in the reasoning of the Supreme Court of Canada in *Oakes*^{xxxix}, that those who would infringe a citizen’s fundamental right to freedom of expression must satisfy a heavy burden of proof. In particular, they must show that (i) the objective at which the liberty-limiting legislation aims is socially valuable, (ii) that the restriction of speech is reasonably likely to achieve its objective, (iii) that there are no alternative (less restrictive, less invasive of human rights) measures available to achieve the same objective, and (iv) that the likely balance of good over bad consequences will be sufficiently positive to justify the violation of one of the most basic liberties in a free and democratic society.

Arguments have been offered which challenge (ii), (iii) and (iv).

It has been argued that many liberty-limiting restrictions contained in City By-law No. 128/205 are aimed at peaceful rather than aggressive panhandling. That is, the legislation is significantly broader than it needs to be if the aim, as declared, is to combat aggressive panhandling. It has been argued that peaceful panhandling has benefits as well as causing harms, and that it is very far from obvious that the harms exceed the benefits. It has been further argued that there are alternative methods to attenuate or even to eliminate the harms, alternatives which do not violate fundamental human rights but which, on the contrary, enhance the dignity and the life chances of some of the most disadvantaged people in Canada.

There is, therefore, good reason to conclude that By-law No. 128/205 does not deserve to survive a constitutional challenge to its validity.

- ⁱ A By-law of the City of Winnipeg to amend the Obstructive Solicitation By-law No. 7700/2000.
- ⁱⁱ 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.
- ⁱⁱⁱ 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.
- ^{iv} 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.
- ^v Thomas Scanlon, “A Theory of Freedom of Expression,” *Philosophy and Public Affairs*, vol.1 (1972), pp.204-26.
- ^{vi} In Canadian jurisprudence these philosophical requirements have come to be known as “the Oakes test. R. v. Oakes, [1986] 1 SCR 1031 26 DLR (4th) 200.
- ^{vii} 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”.
- ^{viii} The Supreme Court of Canada gives its answer to this question in R. v. Keegstra (1990) 3 S.C.R. 697.
- ^{ix} See, e.g., the discussion of this point in: H. Hershcoff and A. S.Cohen, “Begging to differ: the first Amendment and the Right to Beg”, 104 Harvard Law Review 896.
- ^x *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.
- ^{xi} 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.
- ^{xii} Daniel Mark Cohen, “Begging the court’s Pardon: Justice denied for the poorest of the poor”, 14 St. Thomas Law Review, 825, Summer, 2002.
- ^{xiii} Anatole France, *The Red Lily (Le Lys Rouge)*, 1894, chapter 7.
- ^{xiv} By “personal resources” is meant: education, skills, social support systems and networks of friends and family.
- ^{xv} Neal Conan, National Public Radio, “Talk of the Nation” from Washington ...
- ^{xvi} *loc. Cit.*
- ^{xvii} 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).
- ^{xviii} Mill, *ibid.*, p. 19
- ^{xix} Sumner, *op. cit.*, p.31.
- ^{xx} Police Department of Chicago v. Mosley, 408 U.S. 92, 95-96 (1972)
- ^{xxi} Joshua Cohen, “Freedom of Expression”, *Philosophy and Public Affairs*, p. 216
- ^{xxii} Whitney v. California, 274 U.S. 357, 375-376, 377 (1927) (concurring).
- ^{xxiii} Cohen, *op. cit.*, p. 224.
- ^{xxiv} *Ibid*, p. 216.
- ^{xxv} Winnipeg Free Press ...
- ^{xxvi} 21st June 2005, p.1
- ^{xxvii} *loc. Cit.*
- ^{xxviii} As supplemented by the provisions of the City’s previous anti-panhandling by-law.
- ^{xxix} Jane Jacobs, *The Death and Life of Great American Cities*, 1961.
- ^{xxx} Kelling and Wilson, 1996.
- ^{xxxi} Kelling and Coles, 1996.
- ^{xxxii} Arthur Schafer, *Down and Out in Winnipeg and Toronto: The Ethics of Legislating Against Panhandling*, Caledon Institute of Social Policy, 1998.
- ^{xxxiii} George L. Kelling and Catherine M. Coles. (1996). *Fixing Broken Windows: restoring order and reducing crime in our communities*. New York: Martin Kessler Books.

^{xxxiv} David Burnham. (1966). *Above the Law: Secret Deals, Political Fixes, and Other Misadventures of the U.S. Department of Justice*. New York: Scribener.

^{xxxv} For elaboration of this argument see Schafer : *op. cit.*, p.4-6.

^{xxxvi} *Ibid.*, p.6.

^{xxxvii} Christopher Jencks. *Rethinking Social Policy, Race, Poverty and the Underclass*. Cambridge, Mass: Harvard University Press. (1992)

^{xxxviii} Schafer, *op. cit.*, p.12.

^{xxxix} R v. Oakes [1986] 1 SCR 103; 26 DLR (4th) 200.