



Homelessness and Community

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I *Introduction*

I am not a communitarian, but I was prompted to ask questions about the relation between homelessness and community by an encounter in California some years ago with an organization called The American Alliance for Rights and Responsibilities (AARR). The AARR is an activist arm of The Communitarian Network,¹ litigating to defend local and municipal initiatives that promote what it regards as increased safety, civility, and

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† This is a slightly modified version of the Cecil A. Wright Memorial Lecture, delivered at the University of Toronto Law School in February 2000. Earlier versions were presented, under the title *Homelessness, Community and Denial*, at a 1998 Conference on Homelessness at Georgia State University in Atlanta and at a meeting of Columbia University's Fifteen Minute Paper Group. I am grateful to all the participants on those occasions – particularly Robert Ellickson – for their comments and suggestions.

1 D.B. Kopel & C.C. Little, 'Communitarians, Neorepublicans, and Guns: Assessing the Case For Firearms Prohibition' (1997) 56 Mar.L.Rev 438 at 443: 'The Communitarian Network has created an activist arm to implement its ideas on a grassroots level: the American Alliance for Rights and Responsibilities.' The AARR is a non-profit public interest group founded in 1988 and described by one of its leading litigators as aiming to 'restore the spirit of community in the United States.... [Its] approach is to identify, promote and defend new approaches which make citizens part of the solution, and strike a balance between extreme rights claims and those who would sacrifice civil liberties as means to an end.' R.S. Golden, 'Toward a Model of Community Representation for Legal Assistance Lawyering: Examining the Role of Legal Assistance Agencies in Drug-related Evictions from Public Housing' (1988) 17 Yale L. & Pol'y Rev. 527 at 552n, quoting Affidavit of Roger Conner in Support of Motion To Modify and Intervene, in *Escalera v. NYCHA*, 924 F. Supp. 1323 (S.D.N.Y. 1996). In recent years, the AARR has taken on a new name, 'The Center for the Community Interest'; see H.P. Fahringer, 'Zoning Out Free Expression: An Analysis of New York City's Adult Zoning Resolution' (1998) 46 Buff.L.Rev. 403 at 403n. The following articles by Robert Teir, leading counsel for AARR, provide a good account of the organization's mission: 'Restoring Order in Urban Public Spaces' (1998) 2 Tex.Rev.L. & Pol. 255; 'Maintaining Safety and Civility in Public Spaces: A Constitutional Approach to Aggressive Begging' (1993) 54 Lou.L.Rev. 285 [hereinafter 'Maintaining Safety and Civility'].

community responsibility.² The AARR filed an amicus brief supporting the City of San Francisco in some litigation brought by homeless advocates against former Mayor Frank Jordan's 'Matrix' program,³ which was intended as a coordinated set of initiatives by police and social services to remove encampments of homeless people from the centre of San Francisco (particularly the public places around the Civic Center).⁴ An ex-student of mine was involved in the litigation, representing the plaintiffs, and, since he had read an article on homelessness that I published in 1991,⁵ he asked if I would be willing to file a response to the AARR brief. Needless to say, the lawsuit was unsuccessful; actually it was eventually declared moot, the City of San Francisco having abandoned the program in question after the election of Mayor Willie Brown in 1995. But the issues that were raised in the exchange I had with the American Alliance for Rights and Responsibilities remained with me, and I want to talk about some of those in this essay.

II Community control of public places

The line taken by the AARR was a familiar one, and it is one they have pursued in a number of cities in the United States.⁶ Mayor Jordan's

2 Cases with AARR intervention have included *Asquith v. City of Beaufort*, 139 F.3d (1998), supporting South Carolina municipal noise ordinance against challenge by street preachers; *Johnson v. Rodriguez*, 110 F.3d 299 (1997), supporting consideration by Texas parole boards of letters from members of public against prisoner release; *Doe v. Pataki*, 120 F.3d 1263 (1997), defending 'Megan's Law' requirement of registration of sex offenders; *Hutchins v. District of Columbia*, 942 F.Supp. 665 (1996), defending Juvenile Curfew Act; *Herndon v. Chapel Hill-Carrboro City Board of Education*, 89 F.3d 174 (1996), defending compulsory public service program for high school students; *Roulette v. City of Seattle*, 78 F.3d 1425 (1996), supporting city laws against obstruction of sidewalk; *Montana v. Egelhoff*, 518 U.S. 37, 116 S.Ct. 2013 (1996), arguing against defendant's right to introduce evidence of his voluntary intoxication to establish diminished responsibility; *Nunez v. City of San Diego*, 963 F.Supp. 912 (1995), supporting curfew for under-eighteens; *Johnson v. City of Dallas*, 61 F.3d 442 (5th Cir. 1995), supporting city laws against sleeping in public; *Loper v. NYPD*, 999 F.2d 699 (1993), supporting police action against panhandlers; and *Michigan Department of State Police v. Sitz*, 496 U.S. 444, 110 S.Ct. 2481 (1990), defending highway sobriety checkpoints.

3 *Joyce v. City of San Francisco*, 846 F. Supp. 843 (N.D. Calif. 1994).

4 There is an excellent account of the San Francisco Matrix Program and the public response to it in N. Wright, 'Not in Anyone's Backyard: Ending the "Contest of Nonresponsibility" and Implementing Longterm Solutions to Homelessness' (1995) 2 Geo.J. on Fighting Poverty 163 at 180-1.

5 J. Waldron, 'Homelessness and the Issue of Freedom' (1991) 39 U.C.L.A. Law Rev. 295 [hereinafter 'Homelessness']; reprinted in J. Waldron, *Liberal Rights: Collected Papers 1981-1991* (Cambridge: Cambridge University Press, 1993) [hereinafter *Liberal Rights*].

6 See especially *Roulette v. City of Seattle*, supra note 2, supporting city laws against obstruction of sidewalk, and *Johnson v. City of Dallas*, supra note 2, supporting city laws against sleeping in public.

Matrix program was an attempt, they said, to recover the public spaces of the city for the community. So long as homeless people remain encamped in the city's streets, parks, and public squares, those places will be cluttered with tents, dirty sleeping bags, cardboard shelters, and stolen shopping carts and contaminated with urine, faeces, and drug paraphernalia. Such conditions, argued the AARR, make it very difficult for ordinary citizens, either individually or in families, to use those spaces in the way that they were intended to be used. Panhandling, drinking, and various forms of disturbed behaviour exacerbate the problem, making the public urban environment not only unpleasant but hostile and potentially dangerous. The result is that public places that used to be available to the whole community are now 'becoming the preserve of those on the margins of society.'⁷

The AARR argued that a community has a right to control behaviour in its public spaces, and to outlaw activities such as drinking, panhandling, sleeping on benches, washing in fountains, urinating and defecating in public, and so on. The point of such restrictions, they said, is not to oppress the homeless or to diminish their liberty, but to reduce annoyance, to provide a fair basis on which all citizens could make use of the public spaces of their city, and to allow parks and squares to become once again a healthy focus for the public life of the community. The AARR argued that communities benefit from public spaces being kept sufficiently attractive to act as public meeting places and as places where people voluntarily spend their time.⁸ The brief spoke eloquently of a time when citizens from all walks of life could spend their leisure hours in public places, a time when parks and boulevards were places of 'interaction, integration, relaxation, and reflection.'⁹ And it urged the court to allow the city to persevere in its efforts to restore this communitarian mode of the use of its public spaces.

It seemed to me important to say, in response to these contentions, that although it is certainly true (as the AARR put it) that 'governments have the right to regulate certain types of conduct in public places, to ensure that parks and sidewalks remain accessible and welcome to all,'¹⁰ and although a city must accept responsibility for maintaining the quality of its public places and may not treat what happens there as a matter of indifference, still the regulation of public space is a different matter in a community some of whose members have no private space to retreat to than in a community all of whose members have access to private spaces – *homes* – as well as public spaces, where they can live their lives and take

7 Amicus brief of American Alliance for Rights and Responsibilities in *Joyce v. City of San Francisco*, supra note 3 at 2 (on file with author.)

8 See Teir, *Restoring Order*, supra note 1 at 256.

9 AARR brief in *Joyce*, supra note 2 at 2.

10 Ibid. at 1.

care of their bodily needs. In the latter society, where everyone also has a private place to go to, it is perhaps reasonable to say that the activities performed in public might be the *complement* of activities appropriately performed in private – a different and complementary set of activities. But in the former society, where some individuals have no choice but to live all their lives in public, that same complementarity cannot prevail. I intend to elaborate that argument – about the implicit premise of complementarity between public and private – which I think underlies much communitarian writing (including, I fear, a certain amount of communitarian writing by the left) about the use of public spaces, a little later in the essay.

III Robert Ellickson

Before doing that, I would like to refer to a second occasion that has stimulated my thoughts on these matters. This is a more academic occasion: the publication in 1996 in the *Yale Law Journal* of a long article by Yale law professor Robert Ellickson, entitled ‘Controlling Chronic Misconduct in City Spaces: Of Panhandlers, Skid Rows, and Public Space Zoning.’¹¹ Professor Ellickson raised many of the same issues as the AARR brief in *Joyce*, but in a long law review piece he was able to address the issues at greater length, to display the sinews of the argument, and to offer readers a deeper opportunity for reflection on the premises of his account. (I should add that Ellickson is interested not only in the problem of regulating public spaces but in the more abstract issues that it raises, for example, issues concerning the emergence and effectiveness of social, as opposed to strictly legal, norms.)¹²

Let me string together few quotations to give you a sense of the overall flavour of Ellickson’s article:

In large cities in the United States, government owns as much as 45% of the developed land area and allocate most of these public lands for use as streets and highways.... To socialize its members, any society, and especially one as diverse as the United States, requires venues where people of all backgrounds can rub elbows.... A liberal society that aspires to ensure equality of opportunity and universal political participation must presumptively entitle every individual, even the humblest, to enter all transportation corridors and open-access public spaces.

11 (1996) 105 Yale L.J. 1165 [hereinafter ‘Controlling Chronic Misconduct’].

12 See also R.C. Ellickson, *Order Without Law: How Neighbors Settle Disputes* (Cambridge: Harvard University Press, 1991) [hereinafter *Order Without Law*]. I discuss this aspect of Ellickson’s work, in its bearing on the issue of street misconduct, *infra* in section XI.

A space that all can enter, however, is a space that each is tempted to abuse. Societies therefore impose rules-of-the-road for public spaces.... Rules of proper street behavior are not an impediment to freedom, but a foundation of it.... [T]o be truly *public* a space must be orderly enough to invite the entry of a large majority of those who come to it. Just as disruptive forces at a town meeting may lower citizen attendance, chronic panhandlers, bench squatters and other disorderly people may deter some citizens from gathering in the agora.¹³

The media are quick to report the gravest problems of the streets, such as armed robberies, drug trafficking, and drive by shootings. This Article [Ellickson says] focuses on problems that by comparison seem trivial: chronic street nuisances. Chronic street nuisances occur when a person regularly behaves in a public place in a way that annoys – but no more than annoys – most other users, and persists in doing so over a protracted period.¹⁴

And Ellickson offers this definition of the phenomenon he takes as his target in the article:

A person perpetrates a chronic street nuisance by persistently acting in a public space in a manner that violates prevailing community standards of behavior to the significant cumulative annoyance of persons of ordinary sensibility who use the same spaces.¹⁵

Unless chronic street nuisances of this sort are controlled, says Ellickson, unless city dwellers can enjoy ‘a basic minimum of decorum in downtown public spaces, they will increasingly flee from those locations to cyberspace, suburban malls, and private walled communities.’¹⁶ The rhetoric is more or less exactly that of the AARR, cited by the court in *Roulette v. City of Seattle*. ‘As amicus American Alliance for Rights and Responsibilities explains on the city’s behalf, “[a] downtown area becomes dangerous to pedestrian safety and economic vitality when individuals block the public sidewalks, thereby causing a steady cycle of decline as residents and tourists go elsewhere to meet, shop and dine.”’¹⁷

The reactions to Ellickson’s article that I have seen¹⁸ respond mostly to a particular policy proposal that he asks his readers to entertain: a

13 Ibid. at 1176.

14 Ibid. at 1168–9.

15 Ibid. at 1185 (emphasis omitted).

16 Ibid. at 1172.

17 Supra note 2 at 1430.

18 The best discussion to date is S.R. Munzer, ‘Ellickson on “Chronic Misconduct” in Urban Spaces: Of Panhandlers, Bench Squatters, and Day Laborers’ (1997) 32 Harv.C.R.-C.L.Law Rev. 1. I am grateful to Professor Munzer for a most helpful conversation on these issues. See also M.D. Rosen, ‘Our Nonuniform Constitution: Geographical Variations of Constitutional Requirements in the Aid of Community’ (1999) 77 Tex.L.Rev. 1129 at 1135n; A.J. Gold, ‘The Trinity Initiative in Economic Perspective: Place or People

system of zoning in public places, permitting panhandling and other offensive behaviour at any time in certain zones that he calls 'Red Zones,' permitting them on an intermittent but not chronic basis in other areas that he calls 'Yellow Zones,' and forbidding them altogether in those public places that he refers to as 'Green Zones.'¹⁹ I shall not say much about that proposal, partly because it is not clear that Ellickson is offering it as anything other than a thought-experiment,²⁰ but mainly because I think it more important to ponder some of the premises than to evaluate the policy conclusions of Ellickson's account, for I have the impression that Ellickson's premises are shared by many who may not want to pursue his particular zoning proposal.

IV Costs and benefits

What Ellickson's article and the AARR argument have in common is concern about the offence and *annoyance* to ordinary citizens caused by the presence and activities of homeless people in public places. (Professor Ellickson himself is not known as a communitarian theorist; though there are clear communitarian themes in his work,²¹ his ideological framework is more law-and-economics.) I want to begin my discussion by

Prosperity?' (1998) 30 Conn.L.Rev. 1317 at 1330n; R. Austin, "Not Just for the Fun of It!": Governmental Restraints on Black Leisure, Social Inequality, and the Privatization of Public Space' (1998) 71 So.Calif.L.Rev. 667 at 705n; L. White, 'Searching for the Logic Behind Welfare Reform' (1996) 6 U.C.L.A. Women's L.J. 427 at 439n; G.E. Frug, 'City Services' (1998) 73 N.Y.U.L.R. 23 at 78n; and M. Foscarnin, 'Downward Spiral: Homelessness and its Criminalization' (1996) 14 Yale L. & Pol'y Rev. 1 at 3n.

19 Ellickson, 'Controlling Chronic Misconduct,' *supra* note 12 at 1220–6. The core insight of Ellickson's zoning proposal takes its inspiration from the diversity of social norms traditionally enforced in different parts of American cities: Because demands on public spaces are highly diverse, city dwellers have historically tended to differentiate their rules of conduct for specific sidewalks, parks, and plazas. Some neighborhoods, like traditional Skid Rows, have been set aside as safe harbors for disorderly people. Other sites, like tot-lots, have been allocated as refuges for persons of delicate sensibility. A constitutional doctrine that compels a monolithic law of public spaces is as silly as one that would compel a monolithic speed limit for all streets. (*Ibid.* at 1247.)

20 Ellickson introduces his zoning proposal by saying: 'As a *mental experiment*, imagine that it would be desirable for a city to have three codes, of varying stringency, governing street behavior.' *Ibid.* at 1220 (my emphasis). This suggests that it is not to be taken seriously as an actual policy recommendation. Elsewhere, however, Ellickson refers to the idea that 'a city's codes of conduct should be allowed to vary spatially – from street to street, from park to park, from sidewalk to sidewalk' as a 'central normative thesis' of his article. *Ibid.* at 1171–2.

21 See *ibid.* at 1172, note 26. See also 'New Institutions For Old Neighborhoods' (1998) 48 Duke L.J. 75 at 107 ff, defending neighbourhood-level community organization against liberal objections; and 'Property in Land' (1993) 102 Yale L.J. 1315 at 1344 ff, on communitarian arguments about property.

considering the way in which he categorizes what he calls 'annoyance' in an economic account.

Early in the article, Ellickson attempts what appears to be an economist's cost-benefit analysis of chronic street misconduct. Both panhandling and bench-squatting are said to confer benefits on various parties. As Ellickson puts it, in the peculiar language used in analyses of this kind,

Panhandlers and at least some of their donors benefit from begging. The magnitude of these benefits depends on the opportunity costs incurred if the panhandling were to cease and both panhandlers and donors had to resort to their next best substitutes.²²

For panhandlers, the benefit is the difference between begging and (say) collecting cans and bottles; for those donors who 'take affirmative pleasure in satisfying a request for a handout,' the extent of the benefit turns on 'the quality of the almsgivers' other alternatives for being charitable.'²³ Similarly, bench-squatting has economic benefits:

[T]he magnitude depends on the quality of the bench squatters's next best alternatives. These might include: squatting in another public locale better suited to long-term stays; cycling among a number of public places (...); spending more daylight hours indoors (perhaps in a board-and-care facility, a drop-in center, a rented apartment, or a relative's home); and voluntarily initiating institutionalization. Because the first alternatives listed are close substitutes, the benefits of an entitlement to bench squat in a particular location ... are apt to be small.²⁴

Those are the benefits. What about the harms? The harms, Ellickson says, consist in 'minor annoyance' multiplied over many individuals and sustained over a period of time. 'When being pan-handled,' he says, 'a pedestrian of ordinary sensibility may feel some combination of: aggravation [*sic*] that his privacy has been disturbed, resentment that the panhandler's plea has a high probability of being fraudulent, and fear.'²⁵ The fear element may not be present among those pedestrians who encounter chronic panhandlers who are familiar to them; however,

[i]n other respects, ... the encounter may be more annoying than an encounter with an unfamiliar panhandler. A pedestrian who sees a regular panhandler is likely to become increasingly irked that the supplicant has not sought aid from charities and welfare agencies better able than pedestrians to appraise desert.²⁶

22 'Controlling Chronic Misconduct,' *supra* note 12 at 1179.

23 *Ibid.* at 1179–80.

24 *Ibid.* at 1183. (I make no comment on the plausibility – or tone – of this analysis.)

25 *Ibid.* at 1181.

26 *Ibid.* at 1182.

And such a panhandler may also annoy because his activity signals to the pedestrian the breakdown of a social norm – such as the work ethic – that the pedestrian cherishes.²⁷ As for the annoyance caused by bench-squatting, Ellickson says the following:

The most flagrant examples involve offense to a number of the senses. A man who sits in a well-trafficked space amid shopping carts full of junk, who stinks with body odor, and who urinates publicly into plastic jugs, is likely to trigger frequent complaints to the police. A woman who sleeps on a busy sidewalk, who smells of feces, and who shouts obscenities certainly engages in offensive behavior....²⁸

Now, these may all seem trivial harms – annoyances rather than injuries. But Ellickson is right to emphasize that a set of harms should not be ignored in policy analysis merely because each one considered by itself is very small. As the moral philosopher Derek Parfit has emphasized, and as those who study collective action problems know, consequentialist analysis can go seriously wrong by ignoring tiny harms.²⁹ An individual automobile driver may release only small amounts of toxic wastes into the environment when he drives to work. But the effects of hundreds of thousands of drivers using that freeway on a given day may add up to deadly pollution. Moreover, it may be impossible to solve such a pollution problem except by subjecting all motorists to certain regulations (*e.g.*, requiring smog checks) and punishing them one by one – despite the almost imperceptible harm that each causes individually – if they do not comply with the regulations. So it is perfectly fair for Ellickson's analysis to take account of the fact that because a piece of street misconduct (relatively trivial in itself) 'occurs in a public place, it may affect hundreds or thousands of people per hour,' and for him to insist, too, that 'as hours blend into days and weeks, the total annoyance accumulates.'³⁰ No doubt there are further questions to be asked about how much moral weight we should give to the aggregation of tiny harms in a social calculus. Do we ever want to say, for example, that a very great harm (say, torture) inflicted on a single individual is the equivalent of the sum of tiny harms (analogous to those Ellickson is studying) suffered by *N* individuals (where *N* is a very large number, say in the millions)?³¹ If the answer is 'No,' then can a somewhat less serious individual harm, such as arrest, suffered by one person be outweighed by (say) thousands of ambient annoyances suffered by Ellickson's passing pedestrians? If the

27 Ibid.

28 Ibid. at 1183.

29 See D. Parfit, *Reasons and Persons* ch. 3 (Oxford: Clarendon Press, 1984).

30 *Controlling Chronic Misconduct*, *supra* note 12 at 1177.

31 See Parfit, *supra* note 31 at 75–82.

answer to the latter question is supposed to be 'Yes,' then what's the principle underlying the difference? These are all interesting questions, and they go to the heart of some central difficulties in utilitarian analysis.³² But the problem in Ellickson's analysis that I would like to explore arises at an earlier stage.

V *Are distress and annoyance harms?*

The question I want to ask is whether the discomfort caused to ordinary pedestrians by the presence and activities of homeless people should even be considered a harm at all.

On the face of it, the question seems preposterous. Of course discomfort and annoyance are harms. They may not be very serious harms – except to the extent that they accumulate – but surely they are to be counted on the debit side of any plausible utilitarian calculus.

I am not so sure. Think of it along these lines. Imagine that in a country where homelessness has only recently become a problem, a citizen previously unaware of the extent of the poverty in his society comes across a person living on the streets in filth and squalor. He is likely to be distressed by the spectacle, but his distress may have the following flavour: 'This is awful. I am glad I have found out about this,' and he may be moved by his horror to try and do something about it.³³ Is this distress a *harm* to the citizen, something that in a utilitarian calculus should count *pro tanto* against his finding out about poverty and in favour of his being sheltered from his knowledge? I think we should say *not* – not even that it is a slight harm out-balanced perhaps by greater benefits associated with his knowledge. On the contrary, there is a clear sense in which distress occasioned by the spectacle of another's suffering is a good rather than an evil (just as pleasure occasioned by another's suffering is an evil, not a good). If there is first-order suffering of this sort around, then it is better that it be seen and that people be distressed by it than that it remain invisible to all but the immediate sufferers. A world that differed from our own only in that the spectators of such suffering were not moved to any sort of distress by the spectacle of poverty would

32 See also the discussion of trade-offs in J. Waldron, 'Rights in Conflict' in *Liberal Rights*, supra note 5 at 208–11.

33 Cf. W. Shakespeare, *King Lear*, Act III, scene 4:

Lear:

Poor naked wretches, whereso'er you are,
That bide the pelting of this pitiless storm,
How shall your houseless heads and unfed sides,
Your loop'd and window'd raggedness, defend you
From seasons such as these? O, I have ta'en
Too little care of this!

be *pro tanto* a worse world. I shall call this the 'Appropriate Distress Argument.'

Or think of the situation along these lines. A pedestrian comes across a chronic bench-squatter, and he feels distress of the following kind: he thinks to himself, furiously and agitatedly, 'It is *outrageous* that people like this should sit idly around, instead of fulfilling their moral obligation to get a job and contribute to the social product.' But if someone asked *why* the bench-squatter has a moral obligation to get a job, it would surely be inappropriate to cite the pedestrian's agitation as a utilitarian reason – that is, 'People ought to get jobs so as to avoid distressing those who think that they ought to get jobs.' To argue in that way would be like arguing in a circle; one would be trying to defend a moral proposition by citing forms of distress whose occurrence presupposed that the moral proposition was true. I shall call this the 'External Preference Argument.'

Both arguments seem applicable to Ellickson's analysis – I mean applicable as critiques. In both regards, his rather ingenuous account of the 'cost' or the 'harm' caused by chronic misconduct in public places ignores a lot of quite interesting work that has been done in recent moral philosophy about the way in which preferences and putative harms ought to be counted in a social calculus.

VI *The Appropriate Distress Argument*

There is a well-known controversy about the application of the 'Harm Principle' propounded in John Stuart Mill's book *On Liberty* that goes as follows. Suppose someone is distressed by the conduct of another – suppose for example that a person feels offence and revulsion whenever he sees two men kissing. Is distress of this kind – which is certainly painful to experience – to be counted as *harm* for the purposes of a principle which holds that 'the only purpose for which power can rightfully be exercised over any member of a civilized community, against his will, is to prevent harm to others'?³⁴

The most plausible answer to that question – which I defended some time ago in a little piece called 'Mill and the Value of Moral Distress'³⁵ – is emphatically negative. For the purposes of Mill's argument in *On Liberty*, distress of this kind is to be counted as a social *good*. This is not because it is intrinsically good for homophobes to suffer, but because it is important for people to be confronted with ideas and ways of life that challenge their own comfortable preconceptions. Ethical confrontation – the confrontation of ideas and lifestyles – is a positive good for Mill. But of course it is not a painless business. It hurts to be confronted in debate

34 J.S. Mill, *On Liberty*, ed. C.V. Shields (Indianapolis: Bobbs Merrill, 1956) at 13.

35 (1987) 35 Pol.Studies 410, reprinted in *Liberal Rights*, supra note 5 at 115.

if one takes seriously the views one is propounding, and it is distressing to be faced with examples of lifestyles that pose a challenge to the foundations of one's own. People are naturally upset when they are involved in this sort of confrontation. If no one is disturbed, hurt, or distressed in this way, that is a sign that vigorous ethical confrontation is not taking place, and, for Mill, that in turn is a sign that the intellectual life and ethical and cultural progress of our civilization may be grinding to a halt. This is why Mill is very suspicious of any proviso to the effect 'that the free expression of all opinions should be permitted on condition that the manner be temperate':

If the test be offence to those whose opinions are attacked, I think experience testifies that this offence is given whenever the attack is telling and powerful, and that every opponent who pushes them hard, and whom they find it difficult to answer, appears to them, if he shows any strong feeling on the subject, an intemperate opponent.³⁶

Intemperance and the offence it inevitably occasions are indispensable for confrontation and for the progress that only confrontation can bring about. Think what would be entailed by an interpretation that *did* regard this sort of offence as sufficient to cross the threshold required by the Harm Principle. On that assumption, what ought to be taken as evidence that freedom of thought and lifestyle was promoting progress would be invoked instead as a *prima facie* reason for interfering with that freedom. A sign of vitality would be cited as a necessary condition for the legitimate suppression of that vitality. A symptom of progress would count as a justification for acting in a way that would bring progress to a halt. Mill cannot have held such a view.

Against this, it will be said that Mill was a utilitarian. How can a utilitarian not count discomfort, revulsion, and distress as pain?³⁷ How can a utilitarian not count them – as Professor Ellickson counts them – on the debit or cost side of the social calculus? To answer this, we must bear in mind the sort of utilitarian Mill was. Mill's utilitarianism is not a Benthamite calculus of pleasures and pains, or of satisfactions and dissatisfactions, of all sorts. The value on which liberty (defended by the Harm Principle) is based is certainly utility, on Mill's account; but, as he insists in the Introduction to *On Liberty*, 'it must be utility in the largest sense, grounded on the permanent interests of man as a progressive being.'³⁸ And I take it that this passage refers not merely to the nature of

36 Mill, *supra* note 36 at 64–5.

37 This objection is put forward by T. Honderich, 'On Liberty and Morality-Dependent Harms' (1982) 30 *Pol. Studies* 507.

38 Mill, *supra* note 36 at 15.

Mill's utilitarian computations – for example, taking a long-run rather than a short-run view – but also to the content and character of his utilitarian values. If we accept the arguments about the importance of progress in Chapter 2 of *On Liberty*, or the arguments about spontaneity in Chapter 3, it is not open to us to say that the distress experienced when one's preconceptions are challenged goes against one's interests as a progressive being. A creature who defined his interests – even in part – in terms of being free from the shock of ethical debate or free from anxiety about the grounds and worth of his lifestyle would be like the satisfied 'fool' in Mill's *Utilitarianism*.³⁹

Now, I am not saying that Ellickson's pedestrians actually benefit by being confronted with the unusual lifestyles of bench squatters and so on (though they probably do). I have invoked Mill's argument primarily because it opens up for consideration an array of ways in which we might reject Ellickson's rather simple-minded characterization of all his pedestrians' distresses as harms.

The particular argument I want to make is that if Ellickson's pedestrians are regarded as progressive beings, in Mill's sense, then we should not go around saying that they have an interest in not knowing or in not perceiving the true state of affairs in their society – the condition in which some of their fellow citizens are having to live – simply because that knowledge or perception is distressing to them. If the situation of some in society is distressing, then it is important that others be distressed by it; if the situation of some in society is discomforting, then it is important that others be discomforted.⁴⁰

(By the same token, the distress occasioned by finding out some unpleasant fact of our history should not be counted as a harm in a sophisticated social calculus; it seems crazy to say, as the tenor of Ellickson's analysis would seem to imply, that people of decent sensibility are harmed by their distressing knowledge of the historical existence of slavery, for example, or genocide.)⁴¹

To put it another way, if the basis of our moral sense is, as Rousseau put it, a natural repugnance at seeing a fellow being suffer,⁴² then it is

39 'Utilitarianism' in J.S. Mill, *Dissertations and Discussions: Political, Philosophical and Historical*, vol. 3 (New York: Henry Holt & Co., 1882) 300 at 312.

40 Thus I agree with Munzer, *supra* note 20 at 33, when he writes: 'Seeing the distress of those who panhandle or bench squat is not, or at least not merely, an annoyance. It is rather, or also, an experience of getting information, which no rational person should consider a social harm, about the lives of a significant fraction of the poor in America.'

41 But compare R.K. Fullinwider, 'Patriotic History' in R.K. Fullinwider, ed., *Public Education in a Multicultural Society: Policy, Theory Critique* (Cambridge: Cambridge University Press, 1996) 203.

42 J.-J. Rousseau, 'Preface' in J.-J. Rousseau, *A Discourse on the Origin of Inequality*, trans. P. Coleman (New York: Oxford University Press, 1994) 3.

important that such repugnance not be treated as itself an evil on the order of the first-order suffering that evokes it. Or, at the very least, it is important that it not be treated as an *independent* evil, that is, as an evil that is independently relievable or preventable. The only appropriate way to relieve or prevent the suffering occasioned in me by seeing another being suffer (which we may call 'respondent suffering') is to relieve or prevent the first-order suffering to which it is a response. If, on the contrary, one were to try to relieve or prevent respondent suffering as an independent matter, one might do one's best to ensure that first-order suffering took place as far as possible out of sight, unperceived by those who might be moved by it. (Or one would try, by education or conditioning, to deaden the affective response in people to such first-order distress as remained visible.) But an attempt so motivated to render first-order suffering invisible, or to block the normal response to it, would be a way of showing that one did not understand the function of respondent suffering and empathetic distress in a human being. And my point is precisely that Ellickson's categorization of any negative feeling as *harm*, in the encounters he considers, shows precisely such a misunderstanding – a misunderstanding that is not, I think, mitigated by the use of such jargon terms as 'compassion fatigue.'⁴³

Having said that, in all fairness, I should add that sympathetic distress at the sight of the homeless is not Ellickson's main concern in the article so far as the putative costs of street misconduct are concerned. He also mentions revulsion – at body odours and the stink of urine and faeces – and annoyance.

So far as revulsion at odours is concerned, the situation is complicated. It is, of course, appropriate to recoil in public from the smell of urine and faeces. This sort of sensory distress has a proper motivating effect, namely to ensure as far as possible that human waste is disposed of in sanitary conditions. The argument for providing public lavatories is partly dependent on the importance of avoiding distress of this kind.⁴⁴ But so far as the homeless are concerned, that is only part of the argu-

43 *E.g.*, *Controlling Chronic Misconduct*, supra note 12 at 1168, 1178, 1218; the same language is also used by the AARR, *e.g.*, in Teir, 'Maintaining Safety and Civility,' supra note 1 at 288. For a critique of the use of this phrase, see N. A. Millich, 'Compassion Fatigue and the First Amendment: Are the Homeless Constitutional Castaways?' (1994) 27 U.C.DAVIS L.R. 255.

44 For discussion of the lack of provision of public lavatory facilities in the United States and its impact on the homeless, see M. Davis, 'A Logic like Hell's: Being Homeless in Los Angeles' (1991) 39 U.C.L.A. Law Rev. 325 at 329–30; M. Foscarinis, K. Cunningham-Bowers, & K.E. Brown, 'Out of Sight – Out of Mind? The Continuing Trend Toward The Criminalization of Homelessness' (1999) 6 Georgetown J. on Poverty Law & Policy 145 at 154; and L. Sossin, 'The Criminalization and Administration of the Homeless: Notes on the Possibilities and Limits of Bureaucratic Engagement' (1996) 22 N.Y.U. Rev.L. & Soc. Change 623 at 653.

ment. As I emphasized in my earlier piece, the main argument for this provision has to do with the immediate distress and indignity suffered by those who have to live almost their whole lives in a public space in which such facilities are not provided.⁴⁵ I will return to this later.⁴⁶ For now, the point I want to emphasize is that since a conscious political decision has been made *not* to provide such facilities – this is true in the United States (for reasons, I must say, that entirely escape me);⁴⁷ it is not true in most other advanced societies – then it is surely a bit much for those who have failed to offer even this modicum of social provision to the homeless to complain about the consequent smell and to treat that as grounds for offering the homeless *further* indignities and restrictions.

VII *Cognitive dissonance*

What about annoyance? I think much of the angry side of the discomfiture that concerns Ellickson is a matter of cognitive dissonance, associated with the visible refutation of the claims that Americans are proud to make about their society.⁴⁸ They say that theirs is a just and prosperous society, a society of equal opportunity; they say that capitalism and the market economy work wonderfully. But they are confronted on the streets of their cities with hundreds or thousands of persons who live on the very margins of civilized existence, on the very margins of life itself – who flaunt in their persons the abject and desperate poverty that disfigures American society and the idea of the American dream. Since their feeling good about themselves as Americans depends primarily on a sense that *these things cannot be*, ordinary people tend to respond with annoyance and anger to the sight that they very evidently are. Now, I am not making the argument that the United States should live up to its ideals – that is almost certainly a hopeless enterprise. But political and social theories that count as harm – for purposes of social policy – the negative feelings of anger and annoyance that people experience when they are shown that their society is *not* living up to its ideals – theories that count this as harm, to be avoided if possible by removing the spectacle that occasions the dissonance – are treading on very dangerous ground. Since the Enlightenment, it has been a principle of good social

45 Waldron, 'Homelessness,' supra note 5 at 320–1 (*Liberal Rights* at 334–5).

46 See infra section X, especially notes 89–91 and accompanying text.

47 See C. Habermas, 'City Hall Can't Answer Nature's Call' *New York Times* (11 February 2000) B1; A. Hagedorn & W. Green, 'Advocacy Group Sues New York, Citing Lack of Public Restrooms' *Wall Street Journal* (1 November 1990) B8. See also *Lucas v. Dinkins*, 608 N.Y.S.2d 403 (App.Div. 1994), holding that homeless individuals' complaint about New York City's failure to provide public toilets was not justiciable.

48 For a similar phenomenon in Canada, see J. Stackhouse, 'My Life Without a Home' *The [Toronto] Globe and Mail* (18 December 1999) 'Focus' 1, and the ensuing discussion.

and political theory that the social order should be subject to a constraint of *transparency* – which means, roughly, that social stability should not depend on any comprehensive misunderstanding of social reality on the part of citizens.⁴⁹ In a well-ordered society, as John Rawls puts it, ‘nothing need be hidden.’⁵⁰ Now, of course, we all know that, in the United States at least, social stability *does* largely depend on misunderstanding and false ideological perception of actually existing social conditions. But it is rare to find a theorist making a virtue of it, let alone designating the annoyance at having the illusion dispelled as a cost or a harm, to be prevented, if need be, by the police and the criminal law.

Of course, Ellickson would not describe it in this way. He resorts instead to the simple utilitarian formulas of the law-and-economics movement. The flaw in his article is that he has not thought through the significance of lumping all forms of distress together as social harms. Law-and-economics types often present themselves as hard-headed men of the world, willing to take a much clearer view of what is really going on than most of their sentimental philosophical opponents.⁵¹ But this self-presentation is undermined if what law-and-economics yields is a social theory that panders, in the name of utility or of the minimization of social cost, to people’s desires not to have their illusions about the society they live in dispelled.

VIII *Broken windows*

This may be the appropriate place to say something about the relation between the visibility of homelessness and a theory of community policing sometimes referred to as the ‘Broken Windows Theory.’⁵² This is

49 See J. Rawls, *A Theory of Justice* (Cambridge: Harvard University Press, 1971) 133 at 454. See also the discussion in J. Waldron, ‘Theoretical Foundations of Liberalism’ (1987) 37 *Phil.Q.* 127 at 134–5 and 146 ff., reprinted in *Liberal Rights*, supra note 5, 35 at 43–4 and 57 ff.

50 J. Rawls, *Political Liberalism* (New York: Columbia University Press, 1983) at 68. Rawls adds in a note: ‘... in a free society that all correctly recognize as just there is no need for the illusions and delusions of ideology for society to work properly and for citizens to accept it willingly. In this sense a well-ordered society may lack ideological or false consciousness.’ *Ibid.* at 68–9, note 21.

51 It was, after all, the grandfather of rational choice theory, Thomas Hobbes, who invented and defended the principle of transparency. See Hobbes, *Leviathan*, ed. Richard Tuck (Cambridge: Cambridge University Press, 1991) ch. 30 at 231–2. See also J. Waldron, ‘Hobbes on Truth and Civil Doctrine’ in A. Rorty, ed., *Philosophers on Education* (London: Routledge, 1998), and ‘Hobbes and the Principle of Publicity’ in B. Honig, ed., *Essays in Honor of Richard Flathman* (forthcoming, 2001).

52 For good overviews see D. Livingston, ‘Police Discretion and the Quality of Life in Public Places: Courts, Communities and New Policing’ (1997) 97 *Colum.L.Rev.* 551; B.E. Harcourt, ‘Reflecting on the Subject: A Critique of the Social Influence

the view put forward by George Kelling and James Q. Wilson in a famous article published in 1982, in which they argued that visible signs on the streets of lack of repair or lack of community concern – signs like a broken window, a pile of uncollected garbage, abandoned furniture, or an abandoned car – are likely to attract further disorder, and also crime, because they signify to anyone who is interested that social controls are weak or attenuated at that locale.⁵³ According to some proponents of this theory, derelict human beings behaving in an offensive fashion are just one more such sign of disorder:

[J]ust as unrepaired broken windows in buildings may signal that nobody cares and lead to additional vandalism and damage, so untended disorderly behavior may also communicate that nobody cares (or that nobody can or will do anything about disorder) and thus lead to increasingly aggressive criminal and dangerous predatory behavior.⁵⁴

On this account, 'the ill-smelling drunk [or] the unchecked panhandler is, in effect, the first broken window.'⁵⁵ Or, as Ellickson puts it, 'a regular beggar is like an unrepaired broken window – a sign of the absence of effective social-control mechanisms in that public space.'⁵⁶

Now, I think we ought to be very watchful of theories of community control that assimilate human beings even figuratively to *things*, like uncollected garbage or shattered window panes. (If Kelling and Wilson had titled their article 'Broken People,' would it perhaps have had a different impact?) If we *are* to countenance policy talk about broken people on the analogy of broken windows, then we need to ask two tough questions:

(1) Relative to what norms of order are bench-squatters or panhandlers or smelly street people described as 'signs of disorder'? Are these the norms of order for a complacent and self-righteous society, whose more prosperous members are trying desperately to sustain various delusions about the situation of the poor? Or are they norms of order for a society whose members are attempting in good faith to live honestly with a given mixture of great prosperity and great poverty? In some societies whose members are familiar with great and endemic poverty – India springs to mind as an example – people regard street begging as a *normal* activity, and not at all as a disorder. Their response to any com-

Conception of Deterrence, the Broken Windows Theory, and Order-Maintenance Policing New York Style' (1998) 97 Mich.L.Rev. 291.

53 J.Q. Wilson & G.L. Kelling, 'Broken Windows' *Atlantic Monthly* (March 1982) 29.

54 G.L. Kelling, 'Acquiring a Taste for Order: The Community and Police' (1987) 33 *Crim.& Delin.* 90 at 92, quoted by AARR counsel Rob Teir in 'Maintaining Safety and Civility,' *supra* note 1 at 290.

55 Kelling & Wilson, *supra* note 55 at 34.

56 'Controlling Chronic Misconduct,' *supra* note 12 at 1182.

plaint about such 'disorder' would be: 'Given the existence of poverty (which you propose to do nothing about), what on earth do you expect?' I believe there is a dignity in that candour, certainly compared to the shameful and self-righteous denial that we find on the streets of America and the infantile preference for image over reality that dominates discussion in the United States. So the first question is this: Are the norms – relative to which human windows seem 'broken' – norms of order for society in which it is envisaged that everyone has a home to go to, that is, norms predicated on the assumption of complementarity that I mentioned in section III? Or are they norms of order based on an honest grasp of economic reality in an unequal society?

(2) The second question is this: Relative to whatever norms are appropriate, what (according to the Kelling and Wilson approach) is to count as *fixing* the window, when the 'broken window' is a human being? A panhandler needs, or thinks he needs, money. Presumably, giving him money is not 'fixing the window' in terms of the Broken Windows Theory. But then what is? Suppose we are regularly confronted in a derelict neighbourhood with people who smell of urine and faeces. There's a broken window, according to the Kelling and Wilson approach. Now how do we fix it? For some reason – in the United States at least – nobody (certainly nobody who invokes this theory) seems to think that the appropriate answer is: 'Provide public lavatories and public shower facilities.' Instead, fixing the window is taken to mean rousting the smelly individual and making him move out of the public park or city square. (It is as though the smartest way to fix an actual broken window were to knock down the whole building, or move it to just outside the edge of town.)

There is much more one could say about the Broken Windows Theory. One could question, for example, the theory's deterministic assumption of there being a constant potential for escalating, predatory crime, roaming the cities, looking for disorderly and neglected sites to settle on. One could talk about the way in which Ellickson, Teir, and others have converted (or, more accurately, hijacked) a theory about policing priorities⁵⁷ and turned it into a theory of legislation – that is, into a theory about what sorts of things (e.g., panhandling, sleeping in public) should be made into offences. And, in that regard, one could dwell for a moment or two on the ethics of criminalizing activities performed by one group of people in order to offset the attraction that their derelict condition may offer to other offenders.⁵⁸

57 That is, a theory about the importance of the police focusing on minor as well as major crime: see, e.g., W.J. Bratton, 'The New York City Police Department's Civil Enforcement of Quality-of-Life Crimes' (1995) 42 J. Law & Pol'y 447.

58 Cf. Foscarinis *et al.*, *supra* note 46 at 153: 'This punitive approach raises serious concerns about fundamental fairness.... [P]unishing one group of people to prevent

Mainly, however, what I want to say about the Broken Windows Theory is the following. Prosperous societies in the West, particularly the United States (but now, increasingly, Canada, the European Union, Australia, and New Zealand as well) have entered into a bargain with the devil. For decades we conjectured that poverty for some would lead eventually to a deterioration in the quality of life for everyone, even for the rich and comfortable. And on the basis of that conjecture we sought to mitigate the worst effects of inequality. We did so in our own interest, as well as on the basis of more altruistic and social justice concerns. We believed that if we didn't, inequality would eventually redound to the detriment of us all. Since 1980, however, the United Kingdom first, then the United States, and then other countries following their lead have decided to test that conjecture and, if possible, refute it. (This is the devil's bargain I refer to.) Now we are working on a different hypothesis: maybe extreme poverty for a substantial section of society can be tolerated with impunity, without undermining (even in the long run) security and quality of life for the most prosperous and the opportunities they cherish for their children. Maybe aggressive policing strategies mean that we can have all the glamour of a prosperous-looking society without doing very much – doing perhaps much less than we have done in the past – to help the poor, the unfortunate, and those who have made disastrous choices. And who knows? Maybe that hypothesis is true. Maybe the bargain with the devil will work, with a huge payoff – a sort of compassion-fatigue dividend – for those of us who are prospering.

Maybe. But it does seem a bit much – it seems unconscionable, in fact – to complain about and stigmatize the poorest of the poor for refusing to cooperate with this experiment in the cosmetics of injustice, for refusing to play their part in this new scenario in which we tolerate and benefit from inequality while protecting our illusions and sensibilities. It does seem a bit much to characterize the poorest of the poor as 'broken windows' relative to a self-image of righteous prosperity and order, when it is not entirely clear – indeed, when it is exactly the point of our experiment to see – whether we are entitled to project that image.⁵⁹

future criminal activity by others runs afoul of the basic notions of equity underlying our criminal justice system.'

- 59 In times past, inequality and great poverty have themselves been regarded as social disorders, as 'broken windows' in the fabric of a well-ordered society; and it has been thought that sweeping them from view, far from remedying the disorder, actually compounds it. Here I agree with Munzer, *supra* note 21 at 33, when he writes, 'The existence of what Ellickson calls "street disorder" has not merely a corrosive effect on the public good of harmonious city life but also is an indicator of social injustice. It serves as a constant reminder that something is deeply wrong with a society that has vast numbers of bench squatters and chronic panhandlers.'

IX *The External Preference Argument*

I mentioned two lines of argument against Ellickson's characterization of offence and annoyance as social costs. The first was the 'Appropriate Distress' argument, which I set out in section VII. The second line of argument I called the 'External Preference Argument,' and it pertains to Ellickson's claim that '[a] pedestrian who sees a regular panhandler is likely to become increasingly irked that the supplicant has not sought aid from charities and welfare agencies better able than pedestrians to appraise desert'⁶⁰ and to his view that this '*irk*' or this being *irked* constitutes a harm to the '*irkee*.'

The External Preference Argument was made originally by Ronald Dworkin to criticize versions of the utilitarian calculus that treated people's preferences as to what *others* should do or have (which Dworkin called 'external preferences') on a par with people's preferences for themselves ('personal preferences').⁶¹ In the debate about segregated education, for example, Dworkin believed that it was appropriate to consider both the costs and the benefits of integration, but he thought it was not appropriate to count, as a cost of integration, the frustration of the desire of some racists that blacks count for less or that they be denied equal educational opportunities. Counting such preferences would undermine whatever moral appeal utilitarian calculations have as a fair basis for the evaluation of costs and benefits. One ground for the moral appeal of the utilitarian calculus is the utilitarian's commitment to equality, at least at the level of inputs: each person is to count for one, nobody for more than one.

If a utilitarian argument counts external preferences along with personal preferences, then the egalitarian character of that argument is corrupted, because the chance that anyone's preferences have to succeed will then depend, not on the demands that the personal preferences of others make on scarce resources, but on the respect or affection they have for him or his way of life. If external preferences tip the balance, then the fact that a policy makes the community better off in a utilitarian sense would *not* provide a justification compatible with the right of those it disadvantages to be treated as equals.⁶²

I will not go into what Dworkin has made of this point or the central role it plays in his theory of rights-as-trumps-over-utility.⁶³ I do want to

60 *Controlling Chronic Misconduct*, supra note 13 at 1182.

61 R. Dworkin, *Taking Rights Seriously*, rev. ed. (London: Duckworth, 1977) at 234 ff. and 275–6.

62 Ibid. at 235.

63 But see *ibid.* at 274–8 and 356–9. The connection is set out in J. Waldron, 'Pildes on Dworkin's Theory of Rights' (2000) 29 *J. Legal Stud.* 301.

emphasize, however, that it applies not only to vicious external preferences like the racist ones just mentioned but to virtuous, even admirable, external preferences as well. In a notable critique of Dworkin's argument, H.L.A. Hart argued that it was in fact perfectly appropriate for external preferences to be counted in the determination of social policy.⁶⁴ Hart argued that the importance of not disqualifying external preferences is shown by the example of homosexual law reform in England in the 1960s, where, he says, it is perfectly possible that 'it was the disinterested external preferences of liberal heterosexuals that homosexuals should have this freedom that tipped the balance against the external preferences of other heterosexuals who would deny this freedom.'⁶⁵ How could anyone possibly complain about counting external preferences in that case? And if we count them in that case, why not count them in any case, including cases of the sort that Ellickson describes?

Hart's critique has convinced many commentators.⁶⁶ But I think Dworkin's response to Hart is exactly right, and it is adaptable to the case we are considering. Dworkin concedes that a simple-minded form of utilitarianism *would* count external preferences: it 'would count the attractive political convictions of the liberals of the nineteen-sixties simply as data, to be balanced against the less attractive convictions of others, to see which carried the day in the contest of number and intensity.'⁶⁷ But this, he says, is surely not how the liberals of the 1960s intended their preferences to be taken:

They of course *expressed* their own political preferences in their votes and arguments, but they did not *appeal* to the popularity of these preferences as providing an argument in itself for what they wanted, as the unrestricted utilitarian argument I oppose would have encouraged them to do.⁶⁸

The arguments made by the liberal supporters of gay rights were presumably arguments of principle – arguments (*e.g.*, about liberty and privacy) intended to stand on their own grounds, and not on the mere

64 H.L.A. Hart, 'Between Utility and Rights' in A. Ryan, ed., *The Idea of Freedom: Essays in Honor of Isaiah Berlin* (Oxford: Oxford University Press, 1979) 77 at 86 ff.

65 Ibid. at 92–3.

66 See, *e.g.*, J.H. Ely, 'Professor Dworkin's External/personal Preference Distinction' (1983) Duke L.J. 959; T. Morawetz, 'Persons Without History: Liberal Theory and Human Experience' (1986) 66 B.U.L.Rev. 1013 at 1017; and P.E. Johnson, 'Do You Sincerely Want to Be Radical?' (1984) 36 Stanford L.Rev. 247 at 276. However, for a more careful view of Hart's critique, see J. Raz, 'Liberalism, Skepticism, and Democracy' (1989) 74 Iowa L.R. 761 at 772–4.

67 R. Dworkin, 'Rights as Trumps' in J. Waldron, ed., *Theories of Rights* (Oxford: Oxford University Press, 1984) 153 at 162.

68 Ibid.

fact of their being held and supported. Certainly Dworkin is not arguing that people should refrain from expressing their external preferences or their principled convictions; he is not urging a politics of self-interest.⁶⁹ His argument is, rather, that the utilitarian calculus has specific work to do in politics, and that when it does its work it should work in the domain of personal preferences to establish who would be harmed or who would be benefited in terms of what they want for themselves from some political proposal. That, then, may be used as a way of defending or criticizing political proposals, and it may be appealed to as a basis for voting one way or the other.⁷⁰ But it can do this work only if it is conceived as a distinct form of political justification, not if it operates as a function over moral convictions that people already have and that they justify (if they do) on independent grounds.

The point, then, is this. In cases where people feel vehemently about some matter of principle – whether they feel great because the principle

69 See Dworkin, *Taking Rights Seriously*, supra note 63 at 358: 'Nothing could be further from what I suppose than the idea that people should act only in their own interests and never in the interests of children, lovers, friends or humanity, or that their votes should not represent their ideals of justice or other political ideals as well as their selfish interests.'

70 The connection between votes and external preferences is subtle and important. People inevitably – and properly – vote on the basis of their external preferences, says Dworkin:

[T]hey will vote for legislators, for example, who share their own theories of political justice. How else should they decide for whom to vote? But when these legislators are elected, they are subject to constraints about how far preference utilitarianism provides a justification for their decisions; that is, how far the fact that a majority prefers a particular state of affairs (as distinct from the justice of what the majority wants) counts as an argument for a political decision to promote it. (Ibid.)

This passage needs to be read carefully. In the context of a plebiscite, the fact that a majority support a proposal makes it legitimate; and in the context of an election, the fact that a majority shows support for a policy provides an electoral mandate for it. But in neither of these cases does it necessarily provide an *argument* for it (*e.g.*, an argument that might convince a citizen to vote one way rather than the other). Whether it provides an argument depends on whether something like utilitarianism is an acceptable theory of social policy in a given area, and it is in relation to that question that Dworkin's exclusion of external preferences is important.

To put it another way, voting doesn't purport to *justify* a political position (although it may, in some circumstances, be cited as evidence in a utilitarian justification). Rather, it is a way of choosing political positions for society in circumstances where people disagree about what is justified. But utilitarianism does purport to be a justificatory theory, and in that context there is something very fishy about citing as part of the justification of a principle a preference or feeling whose felt character presupposes that the principle is justified. For further discussion of this distinction between first-level arguments and second-level legitimacy, see J. Waldron, 'The Circumstances of Integrity' (1997) 3 *Leg. Theory* 1 at 9–12, and J. Waldron, *Law and Disagreement* (Oxford: Clarendon Press, 1999) at 195–8.

has been vindicated or whether they feel offended because it is violated – it almost always misrepresents their view to say that the pleasure of vindication or the pain of offence are themselves grounds for the principle in question. From the point of view of the principle's justification, these sorts of pains and pleasures are mere epiphenomena. Which is not to say that the principle may not have a utilitarian justification; but it is not a justification of this sort.

I made this deviation into the controversy about external preferences because, again, I wanted to indicate how poorly thought through Professor Ellickson's conception of the harms occasioned by panhandling and bench-squatting actually is. We have already seen that the annoyance aspect of being confronted by someone who casts doubt on one's view of what society is really like should not be counted as a harm. If anything it is a benefit, although it is probably more accurate to say that the simple-minded cost-benefit dichotomy is quite inadequate to deal with all this. And now we have seen that there is reason, too, for doubting whether the normative, condemnatory side of the annoyance suffered by Ellickson's pedestrian should be regarded as harm for the purposes of developing anything like a utilitarian justification of restrictions on the homeless.

The pedestrian is irked that the bench-squatter is idle. He does not think such idleness should be permitted, so he campaigns for a law against bench-squatting, together perhaps with a 'workfare' requirement, which would effectively put an end to the practice. Now, there may be good reasons in favour of that legal change. If the pedestrian is aware of them, then they are presumably the reasons that weigh with him, explaining why the bench-squatting annoys him in the first place. But the self-aware pedestrian will not think that his annoyance justifies the proposal to change the law; instead, he will think that the reasons that justify the annoyance also justify the proposal.

Suppose now that the case in favour of the workfare-and-anti-bench-squatting law is finely balanced. On the one side is the array of reasons – R_1 , R_2 , R_3 – that convinced the pedestrian; on the other side are various reasons of a humanitarian and administrative character – call them R_5 , R_6 , and R_7 . When the issue is finely balanced like this, should we introduce the fact that the proposed law would relieve the pedestrian's annoyance as an additional reason R_4 , operating perhaps as a tie-breaker? Surely not. The pedestrian's annoyance is not an additional factor in favour of the law over and above R_1 , R_2 , and R_3 . Rather, the pedestrian's annoyance is simply the effect that R_1 , R_2 , and R_3 have in the mind of someone who believes that they are not being properly attended to.

This is not to say that the condemnatory aspect of the anger that Ellickson's pedestrians feel is unimportant or not worth considering. It is important. But what is worth considering about it is the question of its

justification. If Ellickson's pedestrian is irked by the fact that homeless people are violating rules of conduct for public spaces, then we need to ask what these rules are and how are they justified; we should not be in the business of citing the fact that the pedestrians are irked as a reason in support of their views about these rules.

The External Preference argument may also work in another way, in the contexts Ellickson considers. Many of those who are annoyed by the demands of street people were brought up to believe that generosity is a virtue, and that there is something wrong about simply turning one's back on a cry for alms.⁷¹ Now, though, when the demands for help seem overwhelming, the response is often to oppose to the felt duty of almsgiving a moral judgement to the effect that the poor must take responsibility for their own predicament. And so one walks past the beggars on the street, repeating in one's mind furiously the modern mantra 'Own fault. Own fault.' The opposition between these judgements may be experienced subjectively as anxiety and agitation, as new economic wisdom clashes with moral upbringing. Most of us *feel bad* after each of these encounters, or each of these turnings-away. But it would be wrong to cite the feeling as one of the costs of street misconduct. It is not an independent factor in the moral calculation; at best, it is one of the symptoms of the moral calculation's being performed.

71 For the Christian view, see Matthew 25:31–46:

When the Son of man shall come in his glory, ... before him shall be gathered all nations: and he shall separate them one from another, as a shepherd divideth his sheep from the goats: And he shall set the sheep on his right hand, but the goats on the left. Then shall the King say unto them on his right hand, Come, ye blessed of my Father, inherit the kingdom prepared for you from the foundation of the world: For I was an hungred, and ye gave me meat: I was thirsty, and ye gave me drink: I was a stranger, and ye took me in: Naked, and ye clothed me: I was sick, and ye visited me: I was in prison, and ye came unto me. Then shall the righteous answer him, saying, Lord, when saw we thee an hungred, and fed thee? or thirsty, and gave thee drink? When saw we thee a stranger, and took thee in? or naked, and clothed thee? Or when saw we thee sick, or in prison, and came unto thee? And the King shall answer and say unto them, Verily I say unto you, Inasmuch as ye have done it unto one of the least of these my brethren, ye have done it unto me. Then shall he say also unto them on the left hand, Depart from me, ye cursed, into everlasting fire, prepared for the devil and his angels: For I was an hungred, and ye gave me no meat: I was thirsty, and ye gave me no drink: I was a stranger, and ye took me not in: naked, and ye clothed me not: sick, and in prison, and ye visited me not. Then shall they also answer him, saying, Lord, when saw we thee an hungred, or athirst, or a stranger, or naked, or sick, or in prison, and did not minister unto thee? Then shall he answer them, saying, Verily I say unto you, Inasmuch as ye did it not to one of the least of these, ye did it not to me. And these shall go away into everlasting punishment: but the righteous into life eternal.

X *Complementarity again*

So I return to my little contretemps with the American Alliance for Rights and Responsibilities. The premise of their position was that 'governments have the right to regulate certain types of conduct in public places, to ensure that parks and sidewalks remain accessible and welcome to all.'⁷² And as I said in section II, I agree with this. The question is: How? On what basis is this regulation to be set up?

If there were no homeless persons in our community – that is, if everyone living in our cities had access to private accommodation or guaranteed shelter space for sleeping and for care of self, and so on – then public spaces could be regulated on the following basis. Since everyone would have access to a private home, activities deemed particularly appropriate to the private realm – activities like sleeping, copulating, washing, urinating, and so forth – could be confined to that realm. Public places could be put off-limits to such activities, and dedicated instead to activities that *complemented* those that citizens performed in their own homes. (This is the Complementarity Thesis I mentioned at the beginning of this essay.)⁷³ Public places could be dedicated to things like strolling, picnics, meeting people, walking dogs, children's play, and so on. It would be reasonable for those who wanted to enjoy the public spaces to expect not to find people sleeping, cooking, or storing their possessions there, and not to find evidence of human urination or defecation. They could reasonably assume that everyone had a home to go to for activities of that kind. Laws and regulations prohibiting sleeping and storing possessions on sidewalks and public parks could be enforced in the light of that expectation without fear of disparate impact.

That, in my view, captures the spirit of the AARR brief, which (as I said earlier) evoked a time when citizens from all walks of life – '[t]hose with Armani suits, and those with nose rings; elderly people and gay couples; residents and visitors; rich, middle, and struggling classes'⁷⁴ – spent their leisure hours in public places.⁷⁵ It is an attractive idea, of public places facilitating interaction among strangers, not just among friends,⁷⁶ and as such it is preferable to the usual nostalgia for *Gemeinschaft* that one finds in the communitarian literature.⁷⁷ As AARR counsel Rob Teir puts it,

⁷² AARR brief in Joyce, *supra* note 7 at 1.

⁷³ Towards the end of section II, *supra*.

⁷⁴ Teir, 'Restoring Order,' *supra* note 1 at 290.

⁷⁵ AARR brief in Joyce, *supra* note 7 at 2.

⁷⁶ See also the discussion in M. Ignatieff, *The Needs of Strangers* (London: Chatto & Windus, 1984) at 139 ff.

⁷⁷ See also J. Waldron, 'Particular Values and Critical Morality' 77 Cal.L.Rev. 561 at 581 ff., reprinted in *Liberal Rights*, *supra* note 5, 168 at 193 ff.

City parks and sidewalks were built to be community meeting places, where people of different races, religions, ethnic groups, socio-economic levels, and political views, could come together and share in the benefits of public spaces. These venues are places of integration, assimilation, mixture of social classes, and a counterweight to the increasing fragmentation of society.⁷⁸

We are to imagine diverse citizens coming out into the parks and boulevards where they can enjoy their leisure, 'interact with their fellow citizens and leave behind their isolation and segregation'⁷⁹ before returning once again to the private realm. Certainly this is an attractive image. Unfortunately, it is not appropriate for the regulation of public places in a society where there are large numbers of homeless people. In such a society, public spaces have to be regulated on a somewhat different basis. They have to be regulated in light of the recognition that some people have no private space – not even the temporary privacy that public shelters or public toilets would afford – to come out of or to return to. Fairness demands that public spaces be regulated in light of the recognition that large numbers of people have no alternative but to be and remain and live *all their lives* in public. For such persons, there is an unavoidable failure of the complementarity between the use of private space and the use of public space, and unless we are prepared to embrace the most egregious unfairness in the way our community polices itself in public, we are simply not in a position to use that complementarity as a basis for regulation.⁸⁰

It is worth dwelling on the question of fairness. Professor Ellickson recognizes it as a formidable issue,⁸¹ but the AARR's counsel Robert Teir protests that

78 'Maintaining Safety and Civility,' supra note 1 at 289.

79 Ibid. at 337.

80 Whether this works as a constitutional argument is another matter: one has to contrast the argument that worked in *Pottinger v. City of Miami*, 810 F.Supp. 1551 at 1571 (S.D.Fla. 1992) – holding that the 'practice of arresting homeless individuals for performing inoffensive conduct in public when they have no place to go is cruel and unusual in violation of the eighth amendment, is overbroad to the extent that it reaches innocent acts in violation of the due process clause of the fourteenth amendment and infringes on the fundamental right to travel in violation of the equal protection clause of the fourteenth amendment' (ibid. at 1583) – with the argument that was rejected in *Joyce v. City of San Francisco*, 846 F.Supp. 843 (N.D.Calif., 1994).

But even assuming that a constitutional challenge fails, the fact that the legislation is constitutional does not mean it is fair. This essay should be read as a consideration of the issue of fairness without much regard to the political forum in which that issue might be explored.

81 See 'Controlling Chronic Misconduct,' supra note 12 at 1247: 'The reconciliation of individual rights and community values on the streets is a profoundly difficult problem.'

[t]here is nothing unfair or mean-spirited about wanting to be free from harassment and intimidation, wanting urban parks where children can play and adults can enjoy the green, and the quiet, or wanting urban parks that are not filled with litter, human waste, needles, bedrolls, drug users, and used condoms.... These rules ... are set so that all people feel welcome in the public spaces.⁸²

He is right. In itself, the aspiration he mentions is just and admirable. Unfairness comes into the picture only when we consider the implementation of this goal against the background of homelessness. But again Teir protests. He says that those who suffer from the deterioration of public places are often the poorest, rather than the most prosperous, of those who have a home to go to; this is not a case of discrimination against the poor in favour of the rich; at worst, it is discrimination against one class of poor people in favour of another.⁸³ And anyway, he says, the measures discussed in this article are not aimed at the homeless. Rather, they are aimed at and address *conduct*, and only those who choose to engage in the prohibited conduct fall within their reach.⁸⁴

Once again, he may be right – at least as to the intention.⁸⁵ But one is entitled to consider, also, evident and predictable disparities that

82 'Restoring Order,' supra note 1 at 290.

83 Thus Teir writes, *ibid.* at 290–1

Nor are these measure unfair to the poor.... [I]t is not the affluent who reap the benefits of these measures. The rich, after all, can take care of themselves. They are not, speaking generally, dependent upon public parks for recreation. They usually live in secured communities, and shop in safe and comfortable places. The well-off can also leave an area when it gets intolerable. Rather, it is the poor and middle-classes who depend upon the safety and civility of public spaces. They have fewer options about relocating, less options about schools, and less options about private recreational places.

Ellickson takes a similar line in 'Controlling Chronic Misconduct,' supra note 13 at 1189–90:

Most beggars and bench squatters are economically and socially destitute. For observers concerned primarily with distributive justice, extreme poverty might furnish ... a sufficient reason for siding with a disorderly street person in any policy context. This is an ill-considered position. To favor the poorest may disadvantage the poor, who are as unhappy with street disorder as the rest of the population. Because residents of poor urban neighborhoods tend to make especially heavy use of streets and sidewalks for social interactions, they have an unusually large stake in preventing misconduct there.

These are perfectly reasonable points. The issues about fairness discussed in the text concern, not rich/poor comparisons, but the enormous difference in burden cast by public-space regulations on those who are homeless and those (whether rich or poor) who are not.

84 Teir, 'Restoring Order,' supra note 1 at 291.

85 For some doubts, see Waldron, 'Homelessness,' supra note 5 at 313–4 (*Liberal Rights* at 327–8), setting out four reasons for doubting the impartiality of the intentions of those who lobby for prohibitions on sleeping in public.

different classes of people will experience in bringing their behaviour within the norms he wants to enforce. If not as a constitutional matter, then certainly as a matter of justice, those who have the power to regulate public places must pay special attention to the difference between the impact of a given regulation on a person who has a home and its impact on someone who is homeless. In the case of a person who has a home, compliance with an ordinance prohibiting, for example, sleeping in public places is simply a matter of relocation. For someone who has no home, however, and – let's say – no access to a shelter,⁸⁶ compliance with such an ordinance would mean that *he must not sleep* (for there is now *no place* where his sleeping is permissible).⁸⁷ This may not be what any enforcer or communitarian lobbyist intends, but it is the easily foreseeable result of a number of familiar intentional prohibitions.⁸⁸ This impact is so qualitatively different from the impact of the regulation on the person who has a home to return to that it amounts almost to the application of a quite different set of laws. Certainly, the ordinance, if enforced, would have an impact on the homeless whose cruelty (the denial of sleep, *period*) was out of all proportion to the minor inconvenience that would be suffered by a person who had somewhere else to sleep. And, of course, eventually, the effective prohibition on sleep becomes physiologically impossible to comply with.⁸⁹ (Against all this,

86 More about this condition in a moment: see text accompanying note 93 *infra*.

87 Waldron, 'Homelessness,' *supra* note 6 at 315 (*Liberal Rights* at 328–9):

For a person who has no home, and has no expectation of being allowed into something like a private office building or a restaurant, prohibitions on things like sleeping that apply particularly to public places pose a special problem. For although there is no general prohibition on acts of these types, still they are effectively ruled out altogether for anyone who is homeless and who has no shelter to go to. The prohibition is comprehensive in effect because of the cumulation, in the case of the homeless, of a number of different bans, differently imposed. The rules of property prohibit the homeless person from doing any of these acts in private, since there is no private place that he has a right to be. And the rules governing public places prohibit him from doing any of these acts in public, since that is how we have decided to regulate the use of public places.... Since private places and public places between them exhaust all the places that there are, there is nowhere that these actions may be performed by the homeless person. And since freedom to perform a concrete action requires freedom to perform it at some place, it follows that the homeless person does not have the freedom to perform them. If sleeping is prohibited in public places, then sleeping is comprehensively prohibited to the homeless.

88 For the detailed argument here, see *ibid.* at 315–7 (*Liberal Rights* at 329–32).

89 *Ibid.* at 320 (*Liberal Rights* at 334–5): '[A]ny restriction on the performance of these basic acts has the feature of being not only uncomfortable and degrading, but more or less literally unbearable for the people concerned. People need sleep, for example, not just in the sense that sleep is necessary for health, but also in the sense that they will eventually fall asleep or drop from exhaustion if it is denied them. People simply cannot bear a lack of sleep, and they will do themselves a great deal of damage trying to bear it. The same, obviously, is true of bodily functions like urinating and

Ellickson's observation that '[w]hile no one's will is fully free, virtually all of us have some capacity for self-control' does seem a little lame, to say the least.)⁹⁰

I said a moment ago that we should assume for the sake of argument that the homeless have no publicly provided shelter to go to. For many of the homeless this is false,⁹¹ although it is true during daylight hours, and importantly true then so far as publicly provided bathrooms are concerned. I suggested this assumption – artificial as it is – in order to emphasize the extent to which the fairness of public-place regulations depends on other aspects of provision for the homeless. Robert Teir believes that the two issues are separable. He cites a comment by columnist George Will to the effect that '[t]he question of what society owes in compassionate help to street people is, surely, severable from the ques-

defecating. These are things that people simply have to do; any attempt voluntarily to refrain from doing them is at once painful, dangerous, and finally impossible.' This – as I said in the 'Homelessness' article (ibid. at 320; *Liberal Rights* at 334) – is something that every torturer knows: '[T]o break the human spirit, focus the mind of the victim through petty restrictions pitilessly imposed on the banal necessities of human life. We should be ashamed that we have allowed our laws of public and private property to reduce a million or more citizens to something approaching this level of degradation. Increasingly, in the way we organize common property, we have done all we can to prevent people from taking care of these elementary needs themselves, quietly, with dignity, as ordinary human beings.'

- 90 Ellickson, 'Controlling Chronic Misconduct,' supra note 6 at 1187. The full text of the passage reads (footnotes omitted):

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

- 91 For example, New York City guarantees a bed in a shelter to any person who seeks it (subject to some work and conduct requirements): see P.T. Kilborn, 'Gimme Shelter: Same Song, New Tune' *The New York Times* (5 December 1999) 5. But New York is exceptional among American cities in this regard. (See also Donna Wilson Kirchheimer, 'Sheltering the Homeless in New York City: Expansion in an Era of Government Contraction' (1989) 104 *Pol.Sci.Quar.* 607.) A report commissioned by the United States Conference of Mayors between 1986 and 1995 in twenty-nine major cities indicates that in 1995, for example, 24% of shelter requests went unmet during that year and that emergency shelters in 79% of the surveyed cities turn away homeless families because of a lack of resources. See L.D. Waxman, K. Peterson, & M. McClure, *U.S. Conference of Mayors, a Status Report on Hunger and Homelessness in America's Cities: 1995* (1995) at 59–60, cited in C.V. Tusan, 'Homeless Families from 1980–1996: Casualties of Declining Support for the War on Poverty' (1997) 70 *So.Calif.L.Rev.* 1141 at 1144.

tion of what right the community has to protect a minimally civilized ambience in public spaces.⁹² The analysis I have given shows why the questions are *not* severable: the less the society provides in the way of public assistance, the more unfair is its enforcement of norms for public places that depend on a complementarity that simply doesn't apply to a considerable number of citizens. Notice, though, that this does not mean that *all* regulation of public places must be suspended until provision has been made for the needs of the homeless. From what I have said here, nothing follows about the enforcement in public places of those rules of conduct that apply everywhere: murder and assault will remain illegal in public as well as in private, and if the use and supply of narcotics continues to be banned, then they too will be banned in public places. The arguments I have made primarily concern necessary activities – such as sleeping and urinating – which would be perfectly legal if performed in private. So far as these actions are concerned, it is quite unfair to ban them in public – to say to the homeless person in a public street or square, 'This is not the place for *that* activity' – if we have not at the same time taken steps to ensure that everyone has access to a private place in which to perform them. So long as we have not taken those steps, then banning such activities in public is like enforcing a curfew against the homeless when there is nowhere for them to go. It fails to take proper account of the fact that, as things stand, public places are the only places they are allowed to be.

If, as a result, the visibility of these properly private (but, for the homeless, unavoidably public) activities is a deterrent to more traditional uses of public space by citizens who *do* have a home to go, then we have no choice but to say to the latter, 'In the present state of public policy, we can longer guarantee the use of public space for this sort of respectable activity alone. Any use you make of the public space will just have to put up with the company of hundreds of people washing, urinating, and sleeping in the area where you want to have your demonstration, or do your juggling, or play pick-up football, or lay out your picnic, or make your promenade.' Now, this is certainly a matter of regret, and the consequence may well be, as Ellickson has suggested, an impoverishment of the public dimension of culture and civil society, as those who have a choice flee the downtown streets and parks and take refuge in cyberspace, suburban malls, or gated communities, leaving public places to the mercy of those who have no option about remaining there.⁹³ But it is important to see that this is not the sort of dilemma that we can solve by simply adjusting the regulations. We can't have it all ways: unless we are willing to take the next step and actually eradicate the homeless or put

92 G.F. Will, 'Beggars and Judicial Imperialism' *The Washington Post* (1 February 1990) A21, cited in Teir, 'Maintaining Safety and Civility,' *supra* note 1 at 337.

93 Ellickson, 'Controlling Chronic Misconduct,' *supra* note 12 at 1172.

them out of sight in concentration camps,⁹⁴ then they and their lives are just *there* – unavoidably – by virtue of the fact that distribution of housing has left them nowhere else to go. And our use and regulation of public places must be adjusted accordingly.

I suspect that an apprehension of this collapse of the complementarity on which the traditional use of public space depended lies at the heart of many of the attitudes that Robert Ellickson discerns in his pedestrians. The rules that concern them – the rules they are distressed to see the homeless flouting – are predicated on the traditional public/private complementarity; and the distress they feel may reflect an angry frustration arising from their knowledge that the basis for the fair enforcement of those rules no longer exists. If this is true, then there is an additional mistake in Ellickson's citing such frustration as a utilitarian ground for persisting with the rules in question, or enhancing or intensifying their enforcement. For now we see that the very distress he regards as a *harm* of the homeless people's activity is in fact frustration associated with an apprehension of the unfairness of effectively prohibiting that activity, indeed the moral impossibility of the whole traditional framework of rules of that kind. Once again we see how badly one can go wrong by simply categorizing every negative emotion that people feel as a *cost* for the purpose of an economic calculus.

XI *Social norms*

Let me head for the finish on a more conciliatory note. The best work that Ellickson has done concerns the emergence and role of social norms – informal customs and practices addressing problems and conflict on the ground, so to speak, to which formal state or sovereign law often takes a distant second place.⁹⁵ In his 1996 article on 'Chronic Misconduct in Public Places,' Ellickson recognized that this social norms perspective

94 For apprehensions along these lines see, e.g., Bob Pool, 'Fanfare, Fear Surround New Shelter' *Los Angeles Times* (16 April 1999) at B1:

Development of the center was first proposed in 1994 by downtown business leaders and supported by Mayor Richard Riordan. Its original concept called for a \$4 million urban campground serving as many as 800 homeless people on a fenced-in lot. As part of that plan, outreach vans would circulate through downtown streets and social services workers would invite transients to ride with them to the center. But the city scaled back its proposal after critics such as the Los Angeles Coalition to End Homelessness blasted the plan as 'a first step on a slippery slope down to concentration camps in rural areas for homeless people.'

95 See especially *Order Without Law*, supra note 13, discussing informal rules about cattle trespass in Shasta County, California. See also R.C. Ellickson, 'Of Coase and Cattle: Dispute Resolution among Neighbors in Shasta County' (1986) 38 *Stanford L.Rev.* 623 and 'Law and Economics Discovers Social Norms' (1998) 27 *J.Legal Stud.* 537.

ought to apply to city streets also. He invoked an oft-cited dictum from Jane Jacobs's classic study of urban organization:

[T]he public peace – the sidewalk and street peace – of cities is not kept primarily by the police, necessary as police are. It is kept primarily by an intricate, almost unconscious, network of voluntary controls and standards among the people themselves, and enforced by the people themselves.... No amount of police can enforce civilization where the normal, casual enforcement of it has broken down.⁹⁶

He also expressed some apprehension about the obstacles that defeat or undermine this pattern of 'normal, casual enforcement,' so far as the prevention of chronic annoyance by the homeless is concerned. In principle, it should be possible, he said, 'for a bystander to intervene to prevent a street person from annoying another sidewalk user.'⁹⁷ Even a person who is 'reluctant to chastise a panhandler may be willing to frown at an almsgiver.'⁹⁸ But, he laments, these things seldom happen. His explanation has to do mainly with the public goods aspect of street order, especially in a large metropolitan city, where encounters are anonymous and not necessarily repetitive as between the same 'players.'⁹⁹ (Here we come back to the point about the insignificance of harms inflicted by these annoyances on any one occasion.)¹⁰⁰

But there's also another explanation, which may be more charitable to Ellickson's pedestrians. We have seen that because of the failure of complementarity, the conditions for the legitimacy and fairness of traditional norms of conduct in public places now no longer apply, so far as a significant number of citizens are concerned. I suspect that this is widely recognized among Ellickson's pedestrians, and that it accounts in part for their failure to participate enthusiastically in the informal social enforcement exercise that he recommends. True – as I argued earlier¹⁰¹ – that recognition of the failure of complementarity is not particularly cheerful. Often it is associated with anger, best explained in terms of cognitive dissonance and denial. This leaves many people acutely uncomfortable as they struggle to express, regulate, and make sense of the annoyance that accrues from being confronted with the spectacle

96 J. Jacobs, *The Death and Life of Great American Cities* (New York: Random House, 1961) at 31–2, quoted by Ellickson in 'Controlling Chronic Misconduct,' *supra* note 12 at 1196. See also R.H. Pildes, 'The Destruction of Social Capital Through Law' (1996) 144 U.Pa.L.Rev. 2055 at 2061 ff. and Livingston, *supra* note 54 at 558.

97 'Controlling Chronic Misconduct,' *supra* note 12 at 1196.

98 *Ibid.* at 1197.

99 *Ibid.* at 1196–7.

100 See *supra* section IV, especially notes 31–2 and accompanying text.

101 See *supra* section VII, especially note 50 and accompanying text.

and the demands of street people. But the pedestrians that I see seem more aware than Ellickson appears to be of the conditional nature of street regulation. The regulation of public places is not like the categorical imperative; it is sensitive to conditions and circumstances. I think most people recognize that with the advent of large-scale homelessness in our cities, conditions, and circumstances have changed; and, while this may not necessarily excite a great deal of politically effective compassion, still its implicit recognition may be enough to undermine – and (in an indirect and no doubt back-handed way) to *appropriately* undermine – the sense of there being any acceptable ethical basis for the ordinary citizen to chastise a panhandler or to roust and admonish a person who has fallen asleep on the street.

I don't mean that normativity has disappeared altogether from the streets. Quite the contrary: new norms may be emerging, or new selections being made in new circumstances from among the traditional social rules. For example: many who give regularly to panhandlers understand the importance of norms of time, place, and manner so far as begging for change is concerned, and they do what they can to enforce these – even if only by selective giving. (I know from conversation that many people will contemplate giving only in circumstances where all parties to the transaction have an opportunity to move away if they wish; they will not, for example, under any circumstances, give money to a panhandler in a crowded subway car.)¹⁰²

Also, the more or less permanent presence of the homeless may actually enhance street order in certain ways. Jane Jacobs spoke of the importance of 'eyes upon the street'; she mentioned the special incentives of merchants and regular users to observe and control what goes on in a particular locale.¹⁰³ Regular panhandlers have their eyes on the street day and night, and often they know it as well as or better than its more prosperous users. They often form bonds of affability, trust, even – paradoxically – protectiveness vis-à-vis their regular alms-giving clientele. And their sense of what is going on may well equal or even surpass – occasionally they may be called on to supplement – the street knowledge of an alert patrol officer.¹⁰⁴

102 Ellickson's proposed test for this – 'How often has a New York commuter countered a subway panhandler's monologue by, for example, starting a chant of "Just say 'no'"?' ('Controlling Chronic Misconduct,' supra note 12 at 1197) – is arguably somewhat under-inclusive.

103 Jacobs, supra note 98 at 35–7, mentioned by Ellickson in 'Controlling Chronic Misconduct,' supra note 12 at 1197–8.

104 However, Ellickson deprecates this. Responding to a suggestion in B.J. Goldstein, 'Panhandlers at Yale: A Case Study in the Limits of Law' (1993) 27 Ind. L.R. 295 at 346, that 'unaggressive chronic panhandlers may aid in police efforts to curb boisterous transients,' Ellickson writes ('Controlling Chronic Misconduct,' supra note 12 at

As Ellickson well knows, the emergence and sustenance of social norms is not a simple or predictable business. Such norms will not emerge in response to every situation about which the indignant citizen thinks, 'Something ought to be done.' The closeness to the ground (so to speak) of the conditions under which social norms are constructed means that they are likely to be much more sensitive (than, say, a legislature is) to the detailed predicaments of various persons in a given situation and to others' awareness of those predicaments. If a norm is manifestly unreasonable at the human level, then it may prove unenforceable, since its enforcement relies on the voluntary intervention of those who are closely acquainted with the basis of the unreasonableness. The contrast with the enforcement of official state law is important here. In the case of a social norm, extra enforcement resources that are blind to, or unaffected by, the sense of the norm's unreasonableness can simply be wheeled in to supplant the reluctance of the enforcers on the ground. (Social norms cannot mobilize task forces.) So, for example, if it is well known that there are no public restrooms in a given vicinity, and that homeless people have access to shelter facilities only at night, then social norms are unlikely to spring up enforcing absolute prohibitions on public urination. Instead, such social norms as there are on this issue will likely direct street people to particular locations (in parks and public gardens, etc.) where a modicum of privacy is available and where offence to other members of the public is less likely.¹⁰⁵ And the street-level reasonableness of social norms in this regard is likely to be echoed also, to a certain extent, in the exercise of ordinary discretion by police officers on patrol. Someone urinating into the fountain in Lincoln Plaza may be arrested; someone who has been seen behind a bush in Central Park may not be.

These conclusions about social norms are significant for an evaluation of the various legislative proposals that Ellickson and also the AARR put forward. In Ellickson's presentation particularly, the proposals are put forward as a legal response to the failure of social norms: it is the familiar idea of law stepping into the breach where externalities and transaction costs have defeated more informal processes. In fact, however, the implications of the failure of social norms in this area may be more direct:

1198n), 'Most chronic panhandling, however, occurs in well-trafficked locations, where there are likely to be numerous other eyes upon the street. A chronic panhandler is therefore unlikely to make a net contribution to street order.'

- 105 Professor Ellickson and I were once given a tour of such sites in downtown Atlanta by a homeless person (during a break in the conference mentioned *supra* note †). It was made clear to us that, among street people, the designation of such sites was *normative* as well as *matter-of-fact* – these were known as 'appropriate' places to, for example, urinate – although I should add that I don't remember the *word* 'normativity' actually being used.

their lack of viability may provide useful information about the unreasonableness of the proposed scheme of regulation by demonstrating, in effect, that those who would have to enforce them do not have the stomach to do so against people who have little choice but to be in some sense in violation of such norms.

XII Conclusion

The problem of homelessness has the potential to show communitarianism at its best and at its worst.

At its best, communitarianism refuses to be browbeaten by either conservative or liberal theories about what a good society *must* be like: it encourages us to look to the conditions of viability of *actual* communities, and it predicts that those conditions may sometimes surprise us, which means that actually existing communities have the potential to teach us something about social and political ideals. 'A community,' in Philip Selznick's definition, 'is a comprehensive framework for social life.'¹⁰⁶ It provides a basis on which various human concerns are felt, values pursued, and commitments entered into, among relatively large numbers of people who accept that, since they are living more or less permanently in one another's company, they have a responsibility to orient their actions and relations to the shared environment – moral as well as physical – in which all of them must live.¹⁰⁷ In this respect, there is a certain sociological *given*-ness about community: it contrasts, on the one hand, with utopia and social ideal, and, on the other hand, with club, cult, and commune. One *finds oneself* a member of a given community, not by enlisting a group of like-minded chums, but by understanding who it *is* that one is 'unavoidably side-by-side' with, and who it *is* that the impact of one's actions and decisions is going to be felt by, whether one chooses this or not. The fellow members of one's community are not necessarily people like oneself: they are, rather, those with whom 'one cannot avoid interacting.'¹⁰⁸ One is already in a community, already in community with specified others; and one's communitarian responsibilities spring from that, not from one's wishes or ideals. Thus the fact that someone smells bad, looks dishevelled, or is not the person one would choose to associate with does not mean that he is not a member of one's community. If he is *there*, on the streets – the very streets that are the basis of one's social, commercial, recreational interactions – then he is a

106 P. Selznick, 'The Idea of a Communitarian Morality' (1987) 75 Cal.L.Rev. 445 at 449.

107 See P. Selznick, *The Moral Commonwealth* (Berkeley: University of California Press, 1992) at 357–71.

108 These formulations are drawn from I. Kant, *The Metaphysics of Morals*, trans. M. Gregor (Cambridge: Cambridge University Press, 1991) at 121–4.

member of the community too. And any story one tells about communal rights and responsibilities must take him and his interests into account.

But there is also a more disturbing side to contemporary communitarianism. Communitarians often seem to be yearning for forms and images of community that are no longer present or really possible. They conjure up a delightful image of community, a sort of Norman Rockwell picture of cheerful, prosperous people interacting respectfully on the streets, in the parks, at church, in town meetings, at Little League games, looking out for one another, and sustaining cherished traditions of civility, participation, civic boosterism, and mutual aid.¹⁰⁹ Nothing is too crowded, no one is ever scared or intimidated, nothing or no one is dirty or in despair, and there are no broken windows. I guess that as long as these yearnings are confined to the realtor's brochures for actual or notionally 'gated' communities, or to various Disneyfied experiments in urban reconstruction,¹¹⁰ they are probably no more harmful than any other cosmetic embodiment of American *schwarmerei*. But they become dangerous, and they portend great injustice, when they are used as a basis for determining rules of social conduct in community settings that do not initially meet their specifications. When this happens, then, although the resulting rules may be called 'community norms,' what they

109 See the extract from the AARR brief in *Joyce*, quoted at text accompanying note 9 *supra*.

110 The most explicit such experiment is the town of Celebration, Florida. See D. Young, 'The Laws of Community: The Normative Implications of Crime, Common Interest Developments, and "Celebration"' (1998) 9 *Hast.W.L.J.* 121:

Celebration represents the privatization and increased corporate control of whole aspects of the American lifestyle, a bastardization of the term 'community.' Much like common interest developments, Celebration functions largely by conformity and control rather than true cultural consensus and community decision-making. Though Celebration will have many of the semblances of a real town, for example, 'The Celebration Town Hall,' 'The Workplace,' and 'The Institute,' there is no real town government. The closest thing to representation in Celebration is membership in the homeowner association. However, even the actions of this homeowner association can be unilaterally overruled by the corporation. The sense of community so often yearned for seems to be ironically misguided in the 'pretty calm' and 'civic infancy' of Celebration. The longing for a bygone America, 'is a yearning for civic maturity' in which the 'messy responsibility of democracy held sway, and society worked.' Celebration does not offer these attributes.

See also A. Ross, *The Celebration Chronicles: Life, Liberty and The Pursuit of Property Values in Disney's New Towns* (New York: Ballantine, 1999); M. Pollan, 'Town-Building Is No Mickey Mouse Operation' *The New York Times* (14 December 1997) at 56; D. Tarrant, 'No Cause for Celebration: Disney-created Town Fell Short of Being the Utopia Its Planners Envisioned, but It's Not the Set for Another Truman Show, Either' *Sun-Sentinel [Fort Lauderdale]* (22 August 1999) 1D; and J.V. Iovine, 'A Tale of Two Main Streets: The Towns That Inspired Disney Are Searching for a Little Magic of Their Own' *The New York Times* (15 October 1998) F1.

actually represent is the imposition of a particular *a priori* vision by a few persons (often outsiders) on a community that has traditionally organized itself on quite another basis.

A paragraph or two ago,¹¹¹ I said that an attractive communitarianism takes communities and their members as it finds them, not as its proponents wish they would be. Those who have responsibility for the health of the common environment in a particular place are those who actually inhabit that place. This principle of the given-ness of community is quite rightly invoked by Ellickson, Teir, and others when they argue that street people too have responsibilities to the community – responsibilities, for example, for the condition and safety of the community's public spaces. Whether or not a homeless person has any choice about being on the streets, the sheer fact of his being there means that he too has a duty to the community in that regard. This we can accept. What we cannot accept, however, is that the definition of communal responsibilities should proceed on a basis that takes no account of the *predicament* of the homeless person or of the particular nature of the stake that she may have in the way public spaces are regulated. If the norms for public spaces are to be observed *by* him, then the logic of genuine as opposed to cosmetic communitarianism requires that those norms be constructed in part *for* him as well. We are not entitled to insist that the homeless person abide by community norms, or that those norms be enforced against her, if the norms are constructed in an image of community whose logic denies in effect that homelessness exists.

In the end it comes down to a connection between community and authenticity. In my particular criticisms of Ellickson, in sections VII and IX of this essay, I wanted to insist that the calculus of social costs and benefits should not be used in a way that panders to the denial and the fantasizing that distorts much American thinking about injustice. But the broader message about homelessness and community as such is the following. So long as people live among us in a condition of homelessness, our normative definitions of community must be responsive to their predicament; and it must be responsive, not only in articulating some vague sense of social obligation to 'do something' about the problem, but in accepting that the very definition of community must accommodate the stake that the homeless have – as community members – in the regulation of public places. If the call for a greater emphasis on 'community values' helps us see that, and helps us see our way through to new and more hospitable conceptions of communal responsibility, then well and good. But, as things stand, the call is most often heard in connection with schemes of regulation that simply try to wish homeless members of the community away. So long as that is the case, the moral credibility of modern communitarianism remains a matter of doubt.

111 See text accompanying note 110 *supra*.