

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

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I. Introduction

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

Jonathan Kozol, author of *Rachel and Her Children*.¹

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

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

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

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

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

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

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

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

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

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

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

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

A. Who Are These Beggars?

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

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

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

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

5. *Id.* at 13.

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

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

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

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

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

are equally varied:

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

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

B. Distribution of Wealth

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

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

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

13. *Id.*

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

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

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

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

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

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

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

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

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

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

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

credit card purchasing, by our government as well as by individuals, of dramatic tax reductions for the rich, and of deregulation of corporate America, "all indulged in with the greatest recklessness while beggars filled the streets and the average family's real disposable income declined toward a dimming future."¹⁹ As the income gap has widened, the United States has developed "one of the sharpest cleavages between rich and poor^{1*} among Western nations."²⁰ By disproportionately taxing the working class, filling regulatory agency posts with those critical of regulation, and massively increasing defense spending at the expense of human services, we have fostered a nation of haves and have-nots and spawned an underclass unheard of in modern civilized society. "[N]o other democratic country," charges Senator Daniel Patrick Moynihan, 'takes as large a portion of its revenue from working people at the lower ends of the spectrum and as little from persons who have property or high incomes."²¹

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

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

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

20. *Id.* at 8.

21. *Id.* at 80.

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

23. *Id.* at II.

24. *Id.* at 12.

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

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

27. *Id.* at 166.

28. *Id.* at 14.

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

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

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

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

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

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

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

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

33. *Id.* at 67.

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

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

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

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

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

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

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

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

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

38. *Id.* at 16-17.

39. *Id.* at 42.

40. *Id.* at 44.

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

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

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

Perhaps the most disheartening and damaging aspect of our increasingly divided society is the maintenance of a dual school system—a private one for the children of the upper and upper middle classes, and a public one for the offspring of the working class and the unemployed. Our federal government has effectively washed its hands of the problem by reducing its contribution to the costs of primary and secondary education to little more than 6%; and state and local governments have been hard pressed to pick up the slack. Not surprisingly, states with a higher concentration of wealthy residents can buy better quality. For example, in 1989, the average public school teacher in Arkansas earned \$21,700; in Connecticut, \$37,300.⁴⁴ This disparity is equally dramatic within most states, correlating closely with the average income of school district's residents. For example, the average pupil expenditure in New York City in 1987 was \$5,500, while in the affluent suburbs of Great Neck and Manhasset the figure was more than \$11,000 and, in the wealthiest districts in the state, \$15,000.⁴⁵ In Texas, school district expenditures range from a high of \$19,300 per year, per pupil, to a low of \$2,100 per year.⁴⁶ In a wealthy suburb of Dallas, Highland Park High School students "enjoy a campus with a planetarium, indoor swimming pool, closed-circuit television studio and state-of-the-art science laboratory. Highland Park

43. *Id.*

44. *Id.*

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

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

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

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

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

Id.

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

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

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

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

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

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

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

Id.

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

are no classes in America."⁵³ This delusion of a meritocracy, in which "social strata are evanescent and meaningless,"⁵⁴ serves an important purpose:

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

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

C. Social Darwinism on the Rise

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

53. *Id.* at 22.

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

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

Id. at 22.

54. *Id.*

55. *Id.*

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

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

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

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

enough that "32 million Americans are living in poverty [and] . . . 39 percent of them are children under 18. . ."?⁶⁰

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

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

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

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

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

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

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

65. In Stunner's words:

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

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

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

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

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

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

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

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

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

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

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

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

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

70. *Id.*

71. *Id.*

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

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

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

III. Responding to Beggars

A. Our Personal Responses

I. Internal Dialogues

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

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

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

75. *Id.*

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

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

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

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

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

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

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

78. *Id.*

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

80. *Id.* at 79.

81. *Id.* at 82.

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

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

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

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

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

83. *Id.*

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

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

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

87. *Id.*

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

work for a living."⁸⁹ "I've come to the point where they're all pros until proved otherwise," says a Chicago priest "We have been taken so many times."⁹⁰

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

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

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

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

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

91. *Id.* at 74.

92. *Id.*

93. W. at 68.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Marin, *supra* note 11, at 47.

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

99. *Id.*

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

2. *Who Gives (a Damn)?*

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

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

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

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

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

103. *Id.*

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

105. *Id.*

an average of \$47,432 in 1980, but after the 1986 tax code revisions reduced the benefits of charitable giving, gave an average of \$16,062 in 1988.¹⁰⁶ Corporate philanthropy is apparently following the same general pattern.¹⁰⁷

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

B. Governmental Responses

1. Common Law

a. Duty to Render Assistance

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

106. *Id.*

107. *Id.*

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

109. *Id.*

110. *Id.*

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

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

Samaritans when motivated by a higher law or by their conscience. But, the good Samaritan cannot rightfully claim that title if forced to act by legal mandate.¹¹³

Beginning with Professor James Barr Ames's oft-cited article¹¹⁴ published in 1908, numerous commentators have severely criticized the amorality of the common law rule.¹¹⁵ Following the example of twelve European countries¹¹⁶ whose laws require that those witnessing a person in serious peril must undertake reasonable assistance, Vermont and Minnesota have imposed on their citizenry an affirmative duty of safe rescue; a duty to rescue when there is no danger to the rescuer.¹¹⁷ No cases have arisen under the Vermont statute, and the Minnesota statute was only peripheral to a recent decision finding a duty to rescue where a host relationship existed.¹¹⁸

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

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

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

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

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

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

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

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

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

since it serves to influence civic conduct, is worth our consideration.¹²¹

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

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

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

b. *Necessity Defense*

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

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

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

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

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

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

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

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

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

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

125. GLANVILLE WILLIAMS, *CRIMINAL LAW* § 229 (2d ed. 1961). Historically, the necessity defense could only be used when the harm to be caused, or the predicament, was created by natural forces such as a storm or fire. For example, a severely storm damaged ship was justified in entering a port in violation of the embargo laws, *The William Gray*, 29 F. Cas. 1300 (C.C.D.N.Y. 1810) (No. 17,694), and sailors were justified in mutiny once their ship had become unseaworthy, *United States v. Ashton*, 24 F. Cas. 873 (C.C.D. Mass. 1834) (No. 14,470). More recently, courts have been willing to recognize harm that emanates from human sources as well as natural sources. For example, prison inmates have been permitted to raise the necessity defense in cases of escape to avoid imminent and serious threats of death or assault from other prisoners. See *People v. Lovercamp*, 118 Cal. Rptr. 110 (Ct App. 1974). However, there is some case law that states that "[w]hen the harm emanates from a human source, the harm must be unlawful before the necessity defense can be used." *City of Akron v. Detwiler*, No. 14385, slip op. at 2 (Ohio App. July 5, 1990), *affd.*, 565 N.R2d 602 (Ohio 1990).

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

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

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

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

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

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

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

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

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

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

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

alternatives were futile.¹³⁵

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

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

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

135. *Id.* at 610-11.

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

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

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

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

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

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

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

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

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

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

Id. at 301-02.

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

2. Legislative Ban & Regulations

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

142. Twenty-eight states (including the District of Columbia) prohibit begging in some form. Six states prohibit loitering for the purpose of begging: ALA. CODE § 13A-11-9(a)(1) (1982); ARIZ. REV. STAT. ANN. § 13-2905(A)(3) (1989); ARK. CODE ANN. § 5-71-213(a)(3) (Michie 1987); COLO. REV. STAT. § 18-9-112(2)(a) (1986); DEL. CODE ANN. tit. 11, § 1321(4) (1987); N.Y. PENAL LAW § 240.35(1) (McKinney 1983). Four states prohibit begging as disorderly conduct: CAL. PENAL CODE § 647(c) (West 1983) (accosting persons for purpose of begging); HAW. REV. STAT. § 711-1101(l)(e) (1985) (impedes or obstructs people for purpose of begging); MICH. COMP. LAWS ANN. § 750.167(l)(h) (West 1990); N.C. GEN. STAT. § 14-444(a)(5) (1982) (begging while intoxicated). Eight states prohibit begging as vagrancy: KAN. STAT. ANN. § 21-4108(e) (1988) (prohibition on deriving support from begging); LA. REV. STAT. ANN. § 14:107(3) (West 1986) (prohibition of able bodied persons begging *except* bona fide organizations); MASS. GEN. LAWS ANN. ch. 272, § 66 (West 1988); MINN. STAT. ANN. § 609.725(4) (West 1987); Miss. CODE ANN. § 97-35-37(g) (1972); NEV. REV. STAT. ANN. § 207.030(l)(d), (e) (Michie 1987) (accosts persons or goes house to house); Vt. STAT. ANN. tit 13, § 3901 (1989); WIS. STAT. ANN. § 947.02(4) (West 1988) (derives part of support from begging). One state prohibits begging as a tramp: MASS. GEN. LAWS ANN. ch. 272, § 63 (West 1988). Three states prohibit begging in specific places: D.C. CODE ANN. § 9-110(1981) (on Capitol grounds); GA. CODE ANN. § 50-9-9(b) (Michie 1982) (on state controlled property); NJ. STAT. ANN. § 32: 1-146.6(l)(d) (West 1989) (on Port Authority property). Ten states have regulations on children begging: CAL. LAB. CODE § 1308 (West 1983); IDAHO CODE § 44-1306 (1990); ILL. ANN. STAT. ch. 23, para. 2351 (Smith-Hurd 1989); KY. REV. STAT. ANN. § 201.090(2) (Michie/Bobbs-Merrill 1981); LA. REV. STAT. ANN. § 1452.1 (West 1986); MASS. GEN. LAWS ANN. ch. 272, § 58 (West 1988); Mo. ANN. STAT. § 294.043 (Vernon 1983); NEV. REV. STAT. ANN. § 609.210(1) (Michie 1987); N.Y. ARTS & CULT. AFF. LAW § 35.07(1)(c) (McKinney 1983); R.I. GEN. LAWS § 11-9-1(a) (1989). Three states prohibit begging to purchase alcohol: ALASKA STAT. § 04.16.020(b) (1986); CAL. PENAL CODE § 303(a) (West 1983); FLA. STAT. ANN. § 562.131(2) (West 1989).

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

327. Kornfield, *supra* note 325.

328. *Id.*

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

