

CRIMINALIZING POVERTY: THE CRIMINAL LAW POWER AND THE *SAFE STREETS ACT*

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RÉSUMÉ

La pratique de laver, contre de l'argent, le pare-brise des voitures qui s'arrêtent, est devenue courante à Toronto au milieu des années 1990 et jusqu'à la fin de cette même décennie. Cette pratique est née durant une période de pauvreté accrue en raison d'emplois non conventionnels et d'un certain recul affiché par le gouvernement à l'égard des programmes sociaux. Plutôt que de faire face aux causes politiques et économiques profondes du problème, le gouvernement de l'Ontario a essayé de débarrasser les rues des laveurs de vitres itinérants, qu'on appelle aussi « squeegees », en déposant la *Loi sur la sécurité dans les rues*. En agissant de la sorte, il a peut-être dépassé son champ de compétence. L'élément essentiel de la *Loi sur la sécurité dans les rues* est l'interdiction du lavage de pare-brise par des itinérants et de nombreuses formes de mendicité. Par conséquent, la Loi est une loi moderne contre le vagabondage, un domaine habituellement régi par le Parlement en vertu du droit pénal. En outre, le langage de justification utilisé par le gouvernement pour expliquer le besoin d'interdire cette pratique se fonde sur une interprétation du comportement des laveurs de vitres itinérants comme étant dangereux et contraire à l'ordre public. La *Loi sur la sécurité dans les rues* a une finalité de droit criminel et représente une tentative du gouvernement provincial d'empiéter sur un champ de compétence réservé uniquement au Parlement.

INTRODUCTION

Visible poverty in public space is a contentious issue. Homelessness has become an increasingly serious problem in Canadian cities, and youth are one of the fastest growing sectors of that population.¹ When faced with signs of extreme poverty, such as people panhandling for change or sleeping on sidewalks, passersby are forced to attempt to explain these phenomena. Explanations commonly break down broadly into two camps: those who believe homelessness is caused by individual character “flaws” such as alcoholism, mental illness or a desire to avoid employment; and those who point to structural factors, such as government policies that have reduced the availability of decent employment, welfare and affordable housing. However, these com-

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1. Mayor's Homelessness Action Task Force, *Breaking the Cycle of Homelessness: Interim Report of the Mayor's Homelessness Action Task Force* (Toronto: Municipality of Toronto, 1998).

peting explanations conceal a deeper argument over the causes of poverty in a liberal capitalist society – a polarized debate between those who believe that capitalism allows those who work hard to succeed, and those who maintain that the free market is not sufficient to provide for the needs of all. That this public debate has emerged so strongly over the past decade should not blind us to the fact that this debate is not new. It simply becomes more visible at times, such as this, in which massive increases in homelessness have thrust the debate into further public prominence.

While homelessness in general has increased, one form has drawn particular attention – the emergence of a group of people, mostly young, washing windshields on street-corners in major cities across Canada and the United States. The reaction of the state, in Ontario at least, has been legislation designed to undermine the source of their subsistence. In the fall of 1999, the Ontario government introduced a bill making squeegeeing and some forms of panhandling illegal. The *Safe Streets Act* came into effect in January 2000.² Squeegeers were a particular target of the *Act*, differentiated from poor people who solicit in public space. When the legislation was announced, the Attorney-General held a press conference on a street in downtown Toronto, flailing a squeegee and promising to crack down on squeegeers. The focus of this paper will therefore be on the prohibition of squeegeeing contained in the *Safe Streets Act*, though its impact on panhandling more generally will inform and underlie the analysis – largely because the distinction between squeegeeing and panhandling is unwarranted.

Not long after the *Act* came into effect, a legal challenge was brought on behalf of thirteen defendants charged under the *Safe Streets Act*. Twelve of the thirteen had been charged as a result of squeegeeing activity. Lawyers argued that the *Act* was unconstitutional both because it invaded Parliament's criminal law power, and because it represented a serious attack on *Charter* rights, including freedom of expression, the right to life, liberty and security of the person, and the right to equality. At the initial trial, all of these arguments were rejected and the *Safe Streets Act* was upheld as constitutional.³ This decision is currently under appeal, and the case is expected to eventually wind its way up to the Supreme Court of Canada. I will take up the federalism arguments, focusing my analysis on those sections of the *Act* that effectively prohibit squeegeeing. Although it has been argued that the anti-squeegeeing

2. S.O. 1999, c. 8.

3. *R. v. Banks* (2001), 55 O.R. (3d) 374 (Ont. Ct. Just.), on appeal to Ont. Sup. Ct. Just. (Danbrot J.) (decision pending); *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982* being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11, ss. 2(b), 7, 15 [hereinafter *Charter*]. Despite potential application to parking lot attendants and intoxicated individuals asking friends for some change to make a phone call, among others, Mr. Justice Babe held that the *Act* is not overly broad or vague. It was held that the *Act* should be construed so as to avoid absurd or unintended consequences so as to preserve its constitutionality. Arguments that section 7 of the *Charter* should be interpreted as including an economic right to survival were rejected. Mr. Justice Babe also refused to extend the *Charter* equality jurisprudence to include poverty as an analogous ground. While Mr. Justice Babe did find that the *Act* violated the guarantee of freedom of expression in section 2 of the *Charter*, this violation was upheld under section 1 – based on a characterization of squeegeeing and panhandling as more akin to commercial than political speech. The federalism arguments will be addressed further, *infra*.

provisions are “more impervious to the charge of usurping the federal criminal law power than are the provisions regarding aggressive begging,”⁴ I will argue that these statutory provisions represent a colourable incursion into the criminal law field.

Critical legal theorists have observed that legal doctrine cannot be divorced from its social and ideological context. Although the “official version of the law” posits the law as objective and neutral, Marxist legal theorists see this as a form of ideology: “a particular value-laden position that has the effect of legitimating a system of unequal social relations.”⁵ By abstracting people from their social context and locations, the legal system promises a formal legal equality, while material inequality is obscured.⁶ In approaching the “division of powers” doctrine, I will seek to bring arguments about the ideological nature of the law to the front of the analysis. Legal and political arguments are never separate and distinguishable. Thus the ways in which the law has produced and reproduced inequality will be explicit and underpin arguments that the *Safe Streets Act* is criminal law.

There is much dispute and misinformation regarding the economic position of squeegeers. Part one will address the political and economic roots of youth poverty and homelessness to show that squeegeers are indeed poor. I will demonstrate how shifting patterns of employment have undermined the economic position of young workers. The accompanying retreat from the welfare state has further marginalized those who cannot access stable employment with sufficient wages. As a result, there are few supports for those young people who must subsist apart from a family setting.

Part two will deal with the first step in a division of powers argument – the pith and substance of the law. I will demonstrate through the plain text of the *Act*, and extrinsic evidence drawn from the Hansard debates, that the pith and substance of the *Safe Streets Act* is the prohibition of squeegeeing and panhandling.

Part three addresses the heart of the legal test. The argument that a purpose of the *Act* is to target squeegeeing is key to defining which level of government has jurisdiction to act in this area. Government arguments that characterize the *Act* as falling within the provincial jurisdiction to regulate roadways or trade are not supported by the evidence. Rather the evidence suggests that the purpose of the *Act* falls within the criminal law field. To demonstrate that a statutory provision is criminal law, it must be shown that it consists of a prohibition and a penalty, enacted for a criminal law purpose.⁷ Vagrancy laws have historically been part of the criminal law, and have

4. D. Schneiderman, “The Constitutional Disorder of the *Safe Streets Act*: A Federalism Analysis” in J. Hermer & J. Mosher, eds., *Disorderly People: Law and the Politics of Exclusion in Ontario* (Halifax: Fernwood Publishing, 2002) 79 at 81.

5. E. Comack, “Theoretical Excursions” in E. Comack, ed., *Locating Law: Race/Class/Gender Connections* (Halifax: Fernwood Publishing, 1999) 19 at 43.

6. J. Fudge, “Legal Forms and Social Norms: Class, Gender, and the Legal Regulation of Women’s Work in Canada from 1870 to 1920” in E. Comack, ed., *Locating Law: Race/Class/Gender Connections* (Halifax: Fernwood Publishing, 1999) 160 at 161.

7. *Reference as to the Validity of section 5(1) of the Dairy Industry Act, R.S.C. 1927, Chapter 45*, [1948] S.C.R. 1 at 50 *per* Rand J. [hereinafter *Margarine Reference*].

played a role as a method of social control, reinforcing the requirement to work. The parallels between the vagrancy laws of the past and *Safe Streets Act* will be highlighted in order to argue that the anti-squeegee provisions play a similar role. Drawing on the political and economic context described in Part one, it will be argued that squeegeers are contemporary “vagrants.” This suggests that the *Safe Streets Act* is criminal law. Further, the language used by government officials to justify the enactment of the legislation indicates that the *Act* was created in order to protect motorists and pedestrians from intimidation and disorder caused by squeegeeing. It will be argued that such a purpose falls squarely within the criminal law field, and represents the criminalization of poverty.

PART ONE: THE POLITICAL ECONOMY OF SQUEEGEEING

Squeegeeing is a subsistence strategy adopted mainly by young people. The majority of squeegeers in Toronto fall between the ages of 16 and 25.⁸ Approximately 60% of squeegeers are male, 40% are female. Roughly 40% are from outside the Toronto area, with many of those from outside the province represented by francophones from Montreal.⁹ Most squeegeeing youth are homeless: 34% are without shelter of any kind; 24% are living in “squats”; 15% are staying with a friend or relative; 24% are renting; and 3% are in the shelter system.¹⁰ The police and City council estimated that there were approximately 220 squeegeers in Toronto during the summer of 1998.¹¹ However, since the *Safe Streets Act* came into effect in January 2000, there has been a marked decrease in the number of squeegeers on Toronto’s streetcorners.¹² Although their exact numbers are uncertain, it is clear that squeegeers constitute a very small fraction of the homeless population in Toronto, that have nonetheless captured a disproportionate response from the public, the media, the police and government.

These demographics are not widely known, and there continues to be great dispute over who squeegeers are. The persistence of a “common sense” knowledge that squeegeers are middle-class kids who have left comfortable homes out of youthful and misguided rebellion, means that it is not immediately apparent to many that squeegeeing is a poverty issue.¹³ However, the practice of squeegeeing emerged in the mid-1990s, during a period marked by the retrenchment of the welfare state and

8. All demographic information is drawn from a Toronto sample.

9. Community and Social Planning Council of Toronto, *Surviving the Streets: Street Youth and Squeegeeing in Toronto* (Toronto: CSPC-T, 1998).

10. *Ibid.* at 7.

11. Mayor’s Homelessness Action Task Force, *Taking Responsibility for Homelessness: An Action Plan for Toronto*, (Toronto: Municipality of Toronto, 1999); Municipality of Toronto, *Diversion Options for Youth Involved in the Squeegee Trade* (Toronto: Community and Neighborhood Services, 1998).

12. B. O’Grady & R. Bright, “Squeezed to the Point of Exclusion: The Case of Toronto Squeegee Cleaners” in J. Hermer & J. Mosher, eds., *Disorderly People: Law and the Politics of Exclusion in Ontario* (Halifax: Fernwood Publishing, 2002) 23 at 24.

13. For example, see a debate found in the “letters to the editor” section of the *Toronto Star* in 1998, many of which reflect such an analysis: *Toronto Star* (1 August 1998) B3.

the increasing marginalization of young workers from standard employment. Squeezing cannot be understood apart from this context.

An increasing emphasis on the need for flexibility in employment, has resulted in an explosion in non-standard work relationships, such as temporary work and self-employment, part-time and contract work. Between 1983 and 1995, part-time employment grew by 35%.¹⁴ Between 1990 and 1995, self-employment rose by 28%, resting at 18% of the workforce in 1997.¹⁵ In 1997, only 33% of Canadian workers held standard, full-time and permanent jobs.¹⁶ The increasing reliance on non-standard employment has meant greater profits for employers, but less stability for workers and a growing polarization of earnings.¹⁷ Young workers have been particularly hard hit by these trends in the labour market. While the general unemployment rate was quite high throughout the 1990s, hovering between 8-10%, the youth unemployment rate has been, at times, closer to 25%.¹⁸ In December 2000, the official unemployment rate for adults stood at 6.0%, while for workers under 25 the unemployment rate was more than double, at 12.5%.¹⁹

In addition to problems securing jobs in the changing market, the real wages of workers under 35 have been dropping since 1982. While all age groups saw some loss of earnings between 1990 and 1995, there was a 20% drop in the earnings of workers aged 15 to 24, from \$10,212 to \$8,199.²⁰ Jobs that are open to youth are often part-time, seasonal, or temporary and do not provide wages sufficient to live independently or to support a young family. These casual jobs are mainly in the service sector and offer few possibilities for advancement or higher wages. In addition to being very low-waged, these jobs are the least likely to be associated with organized labour and lack all the security that comes with unionization. Thus, the restructuring of the labour market, while affecting all workers, has been based on the particular devaluation of younger workers.²¹ It is not surprising, then, that the poverty rate for people under the age of 25 increased rapidly during the 1990s. For families with heads under 25, the poverty rate jumped from 28% in 1989 to 43.3% in 1998. The rate for single-parent

14. M. Burke & J. Shields, "Tracking Inequality in the New Canadian Labour Market" in M. Burke, C. Mooers & J. Shields, eds., *Restructuring and Resistance: Canadian Public Policy in an Age of Global Capitalism* (Halifax: Fernwood Publishing, 2000) 98 at 104.

15. *Ibid.*

16. Employment Standards Work Group, *Time for Change: Tories Turn Back the Clock But Working People Want to Move Forward* (Toronto: Employment Standards Work Group, 2000) at 7.

17. *Ibid.* at 8.

18. N. Rehnby & S. McBride, *Help Wanted: Economic Security for Youth* (Ottawa: Canadian Centre for Policy Alternatives, 1997) at 6.

19. Statistics Canada, *The Daily* (Ottawa: Queen's Press, January 5, 2001).

20. A. Yalnizyan, *The Growing Gap: A Report on Growing Inequality Between the Rich and Poor in Canada* (Toronto: Centre for Social Justice, 1998) at 20.

21. It should be noted that other social groups have experienced similar devaluation of their work, in particular immigrant workers and women.

mothers under 25 was a shocking 85.4% in 1998. For unattached individuals under 25, the poverty rate went from 47.8% in 1989 to 60.7% in 1998.²²

Increasing poverty rates and a greater reliance on casual labour have meant that fewer young people have the stability required to survive without social programs. However, there has been significant erosion of income support programs since the 1980s. Sears argues that far from protecting workers in an increasingly unstable labour market, the advanced capitalist states have shifted their social policies in order to promote the formation of these flexible workers – what he calls a “lean state”:

The standardization practices of the broad welfare state contributed to the development of labour market rigidities in the form of high wages, limited wage differentials, entitlements through social programmes and labour market regulations. The social policy of the lean state aims to disentitle and deregulate in order to promote the development of the flexible worker who is mobile and willing to work under any conditions.²³

Thus income support programs have been drastically altered in order to encourage or force recipients to return to the labour market. Unemployment insurance has been slowly altered since the late 1980s, and fairly drastic changes were introduced in January of 1997. By extending the number of hours of work required to be eligible for benefits, unemployment insurance is no longer attainable for many part-time and temporary workers despite the fact that those engaged in such employment pay premiums. In 1997 only 15% of young workers received unemployment insurance as compared to 54% in 1989 and 22% in 1996.²⁴

Mike Harris’ Conservative government introduced extremely punitive cuts of 21.6% to welfare benefits in 1995. Currently a single person receives a cheque for \$520 per month. Of this total, a maximum of \$325 is allotted for shelter, which must cover the cost of rent and utilities. This leaves \$195 to spend on food, clothing, and everything else necessary for survival. A single person in Toronto must find an apartment to rent for \$325 per month while the average one-bedroom apartment rented for approximately \$950 in 2001.²⁵ Finding affordable housing has become even more difficult since the introduction of “vacancy decontrol” in the *Tenant Protection Act*²⁶ – this allows landlords to increase the rent on an apartment as high as they like when it has been vacated by a previous tenant. This end to rent control has had a significant impact on the cost of housing in Toronto, with average rents increasing rapidly at the same time as wages have stagnated.²⁷

22. National Council of Welfare, *Poverty Profile 1998* (Ottawa: Minister of Public Works and Government Services Canada, 2000) at 1-2.

23. A. Sears, “The ‘Lean’ State and Capitalist Restructuring: Towards a Theoretical Account” (1999) 59 *Studies in Political Economy* 91 at 99.

24. Canadian Labour Congress, *Unemployment Insurance Bulletin* (Ottawa: CLC, 1998).

25. Municipality of Toronto, *Toronto Report Card on Homelessness, 2001* (Toronto: Municipality of Toronto, 2001) at 12.

26. 1997, S.O. 1997, c.24.

27. Report Card on Homelessness, *supra* note 25 at 12.

Young people have difficulty accessing even these inadequate income supports. Not only must 16- and 17-year-olds demonstrate that there are “special circumstances”, such as abuse in the home, that prevent them from relying on their family for support, but they must also attend school full-time in order to be eligible for benefits. Those who miss even a small number of classes are cut off benefits until they reach the age of 18.²⁸ It has become virtually impossible for homeless youth to access welfare, as they face daunting obstacles in attending classes full-time. Street youth also come from backgrounds with a higher incidence of physical, sexual and psychological abuse.²⁹ However there are few supports for older youth in the child protection system,³⁰ and the safety net and jobs that were once available to catch many of the youth that left unbearable situations at home are no longer there. When placed within a political and economic context, the current rise in youth poverty can be seen as the predictable outcome of the kinds of economic restructuring dominant in the political sphere.

The choice to squeegee, then, is a choice amongst very marginalized subsistence strategies. Squeegeers are indeed living in poverty.³¹ Although squeegeeing may have many of the characteristics of a basic commercial transaction, these characteristics do not change the fact that squeegeeing is a modern form of “vagrancy” – it involves visibly poor people, seeking assistance for basic survival from private citizens in public spaces. Squeegeeing should not, therefore, be greatly differentiated from other forms of vagrancy such as panhandling. Like panhandling, squeegeeing is an income-generating activity relied on by homeless people. Like panhandling, squeegeeing has become increasingly visible in the city landscape as homelessness increases. Rather than addressing the root causes of squeegeeing, which lie in government policies which increase poverty, the Ontario government has approached the problem as one of criminality.

PART TWO: THE PITH AND SUBSTANCE OF THE *SAFE STREETS ACT* IS TO PROHIBIT SQUEEGEEING AND PANHANDLING

The *Safe Streets Act* was introduced in the fall of 1999 as a central plank in the Provincial government’s “law and order” agenda. The *Act* does not explicitly refer to

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28. R. Blake Brown, “‘Special Circumstances’: Teens, Welfare and Politics in Ontario During the 1990s” (1999) 14 *J.L. & Social Pol’y* 191.
 29. B. O’Grady et al., “Sub-employment and street youths: an analysis of the impact of squeegee cleaning on homeless youths” (1998) 11 *Security J.* 315 at 316.
 30. D. Martin, “Demonizing Youth, Marketing Fear: The New Politics of Crime” in J. Hermer & J. Mosher, eds., *Disorderly People: Law and the Politics of Exclusion in Ontario* (Halifax: Fernwood Publishing, 2002) 91 at 93.
 31. J. Esmonde, *Neoliberalism, Youth Poverty and Washing Windshields: An Ethnographic Study of Squeegeeing in Toronto* (M.A. Thesis, York University 1999) [unpublished]; B. O’Grady et al., *Making Money: The Shout Clinic Report on Homeless Youth and Employment* (Toronto: Central Toronto Community Health Centres, 1999).

squeegeeing or panhandling, referring instead to prohibitions on “soliciting.” “Solicit” is defined in the *Act* as:

To request, in person, the immediate provision of money or another thing of value, regardless of whether consideration is offered or provided in return, using the spoken, written or printed word, a gesture or other means.³²

The *Act* then sets out specific forms of soliciting that are prohibited, divided into two categories of activity: soliciting in an “aggressive manner” and soliciting a “captive audience.”

“Aggressive manner” is defined as “a manner that is likely to cause a reasonable person to be concerned for his or her safety or security.” Section 2(2) identifies acts that are deemed to be aggressive:

- 10 Threatening the person solicited with physical harm, by word, gesture or other means, during the solicitation or after the person solicited responds or fails to respond to the solicitation.
- 20 Obstructing the path of the person solicited during the solicitation or after the person solicited responds or fails to respond to the solicitation.
- 30 Using abusive language during the solicitation or after the person solicited responds or fails to respond to the solicitation.
- 40 Proceeding behind, alongside or ahead of the person solicited during the solicitation or after the person solicited responds or fails to respond to the solicitation.
- 50 Soliciting while intoxicated by alcohol or drugs.
- 60 Continuing to solicit a person in a persistent manner after the person has responded negatively to the solicitation.

Section 3 of the *Safe Streets Act* prohibits soliciting a “captive audience” by providing that “no person shall”:

- (a) solicit a person who is using, waiting to use, or departing from an automated teller machine;
- (b) solicit a person who is using or waiting to use a pay telephone or a public toilet facility;
- (c) solicit a person who is waiting at a taxi stop or a public transit stop;
- (d) solicit a person who is in or on a public transit vehicle;
- (e) solicit a person who is in the process of getting in, out of or off a vehicle or who is in a parking lot; or
- (f) while on a roadway, solicit a person who is in or on a stopped, standing or parked vehicle.

Although no specific reference is made to “begging,” the combination of the aggressive soliciting and captive audience provisions operates to severely restrict panhandling. The legislative definition of “soliciting” is so broad as to include any conduct

32. *Safe Streets Act*, *supra* note 2 at s. 1.

that communicates need. Thus a homeless person who appears in need, perhaps by wearing soiled and tattered clothing, could violate the *Act* simply by being present in large areas of public space.³³ The practical difficulties of living without shelter can also have the effect of drawing panhandlers into the scope of the *Act*, even when they are not in any of the areas of public space populated by a “captive audience.” Because homeless people must carry their belongings with them wherever they go, it would be difficult to avoid violating the *Safe Streets Act* even if soliciting in the most polite and respectful manner – the belongings are likely to constitute an “obstruction.”³⁴ As others have noted, these restrictions on panhandling are vulnerable to a constitutional challenge on both federalism and *Charter* grounds.³⁵

Squeegeeing appears to have been specifically prohibited by two different statutory provisions. Section 3(2)(f) prohibits a person, while on a roadway, from soliciting a person in a vehicle. Amendments to the *Highway Traffic Act* that accompanied the enactment of the *Safe Streets Act* prohibit precisely the same activity.³⁶ Thus squeegeers who enter a roadway while offering to clean a windshield for money are in violation of both provisions, and squeegeers have been charged under both. Under the *Safe Streets Act*, a first conviction can result in a fine as high as \$500. A second conviction under either section 2 or section 3 of the *Act* can result in a prison term for up to six months and/or a fine up to \$1000. There is a similar provision in the amendments to the *Highway Traffic Act*.³⁷

This legislation is part of a larger trend, which has witnessed the increasing use of police powers to deal with poverty in public spaces. Numerous municipal governments across Canada have enacted by-laws that prohibit or limit panhandling in similar ways and there is a parallel trend in the United States.³⁸ This is typical of a law and order response to socioeconomic issues: “Government policies force people into poverty, homelessness and marginalization, and then those same governments enact yet more policies which turn these same people into criminals for exercising their survival strategies.”³⁹ This is, of course, entirely inappropriate for solving the problem, but may be quite useful in reinforcing the ideological agenda of the current government.

33. J. Hermer & J. Mosher, “Introduction” in J. Hermer & J. Mosher, eds., *Disorderly People: Law and the Politics of Exclusion in Ontario* (Halifax: Fernwood Publishing, 2002) 11 at 13.

34. *Banks*, *supra* note 3 (Defendant’s Book of Affidavits, Affidavit 1 at para 24).

35. See D. Graser, “Panhandling for Change in Canadian Law” (2000) 15 J.L. & Social Pol’y 45; R. Moon, “Keeping the Streets Safe from Free Expression” in J. Hermer & J. Mosher, eds., *Disorderly People: Law and the Politics of Exclusion in Ontario* (Halifax: Fernwood Publishing, 2002) at 65; Schneiderman, *supra* note 4.

36. *Highway Traffic Act*, R.S.O. 1990, c. H.8 s. 177(2).

37. *Safe Streets Act*, *supra* note 2 at s. 4; *Highway Traffic Act*, *supra* note 36 at s. 177(4).

38. For Canadian examples see D. Graser, *supra* note 35. For an overview of developments in the United States see National Law Center on Homelessness and Poverty, *Mean Sweeps: A Report on Anti-Homeless Laws, Litigation and Alternatives in 50 United States Cities* (Washington, DC: National Law Center on Homelessness and Poverty, 1996).

39. Committee to Stop Targeted Policing, *Who’s the Target? An Evaluation of Community Action Policing* (Toronto, Committee to Stop Targeted Policing, 2000) at 26.

The disconcerting sight of young, white teenagers washing windshields disrupts images of a booming economy by demonstrating that the rewards of economic growth are not being shared equally. Portraying these young people as threats to the safety of the community can prevent more critical conclusions about the appropriate role of government in regulating labour markets and providing social programs.

If these are indeed the motivations behind the enactment of the *Safe Streets Act*, a question arises as to whether this kind of governmental strategy falls within the constitutional powers of a provincial government. The *Constitution Act, 1982* sets out the heads of power over which federal and provincial governments have jurisdiction.⁴⁰ There are several heads under which the *Safe Streets Act* could arguably fit. The *Act* could be considered criminal law, over which the Federal government has sole jurisdiction in Canada.⁴¹ Or the *Act* could be said to relate to the regulation of streets, sidewalks and highways,⁴² the regulation of commerce and trade,⁴³ or the suppression of conditions likely to give rise to crime⁴⁴ – all heads of power within provincial jurisdiction. Determining under which head(s) of power the *Act* falls relies greatly on what, in fact, the Provincial government was attempting to accomplish when it enacted the *Safe Streets Act*. The constitutionality of the portions of the *Act* that relate to squeegeeing activity depends on whether they are characterized as the regulation of a broader category of “solicitation,” or the criminalization of squeegeeing.

Classification of a law for the purposes of federalism involves first identifying the “matter” of the law, and then assigning it to one of the classes of subjects in respect to which the Federal and provincial governments have legislative authority under sections 91 and 92 of the *Constitution Act, 1867*.⁴⁵ A law’s “matter” or “pith and substance” is its leading feature or true character. There is no single test for a law’s pith and substance, however the approach must be flexible.⁴⁶ Both the purpose and the effect of an impugned law are relevant considerations in the process of characterization of laws. It is often the case that the legislation’s dominant purpose or aim is the key to determining its constitutional validity. The purpose of a law can be discerned by examining the plain text of the law, and by examining extrinsic evidence such as Hansard debates and government reports.⁴⁷

40. *Constitution Act, 1867* (U.K.), 30 & 31 Vict., c. 3, reprinted in R.S.C. 1985, App. II, No. 5.

41. *Ibid.* s. 91(27).

42. *Ibid.* s. 92(13).

43. *Ibid.*

44. *Ibid.*, see *Attorney-General (Canada) and Dupond v. Montreal*, [1978] 2 S.C.R. 770 [hereinafter *Dupond*].

45. *Supra* note 40.

46. *R. v. Morgentaler*, [1993] 3 S.C.R. 463 at 481 *per* Sopinka J. [hereinafter *Morgentaler*]; *RJR-MacDonald Inc. v. Canada (Attorney General)* (1995), S.C.J. No. 68 para. 29 (S.C.C.), online: QL (S.C.J.) *per* La Forest J., dissenting but not on this point [hereinafter *RJR MacDonald*].

47. *Morgentaler*, *supra* note 46 at 482-83, *per* Sopinka J.; *R. v. Hydro-Québec*, [1997] S.C.J. No 76. at para 23 and 26 (S.C.C.), online: QL (S.C.J.) *per* Lamer C.J. and Iacobucci J., in dissent but not on this point [hereinafter *Hydro-Québec*].

On its face the *Safe Streets Act* does not explicitly refer to squeegeeing, although the effect of prohibiting soliciting, stopping or approaching vehicles on a roadway is to prohibit all squeegeeing activity.⁴⁸ Porter argues that the *Safe Streets Act* is an example of facially neutral legislation that targets activities engaged in by the poor:

Affluent people use public places to make telephone calls, park their cars, use instant teller machines, walk along the sidewalk to their favourite bar or café or catch a taxi. Poor people, however, increasingly rely on public spaces to solicit donations in order to be able to meet their basic necessities. The affluent use roadways to drive downtown to their work or entertainment. Homeless youth use the same roadways to offer to wash windows, in the hope of receiving a small payment.⁴⁹

In the trial at first instance, the Court in *Banks* held that on its face, the *Safe Streets Act* falls entirely within the provincial spheres relating to the regulation of streets and highways, and the regulation of commerce and trade.⁵⁰ In so finding, the Court relied heavily on fact that the wording of the *Act* does not explicitly refer to squeegeers and panhandlers. The Court accepted that there are no specific groups of people who are targeted by the *Act*, that it is intended to capture the activities of anyone who solicits in the manner prohibited by the *Act*. Such an argument fails to acknowledge the differential impact the legislation has on poor people – the rich and poor alike are prohibited from squeegeeing. Indeed the judgment is almost entirely bereft of any discussion of squeegeeing and panhandling. The argument that the *Safe Streets Act* is facially neutral legislation geared at regulating roadways and commerce must fail in another crucial manner – it fails to seriously take up the evidence beyond the face of the *Act*. The extrinsic evidence reveals that “the dominant purpose revealed by the *Act* as a whole has more to do with regulating behaviour found to be offensive by some . . . than the regulation of streets and sidewalks.”⁵¹

Of all the provisions in the *Act*, the sections that prohibit squeegeeing activity appear to most clearly raise concerns about traffic and pedestrian safety. If this is, indeed, the case, then the province could reasonably argue that they have merely exercised their jurisdiction to regulate the highways and have made the streets safer by keeping pedestrians off the roadway. However Ezra Hauer, an expert in road safety research and consulting, studied the *Safe Streets Act* and found that, its name aside, the *Act* does not directly address issues of highway safety.⁵² In analyzing section 3(2)(f) he noted that this provision prohibits solicitation only from cars that are *not moving*:

Paragraph 3(2)(f) speaks of soliciting on the roadway a person in a “stopped, standing or parked vehicle.” I am assuming that the categories “standing” and “parked” refer to a vehicle at the curb. From the traffic safety point of view,

48. *Banks*, *supra* note 3 (Defendant’s Book of Affidavits, Affidavit 7 at para 6).

49. *Banks*, *supra* note 3 (Defendants’ Book of Affidavits, Affidavit 8 at para 34).

50. *Banks*, *supra* note 3.

51. Schneiderman, *supra* note 4 at 85.

52. *Banks*, *supra* note 3 (Defendant’s Book of Affidavits, Affidavit 3 at para 3).

soliciting persons in such vehicles is no more dangerous than entering or exiting the vehicle.⁵³

He further stated that soliciting stopped cars is not a major factor in motor vehicle accidents, which is corroborated by Hulchanski, who carried out a literature search and was unable to locate a single study linking squeegeeing and panhandling with traffic accidents.⁵⁴

Even if it could be argued that the provisions that prohibit squeegeeing address a serious safety concern, the *Act* is not actually directed at preventing threats to safety caused by pedestrians entering a roadway. It is aimed much more narrowly at *solicitation* in a roadway. In *Westendorp*, the Supreme Court of Canada analyzed the pith and substance of a Calgary by-law prohibiting being on a street for the purpose of prostitution. Similar to the *Safe Streets Act*, the by-law stated that it was prohibiting activity that interfered with the ability of pedestrians to move freely and peacefully on city streets. Speaking for a unanimous court, Chief Justice Laskin stated:

It is specious to regard s. 6.1 as relating to control of the streets. If that were its purpose, it would have dealt with congregation of persons on the streets or with obstruction, unrelated to what the congregating or obstructing persons say or otherwise do. As the by-law stands and reads, it is activated only by what is said by the person, referable to the offer of sexual services. . . . There is no violation of s. 6.1 by congregation or obstruction *per se*.⁵⁵

Similarly, the *Safe Streets Act* is activated by a solicitation, not obstructions or threats to highway safety *per se*. Recall the broad definition of “solicitation” in the *Act*, which encompasses any gesture that conveys a request for money or any other thing of value. Therefore, as in *Westendorp*, the *Act* is activated by what is communicated by the person soliciting, and is not specifically directed at hazards on the road.

There is ample evidence outside the “four corners of the *Act*” to show that the object of the *Safe Streets Act* was even more specific than the prohibition of some forms of “solicitation,” which incidentally included squeegeeing. Extrinsic evidence, such as the legislative history, Parliamentary debates and similar material may be considered in determining the purpose of a law, as long as it is relevant, reliable and is not given undue weight.⁵⁶ This material can be invaluable in detecting a “colourable” attempt to enter the jurisdiction of another level of government – in other words, a veiled attempt to pass a law that, regardless of its form, is beyond the jurisdiction of the government. The *Westendorp* case, discussed above, is an example of just such a “colourable” law. The *Morgentaler* case is also instructive, in that the Supreme Court of Canada assessed evidence beyond the provisions in a statute, in order to determine that the purpose of the Nova Scotia government was colourable.⁵⁷

53. *Banks*, *supra* note 3 (Defendant’s Book of Affidavits, Affidavit 3 at para 4).

54. *Banks*, *supra* note 3 (Defendant’s Book of Affidavits, Affidavit 5 at para 8).

55. [1983] 1 S.C.R. 43 at 51-52 [hereinafter *Westendorp*].

56. *Reference Re: Firearms Act (Can.)*, [2000] S.C.J. No. 31 at para 17 (S.C.C.), online: QL (S.C.J.) *per* The Court [hereinafter *Firearms Reference*]; *Morgentaler*, *supra* note 46 at 483-85.

57. *Morgentaler*, *supra* note 46.

In *Morgentaler*, the stated purpose of the *Nova Scotia Medical Services Act* was to prevent the privatization of health services – a purpose that would clearly fall within provincial jurisdiction. However the debates in the legislature indicated that government representatives were concerned only with the possibility of private clinics performing abortions in light of the de-criminalization of abortion. There were no studies on cost control or consultation with medical professionals. The Supreme Court of Canada took this evidence into account to determine that the pith and substance of the *Medical Services Act* was to prohibit abortions in free-standing clinics.⁵⁸ Since the regulation of abortion was found to fall within the criminal law field, the legislation was struck down as a colourable invasion of the Federal jurisdiction.

Although the Court is always mindful of the limitations of evidence taken from legislative debates, where the debate is overwhelmingly consistent in identifying a particular issue that the law is meant to address, as was the case in *Morgentaler*, legislative debates can be useful in determining the purpose of the legislation. The debates about the *Safe Streets Act* in the Legislative Assembly reveal that intimidation and harassment caused by squeegeeing and panhandling were consistently and overwhelmingly raised by both opposition and government representatives as the “mischief” which the *Safe Streets Act* was meant to address. The examples contained within the Hansard debates are far too numerous to include here. Two examples, drawn from speeches by the then Premier and the Attorney-General suffice to show that squeegeers and panhandlers were very much on the minds of the legislators when they drafted the *Act*.

On November 2, 1999 the Attorney-General, the Honourable Jim Flaherty, introduced the Bill that would eventually become the *Safe Streets Act*. He stated that:

In the Blueprint, we made a commitment to take action about behaviour that jeopardizes the safe use of the streets. Last month in the speech from the throne, we reiterated our intention to introduce legislation empowering the police *to crack down on squeegeeing and aggressive forms of solicitation experienced by many people in Ontario through panhandlers*. . . . Our government believes that all people in Ontario have the right to drive on the roads, walk down the street or go to public places *without being or feeling intimidated*. *They must be able to carry out their daily activities without fear*. When they are not able to do so, it is time for government to act.⁵⁹

A few weeks later the Premier referred to the *Safe Streets Act* as a tool to address squeegeeing and panhandling:

Responding to the concerns of police officers in urban communities, we have introduced the *Safe Streets Act*. This law would give police the tools to crack down on aggressive panhandlers and on squeegee people who *harass and intimidate* motorists.⁶⁰

58. *Ibid.* at 504.

59. Emphasis added. Ontario, Legislative Assembly, *Debates* (2 November 1999) at 1332 (Honourable J. Flaherty).

60. Emphasis added. Ontario, Legislative Assembly, *Debates* (15 November 1999) at 1400 (Honourable M. Harris).

The evidence that the legislation was intended to target panhandlers and squeegeers is reinforced by the reaction to concerns that the *Safe Streets Act* would prevent registered charities from carrying out fundraising activities in public spaces. Statements by Premier Harris, the Solicitor-General and the Attorney General have clearly stated that “legitimate charities” are not to be affected by the *Safe Streets Act*.⁶¹ Other Government speakers went so far as to say that charities would be exempt from the *Act* – something that is far from evident on the face of the legislation.⁶² It appears then, that activities carried out by university students for Shinerama, for example, were not intended to fall within the purview of the *Safe Streets Act*. In Windsor, the police have agreed to allow a charitable organization known as the “Goodfellows” to sell their newspapers to drivers stopped at traffic lights.⁶³ This example of the selective enforcement of the *Act* is a reminder of the real purpose motivating the enactment of the *Safe Streets Act*: “the removal of beggars and squeegee people from the streets.”⁶⁴

While the Government may be attempting to ensure that the legislation can pass constitutional scrutiny by excluding any reference to squeegeeing from the *Act* itself, its public statements indicate that the *Act* is directed at soliciting by certain *kinds of people*, not soliciting in general. Furthermore, statements by high-level Government representatives clarify the meaning of “safety” in the *Safe Streets Act*. The *Act* is supposed to alleviate the fear caused by squeegeers and panhandlers, who are described as threats to safety due to intimidating and harassing behaviour – not because they block the sidewalks and not because they may interfere with traffic. If this is the real purpose motivating the *Act*, those provisions that effectively prohibit squeegeeing may well represent a colourable attempt to invade the Federal government’s criminal law power.

PART THREE: THE *SAFE STREETS ACT* IS AN EXERCISE OF THE CRIMINAL LAW POWER

Once the pith and substance of a piece of legislation has been determined, it must be assigned to one of the heads of legislative power.⁶⁵ Section 91(27) of the *Constitution Act, 1867* assigns to Parliament:

91(27) The Criminal Law, except the Constitution of Courts of Criminal Jurisdiction, but including the Procedure in Criminal Matters.⁶⁶

61. *Banks*, *supra* note 3 (Defendant’s Book of Affidavits, Affidavit 4 Exhibit B at 1); Ontario, Legislative Assembly, *Debates* (10 April 2000) (Premier M.Harris); Ontario, Legislative Assembly, *Debates* (10 October 2000) at 1330 (Solicitor-General D. Tsubouchi).

62. Ontario, Legislative Assembly, *Debates* (17 November 1999) at 1920 (Mr. G. Dunlop).

63. Moon, *supra* note 35 at 77.

64. *Ibid.* at 76.

65. *Hydro-Quebec*, *supra* note 47 at para 23.

66. *Constitution Act, 1867*, *supra* note 40.

Criminal law constitutes a broad area of Federal jurisdiction. It is not “carved out” from provincial jurisdiction. The only limitation is that the criminal law field cannot encroach on any of the classes of subjects enumerated in section 92 of the *Constitution Act, 1867*.⁶⁷ However the courts have also carved out a broad area for provincial jurisdiction, and have permitted the enactment of provincial laws that regulate conduct addressed in the *Criminal Code* where it can be shown that the province acted for a legitimate purpose related to a provincial head of power. Thus concurrency is permitted unless there is a conflict between laws, in which case the Federal legislation is paramount. The absence of operative Federal legislation does not enlarge provincial jurisdiction. The legislatures cannot invade the criminal field by attempting to stiffen, supplement or replace the criminal law or to fill perceived gaps or defects.⁶⁸

Legislation that falls under the Federal criminal law power must meet a three-part test: It must contain: 1) a prohibition; 2) that is backed with a penalty; 3) for a valid criminal law purpose such as public peace, order, security, health and morality.⁶⁹ An Act that contains a “prohibition backed by a penalty” raises a *prima facie* case that the Act falls within the criminal law power.⁷⁰ Where a *prima facie* case has been established, the purpose of the impugned Act will be vital.

The *Safe Streets Act* is a short piece of legislation that contains a series of prohibitions. The captions for sections 2, 3, and section 177(2) of the *Highway Traffic Act* are clearly identified as “prohibitions.” The identification by its drafters that the *Safe Streets Act* consists of prohibitions, and the simplicity of the *Act* indicate that it is prohibitive, rather than regulatory, in nature.⁷¹ These prohibitions are backed by fairly severe penalties: fines up to \$500 for a first offence, and fines up to \$1000 or up to six months in prison for a second conviction. The *Act* also permits police officers to arrest without a warrant where they reasonably believe that that the *Act* has been violated and that the arrest is necessary to establish identity. Schneiderman has noted that: “given the purported objective of the legislation, to regulate the safe use of streets and public spaces, arrest without warrant seems either like legislative overreaction or intrusion into the criminal law field.”⁷² The existence of a prohibition with a penalty indicates that the *Safe Streets Act* is *prima facie* criminal law. The analysis then turns to the question of whether the *Safe Streets Act* was enacted for a criminal law purpose.

The classic test for identifying a criminal law purpose was articulated in the *Margarine Reference*:

A crime is an act which the law, with appropriate penal sanctions, forbids: but as prohibitions are not enacted in a vacuum, we can properly look for some evil or

67. *Firearms Act Reference*, *supra* note 56 at para 28; *Scowby v. Glendenning*, [1986] 2 S.C.R. 226 at 238 *per* Estey J. [hereinafter *Scowby*].

68. *Scowby*, *supra* note 67 at 238; *Morgentaler*, *supra* note 46 at 498.

69. *Margarine Reference*, *supra* note 7; *Firearms Reference*, *supra* note 56 at para 31.

70. *RJR MacDonald*, *supra* note 46 at para 29.

71. *Hydro-Quebec*, *supra* note 47 at para 46-48.

72. Schneiderman, *supra* note 4 at 85.

injurious or undesirable effect upon the public against which the law is directed. That effect may be in relation to social, economic or political interests; and the legislature has had in mind to suppress the evil or to safeguard the interest threatened.

...

Is the prohibition then enacted with a view to a public purpose which can support it as being in relation to criminal law? Public peace, order, security, health and morality: these are the ordinary though not exclusive ends served by that law.⁷³

Public peace, order, security, health and morality are very broad and nebulous concerns, which lack specific meaning. In determining the scope of the criminal law power, courts, while always alive to concerns about the appropriate division of powers under federalism, have often been guided by what has traditionally been considered criminal law.

In *Scowby*, the Supreme Court of Canada assessed the constitutionality of a provision in the *Saskatchewan Human Rights Code* that prohibited arbitrary arrest. The Court described several *Criminal Code* provisions that dealt with arrest and detention. Speaking for the majority, Mr. Justice Estey stated:

... these [*Criminal Code*] provisions are advanced to illustrate that the type of action taken by the provincial legislature in s. 7 has been, almost since the advent of Confederation, taken by the Parliament of Canada in the exercise of its exclusive sovereignty over criminal law. That is not to say that repetition produces constitutionality. It does, however, illustrate that the community through its elected representatives, and in the course of its criminal law enforcement system, has for at least a century regarded the arrest and detention provision in the *Criminal Codes* as illustrations of the broadly defined approach to the criminal law in the authorities.⁷⁴

By prohibiting squeegeers from engaging in income-generating activities in public space, the *Safe Streets Act* has much in common with vagrancy laws of the past. The best insights into the purpose of vagrancy laws, and their relationship to criminal law, can be glimpsed through examining their historical role in disciplining the workforce. The decision in *Banks* rejected all arguments that the *Safe Streets Act* falls within the criminal law power. Specifically, the court argued that the fact that vagrancy has traditionally been governed by the criminal law was not significant to the validity of the *Act* as provincial law. However, the relationship between the historic control of vagrancy, the criminal law and the current *Safe Streets Act* is an essential element in understanding the purpose and role fulfilled by the *Act*.

Public order offences – prohibitions on behaviour that renders public space “disorderly” – historically and contemporaneously form an important part of the criminal law. Far from serving a minor role in law enforcement, public order offences have played a significant part in the policing of urban space. In a study of policing in Toronto between 1859 and 1955, Boritch and Hagan found that though there were large

73. *Supra*, note 7 at 49-51.

74. *Scowby*, *supra* note 67 at 240-41.

variations in the public order arrest rate, these arrests constituted 60-85% of all arrests in Toronto from 1859 to 1955, and averaged approximately 70% of all arrests.⁷⁵

Public order offences have typically included activities that are most prevalent amongst the poor, particularly since poor people (especially homeless people) have less access to “private” spaces in which to carry out their lives. Therefore the criminal law has historically prohibited such things as vagrancy, prostitution, public drunkenness, and causing a disturbance. The criminal law has been an important way of controlling the poor, both in terms of who gets charged,⁷⁶ and in terms of what is defined as crime. Thus while the criminal law may employ neutral language in defining spheres of prohibited conduct, its impact is disproportionately felt by the poor and marginalized, as was eloquently demonstrated by Anatole France’s famous statement: “the law in its majestic equality, prohibits rich and poor alike from begging on the streets and sleeping under bridges.”

Vagrancy legislation is thought to have first emerged in England with the *Statutes of Labourers* in 1349.⁷⁷ At the time, the Black Death had killed virtually half the population of England, and a profound labour shortage had emerged – giving workers greater power to demand better conditions and wages. The law did three things. First, those who fell within the *Statute* and were able to work were required to do so at reasonable rates. Second, it became a criminal offence for an able-bodied person to refuse to work. Third, it prohibited all but the “impotent” from soliciting alms. This *Statute* virtually precluded worker mobility, and ensured cheap labour for landowners.⁷⁸ However, without any system to provide work and poor relief, the number of vagrants merely increased, exacerbated by other social, economic and political causes, including the enclosure movement and entailment of land. Vagrancy laws were therefore arising concurrently with the development of capitalism. With the rise of industrial capitalism, more and more landless and impoverished people were entering cities, sparking concern over lawless vagabonds and thieves. As Marx argued:

On the one hand, these men, suddenly dragged from their accustomed mode of life, could not immediately adapt themselves to the discipline of their new condition. They were turned in massive quantities into beggars, robbers and vagabonds . . . a bloody legislation against vagabondage was enforced throughout Western Europe.⁷⁹

The laws became more repressive, eventually including punishments such as whipping, branding and death for vagrancy.⁸⁰

75. “Crime and Changing Forms of Class Control: Policing Public Order in ‘Toronto the Good,’ 1859-1955” (1987) 66 *Social Forces* 307 at 316-17.

76. See National Council of Welfare, *Justice and the Poor* (Ottawa: Minister of Public Works and Government Services Canada, 2000).

77. C.G. Hall, “A Legislative History of Vagrancy in England and Barbados” (1997) 7 *Caribbean Law Review* 314 at 336-37.

78. *Ibid.*

79. K. Marx, *Capital: A Critique of Political Economy Volume I*, B. Fowkes, trans. (Harmondsworth: Penguin, 1976) at 896.

80. H. Simon, “Town Without Pity: A Constitutional and Historical Analysis of Official Efforts to Drive

The administration of the poor laws (and of the poor) has relied on a conceptual division between the “deserving” and the “undeserving” poor, distinguished mainly by their perceived capacity to work.⁸¹ The division between the two categories separated those who were deserving of state support because they were deemed “unable to work” – these included the widowed, elderly, blind, or orphaned – from the able-bodied poor.⁸² Those singled out for the most vehement censure were those who were able-bodied yet unemployed. Since they were able to work yet did not, it was argued that they must have chosen not to work due to flaws of character.⁸³ The Elizabethan poor laws introduced some measures to provide poor relief for the deserving, but the criminal law has continued to characterize the state’s response to the undeserving.

It is not a coincidence that these divisions first appeared during the European transition to a capitalist economy, since these divisions of worthy and unworthy poor reinforce the interests of capital accumulation. During this transition, the working class had to be “made” and workers had to be convinced to submit to a new mode of production.⁸⁴ Neocleous argued that:

Ostensibly, the concern over vagrancy and begging was a concern that those persons engaged in such activities were more likely to engage in criminal activity, but in some sense the greatest “crime” was thought to be idleness itself, since this deprived the state of the vagabond’s contribution to prosperity and was at the heart of all other disorderly behaviour.⁸⁵

Those who did not work, regardless of the availability of work, had to be punished and degraded in order to set an example for those who might want to avoid selling their labour power.

In the Canadian context, vagrancy laws were part of the criminal law from the time of Confederation. According to the *Criminal Code* of 1892,⁸⁶ which was based almost entirely on the 1886 consolidation,⁸⁷ a vagrant was a “loose, idle and disorderly person.” There were twelve separate vagrancy offences, including: not having visible means of maintaining oneself; living without employment; begging without a certificate; and having no peaceable profession, but supporting oneself through gaming, crime or the avails of prostitution. The next significant changes to the *Criminal Code* came in 1954,

Homeless Persons from American Cities” (1992) 66 *Tul. L. Rev.* 631 at 640.

81. P. Gulati, “Ideology, Public Policy and Homeless Families” (1992) 19(4) *Journal of Sociology and Social Welfare* 1 at 115.

82. M. Katz, *The Undeserving Poor: From the War on Poverty to the War on Welfare* (New York: Pantheon Books, 1989).

83. Esmonde, *supra* note 31.

84. E.P. Thompson, *The Making of the English Working Class* (Toronto: Penguin Books [1963] 1991).

85. M. Neocleous, *The Fabrication of Social Order: A Critical Theory of Police Power* (London, England: Pluto Press, 2000) at 17.

86. 55 & 56 *Vict. c.* 29, ss. 207-9.

87. R.S.C. 1886, c. 157, s.8.

when vagrancy offences were split into two parts. The first addressed offences that caused a public disturbance. The second created a new vagrancy offence, which included wandering or trespassing without any apparent means of support, and begging from door to door in a public place.⁸⁸ It was not until 1972 that vagrancy offences were purged from the *Criminal Code*. The *Safe Streets Act* appears to represent a new vagrancy law. It does so not only through its form – the prohibition of requests for financial assistance by the visibly poor in public spaces – but also by its purpose.

Vagrancy laws perform a particular pragmatic function in the administration of poverty. In their original forms they consisted of actual physical coercion to engage in work. It should not be surprising that they would continue to perform similar functions now, though they do so in more subtle ways, conditioned by the particular historical and social context. As discussed earlier, in Canada the rise of neoliberalism has been marked by rapidly shifting norms of work, a retrenchment of social programs and a greater reliance on the market as a way of regulating social, political and economic relationships. As these processes have resulted in increasing poverty and instability, there has been a greater reliance on repressive measures in order to ensure the acceptance of such policies by an often resistant population. As such, neoliberal states have been characterized by a major reorientation in the direction of “coercive discipline”:

State disciplinary activities reinforce market discipline by visibly suppressing forms of “deviant” conduct which threaten the norm of commodity exchange. These activities also direct the very real insecurities that people feel in conditions of high unemployment and lean production against portions of the population constructed as wrong-doers.⁸⁹

This is the backdrop against which the new vagrancy laws have emerged.

Squeegeeing is a subsistence strategy used by a segment of young people who are increasingly marginalized by unstable options for “legitimate” work, and who have been effectively abandoned by the state. They are present on streetcorners as indicia of the failure of the capitalist system to ensure that the basic requirements for survival are guaranteed to all. Although squeegeers are constructed through the *Safe Streets Act* as participants in a commercial transaction, squeegeeing is not treated as a legitimate form of self-employment. Nor is it the transaction itself that is prohibited, since the punitive sections of the *Act* apply only to the solicitor – the *Act* does not require money to have been given in exchange for a clean windshield, and in the event that a payment is made, the payor is not subject to any punishment. The *Act* is aimed at the squeegeer alone. Like the vagrancy laws of the past, the squeegee-provisions in the *Safe Streets Act* discipline and express moral disapproval for those operating outside of the norms of commodity exchange and wage labour. Not only does this punish the squeegeer who very often had few other choices for survival, but it also serves as a reinforcement for others that neoliberal work relationships are the only legitimate form of subsistence. In conjunction with other neoliberal policies, such as cuts to income support programs, the *Act* attempts

88. S.C. 1953-1954, c. 51, ss. 160, 164, 182, 372.

89. Sears, *supra* note 23 at 105.

to force people to accept work – such as there is – no matter how terrible the conditions. Thus, the similarities between criminal vagrancy laws of the past and the *Safe Streets Act*, raise the inference that the province of Ontario has carried out an unconstitutional incursion into the criminal law field.

In addition to representing the re-enactment of vagrancy offences, the language used to justify this re-enactment relies on constructions of squeegeers as dangerous to the public. This ideological spin on the legislation is most problematic for those who wish to argue that the *Safe Streets Act* is merely an exercise of the Province's jurisdiction over sidewalks and streets. The criminal law jurisdiction is triggered by concerns over "public peace, order, security, health and morality."⁹⁰ The language used to justify prohibitions on squeegeeing fall squarely within the scope of public peace, order and security.

Extremely poor people have often been portrayed as dangerous. Poverty has been conceptually linked with more colloquial notions of "criminality," to allow for the creation of a "dangerous class" which must be subject to the criminal law. The construction of this dangerous class is often racialized, and reflects the changing social construction of race over time. For example, in Canada in the nineteenth century, Eastern European immigrants were the "dangerous foreigners,"⁹¹ while the fears of a Black "underclass" are more conspicuous today. The role that public order offences have played in policing aboriginal communities in Canada cannot be underestimated. It is by playing on notions of criminality and threats to safety that public order laws are justified.

Squeegeers have also been described as part of this "dangerous class." There are repeated references throughout the Hansard debates to the need to protect pedestrians and drivers from intimidation and harassment caused by squeegeers.⁹² As the legislation does not distinguish squeegeeing activity that is polite from that which is threatening, it must be assumed that the Provincial government wished to target all squeegeeing activity as being intimidating and harassing in some regard. However there are numerous provisions in the *Criminal Code* that could be used in order to address such concerns, including criminal harassment,⁹³ uttering threats,⁹⁴ extortion,⁹⁵ intimidation,⁹⁶ and mischief.⁹⁷ By addressing personal security concerns related to claimed threats to safety by squeegeers, the prohi-

90. *Margerine Reference*, *supra* note 7 at 51.

91. A. Brannigan & A. Lin, "'Where East Meets West': Police, Immigration and Public Order Crime in the Settlement of Canada from 1896 to 1940" (1999) 24(1) *Canadian Journal of Sociology* 87 at 89.

92. The Hansards are peppered with these kinds of statements. For a few examples see Ontario, Legislative Assembly, *Debates*, (15 November 1999) at 1540 (Hon. J. Flaherty); Ontario, Legislative Assembly, *Debates*, (15 November 1999) at 1610 (Mr. G. Stewart).

93. *Criminal Code*, R.S.C. 1985, c. C-46, s. 264.

94. *Ibid.* s. 264.1.

95. *Ibid.* s. 346.

96. *Ibid.* s. 423.

97. *Ibid.* s. 430. See also Schneiderman, *supra* note 4, regarding how the existence of these *Criminal Code* provisions calls into question the constitutionality of the "aggressive solicitation" provisions.

bition on squeegeeing in the *Safe Streets Act* falls within the heart of criminal law jurisdiction.

The stated concerns about squeegeeing go beyond concerns for safety from bodily harm, to include a threat to society as a whole caused by the appearance of “disorder” on the streets. The “broken windows” theory, which has gained prominence amongst “law and order” proponents including the police, suggests that: “small signs of disorder – such as broken windows – give rise to a sense that nobody cares about the community, and paves the way for more serious criminal activities.”⁹⁸ Therefore addressing “disorder” must be a significant part of the policing role. These are concepts that were explicitly used by the government in explaining the need for the *Safe Streets Act*:

The basis of this bill really goes back to the founder of our police systems, Sir Robert Peel, who . . . stated that it was the duty of the public and the police to control crime and disorder, not just crime as we know it but in fact disorder. Why should disorder as compared to crime, be important? I think in our many visits across this province, some 70 in all, as a co-commissioner of the Ontario Crime Control Commission, it became evident that people were concerned for themselves and their families and that disorder played a role in causing that concern. If there is disorder in our streets, people will vacate our streets out of concern for their safety and that void will be filled by additional crime.⁹⁹

Thus the mere presence of squeegeers on streetcorners is a symbolic “broken window.” Not only is this evidence of disorder threatening to the individual witnessing the squeegeer, it poses a larger threat to entire communities and areas of the city. This is a long way from safety in the sense of a highway regulation, and brings the *Safe Streets Act* within the scope of the criminal law purpose of maintaining public order.

A reliance on the broken windows theory could perhaps support an argument that the legislation was enacted in order to suppress the conditions that give rise to crime – an area of provincial jurisdiction.¹⁰⁰ Such an argument must fail for several reasons. First, to suggest that people will desert areas of the city frequented by squeegeers, and that this desertion will then lead to greater crime, is simplistic and speculative at best. The Government did not carry out any studies, or provide any evidence to support the argument that the presence of squeegeers leads to greater incidence of crime. As was the case in *Morgentaler*, the lack of government research can lead to an inference that the prevention of crime was not a purpose of the *Act*. Secondly, the argument that government regulation of disorder is required begs the question of what exactly is disorderly about squeegeeing. Statements that squeegeers induce fear implies that there is something wrong about what they are doing, and takes us back to arguments that squeegeeing is intimidating and harassing. Since intimidation and harassment are already crimes under the *Criminal Code*, suggesting that the *Safe Streets Act* is a

98. Graser, *supra* note 35 at 48.

99. Ontario, Legislative Assembly, *Debates* (7 December 1999) at 1845 (Mr. Martiniuk).

100. Dupond, *supra* note 44.

preventive piece of legislation would be similar to labeling prohibitions on murders as designed to suppress the conditions giving rise to crime.

The Ontario government's attempt to ground the provisions of the *Safe Streets Act* that prohibit squeegeeing within the sphere of provincial jurisdiction must fail if its real target is the intimidation and disorder that it claims is caused by squeegeeing. In *Westendorp*, a unanimous decision by the Supreme Court of Canada, a City of Calgary by-law prohibiting being on the street for the purpose of prostitution was struck down as *ultra vires* for invading Parliament's criminal law power. Of particular relevance was a statement by Chief Justice Lamer:

If a province or municipality may translate a direct attack on prostitution into street control through reliance on public nuisance, it may do the same with respect to trafficking in drugs. And, may it not, on the same view, seek to punish assaults that take place on city streets as an aspect of street control!¹⁰¹

By enacting the *Safe Streets Act*, the province of Ontario has attempted to translate a direct attack on vagrancy, which it characterizes as intimidation and disorder, into street control. The evidence culled from the Hansard debates demonstrates that the real reason behind the enactment of section 3(2)(f) of the *Safe Streets Act*, and section 177(2) *Highway Traffic Act*, is to prohibit squeegeeing for a colourable criminal law purpose. The *Safe Streets Act* has the criminal law purpose of disciplining the contemporary vagrant, reinforcing that work and subsistence performed outside of capitalist social relations is criminal.

CONCLUSION

The *Safe Streets Act* was created during a time of rapidly widening disparities between the incomes of the rich and the incomes of the poor.¹⁰² Government policies have exacerbated this polarization through the dismantling of the welfare state, which puts us all at the mercy of the free market. However, the free market cannot provide an adequate level of affordable housing, nor guarantee full employment, nor ensure an adequate income for all. The most visible results of such policies are the increasing number of homeless people populating public spaces. The response in Ontario has been the criminalization of the results of government policies, through aggressive welfare fraud investigations, increased funding to the police, and legislation such as the *Safe Streets Act*.

In its rush to bring its repressive powers to bear on poor people, the Ontario government may have overstepped its constitutional jurisdiction. The "pith and substance" of the *Safe Streets Act* is the prohibition of squeegeeing and many (if not most) forms of panhandling. In a context of rapidly shifting labour relations, with an increased reliance on contingent work, workers find themselves with insufficient protection of their interests. However, as did vagrancy laws of the past, the *Safe Streets Act*

101. *Westendorp*, *supra* note 55 at 53-54.

102. Yalnizyan, *supra* note 20.

disciplines and punishes those who attempt to subsist outside of these relations. The *Act* is therefore a contemporary anti-vagrancy law, which is an area of government action traditionally governed by the criminal law. In addition, the language of justification used to explain the need for prohibitions on squeegeeing, relies on constructions of squeegeers as dangerous and disorderly. The *Safe Streets Act* therefore has a criminal law purpose, and represents a colourable attempt by the Provincial government to enter an area of jurisdiction granted only to Parliament.

The emergence of this legislative attack on the subsistence activities of incredibly poor people presents a challenge to those engaged in poverty law. In a context in which homeless people have little access to stable and sufficient wages, and where income supports are totally inadequate, it is troubling that the Provincial government has so severely limited the possibilities for seeking assistance directly from private citizens. However, as legal practitioners we must resist the urge to think that a strictly legal response can solve this problem.

The *Safe Streets Act* is open to constitutional challenge on many different levels. It can legitimately be argued that the *Act* interferes with freedom of expression, by prohibiting expression that conveys need.¹⁰³ In addition, the drafting of the *Act* is vague and overbroad, perhaps as an attempt to disguise the fact that squeegeers and panhandlers are the actual targets. The *Act* captures actions which surely were not intended by the government, such as payments to parking lot attendants, solicitations in private places such as a home, and solicitations between friends walking down a street together – for example an intoxicated person asking their spouse for a quarter to make a phone call would violate the *Act*. And crucially the *Act* is discriminatory in its singling out of subsistence activities by extremely impoverished people. Some or all of these arguments could win the day at the Supreme Court of Canada. But would this mean that squeegeers and panhandlers could return to their streetcorners without fear of prosecution (or persecution)? And should this really be our goal?

Defeating the *Safe Streets Act* will not mean that police will stop harassing poor people engaged in solicitations in public space. Decisions of the United States Supreme Court that struck down vagrancy and loitering laws in the early 1970s changed the form but not the substance of official efforts to control the homeless. Police now arrest homeless people for camping or sleeping on public land, and police regularly seize and destroy their possessions.¹⁰⁴ In Canada, vagrancy offences were removed from the *Criminal Code* thirty years ago, but this did not give beggars free reign before the *Safe Streets Act* nor will it do so if it is repealed. There is ample evidence that squeegeers were subject to a high level of police intervention before the *Safe Streets Act* was enacted, or had even been seriously proposed by the Conservative government.¹⁰⁵

Public order offences are a cornerstone of the policing project, and explicit prohibitions on vagrancy are not necessary in order to carry this out. What must be under-

103. Moon, *supra* note 35.

104. Simon, *supra* note 80 at 634.

105. Esmonde, *supra* note 31; O'Grady, *supra* note 12 at 24.

mined is the project itself. A legal challenge to the *Safe Streets Act* presents an opportunity to make political arguments about the nature of the administration of poverty under capitalism. But this can only be one part of a larger campaign for reform that makes the links between cuts to welfare and laws prohibiting panhandling. Government adherence to the agenda of neoliberalism is not inevitable, and can be challenged through struggle and resistance on a far broader level than is possible for a legalistic strategy. Thus a larger vision is necessary, a vision that goes beyond the small gains that could be won by championing the right to beg in the highest court of the country. Surely the ideology of neoliberalism has not so poisoned our imaginations that we cannot envisage a world in which people need not squeegee or beg in order to survive.