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CRIMES OF MISERY AND THEORIES OF PUNISHMENT

John B. Mitchell*

Increasingly, one sees the homeless on the streets, alleys, and doorways of the commercial, recreational, and living spaces of our cities, otherwise populated by the affluent and relatively affluent. At the same time, there has been an increase in the creation and use of so-called "public order laws," such as forbidding sitting on sidewalks, lying down on benches, and panhandling in certain tourist areas. Together with laws already on the books forbidding public intoxication, open containers of liquor in public, and urinating in public, this suite of laws provides police with a means to control the day-to-day lives of the homeless on the city streets. Although there is a rich and extensive literature exploring the philosophical justification for the use of the criminal sanction, little has been concerned with minor crimes (misdemeanors), and none of the literature concerns these misdemeanor public order laws. Termed "crimes of misery" herein, this suite of laws forbids conduct naturally flowing from life on streets as experienced by the desperately impoverished, mentally ill, chronically alcoholic, and/or drug-addicted.

In this article, the author carefully analyzes these crimes of misery within each of the five philosophical grounds that traditionally justify and guide punishment: a variety of theories of retribution, as well as general deterrence, specific deterrence, incapacitation, and rehabilitation. From this analysis, the author concludes that

*Professor of Law, Seattle University School of Law. The author wishes to thank Robert Weisberg for his insights and guidance; Jackie Helfgott for introducing me to both criminology literature and key members of the Seattle Police Department; the peer reviewers for the journal whose comments vastly improved this article; world class librarians Kelly Kunsch and Susan Kezelle; my administrative assistant Jonathan LeBlanc; and NCLR copyeditor Cher Paul, who did a superlative job in correcting my grammar, syntax, and footnote form.

none of the traditional philosophical theories can justify the crimes of misery and, as such, those crimes are morally unsupportable and unjust.

Keywords: *theory of punishment, rehabilitation, incapacitation, deterrence, retribution, sentencing, broken window policing, homeless/ness*

Throughout America, cities and counties have consciously assembled a suite of misdemeanor laws as one of their dominant techniques for dealing with the wretchedly poor on our urban streets.¹ Most of the targets of these laws are from among the estimated 3.2 million homeless people in our nation,² whose numbers are only increasing with recent foreclosures on rental property and the economy.³ Many are mentally ill⁴ and/or addicted to alcohol⁵ and drugs.⁶ Nearly 20 percent are victims of domestic violence,⁷ and a similar percentage are military veterans.⁸ Some are among the working poor, so-called car-camping

1. See National Center on Homelessness and Poverty, and National Coalition for the Homeless, *Homes Not Handcuffs: The Criminalization of Homelessness in U.S. Cities* (June 2009), http://www.nationalhomeless.org/publications/crimreport/CrimzReport_2009.pdf [hereinafter, *Homes Not Handcuffs*].

2. National Coalition for the Homeless, *How Many People Experience Homelessness?* (July 2009), http://www.nationalhomeless.org/factsheets/How_Many.html [hereinafter, *How Many People?*].

3. See *Homes Not Handcuffs*, supra note 1, at 8. The overall explosion of homelessness in our country is a function of the confluence of a “growing shortage of affordable rental housing [federal support for low income housing dropped 49% between 1980 and 2003] and a simultaneous increase in poverty.” National Coalition for the Homeless, *Why Are People Homeless?* (July 2009), <http://www.nationalhomeless.org/factsheets/why.html> [hereinafter, *Why Homeless?*]. As to the latter, there was an enormous cut in social support services between 1981 and 1986. See Peter Marcuse, *Neutralizing Homelessness*, 18 *Socialist Rev.* 69, 78 (1988).

4. Among the homeless population, 26% are mentally ill. *How Many People?*, supra note 2, at 2. 16% of the homeless population are severely mentally ill. *Why Homeless?*, supra note 3, at 4. However, their mental illness is not the direct cause of their homelessness; most were released from mental hospitals in the 1950s and '60s and did not become homeless until the '80s. *Id.*; see also Marcuse, supra note 3, at 73, 89–90.

5. See National Coalition for the Homeless, *Who is Homeless?* (July 2009) (in survey, 38% reported alcohol problems).

6. *Id.* (estimated 30% are addicted; in survey, 26% reported problems with drugs).

7. See *How Many People?*, supra note 2 (19% of homeless are victims of domestic violence).

8. *Id.* (13% of homeless are veterans).

because they live in their cars.⁹ 42 percent are black,¹⁰ 13 percent Hispanic,¹¹ and 39 percent white.¹²

Certainly, when I grew up in the 1950s, there were laws against public intoxication, open liquor containers in public, disorderly conduct, blocking public thoroughfares, and urinating in public. Arresting the town drunk and letting him sleep it off in jail seems now to be almost the subject of a Norman Rockwell painting. But we are not talking about romanticized mid-twentieth-century small-town America. We are talking about an urban underclass trying to survive in desperate economic times. And we are talking about the melding of these traditional public order crimes with new offenses¹³ such as making it illegal to sleep, sit, or store belongings in public spaces, forbidding aggressive panhandling (i.e., begging),¹⁴ and tweaking trespass law so that it becomes illegal to be on property belonging to or open to the public because the person has previously been handed a notice telling them that, for a set period of time, they may not sit in a particular park or walk in a particular mall without thereby committing trespass.¹⁵ I see this

9. In what is termed "car-camping," homeless individuals and families live in vehicles while still going to work. See interview with Harris, *infra* note 44: municipalities try to discourage this by, e.g., posting signs announcing, "No parking 2am–6am." *Id.* See also *How Many People?*, *supra* note 2 (19% of homeless are employed).

10. See *How Many People?*, *supra* note 2.

11. *Id.*

12. *Id.*

13. Some have suggested that these crimes be treated as civil infractions, accompanied by a fine, to be converted to criminal misdemeanors only if the violator fails to pay the fine or to do community service. See Debra Livingston, *Police Discretion and the Quality of Life in Public Places: Courts, Communities, and the New Policing*, 97 *Colum. L. Rev.* 551, 640 (1997) (citing as example Seattle, Washington, ordinance). When applied to homeless beggars, constantly in transition from various shelters to the streets and back again, the likely result of such an ordinance would seem to be that any violation will eventually become a criminal charge.

14. See *Homes Not Handcuffs*, *supra* note 1, at 9–10.

15. In describing the use of no-trespass bans to exclude street people from public spaces, Katherine Beckett and Steve Herbert describe the strategy as follows:

Other innovations extend trespass authority over time, such that a person is not just asked to leave a particular space but is banned from that space—which can be defined quite expansively—for extended periods of time. . . . Criminal trespass admonishments provide law enforcement officers with an attractive way of dealing with disorder in Seattle. As a former Seattle police officer explained:

"I mean, that's the thing about a trespass [admonishment], you can still trespass anybody for anything. . . . It's an easy, it's like a win-win. You know? . . . and then that [the admonishment] gives you a year worth of, you know, being able to shake 'em, and

suite of offenses—increasingly common across America,¹⁶ with the trend only growing¹⁷—not as reflecting offenses to public order, but as crimes of misery.

Admittedly, laws aimed at controlling the poor in the streets have a long pedigree that precedes my 1950s childhood by over 600 years, tracing their origins to the breakup of the feudal system¹⁸ and the Black Plague, which ravaged Europe in the fourteenth century.¹⁹ Resulting labor shortages from those two events led to laws forbidding workers from leaving their home areas in search of better working conditions²⁰ and criminalizing the “vagrant life” of the masses of masterless men and their families that crowded the roadways.²¹

From early on, the control of vagrants and various sundry “disorderly persons” was one of the central preoccupations of the royal *pater familias*. Of the nine offenses on Blackstone’s list of offenses “against the public police and oeconomy,” three dealt with various forms of vagrancy. This makes sense: A vagrant, after all, was someone who had fallen outside the scope of government in the household tradition (micro) family, the sphere of “domestic, or private,

pat ’em down. . . . I mean, technically, they’re trespassed, once you stop them, they can be under arrest. . . . So every time I stop someone who’s been trespassed, then I can completely search them.”

Perhaps not surprisingly, our data indicate that trespass admonishments are widely used in Seattle and elsewhere. . . .

Beckett & Herbert, *Dealing with Disorder: Social Control in the Post-industrial City*, 12 *Theoretical Criminology* 5, 9 (2008).

16. In *Homes Not Handcuffs*, *supra* note 1, at 10, the authors document how widespread is the proliferation of these crimes of misery:

City ordinances frequently serve as a prominent tool for criminalizing homelessness. Of the 235 cities surveyed for our prohibited conduct chart (see p. 159):

- 33% prohibit “camping” in particular public places in the city and 17% have citywide prohibitions on “Camping.”
- 30% prohibit sitting/lying in certain public places.
- 47% prohibit loitering in particular public areas and 19% prohibit loitering citywide.
- 47% prohibit begging in particular public places; 49% prohibit aggressive pan-handling and 23% have citywide prohibitions in begging.

17. *Id.*

18. See *Papachristo v. City of Jacksonville*, 405 U.S. 156, 161 (1972).

19. *Id.* at 162.

20. *Id.* at 161.

21. *Id.* at 162.

economy,” in Rousseau’s terms. He therefore was the perfect candidate for early governance at the level of the state (macro) household, in the realm of “general, or political, economy.” [footnotes omitted]²²

In some American colonies, individuals who were not part of a resident household were given the choice of either integrating into an established household or banishment,²³ while in other colonies, vagrants were whipped and sent back to correctional facilities located in the area where they grew up.²⁴

Throughout America’s history, “[a]lthough vagrants might be imprisoned for short terms, vagrancy laws were most important in low level and continuous police harassment of undesirables.”²⁵ And these laws continued in this manner unabated until 1972, when they were held unconstitutional on vagueness and overbreadth grounds by the United States Supreme Court.²⁶ So, as some have contended, are the crimes of misery simply a continuance of this same history,²⁷ albeit in a different package?²⁸ Three factors lead me to answer in the negative.

First, one must consider the significant increase we’ve seen in the number of homeless over only a few decades.²⁹ Second, the governmental approach to the homeless on the streets appears far broader and systematic than the unreviewable day-to-day use of discretion by police on the streets under vagrancy laws. Rather, the current approach is one inevitably following from the overarching political philosophy of the industrialized nations of today,

22. Markus Dirk Dubber, “The Power to Govern Men and Things”: Patriarchal Origins of the Police Power in American Law, 52 *Buffalo L. Rev.* 1277, 1286–87 (2004).

23. *Id.* at 1289.

24. *Id.* at 1288.

25. Markus Dirk Dubber, *Policing Possession: The War on Crime and the End of Criminal Law*, 91 *J. Crim. L. & Criminology* 829, 910 (2001) [hereinafter, *Policing Possession*].

26. See, *Papachristo v. City of Jacksonville*, 405 U.S. 156 (1972).

27. See *supra* notes 18–25 and accompanying text. See also Livingston, *supra* note 13, at 557 (“... legal scholars have paid inadequate attention to the reemergence of statutes, ordinances, and law enforcement measures aimed at public conduct and, more broadly, the quality of life in public spaces [footnote omitted]”).

28. In discussing the array of crimes of possession, Professor Dubber refers to those crimes as “the new and improved vagrancy, a modern policing tool for a modern policing regime.” See Dubber, *Policing Possession*, *supra* note 25, at 831.

29. In a study of 182 cities with populations over 100,000, the rate of homelessness was found to have *tripled* between 1981 and 1989. See Martha R. Burt, *Causes of the Growth of Homelessness During the 1980s*, in *Understanding Homelessness: New Policy and Research Perspectives* 169, 181 (Dennis P. Culhane & Steven P. Hornburg, eds., 1997), http://www.knowledgeplex.org/kp/report/report/relfiles/fmf_understandinghome.html.

termed “neoliberalism.”³⁰ In fact, approaching the social problem of the homeless on the streets through a mechanism like the crimes of misery naturally follows from two of the tenets of neoliberalism, “welfare state devolution, retraction, and recomposition,”³¹ and “an expansive, intrusive, and proactive penal apparatus.”³²

Third, though at times we may find it uncomfortable encountering the homeless on the streets and wish they were somewhere else, it is hard to see them solely as “rogues and vagabonds,”³³ “dissolute persons,”³⁴ “common drunkards,”³⁵ “lewd, wanton and lascivious persons,”³⁶ or “habitual loafers.”³⁷ I think most of us know better. We know what we’re witnessing is not the historical conception of the vagrant as “a member of a permanent underclass . . . constitute[ing] a constant conspiracy against innocent and hardworking citizens . . . a breeding ground of criminality, a menace to society.”³⁸ I think most of us have the intuition that we are looking at fellow human beings suffering from drug and alcohol addiction, mental health problems, and/or those who are victims of drastic economic misfortune. The available statistics discussed above confirm this intuition.

Structure and Approach of Article

Before analyzing the crimes of misery under each of the five rationales, however, I first address two questions concerning my methodology (Section I). I therefore consider whether using theories concerned with punishment is an appropriate basis for assessing the legitimacy of crimes, and whether the distinction between “true” crimes (robbery, murder, etc.) and so-called regulatory/welfare offenses should play a more prominent role in my analysis.

30. The neoliberal state is characterized by (1) economic deregulation, (2) welfare state retraction and recomposition, (3) a culture espousing “individual responsibility,” and (4) an expansive, intrusive penal apparatus. See, Loïc Wacquant, *Punishing the Poor: The Neoliberal Government of Social Insecurity* 307 (2009).

31. *Id.*

32. *Id.*

33. See language from Jacksonville, Florida, ordinance found unconstitutional in *Papa-christou v. City of Jacksonville*, 405 U.S. 156 (1972), at 158.

34. *Id.*

35. *Id.*

36. *Id.*

37. *Id.*

38. See Dubber, *Policing Possession*, *supra* note 25, at 919.

In the remaining sections of the article, I assess the moral legitimacy of pursuing the crimes of misery under the five recognized philosophical rationales for punishment: Retribution (Section II), General Deterrence (Section III), Specific Deterrence (Section IV), Incapacitation (Section V), and Rehabilitation (Section VI). Although any sovereign plainly possesses the raw power to circumscribe any conduct it finds socially harmful by labeling it as criminal,³⁹ and thereby bringing that conduct within the ambit of the state's coercive power⁴⁰—limited in our society only by constitutional constraints⁴¹—that does not make that exercise of power morally supportable. In theory, a society could achieve increased social protection by at times punishing innocent people who have caused no harm, as well as by denying defenses such as mistake of fact and self-defense. That, however, would not make those practices ethically just. Since, as this article will demonstrate, the current application of the crimes of misery cannot be justified under any accepted philosophical theory of punishment, their use is both morally illegitimate and unjust.

In the remainder of this introductory section I will explain two choices I made in writing this article.

My Decision to Utilize Interviews and Composite Profiles

In researching for this article, I interviewed police,⁴² homeless citizens,⁴³ and their advocates.⁴⁴ Without exception, none of those with whom I spoke

39. See Jerome Hall, *General Principles of Criminal Law* 2 (1947).

40. See Nicole Lacey, *State Punishment: Political Principles and Community Values* 2 (1988); Gregg Barak, Paul Leighton, & Jeanne Flavin, *Class, Race, Gender, and Crime: The Social Realities of Justice in America* xii, 123 (2007) (the criminal justice system has the monopoly in the coercive use of force).

41. In fact, across the country the various crimes of misery have been attacked on First Amendment, Fourth Amendment, Fifth Amendment (due process), and Eighth Amendment grounds, at times with success. See *Homes Not Handcuffs*, *supra* note 1, at 23–25, 85–164. See also Livingston, *supra* note 13, at 557 n.16; Maria Foscarinis, *Downward Spiral: Homelessness and Its Criminalization*, 14 *Yale Law & Pol. Rev.* 1 (1996) (author discusses constitutional arguments against crimes of misery).

42. Interview with Seattle Police, West Precinct, May 17, 2010, and May 26, 2010, Seattle, Washington (notes on file with author).

43. Interview with homeless men and women at drop-in center, Compass Housing Alliance, May 5, 2010, Seattle, Washington (notes on file with author).

44. Interview with Tim Harris, founder and executive director of *Real Change*, street paper sold by homeless vendors, April 14, 2010, Seattle, Washington (notes on file with author); interview with Christine Jackson, Supervisor for Misdemeanors and Appeals, Office of the King County Defender Association, April 30, 2010, Seattle, Washington (notes on file with author).

thought of those on the streets in terms of the generic phrase “the homeless.” They were people, and it is only with that full, human understanding that I believe this article can have any real meaning beyond the abstract academic. To that end, throughout the article I will specifically refer “Carlos,” “Ed,” and “Nina” in my analysis of the five theoretical justifications for punishment. They are not real individuals; they are composite proxies, created from textual research and interviews, who I believe accurately represent many of those currently on the streets who are subject to the force of the crimes of misery.

(NOT) WANTED

Aggressive Panhandling; disorderly conduct

Ed — 25, black. History of mental illness. Lost right leg in car accident. Moved from prescription drugs to street drugs to deal with chronic pain.

(NOT) WANTED

Trespass; sitting in park after ban order

Carlos — mid-40s, Hispanic. Iraqi war veteran. Suffers from Post-Traumatic Stress Disorder (PTSD). Won't go to Veteran's Administration for services; important for him to see himself as someone who “takes responsibility for self.” Likes to sleep at night in green spaces in city. Several times police have taken his bedding and destroyed the shelter he created.

(NOT) WANTED

Urinating in public; having cardboard shelter on sidewalk; public intoxication; open container of alcohol in public

NINA — 50, white. Physically and sexually abused at home as a teen. Former prostitute; in and out of jail. Chronic alcoholic who has gone through a number of detox programs, which failed.

At this point one might contend that I have created a conceptual mismatch, mixing claims based on theoretical analysis with fragments of personal observations and pieces from interviews. Thus, the critique would go, to the extent I've made claims based on the characteristics and situations of individuals, or composites of individuals, I have raised concerns more appropriately addressed to police decisions about when to arrest, prosecutors about whether to charge, and the decisions of courts at sentencing. Accordingly, such data cannot be employed to make an argument about moral, ethical legitimacy based on philosophical theories.

If the crimes of misery were crimes of broad application, I would agree. But they are not. Nor is the issue one of the discriminatory enforcement of otherwise legitimate laws. Without the homeless on the streets, most of these crimes of misery would not even exist—or, as in the case of crimes like public intoxication, would not have been transformed from a true social offense to one among many phrases given police as a vocabulary of power for managing and controlling homeless populations. The homeless are the *raison d'être* for the crimes of misery,⁴⁵ and as such, it is appropriate to treat the homeless and their experience as the only universe within which to analyze the crimes of misery. Any discussion of empirical information in the article therefore is not in any way intended as some statistically based criminological analysis; rather, it is solely to provide texture to the world circumscribed by the crimes of misery.

My Decision to Focus Solely on the American Experience

I recognize that the problems of the homeless and destitute in the streets, and the hyper-punitive response of government to this social problem, is not limited to America. The phenomenon is world-wide, including Australia,⁴⁶ Western Europe,⁴⁷ and South America.⁴⁸ Limiting my analysis to my home

45. The problem is not that the crimes of misery are conceived to target a particular population; RICO plainly was initially intended to focus on “racketeers” (i.e., organized crime), 18 USC § 1961 (West, 2000). Unlike the crimes of misery, however, no one could contend that punishing mobsters failed to meet all of, as opposed to none of, the philosophical rationalizations for punishment.

46. See Peter Lynch, *Begging for Change: Homelessness and the Law*, 26 Melb. U. L. Rev. 690 (2002).

47. See Lois Wacquant, *Pushing the Poor: The Neoliberal Government of Social Insecurity*, xvii, xxi (2009).

48. *Id.*

country, however, is not a matter of mere parochialism or staying within my legal and cultural comfort zone.

America's current approach to those on the streets constitutes a model that has, in effect, been exported to other nations.⁴⁹

Just as the neoliberalism vision in economics rests on models of dynamic equilibrium constructed by an orthodox economic science "made in the USA," the country that holds a near-monopoly over Nobel prizes in that discipline, so the law-and-order vulgate of the turn of the century presents itself in the guise of a scholarly discourse purporting to put the most advanced "criminological theory" at the service of a resolutely "rational" policy, a policy deemed ideologically neutral and ultimately indisputable since it rests on pure considerations of effectiveness and efficiency. Like the doctrine of generalized subordination to the market, the new security doxa comes straight from the United States . . .⁵⁰

Given this, I find it defensible to limit my study and analysis to the on-the-ground experience of the creator/exporter of the model engendering the crimes of misery—America.

I. METHODOLOGY

A. Can the Five Traditional Rationalizations for Punishment Provide an Appropriate Standard for Judging the Legitimacy of the Crimes of Misery?

It is true that the decision as to the appropriate punishment for a crime involves different considerations than the initial determination whether to criminalize the particular behavior. Whereas the former decision looks to rationales such as retribution and general deterrence, the latter considers social harms, resources, social policy, political climate, and whether the government wants/needs to immediately intervene in conduct by using the "tool" of a group of organized professionals already on the streets (i.e., police) with the powers to investigate, detain, arrest, and if needed, employ deadly force. So am I simply using the wrong benchmarks for my analysis of the crimes of misery? I do not believe so. On both definitional and conceptual grounds, it

49. *Id.* at 7.

50. *Id.* at 246–47.

is an unspoken assumption when criminalizing conduct that any resulting punishment meet at least one of the five traditional purposes of punishment.

Definitionally, “a crime is made up of two parts, forbidden conduct and a prescribed penalty.”⁵¹ I am not contending that government lacks the power to criminalize the crimes of misery (and I am not relying in this article on constitutional contentions).⁵² Rather, my entire inquiry revolves around legitimacy. As such, I read “prescribed penalty” in the above definition as “legitimate penalty.” Even if a criminal statute did not provide for a fine, probation, confinement, restitution, community service, or such, and instead stated that “the sole punishment for this crime is the stigma⁵³ of conviction,”⁵⁴ that minimal punishment would only be a legitimate one if the “stigma” was justified by condemnation (retribution) or general or specific deterrence. If not, there would be no legitimate punishment and, by definition, no (legitimate) crime.

Nor could a crime be conceptually legitimate where, as I contend with respect to the crimes of misery, the resulting punishment fails to fulfill any of the five traditional purposes of punishment. For in such circumstance, we are in effect saying that there is nothing that deserves denunciation or blame (retribution); no action we care to and/or can deter (general deterrence); no individual we want to and/or can deter (specific deterrence); nothing that can be gained by isolation and/or no individual we can isolate for more than a de minimis time (incapacitation); and we are not going to try to change the individual (rehabilitation).

In this situation, we are harming fellow citizens—at the very least, through the stigma, police intrusion into their lives, criminal records affecting available social services⁵⁵—without vindicating any societal interests or obtaining any societal benefits. As such, my use of the five traditional theories justifying

51. See Wayne R. LaFare, 1 *Substantive Criminal Law* 17 § 1.2(d) (2nd ed. 2003).

52. See, *supra* note 41 and accompanying text.

53. “The moral obloquy and the social disgrace incident to criminal convictions are whips which lend effective power to the administration of criminal law.” Francis B. Sayre, *Public Welfare Offenses*, 33 *Colum. L. Rev.* 55, 79 (1933).

54. I see no problem with a crime containing this sole sanction. On the other hand, “sometimes the legislature forbids conduct and then omits (in most cases unintentionally) to provide for a penalty; and there is no catch-all statute. . . . In such a situation one who engages in the forbidden conduct is not guilty of a crime [footnote omitted].” LaFare, *supra* note 51, at 17 § 1.2(d), and cases cited therein.

55. See Boruchowitz, *infra* note 95.

punishment to analyze the very legitimacy of the crimes of misery seems appropriate.

B. Is my Method of Analysis Appropriate when Assessing the Legitimacy of “True Crimes,” but Misguided when Similarly Assessing “Regulatory/Welfare” Offenses, to which Category the Crimes of Misery Properly Belong?

In the literature and case law, a distinction is made between “true crimes” and “regulatory/welfare” offenses. Some thus might question whether this distinction affects my analysis. I do not believe that it does, but to fully present my analysis, I must first briefly take the reader through historical and conceptual origins of this distinction.

In a 1933 article in the *Columbia Law Review*, Frances Sayre noted the rise of “regulatory/welfare” offenses in the criminal law, which he contrasted with what he termed “true crimes”⁵⁶ (i.e., Ten Commandment offenses like robbery and murder). In response to the changes in the world that came with the Industrial Revolution,⁵⁷ governments created statutorily based “regulatory/welfare” offenses, backed by the threat of criminal conviction.

The growing complexities of twentieth century life have demanded an increasing social regulation; and for this purpose the existing machinery of the criminal law has been seized upon and utilized. The original objective of the criminal law was to keep the peace; and under the strong church influence of the Middle Ages its function was extended to curb moral delinquencies of one kind or another. For these purposes it developed a suitable procedure, requiring proof of moral blameworthiness or a criminal intent. But today the crowded conditions of life require social regulation to a degree never before attempted. . . . The old cumbrous machinery of the criminal law, designed to try subjective blameworthiness of individual offenders, is not adapted for exercising petty regulation on a wholesale scale; and consequently a considerable amount of this developing regulation has been placed under administrative control.⁵⁸

56. See Sayre, *supra* note 53, at 67 (author notes “the growing use of the criminal law machinery to enforce not only the true crimes of the classic law, but also new type of Twentieth Century regulatory measure involving no moral delinquency”).

57. See Arthur Leavens, *Beyond Blame—Mens Rea and Regulatory Crime*, 46 U. Louisville L. Rev. 1, 13 (2007).

58. Sayre, *supra* note 53, at 68–69.

Unlike the case with “true crimes,” the concern underlying regulatory/welfare offenses thus is not with individual blame or culpability,⁵⁹ but rather prevention of harm to the public⁶⁰ where potential injury would be widespread and of a public character⁶¹ (such as adulterated food, misbranded drugs, etc.⁶²). Moreover, because regulatory/welfare offenses are enacted to protect the public “rather than punish wrongdoing,”⁶³ the legislature may dispense with the classic requirement of *mens rea*, thereby creating strict liability offenses.⁶⁴ Although the conceptual correctness of distinguishing regulatory/welfare offenses from “true crimes” has been challenged,⁶⁵ and there are surely regulatory crimes—such as dumping toxic chemicals into a waterway⁶⁶—that inspire public denunciation akin to that which accompanies robbery or even murder,⁶⁷ the categorical distinction between the two remains in current doctrine.

Given this distinction, the crimes of misery might fairly be characterized as regulatory/welfare offenses, concerned not with blameworthiness of the homeless or harm to a particular individual as is the case of “true crimes,” but instead as avoiding public harms.⁶⁸ So, what spectre of harms do the crimes

59. See Sayre, *supra* note 53, at 83; Leavens, *supra* note 57, at 3, 15–16. But see Stuart P. Green, *Why It's a Crime to Tear a Tag Off a Mattress: Overcriminalization and the Moral Content of Regulatory Offenses*, 46 *Emory L. J.* 1533, 1538–39 (1997) (presenting the theory that violating regulatory offenses involves conduct meriting moral blame).

60. See Sayre, *supra* note 53, at 83.

61. *Id.* at 62.

62. See Green, *supra* note 59, at 8.

63. See Leavens, *supra* note 57, at 3.

64. See Sayre, *supra* note 53, at 63. For a theory that *mens rea* in regulatory offenses can serve the purpose of providing “notice” to the would-be offender rather than allocating blame, see Leavens, *supra* note 57, at 7 n.27.

65. See, Dubber, *Policing Possession*, *supra* note 25, at 978–79: “Modern criminal administration is by nature apersonal and state-centered. The abandonment of *mens rea* is merely a symptom of the general irrelevance of personhood and the primacy of convenience in the state’s enforcement of its commands. . . . In such an apersonal and state-based system of criminal law, . . . [t]he system of danger control applies equally to a strict liability offense like the sale of adulterated milk, and to a *mens rea* offense like premeditated murder.”

66. See Lawrence M. Friedman, *Crime and Punishment in American History* 285 (1983) (“[T]here are vast differences among regulatory crimes in their moral status within society. There is a huge gulf between what people feel about a corporation that pours tons of poison into a river and how they feel about someone who pulls a tag off a mattress.”).

67. See, Green, *supra* note 59, at 8, 15.

68. Focusing heavy police resources on the crimes of misery has been justified as part of a theory of policing alternatively called “broken windows policing” or “order maintenance

of misery raise? For purposes of my argument, I will presume the following harms (though careful social and economic studies are required to establish the validity of these claims of harm).

Public safety is probably the first possible harm to come to mind. In fact, I believe this concern is generally unfounded. Although predators surely roam the streets, I have yet to read any studies or have any discussions with police or prosecutors that indicate that the homeless on the streets are in any meaningful number among those criminals. In fact, the homeless who are the focus of this article are more likely to be victims of such predators.⁶⁹ On the other hand, no doubt many feel unsafe or at least uncomfortable when walking through areas filled with the homeless—addicted, drunk, mentally ill, dressed in filthy clothes. That result is the second possible harm; local residents and tourists don't want to go in those areas, businesses suffer, property values drop, investment looks elsewhere, and downtown and urban commercial cores fail to regenerate and thrive.

Thus characterized as regulatory/welfare offenses, one could then argue that my analysis using the five traditional justifications for punishment is really an attack on a semi-straw man since three of the five justifications—retribution, incapacitation, and rehabilitation—do not even

policing.” See James Q. Wilson & George L. Kelling, *Broken Windows*, *Atlantic Magazine* 29 (March 1982). See also Don M. Kahan, *Social Influence, Social Meaning, and Deterrence*, 83 *Va. L. Rev.* 349, 368–369 (1997). Under this theory, failure to strictly enforce the crimes of misery conveys the message that people in the community don't value or expect order. The proposed answer to altering this negative social meaning in the community landscape is to engage in “order maintenance policing” in which police aggressively target misdemeanors composed principally of crimes of misery. *Id.* at 351; Bernard E. Harcourt, *After the “Social Meaning” Turn: Implications for Research Design and Methods of Proof in Contemporary Criminal Law Policy Analysis*, 34 *Law & Soc. Rev.* 179, 187 (2000); Steve Herbert & Elizabeth Brown, *Conceptions of Space and Crime in the Punitive Neoliberal City*, *Antipode* 755, 759 (2006).

However, the theory of broken windows policing—which, by the way, is contested both in concept, see Herbert & Brown, *id.* at 758; and in social science methodology, see Harcourt, *supra* at 181, 191, and Robert Weisberg, *Norms and Criminal Law Scholarship*, 93 *J. Crim. Law & Criminology* 467, 491–494 (2003)—has no bearing on my analysis. Broken windows is about allocation of police resources, and justifying a focus on minor crimes as a means to abate serious crime. The theory implicitly *assumes* that the crimes of misery are legitimate. Questioning that legitimacy is of course the entire project of this article.

69. See *Homes Not Handcuffs*, *supra* note 1, at 34.

apply to regulatory/welfare offenses, whose primary concern is general⁷⁰ and specific deterrence.⁷¹

Even if this criticism were correct, it would not invalidate my central premise that the crimes of misery cannot be justified under any traditional theory of punishment. It would mean that I have wasted my reader's time by asking them to read through three superfluous justifications for the criminal sanction; but as long as the crimes of misery could not even be justified under the other two (deterrence and specific deterrence), my position that no theory of punishment supports the crimes of misery still holds.

Moreover, the crimes of misery are not strict liability offenses. They have a *mens rea* and, as such, are subject to analysis under a retributory justification. Take a law prohibiting lying down on a bus bench. Admittedly, it could contend that the crime is committed when one intentionally lies down on a bench, which in fact is a bus bench. But I don't believe that the *mens rea* is as narrow as a mere intent to lie down. Instead, the implicit *mens rea* for the crime is lying down on a bench, which in fact is a bus bench, "with the intent to use it as a piece of furniture, rather than somewhere to wait until one's bus arrives." If someone sat on the bench to wait for the No. 24 bus to arrive and slumped down because they were exhausted, they would lack the implicit *mens rea* for the crime. Similarly, if a man followed a tourist down the street screaming, "Give me ten bucks!", the man might seem to be the perfect candidate for being charged with the crime of aggressive pan handling. But if, because of this misidentification, the man honestly confused the tourist with someone else who actually owed him ten dollars, there would be no crime. Although the man would have committed the *actus* of aggressively seeking money, the mistake of fact would negate the implicit *mens rea* of acting with the intent of having people give him charity.

Interestingly, the only one of the five justifications that I find somewhat problematic is one that does not come to mind when considering most

70. See Green, *supra* note 59, at 1535 ("The move [creating strict liability criminal offenses] is understandable: reformers seek to enlist the moral force implicit in criminal conviction for sake of deterrence. . . .").

71. Thus a high-level officer of a corporation (in this case, a CEO) was held vicariously liable for a strict liability offense, imposing on the officer the responsibility of "not only a positive duty to seek out and remedy violations when they occur but also, and primarily, a duty to implement measures that will ensure that violations will not occur." *United States v. Park*, 421 U.S. 658, 672 (1975).

regulatory/welfare offenses: a form of incapacitation (although one could reasonably contend that a licensing regime is effectively one carrying an ongoing threat of incapacitation in as much as the loss of a license effectively prevents the licensee from further engaging in the particular endeavor). Since the harms resulting from the homeless on the streets do not really depend on mens rea or even actus, but rather on the geographical location of the individual—downtown, commercial, downtown residential, tourist areas—these harms can be mediated by keeping the homeless out of these areas, with the result that they are physically unable to cause harms. I will address this below when I discuss incapacitation.

II. RETRIBUTION

In the past decade, both scholars⁷² and policy makers⁷³ have focused on the retributivist theory of punishment.⁷⁴ Retribution, however, is not a single concept. Rather, throughout the literature there exist a number of philosophical theories variously articulating both the meaning and role for retribution as a rationalization for punishment. Whatever version one considers, however, the concept of retribution cannot justify punishment for these crimes of misery.

In its most primal form, retribution is vengeance (“an eye for an eye”).⁷⁵ Someone has harmed us, or our friends or family, or those in the community

72. See, e.g., David Dolinko, *The Future of Punishment*, 46 UCLA L. Rev. 1719, 1720 (1999) (“[W]e can see that those seemingly antiquated retributive notions . . . have not only failed to disappear, but have come roaring back with—one might say—a vengeance.”); Stephen Garvey, *Punishment as Atonement*, 46 UCLA L. Rev. 1801, 1835 (1999) (“[R]etribution has lately received renewed respect.”).

73. Although desert has become the dominant rationale for sentencing—explicitly so under the ALI Model Penal Code, Paul H. Robinson, *Distributive Principles of Criminal Law: Who Should Be Punished How Much?* 135 (2008) [hereinafter, *Distributive Principles*]⁷⁴—in fact, in this context retribution has lost its deontological sense, and instead “the primary engine behind the expansion of criminal sanctions is the common belief that applying frequent and harsh levels of punishment prevents and controls crimes through the mechanisms of deterrence and incapacitation.” Thomas C. Castellano & Jon B. Gould, *Neglect of Justice in Criminal Justice Theory*, in *Criminal Justice Theory: Explaining The Nature and Behavior of Criminal Justice* 71, 81 (David E. Duffee & Edward R. Maguire eds., 2007) [hereinafter, *Criminal Justice Theory*].

74. See Dan Markel, *Are Shaming Punishments Beautifully Retributive? Retributism and the Implications for the Alternative Sanctions Debate*, 54 Vand. L. Rev. 2157, 2158 (2001).

75. Vengeful rehabilitation “urges punishing an offender in a way that mirrors the harm or suffering he has caused, typically identified as *lex talionis*: the principle or law of retaliation that

with whom we find empathy,⁷⁶ and our primal instinct⁷⁷ is to hurt the offender back, and make them suffer.⁷⁸ Some have called this a “bite back” response.⁷⁹ We all understand. A child accidentally hits you in the face, and for a fraction of a second a primitive urge to strike back flows through your body. Then you regain control, see it was a child and an accident, and joke or ignore the blow. However, by stepping in and punishing a genuine wrongdoer, which implicitly imposes some form of suffering,⁸⁰ society offers us a ritualized form within which to sublimate our innate, primitive reactions,⁸¹ thereby obviating the socially destructive possibility of vengeful self-help, blood feuds, and the like.⁸²

But what does any of this have to do with these crimes of misery? I may feel a range of emotions about Ed or Nina, but a desire for vengeance is

a punishment inflicted should correspond in degree and kind to the offense of the wrongdoer [footnote omitted].” Robinson, *Distributive Principles*, *supra* note 73, at 136–37. See also, Joel Feinberg, 4 *Harmless Wrongdoing: The Moral Limits of the Criminal Law* 160 (1994) [hereinafter, *Moral Limits*].

The *lex talionis*, however, has not lost currency in the modern debate over punishment. Thus, Professor Stephen Garvey has sought to resurrect the ancient *lex talionis* as a guide for alternative forms of punishment under the theories of “moral education” or “moral reform.” Stephen P. Garvey, *Can Shaming Punishments Educate?* 65 *U. Chi. L. Rev.* 733, 738–39, 765 (1998). Garvey interprets the principle to mean that the “punishment should mirror the crime.” *Id.* at 738–39. Since Garvey’s focus is upon *how* to punish, not upon the moral legitimacy of the underlying crime itself, his resort to the *lex talionis*, however, has no direct application to the discussion in this article. Even if it did, moreover, the theory would fail. Take Nina’s conviction for urinating in public. Under the “mirror the crime” approach, we’d have her sit in an outdoor café being forced to eat her crab salad and sip her Chardonnay while inundated with the stench from an adjacent urine-soaked alley. Contrasting this with her common experience of eating food from a dumpster while sitting in that same alley, it is hard to imagine much “moral education” will take place.

76. In fact, in many circumstances we may feel deep resentment toward someone who has harmed another with whom we were not acquainted (as when we hear on TV about someone who has kidnapped and abused a child) and viscerally wish to harm the offender. See P.F. Strawson, *Freedom and Presentation and Other Essays* 14 (1974).

77. See Jeffrie G. Murphy & Jean Hampton, *Forgiveness and Mercy* 117 (1988).

78. *Id.* at 113.

79. According to Professor Mackie, this “bite-back” response is a socially useful instinct because it encourages cooperation by introducing negative sanctions for noncooperation. Cited in *id.* at 117.

80. See *id.* at 113, 78.

81. See Feinberg, *Moral Limits*, *supra* note 75, at 160.

82. *Id.* See also Hyman Gross, *A Theory of Criminal Justice* 19 (1979); Lacey, *supra* note 40, at 34.

hardly one of them. If I want to see them suffer, my wish has already been granted. Their life is suffering. And self-help hardly seems a concern. Am I going to avenge Nina's urinating in public by pissing on the cardboard box she sleeps in or on the trash bag containing all her worldly belongings? Will I seek revenge against Ed for following me down the street begging for change by sending my daughter's entire Girl Scout troop to the doorway in which he sleeps and having them push their cookies on him?

For many who speak of retribution, of course, they are not talking about raw vengeance, but rather what is called "just deserts."⁸³ Retribution in this sense is an ethical, moral limitation on who can be punished. We've chosen you for punishment because you deserve it,⁸⁴ not merely because your punishment would benefit society (which in theory the punishment of an innocent could achieve). Of course, once deciding that punishment is your "just desert," we can distribute that punishment to achieve instrumental objectives⁸⁵ (i.e., general and specific deterrence, incapacitation, rehabilitation).

This in fact is the concept of retribution I learned in my first-year criminal law course in law school. But can "just deserts" really do the moral work it claims? Your crime may be an evil (though it's difficult for me to consider these misery crimes and the notion of "evil" in same sentence), but so is punishment an evil.

The most obvious reason for a need to justify punishment is that it involves, on almost any view of morality, *prima facie* moral wrongs: inflicting unpleasant consequences (objectively or subjectively understood) and doing so irrespective of the will or consent of the person being punished.⁸⁶

83. "The contemporary era in the United States has been termed the 'Just Desert Era' . . . , with the term implying a retributive basis to current punishment policies." Castellano & Gould, in *Criminal Justice Theory*, *supra* note 73, at 81. See also Barak et al., *supra* note 40, at 203.

84. See Robinson, *Distributive Principles*, *supra* note 73, at 135. As such, just deserts is deontological in conception since the rationale does not consider any instrumental use of punishment. See George P. Fletcher, *Rethinking Criminal Law* 416–17 (1973).

85. See Lacey, *supra* note 40, at 54.

86. Lacey, *supra* note 40, at 13. See also Gross, *supra* note 82, at 377; Donald A. Dripps, *Rehabilitating Bentham's Theory of Excuses*, 42 *Texas Tech. L. Rev* (Symposium) 383, 388 (2009) (Bentham saw punishment as an evil that necessitates a counterbalancing social good.). Cf. Lacey, *supra* note 40, at 14 (Punishment can only be legitimate in the context of broader political philosophy; i.e., an unjust society with unjust laws has no moral right to punish.).

Why does one instance of an evil (criminal conduct) merit another (punishment)?⁸⁷ The mere utterance of “just deserts” is a conclusion, not an answer.

Thus a popular version of retribution finds moral purchase by conceiving of the concept of retribution not as allocating “desert,” but as a mechanism to ensure “proportionality” in punishment⁸⁸; that is, the punishment should fit the crime. The offender will suffer, but retribution as a principle sets the total range (top to bottom) of suffering options the society will endorse⁸⁹ and guides the ranking of the particular crime vis-à-vis others within that range.⁹⁰

But when I look at Carlos, who has violated a ban notice and as a result is a trespasser when trying to sleep in a public park, or at Nina, drunk, loudly babbling, begging for a few quarters, I am at a loss to feel any sense of retributive intuition.⁹¹ It’s not simply that, like some other commentators,⁹² I have no idea how to rank what they have done compared with, for example, negligent driving. It’s that I cannot rank them at all. Whereas some may find fault in Nina’s or Carlos’s character (a position many would emphatically contest), we do not punish people for who they *are*; we punish them for what they *do*.⁹³ Looking at Carlos sleeping in the park with his ban notice crumpled in his pocket, or at Nina on the sidewalk, drunk, weird, and unpleasant—looking at what they did—I can find no moral analogy, no sense of moral wrong.⁹⁴ Sleeping in the park or begging simply leave me with

87. *Id.* at 21, 22.

88. See Barak et al., *supra* note 40, at 203 (“Just deserts” refers to “the proportional punishment deserved for the harm inflicted.”).

89. See Robinson, *Distributive Principles*, *supra* note 73, at 156.

90. *Id.* at 141.

91. Professor Robinson distinguishes the philosopher’s sense of desert, which he terms “deontological desert,” from a community’s intuitions of desert, which he terms “empirical desert.” Robinson, *Distributive Principles*, *supra* note 73, at 138, 139. For an analysis of each of the conception’s merits and drawbacks, see *id.* at 229–30.

92. Professor Lacey perceived the same general difficulty with the ranking theory. See Lacey, *supra* note 40, at 21.

93. See Joel Feinberg, *Doing & Deserving: Essays in the Theory of Responsibility* 116–17 (1970). But see Lacey, *supra* note 40, at 66–67, 76–77 (who would punish for “disposition” reflected by a willingness to violate society’s fundamental norms with an attitude of “hostility” toward these norms).

94. Bemoaning what he terms “overcriminalization,” Professor Kadish notes the costs—economic, moral, bad police practices—from using the criminal law to enforce social morality (as with prostitution). See Stanford H. Kadish, *Blame and Punishment: Essays in the Criminal Law* 21–36 (1987). Cf. Lacey, *supra* note 40, at 100 (Society should apply the criminal law only to instances of “real threat” to society’s “fundamental values.”).

no feeling even remotely related to indignation or condemnation. Trying to articulate retribution/just deserts as focusing on proportionality of punishment among criminal offenses simply does not seem to have any connection to these crimes of misery.⁹⁵

More recently, a theory of retribution based on the notion of “mutual political obligation” has emerged.⁹⁶ Through the criminal law we mutually agree not to engage in certain behaviors, though sometimes it might be to my individual advantage to engage in such conduct. I defer to the law, knowing that you will also do so in instances when violating the law would be to your advantage. In this system, therefore, we cannot tolerate those who take advantage through violating the law while the rest defer taking such advantage.⁹⁷ Punishment returns this system of mutual obligation to “equilibrium,” thereby both assuring the rest of us that we have not been suckers for following the law, and avoiding a loss of confidence in the community’s willingness to enforce its criminal prohibitions.⁹⁸

I think this theory reflects a valid insight into the fragility of the social fabric. If it is wildly believed that many people are getting away with cheating on their taxes, I would expect that behavior to increase.⁹⁹ But, this theory does

95. Actually, the consequences of conviction for crimes of misery are extreme and vastly disproportionate to the offense. Conviction of, e.g., disorderly conduct laws can result in losing eligibility for public housing, deportation, and suspension of college student aid. See Robert C. Boruchowitz, Malia N. Brink, & Maureen Dimino, *Minor Crimes, Massive Waste: The terrible toll of America’s Broken Misdemeanor Courts* 34 (2009). Whereas Nina, Ed, and Carlos may not be likely to suffer these consequences (except perhaps deportation), others living at a little bit higher level of poverty well may, making it even more difficult for them to become self-sufficient. See *Homes Not Handcuffs*, *supra* note 1, at 11.

96. See Lacey, *supra* note 40, at 22.

97. See Herbert Morris, *On Guilt and Innocence: Essays in Legal Philosophy and moral Psychology* 24 (1976); Fletcher, *supra* note 84, at 417; Lacey, *supra* note 40, at 23.

98. See Lacey, *supra* note 40, at 183; David Garland, *Punishment and Modern Society: A Study in Social Theory* 42 (1990). (For Emile Durkheim, punishment ensures that once a moral order is established, it will not be destroyed by individual acts that “rob others of their confidence in authority.”). Professor Garvey has noted that even if there is no victim, but the action “risks harm” (e.g., driving while intoxicated), the defendant has shown contempt for law: “While the rest of us play by the rules, the offender behaves as if he is above them, free to do as he wishes.” Stephen P. Garvey, *Restorative Justice, Punishment, and Atonement*, 2003 Utah L. Rev. 303, 306–307 (2003). To characterize the crimes of misery as engendering the risk of harm envisioned by Garvey, however, would require an ingenious torturing of the English language.

99. Some studies have shown a strong correlation between obedience to law and perception of others’ behaviors and attitudes. See Kahan, *supra* note 68, at 354 n.18.

not make sense when applied to crimes of misery. I don't want to beg, aggressively or otherwise. I don't want to be forced to have to urinate in public. I don't want that life. It's hard for me to consider that if we failed to punish those committing crimes of misery, we'd in any sense think of Carlos or Ed or Nina as having gotten away with anything.

Again, take Nina's crime of urinating in public as an example. Nina urinated in public, not to make a symbolic statement or to offend others, but because she desperately had to piss. The choice was to piss all over herself (without benefit of a bathroom to immediately go to and shower, and clean clothes to change into), or to find a spot to urinate. There are almost no public bathrooms in America's urban downtowns, and almost all the commercial spaces have signs saying "restrooms for customers only." One really doesn't have to wonder who those signs are directed at. I've certainly been in Nina's situation, but I just walked past those signs and straight to the washroom. No one was going to stop me. I'm middle class and look it. I might be a customer, if not today then another time. Anyway, customer or not, there's class recognition and with it class-based courtesy. Not so for Nina. She'd have been tossed out as soon as she walked through the door. If she protested, the police would have been summoned.

Nor can the crimes of misery be justified under any other theory of retribution, including contract theories,¹⁰⁰ theories of equal human

100. The legitimacy of retribution has often been tied to a contract theory, entered into by rational individuals capable of calculating costs and consequences. The notion that punishment is justified under a breach of social contract theory first arose in the Enlightenment and was espoused by Beccaria and Bentham. See Barak et al., *supra* note 40, at 97. This version of retribution thus bears a distinctly mercantile sense. See Morris, *supra* note 97, at 91; Feinberg, *Moral Limits*, *supra* note 75, at 159, 263. You violate the contract, you "must pay your debt." See Morris, *supra* note 97, at 91.

Putting aside that the social contract notion is a fictional device used by philosophers to justify various forms of social institutions—see, e.g., John Rawls, *A Theory of Justice* (1971) (Author employs the social contract as a conceptual device for establishing the legitimacy of liberal democratic social institutions.)—to whom does Nina "owe a debt" for pissing in the entrance of an alley, or Ed for aggressive begging? See Feinberg, *Moral Limits*, *supra* note 75, at 159. To society will be the response; in punishment, Nina and Ed "pay their debt to society," expiate their guilt, and emerge with a clean slate. *Id.* at 161. But why would any person in Nina's or Ed's position feel any guilt for their behavior that requires expiation?

Lastly, the entire contract theory of retribution presupposes a rational decision maker, carefully calculating costs and benefits. This is hardly how one would fairly characterize the targets of these crimes of misery: homeless, mentally ill, chronic alcoholic or substance abusers. See Robinson, *Distributive Principles*, *supra* note 73, at 48; see also Dripps, *supra* note 86, at 413.

worth,¹⁰¹ the anti-impunity principle,¹⁰² or the “state self-defense theory.”¹⁰³

Most public order crime can best be described as behavior deemed socially disruptive that is committed by individuals who are powerless, poverty stricken, and caught in a web of addiction and life problems. Jacqueline B. Helfgott, *Criminal Behavior: Theories, Typologies, and Criminal Justice* 317–18 (2008).

101. Yet another retributive theory focuses on the equal worth of all human beings. See Murphy & Hampton, *supra* note 77, at 125. This theory is based on Kantian conceptions of the person. For Kant, by virtue of their reason, all humans had equal worth: as a rational being, a person “must be treated never as a mere means but as the supreme limiting condition on all means; i.e., an end at the same time.” Immanuel Kant, *Foundations of the Metaphysics of Morals* 63–64 (Lewis White Beck trans., 1969). We punish you because you failed to respect the equal value of another person. By treating them as a means to your ends, you have in effect decreed yourself as having more worth than the other person. Punishment thus is a means to vindicate the worth of the victim, not diminish the worth of the offender. *Id.* at 125, 137.

If you’re talking about taking someone’s wallet at gunpoint, this notion makes sense. But the crimes of misery are all committed from a completely subordinate position by people perceived by society as having lesser worth in a social sense. Can one really contend that by following someone down the sidewalk pleading for spare change, Ed the beggar, the supplicant, has treated the person with the wallet stuffed with money as being of lesser value than himself?

102. In yet another iteration, retribution has been given a pragmatic, nonjudgmental framework in the form of the “anti-impunity principle.” See Gross, *supra* note 82, at 400–1. We have criminal laws. If violating them incurs no consequence, only the most virtuous (and those who fear private retaliation) will obey the laws. *Id.* at 401.

Although as a generality the anti-impunity principle seems correct, like most generalities it is overstated. In the first place, we do not expect or even desire that police enforce all laws all the time. See Kenneth Culp Davis, *Police Discretion* 166 (1975) (“Full enforcement [of criminal laws on the books] is both impossible and undesirable.”). See also *id.*, at 62, 86–87.

In the second place, one can not seriously contend that if we fail to punish the alcoholic, mentally ill, desperately poor and homeless for violations of these crimes of misery, we will all come to feel that we do not take our laws seriously, and that we can no longer trust the community to protect us against those who would violate our criminal laws. No one cares whether Ed or Nina is punished. We just want them somewhere else, where we do not have to see or interact with them. If they drink, dope, and urinate in some poor portion of town where the affluent and tourists never go, fine. “Many of those measures [i.e., crimes of misery] appear to have the purpose of moving homeless people out of sight, or even out of a given city.” Homes Not Handcuffs, *supra* note 1, at 9.

103. Finally, Professor Dan Markel has justified retribution through the achievement of “internal goods,” including being a means to serve “the state self-defense mechanism against the illegitimate usurpation of political power by a criminal.” Markel, *supra* note 74, at 2165; see also 2199–201.

According to Markel: “The state is the appropriate agent of retribution because the crime, even if it is ‘victimless,’ is a rebellion against the government’s rule-making authority. . . . On

II. GENERAL DETERRENCE¹⁰⁴

Rejecting retribution as a proper grounds for punishment, the great legal philosopher H.L.A. Hart believed that “social protection” was the only valid basis for punishment.¹⁰⁵ To this he added “fairness” as a side constraint on punishment to ensure that the factually innocent and those with excuses that were in effect “I could not help it” (mistake, duress, insanity, self-defense) would not be used as instruments to the ends of protecting society.¹⁰⁶ In Hart’s model, the actual distribution of punishment to a particular offending individual then became an instrumental matter in which even the overarching justification of deterrence might or might not be appropriate in the particular case.¹⁰⁷

this understanding, every crime is fundamentally an act of political rebellion and punishments serve as measures of war against those rebellions.” *Id.* at 2200–1 (footnotes omitted). Here, Professor Markel offers a valuable insight as he envisions the criminal as not merely an outlaw or deviant, but as a political actor unilaterally asserting the power to redefine the contours of the space circumscribing her permissible conduct in society that had previously been allocated by the constituted government. His rhetorical moves equating criminality with “usurpation” of legitimate power (by which the criminal can be seen as *de facto* vetoing legitimate legislation by her actions) and “rebellion” (by which the criminal can be seen as openly challenging the authority of constituted government over her) brings home the point. And truly, one only need look at accounts of the literal warfare on the streets between criminal drug gangs and Mexican police. See, e.g., Nick Valencia, *Drug traffickers, Mexican police battle within yards of U.S. border*, CNN.com (August 21, 2010); *Bodies from Mexico’s drug war cram morgues; dead literally pile up as cartels battle police, one another*, Grand Rapids Press (Mich.), A-8 (Nation/World), (Sunday, March 15, 2009) to appreciate the full implication of what he has written. Yet, when applied to the crimes of misery, the notions of usurpation of power and rebellion completely lose their force. These acts reflect degradation, not rebellion.

104. In deterrence, individuals are, contrary to Kantian principles, used as a *means*: “The state’s role in punishing, in the general deterrence theory, is to reduce certain unwanted and economically reducible forms of behavior: individuals may be sacrificed to this dominant purpose.” Lacey, *supra* note 40, at 29. Under Professor Lacey’s communitarian theory of punishment, however, the use of punishment for a general deterrence is far less in conflict with Kant: “Thus the recurring and fundamental preoccupation within the Kantian strand of liberal theorizing about punishment—that individuals should never be sacrificed to diffuse social goals—seems to present us with something of a false dilemma. For if individuals have a fundamental interest in the maintenance and development of a peaceful, just society to which they belong and through which their personal development and many of their interests are realized and indeed constructed, the alleged moral boundaries which dictate that individuals never be used as merely a means to social ends begin to dissolve.” *Id.* at 172–73.

105. Cited in Fletcher, *supra* note 84, at 418–19, 419 n.29; and Lacey, *supra* note 40, at 47.

106. Cited in Lacey, *supra* note 40, at 47.

107. Cited in Fletcher, *supra* note 84, at 419.

In response to Hart's conception, there appears a fairly widespread belief that in fact punishment or the threat of punishment does not really deter future criminality.¹⁰⁸ After all, it would seem that no one among those who everyday commit crimes in America was deterred.¹⁰⁹ Rather, the prevailing view is that the deterrent effect of the criminal law cannot be equated with the brute threat of its explicit sanction. Putting aside juvenile "thrill" shoplifting, where the very illegality of the act creates the lure and excitement of the behavior,¹¹⁰ or stealing a street sign when in college as the participants redefine the meaning of the conduct as not criminal but as a tension-filled "prank," most of us simply do not violate the criminal law. The very existence of that body of law plays a central role in our law-abiding behavior, but not in some simplistic cause-and-effect model where threat of punishment is the cause and law-abiding behavior the effect. Rather, many academics perceive the criminal law as central to a values-inculcating process where the law expresses the limits of aberrational behavior that our individualistic and autonomy-valuing society¹¹¹ will tolerate and, as such, functions as a powerful social institution for communicating blame toward those who exceed these limits on their behavior.¹¹² In conjunction with other values-enforcing

108. See Robinson, *Distributive Principles*, *supra* note 73, at 22, 71.

109. On the other hand, deterrence often functions through institutions outside of, but interacting with, the criminal law. In the realm of driving offenses (other than driving while intoxicated and vehicular homicide), as most of us are aware, automobile insurance provides a significant constraint on driving behavior with the threat of raised premiums, policy cancellation, and reference to high-risk driving pools. In this, the criminal law plays a role by providing the traffic tickets that trigger consequences in the insurance realm. (Of course, the desire not to have to pay significant traffic fines, as well as not wishing to hurt others, ourselves, or our vehicles also play in the mix.)

110. See Jack Katz, *Seduction of Crime: Moral and Sensual Attractions in Doing Evil* 52, 78 (1988); Mercier L. Sullivan, *Getting Paid* 116 (1989) ("the relative emphasis on thrills versus economic gain did vary among individuals and neighborhoods, but some mixture of the two characterized most early explorations of economic crime.").

111. For a detailed explanation of "autonomy as sovereignty" in assessing the limits of the criminal law, see Feinberg, *Moral Limits*, *supra* note 75.

112. "Our important collective institution for teaching through blaming is the criminal law." Louis Michael Seidman, *Soldiers, Martyrs, and Criminals: Utilitarian Theory and the Problem of Crime Control*, 94 *Yale L.J.* 315, 336 (1984). Professor Robinson has a more circumscribed view of the teaching power of the criminal law: "Criminal law's influence comes from its operation as a societal mechanism through which the force of social norms is realized and by which the force of internal moral principles is strengthened. *That is, the law has little independent force, in the way that social group norms and internalized norms do.* It has power to the extent that it can amplify, sustain, and shape these two power sources, and it has power to the extent that it influences what the social

institutions,¹¹³ such as family, school, and religion, the criminal law achieves general enforcement through our individual internalization of the values¹¹⁴ it propounds and threatens to enforce with coercive force.

As a general proposition, I find this notion that we self-police through internalization of a set of values a useful one. Thus, in some broad sense most people do not steal or kill, not so much out of fear of punishment as out of a moral sense that such conduct is wrong and that we do not want to do wrong. On the one hand, the existence of particular punishments for particular crimes correlates with and reinforces our intuitive sense of the magnitude of wrongness of what the criminal did. On the other hand, the existence of an overall system of punishment reinforces the basic value that one should not violate the law; that is, that violating the criminal law is wrong by definition simply because it is the law.¹¹⁵ Further, people fear informal social sanctions that might accompany being caught in law-breaching activity.¹¹⁶

But why would Nina, Ed, or Carlos have any such reactions to committing crimes of misery? For them and their peers on the streets, surviving physically and psychologically is what each day is about. They have not made some decision to engage in criminality as a path in their life, like a drug dealer, thief, embezzler, or insider-trader. All they're doing is existing—sleeping, drinking, going to the bathroom, seeking enough money to avoid starving.¹¹⁷

group thinks and what its members internalize.” Paul H. Robinson, *Why Does the Criminal Law Care What the Layperson Thinks Is Just? Coercive Versus Normative Crime Control*, 86 Va. L. Rev. 1839, 1863–64 (2000) (emphasis added).

The criminal law, however, can “nurture norms” in interaction with the wider society (such as with our current attitudes toward domestic violence and driving while intoxicated). *Id.* at 1868. See also Robinson, *Distributive Principles*, *supra* note 73, at 96.

113. See Lacey, *supra* note 40, at 92, 100.

114. See Seidman, *supra* note 112, at 334–36; Robinson, *Why Does the Criminal Law Care?*, *supra* note 112, at 1840, 1863.

115. See Green, *supra* note 59, at 1581, 1591, 1593–94; Dubber, *Policing Possession*, *supra* note 25, at 849–850.

116. See Robinson, *supra* note 112, at 1861–62: “More than because of the threat of legal punishment, people obey the law because they fear the disapproval of their social group if they violate the law, and because they generally see themselves as moral beings who want to do the right thing as they perceive it. . . . Three classes of ‘informal sanctions’ are usually identified and can be incurred when one’s group judges that one has transgressed: ‘commitment costs,’ in which past accomplishments are in jeopardy; ‘attachment costs,’ involving the loss of valued relationships with others; and ‘stigma,’ or discredit in the eyes of others.”

117. See Beckett & Herbert, *supra* note 15, at 9 (“Regardless of their intent, these laws undoubtedly have the effect of criminalizing common behaviors such as drinking, sleeping, and

It's just that in the context of their deplorable situation on the streets, society has chosen to criminalize for them what is normal behavior for the rest of us. What set of internalized values, self-conception, or desire for peer approval would lead someone to the conclusion that they are not entitled to survive?¹¹⁸

Finally, even looking at crimes of misery through the lens of classic deterrence theory, where threat of punishment directly discourages engagement in crime, punishment for the crimes of misery cannot be justified. Deterrence can only be successful if three conditions are met: (1) would-be offenders know about the law; (2) would-be offenders are rational decision makers; (3) there must be an immediacy to the threat of punishment.¹¹⁹ (And the last is significantly discounted if the risk of being caught, charged, and punished is relatively low¹²⁰ and/or the process that ends in punishment appears far into the future.¹²¹)

People such as Nina or Carlos likely know about the criminal ordinances that affect them from regular encounters with police on the streets, and information from peers on the streets, conversations in shelters, and such. Rational decision making is another matter; there are two ways to look at this second factor in the deterrence calculus.

First, the population of drug addicts, mentally ill, and chronic alcoholics who comprise many of those targeted by crimes of misery cannot be comfortably categorized as rational decision makers.¹²² (At minimum, all have very high discount rates as to the risk of the future consequences of running afoul of the criminal law.¹²³) Decision making, moreover, is often not solely an individual matter. Thus, an individual's view of whether or not a particular decision is rational can be strongly affected by peer group response to a

urinating when those behaviors occur in public spaces, and therefore have a disproportionate impact on the homeless. . . ."). See also, *Homes Not Handcuffs*, *supra* note 1, at 9 ("Even though most cities do not provide enough affordable housing, shelter space, and food to meet the need, many cities use the criminal justice system to punish people living in the street for doing things that they need to do to survive.").

118. Public order crimes like the crimes of misery do not appear to escalate over time to more serious criminal behavior. See Helfgott, *supra* note 100, at 288.

119. See Robinson, *Distributive Principles*, *supra* note 73, at 22.

120. *Id.* at 22. It is generally believed that a threat of a high punishment with low certainty of being caught, charged, or convicted has less deterrent impact than a lower penalty with high certainty of apprehension and conviction. See Kahan, *supra* note 68, at 378–79.

121. See Robinson, *Distributive Principles*, *supra* note 73, at 22.

122. *Id.* at 28.

123. *Id.* at 48.

situation.¹²⁴ Nina and Carlos spend their lives on the streets surrounded by such a peer group. As to crimes of misery, those on the streets all are in the same boat. Again, we are not dealing with some criminal subculture; those on the streets are all just trying to live their lives under the most wretched of circumstances. They're doing what they have to do, or are capable of doing. (I can imagine, on the other hand, that if the behavior of, for example, an extremely aggressive panhandler led the police to hassle other panhandlers,¹²⁵ the street community might voice their displeasure at the offending individual.)

Second, instead of merely assuming from the start that this population cannot be considered rational decision makers, perhaps we might try to define what is rational decision making for a destitute, chronic alcoholic beggar. Certainly, the panhandlers might avoid the police and the threats of crimes of misery if they moved away from the business and commercial areas where the police focus their concern¹²⁶; but how "rational" would that be? To leave that area, they'd have to leave the area with significant pedestrian traffic by people who have small amounts of money they can give away. They would also have to leave their community, companionship and friendship, and go off where they're lonely and, being more isolated, far more physically vulnerable. Those on the streets are extremely vulnerable, particularly when intoxicated, drugged, and/or mentally ill. They thus become the victims of, generally not

124. *Id.* at 30.

125. The police have the power to approach anyone (whether arguing, lying on the sidewalk, or just waiting for a bus) without violating the Fourth Amendment, so long as the interaction is noncoercive, such that a reasonable citizen would "feel free to leave [or decline interaction]". See, e.g., *Florida v. Rodriguez*, 469 U.S. 1, 5–6, 105 S. Ct. 308, 311 (1984) ("The initial encounter between the officers and respondent, where they simply asked if he would step aside and talk to them, was clearly the sort of conversational encounter that implicates no Fourth Amendment interest.").

126. See Beckett & Herbert, *supra* note 15, at 8, 9, 17. See also, Timothy A. Gibson, *Securing the Spectacular City: The Politics of Revitalization and Homelessness in Downtown Seattle* 155 (2004) ("Accordingly, this elite concern over the corrosive effect of visible poverty on the 'street atmosphere' of newly revitalized districts has inspired many American city governments to pursue a more coercive approach to homelessness, whereby the homeless are more aggressively policed in the name of restoring civility to key urban spaces."); Lily E. Hirsh, *Weaponizing Classical Music: Crime Prevention and Symbolic Power in the Age of Repetition*, 19 *J. Pop Music Studies* 342, 354 (2007); Gibson, *supra* at 161 (footnote omitted): "Within this new expanded 'zone of exclusion' . . . , the desire to create attractive, socially homogenous public spaces for the middle- and upper-class [New York City] residents, merchants, and tourists, outweighed the interests of the homeless and recently displaced evictees who were often told to 'move along.'"

other homeless people, but “the bottom-feeders of the criminal predator food chain,” criminals who would “hit some homeless person over the head with a lead pipe to steal a few bucks and maybe his jacket. . . . [while] women on the street are very commonly raped by the same scum.”¹²⁷ Finally, they’d have to leave the very area where most of the social service agencies and providers are located.¹²⁸

They of course could stop “self-medicating” with alcohol or drugs to get through depression, more severe mental illness, or physical pain in a world in which we provide woefully insufficient mental health and social services—that is, if you believe alcoholics and drug addicts on the streets can just stop.¹²⁹

Thus given the realistic range of choices, the behavior of those who are the targets of these crimes of misery hardly appears irrational.

As to the third factor in the deterrence calculus, immediacy of punishment, the intervention of police with those on the streets is fairly regular. But what’s really at stake for our impoverished citizen? Likely, they’ll just be told to stop what they are doing or to move on.¹³⁰ If arrested and charged, they’ll spend a few days in jail,¹³¹ plead guilty at their first court appearance, and be sentenced to “time served” (although repeat offenses could result in a sentence of weeks in jail). This addition to Ed’s or Nina’s criminal record, moreover, will be meaningless in their lives—merely a notation documenting their powerlessness and extreme marginality in the society.

Finally, while I’d never say that most would not prefer the freedom of even the impoverished streets to confinement of jail, the difference between a few

127. Interview with Harris, *supra* note 44. See also, interview with Seattle Police, *supra* note 42.

128. See Homes Not Handcuffs, *supra* note 1, at 34.

129. On April 10, 2010, the author interviewed licensed psychologist Ruby Takushi, Ph.D. Dr. Takushi is the Director of Programs at Recovery Café in Seattle, Washington, www.recoverycafe.org (notes on file with author). According to Dr. Takushi, it is “very unlikely” that an addict or alcoholic living on the streets could stop using by themselves. Such a thing may be possible for one surrounded by support structures such as family and work, but people on the streets who are substance dependant are there because they have exhausted the usual resiliency network and therefore cannot stop without help. The task is even more impossible given that on the streets they are surrounded by people trying to sell them drugs or alcohol.

130. If they’re an alcoholic or drug addict who is, e.g., overdosing, they will be taken to detox or a hospital emergency room. See interview with Jackson, *supra* note 44.

131. For the working poor, on the other hand, a few days in jail can mean loss of job and resulting economic devastation. See interview with Jackson, *supra* note 44; interview with Harris, *supra* note 44.

days in jail or on the streets does not reflect the dramatic change in lifestyle that it would for the truly autonomous lives of the affluent. In fact, in harsh winter weather, some homeless people prefer jail with its “three hots and a cot” to the fight for survival on the freezing streets.¹³² (On the other hand, for a junkie or chronic alcoholic, the thought of the harsh withdrawal that will inevitably accompany any incarceration may well provide a genuine source of fear.)

III. SPECIFIC DETERRENCE¹³³

The notion here is that once punished, the offender will have learned her lesson and thereafter walk the straight and narrow. The offender has suffered firsthand the unpleasantness of criminal sanctions and no doubt realizes that the next encounter with the criminal courts will likely be worse, as the judge will see the reoffender as having “thumbed their nose”¹³⁴ at the court by re-engaging in criminal conduct. Speeding tickets also offer a good example of specific deterrence in action. Most of us who drive probably speed on a regular basis. If we get a speeding ticket, however, most of us think we’ve used up our quota of luck, and for quite a while afterward our speedometer will rest on 55 in a 55-mph zone.

But what does any of this mean if the crime is among the suite comprising the crimes of misery? What lesson is Nina, or Ed, or Carlos to learn from any encounter with the criminal courts? There is no real lesson for them to learn except that they are powerless and that for them, the police are the justice system, whether arbitrary, fair, or acting based on the officer’s own private set of rules and standards.¹³⁵

The view of the police expressed by the several dozen homeless individuals interviewed for this article¹³⁶ was of course more varied and particularized than this overarching generalization. All agreed with the common cultural wisdom that you don’t “lip-off” to the police. Thus, if police see a group of homeless individuals sleeping in an urban park in violation of a local

132. See interview with Jackson, *supra* note 44.

133. See Fletcher, *supra* note 84, at 414.

134. “By committing an offense after a previous conviction, an offender might be seen as ‘thumbing his nose.’” Robinson, *Distributive Principles*, *supra* note 73, at 32.

135. Kadish, *supra* note 94, at 32.

136. See interview with homeless men and woman, *supra* note 43, at 32.

ordinance, or a similar grouping on a street corner in an area known for drugs and prostitution, they will approach the group and ask for identification (name and birth date), which they will then run through a computer for warrants. Anyone who has warrants will be arrested; those without warrants will be dispersed one at a time—unless someone mouths off. That person will be told to shut up, and if they persist will be arrested. There was a stark division, however, between how white individuals and individuals of color responded to the question, “If you’re just sitting on the sidewalk minding your own business, will the police ignore you?” Without exception, all the white people I interviewed said that, so long as they didn’t lip-off to the police, they’d be left alone; without exception, persons of color interviewed said the police would tell them to move away (particularly if they were in a tourist area during tourist season). If they talked back they’d face arrest. “Like if I’d stand next to that big office building on Third and light up a cigarette, the police would say, ‘Get your black ass out of here—there’s no smoking.’ If I pointed out that there weren’t any no smoking signs anywhere, they’d come towards me, and if I opened my mouth again instead of putting out my cigarette and starting to walk away, I’d be arrested.” One man I interviewed stated unequivocally that the police were only part of a system of controlling and keeping track of the homeless. The shelters, which kept a computer database on when a homeless person entered and left a shelter each day they stayed there, also played a part in this system.¹³⁷

For police engaging with the homeless on the urban streets, on the other hand, the question was one of how best to exercise their discretion¹³⁸ when interacting with the homeless. How are factors of time, place, manner, and circumstances¹³⁹ to be applied in the field? I cannot assert that the Seattle Police officers I interviewed¹⁴⁰ serve as proxies for all police in America’s large cities. Yet I believe that there are sufficient similarities in the circumstances in

137. What was most remarkable about this statement is that it exactly paralleled the theory of Michael Foucault. Foucault perceived punishment as part of a system of “societal power and control.” See Garland, *supra* note 98, at 137. He saw no moral content in the endeavor of punishment, but rather saw it as one of the many power relationships throughout the society, *id.* at 138, with prison demonstrating the ultimate system of techniques for surveilling and controlling populations. *Id.* at 151, 153.

138. See Livingstone, *supra* note 13, at 588–89; George L. Kelling, “Broken Windows and Police Discretion,” National Institute of Justice Research Report 1-3 (October 1999).

139. See Kelling, *supra* note 138, at 35.

140. See interview with Seattle Police, *supra* note 42.

which they work that their views are instructive for this analysis of the crimes of misery. Not surprisingly, the officers saw their interaction with those on the streets differently than did the homeless to whom I spoke. For the police, it was about “behaviors,” not the fact that a landscape filled with homeless beggars in the downtown area was aesthetically unappealing to the affluent. If the homeless merely sat next to sidewalks holding signs asking for money, the police had no problem with them. Urinating in public, public drinking, aggressive panhandling were different matters. In some alleys the urine had soaked into the masonry, so part of the buildings would have to be torn down to get rid of the smell. (On the other hand, the police recognized that given the lack of public bathrooms, many in the streets had no choice. As a result, the police captain I interviewed, who was supervisor of the precinct patrolling the downtown, has been lobbying community groups to seek expert consultants on the creation and management of public restrooms.)

To the police, public drinking and aggressive panhandling make people feel the area is unpleasant and unsafe. In the commercial core, this means loss of revenues and the gradual decline of a previously vital urban core as people become less willing to go into the area. How police deal with violators is the function of a mixture of individual officer discretion and policies announced by the police supervisor for the precinct. Drinking in public is a good example. If an officer sees someone on the streets drinking alcohol, they will approach the person, talk about the law, and then, for example, ask them to go elsewhere or pour out the bottle. So long as this person has not had repeated contacts with police about public drinking, arrest will not even be on the officer’s radar. If a group is drinking, the officer will likely get information from each person for a warrant check,¹⁴¹ but if there are no warrants, again, no one will be arrested. But with summer coming and with it the tourist season, the police captain has told the officers in the precinct that there will be no public drinking in the tourist area. That means that now all officers are “educating” those on the streets about the expected standards of conduct

141. Professor Weisberg sees this type of police conduct as leading to further questions about the alleged efficacy of so-called broken windows policing, *supra* note 68. For Weisberg, the police officers’ narrative from my interview demonstrates “the blurry line between at least two of the rationalizations of broken-windows policing. Was it that public disorder, even if not especially culpable, degrades the environment so as to invite more real crime? Or that most of the low-level offenders can be grabbed in this net-widening and then we discover there are warrants against them. The Giuliani [then Mayor of New York] rationalizations always exploited this ambiguity.” Email sent September 14, 2010 (on file with author).

regarding public drinking over the summer. It also means that when summer comes, the individual officers in the tourist area will not have discretion about whether or not to arrest for drinking in public.

Generally, however, the police do not want to arrest the homeless for what I've termed crimes of misery; they know it will not change anything. But they do want laws that allow them to intervene in situations on the street. As one officer said, "The best laws are those we never have to enforce, but let us deal with situations on the street." All the police believed that enforcement was a futile strategy unless connected to effective, long-term social services. When I asked the captain if he'd like more police on the streets, he answered, "There's no police supervisor who would turn down an offer of more police, but truthfully if you offered me two more patrol officers, I'd say I'd rather have two mental health professionals instead who would work the streets with teams of police. Or several committed community members, because without a well-coordinated partnership with community and business groups, committed community members, and all the various social service providers working together, rather than seeing each other as competitors for the same scarce dollars, we cannot accomplish much."

Regardless of the nature and reality of their interaction with the police, however, people like Ed, Carlos, and Nina must remain on the streets during the day, even if that night they will stay in some shelter. One of the rules of the shelters is that people cannot stay there during the day.¹⁴² Also, given the severely inadequate number of beds for the homeless,¹⁴³ Ed and Nina will inevitably have to spend many nights on the streets. They will at times have to urinate and defecate in public because no private facilities are available to them. If they are mentally ill, their begging for a few quarters so that they can get some coffee or food may cross the line demarcating the conventions of acceptable solicitation techniques. If they are chronic alcoholics or drug addicts, they will drink and do drugs, and because of the understandable rules of most

142. Generally, people get in line to enter shelters at 6 or 7 in the evening, and must leave by 5:30 or 6 the next morning. Interview with Harris, *supra* note 44. There are shelters, however, with two "shifts"—day and night—which permits the shelter to effectively double its capacity. See interview with homeless men and women, *supra* note 43.

143. See *Homes Not Handcuffs*, *supra* note 1, at 8; *How Many People?*, *supra* note 2 (the number of homeless greatly exceed emergency shelter and transitional housing space). Tim Harris estimates that for the past twenty years in Seattle, every night one person is on the streets for every two in the shelters. See interview with Harris, *supra* note 44.

shelters not permitting drugs or alcohol,¹⁴⁴ they will be forced to stay on the streets day and night. Additionally, many who prefer the streets to the shelters are neither mentally ill nor substance abusers. Although there are a handful of “upscale” emergency shelters with mattresses and donated quilts, and a few where one can stay for years in a room with two bunk beds, the most common accommodations are quite different—a large room with thin mats on the floor, four inches away from the next person on all sides. Some cannot tolerate the claustrophobic conditions, others fear germs and resulting illness, still others choose the streets over a room permeated with strong body odor and incessant snoring.¹⁴⁵ To give up this life of crimes of misery, they would have to give up their lives.

IV. INCAPACITATION¹⁴⁶

By incarcerating offenders, we isolate them from the rest of society and thereby ensure that for that period of time they are not capable of causing harm to the rest of us.¹⁴⁷ The United States is the world leader in this technique,¹⁴⁸

144. Shelters understandably forbid the use of alcohol and drugs. That means, however, that chronic alcoholics must remain on the streets. Interview with Harris, *supra* note 44. The exception to this widely established rule in shelters is the “Wet House” where chronic alcoholics can drink and have access to supportive services. See Kevin Duchsere, *Wet House: Not Always Sober, but Safe*, *Minneapolis Star Tribune* (October 14, 2009), from startribune.com. A wet house in Seattle, Washington, has proved successful, both in terms of the well-being of the 95 residents and the economic benefits to the county. The residents “decreased their drinking after moving in. . . . Some even stopped entirely,” and the county saved over \$4 million a year in emergency social and health programs and in jail costs compared to the cost of leaving those 95 individuals on the streets. Donna Gordon Blankship, *Study: Housing homeless, letting them drink saves \$4 M a year*, *Seattle Times* (March 31, 2009), at http://seattletimes.nwsource.com/html/localnews/2008957119_webalcoholics01m.html.

145. Interview with Neal Lampi, former homeless individual and current business manager for Real Change, held on April 4, 2010, in Seattle, Washington (notes on file with author.)

146. “[A] fairly certain consequence of coercive confinement is that during the period of confinement, the offender will not pose a threat to persons outside the prison.” Fletcher, *supra* note 84, at 414.

147. As Professor Robinson has articulated, on a theoretical level, using incapacitation as a goal of punishment fundamentally conflicts with resting punishment on just deserts retribution. See Robinson, *Distributive Principles*, *supra* note 73, at 119.

148. “[E]xcept perhaps for Russia, the United States has the highest imprisonment rate of any other nation, even a number of nations without extensive democratic traditions (e.g., South Africa, Cambodia, and Poland).” Castellano & Gould, *Criminal Justice Theory*,

with a 724/100,000 rate of incarceration,¹⁴⁹ compared to Mexico with 191/100,000 rate¹⁵⁰ and China with 118/100,000 rate.¹⁵¹

When considering crimes of misery however, the traditional notion of incapacitation becomes all but meaningless. With rare exceptions, the Eds and Ninas are taken off the streets for only a few days or weeks. If arrested and charged, they will generally remain in jail until their first appearance before the judge (since they cannot make even a token bail¹⁵²), plead guilty at that first appearance to get out, be sentenced to “time served,” and sent back onto the streets to return to their street corner or concrete steps in front of some doorway. Repeat offenders may be sentenced to weeks or more,¹⁵³ but again convicting and punishing is not the point of these crimes of misery. Rather, they provide police with the power to deal with the Eds and Ninas by means “often invisible to formal legal process, since intervention often begins—and ends—with an admonition to ‘knock off’ or requests to ‘quiet down’ or ‘move along.’”¹⁵⁴ As such, police are not acting in the interests of

supra note 73, at 205–6. In fact, the United States rate of incarceration of 724 per 100,000 of population exceeds *every other nation*, including Russia (577 per 100,000), and is seven to ten times higher than most democracies.

The remarkable percentage of minorities currently incarcerated has been widely documented. See, e.g., Herbert & Brown, supra note 68, at 756 (half of the 2.3 million currently incarcerated are black or Hispanic); Todd D. Minton & William J. Sabol, Jail Inmates at Midyear 2008—Statistical Tables, Bureau of Justice Statistics 5, 9 (March, 2009) (of 785,556 jail inmates at midyear 2008, 333,000 were white (42.4%), 308,000 black (39.2%), and 128,500 Hispanic/Latino (16.4%)); Timothy Harris, System Change or Direct Real Change Vendor Support? Real Change 2 (July 8–14, 2009) (“... one in three black men, 20 to 29 years old, is under correctional supervision on control.”)

149. Id. at 206.

150. Id.

151. Id.

152. The following story is reported in Boruchowitz et al., supra note 95, at 33: “A Philadelphia defender reported that they have a chronic problem with homeless and/or poverty-stricken individuals who remain in custody on minor misdemeanor charges such as public urination or disorderly conduct because they cannot pay bail amounts as low as \$100. When they finally get an opportunity to appear in court, they all plead guilty to time served, which by then is frequently longer than they would have served if found guilty of the offense.”

153. See interview with Jackson, supra note 44.

154. See Livingston, supra note 13, at 560 (footnote omitted). Some have contended that an unintended result of the United States Supreme Court’s finding the classic vagrancy laws unconstitutional, *Papachristou v. City of Jacksonville*, 405 U.S. 156 (1972), directly led to laws like the crimes of misery that returned large amounts of discretion to police in dealing with the homeless. See Beckett & Herbert, supra note 15, at 9.

law enforcement, but rather are enforcing their own view of “relative tranquility and order on the streets.”¹⁵⁵

On the other hand, to the extent the intervention of the criminal law forces Ed, Nina, or Carlos to move away from the downtown business area, one could perhaps consider them functionally incapacitated; that is, we don’t care what they do so long as they are voluntarily or involuntarily removed and excluded from geographical spaces where commerce is done and the nonimpoverished visit and reside. As the following analysis demonstrates, however, any such movement of the homeless out of the downtown and tourist areas ultimately would not constitute what could legitimately be considered the philosophical justification for punishment of incapacitation.

Whereas incapacitation usually envisions some form of confinement that makes the offender physically unable to harm the public, forcing the homeless from the streets of urban commercial and residential downtowns and tourist areas would have a comparable effect. As such, the implementation of the crimes of misery would appear to comport with the theoretical description of modern criminal law and policing proposed by Markus Dirk Dubber. For Dubber, the modern criminal law is about neither persons nor victims.¹⁵⁶ It is not even about actual harms.¹⁵⁷ Rather it is about preventing (not punishing) harms by focusing on “threats.”¹⁵⁸

Policing human threats is different from punishing persons. A police regime doesn’t punish. It seeks to eliminate threats if possible, and to minimize them if necessary. Instead of punishing, a police regime disposes. It resembles environmental regulations of hazardous waste more than it does the criminal law of punishment. [footnote omitted]¹⁵⁹

Threats thus become the harm,¹⁶⁰ thereby allowing the government to enter as soon as possible to obviate the risk that the feared harm will ever

For a thought-provoking article that convincingly demonstrates how possession offenses have replaced vagrancy “as the sweep offense of choice,” but with far more serious consequences for the offender. see Dubber, *Policing Possession*, *supra* note 25, at 836.

155. See Livingston, *supra* note 13, at 589 (footnote omitted).

156. Dubber, *Policing Possession*, *supra* note 25, at 849–53.

157. *Id.* at 834.

158. *Id.* at 839.

159. *Id.* at 833.

160. *Id.* at 834.

come to pass.¹⁶¹ What follows is a highly risk-averse criminal law in which the only concern is protecting the community¹⁶² (or the state in guise of protecting the community)¹⁶³ against any threat (human, animal, or natural).

During the nineteenth century it was the individual interest which held the stage; the criminal law machinery was overburdened with innumerable checks to prevent possible injustice to individual defendants. The scales were weighted in his favor, and, as we have found to our sorrow, the public welfare often suffered. In the twentieth century came reaction. We are thinking today more of the protection of social and public interests; and coincident with the swinging of the pendulum in the field of legal administration in this direction modern criminologists are teaching that the objective underlying correctional treatment should change from the barren aim of punishing human beings to the fruitful one of protecting social interest. [footnote omitted]¹⁶⁴

In such a criminal law regime, crimes are constructed to permit police wide discretion to identify and sort out those who are “dangerous” to the society—and thereby a threat—so that they can be incapacitated before they can do any actual harm.¹⁶⁵ For Dubber, the paradigmatic crimes for accomplishing this result, which he terms “the new and improved vagrancy,”¹⁶⁶ are the array of offenses forbidding mere possession of some object (drugs, weapons).¹⁶⁷

Many of Dubber’s marvelous insights about the operation of modern criminal law and policing surely apply to the crimes of misery. This suite of crimes has little to do with the individual defendant or any identifiable victim, and they give police the power to regularly intrude upon the daily lives of the homeless on the streets (because the crimes describe inevitable aspects of the lives of those left to live on the streets). But the crimes of misery also diverge from Dubber’s threat/incapacitation theory.

In some fundamental sense, the crimes of misery are only coincidental to those harms threatened by the homeless in the streets that I’ve already discussed (fear for safety, aesthetic discomfort, harm to businesses, and lowered property values, etc.). Begging, sleeping in parks, sitting on sidewalks, or

161. *Id.* at 834, 838, 852.

162. *Id.* at 851, 852.

163. *Id.* at 970.

164. *Id.* at 851–52.

165. *Id.* at 844, 917–18.

166. *Id.* at 831.

167. *Id.* at 914–15.

lying on benches are not really “threats” in Dubber’s sense that these violations provide a vague indicia of some vague, feared future harm. The homeless person who, exhausted, lies down on a bus bench is not “dangerous” in the sense that we can in any way infer from their forbidden nap on the bus bench that they might then commit some other crime engendering the harm we fear.¹⁶⁸ In other words, the illegal possession of a sawed-off shotgun or machine gun might make a highly risk-averse society see the possessor of these illegal armaments as a threat to someday carry out the feared harm (robbing a bank, killing someone in a drive-by shooting). But from sleeping on a bus bench, panhandling, urinating in some alley, all we can infer is that the person is likely homeless. The harms do not result from commission of the crimes of misery. Rather the threat and harm are one in the same: The harm results from the very presence of the homeless in particular geographical areas.

There are crimes, such as public intoxication and burglary, the criminality of which in part involves a particular geographical location—being “in public” for the former, and “while entering a dwelling” for the latter. Unlike the crimes of misery, however, these geographical locations are among the elements of these offenses. Moving the homeless out of the downtown and tourist areas to some marginalized area of the city does not prevent commission of the crimes of misery. In fact, other than panhandling (which is not likely to be effective in a poor area), the commission of the other crimes of misery will go unabated or likely increase in frequency for those homeless who have been removed from the location of shelters and support services.¹⁶⁹

Court orders that convicted defendants stay out of areas of prostitution (SOPA orders)¹⁷⁰ or stay out of areas where drugs are sold (SODA orders)¹⁷¹ superficially provide some analogy.¹⁷² Both my hypothetical conception of employing the crimes of misery to move the homeless out of downtown and tourist areas where their very presence causes harm, and forcing prostitutes

168. In contrast, although vague and overbroad, vagrancy laws plainly trapped real criminals within their net, as among those loitering for no apparent reason were street criminals staking out a robbery, waiting for the opportunity to snatch a purse or shoplift, and such.

169. See, *infra*, note 128.

170. See Gordon Hill, *The Use of Preexisting Exclusionary Zones as Probationary Conditions for Prostitution Offenses: A Call for the Sincere Application of Heightened Scrutiny*, 28 *Seattle U.L. Rev.* 173, 175 (2004).

171. *Id.* at 191.

172. “[T]he goal of SOPA orders is to push prostitution out of certain neighborhoods or jurisdictions into unseen corners of our community.” *Id.* at 206.

and drug users to stay out of areas of prostitution and drug sales, respectively, both involve geographical limitations¹⁷³ to protect society from threats of harm. There is where the similarity ends. The SOPA and SODA orders result from formal actions by members of the judicial branch, subject to public scrutiny and appellate review. The geographical movement of the homeless through employing the crimes of misery would be accomplished by the unreviewable actions of the executive (police) in harassing the homeless on the streets to the point that they leave.¹⁷⁴

More significantly, any attempt to use the crimes of misery to relocate the homeless, while plainly geared at avoiding harms, would have nothing to do with preventing crime. The SOPA and SODA orders in theory are to reduce the incidents of those crimes by making the convicted defendant remain in geographical locations where the offender finds less temptation to commit the crime, and far less opportunity, thus making it harder to commit the crime. But again, removing the homeless from the downtown and tourist areas is not motivated by a desire to stop these crimes of misery. It's about location, location, location. Piss on all the crumbling walls you wish, sleep in all the weed filled parks you desire, so long as it's not in the downtown and tourist areas.

This is not incapacitation. We're not physically preventing the Eds and Ninas from committing crimes if we drive them to another location. And we don't really care about the crimes; they are just a way to control the homeless on the streets. As a general proposition, the homeless person committing one or more of the crimes of misery, as they inevitably will given their life situation, does no more to contribute to the aggregate harm from the impoverished homeless on the streets than an individual who looks insane, wears filthy rags, and mumbles to herself while standing on a downtown street corner holding a tattered cardboard sign politely asking for money. The harm is from the collective presence of the homeless in a particular location, not the crimes of misery.

Ultimately, the closest analogy to our desire to move the homeless out of our centers of commerce, entertainment, knowledge, and culture is banishment. Banishment is not unfamiliar in our society. On a small scale, towns used to bring those charged with vagrancy before the local magistrate, who

173. These types of geographical exclusionary orders have been challenged, at times successfully, on the grounds that they violate the constitutional right to intrastate travel. See *id.* at 183.

174. As such, the crimes of misery could be considered what have been called "sweeping offenses." See, Dubber, *Policing Possession*, *supra* note 25, at 857.

would give the defendant the choice of jail or being out of town within 24 hours.¹⁷⁵ In fact, an impulse to banishment arguably underlies Dubber's threat/harm approach to criminal law and policing.

In the communitarian approach to the question of police control, the battle lines are clearly drawn. On the one hand is the community of potential victims, the insiders. On the other hand is community of potential offenders, the outsiders. The boundaries of these communities are not fluid. One either belongs to one community or the other. And it is the duty of the community of potential victims to identify those aliens who have infiltrated its borders, so that they may be expelled and controlled, and their essential threat thereby neutralized.¹⁷⁶

In the current instance, however, we are talking about attempting to banish an entire group of citizens from the core of urban life because they are poor and homeless and their very presence causes harm. Within this type of framework our nation has banished people before, every instance remembered with national shame and tragic regret: the exclusion of the Cherokee and other tribes from their homeland (the "trail of tears") under the Indian Removal Act (1830),¹⁷⁷ the Chinese Exclusion Act (1882),¹⁷⁸ the Internment of the Japanese in World War II under Executive Order 9066 (1942).¹⁷⁹ I'm not suggesting that driving the homeless from the urban core at all equates in magnitude to these three disgraceful episodes in our history, but it is of the same ilk. The banishment of the homeless, moreover, would not be accomplished by presidential executive order or congressional legislation as in the prior cases; rather, the homeless would leave because of the accumulated unpleasantness of police harassment on the streets, and being dragged in and out of the lower courts and jails, all under the banner of the crimes of misery.

Vagrancy laws gave police similar power because their vagueness and overbreadth allowed police to interact with those on the streets as they wished,

175. *Id.* at 911.

176. *Id.* at 847.

177. See Josephine Johnson, *Resisting Genetic Identity: The Black Seminoles and Genetic Tests of Ancestry*, 31 *J.L. Med. & Ethics* 262, 264 (2003).

178. See Richard A. Boswell, *Racism and U.S. Immigration Law: Prospects for Reform After "9/11"?*, 7 *J. Gender, Race & Justice* 315, 318 (2003).

179. See Lorraine K. Bannai, *Taking the Stand: The Lessons of Three Men Who Took the Japanese American Internment to Court*, 4 *Seattle J. Soc. Just.* 1 (2005); Eric Yamamoto et al., *Race, Rights and Reparation: Law and the Japanese American Internment* (2001).

and for courts to do the same.¹⁸⁰ The crimes of misery, however, are not necessarily vague or overbroad¹⁸¹; instead they give absolute power over the homeless because they merely circumscribe natural and inevitable aspects of the lives of impoverished people living on the urban streets. Whether one characterizes this as repackaged vagrancy laws, or the attempt to eliminate a “threat/harm” that directly results from no more than a particular type of citizen¹⁸² (poor and homeless) being present in a particular place otherwise open to all persons, it cannot be justified as legitimate.

One may respond that I have misstated the role of the crimes of misery on the streets. It is not “banishment,” but what Michel Foucault terms “management.”¹⁸³

From the perspective of police what matters is the managing of something, or someone, by someone. The policer is always a person; the policed needn't be. In fact, we might go farther and say that, insofar as he is an object of police, he is not a person. For policing disposes in Foucault's term, rather than influences, persuades, or convinces or even commands. Police control, rather than govern. [footnote omitted]¹⁸⁴

From this management perspective, we accept that the homeless will be on the streets of the downtown and tourist areas, but try to restrict the most offensive conduct (aggressive panhandling, urination in public) and use these behaviors as a proxy for those individuals who, though not really dangerous, are likely to be involved in behaviors that exacerbate the inevitable harms from the presence of homeless on the streets of the urban core. It's a balance, and the crimes of misery allow the police to manage the homeless in an attempt to keep the magnitude of harm in check.

There is some logic to this position, but for a number of reasons it fails to refute the premise of this article. First, few crimes of misery are necessarily

180. The almost absolute discretion given police by vagrancy offences has been consistently noted; see, e.g., *Papachristov v. City of Jacksonville*, 405 U. S. 156 (1972), at 165, 168, 170, 171; Hill, *supra* note 170, at 206; Dubber, *Policing Possession*, *supra* note 25, at 909.

181. But see *Homes Not Handcuffs*, *supra* note 1, at 24; Livingston, *supra* note 13, at 630.

182. It is instructive that the problems faced by vagrancy statutes, when they finally were reviewed by appellate courts, was that they “brimmed with descriptions of types rather than acts.” Dubber, *Policing Possession*, *supra* note 25, at 912. Although on the surface the crimes of misery do not mention any types, they meaningfully only apply to the world of the “homeless.”

183. See, Michel Foucault, *Governmentality*, in *The Foucault Effect: Studies in Governmentality* 87, 102 (Graham Burchell, Colin Gordon, Peter Miller, eds., 1991).

184. *Id.* at 95.

offensive to the general public. Take lying on a bus bench. I have no doubt that if a disheveled homeless man clad in torn, dirty clothing were lying on the bench, passersby may/will look at him askance; but if it were a young professional woman in a business suit, her laptop by her side, most would only shake their heads and smile thinking about how hard these up-and-coming young professionals work. What may or may not be found offensive in this case has nothing to do with how a particular person's body is positioned on a particular bench. It is solely the particular person who is the source of any offense. Similarly, think about sleeping in a public park. Could anyone take offense if they saw a troop of cub scouts and their troop leaders in their sleeping bags, camping under the summer sky? Again, the conduct is not implicitly offensive; what offends is that a homeless person is doing it.

Second, from the fact that some homeless person commits one or more of the crimes of misery, one cannot infer that that individual will cause more harm in the future than any other homeless person. Again, these crimes describe natural human conduct in which anyone living on the streets will engage. Third, however one may characterize "management," it does not comport with the notion of incapacitation. In no way does management incapacitate the homeless individual and physically prevent him from doing any harm to the community. Finally, even if management offers an accurate anthropological description of the role of the crimes of misery in the police interaction with the homeless on the streets, it is only a description. That is a long way from a moral/ethical theory legitimating the conduct being described.

V. REHABILITATION

Rehabilitation roughly captures the notion that providing incarcerated offenders with personal and vocational skills will mean that when they emerge from custody, they will no longer be a source of harm to the society.¹⁸⁵ Again, crimes of misery generally do not result in significant time spent in jail.

185. "[R]ehabilitation or reform . . . means that as a result of treatment during incarceration, the convicted offender will be cured of the impulse to engage in criminal activity." Fletcher, *supra* note 84, at 414. For an interesting essay on the concept of "paternalistic punishment," where the concern is with the moral improvement of the offender as opposed to rehabilitation's focus on the future protection of society, see Herbert Morris, *A Paternalistic Theory of Punishment*, *Am. Phil. Q.* 263, 264 (1981).

Rehabilitation therefore has no place in the discussion of these crimes. Even if Carlos and Nina spent more time in custody, they would not be provided with the services they require. Over the past few decades, our society has chosen not to invest money in social services for the mentally ill,¹⁸⁶ doing only a little better for the drug addict or alcoholic.¹⁸⁷ As a society, we have moved from the philosophy of the welfare state, in which crime was perceived as the product of repairable social conditions.¹⁸⁸ Things have changed. Among the strategies for dealing with those “deemed undesirable, offensive, or threatening,”¹⁸⁹ we could have approached the problem through “socializing” (deal with homeless by providing affordable housing, job guarantees), “medicalization” (see living on the streets as caused by drugs, alcohol, or mental illness),

186. Jails and prisons are filled with mentally ill offenders, where “corrections has simply has become a last resort caregiver . . . left to deal with the many concerns society has chosen to ignore.” James A. Gondles Jr. (Executive Director, American Correctional Association), *Special Needs Offenders—Everyone’s Concern*, *Corrections Today* 6 (December 2000) (editorial). Research by the Bureau of Justice Statistics indicates approximately 17% of the corrections population are mentally ill. However, if you speak with your colleagues or simply spend time at facilities, you will realize that this number represents a floor rather than a ceiling. *Id.* at 6.

187. When asked whether there are sufficient treatment resources for alcoholics and addicts who live on the streets, Dr. Takushi, *supra* note 129, replied that, based on her extensive experience in the field as well as numerous national conferences, there was “not a simple yes or no answer” to the question. There are waiting lists for treatment services. On the other hand, if an addict or alcoholic needs an emergency bed in a hospital (e.g., for an overdose), such a bed will be found. The problem is that once the crisis is over, the person will be sent back to the streets without anything more (such as a case manager or housing), making repeat visits to the ER often predictable. Even a ten-day stay in detox or ninety-day in-patient treatment is not sufficient, since a long-term solution can require up to two years of continuous support. Of course, neither the human nor financial resources are available for such a long-term solution. Moreover, regardless of available resources, it is almost impossible over even a moderate period of time to maintain communication with, and to guide through the often confusing health care system, someone who has no home, no permanent mailing address, no contact information for friends or relatives with whom they keep regular contact, no post office box, no work phone, no home phone, no cell phone, no voice mail, no email, no PDA, no wall calendar, no desk calendar, and no pocket calendar. Lastly, a significant percentage of substance-dependant individuals also have serious mental health issues, which further complicates treatment since such overlapping service needs require well-functioning systems for coordinating multiple care needs.

188. Indeed, it is better to see the neoliberal state as different, rather than smaller, than the welfare state, and to see the punitive trend as part of this transformation. As punishment replaces welfare as a core state function, poor and largely African American urban residents are recast, from victims of larger economic forces who deserve social support to rapacious predators who deserve banishment. Herbert & Brown, *supra* note 68, at 770.

189. See Wacquant, *supra* note 47, at xxi.

or “penalization.”¹⁹⁰ We chose the latter¹⁹¹ and are currently in a “tough on crime” phase,¹⁹² which is a metaphor for the idea that we will deal with our fundamental social problems and inequities through criminalization of conduct¹⁹³ and investment in penology¹⁹⁴ rather than social services.¹⁹⁵

As Professor Seidman notes:

It seems to me far more plausible that the distribution of the cost of crime reflects no more than the outcome of a political struggle between groups competing

190. *Id.*

191. *Id.*

192. Politicians never lose by being “tough on crime.” It doesn’t matter whether the particular piece of legislation is efficacious or not, symbolically the supporting legislators communicate to their constituents that they stand for social order. See Castellano & Gould, *Criminal Justice Theory*, *supra* note 73, at 79. In politicizing crime, so-called “governing by crime,” the “true causes of crime and the underlying social problems associated with it are ignored and resources diverted from educational and welfare programs into an ineffective, and even contra productive war on crime.” *Id.* See also Barak et al., *supra* note 40, at 12 (authors discuss how media reinforces the “tough on crime” approach, and how politicians use media reinforcing their own get tough credentials and chastizing those who they characterize as lenient.).

Additionally, the shift to tough-on-crime reflects the innate flexibility of institutions (here, the penal system) to find self-justification in the face of apparent failure: “Perhaps there is no better example of this than the ‘nothing works’ discovery in correctional treatment research. The result of this finding of failure was record increases in correctional clients and correctional resources. While the ‘nothing works’ claim, as inaccurate as it might have been, led to reduction in resources for correctional treatment, it was a banner day for punishment. Investment in criminal justice was strengthened. The new policy (tougher punishment) was even less tested than rehabilitation as a means of achieving publicly stated goals. But the causes of the new policy were not questioned. Political focus remained on the claimed object of the policy change: reductions in crime. Few people questioned the disjunction between what correctional systems were actually doing and the goals that were espoused (footnote omitted).” Duffee & Allen, *supra* note 73, at 17.

193. See Castellano & Gould, *Criminal Justice Theory*, *supra* note 73, at 83–84; Barak et al., *supra* note 40, at 117 (discussing how the view of crime has changed from being seen as the result of discrimination and structural inequality to now being perceived as the result of “individual failing and malice, rather than broad social factors.”).

194. Building and maintaining prisons and jails, as well as privatization of penal services, constitutes a \$100 billion/year “criminal justice industrial complex,” Barak et al., *supra* note 40, at 13; in addition, there is a \$65 billion/year private security industry, *id.* at 24. All of this is fueled by constant language and images of dangerousness and calls for retribution, *id.* at 13. Unfortunately, the increasing privatization of our system of incarceration creates vested economic interests in increasing the amount of punishment, *id.* at 287.

195. Thus, dollars have been shifted from social services to the penal system. See Wacquant, *supra* note 47, at 158–59.

to achieve results advantageous to themselves and to those with whom they identify. . . . Although the rhetoric of blame and choice is an important weapon in this struggle, it is exactly backwards to suppose that we impose costs on persons because they are blameworthy. Rather, declarations of blameworthiness are the way we announce the outcome of the struggle to distribute costs.¹⁹⁶

Nina, Carlos, and Ed ironically are the ones absorbing the cost for the broader society's social problems. Blaming them is political, not moral.¹⁹⁷

CONCLUSION

It would be a mistake to conclude at this point that these crimes of misery have no basis. As discussed, they have an economic and cultural basis. In the global environment, cities want to draw foreign investment, tourism, and affluent residents to its downtown core.¹⁹⁸ Ed, Nina, and Carlos do not fit into this endeavor. They tend to scare people.¹⁹⁹ And even if they are seen

196. Seidman, *supra* note 112, at 343. See also Lacey, *supra* note 40, at 170 ("Crime is a social construct—that what counts as a crime in society is a product of social decision."). Cf. Mark Kelman, *Interpretative Construction in the Substantive Criminal Law*, 33 *Stan. L. Rev.* 591, 600 (1980) ("[I]t is most often my belief that interpretative construction appears to enable the legal analyst to avoid dealing with fundamental political problems.").

197. Peter Marcuse conceives of the process of blaming the homeless for their plight as follows:

Blaming the Victim: If denying the problem of homelessness fails in the face of everyday observations, administration officials instead focus on blaming the victims of homelessness. There is a homespun version and an academic formulation. The homespun version goes something like this: "The homeless are not like you and me. There's something wrong with them or they wouldn't be homeless. They are incompetent, crazies, drunks, drug addicts, kooks. They are dirty, unpleasant, queer, different. They talk to themselves. They drink or take dope or are crazy. They are social problems; we have other more worthy social problems to worry about."

The academic formulation is more dangerous, but is often wrapped in jargon more ludicrous than harmful: "Homelessness is a condition of detachment from society characterized by the absence or attenuation of the affiliative bonds that link settled persons to a network of interconnected social structures."

Marcuse, *supra* note 3, at 87 (footnote omitted).

198. See Beckett & Herbert, *supra* note 15, at 16.

199. "[T]he homeless are disturbing—and even frightening for some urban residents—precisely because they seem to be the ultimate social outsiders . . . from both the benefits and, more importantly the obligation of 'normal' society." Gibson, *supra* note 126, at 168. See also

as completely benign, they ruin the aesthetic. Curb appeal is important in marketing real estate, and no competent realtor would allow Nina, Ed, or Carlos on the property when a potential buyer is brought by.

The crimes of misery reflect the visceral reactions of the working, middle, and upper classes. The affluent and economically comfortable simply do not want to have to encounter people like Ed²⁰⁰ for whom they might feel visceral disgust.²⁰¹ They may cringe a bit at Nina, for here she is refusing to control her immediate physical needs and instead openly pissing in public.²⁰²

id. at 168 (“what leverage, in short, does society have to keep the homeless in line? What is to prevent the homeless from lashing out at a stranger in rage, or perhaps merely for sport?”).

200. Peter Marcuse insightfully drew the connection between urban cultural and business aspirations, and the motivation for aggressively pursuing crimes of misery: “THE SHOCK OF HOMELESSNESS would not be so great if the homeless were only in ghettos or slum areas remote from downtown. But homelessness has settled down in the middle of the central business district, threatening to drive away business and the tourist dollar. . . . In earlier times, a skid row could be tolerated even adjacent to a business district, because such districts were clearly defined and somewhat separated from important areas of business and commerce. But today business districts are expanding, and the sight of homelessness in these new business areas is undesirable. . . .” Marcuse, *supra* note 3, at 91 (footnotes omitted).

201. In recent research, subjects were shown a series of photographs while their brains were scanned by functional magnetic resonance imaging (fMRI). There is a section of the medial prefrontal cortex that fires (and therefore lights up on the fMRI) when people think about themselves or other humans. When shown old people, rich people, Olympic athletes, the expected areas lit up brightly on the fMRI. When shown photos of the homeless and drug addicts, however, this area did not light up; those people were not thought of as human by the test subjects. Rather, the brain area that registered was the same one that fires when they were shown a photograph of an overflowing toilet. See *Your Brain on Drug Addicts: Perceiving Addicts and Other Homeless as Less than Human has Deep Neurological Roots*, Stanford Social Innovation Review, Stanford Graduate School of Business 22, 22 (Spring 2007), www.ssiireview.com.

For an extensive analysis of the visceral reaction of disgust, see William Miller, *The Anatomy of Disgust* (1997). See also Weisberg, *supra* note 68, at 575–78.

202. In 1530, a book of etiquette pronounced that it was discourteous to greet someone while they were urinating or defecating in public; by 1729, a book on manners informed its readers that they should withdraw to some private space when they need to relieve themselves. See Norman Ellis, *The History of Manners—The Civilizing Process: Volume I*, 129, 132 (Edmund Jephcott trans., 1978). From this point, “shame” and “repugnance”, id. at 136, were the initial forces restraining the natural impulse to relieve oneself when the urge strikes, id. at 134, 136. Eventually, these norms were internalized, as modern adults and their children assimilated the need to control all their immediate urges, which is the benchmark of what we consider “civilized,” id. at 139. See also, Lynn Hunt, *Inventing Human Rights—A History* 29–30 (2007) (By the eighteenth century, there was an “ever-rising threshold” of shame about bodily functions and a growing sense of bodily decorum.).

After all, most people are uncomfortable seeing acts in public that middle-class conventions dictate should remain in the private sphere²⁰³ (for example, even the nonprudish tend to be uncomfortable with unusually excessive public displays of affection). And the affluent certainly do not wish to experience any unpleasant internal conflicts they might feel passing war veteran Carlos, or at times babbling Nina, begging them for 50¢ as the affluent are about to enter a restaurant where they know they will pay \$150 for dinner and wine for two.²⁰⁴ The working class, on the other hand, find the appearance of the homeless in public spaces to be intolerable because the Ninas and Eds are the “living and threatening incarnation” of the general social insecurity resulting from the “erosion of stable and homogenous wage work.”²⁰⁵

The problem is that, although they have an economic, cultural, and class basis, the crimes of misery lack a moral basis under any theoretical rationale for the criminal sanction. The existence of crimes of misery as they are currently conceived should be seen as a source of shame for all of us. Through their use, we have criminalized the everyday conduct of the poorest, most dispossessed members of our society. At the same time, in our era of the multi-billionaire, we deny these same citizens the most basic resources required for a life of human dignity. And, why? Because we only wish to see beauty, and abject poverty and the resultant destruction of the human soul is ugly? Because commerce must always trump basic humanity and compassion? We are better than that, much better than that.

203. Finally, the spectacle of homeless citizens attending to themselves in full view of the public is disturbing in its own right. In other words, when the homeless are forced to tend to their private needs in parks, alleys, and sidewalks, public spaces begin to take on aspects of “home”; they now become places to sleep, to drink, to make love, to use the toilet, and so on. In modern bourgeois societies, this is actively “out of place.” This activity inverts the distinction between public and private spaces that is fundamental to middle-class notions of citizenship and property. Gibson, *supra* note 126, at 168.

204. “Homelessness *is* shocking to those who are not homeless because it exposes misery in the midst of plenty, and represents alienation from home in a home-based society.” Marcuse, *supra* note 3, at 69.

205. See Wacquant, *supra* note 47, at 4. Thus, the bend toward penalization is not so much a result of “crime insecurity” as of “social insecurity”, which is an objective fear by the post-modern working class, and a subjective one by the middle class. *Id.* at 299–300.