The Teleology of Provincial Offences: A Cause of Social Injustice for the Homeless

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Thesis submitted to the University of Ottawa
in partial Fulfillment of the requirements for the
Master's Degree in Conflict Studies

Conflict Studies
Human Sciences
University of Ottawa

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Introduction

At the signing of the Canadian Charter of Rights and Freedoms, Prime Minister Pierre Elliot Trudeau spoke of Canada building a society based on "justice and generosity" wherein members of minority groups would "feel protected against the possibility of the tyranny of the majority."[1] The Charter sets the expectation that our laws and their enforcement are just. We do not expect that our laws would be the source of social injustices.

Over the course of my career as a police officer, I, as many others, believed our legal system to be fair. After many years as an officer, I recognized that some people facing consequences of law enforcement could benefit from having an advocate who understands the law and the legal processes. I retrained and became a paralegal and advocate. As a licenced paralegal representing defendants, and volunteering with a charity to provide *pro bono* legal services to the homeless, I began to see ways in which the law either created or exacerbated social injustice. Through studying social conflicts and the many theories of causes, it became evident that social injustice in the law is an area that deserves more attention.

Homeless people in Ontario can accumulate tens of thousands of dollars in fines[2] by being found liable for provincial offences, simply because they do not have a private space of their own within which to live. The fines are the result of convictions for charges such as; loitering on the sidewalk[3], trespassing on private property for attempting to access washroom

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[1] Pierre Elliott Trudeau, "Remarks at the Proclamation Ceremony, April 17, 1982," *Library and Archives Canada*. http://www.collectionscanada.gc.ca/primeministers/h4-4024-e.html

[2] Based on experiences of legal representatives interviewed, and supported by statistical data that will be detailed in chapter five.

[3] City of Ottawa By-law: Use and Care of Roads (By-law No. 2003-498) s. 3(1)(4).

facilities in buildings open to the public[4], urinating in public because access to washroom facilities has been denied[5], and being intoxicated in public.[6] The *Provincial Offences Act*[7] provides procedural direction for the administration of provincial regulatory offences, and the penalties upon conviction. This Act also delegates the collection of monetary fines to the Municipalities. I will demonstrate that the monetary fines and the collection of debt are the nexus for the legal and social injustice that follows.

The Canadian Constitution mandates that the laws that govern Canadian society apply to all citizens equally.[8] Over time, as social norms change, both courts and law-makers may choose to re-interpret, or re-write laws and the policies that specify how those laws are enforced. Although law is made by legislators, the responsibility to implement and enforce laws is delegated to a large bureaucracy containing multiple departments and agencies. Unfortunately, this structure can create silos of authority, where those in charge lose perspective on the initial intended purposes of the laws they are enforcing.

The teleology of provincial regulatory laws is public safety and social welfare. When enforced, however, the consequences of regulations are more harmful for marginalized members of society, causing social injustice. The provincial regulations most breached by the homeless are relatively minor, and the law provides a clear list of fines as the appropriate penalties for such offenses. Yet for those who cannot afford to pay a fine or fines, the penalty is not one they can

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[4] *Trespass to Property Act*, R.S.O. 1990, CHAPTER T.21, s. 2(1).

[5] City of Ottawa By-law: Use and Care of Roads (By-law No. 2003-498) s. 3(1)(14).

[6] *Liquor Licence Act*, R.S.O. 1990, CHAPTER L.19 s. 31(4).

[7] *Provincial Offences Act*, RSO 1990, c P.33. Hereinafter referred to as the POA.

[8] *The Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1082, c11, s. 15.

resolve. The penalties for contraventions of the law effect the homeless more harshly than those who can afford to pay the monetary fines imposed under provincial offences. The administrative authority for debt collection results in a record of unpaid fines and a poor credit rating. Landlords may deny tenancy based on poor credit ratings and the perceived inability to pay rent, which perpetuates homelessness. Thus, the teleology fails wherein it causes harm and encourages recidivism.

In this thesis, homelessness will be defined according to contemporary academics and service providers. Homelessness will be examined as a condition within our Western society, as well as differentiated from the commonly recognized identity of individuals who are surviving in this condition. Understanding survival strategies of the homeless is important due to the conflict between these activities and the law. Causes of homelessness will be briefly reviewed to demonstrate why common stereotypes of who the homeless population consist of are harmful, or in the very least, not helpful. The community groups who call for control of the homeless and their activities will be identified to understand their influence on political will and social policies. Also, consideration will be given to weaknesses in enforcement processes that rely on the authority of police officers. With a foundation of current attitudes in society regarding homelessness, this paper will turn to explaining the motivations for control and regulation of the homeless.

Legislative controls apply to all, however by making survival activities illegal, the law falls unevenly. Shunned as social pariahs, the homeless and their survival activities are controlled by laws. To understand the motivations behind the provincial regulatory laws, I will rely on and build upon the theoretical work of Martha C. Nussbaum in *Hiding From Humanity;*

Disgust, Shame and the Law.[9] I will demonstrate how the emotions of disgust and fear related to human animality as explained by Nussbaum, and arising from activities deemed to be normatively immoral, motivate the creation and enforcement of these laws. Yet rather than lacking morality, the homeless engage in these provincially regulated activities as a means necessary for their own survival in a society where they are given no safe alternatives. I will rely on and apply the theoretical work of Jonathan Wolff and Avner de-Shalit in their book *Disadvantage*,[10] which builds on Nussbaum's work in the capabilities approach.[11] When present, these capabilities will be explained as functionings that support a person's ability to participate in society. When absent, a disadvantage is created, impeding a person's autonomous functioning. I will demonstrate provincial regulatory law as a disadvantage for the homeless, wherein the law creates an impediment to their ability to live within the law, and further, to understand the law.

Using the historic context of English poverty laws, I will demonstrate that emotion as a motivator to control the homeless has influenced social policies and laws for centuries. Attitudes and laws regarding homelessness have ebbed and flowed between criminality and charity, eventually being imported to Canada where they have continued to evolve.

Currently in Ontario, Canada, the laws used to control activities of the homeless are administered in a manner that perpetuates homelessness. The legal process will be explained for clarity as to how provincial regulations were intended to protect public welfare. Yet the

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[9] Martha Nussbaum, *Hiding from Humanity: Disgust, Shame, and the Law*. Princeton: Princeton University Press, 2004.

[10] JonathanWolff, and Avner de-Shalit. *Disadvantage*. New York: Oxford University Press, 2007.

[11] Nussbaum, Martha C. *Creating Capabilities: the Human Development Approach*. Cambridge: The Belknap Press of Harvard University, 2011.

administration of regulations lacks proportionality. For minor offences, monetary penalties are imposed, however, the homeless are unable to comply with payment. Specifically, the offences related to homeless activities result in barriers for compliance and encourage recidivism. Instead of contributing to welfare for the homeless, the regulations are harmful and socially unjust. There are no alternative measures or penalties available to the judiciary, thus there is a lack of authority to ensure the consequences of an offence are proportional to the outcome. The collection of default fines is the responsibility of the municipality. Separated from the judicial obligations for justice, the actions of the offence are no longer taken into consideration, and the methods for debt collection are inconsequential to fairness. The unpaid fines are registered against credit records and can become a barrier to obtaining housing, thus the minor regulatory offence can cause homelessness.

Using the City of Ottawa as a case study, I will demonstrate through media coverage that the regulations enforced against the homeless are motivated by the emotions of disgust and fear, as expressed by the Business Improvement Associations and other community groups. I will also use ethnographic interviews with professionals who provide advocacy for the homeless in legal defence and access for housing. They provide experiential evidence of social injustices caused by provincial regulations that support the statistical data regarding imposed fines under provincial regulations and the resulting burden of debt. Using the *Safe Streets Act*[12] as a specific example; public statistics of the Ontario Court of Justice cite between October 2016 and September 2017 there were 142,934 charges in default of payment. Monetarily this means $349,280.00 in fines are outstanding, while $10,436 have been paid in the same time period. Since the enactment of

[12] *Safe Streets Act*, 1999, S.O. 1999, CHAPTER 8.

the *Safe Streets Act* in 1999, $7,461,423.00 in unpaid fines have accrued.[13] In addition, the housing advocates interviewed connect the debt faced by the homeless with direct discrimination and, in particular, the denial of secure housing.

Ultimately, I will argue that the teleology of provincial offences can be remodeled with the expansion of judicial authority for alternative measures and penalties, thus allowing the judiciary to ensure public welfare for all members of society, and correcting the social injustice of controlling and penalizing the activities of the homeless. For the legal system to be just, the consequences of an offence must be proportional to the intended spirit of the law. The welfare of all members of society must be addressed. Therefore, policy makers must consider the full enforcement process and the individual's ability to participate with compliance to ensure the outcomes experienced by all citizens are just. In this thesis, I will show that when penalties in law cause recidivism and perpetuate the very activities that lawmakers hope to control, the teleology fails causing social injustice.

[13] Ontario Court of Justice, Fines by Statute. http://www.ontariocourts.ca/ocj/files/stats/poa/2017/2017-POA-Fines.pdf

Chapter 1: A Focus on Homelessness

Homelessness is a condition that has been extensively studied. This paper does not intend to recreate the extensive political and economic discussions. In this chapter, homelessness is defined in order to enable understanding of a condition that is both created and targeted by the regulation of non-traditional income generation and other related activities. The condition of homelessness can be differentiated from the people who experience homelessness, a reminder that they are not a faceless mass who are affected by provincial regulations, but individuals who are struggling and are worthy of compassion. Also, I will present a brief summary of socio-economic causes of homelessness, as well as a background of the controversial provincial regulation used to control non-traditional income generation. Finally, I will examine the source of demands for enforcement, as well as the influences in the use of police discretion.

Defining Homelessness

The social group upon which this thesis focuses is the homeless population. 'The homeless' have been defined by many academics and service providers. It is important to understand how the condition of homelessness is defined in order to understand how provincial regulations have a disproportionate effect on the people who live in these conditions. The homeless population can be difficult to quantify, due to the transient nature of their circumstances, resulting in an often invisible condition. For example, the authors of *The Panel Study on persons who are homeless in Ottawa*, define homelessness as "living on the street, staying overnight in temporary shelters, staying in places not meant for human habitation, or moving constantly between temporary housing arrangements provided by strangers, friends, and

family".[14] This definition captures the *hidden* homeless that Carole Kauppi and her team researched, giving recognition that not all people access social services if they are without secure housing.[15] For this reason attempts to quantify the homeless are estimates at best, because the charity of people providing shelter in unofficial capacities cannot be quantified on any given day.[16] The author of the "Report to Community and Protective Services Committee and Council; Update on the Ten Year Housing and Homelessness Plan 2014-2024"[17] used two categorical parameters for her references. The first category is *chronically* homeless, defined as: "individuals who are currently homeless (in a shelter or place not fit for human habitation) and have been homeless for six months or more in the past year."[18] The second category is *episodically* homeless, defined as: "individuals, who are currently homeless and have experienced three or more episodes of homelessness in the past year (of note, episodes are defined as periods when a person would be in a shelter or place not fit for human habitation, and after at least 30 days, would be back in the shelter or inhabitable location)."[19] These categories do not define what constitutes a shelter. As a result it is unclear if the report takes into consideration transient conditions such as *couch surfing*, a term referring to people who receive temporary

[14] Tim Aubry, et al. "Homeless to Home: Learning from people who have been homeless in Ottawa," *The Panel Study on Persons who are homeless in Ottawa* (2008): 2.

[15] Carole Kauppi, et al., *Homelessness and Hidden Homelessness in Rural and Northern Ontario*, (Guelph, Rural Ontario Institute, 2017), 9.

[16] Kauppi, et al., *Homelessness and Hidden Homelessness*, 9.

[17] Janice Burelle, "Report to Community and Protective Services Committee and Council; Update on the Ten Year Housing and Homelessness Plan 2014-2024," *City of Ottawa*. File Number: ACS2018-CSS-GEN-0004.

[18] Burelle, "Report to Community and Protective Services Committee and Council," Footnote 1.

[19] Burelle, Footnote 2.

accommodations as charity from others with secure housing. In her research, Suzanne Bouclin addresses a segment of the population that is insecurely housed and describes these individuals as *street-involved*,[20] meaning their life experiences or activities are associated with life on the street, but not necessarily without shelter. She explains street-involvement as a way of sustaining basic necessities, which includes the need to generate supplemental income. These non-traditional income generating activities can include panhandling, squeegeeing, binning, unlicensed vending, and busking,[21] to name a few. I will include street-involved individuals in my category of the homeless for two reasons. First, their accommodations may not be secure.[22] Second, some of the income generating activities brings them into conflict with the law, specifically provincial regulations, and as such they are vulnerable to the disproportional consequences that I argue exist in the teleology of provincial offences.

The Identity of the Homeless

Common perceptions of the identity of homeless people are based on assumptions and symptoms, largely resulting from stereotypes of external characteristics. The external characteristics equated with the homeless are of the rough-sleepers, those who are commonly depicted in film and media;[23] the person who wears all of their clothes in layers, is unwashed and

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[20] Suzanne Bouclin, "Identifying Pathways to and Experiences of Street Involvement through Case Law," *Dalhousie Law Journal* 38, (2015): 350.

[21] Bouclin, "Identifying Pathways," 376-77.

[22] The importance of security in having shelter will be discussed in chapter two.

[23] Mark A. Barnett, et al. "Perceptions of and Reactions to the Homeless: A Survey of Fourth-Grade, High School, and College Students in a Small Midwestern Community," *Journal of Social Distress and the Homeless* 6, no. 4 (1997): 292; Fran Klodawsky, et al. "Images of homelessness in Ottawa: Implications for local politics," *The Canadian Geographer* 46, no. 2 (2002):136-39.

may keep their possessions close at hand. They are perceived to have mental illness and/or addictions. Research has demonstrated that only a minority of people have addictions when they enter homelessness.[24] Many have succumbed to addictions to cope with the stress, stigma and shame of being homeless, or are self-medicating mental health issues developed as a result of becoming homeless.[25] The assumptions of unpredictable behaviour associated with mental illness and addictions (if present and uncontrolled) is associated with potential aggression and thus creates fear of the homeless.[26] These stereotypes dehumanize the homeless, as social norms instruct that no proper person would live in this manner.[27] The perception of the homeless is nearer to an animal than to a person and is commonly regarded with disgust.[28] In the following chapters I will explain how the emotional responses of fear and disgust are prominent motivators behind regulation of the activities of the homeless population.

The recent social awakening toward veteran homelessness has ignited fresh consideration of who the homeless are and is generating recognition that the homeless are worthy of social

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[24] Aubry, et al., "From Homeless to Home," 2.

[25] Navarro-Lashayas, Miguel Angel, and Francisco Jose Eiroa-Orosa, "Substance Use and Psychological Distress is Related with Accommodation Status Among Homeless Immigrants," *American journal of Orthopsychiatry* 87, no. 1 (2017): 24.

[26] Anna Skosireva, et al. "Different faces of discrimination: perceived discrimination among homeless adults with mental illness in healthcare settings," *BMC Health Services Research* 14 (2014): 4. http://www.biomedcentral.com/1472-6963/14/376

[27] Martha C. Nussbaum, *Hiding from Humanity: Disgust, Shame, and the Law*, (Princeton: Princeton University Press, 2004): 70-1.

[28] Lasana T. Harris and Susan T. Fiske, "Dehumanizing the lowest of the low: neuroimaging responses to extreme out-groups," *Psychological Science* 17, no.10 (2006): 848. Medical imaging evidence of emotional disgust responses to homeless people. No indication was provided of what images participants were shown to depict homelessness.

consideration and charity – no longer to be cast away.[29] Although recognition of the human face of the homeless is important to changing social policies, the identification of homeless individuals based on their pathway into homelessness may create discrimination or classification of the deserving or undeserving poor,[30] reminiscent of the English Poor Laws that I will discuss in chapter three.

Causes of Homelessness

In the 1980s and into the 1990s a shift in political approach to social policies led to an increase in people unable to sustain a basic standard of living.[31] Changes in social policies created housing shortages and rent increases.[32] While minimum wage did not increase, social assistance benefits decreased, and the cost of living continued to rise. The trend toward a part-time, casual workforce on low wages without benefits led to under-employment and a lack of sufficient income for adequate food, shelter, medicine, and clothing.[33] Emancipated youth, women escapees from abusive relationships, or individuals formerly institutionalized in foster

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[29] National Shelter Study 2005-2014. https://www.canada.ca/en/employment-social-development/programs/communities/homelessness/reports-shelter-2014.html

[30] Klodawsky, et al., "Images of homelessness in Ottawa,"129.

[31] Jonathan Greene, "Urban Restructuring, Homelessness, and Collective Action in Toronto, 1980-2003," Urban History Review XLII, no. 1 (2014): 22-23.

[32]Stephen Gaetz, "The Struggle to End Homelessness in Canada: How We Created the Crisis, and How We Can End It," *The Open Health Services and Policy Journal* 3 (2010): 22.

[33] Lea Caragata, "Housing and Homelessness," In *Canadian Social Policy: Issues and Perspectives*, ed. Anne Westhues. (Wilfrid Laurier University Press, 2006): 280; Jackie Esmonde, "Criminalizing Poverty: The Criminal Law Power and the Safe Streets Act," *Journal of Law and Social Policy* 17 (2002): 67-68; Graham Riches, "Food Banks and Food Security: Welfare Reform, Human Rights and Social Policy. Lessons from Canada?" *Social Policy and Administration* 36, no.6 (2002): 658.

care, residential schools or correctional facilities, are each identifiable groups within the greater homeless population. Some who were released from institutional systems did not know how to manage independently and were without transitional support.[34] Not knowing how to manage the social assistance they received and unable to find employment, they ended up on the streets unable to meet their own basic needs.

People with disabilities are another group who are frequently marginalized in society. Struggling to find employment in a highly competitive market, people with disabilities are often underemployed.[35] Medical equipment to accommodate their disabilities is expensive and subsidies may not be known or available, increasing expenses for personal necessities.[36] Post-Traumatic Stress Disorder is a common condition among those previously institutionalized, and without support or treatment can lead to homelessness, as well as substance use as a coping mechanism and eventually addiction.[37] These pathways into homelessness are not character flaws of individuals, but are the results of social policies and socio-economic conditions within our society.[38]

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[34] Myra Piat, et al. “Pathways into homelessness: Understanding how both individual and structural factors contribute to and sustain homelessness in Canada,” *Urban Studies Journal Limited* 52, no.13 (2014): 2368, 2373, and 2377-78.

[35] Colin Barnes, and Geof Mercer, "Disability, work, and welfare: challenging the social exclusion of disabled people," *British Sociological Association* 19, no. 3 (2005): 534.

[36] Barnes, "Disability, work, and welfare," 536-37.

[37] Eve B. Carlson, et al. "Traumatic Stressor Exposure and Post-Traumatic Symptoms in Homeless Veterans," *Military Medicine* 178, no. 9 (2013): 972.

[38] Esmonde, "Criminalizing Poverty," 63, 68-71.

Street-involved people often find themselves without the resources to escape and instead decline deeper into homelessness.[39] The lack of sufficient income for basic needs creates a reliance on charity. Hand-outs come in many forms. The hidden charity of friends and family, social assistance through social policies and the services provided through registered charities are commonly recognized forms of hand-outs. The availability of charity does not however make it a socially acceptable means on which to live. The research of Graham Riches revealed the social shame of having to rely on charity as it is not considered to be within the social norms.[40] Social norms create a social hierarchy of those who live within the standards, and the subordinates who live below or outside.[41] Basic human needs, however, sometimes outweigh the shame; the need for dignity becomes less important than the need to generate income.[42] It seems that non-traditional means of earning income could be motivated by either the insufficiency of charity, or by a desire to maintain some level of independence, or to rise up from poverty, which should be encouraged. Non-traditional means of earning income are some of the activities that have been targeted under provincial regulations.[43] Thus, it becomes a matter of need for sustenance over a need to live within the law, such as the provincial regulations against panhandling.

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[39] Piat, et al., “Pathways into homelessness," 2378.

[40] Riches, "Food Banks and Food Security," 650.

[41] Nussbaum, *Hiding from Humanity,* 83.

[42] Terry Skolnik, "Homeless and the Impossibility to Obey the Law," *Fordham Urban Law Journal* 43, no.3 (2016): 747, 760.

[43] Lorne Sossin, “The Criminalization and Administration of the Homeless: Notes on the Possibilities and Limits of Bureaucratic Engagement,” *New York University Review of Law and Social Change* 22 (1996): 639.

Political Tide

In the late 1990s in the City of Toronto there was a spiked increase in the number of visible street-involved youth using non-traditional methods of income generation, specifically squeegeeing. The youth would approach vehicles stopped at busy traffic intersections and offer to wash vehicle windshields during red light cycles for a small fee. The media reported on the increasing incidents of the youth's activities. Calls for action were sounded by business owners, drivers and city politicians for police to control the deviant behaviour.[44] These incidents captured the attention of provincial politicians. In 1998, Jim Flaherty as Attorney-General of Ontario and MPP in the Progressive Conservative provincial government, claimed that the public and the security of society itself was being threatened by people using non-traditional income generating methods.[45] Flaherty's solution was to regulate or control the unwanted behaviour. Not only did he encourage the enactment of the *Safe Streets Act*,[46] he urged the government and police to use existing legislation[47] to control activities of the homeless.[48] By doing so, the homeless were being sign-posted for the "Broken Window Theory" on crime – wherein the presence and activities of the homeless are held out as indications of disorder that attracts criminal behaviour- and are therefore targeted for explusion in order to prevent further social decay.[49]

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[44] Patrick Parnaby, "Disaster Through Dirty Windshields: Law, Order and Toronto's Squeegee Kids," *Canadian Journal of Sociology* 28, no. 3 (2003): 2.

[45] Jackie Esmonde, "Criminalizing Poverty," 64.

[46] *Safe Streets Act*, 1999, S.O. 1999, CHAPTER 8. [*Safe Streets Act]*.

[47] Other legislation used include the *Highway Traffic Act*, RSO 1990, c H.8, the *Liquor Licence Act*, R.S.O. 1990, c L.19, and the *Trespass to Property Act*, R.S.O. 1990, c T.21.

[48] Jackie Esmonde, "Criminalizing Poverty," 75.

[49] Mario Berti, "Handcuffed Access: Homelessness and the Justice System," Urban Geography 31, no. 6 (2010): 837.

In his analysis of the associated media coverage, Parnaby identified the political ideology as being 'tough on crime' which characterized the squeegee kids as delinquent youth in need of law and order.[50] Esmonde stated that the resulting regulation was motivated by a political will to control deviant behaviour, but more importantly indicated a lack of understanding that these non-traditional methods of income generation are due to larger socio-economic issues.[51] It is important to recognize the interests and values that are intended to be served by the regulations imposed by those who are economically advantaged. Those who accept the social contract approach to law, expect to be able to access their community without feeling threatened or insecure.[52] The fearful response to the homeless needs to be examined to determine if it is a reasonable response. If the fear is unreasonable, then it cannot be cited as a justification for control. I argue that if the behaviour of the homeless warrants provincial regulation, then it must be ensured that the consequences of the regulation do not perpetuate recidivism, thus *causing* the condition intended to be controlled. If regulation of the behaviour of the homeless creates homelessness, then I argue provincial regulation has failed.

When discussing the use of provincial regulations to control the activities of the homeless, specifically the *Safe Streets Act*, it is important to know that in 2005, an appeal to the Ontario Court of Justice, known as R vs Banks[53] was filed on behalf of thirteen individuals, all of whom had been convicted under the *Safe Streets Act*. The appellants claimed the legislation discriminated against the homeless and was unconstitutional. The convictions were upheld. That

[50] Parnaby, "Disaster Through Dirty Windshields," 289.

[51] Esmonde, "Criminalizing Poverty, 65.

[52] Berti, "Handcuffed Access," 828.

[53] *R. v. Banks*, 2007 ONCA 19.

decision was appealed to the Ontario Court of Appeal in 2006 where the constitutional challenge was dismissed. A further appeal to the Supreme Court of Canada was filed, however the appeal was denied.[54] The *Safe Streets Act* is again being challenged on a constitutional basis. The paperwork was filed in the Toronto Ontario Court of Justice in July 2017,[55] but has not been heard by a judge. At the time of writing, the legislated control of the homeless is constitutional.

In 2003, the government that created the *Safe Streets Act* and encouraged the control of the homeless was defeated by the Liberals who remained in power for fifteen years. Between 2013 and 2018, the provincial government was lobbied to repeal the *Safe Streets Act*. Michael Bryant, a former Liberal MPP and Attorney General, held a press conference and apologized for not repealing the Act when he had the opportunity and publicly called on the Liberal government to repeal the law that Bryant described as unjust.[56] In 2017, MPP Cheri DiNovo tabled a private members bill for the repeal of the *Safe Streets Act*. In an interview with The [Toronto] Star she commented “The government knows the legislation is discriminatory and wasteful." After eighteen years and nearly 145,000 charges being issued under the *Safe Streets Act*, only 10 percent have been responded to in court and only 0.005 percent[57] have been paid, and so it is clear there is no financial benefit from the regulation. In 2017 alone, $340,860 in fines were

[54]Justice for Children and Youth. http://jfcy.org/en/cases-decisions/r-v-banks-the-safe-streets-act/

[55] Emily Mathieu, "Safe Streets Act to be challenged in court," *Star* (Toronto), June 27, 2017. https://www.thestar.com/news/gta/2017/06/22/safe-streets-act-to-be-challenged-in-court.html

[56] James Armstrong, "Advocates say Ontario law banning panhandling should be repealed," *Global News* (Ottawa), Dec. 15, 2014. https://globalnews.ca/news/1727409/advocates-say-ontario-law-banning-panhandling-should-be-repealed/

[57] "Fines in Default by Statute," *Ontario Court of Justice*, 2017.

issued and only $10,214 collected. DiNovo's private members bill was not passed and the Act remains in effect today.

In June 2018, the Progressive Conservative Party was re-elected as a majority government in Ontario, and the *tough on crime* philosophy does not bode well for the voluntary repeal of the statute. It is important to remember that the *Safe Streets Act* is not the only statute that is being used to control the activities of the homeless, and that the problem is greater than one piece of legislation. The statutes and how they are enforced to control the activities of the homeless and the areas they occupy will be explained in detail in chapter four.

Social Cries

If it is accepted that the dominant social group is controlling the social norms and thus policies and laws, then it is important to understand of whom this dominant group consists. As an example, in the City of Ottawa there are powerful Business Improvement Area (BIA) committees. These are established in cooperation with the City for the creation and rejuvenation of the commercial economy, including tourism.[58] There are also NIMBYs, *Not In My Back Yard* community groups. These groups emerge in response to issues that they believe will affect their local communities. Issues regarding new space-sharing initiatives or re-zoning that are not regarded as suitable for the atmosphere of their neighbourhoods are common developments that

[58] "Ottawa's Business Improvement Areas – Overview," *City of Ottawa*. (Accessed July 25, 2018). https://ottawa.ca/en/business/business-resources/local-business-support-organizations/ottawas-business-improvement-areas

trigger the formation of NIMBYs. Both BIAs and NIMBYs are focused on their self-interests, and not on any larger social issue.[59]

Several social issue examples involving BIAs and NIMBYs have been prominent in the last few years in Ottawa. The BIA of the ByWard Market has been tremendously vocal regarding the homeless population in this popular tourist area. Business owners have called on the City to close shelters and remove the homeless people who occupy public spaces near their establishments.[60] They claim the homeless are scaring off potential customers and negatively affecting their profits. City officials have supported the BIAs on these issues and have called for additional police enforcement.[61]

What is not being addressed in these local activist initiatives, is where the homeless are coming from and how homelessness can be changed or prevented. This has been evident in the example of the Salvation Army's Ottawa Booth Center men's shelter being pressured to move out of the ByWard Market.[62] The organization, in cooperation with the City, identified a new

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[59] Margaret Abraham and Gregory M. Maney, "Transforming place and belonging through action research, community practice, and public policy: comparing responses to NIMBYism," *Current Sociology* 60, no. 2 (2012): 179.

[60] "Homeless Shelter labelled a 'cancer' on Ottawa's ByWard Market," *CTV News* (Ottawa), March 5, 2018 https://www.ctvnews.ca/canada/homeless-shelters-labelled-a-cancer-on-ottawa-s-byward-market-1.3829483

[61] "Crackdown in the ByWard Market," *CTV News* (Ottawa), May 2018 https://ottawa.ctvnews.ca/video?clipId=1397332 . The focus of enforcement will be on disorderly behaviour and panhandling. There is no mention of who is committing the robberies and drug dealing that are cited as the reason the enforcement is needed.

[62] Kristy Nease, "Salvation Army Downtown Shelter may be moving out: Mayor wants 1 of 3 downtown homeless shelters to close or move," *CBC News* (Ottawa), February 12, 2017.

location for the facility in an area of high need. When the location in the neighbourhood of Vanier was announced, the owners of businesses near the proposed site, as well as residential property owners and renters were up-in-arms and 'SOS Vanier' was formed to protest the Salvation Army bringing unwanted, undesirable people into their community, citing that the move will increase crime and cause their property values to drop.[63]

The objections to the homeless shelter expressed by SOS Vanier are based on safety and economics. Yet, there have been no statistics to support the objections. I argue the objections are not based on any fact, but instead based on an emotional response of fear and disgust related to the perceived immorality of the homeless. The close proximity of the homeless to the more privileged socio-economic group forces an acknowledgement that individuals are living in inhumane circumstances. It is the forced recognition of the condition of homelessness and all of its related conditions and challenges, which are no longer invisible, that make people respond with wanting the object of their disgust removed and provides justification and motivation to

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https://www.cbc.ca/news/canada/ottawa/ottawa-downtown-homeless-shelter-salvation-army-1.3970102

[63] "Debate on the Salvation Army's Move," *CTV News* (Ottawa). https://ottawa.ctvnews.ca/video?clipId=1260273 ; Jon Willing, "Salvation Army proposal for Vanier draws over 150 deputations to city hall," *Ottawa Citizen*, November 14, 2017. https://ottawacitizen.com/news/local-news/salvation-army-proposal-for-vanier-draws-over-150-deputations ; "Salvation Army users offer differing opinions in Vanier move: SOS Vanier has raised $26K to challenge city council's decision to Ontario Municipal Board," *CBC News* (Ottawa), December 11, 2017. https://www.cbc.ca/news/canada/ottawa/salvation-army-homeless-different-opinions-vanier-move-1.4442097

regulate or control their whereabouts and activities. I will explain this argument further in chapter two using the work of Martha Nussbaum.[64]

The objection to homeless people is not based on an ethnicity or a religion. It is based on a social condition which includes an economic status, but is more complex than just a lack of income. The objection is based on an identity which is associated with behaviour and activities that are considered unfavourable by the dominant group. It is arguably not even the behaviour or the activities of the homeless that are truly objectionable, but the need to engage in these behaviours for survival that makes people uncomfortable. The very existence of homeless people in our society implies that something has failed.[65] It is more comfortable to blame the individual for their condition, rather than to reflect on the social system that we are a part of, that we support and rely on for our own privilege and in doing so acknowledge that we may be in some way responsible for the homeless condition. Instead, enforcement is called forth to control the population who are not abiding by our social values and behaving *normally*. In chapter two I will use the work of Jonathan Wolff and Avner de-Shalit[66] to explain how disadvantages in social and economic capabilities cause people to enter into and hold people in a condition of homelessness.

Control and Enforcement

In agreement with the BIAs and NIMBY groups, the Ottawa City Council has called for increased enforcement of the provincial regulations used to control the homeless population. The police have responded with enforcement crackdowns on panhandling and other disorderly

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[64] Nussbaum, *Hiding from Humanity*.

[65] Parnaby, "Disaster Through Dirty Windshields," 288-89, 300.

[66] Jonathan Wolff and Avner de-Shalit, *Disadvantage*, (New York: Oxford University Press, 2007).

conduct such as being intoxicated in public.[67] The enforcement, however, is purely subjective. There are no definitions or determining factors to guide the police on the degree to which a person can be under the influence of alcohol in public before one is considered intoxicated. The officer has the discretion to determine when safety is at risk and when to arrest.[68] The officer also has the discretion to determine if an act of panhandling is *aggressive*, whereas the *Safe Streets Act* does not provide definitive criteria for enforcement. This entirely subjective discretion of the enforcement officers[69] is problematic if the officer's motivations are inconsistent with social motivations for the regulations.

Promotion within the police service depends partly on performance. How does an officer prove job performance? The primary measure of job performance is statistical data collected from warnings and charges issued. In some jurisdictions if an officer's statistics are not meeting the agency's expectations there can be disciplinary measures. Therefore, if officers want to demonstrate a strong performance in the duties of their currently assigned position they will issue a higher than average number of charges. It can be assumed that officers have a personal interest

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[67]Christopher Whan, "Ottawa police announce summer safety initiative in ByWard Market, Downtown Rideau," *Global News* (Ottawa), May 17, 2018. https://globalnews.ca/news/4214970/ottawa-police-byward-rideau-crackdown/ ; Kieran Delamont, "Police continue crackdown on disorderly conduct in ByWard Market," *Ottawa Citizen*, July 2, 2018. https://ottawacitizen.com/news/local-news/police-continue-crackdown-on-disorderly-conduct-in-byward-market

[68] *Liquor Licence Act*, s.31(5).

[69] George L. Kelling, "Broken Windows" and Police Discretion," *Office of Justice Programs*, (Washington: U.S. Department of Justice, 1999): 13-16, 23. https://www.ncjrs.gov/pdffiles1/nij/178259.pdf

in issuing citations to satisfy performance expectations.[70] It is reasonable to conclude that in order to issue more citations, officers patrol in areas that are known to have high rates of illegal acts, such as those areas frequented by street-involved people, who are less likely to be in compliance with all provincial regulation. Street-involved people thus become the targets for issuing citations.[71] They can easily be identified by the location they are frequenting, the manner in which they are dressed, and the people with whom they associate. These stereotypes are based on experience and exposure the officers have during patrols. Officers can then easily attend a single location and issue numerous citations, leaving the charges to be addressed by the court and the accused, regardless of the consequences for the homeless individual. Thus the calls for sustained regulation of the homeless are subject to the motivations of the community at large, such as BIAs and NIMBYs, as well as the individual enforcement officers.

Conclusion

Homelessness is a very real and very current issue in our society. The condition of homelessness has many causes, as briefly summarized in this chapter. The activities and behaviour of the homeless fall within a range that is inherent to the condition of being without private space of one's own. The supplemental income generation by non-traditional means is done out of necessity, as traditional methods of income generation are insufficient or inaccessible. The conditions in which the homeless live may lead to further challenges such as mental illness and substance abuse. The control of the homeless is fuelled by BIAs and

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[70] Nigel Fielding, "The Organizational and Occupational Troubles with Community Police," *Policing and Society* 4 (1994): 306-07. http://resolver.scholarsportal.info/resolve/10439463/v04i0004/305_toaotocp

[71]Berti, "Handcuffed Access," 838; Kelling, "Broken Windows", 51.

NIMBYs, supported by political will, and implemented through officer discretion. In the next chapter the motivation for control of the homeless will be explained, as well as the social injustice created through these controls.

Chapter 2: Humanity and Disadvantage

The law is not sterile or robotic. It is created, interpreted and applied by people who are susceptible to emotional influence and personal bias. At all stages of the law, from its inception through all levels of enforcement, the human element is integral to the process. Legislators respond to public demands for safety and security. The laws they create are accepted as being reflective of social norms.[72] These social norms are the values of the dominant culture in a society, but culture is fluid, ever changing under new influences[73] as are our laws, which change with society. An evaluation of the influence of emotions on how our laws are created and enforced provides an insight into the intention behind the regulation of society. Martha Nussbaum, the current Ernst Freund Distinguished Service Professor of Law and Ethics at the University of Chicago,[74] considers several emotions in law: disgust, shame, fear, anger, and compassion. Nussbaum's work provides an in-depth examination of disgust as a defence for criminal behaviour; however, the focus here will be on disgust as an emotional justification for legislative control of certain behaviour.[75] Specifically, on the provincial regulations that have their basis in disgust, fear and anger and result in attempts to control the behaviour of the

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[72] Martha C. Nussbaum. *Hiding from Humanity: Disgust, Shame, and the Law* (Princeton: Princeton University Press 2004), 33.

[73] Glenn Adams, and Hazel Rose Markus, "Toward a Conception of Culture Suitable for a Social Psychology of Culture," in *The Psychological Foundations of Culture*, ed. Mark Schaller and Christian S. Crandall (London: Lawrence Erlbaum Associates, 2004), 337; Holly Arrow and K.L.Burns, "Self-Organizing Culture: How Norms Emerge in Small Groups," in *The Psychological Foundations of Culture*, ed. Mark Schaller and Christian S. Crandall (London: Lawrence Erlbaum Associates, 2004), 182.

[74] http://philosophy.uchicago.edu/faculty/nussbaum.html

[75] Nussbaum, *Hiding from Humanity*, 8.

homeless population. This evaluation will expose a social injustice suffered by the marginalized group identified as homeless.

This Chapter begins with a review of the work of Martha Nussbaum in her 2004 book, *Hiding from Humanity: Disgust, Shame and the Law*.[76] In this book she identifies the origins of disgust and fear and provides reasoning for why, at least in some circumstances, these emotions are not appropriate as motivators in law. She provides reasons why shame may not be an appropriate penalty in law and also explains the benefits of compassionate approaches to consequences for offenders. I will examine how emotions influence laws specific to the homeless population and conclude that homeless people are targeted due to disgust and fear. Further, I will conclude the penalties imposed against the homeless cause shame and create social injustice.

This chapter also examines the theory of disadvantage, as developed by Jonathan Wolff and Avner de-Shalit in their book, *Disadvantage*.[77] As they build on the work of Martha Nussbaum and her capabilities approach,[78] Wolff and de-Shalit develop the concepts of corrosive disadvantages and fertile functionings. In an examination of their theory I will demonstrate how it is applicable to the homeless population as they face provincial regulatory laws and the consequences of social injustice.

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[76] Nussbaum, *Hiding from Humanity*.

[77] Jonathan Wolff and Avner de-Shalit, *Disadvantage* (New York: Oxford University Press, 2007).

[78] Martha C. Nussbaum, *Creating Capabilities: the Human Development Approach*, (Cambridge: The Belknap Press of Harvard University, 2011).

The Influence of Emotion in Law

Nussbaum identifies the function of law as being the protection of social norms, as measured by a reasonable person.[79] If a person is accepting of social norms they are generally considered reasonable.[80] The human desire to distance ourselves from what we perceive to threaten us is a survival instinct; an emotional, primal response that originates at the cellular level.[81] The recognition of a potential harm, or a harm suffered, elicits an emotional response and motivates us to act or react. Emotional responses are thus embedded in socially conforming law based upon what is normally accepted to be a threat. These emotions need to be considered in association with the thought-content that emerges.[82]

Emotions reveal "patterns of evaluation",[83] which form beliefs and values. A person's beliefs, however, can be true or false.[84] Consider for example the unreasonable or uninformed basis of racism[85] that projects the threat of harm onto marginalized groups.[86] The perceived threat to one's values can be a harm, as easily as a physical threat to one's wellbeing, since the threat is to what a person holds in importance. A breach of socially imposed boundaries[87] is a

[79] Nussbaum, *Hiding from Humanity*, 12.

[80] Nussbaum, *Hiding from Humanity*, 33.

[81] K.T. Peil, "Emotion: A Self-regulatory Sense," *EFS International*, (2012): 5. Emotions occur on a cellular level, creating instinctual behaviours, thoughts, and motives.

[82] Nussbaum, *Hiding from Humanity*, 29.

[83] Nussbaum, *Hiding from Humanity*, 29.

[84] Nussbaum, *Hiding from Humanity*, 31.

[85] Nussbaum, *Hiding from Humanity*, 11.

[86] Nussbaum, *Hiding from Humanity*, 74.

[87] Nussbaum, *Hiding from Humanity*, 91.

violation of social norms and creates a threat to social hierarchy.[88] The offenders are deemed subordinate humans.[89] Thus, categorization of people's identity based on beliefs which emerge from emotions of disgust can have social implications[90] such as marginalization.

Nussbaum's theory regarding disgust as a motivator for laws is based on the premise that our bodily functions are a reminder of our mortality and animal vulnerability.[91] Nussbaum suggests that our animalistic characteristics, the off-casting of substances and odours, death and decay, are reminders of our animal vulnerability and trigger our disgust, motivating us to distance ourselves from our animality.[92] We find our human weaknesses disgusting, especially those attributes that interfere with our "aspirations to purity, immortality and nonanimality."[93] The disgust response is a social construct and arguably unreasonable, but socially accepted.[94] When examining the thought-content of the emotion of disgust, she suggests that it is "typically unreasonable, embodying magical ideas of contamination."[95] Our humanity is threatened by our animality, thus our social norms dictate that we distance ourselves from animality both physically as well as ideologically.[96] Social norms allow that our vulnerabilities require protection in law. [97] This stated, if our emotions are responses to disgust or the perception of

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[88] Nussbaum, *Hiding from Humanity*, 83.

[89] Nussbaum, *Hiding from Humanity*, 97.

[90] Nussbaum, *Hiding from Humanity*, 33.

[91] Nussbaum, *Hiding from Humanity*, 92-3.

[92] Nussbaum, *Hiding from Humanity*, 89.

[93] Nussbaum, *Hiding from Humanity*, 14.

[94] Nussbaum, *Hiding from Humanity*, 94.

[95] Nussbaum, *Hiding from Humanity, 14.*

[96] Nussbaum, *Hiding from Humanity*, 74, 88-9.

[97] Nussbaum, *Hiding from Humanity*, 11.

threat to our social norms or morality, we should consider how these emotions influence our legal system.

When one is threatened or actually harmed there is an associated feeling of vulnerability. It is that feeling of vulnerability that we seek to avoid to deny our weaknesses. I argue that the imagined contagions associated with the economic condition of being homeless and not having a consistent place to wash one's self and belongings often results in a lack of hygiene and socially unacceptable odours which increase the perception of animality of the homeless.[98] Further, the perceived lack of aspirations toward social norms and values adds to the determination of immoral and thus, disgusting behaviour.[99] The state of being homeless has been deemed to be disgusting, and needing to be controlled.[100] Nussbaum encourages reflection on how the emotion of disgust has been inappropriately used as she states, "throughout history to exclude and marginalize groups of people who come to embody the dominant group's fear and loathing of its own animality and mortality."[101] The fear of the imagined harm, both biologically from potential contagions due to lack of hygiene, as well as the assault to social values[102] resulting from perceived idle behaviour and lack of industrious ambition, has resulted in the statutes to control geographical location of homeless people and the nature of their activities.

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[98] Nussbaum, *Hiding from Humanity*, 72.

[99] Nussbaum, *Hiding from Humanity*, 74, 98.

[100] Nussbaum, *Hiding from Humanity*, 2, 83.

[101] Nussbaum, *Hiding from Humanity*, 14.

[102] Nussbaum, *Hiding from Humanity*, 98.

It is indignation at the perceived rejection of social norms that creates anger and calls for control.[103] This is the grounding of legislative control of the homeless.[104] When faced with a perceived threat, an accepted response is fear – fear of an imagined imminent harm that could occur. Anger is an accepted response to a harm that has occurred or perceived to have happened.[105] Both are responses to a damage of something held in value, such as physical safety or freedom. A fear based on harm, however motivating, is according to Nussbaum different from motivations of disgust,[106] although they are commonly expressed as one and the same. This leads to the question of what we find threatening and why. In Ontario in the 1990s, when the presence of squeegee kids was targeted[107] and denounced as a threat to public safety, the response was fear and anger and the creation of the *Safe Streets Act*.[108] The homeless person panhandling, unwashed and ragged, invokes a visceral response from a threatening reminder of our animality[109] leading to an imputation of aggression simply through their presence in open spaces. Citizens who are threatened by the presence of homeless people express disgust as though the homeless have contaminated the neighbourhood.[110] They also express fear and anger at the

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[103] Nussbaum, *Hiding from Humanity*, 99, 102.

[104] Nussbaum, *Hiding from Humanity*, 123.

[105] Nussbaum, *Hiding from Humanity*, 13, 27.

[106] Nussbaum, *Hiding from Humanity*, 99.

[107] Nussbaum, *Hiding from Humanity*, 221. Targeting was based on stigma.

[108] *Safe Streets Act*, 1999, S.O. 1999, c. 8. [*Safe Streets Act*]; Nussbaum, *Hiding from Humanity*, 86. "Disgust, instead, is a moral thread or criterion we follow when we ask how immoral the act is; that judgment of immorality is itself what is relevant to the legal regulation of conduct."

[109] Nussbaum, *Hiding from Humanity*, 87-8.

[110] Matthew Pearson, "Q&A: Key questions about Salvation Army's Vanier 'mega-shelter' proposal," *Ottawa Citizen*. August 3, 2017. https://ottawacitizen.com/news/local-news/qa-key-

indignation of being harmed by their presence and claim that the wrong must be corrected with the eviction of the offensive population.[111]

Shame and Compassion as a Consequence of Provincial Regulatory Laws

Nussbaum also considers shaming penalties applied in law, which is germane to a discussion about the homeless population and provincial regulatory laws and the role of compassion in penalties. Nussbaum recognizes that penalties which cause shame for an offender encourage stigmatization.[112] Vagrancy laws, as I will discuss in the following chapters, are applied based on the stigmatizing characteristics of the offenders. Historically, the determination between the *blameless* such as the disabled, and the *idle* who appear able to work and are perceived to not support themselves by choice and instead rely on hand-outs to survive,[113] triggers penalties with varying degrees of stigmatization.[114]

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questions-about-salvation-armys-vanier-mega-shelter-proposal; Matthew Pearson, "Signs of discontent among Vanier residents," *Ottawa Citizen*, November 12, 2017. https://ottawacitizen.com/news/local-news/signs-of-discontent-among-vanier-residents; Matthew Pearson, " 'This is the wrong place for it': Salvation Army shelter bid faces more backlash at planning committee," *Ottawa Citizen*, November 16, 2017.https://ottawacitizen.com/news/local-news/this-is-the-wrong-place-for-it-salvation-army-shelter-bid-faces-more-backlash-at-planning-committee; Paul Heinbecker, "Politics of the Salvation Army homeless plan are deeply flawed: Heinbecker," *Ottawa Citizen*, November 20, 2017. https://ottawacitizen.com/opinion/columnists/heinbecker-politics-of-the-salvation-army-homeless-plan-are-deeplyflaweda-perspective-from-vanier-on-a-very-flawed-political-process

[111] Nussbaum, *Hiding from Humanity*, 105-6.

[112] Nussbaum, *Hiding from Humanity*, 2.

[113] Vorspan, "Vagrancy and the New Poor Law in late-Victorian and Edwardian England," *The English Historical Review* XCII, no.CCCLXII (1977): 81.

[114] Nussbaum, *Hiding from Humanity*, 2, 3, 9.

If the calls for control are differentiated according to disability or idleness, then consider who makes the determination of a disability.[115] The determination is highly discretionary. Institutionally, a determination of disability varies depending on the legal test being applied. The institutional requirements place the onus on the individuals to prove they have a disability in accordance with the agency's standards. Further, the determination of disability does not consider the economic conditions for employment or employability under such a climate.[116] The standards for an employee being disabled according to a provider of employment insurance benefits is specified in contract. Meanwhile, the Ontario Works program[117] has a legal standard based on economics. The *Canada Pension Plan*,[118] however, assesses disability based on one's ability to work in any job for any number of hours on a regular basis, without consideration of one's ability to live off of the wages earned. Evidence of an inability to work requires copious medical corroboration from doctors who may not be aware of the legal threshold. Disabilities cannot be determined without medical opinion, and those opinions are also discretionary. The *Ontario Human Rights Code*[119] applies across the province of Ontario, under which it is an offence to discriminate against a person with a disability and the Human Rights Tribunal of Ontario has ruled that an addiction is to be considered a disability.[120] Yet in the application of laws used in control of homeless activities, a person's disability is not given any assessment when penalties

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[115] Nussbaum, *Hiding from Humanity*, 2, 50.

[116] *Villani v Canada* (A.G.), 2001 FCA 248.

[117] *Ontario Works Act*, 1997, S.O. 1997, c. 25, Sched. A. [Ontario Works].

[118] *Canada Pension Plan*, R.S.C., 1985, c. C-8, s. 42(2). [*Canada Pension Plan*].

[119] *Ontario Human Rights Code*, R.S.O. 1990, c. H.19, s. 17. [*Ontario Human Rights*].

[120] *Stewart v. Elk Valley Coal Corp.*, [2017] 1 SCR 591, 2017 SCC 30 (CanLII).

are assigned. In present day all homeless people are assumed to be idle for matters of provincial regulation, and invoke stigmatizing penalties.

Nussbaum expresses that sympathy is triggered through recognition that there is disproportion between the blame and the consequences, and further when there is recognition of shared vulnerabilities.[121] The experiences of the sympathizer, positive or negative, will create biases that affect the degree to which they are able to hear the offender with compassion.[122] This "eudaimonistic judgment"[123] can be a barrier – disgust – or an asset – compassion – when discretion must be applied to the offender's circumstances. The provincial regulatory process has several key junctions at which discretion- or sympathy and compassion- may be applied. As an example, the charging officer holds discretion as to whether or not to initiate a charge and eudaimonistic judgment is certainly at play in that the officer's experiences with the homeless population will influence how they choose to deal with the offender. Whether to charge, or which offence to charge, will influence the penalty and the degree of stigmatization.

I argue that in the context of the homeless, the physical conditions that they endure, such as the lack of access to secure shelter from the elements, personal hygiene, proper clothing, and medical care is stigmatizing. These resources are accessible in varying degrees, but the lack of secure access and repetitive need, as opposed to one-time emergency need, increases the stigmatization. This stigmatization then perpetuates through disgust, increasing humiliation.[124] This cycle does not have to be in a continuous downward spiral. I will rely on the work of

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[121] Nussbaum, *Hiding from Humanity*, 50.

[122] Nussbaum, *Hiding from Humanity*, 49.

[123] Nussbaum, *Hiding from Humanity*, 51.

[124] Nussbaum, *Hiding from Humanity*, 203.

Nussbaum, specifically her work on the capabilities approach,[125] and Wolff and de-Shalit's work on disadvantage,[126] to examine the concept of functionings.

Capabilities and Homelessness

A capabilities approach is a means of evaluating a society by examining an individual's opportunities for characteristically human forms of functioning and flourishing in that society.[127] Nussbaum expresses that capabilities are not only the aptitudes of an individual but the supports within a society that aid in the development of skills; the ability "to do and to be".[128] External supports allow an individual to reach their full potential.[129] The potential is the capability, and the realization of potential is a functioning.[130] An absence of external support is directly correlated with marginalization, social injustice and inequalities.[131] Nussbaum suggests that there are ten central capabilities: The first capability is **Life**: "Being able to live to the end of a human life of normal length; not dying prematurely, or before one's life is so reduced as to be not worth living".[132] The premature deaths within the homeless population have been confirmed by researchers.[133] The second capability is **Bodily health**: "Being able to have good health,

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[125] Nussbaum, *Creating Capabilities*.

[126] Wolff and de-Shalit, *Disadvantage*.

[127] Nussbaum, *Creating Capabilities*, 18.

[128] Nussbaum, *Creating Capabilities*, 57; Wolff and de-Shalit, *Disadvantage*, 36.

[129] Nussbaum, *Creating Capabilities*, 21.

[130] Nussbaum, *Creating Capabilities*, 24-5.

[131] Nussbaum, *Creating Capabilities*, 19.

[132] Nussbaum, *Creating Capabilities*, 33.

[133] Manal Guirguis-Younger, Vivien Runnels, Tim Aubry, and Jeff Turnbull, "Carrying out a social autopsy of deaths of persons who are homeless," *Evaluation and Program Planning* 29, no. 1 (2006): 44.

including reproductive health; to be adequately nourished; to have adequate shelter".[134] The absence of bodily health as a capability defined by Nussbaum is the commonly recognized state of impoverishment. Third, is the capability of **Bodily integrity**: "Being able to move freely from place to place; to be secure against violent assault, including sexual assault and domestic violence; having opportunities for sexual satisfaction and for choice in matters of reproduction".[135] Provincial regulations are used to control not only homeless activities, but the geographical location in which the homeless participate. Further, the incidents of violence within shelters is a barrier for women and youth accessing services due to fear.[136]

The next capability speaks to a quality of life, vitality and freedom of expression. **Senses, imagination and thought** is the fourth capability:

> Being able to use the senses, to imagine, think, and reason-and to do these things in a "truly human" way, a way informed and cultivated by an adequate education, including, but by no means limited to, literacy and basic mathematical and scientific training. Being able to use imagination and thought in connection with experiencing and producing works and events of one's own choice, religious, literary, musical, and so forth. Being able to use one's mind in ways protected by guarantees of freedom of expression with respect to both political and artistic speech, and freedom of religious exercise. Being able to have pleasurable experiences and to avoid nonbeneficial pain.[137]

The homeless are in a state that consumes their energy for survival leaving depleted internal resources, insufficient for such expression. There is also a lack of opportunity and acceptance of participation due to stigmatization and the level of control regarding behaviour and activities.

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[134] Nussbaum, *Creating Capabilities*, 33.

[135] Nussbaum, *Creating Capabilities*, 33.

[136] Stephen Gaetz, "Safe Streets for Whom? Homeless Youth, Social Exclusion, and Criminal Victimization," *Canadian Journal of Criminology and Criminal Justice* 46, no. 4, (2004): 423-56.

[137] Nussbaum, *Creating Capabilities*, 33.

The fifth capability according to Nussbaum is **Emotions**: "Being able to have attachments to things and people outside ourselves; to love those who love and care for us, to grieve at their absence; in general, to love, to grieve, to experience longing, gratitude, and justify anger. Not having one's emotional development blighted by fear and anxiety".[138] As previously stated, disgust has motivated the separation of the homeless from the general population. This isolation reduces interpersonal connections. Further, the fear and anxiety that exists in the day to day survival on the street overrides interpersonal relationships. **Practical reason** is the sixth capability: "Being able to form a conception of the good and to engage in critical reflection about the planning of one's life".[139] When a person is consumed with survival on a day-to-day basis as the homeless are, there is little planning for the future. The conception of good is skewed by the need for immediate relief by any means possible. The seventh capability is, **Affiliation**, which has two parts:

> (A) Being able to live with and toward others, to recognize and show concern for other human beings, to engage in various forms of social interaction; to be able to imagine the situation of another. (B) Having the social bases of self-respect and nonhumiliation; being able to be treated as a dignified being whose worth is equal to that of others. This entails provisions of non-discrimination on the basis of race, sex, sexual orientation, ethnicity, caste, religion, national origin.[140]

As will be explained in the coming section on disadvantage and functionings, affiliations is a vital capability. There are strong connections among the homeless,[141] however, this capability

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[138] Nussbaum, *Creating Capabilities*, 33-4.

[139] Nussbaum, *Creating Capabilities*, 34.

[140] Nussbaum, *Creating Capabilities*, 34.

[141] Carole Kauppi, Bill O'Grady, Rebecca Schiff, and Fay Martin, and Ontario Municipal Social Services Association, *Homelessness and Hidden Homelessness in Rural and Northern Ontario*, (Guelph: Rural Ontario Institute, 2017): 90.

addresses connections with people of other social classes, not just one's own, and enables beneficial relationships, resources and opportunities that may be otherwise unattainable.

The essence of humanity is captured in Nussbaum's eighth capability; to be able to care for all that is outside of ourselves. **Other species**: "Being able to live with concern for and in relation to animals, plants, and the world of nature".[142] This simple capability brings forth compassion and humility. For some homeless individuals their pets are their only trusted companions,[143] encouraging the capability of emotion. The ninth capability is **Play**: "Being able to laugh, to play, to enjoy recreational activities".[144] This is not only a means of personal growth in learning and relationships, it demonstrates the ability to set aside the stresses of life for even a short time. This capability may not be available to a homeless person who does not have the space, companionship, or security. The tenth of Nussbaum's capabilities is the **Control over one's environment**, which also has two parts:

> (A) *Political*. Being able to participate effectively in political choices that govern one's life; having the right of political participation, protections of free speech and association. (B) *Material*. Being able to hold property (both land and movable goods), and having property rights on an equal basis with others; having the right to seek employment on an equal basis with others; having the freedom from unwarranted search and seizure. In work, being able to work as a human being, exercising practical reason and entering into meaningful relationships of mutual recognition with other workers".[145]

The opportunities for political participation and employment for the homeless are thwarted by stigmatization and physical barriers to access. Additionally, the lack of private space impedes one's ability to maintain ownership of material goods and conditions of socially normative

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[142] Nussbaum, *Creating Capabilities*, 34.

[143] Kauppi, et al., *Homelessness and Hidden Homelessness*, 88.

[144] Nussbaum, *Creating Capabilities*, 34.

[145] Nussbaum, *Creating Capabilities*, 34.

behaviour. Clearly, the homeless population has significant challenges to obtaining and maintaining each of these capabilities.

The capabilities approach suggests a socio-political requirement to actively support people's functional ability.[146] The threshold to be met in each capability is the requirement for human dignity to be respected for all individuals.[147] This means that capabilities are not an entitlement to equality but instead, to equity.[148] There are many reasons why an individual might not have equity of capabilities. These inequities are often referred to as disadvantages. The term disadvantage has been tossed out loosely when referring to individual capabilities and even social injustice. It is however, a concept that has been developed by Johnathan Wolff and Avner de-Shalit that will provide perspective on how lack of capabilities tend to cluster and how functionings can overcome disadvantages.[149]

Disadvantage and Functionings

The authors of *Disadvantage* build on the capabilities approach as described above in Nussbaum's work. They develop a theory of disadvantage and acknowledge that poverty is more than just a lack of money.[150] They reason that poverty cannot be cured simply by a redistribution of money. Instead, they position poverty as a social condition which consists of inequitable relationships.[151] When identifying capabilities and functionings, the autonomy of the individual should not be forgotten. People have a right not to pursue functionings, but the opportunity

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[146] Nussbaum, *Creating Capabilities*, 65.

[147] Nussbaum, *Creating Capabilities*, 36.

[148] Nussbaum, *Creating Capabilities*, 41.

[149] Wolff and de-Shalit, *Disadvantage*, 120-22.

[150] Wolff and de-Shalit, *Disadvantage*, 4.

[151] Wolff and de-Shalit, 5.

should be available. The capability is the access, or the ability to achieve, while the functioning is the accomplishment of the capability,[152] but to Wolff and de-Shalit, the functioning must also be sustainable.[153] In other words, access to the functioning must be consistently available and within one's control.[154] Further, in order for a functioning to be genuine it must not involve "undue cost or risk,"[155] because a lack of sustainability or security of a functioning is a disadvantage.[156] The assessment of a person's disadvantage lies in the "capability to function,"[157] and the security of that capability.[158] Wolff and de-Shalit define disadvantage as "a lack of genuine opportunity for secure functioning."[159]

They suggest that the disadvantages cluster together, meaning that anyone who does not have security in one capability is likely missing security in other capabilities, causing a compounding effect.[160] For example, a person who does not have control over their environment is less likely to have a care or concern for a pet. Wolff and de-Shalit further identified the existence of corrosive disadvantages.[161] This is the phenomenon that occurs when the lack of one genuine opportunity for secure functioning causes the failure of security in other functionings. For example; if a person's bodily integrity is constantly at risk and a person fears for their

[152] Wolff and de-Shalit, 63.

[153] Wolff and de-Shalit, 65.

[154] Wolff and de-Shalit, 66.

[155] Wolff and de-Shalit, 80.

[156] Wolff and de-Shalit, 68, 72.

[157] Wolff and de-Shalit, 8.

[158] Wolff and de-Shalit, 116.

[159] Wolff and de-Shalit, 9.

[160] Wolff and de-Shalit, 10.

[161] Wolff and de-Shalit, 121.

personal safety their bodily health and mental wellbeing will decline, which may lead to substance use and potentially an addiction, which will have a negative effect on their ability to care for themselves, including their nutrition. Further, substance use will place them at increased risk for personal safety from violent behaviour and consequences of criminality and of course their health will decline from the addiction.[162] Thus, corrosive disadvantage has a downward spiral effect on functionings. Wolff and de-Shalit suggest government needs to be attentive to this phenomenon and to seek "fertile functionings,"[163] which create security of functionality and improve the likelihood of other functionings.

The authors reject the "*monist* theories"[164] that suggest that disadvantages can be given a ranking to determine severity. They also reject the suggestion that monetary compensation is the solution to all disadvantages.[165] The authors review several theories for compensation, but each is viewed by the authors as insufficient since the compensation does not speak to past or future injustices[166] and can add insult to injury.[167] The offer of a pittance in compensation devalues the harms suffered, or suggests that the harm can be repaired when it cannot. Their conclusion is that overcompensation in one dimension does not always correct a deficiency in a different dimension.[168] This may be particularly true if the deficiency exists in the dimension of social

[162] Wolff and de-Shalit, 116.

[163] Wolff and de-Shalit, 116; Nussbaum, *Creating Capabilities*, 18-19.

[164] Wolff and de-Shalit, 22. (Emphasis in the original).

[165] Wolff and de-Shalit, 24.

[166] Wolff and de-Shalit, 26.

[167] Wolff and de-Shalit, 28.

[168] Wolff and de-Shalit, 34.

relations, or as Nussbaum refers to it, what a person is capable of "doing and being."[169] This brings Wolff and de-Shalit to consider the opportunities that people have or do not have, or as they refer to them, "(*genuine*) *opportunities for* (*secure*) *functionings*".[170] Again, it is the lack of these secure functionings that equates to disadvantage.[171]

The authors, through their research engaged with people who are in a variety of different states of dis/advantage and sought their input on the capabilities as suggested by Nussbaum. Several additional and interesting categories were expressed during their research interviews, and these included; **Doing good to others**: "Being able to care for others as part of expressing your humanity. Being able to show gratitude."[172] This is similar to aspects of Nussbaum's capabilities, however, more expressly stated. Showing gratitude for the charity received allows the homeless to maintain their dignity during the depths of their need.

This paper will have a focus on the next two capabilities. In particular, the capability of **Living in a law-abiding fashion** is most applicable to the homeless: "The possibility of being able to live within the law; not to be forced to break the law, cheat, or to deceive other people or institutions."[173] When seeking to live independently and to meet one's basic needs, the homeless are arguably resourceful. Unfortunately, the determination of what activities are appropriately industrious is set not by the homeless, but by the social norms. Non-traditional income generation such as panhandling and squeegeeing have been deemed illegal in Ontario.[174] In the

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[169] Wolff and de-Shalit, 36.

[170] Wolff and de-Shalit, 37. (Emphasis in the original).

[171] Wolff and de-Shalit, 38.

[172] Wolff and de-Shalit, 58.

[173] Wolff and de-Shalit, 58.

[174] *Safe Streets Act*.

face of a lack of resources to pursue alternatives this has created a corrosive disadvantage for some homeless despite their apparent willingness to work. When engaging in illicit behaviours, the homeless are placing their personal liberty at risk in order to supplement their income. Functionings become insecure, particularly in the categories of bodily integrity, emotions, practical reason, affiliation, other species, play, and control over one's environment due to the possibility of incarceration upon conviction of provincial regulatory offences.

For those without the capability to live in a law abiding fashion, it is essential they have the capability of **Understanding the law**: "Having a general comprehension of the law, its demands, and the opportunities it offers to individuals. Not standing perplexed before the legal system."[175] This functioning is also at risk when the homeless are charged under provincial regulations. Many lack a working understanding of the court process, or the options available when facing a charge, or the consequences of failing to respond to a charge. This disadvantage also exemplifies the importance of affiliation as a fertile functioning. The affiliation of a legal representative can overcome this disadvantage, as will be explained in chapter five.

Once involved with the court system, the consequences for the homeless are disproportionate compared to an average citizen who is able to pay the monetary fines imposed as penalties under provincial regulations. Wolff and de-Shalit identify the concern of *sectoral justice*, that is, policy which is departmentalized and does not consider effects beyond the department, or narrow objective, for which it is written.[176] For example, the court's imposition of a condition on a probation order for an offender to remain outside of a geographical area,

[175] Wolff and de-Shalit, 59.

[176] Wolff and de-Shalit, 90. (Emphasis in the original).

intended to prevent recidivism.[177] Unfortunately such a condition has the added effect of restricting the individual's ability to access support resources that exist within that geographical area. The harms such actions cause are counter-productive to what they are attempting to achieve.[178] Wolff and de-Shalit suggest that sectoral justice lacks perspective and demonstrates the need for "inter-agency communication, co-operation, and co-ordination."[179] In the context of provincial regulations and the consequences for the homeless, sectoral justice results in a loss of proportionality. There is a gross disconnect between the severity of the offending act and the consequential outcome for the homeless. Wolff and de-Shalit suggest that "at the highest level of decision making some sort of overall assessment of disadvantage is needed."[180]

The authors state that affiliation is one of the most fertile of the functionings.[181] They assert that many functionings can benefit from affiliation and overcome existing disadvantages, while the lack of affiliation is a disadvantage in and of itself. The theory of disadvantage provides us with not only a definition of who is disadvantaged, but a working understanding of what causes disadvantage. It also provides understanding of how disadvantages can be overcome. Functionings can be understood for their positive effects in society and implementation in governmental policy.

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[177] This practice is known as "red lining", whereas a red line is drawn on a map to identify an area that an offender should not attend.

[178] Wolff and de-Shalit, 91.

[179] Wolff and de-Shalit, 92.

[180] Wolff and de-Shalit, 95.

[181] Wolff and de-Shalit, 139.

Focus on Homelessness

The focus of this thesis is on the homeless population, a sub-category of the poor. The poor are generally considered to be those who struggle to provide for their own basic necessities. Often, the poor have to prioritize one need over another, such as food over medicine, shelter over utilities, and they commonly accept charity assistance to fill the gaps for items, such as clothing. The homeless are the poorest of the poor. They have fallen below a line of poverty that is so low that their very existence can depend on the charity of others.

Not only do the homeless not have private spaces of their own in which to live, they rely heavily on others for food, clothing, and medical care. Access to shelter is dependent on the capacity of available shelters, as well as conditional on compliance with shelter policies.[182] In our own private spaces, we have the freedom to make our own rules. Shelter policies may be too restrictive for some clientele, limiting access to even charity shelter. We live in a cold climate where temperatures can drop below -20˚C for days on end. Those without shelter are exposed to the harshest of climate conditions.

Physical harm is an imminent threat from exposure not only to the climate, but exposure to others who suffer from addictions and mental instability. Security of their person is a further condition that must be confronted every day because the homeless do not have private spaces into which they can retreat. A lock cannot be placed on a tent, or a sleeping bag, or a cardboard hut. Even in a shelter there is no control over who else will be present. There are those homeless individuals who are at greater personal risk than others, such as women, LGBTQ2, youth,

[182] Kauppi, et al., *Homelessness and Hidden Homelessness,* 77.

indigenous persons and other racial minorities.[183] Further, personal possessions cannot be secured and leaving them behind risks loss or damage. The fear and anxiety of harm is constant in the lives of the homeless.

The conditions that are imbued in homelessness demonstrate deficiencies in all ten of the capabilities as described by Nussbaum, and the additional three added by Wolff and de-Shalit. It is immediately evident that the capabilities of Life, Bodily Health, Bodily Integrity, Emotions and Control of One's Environment are deficient for the homeless. The capabilities of Senses, Imagination and Thought, as well as Play, Practical Reason, and Other Species, are how we express our individuality and humanity. To supress one's individuality is to de-humanize and crush one's spirit. This seems fundamentally incongruous with Canadian social norms.

Conclusion

Laws are created to protect our social norms. Behaviours and conditions that are not consistent with desirable social norms are deemed immoral. Living in conditions close to animality and perceived to be willingly outside social norms, have been deemed disgusting. Disgust motivates the perception of immorality, be it a physical condition or an ideology. The unreasonable fear of being contaminated, either physically or ideologically by the immoral is motivation to control the undesirable. The control generates social hierarchy within which groups are marginalized. The consequence of control is shame for those marginalized and penalized by stigma. These emotions have influenced social policies and laws for centuries, and continue to be prominent today, as will be demonstrated in the following chapters.

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[183] Gaetz, Stephen. "Safe Streets for Whom? Homeless Youth, Social Exclusion, and Criminal Victimization." *Canadian Journal of Criminology and Criminal Justice* 46, no. 4, (2004): 423-56; Kauppi, et al.,*Homelessness and Hidden Homelessness*, 77.

Capabilities that enable all people in a society to function at an equitable level are necessary in a just society. The lack of functionings for the homeless population explains their vulnerabilities and disadvantages. These disadvantages are the social injustice of homelessness. Corrosive disadvantages, such as the inability to live within the law and a lack of ability to understand the law and legal process, cause further disadvantages. This downward spiral is the perpetuation of homelessness, caused by disproportional consequences in penalties of provincial offences. These disproportional consequences will be further explained in coming chapters.

Before examining the consequences of current provincial regulations, I will next examine the historical origins of English social policies used to control the homeless in the 1300s and onward. English society perceived that welfare for the impoverished was causing harm to the economic classes who paid the taxes. The response was anger resulting in amendments to the poor laws.[184] Under the *New Poor Law*,[185] the poor were relegated to work houses, separated from the average citizen, and forced to live in abhorrent conditions[186] suitable for their ranking in society.[187] These attitudes migrated to Canada and have influenced our current provincial legislation and the control of the homeless.

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[184] Edgar Miller, "English Pauper Lunatics in the Era of the Old Poor Law," *History of Psychiatry* 23, no.3 (2012): 319-20.

[185] *Poor Law Amendment Act* 1834, 4 & 5 Will. 4 c. 76. (Eng.).

[186] Rachel Vorspan, "Vagrancy and the New Poor Law in late-Victorian and Edwardian England," *The English Historical Review* XCII, no.CCCLXII (1977): 67.

[187] Nussbaum, *Hiding from Humanity*, 98.

Chapter 3: A Brief History of Vagrancy and Public Welfare Laws

The origins of our present day laws can be found in the laws of England dating back to the 1300s. In the 1800s laws and traditions migrated to Canada with colonialism, including those related to poverty. If we understand how these laws have evolved it will enable us to reflect on whether we have blindly followed the trends of the past, or whether we have plotted a course with deliberate intention and cause. I argue that it is the former, and that it is time to embrace social, economic and political awareness and to re-evaluate social policies with consideration of their consequences for the whole of society, as encouraged by Nussbaum, Wolff and de-Shalit.

The legal systems as we know them today have roots in the ancient past. Laws which gave consideration to the impoverished can be traced back to Babylonia during the reign of Hammurabi between 1795-1750BCE.[188] Laws provided for the protection of the weak, such as orphans and widows[189], ensuring the provision of bare necessities.[190] The Royal inscriptions cited the King's ability to forgive debt of citizens and referred to justice and welfare for the disadvantaged part of the population.[191] The opportunity to exercise compassion, to reduce

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[188] Charles F. Horne, "The Code of Hammurabi: Introduction" 1915. http://avalon.law.yale.edu/ancient/hammint.asp

[189] J. Dyneley Prince, "The Code of Hammurabi," *The American Journal of Theology* 8, no.3 (Chicago: University of Chicago Press, 1904): 601-609.

[190] George E. Vincent, "The Laws of Hammurabi," *American Journal of Sociology* 9, no.6 (Chicago: University of Chicago Press, 1904): 737-753.

[191] Norbert Lohfink, "Poverty in the laws of the Ancient New East and of the Bible," *Theological Studies* 52, (1991): 36-38; Also see: Edwin M. Good, "Capital Punishment and Its Alternatives in Ancient Near Eastern Law," *Stanford Law Review* 19 (1966.); Vincent, "The Laws of Hammurabi".

hardship for the marginalized members in society, existed in law and policy even 3,700 years ago. In modern times, the well-being of marginalized people has not always been a focus of politics. Demands for improved conditions in society for the lower classes have ebbed and flowed throughout history.[192] The rise of social policy emerged as a means to control social life through politics, thus regulating the population while promoting social norms and practices.[193]

The political and social evolution of western societies were connected to the development of legal systems.[194] In England, as political structures changed from monarchial reign to democracy, so too did the laws of governance. This evolution gave rise to the administrative structure of multi-tiered agencies through which social policies were created and dictated, regulating public and private life.[195] This can be clearly illustrated through the development of the laws which dealt with poverty and poor relief going back to the 1300's. These structures changed to reflect the philosophical political approach of rulers. Eventually, the laws of England were imported to Canada and continued to develop within Canadian society.

This Chapter provides a brief historic overview of the changes in England and the evolution of laws and socio-political structures dealing with poverty and the response for poor

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[192] Martha F. Davis, "The Pendulum Swings Back: Poverty Law in the Old and New Curriculum," *Fordham Urban Law Journal* 34 (2007): 1391-1416; Also see, Charles Tilly and Lesley J. Wood, *Social Movements 1768-2012* 3rd ed. (New York: Routledge, 2016).

[193] Martin Hewitt, "Bio-Politics and Social Policy: Foucault's Account of Welfare," *Theory Culture and Society* 2, no. 1 (1983): 67.

[194] The focus for this paper will be on the English Common Law system, however, I acknowledge that the French Civil Law system has also be largely influential in western societies and throughout the colonized world.

[195] Hewitt, "Bio-Politics and Social Policy," 67-8.

relief. It also reviews the history of vagrancy laws in Canada and, more specifically, Ontario under provincial regulatory laws in recent decades.

Poor Relief and Social Re-structuring

There is one event that changed the social landscape in England in a way that was unequalled by any other over the following 500 years.[196] The economic system was forever changed when the Bubonic Plague, or Black Death, reached England in 1348.[197] Initially, the cause of the disease was not understood, nor were the means by which it was spread. Blame for the Plague was leveled toward the transients, poor and often looking for work or to sell their wares, who travelled across England.[198] I argue that the association of the poor being unwashed and potentially carrying deadly diseases created disgust and fear of the poor, emotions which remain associated with poverty to this day. This disgust, as identified by Nussbaum, is associated

[196] Sevket Pamuk, "The Black Death and the origins of the 'Great Divergence' across Europe, 1300-1600," *European Review of Economic History* II, (Cambridge: Cambridge University Press, 2007): 289-317; Daniel B. Kosove, "English Law in the Age of the Black Death, 1348-1381: A Transformation of Governance and Law by Robert C. Palmer," *Michigan Law Review* 93, no. 6 (The Michigan Law Review Association, 1995): 1768-1777.

[197] Pamuk, "The Black Death," 293. This global phenomenon influenced many countries, most of whom were involved in trade relations. I will focus solely on England. For simplicity, I will hereinafter refer to the Plague.

[198] Anna Foa, "The Jews of Europe after the Black Death," (University of California, 2000). The Jewish tradition for cleanliness lead to a lower incident rate of deaths in Jewish communities, which was viewed with suspicion. The Jewish people were also blamed, accused of having poisoned community wells. Eventually the cause was determined to be a bacterial infection commonly spread by fleas on rats. Logically the spread may have been casually perpetuated by the transient population, caused by stowaway rats in wagons and cargo.

with ideas of a contamination.[199] The fear of the potential harm of infection included the physical disease as well as fear of loss of social standing through association with the undesirable morality of the poor.[200]

The death toll from the Plague is estimated to have been from one-third to over half of the total population of England.[201] In the 1360's there was a resurgence of the Plague, and sporadic outbreaks continued into the fifteenth century.[202] These events continued to decimate the number of able-bodied workers and crippled industrious enterprises which relied on labourers. In the years following the first wave of the Plague demand for labourers and wages soared.[203] In an attempt to control these sudden changes, the *Statute of Labourers*[204] was passed in 1351. This Act attempted to contain wages at pre-Plague rates and made it illegal to be unemployed without just cause.[205] Thus the criminalization of being idle, or vagrant, emerged. The demand for labourers created a shift in the power dynamics between peasants and lords,

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[199] Martha C. Nussbaum, *Hiding From Humanity: Disgust, Shame and the Law* (Princeton: Princeton University Press (2004), 14, 74, 83-4.

[200] Rachel Vorspan, "Vagrancy and the New Poor Law in late-Victorian and Edwardian England," *The English Historical Review* XCII, no.CCCLXII (1977): 74

[201] Kosove, "English Law in the Age," 1768; John Muendel, "King Death: The Black Death and Its Aftermath in Late-Medieval England by Colin Pratt," *Journal of American Medical Association* 277, no.12 (1997):1007; Dan Jones, "The Summer of Blood; The Peasants' Revolt," *History Today* (Harper Press, 2009): 35.

[202] Pamuk, "The Black Death," 293.

[203] Pamuk, "The Black Death," 294.

[204] *Statute of Labourers*, 1351, 25 Edw. 3, chs. 1-7 (Eng.). [*Statute of Labourers*].

[205] Kosove, "English Law in the Age," 1772.

eventually resulting in the Peasant's Revolt of 1381 and the demise of Serfdom.[206] In the years following the Plague, wage rates substantially increased, nearly doubling over the next 150 years, changing the economics of the nation.[207] In the 1500s, wages and demand for labour stabilized as the population recovered from the Plague. The labour shortage after the Plague also had the effect of encouraging innovation to find industrious solutions for production.[208] Machinery designed to do the work of several men meant that tasks could be completed with fewer labourers. As the population recovered, labourers were not in as high of demand and wages began to drop, while the cost of goods remained stable.[209] This had a dual impact of creating genuine work shortages and increasing the difficulty to cover the cost of basic goods. As a result, the standard of living began to decrease and the incidences of poverty increased.[210] Labour shortages caused people to seek work in other communities, increasing transience and its association with poverty. The changes in social economics gave rise to vagrancy.

Focusing on laws as a measure of attitude towards poverty, the Elizabethan Poor Law denotes a shift in approach and attitude. In 1601, *An Acte for the Releife of the Poore* was passed,[211] now commonly known as the Old Poor Law. It set out a social system of providing welfare for those who were unable to provide for themselves.[212] Within the literature there are

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[206] A.L. Beier, "The problem of the poor in Tudor and early Stuart England," (Methuen & Co. Ltd., 1983): 3.

[207] Pamuk, "The Black Death," 292.

[208] Pamuk, "The Black Death," 311.

[209] Beier, "The problem of the poor," 7.

[210] Pamuk, "The Black Death," 296.

[211] *An Acte for the Releife of the Poore*, 43 Eliz. 1 c 2. (Eng.). [Old Poor Law].

[212] Avner Greif and Murat Iyigun, "What did the Old Poor Law Really Accomplish? A Redux," *Institute for the Study of Labour* (2013): 6.

many terms pulled from history to assist in the classification of the poor. The *deserving*, *impotent* or *guiltless* poor tend to be people who, for reasons beyond their control, are incapable of earning their keep. These were people who may have been accepted as disabled, orphaned or widowed. The *undeserving* or *idle* were those who were deemed capable of working, but who were not.[213] This category of poor included unskilled soldiers and sailors returned home between wars; males who appeared physically able to perform labour; persons travelling to sell wares considered unindustrious; or, anyone deemed to be supporting themselves through criminal activity.[214]

As early as 1580, censuses were conducted to take inventory of the poor to determine who were the deserving or undeserving of relief.[215] The relief system was one of charity that relied on three levels of contribution. First the families of the poor were responsible to support an individual or related family group who was in need. For example, spouses were to support each other; parents were to support children and vice versa, regardless of age; siblings were to support siblings and their dependants; and, extended families were to offer relief as needed to relatives by blood or marriage. When the families were unable to provide sufficient support they could turn to the Parish of Settlement.[216] The Parish of Settlement was that in which a man was baptised or, in the case of a widow, determined by the Parish of the husband. The Parish was charged with providing the relief of necessities. This relief was given to the families to ease their burden. If families were unable to provide any support, the Parish provided welfare in

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[213] Charlotte Newman, "To Punish or Protect: The new Poor Law and the English Workhouse," *International Journal History Archaeology* 18, (Springer, 2013): 122-145.

[214] Criminal activity may have been real, such as fraud or theft, or perceived criminality, such as card playing or other games of chance.

[215] Beier, "The problem of the poor," 26-7.

[216] Greif, "What did the Old Poor Law Really Accomplish?" 6.

almshouses for the infirm and elderly, or workhouses for those who could work for their keep. The cost of running these institutions was supplemented by the Parish and government, paid for by the collection of taxes referred to as "poor rates".[217]

The cost of running the welfare institutions was considerable, especially during times of failed crops when the work shortages and food shortages attracted higher numbers of people. In the sixteenth and seventeenth centuries frustration of supporting the poor elicited more severe means of dealing with the idle. New regulations were created to control vagrancy. The political philosophical tide turned toward punishment as dissuasion for those of flawed character, rather than the previous charitable approach.[218] The categorization of "industrious and unfortunate verses idle and criminal"[219] did not appropriately address all who found themselves in the ranks

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[217] Edgar Miller, "English Pauper Lunatics in the Era of the Old Poor Law," *History of Psychiatry* 23, no. 3 (SAGE, 2012): 318-328.

[218] Beier, "The problem of the poor," Appendix, 39-42. 1495: An Act Against Vagabonds and Beggars. 1531: An Act Concerning Punishment of Beggars and Vagabonds. 1536: An Act for Punishment of Sturdy Vagabonds and Beggars. 1547: An Act for the Punishment of Vagabonds and for the Relief of the Poor and Impotent Persons. 1549: An Act Touching the Punishment of Vagabonds and Other Idle Persons. 1552: For the Provision and Relief of the Poor. 1563: An Act for the Relief of the Poor. 1572: An Act for the Punishment of Vagabonds and for the Relief of the Poor and Impotent. 1597: An Act for the Punishment of Rogues, Vagabonds and Sturdy Beggars. 1604: An Act for the Continuance and Explanation of the Statute Made in the 39th Year of the Reign of Our Late Queen Elizabeth, Entitled an Act For Punishment of Rogues, Vagabonds and Sturdy Beggars. 1610: An Act for the Due Execution of Diverse Laws and Statutes Heretofore Made Against Rogues, Vagabonds and Sturdy Beggars and Other Lewd and Idle Persons.

[219] "Observations Upon the Vagrant Laws; Proving that the Statutes in Queen Elizabeth's Time are the most proper Foundation for a Law of that Nature and that all Alterations that have been

of the poor. For example, unemployed soldiers without skills to secure employment in a trade found themselves classified among the idle and criminal.[220] Effectively, it was illegal to be able-bodied and unemployed or transient, including if one was seeking employment.[221] Behaviours for survival, such as begging, or the selling of lace or ribbon, to name just two, were considered to be insufficiently industrious and failing to contribute to society.[222] Punishments were based on the indiscretion of the offence, but included whipping, imprisonment, transportation (return to one's Parish of Settlement), or being hanged. Criticisms of the punishment were related to the expense of imprisonment or transportation, and hanging was acknowledged as too severe.[223]

Reform of the *Old Poor Law* took place in 1834. The *New Poor Law*[224] resulted in the discontinuation of relief for the poor unless determined to be deserving. All those who were able-bodied were sent to institutions.[225] Idle men, women, and children were sent to work houses. The conditions at the work houses are infamous. De-humanizing conditions within the work houses

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made since, have been for the worse," *Hansard report 5675*. (London: University of London, 1903):4; Most commonly differentiated as deserving or undeserving. Also see Miller, 320.

[220] Beier, "The problem of the poor," 6;

[221] Transients who were seeking employment were returned to their parish of settlement in attempt to avoid local people losing work opportunities from out-of-towners. The reasoning was to keep parish of settlement relief expenses low. However parishes of settlement had to pay the cost of transportation to return the person back from where he came.

[222] Miller, "English Pauper Lunatics," 320.

[223] Hansard Report 5675, 4.

[224] *Poor Law Amendment Act* 1834, 4 & 5 Will. 4 c. 76. [*The New Poor Law*].

[225] Grief, "What did the Old Poor Law Really Accomplish?" 7-8; Henderson, John, "Charity and the Poor in Medieval and Renaissance Europe," *Continuity and Change* 3, no.2 (1988):148. Determination of able-bodied was made during the census. In one documented case an eighty year old women with only one hand was deemed able-bodied.

were driven by social policy theoretically designed to motivate people to be industrious.[226] These social policies blamed the poor and created structures that the poor were not capable of overcoming. These policies perpetuated impoverishment through corrosive disadvantages, rather than generating fertile functionings that could have enabled one to change their emotional and material circumstances. The social hierarchy as identified by Nussbaum[227] was present in that those able to live according to social norms made the determination of *deserving* as well as controlled the conditions in the workhouses.

In the early nineteenth century another philosophical shift occurred. The considerable expense to maintain workhouses without industrious economical gain and the mounting objections to the inhumane treatment of those housed, resulted in a change of political will. Nevertheless, remaining institutions were maintained by the English government until April 1st, 1930. Those that remained open were transferred to the control of their county.[228] The change in social policy for dealing with the idle was motivated by the strategic re-integration of the poor into the economy as potential contributors to the labour force, industrial production capacity, and national gross domestic product in a growing global market.[229]

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[226] Joseph Harley, "Material lives of the poor and their strategic use of the workhouse during the final decades of the English old poor law," *Continuity and Change* 30, no. 1 (Cambridge: Cambridge University Press, 1951): 71–103.

[227] Nussbaum, *Hiding from Humanity*, 83.

[228] *London Metropolitan Archives Information* Leaflet Number 4. Poor Law records in London and Middlesex. https://www.cityoflondon.gov.uk/things-to-do/london-metropolitan-archives/visitor-information/Documents/04-poor-law-records-in-london-and-elsewhere.pdf

[229] *Hansard Report 5675*.

Throughout Western history, the poor who occupied public spaces have been controlled through the enforcement of vagrancy laws.[230] Where they lived and how they earned money was determined by those who were higher in the social order. The spread of disease and immorality were considered socially disgusting and the basis for fearing the poor who were transient and unkempt; these emotions were the motivators and the justification for control. Documentation from the 1800s expressed these sentiments as generally socially accepted.[231] The intentions of the Poor Laws have been interpreted as a social responsibility toward the poor; however, there is ambiguity as to whether the responsibility was motivated by charity or punishment.[232] The means of dealing with welfare has been a point of contention between those who carry the burden and those who receive relief.

The historical provision of relief has been extensively interpreted by academics and based on geographical location, available resources, and government of the era and region. Attitudes toward the poor have been interpreted to vary greatly. Palmer states that the Plague was a catalyst for the change in governmental approach in Medieval England – the shift in power due to labour shortages required a more authoritarian approach by government.[233] The results were the introduction of the *Statute of Labourers*[234], which controlled wages, and the *Ordinance of*

[230] Vorspan, "Vagrancy and the New Poor Law,"78. "Workshy and vagrants will be treated as morally on the criminal level…"

[231] Vorspan, "Vagrancy and the New Poor Law," 68.

[232] Beier, "The problem of the poor," 1-2.

[233] Kosove, "English Law in the Age," 1768.

[234] *Statute of Labourers*.

Labourers in 1349,[235] which controlled the activities of labourers such as dress and diet.[236] Palmer also states the intention behind the increase of governmental control was to "force everyone in the kingdom to live up to the obligations that traditionally attached to their respective positions in the social hierarchy."[237] This is akin to Nussbaum's explanation of social hierarchy being created through control of social norms.[238]

As previously mentioned, the initial system of relief for the poor was one of charity, however, in 1601, with the passing of Old Poor Law the state became primarily responsible for ensuring said relief was provided[239], albeit funded through the poor rates. The determinations of whether a person was deserving or undeserving was also a means to control the number of people who received support, thus controlling the cost burden.[240] The popular view of vagrancy was that poverty was a choice[241] and as such undeserving of relief. The 1834 New Poor Law was passed with the intention to "raise the labouring classes … from the idleness, improvidence, and degradation…,"[242] however the conditions of the workhouses under this Act were inhumane.[243] This was not however, the only perspective. In a presentation to parliament the Worshipful Company of Goldsmiths[244] expressed that the accumulative laws for poor relief and control of

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[235] *Ordinance Concerning Labourers and Servants*, 1349, 23 Edw. 3, chs. 1-7 (Eng.).

[236] Kosove, "English Law in the Age," 1772.

[237] Kosove, "English Law in the Age," 1773.

[238] Nussbaum, *Hiding from Humanity*, 83.

[239] Greif, "What did the Old Poor Law Really Accomplish?" 6.

[240] Beier, "The problem of the poor," 30.

[241] Vorspan, "Vagrancy and the New Poor Law," 73-4.

[242] Greif, "What did the Old Poor Law Really Accomplish?" 8.

[243] Vorspan, "Vagrancy and the New Poor Law," 66.

[244] *Hansard Report 5675*. Date of presentation and speaker unknown.

vagrancy were an ineffective and inappropriate economic approach. The laws created an economic burden on the working class, while not providing sufficient alternatives or opportunities to the poor. Further, if production was kept in England there would be sufficient employment opportunities, alleviating the vagrancy problem.[245] The view that vagrancy was not a character flaw but instead a result of a lack of economic opportunity lead to reform in the twentieth Century. This was true not only of England but in Canada as well.

Canada

The earliest documented vagrancy law in what is now known as Canada was enacted in 1759, in Halifax, Nova Scotia:[246] *An Act for regulating and maintaining a House of correction or Work-House within the Town of Halifax.*[247] The attitudes toward the idle continued in the same tone and regard as had been present in England during that time. The distinction between the *deserving* and *undeserving* poor continued as a basis of punitive measures.[248]

At the time of Confederation, efforts were made to consolidate the laws in Canada, which included laws against vagrancy.[249] The 1906 revision of the *Criminal Code* specifies "A conviction for vagrancy under section 238 is not warranted where the accused had at the time of

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[245] Vorspan, "Vagrancy and the New Poor Law," 64. Proposals for reforms came from many sectors, many agreed on the deficiencies of the then present laws and policies.

[246] Prashan Ranasinghe, "Reconceptualizing Vagrancy and Reconstructing the Vagrant: A Socio-Legal Analysis of Criminal Law Reform in Canada, 1953-1972," *Osgoode Hall Law Journal* 48, no. 1 (Toronto: York University, 2010): 55-94.

[247] Ranasinghe, "Reconceptualizing Vagrancy." Suggested to have been modelled after the *Vagrancy Act, 1744* (U.K.), 17 Geo. II, c. 5.

[248] Ranasinghe, "Reconceptualizing Vagrancy," 60.

[249] Ranasinghe, "Reconceptualizing Vagrancy," 61-2; *Criminal Code*, S.C. 1892, c. 29, ss. 207, 208 [*Criminal Code* 1892].

his arrest, sufficient money for his immediate wants and had been regularly employed…"[250] Further it goes on to state, "The law of vagrancy does not apply to persons of general good character, but is intended to apply to loose idle[251] and disorderly[252] persons only."[253] When interpreting the law, the first rule is to use the common language meaning of words.[254] Thus if dictionary definitions are applied to this law, it was illegal to be unemployed and poorly dressed and/or unwashed. Hence vagrancy charges were laid based upon arbitrary character evaluations made by police officers.[255] The 1906 version of vagrancy in the *Criminal Code* remained in force and effect until revisions were made in 1955. During the Great Depression of the 1930s, the application of vagrancy laws flourished in response to unemployment rates.[256] Any criminal activity that an individual conducted, such as theft or fraud, was addressed through distinct and separate charges, while vagrancy was a charge specific for the criminalization of the socio-economic condition of homelessness. These laws and attitudes regarding vagrancy demonstrate a continuation of the 1350 English disgust and fear of the transient poor due to potential contamination of disease and perceived social immorality.

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[250] *Criminal Code*, R.S.C. 1906 c.146. [*Criminal Code* 1906].

[251] *Oxford Online English Dictionary*. Definition of Idle: Lazy, Avoiding work. https://en.oxforddictionaries.com/definition/idle

[252] *Oxford Online English Dictionary*. Definition of Disorderly: Lacking organization; untidy. https://en.oxforddictionaries.com/definition/disorderly; It has evolved to be recognized as a term descriptive of bad behaviour.

[253] *Criminal Code* 1906.

[254] *Legislation Act*, S.O. 2006, c.21.

[255] *R v ETF*, [2002] OJ no 4497 (QL); *R v Baston*, 2007 ONCJ 136; Judicial notice that people who are street involved experience profiling.

[256] Ranasinghe, "Reconceptualizing Vagrancy," 64.

It was in the aftermath of World War II when the economy began to prosper that a shift was seen and social welfare began to develop in Canada.[257] In citing the *House of Commons Debates* in 1944,[258] Ranasinghe quotes Prime Minister William Lyon Mackenzie King as having stated, "…the new order is not going to have things done as charity. What is to be done will be done as a matter of right."[259] Ranasinghe describes that worthiness to receive these new rights had to be proven through administration of the welfare programs[260] wherein an applicant had to prove their eligibility for receipt of benefits. This was similar to the present day determination of disability, as discussed in Chapter two.

In 1955, significant revisions were made to the *Criminal Code*.[261] Specifically looking at vagrancy laws, the choice of language demonstrates an attitudinal shift away from the individual's character and instead toward behaviour. The changes to the vagrancy laws were reflective of the changes in perception of vagrancy as a socio-economic issue rather than character flaws of the individuals.[262] Unemployment was no longer equated with criminality,[263] however, the act of begging in any form became a criminal offence for the first time in Canada.[264] The statutes dealing with vagrancy were reduced in number, however, the language in each section became more general, thus expanding rather than curtailing the application of the

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[257] Ranasinghe, "Reconceptualizing Vagrancy," 65.

[258] Hon. James Allison Glen, K.C, *House of Commons Debates,* (25 July 1944): 5335.

[259] Ranasinghe, "Reconceptualizing Vagrancy," 66.

[260] Ranasinghe, "Reconceptualizing Vagrancy," 66.

[261] Ranasinghe, "Reconceptualizing Vagrancy," 64.

[262] Ranasinghe, "Reconceptualizing Vagrancy," 67.

[263] Ranasinghe, "Reconceptualizing Vagrancy," 78.

[264] *Criminal Code*, R.S.C. 1953-1954, 2 Eliz. 2, c. 51, s. 164(1)(b) [Criminal Code 1953-1954].

legislation.[265] If laws are intended to protect society and its members from harm, it is difficult to rationalize laws against begging. If laws against begging have the intention to control criminal behaviour, such as assault or threats, these laws exist independently. If the intention of laws against begging is merely to prevent people from asking for a charitable gesture of giving spare coins, it is difficult to find harm. I argue the only harm that can be found in the act of begging is the shame experienced by the person in need of charity. Unless one wishes to include the emotional discomfort felt by the passerby who must gaze upon the beggar in the state of shame and destitution.

In the 1970s Prime Minister Trudeau influenced the legislature with his philosophy that freedom was an essential value in a just society.[266] When he commissioned the *Report on the Status of Women* in Canada,[267] the resulting report also captured the use of vagrancy laws which impeded a person's liberty to move about freely.[268] The commission's report was influential in reforming vagrancy laws during the 1972 revisions of the *Criminal Code*.[269] In the 1972 revisions to the *Criminal Code*, three of the five acts that constituted vagrancy were removed.

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[265] Ranasinghe, "Reconceptualizing Vagrancy," 69-70.

[266] Ranasinghe, "Reconceptualizing Vagrancy," 82.

[267] Royal Commission of Canada, "Report of the Royal Commission on the Status of Women," *Government of Canada* (Ottawa: Crown Copyrights, 1970) [*Report on the Status of Women*].

[268] Ranasinghe, "Reconceptualizing Vagrancy," 84-5. Specifically concerned with the gendered implications of the law arbitrarily enforced against females deemed to be prostitutes, however, arbitrary determination of criminality as vagrancy was identified.

[269] *Criminal Law Amendment Act*, S.C. 1972, c. 13, s. 12; Ranasinghe, "Reconceptualizing Vagrancy," 85.

The repealed sections included wandering without purpose, begging and prostitution.[270] The remaining activities deemed as vagrancy focus on supporting oneself on illicit gambling, deceit, or predatory behaviours. Poverty and unemployment were no longer evidence of criminality,[271] however, the behaviour associated with the condition of being poor to the point of homelessness, remained under statute. A specific example is *loitering;* which is inevitable if one does not have a private space of one's own in which to retreat, causing one to occupy public space, and which remains a criminal offence under *Causing a Disturbance*.[272] This section of the *Criminal Code* continues to be enforced today, unchanged in revisions since 1972.

The shift in attitude that resulted in the changes to the laws are exemplified by the political philosophy expressed by Pierre Elliot Trudeau, as Prime Minister of Canada, who believed that morality was separate from criminality.[273] Nevertheless, if it appears that the legislators of his time had come to a consensus that poverty does not equate to criminality and that being idle is not demonstrative of character flaws but is instead a socio-economic condition, we only need to move forward three decades to find evidence to the contrary. Even following passage of the Canadian Charter of Rights and Freedoms, Ontario passed a law under the title *Safe Streets Act*,[274] in 2000. The Act is specific to the control of 'solicitation' and other behaviour

[270] The act of being a prostitute was no longer an offence. The social welfare shift is notable in the new related offence of solicitation, moving the focus to the customer rather than the provider.

[271] *Criminal Code*, R.S.C. 1985, c. C-46, s. 179(1) (a), (b).

[272] *Criminal Code* 1985, section 175.

[273] Ranasinghe, "Reconceptualizing Vagrancy," 83.

[274] *Safe Streets Act*, 1999, S.O. 1999, c.8. [*Safe Streets Act*]

deemed to be a threat to public safety, which targets 'squeegee kids'[275] and panhandlers[276]. The Act was later amended in 2005 to exempt charity activities that resemble behaviour that would contravene the statute. In the 1970s morality of homelessness was removed from criminal law, however it re-entered the law in Ontario through enforcement of provincial regulations. It is notable that prior to 2000, there was not a specific provincial statute dealing with vagrancy or associated behaviours in Ontario.[277] Clearly the *Safe Streets Act* had supporters for its enactment. It also had, and continues to have, critics. The debate regarding the appropriate way to address homelessness continues.

Conclusion

In this chapter I have reviewed the history of the laws in England and Canada which have been used to control the poor and the homeless over the past 600 years. Social policies have been used to govern public and private lives. I have demonstrated that socio-economic conditions have influenced the social policies of welfare programs for the impoverished. The emotional motivators of disgust and fear that call for control of the immoral homeless have historical roots, and as demonstrated in the enactment of the *Safe Streets Act*, continue to flourish in present day. Judgments of their economic activities as being immoral and a threat to society have been grounds for further legislative controls. Punitive social policies of this kind create disadvantages for the marginalized, instead of creating supportive opportunities for improvement of their capabilities. Although popular opinion swings back and forth between charity and punishment,

[275] Denotes youth who solicit money in exchange for cleaning vehicle windows while stopped at traffic lights.

[276] Denotes impoverished individuals who supplement income through street begging.

[277] This will be discussed in depth in Chapter 4.

there has not been a truly viable legal solution for poverty in a Western society. The current use of provincial regulatory laws – in particular, the *Safe Streets Act* – in Ontario disproportionality aims toward the homeless. The next chapter will review provincial regulatory laws and demonstrate where equal punishment becomes disproportionate for the homeless population and examine where fertile functionings can be introduced to overcome the disadvantage of provincial regulatory law.

Chapter 4: Laws, Process, Penalty Principles and Alternative Measures

Chapter one demonstrated the present day attitudes toward the homeless population and chapter two explained how these attitudes and emotions led to control of their activities and the social injustice that the homeless encounter. Chapter three demonstrated that the control of the homeless has been present in social policy for centuries. This chapter focuses on the administrative processes behind the control; enforcement and application of the laws to further explain how social injustice is created and imposed on the most vulnerable in our society. This begins with an explanation of the categorization of criminal laws as applied to vagrancy in Canada. It then goes on to explain the decision of *R. v Sault Ste. Marie*[278] and how it changed the administration of provincial regulatory offences in Ontario. This will include an explanation of the administrative authorities within the *Provincial Offences Act*[279] and the procedures under which regulatory offences are administered. Furthermore, I will explain three provincial regulatory offence Acts in Ontario that are used in the control of the homeless population. Then, I will explain the penalty principles in law and how they are absent in provincial offence regulation. It is here that I will identify several limitations within the judiciaries' authority for sentencing. Finally, I will explain the administrative authorities and procedures that are implemented after a conviction under a provincial regulatory offence in Ontario. This will elucidate the potential lack of proportionality consequential to provincial offences for the homeless.

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[278] *R v Sault Ste. Marie*, [1978] 2 S.C.R. 1299. [*Sault Ste. Marie*]. https://scc-csc.lexum.com/scc-csc/scc-csc/en/item/2605/index.do.

[279] *Provincial Offences Act*, 1979, S.O. 1979, c4.

Summary Criminal Offences

It is helpful to understand what is required in the prosecution of an offence. This begins with the prosecutor having the burden of proof, meaning that in the majority of offences[280] the onus is on the prosecutor to prove that an offence was committed. In order for a person to be convicted of a criminal offence the prosecution must prove beyond-a-reasonable-doubt that the elements of the offence were committed by the person who was charged. The elements of an offence are set out in both the statute as well evolve in case law. Two requirements of every criminal offence include the proof of (1) *mens rea,* and (2) *actus reus. Mens rea* is the mental element of an offence, or intention to have committed the offence. *Actus reus* is the physical element, or action of committing the offence. The mental intention can often be proven based on the interpretation of a person's actions, however, this requirement creates challenges for the prosecution. If the prosecution is successful and a conviction is registered against the accused, then appropriate sentencing or punishment will be determined.[281]

All offences under the *Criminal Code* are categorized according to their perceived severity and harm to society. These categorizations are specified within each section of the *Criminal Code*. There are two categorizations of offences: Summary and Indictable. The *Criminal Code* provides for the discretion of the Crown Prosecutor to determine categorization based on the severity of the circumstances. This is accomplished with an offence being identified as a hybrid-offence, meaning that the Prosecutor may elect to proceed by way of Summary or by way of Indictment. The categorization determines the procedures that

[280] There are exceptions to the prosecution having the burden of proof. These exceptions are known are reverse onus offences, in which the defence has the burden of proof. These exceptions do not apply to Summary offences, and therefore it is sufficient to acknowledge the exceptions exist, however, they are not relevant to the topic at hand.

[281] John Pearson Allen and Rick Libman, *Handling Provincial Offences Cases in Ontario 2010*, (Toronto: Carswell, 2010), 85; Sentencing will be discussed later in further detail.

will be followed in the determination of guilt or innocence of the accused person. As an Indictable offence these procedures include the accused's election of a trial by Judge or Judge and Jury, and provide for severity in sentencing options beyond those of Summary offences.[282] The Summary offences do not allow for trials by Jury. The sentencing for Summary offences is limited to a maximum period of incarceration of six months, and can include a monetary fine of up to $5000.[283]

In the 1970 version of the *Criminal Code*, the offence of Vagrancy was Section 175[284] and it was classified as a Summary offence. The *Criminal Code* was amended in 1972. Since then vagrancy as a specific offence has no longer specifically included behaviours associated with homelessness.[285] Instead, the summary offence of Causing Disturbance[286] at Section 175[287] captures a few of the behaviours previously noted under the offence of vagrancy, specifically loitering.[288] As a consequence, persons charged criminally due to behaviours associated with homelessness have faced the possibility of incarceration of up to six months in jail and monetary fines.

The criminal system does, however, provide alternative measures for punishment. Upon conviction, the *Criminal Code*[289] allows for the offender to be placed on probation in lieu of, or

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[282] This is not the full extent of the procedures under the categorization of Indictment, however, for the sake of brevity, the details here have been limited.

[283] *Criminal Code*, R.S.C. 1985, c. C-46, s.787. [*Criminal Code*]

[284] *Criminal Code*, R.S.C. 1970, c. C-34, s.175.

[285] The 1972 amendment moved the offence of Vagrancy from s.175 to s.179. It now addresses supporting oneself by criminal activities and predatory behaviour.

[286] The 1972 amendment moved the offence of Causing Disturbance from s.171 to s.175.

[287] *Criminal Code*, R.S.C. 1985, c. C-46, s.175.

[288] *Criminal Code*, s.175, (1)(c).

[289] *Criminal Code*, s.737.

in addition to imprisonment and monetary fines. Interestingly, the *Criminal Code*[290] allows for programs of alternative measures to be used in cases where the accused accepts responsibility for their actions (or omission of action) and the prosecutor agrees. These programs may consist of activities such as community service, education or treatment programs. The use of alternative measures was codified in 1996.[291] Whether or not alternative measures[292] are appropriate is largely determined by the circumstances of the offender.[293] The use of these alternative measures are fundamentally based in the Purpose and Principles of Sentencing,[294] which include the requirement for sentencing to be proportional to the circumstances of the offence, as well as to the offender's circumstances.

It is with the above understanding of the criminal system that we turn now to a case which revolutionised provincial regulatory offences.

R. v Sault Ste. Marie

In 1977, *R. v Sault Ste. Marie* was heard on appeal at the Supreme Court of Canada.[295] The city of Sault Ste. Marie had been charged under the provincial *Ontario Water Resources*

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[290] *Criminal Code*, s.717.

[291] Public Prosecution Service of Canada, Website Deskbook 3.8.1 Alternative Measures. (Introduction). http://www.ppsc-sppc.gc.ca/eng/pub/fpsd-sfpg/fps-sfp/tpd/p3/ch08.html (Accessed May 29, 2018)

[292] Also known as diversionary programs, the term is interchangeable with alternative measures. The programs divert an offender away from the harsh consequences of the traditional criminal system.

[293] Public Prosecution Service of Canada, Website Deskbook 3.8.2.2 Alternative Measures. (Statutory preconditions applicable to alternative measures).

[294] *Criminal Code*, ss.718, 718.1, 718.2, 718.3.

[295] Hereinafter referred to as the Supreme Court.

Commission Act[296] for failing to ensure a water way was not contaminated. The contamination occurred due to a contracted waste management company's negligent management of a waste disposal site. The prosecution held the position that the city was ultimately responsible for the land management and oversight of the contractor. Ultimately, the Supreme Court's decision resulted in the judicial creation of a new third category of regulatory offence, *strict liability*, under provincial laws.

When *R. v Sault Ste. Marie* was first heard in 1978, provincial regulatory laws in Ontario were being prosecuted in the same court and manner that criminal cases were being administered, albeit under the authority of the *Summary Conviction Act.*[297] Two provincial offence categories existed at that time: *mens rea* and *absolute liability*. The *mens rea* offence was the most severe offence category in provincial regulations and mirrored the summary offence in criminal law. The absolute liability offence was the least severe. Under an absolute liability charge the defendant was not permitted to put forth a defence. If the prosecution was able to prove the act of the offence, a conviction was registered and only then could the defendant give the court evidence to mitigate the penalty.[298] The *mens rea* and absolute liability categories of offenses continue to apply in 2018.

In 1977 the Supreme Court recognized that the regulatory[299] laws of provincial enactment were offences concerned with the public and social interests,[300] commonly known as Public

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[296] *Ontario Water Resources Commission Act*, R.S.O. 1970, c. 332.

[297] *Summary Convictions Act*, R.S.O. 1914, c 90. This Act has been revised numerous time, the final version was in 1970.

[298] *Sault Ste. Marie*, 1325.

[299] *Sault Ste. Marie*, 1302. Also known as provincial statutory and public welfare laws.

[300] *Sault Ste. Marie*, 1302 and 1312.

Welfare Laws. In the judgment of the court written by The Honourable Dickson J., he acknowledged that at the time of the Supreme Court's decision in *R. v Sault Ste. Marie,* the provincial laws intended to regulate matters of public safety were being prosecuted in the same manner as the criminal laws,[301] even though the offences were substantively civil rather than criminal in nature.[302] The Court detailed that the "[p]ublic welfare laws evolved in mid-nineteenth century Britain… as a means of doing away with the requirement of *mens rea* for petty police offences."[303] Thus public welfare laws evolved with the expectation that they were simple offences that did not require the prosecution to prove a person intended to commit the offence.[304] Instead, to successfully convict, it was enough for the prosecution to prove that the offence had occurred. As a result, an accused charged with an *absolute* liability offence did not have an opportunity to raise a defence or explanation in response to a charge.

The reasoning for absolute liability offences for public welfare laws was founded in administrative efficiency[305] and justified by the minimal penalties.[306] The Supreme Court in its 1978 decision did not fully accept the justification of administrative efficiency pointing out that a defendant may raise evidence of due diligence[307] at the time of sentencing. Thus efficiency would still allow for a defence of due diligence to be heard prior to conviction.[308] The Supreme

[301] *Sault Ste. Marie,* 1302.

[302] *Sault Ste. Marie,* 1302.

[303] *Sault Ste. Marie,* 1310.

[304] *Sault Ste. Marie,* 1310.

[305] *Sault Ste. Marie,* 1311.

[306] *Sault Ste. Marie,* 1311.

[307] Due diligence: Having taken all reasonable steps to avoid harm.

[308] *Sault Ste. Marie,* 1312.

Court further acknowledged that the penalties under public welfare laws had increased in severity and could include incarceration and, as a result, justice would allow the accused to present a defence to the charge.[309] The Supreme Court did not quash absolute liability offences, but instead created a new category of offence, one of strict liability.

A strict liability offence is similar to an absolute liability offence in that there is no *mens rea* required element to be proven by the prosecution, however, unlike an absolute liability offence, the defendant may raise a defence.[310] Further, the Supreme Court affirmed that the burden of proof remained in the same manner as under *mens rea* offences: a defendant does not need to prove innocence but may raise reasonable doubt of guilt.[311] This upholds the *actus reus* element while placing the burden on the defendant for the "control and the opportunity to prevent"[312] the contravention of the law.

It is of interest that the Supreme Court commented on the *justification* of absolute liability offences in public welfare laws that asserted such offences do not "carry the stigma associated with conviction for a criminal offence."[313] The Supreme Court disagreed with this justification and gave the following reason: "The argument that no stigma attaches does not withstand analysis, for the accused will have suffered loss of time, legal costs, exposure to the process of the criminal law at trial and, however, one may downplay it, the opprobrium of conviction."[314] In this statement by the Supreme Court is the acknowledgement that, regardless

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[309] *Sault Ste. Marie*, 1314.

[310] *Sault Ste. Marie*, 1316.

[311] *Sault Ste. Marie*, 1316.

[312] *Sault Ste. Marie*, 1321.

[313] *Sault Ste. Marie*, 1311.

[314] *Sault Ste. Marie*, 1311.

of the severity of the offence, stigma is a consequence of being charged. Arguably, this consequence, as with all other consequences in provincial regulations, should be considered proportionately to the nature of the offence and the defendant's personal circumstances. For the homeless population, particularly those charged as a result of activities which have been deemed socially unacceptable, the stigma and shame of being charged results from having to acknowledge their own disadvantage of an inability to live within the law, an inability to understand the law and answer the charge, or the inability to pay a fine. The stigma and shame are exacerbated if the person must ask for leniency in sentencing.

Regulatory Cycle

Rick Libman, is a Judge in the Ontario Court of Justice and a leading authority in the teleology of provincial offences.[315] He explains the public welfare and safety intentions of provincial regulation as a system in which people are ongoing participants. The regulations are enacted as a means to ensure public safety through standards and restrictions. Those who enter the court system under regulation enforcement are expected to continue to participate in the system during and after the court process. This is best explained with an example: a licenced driver operating a vehicle is participating in an activity regulated under the *Highway Traffic Act*.[316] The driver is expected to follow the speed limit as determined by the Ministry of Transportation. The speed limit has been set for the purposes of public welfare and to ensure safety. It is expected that if a driver wants to maintain their licence, they will abide by the

[315] Rick Libman, "Sentencing Purposes and Principles for Provincial Offences," *Law Commission of Ontario* (n.d); Rick Libman, "The Regulatory Cycle and its Role in Shaping Purposes and Principles of Sentencing for Regulatory Offences," *Criminal Law Quarterly* 59, no. 1, (HeinOnline, 2012): 127-28.

[316] *Highway Traffic Act*, R.S.O. 1990, c. H.8

regulations of the activity. If the driver is charged with speeding, except in extreme cases,[317] the driver will continue to participate in the activity while the charge is proceeding through the legal process. At the end of the penalty phase, except in extreme cases, the driver is granted the opportunity to re-enter the regulated activity as a compliant participant. This Libman refers to as the regulatory cycle.[318] The intention is that people will exercise self-discipline and manage their behaviour according to the regulations toward care for the public wellbeing while participating in regulated activities. This theory of behavioural regulation was first explained by Michel Foucault,[319] as people will discipline themselves and abide by the rules if they believe that they are being monitored and punishment will result from a breach.

There are two challenges with this model of regulation. The first challenge is that the plethora of regulations in society has infiltrated every imaginable area of public and even private life[320] to a degree that it is difficult for any individual to be fully aware of all of the regulations for which they are responsible. This makes it somewhat unreasonable for people to be absolutely liable. This may not have been a consideration of the Supreme Court in their decision of *Sault Ste. Marie*, however, the creation of strict liability offences certainly addresses this challenge in allowing for a defence of reasonableness to be entered when responding to provincial regulatory charges. The second challenge is that there is no consideration built into the regulatory model for people who are disadvantaged in their ability to live within the law due to the need for basic necessities, and thus they are unable to comply with regulations through self-discipline. Without

[317] Extreme cases would include immediate driver licence suspension.

[318] Libman, "The Regulatory Cycle", 127-28.

[319] Meghan Kallman and Rachele Dini, *An Analysis of Michel Foucault's Discipline and Punish*, (Routledge, 2017).

[320] Libman, "Sentencing Purposes and Principles," 2.

an ability to re-enter the regulatory cycle as a compliant participant the disadvantage accumulates. As described by Wolff and de-Shalit, this results in a dynamic clustering of disadvantage.[321] This was demonstrated in England when the poor entered workhouses but were unable to escape the system; not due to character flaws of immorality as was generally accepted in that era, but due to the system which did not recognize the dynamic clustering of disadvantage that was being created. The result of the inability to comply with public welfare laws traps the homeless in a quagmire of consequences. I will return to this point when I explain proportionality in penalties of law.

Post- Sault Ste. Marie

With the categorizations of absolute liability and strict liability offences in provincial regulatory laws distinguished from criminal summary conviction offences through the 1978 decision of the Supreme Court, it was necessary for the provinces to create a system of administration separate from the summary conviction procedures. In Ontario, the *Provincial Offences Act*[322] (P.O.A.) was enacted in 1979, as the administrative procedures and authority for dealing with all charges laid under provincial regulatory law.[323] The Act has subsequently been amended on numerous occasions, therefore I will be referring to the version which is in force and effect at the time of writing.[324]

The P.O.A. is organized in ten parts. Part I deals with the commencement of proceedings by Certificate of Offence. The Certificate of Offence is the document that the provincial offence

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[321] Jonathan Wolff and Avner de-Shalit, *Disadvantage,* (New York: Oxford University Press, 2007): 120.

[322] See footnote 278.

[323] *Provincial Offences Act*, s.2 (1).

[324] *Provincial Offences Act*, R.S.O. 1990, c P.33. [P.O.A.]

officer completes and files with the court, initiating the court's authority and procedures. The officer provides an accused person with an Offence Notice, commonly known as a 'ticket'.[325] The accused person has five choices of response. The first option is to plead guilty to the offence and pay the fine within fifteen days.[326] The second option is to plead guilty with an explanation, provided in person to a presiding Justice of the Peace, and request consideration of a lesser penalty.[327] The third option is to Request an Early Resolution meeting with a Prosecutor and attempt to negotiate a more favourable outcome than the set fine on the face of the ticket.[328] An amendment to a lesser charge or fine may be negotiated in exchange for a guilty plea and the waiving of a trial, at the discretion of the prosecutor.[329] The fourth option is to file a Notice of Intention to Appear which requires a plea of Not Guilty and proceed to a trial to be heard by a Justice of the Peace.[330] The fifth option is not making any response to the charge. Failing to respond is tantamount to not disputing the charge, and grants the Justice of the Peace the authority to accept the Certificate of Offence and convict without evidence. The conviction results in the imposition of the set fine as it appears on the certificate.[331]

Certificates of Offence are issued for strict liability and absolute liability categories of offences as long as the statute provides for a set fine.[332] If the accused does respond to the charge

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[325] *Provincial Offences Act*, s. 3(2)(a).

[326] *Provincial Offences Act*, s. 8(1).

[327] *Provincial Offences Act*, s. 7(1).

[328] *Provincial Offences Act*, s. 5.1(2).

[329] *Provincial Offences Act*, s. 5.1(7).

[330] *Provincial Offences Act*, s. 5(1).

[331] *Provincial Offences Act*, s. 9.

[332] *Provincial Offences Act*, s. 3(2)(b).

and a conviction is registered, the justice of the peace has the discretion to lessen the monetary fine as they deem appropriate. Where available under statute, jail time can be imposed on strict liability offences.[333] In addition to the fine imposed on conviction, there are additional court costs applied at the discretion of the court.[334] It is due to the discretionary authority of the court that it is in a person's best interests to respond to a charge and be heard for consideration of imposed penalty. Without the accused present before the court, justice is blind to the accused's circumstances. This is where the capability to understand and respond to the law becomes particularly important.

Part III of the P.O.A. deals with commencement of proceedings by the swearing of an information.[335] In these proceedings a provincial offence officer issues and serves the accused a summons to appear in court to answer to the charge.[336] The case proceeds at the time and place indicated on the summons. If the accused fails to attend the matter will continue to be heard by the court in their absence.[337] Individuals who are unfamiliar with the court process may not recognize the difference between a Part I Offence Notice and a Part III Summons. The potential of increased consequences of a Part III summons again demonstrates why the capability to understand the law is important. If the accused is not present, or if present and refuses to enter a

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[333] Jail is not an option for absolute liability offences, because the accused cannot put forward a defence.

[334] *Provincial Offences Act*, s. 60. Also see the Ontario Regulations under the *Provincial Offences Act*; O.Reg. 945, Costs; O.Reg. 161.00, Victim Surcharges; O.Reg. 679/92, Fee for Late Payment of Fines.

[335] *Provincial Offences Act*, s. 23.

[336] *Provincial Offences Act*, s. 22.

[337] *Provincial Offences Act*, s. 43(3).

plea to the charge, the court will enter a plea of not guilty on behalf of the accused[338] in which case the matter will proceed to trial.[339] If the accused is not before the court, an *ex parte* trial will be held, during which the prosecution must still meet the burden of proof.[340] Upon a conviction being registered, the available consequences under a Part III extend beyond fines and imprisonment. If the penalty will extend beyond a monetary fine and the accused is not before the court, a warrant can be issued for sentencing purposes. A probation order with conditions can be imposed on the defendant. These conditions must be relevant to the charge and can include prohibitions on activities.[341] Previously the use of 'red lining' was explained, which restricts a person's attendance in areas that are deemed to entice recidivism, however these areas also have necessary resources which are withheld due to restricted access.[342] I argue that through judicial imposition of prohibitions or conditions that restrict a person's functionings, or access to resources, the probation order becomes a disadvantage and dynamic clustering is present. The empirical evidence of judicially imposed disadvantages was confirmed through interviews with legal and housing advocates, and will be further discussed in chapter five.

For the purposes of the proceedings under the P.O.A. a defendant may appear on their own behalf or be represented,[343] however, the court may order the accused to attend personally.[344] The capability of affiliation, as explained in chapter two, can exist through having

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[338] *Provincial Offences Act*, s. 45(5).

[339] *Provincial Offences Act*, s. 46(1).

[340] *Provincial Offences Act*, s. 54 (1) (a).

[341] *Provincial Offences Act*, s. 72.

[342] See footnote 176.

[343] *Provincial Offences Act*, s. 50(1).

[344] *Provincial Offences Act*, s. 51.

a legal representative. This is vital for an individual who does not understand the law. This affiliation enables other barriers to be overcome as well, such as the ability to attend the court when there would otherwise be no means of transportation. I will further examine affiliation through legal aid later in chapter five.

The trial procedures within the P.O.A. are applicable to both Part I and Part III.[345] At trial the court may proceed without the defendant and if the evidence meets the burden of proof a conviction may be registered.[346] If the conviction registered includes a monetary fine, it is deemed to be due within fifteen days.[347] The court has authority to register convictions and impose monetary fines without the accused present.[348] Notice of the convictions are sent to the accused; however, without a fixed address the homeless rarely receive notification. As a result, it is common for these fines to be unpaid and to accumulate as debt.

It is notable that the court has the authority to waive a fine in the exceptional circumstances that the fine would be "unduly oppressive or otherwise not in the interests of justice."[349] The difficulty becomes how the court could make a determination of financial hardship if the accused does not appear. To make such a determination the court would require evidence of personal circumstances from the accused or a representative. Herein lies the reason that failing to respond to a charge is not recommended. The capability to speak to the charge provides a greater opportunity for compassion to influence decision makers.

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[345] *Provincial Offences Act*, s. 28.

[346] *Provincial Offences Act*, s. 54.

[347] *Provincial Offences Act*, s. 66(1).

[348] *Provincial Offences Act*, s. 66(5).

[349] *Provincial Offences Act*, s. 59(2).

The P.O.A. contains a clause for the creation of community service work programs, which would "permit the payment of fines by means of credit for work performed."[350] This alternative to the payment of fines would benefit anyone without the financial means to pay a monetary fine and in so doing remain in, or re-establish good standing in the regulatory cycle. Currently, such programs do not exist in Ontario, which is one of a few provincial jurisdictions in Canada that have not enacted alternative measure programs in the administration of provincial regulatory offences.

A fine imposed by the court is deemed to be due for payment within 15 days of the order being made, meaning that a fine is in default after 15 days if it is unpaid.[351] The court has several options for collection of unpaid fines. For example, if other reasonable methods of collection have been unsuccessful, the debtor may be compelled to attend court, either by summons, or by warrant for arrest.[352] Once before the court, the debtor must justify why the fines are in default.[353] It is within the court's discretion for a warrant of committal to be issued, if the court deems the incarceration to be in the public interest.[354] The calculation for the term of imprisonment is set out in statute.[355] Nothing in this section limits the court's discretion, which in the author's professional experience, is actively applied to avoid unnecessary incarceration that might bring justice into disrepute. I argue the provision for imprisonment in lieu of the payment of fines and lack of community service work programs demonstrates that a corrosive

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[350] *Provincial Offences Act*, s. 67.

[351] *Provincial Offences Act*, s. 69(1).

[352] *Provincial Offences Act*, ss. 69(6), (7).

[353] *Provincial Offences Act*, s. 69(10).

[354] *Provincial Offences Act*, s. 69(14).

[355] *Provincial Offences Act*, s. 69.

disadvantage for the homeless, who lack the ability to pay their fines, exists in social policy and law in Ontario.

Of interest is Section 69(14.1) of the P.O.A., which is not in force at the time of writing. This section, if in force, would allow the debtor to request the justice of the peace to "reduce or expunge a defaulted fine[s],"[356] based on an inability to pay. The requisite regulations, setting out the criteria to determine an inability to pay, have not be developed and thus this section of the Act has remained idle since its drafting in 2009. This demonstrates that this aid to functioning has been contemplated in a social policy; unfortunately, it has not been enacted.

The authority to collect unpaid fines begins with the clerk of the court. The clerk of the court may file a certificate or "order of judgment for the purposes of enforcement"[357] when a fine is in default. In addition to the fine imposed upon conviction, when a fine enters default, the debtor is required to pay an administrative fee that is collectable as part of the debt owed.[358] After ninety days in default, the Ministry of the Attorney General may disclose the "name of the defaulter, the amount of the fine and the date the fine went into default" to a consumer reporting agency.[359] This means that the debt owed from convictions under the P.O.A. becomes part of the person's credit record. Furthermore, in addition to the fine ordered on conviction and the administrative fee, the debtor becomes responsible for the costs incurred by the Ministry of the Attorney General for using a registered collection agency to collect the debt.[360]

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[356] *Provincial Offences Act*, s. 69(14.1).

[357] *Provincial Offences Act*, s. 68(1).

[358] *Provincial Offences Act*, ss. 70(1), (2).

[359] *Provincial Offences Act*, s. 69.1(1).

[360] *Provincial Offences Act*, s. 70.1(1)

Although provincially enacted, the province has transferred the administration of these laws to the municipalities.[361] These transfer agreements provide authority to the municipalities for the collection and enforcement regarding fines.[362] The issue of the authority for fine collection will be further discussed later in the chapter in the context of the *Municipal Act*.[363]

Public Welfare Laws

As previously cited, the Supreme Court defines provincial regulatory laws as offences concerned with public and social interests.[364] Three of the statutes that are most commonly encountered by homeless people, specifically in Ottawa, Ontario,[365] are statutes that are administered under the P.O.A.: the *Liquor Licence Act*,[366] the *Trespass to Property Act*,[367] and the *Safe Streets Act*.[368] None of these acts contains a statement of purpose. In the P.O.A., Section 2 provides a statement of purpose which generally indicates what the Act is intended to accomplish.[369] Although a statement of purpose is not a requirement for a statute, it does have the benefit of providing guidance to the court as to the spirit in which the laws were enacted and intended to be enforced.

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[361] *Provincial Offences Act*, s. 162.

[362] *Provincial Offences Act*, s. 165(1).

[363] *Municipal Act*, 2001, S.O. 2001, c. 25. [*Municipal Act*].

[364] *Sault Ste. Marie,* 1302 and 1312.

[365] This assessment is supported by the statistics obtained from the Ticket Defence Program, which identifies liquor, trespassing, and panhandling as the charges most commonly encountered by their clientele. Statistics on file with the author.

[366] *Liquor Licence Act*, R.S.O. 1990, c. L.19. [*Liquor Licence Act*].

[367] *Trespass to Property Act*, R.S.O. 1990, c. T.21. [*Trespass to Property Act*].

[368] *Safe Streets Act*, 1999, S.O. 1999, c. 8. [*Safe Streets Act*].

[369] *Provincial Offences Act*, s. 2.

The *Trespass to Property Act* is a simple statute that provides for the control of who enters private property. It is the owner of the property, or a person authorized by the owner, who may limit access. Property is considered private even if it is open to the public, such as a City park, or a place of business, such as a restaurant.[370] An offence occurs when a person has been given notice verbally or in writing, or by way of posted notice, that they are not permitted to be on the premises, or are prohibited from specific activities such as camping or loitering. A person having been given notice who enters the property or refuses to leave is in contravention.[371] Offences under this statute have set fines under the P.O.A., in Schedule 85,[372] however, an officer may instead issue a Part III summons, which creates an opportunity for the court to impose greater fines or probation orders. This Act has an impact on homeless persons when enforced against them for such activities as seeking a place to sleep, attempting to access a toilet, or needing a place to simply sit down and rest. These activities would not generally cause a person of average income to contravene the law.

The *Safe Streets Act* is a piece of legislation that has been controversial. According to supporters it is a statute aimed to reduce the accosting behaviours of delinquent youth, typified by 'squeegee kids'.[373] In practice it is used to control the geographic location and behaviour of the homeless who are engaged in non-traditional activities to supplement income. It has been unsuccessfully challenged on a constitutional

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[370] *Trespass to Property*, s. 1.

[371] *Trespass to Property*, s. 2.

[372] *Provincial Offences Act*, Schedule 85.

[373] Patrick Parnaby, "Disaster Through Dirty Windshields: Law, Order and Toronto's Squeegee Kids," *Canadian Journal of Sociology* 28, no. 3 (2003): 282. See Footnote 2.

basis.[374] It is commonly cited by critics as criminalizing poverty[375] as it targets the activities of impoverished people. It re-entered begging as an illegal activity, replacing the criminal vagrancy laws of 1970, under the guise of public safety. The statute begins with a definition of "solicit,"[376] a synonym for begging or panhandling.[377] It continues with a definition of what constitutes an "aggressive manner,"[378] being "likely to cause a reasonable person to be concerned for his or her safety or security."[379] Then the Act provides a list of six activities that are deemed to be aggressive, regardless of whether the person being solicited feels a cause for concern. Interestingly, three of the six activities listed could be construed to match criteria for Causing Disturbance under the *Criminal Code*.[380] Solicitation is further restricted, in non-aggressive forms, based on location. These restrictions include, in the vicinity of (a) an automated teller machine, (b) a pay telephone or toilet, (c) taxi stand or transit stop, (d) of a person on public transit, or (e) of a person getting into, out of, or off a vehicle in a parking lot, or (f) on a roadway, of a person who is in a stopped, standing, or parked vehicle.[381] If the physical layout of a city is considered, these restrictions leave very few areas that would permit legal panhandling.

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[374] *R. v Banks*, 2007 ONCA 19; A new challenge was filed in 2017 that has not been heard by the court.

[375] Jackie Esmonde, "Criminalizing Poverty: The Criminal Law Power and the Safe Streets Act." *Journal of Law and Social Policy* 17, (2002): 63-86.

[376] *Safe Streets Act*, s. 1.

[377] *Oxford Online Dictionary*. "Solicit: Ask for or try to obtain (something) from someone."; "Beg: Ask someone earnestly or humbly for something."; "Panhandle: Beg in the street." https://en.oxforddictionaries.com/definition/

[378] *Safe Streets Act*, s. 2(1).

[379] *Safe Streets Act*, s. 2(1).

[380] *Criminal Code*, s. 175.

[381] *Safe Streets Act*, s. 3(2).

In 2005, in response to criticisms that the *Safe Streets Act* was too restrictive of some charity activities, such as the firefighters' boot drive, in which fire fighters solicited donations from drivers at high volume traffic intersections, the Act was amended to allow for charity fund-raising.[382] This has drawn further criticism from those opposed to the Act, citing the hypocritical approach to regulation. Whereas impoverished individuals are not permitted to beg for money, corporate charities are permitted, assuming the public won't feel harassed or intimidated by groups of people approaching cars simply because the activity is formally organized.

The *Safe Streets Act* also addresses public safety regarding the disposal of unsafe objects, such as used condoms, hypodermic needles and broken glass.[383] The set fines for this statute are under the P.O.A., Schedule 81.1,[384] however this statute also provides for Part III summons, arrest and incarceration.

The *Liquor Licence Act* provides regulations for who may be licenced to make and sell liquor in Ontario, as well as for responsible consumption. This includes who may possess liquor and where it can be consumed. Liquor can only be consumed legally if it is in a place under the authority of a permit or licence,[385] otherwise liquor must be consumed in a residence or private space,[386] meaning not in a public area, which is problematic for the homeless population. The exemption is that a person can possess liquor on the condition that it is in a closed container.[387] The discretion of a police officer is triggered in making the determination of whether a container is closed. Consider for example, a bottle with a threaded cap designed

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[382] *Safe Streets Act*, s. 3(3).

[383] *Safe Streets Act*, s. 4(2).

[384] *Provincial Offences Act,* Schedule 81.1.

[385] *Liquor Licence Act,* ss. 12 and 19.

[386] *Liquor Licence Act,* ss. 31(1), (2); *Liquor Licence Act*, R.S.O. 1990, c. L.19. R.R.O. 1990, Reg. 718: GENERAL. s. 3.

[387] *Liquor Licence Act*, s. 31(3).

for the purpose of re-sealing the container. Once the cap is removed, can the bottle be re-sealed? Although the court has considered these determinations based on the plain language of the statute,[388] it remains the officer who makes the decision, based on what is observed in each incident. This is also true of officer discretion for public intoxication. There is no definition of what intoxication is, in the *Liquor Licence Act*, yet an officer may arrest without warrant, if safety is a concern.[389] A particular section of the *Liquor Licence Act* concerned with public welfare is section 33. Not all alcohol is suitable for ingesting. Alcohol can be found in substances such as after-shave, mouthwash, hairspray and shoe polish. Although ingesting these substances will intoxicate a person, it may also poison them. Section 33 deals with the consumption and sale of products containing alcohol that are not fit for ingesting. The risk for use of these products is higher for a person who has an addiction to alcohol, but who cannot afford liquor. Concern for the welfare of persons is also reflected in a provision that allows a person to be taken into custody and delivered to a hospital for treatment,[390] instead of simply incarcerating them for public intoxication.[391] Furthermore, a court may order a person convicted under to the *Liquor License Act* to be detained for treatment for a period of up to ninety days.[392] Lastly, an officer may arrest without warrant any person who is in contravention of the Act and refuses or is incapable of providing their identity, or who provides a false identity, and they may be detained for the purpose of identification.[393] The set fines for the aforementioned offences are held within Schedule 61, under the P.O.A,[394] and thus charges are typically issued by tickets. These laws effect the homeless

[388] *Legislation Act*, S.O. 2006, c.21, s. 64(1).

[389] *Liquor Licence Act*, s. 31(5).

[390] *Liquor Licence Act*, s. 36(1).

[391] *Liquor Licence Act*, s. 31(5).

[392] *Liquor Licence Act*, s. 37(1).

[393] *Liquor Licence Act*, s. 48.

[394] *Provincial Offences Act*, Schedule 61.

population disproportionally in comparison to a person of average income, mainly due to a lack of private space or residence, as well as a higher rate of substance dependency. While it can be argued that consideration of the short-term welfare of homeless individuals justifies this apparent bias, the longer-term consequences of charges and fines result in a systemic and corrosive disadvantage, as previously discussed.

After Conviction

In reviewing the P.O.A. and the above three public welfare laws, it is evident that enforcement of the law is more than the issuing of the charge under a provincial statute. Enforcement includes the administrative process under the P.O.A. to determine the guilt or innocence of an accused. It further includes the administrative process for the collection of fines upon a conviction being registered. The transfer of the administration of provincial offences to municipalities results in an additional layer of administration and further removes the purpose of the Act and the circumstances of the offence from the eventual consequences encountered by a homeless person.

Each municipality has their own policies and procedures for dealing with administrative issues. Municipalities are departmentalized and have an internal bureaucratic organization. These bureaucracies are not part of the court system and do not have any responsibility to the penalty principles in law. In fact, when fines stemming from convictions under provincial regulations are in default and the municipality is engaged for collection, these debts fall into the same policies as every other debt owed to the municipality.[395]

The collections department first considers whether or not the debt is collectable. This determination is based on such factors as the likelihood of finding the debtor and the debtor's

[395] "Corporate Accounts Receivable Debt Collection and Recovery Policy", *City of Ottawa*. April 7, 2014.

ability to pay. For example; if the debtor has an Ontario driver's licence, the P.O.A. allows for the suspension of the person's licence, pending the payment of the debt in full.[396] If the debtor owns land within the municipality, then the debt can be collected through property taxes.[397] In more challenging circumstances, such as when the debtor does not own property or have a driver's licence, it becomes more difficult to motivate a debtor to pay. The first challenge is finding the debtor, whereas the address on the file obtained from the court may no longer be valid. Or in the case of a homeless person, there may not be an address on file and therefore written notice or letters in demand of payment will not be effective as they will not be delivered to the debtor. Another option is for the municipality to register the debt with a consumer reporting agency that registers the debt against a person's credit record as potential motivation to pay the debt and clear their record. According to the *Municipal Act*, the debt may also be given on contract for collection to a third party collection agency[398] or the debt may be sold to a collection agency.[399] These debts can be on a person's credit record without their knowledge.

A credit record becomes important when a person wants to make a purchase and requires credit from a lending institution. The lending institution will use a credit record to assess risk. Credit records are also used by landlords to assess the financial risk of potential tenants.[400] A person attempting to secure

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[396] *Provincial Offences Act,* s. 69(2).

[397] *Municipal Act*, s. 398(1).

[398] *Municipal Act*, s. 304.

[399] *Municipal Act*, s. 305.

[400] Pat (pseudonym)(housing advocate) in discussion with the author, March 22, 2018. On the date of the interview The Social Housing Registry of Ottawa website contained a notice that credit checks were mandatory for all applicants. The website has since been changed and reference to credit checks is no longer listed. http://www.housingregistry.ca/

housing may be denied due to a poor credit record.[401] If the credit record is poor because of a conviction under a public welfare law, then the consequences of the charge and subsequent conviction may be recidivism and homelessness. This potential outcome, I argue, is disproportionate to the activity that initiated the enforcement and, counter-intuitively, reinforces the circumstance that may have led to the charges in the first place. If the intention of provincial regulations is the welfare and safety of the public, which includes the homeless population, then the consequences of an act of necessity resulting from being homeless should not be the perpetuation of homelessness – an absurdly disproportionate consequence for the disadvantaged who are unable to break the regulatory cycle.

Penalty Principles

Sentencing considerations after a conviction in criminal cases are founded in the Penalty Principles. These are codified in the Criminal Code in Part XXIII.[402] The purpose of these principles is to ensure there is consistency in the penalties applied to offences, with consideration of the circumstances of the offence and the circumstances of the offender. The purported outcome of these principles is proportionality of consequences for an offence. These principles, however, are not codified in the P.O.A. The result of not having the penalty principles codified is that there is a significant lack of consistency in the sentencing for similar offences.[403] This lack of consistency has sparked the call for amendments to the P.O.A. If the penalties are to be consistent with the intention of the statute, then the spirit of the penalty principles should be

[401] "Right at home: Report on the consultation on human rights and rental housing in Ontario," *Ontario Human Rights Commission*, accessed July 14, 2018. http://www.ohrc.on.ca/en/right-home-report-consultation-human-rights-and-rental-housing-ontario

[402] *Criminal Code.* R.S.C., 1985, c. C-46, Part XXIII.

[403] Rick Libman, "Sentencing Purposes and Principles," 2.

adopted. There should also be a recognition that those prosecuted under regulatory laws do not carry the same blameworthiness as offenders under criminal offences.[404]

Sentencing should not be arbitrary. The penalty principles give codified guidance to the court on how to determine what penalty should be imposed. Penalties that are imposed should have several considerations, including an acknowledgement of the harm caused to the victim of a crime.[405] Reparations can be ordered if compensation, or some other form of action by the offender might lessen the harm caused to the victim.[406] Of course not all harms can be repaired.

Punishment is set out to encourage compliance with the law. General deterrence is the intention that the stigma of a punishment, if known publicly, will deter people from committing a similar offence.[407] There are also specific deterrence considerations, which is the intention to fashion a punishment that addresses the individual offender, to deter recidivism.[408] This assumes a person's ability to comply with, or to live within the law. The consideration of public safety also enters into deliberation on whether or not the offender should be removed from the general public,[409] and rehabilitation of the offender can be addressed through sentencing with the requirement for completion of appropriate treatment programs.[410] Finally, penalties are also used to provide the offender with an opportunity to take responsibility for the offence, and by

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[404] Libman, "The Regulatory Cycle", 127.

[405] *Criminal Code*, s. 718(a).

[406] *Criminal Code*, s. 718(e).

[407] *Criminal Code*, s. 718(b); In reflection, this is similar to the undesirable conditions created in the work houses which were intended to motivate people to avoid them.

[408] *Criminal Code*, s. 718(b).

[409] *Criminal Code*, s. 718(c).

[410] *Criminal Code*, s. 718(d).

participating in a penalty, demonstrate their regret for the harm caused to the victim or society as a whole.[411] In the common law system, case law or *stare decises* provides judges with further guidance to ensure that penalties are consistently applied to offenders and offences with similar circumstances.

These penalty principles are not codified in the P.O.A. Although it is generally accepted by the judiciary that the principles should be taken into consideration, there is no requirement to do so.[412] There is also the requirement through the Ontario Court of Justice for *stare decises*, however, case decisions that are made orally, which are prevalent in provincial regulatory matters of common offences, are not captured in any case reporting system.[413] Thus, these unreported case decisions leave a vacuum for inconsistent decisions and penalties.

In cases where the homeless do respond to their tickets and their case is heard by a justice of the peace, the penalties imposed are highly inconsistent. This inconsistency is created by the lack of reported decisions upon which a justice might refer for guidance and to maintain consistency between similar cases.[414] Although it could be argued that each justice is applying the penalty principles, there is commonly a lack of principled reasons expressed in the oral decisions when the penalties are imposed. The use of case law could be used to gain consistency, yet again reported decisions are absent.

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[411] *Criminal Code*, s. 718(f).

[412] Libman, "The Regulatory Cycle," 126.

[413] Legal case reporting systems such as CanLII are online libraries of court decisions and are available free of charge to the public.

[414] As expressed by two licenced interviewees who appear before the Ontario Court of Justice representing homeless people for *Liquor Licence Act*, *Trespass to Property Act*, *and Safe Streets Act* offences.

A fundamental principle codified at section 718.1 of the *Criminal Code*[415] is the need for proportionality, essentially the requirement for the penalty to directly correspond with the severity of the offence, and degree to which the offender has taken responsibility for their actions. In criminal law the proportionality ends at the doling out of the punishment.[416] There is no consideration as to how a criminal record will affect the offender's ability to re-enter society. I argue that in the regulatory cycle, wherein individuals are expected to continue to participate as compliant members of society, the effect of the penalty should be considered in proportion to the person's ability to comply on an ongoing basis.

Public welfare laws regulate the intention of social policy. Given the public welfare intentions and individuals' ongoing participation in the regulatory cycle, the provincial regulations are implicit in social justice.[417] Proportionality in sentencing for provincial offences should move beyond the penalty for an offensive act and give consideration for future implications or consequences encountered by the offender in order that they can remain part of the regulatory cycle. Consequences which impede an offender's ability to re-enter the regulatory cycle as a compliant participant should be avoided.

As described in Chapter 2, social policies that are concerned strictly with implementation within a singular department, without consideration of implications or potential conflict with other departmental policies, result in sectoral justice. To avoid sectoral justice, policy makers should be cognizant of the capabilities effected by the social policies that are reflected in the

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[415] *Criminal Code,* s. 718.1.

[416] Libman, "The Regulatory Cycle," 143. For criminal offences the offender is considered blameworthy and consequences subsequent to punish are not considered. Further discussion on criminal punishment is beyond the scope of this paper.

[417] Libman, "The Regulatory Cycle," 157.

laws, enforcement and administrative practices. If consideration can be granted for the ability to pay a fine, part of this consideration ought to also be the financial consequences to the offender if the fine is paid. In this vein, the consequences of unpaid fines should also be considered if the individual can demonstrate an inability or insufficiency of funds that will result in the loss of a necessity of life, such as shelter, food or utilities. As such, the ability for offenders to accept responsibility in a manner other than fines or a loss of liberty, should be available under the P.O.A. to support proportionality. The *Criminal Code* provides the authority to use alternative measures as a penalty.[418] The accused must first accept responsibility for the offence and consent to participation in the program. These programs are also referred to as Diversion. Successful completion of a program will divert the charge from conviction. Program completion is a condition for the absolute discharge of the offence.[419] These diversionary programs do not exist in P.O.A., limiting the court's ability to apply proportionality to a penalty.

Conclusion

Criminal offences are judged based on the blameworthiness of the offender and are considered offences against society. In comparison, provincial regulatory laws are minor offences concerned with public welfare and safety. The administrative process for enforcement supports the social policies, however sectoral justice exists wherein compliance and participation in the regulatory cycle are not supported. Enforcement of social policies against the homeless has been demonstrated in three public welfare statutes that create disproportionate and compounding

[418] *Criminal Code*, s. 717.

[419] Criminal Code, s. 730; Absolute discharge means the charge is removed from the system as though the charge had not been laid.

consequences. This system does not take into consideration a person's inability to live within the law and administration of penalties perpetuates non-compliance for disadvantaged individuals.

I have explained why consideration of consequences beyond the mere act of the offence is socially justified under the intention of provincial regulatory laws and within the regulatory cycle. Wherein the more serious offences under the Criminal Code have alternative measures for addressing responsibility, the less serious regulatory offences do not.

In chapter six I will explain how alternative measures could create fertile functionings and/or avoid corrosive disadvantage, and how alternative penalties, which could create more proportional consequences in public welfare laws for the disadvantaged who are unable to comply within the regulatory cycle. The importance of affiliation in responding to charges has been introduced, and in chapter five I will present the experiential data from five professionals who work on the frontlines with the homeless, combating disadvantage.

Chapter 5: Empirical Implications

In previous chapters I have demonstrated the contemporary regard for the homeless population in Ontario, which I argue is motivated by an unreasonable disgust and fear. These emotions have motivated the social policies that guide the control of these disadvantaged individuals. I have further argued that provincial regulations used for control have disproportional consequences for the disadvantaged, thus being a cause of social injustice. In this chapter these consequences will be demonstrated as being very real and perpetuating homelessness in Ontario.

Using the City of Ottawa as a case study, I will examine media reports of community responses to the homeless, which have resulted in increased enforcement of regulatory laws against the homeless. Additionally, I have used narrative research to collect experiential data[420] of the social injustices that I have theorized. I conducted interviews with professional advocates who work directly with the homeless population, either in the capacity of legal representatives for offences under provincial regulations, or as case workers who have assisted the homeless in accessing housing.

Each of the legal representatives interviewed met two requirements; 1) experience providing legal representation in provincial regulatory law, and 2) experience in representing homeless clientele. These dual requirements significantly narrowed the field of qualified interviewees. The legal representatives were identified and recruited for participation as a result of their volunteer work with the homeless population of Ottawa. These are professionals whom I

[420] John W. Creswell, "Five Approaches to Qualitative Inquiry," In *Qualitative Inquiry & Research Design: Choosing Among Five Approaches*, edited by John Creswell, California: Sage. 2007: 70.

have worked with in the past and continue to do so. In advance of the interviews I had provided each of them with a list of topics that were of interest for my research. This allowed them to review their case files for pertinent examples, if any, as well as maintain authority over the information shared. It was essential for the interviewees to protect their clients' private information and identities in accordance with their professional obligations as members of the Law Society of Ontario. The interviews were conducted at their places of business, with an open, mutual sharing of information and discussions about the social impacts of the law.

The housing advocates were recruited through an invitation to participate, which was forwarded to several organizations that provide services to the homeless or those at risk of losing their housing. The responding participants were professionals with whom I have had no prior affiliation. These interviewees were also provided topics of discussion in advance of our conversations, which allowed them to focus our discussion on their own experiences relevant to my research. The interviews with the housing advocates were opportunities for the interviewees to share their experiences, concerns and perspectives regarding social injustice and discrimination against the homeless. These interviews were informative and enlightening.

Although I have interviewed only five professional advocates, three lawyers and two case workers, my decision to do so was strategic in consideration of the scope of this paper. These interviewees each have substantial experience, of more than a decade each, with a multitude of clientele in their respective fields. Thus instead of interviewing homeless individuals who may suffer with the disadvantage of not understanding the system or process with which they are engaged, I have instead obtained the information from professional, knowing and understanding perspectives. It is through their shared experiences with the homeless that the theoretical arguments will be demonstrated: enforcement of laws to control the homeless population result

in consequences of corrosive disadvantage. Their experiences will also provide examples of how the fertile functioning of affiliations can remove the disadvantage experienced by homeless individuals amid the current social policies.

Community Action Against the Homeless

As explained in chapter one, the political will to create and use provincial offences to control the homeless stems from demands within the community, specifically the Business Interest Associations (BIA) and Not In My Backyard public groups. In answer to calls for control of the homeless population, the police respond with enforcement. In the downtown core of Ottawa there are three church-led shelters. In total there are 687 shelter beds available each night.[421] During daytime hours, between 9am and 5 pm, the shelters are closed to clientele, with the exception of attendance to treatment programs. These closures result in limited indoor space available to the homeless. There are day programs available[422] for the homeless to attend for social programming, however not everyone chooses to participate. Many conduct their activities on the streets in the area, which means much of Ottawa's homeless spend their days in the popular tourist centre of the city known as the ByWard Market.

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[421] The Ottawa Mission has 233 beds available for men. In 2017, 1,982 people were given shelter. https://ottawamission.com/about-us/keystatistics/ ; The Shepherds of Good Hope has 256 beds available in various shelter and treatment programs with 64 beds dedicated to women. http://www.shepherdsofgoodhope.com/about-us/programs/ ; The Salvation Army Ottawa Booth Center has 198 beds available for men. http://www.ottawaboothcentre.org/programs/mens-hostel/.

[422] Center 454 is a day program run by the Anglican Church at 454 King Edward Avenue. http://www.centre454.ca/index.php/en/about-us ; Center 507 is a day program run by the United Church at 507 Bank Street. http://www.centre507.org/about-us/.

The proximity of these shelters and their clientele to the ByWard Market area is a significant source of conflict. Some homeless individuals participate in revenue generating activities to supplement their income. These activities commonly include panhandling and binning. While binning generally takes place in alleyways, panhandling is conducted in areas of greatest populace for efficiency in interacting with potential donors. In an area frequented by tourists and residents the homeless are visible and identifiable. The ByWard Market BIA is staunchly opposed to the presence of the homeless in proximity to their businesses[423] and have even referred to the shelters and their clients as a 'cancer', while citing threats to public safety and loss of revenue due to tourists avoiding areas where the homeless are present.[424] In 2017, City Councillor Mathieu Fleury made several statements to the media regarding the need for the Salvation Army to "clean up" the street in front of the Ottawa Booth Center.[425]

Pragmatically, the *people* in front of the Ottawa Booth Center are generally homeless. However, they are not necessarily the clientele of the Ottawa Booth Center and therefore not the

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[423] "Homeless Shelter labelled a 'cancer' on Ottawa's ByWard Market." *CTV Ottawa News*. (March 5, 2018). https://www.ctvnews.ca/canada/homeless-shelters-labelled-a-cancer-on-ottawa-s-byward-market-1.3829483

[424] Don Mitchell, "The Annihilation of Space by Law: The Roots and Implications of Anti-Homeless Laws in the United States," *Antipode* 29, no. 3 (1997): 307, 309-10; Randall Amster, "Patterns of Exclusion: Sanitizing Space, Criminalizing homelessness," *Social Justice* 30, no. 1 (2003): 210.

[425] Kristy Nease, "Salvation Army Downtown Shelter may be moving out: Mayor wants 1 of 3 downtown homeless shelters to close or move," *CBC Ottawa News*, (February 12, 2017). https://www.cbc.ca/news/canada/ottawa/ottawa-downtown-homeless-shelter-salvation-army-1.3970102

responsibility of the Ottawa Booth Center.[426] More importantly, these people are not rubbish that needs sweeping away or disposing of. The particular choice of words by city officials suggests a disgust toward the homeless, as well as the perception of a need to deal with a threat associated with their presence. The fear of the homeless is evident as safety concerns are repeatedly expressed.

The incidents of criminal activities which are cited in the media, implying that increased enforcement of laws are needed for protection of the public from the disorderly homeless, are not factually linked to homeless individuals.[427] Instead this connection is left to the imagination. The mere presence of individuals in the area surrounding the shelters creates an assumption of their homelessness.[428] When panhandling is listed among the unwanted criminal behaviour there is a presumed blameworthiness, or character deficiency, associated with the activity,[429] rather than it being recognized as a regulated activity. Thus the disgust toward the immoral behaviour leads to the fear of the homeless contaminating the social order within the community.[430] This fear is attached to identity of the homeless like unwashed clothing.[431]

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[426] Idil Mussa, "Salvation Army safety measures fall short, councillor says," CBC News Ottawa. https://www.cbc.ca/news/canada/ottawa/salvation-army-booth-centre-safety-changes-1.3811467

[427] "Crackdown in the ByWard Market." *CTV Ottawa News*. (May 2018). https://ottawa.ctvnews.ca/video?clipId=1397332

[428] Amster, "Patterns of Exclusion," 196.

[429] Rick Libman. "The Regulatory Cycle and its Role in Shaping Purposes and Principles of Sentencing for Regulatory Offences." *Criminal Law Quarterly* 59, no. 2 (2012): 127

[430] Amster, "Patterns of Exclusion," 199.

[431] Amster, "Patterns of Exclusion," 198.

Business owners point to economic loss allegedly being suffered due to the presence of the homeless.[432] They claim potential customers are afraid to approach their stores when there are homeless people in close proximity.[433] Thus, it is an indignant anger[434] toward a perceived economic harm being used as justification for the exclusion of the homeless from the ByWard Market. It is not fear of the homeless individual per se, that keeps potential customers away, but instead the emotional discomfort of seeing a person in the depths of disadvantage, which results in avoidance. This is supported by the research of Jost, Walslak, and Tyler, who identified one response to encountering social inequality as being aversive emotions such as guilt and dissonance.[435]

On several occasions the City has answered the call of the ByWard Market BIA for increased control of the homeless. The Ottawa Police Service, in response to requests by the City Council, have conducted numerous crackdowns on panhandling and disorderly conduct, specifically toward the homeless.[436] Jost et al. identify that the guilt and dissonance can trigger different reactions, one reaction being driven by the desire to justify the inequitable social system

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[432] Laura Osman, "ByWard Market petition compares shelter to 'cancer'," *CBC News Ottawa*, March 5, 2018. https://www.cbc.ca/news/canada/ottawa/byward-market-homeless-shelters-petition-1.4562771 ; Amster, "Patterns of Exclusion," 205.

[433] Mitchell, "The Annihilation of Space by Law," 209-10.

[434] Nussbaum, *Hiding from Humanity*, 97.

[435] John Jost, Cheryl Wakslak, and Tom Tyler, "System justification theory and the alleviation of emotional distress: Palliative effects of ideology in an arbitrary social hierarchy and in society," *Advances in Group Process* 25 (2008): 186.

[436] "Crackdown in the ByWard Market." *CTV Ottawa News*. (May 2018). https://ottawa.ctvnews.ca/video?clipId=1397332

and alleviate guilt through rationalization.[437] Thus giving rise to the justification and rationalization of requests for control and regulation of the homeless and their activities. This ties together with the idea that the fear of immoral behaviour threatens social order and motivates control.

Profiling

When the calls for law enforcement are answered, who are those receiving charges? In the case of panhandling, trespassing, and public intoxication, the police focus on areas with high incidence of complaints, and target individuals of stereotypical characterizations. Once known to police as having contravened provincial regulations, an individual will continue to be targeted.[438] Meanwhile people not physically identifiable as being homeless will not endure the same attention or enforcement. As an example, under the *Safe Streets Act*, it is illegal to solicit money in close proximity to parked cars.[439] If two friends were to drive downtown and park their vehicle before going shopping, and one friend solicited coins to pay for parking from the other friend, this by definition would constitute aggressive panhandling. This incident, even if witnessed by a police officer, would not be enforced under the *Safe Streets Act*. The question becomes, what characteristics trigger police enforcement? This is where the argument of profiling the homeless and the criminalization of poverty arises.

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[437] Jost, et al., "System justification theory," 184-86.

[438] Carole Kauppi, Bill O'Grady, Rebecca Schiff, and Fay Martin, and Ontario Municipal Social Services Association, "Homelessness and Hidden Homelessness in Rural and Northern Ontario," *Rural Ontario Institute* (Guelph, 2017): 89-90.

[439] *Safe Streets Act*, s. 3(2)(e).

The restaurant employee who calls the police to charge[440] a person whom has entered the business with the need to use the toilet, is not calling because an average person is involved. The person is being targeted due to an assumption that they cannot afford to purchase anything, and their presence is disruptive to other patrons.[441] The true offence is the causing of disgust. For charges of aggressive panhandling and public intoxication there is an implicit assumption of fear and anticipated threat to public safety, as explained in chapter two. The Ottawa Police Service has cited crime rates in the ByWard Market in support of the need to crack-down on panhandling, however, no statistics have been revealed in support of the homeless population being the source of the increased incidence of crime. Instead, the assumption of homeless criminality plays on the fears of the general population to support enforcement of the *Safe Streets Act*, the *Trespass to Property Act* and the *Liquor Licence Act*.

The assumption that homeless people are the cause of criminal incidents creates a further disadvantage, whereas the police are less responsive to the protection of the homeless who are victims of crime. In his research, Mario Berit documented the commonly held belief among homeless youth that the police are only for the rich people and are against the homeless.[442] As a result the homeless do not report being victims of crime or discrimination.

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[440] *Trespass to Property*, 2(1)(b)

[441] Philip Lynch and Bella Stagoll, "Promoting Equality: Homelessness and Discrimination," Deakin Law Review 7, no. 2 (2002): 303, 307.

[442] Mario Berti, "Handcuffed Access: Homelessness and the Justice System," *Urban Geography* 31, no. 6 (2010): 832. Also see, Kauppi, Carole, Bill O'Grady, Rebecca Schiff, Fay Martin, and Ontario Municipal Social Services Association. *Homelessness and Hidden Homelessness in Rural and Northern Ontario*. Guelph: Rural Ontario Institute. 2017: 89.

Affiliations – pro bono representation

Three of the people whom I interviewed are criminal lawyers who have provide pro-bono legal representation to homeless individuals in Ottawa, facing provincial offence charges. The interviewees identified the primary Acts under which representation is provided to homeless clientele; the *Liquor Licence Act*, *Safe Streets Act*, *Trespass to Property Act* and City By-laws.[443] The interviewees agreed that when the clientele initially engage their services, a majority of them are aware of historic charges, however, because they had not responded to the charges, they are unaware of any imposed fine. If they are aware of fines having been imposed, they are unaware of the amount owing. It was surmised by the interviewees that the lack of awareness is due to a lack of functionality in their clients' lives. The priority for dealing with charges falls far below daily necessities. As Blair pointed out, "They are not functioning at a level that they are able to prioritize the ticket, to think about the options and that they could do something."[444] Responding to charges is put off until such time as an improvement in their functioning occurs, or an imminent need to address the charges arises, such as being arrested or being denied housing due to debt from unpaid fines. For each interviewee the need for advocacy or affiliation ranked as an essential functioning toward addressing provincial offence charges. Disadvantages that can be overcome with affiliation include: understanding the law and the legal process, access to the

[443] Blair (lawyer) in discussion with the author, March 2018. (A pseudonym given to protect confidentiality in accordance with consent to participate.); Jamie (lawyer) in discussion with the author, March 2018. (A pseudonym given to protect confidentiality in accordance with consent to participate.); Taylor (lawyer) in discussion with the author, July 2018. (A pseudonym given to protect confidentiality in accordance with consent to participate.)

[444] Blair, March 2018.

court facilities, and the ability to negotiate with the prosecutor toward a favorable outcome, all of which are necessary in order to navigate the legal system. In Blair's words:

> Just being unaware of the legal system is a barrier for most people. But it is an additional barrier that these folks are so out of place and uncomfortable in the formal environment of the court. Especially if it is someone who is not clean or does not have nice clothes. Whatever discrimination they encounter on the street, they can expect to encounter even more in the courts.[445]

The institutionality of the court was identified by Blair as a barrier, due to an antagonistic environment that elicits distrust and animosity, "perceived as being an institution that is against them."[446] Other disadvantages identified by the interviewees included bodily health, due to addictions, specifically alcoholism. The altered state of consciousness when receiving tickets commonly lead to a lack of memory of the charge, or the loss of the ticket. Without the ticket to alert them to need for action, charges are not responded to. The short timeline of 15 days to respond to a ticket as permitted by the P.O.A. exasperates even an advocate's ability to respond to a charge received by a homeless person. When a client gains a level of functioning whereby they are able to seek assistance with the charge, the P.O.A. timeline has often lapsed and the charge is already in default. Further, an advocate requires direction from their client during the court process. If a client has a lapse in functioning that results in a loss of communication it precludes the advocate's ability to act on behalf of the client and can result in a conviction with an unfavourable penalty.[447]

The negotiations toward favourable outcomes were expressed by interviewees as being primarily determined by the individual prosecutor and highly determined by the prosecutor's

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[445] Blair, March 2018.

[446] Blair, March 2018.

[447] Blair, March 2018; Jamie, March 2018; Taylor, July 2018.

personal perspective on homelessness and the charges at hand. The penalties being sought upon conviction were determined more by the individual prosecutor's level of compassion, which was stated to be more important than the prosecutor's awareness of potential future consequences. Blair described an advocate's influence as:

> Just being able to tell the client's story or explain their circumstances, situation and barriers in a way that will make sense to the prosecutor. Things that are deemed relevant, I think we can have influence that way, compared to the individual showing up at court on their own, maybe angry, frustrated, confused and maybe not presenting the things that matter as much, they are focused on other things. I think that we can definitely have influence on the prosecutor's approach, just by being there, because otherwise there are so many tickets convicted in absentia. I think that having someone even open the discussion vastly improves the individual's chance of getting a better result.[448]

This was consistent with all three legal interviewees' perspectives on the judiciary's tendency toward imposition of monetary fines for homeless offenders in that long-term consequences are not necessarily considered, but that advocacy can be effective persuasion for reducing the fines.

> Because it is an institution that is so far removed from the realities of homeless people, it really depends on the degree to which the individual justices are aware, and care… The justice of the peace can go ahead and impose the full fine, knowing that it will not be paid, or they can play the game a little with us and come up with something that makes everybody feel like it is actually resolved in a meaningful way.[449]

Thus compassion within the judicial system can be triggered by the involvement of an advocate. Each interviewee stated that the physical presence of their client in court to answer a charge was by far the most compelling strategy to garner compassion from the court.

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[448] Blair, March 2018.

[449] Blair, March 2018.

Legal aid certificates

In Ontario, Legal Aid is funding that is available for people of low-income who require legal representation.[450] According to Section 2 of the *Legal Aid Services Act*,[451] funding is available for provincial offences which are categorized under criminal law. The Interviewees concurred that in actual fact, although theoretically available, legal aid certificates are only issued in circumstances where the prosecutor is seeking incarceration upon conviction, which places the defendant's liberty at risk and triggers their Constitutional Right to legal representation.[452] According to Blair, at the first appearance in court the prosecutor would have to provide written confirmation of the incarceration penalty being sought, an act which in itself would be highly unusual. This requirement for incarceration to be sought as a penalty means that only charges under Part III of the POA (Summons) are eligible for legal aid certificates, because incarceration is not an available penalty for charges initiated under Part I of the POA (tickets). Thus, the legal aid system, which has the potential to be a source of fertile functioning, does not consider the disproportionate consequences of monetary fines for those with low incomes, in spite of legal aid having the purpose of "promot[ing] access to justice throughout Ontario for low-income individuals."[453] Without a legal advocate, a person's ability to answer a charge can be significantly limited.

Legal aid, as an external resource, has the promise of providing the fertile functioning of an affiliation with legal advocates that generates understanding of the law and improves access to

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[450] *Legal Aid Services Act*, 1998, S.O. 1998, CHAPTER 26. [*Legal Aid Services Act*].

[451] *Legal Aid Services Act*, s.2.

[452] *Constitution Act*, 1982, Schedule B to the *Canada Act* 1982 (UK), 1982, c 11, Part I *Canadian Charter of Rights and Freedoms*, ss. 7, 10.

[453] *Legal Aid Services Act*, 1998 S.O. 1998, CHAPTER 26, section 1.

justice. The policy limitations for availability of Legal Aid in provincial offences prevents equal access to justice and reinforces disadvantages of the homeless. This is supported by Ab Currie, who states, "Lack of access to justice represents the vulnerability and disadvantage that characterize the poor and that may define the dynamics that create and perpetuate social inequality and marginalization."[454] He further states, "Social exclusion has been defined as what happens when multiple problems occur at the same time, creating interlocking patterns of marginalization, and the experience of justiciable problems and the lack of effective means to deal with them may be a key aspect of the development of social exclusion."[455] This has been expressed by Wolff and de-Shalit as corrosive disadvantage.[456] Legal Aid is the tool created by legislators to ensure equitable access to justice, yet its availability is restricted. Again the minor offences under provincial regulations result in a more serious consequences for marginalized members of society.

Response to Charges

The interviewees confirmed through their experiences what is evident in the statistics. Very few provincial offence charges received by the homeless are responded to without the assistance of an advocate. The statistics of the Attorney General of Ontario[457] are grouped

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[454] Ab Currie, "A National survey of the civil justice problems of low –and moderate- income Canadians: incidence and patterns," *International Journal of the Legal Profession* 13, no. 3 (2006):218.

[455] Currie, "A National survey of the civil justice problems," 218.

[456] Wolff, Jonathan and Avner de-Shalit. *Disadvantage*. New York: Oxford University Press, 2007: 121.

[457] Ontario Court of Justice, Provincial Offence Court Activity by Statute, Provincial Overview 2017. http://www.ontariocourts.ca/ocj/files/stats/poa/2017/2017-POA-Statute.pdf; For further year-by-year statistics listed by municipality see http://www.ontariocourts.ca/ocj/stats-prov/.

according to the Act under which they were issued. In consideration of the variety of charges and circumstances that *Liquor Licence Act* and *Trespass to Property Act* charges can be laid, I will rely only on the *Safe Streets Act* statistics to demonstrate how the homeless are responding to their provincial offence charges, with the reasonable assumption that all charges would be responded to in the same manner. In 2017, on a province wide basis, there were 7,221 Safe Streets Act charges laid by either a Part I ticket or a Part III summons. Province wide, there were 6,549 charges not responded to, with an automatic conviction and imposition of a monetary fine. No response was filed in 90 percent of all *Safe Streets Act* charges. Of the 672 charges that were responded to, only 40 charges were paid upon receipt, accounting for 0.005 percent. The remaining 632 charges were disposed of in several ways, including; 88 pleas of guilty without a trial (amount of fines imposed is unknown), 111 charges were withdrawn by the prosecution, and 86 were otherwise disposed (these could have been quashed due to being written improperly, filed beyond the required date, or deemed not served correctly). For the accused who requested trials, 40 failed to attend and were found guilty (amount of fines imposed is unknown), 32 plead guilty at trial (amount of fines imposed is unknown), 157 charges were withdrawn by the prosecutor on the day of trial, and 177 trials were held (outcome of trials unknown). The total fines imposed in 2017 on a province wide basis was $340,860, while only $10,214 was collected, accounting for less than 3 percent. In the City of Ottawa there were 491 charges with 443 not responded to, leaving only 48 responded to, or less than 10 percent, matching the provincial

average. Since the *Safe Streets Act* came into effect in 2000, there are 144,997 charges with fines in default, totalling an estimated $7,566,190.00.[458]

When asked what the catalyst was for homeless people to respond to their charges, Jamie stated that affiliation with social workers was primary. "Social worker or case worker. My experience is that most of them [homeless] have been receiving tickets for so long, and have so many, that they just don't care anymore."[459] Affiliation of legal representatives means that not only does the accused have someone who can explain the law and court process to them, but also someone who can provide the needed access to the court system, through filing appropriate documents and entering into negotiation with prosecutor. The interviewees identified the ability to have discussions with the prosecutor on an equal footing as essential in their success in achieving favourable outcomes for their clientele. They expressed that these discussions would likely not be as favourable if the accused were to attend alone, whether due to a lack of knowledge regarding process, rights, or strategy. It was the interviewees' experience spanning dozens of clients that merely having an advocate often results in the automatic withdrawal of the charge, or a suspended sentence, meaning there is no fine imposed but a conviction is registered. The interviewees stated that a reduction in a fine (sometimes to $0.00) was a typical outcome.

The frustration for the interviewees was a lack of consistency in penalties negotiated with no apparent rhyme or reason to the prosecutor's position on penalty, demonstrating a lack of penalty principles. This experience further transferred to the judiciary, who heavily rely on the

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[458] Ontario Court of Justice, Provincial Offence Court Fines by Statute, Provincial Overview April 2017 – March 2018. http://www.ontariocourts.ca/ocj/files/stats/poa/2018/2018-POA-Fines.pdf.

[459] Jamie, March 2018.

joint submissions to determine the penalty. For minor offences it is common for the judiciary to not articulate reasons for the penalty imposed, beyond an ability to pay. The interviewees expressed the belief that compassion of the individual judiciary is the primary consideration in sentencing.

When asked to what degree the prosecution and judiciary are aware of the consequences of the convictions, Jamie implied that there is a significant lack of training in provincial offences court, in comparison to the criminal court. The focus of the judiciary and the prosecution is on the charge until the point of conviction, with an awareness of the potential for driver's licence suspensions in sentencing, but limited understanding of the collections process for fines in default. Interviewees expressed that the general attitude within the provincial offence court system is that convictions for regulatory offences are not as damaging as criminal code offences, even though criminal code convictions can be expunged and provincial offences cannot. Taylor told of an incident during negotiations for a client, when the prosecutor suggested the amount of the imposed fine did not matter, whereas it would go unpaid and would have no ill effects. This lack of awareness of long-term consequences and how the disproportionate effects of unpaid fines on the homeless limits the degree of compassion that might be aroused in either the prosecution or the judiciary when determining penalties.

Unofficial Alternative Measures

The interviewees acknowledged the use of unofficial alternative measures in lieu of monetary fines. Jamie spoke of the agreements reached with the prosecutors on a strictly off-record basis, due to there being no coordinated system for alternative measures in Ontario provincial court. During discussions with the prosecutor an unofficial process is set up, whereby a defendant will complete a specified number of community service hours by a specified date,

after which, the case is returned to the court. On the second court appearance the accused or the representative must demonstrate by way of a letter that the hours have in fact been completed. Upon satisfaction of the hours, the charge is then withdrawn by the prosecution. Taylor advised that the prosecution had engaged with unofficial alternative measures frequently in past years, but the lack of provincial oversight placed the burden on the prosecutors to monitor and the practise was largely discontinued, except in circumstances with reliable representation taking on the responsibility. This demonstrates once again the fertile functioning of affiliation when responding to provincial offences, as well as the existence of compassion to work around restrictive policies in order to limit penalties.

No Pardons – Permanent Record

Although it is true that criminal records can be a disadvantage as they are used to deny employment and even housing,[460] Alex,[461] a social worker who assists with housing applications explained it is also true that criminal records can be expunged. In the case of provincial offences, a process to remove convictions does not exist. The conviction remains as a permanent record, and the fines remain owing until paid. In fact, as a registered debt, even the Estate of a deceased person can be responsible for payment. Taylor conveyed a story of a client's untimely death and how the Estate of the deceased was pursued for the fines owed to the city.

Jamie and Blair identified two means of challenging old convictions under the P.O.A. The first is to apply to the court for the charge to be re-opened. However, this process is limited

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[460] "The Invisible Burden: Police Records and the Barriers to Employment in Toronto." *John Howard Society of Ontario*. 2018:21. http://policerecordhub.ca/invisibleburden/

[461] Alex, (Case Worker/ Housing Advocate) in discussion with the author, March 2018. (A pseudonym given to protect confidentiality in accordance with consent to participate.)

to within fifteen days after the person has become aware of the conviction. The second means of challenging old convictions is an Appeal. Appeals can be of either the overall conviction, or of the penalty. This is a time consuming process, and the volume of charges precludes *pro bono* representation in more than a select few cases. Ultimately for the majority of offenders, once convicted the record and the debt are permanent, as is the credit record. The interviewees concurred that due to the lack of awareness of the collections process, the offenders are unaware of the debts they have been deemed to owe. If there were an address on file with the court a notice of collections would be sent to the debtor, but due to their circumstances, the homeless are often oblivious to the debt. Blair, Taylor and Jamie agreed that most of the homeless whom they represent are unaware of the total amount of their debt. Each interviewee had witnessed debts upwards of $10,000.00, with the majority in the range between $2,000 and $6,000.

The trend identified by the interviewees is for the homeless who are changing their circumstances through being involved with a case worker, getting treatment for their addictions, and seeking housing or employment, to begin to want to deal with past convictions. It is at this juncture the homeless seek legal advocacy, and through the process, become aware of their debts. Jamie provided the example of one client who arrived at the consultation with a credit report, which identified outstanding debt due to convictions under the POA. Alex explained that the credit records detail not only the debt, but the source of the debt. It was through the application process for social housing that the debt came to the client's attention. Kauppi *et al*. convey the story of an interviewee who began receiving collection notices for his unpaid fines after he had received housing. He expressed his consideration to return to homelessness to avoid the stresses of a debt he is not in a financial position to pay.[462] While the social housing is

[462] Kauppi, Carole, Bill O'Grady, Rebecca Schiff, Fay Martin, and Ontario Municipal Social

subsidized according to income, it does not take into account outstanding debt. Pat,[463] a case worker who assists with housing applications expressed concern with the stress a tenant would face managing to cover their basic necessities and attempting to re-pay thousands of dollars of debt for provincial offence convictions, of which they may not even have recollection. Pat surmised that these types of anticipated stressors deter the homeless from seeking housing. This accumulation of disadvantage places provincial offences convictions as a corrosive disadvantage.

Disadvantage and Affiliation – housing applications

Through interviews and discussions with case workers who assist with applications for housing, several prominent disadvantages were identified. The institutional nature of the social housing system deterred individuals from engaging in an application process on their own. Alex spoke of people being aware of credit checks as part of the application process, and not wanting to have their debts exposed to strangers. Anticipating denial of a rental application due to debt, and perceived shame and stigma that might arise during an application when the source of debt was exposed, some people may not seek assistance to find housing and instead, choose to remain in the system of temporary shelter. Once an individual had affiliation with an advocate, there were several other disadvantages that were also resolved. Alex identified that landlords discriminate against people on Ontario Works or Ontario Disability Support Program due to perception of being unable to pay the rent. When potential tenants attend to view an available

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Services Association. *Homelessness and Hidden Homelessness in Rural and Northern Ontario*. (Guelph: Rural Ontario Institute. 2017): 63; Also see Kent Glowinski, "Don't Get Enough Credit? The need for an impartial consumer credit report tribunal in Ontario." *Journal of Law and Social Policy* 22 (2009): 10, 17.

[463] Pat (Case Worker/ Housing Advocate) in discussion with the author, March 2018. (A pseudonym given to protect confidentiality in accordance with consent to participate.)

apartment, the landlord may prejudge based on attire, evident addictions or mental health. Individuals with criminal records are stereotyped as tenants with poor behaviour. Pat also identified the "very common barrier"[464]of bad credit, which the landlords use to deny applicants on the belief that they will not pay their rent. Although these barriers into housing are identified by case workers assisting with housing applications, there are no recorded statistics to assist in understanding how frequently people are denied housing on these grounds.

Alex provided the insight that the use of credit reports as a basis for denial of a social housing application is forbidden under the *Housing Services Act,*[465] for housing accommodations under a provincial agreement.[466] Having been previously unaware of this, Alex had been paying for credit reports on applicants until it was recently brought to her attention by a City employee. She described her use of the credit report as an evaluation tool, reading not only the credit report recommendation of whether or not to grant tenancy, but scrutinizing the debts owed, amounts and creditor. She acknowledged the risk of landlords using the credit reports to discriminate against potential tenants, agreeing that the bad credit rating is a disadvantage toward obtaining housing. Although illegal under the *Housing Services Act*, there is evidence that the practice of landlords using credit reports as a screening tool against unwitting applicants is not uncommon. In much the same way that a legal representative can overcome the disadvantages within the court system, affiliation with an advocate for social housing can overcome discriminatory

[464] Pat, March 2018.

[465] *Housing Services Act*, 2011, S.O. 2011, c.6.

[466] Social housing under Federal agreements do not have any restrictions on the use of credit history to deny applicants.

practices and prejudices of landlords by knowing and understanding the laws and policies, and ensuring their clients receive equitable treatment, and achieve secure housing.

Housing Aftermath

One aspect of the provincial social housing program that Pat and Alex spoke of during their interviews was the central registry waitlist. The waitlist is managed by the municipality which oversees all projects for subsidized housing. Pat explained that when people receive housing the registry is advised and the individual is place on a registry of tenancy. This list keeps track of any tenant who abandons their accommodations with rent-arrears, as well as notes damage to property left behind. It is this registry, managed by the municipality and shared internally with the collections department that leads to the debtors, who previously had no fixed address, being located. With information on the person's whereabouts the collections process can begin, resulting in agents knocking at their door demanding payment. The security of housing is then placed in jeopardy as the individual now faces the stress of dealing with debt collection agents and the need to find funds to pay the debt out of social assistance. The lack of security in housing is a disadvantage created by the sectoral justice of the debt collection process.

Conclusion

The political will and social demand for control of the homeless within the community of Ottawa is evident through the media's reporting. BIAs are supported by the city for their economic development and threats to that development are addressed with a political voice calling for police action of enforcement and control. The homeless are targeted as the cause of criminality, but it is the emotional discomfort of social inequality that justifies and rationalizes the enforcement of this disadvantaged population. The inability for homeless individuals to live within the law is caused by the conditions in which they survive: their need to supplement

income to provide for basic necessities: the coping mechanism of substance use: and lack of private space. The disadvantages can be readily identified by those who advocate for the homeless. The institutional system is a barrier that many of the homeless cannot overcome on their own due to the level of functioning they experience on a regular basis. The condition of homelessness feeds into the behaviours which are targeted under provincial regulations. Their struggle with functionings creates prioritizations in which dealing with charges is generally less important than basic necessities, until access to necessities are affected by the legal issues. Advocates such as case workers and *pro bono* legal representatives are able to assist the homeless overcome a variety of barriers. Thus, a lack of understanding of the law can be overcome by the fertile functioning of affiliation. Without affiliation to address provincial offences, the consequences cluster; imposition of fines, poor credit records, and potentially the denial of housing, or inability to maintain secure housing due to accumulated debt. Thus enforcement of provincial regulations is a corrosive disadvantage for the homeless, resulting in social injustice.

The judicial system is commonly referred to as being blind, as a way of referring to neutrality. This blindness assumes that all persons before the court are equal. The reality is, that not everyone in society is treated as equal, and their disadvantages carry forward into the judicial system. There are ways that the provincial regulatory system can become more equitable, as I will demonstrate in the final chapter.

Chapter 6 – Corrective Measures

The provincial regulations used in Ontario, Canada to control the homeless population are administered through a statute that limits the judicial response upon conviction, as demonstrated in chapters four and five. There are several corrective measures that if implemented would significantly reduce the corrosive disadvantage experienced by the homeless when in contact with the cycle of provincial regulations. I have argued that calls for control of the homeless population are based in disgust of perceived immorality and unreasonable fear of social contamination. Furthermore, the administration of provincial regulations to control the homeless is creating social injustice. What I have not argued is for the repeal of the laws. If enforced upon individuals who pose an actual physical threat to others, there can be public safety benefits to these laws. It is the targeted enforcement of laws against the homeless based on unreasonable fear that I oppose. The administrative processes for enforcement that currently exists blindly imposes penalties without measure of the disadvantages that are or will be experienced by the offenders. Corrective action for the political will of unjust targeted enforcement is beyond the scope of this paper, however, corrective action for the administrative process will be explored in this chapter.

The enforcement of provincial regulations has the potential to address the truly physically aggressive and threatening acts of a few individuals. However infrequent these incidents are, the threat of actual physical harm creates a stereotype for all individuals who solicit the public, or conduct private acts in public spaces. The non-aggressive homeless individuals who beg for money to support themselves against great disadvantages, and desire to use public facilities and spaces for non-nefarious purposes, are harmed in reputation, income, and functionings by these

few aggressive individuals,[467] and the biases then held against the perception of the homeless. There are those who believe that the homeless have character flaws and are blameworthy for their own condition and that tough regulation is the only means to deal with them. The majority of contemporary literature, however, takes the position that it has been changes in public social policies that have resulted in the modern condition of homelessness. I have demonstrated the administration of provincial regulations has, through a lack of proportional consequences, contributed to the socially unjust condition of homelessness. The administration can be corrected. The laws are only *ink on paper*, policed by political will and discretion.

To ensure corrosive disadvantages are eliminated from the regulatory cycle of provincial offences there are several changes required: A change in political will of a community demonstrated through the discontinuation of calls for enforcement against the homeless; public social policies being developed with consideration toward fertile functions and the elimination of disadvantages; and increased legislative authority. The change in political will and social policies may occur if the people with influence can demonstrate a new and better way of responding to the homeless population that will generate beneficial outcomes for everyone, without substantial cost or negative effects.[468] What these better ways are, is beyond the scope of this paper. The legislative authorities that contribute to disadvantages have been detailed in chapter four and exemplified in chapter five.

There are several ways that increases in judicial authority can be implemented to remove the corrosive disadvantage described as disproportional consequences which cause social

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[467] Bill O'Grady, Stephen Gaetz, and Kristy Buccieri, "Tickets…and more Tickets: A Case Study of the Enforcement of the Ontario Safe Streets Act," *Canadian Public Policy* 39, no. 4 (2013): 543.

[468] O'Grady, et al. "Tickets…and more Tickets," 552, 555.

injustices such as forced recidivism and homelessness. This chapter will review these changes to judicial authority and explain how they build equity into the administration of provincial regulations. The areas of focus are; 1) timelines for responding to charges, 2) options for penalty-only submissions, 3) penalty principles for regulatory laws, 4) alternative measures and penalties, 5) legal aid and, 6) a library of Case Law to ensure consistent penalties.

Timelines

The timeline for responding to a charge, as reviewed in chapter four, is 15 days. The diminished functionings of the homeless population commonly result in no response being filed for charges. The 15 day response time may appear to be efficient in that the charges will move through the court system quickly, however if that was the only consideration in determining the timeline, policy makers could easily have made it even shorter, such as 7 days. I suggest the timeline was presumed to be *reasonable.* Although 15 days may be reasonable for some defendants under the POA, the level of functioning of the homeless defendants and their need for affiliation of case workers and legal representatives, it should be recognized that additional time is reasonable. There is no efficiency in charges that remain in the default files for decades, therefore additional time to respond does not harm the court's efficiency. I suggest that 60 days is not an unreasonable amount of time for people to make a response to charges under the POA.

Penalty only submissions

Currently there are five options for response to a Part I ticket under the POA, as I have explained in chapter four. Four of these response are currently required to be made within 15 days of receiving the charge. The fifth option is not responding. Two of the four options include an admission of guilt. Pleading guilty before a justice of the peace, then asking for leniency in sentencing is a means of a person accepting responsibility for their actions, but receiving a

penalty that is proportional to their capacity to pay. It is efficient in that it does not require the prosecution to present evidence and prove the case, but shifts the burden on to the defendant for proof of what is a reasonable penalty in their circumstances. Currently if a defendant does not respond within the 15 days and a conviction is registered, a case can be re-opened within 15 days of the defendant *becoming aware of* their conviction.[469] According to the lawyers interviewed, this has been interpreted as meaning once a client is made aware of a conviction through representative inquiries at the court, because the homeless clientele do not receive notice of their convictions. Thus this section has been used to address historic tickets, upwards of 15 years old. The prosecution has objected to historic tickets being re-opened due to evidence no longer being available, which is prejudicial for their case. The Appeals process is administratively burdensome, and has a 30 day timeline after the conviction is registered and is therefore not conducive for *pro bono* representatives. Upon conviction a defendant may also request an extension of time to pay an imposed fine, however, an extension is only granted if a person has been making a reasonable attempt to pay the debt. If a defendant has not been able to make payments, or if their circumstances have changed, their request for an extension may not be granted. Further, an extension is only beneficial if a defendant will be able to make future payments. Making statutory provisions that allow for a process in which a person can make submissions on penalty without an Appeal, and without a time restriction, is reasonable. In making such a provision, someone who is unable to pay a full fine may respond and pay part of the fine instead of avoiding the case entirely. The province has default fines that may be partially collected, if a means were available to speak to the court. Of course, if people are unable to pay any fine, the challenge is how they make amends without going to jail.

[469] *Provincial Offences Act*, s 11(1)

Penalty Principles

In chapter four I argued the importance of the penalty principles for regulatory laws. The difference between the penalty principles in criminal law and regulatory law should be that in criminal law members of society are meant to be punished and not return to the criminal activity. In regulatory law, members of society are meant to be or become compliant and continue to participate in the regulated activities. This requires the penalties (except in extreme cases) to be conducive to compliance. If public welfare laws are for the welfare and protection of society, then an outcome should be an improvement on society's wellbeing. Compliance should improve society, and compliance, not recidivism, should be a consequence. Thus if control of the homeless population is an objective, then the improved wellbeing of the homeless – permitting their compliance with social regulations – is reasonable. If it is accepted that monetary penalties cause corrosive disadvantages, then there should be alternatives to monetary penalties.

Alternative measures and penalties

Where a person with insufficient funds would like to take responsibility for their actions, but is unable to pay any imposed fine, alternative measures would allow for this possibility. Instead, the inability to pay leads to default in payment and the associated disproportional consequences. Alternative measures in provincial regulatory offences would grant homeless persons the dignity to answer to a charge in a responsible manner, and have pride in facing consequences[470], rather than hiding in shame from their limitations to act as a responsible citizen.[471] Further, alternative measures would enable the regulatory cycle.[472] Probation, under

[470] This is not condoning the overly aggressive enforcement against the homeless.

[471] Nussbaum, *Hiding from Humanity*, 174-75, 232.

[472] Libman, "Regulatory Cycle,"147-48.

the P.O.A. has conditions limited to the statute under which the charges were laid, and general conditions which specify no recidivism of the same or similar offences. The provincial courts are arguably not set up for monitoring probation orders; there are no probation officers at the provincial level. Breaches of probation orders only come to light if charges are laid during the probationary period. The enactment of provisions for community service in lieu of either monetary penalties or incarceration would have benefits throughout society. For the homeless, community service provides the chance for new relationships and networking within the community, which could lead to beneficial opportunities and increased appreciation from the community of the potential for economically impoverished individuals to contribute. If enacted in a meaningful way, these alternative penalties offer options that would act as a fertile functioning in aid of removing barriers for the homeless population to respond to the charges that they receive and increase affiliation within their community. There is also the possibility to generate change in political will within the community as stereotypes are debunked and as there is an increase in recognition of the value that these individuals bring to our society. In addition to community service, the use of attendance in treatment programs can be used to reduce recidivism and improve the functionings of the disadvantaged. This does not only have to apply to the provincial regulations enforced on the homeless. Alternative measures, such as training through regulatory bodies[473] can be implemented to reduce recidivism. The cost of these alternative measure programs would be offset by the reduced expense of debt collection practices and future regulatory enforcement. Further, if fertile functioning can overcome disadvantages and promote

[473] Example of a regulatory bodies; Conservation Authorities, Workplace Safety Insurance Board, College of Trades, Electrical Safety Authority, etc.

compliance, then consequences should promote fertile functionings, such as affiliation. This can be accomplished through alternative measures.

Legal Aid

The lack of advocacy for people facing regulatory charges and who cannot afford to pay a legal representative results in disproportionate consequences. As explained in chapter five, the availability of legal aid is restricted to cases where loss of liberty is at risk. The disproportionate consequences of monetary fines for the impoverished, and the potential effect on the affordability of basic necessities is not considered in the granting of legal aid certificates. The entitlement assessment or qualifications for legal aid certificates should be more cognizant of the disproportionate consequences of fines on the impoverished. Having legal aid application assistance available at the courthouse to assist and process legal aid certificates would ensure that those who qualify for legal aid are able to engage with a legal representative. In addition, the provision of duty counsel – free legal advice available to anyone who does not have legal representation – at their first appearance when responding to a charge, would ensure that defendants are best able to understand the law and the process they are facing. Duty counsel does not provide ongoing representation, but explains the legal process and options, and may speak on a defendant's behalf before the court. Duty counsel also increases a defendant's access to further advocacy options through creating an awareness of the benefits of engaging with an advocate.

Case Law

Finally, the lack of precedent decisions upon which the judiciary can rely needs to be addressed. As mentioned in chapters four and five, the decisions in Provincial Offences Court are primarily given orally. Although transcripts are available, these are infrequently reported in any formal Case Law library. The decisions being released vary from not only region to region, but

from justice to justice. The circumstances of an individual defendant may have more persuasion on one judiciary than on another with different experiences or biases. This results in inconsistent penalties being imposed. If the judiciary relied on guidance from precedent cases regarding penalties, the appearance of justice being done would be more consistent, and thus the legal regime would appear fairer. At present, a primary means of ensuring a fair penalty is with the assistance of an advocate.

Strategies and needs

There are potential strategies for addressing the needs of the homeless, before the administration of regulatory laws. The following are a few ideas: the installation of public toilets is a need of all those who use public spaces, so too are increased rest areas with seating and water fountains. While great strides have been made toward the recognition of benefits to public safety in providing safe, supervised space for consumption of illegal substances and encouraging treatment, no such space exists for the legal substance of alcohol or, beginning in October 2018, marijuana, thus the creation of safe consumption sites would assist in reducing public consumption.

Conclusion

The strategies detailed above demonstrate that the administration of provincial regulations can be enhanced to better address the public welfare intentions of the laws. These are strategies inspired by the needs of the disadvantaged for better functioning in society. The strategies are aimed at reducing the corrosive disadvantage leading to recidivism, improving homeless participation in the regulatory cycle, and improving society's wellbeing. These strategies are not a means of permitting lawlessness of the homeless. Instead the strategies

should promote equity through universal benefit while reducing disadvantages faced by the homeless.

Conclusion

The teleology of provincial offences in Ontario is purported to be the protection of public safety and welfare. The regulation of public and private lives is administered through a plethora of statutes that are administered in a homogenous way over a non-homogenous public. Reflective of social policy and enforced under political will, the laws have disproportionate effects on those being regulated. This paper has focused on a marginalized group within society, the homeless, to demonstrate the social injustice that occurs through the creation, enforcement and administration of targeted control.

The determination of who is homeless assists in understanding why they are being affected by so-called public welfare laws. Insecure housing due to an inability to sustain an income sufficient to cover basic human needs, can lead to the activities recognized and associated with homelessness. These activities have drawn scorn and generated political will for control. The scorn is spearheaded by business and local community groups who call on elected officials to take action. The action is the creation and enforcement of laws.

Social norms are intrinsic to laws in Western society. Using the work of Martha Nussbaum, I have demonstrated that adherence to social norms creates a social hierarchy and causes marginalization for those who do not or cannot conform. The homeless live in physical conditions that are reminiscent of animality, garnering an emotional response of disgust. Perceived to be willingly living outside of social norms, in animalistic conditions, homelessness is deemed morally disgusting. Fear of contagion, be it physical or ideological, generates support to control the homeless. The unreasonable fear of the homeless results in unreasonable control with patently unreasonable consequences.

The work of Wolff and de-Shalit has aided my demonstration of homelessness being symptomatic of lacking functionings or capabilities for an autonomous life. Disadvantages are indicative of insufficient opportunities for secure functioning. The marginalization of the homeless further reduces access to sufficient functionings. This paper has focused on the disadvantage of being unable to live within the law. For the homeless population, living within the law may result in the loss of functionings, while not living within the law may also result in the loss of other functionings, thus making it a corrosive disadvantage. Additionally, this paper has focused on the capability to understand the law. Without an understanding of the law, the consequential risks are greater, making it too a corrosive disadvantage if absent. The presence of affiliation has been focused on as a fertile functioning, specifically in regard to advocates for understanding the law. The affiliation of a social worker or legal advocate can overcome the disadvantage of not understanding the law, but does not correct the unreasonable targeting of a marginalized group for law enforcement and control. For the homeless population, the regulation of activities inherent to the condition of not having secure housing is socially unjust.

Tracing back to the Plague of 1348 in England, I have demonstrated that social policies have been used to govern the public and private lives of the homeless and that these controls are rooted in the disgust of perceived immoral behaviour and the unreasonable fear of social contagion. In recent decades, the *Safe Streets Act* was enacted in Ontario, and is reflective of the emotional response of disgust and fear. This Act has been used to exemplify the targeted use of legislation for the control of the perceived immoral condition of homelessness, without consideration of the causes of homelessness.

Provincial offences used for regulation of activities affecting public welfare and safety are considered minor infractions. Criminal offenders, by contrast, are considered blameworthy

for the resultant harm of their actions. Regulatory offences are administered in a system which seeks participant compliance and continued participation. This regulatory cycle presumes equality among members of society, and does not account for the disadvantage of the marginalized people and the disproportionate consequences of the penalties they encounter. The teleology of provincial regulations fails when the consequences of penalties, specifically monetary fines, cause recidivism, and entrenchment in disadvantage. Furthermore, the lack of alternative penalties restricts the court's ability to engage the judicial system for public welfare and safety that includes marginalized members of society.

Targeting of the homeless is evident in the media, where business owners and community groups seek to remove unwanted individuals from *their* streets and neighbourhoods. Empirical encounters with legal representatives and advocates for housing have supported the theoretical and statistical determinations within this paper. The interviewees have given a voice to the homeless whose functioning on a regular basis is too challenged to appropriately address the regulatory charges they receive. Affiliation with advocates was upheld as an essential and fertile functioning, one that brings forth capabilities in additional areas of autonomous functionings. Advocates reported their ability to achieve equity for their homeless clientele within the legal system. Their ability to negotiate with prosecutors and speak to the judiciary to elicit compassion resulted in reasonable penalties and improved opportunities for their clients to demonstrate compliance and to participate in the regulatory system. Housing advocates evidenced the ability to prevent discrimination and promote security in the functioning of housing.

Provincial regulatory laws are administered without proportionality between the offending act and the consequential outcomes for marginalized, homeless individuals. The judicial authority within the Ontario Court of Justice is restricted by the language of the law,

lacking of explicit principles explaining the need to ensure that penalties imposed consider the circumstances of the offender their ability to participate in the regulatory system, and without penalties that ensure causal outcomes are appropriate and proportional for all offences and offenders. Extending the judicial authority to permit alternative measures and penalties in order to emphasise public welfare and support compliant participation in the regulatory cycle would correct the sectoral justice in the teleology of the provincial regulatory laws, and reduce the social injustice inflicted upon the homeless.

The teleology of provincial regulatory law is public safety and welfare of society, and assumes that all members of society are equal before the law. I have demonstrated that the homeless are disadvantaged when dealing with all aspects of regulatory law. The inability of the homeless to be compliant participants in the regulatory system places their safety and wellbeing at risk. When treated as equal and issued equal punishment, their disadvantage results in disproportional consequences and further disadvantages. In a system with a purpose of safety and welfare, the creation of risk and potential harm amounts to failure. The system's failure is specific to the homeless and the social injustice of homelessness that is perpetuated.

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