In contemporary western societies, citizenship is constructed now more than ever around the values of the market. Freedom is on offer to those who choose to participate in the multiple market exchanges that proliferate in everyday life. Consumerism—the ability to consume goods and services from any place and to travel anywhere—offers a space of freedom to those who face obstacles in most other areas of their lives (Hall 1996: 234). Political actors understand the significance of this conception of citizenship. More often than not, they choose to trade social welfare for greater purchasing power by reducing taxes and the size of public expenditure (Williams 1961: 325). There are, of course, those who wish to resist this form of political life, and so they unplug their cable, join in consumer boycotts or engage in acts of protest or civil disobedience at Seattle or Quebec City.

Then there are those who are denied this semblance of agency, those who have no capacity to participate in modern consumerism because they are poor, without work or homeless. They are designated “failed” (Rose 1998: 79) or “flawed” consumers (Bauman 1998: 38) and “inadequate” (Bauman 1998: 38) or “anti-” (Rose 1998: 79) citizens. These individuals are hard to understand, for they are deemed to have chosen this form of lifestyle. Having voluntarily removed themselves from the civil order they constitute a problem of disorder. Analysis accordingly shifts from the causes of poverty—jobless growth and sustained unemployment—to “the behaviour of the poor as the problem” (Procacci 1998: 23). Poverty thereby becomes a problem to be regulated by criminal prohibition.

In Madness and Civilization, Michel Foucault describes the “great
confinement” and forced labour of the poor in seventeenth-century Europe as animated by moral disapproval. In the European mind, the poor “cross[ed] the frontiers of bourgeois order of his [or her] own accord; and alienate[d] himself [or herself] outside the sacred limits of its ethic” (Foucault 1965: 58). The strategic response today is to seek the ethical rehabilitation of the poor or, alternatively, to banish them from sight. Those who refuse to govern themselves as productive citizens “have also refused the offer to become members of our moral community,” writes Nikolas Rose. For them, it seems, “harsh measures are entirely appropriate” (Rose 1999: 267).

The Ontario Safe Streets Act exhibits this sort of moral disapproval. The purported intention of this provincial Act is to remove from public sight individuals whose conduct is deemed to have crossed the frontier of our social and ethical order: the beggars, the squeegee kids and the homeless, those who have “voluntarily” removed themselves from our moral community. If the impetus of the law is to express disapproval of conduct that crosses the frontier of moral order, this makes the law constitutionally suspect. It may be that this subject matter belongs more appropriately to the federal government as a matter for the criminal law. If so, the Safe Streets Act is beyond the authority of the provincial government.

The federal government alone has authority to make the criminal law of Canada. The provinces, in contrast, are allocated responsibility for the administration of justice in the province—in effect, they enforce the federal criminal law. Provinces also have authority to attach penalties to provincial offences, that is, offences of provincial laws validly authorized under one of the classes of subjects listed in section 92 of the Constitution Act, 1982. For our purposes, provinces have authority to make laws that concern the regulation of streets, sidewalks and highways and the suppression of conditions likely to give rise to the commission of crimes.

This essay’s inquiry into the scope of provincial authority suggests that the provincial government may have overstepped its authority in regard to the “solicitation” provisions of the Act—those provisions concerning aggressive begging or begging of a so-called “captive” audience. This essay does not address other aspects of the Act, such as amendments to the Highway Traffic Act that prohibit squeegeeing or prohibitions on the disposal of condoms or needles in public spaces. However one characterizes these latter provisions, as concerning the regulation of a specific trade, regulations concerning road safety or removing conditions ancillary to crime, they are more impervious to the charge of usurping the federal
Federalism analysis is not ordinarily concerned with the moral rightness of legislation. I would maintain, however, that federalism analysis often is a value-driven exercise, represented by past choices and present-day evaluations of social problems. Admittedly, this sort of analysis has nothing to do with solving the root problems that give rise to the problem of poverty in Canada. Federalism analysis offers only a formalistic and formulaic response to what are complex social problems. But this remains a fruitful enterprise, as the division of power analysis helps to uncover the moral impetus for the legislation and its connections to techniques of governance related to neo-liberalism and economic globalization. The ultimate judicial resolution of this constitutional question also may reveal the degree to which these governance techniques have affected other branches of the state. It may disclose whether there is a judicial propensity to banish the poor from judicial concern while at the same time tightening the hold of consumer citizenship in Canadian constitutional law.

The Federal Criminal Law Power

According to post-World War II Canadian judicial interpretation, there is virtually nothing beyond the purview of the federal criminal law power. In an era of increasing devolution, untied funding and withdrawal of state regulation over matters concerning the economy, the criminal law power remains one of the few legitimate levers of control available to the national government. This, I would claim, is no mere coincidence. Economic globalization constructs a realm beyond the reach of ordinary politics. There are few things left for states to do other than to secure the conditions for the smooth operation of the market and related concerns regarding personal safety and security. This helps to explain the politics of vengeance that dominates provincial and national politics. What governments can do is legislate in regard to safety, the "only field," Zygmunt Bauman (1999: 5) writes, "in which something can be done and seen to be done." It is the desire of the government of Ontario to enter into this field that helps to explain the impetus for the Act.

The federal criminal law power long has had a centralizing influence on Canadian public policy. The authority of the federal government to make criminal law is traceable back to the conquest of the French in North America. Several years later, the Quebec Act, 1774 restored the civil law and preserved Roman Catholic religious education and institutions but provided no exemption from application of the English criminal law.
unifying feature of the criminal law was not lost on the framers of the 1867 *British North America Act* (Friedland 1984: 49).

Though its definition has been an elusive one, the judiciary traditionally has granted the federal criminal law power a wide ambit, and this continues to the present day. Most recently, in the *Gun Control Reference*, the Supreme Court of Canada reaffirmed the capacity of the federal government to make criminal law in a wide range of areas using a variety of legislative mechanisms (*Reference Re Firearms Act* 2000). This capacity is subject to the formal requirement that criminal law is that which is framed as a prohibition with a penalty and which has a "criminal public purpose." The latter was famously defined by Justice Ivan Rand in the *Margarine Reference* as having to do with "public peace, order, security, health, [and] morality." These were the "ordinary though not exclusive ends served" by the criminal law (*Reference re Validity of Section 5(1) of the Dairy Industry Act* 1949: 49).

The test of criminal public purpose addresses the question of "colourability" (*RJR Macdonald Inc. v. Canada (Attorney General)* 1995: para. 122)—the disguised attempt to invade the other's jurisdictional field. But valid criminal public purposes have included restrictions on tobacco advertising in order to promote health (*RJR Macdonald Inc. v. Canada (Attorney General)* 1995) and regulatory mechanisms for the identification of prohibited toxic substances under the Canadian *Environmental Protection Act* (*R. v. Hydro-Quebec* 1997). The purpose of the criminal law, wrote Justice LaForest, is to "underline and protect our fundamental values" (*R. v. Hydro-Quebec* 1997: para. 127), and the criminal law power must keep pace with those changing values.² Thus, "it is entirely within the discretion of Parliament to determine what evil it wishes by penal prohibition to suppress and what threatened interest it thereby wishes to safeguard" (*R. v. Hydro-Quebec* 1997: para. 119). The real force of the criminal law power arises in those instances where provincial laws are challenged for intruding into the federal field (Hutchinson and Schneiderman 1995: 16)—when provincial laws are tested for their colourability.

**Provincial Powers**

The modern law of Canadian federalism analysis, however, grants a wide ambit for both federal and provincial legislative authority, in this field as in others. Courts have upheld provincial laws that regulate a variety of forms of conduct covered by the federal *Criminal Code*, so long as they are validly enacted for provincial purposes. In the *Rio Hotel* case, for instance, New Brunswick could attach as a condition to liquor licensing a ban on nude
performances of the sort prohibited by the "public nudity" provisions of the Criminal Code (Rio Hotel Ltd. v. New Brunswick 1987). In the infamous Dupond case, a Montreal municipal by-law prohibited assemblies, parades or other gatherings where there were reasonable grounds to believe that they would endanger safety, peace or public order (a temporary ordinance also prohibited any assembly, parade or gathering for a thirty-day period). The Supreme Court of Canada upheld the municipal actions, characterizing them as preventive, not punitive measures, intended to prevent "conditions conducive to breaches of the peace and detrimental to the administration of justice" (Attorney General Canada v. Dupond 1978: 435). The measures concerned unlawful activities—namely unlawful assemblies and riots—but before they had yet taken place and so were "complementary" to federal legislation.

The law of Canadian federalism condones concurrency. So long as the prohibition relates to a valid provincial purpose, provincial law may cover the same field as the federal criminal law. Should there be conflict, the provincial will yield to the federal to the extent of the inconsistency. On occasion, though, the Supreme Court of Canada has been less tolerant of provincial incursions into the criminal law field. The rationales for these decisions may have something to do with the fact that they concern traditional criminal subject areas like prostitution and abortion. The focus for the Court in these cases again is colourability—a veiled attempt to invade the other's jurisdiction in the guise of valid provincial law. The Court undertakes this task by looking beyond form, or "beyond the four corners of the legislation" (R. v. Morgentaler 1993: 497). Two cases of this sort form a backdrop to the current analysis.

The Westendorp case concerned a Calgary municipal by-law purportedly to deal with prostitutes gathering on the street and, according to the by-law's recitals, attracting crowds, creating "annoyance and embarrassment" and impeding the "right and ability" of the public "to move freely and peacefully on the streets" (Westendorp v. The Queen 1983: 49). The purported object of the by-law concerned movement on municipal property—its streets and sidewalks—a matter legitimately within the authority of municipalities as delegates of the provincial government. The Supreme Court looked beyond the recitals, however. The by-law prohibited not the blocking of passageways but soliciting for the purposes of prostitution, precisely the type of conduct prohibited by the old soliciting provisions of the Criminal Code.

The 1993 Morgentaler case is even more instructive. In the wake of the Supreme Court of Canada's decision declaring invalid the Criminal Code
prohibitions concerning access to therapeutic abortions (R. v. Morgentaler 1988), the Nova Scotia Legislative Assembly prohibited the performance of abortions outside of hospitals. The Medical Services Act was enacted and its regulations promulgated, solely in response to Dr. Henry Morgentaler's establishment of a free-standing abortion clinic in Nova Scotia. The stated intention of the enactment was to "prohibit the privatization of the provision of certain medical services in order to maintain a single high-quality health-care delivery system for all Nova Scotians" (R. v. Morgentaler 1988: 470). This stated purpose certainly was within the purview of the province, but the Supreme Court of Canada, in a unanimous judgment, looked beyond "the four corners" of the Act: to Morgentaler's opening of a clinic as providing the impetus for the legislature to act; to the legislative debates, which disclosed little or no concern for privatization or quality control; to the lack of any study on cost control or consultation with the medical profession; and to the severity of the penalties (fines ranged from $10,000 to $50,000). The primary object of the legislation, the Court concluded, was to prohibit "socially undesirable conduct ... from the viewpoint of public wrongs or crimes" (R. v. Morgentaler 1988: 513).

A similar analysis can be undertaken in regard to the Ontario Safe Streets Act. Bearing in mind that modern law of Canadian federalism grants a wide berth to legislatures to attach penalties to validly enacted laws concerning economic regulation and social policy, what does the text of the Act, and the circumstances giving rise to it, tell us about its dominant purpose?

The Disorder of the Law

The Ontario Tories in their 1999 election campaign "Blueprint" outlined a commitment to outlaw "behaviour that jeopardizes the safe use of the streets" (Ontario Legislative Debates, November 2, 1999). The Safe Streets Act was meant to fulfil that promise. The Act outlaws not only squeegee people on Ontario roads but solicitation in an "aggressive manner ... likely to cause a reasonable person to be concerned for his or her safety or security." Certain activities are "deemed to be" aggressive solicitation, including threatening persons by word or gesture in the course of solicitation, obstructing a person's path, using abusive language, proceeding behind, alongside or ahead of a person, soliciting while intoxicated, or continuing to solicit after being refused. In addition, solicitation of a so-called "captive audience" is prohibited, including solicitation of persons at teller machines, pay telephones or toilets, waiting at a transit stop or getting in or
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out of vehicles. Persons found guilty of these offences can be fined up to five hundred dollars on a first conviction and up to one thousand dollars or six months imprisonment on each subsequent conviction.

Note that the solicitation provisions of the Act are only secondarily concerned with the movement of persons on streets and sidewalks (a matter within provincial legislative competence). Many of the activities considered to be aggressive solicitation, such as using abusive language or soliciting while intoxicated, are only remotely connected to securing safe passage for pedestrians on sidewalks and streets. Similarly, begging outside of pay telephones, bus stops or banking machines bears only a remote relationship to impeding movement. None of these are very well anchored in provincial authority. Only two examples of deemed aggressive soliciting directly concern impeding a person's progress, and these are "obstructing a person's path" or proceeding "behind, alongside, or ahead of a person." The dominant purpose revealed by the Act as a whole has more to do with regulating behaviour found to be offensive by some (what the Tory "Blueprint" called "threatening and harassing behaviour") than the regulation of streets and sidewalks. Moreover, the fines seem high given the nature of the offence, and this is particularly so for repeat offenders. The Act also entitles police officers to arrest without warrant those persons who are reasonably believed to have offended the Act in order to establish their identity. Given the purported objective of the legislation, to regulate the safe use of streets and public spaces, arrest without warrant seems either like legislative overreaction or intrusion into the criminal law field.

An important consideration is the fact that the provincial offences defined in the Act bear strong similarity to a number of existing Criminal Code offences. In this way, the Act appears to do more than merely prevent the conditions giving rise to crime. General Counsel of the Canadian Civil Liberties Association, Alan Borovoy, underlined this point in testimony to the Ontario Standing Committee on Justice and Social Policy. Where the Act "does address issues of harm," he declared, it is "probably already unlawful" (Ontario Standing Committee on Justice and Social Policy 1999). Criminal Code offences like "intimidation" (section 423[1]), "harassment" (section 264) "uttering threats" (section 264), "threatened assault" (section 265), "extortion" (section 346), and "common nuisance" (section 180) effectively cover the same territory. The Safe Streets Act not only replicates existing Criminal Code offences, it reinstates the offence of vagrancy, which was removed from the Criminal Code in 1972. The old vagrancy provisions made it an offence to beg from door to door in a public place and to "wander or trespass without means of support."
What do the legislative debates disclose? When he introduced Bill 8 (the Safe Streets Act) in the Ontario Legislature, Jim Flaherty, Attorney General for Ontario, confirmed that the purpose of the Bill was to guarantee the people of Ontario the right to be in public spaces in a “safe and secure manner,” “without being or feeling intimidated." “They must be able to carry out their daily activities without fear," he declared. The Bill responded to these concerns by regulating conduct “that interferes with the safe use of public spaces” (Ontario Legislature, November 2, 1999). The Minister nevertheless stressed the language of movement and safety, subjects more appropriately within provincial purview. Speaking on behalf of the Government on third reading of the Bill, Gerry Martinuk (MLA for Cambridge) maintained that Bill 8 was “designed to regulate the use of our sidewalks, streets and other public places” (Ontario Legislature, November 7, 1999). Martinuk also explained that the Bill was about controlling “disorder.” Drawing on the Tories' “broken window” strategy, he stated that if “there is disorder on our streets, people will vacate our streets out of concern for their safety and that void will be filled by additional crime” (Ontario Legislature, November 7, 1999).

The discourse of “disorder” also was employed by Staff Sergeant Ken Kinsman of the Toronto Police Service. In his testimony concerning Bill 8 before the Ontario Standing Committee on Justice and Social Policy, Staff Sergeant Kinsmen invoked the image of a “pyramid of crime.” “Astride the top of the pyramid were street-level drug dealers, and at the bottom were “graffiti and garbage issues.” Somewhere near the bottom was the category of disorderly behaviour, which lumped together “publicly intoxicated, aggressive panhandlers” and squeegee people. Kinsmen maintained that “disorder issues are the most serious problem facing communities today” (Ontario Standing Committee on Justice and Social Policy 1999).

Other circumstances surrounding the passage of the Bill also suggest legislation in the nature of the federal criminal law rather than mere provincial regulation of street safety. There appeared to be no research data documenting the incidence of aggressive begging or the panhandling of captive audiences. In her testimony before the Justice and Social Policy Committee, Laurie Rector, Executive Director of the National Anti-Poverty Organization, submitted that “to date there is no substantive evidence that points to the fact that panhandlers or squeegee people pose a danger to anyone” (Ontario Standing Committee on Justice and Social Policy 1999). Lastly, the legislation was rushed into passage both before the Committee and in the Ontario Legislative Assembly. Liberal MLA Michael Bryant
claimed that the law was "rammed through, fast-tracked and no attention was paid to the [drafting of the] bill whatsoever" (Ontario Legislature, December 7, 1999).

Much of this suggests that the *Safe Streets Act* is in the nature of the "prohibition of socially undesirable conduct," to borrow a phrase from Justice Sopinka in *Morgentaler*. Yet there is one further set of reasons having to do with the moral nature of the legislation that signals its status as criminal law.

**The Morality of Disorder**

With no apparent empirical evidence to justify the vague and broad prohibitions on "aggressive begging" and soliciting a "captive audience," the impetus for the Act might be traceable to the pressures generated by "agents of moral reform" (Hunt 1999: 214). Admittedly, the general anxieties associated with the rise of economic globalization and the spread of neo-liberalism alone are insufficient to explain "either the timing or the specific configuration of a moral reform campaign" (Hunt 1999: 214). If approached with some caution, however, drawing linkages to the fears and anxieties associated with the presence of poor people in the midst of plenty may be instructive when it comes to characterizing the dominant purpose of the legislation.

The Act, in brief, gives expression to the discomfort many feel when confronted directly by the poor. Recall that the definition of aggressive solicitation turns not on the conduct of the solicitor but on the feeling of safety and security of the person being solicited (the provision reads: "likely to cause a reasonable person to be concerned for his or her safety or security."). Herbert Gans writes that "the feelings harboured by the more fortunate classes about the poor [are a] mixture of fear, anger and disapproval, but fear may be the most important element in the mixture" (Gans 1995: 75). This fear is generated, in part, by the impression that street beggars have chosen voluntarily to live outside of "civil society": the society constituted by the consumer lifestyle that the publics of the North Atlantic economies have embraced so enthusiastically. The poor seemingly have refused to live by "the bonds of civility and responsibility" (Rose 1999: 259); they have elected to spurn consumer citizenship. The associated anxieties resemble the nineteenth-century discourses concerning "pauperism" (Dean 1991: 174) and "the residuum" typically characterized as the "economically dead" (Cruikshank 1999: 15). According to Barbara Cruikshank, what placed the poor "outside society as a whole" was the
perception “not that they had the wrong values but that they had no values” (Cruikshank 1999: 15).

Disapproval of this lifestyle choice “is topped up by fear; non-obedi-
ence to the work ethic becomes a fearful act, in addition to being morally
odious and repulsive” (Bauman 1998: 77). Having refused to become
ethically responsible citizens, harsh measures seem appropriate. Neo-lib-
eral forms of governance require the management of groups according to
their dangerousness (Rose 1999: 236), and so begging is classified as a
dangerous act, endangering the safety and security of civil society. No
attempts at rehabilitation are made; the underclass of beggars and
panhandlers are beyond reprieve. The reduction of their visible presence is
the only manageable option.

These are the ends served by the Safe Streets Act, its self-proclaimed
dominant purpose: to improve feelings of safety and security of those who
fear the poor, hungry and indigent. Just as it is the role of the state to
improve conditions for the smooth operation of the market, so it is its role
to improve feelings of safety and security of those who participate in the
market: politics intervenes to “create the organizational and subjective
conditions for entrepreneurship” (Rose 1999: 144).

That the Safe Streets Act links up neatly to neo-Foucauldian work on
“moral regulation” hardly qualifies it as criminal law. But this analysis
should help to situate the Act in a larger discourse about security and
threats to freedom based on behaviour that is deemed to have “crossed
the frontier of ... social order” (Foucault 1965: 58). It is this kind of expres-
sion of “fundamental values,” to borrow a phrase from Justice LaForest,
that more appropriately belongs in the realm of the criminal law.

At the same time as we characterize the legislation as moralistic and
criminal in nature, we are confronted with the same “inevitable compro-
mises” as those seeking to challenge the authority of the provinces to
regulate access to abortion (Gavigan and Jenson 1992: 144). By claiming
that a large part of the Safe Streets Act can only validly be enacted by the
federal Parliament, we should not be seen to be endorsing the criminalization
of conduct better regulated by provincial health and welfare legislation.
Indeed, the conduct at issue is more appropriately the subject of laws
securing the satisfaction of basic human needs—health and welfare meas-
ures concerning minimum-income and minimum-wage laws—and not
the exercise of the criminal law power. In this way, constitutional analysis
based on the division of legislative powers leads to a different kind of risk,
a constitutional disorder of another sort.
Notes

1. I have addressed the judicial role in valourizing consumer freedom elsewhere. See Schneideman 1998.
2. Jean Leclair writes that this enlarged scope for the criminal law power enables courts to contribute to the construction of a national identity (Leclair 1998: 376).
3. See the original offences in the Criminal Code, 55 & 56 Vict., c.29, ss.207–09 and the last version in S.C. 1954–55, c.51, Ss.160, 164, 182 and 372. The provisions were repealed in S.C.1972, c. 13, s.12. I am grateful to Joe Hermer for his genealogy of begging as a crime of vagrancy.
4. Motorists were blocked by squeegee people and shoppers by aggressive solicitation.
5. Frank Mazzilli (MLA for London-Fanshawe) explained that “people” told the government that they have been threatened with physical harm, that they have had their path obstructed during and after being solicited, that they have been subjected to abusive language, followed, approached by people under the influence of alcohol or drugs, and solicited even after they had said no (Ontario Standing Committee on Justice and Social Policy 1999).

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Disorderly People

Law and the Politics of Exclusion in Ontario

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