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## Litigating State Constitutional Rights to Happiness and Safety: A Strategy for Ensuring the Provision of Basic Needs to the Poor

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## LITIGATING STATE CONSTITUTIONAL RIGHTS TO HAPPINESS AND SAFETY: A STRATEGY FOR ENSURING THE PROVISION OF BASIC NEEDS TO THE POOR

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## I. INTRODUCTION

My name is Ronald H.  
 I live [in] Cleveland, Ohio . . . .  
 I am 35 years old.  
 Currently, I am receiving General Assistance.  
 I need this money in order to survive.  
 My G[eneral] A[ssistance] [will be] cut off.  
 That will mean that I will have no funds which I need . . . to live.  
 I have been trying to find employment.  
 I would be willing to work at anything.  
 I can work as a carpenter.  
 I can also work as a busboy in a restaurant.  
 It has been several years since I was last able to find steady employment. I have only been able to find some part-time work . . . .  
 These, however, do not provide very much money.  
 Also, there is no coverage for any medical help.  
 I am very much concerned about what will happen to me.  
 Right now I am forced to stay in a shelter.  
 But that will not last forever.  
 [Soon], I will have to leave and find other shelter.  
 I will need the G[eneral] A[ssistance] to afford anything.  
 Otherwise, I will be homeless.  
 What can I do?<sup>1</sup>

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<sup>1</sup> Brief of Amicus Curiae, The Greater Cleveland Welfare Rights Organization, Inc., in Support of Plaintiffs' Motion for a Preliminary Injunction at c-1, c-2, Daugherty v. Wallace, (Ct. C.P. Montgomery County, Ohio 1992)(No. 92-1206), *appeal docketed*, No. 13619 (Ohio Ct. App. Montgomery County Aug. 25, 1992).

Ronald H. is one of many. Scarlet Daugherty is another. Like Ronald H., Scarlet Daugherty<sup>2</sup> is very poor, and she does not have a job. She meets her living expenses with General Assistance (GA) funds provided by the state. General Assistance programs are a "last resort," providing financial and medical assistance to eligible impoverished people who do not qualify for federal or state public assistance programs.<sup>3</sup> Such programs are by definition safety net programs providing support to the poorest of the poor.<sup>4</sup>

As state budgets are tightened, General Assistance programs have come under attack in many states. In Ohio, where Scarlet Daugherty lives, the Ohio legislature voted to slash General Assistance in 1991.<sup>5</sup> Cash assistance for destitute persons who are not disabled was slashed from \$148 to \$100 per month, and for the first time in the state's history, a time limitation was placed upon receipt of benefits.<sup>6</sup> Pursuant to the new statute, non-disabled poor persons may receive the reduced General Assistance for a maximum of six months in any twelve-month period.<sup>7</sup>

In Ohio, as T.S. Eliot suggested, "April is the cruellest month."<sup>8</sup> When Scarlet Daugherty exhausted her six months of eligibility for assistance on April 1, 1992, she and approximately 106,000 people who had been receiving General Assistance since October 1991 were terminated from the General Assistance program.<sup>9</sup> They lost eligibility for cash assistance and medical assistance for six months of the year. How will they pay rent? Buy medicine? Exist?

One answer has become nearly reflexive—they should get jobs. In all likelihood, this thought inspired the legislature of the State of Ohio to draft the legislation as it did, offering year-round assistance to minors, the disabled, and the elderly, while forcing "able-bodied" adults off the program for six months of the year.<sup>10</sup> There is definite political and perhaps moral appeal to cutting assistance to able-bodied adults to motivate them to work. There is, however, a practical problem with the general assistance scheme in Ohio, and it is a big problem indeed. The legislature failed to consider whether jobs were or could actually be available to all of these indigent people. The safety net for the poor was slashed *without regard to whether any employment opportunities were actually available to them.*

The United States Supreme Court has made it clear during the past twenty years that the Federal Constitution does not impose any affirmative duty upon governments to provide indigents with their basic needs, either directly or through the provision of a job. "Welfare benefits are not a fundamental right, and neither the State nor Federal Government is under any sort of constitutional obligation to guarantee minimum levels

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As this article was going to press, the intermediate court issued its decision, affirming the trial court's conclusion that the Ohio constitutional right to safety does not impose any obligation on the state to provide minimal welfare benefits. Plaintiffs are considering an appeal to the state's highest court.

<sup>2</sup> Scarlet Daugherty is one of many plaintiffs in the class action suit out of which this article arose.

<sup>3</sup> The majority of other public assistance programs are supported in whole or in part by federal funds (e.g., aid to dependent children, supplemental security income). See OHIO ADMIN. CODE § 5101:1-5-01 (1991).

<sup>4</sup> See OHIO ADMIN. CODE § 5101:4-1-03 (1991).

<sup>5</sup> See OHIO ADMIN. CODE § 5101:1-5-01 (1991).

<sup>6</sup> *Id.*

<sup>7</sup> *Id.*

<sup>8</sup> T.S. ELIOT, *THE WASTE LAND* 53 (Harcourt, Bruce & World, Inc. 1963) (1922).

<sup>9</sup> See OHIO ADMIN. CODE § 5101:1-5-01 (1991). This number was obtained from the "Fact Sheet on General Assistance," compiled by the Ohio Coalition for the Homeless, Mar. 4, 1992.

<sup>10</sup> See *id.*

of support.’’<sup>11</sup> There is thus no federal constitutional right to basic needs even though “[t]he right to basic subsistence is arguably the most fundamental of all human rights,’’<sup>12</sup> because “[f]or a person who is starving and without shelter, all other rights appear to pale in comparison.’’<sup>13</sup>

Faced with the dead-end nature of attempting to use the United States Constitution to develop enforceable minimum standards of care for the poor, the poor and their advocates have looked to state constitutional and statutory law for the protection of basic needs. Compared to the textual wasteland of the Federal Constitution, state constitutions have much to offer. Many state constitutions contain substantive provisions dealing explicitly with poverty, housing, shelter, and nutrition.<sup>14</sup> Among representative possibilities are New York’s requirement that the legislature provide for “aid, care and support of the needy’’<sup>15</sup> and Alabama’s obligation to provide “adequate provision for the maintenance of the poor.’’<sup>16</sup> Many state constitutions also include declarations that set out as inalienable the right to seek and/or obtain safety and the right to pursue and/or obtain happiness.<sup>17</sup> This article chronicles the attempt of advocates for the poor in Ohio to elucidate protection of basic needs from the state’s constitution. The issue presented itself when the cuts in General Assistance were enacted in Ohio, and the case of *Daugherty v. Wallace* was born.<sup>18</sup> We, the authors, speak not without interest in the case, as each of us was involved in the litigation.

The Constitution of the State of Ohio grants to all persons the right to enjoy and defend life and to seek and obtain happiness and safety.<sup>19</sup> The wording of these rights, as set out in the state Bill of Rights, is as follows: “All men are, by nature, free and independent, and have certain inalienable rights, among which are those of enjoying and defending life and liberty, acquiring, possessing and protecting property, and seeking and obtaining happiness and safety.’’<sup>20</sup>

The plaintiffs in *Daugherty* argued that Ohio’s constitutional guarantee of the right of “obtaining . . . safety’’ incorporates or encompasses the right of poor citizens to receive subsistence assistance from the state, in an amount sufficient to enable them to avoid homelessness and to obtain basic health care.<sup>21</sup> Although the happiness and safety clause has been a fixture of the Ohio constitution since 1802, the question of whether it encompasses a right to public assistance is a matter of first impression in the State of Ohio.

Plaintiffs’ position was supported by thirty-one amici curiae, consisting of social service organizations (including shelters, soup kitchens, food pantries, a mental health association, and a statewide child protection association), the AFL-CIO, religious organizations, as well as the cities of Cleveland and Cincinnati and the County of Lucas.

<sup>11</sup> *Lavine v. Milne*, 424 U.S. 577, 585 n.9 (1976)

(citing *Dandridge v. Williams*, 397 U.S. 471, 485 (1970) (finding no constitutional right to welfare even when “the most basic economic needs of impoverished human beings’’ are at stake).

<sup>12</sup> *Price v. Cohen*, 715 F.2d 87, 93 (3d Cir. 1983), *cert. denied*, 465 U.S. 1032 (1984).

<sup>13</sup> *Id.*

<sup>14</sup> For a lengthy listing of such substantive provisions, see Burt Neuborne, *State Constitutions and the Evolution of Positive Rights*, 20 RUTGERS L.J. 881, 893-95 (1989).

<sup>15</sup> N.Y. CONST. art. XVII, § 1.

<sup>16</sup> ALA. CONST. art. IV, § 88.

<sup>17</sup> OHIO ADMIN. CODE § 5101:1-5-01(a) (1991).

<sup>18</sup> *Daugherty* (No. 92-1206).

<sup>19</sup> OHIO CONST. art I, § 1. Article I of the Ohio constitution constitutes the state Bill of Rights.

<sup>20</sup> *Id.*

<sup>21</sup> Plaintiffs’ Memorandum in Support of Motion for Preliminary Injunction at 17, *Daugherty* (No. 92-1206) [hereinafter Plaintiffs’ Memorandum]; see also Plaintiffs-Appellants’ Opening Brief at 11, *Daugherty* (No. 92-1206).

All amici assert an interest in and/or daily contact with the poorest of Ohioans. The Urban Morgan Institute for Human Rights of the University of Cincinnati College of Law as amicus framed the issue more broadly than plaintiffs, urging the court to find that the Ohio constitutional grant of the right to obtain happiness, in addition to the right to obtain safety, is also a source of an affirmative right to basic subsistence.<sup>22</sup> The Urban Morgan Institute also asserted that the state's obligation to the poor could be met directly by the provision of cash or in-kind assistance or indirectly through the provision of a job.<sup>23</sup>

The litigation in Ohio is noteworthy because many states have safety and/or happiness provisions in their constitutions. Ten other state constitutions likewise proclaim an inalienable right to seek and/or obtain safety and happiness, an additional ten states declare an inalienable right to the pursuit of happiness, and many state constitutions proclaim that government was created for the people's safety or security and/or happiness.<sup>24</sup>

State constitutional language such as this can serve as the basis for a constitutional right to public assistance sufficient to meet basic needs. Despite this potential, the only known litigation on the point has been that of the Legal Aid Societies of Cincinnati and Dayton in *Daugherty*. This article is published with the hope that the strategies and arguments invoked in the Ohio litigation for giving content to state constitutional language and for demonstrating the affirmative nature of the rights to safety and happiness may be useful to advocates in states with similar constitutional rights.

## II. SLASHES IN THE SAFETY NET—OHIO'S GENERAL ASSISTANCE CUTS AND THEIR IMPACT ON THE POOR AND LOCAL COMMUNITIES

In 1991, the State of Ohio drastically revised and reduced its General Assistance program, which provides financial and medical assistance to eligible impoverished people who do not qualify for public assistance programs that are supported in whole or in part by federal funds.<sup>25</sup> The new legislation essentially modified and divided the existing General Assistance program into two programs: a revised General Assistance program and a new Disability Assistance (DA) program.<sup>26</sup>

<sup>22</sup> Amicus Curiae Brief of The Urban Morgan Institute for Human Rights at 43-46, *Daugherty* (No. 92-1206) [hereinafter Morgan Institute Brief].

<sup>23</sup> *Id.* at 43.

<sup>24</sup> Like Ohio, the constitutions of several other states document the right to seek (or pursue) and obtain safety and happiness among inalienable rights. *See, e.g.*, CAL. CONST. art. I, § 1; COLO. CONST. art. II, § 3; MASS. CONST. art. I, § 1; N.J. CONST. art. I, § 1; N.M. CONST. art. II, § 4. VT. CONST. art. I, § 1; VA. CONST. art. I, § 1; W. VA. CONST. art. III, § 1.

Other states include variations on this theme. Idaho's constitution, for example, declares that inalienable rights include "pursuing happiness and securing safety," IDAHO CONST. art. I, § 1; whereas Kentucky declares the rights of seeking and pursuing safety and happiness to be inalienable rights. KY. CONST. art. I, § 1.

A number of states have chosen to include in their declaration of rights the right to "the pursuit of happiness," omitting safety. *See, e.g.*, ALA. CONST. art. I, § 1; ALASKA CONST. art. I, § 1; ARK. CONST. art. II, § 2; FLA. CONST. art. I, § 2; HAW. CONST. art. I, § 2; OKLA. CONST. art. II, § 2; N.C. CONST. art. I, § 1; PA. CONST. art. I, § 1; S.D. CONST. art. I, § 1; WIS. CONST. art. I, § 1; WYO. CONST. art. I, § 2. Other states proclaim that government was instituted for purposes including the people's protection, safety or security, benefit and/or happiness. *See, e.g.*, IND. CONST. art. I, § 1; KY. CONST. § 4; OKLA. CONST. art. II, § 1; R.I. CONST. art. I, § 2; TENN. CONST. art. I, § 1; VA. CONST. art. I, § 3; W. VA. CONST. art. III, § 3; WYO. CONST. art. I, § 1.

<sup>25</sup> OHIO ADMIN. CODE § 5101:1-5-01(A) (1991). These federal programs include aid to dependent children and supplemental security income.

<sup>26</sup> *Id.*

Under the revised GA program, payments to GA recipients were reduced to \$100 per month<sup>27</sup> for a maximum of six months in any twelve-month period.<sup>28</sup> When eligibility for cash assistance ceases, medical assistance also ceases, regardless of a person's ability to find employment.<sup>29</sup> Previously, GA benefits of \$148 per month were available year round if necessary.<sup>30</sup> The 1991 legislation abruptly terminated a 190-year-old state policy of providing assistance to all indigent persons as long as necessary.<sup>31</sup>

Under the new legislation, Disability Assistance is available to impoverished adults who are 1) over 60 years old, 2) pregnant, 3) medication dependant, or 4) disabled for a duration of more than nine months.<sup>32</sup> The definition of disability in the program is narrow: a person meets the definition only if totally unable to perform virtually any work.<sup>33</sup> A person with a chronic physical or mental impairment who cannot find employment is not disabled if any jobs exist in the economy that the person could perform, regardless of whether such employment opportunities are actually available. People who do not fall into any of the DA categories can get financial and medical assistance only through the General Assistance program.<sup>34</sup> DA recipients may receive \$115 per month,<sup>35</sup> but there is no time limitation on their participation.<sup>36</sup> Thus, a DA recipient may receive cash and medical assistance each month of the year.<sup>37</sup>

This division of the General Assistance population into the disabled and those not disabled fails to take into account that many people who are not "disabled" by definition are nevertheless unable to work and are no less needy or "deserving" than the disabled. Included in this class are 1) persons who suffer from disabilities of lesser severity or duration than those meeting the standard for disability under the DA program, but who, by virtue of these disabilities, are nonetheless unemployable, 2) persons with very limited education and employment skills who are unable to find employment in the state, and 3) persons who may be employable but are unable to find jobs, including those who have exhausted unemployment benefits. Thus, the large majority of persons dependent upon GA are people who, due to their own personal conditions and circumstances or the inability of the economy to absorb all the unemployed or both, cannot get a job. They will have no income, save for food stamps, for six months each year. The time limitation of GA for persons who have no reasonable prospect of finding employment will cause thousands

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<sup>27</sup> The Ohio Department of Human Services determines the actual dollar amount that a GA or DA recipient may receive. OHIO REV. CODE ANN. § 5113.03(B) (Baldwin 1991). The Department recently calculated that a single adult in Ohio needs \$487.00 per month, every month, to meet basic survival needs, including the amount of money necessary to obtain the minimum requirement for food, clothing, housing, utilities, transportation, and personal/incidental items. OHIO ADMIN. CODE § 5101:1-21-05 (1991). Even assuming that the person receives a full food stamp allotment, the cash assistance which a recipient gets under the GA and DA programs does not come close to meeting basic survival needs. Federal law requires each state to define the standard of need or poverty line, although they are not required to meet that need.

<sup>28</sup> See OHIO ADMIN. CODE § 5101:1-5-01 (1991).

<sup>29</sup> OHIO REV. CODE ANN. § 5113.03 (Baldwin 1992); OHIO ADMIN. CODE §§ 5101:1-5-01(B)-(C), 1-5-013(A)-(C) (1991).

<sup>30</sup> Prior to October 1, 1991, the GA program provided financial assistance as well as medical assistance. As long as a recipient remained eligible for GA, benefits would be provided. OHIO REV. CODE ANN. §§ 5113.02(a), 5113.03 (Baldwin 1987), amended by OHIO REV. CODE ANN. § 5113.03 (Baldwin 1991).

<sup>31</sup> OHIO REV. CODE ANN. § 5113.03 (Baldwin 1991).

<sup>32</sup> OHIO ADMIN. CODE § 5101:1-5-02 (1991).

<sup>33</sup> Disability for purposes of the DA program is defined as the inability to work due to a "physical or mental impairment which can be expected to result in death or which has lasted or can be expected to last for not less than nine months." OHIO ADMIN. CODE § 5101:1-5-022(C) (1991).

<sup>34</sup> OHIO ADMIN. CODE § 5101:1-5-024(A) (1991).

<sup>35</sup> OHIO REV. CODE ANN. § 5115.01 (Baldwin 1992) (citing 1991 H 298, § 74.10).

<sup>36</sup> OHIO ADMIN. CODE § 5101:1-5-024(C) (1991).

<sup>37</sup> OHIO REV. CODE ANN. § 5115.01 (Baldwin 1992); OHIO ADMIN. CODE § 5101:1-21-05 (1991).

of Ohioans to become destitute and homeless.<sup>38</sup> Their health will deteriorate from lack of medical care. Their future prospects of finding and maintaining employment, however slim, will dissipate. Moreover, despite continuous eligibility for food stamps, the GA cuts may cause many of the poor to suffer from the effects of inadequate nutrition. Many of the poor are faced with a Hobson's choice. To avoid homelessness, they may choose to sell their food stamps on the black market to get money to pay rent.<sup>39</sup>

The cuts in the GA program have, as expected, resulted in increased costs to cities and counties and other public and privately funded organizations as well. One county estimated that its economy would lose over \$660,000 per month as a result of the cuts in GA.<sup>40</sup> Community agencies cannot fill the gap left by the reduction of state aid. Even before thousands of the poor were terminated from the General Assistance program, emergency shelters, mental health programs, emergency food programs, clinics, hospitals, substance abuse programs, social service agencies, and utility assistance programs were inundated with more requests for help than they could meet.<sup>41</sup> Law enforcement agencies, including police, courts, jails and prisons, will also face rising costs as some of the poor are likely to turn to crime out of desperation.<sup>42</sup>

### III. THE POOR IN OHIO RESPOND—A SUMMARY OF THE LITIGATION STRATEGIES AND THE PROCEEDINGS IN *DAUGHERTY*

On March 16, 1992, four poor Ohioans who were scheduled to be terminated from General Assistance, and the Ohio Coalition for the Homeless, represented by the Legal Aid Society of Cincinnati and the Legal Aid Society of Dayton, joined together to file a class action suit.<sup>43</sup> Plaintiffs attacked the legislation as unconstitutional on two grounds. They asserted that the statutory cuts in General Assistance violate the Ohio constitutional guarantee of the right of "obtaining . . . safety"<sup>44</sup> because the cuts result in abandoning

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<sup>38</sup> See Memoranda of Amici Curiae in Support of Plaintiffs' Motion for a Temporary Restraining Order, Christ Church (Episcopal), Drop Inn Center Shelterhouse, Free Store/Food Bank, Saint John's Social Service Center and The Salvation Army Southwest Ohio Northeast Kentucky Division, at 5, *Daugherty* (No. 92-1206) [hereinafter Memoranda of Amici Curiae Christ Church]. Amici stated that the GA cuts would lead to widespread evictions and that shelters would not be able to absorb the homeless. They also noted that the progress of people moving from shelters to more independent living had been stalled because the reduced amount of general assistance payments are insufficient to pay for any kind of housing. *Id.*

In addition, termination of GA benefits for six months may also deprive otherwise eligible recipients of resuming GA payments when their six-month period of ineligibility ends. OHIO REV. CODE ANN. § 5113.03(C) (Baldwin 1991) reserves GA to persons living in their own homes or other suitable quarters. If people do not have sufficient funds to maintain a home during the six months when they lose eligibility for assistance, they will not be eligible to restart GA when their period of ineligibility ends. See OHIO ADMIN. CODE § 5101:1-5-03 (1991).

<sup>39</sup> See Memoranda of Amici Curiae Christ Church, *supra* note 38, at 4, and accompanying affidavits of Goldie Lowry and Helen Francis (testifying that the low street value of food stamps on the black market attests to the volume of stamps being sold).

<sup>40</sup> County of Lucas' Motion to Join in Brief of Amicus Curiae City of Cleveland in Support of Plaintiffs' Motion for Preliminary Injunction at 2, *Daugherty* (No. 92-1206) and accompanying affidavit of George Steger.

<sup>41</sup> See, e.g., Brief of Amicus Curiae of the Federation for Community Planning, Interchurch Council of Greater Cleveland, Catholic Charities Service Corporation, and Jewish Community Federation of Cleveland, in Support of Plaintiffs' Motion for Preliminary Injunction at 6, *Daugherty* (No. 92-1206) and accompanying affidavits. See also, Memoranda of Amici Curiae Christ Church, *supra* note 38, at 5.

<sup>42</sup> Brief of Amicus Curiae, the City of Cleveland in Support of Plaintiffs' Motion for Preliminary Injunction at 8, *Daugherty* (No. 92-1206). County of Lucas' Motion to Join in Brief of Amicus Curiae City of Cleveland in Support of Plaintiffs' Motion for Preliminary Injunction at 3, *Daugherty* (No. 92-1206).

<sup>43</sup> *Daugherty* (No. 92-1206).

<sup>44</sup> OHIO CONST. art. I, § 1.



many of the poor to the streets, without shelter or health care, leaving them indisputably unsafe.<sup>45</sup> Plaintiffs also challenged the statutory scheme under the state's Equal Protection Clause because it draws an irrational distinction between the "disabled" who are presumed to be unemployable and those who do not fall into the category of "disabled" who are presumed able to work, without regard to whether they could in actuality find or maintain a job.<sup>46</sup>

Plaintiffs asserted that the right to safety incorporates or encompasses the affirmative right of poor citizens to receive subsistence assistance from the state in an amount sufficient to enable them to avoid homelessness and obtain basic health care.<sup>47</sup> One of the amici, the Urban Morgan Institute for Human Rights, urged the Ohio constitutional guarantee of the right of "pursuing and obtaining happiness"<sup>48</sup> as an additional constitutional anchor for the right to public assistance.<sup>49</sup> The Urban Morgan Institute for Human Rights also framed the scope of the right a bit more broadly than plaintiffs, urging that the Ohio constitutional rights to happiness and safety encompass a right to basic subsistence.<sup>50</sup> The term "right to subsistence" is used to describe a guarantee of state protection against the deprivation of the food, clothing, shelter, and medical care minimally necessary for a decent life.<sup>51</sup>

The most difficult aspect of proving a violation of the right to safety encountered by plaintiffs was a dispute as to whether the right imposes any affirmative duties on the state. In this regard, plaintiffs first focused on demonstrating that the failure of the Federal Constitution to protect basic needs was not controlling.<sup>52</sup> Plaintiffs then urged that the plain meaning of the state constitutional text, the state's unbroken history of providing assistance to the needy, and an interpretation sensitive to the modern political and economic context, all indicate or confirm an affirmative obligation.<sup>53</sup> In plaintiffs' view, the right to obtain happiness and safety is meaningless for the unemployed, non-disabled

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<sup>45</sup> Plaintiffs' Memorandum in Opposition to Defendants' Motion to Dismiss at 18, *Daugherty* (No. 92-1206).

<sup>46</sup> Plaintiffs' Memorandum, *supra* note 21, at 15, 35. Although the equal protection argument is distinct from the subject of this article, the level of scrutiny under equal protection analysis is affected by whether the court views the happiness or safety clauses as encompassing a right to basic needs.

Plaintiffs presented compelling arguments to demonstrate that the right to safety is a fundamental right or at least "constitutionally-significant," and thereby merits strict or heightened scrutiny under an equal protection analysis. Decision and Entry Granting Terry Wallace's Motion to Dismiss; Denying Plaintiffs' Motion for a Preliminary Injunction at 7, *Daugherty* (No. 92-1206) [hereinafter Decision and Entry]. Nevertheless, the trial court held that "there is no fundamental right to public assistance under the Ohio Constitution" and accordingly applied the rational basis test. *Id.* In an unwarranted exaltation of the state's interest in saving money to the status of a constitutional duty, the trial court upheld the statutory scheme under the rational basis test. The court found it permissible for the legislature to give an extra entitlement to disabled persons. *Id.*

Under even the lowest level of scrutiny, the rational basis test, the classifications employed in the GA statutory scheme further no legitimate governmental objective. Thus, the statutory scheme should have been invalidated because it treats similarly situated unemployable persons unequally, with drastic consequences. Plaintiffs' Memorandum, *supra* note 21, at 47.

<sup>47</sup> Plaintiffs sought preliminary relief enjoining the state from terminating class members who had exhausted their six months of eligibility under the statutory scheme and obligating it to continue cash assistance at the current level and medical assistance to all GA recipients until the legislature acted to establish a program with benefits sufficient in amount and type to prevent homelessness and to provide basic health care on a non-time limited basis. Plaintiffs' Memorandum, *supra* note 21.

<sup>48</sup> See OHIO CONST. art. 1, § 1.

<sup>49</sup> Morgan Institute Brief, *supra* note 22, at 14.

<sup>50</sup> *Id.* at 21.

<sup>51</sup> *Id.*

<sup>52</sup> *Id.* at 12.

<sup>53</sup> *Id.* at 8.

poor unless interpreted as imposing an affirmative right to assistance sufficient to provide shelter and medical care.<sup>54</sup>

In explaining the affirmative nature of the right to safety and happiness, plaintiffs hope to shatter the myth that constitutionally recognized rights are only negative in nature, by showing that many civil and political rights, traditionally viewed as restraints upon government action, in reality entail considerable governmental action and expense for their protection.<sup>55</sup> In addition, another common misconception, that the economic right to subsistence is not readily subject to adjudication, is also addressed.<sup>56</sup>

Further, The Urban Morgan Institute for Human Rights as Amicus cautions against coloring the interpretation of Article I Section 1 of the Ohio constitution by negative attitudes toward “hand-out” programs for the poor. A comparison of General Assistance benefits to governmental subsidies for various individuals and businesses shows that both perform the same function—stabilizing and remedying imbalances in the economy.<sup>57</sup> Thus, General Assistance benefits as mandated by the Ohio state constitution are entitled to at least the same public acceptance as these discretionary subsidies.

Defendant filed a motion to dismiss, which was granted by the trial court, the Common Pleas Court of Montgomery County, on August 11, 1992.<sup>58</sup> Plaintiffs filed an appeal of the dismissal and denial of their motion for a preliminary injunction to the Court of Appeals, Second Division, Montgomery County, Ohio.<sup>59</sup>

#### IV. STATE CONSTITUTIONAL HAPPINESS AND SAFETY CLAUSES AS THE SOURCE OF POSITIVE RIGHTS TO BASIC NEEDS

As mentioned above, many state constitutions have clauses declaring as inalienable the right to seek and/or obtain happiness and/or safety. These clauses may serve as a source of positive rights to basic needs. As discussed herein, the notion of safety includes freedom from the dangers of homelessness and lack of health care. The argument that the notion of happiness also includes material well-being, advanced by amicus The Urban Morgan Institute for Human Rights, is not so straightforward, yet it is worthy of attention. Once the right to basic needs is found to be encompassed within a constitutional guarantee, the next and most challenging issue arises: determining whether the right imposes an affirmative obligation on the government. The answers can be found in the state constitutional text construed in light of modern economic conditions and international human rights law.<sup>60</sup>

##### *A. Interpreting State Constitutional Safety and Happiness Clauses as Affirmative Rights*

###### *1. The Right to Safety*

As plaintiffs urged, the right to safety encompasses the right to be safe from the dangers, harms, or risks of being homeless or without basic health care.<sup>61</sup> No stretch of the imagination is necessary to see that a person vulnerable to the grievous dangers of

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<sup>54</sup> *Id.* at 19.

<sup>55</sup> *Id.* at 43-46.

<sup>56</sup> *Id.* at 46-49.

<sup>57</sup> *Id.* at 42.

<sup>58</sup> Decision and Entry, *supra* note 46.

<sup>59</sup> *Daugherty* (No. 92-1206).

<sup>60</sup> See *infra* notes 105-09 and accompanying text.

<sup>61</sup> Plaintiffs' Memorandum, *supra* note 21, at 21.

homelessness and untreated illness cannot reasonably be considered safe. In fact, neither the defendants nor the lower court in *Daugherty* disputed that protection from the dangers of homelessness or lack of medical care was encompassed within the meaning of safety.

The plain meaning of the term “safety” also encompasses the right to be free from any sort of dangers or harm. Dictionaries of the period in which the Ohio constitution was drafted define “safety” as “freedom from danger” or “preservation from hurt.”<sup>62</sup> As such, safety also includes freedom from the dangers of inadequate nutrition.

The divisive issue in the Ohio case is whether the right to obtain safety imposes any affirmative obligation on the state government.<sup>63</sup> A right which requires the government to take positive action to ensure its protection is commonly referred to as an affirmative right. Construed affirmatively, the right to safety obligates the state to supply financial assistance sufficient in amount and type to provide housing and medical benefits for those unable to provide for themselves.<sup>64</sup> Under a negative construction of the right to safety or happiness, the state has no obligation or duty to provide assistance to needy citizens. The state would only be restrained from placing unreasonable restrictions on an individual’s right to seek and obtain his own safety or happiness. It would then be permissible for the “[S]tate to stand idly by while citizens fall into indisputably unsafe circumstances, piously assuring such citizens that it is not interfering with their right to pursue and obtain safety.”<sup>65</sup>

The lower court in *Daugherty* ruled that the safety provision of the Ohio constitution does not place any affirmative duty on the state to provide public assistance to its citizens.

Rather, the provision of public assistance by the State is seen as discretionary. This Court construes the safety clause in a manner consistent with interpretations of the Fourteenth Amendment to the United States Constitution, that citizens are free to seek safety in their chosen manner, subject to reasonable state regulation and discretion, but that the state has no *duty* to furnish that safety.<sup>66</sup>

The lower court’s conclusion is incorrect in that it relied primarily on federal due process case law to determine that the right to safety did not place any affirmative duty on the state.<sup>67</sup> In so doing, it failed to address the affirmative nature of the right as conveyed by the constitutional text and confirmed by a 190-year-long state policy of providing aid to the poor.<sup>68</sup>

In any such case it must be remembered that the failure of the United States Constitution to guarantee a positive right to subsistence is not determinative of whether subsistence rights are protected by any state’s constitution.<sup>69</sup> Federal constitutional standards provide only a minimal floor of guarantees for individual rights at the state level.<sup>70</sup> As Justice William Brennan stated, “rediscovery by state supreme courts of the

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<sup>62</sup> Plaintiffs’ Memorandum, *supra* note 21, at 20-21 (citing NOAH WEBSTER, FIRST EDITION OF AN AMERICAN DICTIONARY OF THE ENGLISH LANGUAGE (1828)).

<sup>63</sup> Morgan Institute Brief, *supra* note 22, at 14-15.

<sup>64</sup> *Id.* at 11-14.

<sup>65</sup> Plaintiffs’ Memorandum, *supra* note 21, at 35.

<sup>66</sup> Decision and Entry, *supra* note 46, at 6-7.

<sup>67</sup> *Id.* at 6.

<sup>68</sup> See Morgan Institute Brief, *supra* note 22, at 8.

<sup>69</sup> *Id.* at 12.

<sup>70</sup> While United States Supreme Court decisions may be helpful in construing similar provisions of a state constitution, they are not controlling. *Pruneyard Shopping Ctr. v. Robins*, 447 U.S. 74, 81 (1980). See generally William J. Brennan, Jr., *The Bill of Rights and the States: The Revival of State Constitutions as*

broader protections afforded their own citizens by their state constitutions . . . is probably the most important development in constitutional jurisprudence of our times."<sup>71</sup>

Focusing on case law, the Ohio court held that several sections of the Ohio Bill of Rights, including Article I, Section 1 with its guarantee of inalienable rights, ran "parallel to" and "similar to" the protections of the Fourteenth Amendment to the United States Constitution.<sup>72</sup> It then reiterated that the Federal Due Process Clause confers no affirmative duty on states to take care of citizens unless the individual has been taken into custody by the state.<sup>73</sup> Adhering to federal case law, the court concluded that the right to safety imposes no affirmative duties and only restrains the state from interfering with an individual's efforts to seek and obtain safety.<sup>74</sup>

The court's analysis missed the point. The language acknowledging the similarities between the Ohio Bill of Rights and the rights guaranteed by the Fourteenth Amendment is not meant to limit the state's protection of individual rights to the rights protected by the Federal Constitution. A warning against such inflexible adherence to federal interpretation is issued in an Ohio case cited by the lower court.<sup>75</sup> Immediately following the statement that the rights in Article I, Section 1 are similar to the protections of the Fourteenth Amendment, the Ohio court asserted that:

If in the midst of current trends toward regimentation of persons and property, this long history of parallelism seems threatened by a narrowing federal interpretation of federal guaranties, it is well to remember that *Ohio is a sovereign state and that the fundamental guaranties of the Ohio Bill of Rights have undiminished vitality*.<sup>76</sup>

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*Guardians of Individual Rights*, 61 N.Y.U. L. REV. 535, 548 (1986); Hans A. Linde, *E Pluribus — Constitutional Theory and State Courts*, 18 GA. L. REV. 165 (1984) (stating that federal preservation of civil liberties is a minimum which the states may surpass precluding a clash with the Federal Constitution itself).

<sup>71</sup> William J. Brennan, Jr., NAT'L L. J., Sept. 29, 1986, Special Section, at S-2. In fact, state courts are increasingly extending individual rights through the independent interpretation of state law guarantees. See Robert A. Sedler, *The State Constitutions and the Supplemental Protection of Individual Rights*, 16 U. TOL. L. REV. 465, 469 (1988) (discussing state court decisions invalidating state economic and social regulations that would have been sustained under the United States Supreme Court equal protection analysis and state court extensions of privacy and associational interests beyond the federal level of protection). It was estimated that between 1970 and 1984, state courts rendered more than 250 opinions holding that the constitutional minimums set by the United States Supreme Court were not sufficient to meet the more stringent standards of state constitutional law. Brennan, *supra* note 70, at 548.

<sup>72</sup> *Direct Plumbing Supply Co. v. Dayton*, 38 N.E.2d 70, 72-73 (Ohio 1941) (stating that OHIO CONST. art. 1, § 1 (guarantee of inalienable rights), § 2 (assurance of equal protection of the law), and § 19 (guarantee of inviolability of private property) "have run parallel with" U.S. CONST. amend. XIV). Additionally, OHIO CONST. art. 1, § 16 ("due course of law") has been construed to be "the equivalent of the 'due process of law' clause in the Fourteenth Amendment." *Id.* at 72. Due to these similarities, Ohioans, when faced with a governmental invasion of their individual rights, have jointly invoked the Fourteenth Amendment and the Ohio Bill of Rights.

<sup>73</sup> *Deshaney v. Winnebago County Dep't of Social Servs.*, 489 U.S. 189, 199-200 (1989).

<sup>74</sup> See *id.* at 201.

<sup>75</sup> *Direct Plumbing Supply*, 38 N.E.2d at 73.

<sup>76</sup> *Id.* (emphasis added). Indeed, the Supreme Court of Ohio has affirmed that the rights in the Ohio Bill of Rights may exceed those afforded by the Federal Constitution. *State ex rel. The Repository v. Unger*, 504 N.E.2d 37, 41 (Ohio 1986) (Celebrezze, C.J., concurring). In fact, the Ohio constitution offers greater protection of rights than the Federal Constitution in several areas. For example, indigent parents facing a state-initiated action to terminate their parental rights have a right to appointed counsel under the Ohio constitution but not under the U.S. Constitution. *Beard v. Williams County Dep't of Social Servs.*, 465 N.E.2d 397, 399 (Ohio 1984).

Strict adherence to federal standards is thus inappropriate in construing state constitutional provisions even if the language of the state constitution is identical to that in the Federal Constitution. Such adherence is totally misplaced in a case such as *Daugherty* in which the state constitution grants rights, such as the rights to safety and happiness, that are absent from the Federal Constitution.<sup>77</sup>

Because federal law is not controlling, the state constitution must be construed independently to determine whether it grants positive rights. The affirmative nature of the Ohio constitutional right to happiness and safety is mandated by the constitutional provision that “all” have a “right to . . . obtain” happiness and safety.<sup>78</sup> Similarly, a number of other states guarantee rights to pursue and/or obtain happiness and safety in their constitutions. In regard to Ohio’s constitutional language, each significant term, the clause as a whole, and the constitutional characterization of the governmental purpose, indicate an affirmative obligation by the government to provide assistance.<sup>79</sup>

First, the affirmative obligation of the government to provide safety through subsistence assistance is manifest in the guarantee of obtaining safety to “all,”<sup>80</sup> not just to those who are able to secure safety by their own efforts. Thus, a person who needs governmental assistance to meet his subsistence needs is included among those who have a right to obtain safety and happiness, and the government’s failure to provide subsistence assistance would render the right meaningless. Moreover, the term “obtain” is significant. The plain meaning of the term “obtain” is not limited to possession through one’s own efforts but includes coming into possession of something by request.<sup>81</sup>

<sup>77</sup> The federal cases relied upon by the lower court involved plaintiffs who alleged violations of the Substantive Due Process Clauses of the Fifth and Fourteenth Amendments. *See, e.g., DeShaney*, 489 U.S. at 201. (The plaintiffs relied on the Due Process Clause because the Federal Constitution did not expressly include the particular substantive right at issue.)

The litigation strategy used in *DeShaney* (urging the Federal Due Process Clause as a means of protecting substantive rights) is well-worn. In fact, after efforts to derive a set of positive floors in education, health, nutrition, and shelter directly from the United States Constitution failed, lawyers seeking to use the Federal Constitution to protect the poor turned to the Equal Protection and Due Process Clauses to derive positive rights. *See Neuborne, supra* note 14, at 887. For the most part, the Supreme Court has refused to use the Equal Protection Clause and the Procedural Due Process Clause as wholesale substantive substitutes. *Id.*

Plaintiffs in *Daugherty* came before the court in an entirely different posture. They raised no due process arguments. Such an argument was unnecessary because the Ohio constitution, unlike the Federal Constitution, grants the inalienable right to seek and obtain happiness and safety.

<sup>78</sup> OHIO CONST. art. I, § 1.

<sup>79</sup> OHIO CONST. pmbl., art. I, § 1. Plaintiffs also assert that a practical interpretation of the right to safety can be gleaned from actual legislative practice. Ohio has a 190-year history, even predating statehood, of providing assistance to the poor. Plaintiffs assert that this continuous practice is an explicit expression of the fundamental nature of the right to public assistance when in need, regardless of one’s alleged employability.

Plaintiffs traced Ohio’s history in providing assistance to the needy from the time Ohio was part of the Northwest Territory in 1787 (a law enacted in 1795 authorized “overseers of the poor” in each township to make assessments to support the poor who were unable to work and to provide employment for those capable of working), through the time of the Great Depression (when the General Assembly enacted a poor relief program in which poor relief could take the form of either work or direct relief), to much more recent history (when in 1966, the legislature shifted the responsibility for poor relief to the counties, and in the 1970s, when counties imposed time limitations on eligibility or exclusions from eligibility for allegedly employable persons they were invalidated under state statutes). Despite changes in the structure and definition of poor relief, as a matter of state policy, the state has never, until the 1991 GA cuts, excluded any segment of the population from assistance for any period of time. Plaintiffs’ Memorandum, *supra* note 21, at 18-24.

<sup>80</sup> OHIO CONST. art. I, § 1.

<sup>81</sup> *See* THOMAS SHERIDAN, A COMPLETE DICTIONARY OF THE ENGLISH LANGUAGE (1789) (“to acquire; to procure; to gain . . .”).

Second, the clause as a whole is written in positive terms, as a grant of rights to all. The drafters could have chosen a formulation in which the government's role would be limited to restraint by prohibiting the states from interfering with a person's right to happiness and safety.

Third, the statement of governmental purpose in Article I, Section 2 of the Ohio Bill of Rights is couched in affirmative terms: "All political power is inherent in the people. Government is instituted for their equal protection and benefit."<sup>82</sup> This language mandates that the state has affirmative obligations to provide for its citizens' benefit and protection, which logically must include their safety. This is supported by case law in Ohio,<sup>83</sup> and by direct constitutional language in other states,<sup>84</sup> recognizing that the state government was instituted *to secure* the protection of rights. The Ohio constitution is "constructed upon the theory that the majorities can and will take care of themselves; but that *the safety and happiness of individuals and minorities need to be secured by guarantees* and limitations in the social compact, called a 'constitution.'" <sup>85</sup> A government that is created to secure rights falls far short of its obligations if it views its role as mere restraint from interfering with those rights.

This affirmative phrasing, that Ohio's government was instituted for the citizens' protection and benefit and to secure their rights, is interesting in comparison to the more negative phrasing of the Federal Bill of Rights and the Fourteenth Amendment, which speak in terms of prohibitions. The Federal Constitution has been traditionally viewed as a negative rights document, enumerating restraints upon government. On the contrary, most state constitutions are enabling documents designed to authorize, not restrain, the government.<sup>86</sup>

The Declaration of Independence manifests a government's affirmative role in protecting rights. Its declaration of the inalienable rights of life, liberty, and the pursuit of happiness is followed immediately by the statement that "to secure these rights, [g]overnments are instituted among [m]en."<sup>87</sup> As part of the law of the State of Ohio, and as the inspiration for Article I of the Ohio constitution, the recognition in the Declaration of Independence of the need for affirmative governmental measures to secure fundamental rights should be respected in interpreting the Ohio constitution.<sup>88</sup>

## 2. *The Right to Happiness*

A state constitutional right to pursue and/or obtain happiness may serve as a basis for a right to basic needs. At first blush, this may seem implausible, as the pursuit of happiness has generally not been ascribed more meaning than the pursuit of livelihood or occupation. However, examination of the notion of happiness as used in colonial times yields compelling consideration. Its content is certainly not limited to the pursuit of an occupation.

<sup>82</sup> OHIO CONST. art. I, § 2.

<sup>83</sup> See *Toledo Bank v. Bond*, 1 Ohio St. 623, 632 (1853) ("Government is the necessary burden imposed on man as the only means of securing the protection of rights.').

<sup>84</sup> See *Neuborne*, *supra* note 14 and accompanying text.

<sup>85</sup> *Kiser v. Board of Comm'rs of Logan City*, 97 N.E.2d 52, 53 (Ohio 1911) (emphasis added) (discussing a taking of private property).

<sup>86</sup> See *Neuborne*, *supra* note 14, at 898.

<sup>87</sup> THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776) (specifying that the pursuit of happiness is an unalienable right). Examination of Jefferson's work reveals that Jefferson intended his more concise phrase to have the same meaning as Mason's phrase "to seek and obtain happiness." Arthur M. Schlesinger, *The Lost Meaning of the "Pursuit of Happiness,"* 21 WM. & MARY Q. (3d Ser.) 325, 326-27 (1964).

<sup>88</sup> *Fidelity & Casualty Co. v. Union Sav. Bank Co.*, 163 N.E. 221, 222 (Ohio 1928).

In examining the notion of happiness in the Ohio constitution, plaintiffs began by studying the sources from which the clause was adopted.<sup>89</sup> Article I, Section 1 is based on the second paragraph of the Declaration of Independence, which reads as follows: "We hold these truths to be self evident, that all men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty, and the pursuit of happiness."<sup>90</sup>

Thomas Jefferson, in drafting the Declaration of Independence, borrowed language from the first state bill of rights, George Mason's 1776 Virginia Declaration of Rights. Among the inalienable rights listed in the Virginia Declaration are "the enjoyment of life and liberty, with the means of acquiring and possessing property, and pursuing and obtaining happiness and safety."<sup>91</sup> The language in the Ohio constitution, like that of many other state constitutions, was essentially borrowed from the Declaration of Independence and from the Virginia Declaration of Rights. The meaning of similar terms in these documents can shed light on the content of the Ohio constitution.<sup>92</sup>

The definition of happiness has varied little from the era in which the Ohio constitution was drafted. It was then defined as the "state in which the desires are satisfied" and "good fortune."<sup>93</sup> In addition, a notion of happiness as the legitimate goal of government was also generally accepted by Americans of the revolutionary period.<sup>94</sup> Jefferson and Mason both believed that the best government is that which produces the greatest degree of happiness and safety for the greatest number.<sup>95</sup> Jefferson's use of the concept of happiness as a term implying people's basic welfare was reflected in an earlier plea to friends going to Europe to study the effects of politics "on the happiness" of the people. He urged his friends "to take every opportunity to enter into the hovels of the labourers . . . see what they eat, how they are cloathed, whether they are obliged to labour too hard . . ."<sup>96</sup> In the context of happiness as a goal of the government, happiness did not merely connote a pleasant sensation but rather was understood as an end grounded solidly in peoples' daily lives and welfare.<sup>97</sup> While these indications of Jefferson's and

<sup>89</sup> The Ohio constitutional provision of the right to obtain happiness and safety appeared in Ohio's first constitution, which was adopted in 1802. OHIO CONST. of 1802, art. 8, § 1. When Ohio's present constitution was adopted in 1851, the right remained intact. OHIO CONST. art. 1, § 1.

<sup>90</sup> THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776).

<sup>91</sup> VIRGINIA DECLARATION OF RIGHTS para. 1 (Va. 1776).

<sup>92</sup> See *D'Alton v. Ritchie*, 119 N.E. 124, 126 (Ohio 1917) (concluding that language adopted from an earlier document is generally held to have the meaning attributed to it under the earlier instrument).

<sup>93</sup> SHERIDAN, *supra* note 81.

<sup>94</sup> See Herbert Ganter, *Jefferson's "Pursuit of Happiness" and Some Forgotten Men*, 16 WM. & MARY Q. 422, 558 n.29 (1936) (describing the origins of the notion that the greatest happiness is the goal of government). See also JAMES M. BURNS & STEWART BURNS, *A PEOPLES CHARTER* 26-28 (1991). The phrase "the greatest happiness for the greatest number" is often attributed to Francis Hutcheson, who is generally referred to as the father of the Scotch school of philosophy.

<sup>95</sup> Jefferson read extensively in the school of the Scottish philosophy, including the works of Francis Hutcheson, who advocated "the greatest happiness for the greatest number." See A.E. DICK HOWARD, *COMMENTARIES ON THE CONSTITUTION OF VIRGINIA* 26-28, 41 (1974). Mason's views are apparent in the Virginia Declaration of Rights, which provides that the best government is that which produces the greatest degree of happiness and safety. VIRGINIA DECLARATION OF RIGHTS para. 3 (Va. 1776). In drafting the Declaration, Jefferson paraphrased Locke's traditional trinity of life, liberty, and property, but he substituted happiness for property. THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776). By this substitution, Jefferson may have been making a statement about his priorities, making the larger quality of peoples' lives, not merely the security of possessions, the effective test of the government's legitimacy. BURNS & BURNS, *supra* note 94, at 41.

<sup>96</sup> Letter from Thomas Jefferson to Rev. James Madison (Oct. 28, 1785), in 8 JEFFERSON PAPERS 682 (Julian P. Boyd ed., 1950).

<sup>97</sup> See BURNS & BURNS, *supra* note 94, at 41.

Mason's concept of happiness do not serve as definitive evidence of the intended meaning of the term in the Ohio constitution, it is evident that at the time of the drafting of the Ohio constitution, concern for the basic needs of the less fortunate was at least one aspect of happiness.

In addition, evidence exists that the founders of our nation contemplated some positive action by the government to help the poor. Thomas Jefferson's concept of the pursuit of happiness, for example, contemplated a positive duty to assist the poor. A scholarly study devoted to Jefferson's works concluded:

The happiness principle is undoubtedly the most significant feature of Jefferson's theory of rights, for it raises government above the mere negative function of securing the individual against the encroachments of others. By recognizing a right to the pursuit of happiness, the state is committed to aid its citizens in the constructive task of obtaining their desires, whatever they may be . . . . The state is to secure, not merely the greatest happiness of the greatest number, but so far as possible the greatest happiness of all its citizens, whatever their condition. It may well mean, therefore, that many will be restrained from achieving the maximum of happiness, that others less fortunate may obtain more than the minimum. No one will get all he wants, perhaps, but so far as the power of the state can go, everyone will get something.<sup>98</sup>

Both the plain and ordinary meaning of happiness and its common usage in the eighteenth century indicate that the notion of happiness cannot be entirely separated from material well-being.<sup>99</sup> Access to the minimal necessities of life, such as shelter or basic medical care, is thus an indispensable prerequisite to the notion of happiness.<sup>100</sup>

#### *B. Consideration of Modern Economic Conditions Underscores the Affirmative Nature of Rights to Safety or Happiness*

Constitutions are meant to endure. Therefore, unlike an ordinary law, the terms of the Federal Constitution must be construed as living and evolving. Its terms are to be given

<sup>98</sup> CHARLES M. WILTSE, *THE JEFFERSONIAN TRADITION IN AMERICAN DEMOCRACY* (1935), quoted in Ganter, *supra* note 94, at 559 n.29. In addition, Jefferson wrote:

Whenever there is in any country, uncultivated lands and unemployed poor, it is clear that the laws of property have been so far extended as to violate natural right. The earth is given as a common stock for man to labour and live on. [If land was appropriated to encourage industry, he went on, other employment should be provided to those] excluded from the appropriation. [As few as possible should be] without a little portion of the land.

Letter from Thomas Jefferson to Rev. James Madison (Oct. 28, 1785), in 8 *JEFFERSON PAPERS* 682 (Julian P. Boyd ed., 1950).

Nearly all of the founders were heavily influenced by the theories of John Locke. See DAVID LITTLE, *Natural Rights and Human Rights: The International Imperative*, in *NATURAL RIGHTS AND NATURAL LAW: THE LEGACY OF GEORGE MASON* 3, 67 (Robert P. Davidow ed., 1986). Although Locke's theories are not capable of easy caricature, he implied that government was obligated to provide each citizen with the requisite goods for the preservation of life. *Id.* at 84, 88-89.

<sup>99</sup> *Myers v. Defiance*, 36 N.E.2d 162, 166-67 (Ohio Ct. App. 1940) (interpreting the pursuit of happiness "as the right to follow or pursue any occupation or profession without having a restriction imposed on one not imposed on others"). While the meaning of happiness has received little other scrutiny, it has been by no means limited to the pursuit of an occupation. See CONSTITUTIONAL REVISION COMMISSION, 1970-77 FINAL REPORT 444 (1977).

<sup>100</sup> See, e.g., Charles L. Black, Jr., *Further Reflections of the Constitutional Justice of Livelihood*, 86 COLUM. L. REV. 1103 (1986).



a flexible interpretation and application, so as to adapt to new and different circumstances.<sup>101</sup> Changes in social surroundings over the years since Ohio and other state constitutions were adopted may impart new meaning to constitutional provisions and thus require novel application and interpretation.<sup>102</sup>

Nearly a half century ago, in the State of the Union address of 1944, President Franklin D. Roosevelt characterized the political nature of the Federal Bill of Rights as no longer adequate to ensure freedom and equality. He recognized that as our economy changed, true freedom could not exist without economic rights. In his words:

This Republic had its beginning, and grew to its present strength, under the protection of certain inalienable political rights . . . our rights to life and liberty.

As our Nation has grown in size and stature, however—as our industrial economy expanded—[political rights to life and liberty] proved inadequate to assure us equality in the pursuit of happiness.

We have come to a clear realization of the fact that true individual freedom cannot exist without economic security and independence. “Necessitous men are not free men.”<sup>103</sup>

Roosevelt continued, articulating a “Second Bill of Rights” under which a new basis for security and prosperity could be established for all, including:

The right to a useful and remunerative job . . . ;  
 The right to earn enough to provide adequate food and clothing and recreation . . . ;  
 The right of every family to a decent home;  
 The right to adequate medical care . . . ;  
 The right to adequate protection from the economic fears of old age, sickness, accident, and unemployment;  
 The right to a good education.<sup>104</sup>

The changes in economic conditions over the past 200 years suggest that the happiness and safety clauses of the Ohio constitution should be interpreted as encompassing a right to basic subsistence.

### *1. Where Insufficient Numbers of Jobs Exist, the Right to Safety is Meaningless Unless Construed Affirmatively*

In the early 1800s when the Ohio constitution was first drafted, Ohio, like many other states, was primarily an agrarian society. Land was abundant and available to anyone to settle, hunt, and farm. Poor persons who could not make a living in settled communities had the option of moving to the frontier as long as they were capable of physical labor.

<sup>101</sup> *McCulloch v. Maryland*, 17 U.S. 316, 415 (1819) (observing that the Constitution was intended to endure for ages and therefore should be adapted to the various crises of human affairs).

<sup>102</sup> *State ex rel. Columbus v. Ketterer*, 189 N.E. 252, 256 (Ohio 1934) (“Constitutions are not lifeless or static instruments whose interpretation is confined to the conditions and outlook which prevailed at the time of their adoption.”).

<sup>103</sup> 90-1 CONG. REC. 55, 57 (1944).

<sup>104</sup> *Id.* Roosevelt also envisioned “freedom from want” as one of the four essential human freedoms.  
*Id.*

With industrialization, urbanization, and the growth of governmental and corporate institutions, society was transformed. Able-bodied poor no longer have the option to simply "go west" and claim land. Many people, especially those lacking education, skills, and training or those with marginal health or social skills, experience unemployment and termination of jobs with limited prospects for reemployment. In many instances, they do not have the option of migrating to a situation any different from the one they would leave behind. If they lack family able to house and support them, they are virtually without options for meeting survival needs. Even the U.S. Supreme Court has recognized that "forces not within the control of the poor contribute to their poverty."<sup>105</sup>

Ohio, like a number of other states, has witnessed rising unemployment in recent years. The Ohio unemployment rate for December 1991, excluding part-time and discouraged<sup>106</sup> workers, was 6.5%, a figure representing more than 350,000 jobless workers.<sup>107</sup> Although government played a role in creating such conditions, its role has escaped wide-spread public attention. People have instead clung to the belief that any able-bodied person wishing to work can find a job, and that each individual bears sole responsibility for an inability to meet basic needs.<sup>108</sup> This belief regarding poverty, while comforting in its ability to absolve others of any responsibility for poverty and to distance ourselves from the poor, obscures a more accurate picture of present conditions. At the current level of economic and social development in which the United States has developed the ability to produce great wealth and surpluses of food, poverty and hunger in our society result not from scarcity, but rather from political and economic decisions and policies.<sup>109</sup>

The present bleak employment picture facing many current General Assistance recipients<sup>110</sup> stems in part from the effects of state and federal government as well as private sector decisions. First, the state plays a role in economic development by defining the areas in which the state chooses to intervene or not to protect the rights to property and to contract.<sup>111</sup> In many ways, government has taken an even more active role in economic decisions. Some governmental decisions have shaped the location of available jobs and created disparities between the location of jobs and that of workers.<sup>112</sup> Government has also played a direct role in job creation, both through public sector employment and through government contracting. Clearly, government choices in this area affect the nature of employment opportunities.<sup>113</sup>

In addition to affecting employment opportunities, government plays a role in shaping the circumstances that face unemployed and impoverished persons. First, the state, through its fiscal policy, both on the revenue and spending sides, determines the amount of money

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<sup>105</sup> *Goldberg v. Kelly*, 397 U.S. 254, 265 (1970).

<sup>106</sup> Discouraged workers include those who have stopped seeking work and are thus not counted in the normally publicized unemployment figures.

<sup>107</sup> *News Release*, Ohio Bureau of Employment Services, Jan. 31, 1992, at 1-2.

<sup>108</sup> See Charles A. Reich, *The Individual Sector*, 100 *YALE L.J.* 1409, 1439 (1991).

<sup>109</sup> See MICHAEL B. KATZ, *THE UNDESERVING POOR: FROM THE WAR ON POVERTY TO THE WAR ON WELFARE* 7 (1989).

<sup>110</sup> See Memoranda of Amici Curiae Christ Church, *supra* note 38 and accompanying text.

<sup>111</sup> LAWRENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW* 579 (2d ed. 1988).

<sup>112</sup> For example, during the two world wars, government production policies for war plants drew massive numbers of people into cities for work. Following the war, government did little to provide new jobs when the war production ceased. Further, government spending to create interstate highway systems rather than public transportation systems has shaped employment by spreading the distance between workers' homes and their jobs.

<sup>113</sup> Federal defense contracting presents an obvious example. The government's choice to contract for high technology weapons systems creates high salary jobs for a few highly educated specialists while creating far fewer jobs for low-skilled workers.

available for social welfare or other programs to assist the poor.<sup>114</sup> For example, in Ohio, a partially regressive tax structure has resulted in imposing the highest effective taxes on individuals and families with the lowest incomes, while extracting the lowest rate of tax from those with the highest incomes.<sup>115</sup> This results in lower tax revenues than a progressive, equitable system and reduces the amount of money available to a state for social welfare or other programs. In addition, the state shapes the circumstances facing the poor by determining whether it will supplement federally funded housing programs by making more affordable housing or shelter available to the needy and by defining eligibility requirements for any such housing or shelter.

Governmental policy affects the availability of jobs and other basic needs such as affordable housing, although the extent to which government activity affects the incidence of poverty is a subject of debate. The unemployed poor, both those who lack the education, skill, or requisite health to find and maintain employment, and “able-bodied” persons simply unable to locate work, face grave and imminent dangers when their General Assistance benefits are terminated.<sup>116</sup> Many will face homelessness and deprivation of basic health care.<sup>117</sup> Thus, in an economy which does not offer sufficient jobs for all who seek and need work, and especially where the government has played a role in creating the bleak economic conditions, the right to obtain happiness and safety and to enjoy life are meaningless for large numbers of citizens unless the rights are interpreted expansively to include a right to subsistence.

## 2. *The Provision of Public Assistance as a Remedy for Imbalances in the Economy*

Interpretation of constitutional language embodying a right to basic needs should not be colored by a negative attitude toward public assistance as a “hand-out” program. As mentioned earlier, and as recognized by the U. S. Supreme Court, forces outside the control of the poor, such as the state of the economy, the unemployment rate, the minimum wage, and the rising costs of shelter and health care, contribute to their poverty.<sup>118</sup> The U.S. Supreme Court has also recognized the importance of welfare assistance in that it “can help bring within the reach of the poor the same opportunities that are available to others to participate meaningfully in the life of the community.”<sup>119</sup> Recognizing a right to public assistance sufficient for subsistence thus can be described as governmental action to correct imbalances in the economy.

Outside the area of public assistance for the poor, the government has acted through subsidies to correct imbalances in the economy. Many private actors have grown

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<sup>114</sup> The current federal budget deficit and the accumulated debt of past deficits burden the economy through the weight of interest payments and threatened spending cuts. The deficit is the result of active government decisions, particularly regarding tax policy. The current deficit and accumulated debt has primarily resulted from tax cuts, particularly cuts benefitting the wealthiest taxpayers. ROBERT S. MCINTYRE, *INEQUALITY & THE FEDERAL BUDGET DEFICIT* 3-4 (1991). As such, the federal deficit stems not from increased spending, but from government decisions to cut taxes for the wealthy. *Id.*

<sup>115</sup> *Ohio Taxes Poor at Rate 40% Higher than Rate of Affluent*, CTJ NEWS (Citizens for Tax Justice), Apr. 22, 1991, at 1 (stating that while Ohio has a progressive income tax, that tax represents only one of a number of the taxes by which Ohio seeks revenue). Since 1985, Ohio has also relied heavily on regressive property, sales, and excise taxes to meet fiscal needs. The scale of these regressive taxes has resulted in the poorest Ohioans paying taxes at a 40% higher rate than the richest. The poorest 20% of Ohio taxpayers pay 13.4% of their income in taxes while the richest 1% pay only 9.6%. *Id.*

<sup>116</sup> See Memoranda of Amici Curiae Christ Church, *supra* note 38 and accompanying text.

<sup>117</sup> *Id.*

<sup>118</sup> See *Goldberg v. Kelly*, 397 U.S. 254, 265 (1970).

<sup>119</sup> *Id.*

increasingly reliant on public funds for their business survival.<sup>120</sup> Our society has grown to accept public subsidy of private business when it is deemed needed.

As the National Conference of Catholic Bishops noted, “[s]ome of the most generous subsidies for individuals and corporations are taken for granted, and are not even called benefits but entitlements.”<sup>121</sup> For example, subsidies to farmers and ranchers are viewed not as welfare but as a need to restore balance to a part of the economy thrown out of equilibrium by economic forces beyond the farmers’ control. The farm subsidies are structured in a manner to preserve the farmers’ dignity and self-esteem. Once subsidies are paid to the farmers, the funds are no longer considered public; the government does not attempt to monitor how farmers spend the subsidies.<sup>122</sup> In short, the government subsidies are given to protect the economic stability and dignity of businessmen and farmers.

General Assistance recipients are as harmed by economic factors beyond their control as are farmers and businessmen. The provision of subsistence benefits to the unemployed and impoverished adults is similar to the farm and business subsidies in that it serves to restore stability in the lives of people damaged by economic forces while preserving the individual’s dignity and self-esteem. Consequently, a double standard that approves of extensive public aid to business and farmers and disapproves of welfare assistance is inappropriate. This double standard is all the more intolerable where, as in this case, public assistance is constitutionally mandated and farm and business subsidies are discretionary governmental actions.

### *C. International Human Rights Norms as an Aid to Construing State Constitutional Provisions*

#### *1. The Right to an Adequate Standard of Living—Sources and Content*

The rights to adequate food, clothing, shelter, and medical care have achieved recognition as fundamental human rights in international law. This recognition represents a universal legal affirmation of the principle that an individual cannot fully enjoy civil and political rights or freedoms unless his basic needs are fulfilled.<sup>123</sup>

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<sup>120</sup> See, e.g., Charles A. Reich, *Social Welfare in the Public-Private State*, 114 U. PA. L. REV. 487, 488-489 (1966) (stating that the shipping industry receives direct subsidies and indirect aid through “laws favoring the American flag;” the railroad industry receives government support; farmers have long received government subsidies to lessen the shock of economic fluctuations; ranchers receive indirect but substantial subsidies through the opportunity to graze cattle on public land and use public water to irrigate lands).

More recently, the federal government has provided massive public aid to rescue management, shareholders, and depositors of failed savings and loan institutions. Also, government reliance on regressive taxes to meet fiscal needs effectively provides subsidies to wealthy taxpayers. Similarly, the home mortgage tax credit provides a subsidy to homeowners that is unavailable to the poor who can perhaps barely afford to pay rent. Society has accepted these subsidies as necessary for economic stability.

<sup>121</sup> NATIONAL CONFERENCE OF CATHOLIC BISHOPS, *ECONOMIC JUSTICE FOR ALL: PASTORAL LETTER ON CATHOLIC SOCIAL TEACHING AND THE U.S. ECONOMY* 96-97 (1986).

<sup>122</sup> Reich, *supra* note 120, at 489-90.

<sup>123</sup> See Danilo Turk, *The United Nations and the Realization of Economic, Social and Cultural Rights*, in *THE IMPLEMENTATION OF ECONOMIC AND SOCIAL RIGHTS: NATIONAL, INTERNATIONAL AND COMPARATIVE ASPECTS* 95, 102-03 (Franz Matscher ed., 1991) [hereinafter *IMPLEMENTATION*]. Although implementation of economic rights is necessary for an individual to fully realize his civil and political rights, international law places no priority on economic or social rights. Rather, “equal attention and urgent consideration should be given to the implementation . . . of civil, political, economic, social and cultural rights.” United Nations Declaration of the Right to Development, U.N. GAOR, 41st Sess., Supp. No. 53, at art. 6, para. 2, U.N. Doc. A/41/925 (1986).

The Universal Declaration of Human Rights, which was approved without dissent in 1948 by the General Assembly of the United Nations, is commonly referred to as the International Magna Carta.<sup>124</sup> The Declaration constitutes an authoritative interpretation of the obligation under the United Nations Charter to observe human rights.<sup>125</sup> The Universal Declaration recognizes the right to an adequate standard of living:

Everyone has the right to a standard of living adequate for the health and well-being of himself and of his family, including food, clothing, housing and medical care and necessary social services, and the right to security in the event of unemployment, sickness, disability, widowhood, old age or other lack of livelihood in circumstances beyond his control.<sup>126</sup>

To provide a means of implementing the Universal Declaration, the International Covenant on Economic, Social, and Cultural Rights came into effect.<sup>127</sup> In nearly the same terms as the Universal Declaration, the Economic and Social Covenant, in Article 11, recognizes the right to an adequate standard of living. More than 100 nations have ratified the Economic Covenant, including all major industrialized nations, save for the United States. In fact, every country, except the United States, that ratified the International Covenant on Civil and Political Rights<sup>128</sup> also ratified the Economic and Social Covenant. While this case was pending, the United States ratified the Civil and Political Covenant.<sup>129</sup> Moreover, President Bush's representative to the United Nations Commission of Human Rights, Ambassador Kenneth Blackwell, called for the United

<sup>124</sup> Universal Declaration of Human Rights, U.N. Doc. A/810, at 71 (1948) [hereinafter Universal Declaration].

<sup>125</sup> The United Nations Charter, to which the United States is a party, commits nations to promote: "higher standards of living, full employment, and conditions of economic and social progress and development" and "universal respect for, and observance of, human rights and fundamental freedoms. . . ." U.N. CHARTER art. 55, ¶ (a), (c).

<sup>126</sup> Universal Declaration, *supra* note 124, at art. 25. The Universal Declaration also specifies that everyone has the right to work. Included with the right to work are the rights "to free choice of employment, to just and favourable conditions of work and to protection against unemployment. . . . Everyone who works has the right to just and favourable remuneration ensuring for himself and his family an existence worthy of human dignity, and supplemented, if necessary, by other means of social protection." *Id.* at art. 23.

The economic and social rights set out in international law are not foreign to American political and cultural traditions. In fact, the economic rights to subsistence and to work owe their origins, at least in part, to American principles. The Covenant was strongly influenced by the "Second Bill of Rights" outlined in President Roosevelt's message to the House, Jan. 11, 1944. See Roosevelt, *supra* note 103.

<sup>127</sup> International Covenant on Economic, Social, and Cultural Rights, U.N. GAOR, 21st Sess., Supp. No. 16, at 49, U.N. Doc. A/6317 (1976) [hereinafter Economic and Social Covenant]. The major documents created under the auspices of the United Nations, particularly the United Nations Charter, the Universal Declaration of Human Rights, the International Covenant on Economic, Social and Cultural Rights and the International Covenant on Civil and Political Rights [hereinafter Civil and Political Covenant], are collectively referred to as the International Bill of Rights, *reprinted in* INTERNATIONAL HUMAN RIGHTS INSTRUMENTS: A COMPILATION OF TREATIES, AGREEMENTS, AND DECLARATIONS OF ESPECIAL INTEREST TO THE UNITED STATES (Richard B. Lillich ed., 2d ed. 1990) [hereinafter RIGHTS INSTRUMENTS].

<sup>128</sup> Civil and Political Covenant, U.N. GAOR, 21st Sess., Supp. No. 16, at 52, U.N. Doc. A/6316 (1976).

<sup>129</sup> *Id.*

States to ratify the Economic and Social Covenant.<sup>130</sup> The right to subsistence is also protected by regional international law.<sup>131</sup>

The rights recognized in the covenant are legally binding on parties; they are not merely aspirations.<sup>132</sup> Where necessary, international human rights law requires states to undertake positive measures to ensure the promotion of human rights. For example, protection of the right to life under the International Covenant on Economic, Social, and Cultural Rights is not limited to protection against arbitrary deprivation of life. Rather, it requires states to take positive measures, such as measures to decrease infant mortality and to increase life expectancy.<sup>133</sup>

Under the Economic and Social Covenant, each ratifying nation is obligated to take steps, to the maximum of its available resources, to achieve progressively the full realization of the economic rights.<sup>134</sup> Thus, while the Economic and Social Covenant acknowledges constraints due to the limits of available resources, it imposes the obligation to take deliberate and concrete steps toward the goal of full realization of the relevant

<sup>130</sup> Ambassador J. Kenneth Blackwell, 14 HUM. RTS. Q. 485, 502 (1992) (reviewing HOWARD TOLLEY, JR., THE U.N. COMMISSION ON HUMAN RIGHTS (1987)). See also Barbara Stark, *Economic Rights in the United States and International Human Rights Law: Toward an 'Entirely New Strategy,'* 44 HASTINGS L.J. 79 (1992).

<sup>131</sup> The Inter-American human rights system operates under the auspices of the Organization of American States (O.A.S.). The O.A.S. Charter, as amended by the Protocol of Buenos Aires, recognizes a "right to material well-being" and a right to work that includes "a system of fair wages, that ensure life, health, and a decent standard of living for the worker and his family, both during his working years and in his old age or when any circumstance deprives him of the possibility of working." *Protocol of Amendment to the Charter of the O.A.S.*, Feb. 27, 1967, 21 U.S.T. 607. The Charter also binds parties to "dedicate every effort" to achieve adequate housing for all. *Id.* The United States is a party and thus bound by the Charter and the Protocol of Buenos Aires.

The American Declaration of the Rights and Duties of Man, which is also an instrument of the Inter-American human rights system and also binding on the United States, provides that "[e]very person has the right to the preservation of his health, through sanitary and social measures, relating to food, clothing, housing and medical care, to the extent permitted by public and community resources." American Declaration of the Rights and Duties of Man, O.A.S. Res., 9th Conf., O.A.S. Off. Re. OEA/Ser.L/V/I.4 Rev. (1965). The American Declaration also provides that each person has the duty "to cooperate with the state and the community with respect to social security and welfare, in accordance with his ability and with existing circumstances." *Id.*, at art. 35.

The binding effect of the Declaration on the United States is made clear in 1987 INTER-AMERICAN YEARBOOK ON HUMAN RIGHTS 296 (1990).

<sup>132</sup> The rights in the Economic and Social Covenant are entitled to the same protection as the rights contained in the Civil and Political Covenant. See Symposium, *The Limburg Principles on the Implementation of the International Covenant on Economic, Social and Cultural Rights*, 9 HUM. RTS. Q. 121, 123 (1987); E.V.O. Dankwa & Cees Flinterman, *Commentary by the Rapporteurs on the Nature and Scope of States Parties' Obligations*, 9 HUM. RTS. Q. 136 (1987). All forms of deprivation of human dignity, whether in the civil and political arena or in the economic area, are equally intolerable.

<sup>133</sup> Economic and Social Covenant, *supra* note 127, at art. 12. The Universal Declaration provides that "[e]veryone has the right to life, liberty and security of person." Universal Declaration, *supra* note 124, at art. 3. The right to life is also protected by the Civil and Political Covenant, which provides that: "Every human being has the inherent right to life. This right shall be protected by law. No one shall be arbitrarily deprived of life." Civil and Political Covenant, *supra* note 127, at art. 6. The United Nations Human Rights Committee, which monitors states' progress under the Civil and Political Covenant, has supported a broad interpretation of the right to life which includes the protection of subsistence. The Committee stated that the protection of the right to life requires states to take positive measures and suggested measures to decrease infant mortality and to increase life expectancy. General Comment No. 6(16), at 93-94, U.N. Doc. A/37/40, reprinted in DOMINIC MCGOLDRICK, THE HUMAN RIGHTS COMMITTEE 329 (New York: Oxford University Press, 1990). The Committee's understanding that the right to life embraces protection of subsistence is apparent.

<sup>134</sup> Economic and Social Covenant, *supra* note 127, at art. 2(1). There is no allowance for progressive implementation under the Civil and Political Covenant.

rights within a reasonably short time.<sup>135</sup> The committee of experts charged with monitoring implementation of the rights in the Economic and Social Covenant interpreted the covenant as imposing, at the very least, an obligation to ensure the satisfaction of minimum essential levels of food, basic shelter, and health care.<sup>136</sup> A failure to do so cannot be justified by a lack of available resources unless the state demonstrates that every effort has been made to use all available resources in an attempt to satisfy those minimum obligations.<sup>137</sup> The committee further commented that even in times of severe resource constraint, the vulnerable members of society can and must be protected by relatively low-cost targeted programs.<sup>138</sup> Finally, any deliberately retrogressive measures in this regard would need to be fully justified by reference to the totality of rights provided for in the Covenant and in the context of the full use of the maximum available resources.<sup>139</sup>

## 2. *The International Human Right to an Adequate Standard of Living—At Home in Ohio*

International human rights law has become an accepted means of providing useful content for clarifying and supplementing domestic law, both state and federal, both constitutional and statutory.<sup>140</sup> International legal recognition of the right to an adequate standard of living, including minimal food, clothing, shelter, and medical care, should be of interest to all advocates of the poor because international norms can serve as a valuable aid in interpreting domestic law.

The power of international legal norms to fill in the gaps of federal law, both statutory and constitutional, was firmly established by the decade of the 1980s. International human rights norms were used in interpreting a federal immigration statute;<sup>141</sup> in interpreting whether overcrowding of pre-trial detainees was incompatible with the canons of decency and fairness which express the notions of justice embodied in the Due Process Clause, as well as whether overcrowding of convicted prisoners was incompatible with the “evolving standards of decency” which are basic to jurisprudence on the Eighth Amendment’s guarantee against cruel and unusual punishment;<sup>142</sup> in

<sup>135</sup> *Id.* See also Philip Alston & Gerard Quinn, *The Nature and Scope of States Parties’ Obligations under the International Covenant on Economic, Social and Cultural Rights*, 9 HUM. RTS. Q. 156 (1987).

<sup>136</sup> Committee on Economic, Social and Cultural Rights, U.N. ESCOR, 5th Sess., Supp. No. 3, at para. 10, U.N. Doc. E/C.12/1990/8 (1991). The General Comment is fully discussed in Bruno Simma, *The Implementation of the International Covenant on Economic, Social, and Cultural Rights*, in IMPLEMENTATION, *supra* note 123, at 92; see also Scott Leckie, *An Overview and Appraisal of the Fifth Session of the UN Committee on Economic, Social and Cultural Rights*, 13 HUM. RTS. Q. 545, 564 (1991).

<sup>137</sup> U.N. ESCOR, *supra* note 136, at ¶ 11.

<sup>138</sup> *Id.* at ¶ 12.

<sup>139</sup> *Id.* at ¶ 4.

<sup>140</sup> See Hans A. Linde, *Comments*, 18 INT’L LAW. 77 (1984); Jordan J. Paust, *On Human Rights: The Use of Human Right Precepts in U.S. History and the Right to an Effective Remedy in Domestic Courts*, 10 MICH. J. INT’L L. 543, 611-628 (1989) (observing that the Supreme Court’s reliance on human rights to provide useful content for domestic law has steadily increased); Gordan A. Christenson, *The Uses of Human Rights Norms to Inform Constitutional Interpretation*, 4 HOUS. J. INT’L L. 39 (1981); Kathryn Burke et al., *Application of International Human Rights Law in State and Federal Courts*, 18 TEX. INT’L L.J. 291 (1983).

<sup>141</sup> *Fernandez v. Wilkinson*, 505 F. Supp. 787, 795-99 (D. Kan. 1980), *aff’d on other grounds sub nom. Rodriguez-Fernandez v. Wilkinson*, 654 F.2d 1382 (10th Cir. 1981) (looking to the international human rights norms against arbitrary detention to provide content to the relevant federal statute and the Constitution).

<sup>142</sup> *Lareau v. Manson*, 507 F. Supp. 1177, 1192-93 (D. Conn. 1980), *modified on other grounds*, 651 F.2d 96 (2d Cir. 1981) (holding that the United Nations Standard Minimum Rules for the Treatment of Prisoners “form[s] part of the body of international human rights principles establishing standards for decent and humane conduct by all nations”).

interpreting the Eighth Amendment to proscribe imposition of the death penalty on juveniles who were less than fifteen years old at the time of the commission of the crime;<sup>143</sup> and in interpreting the Equal Protection Clause of the Fourteenth Amendment to ban racially discriminatory state laws.<sup>144</sup>

The use of international human rights norms to aid in giving content to state laws and constitutions is equally well-established. Human rights norms have been used to interpret state law in a variety of contexts,<sup>145</sup> including their use as an aid in determining the content and reach of welfare rights. This is demonstrated in *Boehm v. Superior Court*, in which international human rights norms were invoked to aid in interpreting a state law requiring that the poor be given enough money to adequately "relieve and support" them.<sup>146</sup> The judge prominently quoted the Universal Declaration of Human Rights, which provides that everyone shall have the right to an adequate standard of living, including food, clothing, shelter, and medical care,<sup>147</sup> and interprets the California welfare statute as guaranteeing the grant of funds sufficient not only for food and shelter, but also for clothing, transportation, and medical care.<sup>148</sup>

In addition, international human rights norms have been used to expand state protection of rights beyond that guaranteed by the Federal Constitution. For example, the U.S. Supreme Court has refused to hold that education is a fundamental right.<sup>149</sup> However, both West Virginia and California held education to be a fundamental right under their state constitutions. In *Pauley v. Kelly*,<sup>150</sup> the West Virginia Supreme Court referred to human rights norms to interpret the state constitution. The court noted that the Universal Declaration of Human Rights "appears to proclaim education to be a fundamental right of everyone, at least on this planet."<sup>151</sup> Accordingly, the court interpreted education to be a fundamental right under the state constitutional requirement

<sup>143</sup> *Thompson v. Oklahoma*, 487 U.S. 815 (1988). See also *Estelle v. Gamble*, 429 U.S. 97, 102 (1976) (citing United Nations declarations as evidence of "evolving standards of decency that mark the progress of a maturing society" for Eighth Amendment purposes).

<sup>144</sup> *Oyama v. California*, 332 U.S. 633, 673 (1948) (Murphy, J., concurring); *id.* at 649-50 (Black, J., concurring) (citing the United Nations Charter as additional support for invalidating part of California's racially discriminatory alien land law).

<sup>145</sup> See Stephen Rosenbaum, *Lawyers Pro Bono Publico: Using International Human Rights Law on Behalf of the Poor*, in *NEW DIRECTIONS IN HUMAN RIGHTS* 109, 115-21 (Ellen Lutz, Hurst Hannum, & Kathryn Burke eds., 1989). See also *Sterling v. Cupp*, 625 P.2d 123, 132 n.21 (Or. 1981) (citing to numerous international documents as examples of principles governing the treatment of prisoners).

<sup>146</sup> *Boehm v. Superior Ct.*, 223 Cal. Rptr. 716 (1986). In that case, remarkably similar to *Daugherty*, county welfare recipients filed a lawsuit when the public assistance grants they received were reduced to the minimal level necessary for food and shelter. The grants made no allowance for clothing, medical care, or transportation. State law required that the poor be given enough money to adequately "relieve and support" them. WELF. & INST. § 17000.

<sup>147</sup> Universal Declaration, *supra* note 124.

<sup>148</sup> *Boehm*, 223 Cal. Rptr. at 720. The court commented that:

Indeed, it defies common sense and all notions of human dignity to exclude from minimum subsistence allowances for clothing, transportation, and medical care. Such allowances are essential and necessary to "encourage [self-respect and] self-reliance" . . . in a 'humane' manner consistent with modern standards. . . . Without a clothing allowance, recipients must wear tattered clothing and worn out shoes. The lack of adequate and decent clothing and essential transportation is damaging both to recipients' self-respect and their ability to obtain employment. Finally, to leave recipients without minimum medical assistance is inhumane and shocking to the conscience.

*Id.*

<sup>149</sup> *San Antonio Independent School District v. Rodriguez*, 411 U.S. 1, 33 (1973).

<sup>150</sup> *Pauley v. Kelly*, 255 S.E.2d 859, 878 (W. Va. 1979).

<sup>151</sup> *Id.* at 864.



that the legislature provide “thorough and efficient” schools.<sup>152</sup> Similarly, in California, the Supreme Court determined that education was a fundamental right, applied strict scrutiny, and invalidated a school financing system under the equal protection clause of the state constitution.<sup>153</sup>

Reference to international human rights norms confirms that state constitutional guarantees of safety and happiness should be interpreted to encompass an affirmative right to assistance sufficient to prevent homelessness and to provide medical care. International norms indicate that subsistence rights must be implemented to the maximum of the state’s available resources.

To fully implement the right to subsistence, the state should provide assistance sufficient for minimum food, clothing, shelter, and medical care.<sup>154</sup> Given the resources of each state in the U.S., it is fair to say that the subsistence needs of all should be met without delay. One commentator has stated:

In the United States, we have neither embraced a domestic constitutional right to housing, as have such western democracies as Sweden and the Netherlands, nor do we now profess that our citizens have the ‘fundamental right, regardless of economic circumstances, to enjoy adequate shelter at reasonable costs,’ as does our neighbor Canada. Moreover, we have not authorized our government to take ‘extraordinary steps’ to alleviate any housing shortage, as has Germany. In none of these countries, nor in any other western democracy, with the exception of Great Britain (whose current government shares this government’s political vision), does the extent of homelessness even begin to approach the dimensions of our own.<sup>155</sup>

At a minimum, international law dictates that states should work toward progressive implementation by all available means even if limited resources prevent full satisfaction of the right. In the present case, the duty to work toward fulfilling subsistence rights clearly precludes Ohio from taking a step backward to reduce General Assistance payments both in amount and by implementing a six-month limitation.

## V. SHATTERING MISCONCEPTIONS

### *A. Fundamental Constitutional, Civil, and Political Rights Often Entail Significant Affirmative Expenditures by the Government*

One obstacle that must be surmounted in recognizing an affirmative right to basic needs is the misconception that constitutionally protected rights do not impose affirmative obligations on the part of the government. In fact, many revered federal constitutional rights and their state counterparts require overt positive action as well as substantial government expense for their implementation. To effectively guarantee the right to assistance of counsel in all criminal prosecutions,<sup>156</sup> both the U.S. and state governments

<sup>152</sup> *Id.* at 878.

<sup>153</sup> *Serrano v. Priest* (Serrano II), 557 P.2d 929, 952-58, (Cal. 1976), *cert. denied*, 432 U.S. 907 (1977). See also *Serrano v. Priest* (Serrano I), 487 P.2d 1241, 1258 (Cal. 1971).

<sup>154</sup> This amount is determined annually in Ohio, and is referred to as the standard of need. OHIO ADMIN. CODE § 5101:1-21-05 (A)(1) (1991).

<sup>155</sup> Curtis Berger, *Beyond Homelessness: An Entitlement to Housing*, 45 U. MIAMI L. REV. 315, 334-35 (1990-91) (footnotes omitted).

<sup>156</sup> U.S. CONST. amend. VI.

must maintain, at significant cost, public defender systems to assist indigent defendants.<sup>157</sup> Similarly, to ensure free exercise of the right to a jury trial in both civil and criminal matters,<sup>158</sup> the government must bear the cost and administrative responsibility of empaneling juries.<sup>159</sup> The right to a fair and speedy trial in all criminal prosecutions<sup>160</sup> obligates the government to maintain a well-staffed judicial system, including the availability of services such as sign language interpretation for the deaf, language translation, and psychiatric assistance for indigent mentally ill defendants.

Likewise, the constitutional guarantee against cruel and unusual punishment<sup>161</sup> does not merely require government to refrain from action. Rather, this civil right imposes substantial positive obligations on the government to remedy inhumane prison conditions by refurbishing existing prisons or closing intolerable ones.<sup>162</sup> In a number of cases, governments have entered into consent decrees that acknowledge the government obligation to provide essential services to inmates, including reasonable medical care,<sup>163</sup> access to legal resources,<sup>164</sup> and adequate supervision for their protection,<sup>165</sup> again all hefty positive obligations with significant costs.

Further, the First Amendment right to freedom of expression,<sup>166</sup> perhaps the most revered of civil rights, has at times entailed affirmative government action and considerable cost to ensure its enjoyment by all citizens. The most salient examples of this reality are cases in which hate groups such as the Nazis or the Ku Klux Klan sought to assemble and speak in public. Guaranteeing the rights of such groups to assemble and speak invariably required the use of significant government resources in the form of police protection.<sup>167</sup>

This list demonstrates that fundamental constitutional rights in fact require affirmative government action at significant public expense to ensure their enjoyment. Recognized constitutional rights are not merely negative rights. In fact, whether a government is burdened with an affirmative obligation to protect a right or whether its obligation is limited to restraint depends on whether the citizen is able to provide the necessary protection for himself. For example, if a criminal defendant cannot afford counsel, the

<sup>157</sup> Estimated budgeted expenditures for federal government public defender systems in 1992 were \$193 million. Executive Office of the President, Office of Management and Budget, *Budget of the U.S. Government, Fiscal Year 1992* 4-264 (1991). Similarly, Ohio expenditures to ensure the right to counsel were: 1990, \$31 million; 1991, \$32 million (est.); 1992, \$32 million (est.). Ohio Office of Budget & Management, *State of Ohio Executive Budget 7.10.01* (1991).

<sup>158</sup> U.S. CONST. amends. VI, VII; OHIO CONST. art. I, § 5.

<sup>159</sup> To provide jury allowances and other expenses (such as refreshments) in all federal jury trials, the U.S. government spent \$54 million in 1990 and estimated amounts of \$60 million in 1991 and \$70 million in 1992. Executive Office of the President, Office of Management and Budget, *Budget of the U.S. Government, Fiscal Year 1992* 4-265 (1991).

<sup>160</sup> U.S. CONST. amend. VI; OHIO CONST. art. I, § 10.

<sup>161</sup> U.S. CONST. amend. VIII.

<sup>162</sup> See, e.g., *Jones v. Willensberg*, 330 F. Supp 707 (N.D. Ohio 1971) (ordering a wide range of improvements); *Rhem v. Malcome*, 377 F. Supp. 995 (S.D.N.Y. 1974) *aff'd*, 507 F.2d 333 (2d Cir. 1974) (ordering jail facility to close).

<sup>163</sup> See, e.g., *Newman v. Alabama*, 349 F. Supp 278 (M.D. Ala. 1972).

<sup>164</sup> *Bounds v. Smith*, 430 U.S. 817 (1977) (holding that Constitution requires inmates to have access to adequate law library or legal services).

<sup>165</sup> See, e.g., *Holt v. Sarver*, 309 F. Supp. 362 (E.D. Ark. 1970), *aff'd*, 442 F.2d 304 (8th Cir. 1971).

<sup>166</sup> U.S. CONST. amend. I.

<sup>167</sup> It is generally recognized that the police have a duty to protect speakers' rights. See generally *Feiner v. New York*, 340 U.S. 315, 326-27 (1951) (Black, J., dissenting); *id.* at 331 (Douglas, J., dissenting). An example of very costly police protection occurred when 400 police in riot gear assembled to protect 25 Nazi marchers at a march in Chicago in 1978, which followed a controversial march through Skokie, Illinois. See GEOFFERY STONE *et al.*, CONSTITUTIONAL LAW 1016 (1986).

government's role does not cease upon its assurance that it is not interfering with the defendant's right to have counsel. The government must take the affirmative step to ensure counsel is provided.

The right to obtain safety or happiness is no different than the right to counsel. If a citizen is facing homelessness or a lack of medical care, and cannot afford to protect himself from these dangerous situations, the government must act affirmatively to protect the threatened safety and happiness.

### *B. The Economic Right to Subsistence is Justiciable*

Despite the United States Supreme Court's unjustified characterization of economic rights as presenting intractable and unmanageable issues,<sup>168</sup> courts in fact can readily define, adjudicate, and enforce<sup>169</sup> a basic right to subsistence. This is true regardless of whether a state chooses to provide cash assistance to allow a person to purchase the necessities of shelter, food, and medical care or whether the state chooses to provide subsistence aid in kind, by the provision of adequate housing, shelter, food, and medical care.

In terms of cash assistance, experts in the relevant fields can readily determine the amount of income that a person or family needs to meet minimal requirements, such as food, clothing, housing, utilities, transportation, personal items and incidental items for subsistence. In fact, the Ohio Department of Human Services, like other state welfare departments, annually calculates such an amount as the "need standard." In 1991, the Ohio department calculated the need standard for one person at \$487 per month; for a household of two persons at \$670 per month; and for a household of four persons at \$1010 per month.<sup>170</sup> In terms of in kind assistance, experts and standards such as housing codes could be used to determine if shelter, food and medical care provided by the state are adequate. This theory suggests that a court can readily define the parameters of a right to subsistence.

The relative simplicity of defining the scope of a right to basic needs is perhaps better appreciated in comparison with the judiciary's task in defining the scope of several fundamental civil and political rights, such as the right to free speech, to freedom of religion or to freedom from unreasonable searches and seizures. The rights to freedom of expression and religion have not been subject to precise definition. Both rights have fueled scores of interesting and controversial judicial opinions over the years. The fact that the rights to freedom of expression or religion cannot be easily quantified in no way diminishes their status as fundamental rights. Similarly, the right to privacy embodied in the prohibition against unreasonable searches and seizures defies precise definition and

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<sup>168</sup> *Dandridge v. Williams*, 397 U.S. 471, 487 (1970) ("[T]he intractable economic, social and even philosophical problems presented by public welfare assistance programs are not the business of this Court."). Yet underlying this claim of judicial helplessness lies much rhetoric regarding poverty: that poverty is somehow built into the basic structure of our society and our legal system; that eradication of poverty, if possible, would require a radical transformation of our society. Thomas Ross, *The Rhetoric of Poverty: Their Immorality, Our Helplessness*, 79 GEO. L.J. 1499, 1501 (1991). The discussion elsewhere in this brief regarding subsidies in other sectors of our economy exposes the weakness of this rhetoric and indicates that welfare assistance programs parallel other pervasive forms of public assistance.

See Sar Levitan & Robert Taggart, *The Great Society Did Succeed*, 91 POL. SCI. Q. 601 (1977) (expert studies indicate that courts and legislatures can effectively assure provision of basic subsistence rights).

<sup>169</sup> See *Missouri v. Jenkins*, 495 U.S. 33, 35 (1990) (upholding the trial court's exercise of equitable powers to order increased property tax rate).

<sup>170</sup> OHIO ADMIN. CODE § 5101:1-21-05 (1991).

thus has engendered numerous judicial decisions in the attempt to define what is a reasonable search or seizure.<sup>171</sup>

## VI. FACING THE DIFFICULT CONSEQUENCES

The reluctance of a state court to interpret the state's constitution as granting a right to full basic assistance is understandable. The judiciary may fear that such a right will destroy individual motivation to provide for oneself, fostering ever increasing dependency on the state, or that the state could become a magnet to indigents of other states enabling the indigents to take advantage of the state's generosity. To state officials working with already strained budgets, an influx of the poor from other states could be described as catastrophic or worse.

As a result of the extensive poverty in the United States and the unfairness of a scenario in which any state that provides adequate public assistance could be "punished" with the influx of out-of-state poor, the problem cries out for a federal solution. As discussed above, however, the U.S. Supreme Court has, rightly or not, chosen to absolve the federal government from any affirmative responsibility to meet the basic needs of the poor. As a result, the problem of poverty trickles down to the states.

Yet the fear of recognizing a state right to subsistence benefits need not be overwhelming. State courts and legislatures would have considerable leeway in drawing the parameters of what a right to basic needs entails. For example, as the plaintiffs in *Daugherty* urged, the right to safety encompasses the right to adequate shelter and basic medical care.<sup>172</sup> A state could satisfy this mandate in several ways: 1) by providing cash assistance to allow a person to purchase necessities; 2) by providing subsistence aid in kind, through the provision of adequate housing or shelter and medical care; or alternately, 3) in the case of impoverished adults who are physically and mentally able to work, the government could meet its obligation by making employment available, either in the private or public sector. Employment opportunities would enable them to earn sufficient income to obtain food, health care and shelter for themselves and their dependents. If state officials worry that a constitutional right to subsistence would destroy the motive to work and foster dependency on the state, they could choose the latter option.

The state would have to determine what type of shelter and what extent of medical care is minimally required by a right to subsistence. The definition of adequate shelter, for example, could span the spectrum from the modicum of shelter in a safe and sanitary dorm or barracks style building to the ideal of the provision of a modest private apartment or home. Obviously, a state's choice regarding these issues would influence how much of a magnet the state's plan would be to the poor of other states. Likewise, states would have the authority to define what constitutes minimally adequate health care and to determine how the care should be provided. Again, a state's choice would affect how attractive the state becomes to non-resident poor. Also, all or most states have hospitals that provide free care for the poor, at least for emergencies; therefore, the declaration that citizens of a state have a constitutional right to minimally adequate medical assistance may not draw droves of poor non-residents to the state. Many of a state's fears about the effects of recognizing a right to subsistence thus may be allayed by careful thought regarding the parameters of the right.

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<sup>171</sup> This issue is so complex that entire volumes have been dedicated to it. See, e.g., JOHN WESLEY HALL, JR., *SEARCH AND SEIZURE* (2d ed. 1991).

<sup>172</sup> See *supra* notes 21-23 and accompanying text.

## VII. CONCLUSION

April was a cruel month in Ohio. In April of 1991, the General Assistance program was slashed, leaving thousands of poor individuals in Ohio with no financial or medical assistance for six months of the year. The safety net in Ohio, as in other states, was slashed. Increasing numbers of poor are left vulnerable to the dangers of homelessness, inadequate nutrition, and the lack of medical care. Once denied General Assistance funds necessary to provide shelter, clothing, medicine, or other basic hygiene needs, the likelihood that these people will have any chance of finding work or participating in community life decreases even further.

In this era when the federal government recognizes no rights to subsistence, state constitutional rights to happiness and safety may serve as the source of an affirmative right to public assistance sufficient in amount or kind to satisfy the basic needs of the poor. The argument that Ohio's constitutional right to "seek and obtain happiness and safety" encompasses a right to public assistance sufficient to prevent homelessness and provide basic health care has been made in litigation in the state courts of Ohio in *Daugherty v. Wallace*.

The largest task facing plaintiffs in making such an argument is overcoming the resistance to the idea that the rights to safety and happiness impose an affirmative obligation on the state government to provide some extent of public assistance to the poor. Indeed, the *Daugherty* plaintiffs' claims were dismissed from the lower court on this basis. As Plaintiffs have urged on appeal, however, the constitutional provisions should be construed affirmatively. An affirmative construction is especially warranted in light of modern economic conditions, in which there are not sufficient jobs for all who seek them, and in light of international human rights law establishing a right to an adequate standard of living.

Although the ultimate success of the plaintiffs' claims pursuant to the Ohio constitution remains to be seen, their strategy of litigating the happiness and safety clauses of the state constitution may be adapted by advocates of the poor in other states facing serious reductions in public assistance benefits. It is our hope that state constitutions will prove to be better vehicles than the Federal Constitution for responding to the needs of the impoverished and unemployed.