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Brother Can You Spare Some Change?— And Your Privacy Too?: Avoiding a Fatal Collision¹ Between Public Interests and Beggars' First Amendment Rights

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FROM ENGLISH COMMON law dealing with vagrants, American jurisdictions have formulated their own laws to tackle the problems related to what we call beggars, "idle or dissolute person[s], physically able to work who beg[] or subsist[] on charity."² English laws criminalizing begging were enacted when throngs of jobless and homeless people began living in the streets³ and a notorious "brotherhood of beggars" roamed from place to place and became a definite and serious menace to the community.⁴ Derived from their English counterparts, American laws also criminalize vagrancy, loitering and begging.⁵

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1. *Cantwell v. Connecticut*, 310 U.S. 296,307 (1940) (analyzing states' interests and interests protected in the federal compact).

2. Gary V. Dublin & Richard H. Robinson, *The Vagrancy Concept Reconsidered: Problems and Abuses of Status Criminality*, 37 N.Y.U. L. Rev. 102, 108-09 (1962) (advocating complete abolishment of vagrancy laws).

3. *Papachristou v. City of Jacksonville*, 405 U.S. 156,161 n.4 (1972).

4. *Id.*

5. *Id.* at 161-62. The roads of England were crowded with unemployed people who adopted vagrant lifestyles. Some of them roamed together as beggars and were a public menace. *Id.* at 161 n.4 (citing *Ledwith v. Roberts*, 1 K.B. 232,271 (1937)). See also *Loper v. New York City Police Dep't*, 802 P. Supp. 1029, 1031-32 (S.D.N.Y. 1992), *aff'd*, 999 F.2d 699 (2d Cir. 1993) (loitering for the purpose of begging was a crime under New York law which was based on English law). See. e.g., *infra* note 19.

In America today, the situation is much like that of old England. Tens of thousands of homeless people in New York City alone⁶ are living in make-shift homes set up on busy sidewalks, in public parks and transportation stations, under bridges and anywhere else they can find shelter.⁷ Many subsist on begging alone.⁸ In metropolitan areas throughout the United States, scores of men, women and children beg for quarters, nickels and dimes to purchase food, shelter, clothing, transportation, drugs, alcohol and

6. *City of Seattle v. Webster*, 802 P.2d 1333,1340 (Wash. 1990), *cert. denied*, III S. Ct. 1690 (1991) ("Homelessness is a real national concern, particularly in metropolitan areas such as Seattle."). *See also Court as Scapegoat*, NAT'L L.J., Feb. 12,1990, at 14 ("Lest anyone think it's a peculiarly New York problem, similar conditions exist, to a varying extent, in Philadelphia, Washington, D.C., Boston, and Atlanta."); Malcolm Gladwell, *Rooms with a View to Housing the Poor*, WASH. POST, Mar. 28, 1993, at A4 (lamenting that the renovation of 100,000 rooms in single occupancy hotels in New York has pushed thousands of poor people into the street).

Beggars are not exclusively a domestic problem. New Delhi has a number of road hazards including cows, elephants and beggars. John W. Anderson, *On the Routes of the Killer Buses*, WASH. POST, July 26, 1993, at A11.

7. *See, e.g.*, Gladwell, *supra* note 6 (people living under bridges); Douglas Martin, *Giving Alternatives to the Visible Poor*, N.Y. TIMES, Jan. 7,1994, at B3 (homeless living in shelters made of milk crates, office furniture, boards and plastic); *Metro Closing 2 More Stations*, WASH. POST, Apr. 29, 1993, at C3 (subway station entrances enclosed to prevent homeless people from living there); Brian Moar, *Eking Out a Buck Between the Red and Green*, WASH. POST, May 9,1993, at B5 ("family of panhandlers" living in railroad tunnel); Deborah Pines, *State's Anti-Begging Law Struck*, N.Y. L.J., Oct. 2,1992, at 1 (1992) (couple living in city park); Robert Teir, *Legislation for Livable City Spaces*, NAT'L L.J., Jan. 11, 1993, at 17 (people sleeping on sidewalks).

8. Although the rationale is unclear, at least one author distinguishes between homeless people and beggars. Anthony J. Rose, *The Beggar's Free Speech Claim*, 65 IND. L.J. 191,198-99 n.47 (1989) ("While some overlap may exist between beggars and homeless people, the two should be kept distinct."). Other sources recognize that at times, beggars are destitute as well as homeless. *See, e.g.*, *Young v. New York City Transit Auth.*, 903 F.2d 146, 166 (2d Cir.), *cert. denied*, 498 U.S. 984 (1990); *Loper*, 802 F. Supp. at 1033; *Blair v. Shanahan*, 775 F. Supp. 1315, 1318 (N.D. Cal. 1991). *See also Clark v. Community for Creative Non-violence*, 468 U.S. 288, 304 n.4 (1984) (Marshall, J., dissenting) ("detrimental effects of homelessness are manifold"); *Edwards v. California*, 314 U.S. 160, 177 (1941) ("Whatever may have been the notion then prevailing, we do not think that it will now be seriously contended that because a person is without employment and without funds he constitutes a 'moral pestilence.' Poverty and immorality are not synonymous."); Charles F. Knapp, *Statutory Restriction of Panhandling in Light of Young v. New York City Transit: Are States Begging Out of First Amendment Proscriptions?*, 76 IOWA L. REV. 405,406 (1991). *Accord Decker v. Fillis*, 306 F. Supp. 613,617 (D. Utah 1969) (opining that the statute "attempts] to make idleness or indigency coupled with being able-bodied a crime"). However, a consultant in *Young* called beggars a "subset of the homeless." 903 F.2d at 150 (quoting Professor George Kelling who studied begging in the subway system); *Webster*, 802 P.2d at 1340-41 (amicus arguing that pedestrian interference or begging ordinances "necessarily disparately affects the homeless as a class").

medical care.⁹ "The size of this class [of beggars] is, and will remain unknown."¹⁰

Beggars are everywhere—sidewalks, streets, medians, parks and restaurants. They have become "part of the urban landscape."¹¹ It is not unusual to encounter as many as six beggars in one city block.¹² Typically they stand in the street or park asking passersby for spare change for food. Occasionally they initiate conversation with the people from whom they are begging,¹³ often speaking about inefficient government social services or some personal misfortune which has forced them to plead for donations.¹⁴

9. *Young*, 903 F.2d at ISO (citing research indicating that the homeless in subways are generally suffering from mental illness and alcohol and/or drug abuse). See also *Loper*, 802 F. Supp. at 1033 (class action filed by those unable to pay for food, shelter, medical care and transportation). Panhandlers are often drug or alcohol-dependent people who need professional assistance in combatting their illnesses. See, e.g., Kevin Kosar, *Homeless Need Help, Not Nickels*, WASH. SQUARE NEWS, NOV. 17, 1993, at 7. One beggar admitted he begged in order to pay his rent, but he was more concerned about getting money for crack: "I'll tell you the truth . . . Most of the guys who work out here have drug habits." Mooar, *supra* note 7, at B5. One homeless beggar saved money to buy a beeper so that prospective employers could contact her. Mooar, *supra* note 7, at B5. See also DISTRICT OF COLUMBIA CITY COUNCIL, REPORT ON PANHANDLING CONTROL ACT OP 1993 [hereinafter REPORT ON PANHANDLING] (money donated used by beggars to support addictive habits); Kerin Adelson, *Brother, Can You Spare a Voucher?*, MANHATTAN SPIRIT, Aug. 29, 1993, at 9; Kosar, *supra*, at 7 ("85 percent of street people are alcoholics, drug addicts, or mentally ill"); Linda Wheeler, *70 Arrested Under D.C. Panhandling Law*, WASH. POST, July 1, 1993, at C8 [hereinafter Wheeler, *Arrested*].

10. *Loper*, 802 R Supp. 1029, 1031, 1033 (S.D.N.Y. 1992), *aff'd*, 999 F.2d 699 (2d Cir. 1993). See also *Clark*, 468 U.S. at 304 n.4 (Marshall, Brennan, JJ. dissenting) (1984 estimates of the number of homeless were two to three million); Nancy R. Gibbs, *Begging: To Give or Not to Give*, TIME, Sept. 5, 1988, at 71 ("No one ever knows how many beggars there are, though estimates run as high as 5,000 in New York City, 1,500 in Chicago."); Jay Mathews, *Just How Safe Is It?*, WASH. POST, Apr. 18, 1993, at E1, E14 (New Yorkers admit there are more panhandlers on the street); Linda Wheeler, *Panhandlers Tap Deep Pockets of Resentment*, WASH. POST, May 9, 1993, at B1 [hereinafter Wheeler, *Panhandlers*] ("No one knows how many [panhandlers] mere are.").

Some authors surmise that since the number of homeless people is high, men proportionately speaking, the number of people who beg will be high. The number may get even higher because of the limited public resources available to needy people. J. Buckrop & D. Miller, *Brother, Can You Spare a Dime? An Analysis of Young v. New York City Transit Authority*, 30 FREE SPEECH Y.B. 88, 89 (1992).

11. Morenike Efuntade, *Panhandlers Warned in Leaflets*, WASH. POST, June 16, 1993, at C3; James Nathanson, *Making Panhandling Legitimate*, WASH. POST, May 31, 1993, at A18. See generally HARLAN W. GILMORB, *THE BEGGAR* (1940).

12. Wheeler, *Panhandlers*, *supra* note 10, at B4. .

13. *Loper v. New York City Police Dep't*, 135 F.R.D. 81, 82 (S.D.N.Y. 1991). See also *Loper*, 802 F. Supp. at 1033.

14. See *Loper*, 802 F. Supp. at 1033 (beggars discussing their plight). See also Helen Hershkoff & Adam S. Cohen, *Begging to Differ: The First Amendment and the Right to Beg*, 104 HARV. L. REV. 896, 898-901 (1991) (contending that begging is protected speech which enlightens listeners about beggars' plight).

Begging styles range from passively carrying a sign or holding out a cup on a city sidewalk, to threatening, taunting and touching passersby in an attempt to intimidate them into contributing. These "aggressive toll collectors" use numerous "props" to get attention, sometimes obstructing a pedestrian's path as they shove their hand or a cup out in front of them.¹⁵ Meanwhile, "the public is . . . divided and ambivalent about the proper response to dependent persons. Beggars . . . - sorely tax both public purse and private conscience."¹⁶

There are few cases specifically addressing the question of whether an individual has a First Amendment right to solicit funds, perhaps because the people against whom begging laws are enforced have neither the means nor the wherewithal to pursue a constitutional claim. Many United States Supreme Court and state court decisions have recognized solicitation rights for organizations. However, individual beggars' rights to seek contributions remain unclear.

Part I of this Article focuses on the right to solicit contributions under the First Amendment, and argues that there is no justification for distinguishing between organized solicitors and beggars. Part II discusses the balancing approach taken by some courts, weighing the beggars' right to communicate against the public's interests in privacy and safety to determine the constitutionality of the laws regulating begging. This Part closely analyzes five of the leading cases on beggars' rights to illustrate the inevitable tension between the two groups. Finally, Part III argues that begging should be carefully regulated to protect both the beggars' First Amendment right to communicate and the public's interests in privacy and safety. Specifically, this Part advocates the use of content-neutral time, place and manner restrictions on beggars' speech in the face of a substantial government interest, as long as the restrictions do not unreasonably limit other means of communication.

I. Individual Beggars Are Indistinguishable from Organized Solicitors

The First Amendment of the United States Constitution provides that "Congress shall make no law . . . abridging the freedom of speech."¹⁷

15. Robert Lipsyte, *My Bum Bill, My Secret Sharer of the Streets*, N.Y. TIMES, Sept 12, 1993, § 13, at 1 (refusing to put money in crumpled paper cup thrust out by beggar).

16. Margaret K. Rosenheim, *Shapiro v. Thompson: The Beggars Are Coming to Town*, 1969 SUP. CT. REV. 303, 303.

17. U.S. CONST, amend I. The drafters of the First Amendment left no record as to what they intended by this oft-quoted passage." MELVILLE B. NIMMER, NIMMER ON FREEDOM OF SPEECH, A TREATISE ON THE THEORY OF THE FIRST AMENDMENT § 1.01 (1984).

When this amendment was ratified, at least eight of the fourteen states in the Union prohibited begging.¹⁸ Today, several states still forbid such activity.¹⁹

Protected expression may be oral, written or symbolic conduct that is intended to be communicative.²⁰ Begging is a form of communication which often inextricably intertwines expression and conduct.²¹ "Even the statement 'I am hungry' communicates a fact of social existence of some relevance to public discourse The rudimentary nature of a communication cannot deprive it of all First Amendment protection."²² Consequently, begging is a clear example of communication that deserves full First Amendment protection.²³

The United States Supreme Court has not issued an opinion on individual beggars' rights to solicit funds. In November 1990, the Court declined an opportunity to end this controversy when it denied certiorari in *Young v. New York City Transit Authority*.²⁴ In *Young*, the court of appeals held that a transit authority regulation prohibiting begging and panhandling in the subway system did not violate the First Amendment.²⁵

At the same time, the Supreme Court has repeatedly upheld fifty-year-old rules declaring that solicitations from charitable and religious organiza-

18. *Loper v. New York City Police Dep't* 766 F. Supp. 1280,1287 (S.D.N.Y. 1991), *aff'd*, 999 F.2d 699 (2d Cir. 1993).

19. See, e.g., ALA. CODE § 13A-11-9(a)(1) (1982); ARE. REV. STAT. ANN. § 13-2905(AX3) (1989); COLO. REV. STAT. § 18-9-112(2)(a) (1986); DEL. CODE ANN. tit 11, § 1321(4) (1992); KAN. STAT. ANN. § 21-4108(e) (1988); LA. REV. STAT. ANN. § 14:107(3) (West 1986); MASS. GEN. LAWS ANN. ch. 272, § 63 (West 1990); MICH. COMP. LAWS ANN. § 750.167(1)(h) (West 1991); MINN. STAT. ANN. § 609.725(4) (West 1987); Miss. CODE ANN. § 97-35-37(g) (1972); VT. STAT. ANN. tit 13, § 3901 (1974); Wis. STAT. ANN. § 947.02(4) (West 1982). See also *Young v. New York City Transit Auth.*, 729 F. Supp. 341, 354 nn.23-26 (S.D.N.Y. 1990) (citing several statutes regulating begging). See also Knapp, *supra* note 8, at 407-08; Linda Wheeler, *Tour Group Is Fed Up with Pushy Panhandlers*, WASH. POST, May 12, 1993, at D3 [hereinafter Wheeler, *Tour Group*].

20. *Clark v. Community for Creative Non-Violence*, 468 U.S. 288, 293 (1984) (camping in national park constitutionally prohibited). Cf. *Loper*, 802 F. Supp. at 1046 (statute prohibiting begging in New York City parks unconstitutional).

21. *Loper*, 802 F. Supp. at 1038 (inherent message in the request); *Blair v. Shanahan*, 775 P. Supp. 1315,1322 (N.D. Cal. 1991). See also Rose, *supra* note 8, at 201-02. Cf. *Ulmer v. Municipal Court for Oakland-Piedmont Judicial Dist*, 127 Cal. Rptr. 445,447 (Ct. App. 1976) (begging and solicitation do not necessarily involve communication).

22. *City of Seattle v. Webster*, 802 P.2d 1333, 1342 (Wash. 1990), *cert. denied*, 111 S. Ct 1690 (1991).

23. Paul G. Chevigny, *Begging and the First Amendment: Young v. New York City Transit Authority*, 57 BROOKLYN L. REV. 525, 544 (1991).

24. 903 F.2d 146 (2d Cir.), *cert. denied*, 498 U.S. 984 (1990).

25. *Id.* at 147-48.

tions constitute protected speech.²⁶ The Court has enunciated the same First Amendment guarantee for others who solicit funds,²⁷ including professional fundraising groups,²⁸ non-profit groups²⁹ and political action

26. The right to engage in charitable solicitation has been recognized on several occasions by state and federal courts. *See, e.g.*, *United States v. Kokinda*, 497 U.S. 720,725 (1990); *Riley v. National Fed'n of the Blind*, 487 U.S. 781, 789 (1988); *Comelious v. NAACP Legal Defense & Educ. Fund, Inc.*, 473 U.S. 788, 797 (1985) (charity drives in federal offices); *Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 761 (1976) (charitable solicitations in residential neighborhoods clearly within First Amendment protections); *Pilsen Neighbors Community Council v. Netsch*, 960 F.2d 676,684 (7th Cir. 1992); *Famine Relief Fund v. State of W. Va.*, 905 F.2d 747,750 (4th Cir. 1990); *Blair v. Shanahan*, 775 F. Supp. 1315,1322 (N.D. Cal. 1991); *Indiana Voluntary Firemen's Ass'n v. Pearson*, 700 F. Supp. 421,437 (S.D. Ind. 1988) (comparing charity's own solicitation with that of professional solicitation); *People v. American Youth Sports Found.*, 239 Cal. Rptr. 621,623 (Cal. App. Dep't Super. Ct 1987); *State v. Events Int'l, Inc.*, 528 A.2d 458,460 (Me. 1987) (recognizing protection for professional solicitors' work for charities). *See also* *Hershkoff & Cohen*, *supra* note 14, at 904-06; *Rose*, *supra* note 8, at 206-07.

Similarly, religious solicitations have been upheld since 1940. *See* *Heffron v. International Soc'y for Krishna Consciousness, Inc. ("ISKCON")*, 452 U.S. 640,647 (1981) (religious practice involving solicitation of contributions); *Murdock v. Pennsylvania*, 319 U.S. 105, 110 (1943); *ISKCON v. New Jersey Sports*, 691 F.2d 155, 159 (3d Cir. 1982) (covering "unpopular" sects); *ISKCON v. City of Houston*, 482 F. Supp. 852, 857 (S.D. Tex. 1979), *rev'd*, 689 F.2d 541 (5th Cir. 1982); *Westfall v. Board of Comm'rs*, 477 F. Supp. 862, 865 (N.D. Ga. 1979); *McMurdie v. Douitt*, 468 F. Supp. 766, 772 (N.D. Ohio 1979) (solicitation for the Unification Church as a religious practice); *ISKCON v. Lentini*, 461 F. Supp. 49, 51 (E.D. La. 1978); *Holy Spirit Ass'n for the Unification of World Christianity v. Alley*, 460 F. Supp. 346, 347 (N.D. Tex. 1978); *Hall v. McNamara*, 456 F. Supp. 245, 246 (N.D. Cal. 1978).

27. *See, e.g.*, *ISKCON v. Lee*, 112 S. Ct. 2701, 2705 (1992); *Kokinda*, 497 U.S. at 725; *Riley*, 487 U.S. at 789; *Heffron*, 452 U.S. at 647; *Village of Schaumburg v. Citizens for a Better Env't*, 444 U.S. 620, 632-33, *reh'g denied*, 445 U.S. 972 (1980); *Cantwell v. Connecticut*, 310 U.S. 296, 306 (1940). As expected, lower courts have applied the same law. *See, e.g.*, *Ater v. Armstrong*, 961 F.2d 1224, 1228 (6th Cir. 1992); *United States v. Belsky*, 799 F.2d 1485, 1488 (11th Cir. 1986); *Association of Community Org. for Reform Now ("ACORN") v. City of Phoenix*, 603 F. Supp. 869 (D. Ariz. 1985), *aff'd on other grounds*, 798 F.2d 1260, 1268 (9th Cir. 1986); *ACORN v. Municipality of Golden*, 744 F.2d 739, 741 (10th Cir. 1984) (unconstitutional ordinance preventing door-to-door solicitation without exemption from city council); *Church of Scientology Flag Serv. Org. v. City of Clearwater*, 756 F. Supp. 1498, 1515 (M.D. Fla. 1991) ("Public solicitation is protected under the First Amendment because solicitation is a form of communication."); *Hillman v. Britton*, 168 Cal. Rptr. 852, 857-58 (Ct App. 1980).

28. *See, e.g.*, *Secretary of Md. v. Joseph H. Munson Co.*, 467 U.S. 947, 967-68 (1984) (invalidating percentage limits as protection against fraud); *Shannon v. Telco Communications, Inc.*, 824 F.2d 150, 152-54 (1st Cir. 1987); *Indiana Voluntary Firemen's Ass'n*, 700 F. Supp. at 437 (fee disclosure requirement impinging upon professional solicitor's First Amendment rights); *Telco Communications, Inc. v. Carbaugh*, 700 F. Supp. 294, 296 (E.D. Va. 1988); *Bellotti v. Telco Communications, Inc.*, 650 F. Supp. 149,152-53 (D. Mass. 1986) (percentage restriction on professional solicitor's compensation unconstitutional); *Heritage Pub. Co. v. Fishman*, 634 F. Supp. 1489, 1498-99 (D. Minn. 1986) (limit of costs of fundraising to 30% income directly and substantially limited speech); *Streich v. Pennsylvania Comm'n on Charitable Org.*, 579 F. Supp. 172,175 (M.D. Pa. 1984) (prior restraint unconstitutional when granting unbridled discretion to an individual to determine limits on speech); *Events Intern, Inc.*, 528 A.2d at 460 (unconstitutional requirement for disclosure of financial allocations). *See also* *Knapp*, *supra* note 8, at 416-17 (finding no distinction between professional fundraisers and beggars).

groups.³⁰ The rationale for allowing these groups to solicit funds is that their "solicitation is characteristically intertwined with informative and perhaps persuasive speech seeking support for particular causes or for particular views on economic, political, or social issues, and . . . without [such] solicitation the flow of such information and advocacy would likely cease."³¹

The Supreme Court should provide direction on beggars' rights to resolve the confusion created by the conflicting decisions in the lower courts. In general, the courts have been unable to agree on whether begging is speech or conduct, much less whether it is protected. Some courts have compared begging with charitable solicitation, which the Supreme Court has unequivocally cloaked with First Amendment protection; these courts have concluded that "[n]o distinction of constitutional dimension exists between soliciting funds for oneself and for the charities."³² In the view of these courts, beggars inform the public about societal conditions and the First Amendment protects such particularized messages.³³

Other courts have held that begging is conduct and behavior that is unworthy of First Amendment protection because it does not necessarily

29. *Thomas v. Collins*, 323 U.S. 516, 531 (1945) (soliciting funds for labor union); *City of Phoenix*, 798 F.2d at 1268 (advancing interests of low and moderate income people); *National Anti-Drug Coalition, Inc. v. Bolger*, 737 F.2d 717 (7th Cir. 1984) (supporting a "drug-free" society).

30. *Hynes v. Mayor & Council of Oradell*, 425 U.S. 610,614 (1976) (New Jersey assemblyman); *Ater*, 961 F.2d at 1228 n.4 ("Because anyone, from the Ku Klux Klan to the NAACP, may solicit but no one may undertake other expressive conduct in Kentucky's roads, the exception leaves all content on equal footing."); *Belsky*, 799 F.2d at 1488 (11th Cir. 1986) (solicitation by National Democratic Policy Committee examined); *United States v. Bjerke*, 796 F.2d 643,646 (3d Cir. 1986); *International Ass'n of Mach. and Aerospace Workers v. Federal Election Comm'n*, 678 F.2d 1092 (D.C. Cir.), *aff'd*, 459 U.S. 983 (1982) (corporate political action committee solicitation of contribution from employees); *Bread Pol. Action Comm. v. Federal Election Comm'n*, 635 F.2d 621 (7th Cir. 1980), *rev'd*, 455 U.S. 577 (1982) (political action committee solicitation for contributions); *Connecticut Citizens Action Group v. Town of Southington*, 508 F. Supp. 43, 45 (D. Conn. 1980) (protecting political speech).

31. *Village of Schaumburg v. Citizens for a Better Env't*, 444 U.S. 620, 632, *reh'g denied*, 445 U.S. 972 (1980).

32. *Loper v. New York City Police Dep't*, 802 F. Supp. 1029,1040 (S.D.N.Y. 1992), *aff'd*, 999 F.2d 699 (2d Cir. 1993) (declaring messages were the same and the only difference was the "eventual ends of the funds contributed"); *Blair v. Shanahan*, 775 F. Supp. 1315,1322 (N.D. Cal. 1991).

33. *Blair*, 775 F. Supp. at 1322-23; *City of Seattle v. Webster*, 802 P.2d 1333,1342 (Wash. 1990), *cert. denied*, H.I.S. Ct. 1690 (1991). However, some pessimists think that people will do very little with the information they receive from the beggars. "That the pleas of a beggar or professional fundraiser may change the way his listeners think about their world is often only a desirable side effect." *Blair*, 775 F. Supp. at 1323.

involve communication of information or opinion.³⁴ These courts have classified beggars' communication as "incidental speech" and distinguished it from that of charitable solicitations: "While organized charities serve community interests by enhancing communication and disseminating ideas, the conduct of begging and panhandling . . . amounts to nothing less than a menace to the common good."³⁵ In organized solicitation cases, the identification of the speaker is not dispositive of determining whether speech is protected under the First Amendment.³⁶ As to individual begging, however, it is the messenger, not the message, that keeps beggars from speaking freely.³⁷

There is no justification for distinguishing between beggars and organizations.³⁸ "Take away the status of the professional fundraiser, take away the nice clothing, take away the cleanliness that comes with regular access to showers and washing machines, and what is left is a person appealing for money" ³⁹ Beggars' speech should not be enjoined simply because they receive contributions for their own use in connection with their communication with the public.⁴⁰ "To refuse to extend the protection afforded

34. See, e.g., *Young v. New York City Transit Auth.*, 903 F.2d 146, 166 (2d Cir.), cert. denied, 498 U.S. 984 (1990) (describes begging as much more conduct than speech); *Ulmer v. Municipal Court for Oakland-Piedmont Judicial Dist.*, 127 Cal. Rptr. 445, 447 (Ct App. 1976).

35. *Young*, 903 F.2d at 156. "[B]egging in the subway often amounts to nothing less than assault." *Id.* at 158.

36. Eric Neisser, *Homeless Orators—Begging as Free Speech*, N.J. L.J., Feb. 22, 1990, at 12 (1990). The writer expresses a similar viewpoint:

It is the messenger or the message, not the medium that offends. Just as you will never find a statute banning the kissing of the flag, you will not see a subway regulation prohibiting the Junior League from "begging" for diabetics or Jerry Lewis from "begging" for children with muscular dystrophy.

Id.

37. *Loper v. New York City Police Dep'L*, 820 F. Supp. 1029,1037 (S.D.N.Y. 1992), *aff'd*, 999 F.2d 699 (2d Cir. 1993) (same message offered by charitable solicitors and beggars entitled to First Amendment protection); *Blair*, 775 F. Supp. at 1323.

38. Charities solicit and beggars beg or panhandle. The terms are synonymous. *Loper*, 802 F. Supp. at 1037; *Blair*, 775 F. Supp. at 1322 ("No distinction of constitutional dimension exists between soliciting funds for oneself and for charities."). "To beg is 'to ask for as a charity.'" *Loper*, 802 F. Supp. at 1037 (quoting WEBSTER'S NEW COUXCIATE DICTIONARY 100 (1978)). See also *Young*, 903 F.2d at 164-65 (Meskill, J., dissenting) (beggars and organized charities deserve the same protection); *Hershkoff & Cohen*, *supra* note 14, at 904-06; *Rose*, *supra* note 8, at 207.

39. *Buckrop & Miller*, *supra* note 10, at 92 (noting similarities between charitable solicitation and begging).

40. *Loper*, 802 F. Supp. at 1037, 1042; *Blair*, 775 F. Supp. at 1322. See also *Riley v. National Fed'n of the Blind*, 487 U.S. 781, 801 (1988) (speaker's right not lost just because she was compensated).

Some may argue that begging is commercial speech since the beggar has a financial motivation for speaking. *Loper*, 802 F. Supp. at 1038. However, this argument is of no moment since the First Amendment also protects commercial speech. *Id.* See also *Hershkoff & Cohen*, *supra* note 14, at 905 (begging is more than commercial speech).

organized solicitation to [beggars] . . . offend[s] logic . . . [and] the Constitution, which [was] designed to protect *individual* rights"⁴¹

In *International Society for Krishna Consciousness, Inc. v. Lee*,⁴² the Court held that port authority regulations restricting, inter alia, repeated solicitation of contributions in airport terminals satisfied a reasonableness requirement and were therefore constitutional.⁴³ In its decision, however, the Supreme Court cast doubt on the *Young* opinion, which upheld a *prohibition* of begging and panhandling in the subway system, when it ruled that face-to-face solicitation is entitled to First Amendment protection.⁴⁴ Unfortunately, because the solicitors in *Lee* were members of an organized religious group⁴⁵ whose solicitation rights have been upheld on numerous occasions, the question regarding individual begging remains unanswered.

In addition to court decisions on the issue, several states enforce laws that unreasonably control or completely prohibit begging.⁴⁶ In some states, organizations are allowed, with minimal restrictions, to solicit for charitable, religious or political causes. At the same time, these states expressly prohibit begging.⁴⁷ Such laws "treat solicitors standing side-by-side differently. If the solicitor is an organized charity, the solicitation is permitted.

41. Rose, *supra* note 8, at 210 (emphasis added). See also Hershkoff & Cohen, *supra* note 14, at 906-07; Pines, *supra* note 7 ("Nothing less than the First Amendment assures their right to meet us eye to eye to ask for help.").

42. 112 S. Ct. 2701 (1992) (per curiam).

43. *Id.* at 2706. The regulations permit solicitation on the sidewalks outside the terminal buildings. *Id.*

44. ISKCON v. Lee, 112 S. CL at 2705 (decision expressly limited to solicitation "in this case"). In *Lee*, the Supreme Court upheld a total ban on solicitations in public airport terminals. *Id.* at 2709. The ban was reasonable in light of the fact that the terminals were non-public; solicitation disrupted traffic flow in an already overcrowded arena; patrons were potential victims of duress and fraud; and solicitors could request funds on sidewalks located outside the terminal. *Id.* at 2708-09.

45. The solicitors were members of ISKCON, a religious sect which practiced *sankirtan*. *Id.* at 2703. This ritual involved public dissemination of religious literature and solicitation of funds to support the Krishna religion. *Id.*

46. See *supra* note 19. See also Knapp, *supra* note 8, at 407 & n.15.

47. Compare JACKSONVILLE, FLA., MUNICIPAL ORDINANCE § 404.102-404.103 (permitting registered charitable organizations to solicit contributions) and JACKSONVILLE, FLA., MUNICIPAL ORDINANCE § 330.105 (prohibiting begging in public places). Likewise, begging was not allowed in the New York subway system, but organizations were allowed to solicit for charitable, religious or political causes with few restrictions. N.Y. COMP. CODES R. & REGS, tit 21, §§ 1050.6(b), 1050.6(c) (1989). See also LA. REV. STAT. ANN. § 14:107(3) (West 1986) (distinguishing able-bodied beggars from religious, charitable or eleemosynary organizations, which are allowed to solicit). A Supreme Court Justice made a distinction in a 1980 opinion: "(N)othing in the United States Constitution should prevent residents of a community from making the collective judgment that certain worthy charities may solicit door to door while at the same time insulating themselves against panhandlers, profiteers, and peddlers." *Village of Schaumburg v. Citizens for a Better Env't*, 444 U.S. 620, 644, *reh'g denied*, 445 U.S. 972 (1980) (Rehnquist, J., dissenting).

If the solicitor is a beggar, the solicitation is criminal.⁴⁸ Under these statutes, peddlers, preachers and Salvation Army bands can solicit, but beggars cannot.⁴⁹ Such an arbitrary distinction is not constitutional. Most of the statutes that try to regulate begging in this manner effectuate an overbroad restraint on speech.⁵⁰ There are better ways to regulate beggars' communications.

II. Balancing Beggars' Rights with Public Interests

This section discusses begging cases which reveal the courts' view of the relationship between beggars' rights and public interests. "[T]he issues raised . . . expose not only the inevitable tension between individual rights and the interests of society but the very rationality of our society in its commitment to the rights protected by the First Amendment."⁵¹ The following cases help illustrate this tension between beggars' rights to communicate and the public's right to privacy and safety.

*Ulmer v. Municipal Court for Oakland-Piedmont Judicial District*⁵²

In *Ulmer*, a beggar soliciting funds in public was accused of violating section 647(c) of the California Penal Code which made "[e]very person . . . [w]ho accosts other persons in any public place or in any place open to the public for the purpose of begging or soliciting alms" guilty of disorderly conduct.⁵³ The legislative history of section 647(c) reveals the legislature's intent to allow charitable solicitation and to protect its citizens from aggressive beggars:

[Section 647(c)] is aimed at the conduct of the individual who goes about the streets accosting others for handouts. It is framed in this manner in order to exclude from one ambit of the law the blind or crippled person who merely sits or stands by the wayside, the Salvation Army worker who solicits funds for charity on the streets at Christmas time and others whose charitable appeals may well be left to local control.⁵⁴

The California Court of Appeals rejected the superior court's holding that the statute was unconstitutionally overbroad, explaining that the language in section 647(c) clearly distinguished peaceable begging, which was permitted, from intrusive begging, which was not permitted. "Walking up to and

48. *Loper v. New York City Police Dep't*, 802 F. Supp. 1029, 1040 (S.D.N.Y. 1992), *aff'd*, 999 F.2d 699 (2d Cir. 1993).

49. *Id.* at 1039 (only beggars subject to blanket restriction).

50. Knapp, *supra* note 8, at 422-23.

51. *Loper*, 802 F. Supp. at 1031.

52. 127 Cal. Rptr. 445 (a App. 1976).

53. *Id.* at 446-47. See also CAL. PENAL CODB § 647(c) (West 1961).

54. 127 Cal. Rptr. at 447 (citing APPENDIX TO THE JOURNAL OF THE ASSEMBLY, REG. SBSS. 1961, 2 REPORT OF ASSEMBLY INTERIM COMM. ON CRIM. PROC. 12-13 (1959-61)).

approaching another for the purpose of soliciting, as opposed to merely receiving donations, is prohibited"⁵⁵ The court therefore upheld the statute.

*C.C.B. v. State*⁵⁶

In *C.C.B.*, a child³⁷ challenged section 330.105 of the Jacksonville Municipal Ordinance, prohibiting begging in streets and public places.⁵⁸ A separate city ordinance allowed registered charitable organizations to exact contributions.⁵⁹

The state argued that the City of Jacksonville was properly fulfilling its responsibility of protecting its citizens from undue public annoyance and preventing obstruction of pedestrian and vehicular traffic.⁶⁰ Although the court recognized the city's authority to protect its citizens, it was not persuaded that the city had a sufficiently compelling reason to justify a total abridgment of beggars' freedom of speech:

That lofty goal must be measured and balanced against the right of those who seek welfare and sustenance for themselves, by their own hand and voice rather than by means of the muscle and mouths of others. We have learned through the ages that charity begins at home, and if so, the less fortunate of our societal admixture should be permitted, under our system, to apply self help.⁶¹

The court then reminded city representatives that they had the power to regulate the manner of begging with strict, definitive principles to further Jacksonville's interests without absolutely restricting begging.⁶²

*Young v. New York City Transit Authority*⁶³

In *Young*, another major case involving beggars' rights, the United States Court of Appeals for the Second Circuit announced a standard for

55. *Id.* at 448. The court decided that the meaning of the statute was clear enough to warn citizens that certain conduct was proscribed. Again the court used the term "conduct" to describe confrontational begging. *Id.*

56. 458 So. 2d 47 (Fla. Dist Ct App. 1984).

57. There is no information in the decision about the child's age. See generally J. ROZES, BEGGING—LES ENFANTS VAGABONDS (1900) (regarding children and juvenile delinquents begging).

58. 458 So. 2d at 48.

59. *Id.* See also JACKSONVILLE, FLA., MUNICIPAL ORDINANCE § 404.102 (charitable organizations allowed to solicit with permits).

60. 458 So. 2d at 48.

61. *Id.*

62. *Id.* at 50 (citing *People v. Fogelson*, 577 P.2d 677,700 (Cal. 1978)) (declining to undertake the legislative task of drafting such an ordinance).

63. 729 F. Supp. 341 (S.D.N.Y.), *rev'd and vacated*, 903 F.2d 146 (2d Cir.), *cert. denied*, 498 U.S. 984 (1990). The district court's decision barring enforcement of begging laws was

reviewing laws, such as section 1050.6 of Title 21 of the New York Compiled Codes of Rules and Regulations, prohibiting unauthorized begging in the New York subway system.⁶⁴ The New York City Transit Authority and other local transit authorities ("TA") were named as defendants.

The TA rationalized its restriction on beggars by arguing that begging was not expression, the subway was not a public forum, and the regulation was a reasonable time, place and manner restriction on passenger conduct.⁶⁵ Therefore, the TA contended, a restriction on begging was necessary to provide effective, safe, and reliable public transportation.⁶⁶

At the time section 1050.6 was drafted, begging was a pervasive problem throughout the New York subway system. Beggars moved about on subway cars, steps, walkways, escalators and crowded platforms, aggressively soliciting contributions from subway patrons. Passengers were often intimidated and harassed into making donations when beggars touched them, detained them or impeded their passage.⁶⁷

The three-judge appellate court panel held that because section 1050.6 involved some degree of communication, the principles announced in *United States v. O'Brien* should apply.⁶⁸ Under the *O'Brien* test, government interests were balanced against an individual's right to speak and a limitation on speech was justified if:

it [was] within the constitutional power of the Government; if it furthered] an important or substantial governmental interest; if the governmental interest [was] unrelated to the suppression of free expression; and if the incidental restriction on alleged First Amendment freedoms [was] no greater than [was] essential to the furtherance of that interest.⁶⁹

The *Young* court applied the *O'Brien* test and held that section 1050.6 was constitutional.⁷⁰ Undeniably, the TA has a compelling interest to protect its passengers from potential serious injury related to the "alarming

harshly criticized by mass transit authorities. See, e.g., *Court as Scapegoat*, *supra* note 6 (critics "holding Judge Sands responsible for the mass-transit hell under city streets").

64. "No person, unduly authorized . . . shall upon any facility or conveyance . . . solicit alms." N.Y. COMP. CODES R. & REGS. tit. 21. § 1050.6(b) (1989).

65. *Young*, 903 F.2d at 147.

66. *Id.* at 148.

67. *Id.* at 149,158. See also Paul Reidinger, *The Expressionists, When Is Conduct Speech?*, 76 A.B.A. J. 90,92 (Aug. 1990). Since non-obscene nude dancers were protected under the First Amendment and subway beggars were not, the author asked a rhetorical question, "Will subway beggars soon be doing stripteases?" implying that panhandling may not be allowed but beggars may legally strip for money. *Id.* at 90.

68. *Young*, 903 F.2d at 157 (citing *United States v. O'Brien*, 391 U.S. 367 (1968)).

69. 391 U.S. at 377. See also *Young*, 903 F.2d at 157-61 (analysis of facts under *O'Brien* standard).

70. 903 F.2d at 161 (regulation "more than satisfies the *O'Brien* standard").

harmful conduct" of aggressive beggars.⁷¹ The court also found that section 1050.6 was content-neutral, as required by *O'Brien*, because the proscribed conduct was unrelated to its communicative impact.⁷² Moreover, there were no less restrictive means available to maintain public safety in the mass transit system while trying to accommodate beggars' rights.⁷³ Therefore, "the exigencies created by begging and panhandling in the subway warrant[ed] the conduct's complete prohibition."⁷⁴ The court further ruled that beggars had ample alternative channels of communication because section 1050.6 prohibited begging only in the subway system, not throughout New York City.⁷⁵

*Blair v. Shanahan*⁷⁶

In *Blair*, Celestus Blair, Jr., a panhandler,⁷⁷ was destitute and homeless. After being arrested at least five times for violating section 647(c) of the California Penal Code, Blair challenged the statute on grounds of unconstitutionality.⁷⁸

The court's impression of section 647(c), reviewed fifteen years earlier in *Ulmer*, was unfavorable. In fact, District Court Judge Orrick stated: "A more encompassing prohibition of speech in a public forum would be difficult to create."⁷⁹ He was equally unimpressed with the argument that the statute was necessary to both avoid public annoyance and protect the public from coercive and intrusive begging.⁸⁰ The court ruled that neither of those purported interests was sufficiently compelling, nor was the statute narrowly tailored to sustain infringement of beggars' First Amendment freedom to speak in public.⁸¹ The court explained:

71. *Id.* at 158.

72. *Id.* at 159.

73. *Id.* at 159-60.

74. *Id.* at 159.

75. *Id.* at 160. The *Young* decision was a bittersweet victory for the TA. One representative told *Newsday*, "We can't be happy about it. It's really a victory over poor and unfortunate people." Hentoff. *No Speech Rights for Beggars—Justices Don't Say Why Charities Can Still Solicit Funds*, Los ANGELES DAILY J., Jan. 10, 1991, at 6.

76. 775 F. Supp. 1315 (N.D. Cal. 1991).

77. There is DO significant difference between the terms "beggar" and "panhandler." *Young*, 903 F.2d at 147 n.1. By the time Blair went to trial, he was gainfully employed and did not intend to resume begging. *Blair*, 775 F. Supp. at 1318, 1320.

78. *Blair*, 775 F. Supp. at 1318. Over 15 years after *Ulmer*, the California legislators had not changed one word of § 647(c). District Court Judge Orrick opined that state officials would continue to enforce that facially unconstitutional statute until a federal court took action. *Id.* at 1320.

79. *Id.* at 1324.

80. *Id.* "[P]reventing an intrusion on the public at large is no more compelling a justification for this limitation on speech than is avoiding annoyance." *Id.*

81. *Id.*

City streets are a public forum, one of the few remaining democratic spaces where the conventioner, the gawking tourist, the eager consumer, the city resident, and the needy may mingle freely. Under this statute, City authorities claim the power to remove from this public forum those that through the exercise of their First Amendment rights, plus additional unspecified conduct, make the rest of us uncomfortable. The speech of the needy around us may well be subjectively felt as an unwelcome intrusion by some, but the expressive freedom guaranteed by the Constitution has never been costless. That speech may not be barred by a statute such as this.⁸²

Judge Orrick acknowledged that state intervention was not completely thwarted by the ruling in *Blair*. The state could regulate intimidation, threats or coercion with separate laws intended to control that unwanted conduct.⁸³

*Loper v. New York City Police Department*⁸⁴

In the recent *Loper* decision, the district court reviewed section 240.35(1) of the New York Penal Law, a statute rooted in 1886 law, which made loitering and begging synonymous. "A person is guilty of loitering when he: . . . loiters, remains or wanders about in a public place for the purpose of begging . . ." ⁸⁵ In a four-year period, thousands of beggars were arrested under the statute.⁸⁶

In the *Loper* decision, the court listed four interests which have to be balanced to determine the constitutionality of the statute: the beggars' interests; the audience's interests; the public's interests; and the government's interest in protecting the public.⁸⁷ The beggars' interest is in soliciting funds and imparting the "critical message" that social and economic conditions and a lack of government services make begging necessary.⁸⁸ The audience and the public are interested in receiving free-flowing information, having their personal privacy respected, and avoiding fraud.⁸⁹ The privacy interests reach the "heart of one's right to be left alone, to decide whether or

82. *Id.* at 1325.

83. *Id.* at 1324 n.10.

84. 802 F. Supp. 1029 (S.D.N.Y. 1992).

85. N.Y. PENAL LAW § 240.35(1) (Consol. 1989). "Its post-independence genesis may be found in a 1788 statute that classified as disorderly persons 'all persons who go about from door to door or place themselves in the streets, highways or passages, to beg in the cities and towns _____'" 802 F. Supp. at 1032 (citation omitted).

86. 802 F. Supp. at 1033. *See generally Orders to Move On and the Prevention of Crime*, 87 YALE L.J. 603-26 (1978) (promoting statutes giving police authority to order loiterers and vagrants to move on as an alternative to arresting them under unconstitutional loitering and vagrancy laws).

87. 802 F. Supp. at 1041-48.

88. *Id.* at 1042.

89. *Id.*

not to even be an actual audience member, and to enjoy public facilities without interference."⁹⁰

Government officials attempted to justify the New York penal law as necessary to protect citizens from fraud.⁹¹ They contended that it was impossible to monitor whether beggars used money donated for "announced purposes" or for "more destructive ends, such as the purchase of tobacco, alcohol or drugs."⁹² Officials further stated that section 240.35(1) helped to maintain public order by curtailing aggressive begging, traffic congestion and interference with commercial business.⁹³

The court ruled that the statute was unconstitutionally overbroad to achieve those laudable objectives because the State of New York already had laws making it unlawful to block traffic, harass pedestrians, trespass, or commit extortion and fraud.⁹⁴ Notwithstanding the State's valid interests, "the interest in permitting free speech and the message begging sends about our society predominate[d]."⁹⁵

Each of the five decisions discussed above has had a significant impact on beggars' freedom of speech and illustrates the tension between the rights of beggars and the public's privacy interests. The aftermath of *Young* is illustrative of this impact. Immediately after the United States Court of Appeals for the Second Circuit released the *Young* opinion, officials in other cities began rousting beggars out of certain areas using *Young* as authority.⁹⁶

HI. Regulating Beggars' Speech to Protect Both the Beggars' First Amendment Rights and the Public's Rights of Privacy and Safety

Although beggars have a First Amendment right to beg, they do not have free rein to beg "at all times and places or in any manner that may be desired."⁹⁷ Even beggars and their lawyers have agreed that aggressive

90. *Id.* However, the right to privacy is tempered by the interest in exposure to expression. *Id.* at 1042-43.

91. *Id.* at 1046-47.

92. *Id.* at 1047 ("[P]anhandling is rife with possibilities for misleading those who are the subjects of the panhandler's entreaty.").

93. *Id.* at 1045-46.

94. *Id.*

95. *Id.* at 1047.

96. Chevigny, *supra* note 23, at 527 & n.10.

97. *ISKCON v. Lee*, 112 S. Ct 2701,2705 (1992); *Heffion v. ISKCON*, 452 U.S. 640,647 (1981). *See also* *Coroelious v. NAACP Legal Defense and Educ. Fund, Inc.*, 473 U.S. 788, 799-800 (1985). "The intent is not to single out the poor or the powerless . . . but to place limits on permissible practices for the benefit of the public-at-large." Nathanson, *supra* note 11, at 18.

beggars' conduct should be controlled because aggressive begging scares people, making it difficult for other beggars to receive donations.⁹⁸

However, "individuals in public places cannot expect the same degree of protection from contact with others as they are entitled to in their own homes."⁹⁹ People cannot demand privacy while strolling through a city park.¹⁰⁰ Nevertheless, some privacy rights exist even in a public forum. Consequently, a person's "right to be let alone"¹⁰¹ must be balanced with the beggars' right to communicate.¹⁰² The court in *Loper* laid out the following principle:

If there is a bedrock principle underlying the First Amendment, it is that the government may not prohibit the expression of one idea simply because society finds the idea itself offensive and disagreeable. This principle imposes an inevitable burden on a certain segment of the society that requires them to sacrifice a portion of their privacy and comfort as they enter into the interpersonal world of the society that surrounds them. This principle requires a trade-off: When leaving the insular security of one's home and becoming a participant in the world organized by society, one interacts with its elements. This necessarily includes those who have different viewpoints and background. Paying attention is not a requirement. Instead, ignoring or answering back with more speech is a reciprocal privilege.¹⁰³

Nevertheless, after balancing beggars' rights and the public's interests, speech restrictions are necessary in some situations.

A. Time, Place and Manner Restrictions

A possible approach to regulating beggars' communication in light of the balance of interests is to use content-neutral "time, place and manner" restrictions, which are constitutional as long as they serve a substantial government interest and do not unreasonably limit other means of communica-

98. See *Efuntade*, *supra* note 11. See also *infra* part III.A.3.

Beggars welcome protection of pedestrians against aggressive panhandling. "I've seen people be quite forceful. . . . That's not right to do that. If they get taken off the street, that would help me because people would feel better about panhandlers and not be so afraid." Linda Wheeler & Paul Duggan, *D.C. Officers Skeptical of Panhandling Limits*, WASH. POST, June 3, 1993, at B1 (interviewing panhandler on the street). "Lawyers for the homeless agreed that their clients would conform to restrictions placed on recognized charities—no soliciting on subway trains or within 25 feet of token booths." Donald Dilworth, *Give Me Liberty—or Some Spare Change*, TRIAL, May 1990, at 16.

99. *C.C.B. v. State of Florida*, 458 So. 2d 47, 49 (1984). See also *Loper*, 802 F. Supp. at 1043-44.

100. 802 F. Supp. at 1043-45 (comparing privacy interest in walking through courthouse corridor to a walk in the park and privacy in one's home).

101. *Olmstead v. United States*, 277 U.S. 438, 478 (1928) (Brandeis, J., dissenting).

102. *Rowan v. United States Post Office Dep't*, 397 U.S. 728, 736 (1970).

103. *Loper*, 802 F. Supp. at 1047.

tion.¹⁰⁴ State and federal governments should promulgate and enforce time, place and manner restrictions to protect beggars and the public. In accordance with organized solicitation principles, restrictions on begging in public places, traditionally reserved or designated for public expression, should be closely examined, thus ensuring that they serve a compelling government interest in a manner that is both unrelated to the content of the expression, and evenhandedly applied to *all* who desire to solicit funds.¹⁰⁵

In this context, courts have held that legitimate government interests include promoting motorists' safety,¹⁰⁶ preventing crime,¹⁰⁷ avoiding pedestrian and traffic congestion,¹⁰⁸ protecting citizens' privacy,¹⁰⁹ preventing fraud,¹¹⁰ preventing duress,¹¹¹ and promoting the general public safety,

104. *City of Renton v. Playtime Theatres*, 475 U.S. 41, 48 (1986).

105. *ISKCON v. Ue*, 112 S. CL 2701,2709 (1992) (if ISKCON is given access to solicit in airports, "so too must other groups"); *Frisby v. Schuitz*, 487 U.S. 474, 481 (1988); *Heffron v. ISKCON*, 452 U.S. 640,648-49 (1981); *Ater v. Armstrong*, 961 F.2d 1224, 1227 (6th Cir.), *cert. denied*, 113 S. Ct. 493 (1992) (statute applies to all who solicit contributions in the roadways); *ACORN v. St. Louis County*, 930 F.2d 591, 594 (8th Or. 1991) (ordinance content neutral because justification of solicitors' and motorists' safety unrelated to content of speech); *ACORN v. City of Phoenix*, 798 F.2d 1260, 1267 (9th Cir. 1986).

106. *Ater*, 961 F.2d at 1229 (promoting legitimate goals of roadway safety by prohibiting solicitation of funds on Kentucky roadway); *St. Louis County*, 930 F.2d at 596 ("The government need not wait for accidents to justify safety regulations.")-

107. *Hynes v. Mayor & Council of Oradell*, 425 U.S. 610,618-19 (1976); *City of Watseka v. Illinois Pub. Action Council*, 796 F.2d 1547, 1551 (7th Cir. 1986), *aff'd*, 479 U.S. 1048, *reh'g denied*, 480 U.S. 926 (1987); *Pennsylvania Alliance for Jobs & Energy v. Council of Munhall*, 743 F.2d 182,187 (3d Cir. 1984) (holding time-of-day restrictions served interests in preventing crime and protecting privacy); *ACORN v. City of Frontenac*, 714 F.2d 813, 817 (8th Cir. 1983) (city has duty to regulate for crime protection).

108. *Heffron*, 452 U.S. at 650-52 (face-to-face solicitation more likely to impede normal traffic flow); *Ater*, 961 F.2d at 1229; *St. Louis County*, 930 F.2d at 594 (government interest in traffic efficiency is significant).

109. *Ward v. Rock Against Racism*, 491 U.S. 781, 796 (1989) (protect public from unwelcome noise); *Hynes*, 425 U.S. at 616-17; *United States v. Belsky*, 799 F.2d 1485,1489 (11th Cir. 1986) (upholding postal service interest in flow of traffic to and from postal facility); *City of Watseka*, 796 F.2d at 1551; *Wisconsin Action Coalition v. City of Kenosha*, 767 F.2d 1248,1251 (7th Cir. 1985) (securing citizens' peaceful enjoyment of their homes).

110. *Lee*, 112 S. Ct. at 2708 ("unsavory solicitors] can... commit fraud"); *Riley v. National Fed'n of the Blind*, 487 U.S. 789,792 (1988) (protecting public from fraud is sufficiently substantial interest); *Femandes v. Limmer*, 663 F.2d 619,629 (5th Cir. 1981) (fraud statute violated First Amendment); *Loper v. New York City Police Dep't*, 802 F. Supp. 1029, 1046-47 (S.D.N.Y. 1992), *aff'd*, 999 F.2d 699 (2d Cir. 1993). Some beggars admit that a few people believe they are homeless when they are not homeless. *Mooar*, *supra* note 7 (beggars renting nice apartment in the suburbs); *Wheeler, Panhandlers*, *supra* note 10, at B4 (contributor "duped" by panhandler). *See also Rose*, *supra* note 8, at 217-18 ("Not all beggars are as they appear; some are indeed 'con men' who have homes, are on welfare, or feel that they can make more money by begging than by working."*).

111. *Lee*, 112 S. CL at 2708 ("face-to-face solicitation presents risks of duress that are an appropriate target of regulation").

health, welfare and convenience.¹¹² Nevertheless, in compliance with the *O'Brien* test, regulations protecting these government interests must be narrowly tailored to achieve the government's goals without unnecessarily intruding upon beggars' speech.¹¹³ Furthermore, it must leave open ample alternative channels of communication to beggars.¹¹⁴ The balance of this Article therefore analyzes time, place and manner restrictions which have been properly applied to other solicitors and should fairly be applied to beggars.

1. Time Restrictions: When Shall They Beg?

At times begging poses particular hazards; thus reasonable restrictions should be permitted to regulate such conduct during certain hours. For example, traffic flow and safety concerns may necessitate a prohibition against begging in places like Grand Central Station during rush hour.¹¹⁵

The legitimate government interests most often stated for time-of-day restrictions, primarily applied in the evening and after dark, have been protection of the citizens' privacy and prevention of crime.¹¹⁶ Most hourly constraints, however, have been struck down as unconstitutional because they prohibited speech "before [a word] . . . [was] even uttered" and were not narrowly tailored to accomplish the proposed goals of preventing crime or undue infringement on public privacy.¹¹⁷ For example, courts have in-

112. *Heffron*, 452 U.S. at 654 (valid objectives to serve substantial state interest).

113. *St. Louis County*, 930 F.2d at 595-97. See also *Heffron*, 452 U.S. at 650-51; *New Jersey Citizen Action v. Edison Township*, 797 F.2d 1250,1266 (3d Cir. 1986) ("Decisions involving the First Amendment often require difficult adjustments of the rights of individuals and the legitimate aims of government.").

114. *Comelious v. NAACP Legal Defense & Educ. Fund*, 473 U.S. 788, 808 (1985) (non-public forum rarely the only way of contacting a particular audience); *St. Louis County*, 726 F. Supp. at 754 (allowing solicitation while walking down the median or using lane closest to the median).

115. *Loper*, 802 F. Supp. at 1040.

116. See *City of Waseka v. Illinois Pub. Action Council*, 796 F.2d 1547, 1550-51 (7th Cir. 1986). *aff'd*, 479 U.S. 1048 (1987), *reh'g denied*, 480 U.S. 926 (1987); *ACORN v. City of Frontenac*, 714 F.2d 813,817 (8th Cir. 1983); *New York Community Action Network, Inc. v. Town of Hempstead*, 601 F. Supp. 1066, 1069-70 (E.D.N.Y. 1984); *Pennsylvania Pub. Interest Coalition v. York Township*, 569 F. Supp. 1398, 1402-03 (M.D. Pa. 1983); *Citizens for a Better Env't v. Village of Olympia Fields*, 511 F. Supp. 104, 107 & n.5 (N.D. Ill. 1980) (hinting that decision against constitutionality might be different if canvassers were soliciting after 9:00 p.m. or late evening when residents would be resting); *Connecticut Citizens Action Group v. Town of Southington*, 508 F. Supp. 43,45-47 (D. Conn. 1980) (much careful regard for First Amendment rights warranted).

117. *City of Waseka*, 796 F.2d at 1555-56; *New York Community Action Network, Inc. v. Town of Hempstead*, 601 F. Supp. 1066, 1069-70 (E.D.N.Y. 1984) (ordinance invalid because crime and annoyance not more likely to occur after dark); *Citizens for a Better Env't*, 511 F. Supp. at 106-07 (no showing that crime occurs more often after dark); *Alternatives for Cal. Women, Inc. v. County of Contra Costa*, 193 Cal. Rptr. 384, 391 (Q. App. 1983). In two centuries, the

validated hourly restrictions when begging was prohibited during certain hours or on particular days of the week. The courts reasoned that solicitors would have been deprived of the opportunity to seek funds at the times solicitation would be most effective.¹¹⁸ In other words, time-based restrictions are a plausible method of protecting the public's privacy and safety interests, but they must be narrowly tailored to protect beggars' rights as well.

2. Place Restrictions: Where Shall-They Beg?

The First Amendment does not guarantee access to all government-owned or government-controlled property.¹¹⁹ However, beggars should be given the same access granted to organized solicitors. Therefore, beggars should be permitted to solicit contributions wherever organized solicitors are allowed to seek donations. Likewise, they should be prohibited from begging wherever organizations may not solicit. The constitutionality of place restrictions depends upon the forum beggars select.¹²⁰ There are three types of fora where beggars are likely to engage in begging: traditional public fora, designated public fora and non-public fora.¹²¹

Supreme Court has not sustained prior restraints on pure speech rights. *Auburn Police Union v. Carpenter*, 798 F. Supp. 819, 824 (D. Me. 1992).

118. *City of Watseka*, 796 F.2d at 1556 (unconstitutional limitation of solicitation to hours between 5:00 p.m. and 9:00 p.m.); *City of Frontenac*, 714 F.2d at 820 (holding ordinance prohibiting door-to-door soliciting and canvassing between 6:00 p.m. and 9:00 p.m. on weekdays not narrowly tailored to advance city's legitimate objectives and violative of First Amendment rights). See also *New York Community Action Network, Inc.*, 601 F. Supp. at 1070 (most working people away from home until 6:00 p.m.).

119. *ISKON v. Lee*, 112 S. Ct. 2701, 2705 (1992); *United States v. Grace*, 461 U.S. 171, 178 (1983). See generally Harry Kalven, Jr., *The Concept of the Public Forum: Cox v. Louisiana*, 1965 SUP. CT. REV. I.

120. *Lee*, 112 S. Ct. at 2705-06; *Comelious v. NAACP Legal Defense & Educ. Fund, Inc.*, 473 U.S. 788, 797 (1985); *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 44 (1983); *Heffron v. ISKCON*, 452 U.S. 640, 650-51 (1981); *Lehman v. City of Shaker Heights*, 418 U.S. 298, 302 (1974) (need to know the history of the place); *ACORN v. St. Louis County*, 930 F.2d 591, 594 (8th Cir. 1991); *United States v. Belsky*, 799 F.2d 1485, 1488 (11th Cir. 1986).

121. *Lee*, n2S.Ctat2105; *Perry Educ. Ass'n*, AGO U.S. at 45-46. See also *Comelious*, 473 U.S. at 800-02; *Hague v. Committee for Indus. Org.*, 307 U.S. 496, 515-16 (1939):

The privilege of a citizen of the United States to use the streets and parks for communication of views on national questions may be regulated in the interest of all; it is not absolute, but relative, and must be exercised in subordination to the general comfort and convenience, and in consonance with peace and good order, but it must not, in the guise of regulation, be abridged or denied.

a. Traditional Public Fora

Begging is entitled to First Amendment protection in most traditional public fora.¹²² Traditional public fora are places which have been traditionally devoted to assembly and debate.¹²³ Consequently, regulation of speech in traditional public fora is subject to the highest scrutiny.¹²⁴ Public streets, city roadways and parks are traditional public fora "immemorially [] held in trust for the use of the public."¹²⁵ Public sidewalks,¹²⁶ bandshells in public parks,¹²⁷ state capitol grounds¹²⁸ and public bus terminals are additional examples of public fora.¹²⁹

In traditional public fora, people can normally control whether they listen to what is happening around them. They can also avert their eyes or walk away. In most instances, restrictions on a speaker's right to express herself in these fora may be unconstitutional because of the diminished privacy interests in such places.¹³⁰ However, restrictions may be permissible when the public forum holds a captive audience, in which case the confines of the area prevent escape from the unwanted speech.¹³¹

122. *Rose, supra note 8*, at 205.

123. *Perry Educ. Ass'n*, 460 U.S. at 45; *Hague*, 307 U.S. at 515.

124. *Lee*, 112 S. Ct. at 2705-06; *Frisby v. Schultz*, 487 U.S. 474, 481 (1988) (residential street); *Perry Educ. Ass'n*, 460 U.S. at 45-46; *Hague*, 307 U.S. at 515-16 (1939) (streets and parks); *ACORN v. City of Phoenix*, 798 F.2d 1260, 1267 (9th Cir. 1986).

125. *Hague*, 307 U.S. at 515-16. *See also Frisby*, 487 U.S. at 480-81 (1988) (public street includes those running through residential neighborhoods); *Ater v. Armstrong*, 961 F.2d 1224, 1227 (6th Cir.), *cert denied*, 113 S. Ct. 493 (1992) (Kentucky streets called traditional public fora); LUCIAS J. BARKER & TWILEY W. BARKER, JR., *CIVIL LIBERTIES AND THE CONSTITUTION* 114-26 (6th ed 1990) (stating how and under what conditions the state may control solicitation in streets and parks).

126. *United States v. Grace*, 461 U.S. 171, 179 (1983) (sidewalks around Court indistinguishable from any other sidewalk in the nation's capital). *Cf. Carreras v. City of Anaheim*, 768 F.2d 1039, 1048 (9th Cir. 1985) (invalidating statute which denied solicitation on exterior of Anaheim stadium and walkways outside Anaheim Convention Center).

127. *Ward v. Rock Against Racism*, 491 U.S. 781, 791, 797-802 (1989).

128. *Edwards v. South Carolina*, 372 U.S. 229, 235-39 (1963) (state capitol grounds traditionally open to public); *Adderley v. Florida*, 385 U.S. 39, 41 (1966).

129. *Wolin v. Port of New York Auth.*, 392 F.2d 83, 89 (2d Cir. 1968) (bus terminal resembles thoroughfare with all its shops, restaurants and theaters). *See also ISKCON v. Lee*, 112 S. Ct. 2701, 2707 (1992) (court distinguishing privately held transportation centers from publicly owned parks and airports).

130. *Loper v. New York City Police Dep't*, 802 F. Supp. 1029, 1043-44 (S.D.N.Y. 1992), *aff'd*, 999 F.2d 699 (2d Cir. 1993) (enforced even when the expression is obscene or offensive).

131. *Id.* at 1044-45. Here, the court seems to agree with *Young*, since *Young* involved unwilling subway riders who were trapped in the transit system. *See also Rose, supra note 8*, at 218-19.

b. Designated Public Fora

Begging is also entitled to First Amendment protection in designated public fora.¹³² Designated public fora is public property, such as municipal auditoriums and university meeting rooms open to students, which the government opens to part or all of the public for use as a place for expressive activity.¹³³ As in traditional fora, regulation of speech in designated public fora is subject to the highest scrutiny.¹³⁴

c. Non-Public Fora

The third type of fora is non-public fora, public property that is neither traditional nor designated for expressive activity.¹³⁵ Non-public fora include ingress and egress walkways to post office buildings,¹³⁶ sidewalks and streets on military reservations,¹³⁷ public buses,¹³⁸ subway and street cars,¹³⁹ jails and prisons,¹⁴⁰ publicly owned airport terminals,¹⁴¹ govern-

132. *Rose*, *supra* note 8, at 205.

133. *Lee*, 112 S. Ct at 2705; *Cornelius v. NAACP Legal Defense & Educ. Fund*, 473 U.S. 788, 800 (1985); *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 45 (1983); *Widmar v. Vincent*, 454 U.S. 263,267 (1981) (students use of state university's meeting facilities created public fora). *Cf. Garnett v. Renton Sen. Dist. No. 403.987 F.2d 641* (9th Cir. 1993) (high school students entitled to hold religious meetings in school facilities). *But see Perry Educ. Ass'n*, 460 U.S. at 46 (not required to retain openness indefinitely).

134. *Ue*, 112 S. Ct at 2705-06; *Frisby v. Schultz*, 487 U.S. 474, 481 (1988) (residential street); *Perry Educ. Ass'n*, 460 U.S. at 45-46; *Hague v. Committee for Indus. Org.*, 307 U.S. 496, 515-16 (1939) (streets and parks); *ACORN v. City of Phoenix*, 798 F.2d 1260, 1267 (9th Cir. 1986).

135. *Perry Educ. Ass'n*, 460 U.S. at 46 (First Amendment does not guarantee access to all property owned and controlled by the government). *See also Cornelius*, 473 U.S. at 811 (non-public forum "not dedicated to general debate or the free exchange of ideas").

136. *United States v. Kokinda*, 497 U.S. 720,737 (1990); *United States v. Belsky*, 799 F.2d 1485, 1489 (11th Cir. 1986) (intended to accommodate post office customers); *United States v. Bjerke*, 796 F.2d 643, 645, 648 (3d Cir. 1986) (operations at McKnight post office substantially affected by solicitors); *National Anti-Drug Coalition v. Bolger*, 737 F.2d 717, 727-28 (7th Cir. 1984).

137. *Greer v. Spock*, 424 U.S. 828, 838 (1976).

138. *Lehman v. City of Shaker Heights*, 418 U.S. 298, 306 (1974) (Douglas, J., concurring) (city ownership of street cars and buses does not create a public forum).

139. *Lehman*, 418 U.S. at 304 ("No First Amendment forum is here to be found."); *Young v. New York City Transit Auth.*, 903 F.2d 146,161-62 (2d Cir.), *cert. denied*, 498 U.S. 984 (1990). "Moreover, the subway, unlike city streets, is not a public forum. Thus, proscribing begging in the subway could be viewed as a reasonable time, place, and manner restriction on the beggar's right to speech." *Blair v. Shanahan*, 775 F. Supp. 1315, 1322 n.5 (N.D. Cal. 1991).

140. *Jones v. North Carolina Prisoners' Labor Union, Inc.*, 433 U.S. 119, 130 (1977); *Adderley v. Florida*, 385 U.S. 39, 47 (1966) (for security purposes, portion of jail grounds off-limits even for free speech activities).

141. *ISKCON v. Lee*, 112 S. Ct. 2701, 2708 (1992). Until *Ue* was decided, the courts of appeal were split on the question of whether airports were public fora. *Id.* at 2705 & n.2. *See also* 14 C.F.R. § 159.94 (1993) (Federal Aviation Administration's regulations regarding solicitation of funds in airports); Barbara L. Hall Comment. *The Second Circuit Takes Off in a New Direction:*

ment office buildings,¹⁴² race tracks and sports stadiums,¹⁴³ schools, hospitals, public libraries, apartment hallways, and city council chambers.¹⁴⁴ Solicitation by organizations has been disallowed in these places; hence, they should be off-limits to beggars as well:

When self-governing men demand freedom of speech they are not saying that every individual has an inalienable right to speak whenever, wherever, however he chooses. . . . Anyone who would . . . irresponsibly interrupt the activities of a lecture, a hospital, a concert hall, a church, a machine shop, a classroom, a football field, or at a home, does not thereby exhibit his freedom. Rather he shows himself to be a boor, a public nuisance, who must be abated, by force if necessary.¹⁴⁵

In non-public fora, place restrictions are held only to a reasonableness standard provided they do not suppress speech based on disagreement with the speaker's viewpoint.¹⁴⁶

d. Situations Warranting Reasonable Restrictions or Prohibitions

Certain places pose particular hazards or concerns which warrant reasonable restrictions or prohibitions on begging activity.

(1) Begging in the Streets

Begging in the streets should be forbidden absolutely.¹⁴⁷ Highway begging is a serious problem in many metropolitan areas. Beggars in some cities converge on cars in traffic and harass the occupants for contributions. Moreover, some beggars set up street enterprises: they solicit donations to

Airport Terminals Deemed Nonpublic Fora in International Society for Krishna Consciousness, Inc. v. Lee, 66 ST. JOHN'S L. REV. 207, 213-16 (1992) (submitting that the Second Circuit erred in holding that airport terminals are non-public fora and beseeching the Supreme Court to resolve the controversy); Deborah Squiers, *Airport Ban on Begging Sustained: Terminals Declared Not Public Forums*, 205 N.Y. L.J., Feb. 11, 1991, at 1.

142. *Cornelius v. NAACP Legal Defense & Educ. Fund*, 473 U.S. 788, 797 (1985).

143. *ISKCON v. New Jersey Sports*, 691 F.2d 155, 161-62 (3d Cir. 1982) (solicitation ban protects patrons unable to escape from unwanted intrusions).

144. *Grace Bible Fellowship, Inc. v. Maine Sen. Admin. Disc.*, 941 F.2d 45, 47 (1st Cir. 1991); *Glover v. Cole*, 762 F.2d 1197, 1201-03 (4th Cir. 1985) (enforcement of state policy prohibiting solicitation of donations by non-school-sponsored groups not violative of First Amendment); *Wolin v. Port of New York Auth.*, 392 F.2d 83, 90 & n.8 (2d Cir. 1968) (citations omitted). See also John Sarna, *Advocates Are Cheered by Ruling on Begging*, NAT'L L.J., Feb. 12, 1990, at 17 (quoting Professor Tribe: "[S]pecial purpose places [are public fora where] people can expect to be protected from being accosted.").

145. ALEXANDER MEIKLEJOHN, *POLITICAL FREEDOM* 25 (1965).

146. *ISKCON v. Lee*, 112 S. CL 2701, 2705-06 (1992) (reasonable regulations not suppressing speech due to disagreement with the content of the speech allowed); *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 46 (1983).

147. *ACORN v. City of Phoenix*, 798 F.2d 1260, 1268-70 (9th Cir. 1986); *ACORN v. St Louis County*, 726 F. Supp. 747, 752 (E.D. Mo. 1989) (upholding St. Louis ordinance prohibiting soliciting while standing on roadway).

reserve parking spaces for drivers on busy streets where parking is scarce, or wash car windows when the driver pauses at a traffic light.¹⁴⁸

Highway begging can also be dangerous. Beggars who walk with moving traffic can sustain serious injury or death. Such injuries occur when beggars approach occupants of cars, misjudge the sequence of traffic lights and fail to return to a safe place before the light changes.¹⁴⁹

Begging on streets also creates traffic congestion. It exacerbates traffic delays and backups because of the response it requires from the occupants of vehicles on the road. The donor must reach for money and replace a wallet or purse before returning her attention to driving the vehicle.¹⁵⁰ For the reasons stated above, the government has obvious and compelling interests in prohibiting begging on the streets:

[T]here are indeed substantial differences in nature between a street, kept open to motorized vehicle traffic, and a sidewalk or public park. A pedestrian ordinarily has an entitlement to be present upon the sidewalk or on the grounds of a park and thus is generally free at all times to engage in expression and public discourse at such locations. This is obviously not true of streets continually filled with pulsing vehicular traffic. Consequently, more so than with sidewalks or parks, courts have recognized a greater government interest in regulating the use of city streets.¹⁵¹

Thus, the dangers of begging in the streets warrant place restrictions prohibiting such activity.

148. REPORT ON PANHANDLING, *supra* note 9; *City of Phoenix*, 798 R2d at 1270-71 n.11 (statute prohibiting people from soliciting contributions from occupants of any vehicle property promoted public peace and protected motorists from harassment as they were temporarily confined in their vehicle waiting for the traffic light to change). See generally MELVILLE B. NIMMER, NIMMER ON FREEDOM OF SPEECH, A TREATISE ON THE THEORY OF THE FIRST AMENDMENT § 1.02 [F]2] (1984); G. Michael Taylor, Comment, *I'll Defend to the Death Your Right to Say It ...But Not to Me—The Captive Audience Corollary to the First Amendment*, 1983 S. III. U. L.J. 211,211-12; Margaret A. Warder, *Crack Down on "Squeegees," Those Street-Corner Extortionists*, N.Y. TIMES, Dec. 21, 1993, at A29 (window washers damage cars when donations are denied).

149. Moar, *supra* note 7, at B5 (where interviewee worried that someone was going to get killed). See also *St. Louis County*, 930 F.2d at 593-94, 596; *City of Phoenix*, 798 F.2d at 1269; Matthew Kelly, *Bugged by Beggars*, WASH. POST, May 15, 1993, at A24 (where editorialist opined that motorists are entitled to "panhandlers sanctuary" in their cars).

150. *City of Phoenix*, 798 F.2d at 1268-69. However, "successful solicitation goes beyond pure speech in the response it demands on the part of the audience [by requiring] individuals to respond by searching for currency and passing it along to the solicitor." *Id.* at 1269. See also *United States v. Kokinda*, 497 U.S. 720, 734 (1990) (similar pedestrian donor's response).

151. *City of Phoenix*, 798 F.2d at 1267 (declining to decide whether stations were perpetual public fora or public fora only while in use by motor vehicles). See also *Cox v. New Hampshire*, 312 U.S. 569, 576 (1941) (cities may constitutionally prohibit parades and demonstrations on streets without special permit).

(2) Begging on Sidewalks

Begging should be permitted on sidewalks, assuming there is no fence or other indication that a special enclave is intended.¹⁵² For example, the sidewalks bordering the United States Supreme Court building should be open for begging because they "compris[e] the outerbanks of the Court grounds [and] are indistinguishable from any other sidewalks . . . which are normally open for expressive activity."¹⁵³

Not every sidewalk, however, is a public forum.¹⁵⁴ In *United States v. Kokinda*,¹⁵⁵ the United States Supreme Court held that regulations prohibiting solicitation on walkways leading to post offices did not violate the First Amendment.¹⁵⁶ The Court declared that the postal service's compelling interests in preventing traffic congestion and disruption of postal service business were sufficient to sustain the constitutionality of such total bans on solicitation.¹⁵⁷

Begging should not be permitted on such walkways; they are not thoroughfares.¹⁵⁸ Rather, they are on government property, owned by the postal service and dedicated solely for the purpose of providing an ingress or egress for customers who patronize the post office.¹⁵⁹ The fact that postal entrances are open to the public does not establish them as traditional public fora.¹⁶⁰

For national defense reasons, begging also should not be permitted on sidewalks inside military reservations¹⁶¹ which are separated from city streets and sidewalks.¹⁶² Similarly, begging should be banned on certain sidewalks around the United Nations building.¹⁶³ Like other solicitors, beggars would block entrances and exits, thereby making it difficult for people

152. *United States v. Grace*, 461 U.S. 171,180 (1983). *See also* *ISKCON v. Lee*, 112 S. Ct. 2701, 2706 (1992) ("separation from acknowledged public areas may serve to indicate (hat the separated property is a special enclave subject to greater restriction").

153. *Grace*, 461 U.S. at 179.

154. *See United States v. Belsky*, 799 F.2d 1485, 1488-89 (11th Cir. 1986); *United States v. Bjerke*, 796 F.2d 643, 648 (3d Cir. 1986) (post office sidewalks should not be used to solicit funds).

155. 497 U.S. 720 (1990).

156. *Id.* at 731-37.

157. *Id.* at 732-36.

158. *Id.* at 727; *Bjerke*, 796 F.2d at 648-49 (post office walkways cannot be confused with municipal sidewalks).

159. *Kokinda*, 497 U.S. at 727-28.

160. *Id.* at 728.

161. *Greer v. Spock*, 424 U.S. 828, 838 (1976).

162. *Id.* at 830 (civilians free to visit but not to solicit at Fort Dix).

163. *ISKCON v. City of New York*, 504 F. Supp. 118, 126-29 (S.D.N.Y. 1980) (solicitation obstructed traffic flow and heightened security risks).

to enter or leave the building quickly, and preventing law enforcement officers from monitoring security.¹⁶⁴

Begging on sidewalks within close proximity to automated teller machines ("ATMs") and banks should also be prohibited.¹⁶⁵ Bank customers conducting financial transactions at ATMs are easily intimidated by beggars asking for money. These customers comprise a captive audience that is both exposed and vulnerable. In fact, many of these customers have stated they have paid "extortion money" to avoid being robbed.¹⁶⁶

(3) Begging in Parks

Begging in parks should be restricted.¹⁶⁷ The government has a substantial interest in keeping parks intact and attractive for the millions of people who visit them. These parks may become damaged or inaccessible to visitors if unrestricted begging is permitted.¹⁶⁸ "Lafayette Park [in Washington, D.C.] and others like it are for *all* people, and their rights are not to be trespassed even by those who have some 'statement' to make."¹⁶⁹ In light of the substantial government interest in protecting the parks, reasonable restrictions on begging in these areas should be allowed.

(4) Begging at Special Events

Begging during special events should be limited to particular areas. In *Heffron v. International Society for Krishna Consciousness, Me.*,¹⁷⁰ the Supreme Court held that Minnesota state fair officials could restrict an organization's solicitation of donations to an assigned booth in a particular location at the fair.¹⁷¹ Solicitors were permitted to move freely to speak with fairgoers, but requests for funds could be made only from their as-

164. *Id.* at 120-22.

165. *Loper v. New York City Police Dep't*, 802 F. Supp. 1029,1040 (S.D.N.Y. 1992), *aff'd*, 999 F.2d 699 (2d Cir. 1993) (regulation prohibiting begging in immediate vicinity of ATMs would probably survive scrutiny).

166. REPORT ON PANHANDLING, *supra* note 9, at 3.

167. *Clark v. Community for Creative Non-Violence*, 468 U.S. 288, 294-99 (1984). *See also* National Capital Region Parks, 36 C.F.R. § 7.96(h) (1993) (soliciting money prohibited); National Archives & Records Admin., 36 CFJL § 1280.8(d) (1993) (no charitable, commercial or political soliciting allowed). *Cf. Hague v. Committee for Indus. Org.*, 307 U.S. 496, 515 (1939) (public parks historically available for exercising rights); *Loper*, 802 F. Supp. at 1044 & n.21.

168. *Clark*, 468 U.S. at 298.

169. *Id.* at 296, 300 (Burger, C.J., concurring) (emphasis added).

170. 452 U.S. 640,654(1981).

171. *Heffron*, 452 U.S. at 654-55. *Accord Hynes v. Metropolitan Gov't of Nashville & Davidson County*, 478 F. Supp. 9 (M.D. Tenn. 1979), *aff'd*, 667 F.2d 549, 550-51 (6th Cir. 1982) (Tennessee state fair rule prohibiting solicitation of funds except from assigned booths found constitutional). *Cf. Edwards v. Maryland State Fair & Agric. Soc'y. Inc.*, 476 F. Supp. 153 (D. Md. 1979), *aff'd in part and rev'd in part*, 628 F.2d 282,286-87 (4th Cir. 1980) (Maryland booth

signed booth. In the court's view, the state's interest in avoiding crowd flow problems and concern for public safety justified such restrictions.¹⁷² These same restrictions should apply to beggars. Because solicitors and beggars both appeal for money, no distinction should be made between the two.¹⁷³

(5) Begging in Places with a Captive Audience

Beggars' rights are less likely to prevail over the government's interest in protecting its citizens when the listener is unable to avoid the communication. In all of the fora discussed above, a person who does not want to communicate with beggars can ignore them or move on.¹⁷⁴ Persons who are confined on public transportation or in cars stopped at traffic intersections, however, are unable to escape unwanted intrusions from beggars.¹⁷⁵

Captive audiences require additional protection from beggars.¹⁷⁶ Indeed, the United States Supreme Court upheld a statute banning certain advertisements from subway cars to avoid the risk of imposing upon passengers, even though such advertisements would not have been banned in traditional or designated public fora. The Court considered both the advertisers' and the passengers' rights:

In asking us to force the system to accept his message . . . the petitioner overlooks the constitutional rights of the commuters. While petitioner clearly has a right to express his views to those who wish to listen, he has no right to force his message upon an audience incapable of declining to receive it [T]he right of the commuters to be free from forced

rule violated First Amendment because no serious disruptions shown and no showing that less restrictive regulation would not accomplish same result).

172. *Heffron*, 452 U.S. at 654-55.

173. *See supra* notes 38-39 and accompanying text.

174. *Blair v. Shanahan*, 775 F. Supp. 1315, 1322 n.5 (N.D. Cal. 1991) ("Subway passengers, unlike city pedestrians, have no way to escape a beggar's presence."). *See also* *Chevigny*, *supra* note 23, at 544.

175. *Lehman v. City of Shaker Heights*, 418 U.S. 298, 302 (1974) (subway riders); *ACORN v. City of Phoenix*, 798 F.2d 1260, 1270-71 & n.11 (9th Cir. 1986) (motorists); *ISKCON v. New Jersey Sports*, 691 F.2d 155, 162 (3d Cir. 1982) (sports arena); *ISKCON v. City of Baton Rouge*, 668 F. Supp. 527 (M.D. La. 1987). *affid.*, 876 F.2d 494, 500 (5th Cir. 1989) (ordinance prohibiting solicitation from occupants of vehicle on any Street or roadway upheld); *People v. Tosch*, 501 N.E.2d 1253, 1257 011. 1986); *Jeremy Handler, MTA to Improve W. 4th St. Station*, THE WASH. SQUARE NEWS, Dec. 8, 1993, at 1 (implementing plans to control excessive panhandling at subway station); Editorial, *Begging and Giving*, N.Y. TIMES, Jan. 12, 1994, at A20 (protecting "temporary captives" on the subway).

176. *Young v. New York City Transit Auth.*, 903 F.2d 146, 158 (2d Cir.), *cert. denied*, 498 U.S. 984 (1990) (beggars assault, harass, startle, intimidate and threaten subway patrons). *Accord* *Public Util. Comm'n v. Pollak*, 343 U.S. 451; 468 (1952) (Douglas, J., dissenting) ("The streetcar audience is a captive audience. It is there as a matter of necessity, not of choice."); REPORT ON PANHANDLING; *supra* note 9, at 3 ("People using public transportation are especially vulnerable because their dependence on public transportation makes them a captive audience.").

intrusions on their privacy precludes the city from transforming its vehicles of public transportation into forums for the dissemination of ideas upon this captive audience.¹⁷⁷

To protect captive audiences from unwanted communications, reasonable regulations on solicitation should be permitted.

(6) Begging in Residential Neighborhoods

The scope of the First Amendment freedom of expression encompasses door-to-door solicitation of financial contributions in residential neighborhoods.¹⁷⁸ Persons who are approached on their private property have alternatives to communicating with beggars;¹⁷⁹ they may avoid any unwanted contact by posting signs indicating that no solicitation is allowed, asking beggars to leave or closing the door to end the contact with the beggar.¹⁸⁰ Additionally, local municipalities have a responsibility to assist residents in maintaining the peace and enjoyment of their home by enforcing trespass laws. The state's "interest in protecting the well-being, tranquility, and privacy of the home is certainly of the highest order in a free and civilized society."¹⁸¹

Thus, both the public's privacy interest and beggars' First Amendment rights must be considered when place restrictions are enacted. Citizens want to choose when and where they will receive information.¹⁸² However,

177. *Lehman*, 418 U.S. at 307 (Douglas, J., concurring). *Accord* *Frisby v. Schultz*, 487 U.S. 474, 487 (1988) (resident trapped inside her home cannot avoid "objectionable speech").

178. *Village of Schaumburg v. Citizens for a Better Env't*, 444 U.S. 620, 633, *reh'g denied*, 445 U.S. 972 (1980); *City of Waukegan v. Illinois Pub. Action Council*, 796 F.2d 1547, 1550 (7th Cir. 1986), *aff'd*, 479 U.S. 1048 (1987), *reh'g denied*, 480 U.S. 926 (1987); *Wisconsin Action Coalition v. City of Kenosha*, 767 F.2d 1248, 1251 (7th Cir. 1985); *ACORN v. Municipality of Golden*, 744 F.2d 739, 748-50 (10th Cir. 1984) (ordinance preventing door-to-door solicitation without exemption from city council unconstitutional); *Church of Scientology Flag Serv. Org. v. City of Clearwater*, 756 F. Supp. 1498, 1515 (N.D. Fla. 1991) (solicitation is communication). *See also* *Neisser*, *supra* note 36 (encouraging people who are uncomfortable with begging to work to eliminate the reasons for begging).

179. *Buckrop & Miller*, *supra* note 10, at 94. Note, however, that in *Lee*, the Court distinguished between privately held and public facilities. *ISKCON v. Lee*, 112 S. Ct. 2701, 2707-08 (1992).

180. *City of Waukegan*, 796 F.2d at 1550-51, 1557; *Wisconsin Action Coalition*, 767 F.2d at 1257 (posting signs to avoid solicitation); *Massachusetts Fair Share, Inc. v. Town of Rockland*, 610 F. Supp. 682, 689 (1985); *New York Community Action Network, Inc. v. Town of Hemstead*, 601 F. Supp. 1071 (E.D.N.Y. 1984) (resident can close her door or post "no soliciting" sign); *Citizens for a Better Env't*, 511 F. Supp. at 107.

181. *Carey v. Brown*, 447 U.S. 455, 471 (1980); *Wisconsin Action Coalition*, 767 F.2d at 1251-52 (and cases cited therein); *Massachusetts Fair Share, Inc.*, 610 F. Supp. at 689; *Alternatives for Cal. Women, Inc. v. County of Contra Costa*, 193 Cal. Rptr. 384, 392 (1983).

182. *Loper v. New York City Police Dep't*, 802 F. Supp. 1029, 1042-43, *aff'd*, 999 F.2d 699 (2d Cir. 1993). *See also* T.M. Scanlon, Jr., *Freedom of Expression and Categories of Expression*, 40 U. PITT. L. REV. 519, 524 (1979) ("What audiences generally want... is to have expression available to them should they want to attend to it").

except in fora containing captive audiences, beggars have a constitutional right to communicate. This right must be honored even when the audience is unwilling to listen.¹⁸³

3. Manner Restrictions: How Should They Beg?

a. Distinguishing Peaceful From Aggressive Begging

While peaceful and non-confrontational begging may be restricted, aggressive begging should be prohibited altogether. Polite, passive begging is not illegal. Peaceful beggars asking for money "in a nice way" do not pose a threat to society.¹⁸⁴ In contrast, some requests for financial assistance unduly encroach upon a person's consciousness and privacy.¹⁸⁵ Indeed, "[t]he increasing desperation of the very poor has made them turn up the[] pitch on their appeals" and the public's alarm at intrusive begging tactics has intensified.¹⁸⁶ While many beggars are soft-spoken or silent, others are loud and belligerent. These itinerant beggars frequently disrupt traffic, and assault, detain, intimidate, threaten or follow pedestrians. On a daily basis, residents and commuters in New York City experience beggars walking about subway cars telling tales of woe, including contraction of the AIDS virus, while passengers cringe in their seats.¹⁸⁷

Businesses are also gravely affected by begging. One merchant anticipated a loss of \$277,000 in business because tour groups would no longer patronize his establishment after beggars harassed tourists there.¹⁸⁸ This

183. Rose, *supra* note 8, at 198. See also *FCC v. Pacifica Found.*, 438 U.S. 726, 749 & n.27 (1978) ("Outside the home, the balance between the offensive speaker and the unwilling audience may sometimes tip in favor of the speaker, requiring the offended listener to turn away.")

184. *Loper*, 802 F. Supp. at 1046. "The simple question is: 'Can society bar all forms of begging?' The simple answer is: 'No.'" *Id.*, at 1039. See also Wheeler, *Panhandlers*, *supra* note 10, at B4 (quoting District of Columbia Councilmember James Nathanson).

185. See *Court as Scapegoat*, *supra* note 6.

186. *Court as Scapegoat*, *supra* note 6 (associating begging problems in subway system with growing number of homeless people).

187. *United States v. Kokinda*, 497 U.S. 720, 734 (1990); *Young v. New York City Transit Auth.*, 903 F.2d 146, 149, 158 (2d Cir.), *cert denied*, 498 U.S. 984 (1990); *Loper*, 802 F. Supp. at 1040; *City of Seattle v. Webster*, 802 P.2d 1333, 1336 (Wash. 1990), *cert denied*, 51 S. Ct. 1690 (1991) (transient arrested for stopping pedestrians, blocking their path, sticking his hand out, and forcing pedestrians to walk around him). See also *ISKCON v. Lee*, 112 S.Ct. 2701, 2719 (1992) (Kennedy, Bickman, Stevens, Souter, JJ., concurring in part) ("The First Amendment is often inconvenient"); *C.C.B. v. Florida*, 458 So. 2d 47, 49-50 (Fla. App. 1984).

No one knows how many panhandlers still ride New York's subway cars although the State has spent and spends millions of dollars to purge the transit system of panhandlers. *Battling Beggars* (NBC television broadcast, Oct. 7, 1993); Linda Wheeler, *Council Panel Backs Limits on D.C. Panhandling*, WASH. POST, May 13, 1993, at B1 (panhandlers curse, threaten, follow and intimidate District of Columbia residents).

188. Wheeler, *Tour Group*, *supra* note 19, at D3. The United States Supreme Court has also noted the disruptive effect that solicitation may have on businesses. *Lee*, 112 S. Ct. at 2708;

type of behavior should not be tolerated. Personal abuse is not communication of information or opinion that is protected by the Constitution.¹⁸⁹ "[T]he constitutional status of begging does not involve giving beggars an unlimited right to harass potential donors."¹⁹⁰ A total ban on this aggressive behavior would therefore be constitutional.¹⁹¹

b. Regulating Aggressive Begging

In *Cantwell v. Connecticut*,¹⁹² a religious solicitation case, the United States Supreme Court ruled that the State had obvious power to prevent or punish any person who caused "clear and present danger of riot, disorder, interference with traffic upon the public streets, or other immediate threat to public safety, peace, or order . . .".¹⁹³ Beggars frequently engage in such conduct.

A recent occurrence in the District of Columbia illustrates the "clear and present dangers" of begging. In retaliation for being asked to move from the front of a restaurant, a beggar followed the owner inside the restaurant and struck him with such force that he broke the owner's jaw.¹⁹⁴ In such instances where beggars engage in violent conduct, the government has access to legislative weapons which are much less intrusive than a blanket ban on begging.¹⁹⁵ Courts have suggested a declaration and enforcement of laws against fraud, trespass, breach of peace, assault, burglary and other offenses committed by aggressive beggars.¹⁹⁶ Laws should also prohibit beggars from engaging in any unwelcome physical contact, threatening gestures, harassment, attacks and continued begging after a person

Kokinda, 497 U.S. at 732-33; *Heffron v. ISKCON*, 452 U.S. 640, 663 (1981) (Blackmun, J., concurring in part and dissenting in part). See also Linda Wheeler, *D.C. Limits Aggressive Panhandling*, WASH. POST, June 2, 1993, at A1 (panhandlers scare customers away).

189. *Cantwell v. Connecticut*, 310 U.S. 296, 309-10 (1940).

190. *Webster*, 802 P.2d at 1342 (Utter, J., concurring in part and dissenting in part).

191. *Loper*, 802 F. Supp. at 1040; *C.C.B.*, 458 So. 2d at 49.

192. 310 U.S. 296 (1940).

193. *Id.* at 308.

194. Wheeler, *Panhandlers*, *supra* note 10.

195. *Loper*, 802 F. Supp. at 1040 (statute cannot cut off all means of begging); *Blair v. Shanahan*, 775 F. Supp. 1315, 1324 & n.10, 1325 (N.D. Cal. 1991); *Alternatives for Cal. Women, Inc. v. Contra Costa County*, 193 Cal. Rptr. 384, 392 (1983). See also *Riley v. National Fed'n of the Blind*, 487 U.S. 781, 795 (1988) (state can protect citizens from fraud without improper rules prohibiting speech); *Village of Schaumburg v. Citizens for a Better Env't*, 444 U.S. 620, 637-38, *reh'g denied*, 445 U.S. 972 (1980); *People v. American Youth Sports Found.*, 239 Cal. Rptr. 621, 624-25 (1987); *Knapp*, *supra* note 8, at 423 (dealing with solicitor's fraud).

196. See, e.g., *Loper*, 802 P. Supp. at 1045-47; *Blair*, 775 F. Supp. at 1324.

refuses to make a contribution.¹⁹⁷ This approach is far more acceptable than an outright ban on begging.¹⁹⁸

B. Legislation: Alternative Approaches to Balancing the Rights of Beggars and the Public

Some cities have already enacted legislation which balances beggars' rights against the public interests in privacy and safety. San Francisco, Atlanta, Seattle and Santa Barbara have recently adopted anti-aggressive panhandling laws.¹⁹⁹ In addition, the District of Columbia passed the Panhandling Control Act of 1993²⁰⁰ ("the Act") in response to a number of citizen complaints regarding beggars blocking entrances to public and private buildings, taunting the elderly and intimidating residents, tourists and visitors. Additionally, citizens complained that "confidence operators," who were not homeless, were masquerading as beggars.²⁰¹

The Act expressly permits peaceable begging in some places but prohibits aggressive panhandling throughout the city.²⁰² The penalties for violating the Act are a maximum fine of \$300, imprisonment for no more than

197. *Blair*, 775 F. Supp. at 1325. The legislature can "reduce the perceived evil of street intimidation for money. The people of San Francisco deserve the entitlement to expect police protection from any such intimidation, coercion, or threat for *aims*." *Id.* See also *ISKCON v. Griffin*, 437 F. Supp. 666, 673 (W.D. Penn. 1977) (after altercations developed, court forbade ISKCON members from touching prospective donors without their consent). See also Helen Hershkoff, *Aggressive Panhandling Laws*, 79 A.B.A.J. 40 (June 1993) (laws necessary to stave off urban decline and for protection of vulnerable people from verbal and physical intimidation); Wheeler, *Panhandlers*, *supra* note 10. During a recent television broadcast, an ACLU representative offered a contrary view. He intimated that although begging may be annoying, people cannot be locked up for being annoying. *Panhandlers: Are Beggars Getting More Aggressive?* (WTTG television news broadcast. Mar. 31, 1993). See also 14 C.F.R. § 159.94(h) (1992).

198. See, e.g., *Blair*, 802 F. Supp. at 1045-47 (suggesting alternatives to complete ban on begging).

199. *Teir*, *supra* note 7 (discussing urban cities' attempts to regulate aggressive panhandling); Dennis Culhane, *Where Should the Homeless Sleep?: Shelters Lead Nowhere*, N.Y. TIMES, Dec. 19, 1993, § 4, at 13 (San Francisco and Seattle residents "fed up" with aggressive panhandlers); Timothy Egan, *In 3 Progressive Cities, Stem Homeless Policies*, N.Y. TIMES, Dec. 12, 1993, at L26 ("Attitudes about homeless people shift from pity to impatience.").

200. DISTRICT OF COLUMBIA COUNCIL, REPORT ON BILL NO. 10-72 (1993). The District of Columbia's Act is modeled after § 14.20.060 of the Oregon Revised Statutes (1987), which was upheld in *City of Portland v. Bitans*, 786 P.2d 222, 224 (Or. 1990).

201. REPORT ON PANHANDLING, *supra* note 9, § 2.

202. REPORT ON PANHANDLING, *supra* note 9, § 3(a). The following conduct is prohibited under the Act

- (a) No person may ask, beg, or solicit alms, including money and other things of value, in an aggressive manner in any place open to the general public, including sidewalks, streets, alleys, driveways, parking lots, parks, plazas, buildings, and grounds enclosing buildings.
- (b) No person may ask, beg, or solicit alms in any public transportation vehicle: or at any bus, train, or subway station or stop.

ninety days and/or community service.²⁰³ All three penalties may be assessed in appropriate instances.²⁰⁴

Legislators may look to model statutes and ordinances to draft regulations that do not infringe upon beggars' right to speak or unnecessarily impose upon a citizen's privacy.²⁰⁵ The task of drafting such legislation should be left to the legislature, not the courts.²⁰⁶ We must be mindful, however, that the legislative process may not be expeditious. "When a leg-

(c) No person may ask, beg, or solicit alms within 10 feet of any automatic teller machine (ATM).

(d) No person may ask, beg, or solicit alms from any operator or occupant of a motor vehicle that is in traffic on a public street

(e) No person may ask, beg, or solicit alms from any operator or occupant of a motor vehicle on a public street in exchange for blocking, occupying, or reserving a public parking space, or directing the operator or occupant to a public parking space.

(f) No person may ask, beg, or solicit alms in exchange for cleaning motor vehicle windows while the vehicle is in traffic on a public street

(g) No person may ask, beg, or solicit alms in exchange for protecting, watching, washing, cleaning, repairing, or painting a motor vehicle or bicycle while it is parked on a public street

(h) No person may ask, beg, or solicit alms on private property or residential property, without permission of the owner or occupant

The term "aggressive manner" is expressly defined in the Act:

(A) Approaching, speaking to, or following a person in a manner as would cause a reasonable person to fear avoiding harm or the commission of a criminal act upon the person, or upon property in the person's immediate possession;

(B) Touching another person without that person's consent in the course of asking for alms;

(C) Continuously asking, begging, or soliciting alms from a person after the person has made a negative response; or

(D) Intentionally blocking or interfering with the safe or free passage of a person by any means, including unreasonably causing a person to take evasive action to avoid physical contact;

203. REPORT ON PANHANDLING, *supra* note 9, § 5.

Punishment for crimes associated with solicitation of funds is not a new phenomenon. *See, e.g., Cantwell v. Connecticut*, 310 U.S. 296, 306 (1940) ("Nothing we have said is intended even remotely to imply that, under the cloak of religion, persons may, with impunity, commit frauds upon the public. Certainly, penal laws are available to punish such conduct"). *C/ Loper v. New York City Police Dep't* 802 F. Supp. 1029, 1032 n.8 (S.D.N.Y. 1992), *aff'd*, 999 F.2d 699 (2d Cir. 1993) (noting stiff English punishment included whipping children, strict discipline and hard labor).

204. REPORT ON PANHANDLING, *supra* note 9, § 5.

205. CHESTER J. ANTIEAU, MODERN CONSTITUTIONAL LAW—THE INDIVIDUAL AND THE GOVERNMENT 26-28 (1969 & Supp. 1992) (suggestions for allowing solicitation of funds); THOMAS A. MATTHEWS & BYRON S. MATTHEWS, MUNICIPAL ORDINANCES §5 39.149 (b), (c), 39.150 (rev. ed. 1985) (proposed ordinances against obstructing the free flow of pedestrian traffic but allowing solicitation from the median strip).

206. *C.C.B. v. Florida*, 458 So. 2d 47,50 (Fla. App. 1984) (court left regulatory task to City of Jacksonville); Knapp, *supra* note 8, at 423. *See also* Arthur H. Sherry, *Vagrants, Rogues and Vagabonds—Old Concepts in Need of Revision*, 48 CAL. L. REV. 557 (1960) (suggested draft of statute distinguishing aggressive and passive begging).

islature undertakes to address social problems, [we ought] not to fault it for failing to address every instance immediately."²⁰⁷ At the same time, we should reasonably expect the legislature to promulgate laws to sufficiently and effectively protect both the beggars and the public.

Conclusion

Begging is much more than "an abstract question of free speech."²⁰⁸ Even the most marginal among us is entitled to protection under the First Amendment.²⁰⁹ Organized solicitation is permitted and regulated. Begging should be permitted and regulated as well.

Beggars may annoy and disturb some people.²¹⁰ However, "the fact that some people may find beggars unsightly, annoying, or even frightening, provides no basis for banning begging, any more than the fact that some people find survey-takers or leafleteers or picketers annoying or even frightening could justify a ban on their activities."²¹¹ Beggars have a right

207. *Auburn Police Union v. Carpenter*, 798 F. Supp. 819, 827 (D. Me. 1992). The First Amendment does not command perfection. In a statute affecting speech, *some* degree of over-inclusiveness and under-inclusiveness is generally unavoidable." *Id.* at 828 (emphasis added).

A related issue is whether police will enforce new regulations. Two dozen District of Columbia officers said they would simply warn panhandlers, and that they would give panhandler complaints low priority because they were too busy with more serious calls. The officers expressed further reluctance to arrest panhandlers because complainants are not likely to take time from work to appear in court and the jails are already overflowing with other criminals. See Wheeler & Duggan, *supra* note 98.

Some non-regulatory methods of discouraging begging have been implemented. For example, a Washington, D.C. group has published a pamphlet entitled "Your Nickels and Dimes Don't Add Up to Change." Their philosophy is that giving money to a panhandler encourages other panhandlers to congregate in the same area. Instead, the association advises donors to make donations to particular organizations dedicated to providing food, shelter and counseling to needy people. See Wheeler, *Arrested*, *supra* note 9. Other advocates use redeemable food vouchers for exchange at New York supermarkets. See Adelson, *supra* note 9; Mary B. Tabor, *Voucher Plan to Aid Beggars in Place on West Side*, N.Y. TIMES, Dec. 20, 1993, at B1 (offering vouchers for food on personal items instead of money).

208. Mordecai Rosenfeld, *Does Odysseus Ride the "A" Train?*, N.Y. L.J., June 4, 1990, at 2 (lamenting that judges who do not ride the subways do not realize the exigencies of begging: "Isn't it better to have them beg on the subway, where it never rains or snows and is never cold, man on the open, unprotected streets . . . ?").

209. Hentoff, *supra* note 75 ("Daniel Pollitt, a University of North Carolina law professor, teaches that the living Constitution is also an enlarging document—thereby protecting those among us who become marginal.").

210. *ISKCON v. Lee*, 112 S. Ct. 2701, 2708 (1992). Persons who take the time to collect a donation and those who alter their path to avoid solicitors ultimately cause traffic flow problems. *Id.* See also *Loper v. New York City Police Dep't*, 802 F. Supp. 1029, 1046 (S.D.N.Y. 1992), *ajfd*, 999 F.2d 699 (2d Cir. 1993).

211. REPORT ON PANHANDLING, *supra* note 9, at app. (Testimony of Arthur Spitzer on behalf of the American Civil Liberties Union of the National Capital Area).

to solicit money for their livelihood in appropriate circumstances.²¹² In the interest of peace, however, the government must impose reasonable time, place and manner restrictions to protect the public from aggressive beggars. As many metropolitan areas have been forced to discover, this goal can and must be accomplished without imposing a complete ban on begging.²¹³ The First Amendment demands it.

212. Beggars do not disclose their take, but in some places, begging can be quite lucrative. Mooar, *supra* note 7. One man collected \$298 in one day, much more than some people collect for working all day. Christine Brennan, *U.S. Kayaker Navigates Streets in Search of Cash*, WASH. POST, May 12, 1993, at A13 (Olympic team member begging monetary gifts to finance his trip to the Olympics). Another beggar admitted to collecting up to \$100 per day. Mooar, *supra* note 7. One woman admitted that she moved from her usual place of begging in downtown Washington, D.C. to Georgetown, an affluent neighborhood, because she could make more money in Georgetown—\$30 to \$45 in two-and-one-half hours. *Random Charity* (ABC television broadcast, May 13, 1993). Cf. Stuart Miller, *Holidays Hit Homeless Hard*, THE WASH. SQUARE NEWS, Dec. 14, 1993, at 2 ("Today, I'll be lucky if I make five bucks.").

213. *City of Seattle v. Webster*, 802 P.2d 1333, 1343 (Wash. 1990), *cert. denied*, 111 S. Ct. 1690 (1991) (Utter, J., concurring in part dissenting in part); Elizabeth McGlynn, Comment, *Constitutional Law—A Denial of First Amendment Protection for Begging in the Subway—Young v. New York City Transit Authority*, 25 SUFFOLK U. L. REV. 805, 811-12 (1991) (First Amendment "does not permit the burdening of free speech merely because the public is uncomfortable with the message").

There are other methods of regulating organizational solicitation which may be applicable to beggars. Courts suggest that appropriate registration, licensing, identification and permit procedures could be used to prevent fraud and encroachments on privacy. See *New Jersey Citizen Action v. Edison Township*, 797 F.2d 1250, 1264, 1262-65 (3d Cir. 1986) (identification requirements may be constitutional, but fingerprinting may not be constitutional without showing of significant criminal behavior among beggars). See also *C.C.B. v. Florida*, 458 So. 2d 47, 50 (Fla. App. 1984) (suggests narrowly drawn permit system); *State v. Hundley*, 142 S.E. 330, 332 (N.C. 1928) (upholding municipal license requirement for charitable and religious begging). See generally *Peddlers, Solicitors and Transient Dealers*, 60 AM. JUR. 2D § 67 (1987). Cf. *Loper*, 802 F. Supp. at 1047 (doubting that society would "license the truly needy").

Fee assessments against solicitors have been unsuccessful and probably will not prevail against beggars for obvious reasons—beggars may not be able to pay the fees. Therefore, filing fees for applications, daily solicitation fees, and identification badge fees may be invalid restraints. "Freedom of speech . . . [is] available to all, not merely to those who can pay their own way." *Murdock v. Pennsylvania*, 319 U.S. 105, 111 (1943).

Some believe that begging does not yield an economic waterfall. Subway riders, for instance, "are a parsimonious lot, so that soliciting alms from them [is] an inefficient use of a beggar's time—The occasional rider who donated a quarter considered himself to be a philanthropist" Rosenfeld, *supra* note 208 (referencing studies showing that those contributing did so with nickels, pennies or dimes).