

## **Maintaining Safety and Civility in Public Spaces: A Constitutional Approach to Aggressive Begging**

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#### I. INTRODUCTION: THE DANGER TO PUBLIC SPACES

##### A. A Call for Public Order

The cities of the United States are rapidly losing their public spaces. From Atlanta to Seattle, from San Francisco to New York City, people are abandoning their urban areas out of a perception that street disorder is rising, making cities no longer welcome places to live, work, or voluntarily spend time.

Not all urbanites are giving up. Many City Councils have been convinced to adopt new and innovative controls on anti-social behavior to maintain minimal standards of public conduct and to keep public spaces safe and attractive. These ordinances range from prohibitions on camping in parks to restrictions on lying down on sidewalks.<sup>1</sup> One of the most common examples of these efforts are ordinances aimed at aggressive begging.

Current efforts to limit begging are motivated by a desire to build and maintain a diverse, responsible, and interactive community, by maintaining and preserving viable public spaces where that community can interact. This is possible only when minimum standards of public decency are observed.<sup>2</sup> No one, rich or poor, white or black or hispanic, gay or heterosexual, Jew or Gentile, is benefitted when walking down a city street is an onerous chore. These efforts, however, have run into considerable opposition by those fighting yesterday's battles.

Since the early victories of the Civil Rights movement in the 1960s, laws regulating behavior in public have been viewed with extreme suspicion as threats to the constitutional rights of individuals. Many of the cases from this era were reactions to the use of older laws to harass or discriminate against particular

1. West Hollywood, Cal., Mun. Code 5 4801; Seattle, Wash., Mun. Code 5 15.48.040.

2. "The tolerance, the room for great differences among neighbors, are possible and normal only when the streets of great cities have built-in equipment allowing strangers to dwell in peace together on civilized but essentially dignified and reserved terms." Fred Siegel, *Reclaiming Our Public Spaces*, 2 *City J.* 35, 35 (1992).

(often racial) minority groups.<sup>3</sup> Indeed, these cases were successful in removing many of the arbitrary, discriminatory, and oppressive laws (and law enforcement practices) of the past, creating equality of opportunity for formerly oppressed groups.

These cases, which helped end American apartheid, were then used to try to trump many legitimate community interests, and to elevate all kinds of individual desires into assertions of rights. They are now used to defend the colonization of parks by people wishing to sleep there, to assert a right to sleep and eat in the public place of one's choosing, and to beg in any way one pleases. Consequently, the jurisprudence of the last three decades has "emphasized individual liberty over communal security, privilege over responsibility, self-expression over restraint, and egalitarianism over meritocracy."<sup>4</sup> Nowhere is this more true than where civil liberties claims interfere with the setting of minimal, uniform standards of public conduct.

In the absence of such standards, many citizens and community groups have begun to ask whether their cities have experienced a breakdown of social order, and whether anything can be done about it.<sup>5</sup> Unlike previous calls for public order, which often came from racially homogenous upper classes, current demands for public civility come from "people of all races wanting to walk streets or ride buses without feeling under constant siege by others asserting their 'rights' to say anything or behave any way they wish."<sup>6</sup>

Maintaining public order, like regulating land use and keeping public spaces usable and attractive, are traditional functions of government.<sup>7</sup> Having learned the valuable lessons of the past, grass-roots organizations and city governments have rejected the notion, hinted at or insisted upon by some civil libertarians and homeless advocates, that a tolerance for diversity must mean a rejection of all standards of public conduct. Slowly, individuals, community groups, law enforcement officers, and politicians are coming to see that maintenance of order in public spaces "lies at the heart of the tension between individual freedom and communal security."<sup>8</sup> It would be ironic if the courts permitted the government to regulate all sorts of beneficial commercial activity, including street vendors.

3. See *Shuttlesworth v. City of Birmingham*, 394 U.S. 147, 89 S. Ct. 935 (1969); *Adderley v. Florida*, 385 U.S. 39, 87 S. Ct. 242 (1966); *Cox v. Louisiana*, 379 U.S. 559, 85 S. Ct. 879 (1965); *Hamm v. City of Rock Hill*, 379 U.S. 306, 85 S. Ct. 384 (1964); *Edwards v. South Carolina*, 372 U.S. 229, 83 S. Ct. 680 (1963).

4. George L. Kelling, *Acquiring a Taste for Order: The Community and Police*, 33 *Crime & Delinq.* 90,92 (1987).

5. *Loper v. New York City Police Dep't*, 302 R Supp. 1029,1031 (S.D.N.Y. 1992), aff'd, 999 F.2d 699 (2d Cir. 1993) (acknowledging "the disorder inherently associated with . . . this form of expression").

6. Kelling, *supra* note 4, at 93-94.

7. *Village of Belle Terre v. Boraas*, 416 U.S. 1, 7 (1974); *People v. Trantham*, 161 Cal. App. 3d Supp. 1,13-14(1984).

8. Kelling, *supra* note 4, at 92.

but declared that begging—trading nothing for money—is constitutionally protected and not subject to control or regulation.

This article first explains the consequences of begging to the vitality of urban communities. It also describes the historical approaches to panhandling, from the Middle Ages to the present. It then discusses the judicial response to panhandling controls, and sets forth a balanced and constitutional approach to the problem. Hopefully, this article will contribute to the re-establishment of safety and civility in urban public spaces.

### *B. The Extent of The Problem*

People in cities are confronted by beggars every day. A walk down a major urban street will usually mean being asked for money numerous times. Sitting on a park bench or at an outdoor restaurant can mean holding court to a steady stream of people hustling change. Some panhandlers ply their trade passively, merely making a request, or holding a cup with coins in it. Some are more aggressive, making loud and sometimes repeated demands, or following pedestrians down the street. Many beg where solicitations are particularly intimidating, such as at ATMs and (to motorists) at red lights. Others will touch, shove, or respond with hostility or bigotry if one declines to give money.

The problem is not the man who forgot to bring enough change for the bus. It is also not the Salvation Army volunteer collecting money for charity at Christmas time. It is also not the person who is really down and out on her luck, appealing to our sense of charity and tithing in an unobtrusive manner. The proposal made in this article is designed to allow these activities to continue. Rather, aggressive begging, which creates numerous, and very real, social harms, is the primary focus of this article.

One of the consequences of aggressive begging is a loss of empathy for the homeless, or, perhaps, for poor people in general. Indeed, the fear engendered by aggressive beggars often results in a certain amount of callousness towards the needy as a whole, and contributes to "compassion fatigue."<sup>9</sup>

### *C. The Threat to the Community*

Public streets are among cities' greatest assets. The streets provide not only the transportation, but the vitality, attraction, and interaction in a city. A willingness to walk on and use the streets is essential to businesses, and to the life of a city.

9. See, e.g., Nancy R. Gibbs, *Begging: To Give or Not to Give*, *Time*, Sept. 5, 1988, at 68 (quoting a Manhattan panhandler who complained that "[g]etting money is rough . . . because the crackheads are taking over . . ."). One Seattle panhandler, when asked his reaction to that city's anti-aggressive begging ordinance, responded that he felt aggressive beggars should be "run off," because "they give us others a bad name." Associated Press, *Seattle Enforces Begging Law*, *N.Y. Times*, Dec. 26, 1987, at 10, col. 3.

City parks and sidewalks were built to be community meeting places, where people of different races, religions, ethnic groups, socio-economic levels, and political views, could come together and share in the benefits of public spaces. These venues are places of integration, assimilation, mixture of social classes, and a counterweight to the increasing fragmentation of society.

These social catalysts only exist, however, if public spaces are seen as desirable and attractive. When parks or sidewalks are a place of frequent intimidation and intrusion, they become a place not to be sought out, but to be avoided. People come to think twice about eating their lunch at the local park or square, or taking a walk to the zoo, the library, or the corner store. Exhaustion from having to run a gauntlet of obstacles when using any public place, "locks neighbors behind doors, chases store owners off streets, shuts down businesses, and spreads poverty and despair."<sup>10</sup>

Millions of people have already expressed themselves on this issue with their feet, as well as their moving vans, by leaving cities without a tax base, and communities without public gathering places. As the experiences of Philadelphia, Washington, and Detroit have shown, if the cities become unbearable, many people will relocate to more peaceful surroundings. Urban cores are then left to a few affluent people living in 'trendy condominiums, those seeking cohesion with a minority group, and those dependent upon the government, or illegal activity, for survival.<sup>11</sup>

#### D. *The Threat to Individuals*

In addition to the harms to the community, aggressive begging is also a source of fear and intimidation for individuals. The fears created by beggars are neither irrational nor over-estimated.<sup>12</sup> The number of people on the street has grown significantly in recent years. The reason for this growth may be the deinstitutionalization of mentally ill persons, or a loosening of the support network that used to be provided by friends and families. Perhaps it is due to excessive government regulation which tends to discourage entrants into the low-income housing market. For example, rent control, code requirements, and Byzantine eviction procedures all produce this effect. Another possible reason is the increased number of people that abuse alcohol and drugs.

10. See George L. (Celling, *Measuring What Matters: A New Way of Thinking About Crime and Public Order*, 2 City J. 21. 21 (1992).

11. Lack of public civility contributes to the fear and insecurity that "are consistently among the top two or three reasons cited by New Yorkers who say they want to leave town." *Id.*

12. "The most aggressive and abusive of the city's beggars often appear to be strung out on drugs; pedestrians hand over money in order to pass by in safety, a kind of street toll that comes at the expense of the genuinely needy." Gibbs, *supra* note 9, at 72; see also *Loper v. New York City Police Dep't*, 802 F. Supp. 1029, 1031 (S.D.N.Y. 1992), *aff'd*, 999 F.2d 699 (2d Cir. 1993) (begging's effects range from "mere annoyance and inconvenience to genuine terror").

Perhaps due to the increasing number of people making their living and bed on the streets, fear and the threat of violence has become a commonplace component of begging. Besides the intrusion inherent in accosting a person to pressure her into giving money, recent episodes between beggars and their targets demonstrate that a panhandler may be willing to back up requests for money with more severe measures.<sup>13</sup>

Incidents of aggressive begging have resulted in acts of violence against life and property.<sup>14</sup> Seattle's ordinance prohibiting aggressive begging was passed specifically "under pressure from downtown business interests and members of the public who said they were fed up with escalating intimidation and occasional violence among the city's large street population."<sup>15</sup>

Such fear is not engendered by the homeless in general, nor even by those who peacefully solicit alms without accosting passersby. Only the beggar who intrudes upon an individual's freedom of movement and personal privacy provokes such a sense of threat. As Seattle Mayor Charles Royer noted, "It became clear that while we have some people who are hurting, there are some who are hurting us."<sup>16</sup>

Beyond the immediate intimidation, aggressive begging can be "part of a self-perpetuating cycle of decay"<sup>17</sup> drawing more serious crimes into a neighborhood.<sup>17</sup> Having studied the effects on neighborhoods of such disorderly behavior as begging, Professors James Q. Wilson and George Kelling concluded that "(j)ust as unrepaired broken windows in buildings may signal that nobody cares and lead to additional vandalism and damage, so untended disorderly behavior may also communicate that nobody cares (or that nobody can or will do anything about disorder) and thus lead to increasingly aggressive criminal and dangerous predatory behavior."<sup>18</sup> Scholars announced a theory that has become known as the "Broken Windows" effect.<sup>19</sup>

Because aggressive panhandling threatens personal security, and contributes to the "Broken Windows" effect, it must be regulated in order to maintain attractive and secure public spaces.

13. See *Begging Off; Humane Ways to Set Limits*, Newsday, February 1, 1990, at 68; Gibbs, *supra* note 9, at 69.

14. See, e.g., *Begging Off*, *supra* note 13, at 68 (referring to Rodney Sumtcr, who killed an aggressive panhandler who had threatened his son).

15. Terry Finn, *Seattle's New Panhandling Law in Effect*, UPI, Nov. 19, 1987; see also Gibbs, *supra* note 9, at 69 (referring to the death of a Seattle man who was beaten to death after allegedly rebuffing a panhandler).

16. Gibbs, *supra* note 9, at 74.

17. Kelling, *supra* note 10, at 28.

18. Kelling, *supra* note 4, at 93.

19. See also *Loper v. New York City Police Dep't*, 802 F. Supp. 1029, 1034-35 (S.D.N.Y. 1992), *aff'd*, 999 F.2d 699 (2d Cir. 1993) ("frjeality and everyday experience confirm this 'Broken Windows' Effect").

*E. Three Paths From Here*

The solution to these urban problems, including the "Broken Windows" effect, can be reached only to the extent that people continue to care about urban centers, and deem them worth saving and improving. While society may not be able to regain the lower crime rates of decades past, hope of regaining a modicum of serenity and security in urban centers should not be lost. This goal is not only consistent with, but relies upon, a vision of urban spaces where integration and tolerance is expected.

There are three choices to the growing problem of urban incivility. First, people can surrender the streets to those who would prevent reasonable and unobstructed access. This would allow everyone "to let it all hang out" and do as they please, using the sidewalks as their stage, and the few people who dare to venture into town as their involuntary audience. In other words, people can sit idly by while social interaction in public grinds to a standstill, property values decrease, segregation and isolation increases, and crime increases.

The second choice is to listen to the ham-fisted authoritarians and revert to the 1950s laws against loitering and vagrancy. These laws were subject to discriminatory and arbitrary application and were particularly used against racial minorities. The abuses under these laws were widespread, leading the Supreme Court, with considerable justification, to strike many of them down. It is no answer to the current situation to once again grant the police unfettered discretion to approach, question, and harass anyone they, or the majority, do not like.

The third choice represents a middle way. A thoughtful, considerate, balanced approach involves carefully tailored legislation that is aimed precisely at the real problems on our streets and our communities. This approach operates from the belief that what stands between a surrender of public spaces and a caring, responsive, and vibrant community is a willingness to allow communities a modicum of safety, civility, and serenity on their streets, sidewalks, and parks. One place to begin is the protection of pedestrians from unwanted solicitations, harassments, and assault.

The moderate approach can be taken without having to first address long-standing sociological problems. Making it easier and more pleasant to walk down an urban street does not require ambitious new social programs. It requires only well-tailored legislation that defines both begging and accosting in a manner that prohibits only the behaviors that present a real threat to the safety and sensibilities of a reasonable person. The effort should avoid the excesses of the past and have a solid constitutional foundation.<sup>20</sup> Such an approach is

20. Legislation aimed at unwelcome panhandling is a key element in returning safety and civility to urban streets. Other measures being tried with success, but also routinely challenged by radical individualists, include anti-drug loitering ordinances, regulations of the locale of public sleeping, asset seizures for drug and prostitution customers, and limitations on the public consumption of alcohol. All of these efforts have in common an effort to strengthen communities and make the streets safe so that community life can flourish.

entirely consistent with compassionate treatment of the homeless. It seems hardly helpful to the homeless to feed addictions, to financially encourage life on the street, or to declare a "right" to freeze to death without help. What the homeless appear to need is hospitalization for severe mental illnesses and substance abuse rehabilitation.<sup>21</sup>

Annoying solicitations may be beyond complete eradication, but if these behaviors can be kept within defined limits, made more discreet, and less intrusive, law-abiding people can regain control over their public spaces, and walk down the street in peace. The process of reversing the lawlessness, the discomfort, and the lack of civility of recent years begins with an attention to one of the goals of the federal Constitution: to ensure domestic tranquility.

n. SOME HISTORY

Current efforts to regulate begging, far from being a unique or unusual limitation on public conduct, are merely the latest in a long line of anti-begging measures stretching back to the earliest civilizations. Nevertheless, the purposes of these laws have evolved through the ages.

A. *A Crucial Difference*

The anti-aggressive begging ordinances of recent years present a marked difference from preceding laws in that they aim not to remove the poor from public view, but merely to prohibit the actions of beggars that inhibit use of public spaces. While older laws were aimed at punishing the laggard and the lazy, the current measures are aimed at enabling the community to enjoy unimpeded passage through safe public spaces.

Ancient anti-begging laws were based on the view that any unproductive member of society was a threat to the health of the community as a whole. Thus, the man who could work, but chose not to, could be enslaved or otherwise impelled to labor. In feudal Europe, begging came to be seen as a symptom of vagrancy, that is to say, of being outside the feudal order. The justification for retaining vagrancy laws, after the decay of the feudal system, eventually came to focus on the belief that those without a consistent means of support were a dangerous class, likely to commit criminal acts. This was the basis of vagrancy laws in the United States until they were struck down by the federal courts as unconstitutional two decades ago.<sup>22</sup>

21. See generally Alice Baum and David Burns, *A Nation in Denial: The Truth About Homelessness* (1993).

22. See *Papachristou v. City of Jacksonville*, 405 U.S. 156, 92 S. Ct. 839 (1972); *Shuttlesworth v. City of Birmingham*, 394 U.S. 147, 89 S. Ct. 935 (1969).

The "potential danger" presented by vagabonds has not disappeared as a concern, either by those who defend anti-begging measures in court, or by politicians. For example, a Miami Assistant City Attorney said that the city could not "close [its] eyes to the fact that there are criminal elements in

Modern ordinances seeking to control intrusive panhandling are part of a newer class of public conduct measures passed in response to the United States Supreme Court's rejection of "mere loitering laws" and similar attacks of "vagrancy." The older loitering laws largely prohibited the mere act of wandering and were derived from the medieval English laws aimed at controlling unemployed and fugitive serfs.<sup>23</sup> Often, these laws criminalized a person's status by making it an offense simply to be a beggar, gambler, drunkard, or prostitute.<sup>24</sup>

The Supreme Court's objection to the older style of "mere loitering" laws was clean harmless activity engaged in by people lacking any illicit intentions had been made criminal. Thus, the old laws could apply to mere strollers and star-gazers, activities which were "historically part of the amenities of life as we know them."<sup>25</sup>

These concerns, and these abuses, are a far cry from the efforts to protect the public from over-reaching by persons who ask money on the streets. Anti-aggressive begging ordinances leaves behind the innocent activities and generalized laws that were struck down in *Papachristou*, and are part of a new generation of laws aimed at those who engage in specific, harmful conduct.

The modern anti-begging laws differ from the older, unconstitutional statutes in at least three marked ways. First, they are aimed at an activity, and thus do not criminalize the defendant's status. Although there may be a right to *be* a vagabond, there is no constitutional right to aggressively panhandle, or to be free from government regulation of a particular trade.<sup>26</sup> Second, the activities that the ordinances seek to curtail, like assaults, are within the government's legitimate regulatory interest. Third, the ordinances do not provide unfettered discretion to the police to pick and choose whom to arrest. Rather, the laws proscribe specific conduct, which must be found in order to sustain arrest and conviction.<sup>27</sup>

Valuable lessons can be learned from the older European approaches to begging. First, the Europeans believed that communities had some social

the homeless community," to justify arresting people who had been sleeping in parks and under freeways. Beth Duff-Brown, Associated Press Wire (June 20, 1992).

The justification for controls on aggressive begging is presented in more detail both in the introductory section of (his paper and in my defense of the constitutionality of these measures.

23. *Id.*; cf. James F. Stephen, A History of the Criminal Law of England 226-75 (1883).

24. See Anthony G. Amsterdam, *Federal Constitutional Restrictions on the Punishment of Crimes of Status, Crimes of General Obnoxiousness, Crimes of Displeasing Police Officers, and the Like*. 3 Crim. L. Bull. 205. 205 (1967).

25. See, e.g., *City of St. Louis v. Burton*, 478 S.W.2d 320 (Mo. 1972) (striking down ordinance prohibiting wandering about the streets in the nighttime or frequenting places of public resort by lewd women, etc.); Arthur H. Sherry, *Vagrants, Rogues and Vagabonds—Old Concepts in Need of Revision*, 48 Cal. L. Rev. 557, 559-601 (1960).

26. See *Williamson v. Lee Optical of Oklahoma, Inc.*, 348 U.S. 483, 75 S. Ct. 461 (1955); *West Coast Hotel Co. v. Parrish*, 300 U.S. 379, 57 S. Ct. 578 (1937).

27. Cf. *State v. Ecker*. 311 So. 2d 104 (Fla. 1975).

obligation to those within their community. Second, they drew distinctions between those truly needy and those able to work. Third, they saw a particular harm in more aggressive forms of panhandling. Finally, they saw that panhandling inhibited community development and cohesiveness.

This history is presented below to distinguish the current efforts from the more sweeping measures of the past, but also to demonstrate that the current efforts are part of a long tradition of community efforts to maintain safety and civility in public spaces. Like the highwayman, carjacker, open-air drug dealer, or the street prostitute, the aggressive beggar has been a long-standing problem for law-abiding people seeking a healthy and pleasant community.

### *B. An Ancient Prohibition*

Societies have regulated begging throughout history. The earliest European court of which there is literary record, the *Areopagus* of classical Athens, set out to determine how citizens spent their time. Those who had lived off of alms were punished.<sup>28</sup> Thus, from the earliest western civilizations, society concluded that the beggar contributed nothing positive to a community, and actually interfered with the rights and productivity of others.

The idealized laws of Plato contain a provision for the exile of beggars.<sup>29</sup> Reasoning that, in a state run in accordance with his laws, there would be no need or good reason for begging, Plato would order that:

"no one is to go begging in the state [and that] anyone who attempts to do so, and scrounges a living by never-ending importunities, must be expelled from the market by the Market-Wardens, from the city by the City-Wardens, and from the surrounding country by the Country-Wardens. Beggars were sent across the border, so that the land may rid itself completely of such a creature."<sup>30</sup>

Roman law laid down very detailed procedures for dealing with beggars, but declined to impose an absolute ban. As such, it may have been the first system to distinguish between those beggars who could not physically make a living except through begging alms and those who were healthy, but chose to live through panhandling. The law codified during the reign of the Emperor Justinian provided that a person who discovered and reported a ft beggar should acquire that beggar as his property if the beggar was a slave, or as his permanent serf if the beggar was a free man.<sup>31</sup> The Novels of Justinian, which extended the law to the eastern capital of Constantinople, required that beggars' bodies be

28. 4 William Blackstone, *Commentaries on the Laws of England* 169 (9th ed. 1783) (citing 2 Valerius Maximus, chapter 6).

29. Plato, *The Laws*, 11.90.

30. *Id.*

31. CodeJ. 11.26(25).1.

examined to see whether they were fit for work.<sup>32</sup> If the beggar was fit and he was a slave, he was to be sent back to his owner; if he was free, but not a citizen of the capital, he was to be ordered to return to the province whence he had come; if he was a local inhabitant, he was assigned to the public works, and if he refused to work, he was to be exiled.<sup>33</sup>

These measures, which may sound peculiar or cruel to our contemporaries, represent an early conclusion that the problem with beggars is that they choose to provide for themselves financially without a contribution to the economic system. These societies rejected the parasite, and saw the issue as motivating the laggard to pursue productive work and self-sufficiency.

### C. *"The Begging Drones": The English Approach to Panhandling*

These traditions carried over to the Middle Ages. Our legal forbearers, the English, seemed to feel quite strongly about the problems that beggars presented to their community. The first English law to deal specifically with begging prescribed the death penalty for anyone who gave anything to a beggar able to work, and required all unemployed able-bodied beggars under sixty years of age to serve anyone who required their service.<sup>34</sup> By the latter half of the fourteenth century, begging became a regulated behavior. In 1388, an elaborate statute was passed which required that "beggars impotent to serve shall abide in the cities and towns where they be dwelling at the time of the proclamation of this statute . . .,"<sup>35</sup> Presumably, the English believed that beggars should rely on their home communities, but not burden strangers.

As the urban centers of England became more populous, regulation of begging became more intricate. A statute enacted in 1530, keeping the emphasis on a person's attachment to his or her community, ordered that the disabled poor be licensed to beg within their own local area.<sup>36</sup> Those begging outside the permitted area were to spend two days and nights in the stocks, and fed only bread and water. Moreover, anyone begging without a license was to be whipped and those "whole and mighty in body, able to labor" were to be "tied to the end of a cart naked, and be beaten with whips throughout the same town or other place till his body be bloody by reason of such whipping."<sup>37</sup>

This sanguinary law was amended in 1535 to provide assistance to those who were truly needy, and to guide the others towards productive work. Under

32. Nov. 80.4-5 (S35).

33. *Id.*

34. Statute of Laborers. 23 Edw. 3, St. 1. ch. 7 (1349).

35. Stephen, *supra* note 23, at 268-69 (quoting 12 Rich. 2, ch. 7). These early statutes were part of the vagrancy law which developed in late medieval England to retard the decay of the feudal system and discourage the desertion of serfs. Laws dealing with not living in one's proper home, i.e. vagrancy, date back to the time of Hlothaere and Eadric in the seventh century.

36. 22 Hen. 8, ch. 12.

37. Stephen, *supra* note 23, at 269-70.

the amendment, sturdy beggars were made to work, and invalids were supported by alms collected by the churchwardens and two others of every parish.<sup>38</sup> This was the first English law to legislate charitable sustenance of the poor.

After the accession to the throne of King Edward, the Henrician laws were replaced by more severe measures. The Edwardian statute provided that any loiterer or wanderer who would not work, or had run away from work, was to be branded with a "V" for vagabond.<sup>39</sup> Furthermore, he was to be a slave for two years to whomever demanded him, was to be fed bread and water, and forced to do any task "how vile soever it be as he shall be put unto by beating, chaining, or otherwise."<sup>40</sup> Moreover, if the enslaved beggar ran away, he was to be branded with an "S" upon the cheek and made a slave for life. If he ran away again, he was to be hanged.<sup>41</sup>

The statute of Edward VI was probably enacted to deal with the large number of laborers who were on the streets and byways, having lost their employment during the persecution of Catholics during the Reformation. This severe vagrancy statute proved difficult to enforce and presumably aroused strong opposition. It lasted only two years before being repealed,<sup>42</sup> and the old acts of Henry VIII were reenacted.<sup>43</sup>

During the reign of Queen Mary, more detailed laws were enacted regarding the number of begging licenses to be issued and the organized collection of alms for the poor.<sup>44</sup>

The early part of Elizabeth's reign once more saw chaos resulting from the anti-Protestant purges of Queen Mary and the anti-Catholic reaction. Consequently, in 1572, Parliament enacted a harsh provision which required that all beggars be "grievously whipped and burned through the gristle of the right ear" for a first offense, and held guilty of a felony for a second offense.<sup>45</sup>

In 1597, all previous laws concerning beggars and vagrants were repealed in favor of a statute which would remain in force for over a century.<sup>46</sup> The new law still recognized the problem as getting able people to work, but offered assistance to this class of people (not charity). In accordance with the 1597 act, counties were required to build houses of correction, where "rogues, vagabonds, and sturdy beggars" were to be kept until they were put to work or banished.<sup>47</sup> Those persons found begging were to "be stripped naked from the middle upwards, and be openly whipped until his body be bloody" and then sent to the

38. 27 Hen. 8, ch. 25 (cited in Stephen, *supra* note 23, at 270-71).

39. 1 Edw. 6, ch. 3 (1547) (cited in Stephen, *supra* note 23, at 271).

40. *Id.*

41. *Id.*

42. 3 & 4 Edw. 6, ch. 16 (1549).

43. 5 & 6 Edw. 6, ch. 2 (1552).

44. 2 & 3 Phil. & M., ch. 5 (1555).

45. 14 Eliz. ch. 5 (1572) (quoted in Stephen, *supra* note 23, at 272).

46. 39 Eliz. ch. 4 (1597) (cited in Stephen, *supra* note 23, at 272).

47. *Id.*

house of correction in his birthplace.<sup>48</sup> The Elizabethan statute was a catch-all, and included among those defined as rogues and vagabonds not only "idle persons going about . . . begging," but also fortune-tellers, jugglers, minstrels, and "common laborers, able in body and refusing to work for the wages commonly given."<sup>49</sup>

The latter inclusion underlines the fact that the early vagrancy statutes were used to keep laborers with their local employer in a period of increasing transiency. According to John Locke, poverty and begging were not the result of "scarcity of provisions or want of employment," but rather "the relaxation of discipline and the corruption of manners, virtue, and industry."<sup>50</sup> Locke, when serving as Commissioner of Trade, attempted to address the problem of "the begging drones." His plan included stiff penalties for those who begged without a license, including sending men to sea, hard labor, and sentences to the House of Correction.<sup>51</sup>

The Statute of 1597 was slightly modified in 1713 with a provision authorizing justices to commit incorrigible rogues to a seven-year period as servants or apprentices in Britain or the colonies.<sup>52</sup>

In 1744, the long list of vagrants covered by previous laws was divided into idle and disorderly persons, rogues and vagabonds, and incorrigible rogues.<sup>53</sup> The act specified, in minute detail, procedures and punishments for each class.<sup>54</sup> Able-bodied persons who supported themselves by begging in their own locality were held to be idle and disorderly, and were imprisoned for one month with hard labor.<sup>55</sup> Those who panhandled outside their own parish were classified as rogues and could be imprisoned for up to six months, while repeat offenders were deemed incorrigible rogues and subject to imprisonment for two years.<sup>56</sup> The 1744 act was the law of England when the Continental Congress declared its independence.

In England, the focus of vagrancy law changed from motivating unproductive members of society to work, to preventing crime, thus ushering in the second genre of anti-begging measures.<sup>57</sup> The Vagrancy Act of 1824,<sup>58</sup> which is still in force in the United Kingdom, extended the definition of rogues and

48. *Id.*

49. *Id.*

50. Maurice Cranston, *John Locke: A Biography* 424 (1985) (quoted in *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)).

51. *Id.*

52. 12 Anne, sL 2, ch. 23 (1713).

53. 17 Geo. 2, ch. 5 (1744) (cited in Stephen, *supra* note 35, at 73).

54. *Id.* (cited in 4 William Blackstone, *Commentaries on the Laws of England* 169 (9th ed. 1783)).

55. *Id.*

56. *Id.*

57. Nonetheless, vagrancy and idleness were still described as "offenses against the public economy." 3 Henry J. Stephen, *New Commentaries on the Laws of England* 309 (1844).

58. 5 Geo. 4, ch. 83 (1824).

vagabonds to include loiterers intending to commit crimes, reputed thieves, those possessing thieves' tools, and other potential criminals.<sup>59</sup> By 1883, Sir James F. Stephen remarked that:

These provisions have been so much extended by more recent legislation, that it may now be almost stated as a general proposition, that any person of bad character who prowls about, apparently for an unlawful purpose, is liable to be treated as a rogue and vagabond.<sup>60</sup>

This statement highlights another difference between the Vagrancy Act of 1824 and earlier legislation. The more recent law, which focused on having an unlawful purpose for loitering, punished people not on the basis of status alone, but on the basis of status *and* some specified (actual or imputed) intent.<sup>61</sup>

#### *D. In Scotland*

Scottish law developed along similar lines to English law, though usually somewhat later. This lag in the development of laws regulating begging is probably due to the slower decay of feudalism in Scotland, which had been the impetus for the earliest vagrancy laws in England. Also, after the Act of Union, less importance was attached to the governance of Scotland than of England.

Scotland began with a licensing approach. The first Scottish statute to limit begging forbade anyone between the ages of fourteen and seventy to beg, unless provided with a permit by the sheriff or bailie.<sup>62</sup> At the turn of the sixteenth century, the sheriffs' discretion was limited so that only the "crooked, blind, impotent, and weak" were allowed to beg.<sup>63</sup> Thus, Scottish society's tolerance for the panhandler was limited to those unable to provide for themselves.

These provisions for locally-issued begging permits were the backbone of the Scottish approach to the problem until the unified vagrancy laws of the Hanoverian kings in the eighteenth century. Some detail had been added under Charles II, including a provision allowing sheriffs and bailies to compel able-bodied beggars to work,<sup>64</sup> and requiring the construction of correction houses for beggars.<sup>65</sup>

59. *Id.* (cited in Stephen, *supra* note 35, at 273-74).

60. Stephen, *supra* note 23, at 274.

61. 5« *Ledwith v. Roberts*, 3 All E.R. 570, 579 (1936).

62. Jac. 1, ch. 21 (1424).

63. Jac. 4, ch. 14 (1503). These laws were actually earlier than the corresponding measure in English law during the reign of Henry VIII and may have inspired it

64. Car. 2, ch. 161 (1649).

65. Car. 2, ch. 42 (1672).

*E. In Other Parts of Europe*

On the continent, the Roman law of Justinian was accepted until the codifications of the nineteenth century. The current French Code Penal, as amended from the Code Penal of 1832, distinguishes between those who associate for criminal purposes (*associations de malfaiteurs*), vagrants (*vagabonds*), and beggars (*mendicants*).<sup>66</sup>

The French have incorporated a strong sense of social obligation into their law. Strikingly, those who beg in an area which has no public establishment for the aid of the poor are not punished by the Code.<sup>67</sup> Beggars in areas which provide such an establishment, however, are to be imprisoned for three to six months, and then taken to the poorhouse (*dipôt de mendicite*).<sup>68</sup>

The French shared the English concern with wandering beggars. Even where there was a public charitable establishment, habitual and sturdy beggars (*mendicants d'habitudes valides*) were to be punished with one to three months of imprisonment and, if they were arrested outside their *canton* of legal residence, were punished by six months to two years of imprisonment.<sup>69</sup>

The French were the first to put controls on aggressive or misleading begging. Article 276 of the Code imprisons for six months to two years any beggar (including the handicapped) who begs on private property without permission of the owner, or feigns illness or infirmity, or begs in a group, unless the group consists of a husband and wife, parent and child, or blind person and the person who leads him.<sup>70</sup> Moreover, beggars or vagrants found in possession of weapons or thieves' tools are subject to two to five years in prison,<sup>71</sup> and a beggar or vagrant in possession of any item over one franc in value (approximately 22 cents) whose provenance cannot be explained is subject to six months to two years.<sup>72</sup> These measures laid the groundwork for laws that identify and prohibit more intrusive types of begging. Furthermore, other civil-law systems have generally modeled their anti-begging laws on those of France,<sup>73</sup> though many have now abrogated those laws.<sup>74</sup>

66. See C. pin. Arts. 265-82 (Daloz 24th ed. at 172-76 (1986-87)). Vagrants are defined as "those who have neither certain domicile, nor means of subsistence, and who are not regularly employed." Or, "*ceux qui n'ont ni domicile certain, ni moyens de subsistence, et qui n'exercent habituellement ni métier, ni profession*" *Id.* Art. 270.

67. See Crim. 24 août et 24 nov. 1893, D.P. 96. 1. 430; 6 sept. 1894 et 18 oct. 1895, O.P. 96. 1. 430; 16 mars 1899, D.P. 1900. 5. 435.

68. C. pen. Art 274.

69. C. pen. Art. 275.

70. C. pen. Art. 276.

71. C. pen. Art. 277.

72. C. pen. Art. 278.

73. See, e.g., Danish Criminal Code, ch. 22, Arts. 197-98 (G.E.C. Gad 1958).

74. See, e.g., StGB § 361; EGStGB vom 2.3.1974 (Germany).

Communist legal systems originally did not criminalize begging or vagrancy because, as the state would offer universal employment, no one should have to beg for a living (or, perhaps, since the poor and destitute could not exist in the workers paradise, there was no need to include them in the law). By 1960, however, even the Supreme Soviet recognized that some Russians would prefer to beg rather than work for the state, and accordingly passed an act forbidding "systematically engaging in vagrancy or in begging, continued after warning given by administrative agencies."<sup>75</sup>

In sum, westerners have historically and consistently sought to prevent, or at least control, begging. These societies recognized the negative community consequences of begging, and took corrective action to drive those beggars capable of work to more productive forms of making a living. They were especially concerned with beggars outside of their home communities, and with those beggars who presented a threat to the safety and security of others.<sup>76</sup>

*F. The Lewd, the Disorderly, and the Dissolute: Begging Controls in Early America*

The first effort of the newly independent United States to control beggars and vagrants was to deny them all rights. The nascent United States accomplished this by excepting them from the Privileges and Immunities Clause of the Articles of Confederation:

The free inhabitants of each of these States, *paupers, vagabonds, and fugitives from justice excepted*, shall be entitled to all the privileges and immunities of free citizens in the several States, and the people of each State shall have free ingress and egress to and from any other State.<sup>77</sup>

No such exception appeared in the Constitution of 1787. To the extent that the framers of the Constitution were conscious of the subject, it can probably be assumed that they intended that the matter be left to the control of the states. The states did, in fact, take up the gauntlet. By 1956, vagrancy statutes were in force in every state except West Virginia, where it was a common-law crime.<sup>78</sup>

75. UK RSFSR Art. 209 (Russian Soviet Federated Socialist Republic 1960). *in* Soviet Criminal Law and Procedure: The RSFSR Codes 59, 224 (H. Bennan & J. Spindler trans. 1966).

76. To limit both space and our comparisons to those nations with similar legal systems, we have not discussed panhandling laws outside of Europe. However, the problem and attempts at legislative solutions are not limited to western civilization. Even in India, where begging is a Hindu rite, there is a legislative initiative to control what is perceived as a growing problem of aggressive panhandling. See Vijay Joshi, *Anti-Begging Law Defies Hindu Tradition*. Los Angeles Times, Dec. 13, 1992, at 39.

77. Articles of Confederation, Art. IV (*quoted in* Caleb Foote, *Vagrancy-type Law and Its Administration*. 104 U. Pa. L. Rev. 603, 616 n.33 (1936)).

78. Caleb Foote. *Vagrancy-type Law and Its Administration*, 104 U- Pa. L. Rev. 603, 609 (1956).

Massachusetts's vagrancy statute of 1788<sup>79</sup> was closely patterned on the English law in effect at the time, and used the same classification of idle and disorderly persons, rogues and vagabonds, and incorrigible rogues. Other states appear to have based their definition of vagrants on the Elizabethan law of 1597,<sup>80</sup> with its condemnation of jugglers, minstrels, idlers, etc. An eighteenth century New York law classified as disorderly "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."<sup>81</sup>

The vagrancy statutes of states which later entered the union were usually based on those of the older states, although the newer states may have added prohibited classes to the list. For instance, the offense of being a "common drunkard" was unknown in the common law, but was included in most state vagrancy statutes by the end of the nineteenth century.<sup>82</sup>

A common feature of these state statutes was a prohibition of beggars or begging. One typical measure, from California's statute of 1872, prohibited "[e]very beggar who solicits alms as a business."<sup>83</sup> This provision is still in force, though it has been amended to prohibit "accost[ing] other persons in any public place or in any place open to the public for the purpose of begging or soliciting alms."<sup>84</sup>

Until the 1960s and the initiatives of the Supreme Court, vagrancy laws were generally upheld by state courts. The Washington Supreme Court, for instance, upheld a statute which condemned "[e]very person who is a lewd, disorderly, or dissolute person."<sup>85</sup> The Court held that the statute was not unconstitutionally vague as "[t]he constitutional right of due process of law will not be given such effect as will render impossible laws which are generally admitted to be essential to the safety and well-being of society."<sup>86</sup> The Court emphasized the importance of the vagrancy statute in dramatic terms: "Society recognizes that vagrancy is a parasitic disease, which, if allowed to spread, will sap the life of that upon which it feeds."<sup>87</sup> The state courts, even more than federal courts, reflected this view well into the 1960s.

79. Mass. St. 1788. ch. 21.

80. 39 Eliz., ch. 4 (1597).

81. See Sherry, *supra* note 25. at 558-61.

82. See *id.* at 563.

83. Cal. Penal Code § 647(2) (West 1977).

84. Cal. Penal Code § 647(c) (West 1977). This statute cannot be enforced under a permanent injunction issued by the Federal District Court for the Northern District of California. *Blair v. Shanahan*, 775 F. Supp. 1315 (N.D. Cal. 1991). At the time of this writing, the case was on appeal to the Ninth Circuit. See *Blair v. Shanahan*. Nos. 92-15447, 92-15459, 92-15451 (9th Cir. 1992).

85. *State v. Hartowe*. 24 P.2d 601. 602 (1933).

86. *Id.* at 603.

87. *Id.*

## III. SURVEY OF CURRENT LEGISLATION

A. *State Codes*

Twenty-six states now have laws concerning begging. Eleven states merely authorize municipalities to proscribe begging.<sup>88</sup> Other states have maintained absolute provisions on begging, although apparently no state rigidly enforces such a provision.

The Criminal Code of Kansas prohibits "deriving support in whole or in part from begging."<sup>89</sup> Massachusetts, still maintaining some of the structure of the English statute of 1744, includes those wandering from place to place in order to beg in the definitions of both "tramps"<sup>90</sup> and "vagrants."<sup>91</sup> Under Michigan law, "a person found begging in a public place" is a "disorderly person."<sup>92</sup> Minnesota's vagrancy statute<sup>93</sup> includes in its definition of vagrancy not only "deriv[ing] one's support in whole or in part from begging," but also such Elizabethan practices as fortune-telling or being a "similar imposter." Wisconsin appears to share Minnesota's concern, in that it specifically prohibits "deriv[ing] part of [one's] support from begging or as a fortune teller or similar imposter."<sup>94</sup> Vermont's statute exempts the truly destitute, prohibiting only beggars who have no other visible means of support.<sup>95</sup> Louisiana and Mississippi retain the civil law's distinction between able-bodied and disabled beggars, punishing only the former.<sup>96</sup>

Many of the state laws currently on the books could be described as "status crimes," because they prohibit *being* something, rather than *doing* something. Several other states have some sort of variation on begging prohibitions. Five other states forbid loitering for the purpose of begging.<sup>97</sup>

88. Ark. Code Ann. § 14-54-1408 (Michie 1987); Ill. Rev. Stat., ch. 24, p 11-5-4 (1989); Mont. Code Ann. § -7-32-4304 (1989); Neb. Rev. Stat. § 15-257 (1987); N.H. Rev. Stat. Ann. § 47:17 (1990); N.C. Gen. Stat. § 160A-179 (1982); N.D. Cent. Code § 4(M)5-01(43) (1989); Ohio Rev. Code Ann. § 715.55B (Baldwin 1989); Utah Code Ann. § 10-8-51 (1990); Wash. Rev. Code Ann. § 35.22.280(34) (West 1990); Wyo. Stat. § 15-1-103(a)(xvii) (1990).

89. Kan. Stat. Ann. § 21-4108(e) (1988).

90. Mass. Gen. L. ch. 272, § 63 (1988).

91. Mass. Gen. L. ch. 272, § 66 (1988).

92. Mich. Comp. Laws Ann. § 750.167(lXh) (West 1990).

93. Minn. Stat. Ann. § 609.725(4) (West 1990).

94. Wis. Stat. Ann. § 947.02(4) (West 1988).

95. Vt. Stat. Ann. tit. 13, § 3901 (1989).

96. La. R.S. 14:107(3) (1986); Miss. Code Ann. § 97-35-37 (1972).

97. Ala. Code § 13A-1-1-9(a)(1) (1975); Ariz. Rev. Stat. Ann. § 13-290S(A)(3) (1990); Colo. Rev. Stat. § 18-9-112(2)(a) (1986); Del. Code Ann. tit. II, § 1321(4) (1990); N.Y. Penal Law § 240.35(1) (McKinney 1989). The New York law was niled unconstitutional in *Loper v. New York City Police Dep't*, 999 F.2d 699 (2d Cir. 1993). The Arizona law was upheld in *Slate ex rel. Williams v. City of Tuscon*, 520 P.2d 1166 (Ariz. Ct. App. -1974).

Finally, the aforementioned California statute limits violations to persons who "accost" others for the purpose of begging, thereby limiting its application to aggressive and coercive approaches by beggars. The state statute represented a conscious attempt to address what was perceived as the problem of panhandling, while still reforming the old vagrancy laws.<sup>98</sup>

Hawaii has followed California's lead. Its disorderly conduct statute, based on California's section 647, more specifically punishes an individual if, "with intent to cause physical inconvenience or alarm by a member or members of the public, or recklessly creating a risk thereof, he impedes or obstructs, for the purpose of begging or soliciting alms, any person in any public place or in any place open to the public."<sup>99</sup>

### B. *The Approach of the Cities*

Most of the nation's larger cities have had ordinances prohibiting or limiting begging in public places. Several cities retain absolute bans on begging,<sup>100</sup> although most such ordinances are no longer enforced.<sup>101</sup> A few cities prohibit begging in specific places.<sup>102</sup>

The most recent genre of anti-panhandling laws moves away from all of the actual or potential pitfalls of their predecessors. They do not criminalize the status of being a beggar (or being poor). They do not prohibit innocuous acts such as wandering or loitering, which may be considered harmless. Of course, they also forego the more peculiar and stringent punishments of their medieval ancestors.

Rather, the best of the civic ordinances under consideration or currently in effect are aimed at the problems of civility and usability of public spaces. They attempt to reach only the problems of "aggressive begging" and "pedestrian interference," reaching only conduct which is egregious, dangerous, or intrusive.

One of the earliest of this new genre is Seattle's ordinance forbidding "aggressively beg[ging]" and "obstruct[ing] pedestrian or vehicular traffic."<sup>103</sup> The ordinance defines "aggressively" begging as "begging with the intent to intimidate another person into giving money or goods."<sup>104</sup> Seattle's ordinance has been upheld by the Washington Supreme Court.<sup>105</sup>

98. See 22 Assem. Com. Rep. (1959-1961), No. 1.. Crim. Procedure, p. 9, 2 Appen. to Assent. J. (1961 Reg. Session) (California Legislative Records).

99. Haw. Rev. Stat § 7U-1101(l)(c) (1978).

100. Such cities include: Austin, Baltimore, Buffalo, Chicago, Fort Wayne, Lexington, Miami, Mobile, Newport News, Phoenix, San Francisco, Toledo, and Wichita (in definition of loitering).

101. Only Baltimore and Phoenix made arrests for violations of their begging prohibitions in 1991.

102. Albuquerque (public view); El Paso (in vehicles stopped in the streets at traffic lights); Indianapolis (streets, parks); New York (subways and airports); San Antonio (airports).

103. Seattle, Wash., Mun. Code § 12A.12.015B (1987).

104. Seattle, Wash., Mun. Code 5 12A.12.O1SA(l) (1987).

105. See *Cily of Seattle v. Webster*, 802 P.2d 1333 (Wash. 1990), *cert. denied*. 111 S. Ct. 1690

Almost simultaneously with Seattle's ordinance, the city of Portland, Oregon, passed an act prohibiting "offensive physical contact."<sup>106</sup> Although the statute never mentions begging, and limits its prohibition to physical contact, the Portland ordinance could be applied to aggressive panhandling as it bans "[causing] or attempting] to cause another person reasonably to apprehend that they will be subjected to any offensive physical contact either to their person or to personal property in their immediate possession."<sup>107</sup>

In 1988, Minneapolis followed Seattle's lead and passed an ordinance aimed specifically at "interference with pedestrian or vehicular traffic."<sup>108</sup> The Minneapolis ordinance uses exhaustive language, requiring that:

no person, in any public or private place, shall . . . follow or engage in conduct which reasonably tends to arouse alarm or anger in others, or walk, stand, sit, lie, or place an object in such a manner as to block passage by another person or a vehicle, or to require another person or a driver of a vehicle to take evasive action to avoid physical contact.<sup>109</sup>

This ordinance is a combination between the Portland and Seattle ordinances.

Several other cities have adopted anti-aggressive begging ordinances, including Albuquerque,<sup>110</sup> Atlanta,<sup>111</sup> Baltimore,<sup>112</sup> Cincinnati,<sup>113</sup> Dallas,<sup>114</sup> Tulsa,<sup>115</sup> and Washington (D.C.).<sup>116</sup> Several other cities are also considering such ordinances, including Jacksonville, Florida (respondent in the *Papachristou* decision), Philadelphia, Portland (Maine), Evanston, New York City, Detroit, Long Beach, and Pittsburgh.

(1991). The ordinance has since been amended by adding a prohibition on lying down on public sidewalks. *See* Seattle, Wash., Mun. Code § 15.48.040.

106. Portland, Or., Mun. Code § 14.24.040(a) (1987).

107. *Id.* (emphasis added).

108. Minneapolis, Minn., Charter & Code of Ordinances tit. 15, § 385.65 (1988).

109. *Id.*

110. Albuquerque, N.M., Mun. Code § 12-1-2-7 (1988) ("hindering or molesting persons passing along," "intentionally obstructing" or "aggressively begging . . . if the means are intended to intimidate another person into giving money or goods").

111. Atlanta, Ga., Code of Ordinances § 17-3006 (1991) ("ask, beg or solicit alms . . . by accosting another or forcing oneself upon another").

112. Baltimore City Code, art. 19, § 249.

113. Cincinnati, Ohio, Mun. Code § 910-13 (1992) ("recklessly interfere with pedestrian or vehicular traffic").

114. Dallas, Tex., City Code § 31-35 (1991) ("solicitation by coercion," including "persis[ence] in a solicitation after the person solicited has given a negative response").

115. Tulsa, Okla., Pen. Code § 1407 (1992) ("stop or accost others or direct persons or animals to stop or accost others . . . to ask for money" two or more times within a period of one hour).

116. 22 D.C. Code Ann. § 3311 (1993).

## IV. THE JUDICIAL RESPONSE: BEGGING CONTROLS IN THE COURTS

A. *The Supreme Court's Hints and Guidelines*I. *Response to Controls on Vagrancy*

There are relatively few American cases dealing with the constitutionality of regulations on begging. There are several reasons for this lack of jurisprudence. First, it has been the exception, rather than the rule, for police officers to actually arrest beggars. In a recent New York case, the judge, while striking down a sweeping prohibition of "loitering for the purpose of begging," acknowledged that actual arrests for begging were exceedingly rare.<sup>117</sup> Rather, the police have usually warned beggars, making it rare for the issue to come to trial. The warning, or the "move on" order, of course, can do the trick, and protect the safety and civility of the area.

A second reason is that the roots of vagrancy laws are of such antiquity that, until recently, they have not been questioned by legislators, civil libertarians, or beggars.

Finally, during the nineteenth century, the United States was rapidly expanding both physically and economically while maintaining strong family structures. Consequently, the United States may have had fewer habitual beggars as a portion of the population than it has now.<sup>118</sup> Thus, federal courts did not consider the constitutionality of vagrancy laws until the late 1960s and have only been faced with the issue of regulation of begging within the last three years. Today, more people are making their living or supplementing their income by begging, bringing the issue back to the forefront.

One of the few federal cases of the nineteenth century to mention beggars concerned an effort by the city of New York to regulate immigrants coming through the city's port. In *Mayor of New York v. Miln*,<sup>119</sup> the city fined the master of a vessel which had brought one hundred passengers into the port without reporting the passengers' names, ages, and last legal settlements.<sup>120</sup> The Court held, in a decision which was subsequently overturned, that the exclusion of undesirable immigrants was within the police power of the state, and was not an unconstitutional attempt to regulate interstate commerce.<sup>121</sup> More important than the holding of the Court was its comparison between the

117. *Loper v. New York City Police Dep't*, 802 F. Supp. 1029, 1032, 1036, 1047 (S.D.N.Y. 1992), *aff'd*, 999 F.2d 699 (2d Cir. 1993).

118. "I have now been here *twenty months* and I have only been visited by *two beggars*—one English, one Italian." Paul Johnson, *The Birth of the Modern: World Society 1815-1830* S3 (1991) (quoting William Cobbett, *Journal of a Year's Residence in the United States of America* (1819)).

119. 36 U.S. (11 Pet.) 102 (1837).

120. *Id.* at 131.

121. *Id.* at 142.

exclusion of paupers and beggars to the quarantine of passengers with virulent diseases:

We think it as competent and as necessary for a state to provide precautionary measures against the moral pestilence of paupers, vagabonds, and possibly convicts; as it is to guard against the physical pestilence, which may arise from unsound and infectious articles imported, or from a ship, the crew of which may be labouring under an infectious disease.<sup>122</sup>

This sort of inflammatory language was characteristic of discussions of vagrancy law well into the twentieth century. At that time, though, the focus was not on safety and civility in public spaces, but on the "moral pestilence."

In 1941, the Supreme Court of the United States considered a case which, although not concerning an ordinance that directly affected begging, was to have a major influence on state regulation of activities protected by the First Amendment. In *Cox v. New Hampshire*,<sup>123</sup> a group of Jehovah's Witnesses were convicted of violating a state statute prohibiting any "parade or procession" on a public street without a license. The plaintiffs argued that, as the parade was "for the purpose of disseminating information in the public interest," the licensing provision violated their First Amendment freedoms of speech, religion, and assembly. The Supreme Court did not agree.<sup>124</sup> The Court noted that the ministers were charged only for parading and not for such communication as handing out leaflets or wearing placards.<sup>125</sup> Consequently, the Court upheld the New Hampshire statute as legitimately restricting the *manner* of speech. The Court remarked, in language directly relevant to the current debate, that:

[C]ivil liberties, as guaranteed by the Constitution, imply the existence of an organized society maintaining public order without which liberty itself would be lost in the excesses of unrestrained abuses. The authority of a municipality to impose regulations in order to assure the safety and convenience of the people in the use of public highways has never been regarded as inconsistent with civil liberties but rather as one of the means of safeguarding the good order upon which they ultimately depend.<sup>126</sup>

This case was the first to specifically state that cities had the power to regulate the time, place, and manner of speech in a non-discriminatory fashion.<sup>127</sup> Not only were such restrictions permissible, they were seen as necessary for ordered

122. *Id.* at 142-43.

123. 312 U.S. 569, 570-71, 61 S. Ct. 762, 763 (1941).

124. *Id.* at 573, 61 S. Ct. at 764.

125. *Id.*, 61 S. Ct. at 764.

126. *Id.* at 574, 61 S. Ct. at 765.

127. *Id.* at 576, 61 S. Ct. at 766.

liberty. Current versions of anti-aggressive begging laws follow this principle and seek to protect the order upon which basic civil liberties depend.

In *Shuttlesworth v. City of Birmingham*,<sup>128</sup> the Supreme Court considered an ordinance which made it an offense to obstruct passage on a street or sidewalk and to refuse police orders to move on.<sup>129</sup> The Court upheld the ordinance as constitutional, as long as the police are limited in their discretion and allowed to issue move-on orders only to persons who are obstructing a public thoroughfare.<sup>130</sup>

In a 1968 case, *United States v. O'Brien*?<sup>131</sup> the Supreme Court set the standard for determining the permissible scope of regulation of speech containing expressive elements. The case arose after the defendants were arrested for burning their Selective Service registration certificates during the Vietnam War.<sup>132</sup> The Court found the act in question<sup>133</sup> constitutional because "when 'speech' and 'nonspeech' elements are combined in the same course of conduct, a sufficiently important governmental interest in regulating the nonspeech element can justify incidental limitations on First Amendment freedoms."<sup>134</sup>

The Court held that such a regulation is

sufficiently justified if it is within the constitutional power of the Government; if it furthers an important or substantial governmental interest; if the governmental interest is unrelated to the suppression of free expression; and if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest.<sup>135</sup>

The *O'Brien* test has remained the standard for restrictions on conduct containing an expressive component. All four of these elements appear to be met with anti-aggressive solicitation legislation. Thus, these measures should be upheld as constitutional even if a court were to find an expressive element in street begging.<sup>136</sup>

128. 382 U.S. 87, 86 S. Ct. 211 (1965).

129. *Id.* at 88, 86 S. Ct. at 212.

130. *Id.* at 90-91, 86 S. Ct. at 213-14. Concurring opinions by Justices Douglas, Brennan, and Fortas agreed that, on its face, the ordinance was a reasonable exercise of the City's police power, although they argued that the defendant could not be held guilty on the facts presented. *Id.* at 95, 86 S. Ct. at 216 (Douglas, J., concurring); *id.* at 99, 86 S. Ct. at 217 (Brennan, J., concurring); *id.* at 99, 86 S. Ct. at 218 (Fortas, J., concurring).

131. 391 U.S. 367, 88 S. Ct. 1673 (1968).

132. *Id.* at 369, 88 S. Ct. at 1675.

133. University Military Training and Service Act, ch. 625, §§ 12(b)(1)-(5), 62 Stat. 622 (1948) (codified as amended at 50 U.S.C.A. App. § 462(b)(3) (1990)).

134. *O'Brien*, 391 U.S. at 376, 88 S. Ct. at 1678-79.

135. *Id.* at 377, 88 S. Ct. 1679.

136. See *infra* text at pp. 322-324. The *O'Brien* standard was reiterated and approved in *Members of the City Council v. Taxpayers for Vincent*, 466 U.S. 789, 104 S. Ct. 2118 (1984). There, the Court rejected "the notion that a city is powerless to protect its citizens from unwanted

The question of whether a restriction on begging punishes an individual for his status<sup>137</sup> as a poor person, rather than for a particular act, is analogous to the situation in *Powell v. Texas*.<sup>138</sup> In *Powell*, the defendant was convicted of violating an ordinance prohibiting public drunkenness.<sup>139</sup> The defendant maintained that the ordinance punished him for an "involuntary" characteristic of his status as a chronic alcoholic, thereby violating his Eighth Amendment right to be free from cruel and unusual punishment.<sup>140</sup> The plurality opinion authored by Justice Thurgood Marshall, however, held that the ordinance did not punish anyone for a particular status, but rather "for public behavior which may create substantial health and safety hazards, . . . and which offends the moral and esthetic sensibilities of a large segment of the community."<sup>141</sup> This is, amongst other goals, what cities such as Seattle and Baltimore are trying to accomplish.

In the late 1960s, courts began to confront the question of the constitutionality of vagrancy laws. In the 1966 case *Hicks' v. District of Columbia*,<sup>142</sup> the majority dismissed a writ of certiorari on the technical ground that the petition was untimely and the record inadequate.<sup>143</sup> Justice William O. Douglas dissented, arguing that the definition of vagrancy in the District of Columbia's statute was unconstitutionally vague, and also that crimes which focus on status alone violate the Due Process Clause of the Fifth Amendment. Justice Douglas thought that issue was sufficiently important for the Court to exercise its discretion and pass judgment on the case.<sup>144</sup>

In 1972, the Supreme Court held Jacksonville, Florida's vagrancy statute unconstitutional in an opinion by Justice Douglas that echoed his dissent in *Hicks*.<sup>145</sup> In *Papachristou v. City of Jacksonville*, the Court held that the ordinance's definition of vagrancy, with its language only slightly altered from the Elizabethan statute of 1597, was unconstitutionally vague. The Court reasoned that the statute failed to give a person of ordinary intelligence notice that any particular conduct might be prohibited, and also that it opened the door to arbitrary law enforcement.<sup>146</sup> Justice Douglas' concerns, though, seem to go beyond the problem of vagueness. He argued that the ordinance made criminal "activities which by modern standards are normally innocent."<sup>147</sup> The

exposure to certain methods of expression which may legitimately be deemed a public nuisance." *Id.* at 805. 104 S. Ct. at 2129.

137. *Robinson v. California*, 370 U.S. 660, 82 S. Ct. 1417 (1962) (stating that punishment for status alone violates the Eighth Amendment).

138. 392 U.S. 514. 88 S. Ct. 2145 (1968).

139. *Id.* at 517, 88 S. Ct. at 2146.

140. *Id.* 88 S. Ct. at 2146-47.

141. *Id.* at 532, 88 S. Ct. at 2154.

142. 383 U.S. 252. 86 S. Ct. 798 (1966).

143. *Id.* at 252. 86 S. Ct. at 798.

144. *Id.* at 252-58, 86 S. Ct. at 798-801 (Douglas, J., dissenting).

145. *Papachristou v. City of Jacksonville*. 405 U.S. 156. 92 S. Ct. 839 (1972).

146. *Id.* at 162, 92 S. Ct. at 843.

147. *Id.* at 163, 92 S. Ct. at 844.

opinion, replete with homages to aimless wandering, marks the outer boundary for jurisdictions seeking to address the topic of aggressive solicitations.<sup>148</sup>

Following the Court's sweeping decision in *Papachristou*, most cities and states ceased enforcing any restrictions on beggars or vagrants. This change stopped the enforcement of laws which had often been applied in an arbitrary and racist manner.<sup>149</sup> It also had a baneful effect as police departments became increasingly reluctant to impose any standards of public civility. The baby was tossed out with the proverbial bathwater, leaving urban residents and visitors to cope with increasing sidewalk anarchy.

Controls on aggressive begging represent an attempt to reverse that trend. The response by the judiciary, to attempts to re-establish civility in public spaces while retaining civil liberties, has been mixed.

## 2. Response to Controls on Solicitations for Money

The Supreme Court has yet to rule on whether panhandling is protected by the First Amendment. Nonetheless, in four opinions, it provided directions that can be gainfully used by those drafting legislation in this area.

In *Village of Schaumburg v. Citizens for a Better Environment*,<sup>150</sup> the Court held that certain solicitation by a charitable organization is protected First Amendment speech. The ordinance in question in *Schaumburg* prohibited door-to-door or on-the-street solicitation by organizations not using at least seventy-five percent of their funds for "charitable purposes."<sup>151</sup> The Court held that "charitable appeals for funds, on the street or door to door, involve a variety of speech interests—communication of information, the dissemination and propagation of views and ideas, and the advocacy of causes—that are within the protection of the First Amendment."<sup>152</sup> Charitable solicitation is, at the same time, subject to reasonable regulation, although it must be "undertaken with due regard for the reality that 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."<sup>153</sup> The instant ordinance was found to be unconstitutionally overbroad.<sup>154</sup>

The *Schaumburg* decision sets forth the reasons why some solicitations by strangers come within the protection of the First Amendment. In doing so, it focused on the underlying message, and the contribution that message makes to the community.

148. *Id.* at 163-64, 92 S. Ct. at 843-44.

149. *See generally*. Foote, *supra* note 78.

150. 444 U.S. 620, 100 S. Ct. 826 (1980).

151. *Id.* at 624, 100 S. Ct. at 829.

152. *Id.* at 632, 100 S. Ct. at 833.

153. *Id.*, 100 S. Ct. at 834.

154. *Id.* at 639. 100 S. Ct. at 837.

In 1984, the Supreme Court applied the *O'Brien* test in holding constitutional a National Park Service regulation prohibiting camping in Washington's Lafayette Park (located across the street from the White House).<sup>155</sup> The challengers to the regulation, self-proclaimed advocates for the homeless, wanted to sleep in the park to demonstrate their consternation with the level of government spending going to their constituents. The Court found the anti-sleeping regulation in question to be content-neutral, declaring that it was "justified without reference to the content of the regulated speech,"<sup>156</sup> and was not applied "because of disagreement with the message presented."<sup>157</sup> In other words, people were free to advocate for any message, provided that begging was not done in an aggressive manner.

The Supreme Court directly addressed the topic of solicitation for money in *United States v. Kokinda*.<sup>158</sup> In *Kokinda*, the Court considered a Postal Service regulation prohibiting solicitation of contributions on sidewalks outside of post offices. The Court found the prohibition of face-to-face solicitation justified, given its disruptive nature.<sup>159</sup>

Although the case did not directly deal with street panhandling, the Court offered some clear views on the subject, commenting that "[a]s residents of metropolitan areas know from daily experience, confrontation by a person asking for money disrupts passage and is more intrusive and intimidating than an encounter with a person giving out information."<sup>160</sup> The Court thus firmly distinguished the dissemination of information, which contributes to the public discourse, from mere begging. This distinction apparently arises from a recognition that begging contains no substantive message, is disruptive, and is intimidating.

The *Kokinda* court also clarified the "narrowly tailored" element of the *O'Brien* test, holding that "[e]ven if more narrowly tailored regulations could be promulgated, . . . the Postal Service is only required to adopt *reasonable* regulations, not 'the most reasonable or the only reasonable' regulation possible."<sup>161</sup>

Moving from post offices to airports, the Court upheld a regulation of the Port Authority of New York and New Jersey banning "solicitation and receipt of funds" in a "continuous or repetitive manner" within airport terminals.<sup>162</sup> The plurality opinion in *International Society of Krishna Consciousness v. Lee*, authored by Chief Justice Rehnquist, was centered on four Justices' conclusion

155. *Clark v. Community for Creative Non-violence*, 468 U.S. 288, 104 S. Ct. 3065 (1984).

156. *Id.* at 293, 104 S. Ct. at 3069.

157. *Id.* at 295, 104 S. Ct. 3070.

158. 497 U.S. 720, 110 S. Ct. 3115 (1990).

159. *Id.* at 733, 110 S. Ct. at 3123.

160. *Id.* at 734, 110 S. Ct. at 3123.

161. *Id.* at 735-36, 110 S. Ct. at 3124 (quoting *Cornelius v. NAACP Legal Defense & Educ. Fund*, 473 U.S. 788, 808, 105 S. Ct. 3439, 3452 (1985)).

162. *International Soc'y for Krishna Consciousness, Inc. v. Lee*, 112 S. Ct. 2701, 2704 (1992).

that the airport is not a "traditional public forum," because, unlike the public streets, the Port Authority has never considered the free exchange of ideas to be one of its principal purposes.<sup>163</sup> Therefore, there was no heightened First Amendment analysis; the regulation "need[ed] only satisfy a requirement of reasonableness."<sup>164</sup>

Although the "public forum" category applies to the parks and sidewalks, the plurality's basis for upholding the regulation as reasonable is relevant to the sidewalk panhandler. It found that face-to-face solicitation impedes pedestrian traffic and presents risks of coercion and fraud.<sup>165</sup> That conclusion would apply on urban streets as well.

Justice Anthony Kennedy disagreed with the plurality's public forum analysis.<sup>166</sup> Even though he viewed the airport as a public forum, Justice Kennedy concurred with the plurality in upholding the Port Authority regulation.<sup>167</sup> Because he upheld the ordinance despite concluding that airports were a public forum, his views are the most relevant to an analysis of controls on aggressive begging, and probably foreshadow any future Supreme Court decision on public begging.

Justice Kennedy viewed the ban on face-to-face solicitation as either a "reasonable time, place, and manner restriction, or as a regulation directed at the nonspeech element of expressive conduct."<sup>168</sup> He characterized the regulation as a time, place, or manner restriction because it did not prohibit all speech that solicits funds, but only "personal solicitations for immediate payment of money." He also viewed it as a restriction of nonspeech elements because, like street begging, it was "directed only at the physical exchange of money."<sup>169</sup> These conditions are all true with regard to street begging.

Furthermore, Justice Kennedy found the restriction to be content-neutral because it was aimed at the conduct element of the exchange of money and not at any particular message.<sup>170</sup> Justices Souter, Blackmun, and Stevens dissented, agreeing with Justice Kennedy's public forum analysis, but asserted that, as there

163. *Id.* at 2706.

164. *Id.* at 2708.

165. *Id.* Justice O'Connor concurred in upholding the regulation, agreeing that airports are not public fora, but emphasizing that the proper standard should be whether the regulation is "reasonably related to maintaining the multipurpose environment" of the Port Authority's airports. *International Soc'y for Krishna Consciousness, Inc. v. Lee*, 112 S. Ct. 2711, 2713 (O'Connor, J., concurring) (all concurrences and dissents in both *International Soc'y for Krishna Consciousness, Inc.*, 112 S. Ct. 2701 and a related case. *Lee v. Int'l Soc'y for Krishna Consciousness, Inc.*, 112 S. Ct. 2709 (1992) (per curiam) are reported here under a separate heading).

166. Justice Kennedy maintained that the plurality's analysis would "leave almost no scope for the development of new public forums absent the rare approval of the government." *Id.* at 2716 (Kennedy, J., concurring).

167. *Id.* at 2720.

168. *Id.*

169. *Id.* at 2721.

170. *Id.* at 2722.

was no actual evidence of coercion or fraud, the restriction was unreasonable.<sup>171</sup>

To summarize, the Supreme Court has treated restrictions on the solicitation of alms lightly, and has indicated that it is willing to distinguish its precedents protecting solicitation by recognized charities from common panhandling.

#### *B. The View of Other Federal Courts*

Until quite recently, the federal courts have not been faced with the specific issue of regulation of begging. In the past few years, however, the most important decisions regarding begging limitations have come from federal district and circuit courts.

The first federal court to consider the constitutionality of the begging clause of a vagrancy statute was the United States District Court for the District of Colorado in *Goldman v. Knecht*.<sup>172</sup> The Court struck down the statute before it, although the precedent the court set is far from clear.

The Colorado statute declared unconstitutional in *Goldman* included a provision prohibiting "begging or leading an idle, immoral, or profligate course of life."<sup>173</sup> The Court remarked that the term "begging" was sufficiently clear, but that the rest of the clause was unconstitutionally vague, as it left law enforcement officers with unbridled discretion to determine what activities might be "idle, immoral, or profligate."<sup>174</sup> The Court further held that the statute violated the equal protection clause of the Fourteenth Amendment, "because it punished] all vagrants as future criminals despite the fact that many never resort to criminality."<sup>175</sup>

The decision did not address the government's attempt to control the act of begging, except to declare that the use of "begging" in a statute would not create a vagueness problem. Furthermore, an aggressive begging statute would presumably be valid under this analysis because it would not punish anyone solely because of the possibility of future harm.

In 1990, the United States Court of Appeals for the Second Circuit considered a New York City Transit Authority Regulation prohibiting begging on the city's subway system, and issued what has become the strongest and most persuasive decision in the field.<sup>176</sup> The Circuit Court decision reversed a

171. *Id.* at 2724-25 (Souter, J., dissenting). The Supreme Court later let stand a Circuit ruling upholding a Kentucky law allowing some solicitations on highways, but preventing groups from distributing literature on the same roads. The logic of the law, if not the decision, appears to contradict the hierarchy created by the *ISKCON* decision. See *Ater v. Armstrong*, 961 R2d 1224 (6th Cir.), *cert. denied*, 113 S. CL 493 (1992).

172. 295 F. Supp. 897 (D.Co. 1969).

173. *Id.* at 905 (quoting Colo. Rev. Stat. § 40-8-19 (1963)).

174. *Id.*

175. *Id.* at 906-07.

176. *Young v. New York City Transit Authority*, 903 F.2d 146, 148 (2d Cir. 1990) (citing 21 N.Y.C.R.R. § 1050.6).

decision by the United States District Court for the Southern District of New York, which had held that begging was speech protected by the First Amendment, and that the regulation in question was an unreasonable restriction of that freedom.<sup>177</sup>

The Second Circuit reversed the lower court's decision, expressly holding that panhandling *is not speech protected by the First Amendment*.<sup>178</sup> The court viewed begging not in terms of a spoken appeal, but rather as a physical transfer/reception of money, stating that "[c]ommon sense tells us that begging is much more 'conduct' than it is 'speech.'"<sup>179</sup> The court further held that begging was not expression covered by the First Amendment. It focused on the lack of "[a]n intent to convey a *particularized message*," and the *unlikelihood* "that the message would be understood by those who viewed it."<sup>180</sup> The only message recognized by the court as common to all acts of begging was the desire to be given money, which the court held to be "far outside the scope of protected speech under the First Amendment."<sup>181</sup> Moreover, the court distinguished begging from solicitation by organized charities, as "there is a sufficient nexus between solicitation by organized charities and a 'variety of speech interests' to invoke protection under the First Amendment."<sup>182</sup>

The *Young* court also covered its flank, offering an alternative holding that accepted, *arguendo*, that "give me a dollar" fell within the constitutional protection given to speech. Even if begging were protected expression, the Circuit Court reasoned, the regulation would be valid under the standard enunciated in *United States v. O'Brien*.<sup>183</sup> Under the *O'Brien* test, a limitation of expression combined with conduct is valid if it is within the constitutional power of the government, it furthers an important or substantial government interest, the governmental interest is unrelated to the suppression of free expression, and any incidental restriction on alleged First Amendment freedoms is no greater than is essential to further the interest.<sup>184</sup> The court implicitly recognized that the regulation was within the Transit Authority's power. The second prong of the test led the court to proclaim that begging in the subway "often amounts to nothing less than assault, creating in the passengers the apprehension of imminent danger," and was thus within the government's interest to prohibit.<sup>185</sup> The third criterion of the *O'Brien* test is essentially a requirement of content neutrality. The *Young* court viewed the subway begging

177. *Id.*

178. *Id.* at 152-54.

179. *Id.* at 153.

180. *Id.* at 153 (quoting *Texas v. Johnson*, 491 U.S. 397, 404, 109 S. Ct. 2533, 2539 (1989) (quoting *Spence v. Washington*, 418 U.S. 405, 410-11, 94 S. Ct. 2727, 2730 (1974))).

181. *Id.* at 154.

182. *Id.* at 155.

183. *Id.* at 157.

184. *Id.* (quoting *United States v. O'Brien*, 391 U.S. 367, 377, 88 S. Ct. 1673, 1679 (1968)).

185. *Id.* at 158.

prohibition as content neutral because the justification for the regulation, prevention of intimidation and harassment, was unrelated to any message communicated.<sup>186</sup> Regarding the final criterion, the court held that the Transit Authority was able to demonstrate that begging necessarily leads to aggressive begging and "the only effective way to stop begging in the system was through the enforcement of a total ban."<sup>187</sup>

The landmark decision in *Young* stands for the proposition that begging is not speech entitled to any protection under the First Amendment. The decision laid bare any claim that there was any significant social message conveyed in "give me a dollar," and recognized the intrusion created by a panhandler.

The scope of *Young* did not prove to be very broad. When a federal district court in New York City was confronted with a sweeping prohibition on all begging, the court struck it down as unconstitutional.<sup>188</sup> The latter decision is entirely inconsistent with the conclusion that panhandling is not speech and is therefore not entitled to constitutional protection.

In *Loper v. New York City Police Department*,<sup>189</sup> the district court heard evidence on the "Broken Windows" effect. The police put on evidence that beggars tend to congregate in certain areas, that residents are intimidated by panhandlers, that beggars cause business to decline, block sidewalks, engage in aggressive and threatening behavior, and make fraudulent representations. Nonetheless, it chose to ignore *Young*, and not only find that begging should receive First Amendment protection, but that the beggar's interest (defined largely as "calling his condition to the attention of the general public")<sup>190</sup> outweighed that of the community, broken windows and all.

In reaching its decision, the *Loper* court chose to balance competing interests, largely circumnavigating all of the tests set down by the Supreme Court in *O'Brien* and elsewhere for reviewing First Amendment claims.<sup>191</sup> In doing so the court observed that:

Walking through New York's Times Square, one is bombarded with messages. Giant billboards and flashing neon lights dazzle; marquees beckon; peddlers hawk; preachers beseech; the news warily wraps around the old Times Building; and especially around the holidays, the

186. *Id.* at 158-59.

187. *Id.* at 160.

188. See *Loper v. New York City Police Dep't*, 802 R. Supp. 1029 (S.D.N.Y. 1992), *aff'd*, 999 F.2d 699 (2d Cir. 1993). *Loper* was a class action, brought on behalf of "all needy people who live in the State of New York, who beg on the public streets or the public parks of New York City." The court defined "needy person" as "someone who, because of poverty, is unable to pay for the necessities of life, such as food, shelter, clothing, medical care, and transportation." *Id.* at 1033. The general applicability of this description to either panhandlers or the homeless is very much open to question. See Baum and Bums, *supra* note 21.

189. *Loper*, 802 F. Supp. 1029.

190. *Id.* at 1042.

191. See *id.* The fact that the legislature presumably already did so did not appear to concern the court.

Salvation Army band plays on. One generally encounters a beggar too. Of all these solicitors, though, the only one subject to a blanket restriction is the beggar.<sup>192</sup>

The court's description may lead a person to believe that beggars are being unfairly singled out, and that their effect on the community is the same as the news ticker tape. In fact, amongst the sources of sensory input listed by Judge Sweet, only beggars present a direct, in-your-face, solicitation aimed at particular individuals.

The court's decision was nonetheless narrow. Judge Sweet tells us that "a ban on *aggressive* begging would probably survive scrutiny, "as would a complete ban on begging in certain areas, such as outside of automatic teller machines."<sup>193</sup> The New York law, reaching loitering for the purpose of begging, was rejected because it "cuts off all means of allowing beggars to communicate their message of solicitation."

The district court decision was upheld by a panel of the second circuit.<sup>194</sup> Although a setback for residents of urban areas, the decision will not necessarily interfere with the passage and enforcement of anti-aggressive panhandling laws.<sup>195</sup>

The appeals court primarily relied upon the distinction between a ban on begging in the confined area of New York's subways, and a ban on begging throughout the city.<sup>196</sup> The latter is not only less confining, it is also a public forum, thereby subjecting the restriction to the highest level of judicial scrutiny.<sup>197</sup> The second circuit saw the prohibition on loitering for the purpose of begging as leaving panhandlers "without the means to communicate their individual wants and needs."<sup>198</sup> Relying on the charitable solicitation cases, the court determined that begging is at least a form of speech:

Begging frequently is accompanied by speech indicating the need for food, shelter, clothing, medical care, or transportation. Even without particularized speech, however, the presence of an unkepl and dishevelled person, holding out his or her hand or a cup to receive a donation, itself conveys a message of need for support and assistance.<sup>199</sup>

192. *Id.* at 1039.

193. *Id.* at 1040 (emphasis added). We cannot be sure about the ATM exception or other area bans on begging in public forums. Judge Sweet also said that "the answer is not in criminalizing those people, debtor's prisons being long gone, but in addressing the root cause of their existence. The root cause is not served by removing them from sight, however, society is then able to pretend they do not exist a little longer." *Id.* at 1046.

194. *Loper v. New York City Police Dep't*, 999 F.2d 699 (2d Cir. 1993).

195. *Id.* at 701.

196. *Id.* at 702.

197. *Id.* at 703. 704.

198. *Id.* at 702.

199. *Id.* at 704. The court took this for granted, without consideration of the neediness of those begging. See generally Baum and Burns, *supra* note 21.

Given the resulting "compelling state interest" test, the old statute was almost bound to fail, and it did. Even if the state was considered to have a compelling interest in preventing the evils associated with begging, a statute that totally prohibits begging in all public places was unlikely to be considered narrowly tailored.<sup>200</sup> The court was therefore led to conclude that the socialization was analogous to solicitations by organized charities.<sup>201</sup> If the state of New York permitted the latter, it must not ban the former.

The court closed with a favorable mention of Seattle's anti-aggressive panhandling/pedestrian interference ordinance,<sup>202</sup> thus seemingly leaving the door open for a more circumscribed approach to the panhandling problem by the New York City Council.

### C. *The Ignoble Blair Decision*

The authorities in San Francisco used a narrower approach to their panhandling problem as compared to New York City. There, the city began with enforcement of a state statute aimed only at aggressive begging (accosting while begging) rather than a sweeping ban on begging.<sup>203</sup>

Despite this limitation (a limitation absent in the *Loper* case), a federal judge struck down the statute, holding that there is a constitutional right to accost people for the purpose of begging.<sup>204</sup> The United States District Court for the Northern District of California disagreed with the Second Circuit's decision in *Young*, holding that panhandling is speech protected under the First Amendment.<sup>205</sup> That court criticized the Second Circuit's differentiation between solicitation by organizations and by individuals on their own behalf, noting that "[n]o distinction of constitutional dimension exists between soliciting funds for oneself and for charities."<sup>206</sup> In a stunning confrontation with reality, the *Blair* court held that "[b]egging gives the speaker an opportunity to spread his views and ideas on, among other things, the way our society treats its poor and disenfranchised," and that the communication of these additional messages qualified begging as protected speech.<sup>207</sup>

Having held that section 641(6) was a content-based restriction "aimed specifically at protected speech in a public forum," the court found the proper standard not in the *O'Brien* test, but in the more restrictive standard enunciated in *Boos v. Barry*. That test requires that the regulation be "necessary to serve

200. *Loper*, 999 F.2d at 705.

201. *Id.* at 704.

202. *Id.* at 706.

203. Cat. Penal Code § 647(c) (West 1977).

204. See *Blair v. Shanahan*, 775 F. Supp. 1315 (N.D. Cal. 1991).

205. *Id.* at 1324.

206. *Id.* at 1322.

207. *Id.* at 1322-23.

a compelling state interest and . . . is narrowly drawn to achieve that end."<sup>208</sup> The court accepted a California Court of Appeals interpretation that the purpose of the statute was "to avoid 'annoyance' to the public," an interest that the court found "hardly compelling."<sup>209</sup>

The *Blair* decision is beset with flaws, perhaps emanating from the trial judge's dissatisfaction with the government's treatment of the poor. Although the court saw an expressive message in the act of begging, it provided no explanation as to why anyone, poor or not, was in any way prohibited from conversing on the plight of the poor, the adequacy of government poverty programs, or any other subject.

The *Blair* court also mistakenly merged charity with begging. Because the Supreme Court rulings protecting charitable solicitations rely on the underlying policy issues inherent in such solicitation, and the charity's resulting contribution to the polity, the validity of the comparison rises or falls depending on whether there is truly a message that is being conveyed or obstructed other than, "I want money."

Further, the court in *Blair* gave short shrift to the problem of urban civility (a criticism that cannot be leveled against the *Loper* decision). Perhaps the judge manages to avoid the downtown area of San Francisco. Most people, however, are hardly so fortunate. In other words, the decision can be seen as a singular judicial activist misguidingly trying to help the poor by making life difficult for the general urban population.

The *Blair* decision was simply wrong, representing judicial activism at its worst, and presenting a danger to the desire of the average citizen to regain urban centers as desirable places to live and work.<sup>110</sup>

#### D. Anti-Begging Laws in the State Courts

The begging and vagrancy laws were of such ancient origin and so well accepted that, until recently, cases concerning begging usually did not reach courts of record. When they did, it was on a definitional or evidentiary issue rather than a question of constitutionality and governmental authority.

One of the most important (and wrenching) of these cases was a New York case, *In re Holler?*<sup>211</sup> The case demonstrates the consequences of moving

208. *Id.* at 1324 (quoting *Boos v. Bany*, 485 U.S. 312, 321, 108 S. Ct. 1157, 1164 (1988)).

209. *Id.* (citing *Uimer v. Municipal Court for Oakland-Piedmont Judicial Dist.*, 55 Cal. App. 3d 263, 265, 127 Cal. Rptr. 445, 447 (1976)). Finally, the *Blair* court held that § 647(c) also violated the Equal Protection Clause of the Fourteenth Amendment, as the statute allowed one to accost a person for the purpose of requesting something other than money for oneself. The Court conceded that such a distinction could be valid if narrowly tailored to the achievement of a compelling end, but that in this case the state had not met its burden of proof. *Id.* at 1325-26.

210. The case, as of this writing, is on appeal to the Ninth Circuit. *Blair v. Shanahan*, Nos. 92-15447, Nos. 92-15447, 92-15459, 92-15451 (9th Cir. 1992).

211. 53 N.Y. 131 (1877).

beyond aggressive panhandling measures and seeking a prohibition on all begging at all locations.

In *Haller*, a crippled ten-year-old, while moving on his hands and knees through the Wall Street area of Manhattan, held out his hand to several pedestrians. Many passersby, concerned about the boy's physical plight, gave him money.<sup>212</sup> The boy, Frank Haller, was arrested under a New York law which forbade any child from "begging for alms or soliciting charity from door to door, or in any street, highway or public place of any city or town."<sup>213</sup> The police officers who arrested him had not heard the boy ask for money, but had seen him extend his hand and receive money several times.<sup>214</sup>

Consequently, the Society for the Prevention of Cruelty to Children petitioned for review of the matter, maintaining that such silent action did not constitute "begging alms" or "soliciting charity" within the meaning of the statute.<sup>215</sup> The New York court rejected this argument, holding that extending a hand constituted "begging alms," while noting that "[t]here is nothing in either of these statutes that necessarily requires proof of spoken words to constitute begging for alms or soliciting charity, although such words might in many instances be the best evidence of the offense."<sup>216</sup> While Judge Davis conceded that arresting a poor crippled boy might seem harsh, he pointed out that "[t]he intention of the law is not to punish such children, but to protect and provide for their necessities with tender care."<sup>217</sup>

By the late 1960s, vagrancy statutes had come under attack in some state courts. In *Alegata v. Commonwealth*<sup>218</sup> the Supreme Judicial Court of Massachusetts, foreshadowing *Papachristou*, held a vagrancy law criminalizing idleness unconstitutionally vague.<sup>219</sup> On the other hand, the Supreme Court of Georgia held that a similar provision was not vague, because "[n]one of the words employed [in the statute] are in any sense technical words of art, the meaning of which would not be understood by people of ordinary experience and understanding."<sup>220</sup> Moreover, the vagrant was still referred to as "the chrysalis of every species of criminal."<sup>221</sup>

212. *Id.* at 131.

213. *Id.*

214. *Id.*

215. *Id.* at 132. Resorting to rights assertions was less common at the time.

216. *Id.* Twenty-six years later, a French court came to a similar conclusion. *Bourges*, 30 avr. 1896, DP. 96.2.455.

217. *Haller*, 53 N.Y. at 132. New York law called for invalids to be handed over to the Commissioner of Charities, who had full discretion to return him immediately to his parents.

218. 231 N.E.2d 201 (Mass. 1967).

219. *Id.* at 207.

220. *Wallace v. State*. 161 S.E.2d 288. 290 (Ga. 1968), *cert. denied*, 393 U.S. 1123. 89 S. Ct. 995 (1969). The Georgia Court, furthermore, held that the vagrancy statute did not punish mere poverty, and therefore did not violate the Equal Protection Clause of the Fourteenth Amendment.

221. *Id.* at 290 (quoting *Ex parte Branch*, 137 S.W. 886 (1911)).

The first case to uphold a statute which prohibited loitering for the purpose of begging was from Arizona, *State ex rel. Williams v. City Court of Tucson*.<sup>222</sup> That court held that the ordinance as a whole was not vague.<sup>223</sup> The court further distinguished the case from *Papachristou v. City of Jacksonville*,<sup>224</sup> as the instant ordinance did not place "unfettered discretion" in the hands of the police.<sup>225</sup> As noted previously, a similar law in New York was struck down by a federal court last year.<sup>226</sup>

In *Ulmer v. Municipal Court for Oakland-Piedmont Judicial Dist.*,<sup>227</sup> a California Court of Appeal considered the state statute<sup>228</sup> that was later attacked in *Blair v. Shanahan*.<sup>229</sup> The *Ulmer* court held that the statute did not impinge on First Amendment freedoms because it forbids the "approach" rather than any message.<sup>230</sup> This distinction between the speech and conduct involved in begging was rejected fifteen years later when the same statute came before the Federal District Court for the Northern District of California in *Blair*.<sup>231</sup>

Two years later, the Supreme Court of California declared a Los Angeles ordinance unconstitutional that forbade any person to "seek, beg, or solicit custom, patronage, sales, alms or donations for himself or on behalf of any person" on property owned by the City without written permission from the head of the department housed on, the property.<sup>232</sup> In *People v. Fogelson*, an adherent of the Hare Krishna faith was arrested for soliciting contributions without a permit in the Los Angeles International Airport.<sup>233</sup> The court found the ordinance overbroad as it could be applied to communication protected under the First Amendment, and it did not provide guidance to ensure that officials would not impair constitutionally protected expression.<sup>234</sup> The court's disagreement, though, involved the discretion granted to the airport authorities, not with the fact that there was a control on begging. Citing *Ulmer* in his concurring opinion, Justice Mosk emphasized that while the ordinance in question was unconstitutional, "it is not impossible for the city to reasonably regulate the public conduct of mendicants, including those who purport to be motivated by

222. 520 P.2d 1166 (Ariz. Ct. App. 1974).

223. *U.*

224. 405 U.S. 156, 92 S. Ct. 839 (1972).

225. *State ex rel. Williams*. 520 P.2d at 1170.

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

227. 55 Cal. App. 3d 263, 127 Cal. Rptr. 445 (1976).

228. Cal. Penal Code, § 647(c) (West 1988).

229. 775 F. Supp. 1315 (N.D. Cal. 1991).

230. *Ulmer*, 55 Cal. App. 3d at 267, 127 Cal. Rptr. at 448.

231. *Blair*. 775 F. Supp. 1315.

232. *People v. Fogelson*. 577 P.2d 677, 678 n.1 (1978) (quoting Los Angeles, Cal., Mun. Code § 42.14.1).

233. *Id.*

234. *Id.* at 681-82.

religious fervor."<sup>235</sup> This distinction was confirmed by Justice Kennedy and a majority of the United States Supreme Court in *Krishna*, which ruled that direct solicitation for money can be prohibited at airports, while other solicitation must be tolerated.<sup>236</sup>

The rejection of an absolute ban on begging, the issue in *Loper*, was before the Florida Court of Appeals.<sup>237</sup> The Florida court held that an absolute prohibition of all forms of begging or soliciting alms for oneself in all public spaces went too far.<sup>238</sup> The ordinance in question, again from Jacksonville,<sup>239</sup> made it unlawful "for anyone to beg or solicit alms in the streets or public places of the city or exhibit oneself for the purpose of begging or obtaining alms."<sup>240</sup> While the court recognized the City's "police power to control undue annoyance on the streets and public places and prevent the blocking of vehicle and pedestrian traffic,"<sup>241</sup> it found the ordinance invalid under the First Amendment because it limited expression "in a more intrusive manner than necessary."<sup>242</sup> The court distinguished *Ulmer*, noting that the California statute only prohibited *accosting* others for the purpose of begging, and was therefore more narrowly drawn than the Jacksonville ordinance.<sup>243</sup> Indeed, the court remarked that no compelling reason could justify a complete prohibition of an expressive activity, a category which begging, in the court's view, fit.<sup>244</sup>

This distinction parallels the debate among those seeking legislation in this area. Some prefer an absolute ban, while others advocate for a more tailored approach. The Florida decision is another major impetus for municipalities to adopt aggressive begging measures, rather than absolute begging prohibitions.

Confidence in the constitutionality of anti-aggressive begging measures was further strengthened when the Washington Supreme Court became the highest court to consider a city ordinance aimed specifically at aggressive panhandling and pedestrian interference. In *City of Seattle v. Webster*,<sup>245</sup> the Washington court considered a Seattle ordinance which made it unlawful to "intentionally obstruct pedestrian or vehicular traffic."<sup>246</sup> The respondent maintained that the ordinance was overbroad and unconstitutionally vague.<sup>247</sup> The court denied that the ordinance was overbroad, because of the intent element in the definition

235. *Id.* at 683.

236. *International Soc'y for Krishna Consciousness, Inc. v. Lee*, 112 S. O. 2711, 2720 (1992).

237. *C.C.B. v. State*, 458 So. 2d 47 (Fla. Dist Ct. App. 1984).

238. *Id.* at 50.

239. Jacksonville, Fla., Mun. Ordinance 330.105.

240. *C.C.B.*, 458 So. 2d at 48.

241. *Id.*

242. *Id.* at 50.

243. *Id.* at 49.

244. *Id.* at 50.

245. 802 P.2d 1333 (Wash. 1990), *cert. denied*. 111 S. Ct. 1690 (1991)-

246. *Id.* at 1334 (citing Seattle, Wash., Mun. Code 5 12A.12.015(B)(1)).

247. *Id.*

of the offense.<sup>248</sup> Thus, the ordinance would not prevent "mere sauntering or loitering on a public way," but only *intentionally* blocking another's passage or causing one to "take evasive action."<sup>249</sup>

The Court also held that the element of intent saved the ordinance from being unconstitutionally vague.<sup>250</sup> With that requirement, the mendicant knows that *intentionally* obstructing pedestrian or vehicular traffic is unlawful.<sup>251</sup> Moreover, the Washington court dismissed the respondent's claim that the ordinance violated the equal protection rights of beggars, noting that the ordinance applies equally to all persons possessing the requisite intent, and that the courts of the State of Washington had never declared the homeless to be a protected class for purposes of Fourteenth Amendment analysis.<sup>252</sup>

#### V. THE CONSTITUTIONALITY OF ANTI-AGGRESSIVE BEGGING LAWS: SOME CONCLUSIONS BASED ON POLICY AND PRECEDENT

The constitutionality of laws regarding begging has been challenged under the First Amendment, the Due Process Clause, and the Equal Protection Clause of the federal constitution.<sup>253</sup> Such challenges have had varying degrees of success depending on whether the provision in question is an absolute prohibition of begging in all public places,<sup>254</sup> a prohibition of begging in a specific area, or a limitation on the manner in which a person may beg ("aggressive begging" measures).

This section analyzes begging controls under four possible constitutional pigeonholes: 1) as speech or conduct not protected under the First Amendment; 2) as a time, place, and manner restriction; 3) as a regulation of conduct with an expressive element; and 4) as a control on commercial speech. All of these categories (only one is needed), with all of the resulting tests and factors, yield a conclusion that anti-aggressive begging laws are constitutional.

#### A. *Is Begging Protected Speech?*

Not everything a person says or does is protected by the First Amendment. "It is possible to find some kernel of expression in almost every activity a person

248. Id. at 133S.

249. Id.

250. Id at 1339.

251. Id

252. Id at 1340.

253. In particular cases, we could expect to see state constitutional challenges as well, which would parallel the arguments made under the United States Constitution.

254. See *Loper v. New York City Police Dep't*, 802 F. Supp. 1029 (S.D.N.Y. 1992), *aff'd*, 999 F.2d 699 (2d Cir. 1993). Many absolute prohibitions are part of vagrancy statutes which have not been enforced since such laws were held unconstitutional in *Papachristou v. City of Jacksonville*, 405 U.S. 156, 92 S. O. 839 (1972), although some cities such as Phoenix, Arizona and Austin, Texas still forbid any sort of begging in all public places.

undertakes . . . but such a kernel is not sufficient to bring the activity within the protection of the First Amendment."<sup>255</sup> Rather, the Amendment reaches only "the freedom of speech."<sup>256</sup>

The Second Circuit Court of Appeals, in *Young v. New York City Transit Authority*,<sup>257</sup> held that begging is not speech. Under this view, it would appear that even an absolute ban on begging in all public places would be constitutional.

In *Young*, the court noted that, "common sense tells us that begging is much more 'conduct' than it is 'speech.'"<sup>258</sup> Although the court never made it explicit, it seemed to construe the term "begging" as referring to the action of receiving money rather than the speech involved in requesting alms.<sup>259</sup> That view, however, was not adopted by another panel of the same circuit court.<sup>260</sup>

Even if begging is held not to be speech *per se*, it may yet be considered expressive conduct. Walking up and reaching out to a person for the purpose of asking for money constitutes actions. An action is expressive conduct protected by the First Amendment when "an intent to convey a particularized message was present, and . . . likelihood was great that the message would be understood by those who viewed it."<sup>261</sup> Although "[t]he Government generally has a freer hand in restricting expressive conduct than it has in restricting the written or spoken word,"<sup>262</sup> conduct still receives some protection under the First Amendment.

The pertinent question then is what constitutes a message. It is incredible to assert that those who beg do so in order to express some political or economic idea. Rather, the beggar's aim is to obtain money from passersby.<sup>263</sup> Standing alone, an offer to exchange nothing for money does not communicate anything concerning a condition, society in general, or any other subject. In fact, in terms of communication, the beggar stands in the same position as the hold-up man with a gun.<sup>264</sup> Both could be seen as purely commercial activity, albeit without the exchange of any goods or services.

The *Young* court remarked on the lack of a particularized message associated with begging and the extreme unlikelihood of any message being understood by any audience. The court stated that:

255. *City of Dallas v. Stranglin*, 490 U.S. 19, 25, 109 S. Ct. 1591, 1595 (1989).

256. U.S. Const. amend. 1.

257. 903 F.2d 146, 153-54 (2d Cir.), *cert. denied*, 498 U.S. 984, 111 S. Ct. 516 (1990).

258. *Id.* at 153.

259. In a recent concurring opinion, Justice Kennedy characterized a ban on solicitation and receipt of funds at an airport as a "valid regulation of the nonspeech element of expressive conduct." *International Soc'y for Krishna Consciousness, Inc. v. Lee*, 112 S. Ct. 2711, 2720 (1992) (Kennedy, J., concurring).

260. *Loper v. New York City Police Dep't* 999 F.2d 699 (2d Cir. 1993).

261. *Spence v. Washington*, 418 U.S. 405, 410-11, 94 S. Ct. 2727, 2730 (1974).

262. *Texas v. Johnson*, 491 U.S. 397, 406, 109 S. Ct. 2533, 2540 (1989).

263. *But see Loper*, 999 F.2d at 704.

264. *Young v. New York City Transit Auth.*, 903 F.2d 146, 153 (2d Cir.), *cert. denied*, 498 U.S. 984, 111 S. Ct. 516 (1990).

[t]he only message that we are able to espy as common to all acts of begging is that beggars want to exact money from those whom they accost. While we acknowledge that passengers generally understand this generic message, we think it falls far outside the scope of protected speech under the First Amendment.<sup>265</sup>

In considering California's anti-begging statute, the California Appeals Court agreed with the Second Circuit's conclusion, stating that "begging and soliciting for alms do not necessarily involve the communication of information or opinion; therefore, approaching individuals for that purpose is not protected by the First Amendment."<sup>266</sup>

In *Blair v. Shanahan*,<sup>267</sup> the United States District Court for the Northern District of California made flowers grow out of the desert of a beggar's utterances. The court focused on information that *may be* exchanged in conversation that is in addition, and incidental, to the actual begging.<sup>268</sup> These conversations, however, are neither banned nor regulated by the California statute or by the other anti-aggressive panhandling measures. Indeed, in San Francisco and elsewhere, we can assume that they take place frequently, and with vigor.

Similarly, the *Loper* appeals court not only saw something expressive about the mere existence of beggars, it purported to know what the underlying message was: a "need for support and assistance."<sup>269</sup>

*Blair* has cut across the current of the law in this area, which has distinguished in-your-face solicitations from both mail solicitations and solicitations by charities. Specifically, with charities, spreading the word is the primary goal. The Supreme Court said that, "the reality [is] that without [such] solicitation [s] the flow of . . . information and advocacy would likely cease."<sup>270</sup> But, "[p]anhandling . . . is strictly for the pecuniary gain of the speaker."<sup>271</sup>

If begging is not protected by the First Amendment, then, as a source of harassment, it can be legitimately prohibited. Indeed, as this article has demonstrated, communities in this country and elsewhere have a long history of protecting the public from harassing solicitations, whether for money, sex, or drugs. One might argue that, if a state may prohibit an offer to trade sex for currency, it can surely prohibit trading nothing for the same currency.

265. *id.* at 154.

266. *Ulmer v. Municipal Court for Oakland-Piedmont Judicial Dist.*, 55 Cal. App. 3d 263, 266, 127 Cal. Rptr. 445, 447 (1976).

267. 775 F. Supp. 1315 (N.D. Cal. 1991).

268. *Id.* at 1322.

269. *Loper v. New York City Police Dep't*, 999 F.2d 699, 704 (2d Cir. 1993). These explanations are not self-evident. Others may come upon a beggar and conclude the message was a need to eliminate minimum wage laws so as to create more job opportunities, or simply a desire to not work, drink heavily, and be supported by others.

270. *Village of Schaumburg*, 444 U.S. at 632, 100 S. Ct. at 834.

271. Brief of Amicus Curiae Criminal Justice Legal Foundation, in *Blair v. Shanahan*, Nos. 92-15447, 92-15450, 92-15451 (9th Cir. 1992).

However, only the *Young* court has voiced this opinion. The *Ulmer* court, in holding constitutional California Penal Code § 647(c), specified that the provision was valid because it *did not* prohibit all begging, but only a particular activity sometimes associated with it.<sup>272</sup> The Florida Court of Appeals and the district court in New York emphasized this same distinction when they recognized that the manner (and perhaps location) of begging might be legitimately restricted, but that a prohibition on begging altogether was an infringement of protected speech.<sup>273</sup> Indeed, even the *Young* court cautiously offered an alternative justification for its holding.

I conclude that begging does not "say" anything about a person's state of mind sufficient to come within "the freedom of speech" protected by the First Amendment. At the same time, if begging is deemed to have an expressive element, any regulation must be directed to its non-expressive components. For this reason, measures aimed only at aggressive begging stand a far better chance of withstanding constitutional attack.

#### B. Time, Place, and Manner

Assuming panhandling is constitutionally protected speech, or protected expressive conduct, it is still subject to certain curtailments and regulations. Restrictions on certain types of begging could still be constitutional as a content-neutral restriction of the time, place, or manner of speech. The standard for content-neutral regulation was succinctly stated by the Fifth Circuit in *International Society for Krishna Consciousness, Inc. v. City of Baton Rouge*,<sup>274</sup> which pointed out that whereas "[c]ontent-based regulation[s] must be necessary to serve a compelling state interest and [must] be narrowly drawn to achieve that end; content-neutral regulations of [the] time, place, and manner of expression are enforceable if they are narrowly tailored to serve a significant government interest, and leave open ample alternative channels of communication."<sup>275</sup>

Additionally, the government's interest must be unrelated to the suppression of speech, and the incidental restriction on alleged First Amendment freedoms must not be greater than is essential to the furtherance of the government's purpose.<sup>276</sup> This is essentially the same test that is applied to expressive conduct.<sup>277</sup>

272. *Ulmer v. Municipal Court for Oakland-Piedmont Judicial Dist.*, 55 Cal. App. 3d 263, 267, 127 Cal. Rptr. 445, 447-48 (1976).

273. *C.C.B. v. State*, 458 So. 2d 47, 49 (Fla. Dist. Ci. App. 1984); *Loper v. New York City Police Dep't*, 802 R. Supp. 1029, 1049 (S.D.N.Y. 1992), *aff'd*, 999 F.2d 699 (2d Cir. 1993) ("a ban on aggressive begging would probably survive scrutiny").

274. 876 F.2d 494 (5th Cir. 1989).

275. *Id.* at 497.

276. *United States v. O'Brien*, 391 U.S. 367, 377, 88 S. Ct. 1673, 1679 (1968).

277. *Id.*

1. *Are Controls on Beggars Content-Neutral?*

The content neutrality of a law is determined not by any incidental effect it may have on speech, but by the reason for its promulgation. In other words, the neutrality of a statute depends on whether it is "justified without reference to the content of the regulated speech."<sup>278</sup>

In upholding a ban on solicitation *and* immediate receipt of funds, Justice Kennedy wrote that "[b]ecause the Port Authority's solicitation ban is directed at . . . abusive practices and not at any particular message [or] idea, . . . the regulation is a content-neutral rule serving a significant government interest."<sup>279</sup>

Laws against begging are not aimed at any message or idea communicated by the panhandler. Although some older anti-begging laws included in vagrancy statutes were passed in order to rid the jurisdiction of a potentially dangerous class, most of the current restrictions on begging are meant to prevent intimidation and coercion in public spaces. Moreover, laws against aggressive begging or pedestrian interference do not restrict the expression of any message, idea, or form of speech. Indeed, people are free to ask others for money, provided that they do so in an appropriate manner. A panhandler may still solicit alms and discourse upon her plight. She may not do so, however, in the aggressive manner proscribed by the statute. There is no discrimination between viewpoints.

In *Heffron v. International Society of Krishna Consciousness, Inc.*<sup>280</sup> the United States Supreme Court held that a ban on solicitations is content-neutral because it applied to all seeking to solicit. The Court noted that the restriction there was not intended to silence one particular message and was not an attempt to regulate ideas. At the same time, the Court held that the regulation was valid although it did not address other potentially harmful situations.<sup>281</sup>

Nonetheless, the argument is not fool-proof. As Judge Sweet pointed out, of all possible accosts, only the solicitation for money by non-charities falls under these laws. A person can now approach strangers on the street for nearly any reason, but not to beg. There is a risk that, if begging is speech, its regulation *could be* beyond the power of government to curtail.

One way out of this dilemma may be to allow beggars to say anything they please, but to prohibit the giving of money on the street. This approach calls for a focus on the supply side of the transaction, rather than the demand from the destitute. Such an ordinance does not really address the intrusiveness caused by

278. *Clark v. Community for Creative Non-violence*, 468 U.S. 288, 293, 104 S. Cl. 3065, 3069 (1984).

279. *International Soc'y for Krishna Consciousness, Inc. v. Lee*, 112 S. Cl. 2711, 2722 (1992) (Kennedy, J., concurring).

280. 452 U.S. 640, 649, 101 S. Cl. 2559, 2564 (1981) (restriction which "prefers listener-initiated exchanges to those originating with the speaker" is content-neutral, and is acceptable as a time, place, and manner restriction on speech).

281. At 648-49, 101 S. Cl. at 2564-65.

begging, although it may moot the point by driving the beggars "out of business." Also, the Supreme Court has held that the giving of money, at least in certain contexts, is protected speech under the First Amendment.<sup>282</sup>

Another troublesome aspect of this alternative is that it would prevent all transfer of money in public, including paying a legitimate debt, parents giving lunch money to their children, and the donation to a charity. It seems preferable, then, to focus on the problem that is really bothering people. It is the intrusive, aggravating, community-inhibiting solicitation of aggressive panhandlers that is irksome, and not the actual transfer of funds.

The best way to confront the content-neutrality issue is head-on. That is, assert that, because a beggar's speech is not prohibited, the community can regulate his or her method of presentation. This approach, taken by Justice Kennedy in *Krishna*<sup>283</sup> calls for a focus on the conduct even though the neutral regulation only applies to people who make a certain kind of utterance.

While the issue is a close one, it appears that laws aimed at aggressive begging (but not sweeping begging prohibitions) pass the content-neutrality test. No side in any debate is being given an advantage, unfair or otherwise.<sup>284</sup>

## 2. *The Community's Substantial Interest*

Once the content neutrality of a statute is established, it must be shown that the statute "furthers an important or substantial governmental interest;... [and that] the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest."<sup>285</sup>

Panhandling controls are aimed at protecting the public from intimidation. The Supreme Court of the United States has deemed such an interest to be compelling, noting that "face-to-face solicitation presents risks of duress that are an appropriate target of regulation, [and that] [t]he skillful, and unprincipled, solicitor can target the most vulnerable, including those accompanying children or those suffering physical impairment and who cannot easily avoid the solicitation."<sup>286</sup>

The state's interest in regulating individual solicitation is greater than its interest in regulating many other kinds of public activity, "[a]s residents of metropolitan areas know from daily experience, confrontation by a person asking for money disrupts passage and is more intrusive and intimidating than an encounter with a person giving out information."<sup>287</sup>

282. See e.g., *Buckley v. Valeo*, 424 U.S. 1, 96 S. Ct. 612 (1976).

283. *International Soc'y for Krishna Consciousness, Inc. v. Lee*, 112 S. Ct. 2711 (1992) (Kennedy, J., concurring).

284. See *U.S. v. Kokinda*, 497 U.S. 720, 736, 110 S. Ct. 3115, 3125 (1990) (Postal Service was not granting to one side a "monopoly in expressing its views").

285. *U.S. v. O'Brien*, 391 U.S. 367, 377, 88 S. Ct. 1673, 1679 (1968).

286. *International Soc'y for Krishna Consciousness, Inc. v. Lee*, 112 S. Ct. 2701, 2708 (1992).

287. *Kokinda*, 497 U.S. at 734, 110 S. Ct. at 3123.

Giving people a chance to walk down the street reasonably unencumbered protects strollers, shoppers, storekeepers, and is a life-sustaining force for a community. There are few state interests more pressing or more reasonable.

### 3. *Narrow Tailoring*

The time, place, and manner standard further requires that content-neutral restrictions be narrowly tailored to achieve their purpose.<sup>288</sup> To be considered narrowly tailored, it is not necessary that a statute create no burden on other activities. "It is now well-settled that regulations restricting the time, place or manner of expressive conduct do not violate the First Amendment 'simply because there is some imaginable alternative that might be less burdensome on speech.'<sup>289</sup>

It would be difficult to argue that a prohibition on begging in all public places is narrowly tailored. On the other hand, prohibitions of aggressive begging, and prohibitions on begging where it is especially intrusive, can and have been interpreted as narrowly tailored.<sup>290</sup> These measures are directed only at accosts. Non-confrontational methods of solicitation are permitted, from an open palm to an outright demand, as long as the beggar does not make his appeal in the proscribed manner.

### 4. *Alternative Channels of Communication*

Opponents of restrictions on panhandling have claimed that such regulations "silence debate about social policies toward the poor."<sup>291</sup> This argument is hogwash. The debate is ongoing, as manifested in everything from the recent presidential election campaign to dinner party chatter.

Any law aimed specifically at begging, including the most restrictive, would still leave open ample opportunities to express whatever political, social, or economic message one desires. Indeed, among the possible methods of communicating social ideas open to the destitute, begging for alms seems both

288. *City of Beaufort v. Baker*, 432 S.E.2d 470 (S.C. 1993).

289. *Young v. New York City Transit Auth.*, 903 F.2d 146, 159 (2d Cir.) (quoting *United States v. Albertini*, 472 U.S. 675, 689, 105 S. CL 2897, 2906 (1985)). *cert. denied*, 498 U.S. 984, 111 S. Ct 516 (1990).

290. In *Young*, the Second Circuit Court of Appeals held a complete prohibition of panhandling in the New York City subway system to be narrowly tailored, because "the exigencies created by begging and panhandling in the subway warrant the conduct's complete prohibition." 903 F.2d at 159. As Justice Kennedy noted, a prohibition on begging in New York area airports was narrowly tailored because it affected only the action of receiving funds, rather than any speech. *See International Soc'y for Krishna Consciousness, Inc. v. Lee*, 112 S. Ct. 2711, 2722 (1992) (Kennedy, J. concurring).

291. Helen Hershkoff & Adam S. Cohen, *Begging to Differ: The First Amendment and the Right to Beg*, 104 Harv. L. Rev. 896, 897 (1991); *see also Loper v. New York City Police Dep't*, 999 F.2d 699, 704 (2d Cir. 1993).

one of the most dehumanizing and one of the least direct. If the beggar's real complaint is with the treatment of the poor, providing a few coins hardly addresses the problem or communicates any feeling about it.

The recent ordinances prohibiting aggressive begging do nothing to silence this debate. Any message the solicitor wishes to convey concerning social policy can be offered with impunity under these ordinances. Moreover, even a simple request for alms may be made, if it is not made in the proscribed aggressive manner. The panhandler, like all persons, remains free to communicate, if the interests of others are properly respected. This is nothing more than the corollary of the old adage about "your rights stopping at the tip of my nose."

### C. *The O'Brien Test*

An alternative way to view panhandling restrictions is as a regulation on conduct with an expressive element, as opposed to a restriction on the time, place, and manner of speech. The Supreme Court's designated test for analyzing restrictions on conduct with an expressive element is strikingly similar to its test for time, place, and manner restrictions. The test was set forth in *United States v. O'Brien*.<sup>292</sup>

The *O'Brien* court started with the proposition that not all conduct was protected speech.<sup>293</sup> Regulations of expressive conduct, must, though: 1) be within the constitutional power of government; 2) further an important or substantial government interest; 3) represent a governmental interest unrelated to the suppression of free expression; and 4) cause an incidental restriction on alleged First Amendment freedoms that is not greater than is essential to the furtherance of that interest.<sup>294</sup>

The constitutional-power-of-government question seems like a "throw away." It appears to be aimed at ensuring that there is a legitimate reason for the challenged governmental action. Protecting the public from harassment is a legitimate purpose of government under our constitutional system as it has developed.<sup>295</sup>

The other tests align with those for time, place, and manner restrictions. If the restriction meets the prongs of one test, it has met the prongs of the other.

### D. *Commercial Speech*

An alternative way for a reviewing court to evaluate the constitutionality of a restriction or regulation on panhandling is as a restriction on commercial

292. *United States v. O'Brien*, 391 U.S. 367, 88 S. Ct. 1673 (1968).

293. *See, e.g., Wisconsin v. Mitchell*, 113 S. Ct. 2194, 2199 (citing *Roberts v. United States Jaycees*, 468 U.S. 609, 628, 104 S. Ct. 3244, 3255 (1984) ("Violence or other types of potentially expressive activities that produce special harms distinct from their communicative impact... are entitled to no constitutional protection").

294. *O'Brien*, 391 U.S. at 377, 88 S. Ct. at 1679.

295. *See, e.g., Cantwell v. Connecticut*, 310 U.S. 296, 60 S. Ct. 900 (1940).

speech. Government controls on expression related solely to the economic interest of the speaker or audience are provided with less First Amendment protections than other, more substantive speech.<sup>296</sup> Panhandling may very well fall into the former category because the speaker is trying to increase his or her personal wealth. A tangential connection to some public interest, even if it can be found, will not remove the speech from the commercial category.<sup>297</sup>

The motivations of the panhandler are pecuniary. Although he may tell passersby about his plight, or about the circumstances that led to it, his motivation for doing so is to induce the giving of money. The fact that no goods or services are exchanged is irrelevant because the motivation remains the desire for money.

As the courts have told us, commercial speech receives less First Amendment protection because greater regulatory power is deemed needed to protect the public. The commercial speech is for profit, and therefore more subject to abuse. Also, it contributes less to the fulfillment of the underlying values of the First Amendment.<sup>298</sup>

The government therefore has the power to completely ban forms of commercial speech when it is presented in situations "inherently conducive to overreaching and other forms of misconduct."<sup>299</sup> The government's regulatory power is diminished with regard to commercial speech that is not misleading or coercive. It is uncertain whether panhandling falls into this category.

There is some threat of fraudulent inducement by panhandlers. Frequently, panhandlers will tell passersby about emergencies, physical disabilities, or family crises that do not exist. They will ask for money for commodities, without the slightest intention of ever acquiring these items. They will claim a need to travel to shelters, when either the shelter does not exist, or there is no intention to go there.

Additionally, as the Supreme Court has observed, in-person solicitation is inherently subject to fraud because of the lack of an opportunity to verify what is being claimed:

Unlike a public advertisement, which simply provides information and leaves the recipient free to act upon it or not, in-person solicitation may exert pressure and often demands an immediate response, without providing an opportunity for comparison or reflection. The aim and effect of in-person solicitation may be to provide a one-sided presenta-

296. See *Central Hudson Gas & Elec. Corp. v. Public Service Comm'n*, 447 U.S. 557, 563-100 S. Ct. 2343, 2350 (1980).

297. There is, after all, some public value in the sale of many or possibly all commercial items, from cars to condoms. Cf. *id.*; see also *Board of Trustees of the State University of New York v. Fox*, 492 U.S. 469, 474-75, 109 S. Ct. 3028, 3031-32 (1989).

298. See *Ohralik v. Ohio State Bar Ass'n*, 436 U.S. 447, 98 S. Ct. 1912 (1978). This may be silly, as we have all met people whose passion boils over issues, not money.

299. *Id.* at 464, 98 S. Ct. at 1923.

tion and to encourage speedy and perhaps uninformed decisionmaking; there is no opportunity for intervention or counter-education . . . .<sup>300</sup>

If, however, a court were to find that panhandling is not misleading, a restriction can still be constitutional if it advances a substantial interest and is only as extensive as necessary to achieve that interest.<sup>301</sup> The "necessary" requirement is read loosely and does not require the least restrictive alternative to be used.<sup>302</sup>

Because panhandling restrictions can be an effective way of alleviating one of the major causes of urban incivility, and because the restrictions are addressed precisely at this problem, controls on begging can be upheld as restrictions on commercial speech. This can be done without any finding in regard to the veracity of the statements made. Of course, if a court agrees that these statements run a substantial risk of fraud, then a more permissive lest would be applied.

#### *E. Where are We: The Convergence of Constitutional Tests and Factors*

A restriction on panhandling need only be upheld under one of the appropriate tests. The test employed will depend upon whether the court views the restriction as: 1) a restriction of activity not protected by the First Amendment; 2) a time, place, and manner restriction (to be evaluated using the four-prong test in the preceding section); 3) a restriction on conduct with an expressive element (using the similar test discussed above); or 4) a restriction on purely commercial speech. *If the restriction is acceptable under any of these tests, it is constitutional.* If an anti-begging law cannot meet the requirements of any of these tests, it will be deemed a restriction on the content of speech, and it will run into a near-absolute First Amendment test.

#### *F. The Boos v. Barry Test*

Because it does not prohibit intimidating or coercive speech unrelated to soliciting alms, a prohibition of aggressive begging could be held to be content-based. Nonetheless, such a law could still be constitutional as an appropriate regulation of speech. For a content-based regulation in a public forum to be constitutional, the state must show that it is "necessary to serve a compelling

300. *Id.* at 457, 98 S. Ct. at 191. *See also* 16 C.F.R. § 429.1 (1992) (Federal Trade Commission rule requiring three day "cooling-off period" for door-to-door sales, making it an unfair trade practice to sell door-to-door without it).

301. *Central Hudson Gas & Bee. Corp. v. Public Serv. Comm'n*, 447 U.S. 557, 564, 100 S. Ct. 2343, 2350 (1980).

302. *Board of Trustees of the State University of New York v. Fox*, 492 U.S. 469, 477, 109 S. Ct. 3028, 3033 (1989).

state interest and that it is narrowly drawn to achieve that end."<sup>303</sup> This standard is rarely met.<sup>304</sup>

With regard to regulations of "pure speech," which may present certain dangers to the community, the Supreme Court has stated: "The government may 'protect its citizens from unwanted exposure to certain methods of expression which may legitimately be deemed a public nuisance."<sup>305</sup> Moreover, cities have the power "to protect the well-being and tranquility of a community."<sup>306</sup> The well-being, as well as the existence of a diverse, interactive community is at stake in preserving the unhindered use of public spaces.

The *Blair* court, apparently unconvinced of a need for attractive public spaces, held that the State had not presented a compelling interest to justify California's anti-aggressive begging statute. It reasoned that "preventing an intrusion on the public at large is no more compelling a justification for this limitation on speech than is avoiding annoyance."<sup>307</sup>

As previously noted, "face-to-face solicitation presents risks of duress that are an appropriate target of regulation."<sup>308</sup> Such accosts are completely unlike non-confrontational solicitation, "[a]s residents of metropolitan areas know from daily experience, confrontation by a person asking for money disrupts passage and is more intrusive and intimidating than an encounter with a person giving out information."<sup>309</sup> Thus, the state may have a compelling interest in specifically prohibiting confrontational demands for money. Furthermore, while older statutes were aimed at removing beggars as an undesirable class, current ordinances are tailored specifically to the compelling goal of preventing intimidation, coercion, and threat.

American governments have banned all kinds of solicitations that do not contain physical threats or a clear and present danger of physical violence, such as solicitations for prostitution or illegal drugs, and the prohibition of tobacco advertising on television.<sup>310</sup> Whatever the merits of controls on private prostitution and obscenity,<sup>311</sup> the effect on the community of aggressive

303. *Boos v. Barry*, 485 U.S. 312, 321, 108 S. Ct. 1157, 1164 (1988) (quoting *Perry Education Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 45, 103 S. Ct. 948, 955 (1983)). *See also* *Brandenburg v. Ohio*, 395 U.S. 444, 89 S. Ct. 1827 (1969) (per curiam).

304. *See* *Loper v. New York City Police Dep't*, 999 F.2d 699, 705-06 (2d Cir. 1993).

305. *Young v. New York City Transit Auth.*, 903 F.2d 146, 156 (2d Cir.) (quoting *Members of the City Council of Los Angeles v. Taxpayers for Vincent*, 466 U.S. 789, 805, 104 S. Ct. 2118, 2128 (1984), *cert. denied*, 498 U.S. 984, 111 S. Ct. 516 (1990)).

306. *Kovacs v. Cooper*, 336 U.S. 77, 83, 69 S. Ct. 448, 451 (1949).

307. *Blair v. Shanahan*, 775 F. Supp. 1315, 1324 (N.D. Cal. 1991).

308. *International Soc'y for Krishna Consciousness, Inc. v. Lee*, 112 S. Ct. 2701, 2708 (1992).

309. *United States v. Kokinda*, 497 U.S. 720, 733-34 (1990).

310. *See* *Capital Broadcasting Co. v. Mitchell*, 333 F. Supp. 582 (D.D.C. 1971) (upholding prohibition of electronic advertising of cigarettes), *aff'd*, *Capital Broadcasting Co. v. Kleindienst*, 405 U.S. 1000, 92 S. Ct. 1289 and *National Ass'n of Broadcasters v. Kleindienst*, 405 U.S. 1000, 92 S. Ct. 1290 (1972).

311. *See* *Miller v. California*, 413 U.S. 15, 98 S. Ct. 2607 (1973).

panhandling seems more immediate, dangerous, and prevalent. It would seem that the regulatory power that reaches sex and obscenity can also reach begging.

It appears that if the initial issues are lost, and prohibitions on aggressive begging are deemed to be a content-based restriction on protected speech, then they are likely to be struck down. Although the motivating causes for these measures are exceedingly important, they probably cannot justify the squelching of a particular message or viewpoint presented on the public sidewalks.

### G. Overbreadth

The "overbreadth" doctrine was developed to prevent "laws that are written so broadly that they may inhibit the constitutionally protected speech of third parties."<sup>312</sup> A challenge of overbreadth may be brought by one whose actions were validly forbidden on behalf of others not before the court, whose constitutionally-protected expression could potentially be punished under the challenged statute, or whose protected expression has been inhibited, or chilled, by the broad sweep of the statute's language. The United States Supreme Court has made it very clear that the overbreadth must be substantial, stating that "the mere fact that one can conceive of some impermissible applications of a statute is not sufficient to render it susceptible to an overbreadth challenge."<sup>313</sup>

The overbreadth doctrine is often seen, incorrectly, as a separate ground of constitutional attack. For instance, it may be said that a law violates the First Amendment *and* is overbroad. It is more accurate to say that overbreadth is a broad expansion of the standing doctrine, allowing those caught in conduct dangerous to others to argue about the First Amendment concerns of others.

There are several ways in which an anti-begging statute might be drafted with excessive broadness. First, a statute could, instead of specifying "begging" or "panhandling," prohibit "solicitation" or any other broad term of that sort. Charitable solicitations, protected in the past because of its connection to a variety of important community interests, would fall within the purview of this type of statute.<sup>314</sup> Additionally, a pedestrian interference ordinance could be unconstitutionally overbroad if it did not specifically condemn *intentionally* blocking pedestrian traffic, thus punishing any person who accidentally blocks another's path.<sup>315</sup>

312. *Members of the City Council of Los Angeles v. Taxpayers for Vincent*, 466 U.S. 789, 798. 115 S. Ct. 2118, 2125 (1984).

313. *Id.* at 800. 104 S. Ct. at 2126. See also *City of Seattle v. Huff*, 767 P.2d 572, 573 (Wash. 1989) ("a court's first task is to determine whether the enactment reaches a substantial amount of constitutionally protected conduct") (quoting *City of Houston v. Hill*, 482 U.S. 451, 458, 107 S. Ct. 2502, 2508 (1987)).

314. *Village of Schaumburg v. Citizens for a Better Environment*, 444 U.S. 620, 632, 100 S. Ct. 826, 833 (1980).

315. *City of Seattle v. Webster*, 802 P.2d 1333, 1338 (Wash. 1990).

An ordinance which specifically prohibits non-passive begging, panhandling, or soliciting alms for oneself would not be substantially overbroad as only the conduct harmful to safe, welcoming public spaces is proscribed. Similarly, one would expect that a statute forbidding begging in a manner which would reasonably be perceived as intimidating or threatening would also be held not to be substantially overbroad.

#### H. Vagueness

A statute which is so vague that a reasonable person would not know what conduct is prohibited, or is so vague that it is "susceptible to arbitrary and discriminatory law enforcement,"<sup>316</sup> is unconstitutional because it denies the due process mandated by the Fourteenth Amendment. When determining whether a given statute is unconstitutionally vague:

[s]trict specificity is not required; the exact point where actions cross the line into prohibited conduct need not be predicted. "[I]f [persons] of ordinary intelligence can understand a penal statute *notwithstanding some possible areas of disagreement*, it is not wanting in certainty." A statute is not unconstitutional "if the general area of conduct against which it is directed is made plain."<sup>317</sup>

Thus, a statute forbidding "begging" or "panhandling," whether in public spaces or in a limited area, should not be unconstitutionally vague as the terms are reasonably clear and specific. Courts that have addressed this issue have uniformly agreed.<sup>318</sup>

#### VI. A MODEL ANTI-AGGRESSIVE SOLICITATION ORDINANCE

Some communities have attempted to address the problem of urban security and civility by attempting to prohibit all panhandling. Such measures can be seen as attempts to protect the public and to lead people away from a life on the streets. Begging bans, if enforced, would greatly contribute to the safety, civility, and serenity of public spaces, and would be easy to enforce.

Despite the efficacy of complete begging prohibitions, many legislatures are likely to conclude that people suffering from severe personal problems should have an opportunity to passively seek charity. Therefore, only the more aggressive methods of panhandling are likely to be prohibited. This approach increases the chance that the ordinance would survive a constitutional challenge.

316. *Id.*

317. *Id.* at 1338-39 (quoting *City of Seattle v. Huff*, 767 P.2d 572, 575 (1988)) (emphasis supplied).

318. See, e.g., *State ex rel. Williams v. City Court of Tucson*, 520 P.2d 1166 (Ariz. Ct. App. 1974).

Of course, while a more moderate approach avoids *Loper*, it may run into the brick wall of *Blair*. The adoption of a prohibition only on aggressive begging, however, not only reaches out to those who may be legitimately in need, but also focuses on conduct rather than speech. This type of regulation, therefore, has a far greater chance of being upheld. A tailored approach allows some bothersome conduct, and forgoes the use of an easy "bright-line" test, but also allows people to passively solicit alms. Moreover, an anti-aggressive solicitation approach is a far cry from doing nothing; it is needed, appropriate, balanced, and constitutional.

No piece of legislation comes with any guarantee of constitutionality. Indeed, with the quantity of lawyers and litigants, lawsuits will undoubtedly challenge any attempt to prohibit or control vile forms of begging. This is true regardless of the extent of the problem, and regardless of the approach chosen by the legislature.

The object is not to provide a lawsuit-proof law, but to offer an ordinance designed to meet the challenges and concerns expressed by courts. The model ordinance below is also designed to be balanced and effective, as it is focused on the most egregious of the problems presented by street panhandlers:

#### Begging and Soliciting Money

##### Section 1.

(a) It shall be unlawful for any person to solicit money or other things of value, or to solicit the sale of goods or services, in an aggressive manner in a public area.

(b) For purposes of this section "to solicit money" shall include, without limitation, the spoken, written, or printed word or such other acts or bodily gestures as are conducted in furtherance of the purposes of obtaining alms.

(c) "Aggressive Manner," for purposes of this section, shall be defined as:

1. Intentionally or recklessly making any physical contact with or touching another person in the course of the solicitation, or approaching within an arm's length of the person, except with the person's consent;
2. Following the person being solicited, if that conduct is: a) intended to or is likely to cause a reasonable person to fear imminent bodily harm or the commission of a criminal act upon property in the person's possession, or b) is intended to or is reasonably likely to intimidate the person being solicited into responding affirmatively to the solicitation;
3. Continuing to solicit within five feet of the person being solicited after the person has made a negative response, if continuing the solicitation is: a) intended to or is likely to cause a reasonable person to fear imminent bodily harm or the commission of a criminal act upon property in the person's

possession, or b) is intended to or is reasonably likely to intimidate the person being solicited into responding affirmatively to the solicitation;

4. Intentionally or recklessly blocking the passage of the person being solicited or requiring the person, or the driver of a vehicle, to take evasive action to avoid physical contact with the person making the solicitation;

5. Intentionally or recklessly: a) speaking at an unreasonably loud volume under the circumstances; or b) using words: 1) intended to or likely to cause a reasonable person to fear imminent bodily harm or the commission of a criminal act upon property in the person's possession, or 2) words likely to intimidate the person into responding affirmatively to the solicitation; or

6. Approaching the person being solicited in a manner that: a) is likely to cause a reasonable person to fear imminent bodily harm or the commission of a criminal act upon property in the person's possession, or b) is likely to intimidate the person being solicited into responding affirmatively to the solicitation;

(d) "Public area," for purposes of this section, means an area open to use by the general public, including, but not limited to, alleys, bridges, buildings, driveways, parking lots, parks, plazas, sidewalks, and streets open to the general public, and the doorways and entrances to buildings and dwellings, and the grounds enclosing them.

Section 2.

(a) It shall be unlawful to solicit money or other things of value, or to solicit the sale of goods or services in any public transportation vehicle, or bus or subway station or stop.

Section 3.

It shall be unlawful to solicit money or other things of value, or to solicit the sale of goods or services, if the person making the solicitation knows or reasonably should know that the solicitation is occurring within ten feet of an automated teller machine, or within ten feet of any entrance or exit to a building containing an automated teller machine, unless a private owner of the property covered by this clause consents to such solicitations.

Section 4.

It shall be unlawful to solicit money or other things of value, or to solicit the sale of goods or services on private property or residential property, if the owner, tenant, or lawful occupant has asked the person not to panhandle on the property, or has posted a sign clearly indicating that solicitations and panhandling are not welcome on the property.

Section 5.

It shall be unlawful to solicit money or other things of value, or to solicit the sale of goods or services from any operator of a motor vehicle that is in traffic on a public street, whether in exchange for cleaning the vehicle's windows or otherwise.

Section 6.

It shall be unlawful to solicit money or other things of value from any operator or occupant of a motor vehicle on a public street in exchange for blocking, occupying, or reserving a public space, or directing the occupant to a public parking space.

Section 7.

A violation of this ordinance may be punished by a fine not to exceed Five Hundred Dollars, or by imprisonment for a term not to exceed ninety days, or by both, or by a required public service work, or by a suspension of public benefits.

Section 8.

Any arrest or conviction under this Ordinance shall be disclosed to public and private social service agencies who request the [the applicable public official] to be notified of such events.

Section 9.

No person found to have violated this ordinance more than one time shall have access to city-owned or city-funded shelters until six months have passed since the last determination of such a violation.

Section 10.

This ordinance is not intended to proscribe any demand for payment for services rendered or goods delivered.

Section 11.

If any section, sentence, clause, or phrase of this Ordinance is held invalid, or unconstitutional by any court of competent jurisdiction, then said holding shall in no way affect the validity of the remaining portions of this ordinance.

This ordinance lists specific *actions* that are prohibited when they occur in the context of begging, while allowing beggars to say anything they please on the street. Additionally, it prohibits begging in locales that are particularly threatening or intrusive. Thus, any First Amendment attack would have to assert that one's constitutionally protected right to free expression includes physical contact, causing fear, nagging, or blocking the way of others, as well as a right to beg in the public venue of one's choosing.

The model ordinance takes advantage of the *Young* and *Kokinda* decisions by creating a begging-free zone in the subways, as well as near bank machines, where there is no practical means of escaping the solicitors. Private property owners are exempted from the reach of this clause, as the community's interest in its urban spaces is unaffected.

The inclusion of bus stops is somewhat risky, as these venues were not covered in the Supreme Court decisions.<sup>319</sup> They are included with the understanding that important areas of public transport can be designated as zones where people should be free from unwanted harassment.

The ordinance includes a provision to provide an active discouragement to aggressive begging separate and apart from the criminal justice system. It calls for disclosure to social service agencies who ask for this information. The clause enables social service providers to ensure that their clients respect the privacy and safety of others.<sup>320</sup> It is anticipated that these agencies will counsel the affected individuals with an eye toward encouraging more socially-adoptive and productive behavior. These agencies may also choose to cut off the provision of services to those beggars who continue to violate the ordinance.

Finally, a clause ties the provision of taxpayer-funded shelter to compliance with the anti-aggressive panhandling law. This provision is aimed at a non-incarceration deterrent and ensures that the city will not be subsidizing someone who is harming the community, while focusing limited social service resources on those willing to not beg in an aggressive manner.

The ordinance thus respects and protects expression, while also protecting civility and privacy, or, the "right to be left alone . . . and enjoy public facilities without interference."<sup>321</sup>

#### VII. CONCLUSION

What is at stake in the regulation of begging is communities' ability to set minimum standards of public conduct. Such standards are necessary if individuals are going to voluntarily spend their time in public spaces.

Communities which enact such ordinances are not forsaking their destitute citizens. As George Will noted, "[t]he question of what society owes in compassionate help to street people is, surely, severable from the question of what right the community has to protect a minimally civilized ambience in public spaces."<sup>322</sup> The proponents of reasonable anti-aggressive begging legislation seek communities where people interact with their fellow citizens and leave behind their isolation and segregation.

319. *But see* *Loper v. New York City Police Dep't*, 802 F. Supp. 1029, 104 (S.D.N.Y. 1992), *aff'd*, 999 R2d 699 (2d Cir. 1993) ("A regulation prohibiting all solicitation in a ten-block radius from Grand Central Station during the rush hour no doubt might constitute a reasonable time, place, and manner restriction."). We cannot glean what the court meant by "no doubt might."

320. The policy is modeled after the one used by the South of Market Multi-Service Center, a provider of shelter and social services in San Francisco. The policy was abandoned when the ACLU complained about it.

321. *Loper*, 802 F. Supp. at 1042.

322. George F. Will, *Beggars and Judicial Imperialism*, *The Washington Post*, Feb. 1, 1990, at A-21.

An absolute right to beg may please those who see the courts as the answer to all social problems, see good in a life asking for money in the street, and see value in allowing people to conduct themselves in any manner, regardless of the cost to others. Such a view, however, must take into account those who will withdraw out of fear or out of revulsion. That leaves urban public spaces abandoned by the majority creating a haven for crime.

A moderate approach to the problems of urban civility is possible. This article presents such a solution for the increasing scourge of aggressive panhandling. The approach presented is precise, aimed at conduct, permissive of the expression of all views and opinions, backed by a long history of governmental and societal concern, and supported by the substantial weight of judicial authority.

Tolerance for standards of public conduct does not mean a tolerance for authoritarianism. Ordered liberty is an attraction of this country,<sup>323</sup> and the basis for its democracy and freedoms. The purpose of the ordinances proposed here is, to quote the Preamble of the Constitution, "to insure domestic tranquility."<sup>324</sup> A little more tranquility on the public streets would benefit us all.

323. The term comes from *Palko v. Connecticut*, 302 U.S. 319, 325. 58 S. Ct. 149, 152 (1937) (Cardozo, J.).

324. U.S. Const, pmbl.