SCRIPT FOR INNS OF COURT HOUSE-LESS SKIT

Judge Maurer's Group

November 2016

ACT I
SIT/LIE

Sit/Lie and Camping in Portland
And the Constitution

Amelia – Homeless woman in tent
Peter – Business owner
Rob – Central City Concern

Peter: You can't camp here, or for that matter hang out here all day! You are hurting my business!

Amelia: take a hike! I have a right to be here and you can't make me leave!

Peter: Well, I get that this is public property, but you are hurting my private property and hurting my business! This should be a crime and I am calling the cops.

Rob: Oh hey there, hold up everyone. I work as an advocate for homeless folks and don't you know there is a constitutional right at issue here?

Peter: Constitution?? Where in the Constitution does it protect homeless people sleeping on the sidewalk! Ridiculous!

Rob: Well, it doesn't really say anything about homeless in the constitution, but we do have that 8th Amendment. "Cruel and Unusual Punishments" clause of the Eighth Amendment imposes limits on what can be made criminal and punished as such. Under that basis, laws that criminalize an individual's status, rather than specific conduct, are unconstitutional. If you pass a sit-lie ordinance that makes it a criminal offense to sit or lie on the sidewalk or other public space you might be violating the constitution!

Peter: What the heck? Cant this city make it a crime to sit or camp on a sidewalk downtown?

Rob: Well, the city can try that but it might not have much success. The federal government is even against these sit-lie laws. And, let me tell you bout that.

In August last year, the Department of Justice filed a "Statement of Interest of the United States" in a case out of Boise Idaho. The case is *Janet Bell v. City of Boise.* The Department of Justice urged the Court in that case to apply a case from the Ninth Circuit, called *Jones v. City of Los Angeles*, 505 F.3d 1006 (9th Cir 2006) (vacated after settlement, 505 F.3d 1006 (9th Cir 2007).

In *Jones*, the 9th Circuit said that enforcement of anti-camping ordinances may violate the 8th Amendment on nights where there is inadequate shelter space available for all a city's homeless individuals.

In its brief in the Idaho case, the Department of Justice argued that the court, which is considering Boise's sit-lie ordinance, should follow Jones and consider whether conforming conduct to the ordinance is possible for people who are homeless.

If sufficient shelter space is unavailable because (a) there are inadequate beds for the entire homeless population or (b) there are restrictions on those beds that disqualify certain groups of individuals (for example disability access or maximum sta6y requirements, then it would be impossible for some homeless people to comply with the ordinance. And that, would amount to criminalization of homelessness, in violation of the 8th Amendment.

Peter: Well, that sucks. What if there are enough shelter beds then?

Rob: Well, under the analysis in Jones, a sit-lie law could be considered constitutional at least by the federal government and within the 9th Circuit. That would have to take into account what kind of shelter is available as well.

Peter: Can the City do anything about this at all?

Rob: Yes, look at what the city has been doing at some of the camping spots like Springwater trail, and so on.

Peter: well, why cant the city just try a sit-lie ordinance?

Rob: Let me first say, a "sit-lie" policy is one designed to prevent people from sitting or lying on public sidewalks.

In 2009 the United States District Court ruled that the City's "sit-lie" ordinance was unconstitutional.

But from the City of Portland's website, the City claims it is managing the problem in a couple of ways, by creating more walking beat routes for police, and the City says certain high-use areas are designated "high pedestrian zones", which mandates passable sidewalk; there are many blocks in the Central City that have been given this status by the Portland Bureau of Transportation and Portland Police Bureau.

Peter: What about the camping?

Rob: Per the city's website, camps are against the law. But, if the city wants to move a camp out, then it has to follow the process that came out of a settlement in a case called *Anderson v. Portland*. That requires the City to post notification at the camp that they will have to leave. Then, outreach workers will work with campers to find other locations for them to either camp in a low-impact manner or to move indoors. Then the City has to post a notice that gives from 24 hours to 7 days for people to pack up and leave. Then when the time comes, the City can clean it up and it actually has to store property for a month at a facility.

Peter: Well none of this really helps me out, does it? Sounds to me like we need to work out a solution to this homeless problem that does not involve the courts or the constitution.

ACT II
SEARCH AND SEIZURE
(PDF)

Draft of Script:

Search and Seizure skit

Officer approaches Amelia:

Officer: Good morning. How are things? Say, we have been having some problems with people camping out on sidewalks and storing drugs and other items in their tents and their back packs. I am not saying you are doing any such thing, but the public gets after us for not checking, so I wonder if you would let me take a peek so I can assure my supervisor that I took care to make sure no criminals were acting up on my beat.

Amelia:

Well, I don't have any drugs or anything I shouldn't have, but I do keep my place very tidy and I don't want you to mess things up by going through them.

Officer:

Oh, I can assure you that I won't do anything like that. In fact, I am something of a neatnik myself and always leave places better than I found them, so what do you say?

Amelia:

Well I just don't think so officer. Have a nice day.

Officer:

Listen missy, I tried to be nice about this, but I saw you take something from that sketchy looking guy who passed by a few minutes ago and I have a lot of experience with hand to hand drug buys and I believe you have drugs in your tent. Also, I was just here last week and I told you that you were breaking city law by having your tent on the sidewalk and that you needed to move it. So, at this point, I am just going to go ahead and look. It won't take long and if you don't have anything you should not have, then you have nothing to worry about.

STARTS TO LIFT FLAP OF TENT

DEFENSE ATTORNEY

Hold it, officer, I know the law and you have no right to go into her tent or backpack. I am telling you to stay out of both.

Officer:

Well thank you for your concern. However, I believe I have not only reasonable suspicion to stop and frisk her but also probable cause to search and that is what I am going to do. Say, aren't you one of the defense attorneys I sometimes see in court?

Attorney:

Yes, indeed officer. I am there all the time winning my motions to suppress evidence based on illegal police searches and seizures. You must know me from those occasions.

Officer: Well, you must also know that I don't even need probable cause to search because I can frisk her based on reasonable suspicion she has committed a crime and is dangerous and also because her tent is blocking the sidewalk and under the case law and ordinances, she has no right to be here anyway. I was going to turn my head the other way and let her stay, but now you have forced my hand. She has got to go whether I find drugs or not.

Attorney: Just exactly what laws are you talking about?

Officer: Well to begin with, when Mr. Trump becomes President, he is going to be sure that police can stop and frisk people without probably cause, and anyway, The City of Portland has local ordinances that prohibit erecting structures on public rights of way and camping on public right of way. Those ordinances also authorize me to me to abate the obstruction by taking down the tent and removing it.

Attorney: So what? This is her home! Article I, section 9, of the Oregon Constitution and the Fourth Amendment to the United States Constitution protect people from unreasonable searches and seizures of their homes. And when Hillary Clinton becomes president, she will make sure that the random stopping and frisking of people remains unconstitutional without articulable facts supporting the stop and the frisk.

Officer: I hate to be the one to tell you this, but just last year, the Oregon Court of Appeals decided a case called *State v. Tegland*. The court held that a homeless person has no right to privacy in her tent when that tent is on public land in violation of the city code, when the code authorizes the police to remove the tent, and when the police have previously warned the owner of the tent that she needs to remove it.

Attorney: Yikes. Sounds like he's got you there. Sorry.

~~HE~~ OFFICER LIFTS TENT FLAP AND SEES A METH PIPE AND METH JUST INSIDE HER TENT.

Officer: That's it, missy. You are under arrest for Possession of Methamphetamine and _____ordinance violation. I am taking the drugs and the tent and everything as evidence. You can let me search the back pack she is carrying or I can get a warrant. Put the backpack down [Amelia begrudgingly complies].

Amelia: This is awful! Is there anything that I can do?

Attorney: Well next time, you can make sure your tent is not on the public sidewalk.

Amelia: What difference does that make?

Attorney: In 2013, the Oregon Court of Appeals decided a case called *State v. Wolf*. In that case, the defendant's tent was on a lawfully rented campsite. The court held that the tent in that case was the defendant's place of residence and entitled to be treated as such.

Amelia: A lot of good that'll do me now! Thanks for nothing! What are you going to do about my backpack?! He says he's going to search it and I don't want him to!

Attorney: Ah good point! [pointing emphatically at officer] you can do no such thing. I will tell her to ask for a lawyer and challenge all of this in court.

Officer: I *am* going to search that backpack. It's abandoned property. Sorry, not sorry!

Attorney: Hold it right there. That backpack is *not* abandoned property.

Officer: How do you figure? It's sitting right there!

Attorney: Only because you told her to put it there. In 2003, the Oregon Court of Appeals decided *State v. Stafford*, and summarized the law on abandoned property. The court clarified that, in order to abandon property, the owner must voluntarily relinquish possession.

Officer: So what?

Attorney: I'm not done. The court identified three factors that weigh against a determination that a person has voluntarily relinquished possession: (1) if the relinquishment was the result of police instruction *or* illegal police conduct; (2) if the property was left on private land versus public land; and (3) if the owner hid the property or did something else to indicate to police an intent to maintain control over the property.

Officer: Uh oh.

Attorney: Yeah. "Sorry, not sorry."

Amelia: So he can't search my backpack?

Attorney: Not as abandoned property.

Amelia: Phew! That's a relief.

Attorney: But you better think about whether you've left other bags lying around somewhere else. According to that *Stafford* case, if you voluntarily placed it on public property, in the open, and then left, a police officer would be well within his rights to conclude that you abandoned the bag. That's even if you subjectively intend to return for the property later.

Amelia: What?! That's so unfair! What am I supposed to do? I don't have anywhere to store

my things. Hello, I'm freaking homeless!

Attorney: Hmm . . . I see your point. That *is* a pickle.

CASES:

The Oregon Court of Appeals ruled in State v Tegland that "a person has no reasonable expectation of privacy interest in a temporary shelter erected on public space unless the governmental entity controlling the space has either authorized the structure or, over a period of time, acquiesced in its existence."
The ruling was made by judges Rebecca Duncan, Rick Haselton and David Schuman.The appeals court also noted Tegland's case was markedly different from the 2011 case of David Aubrey Wolf, who was staying at a rented site at an eastern Oregon campground when he was charged with carrying a concealed weapon without a permit. The appeals court reversed his conviction in 2013, finding that Wolf had legally rented the campsite, and therefore it fit the definition of a "residence" and he didn't need a permit to conceal his weapon in his "home."The court said if state legislators had intended a place of residence to apply to only houses, apartments and other established structures, they would have specifically crafted the law to say a place of residence is a "dwelling house" -- as they did in defining home burglary.

ACT III – DOGS/CARE ANIMALS

[Amelia sees Nikki, another homeless woman, on the street with her dog]

AMELIA: [Gasping, dramatic freaking out noises] Ahhhh! Oh my god! Get that monster away from me before he attacks!

NIKKI: What are you talking to me? You can't possibly be talking about my little Baxter? He is so sweet. He would never hurt anyone!

AMELIA: Um, yeah right. I don't even know why you have that beast. I was attacked by some dude's dog last year in the middle of the night when I was walking by his tent. The dog wasn't even on a leash. And I can't tell you how many times I've walked in dog poop on the sidewalk. So gross!

Look, I'm living on the street, too. But at least I don't have a pet that's causing more problems. Why would you even get a dog while you're living on the street?

NIKKI: Wait just a minute there. Causing more problems? No way! My Baxter has never attacked anyone.

And, I didn't just get him. You know, I haven't always been on the street. I got Baxter 8 years ago when I used to have a decent job and an apartment. But then the economy tanked and I got laid off and I couldn't find another job. I got evicted from my apartment and here I am now.

AMELIA: Then why don't you just give him away?

NIKKI: There was no way I would ever leave Baxter – he's my family. He's the only thing I have to live for each day. He is literally the reason I wake up and keep going – just to make sure he's ok and is being cared for. He loves me and gives me hope.

It's not just me who feels this way. It's hard to accurately estimate, but there are an estimated 5-10% of homeless people have dogs or cats. However, in some areas of the country, the rate could be up to 25%. And a number of studies have shown that animals have many positive impacts on their homeless owners. For examples, studies have reported that animals promote a sense of responsibility and provided purpose and direction and help their owners stay sober and avoid lapsing into risky behavior like hard drug use.

AMELIA: Well, whatever. These animals are just a nuisance for everyone. Why can't the government see that? Why don't they just take them away?

That makes me so mad that you think that! And there are have been reports of the police, Multnomah County Animal Services (MCAS), and animal rights groups trying to take away our animals or at least fine us for having them.

Did you know that there's an animal rights group in Portland called Animal Lovers Against Homeless Pet Ownership that reportedly has kidnapped dozens of animals from the homeless? Also during the summer of 2012, the police reportedly partnered with MCAS officers to target travelers' unlicensed dogs. In about a dozen cases, the owners were reportedly cited and the officers took the dogs to a county facility in Troutdale.

I can't understand why anyone would try to take away Baxter from me. Everything else has been taken from me in my life and no one is going to take the one thing I have left—my little Baxter.

AMELIA: I mean it's not like I even like dogs, but how can you take care of him? You can't even take care of yourself. It's it just animal abuse to have them?

NIKKI: Are you kidding me? My dog never goes hungry. I'm sure that there are some people on living on the street who are irresponsible, but for most of us, our pets come first. I always make sure Baxter is fed and cared for and if I have extra food, he eats it. Which means that there are definitely days that I go to sleep hungry, but I don't care.

And, there's some really good people in the community who help like Paw Team that holds regular free clinics for pets of homeless and low-income people, and the Pongo Fund is a cat and dog food bank.

AMELIA: Okay fine – I really don't care about the dog. What about you? Can you even take him to a shelter? And what if you got sick and had to go to the hospital? Isn't your dog stopping you from accessing any service that could actually help you get off the street?

NIKKI: Look, Baxter keeps me going, but by having him, I won't lie -- it also causes other problems for me – especially for access to shelter and medical care. There's only a handful of shelters in Portland that allow pets, but they're hard to get into and aren't necessarily open year-round. At least in the past, there have been few warming shelters, which were only open during the winter or only on the coldest nights of the winter, but allowed pets.

For me, I would never leave Baxter just for a night's sleep indoors. He's my everything. And it doesn't matter all that much because I feel safer with Baxter than I would in a shelter. Also, you know – it's tough being a woman on the street. Baxter may be small, but he protects me. He has scared away guys trying to rob me—what little I have—or do God knows what else to me.

AMELIA: Look, you don't have me convinced that pets are actually a good thing for us. But, he is kind of cute. Can I pet him?

NIKKI: Sure, of course!

AMELIA: [Nervously pets Baxter]. Oh my God! Ahhhhh! I think he bit me! I told you he's a monster! He should be put down!

NIKKI: You're making it up! And even if you aren't, then you deserved it! [Runs away]

ACT IV

Inns of Court Presentation – November 2016

Medical Needs/Services – Chris Carson and Eva Marcotrigiano

Background:
Chris and Eva will be acting as doctors/employees of Outside In (http://outsidein.org/). On this day, Chris and Eva will be working on Outside In's mobile medical unit. They will have stepped out of the mobile unit just in time to witness a dog biting Amelia and then approach Amelia to discuss medical needs of the homeless (and provide care, as there is full primary care on the vehicle).

Props:
Chris and Eva will be dressed in scrubs. Eva is going to make a sign indicating the Outside In mobile unit. We will have some Band-Aids and/or a bandage wrap as we pretend to doctor up Amelia.

Amelia: Ouch! Oh no! I'm bleeding!

Eva (to Chris): Did you hear that? Let's see if she needs our help.

Chris (to Amelia): Hi ma'am. We are doctors with Outside In, and are here today offering free services. Can we take a look at that for you? It looks like that dog got you pretty good and we want to make sure you get the care you need.

Amelia (skeptical): Free? Are you sure? I don't have any money, I just live out here on the street.

Eva (to Amelia): Yup, it is completely free. Come on over to our mobile medical unit with us so we can get you cleaned and stitched up.

Amelia (skeptical): Okayyyy, but I *really* don't get how this is free and I *really* don't have any money.

Chris (to Amelia): *(As the group walks toward mobile unit)* We will tell you all about it, and we can even help you get set up with health insurance today.

Eva: This is Outside In's mobile medical unit. We provide full primary care right here on this vehicle. Outside In is a Federally Qualified Health Center located in downtown Portland near PSU. We also have two of these vans in to provide care right where you are, before medical problems escalate and you end up in the emergency room.

Amelia: How does it work?

Chris: *(As Eva cleans and bandages up Amelia)* Federally Qualified Health Centers are community-based organizations that provide comprehensive health care, including substance abuse services, regardless of their ability to pay and regardless of their health insurance status.

Outside In provides 28,000 medical visits a year to the most vulnerable members of our community–and there are other local centers that do the same.

Inns of Court Presentation – November 2016

Amelia: Are you volunteers? Who pays for this? Are you sure you aren't going to try and charge me?

Eva: We aren't volunteers, we work for Outside In. Our federal funding comes from the Health Resources and Services Administration. We also get outside grants and donations. While we do have to make efforts to collect money like any other place, we do not turn anyone away, and we will not bill you or send you to collections. Clinics and hospitals allocate money in their budget to cover free care and a portion of billed services that they don't expect to get paid for.

Now that we have your wound all doctored up, let's get you signed up for health insurance.

Amelia: Really? I heard that I could qualify but I don't have a computer or even a phone. My friend from camp on the Springwater Corridor tried to sign up using a temporary cell phone, but she was on hold for so long that she ran out of minutes and the phone cut off!

Eva: We can help you with the process right here on the van. You see, you qualify for the ACA if you are at 138% of the federal poverty level, and if you are a legal resident or documented alien. For an individual in 2016, that number is $16,242.

Usually, you can be approved for the Oregon Health Plan the day you sign up, and it will apply to today's visit. Even if it takes longer, it is retroactive to today, the day of application.

Chris: If you happened to walk into Outside In downtown, everyone who works at the front desk is trained as a *certified application assister*. There is always one front desk person assigned to handle enrollments that day.

Eva: Outside In also has an Outreach and Enrollment team. They go to homeless camps and sign people up for health insurance on the spot. Thanks to the ACA and these services, Outside In has gone from having 20% of their patients insured to now almost 90%!

Amelia: So, the ACA, Medicaid, OHP...this is pretty confusing.

Chris: The Affordable Care Act changed and expanded Medicaid, which was originally enacted in 1965. States are not required to participate in Medicaid, but all do.

The ACA requires that participating states cover nearly all people under age 65 who have incomes at or below 138% of the federal poverty level.

Under the ACA, the federal government will fund 100% of most states' costs in 2014 through 2016, gradually decreasing to 90% in 2020 and thereafter. Pre-ACA matching funds, based on a state's per capita income, were 50% to 74%.

Now for the constitutional issue – The Spending Clause. The ACA required states to participate in the new Medicaid structure or risk losing all Medicaid funding. But the Supreme Court said this was too coercive. Nat'l Fed'n of Indep Bus v Sebelius, 132 S Ct 2566, 2012-2 US Tax Cas ¶ 50423, 183 L Ed 2d 450 (2012).

32 states adopted the expansion, including the District of Columbia. 19 states did not adopt the expansion, including Idaho and Utah. There is no deadline to adopt in the future.

Amelia: What if I have a friend who is illegal and needs care?

Eva: Good question. As Chris explained, each state has their own form of Medicaid, which is insurance for the poor, but it is for the documented poor. It is federal money, and then the states run their programs how they want – here in Oregon, our program is OHP.

If a person has some sort of legal status, then they can get coverage in some form under ACA. For example, if someone has a VISA they can get health insurance under the ACA – but if you are here on a tourist VISA you might not have coverage.

The ACA does NOT cover undocumented immigrants. If your friend is an undocumented person, then here in Oregon they can qualify for emergency only insurance. This is a benefit package that covers emergency medical services only. This means the person requires immediate medical treatment due to the sudden onset of a medical condition, and the absence of medical treatment could reasonably be expected to result in placing the client's health in serious jeopardy, serious impairment to bodily function, or serious dysfunction of any organ or body part. Tests to diagnose the patient performed after the date of request may be covered. However, separate charges for post-operative visits and procedures outside the dates of the emergency treatment are not covered.

At Outside In, if someone is undocumented, we treat them as a self-pay person without insurance – if they have funds we use a sliding scale to assess any charges, but most often we write it off on our end using those budget funds we talked about earlier.

Chris: Health care is not a constitutional right. Whatever you do, don't move to Idaho or Utah because you and your friend will be out of luck.

Eva: *(Looking at bandage and paperwork)* Looks like you are all set!

Amelia: Thank you so much for all of the information. I am going to let my friend know what I learned too.

Chris: Sounds great. And remember, anyone can come visit us here on the van at any time, free of charge.

Amelia: (Walking away, talking to herself out of earshot) I want to believe them, but this sounds a little too good to be true. How do I know if they were even real doctors? They could be lawyers pretending to be doctors and then charge me anyway. I should make a sign and try to get some money from people walking by.

ACT V
BEGGING

Begging/Solicitation Script – Will Weiner and Tex Clark

Characters: Tourist 1, Tourist 2, and Amelia (Homeless)

[Amelia writes "Spare change? Need money to treat dog bite." on a cardboard scrap and places it on the ground in front of tent. Two tourists enter scene holding umbrella and begin talking to each other as they start walking past Amelia's tent]

Tourist 1: We only have one afternoon to visit downtown Portland. I want to visit Rogue brewery, voodoo donuts, and Powell's book store. Where do you want to go first?

Tourist 2: Good question. Is Voodoo donuts on this side or the other side of the Will-im-it River [misprounced]? [Pulls Portland map out of pocket and opens it]. Let's go to * * *

Amelia [interrupting]: Can either of you tourists spare any change??! I could spare a few bucks to catch a bus. I need a ride to the hospital to get some medical treatment. Anything will help.

Tourist 1: I don't know if we should help her out. Is she telling us the truth? Is she even homeless? Will she use the money for alcohol, drugs, or tobacco? Also, is it even legal for her to beg?

Tourist 2: When I visited Ft. Lauderdale Beach some years back, the homeless weren't allowed to beg along the beach and the attendant promenade sidewalk. I saw a homeless person fined for doing so.

Tourist 1: Really? Ft. Lauderdale Beach prohibited begging in public?

Tourist 2: Yes, the city passed a law prohibiting begging in an extremely popular tourist destination.

Amelia: That's not fair! Homeless have first amendment rights too.

Tourist 2: Well, cities may lawfully enforce some anti-begging regulations without violating the Constitution. Like other time, place, and manner restrictions, an anti-begging ordinance is lawful if it is 1.) content-neutral; 2.) narrowly tailored to serve a significant government interest; and 3.) leaves open ample alternative channels of communication. On a constitutional challenge, the 11th Circuit upheld the Ft. Lauderdale anti-begging law because the rule was content-neutral and applied to all types of begging and solicitation. It also left open alternative channels of begging as to other parts of the city outside of the tourist hub. The 11th Circuit also found that the anti-begging law was narrowly tailored to serve the city's interest in providing a safe, pleasant environment by the beach for the 4 plus million tourists who flock there each year.

Amelia: what does it mean to leave open ample alternative channels of communication?

Tourist 2: Well for example, a law in New York City that banned all begging in public was unconstitutional because it was overbroad and did not provide other places to beg. However, one that banned begging only in the subway in NYC was constitutional because it was aimed at protecting commuters and the homeless could beg in other parts of the city.

Amelia: Have you two visited other parts of the country that also banned begging?

Tourist 1: Yes, tons of places. When I visited Indianapolis several years ago the homeless were prohibited from panhandling at night. The law also prohibited begging during the day if it is done in an aggressive manner. I remember that a homeless person told me that he was fined $2500 for begging at night by a 7/11. The guy lived on Social Security disability benefits of $417 per month, so after the citation, he decided to leave Indianapolis for good.

Amelia: Wait…the law prohibited begging in an aggressive manner? What does that even mean?! That sounds pretty vague to me.

Tourist 1: Well, an anti-begging law is void-for-vagueness if it uses terms so ambiguous that persons of common intelligence must necessarily guess at its meaning and differ as to its application. Also, a vague statute that vests virtually complete discretion in the hands of the police violates Due Process. The law in Indianapolis was not vague because it specifically identified the term "aggressive" to mean the following: 1.) panhandling by touching a person; 2.) panhandling a person while the person is waiting in line; 3.) panhandling while blocking the path of a person; 4.) following behind a person after soliciting them for money; 5.) using profane or abusive language; 6.) or panhandling in a group of 2 or more persons. The 7th Circuit found this law passed constitutional muster.

Amelia: Are these types of laws prevalent in many cities?

Tourist 2: Yes, I've visited much of the US and a significant percentage of American cities prohibit certain behavior common among homeless people in order to move poor or homeless persons out of a city or a downtown area. In my experience, this is part of the criminalization of homeless and does not address the root problems of homelessness.

Amelia: Well, Portland doesn't have any laws prohibiting begging in public space. Can you please help me out? I need to get some medical care.

Tourist 2: Sure -- here is some spare change. Also, would you like me to call some medical help for you?

ACT VI

"CIVIL COMMITMENT"

By

Billy Prince and Daniel Keese

BILLY (AMELIA'S BROTHER) IS WAITING WITH AMELIA WHEN DANIEL (WHO WORKS AT PROJECT RESPOND) ARRIVES TO EVALUATE AMELIA FOR CIVIL COMMITMENT

BILLY

Hello Daniel. Thank you for showing up so quickly. My sister Amelia has been diagnosed with schizophrenia and I am concerned for her safety if she continues to live on the street.

AMELIA

I'm fine. You are such a worry wort.

DANIEL

What safety concerns do you have?

BILLY

. I am worried about her living on the street since she has been exhibiting increased symptoms of schizophrenia.

DANIEL

What type of symptoms?

BILLY

Hallucinations, delusions, confused thought and speech,

DANIEL

Civil commitment may be an option.

BILLY

What is a civil commitment?

DANIEL

Civil commitment is a process in which a judge decides whether a person alleged to be mentally ill should be required to accept mental health treatment. A civil commitment is not a criminal conviction and will not go on a criminal record.

BILLY

So they can be held against their will? Is that even constitutional?

DANIEL

The civil commitment process has been held to be constitutionally valid. This is because the person is accorded notice, counsel, and confrontation at the initial commitment. Involuntary confinement is limited to 180 days, and cannot be extended except by consent or by a similar judicial hearing. Therefore there are procedural safeguards which satisfy the requirements of the Due Process Clause.

BILLY

That sounds like my best option what is the process.

DANIEL

A civil commitment petition gets filed, and an investigator from the Community Mental Health Program (CMHP) investigates the need for the commitment. Depending on the investigator's decision, the case may be dismissed without a hearing, the person may go into a diversion program, or a hearing may be held.

BILLY

What happens if there is a hearing?

DANIEL

If a hearing is held, the person has a lawyer and witnesses testify. The judge then makes a decision whether the person should be committed. If the person is committed, the person may be hospitalized or may be required to undergo treatment in some other setting.

BILLY

How does the judge decide if a person should be committed?

DANIEL

A person can be committed if after hearing from witnesses a judge finds by clear and convincing evidence that the person has a mental disorder and, because of that mental disorder, is: Unable to provide for basic personal needs like health and safety. or Dangerous to self or others.

BILLY

Can you elaborate on the basic needs?

DANIEL

[t]he legislature's 'basic needs' commitment standard focuses on the capacity of the individual to survive, either through his own resources or with the help of family or friends.

BILLY

How dire does it have to be?

DANIEL

"Well you don't need to wait until Amelia is on the brink of death, but she will not be civilly committed simply because her ability to care for herself is impaired in some respect. Instead, her ability to provide for her basic needs must be impaired by her mental disorder to such a degree that she is "at risk of death in the near future." And that "there is a likelihood that the person probably would not survive in the near future because the person is unable to provide for basic personal needs".

BILLY

Well I don't think she is quite at the risk of death in the near future. But she is certainly deteriorating. I would take her home but I have kids at home and I am not equipped to deal with her needs.

THE END

Judge rules NYC's stop-and-frisk policy unconstitutional; city vows appeal

By Jason Hanna, CNN

Updated 7:39 PM ET, Mon August 12, 2013

Judge: NYPD stop-and-frisk policy not OK 03:20

Story highlights

City vows to appeal; no "change in tactics overnight," mayor says

A judge says an outside monitor will be appointed to oversee changes

A class-action suit claims minority men are stopped without reason

A federal judge ordered Monday that the New York Police Department's controversial stop-and-frisk policy be altered, finding that it violates the Constitution in part by unlawfully targeting blacks and Latinos.

But city officials bristled at the contention that police racially profile suspects, and vowed to appeal the ruling, contending the policy has cut crime.

"You're not going to see a change in tactics overnight," Mayor Michael Bloomberg told

Police officers testified that quotas forced them to make unnecessary stops

reporters Monday, saying it would take time to implement the judge's changes even if an appellate court doesn't temporarily halt it.

Asked if he hopes an appeal will delay the order until he leaves office next year, Bloomberg said: "Boy, I hope so, because I wouldn't want to be responsible for a lot of people dying."

Judge Shira A. Scheindlin, ruling on a class-action lawsuit, wrote that the policy violated plaintiffs' Fourth Amendment rights barring unreasonable searches, finding that police made at least 200,000 stops from 2004 to June 2012 without reasonable suspicion.

She also found evidence of racial profiling, violating plaintiffs' 14th Amendment rights guaranteeing equal protection.

The police department had said that the policy -- in which police stop, question and frisk people they considered suspicious -- is used to deter crime.

"The city's highest officials have turned a blind eye to the evidence that officers are conducting stops in a racially discriminatory manner," Scheindlin wrote. "In their zeal to defend a policy that they believe to be effective, they have willfully ignored overwhelming proof that the policy of targeting 'the right people' is racially discriminatory and therefore violates the United States Constitution."

Coupling Monday's ruling with a similar decision in January, she ordered that the policy be altered so that stops are based on reasonable suspicion and in a racially neutral manner.

Related Video: NYPD Chief: Stop-and-frisk saves lives 04:29

Among her orders:

-- She appointed Peter Zimroth, a former chief assistant district attorney in Manhattan, to develop and oversee near-term reforms, including changes to the NYPD's policies and training.

-- In a pilot project, NYPD patrol officers in five precincts -- one per borough -- must wear video cameras. The chosen precincts would be those with the most stops in 2012. "The recordings should ... alleviate some of the mistrust that has developed between the police and the black and Hispanic communities," and "will be equally helpful to members of NYPD who are wrongly accused of inappropriate behavior," Scheindlin wrote.

-- Other, longer-term reforms would come after community input.

NYPD: Names of innocent to be erased from stop-and-frisk records

The lawsuit, filed in 2008, went to trial for nine weeks this spring. The lead plaintiff in the case was David Floyd, a medical student who was stopped twice -- once in the middle of the afternoon when he was in front of his home in the Bronx, according to the suit.

Another plaintiff, Leroy Downs, described to CNN how he, too, was confronted and frisked as he sat on the steps in front of his own home.

"The officers drove past me, went up the street, reversed, came back, jumped out and they approached me," Downs said, adding that the officers told him, "You look like you (were) smoking weed."

Downs said he told the officers, "Come on, I'm talking on a cell phone."

"They cursed at me and said, 'Get against the fence,' and started pushing me toward the fence and commenced to searching me," added Downs. Police found nothing on Downs.

"I've been so much of this throughout my life, that's one of the reasons why I took part in this -- I just want it to stop," Downs said.

David Ourlicht, also among those stopped, reacted to the judge's ruling with tears and with an assessment: "This is a big thing for New York, but as far as for America as a whole, it shows the polarization of people of color in this country, as how we're viewed."

In her ruling, Scheindlin said more than 80% of the stops involved blacks or Hispanics. The NYPD made more than 4.4 million total stops under the policy from 2004 to June 2012.

She wrote that the NYPD carried out more stops where there were more black and Hispanic residents, at a rate disproportionate with crime rates. She also wrote that the department has an unwritten policy of targeting "the right people" for stops -- encouraging, in practice, the targeting of young blacks and Hispanics based on their prevalence in local crime complaints.

"No one should live in fear of being stopped whenever he leaves his home to go about the activities of daily life," she wrote. "Those who are routinely subjected to stops are overwhelmingly people of color, and they are justifiably troubled to be singled out when many of them have done nothing to attract the unwanted attention."

Officers say they had stop-and-frisk quotas

The city will ask the 2nd Circuit Court of Appeals to block the ruling until an appeal is heard, city attorney Michael Cardozo said Monday.

The ruling hardly impressed Bloomberg and New York Police Commissioner Ray Kelly, who called Scheindlin's finding of racial profiling "disturbing and offensive."

"We do not engage in racial profiling. It is prohibited by law," Kelly said. "We train our officers that they need reasonable suspicion to make a stop, and I can assure you that race is never a reason to conduct a stop."

The policy "is certainly a tool that every police officer needs throughout America," Kelly said.

"If you see something suspicious, you pay your police officers to ask a question, stop to inquire. To the extent that this significantly impacts on that, I think you're going to have a problem, not only here, but across America."

Bloomberg said the policy was one of a number of programs that helped the city's murder rate drop -- it's 50% below the rate when he took office nearly 12 years ago, he said.

The mayor said "we want to match the stops to where the reports of crime are."

"One of the problems we have in our society today is that victims and perpetrators of crime are (disproportionately) young minority men -- that's just a fact," he said. "If there's any administration that's ever worked hard on that, I think it's ours ... we're trying to do something about it.

"That has nothing to do with, however, where we stop people. We go to where the reports of crime are. Those unfortunately happen to be poor neighborhoods and minority neighborhoods. But that's

not the original objective or the intent or how we get there. We get there when there's a crime reported, and we will continue to do that."

The trial, which ended in May, included testimony from men who said police stopped them for no reason and from police officers who say quotas forced them to make unnecessary stops.

Closing arguments gave conflicting accounts of stop-and-frisk incidents. While attorneys for the city argued that one man was stopped because he appeared to be smoking marijuana, the plaintiffs' attorneys argued that he was simply talking on a cell phone.

Another man was reportedly stopped because he fit the description of a wanted man in a high-crime area with a recent string of burglaries, but the plaintiffs' attorneys argued that he was more than a mile from where the burglaries occurred and that the last burglary in that area occurred more than 25 days earlier.

According to the New York Civil Liberties Union, the Police Department logged its 5 millionth stop-and-frisk under Mayor Michael Bloomberg in March.

269 Or.App. 1
Court of Appeals of Oregon.

STATE of Oregon, Plaintiff–Respondent,
v.
Gregory James TEGLAND, Defendant–Appellant.

101134266; A148797.
|
Argued and Submitted Sept. 30, 2013.
|
Decided Feb. 11, 2015.

Synopsis

Background: Defendant was convicted after a bench trial in the Circuit Court, Multnomah County, Janice R. Wilson, J., of possession of methamphetamine and erecting a structure on a public right of way. He appealed.

Holdings: The Court of Appeals, Haselton, C.J., held that:

[1] police officers did not violate state constitution by lifting tarp on defendant's makeshift shelter, and

[2] officers did not violate Fourth Amendment.

Affirmed.

Attorneys and Law Firms

****64** Meredith Allen, Senior Deputy Public Defender, argued the cause for appellant. With her on the brief was Peter Gartlan, Chief Defender, Office of Public Defense Services.

Carson L. Whitehead, Assistant Attorney General, argued the cause for respondent. With him on the brief were Ellen F. Rosenblum, Attorney General, and Anna M. Joyce, Solicitor General.

Before DUNCAN, Presiding Judge, and HASELTON, Chief Judge, and SCHUMAN, Senior Judge. *

Opinion

HASELTON, C.J.

***3** Defendant appeals a judgment of conviction for one count of possession of methamphetamine, ORS 475.894, and one count of erecting a structure on a public right of way, in violation of Portland City Code (PCC) 14A.50.050. He assigns error to the trial court's denial of his motion to suppress evidence found after a police officer lifted a tarp to defendant's makeshift shelter that partially blocked a public sidewalk. We conclude that the officer's action did not effect an unlawful search in that defendant had no constitutionally protected privacy interest associated with the structure. Accordingly, we affirm.

We review the trial court's ruling on the motion to suppress for legal error and are bound by the trial court's findings of historical facts "if there is constitutionally sufficient evidence in the record to support those findings." *State v. Ehly,* 317 Or. 66, 75, 854 P.2d 421 (1993). Where the trial court has made no express findings on disputed issues of fact, "we will presume that the facts were ****65** decided in a manner consistent with the court's ultimate conclusion." *Id.*

Defendant was homeless at the time of his arrest. Using the recessed alcove of an entrance to a private business building located in southeast Portland, defendant had built a shelter out of a grocery cart, a wooden pallet, and multiple tarps. The tarps covered the top of the shelter and the sides of the shelter and were attached to the building door, as well as to other parts of the alcove area. The shelter extended out onto the public sidewalk about two feet—roughly one-quarter of the width of the sidewalk.

On November 14, 2010, at about 9:00 a.m., Portland Police Officers Kofoed and Lowry were on patrol together and saw defendant's structure blocking part of the public sidewalk. The officers had seen other makeshift structures in the same location before, built and inhabited by various people, and the officers had removed such structures in the past. They had seen defendant there a week earlier and, at that time, they told him that he needed to remove his structure.

***4** On the morning of defendant's arrest, the officers approached the structure to "see if there was anyone there" and, "because it was blocking the sidewalk, * * * we were thinking about removing it." Because the tarps covered the structure's sides, the officers could not see anything that was inside the structure, except for

defendant's feet and some bedding. Kofoed lifted one of the tarps to peer inside the structure, and Lowry saw defendant with a glass methamphetamine pipe and a lighter. The officers arrested defendant for violating the city's code against erecting a structure on a public right of way, PCC 14A.50.050 [1] and, in the process of that arrest, the officers found further evidence that led to defendant's arrest for possession of methamphetamine. Defendant was eventually charged with one count of each offense.

In a pretrial motion, defendant moved to suppress all evidence of Lowry's observations after lifting the tarp to the structure and all evidence derived from those observations. Defendant argued that Kofoed's action constituted an unreasonable search under both Article I, section 9, of the Oregon Constitution and the Fourth Amendment to the United States Constitution. The trial court, although determining that the structure was defendant's "residence," denied the motion to suppress:

> "[M]y legal conclusion is that lifting of the tarp flap did not constitute an unlawful search.
>
> ***5** " * * * * *
>
> "[PCC 14A.50.050] provides that such structures are declared a public nuisance and authorizes, among other people, the Chief of Police to summarily abate any such obstruction, which leads me to conclude on probably a couple of alternative grounds that [defendant] had no right to privacy in an illegal structure on the public right-of-way, whether he lived there and that would otherwise—or for other purposes—be considered his residence or not.
>
> " * * * * *
>
> " * * * I don't think lifting a flap of an unauthorized structure such as this could be considered an unlawful search when the police have the authority summarily to simply remove it.
>
> "Therefore, I conclude that Officer Lowry was in a place where he had a right to ****66** be, including with the tarp flap lifted by Officer Kofoed when Officer Lowry saw the glass pipe and the lighter in [defendant's] hands, in plain view at this point."

After waiving his right to a jury trial, defendant was convicted on both charges. He now appeals, assigning error to the denial of his motion to suppress.

[1] The disposition of this appeal turns on whether, in lifting the tarp to the structure, revealing its interior, Kofoed invaded a constitutionally protected privacy interest, rendering that action an unlawful warrantless search. In disputing that matter, the parties reprise their contentions before the trial court: Defendant argues that the structure was his residence and, consequently, he necessarily had a protected privacy interest associated with that structure. The state counters that, because the structure was erected in violation of city code provisions [2] that authorized police to "summarily abate" the illegal structure, defendant had no cognizable privacy interest under either the state or federal constitutions.

[2] Adhering to the requisite "first things first" construct, *State v. Kennedy,* 295 Or. 260, 262, 666 P.2d 1316 (1983), we begin with defendant's argument under ***6** Article I, section 9, which provides, in part, "No law shall violate the right of the people to be secure in their persons, houses, papers, and effects, against unreasonable search, or seizure[.]" "If the government conduct did not invade a privacy interest, then no search occurred; Article I, section 9, is not implicated, and the inquiry is concluded." *State v. Davis,* 237 Or.App. 351, 355, 239 P.3d 1002 (2010).

Defendant argues that the officer's conduct of lifting up the tarp did invade his privacy interest. He posits that, because (as the trial court determined) the structure constituted his residence and he had erected physical barriers "to establish a zone of privacy," any invasion of that space implicated the same privacy interests as those associated with more "traditional" residential structures, such as homes or apartments. *See, e.g., State v. Tanner,* 304 Or. 312, 321, 745 P.2d 757 (1987) ("Residence in a house is uniformly deemed to be a sufficient basis for concluding that the violation of the privacy of the house violated the residents' privacy interests."); *State v. Louis,* 296 Or. 57, 60, 672 P.2d 708 (1983) ("[L]iving quarters * * * are the quintessential domain protected by the constitutional guarantee against warrantless searches.").

[3] There is undeniable appeal—and merit—to the proposition that constitutional protections of privacy cannot vary, categorically, depending on whether living space is "permanent" or "transient" and "makeshift." [3] Nevertheless, just as the "permanent" versus "makeshift" character of residential space cannot be categorically conclusive of the constitutional inquiry, neither can the

"residential" character of the space.[4] That is, although the fact that the referent space was someone's residence is highly significant, it is not *per se* dispositive. Rather, the touchstone, for purposes of Article I, section 9, is whether the space is "a place that *legitimately* can be deemed private." *State v. Smith,* 327 Or. 366, 372–73, 963 P.2d 642 (1998) (emphasis added).

***7** In *State v. Campbell,* 306 Or. 157, 171, 759 P.2d 1040 (1988), the court stated that the underlying principle to Article I, section 9's prohibition on unreasonable searches is " 'the people's' freedom from [government] scrutiny." Thus, we explained in *State v. Holiday,* 258 Or.App. 601, 310 P.3d 1149 (2013), that the focus of our inquiry under Article I, section 9, is "whether the particular practice that is alleged to be a search, 'if engaged in wholly at the discretion of the ****67** government, will significantly impair the people's freedom from scrutiny.' " *Id.* at 607, 310 P.3d 1149 (quoting *Campbell,* 306 Or. at 171, 759 P.2d 1040) (some internal quotation marks omitted). We further explained:

> "In focusing on [the above question], the court must consider the particular context in which the government conduct occurred and also consider the interest for which defendant asserts constitutional protection and determine whether that interest is private within the meaning of Article I, section 9. * * * [The privacy interest under Article I, section 9,] is an interest in freedom from particular *forms of scrutiny.* Thus, in cases involving the alleged violation of a protected privacy interest, the analytical focus is on the government's conduct rather than on a defendant's subjective expectations."

Id. (internal quotation marks and citations omitted; emphasis in original).

Here, our "focus * * * on the government's conduct"—and, particularly, its implications for "the people's freedom from scrutiny," *id.*—is fundamentally informed by three uncontroverted circumstances. First, defendant's structure violated the city code prohibition against temporary structures on a public right-of-way. Second, the police had authorization, under the city code, to summarily abate any such obstruction, meaning that the officers were authorized under the city code to summarily deconstruct and remove the encroaching structure.[5] And, third, the police had previously informed defendant that he could not camp in that ***8** spot.[6] Given the combination of those circumstances, the police conduct here did not violate the constitutional protections against being subjected to impermissible forms of government scrutiny. Accordingly, the officers' conduct did not violate Article I, section 9.

[4] **[5]** We proceed to defendant's Fourth Amendment challenge.[7] The Fourth Amendment protects an individual's reasonable expectation of privacy—that is, an expectation "that society is prepared to recognize as reasonable." *State v. Wacker,* 317 Or. 419, 427–28, 856 P.2d 1029 (1993) (internal quotation marks and citations omitted).

In analogous circumstances, other jurisdictions have considered whether a government agent's entry into a person's temporary structure built on public land violates the Fourth Amendment or similar "reasonable expectation"-based law. Those jurisdictions have uniformly held that a person has no "reasonable expectation of privacy" in a temporary structure illegally built on public land, where the person knows that the structure is there without permission and the governmental entity that controls the space has not in some manner acquiesced to the temporary structure. *See United States v. Ruckman,* 806 F.2d 1471, 1472–73 (10th Cir.1986) (the Fourth Amendment was not violated, because the defendant held no objectively reasonable expectation of privacy in the cave he had resided in for several months, where the cave was on public land, and the defendant ****68** admitted that he was trespassing and subject to immediate ejectment); ***9** *Amezquita v. Hernandez–Colon,* 518 F.2d 8, 11 (1st Cir. 1975), *cert. den.,* 424 U.S. 916, 96 S.Ct. 1117, 47 L.Ed.2d 321 (1976) (members of a squatter community had no Fourth Amendment reasonable expectation of privacy in their homes on government-owned land, because they "had no colorable claim to occupy the land * * * [and] had been asked twice to depart voluntarily"); *People v. Nishi,* 207 Cal.App.4th 954, 963, 143 Cal.Rptr.3d 882, 891 (2012) (the Fourth Amendment was not violated, because the defendant did not have an objectively reasonable

expectation of privacy within the "curtilage" of his campsite, where the defendant was illegally camped on public land, the defendant knew it was illegal, and the defendant had not been given permission to camp there); *People v. Thomas,* 38 Cal.App.4th 1331, 1335, 45 Cal.Rptr.2d 610 (1995) (the police did not violate the defendant's Fourth Amendment rights when they searched the box he was living in on a public sidewalk: "[A] person who occupies a temporary shelter on public property without permission and in violation of an ordinance prohibiting sidewalk blockages is * * * without a reasonable expectation that his shelter will remain undisturbed."). [8]

Conversely, a "reasonable expectation of privacy" has been held to exist where the governmental entity that controlled the space has, by permission or acquiescence, allowed the structure to be on the public land in question, even if the structure was not legally permitted. *See U.S. v. Sandoval,* 200 F.3d 659, 661 (9th Cir.2000) (under the Fourth Amendment, the defendant had an objectively reasonable expectation of privacy in his tent on Bureau of Land Management (BLM) land, where the defendant "was never instructed to vacate or risk eviction, and the record does not establish any applicable rules, regulations or practices concerning recreational or other use of BLM land. Indeed, whether [the defendant] was legally permitted to ***10** be on the land was a matter in dispute."); *State v. Pruss,* 145 Idaho 623, 627, 181 P.3d 1231, 1235 (2008) (under the Fourth Amendment and the Idaho Constitution, the defendant had an objectively reasonable expectation of privacy in his temporary shelter, despite it being constructed on public land not designated for camping, because the State of Idaho had a "longstanding custom" of "[u]tilizing public lands for outdoor recreational activities," including on public lands not designated for camping, and because there was no evidence that the defendant had been told to leave); *People v. Hughston,* 168 Cal.App.4th 1062, 1071, 85 Cal.Rptr.3d 890 (2008) (the defendant had a Fourth Amendment reasonable expectation of privacy in a tarp structure "erected on land specifically set aside for camping during [a] music festival"); *State v. Dias,* 62 Haw. 52, 55, 609 P.2d 637, 640 (1980) (the defendants had a Fourth Amendment reasonable expectation of privacy in a shack that was part of a group of shacks called "Squatter's Row," located on land owned by the State of Hawaii, because "Squatter's Row" had been "allowed to exist by sufferance of the State for a considerable period of time"). [9]

****69** The gravamen of those decisions is that a person has no reasonable expectation of privacy interest in a temporary shelter erected on public space unless the governmental entity controlling the space has either authorized the structure or, over a period of time, acquiesced in its existence. Thus, where erecting a structure in the public space is illegal and the person has been so informed and told that the ***11** structure must be removed, there is no "reasonable expectation of privacy" associated with the space. Accordingly, under the totality of the circumstances in this case, the officers' conduct did not violate the Fourth Amendment. [10]

The trial court correctly denied defendant's motion to suppress.

Affirmed.

All Citations

269 Or.App. 1, 344 P.3d 63

Footnotes

* Haselton, C.J., *vice* Wollheim, S.J.

1 PCC 14A.50.050 provides:

> "A. It shall be unlawful to erect, install, place, leave, or set up any type of permanent or temporary fixture or structure of any material(s) in or upon non-park public property or public right-of-way without a permit or other authorization from the City.
>
> "B. In addition to other remedies provided by law, such an obstruction is hereby declared to be a public nuisance. The City Engineer, City Traffic Engineer, or Chief of Police may summarily abate any such obstruction, or the obstruction may be abated as prescribed in Chapter 29.60 of this Code.

> "C. The provisions of this Section do not apply to merchandise in the course of lawful receipt or delivery, unless that merchandise remains upon the public right-of-way for a period longer than 2 hours, whereupon the provisions of this Section apply.
>
> "D. The provisions of this Section do not apply to depositing material in public right-of-way for less than 2 hours, unless the material is deposited with the intent to interfere with free passage or to block or attempt to block or interfere with any persons(s) using the right-of-way."

2 The trial court determined that defendant had violated not only PCC 14A.50.050, but PCC 14A.50.020 as well, which prohibits camping on public rights-of-way.

3 As defendant observes,

> "a homeless person living in the street does not have the privilege of maintaining solid physical barriers within which to conduct private activities. Yet, social norms allow the homeless person a modicum of dignity."

4 We do not understand defendant to acknowledge any principled limitation or qualification of such categorical protection of "residential" space.

5 Defendant contends that the police officers did not approach his structure for the purpose of removing it, but to see if he was engaged in illegal activities. The trial court did not render any finding as to that innately factual matter. We note, however, that there is evidence in the record that the officers approached defendant's structure because they were "thinking about removing [the structure]." *See* 269 Or.App. at 4. Thus, there is evidence that at least part of Kofoed's motivation in lifting the tarp was to address the code violation.

6 Those circumstances distinguish this case from *State v. Wolf,* 260 Or.App. 414, 425, 317 P.3d 377 (2013), in which we held that the defendant's temporary structure and surrounding outdoor area at his *lawfully rented campsite* constituted his "place of residence," for purposes of determining whether he could lawfully possess a firearm within his campsite, under ORS 166.250. *Cf. State v. Clemente–Perez,* 261 Or.App. 146, 157–58, 322 P.3d 1082, *rev. allowed,* 356 Or. 397, 337 P.3d 127 (2014) (concluding that the defendant's truck that was parked under an awning structure on the defendant's property adjacent to the house was not part of the defendant's "place of residence").

7 The Fourth Amendment provides:

> "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

8 *But cf. State v. Mooney,* 218 Conn. 85, 100–01, 588 A.2d 145, *cert. den.,* 502 U.S. 919, 112 S.Ct. 330, 116 L.Ed.2d 270 (1991) (finding a reasonable expectation of privacy in a duffel bag and closed cardboard box that the defendant, a homeless person, kept underneath a bridge abutment, because the bag and box were "closed containers" found in a secluded place that the police knew the defendant regarded as his home, the bag and box were not with the defendant at the time of the search because the officers had arrested him and taken him into custody, and "the purpose of [the officers'] search was to obtain evidence of the crimes for which he was in custody"). In this case, defendant does not argue that his tarp structure was a "closed container" in which he had a right to privacy.

9 Defendant also invokes *Lavan v. City of Los Angeles,* 693 F.3d 1022 (9th Cir.2012), *cert. den.,* —— U.S. ——, 133 S.Ct. 2855, 186 L.Ed.2d 910 (2013), as support for his argument that he had a right of privacy within his temporary structure on the public sidewalk. In *Lavan,* the issue was whether city employees could summarily seize and destroy a person's unabandoned personal property left temporarily on a public sidewalk, and the court emphasized that it did not need to answer whether a person had a reasonable expectation of privacy in his or her personal property; the issue before it was whether "there was some meaningful interference with [a person's] possessory interest in [his or her] property." *Id.* at 1027 (internal quotation marks omitted). In *dicta,* the court suggested that a person's expectation of privacy in his or her unabandoned shelter "may well" be reasonable. *Id.* at 1028 n. 6.

In the light of the body of well-reasoned opinions in which other courts have engaged in a full consideration of whether a person had a reasonable expectation of privacy in a temporary shelter constructed on public land, we decline to embrace *Lavan's* ambivalent *dicta.*

10 Defendant contends, for the first time on appeal, that the circumstances of this case—and, specifically, the officers' failure to remove the structure when they first encountered it a week before—bring it within the "acquiescence" qualification addressed above. *See Dias,* 62 Haw. at 55, 609 P.2d at 640. We decline to address that contention because it is unpreserved. We note, particularly, that any determination of "acquiescence" is innately factual and circumstantial—for

example, Lowry testified, “Usually, we'll give them the opportunity to take it down and move it themselves. If not, then we will generally arrest them [and] cite them for erecting the structures on the public rights of ways”; Kofoed testified, “[W]e usually try to be proactive removing those things from the sidewalk”—and the trial court was not called upon to render findings regarding the city's actual practices with respect to the timing of removal of encroaching structures. We observe, further and parenthetically, that, while the conduct establishing acquiescence in *Dias* had continued “for a considerable period of time,” in this case only a week had elapsed between the officers' initial and subsequent contact with defendant.

184 Or.App. 674
Court of Appeals of Oregon.

STATE of Oregon, Respondent,
v.
Adrian Cavette STAFFORD, Appellant.

00-02-31288; A113307.
|
Argued and Submitted Aug. 28, 2002.
|
Decided Nov. 6, 2002.

Defendant was convicted in the Circuit Court, Multnomah County, Kimberly C. Frankel, J., of possession and delivery of a Schedule II controlled substance. Defendant appealed. The Court of Appeals, Landau, P.J., held that: (1) officer had implied consent to walk through center door that led to upstairs units of fourplex, and (2) defendant abandoned any constitutionally protected interest in bag containing evidence of crack cocaine that he stuffed between wall and handrail of stairway.

Affirmed.

Attorneys and Law Firms

****599** ***675** Walter J. Ledesma, Deputy Public Defender, argued the cause for appellant. With him on the brief was David E. Groom, Acting Executive Director, Office of Public Defense Services.

Douglas F. Zier, Assistant Attorney General, argued the cause for respondent. With him on the brief were Hardy Myers, Attorney General, and Michael D. Reynolds, Solicitor General.

Before LANDAU, Presiding Judge, and DEITS, Chief Judge, and BREWER, Judge.

Opinion

***676** LANDAU, P.J.

Defendant appeals a judgment of conviction for possession and delivery of a Schedule II controlled substance. ORS 475.992. His single assignment of error is that the trial court should have granted his motion to suppress evidence of controlled substances discovered in a wadded up paper bag that he left in plain view on a stairway at the entry of a fourplex residence. The trial court concluded that the investigating officers violated no one's privacy interests in entering the stairway and that defendant had abandoned the bag. We affirm.

The relevant facts are uncontroverted. Officers Goldschmidt and Chastain investigated a noise complaint at a fourplex. At the front of the building is a set of stairs leading to an outdoor porch with three doors. The doors on the left and the right belong to the two ground-floor units, indicated by addresses at the side of each door. The center door is the primary access to the two upper-floor units, indicated by two addresses, one on each side of the door. The door has a mail slot, a lock plate, and a door knob. There is no doorbell.

As the officers approached the porch, they heard footsteps coming down what sounded like stairs from behind the center door. The center door opened, and defendant stood in the doorway facing the two officers. He had just come down the stairs from the residence of his girlfriend, Clark. He looked surprised to see the two officers. Upon seeing them, defendant closed the door slightly and leaned back appearing to "ditch" something behind him. Chastain heard a crumpling sound from behind the door. Defendant then reopened the door and stepped onto the porch, leaving the door slightly ajar. He walked down the stairs and, after a few words with Chastain, left the scene.

Meanwhile, Goldschmidt pushed the door further open and saw a stairwell and a light switch. At the top of the stairs was a landing, with one door on each side, and a light. Goldschmidt looked in the direction that he had seen defendant lean and saw a handrail and a wadded up brown paper bag stuffed between the handrail and the wall. Goldschmidt opened the bag and found what he suspected was crack ***677** cocaine. He removed the cocaine from the bag and then replaced the bag in the railing.

Goldschmidt and Chastain then watched the building to see if defendant would come back to retrieve the cocaine. Defendant did not return. They did see, however, Clark leave her upstairs apartment, walk down the ****600** stairs, and retrieve the bag. The officers walked up the stairs to her apartment and questioned her. Clark told the officers

that defendant had called her and asked her to get the bag from where he had left it.

Defendant was charged with possession and delivery of a Schedule II controlled substance. Before trial, he moved to suppress the evidence that Goldschmidt had obtained from the brown paper bag on the ground that the officers seized it in violation of his constitutional right to be free of unreasonable searches and seizures guaranteed by Article I, section 9, of the Oregon Constitution. According to defendant, Goldschmidt had no authority to look inside the center door and up the stairway and likewise had no authority to open the brown paper bag.

The trial court concluded that defendant was Clark's guest but that, as such, his privacy or possessory interest in the premises were no greater than Clark's. The court then concluded that, given the nature of the door and stairway, the residents had given the public implied consent to enter. The court noted that the addresses by the center door indicated that it was the door to the two upper-floor units, that the door was unlocked, and that there was no doorbell. Under the circumstances, the court reasoned, there was no reasonable way for any visitor to reach the second-floor units without going up a stairway that apparently was a common area open to the public for just that purpose. As for defendant's interest in the bag, the court concluded that, by leaving it on the stairs, defendant abandoned it and could not now complain about its seizure.

On appeal, defendant first complains that the trial court erred in concluding that Goldschmidt had implied consent to enter the stairway to the upper-floor units of the fourplex. The state argues that the trial court correctly concluded ***678** that, given the physical layout of the premises, there was implied consent to enter.

[1] **[2]** Article I, section 9, of the Oregon Constitution protects a privacy interest in land outside a dwelling. *State v. Dixson/Digby,* 307 Or. 195, 211-12, 766 P.2d 1015 (1988). A resident of a dwelling, however, impliedly consents to members of the public going to the front door, as long as the resident has not "manifested an intent to forbid the intrusion of casual visitors onto the property." *State v. Gabbard,* 129 Or.App. 122, 126-27, 877 P.2d 1217, *rev. den.,* 320 Or. 131, 881 P.2d 815 (1994) (citing *State v. Ohling,* 70 Or.App. 249, 688 P.2d 1384, *rev. den.,* 298 Or. 334, 691 P.2d 483 (1984)). At issue in this case is the location of the "front door." Defendant argues that it was the outside door on the porch and that any implied consent extended only to knocking on that door. The state argues that the outside center door was merely an entry to a common stairway that led to the front doors of the two upstairs units. In resolving that question in the case of a multi-unit dwelling, strict application of the curtilage doctrine is not determinative. *State v. Larson,* 159 Or.App. 34, 40, 977 P.2d 1175, *rev. den.,* 329 Or. 318, 994 P.2d 123 (1999). Instead, we look to "the physical layout of the living units and the residents' use of the area in question." *Id.*

[3] In this case, as the trial court noted, the center door clearly was the entryway to two upstairs units. It was marked by two address numbers, it was unlocked, and there was no doorbell, intercom, or buzzer for members of the public to use to let the upstairs residents know that they wished to gain entry. The stairway itself, leading up to a landing that was the location of the doors to each of the two upper units, confirms its function as a common entry for both of the upstairs units. The residents of the upstairs units neither posted signs nor took any other action to show that they intended to exclude visitors from the stairway. The trial court did not err in concluding that Goldschmidt had implied consent to walk through the center door on the porch.

Defendant next contends that the trial court erred in concluding that he had abandoned any constitutionally protected interest in the brown paper bag that he left in the stairway. The state argues that defendant indicated an intention to relinquish any interest in the bag by voluntarily ***679** leaving it in a public place where members of the public would have been free to inspect it.

[4] **[5]** ****601** The determination whether a defendant has relinquished a constitutionally protected interest in an item of personal property involves both factual and legal issues that we review in the same manner that we review other search and seizure questions arising under Article I, section 9. *State v. Cook,* 332 Or. 601, 607, 34 P.3d 156 (2001). Property law concepts of abandonment are relevant, but not always conclusive. *Id.*

[6] In that regard, the cases suggest that several factors are pertinent: (1) whether a defendant separated himself or herself from the property as a result of police instruction, *Cook,* 332 Or. at 609, 34 P.3d 156, or illegal police conduct,

State v. Morton, 326 Or. 466, 470, 953 P.2d 374 (1998); (2) whether a defendant left the property on private, as opposed to public, property, *State v. Kendall,* 173 Or.App. 487, 491, 24 P.3d 914 (2001); and (3) whether a defendant made any attempt to hide the property or in any other way manifest an intention to the police that he or she was attempting to maintain control over it, *State v. Dickson,* 173 Or.App. 567, 575, 24 P.3d 909, *rev. den.,* 332 Or. 559, 34 P.3d 1177 (2001).

[7] In this case, the police officers lawfully approached the center outside door as defendant walked outside. Seeing the officers, defendant spontaneously turned and left the brown paper bag behind him. He did not relinquish possession of the bag in response to any instruction from, or illegal conduct on the part of, the police. It is undisputed that he did so entirely on his own, without any prompting. Defendant also left the bag in a public entryway of a multi-unit dwelling, where members of the public were likely to see it and likely to inspect its contents. Finally, defendant made no attempt to hide the bag. He left it in plain sight of anyone who walked in the center door.

Thus, the facts of this case recall those in *Dickson,* in which the defendant dropped a backpack behind him in plain sight as officers arrived to execute a search warrant. He argued that, although he had relinquished possession of the backpack, he never intended to abandon all interest in it. We rejected the argument and concluded that the defendant had ***680** abandoned any constitutionally protected interest in the backpack. We explained that the defendant had failed to manifest to the officers any indication that he was maintaining control over the backpack, such as hiding it. To the contrary, we explained, the defendant had

> "dropped the backpack in plain sight of officers in close pursuit of him. That circumstance made it objectively likely that others would inspect the backpack; conversely, it also indicates that [the] defendant did not intend to reclaim the backpack."

Id. at 575, 24 P.3d 909. In addition, we noted, even assuming that the defendant had dropped the backpack in response to the arrival of the police, the fact remained that the police had arrived to execute a valid search warrant and that the defendant did not relinquish possession of the article in response to any unlawful police conduct. *Id.*

Defendant insists that in this case the "care" with which he placed the bag in the handrail demonstrates an intent to retain possession. However much care defendant took to wad up the paper bag, though, the fact remains that he left it in a place that was visible and accessible to any member of the public who entered the doorway. As in *Dickson,* defendant in this case made no attempt to hide the property from public view or give any indication that the wadded brown paper bag was anything other than discarded trash. The trial court did not err in concluding that defendant had abandoned any constitutionally protected interest in the bag.

Affirmed.

All Citations

184 Or.App. 674, 57 P.3d 598

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The trial court concluded that defendant was Clark's guest but that, as such, his privacy or possessory interest in the premises were no greater than Clark's. The court then concluded that, given the nature of the door and stairway, the residents had given the public implied consent to enter. The court noted that the addresses by the center door indicated that it was the door to the two upper-floor units, that the door was unlocked, and that there was no doorbell. Under the circumstances, the court reasoned, there was no reasonable way for any visitor to reach the second-floor units without going up a stairway that apparently was a common area open to the public for just that purpose. As for defendant's interest in the bag, the court concluded that, by leaving it on the stairs, defendant abandoned it and could not now complain about its seizure.

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KeyCite Yellow Flag - Negative Treatment
Not Followed on State Law Grounds Leydon v. Town of Greenwich, Conn., July 26, 2001

999 F.2d 699
United States Court of Appeals,
Second Circuit.

Jennifer LOPER, William Kaye, on behalf of themselves, and all others similarly situated, Plaintiffs-Appellees,
v.
The NEW YORK CITY POLICE DEPARTMENT, Lee P. Brown, Commissioner of NYC Police Dept., Defendants-Appellants.

No. 1035, Docket 92-9127.
|
Argued May 12, 1993.
|
Decided July 29, 1993.

Individuals who begged on city streets brought action against city police department seeking to enjoin enforcement of New York statute prohibiting loitering in public places for purposes of begging. The United States District Court for the Southern District of New York, Robert W. Sweet, J., 802 F.Supp. 1029, entered summary judgment for individuals, and department appealed. The Court of Appeals, Miner, Circuit Judge, held that statute violated First Amendment.

Affirmed.

West Headnotes (9)

[1] **Constitutional Law**
Streets and Highways
Constitutional Law
Parks and Forests

Forum-based approach for First Amendment analysis subjects regulation of speech on government property traditionally available for public expression to highest scrutiny; such property includes streets and parks. U.S.C.A. Const.Amend. 1.

7 Cases that cite this headnote

[2] **Constitutional Law**
Justification for Exclusion or Limitation

Category of public property opened for expressive conduct by part or all of public is known as "designated public forum," which may be limited or unlimited; same First Amendment limitations as those governing traditional public forum apply to regulation of such property. U.S.C.A. Const.Amend. 1.

7 Cases that cite this headnote

[3] **Constitutional Law**
Governmental Disagreement with Message Conveyed

Regulation of expressive conduct neither traditionally available nor designated for that purpose is subject only to limited review under First Amendment; regulation must be reasonable and not designed to prohibit activity based merely on disagreement with views expressed. U.S.C.A. Const.Amend. 1.

2 Cases that cite this headnote

[4] **Constitutional Law**
Sidewalks

For purposes of First Amendment analysis, city sidewalks were within category of public property traditionally held open to public for expressive activity. U.S.C.A. Const.Amend. 1.

8 Cases that cite this headnote

[5] **Constitutional Law**
Begging or Panhandling

Begging implicates expressive conduct or communicative activity for purposes of First Amendment analysis; begging frequently is accompanied by speech indicating need for food, shelter, clothing, medical care, or transportation, and, even without such speech, presence of unkempt and disheveled person holding out his hand or cup to

receive donations itself conveys message of need for support, even though it does not always involve transmission of particularized social message as does organized charitable solicitation. U.S.C.A. Const.Amend. 1.

20 Cases that cite this headnote

[6] **Constitutional Law**
Begging or Panhandling
Vagrancy
Nature and Elements of Offenses

New York statute which prohibited loitering in public place for purpose of begging violated First Amendment; no compelling state interest was served by excluding those who beg in peaceful manner from communicating with their fellow citizens, even if state had such compelling interest, statute totally prohibiting begging in all public places could not be considered narrowly tailored to achieve interest, statute was not content neutral, and it left no alternative channels by which beggars could convey their messages of indigency. U.S.C.A. Const.Amend. 1.; N.Y.McKinney's Penal Law § 240.35, subd. 1.

26 Cases that cite this headnote

[7] **Constitutional Law**
Content-Based Regulations or Restrictions

Where regulation is neither content neutral nor narrowly tailored, it cannot be justified as proper time, place, or manner restriction on protected speech, regardless of whether or not alternative channels are available. U.S.C.A. Const.Amend. 1.

2 Cases that cite this headnote

[8] **Constitutional Law**
Begging or Panhandling
Vagrancy
Nature and Elements of Offenses

Even if more relaxed level of scrutiny under *O'Brien* applied to First Amendment challenge to New York statute prohibiting loitering for purposes of begging in public places, statute violated First Amendment; total prohibition imposed by statute could not be characterized as incidental limitation as it served to silence both speech and expressive conduct underlying speech, and, as state allowed solicitation of contributions in public places by registered, and some unregistered charitable organizations, no significant governmental interest was served by prohibiting others from soliciting for themselves. U.S.C.A. Const.Amend. 1; N.Y.McKinney's Penal Law § 240.35, subd. 1.

25 Cases that cite this headnote

[9] **Constitutional Law**
Begging or Panhandling
Vagrancy
Nature and Elements of Offenses

Even if New York statute prohibiting loitering for purposes of begging in public places could be classified as incidental restriction on free expression, restriction was greater than necessary to further asserted governmental interest in preventing fraud, intimidation, coercion, harassment, and assaultive conduct which allegedly may accompany begging and, thus, violated First Amendment; number of state statutes specifically addressed those harms state sought to prevent. U.S.C.A. Const.Amend. 1; N.Y.McKinney's Penal Law § 240.35, subd. 1.

12 Cases that cite this headnote

West Codenotes

Held Unconstitutional
McKinney's Penal Law § 240.35(1).

Attorneys and Law Firms

***700** Fay Leoussis, Asst. Corp. Counsel City of New York, New York City (O. Peter Sherwood, Corp. Counsel, Leonard Koerner, Bruce Rosenbaum, of counsel), for defendants-appellants.

George Sommers, New York City, for plaintiffs-appellees.

Robert Teir and Henry J. Stern, New York City Submitted a Brief for amici curiae American Alliance for Rights and Responsibilities and The Citizens Union of the City of New York in Support of defendants-appellants.

***701** Before: MINER, McLAUGHLIN and FRIEDMAN, * Circuit Judges.

Opinion

MINER, Circuit Judge:

Defendants-appellants The New York City Police Department and Lee F. Brown, Commissioner of the Department, ("City Police") appeal from a summary judgment entered in the United States District Court for the Southern District of New York (Sweet, *J.*) in favor of plaintiffs-appellees Jennifer Loper and William Kaye, on behalf of themselves and all others similarly situated ("Plaintiffs"). The district court in this case has certified a plaintiff class consisting of all "needy persons who live in the State of New York, who beg on the public streets or in the public parks of New York City." *Loper v. New York City Police Dep't,* 802 F.Supp. 1029, 1033 (S.D.N.Y.1992). The court defined a "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.* The judgment declared unconstitutional on First Amendment grounds the following provision of the New York Penal Law and enjoined the City Police from enforcing it:

> A person is guilty of loitering when he:
>
> 1. Loiters, remains or wanders about in a public place for the purpose of begging....

N.Y. Penal Law § 240.35(1) (McKinney 1989).

On appeal, the City Police argue that begging has no expressive element protected by the First Amendment, that even if a speech interest is implicated in Plaintiffs' conduct, the government's interest in the maintenance of order outweighs the Plaintiffs' interest, and that, in any event, the message Plaintiffs seek to convey is entitled only to the "minimal protection" afforded by the "outer perimeters of the First Amendment."

The City Police regard the challenged statute as an essential tool to address the evils associated with begging on the streets of New York City. They assert that beggars tend to congregate in certain areas and become more aggressive as they do so. Residents are intimidated and local businesses suffer accordingly. Panhandlers are said to station themselves in front of banks, bus stops, automated teller machines and parking lots and frequently engage in conduct described as "intimidating" and "coercive." Panhandlers have been known to block the sidewalk, follow people down the street and threaten those who do not give them money. It is said that they often make false and fraudulent representations to induce passers-by to part with their money. The City Police have begun to focus more attention on order maintenance activities in a program known as "community policing." They contend that it is vital to the program to have the statute available for the officers on the "beat" to deal with those who threaten and harass the citizenry through begging.

Although it is conceded that very few arrests are made and very few summonses are issued for begging alone, officers do make frequent use of the statute as authority to order beggars to "move on." The City Police advance the theory that panhandlers, unless stopped, tend to increase their aggressiveness and ultimately commit more serious crimes. According to this theory, what starts out as peaceful begging inevitably leads to the ruination of a neighborhood. It appears from the contentions of the City Police that only the challenged statute stands between safe streets and rampant crime in the city.

It is ludicrous, of course, to say that a statute that prohibits only loitering for the purpose of begging provides the only authority that is available to prevent and punish all the socially undesirable conduct incident to begging described by the City Police. There are, in fact, a number of New York statutes that proscribe conduct of the type that may accompany individual solicitations for money in the city streets. For example, the crime of harassment in the first degree is committed by one who follows another person in or about a public place or places or repeatedly ***702** commits acts that place the other person in reasonable fear of physical injury. N.Y. Penal Law § 240.25 (McKinney Supp.1993). If a panhandler, with intent to cause public inconvenience, annoyance or alarm, uses obscene or abusive language or obstructs pedestrian or vehicular traffic, he or she is guilty of disorderly

conduct. N.Y. Penal Law §§ 240.20(3), (5) (McKinney 1989). A beggar who accosts a person in a public place with intent to defraud that person of money is guilty of fraudulent accosting. *Id.* § 165.30(1). The crime of menacing in the third degree is committed by a panhandler who, by physical menace, intentionally places or attempts to place another person in fear of physical injury. N.Y. Penal Law § 120.15 (McKinney Supp.1993).

The distinction between the statutes referred to in the preceding paragraph and the challenged statute is that the former prohibit conduct and the latter prohibits speech as well as conduct of a communicative nature. Whether the challenged statute is consonant with the First Amendment is the subject of our inquiry. We do not write upon a clean slate as regards this inquiry, since the Supreme Court as well as this Court has addressed restrictions on the solicitation of money in public places.

In *Young v. New York City Transit Authority,* 903 F.2d 146 (2d Cir.), *cert. denied,* 498 U.S. 984, 111 S.Ct. 516, 112 L.Ed.2d 528 (1990), there was at issue before us a regulation prohibiting begging and panhandling in the New York City Subway System. In that case we "wonder[ed]" whether the beggars' "conduct is not divested of any expressive element as a result of the special surrounding circumstances involved in" begging in the subway, but we did not rest our decision "on an ontological distinction between speech and conduct." *Id.* at 154. We did find that the conduct element of begging, in the confined atmosphere of the subway, " 'disrupts' and 'startles' passengers, thus creating the potential for a serious accident in the fast-moving and crowded subway environment." *Id.* at 158. This finding led to our conclusion that the New York City Transit Authority's "judgment that begging is alarmingly harmful conduct that simply cannot be accommodated in the subway system is not unreasonable." *Id.*

In our First Amendment analysis in *Young,* we applied the "more lenient level of judicial scrutiny," *id.* at 157, prescribed in *United States v. O'Brien,* 391 U.S. 367, 88 S.Ct. 1673, 20 L.Ed.2d 672 (1968) (conviction for destruction of draft card in anti-war protest allowed to stand where speech and nonspeech elements combined in same course of conduct). In accordance with the test outlined in *O'Brien,* we determined: 1) that the subway regulation was within the constitutional power of government; 2) that the regulation advanced substantial and important governmental interests; 3) that the governmental interests were not related to the suppression of free expression; and 4) that, because "the exigencies created by begging and panhandling in the subway warrant the conduct's complete prohibition," *Young,* 903 F.2d at 159, the First Amendment freedom restrictions were no greater than were essential to further the government's interest. *Id.* at 157-59. Citing *Ward v. Rock Against Racism,* 491 U.S. 781, 802, 109 S.Ct. 2746, 2759-60, 105 L.Ed.2d 661 (1989), we observed that ample alternative channels of communication were open. Most pertinent to our analysis in the case at bar, we stated:

> Under the regulation, begging is prohibited only in the subway, not throughout all of New York City. It is untenable to suggest, as do the plaintiffs, that absent the opportunity to beg and panhandle in the subway system, they are left with no means to communicate to the public about needy persons.

Young, 903 F.2d at 160. The case before us does prohibit begging throughout the City and does leave individual beggars without the means to communicate their individual wants and needs.

We also decided in *Young* that the district court erred in concluding that the subway is a public forum where begging and panhandling must be allowed. We indicated that the subway is at best a limited forum that could be, and was, properly restricted as to the types of speech and speakers permitted:

> [T]here can be no doubt that the [New York City Transit Authority] intended to ***703** continue its long-standing prohibition of begging and panhandling even after revising the regulation to permit solicitation by organizations.

Id. at 161. The special conditions of the subway system were said to require a limitation on expressive activity, and we referred in *Young* to our earlier holding in *Gannett Satellite Information Network, Inc. v. Metropolitan Transportation Authority,* 745 F.2d 767, 772-73 (2d Cir.1984), that the subway is not an open forum for public communication either by tradition or

designation. Despite government ownership, it is the nature of the forum that we must examine in order to determine the extent to which expressive activity may be regulated. It long has been settled that all forms of speech need not be permitted on property owned and controlled by a governmental entity. *United States Postal Serv. v. Council of Greenburgh Civic Ass'ns,* 453 U.S. 114, 129, 101 S.Ct. 2676, 2685, 69 L.Ed.2d 517 (1981).

In *International Society for Krishna Consciousness, Inc. v. Lee,* 505 U.S. 672, 112 S.Ct. 2701, 120 L.Ed.2d 541 (1992), *aff'g in part,* 925 F.2d 576 (2d Cir.1991), the Supreme Court agreed with us that a regulation prohibiting solicitation of funds in airline terminals operated by a public authority did not violate the First Amendment. The plaintiff in that case was a religious sect whose members solicited funds in public places as part of a ritual. The Court "conclude[d] that the terminals are nonpublic fora and that the regulation reasonably limits solicitation." *Id.* 505 U.S. at ----, 112 S.Ct. at 2706. This conclusion followed the now-familiar " 'forum-based' approach for assessing restrictions that the government seeks to place on the use of its property." *Id.* 505 U.S. at ----, 112 S.Ct. at 2705. It also followed this significant observation by the Court: "It is uncontested that the solicitation at issue in this case is a form of speech protected under the First Amendment." *Id.*

[1] The forum-based approach for First Amendment analysis subjects to the highest scrutiny the regulation of speech on government property traditionally available for public expression. *Id.* Such property includes streets and parks, which are said to "have immemorially been held in trust for the use of the public and, time out of mind, have been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions." *Hague v. CIO,* 307 U.S. 496, 515, 59 S.Ct. 954, 964, 83 L.Ed. 1423 (1939).

> In these quintessential public forums, the government may not prohibit all communicative activity. For the State to enforce a content-based exclusion it must show that its regulation is necessary to serve a compelling state interest and that it is narrowly drawn to achieve that end.... The State may also enforce regulations of the time, place, and manner of expression which are content-neutral, are narrowly tailored to serve a significant government interest, and leave open ample alternative channels of communication.

Perry Educ. Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37, 45, 103 S.Ct. 948, 955, 74 L.Ed.2d 794 (1983) (citation omitted).

[2] **[3]** The category of public property opened for expressive activity by part or all of the public is known as the designated public forum, which may be of a limited or unlimited character. *Id.* The same limitations as those governing the traditional public forum apply to the regulation of such property. *Id.* at 46, 103 S.Ct. at 955-56. The regulation of expressive activity on public property neither traditionally available nor designated for that purpose is subject only to a limited review-the regulation must be reasonable and not designed to prohibit the activity merely because of disagreement with the views expressed. *Id.* The airport terminals in *International Society* were classified as nonpublic fora, and the regulation prohibiting solicitations there was subject only to a reasonableness review, which it passed. *International Soc'y,* 505 U.S. at ---- - ----, 112 S.Ct. at 2706-08. According to a plurality of the Court, the same was true for a postal service regulation prohibiting solicitation on a sidewalk located on postal service property leading from a parking lot to a post office. *See United States v. Kokinda,* 497 U.S. 720, 110 S.Ct. 3115, 111 L.Ed.2d 571 (1990). In *Kokinda,* the Court noted that postal service property was dedicated to ***704** one means of communication only: public notices were allowed to be posted on bulletin boards designated for the purpose. *Id.* at 730, 110 S.Ct. at 3121-22.

[4] The sidewalks of the City of New York fall into the category of public property traditionally held open to the public for expressive activity. *See United States v. Grace,* 461 U.S. 171, 179-80, 103 S.Ct. 1702, 1708, 75 L.Ed.2d 736 (1983) (sidewalks comprising the outer boundaries of the Supreme Court grounds are indistinguishable from other sidewalks in Washington, D.C. and constitute a proper public forum). Conduct of a communicative nature cannot be regulated in "these quintessential public forums" in the same manner as it can be regulated on the streets of a military reservation. *See Greer v. Spock,* 424 U.S. 828, 96 S.Ct. 1211, 47 L.Ed.2d 505 (1976).

[5] It cannot be gainsaid that begging implicates expressive conduct or communicative activity. *See* Anthony J. Rose, Note, *The Beggar's Free Speech Claim,* 65 Ind.L.J. 191, 200-02 (1989). As agreed by the parties in *International Society,* begging is at least "a form of speech." 505 U.S. at ----, 112 S.Ct. at 2705. In *Village of Schaumburg v. Citizens for a Better Environment,* 444 U.S. 620, 100 S.Ct. 826, 63 L.Ed.2d 73 (1980), the Supreme Court struck down an ordinance prohibiting solicitation by charitable organizations that did not use at least seventy-five percent of their revenues for charitable purposes. 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.... [S]olicitation is characteristically intertwined with informative and perhaps persuasive speech seeking support for particular causes or for particular views on ... social issues, and ... without solicitation the flow of such information and advocacy would likely cease.

Id. at 632, 100 S.Ct. at 834; *accord Riley v. National Fed. of the Blind of N.C., Inc.,* 487 U.S. 781, 108 S.Ct. 2667, 101 L.Ed.2d 669 (1988) (striking down North Carolina statute regulating the fees that professional fundraiser may charge a charity); *Secretary of State of Md. v. Joseph H. Munson Co.,* 467 U.S. 947, 104 S.Ct. 2839, 81 L.Ed.2d 786 (1984) (striking down Maryland statute that prohibited charitable organization, in connection with fund raising activity, from paying professional fund raiser's expenses if those expenses exceeded twenty-five percent of the amount raised).

Inherent in all the charitable solicitation cases revolving around the First Amendment is the concept that "[c]anvassers in such contexts are necessarily more than solicitors for money." *Village of Schaumburg,* 444 U.S. at 632, 100 S.Ct. at 834. While we indicated in *Young* that begging does not always involve the transmission of a particularized social or political message, *see Young,* 903 F.2d at 153, it seems certain that it usually involves some communication of that nature. 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 unkempt and disheveled person holding out his or her hand or a cup to receive a donation itself conveys a message of need for support and assistance. We see little difference between those who solicit for organized charities and those who solicit for themselves in regard to the message conveyed. The former are communicating the needs of others while the latter are communicating their personal needs. Both solicit the charity of others. The distinction is not a significant one for First Amendment purposes. *See Blair v. Shanahan,* 775 F.Supp. 1315, 1322 (N.D.Cal.1991) (appeal pending).

Having established that begging constitutes communicative activity of some sort and that, as far as this case is concerned, it is conducted in a traditional public forum, we next examine whether the statute at issue: (1) is necessary to serve a compelling state interest and is narrowly tailored to achieve that end; or (2) can be characterized as a regulation of the time, place and manner of expression that is content neutral, is narrowly tailored to serve significant government interests and leaves open alternate channels ***705** of communication. *Perry Educ. Ass'n,* 460 U.S. at 45, 103 S.Ct. at 954-55.

[6] **[7]** First, it does not seem to us that any compelling state interest is served by excluding those who beg in a peaceful manner from communicating with their fellow citizens. Even if the state were considered to have a compelling interest in preventing the evils sometimes associated with begging, a statute that totally prohibits begging in all public places cannot be considered "narrowly tailored" to achieve that end. Because of the total prohibition, it is questionable whether the statute even can be said to "regulate" the time, place and manner of expression but even if it does, it is not content neutral because it prohibits all speech related to begging; it certainly is not narrowly tailored to serve any significant governmental interest, as previously noted, because of the total prohibition it commands; it does not leave open alternative channels of communication by which beggars can convey their messages of indigency. In regard to the "alternative channels" issue in *Young,* we observed that the prohibition on panhandling in the subway did not foreclose begging "throughout all of New York City." *Young,* 903 F.2d at 160. Where, as

here, a regulation is neither content neutral nor narrowly tailored, it cannot be justified as a proper time, place or manner restriction on protected speech, *regardless* of whether or not alternate channels are available. *See City of Cincinnati v. Discovery Network, Inc.,* 507 U.S. 410, ----, 113 S.Ct. 1505, 1517, 123 L.Ed.2d 99 (1993) (ban on distribution of commercial handbills on news racks held violative of First Amendment).

[8] Even if we were to apply the *O'Brien* analysis, as we did in *Young,* we would find that the New York statute does not pass First Amendment muster. According to *O'Brien,* it is permissible to establish "incidental limitations on First Amendment freedoms" in order to protect a "sufficiently important governmental interest" that is "unrelated to the suppression of free expression." *O'Brien,* 391 U.S. at 376-77, 88 S.Ct. at 1679. Here, the total prohibition on begging in the city streets imposed by the statute cannot be characterized as a merely incidental limitation, because it serves to silence both speech and expressive conduct on the basis of the message. *See* Helen Hershkoff & Adam S. Cohen, *Begging to Differ: The First Amendment and the Right to Beg,* 104 Harv.L.Rev. 896, 909 (1991). Carrying out the *O'Brien* analysis, the statute in no way advances substantial and important governmental interests. If it did, the State would not allow, as it does, the solicitation of contributions on city streets by individuals who represent charitable organizations that have registered with the Secretary of the State of New York. *See* N.Y.Exec.Law § 172 (McKinney 1993). Moreover, certain religious, educational and fraternal organizations are entitled to solicit contributions in New York through individual solicitors even without registration, due to a statutory exemption. *See id.* § 172-a. If individuals may solicit for charitable and other organizations, no significant governmental interest is served by prohibiting others for soliciting for themselves. Certainly, a member of a charitable, religious or other organization who seeks alms for the organization and is also, as a member, a beneficiary of those alms should be treated no differently from one who begs for his or her own account. *See* Charles Feeney Knapp, Note, *Statutory Restriction of Panhandling in Light of* Young v. New York City Transit: *Are States Begging Out of First Amendment Proscriptions?,* 76 Iowa L.Rev. 405, 416 (1991).

[9] Assuming that the statute at issue were to be classified as an incidental restriction on free expression, *O'Brien* requires that the restriction be "no greater than is essential to the furtherance" of the government's interest. *O'Brien,* 391 U.S. at 377, 88 S.Ct. at 1679. According to the City Police, the interest of the government lies in preventing the fraud, intimidation, coercion, harassment and assaultive conduct that is said frequently to accompany begging by individual street solicitors who do not solicit on behalf of any organization. But, as has been demonstrated, there are a number of statutes that address this sort of conduct specifically. The statute that prohibits loitering for the purpose of begging must be considered as providing a restriction greater than is essential ***706** to further the government interests listed by the City Police, for it sweeps within its overbroad purview the expressive conduct and speech that the government should have no interest in stifling. *See C.C.B. v. Florida,* 458 So.2d 47 (Fla.Dist.Ct.App.1984). A verbal request for money for sustenance or a gesture conveying that request carries no harms of the type enumerated by the City Police, if done in a peaceful manner. However, both the organizational solicitor *and* the individual solicitor are prosecutable for conduct that oversteps the bounds of peaceful begging.

In *City of Seattle v. Webster,* 115 Wash.2d 635, 802 P.2d 1333 (1990) (en banc), *cert. denied,* 500 U.S. 908, 111 S.Ct. 1690, 114 L.Ed.2d 85 (1991), the Supreme Court of the State of Washington rejected a constitutional challenge to a Seattle ordinance that prohibited people from obstructing pedestrian or vehicular traffic or aggressively begging. *See* Seattle, Wash.Mun.Code § 12A.12.015(B) (1987). "Aggressively beg" was defined in the ordinance as meaning "to beg with [the] intent to intimidate another person into giving money or goods." *Id.* § 12A.12.015(A)(1). "Obstruct pedestrian or vehicular traffic" meant "to 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." *Id.* § 12A.12.015(A)(3). Constitutionally protected picketing and protesting explicitly were exempted from punishment. *Id.* In upholding the statute, the *Webster* court emphasized that the specific intent element of the statute saved it from being overbroad, vague or unreasonable. *Webster,* 802 P.2d at 1338-40. Although the majority of the court in that case focused its analysis on the "pedestrian interference" language of the statute because the defendant in the case had not been charged with aggressive begging, Justice Utter found that begging was protected speech that could be regulated with narrowly drawn time, place and manner

restrictions. *Id.* at 1342-44 (Utter, J., concurring in part and dissenting in part).

We refer to *Webster* only because it deals with a regulation that prohibits conduct that extends beyond speech, expression and communication. In contrast with the Seattle ordinance, the statute before us prohibits verbal speech as well as communicative conduct, not in the confined precincts of the subway system, *see Young, supra,* or in the crowded environment of a state fair, *see Heffron v. International Soc'y for Krishna Consciousness, Inc.,* 452 U.S. 640, 651, 101 S.Ct. 2559, 2565-66, 69 L.Ed.2d 298 (1981), but in the open forum of the streets of the City of New York. The New York statute does not square with the requirements of the First Amendment. The plaintiffs have demonstrated that they are entitled to the relief they seek. *See Clark v. Community for Creative Non-Violence,* 468 U.S. 288, 293 n. 5, 104 S.Ct. 3065, 3069 n. 5, 82 L.Ed.2d 221 (1984).

The judgment appealed from is affirmed.

All Citations

999 F.2d 699, 62 USLW 2067

Footnotes

* The Honorable Daniel M. Friedman, of the United States Court of Appeals for the Federal Circuit, sitting by designation.

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KeyCite Yellow Flag - Negative Treatment
Not Followed on State Law Grounds Leydon v. Town of Greenwich, Conn., July 26, 2001

177 F.3d 954
United States Court of Appeals,
Eleventh Circuit.

James Dale SMITH, personally and on behalf of all others similarly situated, Plaintiff-Appellant,
v.
CITY OF FORT LAUDERDALE, FLORIDA, Defendant-Appellee.

No. 98-4973.
|
June 2, 1999.

Class of homeless persons brought First Amendment action challenging regulation of City of Fort Lauderdale, Florida proscribing begging on five-mile strip of beach and two attendant sidewalks. The United States District Court for the Southern District of Florida, No. 93-6970-CV-NCR, Norman C. Roettger, Jr., J., entered summary judgment for City. Class appealed. The Court of Appeals, Hull, Circuit Judge, held that regulation was narrowly tailored to serve City's interest in providing safe, pleasant environment and eliminating nuisance activity on beach, and thus did not violate free speech guarantees.

Affirmed.

West Headnotes (4)

[1] Constitutional Law
Parks and forests

Five-mile strip of beach and two attendant sidewalks in Fort Lauderdale, Florida was "public forum" for purposes of First Amendment challenge to regulation restricting begging. U.S.C.A. Const.Amend. 1.

12 Cases that cite this headnote

[2] Constitutional Law
Begging or panhandling

Like other charitable solicitation, begging is speech entitled to First Amendment protection. U.S.C.A. Const.Amend. 1.

13 Cases that cite this headnote

[3] Constitutional Law
Justification for exclusion or limitation

Even in a public forum, the government may enforce regulations of the time, place, and manner of expression which: (1) are content-neutral; (2) are narrowly tailored to serve a significant government interest; and (3) leave open ample alternative channels of communication. U.S.C.A. Const.Amend. 1.

10 Cases that cite this headnote

[4] Constitutional Law
Begging or panhandling
Vagrancy
Nature and elements of offenses

Regulation proscribing begging on five-mile strip of beach and two attendant sidewalks in City of Fort Lauderdale, Florida was narrowly tailored to serve City's significant government interest in providing safe, pleasant environment and eliminating nuisance activity on beach, and thus did not violate free speech guarantees; City determined that begging in such area adversely impacted tourism, begging was allowed in other public fora throughout City, and proffered alternatives of proscribing only hostile or aggressive begging or confining begging to specific parts of beach did not demonstrate that regulation was substantially broader than necessary. U.S.C.A. Const.Amend. 1.

13 Cases that cite this headnote

Attorneys and Law Firms

***955** Bruce S. Rogow, Beverly A. Pohl, American Civil Liberties Union, Ft. Lauderdale, FL, for Plaintiff-Appellant.

Lisa N. Hodapp, Ft. Lauderdale, FL, for Defendant-Appellee.

Appeal from the United States District Court for the Southern District of Florida.

Before COX and HULL, Circuit Judges, and COHILL [*], Senior District Judge.

Opinion

HULL, Circuit Judge:

A Plaintiff-Appellant class of homeless people appeals the district court's decision granting summary judgment for the City of Fort Lauderdale on the class's First Amendment challenge to a City regulation proscribing begging on a certain five-mile strip of beach and two attendant sidewalks. We hold the challenged restrictions on speech are narrowly tailored to serve the City's legitimate interests and thus affirm.

The controversy in this case began when the City of Fort Lauderdale enacted Rules and Park Regulations for City Parks and Beaches, intended "to provide citizens with a safe environment in which recreational opportunity can be maximized." Pursuant to this purpose, the City included in its regulations Rule 7.5, which prescribes regulations "to eliminate nuisance activity on the beach and provide patrons with a pleasant environment in which to recreate." Rule 7.5(c) states, "Soliciting, begging or panhandling is prohibited." [1]

Plaintiffs challenge Rule 7.5(c)'s application to a five-mile strip of beach, a new, one-and-a-half-mile promenade sidewalk between that beach and Highway A1A, and the commercial-area sidewalk on the opposite side of Highway A1A-hereinafter collectively called the "Fort Lauderdale Beach area." The parties stipulate as follows:

> The Fort Lauderdale Beach area is an essential part of the Fort Lauderdale tourism experience. Tourism is one of Florida's most important economic industries, and Fort Lauderdale is the premiere tourist location of Broward County. The Beach area is Fort Lauderdale's number one tourist attraction. Approximately four million tourists, many of whom are from foreign countries, visit the Fort Lauderdale area, and most of them at one time or another visit the Fort Lauderdale Beach area. City attendance records reflect that almost three million people visit the beach ***956** annually (August, 1993-July, 1994 estimated figures).
>
> The improvement of the Beach area was a high priority in the City's plan to expand the economic base of the community by attracting new investment. Creating an attractive infrastructure was designed to encourage quality development in the Beach area.

[1] **[2]** As an initial matter, we note that Rule 7.5(c)'s limitations on begging in the Fort Lauderdale Beach area restrict speech in a public forum. Like other charitable solicitation, begging is speech entitled to First Amendment protection. [2] *See Loper v. New York City Police Dept.,* 999 F.2d 699, 704 (2d Cir.1993) (holding "begging is at least 'a form of speech' " because of the lack of material distinctions between begging and other forms of charitable solicitation); *see also Village of Schaumburg v. Citizens for a Better Environment,* 444 U.S. 620, 632, 100 S.Ct. 826, 63 L.Ed.2d 73 (1980) (holding charitable organizations' solicitations for contributions are protected speech).

Additionally, this Court's precedent conclusively establishes that the Fort Lauderdale Beach area covered by Rule 7.5(c)-consisting of beach and sidewalk spaces-is a public forum. *See One World Family Now v. City of Miami Beach,* 175 F.3d 1282 (11th Cir.1999) (holding an oceanfront strip of public sidewalk in the historic Art Deco district of Miami Beach to be a "quintessential public forum"); *International Caucus of Labor Committees v. City of Montgomery,* 111 F.3d 1548, 1550 (11th Cir.1997) (confirming the longstanding principle that "[a] sidewalk, although specifically constructed for pedestrian traffic, also constitutes a public forum"); *Naturist Society, Inc. v. Fillyaw,* 958 F.2d 1515, 1521-23 (11th Cir.1992) (holding John D. MacArthur Beach State Park to be a public forum).

[3] **[4]** Nonetheless, Rule 7.5(c)'s restrictions on begging in the Fort Lauderdale Beach area [3] survive Plaintiffs' First Amendment challenge. Even in a public forum, the government may "enforce regulations of the time,

place, and manner of expression which [1] are content-neutral, [2] are narrowly tailored to serve a significant government interest, and [3] leave open ample alternative channels of communication." *Perry Educ. Ass'n v. Perry Local Educators' Ass'n,* 460 U.S. 37, 45, 103 S.Ct. 948, 74 L.Ed.2d 794 (1983); *see also One World Family Now,* 175 F.3d at 1287. Plaintiffs do not dispute that Rule 7.5(c) is content-neutral and leaves open ample alternative channels of communication. Plaintiffs also expressly concede that the City's interest in providing a safe, pleasant environment and eliminating nuisance activity on the beach is "a significant government interest." Plaintiffs argue only that Rule 7.5(c)'s begging restrictions are not narrowly tailored to serve that interest. We disagree.

Rule 7.5(c)'s restrictions on begging in the Fort Lauderdale Beach area are narrowly tailored to serve the City's interest in providing a safe, pleasant environment and eliminating nuisance activity on the beach. The City has made the discretionary determination that begging in this designated, limited beach area adversely impacts tourism. Without second-guessing that judgment, which lies well within the City's discretion, we cannot conclude that banning begging in this limited beach area burdens "substantially more speech than is necessary to further the government's legitimate interest." *One World Family Now,* 175 F.3d at 1287 (quoting *Ward v. Rock Against Racism,* 491 U.S. 781, 789, 109 S.Ct. 2746, 105 L.Ed.2d 661 (1989)). Rule 7.5(c)'s suppression of begging in the ***957** Fort Lauderdale Beach area is materially mitigated by the allowance of begging in streets, on sidewalks, and in many other public fora throughout the City. *Cf. Loper,* 999 F.2d at 701 (assessing a statute applicable to any "public place" in the state of New York).

Moreover, Rule 7.5(c)'s restrictions on begging in the Fort Lauderdale Beach area are not rendered unconstitutional by the possible availability of less-speech-restrictive alternatives. Plaintiffs assert that the City's interest might be served by proscribing only hostile or aggressive begging or by confining begging to specific parts of the beach. But Rule 7.5(c) need not be the "least restrictive or least intrusive means" of serving the City's interest in order to qualify as "narrowly tailored." *Ward,* 491 U.S. at 788-89, 109 S.Ct. 2746. "So long as the means chosen are not substantially broader than necessary to achieve the government's interests ... the regulation will not be invalid simply because a court concludes that the government's interest could be adequately served by some less-speech-restrictive alternative." *Id.* at 799, 109 S.Ct. 2746. Plaintiffs' proffered alternatives fall far short of demonstrating that Rule 7.5(c)'s prohibition of begging in this Fort Lauderdale Beach area is "substantially broader than necessary."

Thus, Rule 7.5(c)'s restrictions on begging in the Fort Lauderdale Beach area do not run afoul of the First Amendment, and the district court's grant of summary judgment for the City is AFFIRMED.

All Citations

177 F.3d 954, 12 Fla. L. Weekly Fed. C 912

Footnotes

* Honorable Maurice B. Cohill, Senior U.S. District Judge for the Western District of Pennsylvania, sitting by designation.

1 It is undisputed that "soliciting," "begging," and "panhandling" are interchangeable terms. We use the term "begging" to encompass all three.

2 The parties do not raise-and thus we do not address-the issue of whether begging is commercial speech entitled to a lower level of First Amendment protection.

3 On appeal, Plaintiffs challenge Rule 7.5(c) only as applied to begging in the Fort Lauderdale Beach area.

KeyCite Yellow Flag - Negative Treatment
Declined to Follow by Blair v. Shanahan, N.D.Cal., September 24, 1991

903 F.2d 146
United States Court of Appeals,
Second Circuit.

William B. YOUNG, Jr., and Joseph Walley, on behalf of themselves and all other persons who are similarly situated; and Legal Action Center for the Homeless, Plaintiffs–Appellees, Sheron Gilmore, Plaintiff–Intervenor–Appellee,
v.
NEW YORK CITY TRANSIT AUTHORITY, Metropolitan Transportation Authority of the State of New York, Metro–North Commuter Railroad Company, The Long Island Rail Road Company, The Port Authority of New York and New Jersey, and Robert R. Kiley, as Chairman of the New York City Transit Authority, the Metropolitan Transportation Authority of the State of New York, the Metro–North Commuter Railroad Company, and the Long Island Rail Road Company, and Robert Abrams, as Attorney General of the State of New York, Defendants–Appellants, Philip D. Kaltenbacher, Chairman, Robert F. Wagner, Sr., Vice–Chairman, Hazel Frank Gluck, James G. Hellmuth, Henry F. Henderson, Jr., William K. Hutchison, Richard C. Leone, Basil Patterson, John G. McGoldrick, William J. Ronan, Howard Schulman, and Robert Van Buren, as the Board of Commissioners of the Port Authority of New York and New Jersey, Appellants.

Nos. 1170, 1171 and 1202, Dockets 90–7115, 90–7137 and 90–7183.
|
Argued March 5, 1990.
|
Decided May 10, 1990.

Organization representing homeless people brought class action, challenging transit authority regulation prohibiting begging and panhandling in subway system. The United States District Court for the Southern District of New York, Leonard B. Sand, J., enjoined enforcement of the regulation, and appeal was taken. The Court of Appeals, Altimari, Circuit Judge, held that regulation did not violate First Amendment.

Reversed and vacated.

Meskill, Circuit Judge, filed opinion concurring in part and dissenting in part.

West Headnotes (6)

[1] **Constitutional Law**
Begging or panhandling

Begging and panhandling in city subway system was not expressive conduct protected by First Amendment. U.S.C.A. Const.Amend. 1.

22 Cases that cite this headnote

[2] **Constitutional Law**
Begging or panhandling

Begging and panhandling in city subway system was not form of charitable solicitation protected by First Amendment. U.S.C.A. Const.Amend. 1.

14 Cases that cite this headnote

[3] **Constitutional Law**
Transit systems and stations
Constitutional Law
Begging or panhandling
Urban Railroads
Statutory or municipal regulations

Even assuming that begging and panhandling were protected forms of speech, city transit authority's prohibition of begging and panhandling in subway system was reasonable. U.S.C.A. Const.Amend. 1.

7 Cases that cite this headnote

[4] **Constitutional Law**
Begging or panhandling
Vagrancy

Nature and elements of offenses

City transit authority rule permitting charitable solicitation by organizations in subway system did not make subway system a public forum in which begging and panhandling was permissible under First Amendment. U.S.C.A. Const.Amend. 1.

25 Cases that cite this headnote

[5] **Constitutional Law**

Case or controversy requirement

Organization representing homeless people, which brought action challenging transit authority rule prohibiting begging and panhandling in subway system, did not allege actual "case or controversy" with regard to whether state statute prohibiting begging violated due process clause of State Constitution, as required for district court to exercise jurisdiction over issue; organization did not maintain that defendants ever violated state law, and issue was instead raised by district court sua sponte. N.Y.McKinney's Penal Law § 240.35, subd. 1; McKinney's Const. Art. 1, § 6; U.S.C.A. Const. Art. 3, § 1 et seq.

20 Cases that cite this headnote

[6] **Federal Courts**

State constitutional claims

Issue of whether state statute prohibiting begging violated due process clause of State Constitution was not within district court's pendent jurisdiction in action challenging validity of transit authority regulation prohibiting begging and panhandling in subway under First Amendment; federal constitutional claim raised legal issues completely unrelated to those presented by state constitutional claim. N.Y.McKinney's Penal Law § 240.35, subd. 1; McKinney's Const. Art. 1, § 6; U.S.C.A. Const. Art. 3, § 1 et seq.; Amend. 1.

28 Cases that cite this headnote

Attorneys and Law Firms

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O. Peter Sherwood, Sol. Gen. (Robert Abrams, Atty. Gen., Peter H. Schiff, Deputy Sol. Gen., Daniel Smirlock, Asst. Atty. Gen., New York City, of counsel), for defendant-appellant Robert Abrams.

Norman Siegel (Robert Levy, Steven Glauberman, the New York Civil Liberties Union Foundation, New York City, of counsel), for amicus curiae New York Civil Liberties Union Foundation.

Before TIMBERS, MESKILL and ALTIMARI, Circuit Judges.

Opinion

ALTIMARI, Circuit Judge:

The central issue on this appeal is whether the prohibition of begging and panhandling [1] in the New York City subway system violates the First Amendment of the United States Constitution. Defendants-appellants New York City Transit Authority ("TA") and Metropolitan Transportation Authority of the State of New York ("MTA") appeal from a judgment entered in the United States District Court for the Southern District of New York, (Leonard B. Sand, *Judge*), permanently enjoining the TA from the enforcement of N.Y.Comp.Codes R. &

Regs. tit. 21, § 1050.6 (1989) ("21 N.Y.C.R.R. § 1050.6" and "§ 1050.6"), a regulation prohibiting begging and panhandling in the subway system. They are joined by defendants-appellants Metro–North Commuter Railroad Company ("Metro–North"), Long Island Rail Road Company ("LIRR") and Port Authority of New York and New Jersey ("Port Authority") to the extent that the district court's judgment enjoins the enforcement of the prohibition against begging in their respective transit facilities. In addition, defendants-appellants New York State Attorney General Robert Abrams ("Attorney General") and Port Authority appeal from that portion of the district court's judgment holding New York Penal Law § 240.35(1) (McKinney 1989) ("N.Y. Penal Law § 240.35(1)" and "§ 240.35(1)") to be unconstitutional under the New York State Constitution.

Upon request of the TA and the Port Authority, this Court issued a complete stay pending appeal of the district court's judgment and expedited the appeal on February 7, 1990. On this appeal, as in the district court, the TA argues that begging is not expression protected by the First Amendment, that the subway is not a designated public forum for begging, and that the TA's regulation prohibiting begging is a reasonable time, place, or manner restriction. The Port Authority and the Attorney ***148** General argue, *inter alia,* that the plaintiffs failed to allege an actual case or controversy in connection with the New York Penal Law, and they join in the contention that begging is not protected expression under the First Amendment.

The district court concluded that begging constitutes a type of speech that merits the full protection of the First Amendment. Absent an analysis as per *United States v. O'Brien,* 391 U.S. 367, 88 S.Ct. 1673, 20 L.Ed.2d 672 (1968), and an appropriate reading of *Village of Schaumburg v. Citizens for a Better Environment,* 444 U.S. 620, 100 S.Ct. 826, 63 L.Ed.2d 73 (1980), hereinafter discussed at some length, we might be inclined to agree.

We do not think, however, that the regulation is directed at speech itself and must be justified by the substantial showing of need that the First Amendment requires. Indeed, the regulation expressly authorizes public speaking and the distribution of written materials. We conclude, therefore, that the regulation is justified by governmental interests that are content neutral and unrelated to the suppression of free expression. Consequently, the regulation comes under the more relaxed level of scrutiny contemplated in *O'Brien* and developed in several recent Supreme Court cases. Pursuant to the *O'Brien* standard, we have no doubt that the regulation comports with the First Amendment.

For the reasons set forth below, we reverse and vacate that part of the district court's judgment enjoining the enforcement of 21 N.Y.C.R.R. § 1050.6 as in contravention of the First Amendment, and we vacate that part of the judgment declaring N.Y. Penal Law § 240.35(1) to be violative of the New York State Constitution.

BACKGROUND

A. The Original Controversy

On November 28, 1989, the Legal Action Center for the Homeless ("LACH") filed suit in the district court on behalf of itself and two homeless men, William B. Young and Joseph Walley, as representative plaintiffs for a class of homeless and needy persons who beg and panhandle in the New York City subway system. The gravamen of the complaint was that the prohibition of begging and panhandling in the subway contravenes the rights to free speech, due process and equal protection of the law. Specifically, the complaint alleged that the enforcement of 21 N.Y.C.R.R. § 1050.6 violated the First and Fourteenth Amendments of the United States Constitution, Article I, §§ 6, 8 and 11 of the New York State Constitution, and 42 U.S.C. §§ 1981 and 1983. Pending the district court's action in declaring the prohibition unconstitutional, the plaintiffs also sought certain preliminary and injunctive relief. Accordingly, they entreated the district court to restrain the defendants from enforcing the prohibition, and to require the defendants to disseminate information throughout the subway system that begging and panhandling are lawful activities.

LACH named the TA, MTA and Metro–North as defendants. Under the direction of the MTA, the TA is empowered to establish regulations governing passenger conduct, in order to facilitate an effective, safe and reliable means of public transportation. N.Y.Pub.Auth.Law § 1201 *et seq.* (McKinney 1982 & Supp.1990). Towards this end, the TA has maintained a longstanding ban on begging and panhandling in the subway system. 21 N.Y.C.R.R. § 1050.6.

In January 1989, the MTA and TA approved the commencement of a rule-making process to amend 21 N.Y.C.R.R. § 1050.6. The existing regulation stipulated that "no person, unless duly authorized ... shall upon any facility or conveyance ... solicit alms, subscription or contribution for any purpose." § 1050.6(b). The process, which included four public hearings, did not alter § 1050.6(b), but only added a provision, § 1050.6(c). The amendment permits greater utilization of the transit system for certain non-commercial activities such as: "public speaking; distribution of written materials; solicitation for charitable, religious or political causes; and artistic performances, including the acceptance of donations." § 1050.6(c). Pursuant to the amended regulation, these non-transit uses are subject to certain place restrictions. ***149** In particular, solicitation for charitable, religious or political causes is prohibited on subway cars, in areas not generally open to the public, within twenty-five feet of a token booth or fifty feet from the entrance to an authority office or tower, § 1050.6(c)(1), in any "location which interferes with access onto or off an escalator, stairway or elevator," § 1050.6(c)(2), and "on a subway platform while construction, renovation or maintenance work is actively underway on or near the platform ...," § 1050.6(c)(3). The amended regulation, which continues the TA's long-standing ban against begging and panhandling, became effective in October 1989.

At that time, the TA commenced "Operation Enforcement", a program designed to implement more effectively the long-standing prohibition on begging and panhandling in the subway. At the outset of Operation Enforcement, the TA distributed 1,500,000 pamphlets that summarized eleven TA rules, including "No panhandling or begging." The TA rules were also displayed on 15,000 posters throughout the subway system. Both the pamphlets and the posters warned that violation of the TA rules could lead to arrest, fine and/or ejection. Plaintiffs Young and Walley acknowledge in affidavits submitted to the district court that they saw the posters and pamphlets during the information campaign of Operation Enforcement. Although they state their understanding that the TA intends to enforce the rules, they admit that they have continued to beg and panhandle. They further acknowledge that when the police have observed the behavior, rather than arrest them or issue a summons, the police have requested that they stop the proscribed activity or leave the system.

Before the district court was the following additional evidence. The New York City Subway System transports approximately 3,500,000 passengers on an average workday, operates twenty-four hours a day, seven days a week, and consists of 648 miles of track, 468 subway stations and over 6,000 subway cars. Many parts of the subway system are almost one hundred years old. In a timeworn routine of New York City life, each day a multitude descends the steep and long staircases and mechanical escalators to wait on narrow and crowded platforms bounded by dark tunnels and high power electrical rails.

In 1988, the TA initiated a lengthy study-process concerning "quality of life problems" experienced by riders in their use of the subway system. The study-process disclosed the fact that begging contributes to a public perception that the subway is fraught with hazard and danger. A research survey conducted by Peter Harris revealed that, in fact, two-thirds of the subway ridership have been intimidated into giving money to beggars. The survey also revealed that beggars are perceived to pervade the subway system, and that the ridership considers the presence of beggars as a significant problem.

As another aspect of the study-process, Detective Bernard Jacobs, a twenty-four year veteran of the Transit Authority Police and initiator of the Transit Police Crime Prevention Unit, met with numerous groups of citizens and passengers. He reported that "passengers almost always voice their concern and discomfort about the prevalence of panhandling" in the subway system. The passengers "feel harassed and intimidated by panhandlers." Moreover, "it is difficult from the police perspective to draw the fine line between panhandling and extortion." Many passengers have complained that demands for money by beggars and panhandlers include "unwanted touching, detaining, impeding and intimidating."

An outside consulting company retained during the study-process confirmed the reality that begging and panhandling in the subway system pose a multi-faceted problem. Professor George Kelling, the president of the consulting company and an expert with extensive national and international experience in social problems,

concluded that behavior such as begging generates "high levels of fear in the passengers, thereby discouraging use of the system." In explaining the need for rules against begging in the subway, Kelling drew a distinction between ordinary city streets and the more constrictive New ***150** York City subway system. Open city streets allow pedestrians what sociologists term "fate-control", or the ability to avoid and move away from an intimidating person. To the contrary, subway riders enjoy considerably less fluidity of movement and ability to control what happens to them. Whether standing in the crush of riders in a speeding subway car, waiting among the pressing masses on a platform, or swarming with the throng through a maze of mezzanines, staircases and ramps, the rider feels "captive". As a result, Kelling concluded, "[i]n the subway environment, begging is inherently aggressive even if not patently so." In addition, Kelling concluded that begging not only intimidates passengers, but also "has the serious potential of creating an accident and injuring many people." As Kelling observed, the act of placing a cup before persons is often disruptive, startling and potentially dangerous.

During the course of the study-process, TA concerns were not limited to the safety of the ridership and their continued patronage. The Kelling affidavit earmarks research indicating that the homeless in the subways are generally males afflicted with serious mental illness and suffering from alcohol and/or drug abuse. Moreover, the sad statistics reveal that during a ten month period in 1989, an average of six homeless persons per month died in the subway, including fifteen persons who were struck by trains. As a result, Kelling counselled that this "subset of the homeless" should not be encouraged to beg and panhandle in the system "for their own well-being".

B. Proceedings in the District Court

At oral argument on December 1, 1989, LACH elucidated its position. LACH suggested that "whenever a homeless and needy person is extending his hand, he is communicating" and, therefore, the action enjoys full First Amendment protection. Acknowledging as constitutionally valid the place restrictions in the August 1989 amended regulation, LACH challenged as unconstitutional the regulation's distinction between solicitation for charitable, religious or political causes and solicitation of alms by private individuals. On this basis, LACH argued that the total ban on begging and panhandling in the subway system was constitutionally impermissible.

The district court directed attention to several potential ambiguities in the regulation's language. In particular, the district court doubted whether the regulation's "distinction between 'solicit alms' and 'solicit for charitable purposes' " could "survive a ... challenge for vagueness." The court further called into question the meaning of the phrase "unless duly authorized by the Authority," and asked whether the TA had "adopted any rules, regulations or standards for the grant or denial of authority." Instructing the TA to brief this issue for the next oral argument, the district court queried "whether this is the regulation that ... [the TA] want[s] to take to the Supreme Court."

In the interim, the TA promptly responded to the district court's concerns about potential ambiguities in the August 1989 amended regulation. A revised regulation was adopted on December 15, 1989. The revision expressly states: "No person shall panhandle or beg upon any facility or conveyance." 21 N.Y.C.R.R. § 1050.6(b)(2). Additionally, the revised regulation prohibits all solicitation for charity except by organizations that:

> (1) have been licensed for any public solicitation within the preceding twelve months by the Commissioner of Social Services of the City of New York under § 21–111 of the Administrative Code of the City of New York or any successor provision, or (2) are duly registered as charitable organizations with the Secretary of State of the State of New York under § 172 of the New York Executive Law or any successor provision, or (3) are exempt from federal income tax under § 501(c)(3) of the United States Internal Revenue Code or any successor provision.

21 N.Y.C.R.R. 1050.6(c). With the exception of these clarifications, the 1989 amended regulation remained unchanged.

***151** At a second oral argument on December 18, 1989, the district court granted plaintiffs' motion for

an order temporarily restraining the TA from enforcing the prohibition on begging and panhandling. During the argument, the district court informed the parties that it had, *sua sponte,* written to the New York Attorney General providing him with the opportunity to intervene in the suit. The district court's December 15, 1989 letter alerted the Attorney General of the court's belief that this case "call[s] into question the constitutionality of New York Penal Law Section 240.35." The statute in pertinent part provides that: "[A] person is guilty of loitering when he ... [l]oiters, remains or wanders about in a public place for the purpose of begging." N.Y. Penal Law § 240.35(1). By a telephone call on the morning of December 18, 1989, the Attorney General's office declined the court's invitation to intervene. The district court then instructed the plaintiffs to file an amended complaint challenging N.Y. Penal Law § 240.35(1) and naming the Attorney General as a defendant in the case.

At this time, the district court also entertained a motion made by the Legal Aid Society to intervene on behalf of Sheron Gilmore. Both the TA and LACH opposed the motion, maintaining that Gilmore was a member of the class represented by Walley and Young and her intervention was not necessary to develop the factual issues in this case. The court, nevertheless, opined that "the case is a very difficult and important case and that there is sufficient work to be done so that the court would welcome the additional resource which the Legal Aid Society can provide." Consequently, the motion was granted. On December 27, 1989, the plaintiffs filed an amended complaint. Complying with the district court's instructions, they named the Attorney General as a defendant and challenged N.Y. Penal Law § 240.35(1). They also added as defendants the LIRR and the Port Authority.

A third oral argument was conducted on January 22, 1990. Once again, the district court instructed the plaintiffs to amend the complaint. This time the list of defendants was augmented to include all twelve commissioners of the Port Authority rather than solely the Chairman. In addition, the court suggested the plaintiffs redefine the representative class by deleting "homeless" from the description and encompassing "all needy people" who live in New York State. As per the court's directions, the plaintiffs moved to amend the complaint.

Thus, not satisfied with the scope of the original controversy, the district court directed that the complaint be amended on numerous occasions; it *sua sponte* contacted the Attorney General, and when he declined to intervene, directed that he be made a party so that N.Y.Penal Law § 240.35(1) be at issue; it instructed that over a dozen defendants be added, and that the class be enlarged to include all needy persons in New York State.

On January 25, 1990, the district court issued its Opinion and Order. 729 F.Supp. 341. As preliminary matters, the court granted plaintiffs' motions to include the twelve Port Authority commissioners and to certify a class of "all needy persons who live in the State of New York, who are or will be asking or soliciting others for charity for their own benefit in the train, bus or subway stations of New York City or all other places within the jurisdiction of defendants where this is presently prohibited."

Pursuant to the standards for a preliminary injunction, the district court then considered "whether there exist sufficiently serious questions going to the merits of the dispute as to make them fair ground for litigation or whether plaintiffs have shown a likelihood of success on the merits." The district court first focused its attention on the challenge to the New York Penal Law. Citing to *People v. Bright,* 71 N.Y.2d 376, 526 N.Y.S.2d 66, 520 N.E.2d 1355 (1988), the district court held that the state statute violates the due process clause of the New York State Constitution.

When the court turned to the plaintiffs' challenge to 21 N.Y.C.R.R. § 1050.6, its findings were not as clear. First, the court ***152** found itself unable to distinguish charitable solicitation and begging on the basis of the "diminished communicative content of begging, the differences between the relative intents of the two types of solicitors, and the historical treatment of begging." In light of the Supreme Court's decision in *Schaumburg, supra,* the court concluded that "begging can be protected by the First Amendment."

The court next considered whether the subway system was a traditional or designated public forum. Previously, we held in *Gannett Satellite Information Network, Inc. v. Metropolitan Transportation Authority,* 745 F.2d 767, 773 (2d Cir.1984), that the subway is neither a designated nor a traditional public forum. However, the district court proffered that since the holding in *Gannett Satellite*

preceded the 1989 amendment of § 1050.6(c), which allows certain non-transit uses of the system, our decision was of "limited precedential value". Citing to *Gannett Satellite,* the district court reasoned that "public property which is neither a traditional nor a designated public forum may still serve as a forum for free expression if that expression is 'appropriate for the property'."

Finally, the district court suggested that the total ban on begging and panhandling is not narrowly tailored to serve a state interest. Under unchallenged regulations, solicitation is prohibited if conducted in a manner reasonably intended to "annoy[ ], alarm[ ] or inconvenienc[e] others" or which "otherwise tend[s] to create a breach of peace," 21 N.Y.C.R.R. § 1050.6(a); in a manner which "may tend to cause harm or damage to any person," § 1050.7(k); or in a manner that "blocks free movement," § 1050.7(j). These prohibitions, rather than a total ban, constitute reasonable time, place and manner restrictions, according to the district court.

Thus, with regards to the merits of plaintiffs' challenge to 21 N.Y.C.R.R. § 1050.6, the district court concluded that "there are serious questions as to its constitutionality both on its face and as applied to plaintiffs." On the basis of this conclusion, the district court granted a preliminary injunction against defendant TA from enforcement of the regulation.

For similar reasons, the district court granted a preliminary injunction against Port Authority from enforcing a prohibition against begging and panhandling through regulations that authorize a variety of expressive activities by a permit system on a first-come, first-serve basis. *See* N.Y.Comp.Codes R. & Regs. tit. 21, §§ 1220.16, 1221.25 & 1290.3 (1973) ("21 N.Y.C.R.R. §§ 1220.16, 1220.25 & 1290.3"). In addition, the district court held that since the Port Authority approach relied on N.Y. Penal Law § 240.35(1) as a basis for withholding permits to beg, the permit approach violated due process under the New York State Constitution.

In an Order dated February 2, 1990, the district court converted the preliminary injunction against enforcing the prohibition of begging and panhandling to a permanent injunction. Pending the outcome on appeal to this court, the district court directed that begging and panhandling be permitted on subway platforms and mezzanines except when under construction, repair or maintenance, while at the same time temporarily prohibiting such behavior on subway trains and in the restricted areas where organized charitable solicitation is prohibited under 21 N.Y.C.R.R. § 1050.6(c). On February 7, 1990, we granted a motion of the TA and Port Authority for a stay of the district court's injunction until their appeal was decided. On February 15, 1990, the Attorney General filed a notice of appeal to this Court, challenging the district court's conclusion that N.Y. Penal Law § 240.35(1) violates New York law.

DISCUSSION

A. Speech v. Conduct

[1] On this appeal the plaintiffs contend that "begging is pure speech fully protected by the First Amendment." Recently, the Supreme Court once again admonished against adopting the " 'view that an apparently limitless variety of conduct can be labeled 'speech' whenever the person engaging in the conduct intends thereby to express an idea.' " ***153** *Texas v. Johnson,* 491U.S. 397, 109 S.Ct. 2533, 2539, 105 L.Ed.2d 342 (1989) (quoting *United States v. O'Brien,* 391 U.S. 367, 376, 88 S.Ct. 1673, 1678, 20 L.Ed.2d 672 (1968)). The Court further cautioned that "[t]he Government generally has a freer hand in restricting expressive conduct than it has in restricting the written or spoken word." *Id.,* 109 S.Ct. at 2540. Despite the warning, the plaintiffs nevertheless invoke the First Amendment on the ground that "whenever a homeless and needy person is extending his hand, he is communicating."

We initiate our discussion by expressing grave doubt as to whether begging and panhandling in the subway are sufficiently imbued with a communicative character to justify constitutional protection. The real issue here is whether begging constitutes the kind of "expressive conduct" protected to some extent by the First Amendment.

Common sense tells us that begging is much more "conduct" than it is "speech". As then Circuit Judge Scalia once remarked: "That this should seem a bold assertion is a commentary upon how far judicial and scholarly discussion of this basic constitutional guarantee has strayed from common and common-sense understanding." *Community for Creative Non–Violence v. Watt,* 703 F.2d 586, 622 (D.C.Cir.1983) (rejecting the notion that sleeping in public parks is expressive conduct about the plight of the homeless) (Scalia, J.,

dissenting), *rev'd sub nom. Clark v. Community for Creative Non–Violence,* 468 U.S. 288, 104 S.Ct. 3065, 82 L.Ed.2d 221 (1984). Here, what common sense beckons the law ordains.

In determining "whether particular conduct possesses sufficient communicative elements to bring the First Amendment into play," the Supreme Court asks "whether '[a]n intent to convey a *particularized message* was present, and [whether] the *likelihood was great* that the message would be understood by those who viewed it.' " *Spence v. Washington,* 418 U.S. 405, 410–11, 94 S.Ct. 2727, 2730, 41 L.Ed.2d 842 (1974) (quoted in *Texas v. Johnson,* 109 S.Ct. at 2539) (emphasis added). For example, the Supreme Court has recognized the "expressive nature" in the burning of a United States flag by a protestor during a political march at the Republican National Convention, *Texas v. Johnson,* 109 S.Ct. at 2540, in the wearing of black arm-bands by school students on particular days in protest of the Vietnam War, *Tinker v. Des Moines Independent Community School District,* 393 U.S. 503, 505, 89 S.Ct. 733, 735, 21 L.Ed.2d 731 (1969), in the peaceful picketing by union members of a supermarket in a large shopping center to protest unfair labor practices, *Amalgamated Food Employees Union Local 509 v. Logan Valley Plaza, Inc.,* 391 U.S. 308, 313–14, 88 S.Ct. 1601, 1605–06, 20 L.Ed.2d 603 (1968), and in conducting a silent sit-in by black persons against a library's segregation policy, *Brown v. Louisiana,* 383 U.S. 131, 141–42, 86 S.Ct. 719, 723–24, 15 L.Ed.2d 637 (1966). We note that in all of these cases there was little doubt from the circumstances of the conduct that it formed a clear and particularized political or social message very much understood by those who viewed it. More than one constitutional scholar has commented that in these cases the "expressive behavior is '100% action and 100% expression.' " L. Tribe, *American Constitutional Law* § 12–7, at 827 (2d ed. 1988) (quoting Ely, *Flag Desecration: A Case Study in the Roles of Categorization and Balancing in First Amendment Analysis,* 88 Harv.L.Rev. 1482, 1495–96 (1975)). In other words, the conduct and the expression were inextricably joined.

Pursuant to the criteria articulated in *Spence,* 418 U.S. at 410–11, 94 S.Ct. at 2730, begging is not inseparably intertwined with a "particularized message." It seems fair to say that most individuals who beg are not doing so to convey any social or political message. Rather, they beg to collect money. Arguably, any given beggar may have "[a]n intent to convey a particularized message," e.g.: "Government benefits are inadequate;" "I am homeless;" or "There is a living to be made in panhandling." To be sure, the possibilities are myriad. However, despite the intent of an individual beggar, there hardly seems to be a "great likelihood" that the ***154** subway passengers who witness the conduct are able to discern what the particularized message might be.

Even where an individual intends to communicate some particularized message through an act of begging, we wonder whether the conduct is not divested of any expressive element as a result of the special surrounding circumstances involved in this case. In the subway, it is the conduct of begging and panhandling, totally independent of any particularized message, that passengers experience as threatening, harassing and intimidating. Unlike burning a flag, wearing a black arm-band, sitting or marching, begging in the subway is experienced as transgressive conduct whether devoid of or inclusive of an intent to convey a particularized message. *See O'Brien,* 391 U.S. at 382, 88 S.Ct. at 1681 ("The case at bar is therefore unlike one where ... the communication allegedly integral to the conduct is itself thought to be harmful."). Given the passengers' apprehensive state of mind, it seems rather unlikely that they would be disposed to focus attention on any message, let alone a tacit and particularized one.

The 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. We certainly do not consider it as a "means indispensable to the discovery and spread of political truth." *Whitney v. California,* 274 U.S. 357, 375, 47 S.Ct. 641, 648, 71 L.Ed. 1095 (1927) (Brandeis, J., joined by Holmes, J., concurring). Nor do we deem it as communicating one of the "inexpressible emotions" falling " 'under the protection of free speech as fully as do Keats' poems or Donne's sermons.' " *Cohen v. California,* 403 U.S. 15, 26, 25, 91 S.Ct. 1780, 1788, 29 L.Ed.2d 284 (1971) (quoting *Winters v. New York,* 333 U.S. 507, 528, 68 S.Ct. 665, 676, 92 L.Ed. 840 (1948) (Frankfurter, J., dissenting)). Consistent with its prior circumscription of what constitutes protected expressive conduct, the Supreme Court recently declared: "It is possible to find some kernel of expression in almost every activity a person undertakes ... but such a kernel is not

sufficient to bring the activity within the protection of the First Amendment." *City of Dallas v. Stanglin,* 490 U.S. 19, 109 S.Ct. 1591, 1595, 104 L.Ed.2d 18 (1989).

The plaintiffs also contend that begging and panhandling on the subway sometimes occasion questions from, and conversations with, passengers. We do not doubt that the proscribed activity may sometimes involve speech and upon occasion even give rise to the exchange of speech. We do not accept, however, that this incidental speech is one and the same as the conduct being regulated. Actual speech which may arise as an incident to conduct is not at issue here. The regulation at stake does not prevent any individual from speaking to passengers. Further, the First Amendment protects speech and not every act that may conceivably occasion engagement in conversation.

Whether with or without words, the object of begging and panhandling is the transfer of money. Speech simply is not inherent to the act; it is not of the essence of the conduct. Although our holding today does not ultimately rest on an ontological distinction between speech and conduct, we think this case presents a particularly poignant example of how the distinction subsists in right reason and coincides with common sense. To be sure, these qualities ought not to be forsaken in our legal analysis.

B. The "Schaumburg" Trilogy

[2] On this appeal the plaintiffs also argue that there is no meaningful distinction between begging and other types of charitable solicitation. The contention is an echo of the district court's finding that "a meaningful distinction cannot be drawn for First Amendment purposes between solicitations for charity and begging." The district court based its finding on three Supreme Court cases: *Schaumburg, supra; Secretary of State of Maryland v. Joseph H. Munson Co., Inc.,* 467 U.S. 947, 104 S.Ct. 2839, 81 L.Ed.2d 786 (1984); and ***155** *Riley v. National Federation of The Blind of North Carolina, Inc.,* 487 U.S. 781, 108 S.Ct. 2667, 101 L.Ed.2d 669 (1988). In these cases the Supreme Court considered laws regulating solicitations by organized charities, and held that such solicitation constituted a type of speech protected by the First Amendment. At a loss to detect a distinction between such solicitation and begging, the district court reasoned that begging must also enjoy constitutional protection. The district court apparently assumed that the outcome of the three Supreme Court cases would have been the same if, instead of involving door-to-door solicitation by organized charities, they had involved begging and panhandling in the subway. We think that the district court misconstrued the line of reasoning that underpins the trilogy.

The Supreme Court's holding in *Schaumburg* rested on the reasoning that appeals by organized charities "involve a variety of speech interests" including "communication of information, the dissemination and propagation of views and ideas, and the advocacy of causes." *Schaumburg,* 444 U.S. at 632, 100 S.Ct. at 833. The Court continued that such "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." *Id.* Absent solicitation by organized charities, the Court expressed its concern that "the flow of such information and advocacy would likely cease." *Id.* As a result, the Court concluded that "[c]anvassers in such contexts are necessarily more than solicitors for money" and do "more than inform private economic decisions." *Id.*

Upon revisiting the charitable solicitation field in *Munson,* the Supreme Court quoted all of the above *Schaumburg* language as the basis for concluding that "charitable solicitations are so intertwined with speech that they are entitled to the protections of the First Amendment." *Munson,* 467 U.S. at 959, 104 S.Ct. at 2848. In *Riley,* the Court reiterated that limitations preventing charitable organizations from raising contributions were "unconstitutional under the force of *Schaumburg.*" *Riley,* 108 S.Ct. at 2673.

The facts in *Munson* demonstrate the significance of the nexus between solicitation and traditional First Amendment activities. Munson was a professional fundraiser who challenged a Maryland statute that prohibited charitable organizations from paying any more than twenty-five percent of the amount raised by fund-raising activity to such professional fund-raisers. The Supreme Court struck down the statute on the ground that "charities often ... combin[e] solicitation with dissemination of information, discussion, and advocacy of public issues, an activity clearly protected by the First Amendment," and not upon the fundraiser's right to retain the funds he solicited on behalf of the charity. *Munson,* 467 U.S. at 961, 104 S.Ct. at 2849. *See also Cornelius v. NAACP Legal Defense & Educ. Fund, Inc.,* 473 U.S. 788, 799, 105 S.Ct. 3439, 3447,

87 L.Ed.2d 567 (1985) ("the nexus between solicitation and the communication of information and advocacy of causes.... implicates interests protected by the First Amendment"); *cf. Ohralik v. Ohio State Bar Ass'n.,* 436 U.S. 447, 457–58, 98 S.Ct. 1912, 1919–20, 56 L.Ed.2d 444 (1978) (lawyer's unsolicited legal advice did not implicate First Amendment since "it actually may disserve the individual and societal interest ... in facilitating 'informed and reliable decisionmaking' ") (citation and footnote omitted). Thus, neither *Schaumburg* nor its progeny stand for the proposition that begging and panhandling are protected speech under the First Amendment. Rather, these cases hold that there is a sufficient nexus between solicitation by organized charities and a "variety of speech interests" to invoke protection under the First Amendment.

Consistent with the *Schaumburg* reasoning, the TA amended 21 N.Y.C.R.R. § 1050.6 to allow for solicitation by organized charities in certain areas of the subway system, while totally prohibiting begging and panhandling. Despite the district court's inability to draw a distinction between begging and solicitation by organized ***156** charities, the amended regulation reflects the TA's ability to do so. Before the district court was evidence that subway passengers experience begging as intimidating, harassing and threatening. Moreover, the passengers perceive that beggars and panhandlers pervade the system. Indeed, such conduct has been reported in virtually every part of the system. Nowhere in the record is there any indication that passengers felt intimidated by organized charities. In amending the regulation based on its experience, the TA drew a distinction between the harmful effects caused by individual begging and the First Amendment interests associated with solicitation by organized charities. Further, the TA obviously made a judgment that while solicitation by organized charities could be contained to certain areas of the system, the problems posed by begging and panhandling could be addressed by nothing less than the enforcement of a total ban. We think that the amendment of the regulation reflects the TA's concerns to respect the First Amendment in accordance with *Schaumburg* and at the same time to protect its patrons from being accosted. We find no reason to quarrel with these legitimate concerns.

Both the reasoning of *Schaumburg* and the experience of the TA point to the difference between begging and solicitation by organized charities. In the instant case, the difference must be examined not from the imaginary heights of Mount Olympus but from the very real context of the New York City subway. While organized charities serve community interests by enhancing communication and disseminating ideas, the conduct of begging and panhandling in the subway amounts to nothing less than a menace to the common good. *See Members of the City Council of the City of Los Angeles v. Taxpayers for Vincent,* 466 U.S. 789, 805, 104 S.Ct. 2118, 2128, 80 L.Ed.2d 772 (1984) (The government may "protect its citizens from unwanted exposure to certain methods of expression which may legitimately be deemed a public nuisance."). The lone dissent in *Schaumburg* recognized this difference stating: "[N]othing in the United States Constitution should prevent residents of a community from making the collective judgment that certain worthy charities may solicit ... while at the same time insulating themselves against panhandlers, profiteers, and peddlers." *Schaumburg,* 444 U.S. at 644, 100 S.Ct. at 840 (Rehnquist, J., dissenting).

The district court attempted to discredit this difference by suggesting that historically begging has not been considered a *malum in se.* Similarly, the plaintiffs warn that the prohibition of begging is "a stark departure ... from our Judeo–Christian tradition." We are not unaware that the giving of alms has long been considered virtuous in our Western tradition. In antiquity the humanist and jurist, Cicero, said of Caesar: "Of all thy virtues none is more marvelous and graceful than charity." Some centuries later the Christian thinker, Augustine of Hippo, observed that it is essential to the virtue that "charity obeys reason, so that charity is vouchsafed in such a way that justice is safeguarded, when we give to the needy." In Medieval times the Jewish philosopher, Moses Maimonides, espoused a charity such that "no contribution should be made without the donor feeling confident that the administration is honest, prudent and capable of management." The district court itself stated that "[i]n early English common law, begging by those able to work was prohibited, but beggars who were unable to work were licensed and restricted to specific areas." Thus, while there can be no doubt that giving alms is virtuous, in the Western tradition there is also no doubt that the virtue is best served when it reflects an "ordered charity." It does not seem to us that the TA's regulation of solicitation and ban on begging are inconsistent with the concept. Although this discussion is certainly not determinative of the legal issues now before us, we mention it here only

because both the plaintiffs and the district court have attributed a fair amount of weight to it. We take this opportunity, therefore, to suggest that it is not the role of this court to resolve all the problems of the homeless, as sympathetic as we may ***157** be. We must fulfill the more modest task of determining whether the TA may properly ban conduct that it finds to be inherently harmful in the subway system.

C. The O'Brien Standard

[3] Assuming *arguendo* that begging and panhandling possess some degree of a communicative nature, we next inquire whether the district court correctly determined the enforcement of 21 N.Y.C.R.R. § 1050.6 to be violative of the First Amendment. The threshold question here is what level of judicial scrutiny to apply in evaluating the regulation. Government regulation of expressive conduct may abridge speech in either of two ways. *See generally* L. Tribe, *American Constitutional Law* § 12–2 (2d ed. 1988) (appropriately enough characterizing the levels of scrutiny as "track one" and "track two"). " 'A law *directed at* the communicative nature of conduct must, like a law directed at speech itself, be justified by the substantial showing of need that the First Amendment requires.' " *Texas v. Johnson,* 109 S.Ct. at 2540 (emphasis in original) (quoting *Community for Creative Non–Violence v. Watt,* 703 F.2d at 622–23 (Scalia, J., dissenting)). Alternatively, a regulation may proscribe particular conduct in order to protect a " 'governmental interest ... unrelated to the suppression of free expression.' " *Id.* (quoting *O'Brien,* 391 U.S. at 377, 88 S.Ct. at 1679). In the latter case, the regulation comes under the "relatively lenient" level of judicial scrutiny represented by the *O'Brien* standard. *Id.* (citing *O'Brien,* 391 U.S. at 377, 88 S.Ct. at 1679). "It is, in short, not simply the verbal or nonverbal nature of the expression, but the governmental interest at stake, that helps to determine whether a restriction on that expression is valid." *Id.*

Pursuant to *O'Brien,* "a government regulation is sufficiently justified" when: (1) "it is within the constitutional power of the Government;" (2) "it furthers an important or substantial governmental interest;" (3) "the governmental interest is unrelated to the suppression of free expression;" and (4) "the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest." *O'Brien,* 391 U.S. at 377, 88 S.Ct. at 1679. *See also City Council of Los Angeles v. Taxpayers For Vincent,* 466 U.S. at 805, 104 S.Ct. at 2128. In its application of *O'Brien,* the Supreme Court has "highlighted" the importance of the third requirement, and seems to have adapted it as a threshold inquiry, the answer to which determines on which track to proceed. *See Texas v. Johnson,* 109 S.Ct. at 2541. Once the third requirement has been satisfied, the Supreme Court has indicated that the *O'Brien* standard " 'in the last analysis is little, if any, different from the standard applied to time, place or manner restrictions.' " *Id.* at 2540 (quoting *Clark,* 468 U.S. at 298, 104 S.Ct. at 3071). *See also FW/PBS, Inc. v. City of Dallas* (Paris Adult Bookstores II), 493 U.S. 215, 110 S.Ct. 596, 614, 107 L.Ed.2d 603 (1990) (White, J., joined by Rehnquist, C.J., concurring) ("Time, place, and manner restrictions are not subject to strict scrutiny and are sustainable if they are content neutral, designed to serve a substantial governmental interest, and do not unreasonably limit alternative means of communication.").

In the present case, there is no indication that the district court ever inquired as to which level of judicial scrutiny is appropriate. Instead, the district court seemed to presume that the conduct at issue deserved full First Amendment protection. We think the omission and presumption were fatal to the district court's reasoning, since the regulation at issue runs squarely onto track two, under the relaxed *O'Brien* standard. Generally speaking, this more lenient level of judicial scrutiny requires us to weigh the extent to which expression is in fact inhibited against the governmental interest in proscribing particular conduct. *See* L. Tribe, *American Constitutional Law* § 12–23, at 979 (2d ed. 1988) ("To be weighed in the balance are, on the one hand, the extent to which communicative activity is in fact inhibited; and, on the other hand, the values, interests, or rights served by enforcing the inhibition."). Here, on balance, the governmental interests must prevail.

***158** The first *O'Brien* requirement is not genuinely at issue. Although the plaintiffs asserted in the original complaint that § 1050.6 was outside the rule-making authority conferred on the TA, their claim is entirely passed over in the district court's Opinion and Order. The TA, in fact, has a broad statutory mandate to promulgate rules "governing the conduct and safety of the public as it may deem necessary, convenient or desirable, ... including without limitation rules relating to the protection or maintenance of such facilities [and] the conduct and safety of the public." N.Y.Pub.Auth.Law § 1204.

Second, the regulation advances substantial governmental interests. A majority of the subway's over three million daily passengers perceive begging and panhandling to be "intimidating", "threatening", and "harassing". The conduct often involves "unwanted touching [and] detaining" of passengers. The police have great difficulty distinguishing between "panhandling and extortion". Begging is "inherently aggressive" to the "captive" passengers in the close confines of the subway atmosphere. Based on these facts, it is fair to say that whether intended as so, or not, begging in the subway often amounts to nothing less than assault, creating in the passengers the apprehension of imminent danger. Additionally, begging in the subway raises legitimate concerns about public safety. The conduct "disrupts" and "startles" passengers, thus creating the potential for a serious accident in the fast-moving and crowded subway environment. In short, the TA's judgment that begging is alarmingly harmful conduct that simply cannot be accommodated in the subway system is not unreasonable.

The governmental interests in the prohibition of begging in the subway are more fully elucidated when the harms to be avoided are juxtaposed with the good to be sustained. The subway is not a domain of the privileged and powerful. Rather, it is the primary means of transportation for literally millions of people of modest means, including hard-working men and women, students and elderly pensioners who live in and around New York City and who are dependent on the subway for the conduct of their daily affairs. They are the bulk of the subway's patronage, and the City has an obvious interest in providing them with a reasonably safe, propitious and benign means of public transportation. In determining the validity of the ban, we must be attentive lest a rigid, mechanistic application of some legal doctrine gainsays the common good. In our estimation, the regulation at issue here is justified by legitimate, indeed compelling, governmental interests. We think that the district court's analysis reflects an exacerbated deference to the alleged individual rights of beggars and panhandlers to the great detriment of the common good.

Third, the regulation relies on governmental interests unrelated to the suppression of free expression. As previously noted, the Supreme Court has "highlighted" the significance of this third *O'Brien* factor. *Texas v. Johnson,* 109 S.Ct. at 2540–41. The requirement that the governmental interest at stake be unrelated to the suppression of free expression seems equivalent to the "content neutrality" requirement. *See Ward v. Rock Against Racism,* 491 U.S. 781, 109 S.Ct. 2746, 2754, 105 L.Ed.2d 661 (1989) ("A regulation that serves purposes unrelated to the content of expression is deemed neutral, even if it has an incidental effect on some speakers or messages but not others."); *Clark v. Community for Creative Non–Violence,* 468 U.S. at 295, 104 S.Ct. at 3070 (The regulation "is content-neutral and is not being applied because of disagreement with the message presented."). In *Ward v. Rock Against Racism,* the Court stated: "The principal inquiry in determining content neutrality ... is whether the government has adopted a regulation of speech because of disagreement with the message it conveys." 109 S.Ct. at 2754. Facially, § 1050.6, of course, has nothing to do with a restriction on expression. In determining whether the governmental interest is content neutral and unrelated to the suppression of free expression, the real question must be whether the dangers relied on as justification for the regulation arise at ***159** least in some measure from the alleged communicative content of the conduct.

For example, in striking down a Texas statute that rendered desecration of the flag unlawful, the Supreme Court noted the statute was directly "aimed at protecting onlookers from being offended by the ideas expressed by the prohibited activity." *Texas v. Johnson,* 109 S.Ct. at 2543, n. 7. Similarly, in *Cohen v. California,* 403 U.S. 15, 91 S.Ct. 1780, 29 L.Ed.2d 284 (1971), the Court reversed the conviction of a defendant under a California penal statute for offensive conduct as a result of wearing a jacket into a courthouse on which were visible the words "F__k the Draft". The Court reasoned this "vulgar allusion" and "unseemly expletive" was protected since "[t]he only 'conduct' which the State sought to punish ... [was] the fact of communication." *Id.* at 18, 20, 23, 91 S.Ct. at 1784, 1785, 1787.

In contrast to *Texas v. Johnson* and *Cohen,* the governmental interests in *O'Brien* concerned the preservation of the selective service system which would have been equally threatened if the conduct of burning a draft card was totally bereft of a communicative character. If, for example, O'Brien had destroyed the card in private with no witnesses, the governmental interest in prohibiting the destructive conduct in order to protect the smooth and proper functioning of the selective service system would have been unchanged. *O'Brien,* 391 U.S. at 375,

88 S.Ct. at 1678. As the Supreme Court explained, O'Brien's conduct "willfully frustrated" the governmental interest, and consequently, he was convicted "[f]or this noncommunicative impact of his conduct, and for nothing else." *Id.* at 382, 88 S.Ct. at 1682. The Court pointed out: "The case at bar is therefore unlike one where the alleged governmental interest in regulating conduct arises in some measure because the communication allegedly integral to the conduct is itself thought to be harmful." *Id.*

Like *O'Brien,* the case now at bar involves proscription of conduct for reasons completely unrelated to the alleged communicative impact of the conduct. There is nothing in the record to suggest even remotely that the TA's interests in stopping begging arise because the TA objects to a particularized idea or message. To the contrary, the TA regulation is simply not directed at any expressive aspect of the proscribed conduct. In fact, under the amended TA rules, the message may be expressly delivered. Quite apart from any particularized idea or message it might arguably possess, begging poses significant dangers to the subway system. The conduct threatens passenger well-being and safety as well as disrupts the system's smooth operation. These dangers, independent of the alleged communicative character of begging, give rise to the regulation. Even if begging had no communicative character at all, these independent dangers would be just as real, and consequently, there would remain a substantial governmental interest in prohibiting the conduct in the subway. It seems evident to us that the regulation is content neutral, and is justified on the ground that it serves legitimate governmental interests totally unrelated to the suppression of free expression.

Finally, the exigencies created by begging and panhandling in the subway warrant the conduct's complete prohibition. 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." *United States v. Albertini,* 472 U.S. 675, 689, 105 S.Ct. 2897, 2906, 86 L.Ed.2d 536 (1985). Commenting on the fourth *O'Brien* factor, the Supreme Court made this point painstakingly clear:

> Lest any confusion on the point remain, we reaffirm today that a regulation of the time, place, or manner of protected speech must be narrowly tailored to serve the government's legitimate content-neutral interests but that it need not be the least-restrictive or least-intrusive means of doing so. Rather, the requirement of narrow tailoring is satisfied "*so long as the ... regulation promotes a substantial government interest that* ***160** *would be achieved less effectively absent the regulation.*"

Ward v. Rock Against Racism, 109 S.Ct. at 2757–58 (emphasis added) (quoting *Albertini,* 472 U.S. at 689, 105 S.Ct. at 2906) (footnote omitted) (ellipses in original).

The Supreme Court's clear statement notwithstanding, the district court reasoned that the prohibition was not a reasonable time, manner or place restriction because "different TA regulations ... already prohibit conduct which has 'the reasonably intended effect of annoying, alarming or inconveniencing others, or otherwise tend[s] to create a breach of peace,' [citation omitted], which 'interferes with the provision of transit service or obstruct[s] the flow of traffic on facilities or conveniences,' [citation omitted], or which 'causes or may tend to cause harm or damage to any person....' " In other words, the district court concluded that the regulation prohibiting begging was invalid since the TA already had at its disposal a less restrictive alternative. Such reasoning flies directly in the face of the tenet quoted above that the narrow tailoring requirement is met when "a substantial government interest [ ] would be achieved less effectively" absent the regulation. A "regulation will not be invalid simply because a court concludes that the government's interest could be adequately served by some less-speech-restrictive alternative." *Ward v. Rock Against Racism,* 109 S.Ct. at 2758.

The district court further reasoned that since the TA regulation allows some solicitation by organized charities in certain areas of the subway system, the TA must permit individual beggars and panhandlers to do the same. According to the Kelling affidavit, TA experience demonstrates that "panhandling leads both to more panhandling and to more aggressive panhandling in the transit system." Indeed, "aggressive" and "intimidating" begging and panhandling have been observed in virtually every part of the subway system, in subway cars and on platforms, escalators, steps and walkways. Based on its

experience, the TA obviously reached a judgment that the only effective way to stop begging in the system was through the enforcement of a total ban. The TA's judgment is consistent with the Supreme Court's rule that the "narrow tailoring" requirement is satisfied "so long as the ... regulation promotes a substantial government interest that would be achieved less effectively absent the regulation." *Ward v. Rock Against Racism,* 109 S.Ct. at 2759; *see N.Y. City Unemployed & Welfare Council v. Brezenoff,* 742 F.2d 718, 721 (2d Cir.1984) ("A blanket prohibition of a particular type of speech in a public forum may sometimes be a reasonable time, place or manner restriction.").

In addition, the regulation at issue "leave[s] open ample alternative channels of communication." *Ward v. Rock Against Racism,* 109 S.Ct. at 2760. Under the regulation, begging is prohibited only in the subway, not throughout all of New York City. It is untenable to suggest, as do the plaintiffs, that absent the opportunity to beg and panhandle in the subway system, they are left with no means to communicate to the public about needy persons. Previously, the Supreme Court rejected a similar claim that a government ban on overnight sleeping in Lafayette Park, in Washington, D.C., impermissibly limited the means of communicating a message about the plight of the homeless. *Clark v. Community for Creative Non–Violence,* 468 U.S. at 295, 104 S.Ct. at 3070. As the Court noted: "Respondents do not suggest that there was, or is, any barrier to delivering to the media, or to the public by other means, the intended message concerning the plight of the homeless." *Id; see also City of Renton v. Playtime Theatres, Inc.,* 475 U.S. 41, 54, 106 S.Ct. 925, 932, 89 L.Ed.2d 29 (1986) (upholding a city ordinance that prohibited adult movie theaters within 1,000 feet of any residential zone, family dwelling, church, park or school since it left 520 acres or about five percent of the city land available for such theaters). While emphasizing the total prohibition of begging in the subway, the district court failed to address the fact that there has been no showing in this case that the remaining avenues of communication are inadequate.

***161** Essentially, the district court saw fit to substitute its judgment for the TA's experience and expertise in operating the subway system. In so doing, the district court contravened the fundamental principle of the judicial deference owed to officials in carrying out their responsibilities based on expertise and experience. Respecting this principle, the Supreme Court, in *Clark v. Community for Creative Non–Violence,* 468 U.S. at 299, 104 S.Ct. at 3072, concluded:

> We do not believe, however, that either *United States v. O'Brien* or the time, place, or manner decisions assign to the judiciary the authority to replace the Park Service as the manager of the Nation's parks or endow the judiciary with the competence to judge how much protection of park lands is wise and how that level of conservation is to be attained.

To paraphrase the High Court, we can only conclude in the instant case that the district court improperly decided to replace the TA as manager of the subway system and falsely assumed the competence to judge how much protection of the system and its passengers is wise and how that level of safe public transportation is to be attained.

In sum, even if begging and panhandling constitute protected expressive conduct, which is in serious doubt, we hold that the regulation at issue more than satisfies the *O'Brien* standard, and thus is not in violation of the First Amendment.

D. Public Forum Analysis

[4] Although it is not necessary to our holding in this case, we briefly turn our attention to the district court's conclusion that the subway is a public forum in which begging and panhandling must be permitted. Since the amended 21 N.Y.C.R.R. § 1050.6 permits organizations to solicit, the district court reasoned that the TA "tacitly acknowledges that solicitation of money [by beggars and panhandlers] is appropriate in segments of the transit system." Based on this reasoning, the district court discounted our holding in *Gannett Satellite,* 745 F.2d at 773, that the subway is not a traditional or designated public forum, and concluded that any area of the subway system where charitable solicitation is permitted, including platforms and mezzanines, is therefore a public forum where begging and panhandling must be permitted. However, it is clear that "[t]he government does not create a public forum ... by permitting limited discourse, but only by intentionally opening a nontraditional forum for public discourse." *Cornelius v. NAACP Legal Defense & Educational Fund,* 473 U.S. at 802, 105 S.Ct. at 3449.

The district court's conclusion misapprehends the TA's intent in revising the regulation. As the Supreme Court has explained: "We will not find that a public forum has been created in the face of clear evidence of a contrary intent, ... nor will we infer that the government intended to create a public forum when the nature of the property is inconsistent with expressive activity." *Id.* at 803, 105 S.Ct. at 3449. Moreover, "[i]n cases where the principal function of the property would be disrupted by expressive activity, the Court is particularly reluctant to hold that the government intended to designate a public forum." *Id.* at 804, 105 S.Ct. at 3450. In the face of Operation Enforcement, there can be no doubt that the TA intended to continue its long-standing prohibition of begging and panhandling even after revising the regulation to permit solicitation by organizations.

Further, it is permissible for the TA to limit solicitation in the subway system to organizations. "[A] public forum may be created by government designation of a place or channel of communication for use by the public at large for assembly and speech, *for use by certain speakers, or for the discussion of certain subjects. Id.* at 802, 105 S.Ct. at 3449 (emphasis added); *see Perry Education Assn. v. Perry Local Educators' Assn.,* 460 U.S. 37, 46 n. 7, 103 S.Ct. 948, 955 n. 7, 74 L.Ed.2d 794 (1983) (A designated public forum "may be created for a limited purpose such as use by certain groups."); *Calash v. City of Bridgeport,* 788 F.2d 80, 84 (2d Cir.1986) ("[A] public forum can be created for use only by certain ***162** speakers or for discussion of certain topics."); *Deeper Life Christian Fellowship, Inc. v. Board of Education,* 852 F.2d 676, 680 (2d Cir.1988) (same).

Thus, the TA never intended to designate sections of the subway system, including platforms and mezzanines, as a place for begging and panhandling. Nor does the amended regulation abrogate our holding in *Gannett Satellite* that the subway system is not a traditional or designated public forum. The amended regulation demonstrates the TA's concern to safeguard the system and to honor the First Amendment. Confronted with the district court's holding, a cynic might remind the TA that "no good deed goes unpunished."

E. N.Y. Penal Law § 240.35(1)

We now turn our attention to the district court's conclusion that N.Y. Penal Law § 240.35(1) violates the due process clause of the New York State Constitution. The district court reached the conclusion solely on the basis of its interpretation of several New York State cases, relying in particular on a recent opinion of the New York Court of Appeals, *People v. Bright, supra.* Our primary concern is whether consideration of this issue was properly within the district court's jurisdiction. The question of whether the court properly exercised jurisdiction may be raised by this Court, itself, at any stage of the proceedings. *Manway Construction Co. v. Housing Authority of Hartford,* 711 F.2d 501, 503 (2d Cir.1983).

[5] First, we are doubtful that plaintiffs have alleged an actual "case or controversy," as required by Article III of the United States Constitution. *See City of Los Angeles v. Lyons,* 461 U.S. 95, 101, 103 S.Ct. 1660, 1664, 75 L.Ed.2d 675 (1983); *Babbitt v. United Farm Workers Nat. Union,* 442 U.S. 289, 297–98, 99 S.Ct. 2301, 2308–09, 60 L.Ed.2d 895 (1979). To satisfy this constitutionally-mandated jurisdictional requirement,

> [p]laintiffs must demonstrate a "personal stake in the outcome" in order to "assure that concrete adverseness which sharpens the presentation of issues" necessary for the proper resolution of constitutional questions.... Abstract injury is not enough. The plaintiff must show that he "has sustained or is immediately in danger of sustaining some direct injury" as the result of the challenged official conduct and the injury or threat of injury must be both "real and immediate," not "conjectural" or "hypothetical."

Lyons, 461 U.S. at 101–02, 103 S.Ct. at 1664–65 (citations omitted). As it relates to the issue of whether § 240.35(1) comports with the New York State Constitution, we do not think that this fundamental prerequisite of jurisdiction has been satisfied.

Initially, the New York Penal Law was simply not at issue in this case. In the original complaint, the plaintiffs alleged violations of their rights as a result of the TA's enforcement of 21 N.Y.C.R.R. § 1050.6(b) in the subway system. They never maintained that any of the defendants, in fact, stopped them from begging and panhandling pursuant to the N.Y. Penal Law § 240.35(1). By instructing the plaintiffs to challenge § 240.35(1), the district court designed a much different case than the controversy that originally came before the court. From the outset, the role of Metro–North, an original defendant in the case, had been dubious since the commuter railroad

was not empowered to enforce the TA ban on begging and panhandling pursuant to § 1050.6. The challenge to § 240.35(1) enabled the district court to exercise jurisdiction over Metro–North, as well as the LIRR, the Port Authority and conceivably any other defendant empowered to enforce this provision of the New York Penal Law. At a minimum, the scope of the case was expanded beyond the subway to include facilities such as Grand Central Station, Pennsylvania Station, the Port Authority Bus Terminal and the World Trade Center.

In its Opinion and Order dated January 25, 1990, the district court indicated that its *sua sponte* "action was prompted by defendants' assertion that transit police, as duly authorized peace officers, were doing no more than enforcing that provision [§ 240.35(1)] of the state penal law." The court was apparently referring to a statement ***163** made by the TA in a memorandum filed November 30, 1989 submitted in opposition to the motion for a preliminary injunction. The memorandum observed that the TA regulation at issue was "comparable to a New York State Penal provision prohibiting loitering, remaining or wandering about in a public place 'for the purpose of begging' N.Y. Penal Law § 240.35." Based on this observation, the district court raised and discussed the issue at length during the first oral argument, subsequently attempted to join the Attorney General so as to call the state statute into question, and finally, at the second oral argument, instructed the plaintiffs to amend the complaint accordingly.

Subject matter jurisdiction may not be created either by the parties, or by the court. The record is devoid of any allegation that the plaintiffs have been prohibited from begging or panhandling on the basis of § 240.35(1). The TA prohibition of begging is based on its own regulations, not on the New York Penal Law. The Port Authority represented during this litigation that, on the basis of § 240.35(1), it would not issue a permit to beg pursuant to 21 N.Y.C.R.R. §§ 1220.16, 1220.25 and 1290.3. However, the plaintiffs have never requested, nor have they been denied, a permit to beg by the Port Authority. Indeed, while plaintiffs admit to begging in the Port Authority facilities, they do not allege that they have ever been requested to desist or to leave by any Port Authority official. Nor do the plaintiffs suggest that anyone has ever been arrested or prosecuted for begging or panhandling in the Port Authority pursuant to § 240.35(1). At most, the plaintiffs have alleged an "abstract" and "hypothetical," rather than a "real and immediate," possibility of injury. *Lyons,* 461 U.S. at 101–02. When one cuts through the procedural labyrinth of this case, it becomes clear that the district court, and not the plaintiffs, raised the New York Penal Law as an issue. As we have noted previously, "[p]rocedural irregularities almost always breed confusion, the great enemy of justice." *United States v. Town of North Hempstead,* 610 F.2d 1025, 1031 (2d Cir.1979).

Based on the plaintiffs' failure to apply to the Port Authority for a permit to beg prior to challenging its reliance on § 240.35(1), we must conclude that they have failed to allege either a direct injury or an imminent danger of injury resulting from the challenged provision of the New York Penal Law. *See Berrigan v. Norton,* 451 F.2d 790 (2d Cir.1971) (Where two prisoners failed to request, and the warden never denied, permission to engage in First Amendment activity outside the prison, the court lacked jurisdiction to consider the prisoners' claims of constitutional violations as they did not present a justiciable case or controversy.). Accordingly, this aspect of their complaint must be dismissed.

[6] Even if the plaintiffs had alleged a justiciable case or controversy, the district court would have lacked subject matter jurisdiction over this issue. The jurisdiction of the district courts is limited not only by the Constitution, but also by Congress. *See Town of North Hempstead,* 610 F.2d at 1029. It seems clear that the district court properly exercised its jurisdiction over plaintiffs' First Amendment claims pursuant to 28 U.S.C. § 1331. However, the constitutionality under the New York State Constitution of a New York Penal Law provision presents no federal questions. Consequently, the district court's adjudication of this issue would only be permissible if the issue properly fell within the court's pendent jurisdiction. *See Carnegie–Mellon University v. Cohill,* 484 U.S. 343, 108 S.Ct. 614, 618, 98 L.Ed.2d 720 (1988); *United Mine Workers v. Gibbs,* 383 U.S. 715, 725, 86 S.Ct. 1130, 1138, 16 L.Ed.2d 218 (1966); *Town of North Hempstead,* 610 F.2d at 1029.

An exercise of pendent jurisdiction is appropriate when "the federal and state claims are sufficiently related so as to be considered to 'comprise but one constitutional "case" ', the test of relatedness being whether the claims 'derive from a common nucleus of operative fact.' " *Town of North Hempstead,* 610 F.2d at 1030 (citation omitted). Although the doctrine of pendent jurisdiction is one of

flexibility and discretion, it is fundamental that "[n]eedless ***164** decisions of state law should be avoided both as a matter of comity and to promote justice between the parties, by procuring for them a surer-footed reading of applicable law." *Gibbs,* 383 U.S. at 726, 86 S.Ct. at 1139 (footnote omitted). A district court ought not "reach out for ... issues, thereby depriving state courts of opportunities to develop and apply state law." *Mayer v. Oil Field Systems Corp.,* 803 F.2d 749, 757 (2d Cir.1986). These same principles underlie our 11th Amendment jurisprudence:

> A federal court's grant of relief against state officials on the basis of state law ... does not vindicate the supreme authority of federal law. On the contrary, it is difficult to think of a greater intrusion on state sovereignty than when a federal court instructs state officials on how to conform their conduct to state law. Such a result conflicts directly with the principles of federalism....

Pennhurst State School & Hospital v. Halderman, 465 U.S. 89, 106, 104 S.Ct. 900, 911, 79 L.Ed.2d 67 (1984). Thus, pendent jurisdiction should not be exercised merely because "the exercise of such judicial power is desirable or expedient." *Town of North Hempstead,* 610 F.2d at 1029.

Applying these principles to the case at bar, we fail to see a sufficient relationship between the First Amendment challenge to the TA's prohibition against begging and the challenge, based on the due process clause of the New York State Constitution, to N.Y. Penal Law § 240.35(1). The federal constitutional claim raises legal issues completely unrelated to those presented by the state constitutional claim. The fact that the TA's prohibition on begging is unconnected to the New York Penal Law deprives the claims of the requisite "common nucleus of operative fact" for the exercise of pendent jurisdiction. *See Gibbs,* 383 U.S. at 725, 86 S.Ct. at 1138; *Town of North Hempstead,* 610 F.2d at 1029–30. Moreover, exercising pendent jurisdiction in this case would violate fundamental principles of federalism and comity. New York State has a definite interest in determining whether its own laws comport with the New York Constitution. A proper determination may well involve ascertaining the state legislature's intention in passing § 240.35(1), as well as interpreting prior decisions of the New York courts. We think the federal district court was ill-disposed to undertake such a task.

CONCLUSION

We hold that 21 N.Y.C.R.R. § 1050.6 does not violate the First Amendment, and consequently, we reverse and vacate the district court's judgment permanently enjoining the various defendants from enforcing a prohibition against begging in their respective public transit facilities. In addition, we vacate the district court's judgment declaring that N.Y. Penal Law § 240.35(1) violates the New York State Constitution.

MESKILL, Circuit Judge, concurring in part and dissenting in part:

I concur with the majority opinion insofar as it vacates the district court's invalidation of N.Y. Penal L. § 240.35(1) (McKinney 1989). With respect to the First Amendment issues, however, the difficult question for me is whether any legally justifiable distinction can be drawn between begging for one's self and solicitation by organized charities. I am unable to do so, and therefore I respectfully dissent from the Court's disposition of these claims.

According to the majority, common sense tells us that begging enjoys no First Amendment protection because it is conduct unassociated with any particularized message and because begging, unlike "charitable solicitation," is mere solicitation for money with a diminished communicative content. I agree that common sense and everyday experience should inform our decision. Their true teaching, however, is that both beggars and organized charities who send representatives into the subway have one primary goal: in the words of the majority, "the transfer of money." Nevertheless, in ***165** *Village of Schaumburg v. Citizens for a Better Environment,* 444 U.S. 620, 100 S.Ct. 826, 63 L.Ed.2d 73 (1980), the Supreme Court saw fit to extend First Amendment protection to the fundraising efforts of organized charities. In my opinion, beggars deserve that same protection.

In *Schaumburg,* the Court held that charitable solicitation is protected because it "is characteristically intertwined with ... speech seeking support for particular causes or for particular views on economic, political, or social issues." 444 U.S. at 632, 100 S.Ct. at 834. Notably, the Court

did not suggest that charitable solicitation is protected expression because it is always accompanied by speech on social issues. If that were the test, then it is doubtful that any organized charity soliciting contributions in the New York subway would be engaged in protected expression. Those charities receive countless donations without engaging in any discussion whatsoever with the typical donor rushing to catch a train. Rather, the *Schaumburg* Court held that First Amendment protection attaches to all charitable solicitation, whether or not any speech incident to the solicitation actually takes place, because a sufficient nexus exists between a charity's expression of ideas and its fundraising. That is, a charity's representatives often explain the purpose of the charity's work to potential donors and perhaps engage in a discussion regarding social issues. In addition, the receipt of donations is essential to the continued existence of a charity. The record in the present case, as well as the common experience of those who ride the New York subways, indicates that begging is protected expression for exactly the same reasons.

Plaintiffs Young, Walley and Gilmore all state in their affidavits that they often speak with potential donors about subjects such as the problems of the homeless and poor, the perceived inefficiency of the social service system in New York and the dangerous nature of the public shelters in which they sometimes sleep. The speech and association inherent in these encounters is without doubt protected by the First Amendment. *See, e.g., Connick v. Myers,* 461 U.S. 138, 145, 103 S.Ct. 1684, 1689, 75 L.Ed.2d 708 (1983). Similarly, a beggar who holds a sign saying "Help the Homeless" or "I am hungry" is engaged in First Amendment activity. *See Cohen v. California,* 403 U.S. 15, 18–19, 91 S.Ct. 1780, 1784–85, 29 L.Ed.2d 284 (1971) (person wearing jacket with anti-war slogan engaged in protected expression of views). Any attempt to distinguish between beggars who hold signs or engage in discussions and those who simply ask for money would be unrealistic. Accordingly, if First Amendment protection extends to charitable solicitation unaccompanied by speech, as it apparently does, it must extend to begging as well. *See Riley v. National Federation of the Blind, Inc.,* 487 U.S. 781, 108 S.Ct. 2667, 2677, 101 L.Ed.2d 669 (1988) (*Schaumburg* "refused to separate the component parts of charitable solicitations from the fully protected whole"); *see also Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.,* 425 U.S. 748, 764–65, 96 S.Ct. 1817, 1827, 48 L.Ed.2d 346 (1976) (holding commercial speech to be protected although "not all commercial messages contain the same or even a very great public interest element").

The majority suggests that plaintiffs are free to engage in First Amendment activity in the subway provided that they do not request donations. This is precisely the argument that was rejected in *Schaumburg* as "represent[ing] a far too limited view of [the] ... cases relevant to canvassing and soliciting by religious and charitable organizations." 444 U.S. at 628, 100 S.Ct. at 831. The rationale for the Supreme Court's rejection of this argument was that charitable organizations would be unable to continue their advocacy and dissemination of ideas without the ability to solicit donations. 444 U.S. at 632, 100 S.Ct. at 833. The majority acknowledges the importance of contributions to a charitable organization's work, but fails to recognize that a beggar's First Amendment activity is no less dependent on his requests for money. In the seclusion of a judge's chambers, it is tempting to assume that beggars could obtain jobs and spend their free time distributing leaflets or buttonholing passersby in the subway to further the cause of ***166** the homeless and poor. The record in this case, however, permits no such speculation. Plaintiff Young states in his affidavit, for example, that he solicits money in the subway so that he can buy food, medicine and other essentials, and take the subway to the Bronx, where he sometimes earns enough money unloading trucks to rent a room for the night. He receives no public assistance. Plaintiff Walley, who is fifty years old, states that he solicits donations because he is unable to find work. If he sleeps in a shelter, he receives reduced public assistance of $21.50 every two weeks. Plaintiff Gilmore's solicitation also is the result of her need for food and medical treatment. To suggest that these individuals, who are obviously struggling to survive, are free to engage in First Amendment activity in their spare time ignores the harsh reality of the life of the urban poor.

Because begging is speech protected by the First Amendment, it is necessary to determine whether the TA regulations withstand the proper level of scrutiny. I agree with the majority that the TA's regulation is content-neutral. Defendants have offered substantial evidence to support their claim that the regulations are aimed at the secondary effects of begging such as increased crime and traffic congestion, rather than at any message conveyed by the beggars. *See City of Renton v. Playtime Theatres, Inc.,*

475 U.S. 41, 48, 106 S.Ct. 925, 929, 89 L.Ed.2d 29 (1986) (zoning restriction applicable to adult movie theaters content-neutral because aimed at secondary effects of such theaters); *see also Boos v. Barry,* 485 U.S. 312, 320–21, 108 S.Ct. 1157, 1163, 99 L.Ed.2d 333 (1988) (discussing *Renton*). I have serious doubts, however, that holding the regulation content-neutral automatically means that it must be analyzed under what the majority terms the "relaxed" standard of *United States v. O'Brien,* 391 U.S. 367, 88 S.Ct. 1673, 20 L.Ed.2d 672 (1968). I question the application of *O'Brien* for two reasons. First, begging, like charitable solicitation, is protected speech, and therefore a direct restriction on it must be "subjected ... to exacting First Amendment scrutiny." *Riley,* 108 S.Ct. at 2673. Second, *O'Brien* has generally been applied to cases involving symbolic conduct rather than speech in the normal sense of the word. *See Ward v. Rock Against Racism,* 491 U.S. 781, 109 S.Ct. 2746, 2757, 105 L.Ed.2d 661 (1989) (applying time, place or manner analysis to content-neutral regulation and referring to *O'Brien* as "the case in which we established the standard for judging the validity of restrictions on expressive conduct"). The protected expression in this case is the beggars' speech incident to their solicitation of alms, not symbolic conduct.

As the majority apparently recognizes, however, it makes little difference whether the regulations in issue are judged under *O'Brien* or under the traditional time, place or manner standard because the two tests are essentially the same with respect to content-neutral regulations. *See Rock Against Racism,* 109 S.Ct. at 2757; *Clark v. Community for Creative Non–Violence,* 468 U.S. 288, 298, 104 S.Ct. 3065, 3071, 82 L.Ed.2d 221 (1984); *see also id.* at 308 n. 6, 104 S.Ct. at 3076 n. 6 (Marshall, *J.,* dissenting). The only element of *O'Brien* on which I disagree with the majority is the fourth, namely, whether the regulation is no greater than is essential to the furtherance of the government's interest. This element corresponds to the narrow tailoring requirement of the time, place or manner analysis. Because no symbolic speech is involved here, I will use the time, place or manner analysis that applies to speech in a public forum.

The TA clearly has created a limited public forum by designating certain areas of the subway system in which charitable solicitation may take place. The majority emphasizes that the TA never intended to open the subway to begging, and that the grant of selective access does not create a public forum for all purposes. While the government's intent is "critical" to the determination that a limited public forum was created, *see Deeper Life Christian Fellowship, Inc. v. Board of Educ.,* 852 F.2d 676, 680 (2d Cir.1988), the fact is defendants intended to open, and did open, certain areas to solicitation by organized charities. ***167** Simply put, the TA designated certain areas in which charitable groups could ask passersby for money. As discussed above, begging is indistinguishable from charitable solicitation for First Amendment purposes. To hold otherwise would mean that an individual's plight is worthy of less protection in the eyes of the law than the interests addressed by an organized group. No court has ever so ruled. Defendants therefore may not open the door to the latter while slamming it in the face of the former. *See Perry Educ. Ass'n v. Perry Local Educators' Ass'n,* 460 U.S. 37, 48, 103 S.Ct. 948, 956, 74 L.Ed.2d 794 (1983) (designated public forum open "to other entities of similar character"). This conclusion is further compelled by defendants' failure to submit any evidence that charitable solicitation does not have the same adverse effects (*e.g.,* impeding traffic, intimidating passengers) that begging is claimed to have. [1] In the absence of such evidence, defendants' contention that begging is not of the same general nature as solicitation by organized charities is nothing more than rank speculation.

I cannot agree that *Gannett Satellite Information Network, Inc. v. Metropolitan Transportation Authority,* 745 F.2d 767 (2d Cir.1984), is dispositive of the status of the subway as a public forum. *Gannett* involved a challenge to a licensing scheme for the placement of newspaper vending machines in commuter railroad stations, not the New York City subway. *Id.* at 770–71. Even if *Gannett's* holding that those commuter stations are neither traditional nor designated public forums could be extended to the subway, the district court was correct in holding that *Gannett* has little precedential value in the present case because it was decided prior to the TA's creation of a designated forum for charitable solicitation.

The status of the Port Authority Bus Terminal as a public forum was established in *Wolin v. Port of New York Authority,* 392 F.2d 83, 88–91 (2d Cir.) (suggesting that Port Authority is a traditional public forum), *cert. denied,* 393 U.S. 940, 89 S.Ct. 290, 21 L.Ed.2d 275 (1968), and defendants present no persuasive argument that *Wolin* is no longer good law. Furthermore, no re-examination

of *Wolin* is necessary in this case because it is clear that those areas in which the Port Authority allows expressive activities to take place constitute a designated public forum for the same reasons set forth above with respect to the subway system.

Because I believe that, in light of Supreme Court precedent, begging is protected expression and that the areas in which it is currently banned are public forums, I next turn to the question whether the regulations in issue can survive the appropriate level of scrutiny. Content-neutral regulations like the ones in question will be upheld as reasonable time, place or manner restrictions if they are "narrowly tailored to serve a significant government interest, and leave open ample alternative channels of communication." *Perry,* 460 U.S. at 45, 103 S.Ct. at 955; *see also Frisby v. Schultz,* 487 U.S. 474, 479–80, 108 S.Ct. 2495, 2499, 101 L.Ed.2d 420 (1988).

While the interests that defendants advance are certainly significant, *e.g.,* protection of the public from harassment, preservation of the quality of life, and maintenance of a safe transit system, the regulations are not narrowly tailored to achieve these interests because they burden a substantial amount of speech that does not implicate the TA's interests. The majority is correct that even a complete ban may in some instances constitute a reasonable time, place or manner restriction, *see, e.g., Community for Creative Non–Violence,* 468 U.S. at 296, 104 S.Ct. at 3070, and that a regulation need not be the least restrictive means of achieving the government's objective in order to be narrowly tailored. ***168** *See Rock Against Racism,* 109 S.Ct. at 2757–58 (narrow tailoring requirement met as long as government interest would be achieved less effectively absent the regulation and it does not burden substantially more speech than necessary). As the district court noted, however, the regulations in this case do not distinguish between passive begging such as a blind man rattling a cup full of change or a homeless person politely requesting money, which would hardly daunt the average New Yorker, and aggressive behavior such as the panhandler who accosts and intimidates subway riders. The evidence submitted by the TA indicates that this aggressive, intimidating behavior is the primary evil that prompted the TA's ban on begging. For example, Bernard Jacobs, a Detective of the New York City Transit Police Department, supports the ban on begging by stating in his affidavit that "passengers feel harassed and intimidated by panhandlers." Similarly, Carl Green, Assistant Vice President for Government Relations of the TA, states that "[t]he policy dictating enforcement of the [ban on begging] is directed against behavior which [our] passengers believe to be intimidating." The TA certainly is free to prevent harassing, intimidating behavior, which existing regulations allow it to do. *See Texas v. Johnson,* 109 S.Ct. 2533, 2542 (1989) (existence of a statute specifically prohibiting breaches of the peace "tends to confirm that Texas need not punish ... flag desecration in order to keep the peace"). The TA has made no showing, however, that passengers perceive all, or even a large percentage, of people who solicit alms in the subway as belligerent or frightening. In addition, there has been no showing that subway riders do not feel harassed when approached by representatives of an organized charity. Thus, the TA may protect its passengers by prohibiting the specific conduct that adversely affects the subway environment, and may address safety concerns such as traffic flow by restricting peaceful begging to areas in which charitable solicitation is allowed. *See Secretary of State of Maryland v. Joseph H. Munson Co.,* 467 U.S. 947, 966–67, 104 S.Ct. 2839, 2852, 81 L.Ed.2d 786 (1984) (restriction on fundraising not sufficiently narrowly tailored to achieve state's interest of preventing fraud). The complete ban on begging, however, burdens substantially more speech than necessary, and therefore is not narrowly tailored to achieve the government's interests. *See Rock Against Racism,* 109 S.Ct. at 2758; *Frisby,* 487 U.S. at 485, 108 S.Ct. at 2502 (complete ban is narrowly tailored "only if each activity within the proscription's scope is an appropriately targeted evil").

In sum, begging is speech protected by the First Amendment that may be regulated, but not entirely prohibited, to achieve the government interests advanced in this case. I recognize that the presence of large numbers of beggars in the subway presents a serious problem for the TA and contributes to the sense of chaos and frustration experienced by the many hard-working New Yorkers who rely on the subway system. Had the TA's regulations continued to bar all charitable solicitation in the subways, I would uphold them because no public forum would have been created. I simply fail to see why the TA should be able to permit organized charities, but not beggars, to rattle a cup full of change as one passes by.

For the foregoing reasons, I respectfully dissent.

All Citations

903 F.2d 146, 58 USLW 2680

Footnotes

1 The district court accepted the parties' stipulation that any difference in the meaning of the terms is not significant for the purposes of this litigation.

1 The majority notes that the record contains no indication that passengers feel intimidated by organized charities, and concludes that this absence of evidence supports the TA's distinction between begging and charitable solicitation. The reason for this lack of evidence is that, while the TA engaged in an enormous effort to gauge passenger reaction to begging, it never inquired how subway riders felt about being accosted by representatives of organized charities.