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**Restrictions on Speech and Expressive Activities in Transit
Terminals and Facilities**

This report was prepared under TCRP Project J-5, "Legal Aspects of Transit and Intermodal Transportation Programs," for which the Transportation Research Board is the agency coordinating the research. The report was prepared by Norman Y Herring and Laura D'Auri. James B. McDaniel, TRB Counsel for Legal Research Projects, was the principal investigator and content editor.

THE PROBLEM AND ITS SOLUTION

The nation's transit agencies need to have access to a program that can provide authoritatively researched, specific, limited-scope studies of legal issues and problems having national significance and application to their businesses. The TCRP Project J-5 is designed to provide insight into the operating practices and legal elements of specific problems in transportation agencies.

The intermodal approach to surface transportation requires a partnership between transit and other transportation modes. To make the partnership work well, attorneys for each mode need to be familiar with the legal framework and processes of the other modes. Research studies in areas of common concern will be needed to determine what adaptations are necessary to carry on successful intermodal programs.

Transit attorneys have noted that they particularly need information in several areas of transportation law, including

- Environmental standards and requirements;
- Construction and procurement contract procedures and administration;
- Civil rights and labor standards; and
- Tort liability, risk management, and system safety.

In other areas of the law, transit programs may involve legal problems and issues that are not shared with other modes; as, for example, compliance with transit-equipment and operations guidelines, FTA financing initiatives, private-sector programs, and labor or environmental standards relating to transit operations. Emphasis is placed on research of current importance and applicability to transit and intermodal operations and programs.

APPLICATIONS

Laws relating to restrictions on First Amendment activity can be quite complex and confusing. Yet public transit agencies must increasingly deal with the process of limiting activities on transit and in terminal facilities.

Lawsuits against transit agencies dealing with First Amendment issues can be time consuming and expensive. Attorneys and other transit officials need information on this subject for application to everyday problems.

This research examines speech-related activities and how the law has been applied in a number of jurisdictions. The report should be immensely useful to attorneys, transit administrators, policy makers, planners, legislators, and others interested in the subject matter.

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RESTRICTIONS ON SPEECH AND EXPRESSIVE ACTIVITIES IN TRANSIT TERMINALS AND FACILITIES

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INTRODUCTION: A PRIMER ON PERMISSIBLE LIMITATIONS ON EXPRESSIVE CONDUCT

This paper is not intended to be an exhaustive study of free speech doctrine and the status of current First Amendment law. However, to set the stage for an analysis of current case law as it affects transportation facilities, some mention of basic free speech jurisprudence is helpful.

Intent, Purpose, Scope

The law relating to valid restrictions on First Amendment activity is highly technical and complex. This study is intended for use nationwide by attorneys confronted with problems arising from restrictions on speech and related activities in transit and termination facilities. Until now, comprehensive research has not been done to provide practicing attorneys with a guide for everyday problems. This article does not discuss speech that is not protected, such as obscenity, release of confidential information, or speech that has an unprotected message.

Lawsuits against public agencies in the First Amendment arena can be costly and can result in the awarding of attorney's fees and, in extreme cases, damages against public officials in their individual capacity. This research digest will be an invaluable aid to attorneys in advising transit and terminal operators and policy boards with regard to what restrictions on First Amendment activities may be validly established and enforced.

Given the number of issues involved, and the lack of uniformity or consensus in different jurisdictions, a study has been done of court cases in different jurisdictions, and an analysis of the results has been conducted. (See Appendix A.) While the authors briefly cover the general subject of First Amendment jurisprudence, emphasis has been placed on the extent to which transit operators may restrict speech and related activity at transit terminals and facilities, including the major transit-related cases.

Regulations on Expressive Activity

There are many commentators who have addressed the fundamentals of free speech. For purposes of this paper, reliance has been placed on Lawrence H. Tribe and his treatise, *American Constitutional Law* (2d ed. 1988). Tribe has divided cases into two major categories, which he labels "track one" and "track two." In track one cases, regulations limit speech in some way, by addressing the communicative impact of speech or

by limiting the speech itself. Such regulations are deemed "content-based."¹

There is a presumption of invalidity of regulations aimed at speech content.² In pursuing track one analysis, courts have protected speech that covers a broad range of controversial communications.³ In limited circumstances, speech can be regulated on track one, but generally the message that is suppressed must pose a "clear and present danger," constitute a defamatory falsehood, or fall on the unprotected side of one of the lines the court has drawn to define permissible regulation.⁴

¹ See Erwin Chemerinsky, *The First Amendment: When the Government Must Make Content-Based Choices*, 42 CLEV. ST. L. REV., 199-214 (1994)

² LAWRENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW* § 12-2a at 791 (2d ed. 1988), and *Widmar v Vincent*, 454 U.S. 263, 269-70 (1981) (there is a presumption of invalidity of regulations aimed at speech content).

³ See, e.g., *R.A.V. v City of St. Paul*, 505 U.S. 377, 112 S. Ct. 2538 (1992) (threatening speech); *Gentile v. State Bar of Nevada*, 501 U.S. 1030 111 S Ct 2720 (1991) (speech threatening fair trial); *Florida Star v. B.J.F.*, 491 U.S. 524 (1989) (speech threatening privacy); *Texas v. Johnson*, 491 U.S. 397 (1989) (offensive speech); *Hustler Magazine v. Falwell*, 485 U.S. 46 (1988) (insulting speech); *Landmark Communications, Inc. v. Virginia*, 435 U.S. 829 (1978) (confidential communications); *Nebraska Press Ass'n v. Stuart*, 427 U.S. 539 (1976) (speech threatening fair trial); *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469 (1975) (speech threatening privacy); *Cohen v. California*, 403 U.S. 15 (1971) (offensive speech); *Brandenburg v. Ohio*, 395 U.S. 444 (1969) (advocacy of illegal action); *New York Times Co v Sullivan*, 376 U.S. 254 (1964) (defamation)

⁴ Cases in which the Supreme Court has allowed, or said it would allow, regulation of track one speech include those in which the speech constitutes: incitement (*Brandenburg*, 395 U.S. 444); fighting words (*Chaplinsky v. New Hampshire*, 315 U.S. 568 (1942)); obscenity (*Miller v. California*, 413 U.S. 15 (1973)); confidential communications (in some instances) (*Landmark Communications*, 435 U.S. at 45); defamation (in some instances), (*New York Times Co v United States*, 403 U.S. 713, 725-27 (1971)); false or deceptive advertising (*Friedman v. Rogers*, 440 U.S. 1 (1979)); advertising of harmful or illegal products or transactions (*Posadas de P.R. Assoc. v Tourism Co.*, 478 U.S. 328 (1986); *Pittsburgh Press Co v Pittsburgh Comm'n on Human Relations*, 413 U.S. 376 (1973)); coercion (in some instances) (*International Longshoremen's Ass'n v. Allied Int'l*, 456 U.S. 212 (1982); *Ohralik v Ohio State Bar Ass'n*, 436 U.S. 447 (1978); *International Bd of Teamsters v Vogt, Inc.*, 354 U.S. 284 (1975)); and speech internal to the workplace (in some instances) (*N.L.R.B. v Gissel*, 395 U.S. 575 (1969)) The Court would undoubtedly affirm, in the face of free speech challenges, convictions for perjury, criminal solicitation, criminal conspiracy, and misrepresentation. See KENT GREENAWALT, *SPEECH, CRIME, AND*

The other major category of free speech cases is included in Tribe's track two analysis. In track two the regulation is "aimed at the non-communicative impact of the act,"⁵ and therefore the regulation is neutral in content.

Track two cases have been separated into two categories that are of importance to the transportation lawyer: the nature of the forum and the classification of the speech activity. The courts have given considerable attention under track two to whether the regulation affects a public forum and/or whether the activity involves symbolic speech. When expressive activities concern access to governmental or quasi-governmental facilities, or at times even private facilities that can be classified as traditional free speech fora, the conventional doctrine is that regulations may impose narrowly drawn restrictions related to the time, place, and manner of speech in order to serve a significant government objective that is unrelated to the speaker's message. The regulation may not entirely restrict speech and there must be adequate alternative channels of communication available.⁶

The courts have generally held that where a facility is a nonpublic forum,⁷ regulations may bar speech entirely or selectively, as long as the regulation is contentneutral.⁸

Symbolic speech is the second subcategory of track two analysis.⁹ The expressive activity in this subcategory was long ago characterized by Justice Frankfurter as "speech plus."¹⁰ The accepted doctrine is that symbols may be regulated in a public forum on the same

grounds as speech, through time, place, and manner restrictions.¹¹

Recent decisions have allowed the Postal Service to ban petition signature gatherers on Postal Service sidewalks,¹² permitted a ban on residential picketing,¹³ and allowed a prohibition on posters placed on utility poles.¹⁴

Time, Place, Manner Restriction

If analysis under the *Spence* test¹⁵ (a particularized message that in all likelihood will be understood by the hearer) results in a finding that the expression is more like speech, the court scrutinizes the restriction under the time, place, and manner standard. If the legislation is content-neutral (not directly aimed at the communication),¹⁶ the restriction must (1) be narrowly tailored to serve an important government interest, and (2) leave open ample alternatives for communication,¹⁷ although it has been said that available alternative channels cannot be the only justification for the regulation.¹⁸ Even where speech is found to merit the highest protection, the time, place, and manner in which it is delivered or expressed can still be regulated, even in a public forum.¹⁹

Speech / Content-Based Regulation

If the *Spence* test analysis finds the expression to be more like speech but the regulation is content-based (directly aimed at or has a significant impact on the communication),²⁰ the restriction must (1) be narrowly tailored to serve a compelling government interest, (2) directly serve that interest, and (3) leave open ample alternatives for communication, though the sole fact that other alternatives exist still may not result in the restriction being upheld, and a "least burdensome" analysis may ensue. (*See* Tribe at Section 12.2.)

THE USES OF LANGUAGE, 132, 239-80, 315-21 (1989). The High Court is generally skeptical of regulations that prohibit unconventional or bizarre ideas. "If there is a bedrock principle underlying the First Amendment, it is that government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable." *Texas v. Johnson*, 491 U.S. 397, 414 (1989) (overturning the conviction of a man who burned an American flag at a political rally).

⁵ TRIBE, *supra*, n.2, § 12-2, at 792.

⁶ *Ward v. Rock Against Racism*, 491 U.S. 781, 796-802 (1989); G. Sidney Buchanan, *The Case of the Vanishing Public Forum*, U. ILL. L. REV. 949, 954 (1991).

⁷ *Compare* *Marsh v. Alabama*, 326 U.S. 501 (1946), which struck down limitations on speech in a company town, with *Hudgens v. NLRB*, 424 U.S. 507 (1976), which upheld a ban on picketers at a privately owned shopping center. In *Intern'l Soc'y for Krishna Consciousness v. Lee*, 112 S. Ct. 2701, 505 U.S. 672; 120 L. Ed. 2d 541 (1992), four Justices, Kennedy, Souter, Blackmun, and Stevens, voiced a strong minority opinion that airports and other facilities were public fora. *Id.* at 2715-20 (Kennedy, S., concurring in judgment); *Id.* at 2724 (Souter, J., concurring in judgment and dissenting).

⁸ *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 46 (1983).

⁹ TRIBE, *supra*, n.2 § 12-6, 7 pp. 821-830.

¹⁰ *Teamsters Local 695 v. Vogt*, 354 U.S. 284 (1957) at 289, 290, 292.

¹¹ *See* Alfauge, *Free Speech and Symbolic Conduct*, 1968 SUP CT REV 1, which analyzed the watershed case of *United States v. O'Brien*, 391 U.S. 367 (1968) (upholding a ban on the burning of draft cards) For a discussion of the distinction between speech and conduct, *see, e.g.*, *Street v. New York*, 394 U.S. 576, 610 (1969) (Black, J. dissenting)

¹² *United States v. Kokinda*, 497 U.S. 720 (1990).

¹³ *Frisby v. Shultz*, 487 U.S. 474 (1988).

¹⁴ *City Council of Los Angeles v. Taxpayers for Vincent*, 466 U.S. 789 (1984).

¹⁵ *Spence v. Washington*, 418 U.S. 405 (1974).

¹⁶ *See* *Doucette v. City of Santa Monica*, 955 F. Supp. 1192 (C.D. CA 1997).

¹⁷ *City of Ladue v. Gilleo*, 512 U.S. 43 (1994); *see also* *Doucette v. City of Santa Monica*, 955 F. Supp. 1192 (C.D. CA. 1997)

¹⁸ *City of Cincinnati v. Discovery Network, Inc.*, 507 U.S. 410 (1993)

¹⁹ *ISKCON v. Eaves*, 601 F.2d 809 (5th Cir. 1979)

²⁰ *City of Ladue, supra*, n. 17.

In *International Society for Krishna Consciousness, Inc. v. Lee*,²¹ five Justices, Blackmun, Kennedy, O'Connor, Souter, and Stevens, were willing to impose some inconveniences--congestion and potential littering--on the operators of airports and their customers to permit religious groups and others to distribute leaflets to whatever audience they could muster at the airports. The other Justices, Rehnquist, White, Scalia, and Thomas, did not regard the airports as public fora similar to streets, sidewalks, and parks. The *Lee* decision is instructive as courts, in assessing limitations on expressive activities, have not generally distinguished airports from other types of transportation facilities.

Factual Scenario That Presents a First Amendment Case

Before a case presents a First Amendment issue, there must be a government actor and a state interest. If the factual scenario being considered presents an issue concerning protected speech, which is purportedly being affected by a government action to advance an alleged state interest, the court will analyze the First Amendment challenge. The court will then consider the type of forum where the expression took place. (*See forum-based analysis at page 7, infra.*)

Who Is a Government Actor?

The government "acts" for purposes of First Amendment speech when a legislative body enacts a law or when an administrative body enforces a regulation or makes a decision. Government action can even be found in acts by a private entity that receives public funding.²²

What Is a Government Interest?

Valid police interests will be upheld when they support content-neutral regulations that have only an incidental impact on protected speech. As a general rule, the following have been found to be government interests sustainable under the police power.

Promoting public safety, the orderly movement of pedestrians, and protection of the local economy by maintaining the aesthetic attractiveness of the downtown zone are valid government interests.²³

"Significant government interests" include the state's interest in physical maintenance and aesthetics (including "visual blight"),²⁴ revenue raising,²⁵ and

²¹ 505 U.S. 672 (1992).

²² *See* *Lebron v. Nat'l R.R. Passenger Corp.*, 115 S. Ct. 961, L. Ed. 2d 902, 130 (1995), in which the court found "Amtrack" to be a "Government-created and-controlled corporation." 115 S. Ct. at 973.

²³ *Roulette v. Seattle*, 78 F.3d 1425 (9th Cir. 1996) (sitting or lying on the sidewalk is not a protected first amendment activity), *accord* *Seattle v. Webster*, 802 P.2d 1333 (Wa. 1990), *cert denied* 500 U.S. 908 (1991)

²⁴ *City of Los Angeles v. Taxpayers for Vincent*, 466 U.S. 789, 816-817 (1984)

²⁵ *Lehman v. City of Shaker Heights*, 418 U.S. 298 (1974).

maintenance of traffic flow and travel on streets.²⁶ A sufficient government interest has been found in the protection of unwilling listeners, and the courts have upheld a ban on picketing in front of a single residence.²⁷

The *Fernandes v. Limmer*²⁸ court found that the interest in keeping terminal traffic freely flowing "is not sufficiently compelling to justify the total exclusion of those wishing to exercise free speech and freedom of religion within the terminals."²⁹ In another context the court found the safety and convenience of persons using a particular forum was a sufficient governmental interest. In *Heffron v. International Society for Krishna Consciousness*,³⁰ a regulation was upheld confining charitable solicitation to booths at a state fair.

Other valid interests that have been announced by the courts are protection from unwanted touching,³¹ protection from extortion,³² protection from aggressive harassment and intimidation,³³ preventing crime, maintaining property values, and preserving order³⁴ (including prohibitions on sitting or lying on sidewalk, obstructing pedestrian traffic, and aggressive begging). In *Doucette v. Santa Monica*,³⁵ the court upheld as content-neutral most of the place and manner restrictions under an anti-solicitation ordinance enacted by the City of Santa Monica, California. The definition of solicitation was "restricted to requests made in person seeking an immediate donation of money or other items of value." (See discussion on panhandling, below. A complete text of the Santa Monica ordinance is found at note 308.)

Based on valid government interests, a number of regulations have been upheld in transit terminals and facilities, including:

²⁶ *See* *Cox v. Louisiana*, 379 U.S. 536, 554 (1965); *ACORN v. City of Phoenix*, 798 F.2d 1260, 1270 (9th Cir. 1986).

²⁷ *Frisby v. Shultz*, 487 U.S. 474, 486 (1988); *but see* *Kirkeby v. Furness*, 92 F.3d 655 (8th Cir. 1996), which struck down a Fargo, N.D., ordinance prohibiting picketing in residential areas within 200 feet of a dwelling. The Eighth Circuit observed that the Fargo ordinance required analysis of the picketing message to determine if the picketing violated the ordinance, thus the ordinance was content-related and not sustainable

²⁸ 663 F.2d 619, at 626 (5th Cir. 1981). While not specifically overruled by *ISKCON v. Lee*, 505 U.S. 672 (1992), the *Lee* court held that the New York-New Jersey airports were not public fora and solicitors could be removed from the terminals, but leaflet distribution was permissible.

²⁹ *Id.*

³⁰ 452 U.S. 640 (1981).

³¹ *Young v. N.Y. Transit Auth.*, 903 F.2d 146, 158 (2nd Cir. 1990), *cert. denied*, 111 S. Ct. 516 (1990).

³² *Id.*

³³ *Id.*

³⁴ *Roulette v. Seattle*, 78 F.3d 1425 (9th Cir. 1996).

³⁵ 955 F. Supp. 1192 (C.D. CA 1997).

- Prohibition on distribution of leaflets in the "fingers" of the terminals leading to and from the arrival and at departure gates,³⁶

- Prohibition on literature distribution and solicitation from proscribed terminal areas where passengers are "captive" or where airport personnel are concerned about safety and security measures,³⁷

- Prohibition on literature distribution for the duration of a stated emergency,³⁸

- Prohibition of tables, chairs, and structures in airport areas (except for commercial business),³⁹ and

- Prohibition on interfering with or obstructing passengers or persons moving through clearly specified areas of the airport.⁴⁰

Some governmental interests have been found insufficient. These include allowing commercial sales only by concessionaires or lessees,⁴¹ prohibiting solicitation by more than one person at a time or by a certain number of people,⁴² prohibiting "disturbances" interfering with the ability of airport passengers and others to hear announcements or to carry on business,⁴³ setting a 4-hour limit for literature distribution,⁴⁴ and charging a 6-dollar daily fee.⁴⁵

Whose Rights Are Protected?

In addition to the government interest, the Supreme Court has clarified that the First Amendment protects both the speaker's right to communicate and the audience's right to receive the information.⁴⁶

In a panhandling case, the problem in the second instance is one of standing, as the proper party would be a transit terminal passenger or the "beggee." However, the passenger generally relies upon the transit authority to pursue the issue based upon their control of the forum. The "unwilling listener" issue has been addressed in part by the court by categorizing the protection of unwilling listeners as a sufficient government interest.⁴⁷ However, in the majority of panhandling

cases, the unwilling listener's right is outweighed by the speaker's right to speak.⁴⁸

Prior Restraints

Most modern commentators acknowledge that prior restraints on speech have been met with nearly absolute rejection by the Supreme Court. The right to speak, write, and print cannot be restricted before it is exercised. To do so amounts to censorship.⁴⁹ If a restriction on speech can be classified as a prior restraint, there is little chance the Court will reach the analysis of whether it is reasonable or necessary to uphold a significant governmental interest. In transportation law, prior restraints such as licensing or notice requirements generally have been interpreted to be invalid.⁵⁰ Thus, a regulation that can be characterized as a prior restraint is to be avoided in favor of one that imposes content-neutral time, place, and manner restrictions.

Some courts have reconsidered the blanket prohibition and have reasserted the right of government to protect its citizens from potentially harmful conduct through prior restraints.⁵¹ This has always been true when there is a compelling governmental interest that can pass the "strict scrutiny" test. As an example, restrictions could be imposed to ensure the timely departure and arrival of vehicles, and they could also be imposed on certain areas of transportation facilities to reduce crime or protect passengers who cannot escape from the speech-related activity.

In the rare case where prior restraints on speech have been approved, the courts have required that (1) the burden of proof is upon the censor; (2) any restraint prior to judicial review is only for a short period of time, and then only to preserve the status quo; and (3) prompt judicial review must be assured.⁵²

⁴⁸ *Erzoznik v City of Jacksonville*, 422 U.S. 205 at 211 (1974).

⁴⁹ *Near v. Minnesota*, 283 U.S. 697 (1931); *New York Times v United States*, 403 U.S. 713 (1971) (per curiam), (Pentagon Papers case); *National Socialist Party v. Skokie*, 432 U.S. 43 (1977) (per curiam) (striking down overbroad permit requirements); see Jeffries, *Rethinking Prior Restraint*, 92 YALE L.J. 409, 437 (1982):

I suggest that the conventional doctrine of prior restraint be laid on one side. In my judgment, that doctrine is so far removed from its historic function, so variously and discrepantly applied, and so often deflective of sound understanding, that it no longer warrants use as an independent category of First Amendment analysis.

⁵⁰ *Rosen v Port of Portland*, 641 F.2d 1243 (9th Cir. 1981), *Kuszynski v. City of Oakland*, 479 F.2d 1130 (9th Cir. 1973).

⁵¹ Hoffman and Gaffney, *Dealing with the Resurgent Prior Restraint*, 14 COMMUNICATIONS LAWYER 3 (ABA 1996).

⁵² See *CBS Inc v. Davis*, 114 S. Ct. 912 (1994); see also *Licensing and Permitting Systems, infra*

³⁶ *Chicago Area Military Project v. City of Chicago*, 508 F.2d 921, 926 (7th Cir.), cert. denied, 421 U.S. 992 (1975).

³⁷ *ISKCON v Rochford*, 585 F.2d 263, 268-69 (7th Cir. 1978)

³⁸ *Id.* at 270

³⁹ *Id.*

⁴⁰ *Fernandes v Limmer*, 663 F.2d 619, 635-36 (5th Cir. 1981), cert. dismissed, 458 U.S. 1124 (1982)

⁴¹ *Rochford*, at 269-70

⁴² *Id.*

⁴³ *Id.*

⁴⁴ *Kuszynski v. City of Oakland*, 479 F.2d 1130, 1131 (9th Cir. 1973)

⁴⁵ *Fernandes*, 663 F.2d at 633

⁴⁶ *West Virginia State Board v Burnette*, 319 U.S. 624 (1943)

⁴⁷ *Frisby v Shultz*, 487 U.S. 474, 488 (1988)

FORUM--BASED ANALYSIS: APPLICATION TO TRANSPORTATION FACILITIES

Practice Aid

The general trend is that transportation facilities are not public fora unless they have been designated as such by their operators, which is the case in many large metropolitan terminals and facilities. The Supreme Court has indicated airports are not public fora and limitations on charitable solicitation can be imposed. However, a total ban on the less intrusive speech activity of leaflet distribution has not found favor. Reasonable time, place, and manner restrictions generally can be imposed if the regulations are content-neutral and leave open alternate avenues of communication.

Property to which the public has access is generally split into four broad categories for First Amendment purposes.

Traditional Public Fora

The first category includes places that "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."⁵³ A traditional public forum has a principal purpose: the free exchange of ideas.⁵⁴ Sidewalks, streets, and parks have been recognized as traditional public fora, because historically they have been devoted to assembly and debate.⁵⁵ It has also been clearly established that in these public fora the government's ability to restrict speech is severely limited.⁵⁶ The current forum-based approach in First

⁵³ Hague v. Committee for Indust. Org., 307 U.S. 496, 515 (1939).

⁵⁴ Int'l Soc'y for Krishna Consciousness, Inc. v. Lee, 505 U.S. 672, 679 (1992).

⁵⁵ ACORN v. City of Phoenix, 798 F.2d 1260, 1264 (9th Cir. 1986).

⁵⁶ See United States v. Grace, 461 U.S. 171, 177 (1983). The question naturally arises whether transportation terminal sidewalks are automatically considered traditional public fora. The few cases that skirt the issue do not offer concrete guidance. The authors posit that the same life and safety concerns that underlay the ban on begging in the subways of New York might apply to congested airport sidewalks, at least during times of heaviest traffic and during a stated emergency. While the "captive audience" situation is not present on an airport sidewalk, the nature of a multitude of cars, vans, and buses dropping off and picking up passengers is not conducive to activities such as a request for money. However, as explained, *supra*, distribution of leaflets can rarely be enjoined.

The sidewalk areas surrounding stairs or ramps leading to underground transit facilities can probably be protected by applying a reasonable "buffer zone" restriction. Bus and train stations are often situated directly adjacent to the public sidewalk, and buffer zones around the ingress and egress to the stations would need to be minimal, such as the 3-foot zone around passengers boarding a transit vehicle or patrons buying movie tickets as upheld in *Doucette*.

Amendment cases is set forth in *Perry Education Association v. Perry Local Educator's Association*⁵⁷ and *Cornelius v. NAACP Legal Defense & Educational Fund*.⁵⁸ These cases emphasize that grave danger is done to the government's position if in regulating access to public property it even appears that there is an unconstitutional discrimination.

Designated or Limited Forum

The second category of property opened to the public consists of property that traditionally has not been a place for public assembly or discussion, but that has been opened for such use by the public as a place for expressive activity. Such forums cannot be created by doing nothing. Rather, the decision to create a public forum must be made "by intentionally opening a nontraditional forum for public discourse."⁵⁹

Examples of designated fora include places such as state university facilities that the government has intentionally made available for the activities of registered student groups.⁶⁰ "Although a state is not required to indefinitely retain the open character of the facility, as long as it does so it is bound by the same standards as apply in a traditional public forum."⁶¹

In *Cornelius*, the court stated that "[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."⁶²

Transit Stations

A third category for purposes of this paper consists of all public property not included in the first two definitions, such as transit stations that are not traditional public fora and continue to elude categorization as designated fora in their entirety. This category includes metropolitan airports,⁶³ bus stations,⁶⁴ and railroad stations.⁶⁵

⁵⁷ 460 U.S. 37 (1983).

⁵⁸ 473 U.S. 788, 802 (1985).

⁵⁹ 473 U.S. 788 (1985). Nor does the sole fact that property is owned by the government automatically open that property to the public for First Amendment purposes.

⁶⁰ See *Widmar v. Vincent*, 454 U.S. 263 (1981).

⁶¹ *Perry Education Assoc v Perry Local Educator's Assoc.*, 460 U.S. 37, 46 (1983). In *Perry*, the court also noted that school board meetings (*City of Madison Joint School Dist. v. Wis. Employment Rel. Comm'n*, 429 U.S. 167 (1976)) and municipal theatres are limited public fora (*Southwestern Promotions Ltd. v. Conrad*, 420 U.S. 546 (1975)), at 45.

⁶² 473 U.S. at 804.

⁶³ See *Lee*, 505 U.S. at 680. Although the airport was public property, the court found it was not a traditional public forum.

⁶⁴ *Wolin v. New York Transit Auth.*, 268 F. Supp. 855 (D.C.N.Y.), *aff'd*, 392 F.2d 83 (1968), *cert. denied*, 393 U.S. 940.

⁶⁵ *Lebron v. National Railroad Passenger Corp (Amtrak)*, 115 S. Ct. 961 (1995).

"Quasi" Limited Fora

Finally, private property to which the public has access may have surrendered its ability to prohibit the exercise of First Amendment rights in some instances.⁶⁶ In *Lloyd v. Tanner*,⁶⁷ the Supreme Court determined that speakers had alternative means of communication and that the right to speak did not overcome a private shopping center owner's right to exclude persons from distributing leaflets inside the mall.

In *Robins*, a California state court determined that the California Constitution provided expanded free speech rights that extended to a shopping center parking lot even though it was privately owned. In *Hudgens v. NLRB*,⁶⁸ the court decided speech-related activities could be restricted, as a shopping center was not a public forum. In comparison, the *Robins* court held that where members of the public were legitimately on the premises, their First Amendment rights could not be unreasonably restricted.

In *Carreras v. Anaheim*,⁶⁹ the court determined that the city could not ban persons from distributing literature and soliciting donations in the parking area and walkways outside the city's stadium and convention center.

The decisions in both *Robins* and *Carreras* are based upon the California Constitutional right of free speech, which is more expansive than the U.S. First Amendment. Thus, if a state has a broad constitutional statute that grants additional protection to expressive activities, a federal court may look to the state provisions. The U.S. Supreme Court has stated that federal constitutional issues should be avoided when the alternative ground lies in state constitutional law.⁷⁰

Is a transit terminal parking lot a traditional or designated public forum? In picketing cases, parking lots have been declared both public and nonpublic. Has a transit authority intentionally opened a parking lot to public debate by virtue of the fact that any car may park there? The 9th Circuit apparently thinks so. If so, does that mean that "long-term" lots used only by passengers are thereby *not* public fora?

The general rule is that a designated public forum is not created by inaction, but by specific acts directed toward allowing speech activity.⁷¹ It is doubtful that under all circumstances a fenced-in transit parking lot

dedicated solely to the transportation terminal would be found to be a traditional forum where there has never been any other activity than parking. The inevitable exception might be a rally at the airport or transit facility, where those coming to park their cars are attending the rally or protest. Another obvious exception might be where the nature of the protest itself is manifested by parking cars in the lot.

For readers who desire to review the law as it relates to public fora, there are numerous sources of information not included in this article.⁷²

The overwhelming trend is to find a public forum in at least some areas of a transit facility, if the transit terminal is owned and operated by a government agency, or receives government funding.⁷³ This does not mean, however, that reasonable restrictions on speech-related activities are impossible.

FIRST AMENDMENT ISSUES RELATING TO THE GENERAL PHYSICAL CHARACTERISTICS OF TERMINAL OR FACILITY

Both *Young*⁷⁴ and *Fernandes v. Limmer* described at some length the physical characteristics of the transit terminals in question. Although *Fernandes* has been amply distinguished by other circuit courts, some of the descriptions are useful to demonstrate the potential importance of the relationship between the physical characteristics of the terminal and the regulation restricting speech activity, and the extent to which a court may analyze such assertions.

In *Young*, the total ban on solicitation was upheld in large part due to the constricted areas of the subway terminal platforms and entranceways, which caused congestion and a captive audience.

In *Fernandes*, the Dallas/Ft. Worth Airport was described as "a major national air transportation center" with the airport complex containing "a hotel, a bank and a variety of other commercial establishments in addition to air terminal facilities."⁷⁵ The four terminal buildings are described as "crescent-shaped" with arrival and departure gates, airline ticketing and baggage operations, passenger waiting areas, bars, shops, and restaurants, as well as office facilities for the various airlines. Arrival and departure gates for air passengers radiate from central corridors running the length of each terminal building. The terminal buildings are connected by a light rail shuttle system.

⁶⁶ See *Robins v. Pruneyard Shopping Center*, 592 P.2d 341 (Ca. 1979).

⁶⁷ 407 U.S. 551 (1972).

⁶⁸ 424 U.S. 507 (1976). In *Fernandes v. Limmer*, 663 F.2d 619 (5th Cir. 1981), the court noted that a comparison of transportation facilities to shopping centers was inapt even though much of the airport space was rented to private parties, as is the case in shopping centers. The ownership was still in the government's hands. *Id.* at 627.

⁶⁹ 768 F.2d 1039 (9th Cir. 1985).

⁷⁰ See *Askew v. Hargrave*, 401 U.S. 476, 478 (1971); *Reetz v. Bozanich*, 397 U.S. 82 (1970).

⁷¹ See n.57, *supra*.

⁷² For a more detailed discussion of the traditional public forum, see Kalven, *The Concept of the Public Forum: Cox v. Louisiana*, 1965 SUP. CT. REV. 1; Cass, *First Amendment Access to Government Facilities*, 65 VA. L. REV. 1287 (1979); Cohen, *Passive Communication in Public Fora: The Case for First Amendment Protection of Newsracks*, 12 CARDOZO L. REV., 191-212 (1990).

⁷³ *Fernandes v. Limmer*, 663 F.2d 619, 626 (5th Cir. 1981); and *Lebron v. Nat'l R.R. Pass. Corp.*, 115 S. Ct. 961 (1995).

⁷⁴ *Young v. New York Transit Auth.*, *supra*, n.31.

⁷⁵ 663 F.2d at 623-624.

The light rail shuttle enabled passengers to deplane and reach connecting flights without leaving the terminal system.⁷⁶

The physical characteristics of the terminals were found relevant to the reasonable time, place, and manner restrictions that are permitted even when protected speech is concerned.

The *Young* court cited as part of its rationale the narrow passageways and corridors of the New York subway system.⁷⁷ Presumably, at least for now, subway stations that are similarly situated and as congested as the New York subway system, in all likelihood can place a blanket ban on panhandling within sections of the subway terminal, such as the egress and ingress walkways and platforms that lead only to the transit vehicles.

Those portions of airports considered "private" by the *Fernandes* court were terminals restricted to airline personnel and arrival and departure gates.⁷⁸ The ground access to the terminal buildings constrained by toll gates "at the fenced perimeter surrounding the airport complex," however, were not found to be private areas, since anyone paying the toll could pass through, and the public was invited to the commercial establishments within the airport complex.

Airport officials in *Fernandes v. Limmer* requested that the court provide detailed guidance in drafting constitutionally sound regulations governing literature distribution and fund solicitation in an airport complex, but the court responded that its jurisdiction was limited to the issues before it.⁷⁹

In *Jews for Jesus II*,⁸⁰ the court questioned the guidelines for noncommercial expressive activity on Massachusetts Bay Transportation Authority (MBTA) property. The MBTA operates commuter trains, subways, and buses in Boston. The Boston transit stations are divided into "paid areas" (where only ticketed passengers are allowed) and "free areas" (where the public is invited). Both the trial and appeals court held that a blanket ban on speech-related activities was impermissible. But the appeals court did confirm that some regulation of activities was permissible in restricted areas of the transit stations. This is consistent with the discussion below.

Airports as Public Fora

Airports are studied first because of the breadth of decisions relating to free speech and conduct associated with airports. While airports do not fall into the category

of intermodal transportation facilities, courts generally have not differentiated between airports and other transportation facilities when analyzing public fora and deciding First Amendment issues.⁸¹

In most circumstances, airport facilities are government owned and operated. The shops, restaurants, parking areas, and pedestrian walkways are all open to the general public with little or no restriction. Based on such criteria, the courts have addressed the various challenges to regulation of expressive activities on airport property. As noted above, where regulation of speech is attempted in a public forum, the regulation must be narrowly tailored to meet a substantial governmental interest.⁸²

In *United States v. Grace*,⁸³ in addressing a federal regulation, the Supreme Court stated that the government could not ban flags and banners from the sidewalks surrounding the Supreme Court grounds since those sidewalks constitute a public forum and the government's power to restrict expression in such places is "very limited." Sidewalks, streets, and parks have been entitled to full public forum protection at least since the 1930s. A finding that a transportation facility is a public forum, or even a limited public forum, grants the same type of protections for those who would exercise free speech related rights.⁸⁴

The Supreme Court has stated that three New York-New Jersey Port Authority airports are not public fora.⁸⁵ Prior to the Supreme Court decisions, the clear consensus from other courts has held that those airports are public fora.⁸⁶ It can be anticipated that First Amendment advocates will argue that the Supreme Court decision was fact-specific to the airports involved. The status of airports is further complicated by the four separate opinions written by the Supreme Court, each treating a different aspect of the public forum issue.⁸⁷

⁸¹ See Carlson, *First Amendment Protections of Free Speech in Public Airports*, 55 J. AIR L. & COMM. 1075 (1990) In the case of *Fernandes v. Limmer*, the court specifically referred to *Wolin v. Port Authority of N. Y.*, a bus station case, as a precedent in holding airports were public fora *Fernandes*, at 626. In *ISKCON v. Lee*, a plurality of the U.S. Supreme Court found that airports are not public fora

⁸² See *Perry Educ. Ass'n v. Perry Local Educator's Ass'n.*, 460 U.S. 37 (1983)

⁸³ 461 U.S. 171, 176-77 (1983)

⁸⁴ See Carlson, *First Amendment Protections of Free Speech in Public Airports*, 55 J. AIR L. & COM. 1075 (1990).

⁸⁵ *ISKCON v. Lee*, 505 U.S. 672 (1992), and *Board of Airport Comm'rs of Los Angeles v. Jews for Jesus Inc.* (*Jews for Jesus I*), 482 U.S. 569 (1987).

⁸⁶ See Carlson, *supra*, n.81, p.1080.

⁸⁷ The authors note the Supreme Court's statement on multiple opinions in a decision, *Marks v. United States*, 430 U.S. 188, 193: "When a fragmented Court decides a case and no single rationale explaining the result enjoys the assent of five justices, the holding of the Court may be viewed as that position taken by those Members who concurred in the judgment on the narrowest grounds," quoting *Gregg v. Georgia*, 428 U.S. 153, 169 n.15

⁷⁶ *Id.* at 624

⁷⁷ 903 F.2d at 149.

⁷⁸ 663 F.2d at 627

⁷⁹ *Id.* at 626

⁸⁰ *Board of Airport Comm'rs Los Angeles v. Jews for Jesus* (*Jews for Jesus II*), 783 F. Supp. 1500 (D.C. 1991), *modified*, 984 F.2d 1319 (6th Cir. 1993). See also *Board of Airport Comm'rs Los Angeles v. Jews for Jesus* (*Jews for Jesus I*), 482 U.S. 569, and 16B C.J.S., CONST. LAW, § 556, n.71.

In reaching their conclusions, courts have compared airport terminals to public streets, and have noted that the terminals are lined by shops, restaurants, newsstands, and other business establishments.⁸⁸ The Supreme Court and courts of appeal have noted that the terminals are open and accessible not only to travelers, but also to the general public.⁸⁹ Any member of the public may enter the airport whether or not he or she plans to board an airplane. Even the curious who desire to view airport operations are admitted without restrictions. Because of the great numbers of persons who travel through airports,⁹⁰ the location makes the transportation facility "particularly desirable to those who wish to exercise their rights because of the unique quality of a very high turnover of people in the airport."⁹¹

If a governmental agency permits but then attempts to regulate those who would demonstrate, distribute literature, or solicit contributions, the courts have reasoned that the regulation establishes the intent to create a public forum.⁹² In *International Soc'y for Krishna Consciousness v. Englehardt*,⁹³ an airport regulation required a permit for solicitation, and the court inferred therefore that the regulators had opened the airport to expressive activities.

In *International Society for Krishna Consciousness, Inc. (ISKCON) v. Lee*,⁹⁴ a majority of the highest court found that the New York/New Jersey airports are not public fora. Unfortunately, the several opinions of the justices on this issue do not provide absolute clarity on whether they intended to adopt this standard for all airports. The regulation at issue prohibited "solicitation and receipt of funds," which all of the justices read to mean "personal solicitations for immediate payment of money."⁹⁵ The High Court then permitted "manner"

⁸⁸ *Jamison v. City of St Louis*, 828 F.2d 1280, 1283 (8th Cir. 1987), *cert denied*, 485 U.S. 987 (1988); *see also* *United States Southwest Africa/Namibia Trade & Cultural Council v. United States*, 708 F.2d 760, 764 (D.C. Cir. 1983) (visitors to the Reagan National and Dulles Airports in Washington, D.C., enjoy "the benefits of restaurants and snack bars, two post offices, various specialty shops, two medical stations, at least five bars, a barber shop, drugstores, banks, newsstands, and police stations.")

⁸⁹ *Fernandes v. Limmer*, 663 F.2d 619, at 627 (5th Cir. 1981), *cert dismissed*, 485 U.S. 1124 (1982).

⁹⁰ *Chicago Area Military Project*, 508 F.2d 925 (7th Cir.), *cert denied* 421 U.S. 992 (1975) (90,000 visitors to the Chicago O'Hare airport daily); and *United States Southwest Africa*, 708 F.2d at 764 (D.C. Cir. 1983) (approximately 18 million people pass through the concourses and walkways of Reagan National and Dulles Airports annually).

⁹¹ *Rochford*, 585 F.2d at 272.

⁹² *Jamison*, 828 F.2d at 1283. The city's ordinance prohibited activities that were commercial in nature, or that interfered with the transportation functions.

⁹³ 425 F.Supp. 176, 180 (W.D. Mo. 1977).

⁹⁴ 505 U.S. 672 (1992).

⁹⁵ *Id.* at 704.

restrictions,⁹⁶ as the Court has "in the past recognized that imperson solicitation has been associated with coercive or fraudulent conduct."⁹⁷ The ordinance also specified that the prohibited solicitation/receipt of funds was for that which was "continuous and repetitive."⁹⁸

A majority⁹⁹ of the court (Chief Justice Rehnquist and Justices O'Connor, White, Scalia, and Thomas) found that an airport is not a public forum, and that a ban on solicitation need only satisfy a reasonableness standard.¹⁰⁰ Justice O'Connor concurred with the opinion, commenting, "There is little doubt that airports are among those publicly owned facilities that could be closed to all except those who have legitimate business there."¹⁰¹ She cited *Kokinda* to the effect that public access to airports is "not inherent" but is a "matter of grace by government officials," and stated that on the facts of this case, the transit authority had not "expressly opened its airports to the types of expression at issue here."¹⁰² These strongly worded comments are the most persuasive indication that the Court intended to adopt a broad standard for all airports and possibly other transportation facilities.

The Rehnquist opinion stated that the fact that wharves and train stations may traditionally have been opened to such activity is irrelevant, since they were usually under private ownership and therefore did not come under governmental First Amendment scrutiny.¹⁰³

Nevertheless, although apparently agreeing with Justice Rehnquist's analysis, Justice O'Connor finds that the "special attributes" and "surrounding circumstances" of the Port Authority airports are determinative on the issue of virtually unlimited access. Justice O'Connor observed that the airports in question "house restaurants, cafeterias, snack bars, coffee shops, cocktail lounges, post offices, banks, telegraph offices, clothing shops, drug stores, food stores, nurseries, barber shops, currency exchanges, art exhibits, commercial advertising displays, bookstores, newsstands, dental offices, and private clubs" and that JFK Airport even contains "two branches of Bloomingdales."¹⁰⁴ Justice O'Connor's comments imply that there is not a five-member majority of the court that would find all airports

⁹⁶ *Id.* at 705.

⁹⁷ *Id.* at 705, citing *Cantwell v. Connecticut*, 310 U.S. 296 (1940) and other cases.

⁹⁸ *Id.* at 707.

⁹⁹ For material on the binding effect on states of a plurality versus a majority opinion, see 65 A.L.R. 3d 504.

¹⁰⁰ 505 U.S. 672, 673 (1992).

¹⁰¹ *Id.* at 686.

¹⁰² *Id.*

¹⁰³ *Id.* at 681. See Justice Rehnquist's comments at 680-681, that airports have only recently reached their contemporary size, that only in recent years has solicitation taken place in airports, and that airports have not traditionally been open for speech activity nor were they opened by their operators for such activity.

¹⁰⁴ *Id.* at 688.

are nonpublic fora. However, O'Connor agrees that "[f]ace-to-face solicitation is incompatible with the airport's functioning in a way that the other, permitted activities are not."¹⁰⁵

Distinguishing leafleting from direct solicitation, O'Connor quotes from *Kokinda* that "[C]onfrontation by a person asking for money disrupts passage and is more intrusive and intimidating than an encounter with a person giving out information,"¹⁰⁶ especially when "continuous or repetitive" activities are targeted, as in the ordinance in question.¹⁰⁷ She therefore found an absolute prohibition on leafleting unconstitutional.¹⁰⁸

Justices Kennedy, Blackmun, Stevens, and Souter concurred in the judgment, but found that "airport corridors and shopping areas outside of the passenger security zones, areas operated by the Port Authority, are public forums,"¹⁰⁹ and speech in those places is entitled to protection against all government regulation inconsistent with public forum principles.¹¹⁰ These four Justices disagreed with the majority holding that "traditional public forums are limited to public property which have as 'a principle purpose...the free exchange of ideas,'"¹¹¹ and with the "reintroduc[ti]on" of proprietary versus regulatory functions of government.¹¹² They would also uphold as public forums "open, public spaces and thoroughfares that are suitable for discourse...whatever their historical pedigree and without concern for a precise classification of the property"¹¹³ Justice Kennedy comments that all too often, public parks--the traditional public fora--have become "locales for crime rather than social intercourse."¹¹⁴

The "Kennedy test" would be based on whether the property shares physical similarities with more traditional public fora, whether the government has permitted or acquiesced in broad public access to the property, and whether expressive activity would tend to interfere in a significant way with the uses to which the government has as a factual matter dedicated the property.¹¹⁵ Justice Kennedy also cites the fact that unlimited access to the airports indicates that the airport authority "does not consider the general public to pose a serious security threat."¹¹⁶

Justice Souter, joined by Justices Blackmun and Stevens, dissented in part and found that "[w]e need not

say that all 'transportation modes' or all airports are public forums in order to find that certain metropolitan airports are." Justice Souter further stated that he has "no difficulty concluding that the unleased public areas at airports, like the metropolitan New York airports at issue in these cases, are public forums."¹¹⁷ However, Souter conceded that "[o]ne can imagine a public airport of a size or design or need for extraordinary security that would render expressive activity incompatible with its normal use."¹¹⁸ In a separate opinion, Souter dissented from the plurality's opinion that solicitation of funds could be banned from the terminals.¹¹⁹

Before *ISKCON v. Lee*, the minority view was stated in *International Caucus of Labor Committees v. Metropolitan Dade County, Florida*.¹²⁰ The court in an extensive analysis noted that most decisions did not establish whether airports were traditional or limited public fora. The court then attempted to analyze whether the Miami airports were either. The court concluded airports were neither traditional nor limited public fora, as airports had no history as places where expressive activities were conducted, and further that the government had taken no steps to open the airport terminals to discourse of any type.¹²¹ In reviewing other factors, the court noted that the city had never advanced expressive activities in the airport and that the crowded terminals were inimicable to First Amendment activities.¹²²

The Dade County opinion has found favor with those who wish to limit First Amendment activities in transportation facilities. In *Jews for Jesus I*,¹²³ the Supreme Court did not specifically declare airports a public forum, but did strike down a regulation that attempted to ban all First Amendment activities in Los Angeles International Airport. Both the U.S. District Court and the Ninth Circuit Court of Appeals had declared the airport to be a public forum.¹²⁴ The district court and appeals court reviewed the activities and location under the traditional public fora analysis and found that the airports were akin to streets. That 1987 decision is questionable in light of the 1992 *ISKCON v. Lee* decision. At the time of submission of this paper, the Los Angeles City Council is once again seeking to ban solicitation at Los Angeles International Airport.

The majority of cases seem to create at least a glowing, if not bright, line rule that while solicitation of money may be prohibited in a number of instances, the

¹⁰⁵ *Id.* at 689

¹⁰⁶ *Id.*

¹⁰⁷ *Id.* at 690.

¹⁰⁸ *Id.* at 690-691

¹⁰⁹ Justice Kennedy cites the statistic that in 1986, the three airports operated by the Port Authority served over 78 million passengers *Id.* at 700

¹¹⁰ *Id.* at 693.

¹¹¹ *Id.* at 694.

¹¹² *Id.* at 695

¹¹³ *Id.* at 697.

¹¹⁴ *Id.* at 698

¹¹⁵ *Id.* at 699

¹¹⁶ *Id.* at 702.

¹¹⁷ *Id.* at 710.

¹¹⁸ *Id.* at 711.

¹¹⁹ *Id.* at 711-712.

¹²⁰ 724 F. Supp 917 (S.D. Fla. 1989).

¹²¹ *Id.* at 924

¹²² *Id.* The Court in dicta further expressed that despite the conclusions of other courts, bus stations and train stations were designed to serve transportation, rather than being expressive activity fora.

¹²³ 482 U.S 569 (1987).

¹²⁴ See 785 F.2d 791, 792 (9th Cir. 1986).

distribution of leaflets enjoys complete protection in all but the most pressing circumstances.

Bus Stations/Terminals

Practice Aid

The Supreme Court has never directly addressed whether bus stations are public fora. In one case, the highest Court denied certiorari to a New York bus terminal case where a federal appeals court had declared the terminal to be a public forum.

The U.S. Supreme Court has not declared that subways or train stations are public fora. The majority of appellate opinions concerning these facilities have found them to be either traditional public fora, or designated fora due to unrestricted access by the public and the presence of a wide range of nontransportation-related activities.

However, the U.S. Supreme Court has held that a designated forum cannot be created from a nonpublic forum through inaction and, once created, can be reconverted to nonpublic forum status by the forum operators.

The general rule of law has long been that bus stations/terminals are considered public fora.¹²⁵

The decisions relating to bus terminals have been based upon the theory that the facility is open to the public for expressive activities so long as the activity does not unduly impede traffic. In a precursor decision to *Lee*¹²⁶ and *ACORN v. City of Phoenix*,¹²⁷ the court in *Wolin* announced that while New York law defined the transportation purpose of the terminal,

the operation of the Terminal requires the Port Authority, as a practical matter, to permit the general public to have free access to the concourse, waiting rooms, and shops and services located in the Terminal building. In effect the concourses of the Terminal, like the streets of New York, function as a thoroughfare through which an average of over 200,000 pedestrians pass daily for the purpose of getting to and from their places of business, homes, shops, and other locations.¹²⁸

In relying upon *Cox v. Louisiana*,¹²⁹ the *Wolin* court did note, however, that the government could exercise its responsibility to ensure that the bus terminal's transportation purpose was not lost through obstruction by those exercising expressive activities.

In the exercise of its responsibility to ensure the flow of traffic through the Terminal, the Port Authority may promulgate reasonable, uniform and nondiscriminatory regulations of general application that are calculated to achieve that objective. In balancing the citizen's Constitutional right to communicate ideas and views against the police responsibility to maintain a free flow of traffic, the exercise of Constitutional rights will be favored unless it is shown that prohibition is

¹²⁵ *Wolin v. Port of New York Auth.*, 268 F. Supp. 855 (S.D. N.Y. 1967), *aff'd*, 392 F.2d 83, *cert. denied*, 393 U.S. 940; *Moskowitz v. Cullman*, 432 F. Supp. 1263 (D.N.J. 1977)

¹²⁶ 505 U.S. 672 (1992)

¹²⁷ 798 F.2d 1260 (9th Cir. 1986).

¹²⁸ 268 F. Supp at 860-861.

¹²⁹ 379 U.S. 536 (1965).

essential under the circumstances to insure operation of the Terminal for its primary purpose.¹³⁰

The *Wolin* decision, announced in 1967, adopted the mainstream position regarding expressive activities in transportation facilities. The court went on to criticize the Port Authority regulations that gave unrestricted authority to the terminal manager to grant permission to distribute literature in the facility. The regulations were also found to be vague, and for those reasons the court declared them "patently unconstitutional."¹³¹

The Port Authority attempted to create an exception to the public forum finding by the district court by arguing that the terminal was different than a street or park because it was enclosed and thus could not be compared to the historical concept of a street.¹³² The court of appeals discarded that notion by saying, "[W]e cannot accept the argument that the mere presence of a roof alters the character of the place, or makes the terminal an inappropriate place for expression."¹³³

But, importantly, the Second District Court of Appeals gave some guidance regarding permissible limitations on expressive activities in transportation facilities.

In accommodating the interest of protesters and the general public, the Port Authority may set approximate and reasonable limitations on the number of persons who may engage in such activities at any specific time, the duration of the activity and the specific places within the building where the, rights of expression may be exercised. Certainly the officials in drawing these rules will be mindful that the plaintiff has a constitutionally cognizable interest in reaching a broad audience, that he is entitled to do so within limits tolerable in light of the usual activities in the Terminal.¹³⁴

The court declined to comment on whether advance notice could be required.

In a more expansive statement, the *Moskowitz v. Cullman* court¹³⁵ stated that the threat of litter cannot intrude upon an individual's right of speech,¹³⁶ nor can the fear that some persons may feel harassed be used as a basis to prohibit leafleting. Even the possibility that there may be disorder created by others who hear the message will not allow a prohibition on speech: "Public inconvenience, annoyance, or even unrest are insufficient to support the exercise of regulatory police power in this area."¹³⁷ All of these statements should be examined carefully in light of the decision of *ISKCON v. Lee*.

¹³⁰ 268 F. Supp at 862

¹³¹ *Id.* at 863

¹³² 392 F.2d at 89

¹³³ *Id.*

¹³⁴ *Id.* at 94

¹³⁵ 432 F. Supp. 1263, 1267 (N.D. N.J. 1977).

¹³⁶ *Id.*, citing *Schneider v. State*, 308 U.S. 147, 163 (1939).

¹³⁷ *Id.*, citing *Terminiello v. Chicago*, 337 U.S. 1, 4 (1939)

Vehicles

The subject of free speech regarding transportation vehicles is divided into two categories: (1) what, if any, expressive activities may be restricted, and (2) what, if any, limitations may be imposed on advertising on vehicles. The general rules regarding expressive activity have been discussed above and are generally applicable here.

Vehicles themselves have not been historically considered to be public fora for expressive activities. Similarly, if buses, trains, subway cars, and airplanes have not otherwise been made available on a limited basis for speech-related activities, they will not be considered public fora. If these presumptions hold true, a review of restrictions on speech in vehicles will be conducted under a more relaxed standard. It may be persuasively argued that passengers on transportation vehicles are a captive audience similar to those in *ACORN v. City of Phoenix*.¹³⁸

In *ACORN*, an ordinance prohibited solicitation of vehicle occupants stopped at intersections on the public streets of Phoenix. The ordinance was challenged on First Amendment grounds but the restriction was upheld even though it was found to be a prior restraint. In citing to *Perry Education Association v. Perry Local Educator's Association*,¹³⁹ the court noted that when property is not characterized as a public forum, the government may reserve the forum for its intended purposes, so long as the regulation is reasonable and not an effort to suppress the speech merely because of the content of the speaker's expression. The court concluded that a complete ban on expression was permissible in a nonpublic forum if the restriction was reasonable and content-neutral.¹⁴⁰

A valuable analytical factor in this area is whether the individual who is being exposed to the expressive activity can avert his eyes or turn away from the speaker.¹⁴¹ When the audience has no opportunity to escape from the expressive act, courts generally have been willing to protect the audience.¹⁴² Thus, it is arguable that in the restricted environment of a vehicle, a complete limitation on expressive activity may be enforced if it is shown the forum has not been opened to expressive activities.

If future decisions find vehicles to be public fora, the government/transit authority has the option of withdrawing the permission that opened the forum to free speech.

As the Supreme Court explained: "We will not find that a public forum has been created in the face of clear

¹³⁸ 798 F.2d 1260 (9th Cir. 1986).

¹³⁹ 460 U.S. at 46.

¹⁴⁰ 798 F.2d at 1265

¹⁴¹ See *Erznoznik v. City of Jacksonville*, 422 U.S. 205, 211 (1974).

¹⁴² See *ACORN*, n 138 above, *Young v. New York City Transit Auth.*, 903 F.2d 146 (2nd Cir. 1990); *Doucette v. City of Santa Monica*, 955 F. Supp. 1192 (S.D. N.Y. 1997).

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."¹⁴³

Absent a clear showing that vehicles have been opened to expressive activities, prohibitions on speech on those vehicles are permissible. (A discussion of advertising is found later in this article.)

Subways

In a leading case, the district court found that subways were public fora. The court of appeals did not reach that issue in *Aids Action Committee v. Mass. Bay Trans. Auth.*, but found a First Amendment violation based on "viewpoint discrimination."¹⁴⁴ Subways have been considered public fora or limited public fora based upon public access and varied uses. As discussed above, this does not mean that restrictions on expressive activity in subways are doomed from the outset. If a significant governmental interest is shown, such as dangerous crowding on subway platforms, a restriction on the number of permitted speakers or even a total ban may be upheld.

Viewed in the light of *ISKCON v. Lee*, a strong argument may be made that subways--or at least subway corridors and platform areas--are primarily for the movement of people, and are not intended to serve as traditional public fora.

The regulations must be content-neutral, narrowly tailored, and exhibit a significant government interest.¹⁴⁵ In *Young v. N.Y. Transit Authority*,¹⁴⁶ a regulation that protected passengers from unwanted touching, extortion, harassment, and intimidation was sustained. The decision in *Young* was supported by extensive factual analysis, including interviews with passengers, which confirmed that, due to the press of people and the narrow corridors, begging in the subway environment was considered an aggressive activity that intimidated passengers.¹⁴⁷

Where subways have actively solicited advertising revenues, the subways have been converted to a limited public forum for advertising purposes.¹⁴⁸

¹⁴³ *Cornelius v NAACP Legal Defense and Educational Fund*, 473 U.S. 788, at 803.

¹⁴⁴ 42 F.3d 1 (1st Cir. 1994).

¹⁴⁵ *Perry*, 460 U.S. 37 (1983).

¹⁴⁶ 903 F.2d 146 (2nd Cir. 1990), *cert denied*, 111 S. Ct. 516 (1990).

¹⁴⁷ *Id.* at 903 F.2d 150. A more thorough discussion of panhandling is found later in this article, but *Young* stands for propositions other than begging. It is worthy of analysis to determine whether all conduct that might express an idea can be classified as speech. See also *Texas v. Johnson*, 491 U.S. 397 (1989). *Young* also indicates that restrictions on begging may be enforceable because begging is not pure speech.

¹⁴⁸ *Penthouse v. Koch*, 599 F. Supp. 1338 (S.D. N.Y. 1984).

Train Stations

Historical analysis demonstrates that train stations generally have been considered public fora. The factors considered are whether the venue is open to the public in general, whether the forum is akin to the historical passageways of a city, and whether there are other adequate channels for expressive activities to reach train passengers.

The Supreme Court has not specifically stated that train stations are public fora, but has concluded Amtrak is a governmental entity for purposes of the First Amendment in *Lebron v. National R.R. Passenger Corp.*¹⁴⁹ In remanding the case, the Court reversed an opinion that allowed restrictions on advertising. The lower court had held Amtrak was not a government agency and that the First Amendment restrains the government but not private persons.¹⁵⁰ But the Court decided that by receiving governmental funding, a governmentally controlled agency was created.

The district court in *Lebron*¹⁵¹ did not address whether a train station was a public forum and instead stated that the decision to disallow a proposed artwork on the grounds that it was "political" was arbitrary and discriminatory.¹⁵² The *Lebron* court laboriously considered the criteria relating to public fora. (See discussion above regarding criteria relating to airports, bus stations, and subways.) It is difficult to understand why the court went through this exercise and then declined to voice an opinion on whether the train station in question was a public forum. The court instead held that when governmentally controlled property is involved and restrictions on speech are attempted, "Along with other constraints, the First Amendment requires that, when the government regulates speech, it must do so by a policy that is (i) clearly set forth, (ii) not so vague as to be subject to abuse, (iii) consistently applied and (iv) not based on viewpoint."¹⁵³

Based upon the totality of public forum analysis, it is highly likely that train stations will continue to be treated as public fora.

¹⁴⁹ 115 S. Ct. 961 (1995).

¹⁵⁰ *Id.*; see also *Columbia Broadcasting System Inc. v. Democratic Nat'l Comm.*, **412 U.S. 94 (1973)**

¹⁵¹ **811 F Supp 993 (S D N.Y. 1993).**

¹⁵² *Id.* at 1001

¹⁵³ *Id.*

OTHER CURRENT FREE SPEECH ISSUES IN TRANSPORTATION FACILITIES: COMMERCIAL SPEECH¹⁵⁴

Practice Aid

The Supreme Court has allowed greater restrictions on commercial speech than pure speech, although the line appears to be fading to some extent. A total ban on political advertisements on a city bus has been upheld by the highest Court. However, if a transit agency has solicited advertising in its facilities or on its vehicles, a regulation is suspect that vests too much discretion in a transit or public official. Likewise, a regulation that on its face bans certain types of speech or selective messages while permitting others is subject to challenge. In the areas of tobacco and alcohol advertising, however, some limitations have been allowed where the stated objective was that of reducing use by minors.

Advertising

Commercial speech is typically speech that proposes only a commercial transaction¹⁵⁵ and is aimed at a listener/consumer who has an interest in the free flow of commercial information in order to make economic and trade decisions.¹⁵⁶

In analyzing a regulation on advertising, the court will ask (1) whether the advertising is lawful and not misleading, (2) whether there is a substantial government interest, (3) whether the regulation is narrowly tailored to directly advance the interest, and (4) whether the regulation reaches no further than necessary.¹⁵⁷ Just because advertising "links a product to a current public debate" does not automatically accord to the product the protection of noncommercial speech.¹⁵⁸

In a seminal case, the U.S. Supreme Court held that transportation operators may refuse to accept political advertising on buses even though the operator sells

¹⁵⁴ See generally Farber, *Commercial Speech and First Amendment Theory*, 74 Nw. U.L. REV., 372, 276 (1979); Gregory C. Lisby, *Beyond the First Amendment: Commerce Regulation as a Model for the Control of Expression*, COMMUNICATIONS AND THE LAW, Sept. 1995, Vol 17, No. 3, at 33-51; O Lee Reed, *Is Commercial Speech Really Less Valuable Than Political Speech? On Replacing Values and Categories in First Amendment Jurisprudence*, AM Bus. L J, Fall 1996, at 1-37; David O Stewart, *Change Brewing in Commercial Speech Decisions Signals Shift Toward Greater First Amendment Practicality*, A.B. A. J., July 1996, at 44.

¹⁵⁵ *Central Hudson Gas & Electric v. Public Utility Comm'n of New York*, 447 U.S. 557 (1980)

¹⁵⁶ *Virginia State Board of Pharmacy v. Vir. Cit. Consumer Council Inc.*, 425 U.S. 748, at 771 (1976)

¹⁵⁷ *Central Hudson Gas & Electric Corp v. N.Y. Pub Serv Comm'n*, 447 U.S. 557 at 561-566 (1980).

¹⁵⁸ *Board of Trustees of State Univ. of New York (SUNY) v. Fox*, 492 U.S. 469, 475 (1989) The SUNY regulation allowed only certain commercial activities on campus, such as food, legal beverages, bookstores, vending, linen supply, laundry, dry cleaning, banking, a barber, beauty shops, and cultural events. Plaintiff sold housewares. At 472-473.

advertising space to other advertisers.¹⁵⁹ The Ohio Supreme Court had decided that, "the constitutionally protected right of free speech with respect to forums for oral speech, or the dissemination of literature on a city's streets, does not extend to commercial or political advertising on rapid transit vehicles."¹⁶⁰ Both the Ohio Court and the Supreme Court noted that all political candidates were excluded from advertising on the buses and the ban was sustainable. The Supreme Court observed that government does have the authority to restrict advertising where the public had the message "thrust upon them."¹⁶¹ The advertising space was equated to a commercial venture and there were no open spaces, meeting hall, park, street corner, or other public thoroughfare.¹⁶²

The decision in *Lehman* holds that a total ban on advertising on buses or subway cars can be sustained. This total ban, however, cannot be extended to allow a ban on selective types of speech or speech with particular messages. In *Aids Action Committee v. Mass. Bay Trans. Auth.*,¹⁶³ the advertising policy of the MBTA was found to violate free speech protections. The MBTA had posted ads for many years on a wide variety of topics, had hired an advertising agency to promote its advertising venues, and had a published advertising policy. By so doing, the district court determined, the MBTA had designated the interior of its cars as public fora. The court of appeals declined to address this issue.

When the court examined the policy, it found the regulation was not content-neutral and therefore was subject to strict scrutiny. Because the MBTA's advertising policy was considered incoherent and gave wide, unrestricted latitude to government officials to reject advertising, the appeals court rejected the policy. The court cited at length the decision of *R.A.V. v. City of St. Paul*,¹⁶⁴ which voided a hate crime ordinance that randomly selected offensive terms. The *R.A.V.* decision indicates that the appearance of hostility to certain viewpoints is content-based discrimination that will not be permitted, even if the objective is permissible.

In two more recent opinions, the Fourth Circuit Court of Appeals found that government regulators had valid reasons to restrict the content of certain display advertising messages.¹⁶⁵ In these cases, the City of Baltimore's restrictions on alcohol and cigarette advertising were upheld as they had as their objectives the

valid governmental interest of reducing use by minors.¹⁶⁶

In the Baltimore cases, the court found that a restriction on certain types of advertising was permissible because the city had met the test announced in *Central Hudson*.¹⁶⁷ If a restriction on commercial speech has as its objective the substantial governmental objective of reducing drinking or smoking by minors, it may be permissible.

Based upon these two Fourth Circuit cases, a restriction on advertising in bus terminals or on alcohol or tobacco advertising on vehicles¹⁶⁸ may be sustained. Similar decisions have been reached by other courts concerning the location of newsracks that contained advertising.¹⁶⁹

A restriction on advertising, if desired, must be carefully crafted to meet the *Central Hudson* test. The most significant factor in such a restriction is that it must not reach beyond the substantial governmental interest served. Where the attempt to limit advertising is supported by less than a compelling interest, rejection of the advertising has been held to be an unreasonable restriction on speech.¹⁷⁰ In *Air Line Pilots Ass'n v. Dept. of Aviation, Chicago*,¹⁷¹ the Seventh Circuit also concluded that a selective ban on displays that were "not in good taste" was vague and therefore unenforceable.¹⁷²

Thus, in bus terminals and on vehicles, reasonable restrictions on advertising may be permissible when they are narrowly drawn and advance a significant government interest. If the transportation operator chooses to ban all advertising in terminals and on vehicles, that ban may also be enforceable.

Newsracks

Practice Aid

The U.S. Supreme Court has held that restrictions on newsracks that distinguish between types of messages are not permissible. Other restrictions are permissible,

¹⁶⁶ See also *Central Hudson Gas & Elec Corp v. New York Pub. Ser. Comm'n*, 447 U.S. 557 (1980).

¹⁶⁷ *Id.*

¹⁶⁸ See Thomas D Blue, Jr., *Over the Edge: 4th Circuit Commercial Speech Analysis in Penn Advertising and Anheuser-Busch*, 74 N.C L. REV., 2086-2107 (1996); Martin H. Redish, *Tobacco Advertising and the First Amendment*, 81 IOWA L. REV., 589-639 (1996).

¹⁶⁹ *Jacobsen v. Harris*, 869 F.2d 1172 (8th Cir. 1989) (The Court accepted aesthetic and safety factors as reasons for limiting advertising); *accord*, *Rodriguez v. Solis*, 1 Cal App. 4th 495 (1991)

¹⁷⁰ *Penthouse v. Koch*, 599 F. Supp. 1338 (S.D. N.Y. 1984). A private leasing agent for the MTA determined that a sexually-suggestive poster was "offensive to good taste." As the poster fell short of obscenity, the court found that a compelling need had not been shown and criterion based upon subjective judgment of officials was overbroad.

¹⁷¹ 45 F.3d 1144 (7th Cir 1995).

¹⁷² *Id.* at 1153

¹⁵⁹ *Lehman v. Shaker Heights*, 418 U.S. 298 (1974) Justice Douglas in a concurring opinion stated in strong language that commuters on municipally owned buses were captives of the advertising. At 307.

¹⁶⁰ *Lehman*, 296 N.E.2d 683, 685 (1973).

¹⁶¹ *Lehman*, 418 U.S. at 302

¹⁶² *Id.* at 303

¹⁶³ 42 F.3d 1 (1st Cir 1994).

¹⁶⁴ 505 U.S. 377, 112 S.Ct. 2538 (1992).

¹⁶⁵ See *Anheuser-Busch, Inc. v. Schmoke*, 63 F.3d 1305 (4th Cir. 1995), vacated and remanded 116 S.Ct. 1821 (1996), and *Penn Advertising of Baltimore Inc. v. Mayor & City Council of Baltimore*, 63 F.3d 1318 (4th Cir. 1995).

such as regulations on the number of newsracks in one location, their color and size, insurance requirements, and the payment of a fee directly related to the cost of administration. The fee may not be directed only at newsracks, but must be imposed equally and impartially on other similar uses at the same locations.

Even in the most protected free speech fora, regulation of newsracks is permitted according to the same time, place, and manner criteria as other speech-related activities if the regulation is content-neutral.¹⁷³ The Ninth Circuit has recently ruled on a California statute that severely limits sales of sexually oriented newspapers. In *Crawford*,¹⁷⁴ the court upheld California Penal Code Section 313.1(c), which prohibits the sale of harmful material to minors from unattended newsracks.

In *Gold Coast*, a newsrack licensing plan based upon safety and pedestrian access was affirmed as narrowly drawn and advancing a significant governmental interest. The appeals court modified the trial court's opinion, but also affirmed the local ordinance as a reasonable restriction on free speech activities.¹⁷⁵

The city of Coral Gables had determined that it was necessary to enact the newsrack ordinance for reasons that were found to be content-neutral and that advanced significant governmental interests. The court also noted in its opinion that commercial speech is entitled to less protection than pure speech.¹⁷⁶ In transportation facilities where passenger safety is a high priority and where pedestrian access is essential, a regulation that promotes those interests, and which meets the content-neutral test, is likely to be constitutionally sound.

The freedom of the press has been interpreted to mean the right to circulate and distribute as well as the

right to receive and read.¹⁷⁷ Ordinances that flatly prohibit newsracks in public places are generally found to be unconstitutional on their face.¹⁷⁸ However, a newsrack operator who chooses to place his newsrack on a public forum may be required to (1) complete an application, (2) pay a permit fee, and (3) obtain liability insurance.¹⁷⁹

LICENSING AND PERMITTING SYSTEMS

In *Freedman v. Maryland*,¹⁸⁰ the court outlined the appropriate procedural standards for a license/permit system that affects First Amendment rights. The court explained that where there is a permitting system that affects First Amendment rights, the state must bear the burden of the speech being unprotected. If the state desires to restrain the speech by some permit requirements, the *Freeman* court also required that the regulator must seek court approval of the restraint within a short and specified period.¹⁸¹ Tribe further explains: "In some cases, the primary concern is that any restraint before dissemination, however temporary, allows the government to destroy the immediacy of the intended speech, overriding the individual's choice of a persuasive moment..."¹⁸²

"[F]reedom of speech...[must be] available to all, not merely to those who can pay their own way."¹⁸³ In *Murdock*, the Supreme Court struck down a licensing fee of \$1.50 per day required of door to door solicitors as a "flat tax" that was imposed on a First Amendment right. It may be safe to say that licensing regulations requiring even a nominal fee will be struck down by the courts where applied against First Amendment activities.

However, reasonable administrative fees may be charged where the fee appropriately reflects the actual amount expended for services or maintenance, but only

¹⁷³ *Gold Coast Pub Inc v. Corrigan*, 798 F. Supp. 1558 (S.D. Fla 1992), 42 F.3d 1336 (11th Cir. 1994); *Heffron v. Int'l Soc for Krishna Consciousness*, 452 U.S. 640 (1981). See also *Gannett v. Metropolitan Trans. Auth.*, 745 F.2d 767 (2d Cir. 1984), which upheld reasonable licensing restrictions on placement of newsracks where the fees were content-neutral, left open alternative means of newspaper distribution, and were the least restrictive means for raising revenues for the private commercial transportation activity.

¹⁷⁴ *Crawford v Lungren*, 96 F.3d 380 (9th Cir. 1996).

¹⁷⁵ *Gold Coast Pub Inc. v Corrigan*, 42 F.3d 1336 (11th Cir. 1994). The ordinance limited the number of newsracks in certain locations, required uniform color and letter size and certificates of insurance, and allowed only certain newsrack models or their equivalent.

¹⁷⁶ *Id* at 1347. This statement may be subject to reinspection in light of *44 Liquor Mart v. Rhode Island*, 116 S.Ct. 1495 (1996), which expanded the rights of commercial speech based upon the listener's right to be informed. A newspaper vendor may submit that his wares are the very essence of what an informed listener needs. The *Gold Coast* court, however, did not focus on the commercial speech issue and the authority is still valid for the main proposition that newsracks may be regulated based upon an aesthetic and safety-related rationale.

¹⁷⁷ See *Metromedia Inc. v City of San Diego*, 453 U.S. 490 (1981).

¹⁷⁸ See *Schneider v State*, 308 U.S. 147 (1939); *accord*, *California Newspaper Publishers Assoc. v. Burbank*, 51 Cal. App. 3d 50, 123 CAL RPTR. 880 (1975).

¹⁷⁹ *Jacobsen v. Harris*, 869 F.2d 1172 (8th Cir 1989). For more information on newsrack jurisprudence, the reader is referred to the article by Sandra L. Cohen, *Passive Communication in Public Fora: The Case for First Amendment Protection of Newsracks*, 12 CARDOZO L. REV. 191-212 (1990)

¹⁸⁰ 380 U.S. 51 (1965); see also *Church of Scientology v. City of Clearwater*, 2 F.3d 1514, 1547 (11th Cir 1993). The court of appeals confirmed that a "system of licensing speech or religious activity may be upheld against first amendment challenge only if the criteria for denying a license are narrowly tailored to serve compelling interests."

¹⁸¹ *Id* at 58, 59. For a complete discussion, see L. Tribe, § 12-34, pp 1039-1042.

¹⁸² *Id.* at 1042.

¹⁸³ *Murdock v Pennsylvania*, 319 U.S. 105, 113 (1943).

to the extent the fees are necessary.¹⁸⁴ Although such fees sometimes have been struck down when applied to newsracks, and fees are generally considered a prior restraint on solicitation, there are exceptions. Recently, the Second Circuit reasoned that under appropriate circumstances, an \$80 fee for professional solicitors may be appropriate.¹⁸⁵ A "sliding scale fee" based on a nonexempt charity's nationwide level of public contribution was also upheld.¹⁸⁶

False Statements/Fraud/Past Convictions as a Reason To Deny Permit

Courts have acknowledged that false statements, fraud, and past convictions of the permit applicant are important government considerations behind permitting systems. *Fernandes* clarified that the false statements at issue are those on the application, not the falsity of the ideas the applicant may wish to disseminate.¹⁸⁷

A governmental agency or transit authority may be concerned with fraud being perpetrated on the public, due to the legitimacy or lack thereof of the permit applicant's organization. A regulation based on this rationale will be found to be an impermissible prior restraint,¹⁸⁸ as the time required to review the application cannot act as a bar to the protected activity.

With regard to fraud, the court in *Schneider v. State*¹⁸⁹ described the options as follows:

Frauds may be denounced as offenses and punished by law. Trespasses may similarly be forbidden. If it is said that these means are less efficient and convenient than bestowal of power on police authorities to decide what information may be disseminated...and who may impart the information, the answer is that considerations of this sort do not empower a municipality to abridge freedom of speech and press.¹⁹⁰

With regard to felony convictions of permit applicants, the *Fernandes* court opined: "That the applicant has been convicted of a crime in the past is not a sufficient reason for his blanket exclusion in the future...Persons with prior criminal records are not First Amendment outcasts."¹⁹¹ This is called the "once a sinner, always a sinner" rationale by the court. The *Fernandes* court found that the transit authority had not shown any "impressive" evidence to sustain the regulation, but was rather "indulging in assumptions" about possible future misconduct based on prior misconduct.¹⁹²

¹⁸⁴ *Moffett v. Killian*, 360 F Supp 228, 231-232 (D. Conn. 1973); *NAACP v City of Chester*, 253 F. Supp. 707 (E D. Pa 1966).

¹⁸⁵ *Nat'l Awareness Found. v Abrams*, 50 F 3d 1159 (2nd Cir 1995)

¹⁸⁶ *Center for Auto Safety v. Athey*, 37 F.3d 139 (4th Cir 1994)

¹⁸⁷ *Fernandes v. Limmer*, 663 F 2d at 629.

¹⁸⁸ *Id.*

¹⁸⁹ 308 U S 147 (1939)

¹⁹⁰ *Id.* at 164.

¹⁹¹ 663 F.2d. at 630.

The court remarked that such a rationale had been rejected twice previously, and was now rejected a third time.

These decisions indicate that prior convictions may not be used as a basis to deny permission to enter public fora to conduct speech-related activities. Legal action may be appropriate against fraud and false statements, but such action must take place after the fact under general criminal statutes, rather than being used as a vehicle for a First Amendment prior restraint.

NONCOMMERCIAL SPEECH--CHARITABLE SOLICITATION

Practice Aid

The U.S. Supreme Court has held that charitable solicitation is a highly protected form of speech. The court has allowed restrictions when the solicitation takes place in an airport or in a narrow passageway, where the targeted individual cannot easily evade a solicitor. To request money in such circumstances has been found by the U.S. Supreme Court to create an environment of stress and potential intimidation. Therefore, even a total ban may be upheld as a reasonable time, place, and manner restriction, since solicitors have available to them other areas of the transportation facilities.

Charitable solicitation is considered worthwhile because it is "characteristically intertwined with informative and perhaps persuasive speech seeking support for particular causes or for particular views on economic, political, or social issues, and for the reality that without solicitation the flow of such information and advocacy would likely cease."¹⁹³

Solicitation to pay or contribute money is protected by the First Amendment,¹⁹⁴ and any regulation licensing professional fundraisers is subject to rigid scrutiny.¹⁹⁵ In *Village of Schaumburg v. Citizens for a Better Environment*,¹⁹⁶ door-to-door solicitation was prohibited to organizations who used less than 75 percent of their receipts for "charitable purposes." The court found that the substantial governmental interests in protecting the public from fraud, crime, and undue annoyance were inadequate to support the regulation.

The *Schaumburg* line of cases establishes what appears to be the current approach toward charitable solicitation in general: that is, that the regulatory

¹⁹² *Id.* See also *Universal Amusement Co v. Vance*, 587 F.2d 159, 165-166 (5th Cir 1978) (en banc), *aff'd*, 445 U.S 308 (1980), *reh'g. denied*, 446 U.S 947.

¹⁹³ *Village of Schaumburg v. Citizens for a Better Env't*, 444 U S 620 at 632 (1980).

¹⁹⁴ *Metromedia Inc v San Diego*, 453 U.S 490 (1981).

¹⁹⁵ *Riley v Nat'l Fed'n of Blind, Inc.*, 487 U.S 781 (1988). The High Court in an opinion by Justice Brennan held that the solicitation of charitable contributions was protected speech. The Rehnquist, O'Connor dissent said the licensing was reasonably aimed to protect the public from unscrupulous fundraisers.

¹⁹⁶ 444 U.S. 620 (1980).

authority "may serve its legitimate interests, but it must do so by narrowly drawn regulations designed to serve those interests without unnecessarily interfering with First Amendment freedoms."¹⁹⁷ The court went on to state that the regulatory interest could be better served by measures less intrusive than a total ban on solicitation, such as a prohibition on false representation, which would be punished under the penal provisions.¹⁹⁸

Even if charitable solicitation includes an item generally considered to be commercial (such as the sale of a T-shirt with a message), the commercial message may be seen as "inextricably intertwined" with the noncommercial message, and the activity retains its noncommercial constitutional privileges. The Ninth Circuit has recently addressed this issue and determined that the *Schaumburg* decision need not extend to all solicitation activities if they can be classified as a commercial activity.¹⁹⁹ However, in *One World One Family Now v. City of Honolulu*,²⁰⁰ the ordinance was intended to eliminate local blight that was ostensibly caused by vendor stands on public sidewalks. The ordinance also was intended to promote the orderly movement of pedestrians on crowded sidewalks, and to protect local merchants from unfair competition.

Solicitation of funds to support a religious organization is speech protected by the First Amendment,²⁰¹ although solicitation is not a fundamental right.²⁰² The government may regulate the time, place, and manner of solicitation in a public forum if the regulation does not unreasonably obstruct or delay the collection of funds.²⁰³ The Second Circuit has persuasively stated that a blanket ban on solicitation on all public streets will fail.²⁰⁴ But, at least in the Second Circuit, solicitation within the narrow confines of subway corridors and platforms may be prohibited.²⁰⁵ The *ISKCON v. Lee* decision is good authority that a ban on a request for money that creates safety hazards in a congested transit terminal will be upheld.²⁰⁶

¹⁹⁷ *Id.* at 637

¹⁹⁸ *Id.*

¹⁹⁹ *Village of Schaumburg supra* (on remand), *Green v. Village of Schaumburg*, 676 F Supp. 870 (N.D. 111. 1988)

²⁰⁰ 76 F 3d 1009, *cert denied*, 117 S Ct. 554 (1996)

²⁰¹ *ISKCON v Lee*, 505 U.S 672 (1992) Limitations on solicitation were allowed as a plurality of the court stated that most of the areas affected were not affected and the regulations were reasonable

²⁰² *Schneider v. State of New Jersey*, 308 U.S. 147 (1939)

²⁰³ *Cantwell v Connecticut*, 310 U S. 296 (1940).

²⁰⁴ *Loper v New York Police Dept.*, 802 F. Supp. 1029 (S.D. N.Y 1992), *aff'd*, 999 F.2d 699 (2nd Cir. 1993)

²⁰⁵ *See Young v New York Transit Auth.*, above at n.146.

²⁰⁶ *ISKCON v Lee*, 505 U.S. 672 (1992).

Restrictions Allowed

Registration

In narrow circumstances, a charitable solicitation ordinance requiring registration can be sustained and need not create entanglement between state and religious activities.²⁰⁷ In the *Clearwater* case, the court determined that the government had what the court found to be a "compelling" interest in protecting church members from material misrepresentation, and allowed a requirement that the organization disclose: (1) the name of the person registering and soliciting funds, (2) whether the registrant is an individual, partnership, corporation, or association, (3) its tax exempt status, and (4) the names of other cities in which the person has solicited within the past 5 years.²⁰⁸ Such a regulation is narrowly tailored to prevent fraud. (But see previous discussion on licensing under prior restraint.)

Other Restrictions

In *ISKCON v. Eaves*,²⁰⁹ the Fifth Circuit upheld with little comment restrictions on solicitation within 10 feet of any area leased exclusively to a tenant of the airport and beyond security checkpoints.²¹⁰ The court struck down a provision allowing only three solicitors in one area at a time, as the ordinance unconstitutionally accorded too much discretion to the official with authority to move solicitors from one area to another,²¹¹ and also struck down a provision that any person or organization convicted of violating the regulations lost his/her/its permit and could not reapply for 12 months.²¹² The court also found that a provision that made it illegal for a permit holder to "obstruct, delay, or interfere with the free movements of any other person...or hamper or impede the conduct of any authorized business at the Airport" was unconstitutionally vague.²¹³

Recently, however, in *Local 3213-325, Service Employees International Union v. PANYNJ*,²¹⁴ the Second

²⁰⁷ *Church of Scientology Flag Service Org Inc. v Clearwater*, 777 F.2d 598 (11th Cir. 1985), *cert. denied*, 476 U S 1116 (1986), on remand, 773 F. Supp 321 (M.D Fla 1991), *aff'd*, 2 F.3d 1509 and 2 F 3d 1514 (2 cases) (11th Cir. 1993) (On remand, the case considered the issue of attorneys' fees and whether the charity was a prevailing party. The court ruled that it was not); *Hynes v Orandell*, 425 U S. 610 (1976).

²⁰⁸ *Church of Scientology*, 2 F.3d at 1539.

²⁰⁹ 601 F.2d 809 (5th Cir. 1979).

²¹⁰ *Id.* at 816

²¹¹ *Id.*

²¹² "(N)o prior restraint may be based on {the} broad generality" that because someone had violated an ordinance once, he/she would do so again 601 F 2d at 833.

²¹³ *Id.*

²¹⁴ *Local 3213-325, Service Employees Int'l. Union v. PANYNJ*, 1996 WL 422237 (1996). The court was met with arguments that limitations on the number of solicitors was essential after the 1990 bombing of the World Trade Center. The court found the limitations were too restrictive even

Circuit upheld a limit of 36 persons soliciting in the bus terminals at seven fixed locations and another 10 "roving" solicitors. The court also upheld closure of some areas of the terminal to reduce crime.

A precursor of sorts to *ISKCON v. Heffron*, *Eaves* upheld the confining of religious solicitation to booths, remarking that "the regulated transfers of money were the medium, not the message,"²¹⁵ thereby presumably confining an exchange of money to the conduct, rather than speech, category, which is subjected to a less stringent analysis.

Solicitation of funds is "primarily secular conduct applicable to any organization soliciting funds."²¹⁶ In *ISKCON v. Houston*, the Fifth Circuit upheld the challenged provisions of the Houston ordinance that required a "brief description of the person registering, the charitable use which the funds are to be solicited [sic], and an explanation of the intended use of the funds toward that purpose," and the "names...of all individuals who will be in direct charge or control of the solicitation of funds."²¹⁷ The court commented that the requirement concerned those in charge of solicitation rather than those in charge of the funds.²¹⁸ It had been argued that the ordinance was an impermissible entanglement between the religious group and the governmental actor, but the court determined the ordinance only extended as far as necessary and no further.

Another section of the Houston ordinance required the applicant to disclose the names of its partners, officers, directors, or members (in circumstances where there were 10 or fewer members), and required exhibition of an identification card issued by the city tax assessor and collector.²¹⁹ Distinguishing the circumstances from those of *NAACP v. Alabama*, where plaintiffs had made a showing that revealing the members' identities exposed them to "economic reprisal, loss of employment, threat of physical coercion, and other manifestations of public hostility," the *ISKCON v. Houston* court commented that the "Houston ordinance does not affect dissident beliefs but only conduct relating to the solicitation of funds from the public, primarily a secular function," and that the requirement did not deter freedom of association.²²⁰ "There is no disclosure required except as it specifically relates to the raising of funds from the public."²²¹

though they allowed one person at all times at each of the four entrances to the terminal, except at rush hours, and the policy also allowed five people in each of two additional locations at corridor crossings. Two people were allowed to display signs at the corridor crossings.

²¹⁵ 601 F.2d at 828.

²¹⁶ *Int'l Soc'y for Krishna v. City of Houston*, 689 F.2d 541, 549 (5th Cir 1982).

²¹⁷ *Id.* at 554-555.

²¹⁸ *Id.* at 555.

²¹⁹ *Id.* at 556.

²²⁰ *Id.* at 556, *contra* *NAACP v. Alabama*, 357 U.S. 449 (1958).

²²¹ *ISKCON v. Houston*, at 556.

In evaluating a fee imposed on solicitors, the *Fernandes* court found that a "licensing fee" may be charged to defray administrative costs but only to the extent necessary. A 6-dollar daily fee was found unconstitutional because there was no showing of nexus between the fee and actual costs.²²² In *Murdock v. Pennsylvania*,²²³ a licensing fee of 1.5-dollars per day was required of door-to-door solicitors as a "flat tax." Even this small amount was deemed oppressive to the speech-related right.

It may be difficult to distinguish between individual panhandlers and professional organizations when attempting to assess administrative fees. A fee imposed upon professional solicitors may prohibit an individual panhandler and thus constitute a total restraint on that expressive right. No clear authority has condoned disparate treatment of professional fundraisers and individual panhandlers. If an administrative fee were to be imposed it must be minimal, which raises the question of whether a fee is justified if the administrative costs exceed revenue. It is certain a court would make that inquiry, and if there is no positive revenue, then the basis for the fee is suspect. In any case, the fee imposed would need to be in direct proportion to the actual costs involved.²²⁴

Hour Limitations

Hour limitations on solicitation have been attempted to protect homeowners from possible criminal activity. Within areas in transit terminals and facilities found to be public fora, where potential dangers present in the case of residential homes cannot be shown, a limitation on the hours of solicitation would require a showing by the transit authority of actual, rather than imagined, harm or hazards. This is true even though the court remarked that even organizational solicitation pursued by peaceful means carries with it the risk that individuals may feel harassed or intimidated.²²⁵ Where a transit terminal is open unrestrictedly to the public, it may be difficult to show that the terminal should be closed to solicitation during certain hours absent concrete findings (higher crime rate after midnight, etc.).

Handbills/Anonymity

Freedom of speech under the First Amendment includes the right to remain anonymous.²²⁶ The government may not require the names and addresses of persons who prepare, distribute, or sponsor handbills.²²⁷

²²² 663 F.2d at 633.

²²³ 319 U.S. 105, 113 (1943).

²²⁴ 663 F.2d at 632-33.

²²⁵ *United States v. Kokinda*, 497 U.S. 720, at 733-34; also, *ISKCON v. Lee*, 505 U.S. at 684; and *ACORN*, 798 F.2d at 1271, n.13.

²²⁶ See *McIntyre v. Ohio Elections Comm'n*, 115 S. Ct. 1511, 1516 (1995).

²²⁷ *Talley v. California*, 362 U.S. 60 (1960).

This is distinguishable from those cases above that required identification of persons involved in charitable solicitation. While the right to remain anonymous is not absolute, a "compelling state" interest must be shown to overcome that right.²²⁸

Begging and Panhandling:²²⁹ "Begging" v. Soliciting for Organized Charities²³⁰

Practice Aid

The trend for subways and airports is to allow limitations on the direct solicitation of money in congested areas of transportation facilities, if the regulations are content-neutral, do not invest too much discretion in a public official, and are reasonably related to a valid governmental objective. The same rationale may apply to portions of train stations whose physical characteristics create for transit passengers the same congestion and safety hazards.

A ban on leaflet distribution receives rigorous review and a blanket regulation will fail. Even time, place, and manner regulations are suspect, if such limitations are based on litter and annoyance to passengers, since such justifications do not overcome the leafleteer's right to speak. The courts have clearly drawn a line between handing out leaflets, where the passenger/individual can either take or reject the leaflet without significant disturbance to forward movement or efficient operation of the terminal, and a request for money, which requires that a passenger/individual stop; set down any items he/she may be carrying; take funds from a pocket, purse, or wallet and convey them to the solicitor; retrieve his/her personal items; and continue on the way.

While giving alms is "virtuous,"²³¹ begging has been called "a nuisance" and "a menace to the common good."²³² The not-so-quietly raging debate over the question

of whether begging or panhandling constitutes speech or conduct, what protections are deserved under the Constitution, and what restrictions should be allowed in which types of forums, are issues conducive to stress headaches in the stoutest of practitioners or policy decision makers.²³³

The Supreme Court has never held that First Amendment protection for charitable solicitation is exclusively reserved for the organized charity.²³⁴ Some courts have held it may be permissible to enjoin solicitation by an individual for his/her individual benefit when the limitation is supported by a legitimate government objective, such as prohibiting individuals from soliciting in the road and stopping cars to solicit rides or business.²³⁵

Is Begging Speech or Expressive Conduct?

The modern cases on begging began as early as 1980, when the Florida District Court in *C.C.B. v. State of Florida*²³⁶ struck down a longstanding, total ban on street begging that the court concluded restricted speech by saying that "mere annoyance" is not enough to impinge upon First Amendment rights.²³⁷

Although acts other than pure speech receive constitutional protection, a "limitless variety of conduct" is not labeled speech simply because the person engaging in the conduct claims or intends to express an idea. Communication for amusement and entertainment purposes, however, is protected expression.²³⁸

In trying to discuss free speech in countless cases, a precise definition of speech has never been enunciated by the Supreme Court. Expressive conduct is called "the wavering line," as the term is considered to "waver" between speech and conduct.²³⁹ Some examples found by the courts to be expressive conduct are: flag desecration,²⁴⁰ flag display,²⁴¹ sleeping to communicate a message,²⁴² voting,²⁴³ covering the motto on a license

²²⁸ *Id.*; NAACP v. Alabama, 357 U.S. 449 (1958)

²²⁹ "To beg" is to ask for as a gift, or as charity or alms. RANDOM HOUSE DICTIONARY OF THE ENGLISH LANGUAGE 188 (2d ed. 1987). To "panhandle" is to accost passersby on the street and beg from them. *Id.* at 1402. (American, 1895-1900, so called from the resemblance of the extended arm to a panhandle.) On begging generally, see Hershkoff and Cohen, *Begging to Differ. The First Amendment Right to Beg*, 104 HARV L. REV. 896, 908 (1991); Charles Mitchell, *Aggressive Panhandling Legislation and Free Speech Claims: Begging for Trouble*, 39 N.Y.L. SCH. L. REV. 697-717 (1994); Cynthia R. Mabry, *Brother, Can You Spare Some Change? And Your Privacy Too? Avoiding a Fatal Collision Between Public Interest and Beggars' First Amendment Rights*, 28 U.S.F.L. REV. 309-341 (1994); Louis A. Modugno, *Brother, Can You Spare a Dime? The Panhandler's First Amendment Right to Beg*, 5 SETON HALL CONST. L.J. 681, 722 (1995); Anne D. Lederman, *Free Choice and the First Amendment, or Would You Read This if I Held It in Your Face and Refused to Leave?*, 45 CASE W. RES. L. REV. 1287-1323 (1995).

²³⁰ *Upset by Beggars, Washington Is Arresting Them*, N.Y. TIMES, Page A20, Nov. 7, 1990.

²³¹ *Village of Schaumburg*, 444 U.S. 620 (1980)

²³² *Young*, 903 F.2d at 156.

²³³ The national media have waded into the fray on begging. See current event program "20/20," broadcast Jan 26, 1996, on ABC. The program covered the Kansas City, Missouri, ordinance that prohibited begging in any public place, an ordinance that in all likelihood would fail if challenged under current interpretations.

²³⁴ See *Young*, 729 F. Supp. at 351.

²³⁵ *People v. Tosch*, 501 N.E.2d 1253 (Ill. 1986), and *ACORN*, 798 F.2d 1266 (9th Cir. 1986).

²³⁶ 458 S.2d 47 (Fla. 1987).

²³⁷ *Id.* at 50.

²³⁸ *Ghafari v. Municipal Court*, 150 CAL. RPTR. 813 (1978). See also 2 A.L.R. 4th 1230.

²³⁹ See Tribe, § 21-7 pp. 825-832.

²⁴⁰ *Texas v. Johnson*, 491 U.S. at 405-406 (1989); *Spence v. Washington*, 418 U.S. at 409 (1974); *Street v. New York*, 394 U.S. 576, 605 (1969).

²⁴¹ *Stromberg v. California*, 283 U.S. 359, 368 (1931).

²⁴² *Clark v. Community for Creative Non-Violence*, 468 U.S. 288, 293 (1984); *United States v. Abney*, 534 F.2d 983, 985 (D.C. Cir. 1976). The court in *Clark* expanded the O'Brien test by holding that a ban on sleeping in the National Park

plate,²⁴⁴ wearing a jacket with an offensive message,²⁴⁵ wearing black armbands in a school,²⁴⁶ picketing,²⁴⁷ and closing a gas station.²⁴⁸

Whether begging is speech or conduct raises the question of what level of protection courts will provide to the activity: strict scrutiny, or a more relaxed standard. *Young v. New York Transit Authority*²⁴⁹ and *Loper v. New York Police Department*²⁵⁰ illustrate the current "wavering" decisions even in the same circuit court. Although the cases differ on the issue of what is speech and what is conduct, in other aspects each case comports with First Amendment jurisprudence on basic issues and as such are both distinguishable and reconcilable.

The court stated in *Young* that the urban effects of panhandling are experienced in perhaps no greater intensification than by the captive population in the subway systems of large metropolitan cities, most notably, New York. In a precursor decision, the Supreme Court in *Hague v. C.I.O.* found that "an outright ban on the use of the [public] forum for expressive purposes...can seldom, if ever, be justified..."²⁵¹ But the Second Circuit in *Young* distinguished the *Hague* principle and applied the *O'Brien* four-part conduct test to begging, upholding a total ban on solicitation and panhandling within the crowded and narrow subway terminals of the New York subway system.²⁵² On behalf of the homeless, the District Court observed that (1) "[w]henver a homeless and needy person is extending his hand, he is communicating"; (2) begging and panhandling on the subway sometimes occasion questions from, and conversations with, passengers (in other words, speech); and (3) there is no meaningful distinction between begging and other types of charitable solicitation and that full constitutional protection should therefore be afforded to begging.

Plaintiffs were homeless people who relied upon panhandling and begging for their survival. Defendants were the Metropolitan Transportation Authority of New York City, Metro-North Commuter Railroad, New York City Transit Authority, Long Island Railroad, Port

was permissible if it was narrowly tailored to meet a significant governmental interest. The ban on sleeping did not bar alternate means of communicating the plight of the homeless

²⁴³ *Clarke v. United States*, 886 F.2d 404, 412 (D.C. Cir. 1989).

²⁴⁴ *Wooley v. Maynard*, 430 U.S. 705, 714-15 (1977).

²⁴⁵ *Cohen v. California*, 403 U.S. 15, 18 (1971).

²⁴⁶ *Tinker v. Des Moines Indep. Community School Dist.*, 393 U.S. 503, 505 (1969).

²⁴⁷ *Brown v. Louisiana*, 383 U.S. 131, 141-142 (1966).

²⁴⁸ *Crown Central Petroleum Corp. v. Waldman*, 486 F. Supp. 759, 767-68 (M.D. Pa. 1980).

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

²⁵⁰ 802 F. Supp. 1029 (S.D.N.Y. 1992) *cf.* *People v. Schrader*, 162 Misc.2d 789, 619 N.Y.S.2d 429 (1994).

²⁵¹ 307 U.S. 496 (1939).

²⁵² 903 F.2d 146 (1990).

Authority of New York and New Jersey, and New York Attorney General.²⁵³

The New York regulation²⁵⁴ ("NYCRR") prohibited any person, unless "duly authorized" by the transit authority, from soliciting "upon any facility or conveyance...alms, subscription or contribution for any purpose," and included an additional provision that authorized certain nontransit uses, including, "public speaking; distribution of written materials; solicitation for charitable, religious or political causes; and artistic performances, including the acceptance of donations."²⁵⁵

The "authorized" nontransit uses were prohibited in all areas. Nontransit uses were also prohibited within 25 feet of a token booth or within 50 feet of the marked entrance to a transit authority office or tower. The exceptions to the last provision were leafleting or distributing literature, campaigning, public speaking, or similar activities "with no sound production device and no physical obstruction..."²⁵⁶

The Second Circuit in *Young* found panhandling to be conduct rather than speech, and applied the less stringent conduct standard of the four-part *O'Brien* test. In reversing the district court, the appeals court expressed "grave doubt as to whether begging and panhandling in the subway are sufficiently imbued with a communicative character to justify constitutional protection."²⁵⁷ The *Young* court held that (1) the regulations at issue were justified by government interests, (2) the regulations were content-neutral and unrelated to the suppression of free expression, and therefore (3) the appropriate level of scrutiny was the less stringent four-part *O'Brien* conduct test,²⁵⁸ rather than the strict scrutiny analysis accorded to speech.²⁵⁹

²⁵³ *Young*, 729 F.3d 341 (S.D.N.Y. 1990).

²⁵⁴ 21 State of New York Codes, Rules and Regulations 1050.6(b) (1976).

²⁵⁵ 21 NYCRR 1050.6b & 6c at (1)-(7).

²⁵⁶ *See* the District Court opinion, *Young v. New York Transit Auth.*, 729 F. Supp. at 344.

²⁵⁷ 903 F.2d at 153.

²⁵⁸ *United States v. O'Brien*, 391 U.S. 367 (1968). Where conduct does not meet the two prongs of the Spence test (a particularized message with great likelihood that the message will be understood by viewers), the conduct is not deserving of highest constitutional protection and will be analyzed under a relaxed "reasonableness" standard. In spite of its definitive comments that panhandling was only for the purpose of obtaining money, the Second Circuit did not explicitly relegate begging to this relaxed standard of scrutiny. Tribe is aggressive in his belief that there is no distinction between conduct and expression. Tribe at note 16, p. 827. In his treatise, Professor Tribe goes so far as to conclude that the Supreme Court has created a legal fiction to justify any distinction between speech and conduct. *Id.*

²⁵⁹ 903 F.2d at 157; "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." Yet where the forum is not traditionally public, and is not one that the government has dedicated to First Amendment use, the lower "reasonableness" standard

On the issue of equating an extended hand with communication, the appeals court found that beggars and panhandlers "beg to collect money,"²⁶⁰ that the object of begging and panhandling is the transfer of money,²⁶¹ that speech "is not of the essence of the conduct" or "inherent to the act,"²⁶² and that "[c]ommon sense tells us that begging is much more 'conduct' than it is 'speech.'"²⁶³ This last policy statement by the court has received considerable criticism.²⁶⁴

As one reviewer stated, the Supreme Court in *O'Brien* observed that conduct may be regulated, even if expressive. But the Court did not state that begging or panhandling were expressive conduct. If a court finds that the conduct contains little or no element of expression worthy of First Amendment protection, the court can uphold a regulation with minimal analysis, and even the "reasonableness" (rationality basis) test may be employed, where no fundamental or First Amendment right is involved.²⁶⁵

In reviewing whether begging sometimes occasions speech between the parties, the court found that First Amendment protection of speech does not protect "every act that may conceivably occasion engagement in conversation."²⁶⁶

The lower court agreed with the plaintiffs that begging by individuals should be equated with charitable solicitation by organizations, but the appeals court strongly disagreed, citing various policy rationales for allowing organizational charity while prohibiting individual solicitation.²⁶⁷ The appeals court went so far as to say that while a historic Western tradition holds that giving alms is virtuous²⁶⁸ and organized charities serve community interests by enhancing communication and

disseminating ideas,²⁶⁹ "the conduct of begging and panhandling in the subway amounts to nothing less than a menace to the common good."²⁷⁰

The Supreme Court in *U.S. v. Kokinda*²⁷¹ agreed and observed that past experience with expressive activity on postal property allowed that the postal department's "judgment that in-person solicitation should be treated differently from alternative forms of solicitation and expression should not be rejected."²⁷²

These distinctions highlight the continued state of disagreement among the courts as to whether panhandling and charitable solicitation should be treated the same. As of the date of publication of this article, the definitive case continues to be the decision in *Young*, finding that begging is conduct. As will be discussed below, at least in the Second Circuit, the *Loper* case must also be considered. If the *Loper* rationale prevails, practitioners should consider that any statute regulating panhandling will probably be analyzed under the time, place, and manner restrictions on speech, rather than the more lenient four-part *O'Brien* conduct test.

In keeping with *Spence v. Washington*,²⁷³ the *Young* court found that most people probably would not understand what particularized message each panhandler might be proffering.²⁷⁴ The court reasoned that "[i]n the subway, it is the conduct of begging and panhandling, totally independent of any particularized message, that passengers experience as threatening, harassing and intimidating."²⁷⁵ As the Court said in *Kokinda*, "Confrontation by a person asking for money disrupts passage and is more intrusive and intimidating than an encounter with a person giving out information."²⁷⁶

In analyzing charitable solicitation v. panhandling, the *Young* court disapproved of the district court's reliance on *Schaumburg*, stating that "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."²⁷⁷ The court concluded that such nexus and interests were lacking in begging and panhandling cases. The *Young* appeals court found that solicitations by beggars and charitable organizations were distinguishable in that the

is still used, even with speech. In *Kokinda*, the Supreme Court found that a regulation prohibiting solicitation on postal premises only had to be reasonable and content-neutral. 497 US at 722

²⁶⁰ *Id.* at 153

²⁶¹ *Id.* at 154.

²⁶² *Id.*

²⁶³ *Id.* at 153.

²⁶⁴ Note *Young v. New York City Transit Authority: Silencing the Beggars in the Subways*, 12 PACE L REV. 359 (1992); Irah H. Donner, *Young v. New York City Transit Authority: The First Amendment Protects Flag Burners, Nazis, Professional Solicitors and Commercial Advertisers. Did Our Framers Forget About The Poor?* TRANSP. PRAC. J. 152; Charles Feeney Knapp, *Statutory Restriction of Panhandling in Light of Young v. New York City Transit: Are States Begging Out of First Amendment Proscriptions?* 76 IOWA L REV. 405 (1991); Stephanie M. Kaufman, *The Speech/Conduct Distinction and First Amendment Protection of Begging in Subways* 79 GEO. L J. 1803 (1991)

²⁶⁵ See Stephanie M. Kaufman, *The Speech/Conduct Distinction and First Amendment Protection of Begging in Subways*, 79 GEO L J. No 6, 1803 (1991)

²⁶⁶ 903 F 2d at 154

²⁶⁷ *Id.* at 155-157.

²⁶⁸ *Id.* at 156

²⁶⁹ *Id.*

²⁷⁰ *Id.*, quoting City Council of the City of Los Angeles v. Taxpayers for Vincent, 466 U.S. 789 (1984).

²⁷¹ 497 U.S. 720 (1990).

²⁷² *Id.*

²⁷³ 418 U.S. 405 (1974).

²⁷⁴ The court cited such possibilities as "Government benefits are inadequate," "I am homeless," or "There is a living to be made in panhandling." *Young* at 153.

²⁷⁵ 903 F 2d at 154.

²⁷⁶ 497 U.S. at 721.

²⁷⁷ 903 F.2d at 155. *Village of Schaumburg v Citizens for a Better Env't*, 444 U.S. 620 (1980).

"ordered" solicitation of charities serve community interests, unlike solicitation by beggars, and that many passengers felt harassed and intimidated by individual beggars.²⁷⁸ The provisions that banned harassing conduct, or conduct that menaces, impedes traffic, or otherwise causes harm were left in force.

The authors have come across no specifically enunciated statistics that individuals feel "harassment and intimidation" from organized charitable solicitors as they do from individual panhandlers.

One commentator has noted that "[t]he presence of a large group in an airport terminal is much more disruptive than that of scattered individuals and may pose other serious problems," which the author noted may²⁷⁹ rightfully subject the group to more strict regulation. In assessing the disruption in transit terminals, the regulator may review whether individual and unorganized panhandlers could potentially pose a greater safety and security threat than more recognizable, organized groups. However, according to these instructive cases, restrictions based upon these distinctions must be based upon demonstrable facts rather than assumptions.

The *Young* court went on to say that the *O'Brien* test is similar to "the standard applied to time, place, or manner restrictions" in cases involving speech.²⁸⁰ Whether or not this is true, *O'Brien* held that 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.²⁸¹

The Second Circuit came full circle in its analysis of begging in *Loper v. New York Police Dept.*²⁸² when it declared "[i]t cannot be gainsaid that begging implicates expressive conduct or communicative activity."²⁸³ This contradicts the Second Circuit majority's finding in *Young* that begging is primarily a request for money.²⁸⁴ The *Loper* court found that begging involves "the individual's appeal for welfare and sustenance."²⁸⁵

In *Loper*, the plaintiff class were those who were homeless and who begged on streets and in parks of New York City. New York Penal Law Section 240.35, subd. 1, provided that a person was guilty of loitering if he loitered, remained, or wandered about in a public place with a purpose of begging. The district court found that the statute imposed a blanket ban on conduct that had an expressive component.²⁸⁶

Statistics on the demographics of the homeless population are given by W. Tucker in *The Excluded Americans: Homelessness and Housing Policies* 34 (1990), where he comments that the homeless population consists of three basic groups: mental patients, substance abusers, and economically disadvantaged persons. If this categorization holds true, one may rightfully ponder the question of whether panhandlers in the first two homeless categories have the capacity to form an intent to communicate, or whether such "message communication" is projected onto them by others.

Does the First Amendment force certain conduct into an expressive category? Put another way, is First Amendment protection unrestrainedly applied to certain conduct because the court or public views the conduct as something which in some possible circumstance could be communication, where in fact the beggar may have no intention whatsoever to communicate, and may simply wish to obtain money? Does the fact that the viewer sees, intuits, or infers meaning change the nature of what the beggar thinks he or she is doing or the protection that should be afforded?

Even if such questions could be conclusively answered, it still begs at least part of the question as to whether responsibility is appropriately placed in the courts for resolution of the problem of growing numbers of homeless in an industrialized nation with a relatively prosperous general population. Taking the argument one step further, if the people may petition their government to redress grievances, may not the people petition to redress the homeless problem? If subsequent tax measures to help the homeless are turned down by the people, can the people legitimately then ask an already overburdened government to foot the bill or make the choices?

According to one writer, statistics show that 63 percent of those surveyed are willing to attribute the plight of the homeless to circumstances beyond their control. Charles Feeney Knapp, *Statutory Restriction of Panhandling in Light of Young v New York City Transit: Are States Begging Out of First Amendment Proscriptions?* 76 IOWA L. REV. 405 at 406 (1991)

Observations by some writers offer another rationale to distinguish between charitable organizations organized to help categories of needy, with the resources and personnel to do so, and the individual solicitor whose only interest or concern may be his individual sustenance from day to day. If everyone is entitled to "three squares a day," as suggested by some, who is better able to bring that to fruition? An organization or a wandering panhandler? Tucker, *The Excluded Americans*, at 50. Yet if the individual panhandler is forced to seek help through organizations, does that restrict his movement and speech rights? Or are those rights subjugated in the particular circumstances to the rights of *all* people not to have their government bankrupted through entitlements to only one sector of the population?

²⁸⁵ *Loper*, 999 F.2d at 704

²⁸⁶ See generally, *Comment, Loitering Permitted: A Valid Weapon is Taken from the Arsenal that Combats Crime in Transportation Facilities*, 55 BROOK. L. REV. 1033 (1989). The

²⁷⁸ 903 F.2d at 154-157.

²⁷⁹ Carlson, *supra*, n 84, at 1113

²⁸⁰ 903 F.2d at 157; *FW/PSB, Inc. v. City of Dallas* (Paris Adult Bookstores II), 493 U.S. 215 (1990) (White, J., joined by Rehnquist, C.J., concurring).

²⁸¹ *United States v. O'Brien*, 391 U.S. 367, 377 (1968).

²⁸² 802 F. Supp. 1029 (S.D. N.Y. 1992), *aff'd*, 999 F.2d 699 (2d Cir 1993)

²⁸³ 999 F.2d at 704.

²⁸⁴ 903 F.2d at 153 In the present legal climate of confusing and conflicting standards and application on constitutional issues relating to panhandling, it is expected that some courts and commentators--educated and legally knowledgeable beings--may reach the conclusion that begging could conceivably and/or legally constitute a "message" or "communication."

In *Young*, the Second Circuit stated that "[a] blanket prohibition of a particular type of speech in a public forum may sometimes be a reasonable time, place or manner restriction."²⁸⁷ The court (applying the *O'Brien* conduct standard) concluded that *all* begging could be prohibited within the limited and congested confines of the New York subway system for safety reasons. The court reasoned that even if beggars were precluded from the subway system, the rest of New York City public fora, as well as other areas of the transit terminal, remained as alternative avenues of communication.

The *Loper* court viewed a city-wide prohibition as an impermissible burden placed on panhandling because there was nowhere in the city that panhandlers could go, including traditional public forums. Thus, in *Loper* under either the time, place, or manner standard, or the *O'Brien* test, a blanket ban throughout the city could not withstand judicial scrutiny.

A related issue was reviewed in *Jews for Jesus II*.²⁸⁸ A ban on noncommercial expressive activity such as solicitation of signatures, leafleting, handshaking, greeting, and public address in designated areas of subway stations was found unreasonable. But the court did decide that prior authorization for groups and reasonable time, place, and manner restrictions on those activities were permissible.²⁸⁹

In *Doucette v. City of Santa Monica*,²⁹⁰ the City of Santa Monica, California, attempted to deal with an overabundance of panhandlers by adopting an ordinance limiting the places and manner in which begging could take place.

The District Court in a probing analysis presented in detail many of the primary concerns of government and transit authorities across the nation with regard to solicitation and panhandling. The case presents one of the most recent reviews of a comprehensive ordinance regulating panhandling.

The *Doucette* plaintiff solicited donations from individuals to fund his newspaper, *Hard Times*, and to "pay for the necessities of life."²⁹¹ The City argued that, because Mr. Doucette was selling a newspaper, he was a commercial enterprise and technically outside the bounds of the solicitation ordinance. However, the court

noted that in all due respect to Mr. Doucette's newspaper, "the Court believes that those who purchase *Hard Times* understand that the purchase is in substance a gift."²⁹²

The stated government interest of maintaining an orderly flow of pedestrians or traffic (a consistently valid government interest) was found insufficient to justify the restrictions as the Santa Monica regulation did not target "areas where traffic flow is of significant importance."²⁹³

In situations analogous to transportation facilities, the *Doucette* court reasoned that the First Amendment allows government to prohibit offensive speech as intrusive when a "captive" audience cannot avoid the objectionable speech.²⁹⁴ The *Doucette* court found that [t]he "interest in protecting citizens from the harassment and duress of solicitation is significant when restricted to places where citizens cannot easily escape."²⁹⁵ This is the rationale recognized in the *Young* decision, where a total ban on solicitation in subway ingress/egress corridors and on subway platforms was upheld.

The *Doucette* court found that a pedestrian was less able to move away with ease in the following areas: Outside eating areas, ticket lines, bus stops, parking garages, and areas within 50 feet of automated teller machines, where "citizens may justifiably feel anxious about being asked for money."²⁹⁶

The court did not specifically apply its ruling to public transportation vehicles or facilities as areas in which direct solicitation of money was prohibited, even though they were included in the Santa Monica ordinance. However, the court stated in no uncertain terms that regulations can protect citizens from harassment and intimidation because, "face-to-face solicitation presents risks of duress that are an appropriate target of regulation."²⁹⁷

The three remaining "manner" restrictions in *Doucette* were prohibitions on (1) coming closer than 3 feet of a person solicited, (2) blocking or impeding a person's passage, or (3) following a person after he declines a solicitation.²⁹⁸ These were upheld by the court with a brief analysis that the conduct being prohibited was basically physical but "could be viewed as expressive conduct" and that it therefore implicated First Amendment concerns as to whether the regulations were valid time, place, or manner regulations.²⁹⁹

anti-loitering statute in *State ex rel. Williams v. City Court*, 520 P.2d 1166, 1171 (Az. 1974) is nearly identical to 240.34(1) held unconstitutional in *Young*. In *C.C.B. v State*, 458 So 2d 47, 50 (Fla Dist Ct App 1984), the court struck down an antibegging statute but indicated in dicta that such an ordinance would be unobjectionable if it contained only narrowly tailored time, place, or manner restrictions.

²⁸⁷ *Young*, 903 F.2d at 160, quoting *New York City Unemployed & Welfare Council v. Brezenoff*, 742 F.2d 718, 721 (2nd Cir. 1984)

²⁸⁸ *Jews for Jesus, Inc. v. Massachusetts Bay Transp. Auth.*, 783 F. Supp. 1500 (D. Mass. 1991).

²⁸⁹ *Id.*

²⁹⁰ 955 F. Supp. 1192 (C.D. Ca. 1997).

²⁹¹ *Id.* at 1200.

²⁹² *Id.*

²⁹³ *Id.* at 1206

²⁹⁴ *Frisby v. Schultz*, 487 U.S. 474 (1988).

²⁹⁵ 955 F Supp at 1206

²⁹⁶ *Id.*

²⁹⁷ *Id.* citing to *ISKCON v. Lee*, 505 U.S. at 684.

²⁹⁸ 955 F Supp. at 1209; SMMC § 4.54 020 (c) (1) (2) & (3).

²⁹⁹ The reference to time, place, and manner scrutiny informs readers that the court chose not to scrutinize the regulations under the *O'Brien* four-part conduct test.

Doucette reaffirmed the view that "[r]egulations of solicitation have repeatedly been found content-neutral."³⁰⁰ The court noted this was so even if the regulation involved solicitation but exempted other types of speech.³⁰¹ The court observed that "the inherently disruptive nature of solicitation itself"³⁰² provided a basis for protective regulations. Whether a regulation is content-neutral is determined by asking if the regulation applies evenhandedly "to every organization or individual, regardless of viewpoint, which would desire to solicit contributions."³⁰³ A difference may not be drawn, however, between commercial and noncommercial speech if both are equally responsible for the problems that the regulation seeks to remedy,³⁰⁴ or the regulation may lose its content-neutrality,³⁰⁵ unless there is a neutral justification for differential treatment.³⁰⁶

Using the rationale as stated above, the *Doucette* court found that no evidence had been presented showing that the City of Santa Monica (1) disagreed with the message advanced by panhandlers or other inperson solicitors of donations, (2) had attempted to advance or restrict any viewpoint, or (3) discriminated on the basis of content. The court therefore found the challenged restrictions to be content-neutral.³⁰⁷

The *Doucette* court applied the time, place, and manner analysis for regulations of speech in critiquing the ordinances in question.³⁰⁸ The court categorized

"solicitation for money" as speech, analyzed the forums in question, and concluded that "[t]he challenged provisions appear to restrict speech both in public and nonpublic fora."³⁰⁹ The court specifically indicated that "public parking lots or structures are not traditional places of expressive activity, and plaintiffs have not suggested that they have been intentionally opened for such activity,"³¹⁰ and found that the same reasoning "may apply to certain public transportation vehicles and facilities."³¹¹

The court commented that the other locations described above "may be public fora."³¹² The parties had submitted no evidence as to the "character" of such places, though some were undeniably located on sidewalks, which are generally considered to be traditional public fora.³¹³

The *Doucette* court found that the failure to characterize the forum "is not essential to the Court's analysis,

she is seeking donations without addressing his or her solicitation to any specific person, other than in response to an inquiry by that person

(b) "Donation" means a gift of money or other item of value and shall also include the purchase of an item for an amount far exceeding its value under circumstances where a reasonable person would understand that the purchase is in substance a gift.

(c) "Abusive solicitation" means to do one or more of the following while engaging in solicitation or immediately thereafter:

(1) Coming closer than three feet to the person solicited unless and until the person solicited indicates that he or she wishes to make a donation;

(2) Blocking or impeding the passage of the person solicited;

(3) Following the person solicited by proceeding behind, ahead or alongside of him or her after the person solicited declines to make a donation;

(4) Threatening the person solicited with physical harm by word or gesture;

(5) Abusing the person solicited with words which are offensive and inherently likely to provoke an immediate violent reaction;

(6) Touching the solicited person without the solicited person's consent; or

(7) Engaging in solicitation activity in any of the prohibited places specified in Section 4 54.030 (Added by Ord. No 1768CCS § 5 (part), adopted 9/13/94).

4 54 030 Locations where solicitation is prohibited Solicitation shall be prohibited when the person solicited is in any of the following locations:

(a) Bus stops;

(b) Public transportation vehicles or facilities;

(c) A vehicle on public streets or alleyways;

(d) Public parking lots or structures;

(e) Outdoor dining areas of restaurants or other dining establishments serving food for immediate consumption;

(f) Within fifty feet of an automated teller machine; or A queue of five or more persons waiting to gain admission to a place or vehicle, or waiting to purchase an item or admission ticket (Added by Ord. No 1768CCS § 5 (part), adopted 9/13/94)

³⁰⁹ *Id.* at 1202.

³¹⁰ *Id.* at 1202-1203.

³¹¹ *Id.*

³¹² *Id.*

³¹³ *Id.* at 1203

³⁰⁰ 955 F. Supp. at 1204.

³⁰¹ *Id.*, citing to *United States v Kokinda*, 497 U.S. 720, 736 (1990); *Heffron*, 452 U.S. at 649; *ACORN*, 798 F.2d at 1267; *ISKCON of Potomac Inc. v. Kennedy*, 61 F.3d 949, 95458 (D.C. Cir 1995).

³⁰² *Id.*

³⁰³ *Id.* quoting from *ACORN*, 798 F.2d at 1267.

³⁰⁴ *Metromedia Inc. v. San Diego*, 453 U.S. 490, 513 (1981) (plurality opinion).

³⁰⁵ *City of Cincinnati v. Discovery Network, Inc.*, 507 U.S. 410 (1993).

³⁰⁶ *Id.*

³⁰⁷ 955 F Supp 1205.

³⁰⁸ *Id.* at 1201. The ordinance in question reads as follows:

Chapter 4 54

Prohibition Against Abusive Solicitation

Sections:

4 54 010 Purpose

4.54 020 Definitions

4 54.030 Locations where solicitation is prohibited

4 54.040 Penalties.

4 54.020 Purpose

It is the intent of this Chapter to impose reasonable place and manner limitations on solicitation, as defined herein, in order to protect the safety of the general public against abusive solicitation while respecting the constitutional right of free speech (Added by Ord. No 1768CCS § 5 (part), adopted 9/13/94)

4 54 020 Definitions.

The following words or phrases as used in this Chapter shall have the following meanings:

(a) "Solicitation" means any request made in person seeking an immediate donation of money or other item of value. A person shall not be deemed to be in the act of solicitation when he or she passively displays a sign or gives any other indication that he or

because the provisions pass muster even under the stricter standards applicable to public fora.³¹⁴

A California Appeals Court in *Ulmer v. Municipal Court for Oakland-Piedmont Judicial District* analyzed California Penal Code Section 647(c) That statute makes it a misdemeanor constituting "disorderly conduct" to accost other persons "in any public place or in any place open to the public for the purpose of begging or soliciting alms."³¹⁵ The court stated that "[b]egging and soliciting for alms do not necessarily involve the communication of information or opinion; therefore, approaching individuals for that purpose is not protected by the First Amendment."³¹⁶

As can be seen from the various interpretations, begging is not always equated with speech, but is more frequently analyzed as expressive conduct under the less stringent *O'Brien* four-part test.

Conclusions Regarding Panhandling and Solicitation

Young, which concerned statutes that forbade all panhandling within a congested subway system, was upheld by the Second Circuit. The significant factors were the captive audience and congestion inside the corridors and on the platforms, and that even a total ban on panhandling in the subway areas undeniably left open ample alternatives for solicitation in adjacent terminal areas and throughout the rest of the city.

Loper addressed statutes that forbade all panhandling within the entire city of New York, which were struck down by the Second Circuit. The significant factors in *Loper* were that the regulations unabridgedly applied the prohibition against panhandling to sidewalks, a historically and traditionally acknowledged public forum, and that precluding all panhandling in the city left no forum for the prohibited activity.

In a constricted subway or terminal area and areas of ingress and egress where panhandling or solicitation would hamper pedestrian access and movement, a total ban on all soliciting may withstand challenge in those limited areas. Other facilities that demonstrate the same environment of limited freedom of movement and "captive audience" may succeed in receiving the same standard of review by the courts.

It is difficult to predict whether the *Loper* characterization of begging and panhandling as speech would be reversed or modified if brought directly before the U.S. Supreme Court. The *Young* court flirts with the notion that begging and panhandling might even represent conduct that is beyond the scope of constitutional protection, although the opinion utilizes the *O'Brien* fourpart test for expression that is more like conduct than

³¹⁴ *Id.*

³¹⁵ 127 CAL. RPTR. 445; 55 Cal. App. 3d at 265 (1976)

³¹⁶ *Id.* The court also commented that the statute applied to those who approach others and not observers sitting or standing nearby.

speech.³¹⁷ In *Lee*, the highest Court focused heavily on the nature of a particular facility and found that the airports in question were public fora. The floating issue remains whether begging and panhandling will ever be accorded full status as speech.

Based on the decisions in *Lee*, *Doucette*, *ACORN* and *Kokinda*, a strong argument can be made to place limitations on panhandling and charitable solicitation. Even if it is not completely clear that begging and panhandling constitute expressive activity, out of an abundance of caution, it should be assumed that regulations that limit the activities of panhandlers, whether on their face or as applied, may be subject to a heightened scrutiny standard. A wide assortment of validated government interests are available to practitioners and regulators in structuring standards for transit terminals and facilities that will withstand constitutional challenge. If regulations are narrowly tailored to achieve those governmental interests, they can be enforced.

However, continuing analysis shows the distinction between charitable solicitation and panhandling may be disappearing, in spite of numerous rational arguments to the contrary.

Street Musicians/Dancing³¹⁸

The high court has said that music is a form of expression and communication,³¹⁹ and an appeals court included a string band performance in that category.³²⁰ Even if the music has no political message and no words, it is still a form of protected expression.³²¹ Restrictions on the use of "sound amplifiers" were condoned by the district court in *Turley v. New York Police Dept.*³²² In *Turley*, the court upheld a 29-dollars per day fee and then stated that the musician had no right to search out a receptive audience by traveling around the city and setting up his equipment where he liked. The court opined that while the music might be protected, the amplifier was not.

Conversely, social or recreational dancing is not entitled to First Amendment protection where no political or ideological expression is involved and no message is intended.³²³

³¹⁷ See *Young*, 903 F.2d at 156-157, for historical discussion of begging.

³¹⁸ See generally Marci A. Hamilton, *Art Speech*, 49 VANDERBILT L. REV. 71, 72-122 (1996); Adine Y. Kernberg, *The Right to Bear Art: The Impact of Municipal Anti-Peddling Ordinances on the First Amendment Right of Artists*, 18 COLUM. J.L. & ARTS, 155-190 (1993).

³¹⁹ *Ward v. Rock Against Racism*, 491 U.S. 781 (1989); *McFarlin/Taylor/Williams v. District of Columbia* 94-CO-1068/-1069/-1461, 1996 WL 428839

³²⁰ *Tacyne v. Philadelphia*, 687 F.2d 793 (3d Cir. 1982) *cert. denied* 459 U.S. 1172, 103 S. Ct 819 (1983)

³²¹ *Cinevision Corp v. Burbank*, 745 F.2d 560 (9th Cir. 1984).

³²² 1996 WL 93726 (1996).

³²³ *Jarman v. Williams*, 753 F.2d 76 (8th Cir. 1985).

Restrictions on musical performances therefore would need to meet the same reasonableness test as previously discussed. A limitation on amplification, location, and numbers of musicians all would be considered reasonable if based upon a legitimate governmental interest that did not attempt to regulate the type or content of the music.³²⁴

Loitering and Assembly

The modern cases have dramatically changed the face of laws relating to loitering or vagrancy. As late as 1956, all American jurisdictions punished the offense of vagrancy. And as late as 1991, 25 states had some type of anti-begging legislation, including 13 states that allow municipalities to regulate begging and 12 states that prohibit begging outright.³²⁵ Unless provisions are

narrowly tailored and are supported by specific findings, they may run afoul of the modern trend.

Whether there is a right to occupy a public place was discussed in *Loper*, above. The Court concluded that prohibiting loitering in public places for the purpose of begging or panhandling violates the First Amendment as (1) no compelling state interest is served by excluding those who beg in a peaceful manner, and (2) a total ban on loitering for the purpose of begging could not be considered either narrowly tailored or content-neutral.³²⁶

In *People v. Bright*,³²⁷ a state court discussed whether a prohibition on loitering was permissible and found that such statutes can be upheld only when they either prohibit loitering for a specific illegal purpose or in a specific place of restricted access,³²⁸ commenting that no other provision of New York law specifically prohibited begging.

In order for a loitering statute to be upheld, it should prohibit loitering that is associated with some illegal act or in an area not generally open to the public.

The 1996 case of *Cordova v. City of Reno*³²⁹ illustrates statutory language that was found repugnant to prohibitions against prior restraints. The *Reno* case raised a number of issues relating to free assembly and the right of association that have been discussed in other legal commentaries.³³⁰

The *Reno* statute prohibited conduct having a tendency to annoy, insult, or offensively disturb any persons passing or being in a public place and congregating in groups of three or more. The "annoy, insult or disturb offensively" language was found to be impermissibly vague, as a person of ordinary intelligence would not know in advance if his/her conduct was so

³²⁴ Ward v Rock Against Racism, 491 U.S 781 (1989).

³²⁵ ALA CODE 13-A-11-9 (a) (1) (1982) (persons who beg in public place guilty of loitering); ARIZ. REV. STAT. ANN. 13-2905 (A) (3) (Supp. 1990) (persons who beg in public place guilty of loitering); ARK. STAT. ANN. 14-54-1408 (1987) (city council may proscribe begging); COLO. REV. STAT. 18-9-112 (2) (a) (1986) (same); DEL. CODE ANN. Tit 11, 1321 (4) (1990) (same); Fla, see Jacksonville Municipal Ordinance 330.105 (prohibiting "anyone to beg or solicit alms in the streets or public places of the city or exhibit oneself for the purpose of begging or obtaining alms " An organized charity was permitted to register with consumer affairs. Statute found unconstitutional in C.C.B. v. State, 458 So. 2d 47 (Fla Dist Ct. App 1984); ILL. REV. STAT. ch 24, para. 11-5-4 (1989) (municipal authorities may ban begging); IND. CODE 35-1-110-2 (1978) (vagrancy and begging are illegal activities); IOWA CODE 60 lb.6 (1978) (begging an illegal activity, repealed 1986; KAN. STAT. ANN 21-4108 (1988) (prohibiting vagrancy, including "[d]eriving support in whole or in part from begging"); LA. REV. STAT ANN 14-107(3) (West 1986) ("able-bodied persons who beg" guilty of vagrancy); ME. REV. STAT. ANN Tit. 17 3751 (1983); MASS GEN. L. 272 63-64 (1990) (prohibiting beggars from soliciting alms in towns in which they have no residence); MICH. COMP LAWS 750.167 (1) (h) (1990) (begging in a public place constitutes disorderly conduct); MINN. STAT. 609 725.(4) (Supp. 1990) ("person who derives support in whole or in part from begging" is guilty of vagrancy); MISS. CODE ANN 97-3537 (1972) (able-bodied who beg are vagrants); MONT. CODE ANN. 7-32-4304 (1989) (municipal authorities may ban vagrancy); NEB. REV. STAT. 15-257 (1987) (metropolitan cities may proscribe begging); N.C. GEN. STAT 160A-179 (1982) (city council); N.H. REV. STAT. ANN. 47-17 (XIII) (Supp. 1990) (city council may prohibit begging); N.J. STAT ANN. 40-48-1 (7) (West Supp. 1989) (municipal authorities); N.D. CENT. CODE 40-05-01 (43) (Supp. 1989) (municipal authorities); OHIO REV. ANN. CODE ANN. 715-55B (Anderson Supp 1989) (municipal authorities); UTAH CODE ANN. 10-8-51 (Supp. 1990) (city); VT. STAT. ANN. tit. 13, 3901 (1989) (person who begs "without visible means of" other support is guilty of vagrancy); WASH. REV. CODE 35-22-280 (34) (1987) (first class cities may ban vagrancy); WEST VA. CODE 8-21-10 (1990) (Parks and Recreation Board may proscribe begging in parks); WISC. STAT ANN. 947.02(4) (West 1988) (person who gains partial support from begging is guilty of a misdemeanor); WYO. STAT 15-1-103 (a) (xvii) (Supp 1990) (municipal authorities may ban vagrancy).

Other cities regulating the subject matter include Atlanta,

Chicago, Miami, Phoenix, Seattle, Minneapolis, and Tulsa. See 76 IOWA L. REV. at 408 (1991).

For other cases discussing statutes regulating begging, see State ex rel. Williams v. Cty. Ct of Tucson, 520 P.2d 1166, 1171 (1974); State v Hundley, 142 S.E. 330, 332 (1978) (begging prohibition upheld as no discretionary review by officials issuing permits)

³²⁶ Loper, 999 F.2d 699. But see Kokinda, 497 U.S 720, 732-34, where the court said even peaceful solicitation can be harassing or intimidating.

³²⁷ 520 N.E.2d 1355 (N.Y. 1988).

³²⁸ See *People v Johnson*, 161 N.E.2d 9, 6 N.Y. 2d 549, 190 N.Y.S.2d 694 (1959) (upholding provision prohibiting loitering in school buildings, where access was restricted); *People v. Merolla*, 172 N.E. 2d 541, 9 N.Y.2d 62, 211 N.Y.S.2d 155 (1961) (upholding as constitutional a statute prohibiting loitering for other than lawful purposes on waterfront, which serviced only commercial needs of shippers); *People v Smith*, 378 N.E.2d 613, 44 N.Y.2d 613, 407 NY S.2d 462 (1978); *People v. Pagnotta*, 253 N.E.2d 202, 25 N.Y. 2d 333, 305 N.Y.S. 2d 484 (1969) (upholding statute prohibiting loitering for purpose of committing crime of possessing or using narcotic drugs).

³²⁹ CV-N-95-0480-ECR, 1996 WL 125617 (1996).

³³⁰ On the right of assembly and association, see 85 L Ed 2d 758

annoying, insulting, or offensive as to be prohibited by the ordinance.

In addition, a prohibition on "a crowd of three or more" impermissibly restrained the rights to travel and to freely assemble and associate.³³¹

Buffer Zones

In some situations, valid regulatory interests may allow creation of a buffer zone. A District of Columbia court held that a regulation of the metropolitan transit authority creating a "buffer zone" of 15 feet from any escalator, stairwell, fare gate, kiosk, bus stop, or fare card machine was a valid time, place, or manner restriction.³³² Other interpretations have found that a 75-yard restriction around the pier during a Navy "Fleet Week" parade prevented demonstrators in boats from conveying their message,³³³ but a 500-foot buffer zone within which demonstrations and displaying of placards were prohibited in front of an embassy was upheld.³³⁴

In one case that reviewed a buffer zone affecting transit operations, the D.C. Circuit held that a statute that stated: "No person may ask, beg, or solicit alms in any public transportation vehicle; or at any bus, train, or subway station or stop" was overly broad. However, the court held that certain activities can be prohibited within 15 feet of an entranceway since the government has explicitly prohibited expressive activity within that limited area. Doing so alleviates congestion at an escalator's entrance or exit that could cause injury.

The [15-foot limitation] also serves a significant governmental interest by ensuring an orderly flow of pedestrian traffic on and off the escalator and, in turn, avoiding congestion at the escalator's entrance or exit which could cause injury (Cite omitted). Where the escalators are a necessary conduit for Metro riders, where they are often congested, and where one mishap could have cruel consequences, the state interest in maintaining orderly movement is surely significant.³³⁵

In 1997, the U.S. Supreme Court reviewed the question of a "floating" buffer zone and a 15-foot buffer zone around an abortion clinic. The floating buffer zone around persons on the sidewalk was too broad, but the buffer zone around the clinic itself was upheld.³³⁶

³³¹ *Cordova v. City of Reno*, No. CV-N-95-0480 ECR 1996 WL 125617 (1996). See also *Coates v. City of Cincinnati*, 402 U.S. 611 (1971).

³³² *O'Brien v. United States*, 444 A.2d 946 (D.C. App. 1982).

³³³ *Bay Area Peace Navy v. United States*, 914 F.2d 1224 (9th Cir. 1990).

³³⁴ *Finzer v. Barry*, 798 F.2d 1450 (D.C. Cir. 1986); *Boos v. Barry*, 479 U.S. 1083 (1987), *aff'd/rev'd in part*, 485 U.S. 312. The *Finzer* discussion, including a 23-page dissent, analyzed a broad swath of U.S. First Amendment law as well as the law of nations and treaty responsibilities.

³³⁵ *O'Brien v. United States*, 444 A.2d 946 at 949 (D.C. App. 1982).

³³⁶ *Schenck v. Pro-Choice Network*, 117 S. Ct. 855 (1997).

MEDIA ACCESS

When newsworthy events occur at transit facilities, the news media may claim a right to go into areas that have not been designated as a public forum.

It has generally been held that the First Amendment does not guarantee the press a constitutional right of special access to information not available to the public generally...Despite the fact that news gathering may be hampered, the press is regularly excluded from grand jury proceedings, [school] conferences, the meetings and other official bodies gathering in executive session, and the meetings of private organizations. Newsmen have no constitutional right of access to the scenes of crime or disaster when the general public is excluded."³³⁷

The First and Fourteenth Amendments bar government from interfering with the press, but the Constitution does not "require government to accord the press special access to information not shared by members of the public generally."³³⁸ In fact, seeking special status as the public's fiduciary would invite additional regulation on that same fiduciary theory.³³⁹ One writer's view is that "freedom of the press meant nothing more to the Framers than freedom from prior restraint."³⁴⁰

In the words of one observer,

"Although it may be argued that specific mention of the press in the First Amendment entitles it to special rights [cites omitted], the press clause probably was intended not to afford the media any greater protection,

³³⁷ *Pell v. Procunier*, 417 U.S. 817, 834 (1974).

³³⁸ *Id.* at 834. See also *Zemel v. Rusk* 381 U.S. 1 (1965):

[T]he prohibition of unauthorized entry into the White House diminishes the citizen's opportunities to gather information he might find relevant to his opinion of the way the country is being run, but that does not make entry into the White House a First Amendment right. The right to speak and publish does not carry with it the unrestrained right to gather information. At 17.

³³⁹ See Van Alstyne, *The Hazards to the Press of Claiming a "Preferred Position"*, 28 HASTINGS L.J. 761 (1977).

³⁴⁰ D. Anderson, *The Origins of the Press Clause*, 30 U.C.L.A. LAW REV. 455, at 534 (1983), citing noted constitutional commentator L. Levy. See *LEGACY OF SUPPRESSION: FREEDOM OF SPEECH AND PRESS IN EARLY AMERICAN HISTORY* 4 (1960).

One commentator has stated that the First Amendment, while numerically superior, is nothing more

Contrary to occasional flights of Newspaper Week oratory, the position of the first amendment did not indicate that the Framers attached primacy to the freedoms of speech and press. The provision we know as the first amendment was third on the list submitted to the states. [cite omitted] It became first only because Amendments One and Two were not ratified [cite omitted] If the order of amendments represented their importance to the Founders, then we know that nothing was as important to them as the election (Amendment One), and compensation (Amendment Two) of congressmen [cite omitted] In fact, freedom of press or speech was never first on anyone's list. It was the last right mentioned in the Address to the Inhabitants of Quebec [cite omitted] It was article twelve of the Pennsylvania Declaration of Rights [cite omitted], the sixteenth of twenty amendments proposed by the Virginia Ratifying Convention [cite omitted], and the second clause of the fourth proposition in Madison's proposed bill of rights. D. Anderson, *The Origins of the Press Clause*, 30 U.C.L.A. LAW REV. 482-483 (1983).

but rather to ensure that the general freedom of expression guaranteed by the First Amendment would not be forfeited by the act of publication.³⁴¹ In any event, it seems that nothing definite can be said of the Framers' intent since they themselves had no very clear idea as to what they meant by 'the freedom of speech, or of the press.'³⁴²

With regard to government places, "[t]otal exclusion...would rarely be appropriate."³⁴³ In some cases, the presence of a limited number of media may be preferable to a large number of people and the media, therefore, may receive preferred access due to the smaller disruption.

The press may seek special access to places controlled by the government and assert that the First Amendment protects their access in order to further the newsgathering enterprise. The Supreme Court to date, however, has generally found that the media has no greater right under the press clause of the First Amendment than the general public,³⁴⁴ although some "special consideration" for the media has not been totally precluded,³⁴⁵ and in practice journalists routinely receive some slight preference, as for example in press pools, news conferences, and reporters' galleries. Such preference is generally rationalized as a check and balance on government activities,³⁴⁶ since the public receive information on subjects in which they are interested through the media.

Supreme Court decisions in the early 1970s stated explicitly that the media "have no constitutional right of access to closed government facilities beyond that afforded the general public."³⁴⁷ In *Pell v. Procunier*, the Court refused to allow newsmen special access to specific prison inmates whom they wanted to interview, ruling that to do so would cause disruption and management problems. In *Saxbe v. Washington Post Co.*,³⁴⁸ the court also prohibited special access beyond that to which the public was entitled.

In both *Pell* and *Saxbe*, the court relied on *Branzburg v. Hayes* to deny that any constitutional right existed that would require government officials to make information

available to journalistic sources that was not available to members of the public generally.³⁴⁹

In *Houchins v. KQED, Inc.*,³⁵⁰ the court indicated that it has not been clarified whether the equal access rule applied to all cases or only those in which the public already had adequate access. In *Houchins*, the media wanted to enter and photograph an infamous detention center and the scene of a recent inmate suicide. Once a formal lawsuit had been filed, Sheriff Houchins initiated tours of the detention center, but without including the "infamous" area in question. The lower court ruled such a tour was insufficient to keep the public informed, and the 9th Circuit affirmed. The Supreme Court reversed, concluding that the media has no special right of access beyond that enjoyed by the general public.³⁵¹ This affirmed the court's view in *Branzburg* that "the first amendment does not guarantee the press a constitutional right of special access to information not available to the public generally."³⁵² "The right to speak does not carry with it the unrestrained right to gather information."³⁵³

However, it is to be noted that in his concurrence Justice Stewart seemed to say that he was joining the opinion because he thought the lower court injunction granting the press access to areas not open to the public was overbroad. He commented: "[T]erms of access that are reasonably imposed on individual members of the public may, if they impede effective reporting without sufficient justification, be unreasonable as applied to journalists who are there to convey to the general public what the visitors see,"³⁵⁴ stating that a journalist's purpose is "to gather information to be passed on to others, and his mission is protected by the Constitution."³⁵⁵

Justice Stewart would have upheld an injunction granting the press access "on a more flexible and frequent basis" than monthly tours granted to the public. He would also have permitted journalists to use cameras and recording equipment, even though such were prohibited if used by the public.³⁵⁶ Such permission could be interpreted as either greater rights than those given the public or simply "a more flexible implementation of the same rights."³⁵⁷

However, in *Houchins* Chief Justice Burger found no support for the proposition that the press is entitled to special constitutional protection to vindicate the

³⁴¹ *The Supreme Court, 1977 Term, Media Right of Access*, 92 HARV. L. REV. 1 at 178 (1978); 28 HASTINGS L.J. 761, 769, n.16 (1977).

³⁴² Chafee, Book Review, 62 HARV. L. REV. 891, 898 (1949), L. TRIBE, AMERICAN CONSTITUTIONAL LAW §12-19, at 675, n.5 (Van Alstyne, *Comment: The Hazards to the Press of Claiming a "Preferred Position"* 28 HASTINGS L.J. 761, 769 n.16 (1977).

³⁴³ Tom A Collins, *The Press Clause Construed in Context: The Journalists' Right of Access to Places*, 52 MO. L. REV. 750 at 778.

³⁴⁴ *Id.* at 752

³⁴⁵ *Id.*

³⁴⁶ *Id.* at 754

³⁴⁷ *Pell v. Procunier* 417 U.S. 817, 834 (1974).

³⁴⁸ 417 U.S. at 843 (1974).

³⁴⁹ *Pell* at 834; *Branzburg v. Hayes*, 408 U.S. 665, 704 (1972).

³⁵⁰ 438 U.S. 1 (1978).

³⁵¹ *Id.* at 16.

³⁵² 408 U.S. at 684, 685

³⁵³ 438 U.S. at 12 (quoting *Zemel v. Rusk*, 381 U.S. at 17).

³⁵⁴ *Id.* at 17

³⁵⁵ *Id.*

³⁵⁶ See also *The Supreme Court, 1977 Term, Media Right of Access*, 92 HARV. L. REV., at 177.

³⁵⁷ *Id.* at 178

public's right to information,³⁵⁸ but rather that the traditional view has always been that the press is an independent institution not subject to any particular obligation to the public.³⁵⁹ Justice Burger questioned the assumption that the proper vindicator of the public's rights is in fact the press.³⁶⁰

It is at least partially clear that the press has no right to access to nonpublic areas of transportation facilities. However, they do have complete right of access to all public areas of transportation facilities and may report on activities in those areas after acquiring that information. When press-related activities interfere with the conduct of transportation-related responsibilities, the press has no greater right than the average citizen.

SUMMARY

Lawrence Tribe, in trying to describe his work on the rights of communication and expression, compares the dialogue to Milton's picture of truth and falsehood grappling in a "free and open encounter."³⁶¹ Many regard legal analysis of speech as a "hodgepodge of categories and tests...[and]...semantic distinctions and artificial rubrics."³⁶²

In this analysis, the struggle to define permissible limitations on speech (and indeed, speech itself) has been equally daunting. Although the current U.S. Supreme Court plurality approach appears to be that transit terminals are not traditional public fora, public areas of such facilities generally will be declared designated fora that have been opened to expressive activity. This may be a bitter pill for some, but acceptance of the principles allows a basis upon which to build reasonable policies and regulations to deal with speech and related activities.

Transportation attorneys and administrators, as well as municipal authorities, should take special care in the drafting and implementation of regulations to ensure that they are not directly aimed at a type of speech activity, except in the rare instances where it is appropriate to do so. Examples would be limitations on tobacco and alcohol advertising in areas where minors habitually congregate, and limitations on the request for money by solicitors in circumstances where that activity would constitute a life and safety hazard.

Not all areas of transportation terminals need to be opened to speech-related activities if there is a reasonable basis to limit access and other avenues of communication are available. The law in this area is still evolving, but the protection of passengers and pedestrians and maintenance of transportation functions have been found to be solid bases for reasonable time, place, and manner restrictions. Increased emphasis is being placed on an actual showing of substantiated facts supporting the underlying rationale for a restriction infringing on speech rights and activities.

In the final analysis, when careful consideration is given to the rights of those who would use transportation facilities to communicate, those rights of expression can be balanced with the objectives of the transportation authorities.

³⁵⁸ 438 U.S. at 11.

³⁵⁹ *Id.* at 10; and *Chicago Joint Bd., Amalgamated Clothing Workers of America v Chicago Tribune Co*, 435 F.2d 470, 474 (7th Cir. 1970), *cert. denied*, 402 U.S. 973 (1971); *Associates & Aldrich Co v Times Mirror Co*, 440 F.2d 133, 135 (9th Cir. 1971); *The Supreme Court, 1977 Term, Media Right to Access*, at 177

³⁶⁰ 438 U.S. at 13-14.

³⁶¹ L. Tribe at 12-1 p. 785, citing to Arcopajitica, *A Speech for the Liberty of Unlicensed Printing*, 20th Parliament of England (1644), in *prose writings* 23-39 (Everyman ed. 1927).

³⁶² *Loper*, 802 F.Supp. 1029 at 1041.

APPENDIX

This appendix is intended to be a quick reference guide to the practitioner for leading cases in the area of the First Amendment as it relates to transportation facilities. The appendix is not exhaustive and may not cover all relevant cases from any one jurisdiction. Current research should accompany any use of these materials in this constantly changing area of law.

The appendix will highlight relevant U.S. Supreme Court decisions in major categories discussed in the article, including advertising, charitable solicitation, leafletting/pamphlets, newsracks, and public fora as they relate to transportation facilities. The appendix will also provide reference to some cases of importance in the other federal courts.

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Advertising

U.S. Supreme Court

Lehman v. City of Shaker Heights, 418 U.S. 298 (1974). A total ban on political advertising on city buses was upheld. Other types of advertising were permitted on the vehicles.

Metromedia v. San Diego, 453 U.S. 490 (1981). The Court, in an opinion by Justice White, held that a ban on outdoor advertising that distinguished between onsite and other types of signage was invalid. While the city had a valid interest in improving traffic safety and aesthetics, those interests cannot overcome an illegal regulation that favors one kind of message over another.

City Council v. Taxpayers for Vincent, 466 U.S. 789 (1984). An ordinance that prohibited political signs in the public right of way was sustained.

Central Hudson Gas & Electric Corp. v. N.Y. Pub. Service Comm'n., 447 U.S. 557 (1980). Courts will use a four-prong test to evaluate regulations on advertising: (1) whether the advertising is lawful and not misleading, (2) whether there is a substantial government interest

in the regulation, (3) whether the regulation is narrowly tailored to directly advance the government interest, and (4) whether the regulation reaches no further than necessary.

44 *Liquor Mart v. Rhode Island*, 116 S. Ct. 1495 (1996). A total ban on advertising of alcohol prices was reversed based upon the public's right to know instead of the speaker's right to deliver the message. This is an expansion of commercial free speech rights.

First Circuit

Aids Action Committee of Mass. v. Mass. Bay Trans. Auth., 42 F.3d 1 (1st Cir. 1994). The practices of the Massachusetts Bay Transportation Authority (MBTA) had converted the interiors of the passenger cars to a public forum. When the MBTA attempted to limit advertising based upon the message, the court held that the policy was not content-neutral and was subject to strict scrutiny. Because certain viewpoints were unacceptable, the policy violated free speech protection.

Fourth Circuit

Anheuser-Busch, Inc. v. Schmoke, 63 F.3d 1305 (4th Cir. 1995) and *Penn Advertising of Baltimore, Inc. v. Mayor & City Council of Baltimore*, 63 F.3d 1318 (4th Cir. 1995). Regulations of the City of Baltimore that restricted alcohol and tobacco advertising were sustained because they had valid government objectives of reducing alcohol and tobacco use by minors. The City had met the *Central-Hudson* test.

Seventh Circuit

Air Lines Pilots Assn. v. Dept. of Aviation, 45 F.3d 1144 (7th Cir. 1995). A selective ban on advertising in an airport was unenforceable due to its vague standards.

District Courts

Hevesi v. Metropolitan Transit Authority, 827 F. Supp. 1069 (S.D. N.Y. 1993). The court concluded that advertising spaces on New York buses had been designated a public forum for commercial and *political* advertising. Distinguishes *Lehman*.

Christ's Bride Ministries v. Southeastern Pennsylvania Transit Authority, 937 F. Supp. 425 (E.D. Pa. 1996). Removal of ads from subway and rail stations was reasonable where the decision was based upon a determination the ads were misleading and inaccurate.

Charitable Solicitation

U.S. Supreme Court

Village of Schaumburg v. Citizens for a Better Environment, 444 U.S. 620 (1980). Charitable solicitation is highly protected speech because of its advancement of economic, political, or social issues.

ISKCON v. Lee, 505 U.S. 672 (1992). A regulation limiting charitable solicitation in airports was

sustained as the airports in question were not traditional public fora and the basis for the regulation was reasonable under a lower standard of review. A ban on leafleting was overturned in *Lee v. ISKCON*, 505 U.S. 830, but the Court stated that airports could not be equated with other transportation centers due to the nontraditional functions of airport terminals.

Circuit Courts

Second Circuit

National Awareness Foundation v. Abrams, 50 F.3d 1159 (2d Cir. 1995). A New York State law that required an 80-dollar annual fee for all professional solicitors was upheld. The fee was closely related to the actual cost of regulating solicitors.

Third Circuit

ISKCON v. New Jersey Sports, Etc., 691 F.2d 155 (3d Cir. 1982). A ban on solicitation at a racetrack and Meadowlands stadium was upheld, as not all public places are public fora for speech purposes.

Fifth Circuit

ISKCON v. Houston, 689 F.2d 541 (5th Cir. 1982). The court permitted a regulation that required the registration of the solicitor by name, the charitable use, and the names of all persons having control over the solicitation.

ISKCON v. Eaves, 601 F.2d 809 (5th Cir. 1979). The court upheld a regulation that prohibited solicitation beyond security checkpoints and within 10 feet of a tenant of the airport's property. Other provisions of the regulation were not allowed.

Seventh Circuit

Chicago Area Military Project v. Chicago, 508 F.2d 921 (7th Cir. 1975). A regulation that upheld a prohibition on leafleting in the "fingers" of the terminal leading to and from departure gates was sustained.

Eighth Circuit

ACORN v. St. Louis County, 930 F.2d 591 (8th Cir. 1991). The Appeals Court upheld a regulation that restricted soliciting in the roadway. The court held that the ordinance was narrowly tailored to preserve public safety. The philosophy of the case is similar to *Kokinda* and *ISKCON v. Lee* in viewing personal solicitation as a threat.

Leafleting/Pamphlets

U.S. Supreme Court

ISKCON v. Lee, 505 U.S. 672 and *Lee v. ISKCON*, 505 U.S. 830 (1992). These companion cases revolved around the issues of charitable solicitation and leafleting, respectively. In *Lee v. ISKCON*, the Court decided that leafleting did not pose the same problems in airport

terminals that solicitation presented and determined that a total ban was unreasonable. The rationale for the distinction was that those receiving information from persons distributing leaflets were not subject to the same pressures and concerns as those being subjected to a personal solicitation for money.

Talley v. California, 362 U.S. 60 (1960). There is a right to anonymity for a leaflet distributor that can only be overcome by a compelling reason.

Newsracks

U.S. Supreme Court

City of Cincinnati v. Discovery Network, Inc., 507 U.S. 410 (1993). An ordinance that distinguishes between commercial and noncommercial speech is content-based, absent a neutral justification for differential treatment. This ban, which prohibited newsracks that distributed commercial handbills but permitted ones with newspapers, was considered to be content-based and did not meet the strict scrutiny test.

City of Lakewood v. Plain Dealer Publishing Co., 486 U.S. 750 (1988). The Court did not address the issue of whether newsracks could be banned altogether from public streets but did overturn this restriction as an unreasonable restraint on commercial speech.

Lovell v. City of Griffin, 303 U.S. 444 (1938). Where the First Amendment is concerned, the protection extends to the distribution as well as the publication of protected material.

Second Circuit

Gannett v. MTA, 745 F.2d 767 (2d Cir. 1984). Where the licensing restriction contained fees that were content-neutral, related to the administrative costs, left open alternative means of newspaper distribution, and were the least restrictive means for raising revenues of the private commercial transportation activity, it was considered constitutional.

Fourth Circuit

Multimedia Publishing Co. v. Greenville-Spartanburg Airport District, 991 F.2d 154 (4th Cir. 1993). A total ban on newsracks in the airport was overturned as it was too restrictive, even though the airport was not a public forum.

Ninth Circuit

Crawford v. Lundgren, 96 F.3d 380 (9th Cir. 1996). A prohibition on newsracks that provided sexually-oriented materials was upheld. The court found that the protection of minors from access to unsupervised newsracks was a sufficient state interest to sustain the prohibition.

Eleventh Circuit

Gold Coast Publishing, Inc. v. Corrigan, 42 F.3d 1336 (11th Cir. 1994). Registration requirements that

limited the number of newsracks in certain locations, required uniform color and letter size, and required proof of insurance were found to be constitutional.

Sentinel Communications v. Watts, 936 F.2d 1189, rehearing denied, 947 F.2d 1492 (11th Cir. 1991). A restriction was upheld on newsracks in public rest areas following the decision of *Gannett v. Berger*, 716 F.Supp. 140 (D.N.J. 1989), which upheld a limitation on placement of newsracks in a passenger terminal.

Panhandling

U.S. Supreme Court

United States v. Kokinda, 497 U.S. 720 (1990). The Court agreed with the U.S. Postal Service's determination that solicitation by an individual was different in character from a charitable solicitation. This case preceded *ISKCON v. Lee* in distinguishing the concerns of personal solicitation. The *Kokinda* court dealt with the issue of placing tables on Postal Service property and stated, "Confrontation by a person asking for money disrupts passage and is more intrusive and intimidating than an encounter with a person giving out information."

Circuit Courts Second Circuit

Young v. New York City Transit Authority, 903 F.2d 146 (2nd Cir. 1990), cert. denied, 498 U.S. 984. The court upheld limits on panhandling in subways. The court distinguished between streets where you could walk away and subways where passageways were restricted. This case is consistent with *ISKCON v. Lee* in describing the perils of personal solicitation.

Loper v. New York Police Department, 999 F.2d 699 (2nd Cir. 1993). A total ban on soliciting on city streets was too broad and was thus unconstitutional. The court discussed the concerns of the public, but the expansive nature of the regulation reached farther than necessary to achieve the city's objectives.

Ninth Circuit

ACORN v. City of Phoenix, 798 F.2d 1260 (9th Cir. 1986). Individual solicitation may be limited where there is a sustainable governmental interest. The Ninth Circuit limited solicitation on streets due to hazards to both those being solicited and those doing the solicitation.

Public Forum

U.S. Supreme Court

ISKCON v. Lee, 505 U.S. 672 (1992) (plurality decision). A traditional public forum has as a principal purpose the free exchange of ideas. The plurality opinion held that the New York and New Jersey Port Authority airports were not public fora, and the Court permitted a limitation on solicitation but not leafleting.

Cornelius v. NAACP Legal Defense and Fed. Fund, 473 U.S. 788 (1985). A designated/limited forum does not occur through inaction but must be intentional on the part of the government.

United States v. Grace, 461 U.S. 171 (1983). Government's right to restrict speech in a public forum is extremely limited. A ban against flags and banners on the sidewalk outside the Supreme Court was struck down.

Perry Education Assoc. v. Perry Local Educator's Assoc., 460 U.S. 37 (1983). Once the forum is designated, the government is bound by First Amendment jurisprudence. However, a designated public forum is not required forever to remain a public forum, unless it is a traditional public forum.

Robins v. Pruneyard Shopping Center, 592 P.2d 341 (Ca. 1979) Based upon the expanded free speech rights of the California Constitution, even private property may be a designated public forum. *Contra*, *Hudgens v. National Labor Relations Board*, 424 U.S. 507 (1976); *Lloyd v. Tanner*, 407 U.S. 551 (1972).

City of Madison School Dist. v. Wisc. Employment Rel. Comm'n., 429 U.S. 167 (1976). School board meetings are limited public fora.

Southwestern Promotions, Ltd. v. Conrad, 420 U.S. 546 (1975). Municipal theaters are limited public fora. *Lloyd v. Tanner*, 407 U.S. 551 (1972). Right to speak did not overcome shopping center owner's right to exclude persons.

Hague v. Committee for Industrial Organization, 307 U.S. 496 (1939). Traditional public fora are places that "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."

Schenk v. Pro-Choice Network, 117 S. Ct. 855 (1997). A 15-foot buffer zone that was fixed around an abortion clinic was upheld, but a floating buffer zone around persons entering and leaving the clinic was struck down, as the restraint on speech was more burdensome than necessary to serve the governmental interests.

Third Circuit

ISKCON v. N. J. Sports, Etc., 691 F.2d 155 (1982). Ban on solicitation at a race track and stadium upheld, as not all public places are public fora. The purpose of the Meadowlands complex was to allow patrons access to sporting events, and the ban protected patrons from unwanted intrusions.

Fifth Circuit

ISKCON v. Eaves, 601 F.2d 809 (5th Cir. 1979). Even speech meriting highest protection and taking place in a public forum can be regulated by time, place, and manner restrictions.

Seventh Circuit

Planned Parenthood v. C.T.A., 767 F.2d 1225 (7th Cir. 1985). Court found designated public forum where

there was no system of control over advertising other than refusing "vulgar, immoral or disreputable" advertising. Because the transit authority had opened up the forum to advertising, the refusal to allow some advertising must meet the reasonable time, place, and manner restrictions.

Ninth Circuit

ACORN v. City of Phoenix, 798 F.2d 1260 (9th Cir. 1986). Sidewalks, streets, and parks have been recognized as traditional public fora because they have historically been devoted to assembly and debate. Restrictions that meet the reasonable time, place, and manner criteria are permissible in such areas.

Gerritsen v. City of Los Angeles, 994 F.2d 570 (9th Cir. 1993). City ordinance struck down that completely banned distribution of leaflets in certain areas of park.

Eleventh Circuit

Sentinel Communications, Inc. v. Watts, 936 F.2d 1189, *reh. denied*, 947 F.2d 1492 (11th Cir. 1991). Restrictions on placement of newsracks in parts of public rest areas along highway.

District Courts

Joyce v. City and County of San Francisco, 846 F.Supp. 843 (N.D. Ca. 1994). Right to sleep is not a fundamental right, though lying on bedroll may not qualify for enforcement.

Community for Creative Non-Violence v. Turner, 714 F.Supp. 29, *amended and superseded*, 729 F.Supp. 868, *aff'd in part, reversed in part*, 893 F.2d 1387, 282 U.S. App. D.C. 238 (1990). Sleeping in park can be regulated. A prior restraint may be constitutional if attended by procedural safeguards to obviate dangers of censorship.

Pottinger v. City of Miami, 810 F. Supp. 1551 (S.D. Fl. 1992). No legitimate expectation of privacy when eating and sleeping in public, but being arrested for sleeping in parks or streets at time of day when there is no place the homeless can lawfully be is in violation of the 8th Amendment.

ISKCON v. Schrader, 461 F. Supp. 714 (N.D. Tex. 1978). Government-owned convention center is not automatically a public forum

Moskowitz v. Cullman, 432 F. Supp. 1263 (D.N.J. 1977). Bus and train terminals of Port Authority of New York and New Jersey were public fora. First Amendment extends to pamphlets and leaflets.

ISKCON v. Englehardt, 425 F. Supp. 176 (W.D. Mo. 1977). When transit operators created a permit regulation for solicitation, they created a public forum.

Resistance v. Comm. of Fairmont Park, 298 F. Supp. 961 (E.D. Pa. 1969). Court granted injunction against Philadelphia Park Commissioners because local regulations allowed authorities "unfettered discretion" in granting permits for speech-related purposes.

Bus Stations

Second Circuit

Wolin v. New York Transit Authority, 268 F. Supp. 855 (D.C. N.Y., 1967), *aff'd*, 392 F.2d 83. Bus stations are public fora, but transportation authority may ensure that the transportation purpose is not lost through obstruction by expressive activity.

District Courts

Moskowitz v. Cullman, 432 F. Supp. 1263 (D.N.J. 1977). Bus stations are public fora. Public inconvenience, annoyance, and even unrest are not sufficient to support exercise of regulatory police power.

Subways

First Circuit

Aids Action Committee of Massachusetts v. Mass. Bay Transit Authority, 42 F.3d 1 (1994). The lower court found subways to be public fora, but the appeals court did not reach issue.

Second Circuit

Wright v. Chief of Transit Police, 558 F.2d 67 (2nd Cir. 1977). There is no absolute right to solicit in the New York subway system.

District Courts

Penthouse v. Koch, 599 F. Supp. 1338 (S.D. N.Y. 1984). New York City subway had opened its uses as a designated public forum for purpose of generating revenue through display of public ads, and for that purpose was subject to reasonable requirements on its regulations.

Christ's Bride Ministries, Inc. v. Southeastern Pennsylvania Transportation Authority, 937 F. Supp. 425 (E.D. Pa. 1996). Subway and commuter rail stations are nonpublic fora. The Southeastern Pennsylvania Transportation Authority did not violate the First Amendment by removing from subway and rail stations a group's advertisements stating that women who choose abortion suffer more and deadlier breast cancer. Decision to remove advertisements was based on statement from Assistant Secretary of Health that the ad was misleading and inaccurate.

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