

# BEGGING AND FREEDOM OF EXPRESSION

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Constitutional challenges are underway against municipal anti-begging (or panhandling) by-laws in several Canadian cities, including Vancouver, Winnipeg and Ottawa.<sup>1</sup> These challenges are based on several grounds. In this comment I will consider the argument that anti-begging by-laws violate freedom of expression under the *Canadian Charter of Rights and Freedoms*.<sup>2</sup>

If, as the Supreme Court of Canada has said, the term 'expression' refers to any act that conveys a message, then begging or panhandling must be protected by section 2(b) of the *Charter*. Begging, no less than advertising or picketing, conveys a message. At minimum, begging involves a request to passers-by for money. The request may be by spoken or written word or by holding out or displaying a cup or hat. Under the Winnipeg by-law, for example, 'panhandle' means "to beg or ask, whether by spoken, written or printed word, for donations of money or other things of value for one's self or for any other person ..."<sup>3</sup> Given the Supreme Court's broad definition of expression, the

municipalities defending these anti-begging by-laws may be prepared to concede the breach of section 2(b).<sup>4</sup>

While the Supreme Court defines the scope of the freedom under section 2(b) broadly so as to protect all non-violent forms of expression, when assessing limits under section 1 of the *Charter* the Court distinguishes between core and marginal forms of expression, identifying different instances of expression as more or less valuable and, on that basis, as more or less vulnerable to restriction. Political expression, for example, is considered core expression because it is closely linked to the values underlying the freedom. As such it can be restricted only for the most substantial and compelling reasons. In contrast, pornography, hate speech and commercial advertising are seen as lying at the margins of the freedom's scope, because they are not so directly linked to the values underlying the

<sup>1</sup> As I was finishing this comment, the Government of Ontario announced its intention to enact the *Safe Streets Act*, S.O. 1999, c. 8 [editor's note: this Act came into effect January 31, 2000] which prohibits solicitation in an "aggressive manner" (s. 2) and the soliciting of a person "who is using, waiting to use, or departing from an automated teller machine" (s. 3 (2)(a)) or "who is using or waiting to use a pay phone" (s. 3(2)(b)) or "who is in the process of getting in, out of, on or off a vehicle or who is in a parking lot" etc. (s. 3 (2)(c)).

<sup>2</sup> Part I of the *Constitution Act, 1982* being Schedule B to the *Canada Act, 1982* (U.K.) 1982, c. 11 [hereinafter the *Charter*]. I have not addressed the argument that anti-begging by-laws violate s. 15 of the *Charter*, the right to equality. It is worth noting, however, that many of points made in the following discussion also support the claim that s. 15 of the *Charter* has been breached. In particular the disadvantaged position of beggars or of the homeless in general is an important component of a powerful s. 15 argument that municipal anti-begging by-laws reflect, and further aggravate, the marginalization of these groups.

<sup>3</sup> City of Winnipeg, By-law No. 6555, *By-law to Regulate and Control Panhandling* (26 January 1995) at s. 2.

<sup>4</sup> There are two exceptions to the Court's broad definition of the scope of freedom expression under s. 2(b). First, the Court has said in *Irwin Toy v. Quebec (A.G.)*, [1989] 1 S.C.R. 927 [hereinafter *Irwin Toy*] at 970 that a violent act, even if intended to carry a message, does not fall within the scope of s. 2(b): "While the guarantee of free expression protects all content of expression, certainly violence as a form of expression receives no such protection." This exclusion extends only to expression that has a violent form. Expression that advocates violence or threatens violence is still protected under s. 2(b), although subject to limits under s. 1.

The Court has also narrowed the scope of s. 2(b) by drawing a distinction between two different kinds of state restriction on expressive activity: state acts that have as their purpose the restriction of expression and state acts that do not have this purpose but nevertheless have this effect. The significance of the purpose/effect distinction, which roughly parallels the distinction in American jurisprudence between content restrictions and time, place and manner restrictions, is that a law intended to limit expression, and in particular the expression of certain messages, will be found to violate s. 2(b) automatically, while a law that simply has the effect of limiting expression will be found to violate s. 2(b) only if the person attacking the law can show that the restricted expression advances the values that underlie freedom of expression. In particular, he/she must show that the restricted expression contributes to the realization of truth, participation in social and political decision-making and diversity in the forms of individual self-fulfilment and human flourishing (*Ibid.* at 976).

freedom. The courts will be more flexible, or less demanding, in their assessment of restrictions on these forms of expression.

In the begging cases, a key question is whether begging should be treated either as core expression or as marginal expression; whether it should be understood as commercial in character or whether it is better understood as a form of political expression that lies at the core of the freedom.<sup>5</sup> If begging is a form of commercial expression, or at least analogous to commercial expression, then its restriction, particularly if in the form of a time, place and manner limitation or if focused on invasive or intimidating instances of begging, may be easily justified under section 1. However, if begging is seen as political in character, restrictions will be more rigorously scrutinized and less likely to be supported under section 1.

The courts routinely state that the category of commercial expression does not lie at the core of the freedom's protection, yet they say very little about why it deserves reduced protection and how it is to be distinguished from political or cultural expression. While begging may look something like advertising, as it involves a request for money, the resemblance is entirely superficial. Begging involves a request for assistance and a claim of need that cannot be made to fit into the model of a commercial transaction. Regardless of whether we think begging can be described as political in character, it is very different from the consumer messages that dominate public discourse. Indeed, it may be that begging is experienced by some passers-by as invasive because it is so different from mainstream (i.e., commercial) expression. Because begging takes place at the margins of public discourse its restriction should be subject to careful scrutiny.

## MARGINAL EXPRESSION OR EXPRESSION AT THE MARGINS

Begging involves a request for money and so bears some resemblance to commercial advertising, which encourages consumers to make a product or service purchase. It is 'profit-oriented,' using this phrase in a rather extended way. As such, the argument goes, begging, like other forms of commercial expression, is not core value expression and so its restriction is easier

to justify — certainly a time, place and manner restriction should easily survive constitutional scrutiny.

However, before making this link between begging and commercial advertising, it is worth considering the basis for the courts' distinction between commercial advertising (marginal) and political (core) expression. The Supreme Court has said on many occasions that commercial expression is less valuable than other forms of expression because it is profit motivated. However, the Court has not directly explained why this motivation is significant or how it is possible to isolate a category of profit-motivated expression in a public discourse that is dominated by commercial voices and operates on market principles.

The view that advertising does not lie at the core of the freedom and can be restricted under section 1 on less than substantial and compelling grounds, is expressed at the beginning of nearly all judicial decisions concerning commercial expression. For example, in *Rocket v. Royal College of Dental Surgeons*, Madame Justice McLachlin observed that, in the case of commercial expression, the motive for imparting information is "primarily economic" and that "the loss" that censorship might cause "is merely loss of profit, and not loss of opportunity to participate in the political process or the 'marketplace of ideas,' or to realize one's spiritual or artistic self-fulfilment."<sup>6</sup> For these reasons, "restrictions on expression of this kind might be easier to justify than other infringements of section 2(b)."<sup>7</sup>

However, Madame Justice McLachlin recognized that while commercial expression may be "designed only to increase profits," it may also play "an important role in consumer choice."<sup>8</sup> Because the interests of the profit-motivated speaker are not significant, any value that profit-motivated (or commercial) expression may

<sup>5</sup> In the US this has been a critical question. See, for example, H. Hershcoff and A. S. Cohen, "Begging to Differ: The First Amendment and the Right to Beg" (1991) 104 Harvard Law Review 896.

<sup>6</sup> *Rocket v. Royal College of Dental Surgeons*, [1990] 2 S.C.R. 232 [hereinafter *Rocket*] at 247.

<sup>7</sup> *Ibid.* at 247. McLachlin J. also notes at 241 that:  
[a]lthough it has been clearly held that commercial expression does not fall outside the ambit of s. 2(b), the fact that expression is commercial is not necessarily without constitutional significance ... It is at [the s. 1] stage that the competing values — the value of the limitation and the value of free expression — are weighed in the context of the case. Part of the context, in the case of regulation of advertising, is the fact that the expression is wholly within the commercial sphere.

<sup>8</sup> *Ibid.* at 247.

have will depend entirely on its contribution to the listener. McLachlin J. considered that:<sup>9</sup>

[t]hese two opposing factors — that the expression is designed only to increase profit, and that the expression plays an important role in consumer choice — will be present in most if not all cases of commercial expression. Their precise mix, however, will vary greatly.

For this reason she thought “it is inadvisable to create a special and standardized test for restrictions on commercial speech.”<sup>10</sup>

Yet, in the later judgment of *RJR Macdonald v. Canada A.G.*, McLachlin J. argued that profit motive or economic orientation should not lessen the claim of expression to constitutional protection: “In my view, motivation to profit is irrelevant to the determination of whether the government has established that the law is reasonable or justified as an infringement of freedom of expression.”<sup>11</sup> She observed that profit is the motive, in whole or in part, behind a variety of expressive forms, some of which are seen as core to the freedom:<sup>12</sup>

Book sellers, newspaper owners, toy sellers — are all linked by their shareholder’s desire to profit from the corporation’s business activity, whether the expression sought to be protected is closely linked to the core values of freedom of expression or not.

It is not clear whether McLachlin J. changed her mind and came to believe that commercial advertising is no less valuable than other forms of expression or whether she simply thought that the lesser protection granted to advertising rests on something other than its profit motivation. If she was arguing the latter, and still accepted that commercial advertising lies outside the core of the freedom, she did not say what this lesser value rests on. Despite these remarks by McLachlin J.

in *RJR Macdonald*, the Supreme Court of Canada, in subsequent judgments such as *Hill v. Church of Scientology of Toronto* has continued to state that “the fact that the targeted material was expression motivated by economic profit more readily justified the imposition of restrictions.”<sup>13</sup>

In a market economy it is difficult to isolate a category of expression for reduced protection on the basis of profit motive or commercial origin.<sup>14</sup> Despite the Court’s frequent but very general references to profit motive, two concerns seem to underlie the decision to locate commercial advertising at the margins of freedom of expression. The first has to do with the way in which advertising appeals to its audience — the vague sense that it is often manipulative or misleading. In *Irwin Toy* manipulation was explicitly identified as the basis for restricting advertising directed at children. And in *RJR Macdonald*, concern about manipulation seemed to underlie the Court’s distinction between lifestyle cigarette advertising, which could be restricted, and informational cigarette advertising, which could not.<sup>15</sup>

<sup>13</sup> *Hill v. Church of Scientology of Toronto*, [1995] 2 S.C.R. 1130 at 1174. See also, *Thomson Newspapers v. Canada (A.G.)*, [1998] 1 S.C.R. 877 at 943 the Supreme Court of Canada once again stated that “[t]he degree of constitutional protection may vary depending on the nature of the expression at issue.”

<sup>14</sup> Commercial enterprises, for reasons of profit, often attempt to influence political action through media advertising. Politicians raise money to spend on campaign speech that follows the model of commercial advertising. As well, the distinction between commercial and cultural expression is difficult to discern in a market economy because culture is often treated as a commodity, something that is advertised and sold for profit. The distinction is also difficult because modern advertising is less about providing consumers with product information and more about representing products as important cultural/social symbols. According to W. Leiss, S. Kline and S. Jhalley, in *Social Communication in Advertising* (New York: Methuen, 1986) at 7:

Advertising is not just a business expenditure undertaken in the hope of moving some merchandise off store shelves, but is rather an integral part of modern culture. Its creations appropriate and transform a vast range of symbolic ideas; its unsurpassed communicative powers recycle cultural models and references back through the networks of social interactions.

As well, even ‘non-commercial’ forms of discourse, such as political expression, have come increasingly to resemble commercial product and service advertising, relying on soundbites and image associations.

<sup>15</sup> See “*RJR Macdonald v. Canada* and the Freedom to Advertise” 7(1) *Constitutional Forum* 1 (1995) at 3 and R. Moon, *The Constitutional Protection of Freedom of Expression* (Toronto: University of Toronto Press, forthcoming) at c. 3.

<sup>9</sup> *Ibid.* at 247–48 continued:

In *Irwin Toy*, for example, the majority did not emphasize the consumer choice aspect, because the expression in question was advertising aimed at children and the majority clearly felt that protection of consumer choice in children was much less important than it would be in adults. That left the relatively weak value of protecting the appellant’s interest in advertising to increase profits to be pitted against the strong countervailing value of protecting children from economic exploitation.

<sup>10</sup> *Ibid.* at 247.

<sup>11</sup> *RJR Macdonald Inc. v. Canada (A.G.)*, [1995] 3 S.C.R. 199 [hereinafter *RJR Macdonald*] at 348.

<sup>12</sup> *Ibid.* at 348.

The other concern is the power of specific advertisements, or advertising in general, to dominate discourse and displace or overwhelm other messages in the 'market place' of ideas.<sup>16</sup> The commercial domination of public discourse is not specifically identified as a concern in the courts' commercial advertising cases, yet it may be critical to understanding the manipulative or deceptive character of particular ads and may explain the willingness of the courts to set lower standards for the restriction of advertising in general. The overwhelming number of commercial messages that we are confronted with each day reduces the space for critical viewing of particular ads. There are so many ads that it is simply not possible for the audience to reflect on the claims or associations of each. As well, the domination of public discourse by advertising means that the unnatural images or absurd associations of particular ads seem unexceptional. Finally, and most importantly, because the principal channels of public discourse are controlled by commercial interests and carry only advertising and programming funded by advertising, the underlying message of advertising, that self-realization is achieved through consumption — is an almost unchallengeable cultural assumption.<sup>17</sup>

If these concerns, and not profit motive, underlie the reduced protection of advertising, it is not at all clear that begging should be treated as 'marginal

expression' under section 2(b). Begging is not simply a request for money that can be assimilated into the model of a commercial or market transaction. It is a claim of need and a request for help that falls entirely outside the realm of consumption and exchange.<sup>18</sup> While we may sometimes feel overwhelmed by the large number of beggars in the downtown areas of certain cities, begging is not part of the mainstream commercial discourse. Indeed, begging is viewed as a nuisance and experienced as invasive because it is so exceptional, because its message of need does not fit within the dominant discourse of lifestyle-based consumption.<sup>19</sup>

The decision to label begging as either political or commercial seems to be governed by the decision-maker's views about social welfare.<sup>20</sup> For those who see

<sup>16</sup> Profit motive may serve as a sort of proxy for these concerns. Pursuit of profit leads speakers to adopt the most effective means of influencing consumer behaviour, which may be something other than rational persuasion. As well, in a market economy, where mass communication is expensive, profit-motivated speech such as advertising comes naturally to dominate public discourse.

<sup>17</sup> For an extended discussion of this see R. Moon, *supra* note 16. Concern that certain messages may dominate discourse and overwhelm or displace other views is more explicit in the debate about the regulation of political or campaign advertising. Election spending limitations, which do not restrict the message or form of expression, but only the amount of money that can be spent in support of a particular message, are justified on the ground that unlimited spending will allow the messages of some candidates to 'drown out' those of other candidates.

Manipulation and 'drowning out' inequality, which are described, and responded to, as separate problems, are really two aspects or dimensions of the much larger problem of the domination of public discourse by commercial messages and the advertising form. Restrictions aimed at either the manipulative impact of expression or the dominance of particular messages, are partial, or symptomatic, responses to this systemic problem. Inequality in election spending is a problem because of the 'advertising' form of campaign expression, which is composed of images and slogans with little evaluative content. Commercial advertisements have a manipulative impact only because they so completely dominate public discourse.

<sup>18</sup> I recognize that this position is not shared by those who view all human interaction through the lens of exchange and all human value through the lens of wealth maximization or preference satisfaction. See for example, R. Ellickson, "Controlling Chronic Misconduct in City Spaces: Of Panhandlers, Skid Rows, and Public-Space Zoning" 105 *Yale Law Journal* 1165 at 1229, in which the author reduced human obligation or charity to a feeling of satisfaction:

Ordinarily, a panhandler's intended message is wholly transactional, namely, "I would like you to give me money." A beggar essentially invites a pedestrian to enter into an exchange. If the exchange were to be completed, the beggar would receive alms, and the donor would receive the feeling of satisfaction that commonly follows an act of generosity.

<sup>19</sup> I note that local merchants are often the main advocates of restrictions on begging, an activity they regard as bad for business. See A. Schafer, "Down and Out in Winnipeg and Toronto: The Ethics of Legislating Against Panhandling" at 7, online: Caledon Institute of Public Policy Homepage <<http://www.caledoninst.org/full91.htm>> (Date accessed: 8 February 2000):

Certainly, many inner-city business people believe that the presence of panhandlers costs them customers. Not surprisingly, these merchants are among the strongest supporters of invoking the law to get panhandlers off the street or, at least, off their street.

<sup>20</sup> I recognize that an individual's views about social welfare and the need for social or charitable support can sometimes be quite ambiguous. Shortly after he was elected Premier of Ontario, Mike Harris was asked a question about foodbanks. In answering this question, Premier Harris said (and I am paraphrasing) that he thought that it was a good and virtuous thing for individuals to donate to foodbanks. He even indicated that he had on occasion made donations to a foodbank. Yet there seemed to be little common sense in the Premier's statement. The central and most effective component in his campaign platform was the promise to substantially reduce provincial welfare payments. During the campaign Harris argued that welfare was being paid to many people who did not need it and that those who did need it were being paid more than they needed. The Premier also suggested during the campaign that state welfare discouraged able-bodied



poverty and homelessness as the consequence of social-economic forces and who see current social welfare provision as inadequate, begging is a political act or an act of political expression. It is political because it reflects or manifests the deeper political/social problems of poverty and homelessness.<sup>21</sup> On the other hand, for those who see poverty or homelessness as something that is within the individual's control or as something that has occurred because of choices that she/he has made (the result of personal deficiencies), begging is simply a request for money — a self-interested act, that is the cause rather than the symptom of social decay.<sup>22</sup> Or as was said by the U.S. Circuit Court in *Young v. New York City Transit Authority*: "The only message that we are able to espy as common to all acts of begging is that beggars want to exact money from those whom they accost;" or "the object of begging and panhandling is the transfer of money."<sup>23</sup>

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individuals from seeking employment and created a culture of dependency. Yet if this is what the Premier believed, why would he think that anyone should donate to a foodbank? Indeed, he might have argued instead that foodbanks, like welfare, discourage self-reliance and the pursuit of gainful employment.

<sup>21</sup> For a discussion of homelessness in Canada see T. O'Reilly-Fleming, *Down and Out in Canada: Homeless Canadians* (Toronto: Canadian Scholar's Press Inc., 1993).

<sup>22</sup> One's views about the causes of begging seem also to determine one's views about the effectiveness of anti-begging by-laws. Those who see begging as the consequence of socio-economic conditions and not as a matter of choice, believe that these by-laws cannot succeed in ridding the streets of beggars. Beggars have limited options. Once released by the police, they will reappear somewhere else or perhaps even at the same location. See, for example, D. M. Smith, "A Theoretical and Legal Challenge to Homeless Criminalization Policy" (1994) 12 *Yale Law & Policy Review* 487 at 496. Certainly, the idea of imposing a fine on a beggar seems rather odd.

However, other people believe that begging is a choice the beggar makes, a choice which is encouraged and supported when individuals donate to the beggar. Those who see begging as a choice assume that anti-begging by-laws will remove this incentive and keep beggars off the street. In their view, if we support the practice of begging then we will encourage more and more people to turn to begging as an easy alternative to minimum wage employment. (Or perhaps more accurately if we treat beggars and the homeless badly enough, they might just disappear from sight).

<sup>23</sup> *Young v. New York City Transit Authority* 903 F.2d 146 (2d. Cir. 1990) at 154. See also: Ellickson, *supra* note 18 at 1230: "the ordinary panhandler does not intend to communicate on any ... political topic, but simply to close a commercial transaction." And R. Teir, "Maintaining Safety and Civility in Public Spaces: A Constitutional Approach to Aggressive Begging" (1993) 54 *Louisiana Law Review* 285 at 322:

It is incredible to assert that those who beg do so in order to express some political or economic idea. Rather, the beggar's aim is to obtain money from passers-by. Standing alone, an offer to exchange nothing for money does not communicate anything concerning a condition, society in general, or any

Begging may not amount to a critique of the social/political order; nevertheless it is not simply a request for money. It is, more fundamentally, a request for help — an appeal to the audience's concern for, and sense of duty to, those in need. Behind the beggar's request is a claim of need — need for food or shelter or clothing. This claim is sometimes explicit, but more often is simply implied in the request for money.<sup>24</sup> It is a personal claim that can only be understood and evaluated within the social/economic context on the basis of the audience's political views.

It is to the claim of need and appeal for help that the passer-by must respond by giving money or declining to give money or apologizing for not having any change or consciously avoiding any eye contact and walking on. The passer-by may believe that the beggar does not really have such a need and is seeking to mislead her/him. Or perhaps the passer-by thinks that there is some form of need but that her/his donation will not be used appropriately; or even if there is need, nothing is owed to the beggar who is responsible for her/his situation. Yet regardless of whether the passer-by accepts or rejects the legitimacy of the beggar's claim/appeal, there is an engagement between strangers about need and obligation in the community. As Schafer argues:<sup>25</sup>

When society silences a panhandler or banishes the panhandler from places which have traditionally been public places, such banishment comes close to being a denial of recognition. Each of us has a fundamental need to be recognized by our fellow citizens

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other subject. In fact, in terms of communication, the beggar stands in the same position as the hold-up man with a gun. Both could be seen as purely commercial activity, albeit without the exchange of any goods or services.

<sup>24</sup> *Loper v. New York City Police Dept.*, 999 F.2d 699 (2d Cir. 1993) [hereinafter *Loper*] at 704: "Even without particularized speech, however, the presence of an unkempt and dishevelled person holding out his or her hand or a cup to receive a donation itself conveys a message of need for support and assistance."

<sup>25</sup> *Supra* note 20 at 12. See also *ibid.* at 8:

Even when a donation is not forthcoming, the person who has been solicited has been drawn, however, briefly, into a personal relationship with a beggar. A bond of sorts has been established. It could be a positive bond of involvement and recognition, or a negative bond of discomfort and hostility.

And *Benefit v. City of Cambridge*, 679 N.E. 2d 184 at 190: "The statute intrudes not only on the right of free communication but it also implicates and suppresses an even broader right — the right to engage fellow human beings with the hope of receiving aid and compassion."

as a person with needs and views. The criminalization of panhandling is not only an attack upon the income of beggars, it is an assault on their dignity and self-respect, on their right to seek self-realization through public interaction with their fellow citizens.

To deny a person the right to ask others for help seems like the most fundamental breach of freedom of expression.<sup>26</sup>

While begging may take place at the margins of society or at the margins of our commercially dominated public discourse, it is not marginally connected to the values of truth, democracy and self-realization, which are said to underlie the constitutional commitment to freedom of expression.<sup>27</sup> It may not be 'political,' as that term is used by Alexander Meiklejohn and other democratic theorists of free speech,<sup>28</sup> but it is 'political' in another and perhaps more profound sense of that term.

## THE JUSTIFICATION FOR RESTRICTING BEGGING

Some municipalities, such as Ottawa, have instituted a total ban on begging.<sup>29</sup> They may have done this because they consider that begging, in all its forms, constitutes a general nuisance. Or perhaps they have introduced a general ban because they consider it too difficult to draft or enforce a ban directed exclusively at aggressive or persistent begging. Indeed, it appears that the Ottawa ban is not being rigorously enforced. It may be that the police only enforce the ban when they think that a particular beggar has acted aggressively or dishonestly or when there is a complaint against a particular beggar. However, for obvious reasons, this sort of discretionary power is troubling and unlikely to satisfy the rational connection and minimum impairment components of the courts' section 1 analysis.<sup>30</sup>

Other municipalities have prohibited certain forms of begging or regulated begging in certain contexts. These municipalities argue that their anti-begging by-laws are designed to prevent aggressive or threatening 'begging' (an oxymoron) or begging that is conducted in a persistent and harassing manner. While a commitment to freedom of expression means that an individual cannot be prevented from speaking simply because others are uncomfortable with her/his speech and find it intrusive or irritating, at a certain point expression may become so invasive or harassing that the state is justified in imposing a restriction. A ban that focuses on aggressive or persistent begging can be seen as protecting important individual and community interests. Such by-laws are not illegitimate simply because they focus on a particular form of aggressive communication while leaving other forms of potentially aggressive behaviour unregulated, for it may be that intimidating or harassing charitable solicitation or tourist questioning or newspaper vending has not been

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in person, the immediate provision of money or another thing of value regardless of whether consideration is offered or provided in return, using the spoken, written or printed word, a gesture or other means."

This provision is designed to get "squeegee kids" off the street. Of course, it does not specifically mention "squeegee kids." I assume that the lawmaker decided to define the scope of the law in more general terms to avoid the complaint that the purpose of the law was simply to suppress a particular social group or prohibit a particular form of communication or exchange.

The problem, however, is that the provision may prohibit other activities that the province (and the community) does not wish to prohibit. For example, in Windsor there is an organization known as the Goodfellows, which has for many years provided Christmas food and gift hampers to poorer families in the city. The Goodfellows raise money over the Christmas period by selling their 'newspaper' at the main road intersections in the city. They (enthusiastically) approach cars stopped at traffic lights and ask for a 'donation' in exchange for the paper. I describe this as a donation because the newspaper is only two pages in length and simply describes the Goodfellows' charitable project. The driver, who makes a donation then places the Goodfellows' newspaper on her/his dashboard so that it is visible. By doing this he/she avoids any further approaches and requests. Similarly, in the case of squeegee kids it is unclear whether one is making a donation or paying for a service.

The fundraising activity of the Windsor Goodfellows is almost certainly caught by this provision. Yet it is difficult to imagine that the police will enforce this law against the Goodfellows. They do good work and cause no obvious harm. Indeed, it is difficult to imagine that the law will be enforced against anyone but the squeegee kids. (And even in the case of the squeegee kids the police may not be willing to devote resources to the law's enforcement). These assumptions or expectations remind us of the law's real purpose or character. The law may be drafted in neutral terms but its purpose (as its selective enforcement will demonstrate) is to stop the squeegee kids because of who they are and what they look like.

<sup>26</sup> A. Schafer "Down and Out" *supra* note 20 at 10.

<sup>27</sup> *Irwin Toy*, *supra* note 5 at 976.

<sup>28</sup> A. Meiklejohn, *Political Freedom* (New York: Oxford Univ. Press, 1965).

<sup>29</sup> City of Ottawa, By-law No. 117-91, *Nuisance By-law*, s. 1 prohibits all panhandling. However, it creates an exception for charitable solicitation and street performers who receive voluntary contributions.

<sup>30</sup> I note that the Ontario *Safe Streets Act*, 1999, *supra* note 2, at s. 3(2)(f) provides that: "No person shall, while on the roadway, solicit a person who is in or on a stopped, standing or parked vehicle for the purpose of offering, selling or providing any commodity or service to the driver or any other person in the motor vehicle." "Solicit" as defined in s. 2 means "to request,

a significant problem requiring specific legislative response.

The Winnipeg and Vancouver by-laws include provisions dealing with persistent begging. The Winnipeg by-law, for example, provides at section 8 that: "No person shall continue to panhandle from a person, or follow a person, after that person has made a negative response."<sup>31</sup> However, these by-laws do not specifically prohibit begging that is physically intimidating; presumably because the use of physical intimidation to obtain money is already covered by the *Criminal Code*. Instead the by-laws restrict begging in certain locations or contexts. For example, the Winnipeg by-law provides that:<sup>32</sup>

Section 3: No person shall panhandle within 10 meters of:

- (a) the main entrance to a bank, credit union or trust company;
- (b) an automatic teller machine;
- (c) a public entrance to a hospital;
- (d) a bus stop; or
- (e) a bus shelter.

Section 4: No person shall panhandle on a bus operated by the City of Winnipeg Transit Department.

Section 5: No person shall panhandle on an elevator or in a pedestrian walkway.

Section 6: No person shall panhandle from an occupant of a motor vehicle which is (a) parked; (b) stopped at a traffic signal; or (c) standing temporarily for the purpose of loading or unloading.

Section 10: No person shall panhandle after sunset.

The Vancouver by-law bans all of these activities, but it also bans sitting or lying "on a street for the purpose of panhandling."<sup>33</sup>

Begging at the entrance of a bank or hospital may sometimes be conducted in an aggressive or harassing manner, with the beggar physically obstructing the entrance. Yet begging at these locations is no more likely to be aggressive than at any other public

location.<sup>34</sup> The most that can be said about these regulations is that they seek to protect members of the public from being confronted by beggars (aggressive or polite) in situations where contact with the beggar is difficult to avoid, or to escape from quickly, or where the 'beggee' may feel more embarrassed by her/his refusal to give. The problem to which these regulations respond is not physically aggressive or intimidating or harassing begging but rather the feeling of invasion or discomfort that passers-by feel when confronted by, or even when confronted with, beggars.

While begging is sometimes conducted in a physically aggressive way, in which the beggar obstructs the pedestrian or threatens her/him, most begging is non-aggressive, and even polite. Nevertheless, begging is experienced by many as invasive or upsetting, or is labelled as 'aggressive' even when it is not conducted in a physically threatening or persistent manner. Public reaction has become increasingly negative as begging has become more common. As Joel Blau observes:<sup>35</sup>

Some people are generous and do not mind occasional requests for money. Too many requests, though, soon exhaust their generosity. Losing their capacity to engage in single charitable acts, they are increasingly inclined to see homelessness as a disfigurement of the landscape, and begging as a personal assault.

Yet, ironically, we experience begging as invasive because it is not the norm, because it is so different from ordinary public interaction. We are not accustomed to being confronted by others, by strangers, and asked for help. Indeed, many of us experience the mere presence or visibility of the homeless as

<sup>31</sup> *Supra* note 4.

<sup>32</sup> *Supra* note 4.

<sup>33</sup> City of Vancouver, By-law No. 7885, *A By-law to Regulate and Control Panhandling*, (30 April 1998), s. 6.

<sup>34</sup> The Government of Ontario's *Safe Streets Act*, 1999, *supra* note 2 prohibits "aggressive solicitation" and the soliciting of a person "who is using, waiting to use, or departing from an automated teller machine" or "who is using or waiting to use a pay phone" or "who is in the process of getting in, out of, on or off a vehicle or who is in a parking lot" etc.

"Solicit" is broadly defined in this Act. It means "to request, in person, the immediate provision of money or another thing of value, regardless of whether consideration is offered or provided in return, using the spoken, written or printed word, a gesture or other means." Presumably the Act is violated when a beggar, identified by general appearance or by a sign asking for spare change, sits near the entrance of a bank or near where cars are being parked and is visible to (or makes eye contact with?) someone leaving a bank or getting out of a car.

<sup>35</sup> As quoted in R. Fantasia and M. Isserman, *Homelessness: A Sourcebook* (New York: Facts on File Inc., 1994) at 137.

invasive.<sup>36</sup> We are uncomfortable with, even afraid of, those who are different from us and living in difficult circumstances. We see in these strangers the potential for violence. As well, we are uneasy about what the growing presence of beggars may tell us about our community. We are not comfortable with having to confront so immediately the question of our personal and shared responsibility to others.

Despite the familiar and idealized description of public/political discourse as the free and open exchange of ideas and information among citizens, the fact is that we engage in very little face-to-face communication with strangers.<sup>37</sup> Most of our public discourse is mediated. It is conducted through newspapers, magazines and on television and radio. It is one-directional, in that the vast majority of citizens receive commercial messages or commercially funded messages to which they have no real opportunity to respond. We are unaccustomed to engaging in any sort of verbal exchange with those who are not friends, family or co-workers. This is why it feels invasive when we are addressed by one or more beggars, by strangers.<sup>38</sup> Ironically, it is the failure of mediated social provision (state-provided welfare) that has led to this increase in direct (non-mediated) contact with strangers — with the poor and homeless.

We are more comfortable with approaches by charitable fundraisers because they are more like 'us,' and provide a buffer between us and the needy. The principal distinction between begging and charitable fundraising is that the former is a request to help the speaker, while the latter is a request to help others. But it is difficult to understand why constitutional

protection should turn on this distinction.<sup>39</sup> Begging and charitable fundraising are sometimes distinguished on the basis of the effectiveness of the donation. While we feel reasonably confident that money donated to a charity will go to those in need, we are less sure that money given to a beggar is going to someone in need or to someone who will use the money wisely. This second distinction, however, may be more a matter of perception than reality. A large percentage of the money donated to many charities goes to cover fundraising and administrative costs.<sup>40</sup> At the same time, there is no evidence to show that fraudulent needs claims by beggars are anything but the exception.

The other factor that makes begging seem invasive is that it runs against the dominant message of public discourse. Advertising is everywhere, around every corner we turn. Yet we do not see advertising as invasive, or as invasive to the same degree as begging, precisely because it is omnipresent. Advertising defines our public discourse and shapes our assumptions about appropriate social interaction. It is a familiar part of our public environment. It is something we expect to see when we go about our day, something to which we have become accustomed, part of the natural order, the way things are and must be. At the same time, the domination of discourse by advertising — by consumer oriented messages — makes begging seem invasive. The beggar's message about basic unsatisfied need and individual and collective responsibility runs against the principal theme of commercially dominated public discourse, that personal satisfaction and fulfilment are achieved through consumption. While in some communities begging is an accepted part of public interaction, in our consumer society we have come to assume that we should be protected from uncomfortable personal interaction or from being confronted with claims of obligation.

It should be obvious from the foregoing that the partial bans on begging introduced by Vancouver and Winnipeg are not simply 'time, place and manner'

<sup>36</sup> O'Reilly-Fleming, *supra* note 22 at 6: "Why would we wish to fine the hungry for the audacity to ask pedestrians to voluntarily give up a small amount of money? The answer is that we are not fining the beggar for his request, but for his presence on the street."

<sup>37</sup> See, for example, Ellickson, *supra* note 19 at 1235: Unlike the offer of a handbill, a spoken plea carries an implicit request for eye-contact and oral response. This intrudes more on a pedestrian's privacy and, because the act is more aggressive, creates a more plausible fear of physical danger.

<sup>38</sup> Schafer, *supra* note 20 at 8 observes: The encounter may not be entirely easy from the beggar's perspective either. It may be a necessary means, however, whereby the beggar obtains subsistence, and it may provide an opportunity publicly to express one's painful condition. But only as a last resort would anyone choose this way of obtaining money or communicating their problems.

<sup>39</sup> Loper, *supra* note 25 at 704:

We see little difference between those who solicit for organized charities and those who solicit for themselves in regard to the message conveyed. The former are communicating the needs of others while the latter are communicating their personal needs. Both solicit the charity of others. The distinction is not a significant one for First Amendment purposes.

<sup>40</sup> See *Epilepsy Canada v. Alberta (A.-G.)* (1994), 115 D.L.R. (4th) 501 (Alta C.A.). In the US, see *Village of Schaumburg v. Citizens for a Better Environment*, 444 U.S. 620 (1980). In each case the court struck down a law restricting charitable solicitation by an organization that did not devote at least 75 per cent of its revenue to charitable purposes.



restrictions, directed at the physical effects of a particular communicative activity. The Supreme Court of Canada has indicated in previous judgments that 'time, place and manner' restrictions may be easier to justify under section 1 of the *Charter*. Because this type of restriction is aimed at the physical consequences of expression rather than at the content of the communicated message, it will often leave the individual speaker with alternative times, places and manners at/in which to communicate her/his message. The state should be permitted to introduce a reasonable restriction on the time, place and manner of expression, provided the restriction leaves adequate space for expression generally or for the expression of particular views — i.e., provided that there are other times, places and manner in which the expression can take place.<sup>41</sup>

Even though these by-laws do not restrict begging in general, and may leave some space for lawful begging, they are not simply time, place and manner restrictions. They restrict the time, place and manner in/at which a particular kind of speaker can communicate a particular kind of message. Only one kind of communicative approach, begging, is restricted. More significantly, the restricted activity is not defined in terms of its harmful physical consequences.<sup>42</sup>

As presently drafted, these by-laws prohibit begging that is neither persistent nor aggressive. The content or message is a critical part of what these by-laws seek to curtail, even if they do leave open some space for begging.<sup>43</sup> How else can we explain the municipalities' decision to restrict begging, but not other soliciting activities, near the entrance of a hospital or near a bus shelter or to restrict sitting or lying on a street for the purpose of panhandling? If the municipality was concerned only with the nuisance or physical interference the speaker might cause by sitting

down on the sidewalk, and was in no way with concerned with her/his message, then the provision would have been broader and included any incident of sitting down on the sidewalk or it would have been narrower so that it dealt only with sitting (or even begging by sitting) that obstructed or impeded pedestrian traffic. Because this and other provisions in the by-law restrict a particular kind of speaker and message and because they do for reasons that relate, at least in part, to the content of the communication, they cannot truly be described as 'time, place and manner' or 'content-neutral' in character and so must be subject to a rigorous standard of review under section 1 of the *Charter*. Begging is banned or restricted because it is experienced as invasive and it is experienced in this way because of its message.

It is difficult not to think that the cities of Winnipeg and Vancouver decided to impose a partial ban, directed at certain kinds of begging or begging in certain circumstances, simply because they recognized that a general ban on begging would have little chance of surviving constitutional review. However, this strategy by the municipalities does not change the substance of the by-laws. The concerns that underlie these partial restrictions are the same as those that underlie Ottawa's general ban and are entirely inadequate as a basis for restricting constitutionally protected freedom of expression. □

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<sup>41</sup> *Peterborough v. Ramsden*, [1993] 2 S.C.R. 1084 at 1106.

<sup>42</sup> In *Irwin Toy*, *supra* note 5 at 974 the Supreme Court of Canada said that a key question is whether "the government aims to control only the physical consequences of certain human activity, regardless of the meaning being conveyed" or whether "the government's purpose is to restrict a form of expression in order to control access by others to the meaning being conveyed or to control the ability of the one conveying the message to do so."

<sup>43</sup> Hershcoff, *supra* note 6 at 906:

Governments that prohibit begging do not forbid all communications among strangers. Indeed they could not constitutionally do so. Instead, bans on begging do not forbid all communications among strangers — the tourist's request for directions, the newspaper seller's exhortation to "read all about it," the politician's pitch to "vote Democratic," and the Christmas Santa's plea to give to the needy — and prevent 'expression' on one particular subject.