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## City Court, City of Rochester, People v. Barton

Kerri Grzymala

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**CITY COURT OF NEW YORK  
CITY OF ROCHESTER**

People v. Barton<sup>1</sup>  
(decided December 14, 2004)

After walking into traffic to solicit money from motorists, Michael Barton was charged with aggressive panhandling.<sup>2</sup> Barton claimed that the ordinance under which he was charged violated the First Amendment of the United States Constitution and article I, section 8 of the New York Constitution.<sup>3</sup> Specifically, Barton argued that “the ordinance [was] not sufficiently narrowly tailored,” and, therefore, did not comport with the constitutional requirements necessary to uphold a regulation which infringes upon his free speech rights.<sup>4</sup> The court struck down the ordinance, dismissed the charge against Barton, and conceded that the ordinance failed to sufficiently limit its scope to situations that fit within its governmental purpose.<sup>5</sup>

Defendant, Michael Barton, walked into traffic on the inner loop of an exit ramp to solicit money from motorists and was charged with aggressive panhandling under Rochester City Code section 44-

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<sup>1</sup> 795 N.Y.S.2d 423 (Rochester City Ct. 2004).

<sup>2</sup> *Id.* at 424.

<sup>3</sup> *Id.*; U.S. CONST. amend. I states in pertinent part: “Congress shall make no law . . . abridging the freedom of speech . . . .”; N.Y. CONST. art. I, § 8 provides in pertinent part: “Every citizen may freely speak, write and publish his or her sentiments on all subjects, being responsible for the abuse of that right; and no law shall be passed to restrain or abridge the liberty of speech . . . .”

<sup>4</sup> *Barton*, 795 N.Y.S.2d at 425.

<sup>5</sup> *Id.* at 429.

4-H.<sup>6</sup> At trial, defendant argued that the ordinance in prohibiting all solicitous speech on the streets of the City of Rochester, violated the First Amendment of the United States Constitution and article I, section 8 of the New York Constitution.<sup>7</sup> Defendant also argued that the ordinance was overly broad and that it was preempted by state law.<sup>8</sup>

First, the court addressed whether the defendant had standing to raise these constitutional claims.<sup>9</sup> The general rule is that a person cannot vicariously challenge the constitutionality of a law, however, there exists an exception to this rule where the constitutional challenge pertains to the First Amendment and the individual alleges that the law is overly broad and facially unconstitutional.<sup>10</sup> Since the court determined that panhandling is considered speech and is, thus, under the protection of the First Amendment, the court found that defendant did, in fact, have proper standing to raise the state and federal constitutional claims.<sup>11</sup>

Upon this finding, the court then addressed whether defendant's panhandling was protected by the federal and state constitutions.<sup>12</sup> The court acknowledged the Supreme Court's view

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<sup>6</sup> *Id.* at 424 (quoting ROCHESTER, N.Y. CITY CODE §44-4-H that states: "No person on a sidewalk or alongside a roadway shall solicit from any occupant of a motor vehicle that is on a street or other public place.").

<sup>7</sup> *Id.*

<sup>8</sup> *Id.* at 425.

<sup>9</sup> *Barton*, 795 N.Y.S.2d at 426 (quoting *Broadrick v. Oklahoma*, 413 U.S. 601, 610) (defining standing as "the principle that a person to whom a statute may constitutionally be applied will not be heard to challenge that statute on the ground that it may conceivably be applied unconstitutionally to others, in other situations not before the Court.").

<sup>10</sup> *Id.* at 426.

<sup>11</sup> *Id.* at 426-27.

<sup>12</sup> *Id.* at 427.

that solicitations by organized charities are protected by the First Amendment.<sup>13</sup> However, a court will uphold limitations on First Amendment protection as long as the limitations are content-neutral, “narrowly tailored to serve a significant government interest,” and leave “open ample alternative channels of communication.”<sup>14</sup>

The court, in analyzing the initial requirement of content-neutrality, recognized that a regulation is content-neutral if it serves purposes that are unrelated to the content of the expression.<sup>15</sup> The intended purpose and justification for the ordinance was to “promote the health, safety, and welfare of the [city’s] citizens and visitors”; it did not serve as a means for the government to express disagreement with the content of the communication.<sup>16</sup> In light of the court’s finding that the Rochester ordinance did not completely ban solicitations and that the City of Rochester did not enact the ordinance because of any disagreement with the message that the speech conveyed, the court concluded that the ordinance was content-neutral.<sup>17</sup>

Finally, the court addressed whether the ordinance imposed was narrowly tailored to serve a significant governmental interest.<sup>18</sup> The court explained that a regulation is narrowly tailored if it “promotes a substantial government interest that would be achieved

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<sup>13</sup> *Barton*, 795 N.Y.S.2d at 427.

<sup>14</sup> *Id.*

<sup>15</sup> *Id.*

<sup>16</sup> *Id.*

<sup>17</sup> *Id.*

<sup>18</sup> *Barton*, 795 N.Y.S.2d at 427.

less effectively absent the regulation.”<sup>19</sup> Defendant argued that because the scope of prohibited actions set forth in the ordinance was not limited to aggressive behavior, the ordinance was not narrowly tailored.<sup>20</sup> The defendant also argued that the ordinance was overly broad because it applied not just to individuals who were soliciting money on the street, but would also apply to individuals who were merely expressing their views publicly on the street by picketing.<sup>21</sup> Due to the fact that the overbreadth issue related significantly to defendant’s first contention, the court discussed both issues and held that the ordinance should be struck down because it was not narrowly tailored.<sup>22</sup> Because the court found that the ordinance was not sufficiently narrowly tailored, and therefore unconstitutional, the court did not need to determine whether the ordinance left open alternative means of communication or the issue of preemption.<sup>23</sup>

The Supreme Court has not specifically dealt with constitutional limitations on panhandling laws with regard to the First Amendment protection of speech; however, the Court has evinced clear direction on these limitations as they are applied to organized charities.<sup>24</sup> In *Village of Schaumburg v. Citizens for a Better Environment*,<sup>25</sup> the Supreme Court of the United States held that a village ordinance<sup>26</sup> specifying that a charitable solicitation permit

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<sup>19</sup> *Id.* (citing *Gresham v. Peterson*, 225 F.3d 899 (7th Cir. 2000)).

<sup>20</sup> *Id.* at 424-425.

<sup>21</sup> *Id.* at 428.

<sup>22</sup> *Id.* at 425, 429.

<sup>23</sup> *Barton*, 795 N.Y.S.2d at 429.

<sup>24</sup> *Gresham*, 225 F.3d at 903.

<sup>25</sup> 444 U.S. 620 (1980).

<sup>26</sup> *Id.* at 624 (quoting SCHAUMBURG, ILL. VILLAGE CODE art. III, §22-20(g) that states in

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must be obtained by all charitable organizations seeking to engage in door-to-door solicitation, was unconstitutional.<sup>27</sup> The Court recognized that charitable solicitations are within the protection of the First Amendment, stating, “[Our] cases long have protected speech even though it is in the form of . . . a solicitation to pay or contribute money.”<sup>28</sup> The Court also found that the ordinance in question was subject to strict scrutiny and therefore could not be upheld without a showing that it “serve[d] a sufficiently strong, subordinating interest that the Village [was] entitled to protect.”<sup>29</sup> While the Village contended that the regulation imposed by the ordinance was “intimately related to substantial governmental interests ‘in protecting the public from fraud, crime and undue annoyance,’ ” the Court found this justification insufficiently related to the interest asserted.<sup>30</sup> Therefore, the ordinance could not survive scrutiny under the First Amendment.<sup>31</sup>

The Second Circuit Court of Appeals in *Loper v. New York City Police Dep’t*, upheld a statute<sup>32</sup> which prohibited begging in public places throughout the city, finding there to be no distinction

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pertinent part: “permit applications [require] . . . satisfactory proof that at least seventy-five percent of the proceeds of such solicitations will be used directly for the charitable purpose of the organization”).

<sup>27</sup> *Id.* at 636, 639 (deciding whether non-profit organization’s assertion that invoking requirements to obtain solicitation permits by charitable organizations violated the First Amendment).

<sup>28</sup> *Id.* at 633 (citing *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964)).

<sup>29</sup> *Id.* at 636

<sup>30</sup> *Schaumburg*, 444 U.S. at 636.

<sup>31</sup> *Id.*

<sup>32</sup> N.Y. PENAL LAW §240.35(1) (McKinney 2005) states in pertinent part: “A person is guilty of loitering when he: 1. Loiters, remains or wanders about in a public place for the purpose of begging . . . .”

between solicitation for organized charities and panhandling.<sup>33</sup> The court ascertained that begging involves communication and conveys a message, even without the transmission of particularized speech.<sup>34</sup> The court concluded that the statute was neither narrowly tailored to serve the government's interest nor did it leave open alternative channels for beggars to convey their message.<sup>35</sup> "If individuals may solicit for charitable and other organizations, no significant governmental interest is served by prohibiting others for [sic] soliciting for themselves."<sup>36</sup>

In *Acorn v. City of Phoenix*,<sup>37</sup> the Ninth Circuit Court of Appeals held that a Phoenix ordinance<sup>38</sup> disallowing solicitations from occupants of vehicles on streets or highways did not violate the First Amendment.<sup>39</sup> The court, in arriving at its conclusion, relied upon the three part forum analysis set forth by the United States Supreme Court.<sup>40</sup> Recognizing the Supreme Court's long-standing designation of streets as public fora and, pursuant to the specifications of the ordinance in question, the *Acorn* court examined

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<sup>33</sup> 999 F.2d 699, 701, 704 (2d Cir. 1993).

<sup>34</sup> *Id.* at 704.

<sup>35</sup> *Id.* at 705.

<sup>36</sup> *Id.*

<sup>37</sup> 798 F.2d 1260 (9th Cir. 1986).

<sup>38</sup> ARIZ. REV. STAT. ANN. §28-796 (2005) provides in pertinent part: "a pedestrian shall not walk along and on an adjacent roadway . . . . A person shall not stand in a roadway for the purpose of soliciting a ride from the driver of a vehicle."

<sup>39</sup> *Acorn*, 798 F.2d at 1273.

<sup>40</sup> *Id.* at 1264-65 (quoting *Perry Educ. Ass'n v. Perry Local Educators' Ass'n.*, 460 U.S. 37, 45, 46 (1983)) (setting forth three categories of fora: public fora are property "which by long tradition . . . have been devoted to assembly or debate"; a second category of public fora which consists of "public property which the State has opened for use by the public as a place for expressive activity"; and nonpublic fora which the government "may reserve . . . for its intended purposes.").

the issue using a public forum analysis.<sup>41</sup> “The government may enforce reasonable time, place, and manner regulations provided the restrictions ‘are content-neutral, are narrowly tailored to serve a significant government interest, and leave open ample alternative channels of communication.’ ”<sup>42</sup> While appellants offered a compelling argument that motorists could just as easily be distracted by billboards or other pedestrians, the court found that type of solicitation to be significantly different from the obtrusive nature of an individual standing closely beside a car.<sup>43</sup> The *Acorn* court found the ordinance in question to be more than justified by the government’s purpose of promoting the safety and peacefulness of its streets, without intrusion by solicitors upon motorists.<sup>44</sup>

The *Barton* court relied upon the holding and reasoning set forth in *Coalition for Humane Immigrant Rights of Los Angeles (CHIRLA) v. Burke*.<sup>45</sup> In *CHIRLA*, the court held that a section of the Los Angeles City Code<sup>46</sup> was in violation of the First Amendment

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<sup>41</sup> *Id.* at 1265-67 (“Speakers may be excluded from a public forum only when ‘exclusion is necessary to serve a compelling state interest’ . . .”).

<sup>42</sup> *Id.* at 1265 (quoting *Perry*, 460 U.S. at 45).

<sup>43</sup> *Id.* at 1269. See also *Heffron v. Int’l Society for Krishna Consciousness, Inc.*, 452 U.S. 640, 665 (Justice Blackmun concurring and dissenting) (noting the disruptive character of solicitation and differentiating between literature distribution and solicitation in that the latter creates more crowd control problems).

<sup>44</sup> *Acorn*, 798 F.2d at 1273.

<sup>45</sup> *Barton*, 795 N.Y.S.2d at 428 (“[T]he court’s analysis [is] both legally sound, and correct as a matter of public policy.”); 2000 U.S. Dist. LEXIS 16520 (C.D. Cal. Aug. 31, 2000) (finding an ordinance prohibiting day laborers from soliciting work on public streets and sidewalks to be unconstitutional on the grounds that the ordinance was not sufficiently narrowly tailored to serve the county’s interest) (holding that the broad reach of the ordinance would prohibit speech not even directed at occupants of vehicles and the ordinance did not provide for alternative avenues of communication).

<sup>46</sup> *CHIRLA*, 2000 U.S. Dist. LEXIS 16520 at \*1-2 (quoting L.A., CAL. CITY CODE §13.15.011 which provides in pertinent part: “It shall be unlawful for any person, while standing in any portion of the public right-of-way . . . to solicit, or attempt to solicit, employment, business, or contributions of money or other property, from any person



due to the exceedingly broad nature by which it extended beyond the scope of the government's intended purpose for enacting the statute.<sup>47</sup> The ordinance present in *CHIRLA*, similar to that at issue in *Barton*, proscribed solicitations by persons on public streets and sidewalks.<sup>48</sup> While acknowledging that the city had a legitimate interest in promoting the safety of its citizens and public streets, the *CHIRLA* court found that the ordinance was so broad that it also encompassed purposes that did not fit within the governmental justification for its imposition.<sup>49</sup>

In *People ex. rel. Acara v. Cloud Books, Inc.*, the New York Court of Appeals established that article I, section 8 of the New York Constitution affords broader protection to the freedom of speech than the First Amendment of the United States Constitution.<sup>50</sup> The court emphasized that the Supreme Court's analysis of First Amendment rights serves as a paradigm for the states' application of individual rights and that "[t]he function of the comparable provisions of the State Constitution . . . is to supplement those rights to meet the needs and expectations of the particular State."<sup>51</sup> Thus, the minimal national standard set forth by the Supreme Court in regard to First Amendment rights is not necessarily dispositive when applied to the

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traveling in a vehicle . . .").

<sup>47</sup> *Id.*, at \*22, 23, 24, 27, 33, 43 (stating that the ordinance was not narrowly tailored to serve the county's intended purpose of protecting its citizens from dangers that could occur due to aggressive solicitation of occupants of vehicles and traffic safety).

<sup>48</sup> *Id.*, at \*2.

<sup>49</sup> *Id.*, at \*22, 24-26, 42-43.

<sup>50</sup> 503 N.E.2d 492, 494 (N.Y. 1986) (recognizing that the provisions of the state constitution are meant to supplement those rights afforded by the First Amendment according to the needs of the particular state).

<sup>51</sup> *Id.* at 494.

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individual guarantees provided by the New York State Constitution.<sup>52</sup>

In *People v. Schrader*, the criminal court of the City of New York found that a statute banning all begging in the New York City transit system did not violate a defendant's freedom of speech under the New York State Constitution.<sup>53</sup> Defendant asserted that the statute was unconstitutional due to the broader protection of speech afforded by the New York State Constitution.<sup>54</sup> The court acknowledged that it was bound, at a minimum, to apply at least as great a protection of speech under the New York State Constitution as is applicable under the First Amendment.<sup>55</sup> The Supreme Court established that "begging constitutes protected speech under the First Amendment;" therefore, minimally, begging will constitute protected speech under the New York Constitution and, consequently, will require the same analysis as would be "applied to other forms of solicitation."<sup>56</sup>

In conclusion, while the Supreme Court has laid the framework for the protection of individual rights under the United States Constitution, the states are left with the discretion to expand upon that foundation through their own state constitutions. In determining whether there exists an infringement of free speech

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<sup>52</sup> *Id.* at 494-95.

<sup>53</sup> 617 N.Y.S.2d 429 (N.Y. Crim. Ct. 1994); 21 NYCRR §1050.6(b)(2) states in pertinent part: "No person . . . shall engage in any commercial activity . . . Commercial activities include . . . the solicitation of money or payment for food, goods, services or entertainment. No person shall panhandle or beg upon any facility or conveyance."; *Schrader*, 617 N.Y.S.2d at 439. Defendant was charged with unlawful solicitation in the subway in violation of the statute. *Id.* at 432.

<sup>54</sup> *Schrader*, 617 N.Y.S.2d at 434.

<sup>55</sup> *Id.* at 435.

<sup>56</sup> *Id.*

rights, the analyses under the United States Constitution and the New York State Constitution are compatible when the protected matter concerns solicitous activity. However, there are certain, unique situations in which article I, section 8 of the New York Constitution grants broader protection of free speech than the First Amendment of the United States Constitution. These situations are limited to cases that involve regulations on conduct that affect speech activities where the conduct and speech activity are not directly related.<sup>57</sup> In light of the fact that the ordinance present in *Barton* involved solicitous speech, the court's analysis under the New York State Constitution was synonymous with that which would be applied under the United States Constitution.

*Kerri Grzymala*

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<sup>57</sup> *Id.* at 439.





**RIGHT AGAINST SELF-INCRIMINATION**

United States Constitution Amendment V:

*No person shall . . . be compelled in any criminal case to be a witness against himself . . . .*

New York Constitution article I, section 6:

*No person shall . . . be compelled in any criminal case to be a witness against himself . . . .*

