



ARTICLES

Compassion Fatigue and the First Amendment: Are the Homeless Constitutional Castaways?

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INTRODUCTION

A. *The Homeless, Compassion Fatigue and the First Amendment*

In the decade since the wan face of homelessness captured the attention of the American public, the number of homeless people in the United States has escalated.¹ In 1984, the Department of Housing and Urban Development released its first estimates of the size of the homeless population, admitting that somewhere between 250,000 and 350,000 people were homeless.² Since 1984, studies indicate that this number has increased ten-fold, and it is now estimated that as many as three million people living in the United States are homeless.³ Perhaps the most distressing demo-

¹ The escalation in the number of homeless is not, of course, limited to the United States. Indeed, hard economic times and the disintegration of nations have left Europe with hundreds of thousands of homeless people. Patrick McDowell, *Homeless Haunt Europe*, S.J. MERCURY NEWS, Feb. 17, 1992, at 2A. Exact figures are elusive, but European agencies that deal with the homeless problem say the situation has been getting worse since the mid-1980s. *Id.*

Even more alarming, according to a World Health Organization study released in April 1993, the number of homeless street children vary from 10 million to 100 million worldwide, depending on how they are defined. *World's Street Children Turning To Drugs*, S.J. MERCURY NEWS, Apr. 26, 1993, at 2A (basing estimates on research and 550 interviews in ten cities including the following: Rio de Janeiro, Brazil; Alexandria and Cairo, Egypt; Tegucigalpa, Honduras; Montreal, Toronto; Manila, The Philippines; Bombay, India; Mexico City, Mexico; Lusaka, Zambia).

² U.S. DEP'T OF HOUS. & URBAN DEV., A RPT. TO THE SECRETARY ON THE HOMELESS AND EMERGENCY SHELTERS 18 (1984). The HUD Report was based on interviews with service providers in sixty cities who were asked to estimate the number of homeless individuals in their areas. This methodology was criticized by advocates for the homeless who asserted that the actual number of homeless exceeded the HUD estimates. *See, e.g.*, *Clark v. Community for Creative Non-Violence*, 468 U.S. 288, 304 n.4 (1984) (Marshall, J., dissenting) ("homelessness is a widespread problem, often ignored, that confronts its victims with life threatening deprivations") (citing Brief for National Coalition for the Homeless, *Amicus Curiae* at 3 (noting that "estimates on the number of homeless persons in the United States range from two to three million")); *Community For Creative Non-Violence v. Pierce*, 814 F.2d 663, 665 (D.C. Cir. 1987) (holding that advocacy organization lacked standing to challenge HUD report as "improperly researched, unsubstantiated, and inaccurate"); *HUD Report on Homelessness, Joint Hearing Before the Subcomm. on Hous. & Community Dev. of the House Comm. on Banking, Finance, & Urban Affairs and the Subcomm. on Manpower & Hous. of the House Comm. on Gov't Operations*, 98th Cong., 2d Sess. 80 (1984) (finding that one 1982 report estimated approximately two million Americans were homeless).

³ Alexander Wohl, *Gimme Shelter: Lawyering For The Poor*, A.B.A. J., Aug. 1990, at 58; *see also Lee v. Pierce*, 698 F. Supp. 332, 335 (D.D.C. 1988) (noting

graphic statistic is that over one-third of the homeless may be families.⁴ Nationwide, surveys indicate that more than 500,000 homeless are children.⁵

As the number of homeless Americans grows, so has compassion fatigue.⁶ The perception of much of the public is that programs offering help to the homeless are unsuccessful and that the more money communities spend on homelessness, the more this problem grows.⁷ As greater numbers of people become homeless, the

there are "approximately three million homeless persons nationwide, including many families and children").

⁴ U.S. CONF. OF MAYORS, A STATUS RPT. ON HUNGER & HOMELESSNESS IN AMERICA'S CITIES: 1990 25 (1990) [hereafter 1990 STATUS REPORT]. The number of homeless families entering New York City's shelter system over the summer of 1992 was almost twice the number seeking housing during the previous summer. Celia W. Dugger, *Twice as Many Families Seek Space in City*, N.Y. TIMES, Sept. 17, 1992, at B3.

⁵ Tom Callahan, *Bring A Van With Doctors In It*, S.J. MERCURY NEWS, Apr. 19, 1992 (Parade Mag.), at 12. Up to one million children may be runaways. *Id.* at 12-13. A study by the Children's Defense Fund revealed that "[h]omeless children experience more acute and chronic medical problems than do poor children who have homes." Ellen L. Bassuk, *Homeless Families*, SCI. AM., Dec. 1991, at 66, 70.

⁶ In 1990, a survey of thirty major cities conducted by the U.S. Conference of Mayors revealed three clear trends: the number of hungry, homeless Americans seeking help is rising quickly; the ability of America's cities to provide help is not keeping pace, and in many places the pace is declining; and, the public's attitude toward the homeless is shifting from compassion to intolerance and even hostility. 1990 STATUS REPORT, *supra* note 4, at 50-53. In its 1991 survey of twenty-eight cities, the U.S. Conference of Mayors said that nearly three-fifths of the cities reported evidence of a public backlash against homeless people. U.S. CONF. OF MAYORS, A STATUS RPT. ON HUNGER & HOMELESSNESS IN AMERICA'S CITIES: 1991 59-60 (1991); *see also* James Bock, *The Homeless Aren't Who We Thought*, S.F. CHRON., May 13, 1993, at B3 (citing Alice Baum's and Doug Brynes' forthcoming book, A NATION IN DENIAL: THE TRUTH ABOUT HOMELESSNESS (stating that Americans have grown "weary, angry and, in some cases, bored with the problem"))).

⁷ Mary Brosnahan, Executive Director of New York's Coalition for the Homeless, commented: "People are a bit weary . . . They have heard all the solutions for the last ten years but it doesn't seem to make a dent in the problem." *Opinions, Attitudes Hardening Toward The Homeless*, S.J. MERCURY NEWS, Sept. 2, 1991, at 8A.

The results of the 1990 and 1991 Surveys of the U.S. Conference of Mayors seem to validate the public's perception that the problems of homelessness and poverty remain unsolved. The Mayors' surveys revealed that requests for emergency food rose by 22% in 1990 and by 26% in 1991. *Homeless Problem Worsening*, S.F. CHRON., Dec. 17, 1991, at A2; Robert A. Rankin, *Homelessness Rises As Tolerance Declines*, S.J. MERCURY NEWS, Dec. 20, 1990 at 1A. Demands

backlash increases. Empathy in the United States is turning into intolerance as Americans seek to impose harsher restrictions on homeless people to reduce their visibility.⁸ If society cannot solve

for emergency shelter increased 24% overall in 1990 and 13% in 1991, including 17% for homeless families. *Id.*; *Homeless Problem Worsening, supra*, at A2. As Chairman of the U.S. Conference of Mayor's Task Force on Hunger and Homelessness, St. Paul, Minnesota, Mayor James Scheibel notes that this is the ninth consecutive year in which the survey has found an increase in requests for emergency shelter. Steven A. Holmes, *Homelessness Rises, But Not As Issue*, N.Y. TIMES, Dec. 25, 1991, at A9. Of perhaps more concern, the 1991 Mayor's Survey revealed that, on the average, 17% of food needs and 15% of shelter needs are not being met. *Homeless Problem Worsening, supra*, at A2. Indeed, in nearly four out of every five cities, hungry people are being turned away from emergency feeding facilities. *Id.*

⁸ See, e.g., N.Y. PENAL LAW § 240.35 (McKinney 1991) (prohibiting, as part of anti-loitering regulation, anyone from "sleeping" in "any transportation facility" who is "unable to give a satisfactory explanation of his presence"); SAN FRANCISCO, CAL., PARK CODE § 3.13 (1988) (providing that "no person shall remain in any park for the purpose of sleeping between the hours of 10:00 p.m. and 6:00 a.m."); Paul Ades, *The Unconstitutionality of "Antihomeless" Laws: Ordinances Prohibiting Sleeping in Outdoor Public Areas as a Violation of the Right to Travel*, L.A. DAILY J., Sept. 28, 1990, at 2.

Much of the restrictive legislation seeks to hide the homeless from public view. Regulations in many communities prohibit the homeless from sleeping in public areas, such as parks or beaches, that would otherwise seem to be ideal settings, due to the usually mild weather and the availability of toilet facilities. See, e.g., SANTA BARBARA, CAL., MUN. ORDINANCE 15.16.085(1) (making it "unlawful for any person to sleep . . . [i]n any public beach during the period of time from one-half hour after sunset to 6:00 A.M."). The ordinance also bars the homeless from sleeping on city streets, sidewalks or parking lots. *Id.*

In *People v. Davenport*, 222 Cal. Rptr. 736 (Cal. App. Dep't Super. Ct. 1985), cert. denied, 475 U.S. 1141 (1986), the Appellate Department of the Santa Barbara Superior Court found that the Santa Barbara ordinance was not unconstitutionally vague or overbroad. In reaching this decision, the court commented that the "[c]ity acts reasonably in lessening the risks to transients from other transients by restricting the areas where overnight sleeping, and thus, vulnerability, can legitimately take place." *Id.* at 739. However, this professed governmental concern with the well-being of the homeless seems open to question because the measure permits the homeless to sleep in "the jungle," a public lot overgrown with eucalyptus trees, where the homeless are "safely" out of sight of the downtown boutiques. *Opinions, Attitudes Hardening Toward The Homeless, supra* note 7, at 8A.

In September of 1993, the ACLU of Southern California sued Santa Barbara as well as the cities of Santa Ana, Orange, Fullerton and Long Beach, arguing that ordinances prohibiting overnight camping in public places are unconstitutional. *Making Criminals Of The Homeless: Overwhelmed Cities Turn Against Beggars*, S.J. MERCURY NEWS, Dec. 14, 1992, at 1B. The ACLU also

threatened Santa Monica, California, with legal action if it made good on its promise to prosecute homeless people pursuant to an "anti-lodging law enacted during post-Civil War Reconstruction." *Id.* The advocacy group wants to end what it calls "social cleansing" by the cities. Larry Rohter, *Homelessness Defies Every City's "Remedy,"* N.Y. TIMES, Nov. 22, 1992, at E3; *see also* Harry Simon, *Towns Without Pity: A Constitutional And Historical Analysis Of Official Efforts To Drive Homeless Persons From American Cities*, 66 TUL. L. REV. 631 (1992) (arguing that courts must be vigilant of unconstitutional efforts to sweep homeless from cities).

During the last two decades, a number of other lawsuits have been brought challenging statutes that prohibit sleeping or camping in public. *See, e.g.*, *Clark v. Community for Creative Non-Violence*, 468 U.S. 288 (1984). In *Clark*, the only one of these cases to reach the United States Supreme Court, a National Park Service regulation prohibiting camping in certain Washington, D.C., parks was applied to prohibit demonstrators on behalf of the homeless from sleeping on the Mall and in Lafayette Park. *Id.* at 289-92. The Court held that the statute did not violate the First Amendment because the Park Service had established other areas of the parks for camping and did not attempt to ban camping entirely. *Id.* at 298-99. In addition, the "regulation otherwise left the demonstration intact" and was not "any barrier to delivering to the media, or to the public by other means, the intended message concerning the plight of the homeless." *Id.* at 295.

Other challenges to statutes prohibiting sleeping or camping in public at the lower federal court level and in state courts have met with mixed results. At least three lower courts have found such regulations invalid. *See, e.g.*, *Pollard v. State*, 687 S.W.2d 373, 374 (Tex. Ct. App. 1985) (dismissing complaint against homeless man for sleeping in public area); *City of Pompano Beach v. Capalbo*, 455 So. 2d 468, 470 (Fla. Dist. Ct. App. 1984) (overturning on vagueness grounds "a sleep in the vehicle statute" because "it leaves unbridled discretion to the police officer" whether to arrest "wide range of persons" who might violate the statute), *review denied*, 461 So. 2d 113 (Fla. 1984), *cert. denied*, 474 U.S. 824 (1985); *State v. Penley*, 276 So. 2d 180, 181 (Fla. Dist. Ct. App. 1973) (overturning as vague ordinance prohibiting sleeping in public because it might "result in arbitrary and erratic arrests and convictions"), *cert. denied*, 281 So. 2d 504 (Fla. 1973).

However, at least seven other lower courts have upheld such regulations. *See, e.g.*, *Stone v. Agnos*, 960 F.2d 893, 895 (9th Cir. 1992) (finding no violation of homeless person's First or Fourth Amendment rights from enforcing statute making it misdemeanor to "lodge in any place . . . without the permission of the owner"); *Whiting v. Town of Westerly*, 942 F.2d 18, 21-22 (1st Cir. 1991) (finding that ordinance banning sleeping in public outdoors or in motor vehicles was not vague or overbroad); *Hersey v. City of Clearwater*, 834 F.2d 937, 940 (11th Cir. 1987) (holding that ordinance prohibiting "lodging" in motor vehicle in public was not vague or overbroad, based on city's interest in "protecting the health, safety and welfare of the public"); *Seeley v. State*, 655 P.2d 803, 805-07 (Ariz. Ct. App. 1982) (upholding conviction for refusing to move from public sidewalk, finding Phoenix's "vigorously enforced" ordinance prohibiting "lying, sleeping or otherwise

the problems of the homeless, at least the public can remove the homeless from sight.⁹ Moreover, public hostility toward the homeless can unfortunately become life-threatening to America's indigent citizens.¹⁰

The economic recession has fueled this public animosity, creating a vicious cycle of homelessness and joblessness.¹¹ Many of the

remaining in a sitting position" on public land not vague, overbroad or violation of equal protection rights of "inebriates and transients"); *People v. Mannon*, 265 Cal. Rptr. 616, 618 (Cal. App. Dep't Super. Ct. 1989) (upholding convictions for sleeping without tents, finding ordinance not ambiguous); *Davenport*, 222 Cal. Rptr. at 738-39; *City of Portland v. Johnson*, 651 P.2d 1384, 1386-87 (Or. Ct. App. 1982) (finding that anti-public-camping ordinance, enacted to prevent "unsafe and unsanitary living situations which pose a threat to peace, health and safety," not vague or overbroad).

⁹ In discussing the diversion of transit police from robbery stakeouts to so-called "quality of life patrols," which involve hustling panhandlers from underground subway stations, Richard Penrose of the New York Coalition for the Homeless stated: "I think people have gotten the sense that the problem just keeps getting worse, the numbers of homeless people are just absolutely out of control. . . . The danger is that people may be forgetting that life can be different. Instead of solving the problem, they are willing to just shove it out of sight." David Von Drehle, *Urban Panhandling*, MIAMI HERALD, June 11, 1990, at A12.

In *Pottinger v. City of Miami*, 720 F. Supp. 955 (S.D. Fla. 1989), a district court granted class certification to a group of homeless plaintiffs who had been, or might become, victims of more broad-based "quality of life patrols." On November 16, 1992, as a result of the lawsuit, U.S. District Court Judge C. Clyde Atkins ordered Miami, Florida, to provide two "safe zones" where the city's 6000 homeless individuals would be allowed to sleep, eat, and perform other "harmless activities" in public. *Making Criminals Of The Homeless*, *supra* note 8, at 1B.

¹⁰ The New York City Transit Authority Police reported 21 incidents in 1992 in which people tried to set fire to homeless individuals sleeping in subway stations by throwing matches, lighting newspapers under their shoes or dousing them with flammable liquids. Michael T. Kaufman, *21 Reasons To Simply Ask, "Why?"* N.Y. TIMES, Jan. 9, 1993, at L27. Two of the homeless burned to death, and in all but eight cases the perpetrators escaped. *Id.* Moreover, the homeless reported that burning incidents have also occurred in skid rows and "hobo jungles." *Id.*

In Gastonia, North Carolina, three police officers pled guilty to charges of assault and civil rights violations in connection with the harassment of homeless men from January 1987 to October 1990. *Police Abuse Of Homeless Splits North Carolina City*, N.Y. TIMES, Nov. 5, 1992, at A22. Homeless victims reported that the officers beat them and doused them with cooking oil, coffee, and urine. *Id.*

¹¹ Allan Parachini, spokesman for the ACLU Foundation of Southern California, noted that people feel economic pressure. "They want homeless

employable homeless had been earning a modest living¹² until they lost their jobs in the recession.¹³ Other homeless people, although willing and able to work, are unable to find employment.¹⁴ Still

people out of sight and out of mind, and they're willing to do completely illogical and illegal things to do it." *Making Criminals Of The Homeless*, *supra* note 8, at 1B.

¹² According to the 1990 Survey of U.S. Conference of Mayors, nearly one-quarter (24%) of the homeless worked full- or part-time. 1990 STATUS REPORT, *supra* note 4, at 25. Throughout most of the 1960s and 1970s, a full-time job at minimum wage was sufficient to maintain a family of three above the poverty line. NATIONAL LAW CENTER ON HOMELESSNESS & POVERTY, GO DIRECTLY TO JAIL 9 (Dec. 1991) (citing AFL-CIO Department of Economic Research, Monthly Estimates of Poverty Line). By 1991, a full-time job at the minimum wage left a family of three nearly \$2000 below the poverty line and a family of four nearly \$5000 below the poverty level. *Id.*; see also Nancy Gibbs, *Shameful Bequests To The Next Generation*, TIME, Oct. 8, 1990, at 43 (quoting Sen. John D. Rockefeller IV, Chairman, National Commission on Children (indicating that official poverty line for family of four was \$12,675 per year)).

¹³ In March of 1993, the index of leading economic indicators declined 1%, the biggest drop in nearly 2 1/2 years. Steve Kaufman, *Grim Economic Reports Signal Threat To Recovery*, S.J. MERCURY NEWS, May 5, 1993, at 1A. The decline followed other recent discouraging reports, "such as a sharp slowdown in economic growth in the first quarter [of 1993] and in job growth in March, deteriorating retail sales, and depressed factory orders." *Id.*

Entire families, pushed over the edge by a combination of the economic recession and the government's indifference, are forced into the dangerous netherworld of the homeless. According to a November 1992 report from the Center on Budget and Policy Priorities, the plight of the poor is so dire nationwide that "one major economic jolt, like an unexpected medical bill or a sudden job layoff, can push these families over the edge into homelessness." *Housing Costs Are Staggering For Poor In U.S., Report Says*, S.J. MERCURY NEWS, Nov. 25, 1992, at 8A (quoting Paul Leonard (co-author of the Report)); see also CENTER ON BUDGET AND POLICY PRIORITIES & FAMILIES USA FOUNDATION, REAL LIFE POVERTY IN AMERICA: WHERE THE AMERICAN PUBLIC WOULD SET THE POVERTY LINE (1990) (studying Census Bureau figures from 1986 to 1989 for forty-four of the nation's fifty largest metropolitan areas).

¹⁴ For example, California lost nearly 800,000 jobs between May 1990 and October 1992, and economists believe that the state economy is in "its worst slump since the Depression." Steve Kaufman, *Economy's Down; Spirits Are Even Lower*, S.J. MERCURY NEWS, Oct. 1, 1992, at 1A. In Michigan, 82,614 "able-bodied" adults were dropped from the state's \$240 million welfare rolls in October 1991, on the theory that the vast majority of those bumped from the rolls were undeserving of public assistance and should be able to find jobs. Jason DeParle, *The Sorrows, and Surprises, After A Welfare Plan Ends*, N.Y. TIMES, Apr. 14, 1992, at A1; Vanessa Williams, *Michigan Welfare Cutoff A Shove Into The Unknown*, S.J. MERCURY NEWS, Dec. 12, 1991, at 2A. However, with more than 400,000 people out of work statewide, few former welfare recipients were able to find employment, leading them to join the ranks of the homeless. Williams,

other members of the homeless population suffer from mental¹⁵ or physical¹⁶ disabilities precluding them from finding employment.¹⁷ In addition, cuts in public assistance threaten the one remaining source of support for many of the unemployed and the unemploya-

supra, at 2A. The Salvation Army estimates that the cuts increased homelessness in Detroit by about 30%. DeParle, *supra*, at A16. Samuel Chambers, the head of Wayne County, Michigan, Department of Social Services, puts the figure at about 50%. *Id.* Critics of the Michigan action have estimated that if 10% of the former recipients end up in prison or in mental hospitals, savings from the cuts will be wiped out. *Id.*

¹⁵ The 1991 Survey of the U.S. Conference of Mayors estimated that one-third of the homeless were severely mentally ill, up 7% since January 1990. *Mayors Slam Cuts In Aid To Mentally Ill*, S.J. MERCURY NEWS, Nov. 9, 1991, at 5F. The 1991 Survey also found that the number of severely mentally ill homeless who abuse illegal drugs and alcohol increased by an average of 9% since January 1990. *Mentally Ill Homeless Are On Rise*, N.Y. TIMES, Nov. 9, 1991, § 1, at 8. Furthermore, in 11 of the 21 cities surveyed, the number of mentally ill homeless requesting space in shelters jumped by one-third in 1991. *Mayors Slam Cuts In Aid To Mentally Ill*, *supra*, at 5F. Boston Mayor Raymond Flynn, President of the U.S. Conference of Mayors, commented that “[b]ecause of budget cuts at the state level, we are seeing that the mentally ill who were located in secure, medically supervised environments are being sentenced to the streets across the country. . . . Homeless shelters and city streets have become the ‘de facto mental institutions’ of the 1980s and 1990s.” *Id.*; see also Bock, *supra* note 6, at B3 (estimating that, as of May 1993, at least one-third of homeless were mentally ill).

¹⁶ Many of the homeless have significant physical problems: 38% are substance abusers and 6% have AIDS or HIV-related illnesses. Rankin, *supra* note 7, at 16A (citing 1990 STATUS REPORT, *supra* note 4). The 1992 New York Mayoral Commission on Homeless for the first time studied substance abuse by drug-testing 1000 of the 15,500 homeless in New York’s shelters, in addition to conducting interviews. Celia W. Dugger, *New York Report Finds Drug Abuse Rife in Shelters*, N.Y. TIMES, Feb. 16, 1992, § 1, part 1, at 1. The survey revealed that 80% of the homeless men housed in New York’s vast armory shelters and 30% of the people in shelters for families abuse drugs or alcohol. *Id.* A prior survey of New York’s homeless, relying only on interviews, suggested that drugs were a far smaller problem since only 18% of those interviewed said that they were currently using drugs. *Id.*; see also Bock, *supra* note 6, at B3 (stating that over two-thirds of homeless suffer from alcoholism, drug addiction, or mental illness).

¹⁷ A significant percentage of the homeless probably experienced their problems with alcoholism, drug addiction or mental illness after they lost their homes. According to a 1992 Stanford University study of 1400 homeless adults in Santa Clara County, after five years of being homeless more than one-third of those with no prior problems had become alcoholics, one-fourth had become addicted to drugs, and one-fifth had been hospitalized for mental illness. Laura Kurtzman, *Study: Homelessness Leads Many To Alcohol, Drugs, Mental Illness*, S.J. MERCURY NEWS, Oct. 21, 1992, at 8B.

ble homeless.¹⁸ At the same time the stock of affordable housing has dwindled.¹⁹ Faced with no visible means to support themselves,

¹⁸ After adjusting for inflation, direct federal aid to cities for poverty programs has fallen more than 60% since 1981. *The War Against The Poor*, N.Y. TIMES, May 6, 1992, at A20. According to a study released on March 26, 1991, by the Food Research and Action Center, a Washington-based anti-hunger advocacy group, one of every eight children in America does not get enough to eat, largely because of inadequate federal assistance programs. John Bare, *One of Eight Kids in U.S. Goes Hungry*, S.J. MERCURY NEWS, Mar. 27, 1991, at 1A.

The two main state programs to assist the indigent, Aid To Families With Dependent Children (AFDC) and General Assistance (GA), have shown a decline similar to the decrease in federal funding. AFDC, established by Title IV-A of the Social Security Act, is the main cash welfare program covering families, while GA provides money to single adults and childless couples. *5 Million Now Get AFDC Benefits*, S.F. CHRON., June 2, 1993, at A4 (noting that, according to Department of Health and Human Services records, as of June 1993 families collecting AFDC benefits had topped five million for first time). Between 1972 and 1991, AFDC benefits for a mother of two children with no income declined by 41% in constant dollars. Richard Whitmire, *Will The Deadbeat Dads Finally Get Tracked Down?*, S.J. MERCURY NEWS, Nov. 14, 1992, at 4A. For a mother of two children who earned \$7500 per year, AFDC benefits declined 93% during the same period. *Id.* By the end of 1992, five states had reduced AFDC benefits to poor families and thirty-nine states had frozen the benefits, despite a 3% increase in the cost of living. Jason DeParle, *States Cutting Or Freezing Their Cash Welfare Benefits*, N.Y. TIMES, Feb. 10, 1993, at A16 (citing survey compiled by Center on Budget and Policy Priorities in Washington, D.C. and Center for the Study of the States at State University of New York in Albany). In addition, many states tightened the eligibility requirements for AFDC assistance. Sylvester Monroe, et al., *How to Get America Off The Dole*, TIME, May 25, 1992, at 44; *see also* Ellen Goodman, *Welfare Conundrums*, S.F. CHRON., Dec. 31, 1991, at A17 (discussing diminishing support for welfare recipients).

Funding for GA programs is more precarious. As of February of 1993, only 28 states had GA programs. DeParle, *supra*, at A7. Of these states, 14 cut the amount of money paid in their programs in 1991 and eight more decreased the amount in 1992. *Id.* After the cuts, the average maximum benefit was only \$215 per month, which would likely force some recipients, such as those living in welfare hotels, into homelessness. *Id.*

¹⁹ Karen Schneider, *Poor Hurt By Loss Of Low-Rent Housing*, S.J. MERCURY NEWS, Dec. 12, 1991, at 3A (citing studies by Center On Budget and Policy Priorities and Low Income Housing Information Service). According to a November 1992 report from the Center On Budget and Policy Priorities, only 5.5 million subsidized or unsubsidized housing units met standards of affordability for the nation's 9.6 million poor households. *Housing Costs Are Staggering For Poor In U.S., Report Says*, *supra* note 13, at 8A; *see also* Stewart B. McKinney Homeless Assistance Act, 42 U.S.C. § 11301 (1988) (stating Act's purpose is "to meet the critically urgent needs of the homeless"); *Lee v. Pierce*, 698 F. Supp. 332, 335 (D.D.C. 1988) (commenting that "absence of

and in many cases their families, increasing numbers of homeless are left with the choice of Victor Hugo's Jean Valjean,²⁰ to steal a loaf of bread or to beg for sustenance.

A homeless American who begs for sustenance is immediately confronted by a backlash of compassion fatigue. The public's concerns regarding begging have led at least twenty states and Washington, D.C. to pass anti-begging ordinances that preclude solicitation by individuals for themselves, although some of the regulations permit solicitation by individuals for organized charities.²¹ In growing numbers, overwhelmed communities are dealing with homeless beggars by trying to criminalize their activities.²² Faced with these legislative obstacles, the homeless have turned to the judicial system, claiming that anti-begging ordinances violate the First Amendment right of free speech.²³

affordable housing is reflected by the long waiting lists for subsidized housing programs: 800,000 households nationwide").

²⁰ See VICTOR HUGO, *LES MISERABLES* 18 (Dodd, Mead & Co. 1984) (1887). Ironically, a homeless person choosing the former course, if arrested and incarcerated for the theft, would at least be guaranteed shelter and three meals a day. See Randy Diamond, *Cities Turning Heartless On The Homeless*, S.F. CHRON., Dec. 10, 1990, at A1.

²¹ John Sarna, *Advocates Are Cheered By Ruling On Begging*, NAT'L L.J., Feb. 12, 1990, at 17; see also *infra* notes 341-46 and accompanying text (citing examples of anti-begging ordinances). Estimates of the number of homeless who engage in begging vary widely. Compare Diamond, *supra* note 20, at A10 (citing Michael Stoops, National Coalition for the Homeless (estimating that nationwide only 1% of homeless "panhandle")) with PETER H. ROSSI, *DOWN AND OUT IN AMERICA: THE ORIGINS OF HOMELESS* 108-09 (1989) (citing Chicago Homeless Study (indicating that 20% of Chicago's homeless reported receiving cash, mainly in the form of handouts from public begging, and an additional 9% reported receiving gifts, which may include handouts from begging)). The discrepancies in statistics regarding both the number of homeless, and the number of homeless who beg, reflect the difficult task faced by researchers. The transient nature of the homeless population makes accurate information difficult to acquire. Inaccurate information also makes it virtually impossible for governmental policy makers to establish effective programs for the homeless.

²² Michael Stoops, Assistant Director of the National Coalition for the Homeless in Washington, D.C., states that at least 12 major cities passed measures to curb begging during the period from 1988 to 1990 alone. Diamond, *supra* note 20, at A10; see also *infra* note 400 and accompanying text.

²³ The Free Speech Clause of the First Amendment to the United States Constitution provides that "Congress shall make no law . . . abridging the freedom of speech." U.S. CONST. amend. I. The Due Process Clause of the Fourteenth Amendment has been construed to make this prohibition applicable to state action. See, e.g., *Lovell v. Griffin*, 303 U.S. 444, 450-51

B. *The Homeless as Constitutional Castaways*

It appears that compassion fatigue may also affect the clarity of judicial decisionmaking, rendering the homeless constitutional castaways. The federal judiciary appears less willing to uphold individual rights for the homeless or indigent than before,²⁴ when lawsuits helped indigent people establish constitutionally guaranteed rights.²⁵

(1938) (finding unconstitutional an ordinance forbidding literature distribution without written permission from city manager).

²⁴ ArLynn Leiber Presser, *Thinking Positive: Do We Need More Rights?*, A.B.A. J., Aug. 1991, at 56, 60 (quoting Judge Richard Posner of Seventh Circuit Court of Appeals, criticizing extending rights to include governmental assistance); see also Wohl, *supra* note 3, at 60-62 (commenting that recent appointments to federal bench showed less willingness to “uphold individual rights for the homeless or indigent”).

²⁵ For example, statutes designed to deter the influx of indigents into a state have long been held to violate the Constitution. Over fifty years ago, in *Edwards v. California*, the Court found that California’s efforts during the Depression to prohibit paupers from entering the state violated the Commerce Clause. 314 U.S. 160, 174 (1941). The *Edwards* Court stressed that “[w]hatever may have been the notion then prevailing, we do not think that it will now be seriously contended that because a person is . . . without funds he constitutes a ‘moral pestilence.’ Poverty and immorality are not synonymous.” *Id.* at 177 (distinguishing *City of New York v. Miln*, 36 U.S. (11 Pet.) 102, 142 (1837)); see also *Zobel v. Williams*, 457 U.S. 55, 64-65 (1982) (holding that statutory scheme by which Alaska distributed natural resources income to adult citizens based on length of each citizen’s residence violated equal protection rights of newer state citizens); *Maricopa Memorial Hosp. v. Maricopa County*, 415 U.S. 250, 269 (1974) (holding that Arizona’s one year residency requirement for indigents to receive nonemergency hospitalization or county-funded medical care created an invidious classification that penalizes indigents for exercising their “constitutional right of interstate migration” by denying them a “basic necessity of life”); *Shapiro v. Thompson*, 394 U.S. 618, 631, 641-42 (1969) (holding that state’s one year residency requirement for welfare was unconstitutional barrier on poor person’s right to interstate travel).

Other U.S. Supreme Court cases have protected indigents’ right to public assistance. See, e.g., *Department of Agric. v. Moreno*, 413 U.S. 528, 538 (1973) (striking down Food Stamp Act of 1971, which denied food stamps to households containing unrelated individuals); *New Jersey Welfare Rights Org. v. Cahill*, 411 U.S. 619, 621 (1973) (striking down, as a violation of equal protection, federal statute denying AFDC benefits to households containing illegitimate children); *Goldberg v. Kelly*, 397 U.S. 254, 265 (1970) (affirming indigent’s procedural due process protections by holding that AFDC benefits could not be terminated without prior hearing). The Court established the right of an indigent citizen to vote in *Harper v. Virginia State Bd. of Elections*, 383 U.S. 663, 668 (1966) (“Wealth, like race, creed, or color is not germane to

The theory that compassion fatigue may be affecting the judiciary is reflected in the chronology of a federal court challenge to the New York City Transit Authority's Anti-Begging Ordinance.²⁶ In *Young v. New York City Transit Authority*, United States District Court Judge Leonard B. Sand found that the First Amendment protected begging.²⁷ Shortly after Judge Sand issued his opinion, the public and the press joined in condemning the decision.²⁸ The *New York Daily News* printed a cartoon of a subway platform overrun by beggars with the caption: "It's really amazing how many federal judges you see down here."²⁹ The Metropolitan Transit Authority, in appealing Judge Sand's decision to the Second Circuit, called it "incorrect, unreasonable and insensitive to the rights of millions of [New York subway] passengers"³⁰ who confront the dirty, noisy, and dangerous subways to commute to work.³¹

In the *Young* appeal,³² the Second Circuit, in a 2-to-1 decision, reversed the district court and rejected the claim of the homeless

one's ability to participate intelligently in the electoral process."). Still other decisions have overturned loitering and vagrancy ordinances that officials disproportionately applied to the poor. *See, e.g.,* *Kolender v. Lawson*, 461 U.S. 352, 361 (1983) (striking down, on vagueness grounds, as "encourag[ing] arbitrary enforcement," California loitering statute that required any person wandering the streets to produce "credible and reliable" identification when requested by police officer); *Papachristou v. City of Jacksonville*, 405 U.S. 156, 171 (1972) (overturning Jacksonville's vagrancy ordinance on due process grounds and commenting that the "rule of law, evenly applied to minorities as well as majorities, to the poor as well as the rich, is the great mucilage that holds society together"); *see also infra* notes 403-19 and accompanying text (presenting examples of other courts' holdings overturning loitering and vagrancy ordinances).

²⁶ The Transit Authority's regulation provided as follows: "No person shall panhandle or beg upon any facility or conveyance." 21 N.Y.C.R.R. § 1050.6(b)(2). This challenge was brought by the Legal Action Center for the Homeless.

²⁷ *Young v. New York City Transit Auth.*, 729 F. Supp. 341, 352 (S.D.N.Y. 1990), *rev'd & vacated*, 903 F.2d 146 (2d Cir. 1990), *cert. denied*, 498 U.S. 984 (1990).

²⁸ *Court As Scapegoat*, NAT'L L.J., Feb. 12, 1990, at 14 ("Columnists and editorialists have jumped on the bandwagon, almost holding the judge responsible for the mass transit hell under city streets.").

²⁹ Priscilla Painton, *Shrugging Off The Homeless*, TIME, Apr. 16, 1990, at 14, 16.

³⁰ Sarna, *supra* note 21, at 17.

³¹ *Court as Scapegoat*, *supra* note 28, at 14.

³² 903 F.2d 146 (2d Cir. 1990), *cert. denied*, 498 U.S. 984 (1990). *Young* was the first case challenging an anti-begging ordinance to reach the federal appellate level. The *Young* decision spawned a considerable amount of

plaintiffs. The circuit court indicated that begging in a public subway system is not speech protected by the First Amendment as charitable solicitation.³³ The court also expressed doubt about whether the First Amendment protected begging as expressive conduct.³⁴ The *Young* opinion is difficult to reconcile with either logic or law. Beggars talking about their travails, holding up handwritten signs asking for assistance, or sitting silently in the subway holding cups engage in some form of speech. These beggars engage in expressive conduct because they project a message that is likely to be understood by those who see it. Furthermore, beggars' activities provide truthful information about indigency and promote debate on the public issue of homelessness. From a legal perspective, these beggars' activities are either charitable solicitation or commercial speech.

This portion of the *Young* decision is difficult to reconcile with either common sense or with First Amendment jurisprudence. This inconsistency suggests, perhaps, that the Second Circuit was affected by the public outcry of compassion fatigue that greeted Judge Sand's decision.³⁵ In fact, it is hard to reconcile this portion of *Young* with the Second Circuit's subsequent decision in *Loper v. New York City Police Department*. In *Loper*, George Sommers, counsel in the *Young* case, successfully challenged the underlying New York anti-loitering statute, which banned begging in all public locations,

discussion among legal scholars. See, e.g., Helen Hershkoff & Adam S. Cohen, *Begging To Differ: The First Amendment and the Right to Beg*, 104 HARV. L. REV. 896 (1991); Susan Daniel, Note, *The Second Circuit Refuses To Extend Beggars A Helping Hand: Young v. New York City Transit Authority*, 69 WASH. U. L.Q. 969 (1991); Stephanie M. Kaufman, Note, *The Speech/Conduct Distinction and First Amendment Protection of Begging in Subways*, 79 GEO. L.J. 1803 (1991); Scott D. Sitner, Note, *Beggar's Banquet: The First Amendment Right To Beg*, 1991 DET. C.L. REV. 795 (1991).

³³ *Young*, 903 F.2d at 153-54.

³⁴ *Id.* at 154, 156. The court opined that "even if begging and panhandling constitute protected expressive conduct, which is in serious doubt, . . . the regulation at issue more than satisfies the *O'Brien* standard, and thus is not in violation of the First Amendment." *Id.* at 161.

³⁵ An alternative theory for the rationale behind the Second Circuit's decision was offered by Manhattan attorney Mordecai Rosenfeld in an essay published in the *New York Law Journal*. This author suggests, in his ironic analysis, that the court was furthering efficiency by banning subway begging. In subways, he notes, beggars would be requesting help from the city's poorer inhabitants. Beggars would spend their time more efficiently requesting help from limousines. Mordecai Rosenfeld, *Does Odysseus Ride The 'A' Train?*, N.Y. L.J., June 4, 1990, at 2.

not just transportation facilities. The state regulation found a person "guilty of loitering when he . . . [l]oiterers, remains or wanders about in a public place for the purpose of begging"³⁶ At the district court level, Judge Robert W. Sweet held that begging was protected by the First Amendment as both charitable solicitation and expressive conduct and that it "might also be entitled to some lesser protection as commercial speech."³⁷

In contrast with its *Young* decision, the Second Circuit in *Loper* affirmed the district court's decision to find that "begging constitutes communicative activity of some sort."³⁸ The court noted that "[w]hile we indicated in *Young* that begging does not always involve the transmission of a particularized social or political message, it seems certain that it usually involves some communication of that nature."³⁹ The court contrasted the Transit Authority's regulation in *Young*, which prohibited begging only in the discrete confines of the subway system, with the state statute in *Loper*, which foreclosed begging throughout all of New York City. The court concluded that the *Loper* statute was unconstitutional because the total prohibition of peaceful begging did not serve any compelling state interest and left beggars without "alternative channels of communication by which beggars can convey their messages of indigency."⁴⁰ Therefore, the Second Circuit's case law is left in a state of conflict and confusion. Lower courts across the country have also reached divergent results regarding the constitutionality of anti-begging ordinances.⁴¹ The United States Supreme Court, however, has not yet considered the issue.

³⁶ N.Y. PENAL LAW § 240.35(1) (McKinney 1989).

³⁷ *Loper v. New York City Police Dep't*, 802 F. Supp. 1029, 1037-39 (S.D.N.Y. 1992), *aff'd*, 999 F.2d 699 (2d Cir. 1993).

³⁸ *Loper v. New York City Police Dep't*, 999 F.2d 699, 704 (2d Cir. 1993).

³⁹ *Id.* at 704 (citing *Young*, 903 F.2d at 153).

⁴⁰ *Id.* at 705.

⁴¹ In *Blair v. Shanahan*, a district court found unconstitutional California's 1891 law banning panhandling. 775 F. Supp. 1315, 1324-25 (N.D. Cal. 1991). In reaching this conclusion, the *Blair* court held that the First Amendment protected begging as a charitable solicitation, and that California's content-based statute violated the equal protection rights of the homeless plaintiffs. In 1976, the California Court of Appeal in *Ulmer v. Municipal Court*, 127 Cal. Rptr. 445, 447 (Ct. App. 1976), upheld a conviction based on a statute barring "accost[ing]" others to solicit money because begging did "not necessarily involve the communication of information or opinion; therefore, approaching individuals for that purpose [was] not protected by the First Amendment." However, the court noted that the legislative history showed that the statute should not apply to someone who "merely sits or stands by the wayside" to beg.

C. Charting the Course

Careful analysis of the constitutionality of anti-begging ordinances is necessary to ensure that compassion fatigue does not affect judicial rulings.⁴² This Article should provide guidance to future courts by analyzing all aspects of begging in light of First Amendment cases. From this review, courts can determine whether ordinances that ban begging, but allow solicitation for charitable organizations, can be reconciled with First Amendment jurisprudence.

Future courts dealing with challenges to anti-begging ordinances by the homeless, future legislatures trying to draft anti-begging regulations that pass constitutional muster, and future homeless plaintiffs challenging these ordinances should consider three distinct, but interlinked, aspects of begging.⁴³ A comprehensive analysis

Id. In 1978, in *People v. Fogelson*, 577 P.2d 677, 680-81 (Cal. 1978), the California Supreme Court stated that it was "evident" that an ordinance "purport[ing] to regulate a very broad range of solicitation activities — including acts of . . . begging or soliciting . . . alms or donations 'in any manner or for any purpose' . . . reaches substantial areas of protected speech" In a more recent case, *C.C.B. v. State*, 458 So. 2d 47, 48-50 (Fla. Dist. Ct. App. 1984), the Florida District Court of Appeal held that a municipal ordinance forbidding "anyone to beg or solicit alms in the street or public places of the city" violated the First and Fourteenth Amendments. Distinguishing *Ulmer* as involving an "accosting statute," the Florida court held that the Florida ordinance was "unconstitutionally overbroad by its abridgment in a more intrusive manner than necessary, of the First Amendment right of individuals to beg or solicit alms for themselves." *Id.* at 48-49.

⁴² See Charles F. 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, 406 n.11 (1991) (citing Baker, *Subway Begging: New York Advocates Seek Hearing*, CHRISTIAN SCI. MONITOR, May 30, 1990, at 8 (asserting that court opinions that sanction anti-begging ordinances have national implications because they condone efforts to hide homelessness)).

⁴³ See *R.A.V. v. City of St. Paul*, 112 S. Ct. 2538, 2567 (1992) (Stevens, J., concurring) (suggesting as alternative to majority's "categorical approach," that Court consider a number of "factors in determining the validity of such [content-based] regulations" including "content and character" of expressive activity, "context of the regulated speech" and "nature and scope of the contested restriction"); see also *City of Cincinnati v. Discovery Network* 113 S. Ct. 1505, 1511 (1993) ("This very case illustrates the difficulty of drawing bright lines that will clearly cabin commercial speech in a distinct category."); John Paul Stevens, *The Freedom Of Speech*, 102 YALE L.J. 1293, 1307 (1993) (criticizing numerous categories, tests and standards that pervade First Amendment jurisprudence).

should consider the content of the beggars' expressive activities,⁴⁴ the location of the begging,⁴⁵ and the nature and scope of the anti-begging ordinances.⁴⁶ Although the Supreme Court has not yet determined whether the First Amendment protects begging by a private individual, in the three years since *Young* the Court has decided six cases with implications for the Court's analysis of this issue.⁴⁷ These decisions have clarified, complicated and, to some extent, confused the legal analysis of the protection accorded the beggars' expressive activities, the classification of the fora typically used by beggars, and the constitutionality of ordinances attempting to regulate begging. These decisions also pull in two contradictory directions — expanding the range of speech protected by the First Amendment, while contracting the number of locations where this speech can occur.

Four of the Court's decisions since *Young* have affirmed or increased the array of speech protected by the First Amendment. In *International Society For Krishna Consciousness v. Lee*, the Court affirmed, without discussion, the protection accorded monetary solicitation by organized charities, such as the International Society for Krishna Consciousness.⁴⁸ In *City of Cincinnati v. Discovery Network* and *Edenfield v. Fane*, the Court reinforced, and suggested strengthening, the First Amendment protection accorded commercial speech and personal solicitation.⁴⁹ In *Barnes v. Glen Theatres*, the

⁴⁴ See *infra* notes 62-227 and accompanying text.

⁴⁵ See *infra* notes 228-279 and accompanying text.

⁴⁶ See *infra* notes 280-419 and accompanying text.

⁴⁷ *Edenfield v. Fane*, 113 S. Ct. 1792 (1993); *City of Cincinnati v. Discovery Network*, 113 S. Ct. 1505 (1993); *International Soc'y For Krishna Consciousness v. Lee*, 112 S. Ct. 2701 (1992); *R.A.V. v. City of St. Paul*, 112 S. Ct. 2538 (1992); *Barnes v. Glen Theatres*, 111 S. Ct. 2456 (1991); *United States v. Kokinda*, 497 U.S. 720 (1990).

⁴⁸ *Krishna*, 112 S. Ct. 2701, 2705; see also *infra* notes 96-128 and accompanying text. The *Krishna* majority upheld a ban on solicitation within airport terminals. *Krishna*, 112 S. Ct. at 2701, 2709. Justices O'Connor, Kennedy and Souter drafted separate opinions cited at *International Society For Krishna Consciousness v. Lee*, 112 S. Ct. 2711 (1992). The majority also held invalid a ban on distribution of leaflets within airport terminals in a fifth opinion cited as *Lee v. International Soc'y For Krishna Consciousness*, 112 S. Ct. 2709 (1992).

⁴⁹ See, e.g., *Edenfield*, 113 S. Ct. at 1797 (reaffirming, in the context of direct, uninvited solicitation by accountants, that "this type of personal solicitation is commercial expression to which the protections of the First Amendment apply"); *Discovery Network*, 113 S. Ct. at 1511 (rejecting Cincinnati's argument that "commercial speech has only a low [First

Court extended the protection accorded expressive conduct to nude dancing.⁵⁰ Finally, in *R.A.V. v. City of St. Paul*, the Court accorded some First Amendment protection to “fighting words,” which had been previously categorized as wholly unprotected speech. The Court in *R.A.V.* overturned a St. Paul hate-speech regulation⁵¹ on First Amendment grounds, noting that a state could not criminalize one class of fighting words, because of their race-based content, and yet protect other fighting words. The prohibition of only race-based fighting words rather than all fighting words constituted content- and viewpoint-discrimination.⁵² With *R.A.V.*, even if begging is not protected speech, the appropriate inquiry would no longer end there. Rather, future courts must determine whether the ordinance is content- or viewpoint-discriminatory, and if so, whether the ordinance restricts all proscribable speech, or only a portion.

Since the *Young* decision, the forum analysis of the context of the beggars’ activities has been transformed by the Court’s decisions in *United States v. Kokinda* and *Krishna*. While the Court has increased the array of speech accorded First Amendment protection, it has eased the forum justification required for government to prohibit otherwise protected speech. In *Kokinda* the Court held that a post office sidewalk was a non-public forum, and in *Krishna* the Court held that three major airport terminals in the New York City area were non-public fora. These conclusions allow the government to regulate speech on merely a rational basis.⁵³ The implications of

Amendment] value”); *id.* at 1521 (Blackmun, J., concurring) (expressing the “hope [that] the Court ultimately will . . . afford[] full protection for truthful, noncoercive commercial speech about lawful activities”); *see also infra* notes 128-85 and accompanying text.

⁵⁰ *Barnes*, 111 S. Ct. at 2462; *see also infra* notes 210-14 and accompanying text.

⁵¹ The St. Paul Bias-Motivated Crime Ordinance provided:

[w]hoever places on public or private property a symbol, object, appellation, characterization or graffiti, including, but not limited to, a burning cross or Nazi swastika, which one knows or has reasonable grounds to know arouses anger, alarm or resentment in others on the basis of race, color, creed, religion or gender commits disorderly conduct and shall be guilty of a misdemeanor.

R.A.V. v. St. Paul, 112 S. Ct. at 2541 (quoting ST. PAUL, MINN., LEGIS. CODE § 292.02 (1990)).

⁵² *R.A.V.*, 112 S. Ct. at 2538; *see also infra* notes 217-23 and accompanying text.

⁵³ *See International Soc’y For Krishna Consciousness v. Lee*, 112 S. Ct. 2701, 2705-06 (1992); *United States v. Kokinda*, 497 U.S. 720, 726-27 (1990); *see also*

these two decisions for the homeless are frightening. The Court's decision in *Krishna* that multi-purpose, metropolitan airport terminals can be non-public fora may indicate that future decisions will hold more and more public facilities closed for solicitation or other unpopular activities. The homeless would thus be unable to beg in any locations where the public congregate. The homeless and their plight would be out of sight and out of the minds of the people who might come to their assistance.

In order to avoid these dire implications, beggars must seek creative ways to challenge the constitutionality of anti-begging ordinances. Perhaps the beggars' best hope of success lies in challenging anti-begging ordinances as unconstitutionally restricting the content or viewpoint of the beggars' speech. At a minimum, the homeless can successfully challenge anti-begging ordinances, such as the regulation in the *Young* case, that ban begging by individuals for themselves while permitting such solicitation by individuals for charitable groups.⁵⁴ These regulations prohibit speech on the basis of both the content of the speech and the viewpoint of the speaker. Anti-begging ordinances that prohibit all forms of solicitation may also be found by future courts to be content- or viewpoint-based if they permit other expressive activities, such as leafletting or picketing. The Court's recent decision in *R.A.V.* indicates that the Court will pay particularly close attention to whether future statutes are content- or viewpoint-based. This scrutiny may allow beggars to challenge ordinances even if they beg in a non-public forum and the government can demonstrate a reasonable basis for the ordinance.⁵⁵

infra notes 228-79 and accompanying text (discussing contexts of beggars' expressive activities).

⁵⁴ Section 1050.6(c) of the Transit Authority's regulation in *Young* permitted solicitation for "charitable, religious or political causes," other than on subway cars and in a few other areas "not generally open to the public." 21 N.Y.C.R.R. § 1050.6(c). Section 1050.6(c) also permitted utilization of the public areas of the transit system for such expressive activities as "public speaking; distribution of written noncommercial materials; [and] artistic performances, including the acceptance of donations." *Id.*

⁵⁵ Under *R.A.V.*, regulation can withstand constitutional scrutiny only if "it is not an effort to suppress the speaker's activity due to disagreement with the speaker's view." *Krishna*, 112 S. Ct. at 2705-06. Similarly, if the beggars' expressive activities occur in a traditional or a designated public forum, the question of whether the ordinance is content- or viewpoint-based forms the threshold constitutional inquiry. *R.A.V.*, 112 S. Ct. at 2544 (quoting *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989)).

Alternatively, blanket bans on begging, like the anti-begging ordinance in *Young*, are subject to challenge by the homeless on the basis that the proffered governmental interests could be accomplished by regulating the objectionable conduct without prohibiting all personal solicitation.⁵⁶ In addition, blanket bans offer no alternative means of solicitation to the politically powerless poor, whose only opportunity to reach the public is through begging.⁵⁷ Indeed, because blanket bans completely silence the beggars' speech, they may constitute presumptively unconstitutional prior restraints as *a priori* restrictions on protected speech.⁵⁸

Unfortunately, if challenges by the homeless are not successful, and anti-begging ordinances are upheld, compassion fatigue will have succeeded in making the homeless constitutional castaways. Furthermore, many of these same issues and concerns also apply to other unpopular individuals and groups whose speech the government may seek to suppress. Although the Court's recent decisions further complicate the complex area of First Amendment jurisprudence, careful analysis demonstrates that begging must be accorded First Amendment protection.

Given the complexity of this legal area, this Article analyzes each evaluative step in great detail. First, in Section I, this Article examines the content and character of begging as an expressive activity.⁵⁹ Section II evaluates the context and forum issues implicated by begging.⁶⁰ In Section III, this Article discusses the nature and scope of anti-begging ordinances.⁶¹ This Article's plea is that legal analysis be employed in dealing with these issues and that future judges not let compassion fatigue cloud their decision-making and silence the voice of the homeless.

I. THE CONTENT AND CHARACTER OF BEGGARS' EXPRESSIVE ACTIVITIES

A. *The Content of the Beggars' Message*

1. Introduction

The content of the beggars' expressive activities determines the level of First Amendment protection accorded the speech. The

⁵⁶ See *infra* notes 369-88 and accompanying text.

⁵⁷ See *infra* notes 389-98 and accompanying text.

⁵⁸ See *infra* notes 355-68 and accompanying text.

⁵⁹ See *infra* notes 62-227 and accompanying text.

⁶⁰ See *infra* notes 228-79 and accompanying text.

⁶¹ See *infra* notes 280-419 and accompanying text.

Court accords speech on public issues and the dissemination of truthful information the highest level of protection.⁶² An examination of begging's content confirms that this activity should be accorded the highest level of First Amendment protection. The beggars' message, and indeed their very presence, contributes to the interchange of ideas regarding homelessness. Their presence and activities also convey the truthful information that American citizens are living as destitute, homeless castaways.

2. The Beggars' Message as Contributing to the Public Issue of Homelessness

The Free Speech Clause of the First Amendment was fashioned to reflect our nation's commitment to wide open public debate⁶³ and free interchange of political and social ideas.⁶⁴ Historically, the United States Supreme Court has "viewed freedom of speech . . . as

⁶² *R.A.V. v. City of St. Paul*, 112 S. Ct. 2538, 2569 (1992) (Stevens, J., concurring); *see also id.* at 2564 ("Our First Amendment decisions have created a rough hierarchy in the constitutional protection of speech. Core political speech occupies the highest, most protected position."); *First Nat'l Bank of Boston v. Bellotti*, 435 U.S. 765, 776 (1978) (noting that expression of views on issue of public importance "is at the heart of the First Amendment's protection").

⁶³ *New York Times Co. v. Sullivan*, 376 U.S. 254, 269 (1964) (establishing knowing falsity or reckless disregard as standard to hold defendant liable for defamation of public official); *see also Clark v. Community for Creative Non-Violence*, 468 U.S. 288, 309 (1984) (Marshall, J., dissenting) (commenting on Court's "oft-stated recognition that the First Amendment was designed to secure 'the widest possible dissemination of information from diverse and antagonistic sources'" (citations omitted); *Stromberg v. California*, 283 U.S. 359, 369 (1930) ("The maintenance of the opportunity for free political discussion to the end that government may be responsive to the will of the people . . . is a fundamental principal of our constitutional system."); *Wolin v. Port of N.Y. Auth.*, 392 F.2d 83, 91 (2d Cir. 1968) ("The framers of the Constitution opted for the disharmony of controversy because they believed that in that unrest lay the best prospect of an ordered society."), *cert. denied*, 393 U.S. 940 (1968).

⁶⁴ *Burson v. Freeman*, 112 S. Ct. 1846, 1861 (1992) (noting that the First Amendment is "'to assure unfettered interchange of ideas for the bringing about of political and social changes desired by the people'" (quoting *Buckley v. Valeo*, 424 U.S. 1, 14 (1976))); *see also Whitney v. California*, 274 U.S. 357, 375-76 (1927) (Brandeis, J., concurring) ("Those who won our independence believed . . . in the power of reason as applied through public discussion, they eschewed silence coerced by law — the argument of force in its worst form. Recognizing the occasional tyrannies of governing majorities, they amended the Constitution so that free speech and assembly should be guaranteed.")

indispensable to a free society and its government.”⁶⁵ Therefore, the Court attaches the greatest importance and supplies the greatest protection to speech on public issues.⁶⁶ First Amendment protection is at its strongest when government seeks to regulate expression of political opinions.⁶⁷

Begging contributes to the free interchange of ideas and to debate on public issues. The beggar provides a unique and valuable perspective on critical public issues regarding homeless Americans. In 1991, a federal district court, in overturning as unconstitutional California’s century-old law prohibiting begging, noted that the statute stifled “a form of speech possessing obvious political relevance.”⁶⁸ The district court explained: “A request for alms clearly conveys information regarding the speaker’s plight. Begging gives the speaker an opportunity to spread his views and ideas on, among other things, the way our society treats its poor and disenfranchised.”⁶⁹ Moreover, the plight of the homeless

⁶⁵ *Smith v. Daily Mail Publishing Co.*, 443 U.S. 97, 106 (1979); *see also* *Garrison v. Louisiana*, 379 U.S. 64, 74-75 (1964) (“For speech concerning public affairs is more than self-expression; it is the essence of self-government.”).

⁶⁶ *Connick v. Myers*, 461 U.S. 138, 145, 154 (1983) (holding that discharge of employee did not offend First Amendment where employee’s “questionnaire touched upon matters of public concern in only a most limited sense” and was “most accurately characterized as an employee grievance concerning internal office policy”); *see also* *R.A.V. v. City of St. Paul*, 112 S. Ct. 2538, 2555 (1992) (White, J., concurring) (indicating that the “First Amendment has its fullest and most urgent application” to political speech); *Burson*, 112 S. Ct. at 1850 (“Whatever differences may exist about interpretations of the First Amendment, there is practically universal agreement that a major purpose of that Amendment was to protect the free discussion of governmental affairs.”) (quoting *Mills v. Alabama*, 384 U.S. 214, 218 (1966)); *Austin v. Michigan Chamber of Commerce*, 494 U.S. 652, 666 (1990) (noting that “the right to engage in political expression is fundamental to our constitutional system”).

⁶⁷ *R.A.V.*, 112 S. Ct. at 2567 (Stevens, J., concurring) (noting that when government regulates “‘expression of . . . opinion on matters of public importance . . . First Amendment protection is at its zenith’”) (quoting *FCC v. League of Women Voters of Cal.*, 468 U.S. 364, 375-76 (1984)); *Meyer v. Grant*, 486 U.S. 414, 425 (1988) (noting that statute prohibiting use of paid petition circulators “trenches upon an area in which the importance of First Amendment protections is ‘at its zenith’”).

⁶⁸ *Blair v. Shanahan*, 775 F. Supp. 1315, 1322-23 (N.D. Cal. 1991).

⁶⁹ *Id.* at 1323; *Loper v. New York City Police Dep’t*, 999 F.2d 699, 704 (2d Cir. 1993) (noting that “begging frequently is accompanied by speech indicating the need for food, shelter, clothing, medical care or transportation”).

underscores the dismal state of the nation's economy.⁷⁰ In order to encourage robust and open debate, the political message in the beggars' expressive activities must not be silenced and should be accorded the highest level of First Amendment protection.

3. The Beggars' Message as Contributing to the Dissemination of Truthful Information

The Supreme Court has established that another central purpose of the First Amendment is to facilitate a quest for truth.⁷¹ The Court defines categories of unprotected speech by whether the speech fails to contribute to "the common quest for truth."⁷² Abusive epithets and "fighting words," for example, do not receive First Amendment protection because such utterances are no essential part of any exposition of ideas.⁷³

The Court's concern with promoting the quest for truth is perhaps best illustrated by the protection accorded the press for the dissemination of truthful, private information, such as the identity of victims of sexual offenses. For example, in *Florida Star v. B.J.F.*,⁷⁴ the Court found unconstitutional a Florida statute imposing civil

⁷⁰ The political relevance of the nation's economy was apparent in the 1992 Presidential election debates, which focused repeatedly on this issue and turned the phrase, "It's the economy, stupid," into a political rallying cry.

⁷¹ *Bose Corp. v. Consumers Union*, 466 U.S. 485, 503-504 (1984) (concluding that to find publisher liable for product disparagement of loudspeaker system, public figure petitioner needed to show proof of actual malice, noting that "the freedom to speak one's mind is . . . essential to the common quest for truth and the vitality of society as a whole"); *see also* *Linmark Assocs. v. Township of Willingboro*, 431 U.S. 85, 95 (1977) (overturning ordinance prohibiting posting of "For Sale" and "Sold" signs to stem the flight of white homeowners from a racially integrated community because Court was "convinced that . . . the First Amendment disabled the State from achieving its goal by restricting the free flow of truthful information") (citing *Virginia Bd. of Pharmacy v. Virginia Citizens Consumer Council*, 425 U.S. 748 (1976)).

⁷² *R.A.V. v. City of St. Paul*, 112 S. Ct. 2538, 2542-43 (1992) ("our society . . . has permitted restrictions upon the content of speech in a few limited areas, which are 'of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality'") (quoting *Chaplinsky v. New Hampshire*, 315 U.S. 568, 571-72 (1942) (finding that addressing someone on public street as "damned fascist" and "damned racketeer" constituted unprotected "insulting or 'fighting' words — those which by their very utterance inflict injury or tend to incite an immediate breach of the peace"))).

⁷³ *See* sources cited *supra* note 72.

⁷⁴ 491 U.S. 524 (1989).

damages on a newspaper for the truthful publication of the name of a rape victim. The Court held that when a newspaper publishes lawfully obtained and truthful information, that newspaper can be punished only if the punishment is narrowly tailored to a state interest of the highest order. In *Florida Star*, Florida failed to show this state interest.⁷⁵ The Court stated that its decision was guided by the Constitution's overriding concern for the dissemination of truth.⁷⁶

Indeed, in *Florida Star* and the trilogy of cases which preceded it, *Cox Broadcasting v. Cohn*,⁷⁷ *Landmark Communications v. Virginia*,⁷⁸ and *Smith v. Daily Mail Publishing*,⁷⁹ the Court consistently held that a state cannot punish the news media for the publication of truthful information.⁸⁰ The Court acknowledged the strong state interests in protecting individual privacy in *Cox*,⁸¹ public confidence in the

⁷⁵ *Id.* The rape victim argued that the Florida statute furthered three closely related interests: the individual "privacy of victims of sexual offenses; the physical safety of such victims, who may be targeted for retaliation if their names became known to their assailants; and the goal of encouraging victims of such crimes to report the offenses without fear of exposure." *Id.* at 537. The Court acknowledged the importance of these interests: "[a]t a time in which we are daily reminded of the tragic reality of rape, it is undeniable that these are highly significant interests." *Id.* Nevertheless, the Court found that these interests were not sufficiently compelling to outweigh the First Amendment right to disseminate truthful information. *Id.*; see also *Globe Newspaper v. Superior Court of Norfolk*, 457 U.S. 596 (1982) (recognizing that state's interests in psychological and physical well-being of rape victim may be sufficiently compelling to justify closure of public rape trial on case-by-case basis); *Coker v. Georgia*, 433 U.S. 584, 597 (1977) ("[s]hort of homicide, [rape] is the 'ultimate violation of self'"); *State v. Evjue*, 33 N.W.2d 305, 309 (1948) ("it is considered that it is a matter of common knowledge that [rape] victims suffer far beyond anything suffered by men or women in connection with other classes of crimes").

⁷⁶ *Florida Star*, 491 U.S. at 533 (quoting *Cox Broadcasting v. Cohn*, 420 U.S. 469, 491 (1975)).

⁷⁷ 420 U.S. at 469.

⁷⁸ 435 U.S. 829 (1978).

⁷⁹ 443 U.S. 97 (1979).

⁸⁰ *Florida Star*, 491 U.S. at 530; see also *Oklahoma Publishing v. District Court*, 430 U.S. 308 (1977) (finding unconstitutional state court's pretrial order enjoining media from publishing name or photograph of eleven-year-old boy charged with second degree murder obtained from closed detention hearing).

⁸¹ *Cox*, 420 U.S. at 496. In *Cox*, the Court found unconstitutional a civil damages award entered against a television station for broadcasting the name of a seventeen-year-old rape-murder victim. *Id.*

judiciary in *Landmark*,⁸² and the rehabilitation of juvenile defendants in *Daily Mail*.⁸³ Even so, the Court has never approved criminal sanctions or civil damage awards against the news media as a means of furthering such interests. In fact, the dissenting Justices in *Florida Star* recognized that the trend has been to hold against an individual's right to keep truthful information private if the press wishes to publish that information.⁸⁴

The Court's concern with the dissemination of truth is also illustrated by the Court's solicitude towards truthful publications in defamation cases. In *Philadelphia Newspapers v. Hepps*,⁸⁵ the Supreme Court allocated the burden of proof of falsity in libel cases to private figure plaintiffs, rather than requiring the defense to prove the statement's truth. The Court premised this ruling on a constitutional requirement giving preference to truthful publications.⁸⁶ Justice Stevens, in his dissent, felt that the majority had fashioned a rule to overturn any law if it excluded any true expression from the

⁸² *Landmark*, 435 U.S. at 833. In *Landmark*, the Court extended First Amendment protection to publication of the name of a judge under investigation by a state judicial review commission even though the information was "withheld by law from the public domain," and the newspaper's source apparently breached a statutory duty of confidentiality. *Id.* at 841. The Court held that the state's interests in maintaining confidentiality to protect the reputation of its judges and the institutional integrity of its courts was not sufficient to justify "repressing speech that would otherwise be free." *Id.* at 842 (citing *New York Times v. Sullivan*, 376 U.S. 254, 272 (1964)).

⁸³ *Daily Mail*, 443 U.S. at 104. In *Daily Mail*, the Court found unconstitutional the indictment of two newspapers for violating a state statute forbidding newspapers "to publish, without written approval of the juvenile court, the name of any youth charged as a juvenile offender." *Id.* at 106. In this case, protection for truthful publication was extended to a situation in which the information was obtained from interviews, *inter alia*, with police and an assistant prosecutor, both of whom were under a statutory duty *not* to disclose the information. *Id.* at 99-100.

⁸⁴ *Florida Star*, 491 U.S. at 553 (White, J., dissenting); *see also* *Richmond Newspapers v. Virginia*, 448 U.S. 555, 582 (1980) (Stevens, J., concurring) (noting that "[u]ntil today the Court has accorded virtually absolute protection to the dissemination of information or ideas, but never before has it squarely held that the acquisition of newsworthy matter is entitled to any constitutional protection whatsoever").

⁸⁵ 475 U.S. 767 (1986).

⁸⁶ *Id.* at 776 ("where the scales are in such an uncertain balance, we believe that the Constitution requires us to tip them in favor of protecting true speech").

public.⁸⁷ Moreover, the *Hepps* Court cited with approval the rule previously stated in *Garrison v. Louisiana*, that “[t]ruth may not be the subject of either civil or criminal sanctions where discussion of public affairs is concerned.”⁸⁸

The constitutional protection afforded the dissemination of truthful information, in both defamation and the publication of private facts, should also apply to beggars’ speech. Most beggars are just what they appear to be — destitute and desperate individuals. The information they convey is truthful — they are homeless and they are not being helped by a compassion-fatigued society.

Begging offers truthful information to help the public understand the complex problems of homelessness and indigency. Moreover, the presence of beggars in society is an essential part of the exposition of ideas. Their very existence demonstrates that our society has failed some of its members. The social interest in order and morality is furthered by the public’s receipt of the beggar’s message.⁸⁹ The district court in *Blair v. Shanahan* noted that “in

⁸⁷ *Id.* at 786-87 (Stevens, J., dissenting) (noting that Court interpreted First Amendment as “tantamount to a command that no rule of law can stand if it will exclude any true speech from the public domain”).

⁸⁸ *Id.* at 777 (citing *Garrison v. Louisiana*, 379 U.S. 64, 74 (1964)). In *Garrison*, the Court struck down a Louisiana criminal libel statute that permitted prosecution of true statements. The Court determined that “the interest in private reputation is overborne by the larger public interest, secured by the Constitution, in the dissemination of truth.” *Garrison*, 379 U.S. at 73.

Even if the published statement is false, a defendant would still be protected from liability for presumed or punitive damages unless the private individual plaintiff could prove that the statement was published with knowing falsity or reckless disregard for the truth. *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 349 (1974) (reversing libel judgment against magazine for implying that private individual plaintiff had criminal record and was “Communist-fronter” because the jury did not apply proper constitutional standards). The press would be protected from actual damages unless the plaintiff could prove the statement was published with some degree of fault. *Id.* at 349. The *Gertz* Court rejected the actual malice test for actual damages, reasoning that private individual plaintiffs have stronger reputational interests because they have not voluntarily exposed themselves to public comment and have less access to the media for replies to the defamation. *Id.* at 338-39, 349-50.

⁸⁹ In September of 1992, in overturning a New York State statute banning begging, the district court noted that the beggar’s message “is a critical message that the beggar has a genuine and legitimate interest in presenting to the public at large.” *Loper v. New York City Police Dep’t*, 802 F. Supp. 1029, 1042 (S.D.N.Y. 1992), *aff’d*, 999 F.2d 699 (2d Cir. 1993).

some cases, a beggar's request can change the way the listener sees his or her relationship with and obligations to the poor."⁹⁰

Moreover, unlike the plaintiffs in *Florida Star*, *Cox*, *Landmark*, and *Daily Mail*, the beggars' right to privacy is not violated by dissemination of their information. The homeless want the public to learn of their plight. In addition, the crucial interests in these cases of protecting rape victims, maintaining judicial integrity and rehabilitating juveniles are not present in the beggars' situation. Nor is there an interest in protecting an individual's reputation, as in defamation cases. Indeed, if *Young* was correctly decided and the First Amendment does not protect individual solicitation, a beggar would be entitled to more constitutional protection for slandering a New York commuter than for asking that same commuter for some pocket change. It would be ironic if the First Amendment were held to protect a beggar who makes false and defamatory comments, but not one who disseminates true information about his or her struggle to survive.⁹¹

B. *The Character of the Beggars' Expressive Activities*

1. Introduction

The character of the beggars' activities determines the amount of protection accorded the beggars' expression. Many of the beggars' expressive activities consist of pure speech, such as speaking and writing. The beggars' spoken pleas for money have, unfortunately, been part of the American scene since at least the 1930s when the classic Depression-era song, "Brother, Can You Spare A Dime?" gained popularity.⁹² The homeless also resort to begging on street corners with simple hand-held signs, such as "Homeless, Hungry — Will Work For Food."⁹³ Beggars who engage in such pure speech

⁹⁰ *Blair v. Shanahan*, 775 F. Supp. 1315, 1323 (N.D. Cal. 1991).

⁹¹ Courts may extend press protections in defamation cases to other types of tort actions, when the plaintiff's claim arose as a result of defendant's writings or speech. See *Hustler Magazine v. Falwell*, 485 U.S. 46 (1988); *Time, Inc. v. Hill*, 385 U.S. 374, 385 (1967); *Meeropol v. Nizer*, 560 F.2d 1061, 1066 (2nd Cir. 1977); *Hall v. Post*, 372 S.E.2d 711, 717 (N.C. 1988).

⁹² JAY GORNEY & E.Y. HARBURG, *Brother Can You Spare a Dime?* (1932). The song was recently reprised in a 1992 album. DR. JOHN AND ODETTA, *STRIKE A DEEP CHORD: BLUES GUITARS FOR THE HOMELESS* (Justice Records 1992). Proceeds from the sale of the album will benefit the National Coalition for the Homeless.

⁹³ *Standing On Corner Doesn't Feel Good, But It's Their Lifeline*, S.J. MERCURY NEWS, Dec. 26, 1991, at 5B. This practice, known among the homeless as

are entitled to either the highest level of First Amendment protection, if the Court classifies their speech as charitable solicitation, or a more limited form of protection if the Court finds their pleas are commercial speech.⁹⁴ Even disheveled, silent beggars, holding out tin cups, are entitled to First Amendment protection for the expressive aspects of their conduct.⁹⁵

2. Begging Through Written or Spoken Words as Pure Speech

a. *Begging as Protected Charitable Solicitation*

The Supreme Court has long recognized that charitable solicitation is a form of expression protected by the First Amendment. The Court has found a nexus between solicitation and the communication of information and advocacy about political and social causes.⁹⁶ In *Village of Schaumburg v. Citizens for a Better Environment*,⁹⁷ a charity, denied a permit under a local ordinance, challenged the ordinance, which prohibited door-to-door solicitation by charities that did not use at least 75 percent of their donations for charitable purposes. The Court found the ordinance unconstitutional, because charitable appeals include information and advocacy and thus further interests protected by the First Amendment.⁹⁸ Moreover, the Court noted that without solicitation “the flow of such information and advocacy would likely cease.”⁹⁹ As a result, the Court concluded that the charity should be protected as more than

“signing,” has emerged at shopping centers, freeway on-ramps, busy intersections and outside movie theatres. *Id.*

⁹⁴ *R.A.V. v. City of St. Paul*, 112 S. Ct. 2538, 2568 (1992) (Stevens, J., concurring).

⁹⁵ *See, e.g., Texas v. Johnson*, 491 U.S. 397, 406 (1989); *United States v. O'Brien*, 391 U.S. 367, 376 (1968).

⁹⁶ *Cornelius v. NAACP Legal Defense and Educ. Fund*, 473 U.S. 788, 799 (1985) (finding that literature sent to federal employees from advocacy group was protected as charitable solicitation because it “facilitates the dissemination of views and ideas” and solicitation of funds allow organization to communicate ideas and goals).

⁹⁷ 444 U.S. 620 (1979).

⁹⁸ *Id.* at 632. The Court reasoned that appeals by organized charities “involve a variety of speech interests, [including the] communication of information, the dissemination and propagation of views and ideas, and the advocacy of causes — that are within the protection of the First Amendment.” *Id.*

⁹⁹ *Id.*

a mere solicitor of money acting to further solely economic interests.¹⁰⁰

Five years later, in *Secretary of State v. Joseph H. Munson Co.*,¹⁰¹ the Court again struck down a statute that included a percentage limitation like the ordinance in *Schaumburg*. In *Munson*, the Court directed the Maryland Secretary of State to issue rules to permit a charitable organization to pay more than 25 percent of its gross income for fundraising expenses, because Maryland's 25 percent limitation prevented the organization from increasing contributions.¹⁰² The Court expressed its concern that the statute would restrict First Amendment solicitation activity that, although expensive, also furthers the charity's goals.¹⁰³ Similarly, in *Riley v. National Federation of the Blind*,¹⁰⁴ the Court struck down a statute designed to regulate fees charged by professional fundraisers who solicited contributions for the National Federation for the Blind. The Court again noted that charities are dependent on the solicitations for their continued existence.¹⁰⁵

In contrast, the Second Circuit in *Young* opined that "neither *Schaumburg* nor its progeny stand for the proposition that begging and panhandling are protected speech under the First Amendment."¹⁰⁶ Rather, the circuit court felt that the charitable solicitation cases focused on "the nexus between solicitation by organized charities and 'a variety of speech interests'" with which organized fundraising is "'characteristically intertwined.'"¹⁰⁷ Unlike charitable solicitation, the *Young* court held that begging was not characteristically intertwined with the advocacy of particular causes and

¹⁰⁰ *Id.* at 636.

¹⁰¹ 467 U.S. 947 (1984).

¹⁰² *Id.*

¹⁰³ *Id.* at 967.

¹⁰⁴ 487 U.S. 781 (1988).

¹⁰⁵ *Id.* at 799; *see also* *Hynes v. Mayor of Oradell*, 425 U.S. 610, 622 (1976) (holding unconstitutionally vague a municipal ordinance requiring advance written notice to local police department by person desiring to solicit for recognized charitable cause, noting that statute gave "police the *effective* power to grant or deny permission to canvass"); *Cantwell v. Connecticut*, 310 U.S. 296 (1940) (overturning statute requiring license for religious solicitation because regulation allowed state official to decide whether cause was religious, concluding that such censorship of religion is denial of liberty protected by First Amendment).

¹⁰⁶ *Young v. New York City Transit Auth.*, 903 F.2d 146, 155 (2d Cir. 1990), *cert. denied*, 498 U.S. 984 (1990).

¹⁰⁷ *Id.* (quoting *Village of Schaumburg v. Citizens for a Better Env't*, 444 U.S. 620, 632 (1979)).

views. The *Young* court instead noted that begging involved only a menace to the common good.¹⁰⁸

However, the *Young* analysis makes little sense in light of the *Schaumburg*, *Munson* and *Riley* decisions. Begging demonstrates the Court's requisite nexus between solicitation and the communication of information and advocacy.¹⁰⁹ With their monetary solicitations, beggars communicate information about their personal plight and about the condition of other homeless individuals, because of the inability, or unwillingness, of the government to come to the assistance of the poor. Indeed, "[e]ven the statement 'I am hungry' communicates a fact of social existence of some relevance to public discourse."¹¹⁰ Beggars also engage in advocacy — they advocate that society's more privileged members assume some responsibility for those who are not as fortunate. District Court Judge Sand noted in the trial court opinion in *Young* that "while often disturbing and sometimes alarmingly graphic, begging is unmistakably informative and persuasive speech."¹¹¹

Even though the beggar's object is to obtain money, the Court has long recognized First Amendment protection for speech in the form of a solicitation to pay or contribute money.¹¹² It also makes no difference that the beggar will profit from his or her own entreaties. In *Riley*, the Court explicitly noted that "[i]t is well settled that a speaker's rights are not lost merely because compensation is received; a speaker is no less a speaker because he or she is paid to speak."¹¹³ In addition, an organized charity, like the

¹⁰⁸ *Id.* at 156.

¹⁰⁹ *Cornelius v. NAACP Legal Defense and Educ. Fund*, 473 U.S. 788, 799 (1985); *see also* *Blair v. Shanahan*, 775 F. Supp. 1315, 1322 (N.D. Cal. 1991) ("Begging can promote the very speech values that entitle charitable appeals to constitutional protection.").

¹¹⁰ *City of Seattle v. Webster*, 802 P.2d 1333, 1342-43 (Wash. 1990) (upholding Seattle ordinance prohibiting pedestrian interference, but noting that "First Amendment protects the spread of information as well as the spread of ideas," finding that begging was "fully protected speech") (citing *Schaumburg*, 444 U.S. at 632; *Riley v. National Fed'n of the Blind*, 487 U.S. 781, 796 (1988); *Secretary of State v. Munson*, 467 U.S. 947 (1984)), *cert. denied*, 111 S. Ct. 1690 (1991).

¹¹¹ *Young*, 729 F. Supp. at 352.

¹¹² *Schaumburg*, 444 U.S. at 629 (quoting *Bates v. State Bar of Ariz.*, 433 U.S. 350, 363 (1977)); *see also* *Riley*, 487 U.S. at 796 (noting that Court has refused to separate component parts of charitable solicitations from protected whole).

¹¹³ *Riley*, 487 U.S. at 801; *see also* *Munson*, 467 U.S. at 955-56 n.6 (noting that paying fundraising organization "to disseminate information does not in itself render its activity unprotected").

National Federation for the Blind in *Riley*, takes some of the funds received and applies them to administrative expenses. The beggar has no administrative expenses.¹¹⁴

Moreover, to assert that solicitations for money by beggars have less communicative content than solicitations by organized charities is to differentiate on the basis of the speech's source. The Supreme Court has held that speech's capacity to inform the public "does not depend upon the identity of its source, whether corporation, association, union or individual."¹¹⁵ No meaningful distinction can be drawn, for First Amendment purposes, between a professional fundraiser, requesting a donation on behalf of a charitable organization, and a similar request by a destitute individual on her own behalf.¹¹⁶ This distinction would lead to the anomalous result that two homeless people could solicit donations for each other but a solitary homeless person could not solicit contributions for herself. As the district court noted in *Blair*, simply because beggars represents themselves and "not an organized charity should not render [their] speech unprotected."¹¹⁷ Therefore, each individual beggar should be viewed as an independent charity, and begging should be indistinguishable from charitable solicitation for First Amendment purposes.

In addition, the *modus operandi* for charitable solicitors and beggars are virtually identical. In the *Young* case's trial opinion, Judge Sand noted that both solicitors and beggars approach people, request donations, and perhaps explain why they want money.¹¹⁸

¹¹⁴ *Loper v. New York City Police Dep't*, 802 F. Supp. 1029, 1037 (S.D.N.Y. 1992), *aff'd*, 999 F.2d 699 (2d Cir. 1993).

¹¹⁵ *First Nat'l Bank of Boston v. Bellotti*, 435 U.S. 765, 777 (1978) (finding unconstitutional Massachusetts criminal statute prohibiting business corporations from making expenditures for purpose of influencing voters).

¹¹⁶ *Loper v. New York City Police Dep't*, 999 F.2d 699, 704 (2d Cir. 1993) ("The former are communicating the needs of others while the latter are communicating their personal needs The distinction is not a significant one for First Amendment purposes.").

¹¹⁷ *Blair v. Shanahan*, 775 F. Supp. 1315, 1323 n.8 (N.D. Cal. 1991) (noting that "an individual with AIDS should be allowed to solicit food for himself just as a group of individuals with AIDS should be able to band together to form a food bank that solicits food for its members"); *Loper*, 999 F.2d at 705 (noting that member of charitable organization who seeks alms for the organization "should be treated no differently from one who begs for his or her own account").

¹¹⁸ *Young v. New York City Transit Auth.*, 729 F. Supp. 341, 352 (S.D.N.Y. 1990), *rev'd & vacated*, 903 F.2d 146 (2d Cir. 1990), *cert. denied*, 498 U.S. 984 (1990).

Even if the professional fundraiser's message is clearer, "First Amendment protections should not be limited to the articulate."¹¹⁹ Moreover, it is irrelevant that beggars may fail to persuade their listeners, for "many charitable solicitors [also] fail to educate, enlighten, or persuade their listeners."¹²⁰

Furthermore, charitable and personal solicitors both seek contributions for the benefit of society's less fortunate members. The donor's contribution demonstrates support for the recipient and her views.¹²¹ Moreover, like organized charities, beggars are dependent on contributions to continue their expressive activity. Most professional fundraisers support themselves from the contributions they receive. Similarly, the only way many beggars can support themselves and their families is by soliciting funds. If beggars were prohibited from soliciting donations, they would engage in fewer conversations with passersby. Thus, laws that prohibit begging impermissibly chill protected speech.¹²² As the dissent in *Young* noted, to suggest that beggars are otherwise free to pursue First Amendment activity ignores the harsh reality of a beggar's life.¹²³

In *Krishna*, the most recent United States Supreme Court case dealing with funds solicitation by a non-profit religious corporation, the Court gave no indication that it would reduce the First Amendment protection previously accorded solicitations by charities. Although the 5-4 *Krishna* decision generated four separate opinions, each Justice recognized that in-person solicitation was entitled to First Amendment protection.¹²⁴ In its majority opinion, the *Krishna* Court noted that no party contested that the solicitation at

¹¹⁹ *Blair*, 775 F. Supp. at 1324; see also *City of Seattle v. Webster*, 802 P.2d 1333, 1342 (Wash. 1990) (stating that "the rudimentary nature of a communication cannot deprive it of all First Amendment protection").

¹²⁰ *Blair*, 775 F. Supp. at 1323.

¹²¹ *Cornelius v. NAACP Legal Defense and Educ. Fund*, 473 U.S. 788, 799 (1985).

¹²² *Blair*, 775 F. Supp. at 1322 n.6.

¹²³ *Young*, 903 F.2d at 166 (Meskill, J., concurring in part and dissenting in part) ("To suggest that these individuals, who are obviously struggling to survive, are free to engage in First Amendment activity in their spare time ignores the harsh reality of the life of the urban poor.").

¹²⁴ *International Soc'y For Krishna Consciousness v. Lee*, 112 S. Ct. 2701, 2705 (1992); *Krishna*, 112 S. Ct. 2711, 2721 (Kennedy, J., concurring); *Krishna*, 112 S. Ct. 2711, 2725 (Souter, J., concurring in part and dissenting in part); see *Krishna*, 112 S. Ct. 2711 (O'Connor, J., concurring); see also *Loper v. New York City Police Dep't*, 802 F. Supp. 1029, 1037 (S.D.N.Y. 1992), *aff'd*, 999 F.2d 699 (2d Cir. 1993).

issue was a form of protected speech.¹²⁵ Justice Souter, in his concurrence, recognized that the majority did not intend to limit the First Amendment protection accorded charitable solicitation.¹²⁶ Justice Kennedy also implied that he would not limit First Amendment protection to solicitation by an organized group, as opposed to an individual.¹²⁷ Thus, the *Krishna* case provides recent authority for the conclusion that begging is protected by the First Amendment as charitable solicitation.

b. Begging as Commercial Speech

1) Introduction

Assuming that the Court fails to find that the First Amendment protects begging as charitable solicitation, begging should be accorded at least the constitutional protections guaranteed to commercial speech.¹²⁸ In *Riley* and *Schaumburg*, the Court determined that charitable solicitations were not “purely commercial speech.”¹²⁹ The Court thus implied that, if charitable solicitation had not been accorded protection as pure speech, it would have been protected as commercial speech.¹³⁰ The philosophical foundation for constitutional protection of commercial speech supports

¹²⁵ *Krishna*, 112 S. Ct. 2701, 2705.

¹²⁶ *Krishna*, 112 S. Ct. 2711, 2725 (Souter, J., concurring in part and dissenting in part) (“We have held the solicitation of money by charities to be fully protected as the dissemination of ideas. . . . [T]he dissemination of ideas cannot be regulated to prevent it from being unfair or unreasonable.”) (quoting *Riley v. National Fed’n of the Blind*, 487 U.S. 781, 803 (1988)).

¹²⁷ *Id.* at 2721 (Kennedy, J., concurring) (“I am in full agreement with the statement of the Court that solicitation is a form of protected speech.”).

¹²⁸ *Loper v. New York City Police Dep’t*, 766 F. Supp. 1280, 1285 (S.D.N.Y. 1991) (denying cross motions for summary judgment with leave to amend upon further discovery); *see also Loper*, 802 F. Supp. at 1038 (“[b]egging might also be entitled to some lesser protection as commercial speech”) (citing *Loper*, 766 F. Supp. at 1285 n.5).

¹²⁹ *See Village of Schaumburg v. Citizens for a Better Env’t*, 444 U.S. 620, 632 (1979) (noting that cases do not treat charitable solicitation as variety of purely commercial speech); *Riley*, 487 U.S. at 795 (noting that speech not necessarily commercial when expression relates to person’s financial motivation for speaking); *Bigelow v. Virginia*, 421 U.S. 809, 822 (1975) (holding that advertising low cost abortions is pure speech rather than commercial speech because it communicates information of widespread public and constitutional interest).

¹³⁰ *Loper*, 766 F. Supp. at 1285 (noting that if begging not protected as charitable solicitation, it may constitute expression that falls within commercial speech doctrine).

this conclusion. Justices have noted that the core purpose for the constitutional guarantees of free speech and free press is to inform the public.¹³¹ For that reason, “[i]n a variety of contexts this Court has referred to a First Amendment right to ‘receive information and ideas.’”¹³² This public right to receive information and ideas underlies the Court’s extension of First Amendment protection to purely commercial speech.¹³³ In *City of Cincinnati v. Discovery Network*, the Court reaffirmed that “the interest in protecting the free flow of information and ideas is still present when such expression is found in a commercial context.”¹³⁴ In *Edenfield v. Fane*, the Court reiterated that the commercial marketplace provides a forum for ideas and information and that the speaker and the audience, not

¹³¹ *Branzburg v. Hayes*, 408 U.S. 665, 725 (1972) (Stewart, J., dissenting) (disagreeing with majority holding that there is no “newsman’s privilege” to refuse to appear before grand jury in criminal matter to answer questions about identity of news source or confidential information).

¹³² *Richmond Newspapers v. Virginia*, 448 U.S. 555, 576 (1980) (holding that order closing criminal trial violated public and press right of access “to prohibit government from limiting the stock of information from which members of the public may draw”) (quoting *Kleindienst v. Mandel*, 408 U.S. 753, 762 (1972) (upholding refusal to grant a visa waiver to scholar who claimed First Amendment right to engage in academic interchange, as valid exercise of plenary power that Congress delegated to Executive Branch)); *see also* *Houchins v. KQED*, 438 U.S. 1, 30 (1978) (Stevens, J., dissenting) (commenting that the “preservation of a full and free flow of information to the general public has long been recognized as a core objective of the First Amendment. . . . It is for this reason that the First Amendment protects not only the dissemination but also the receipt of information and ideas.”); *id.* at 32 n.22 (Stevens, J., dissenting) (noting that dissemination of ideas accomplishes nothing if addressees not free to receive them); *First Nat’l Bank of Boston v. Bellotti*, 435 U.S. 765, 806 (1978) (noting that function of First Amendment is to protect interchange of ideas).

¹³³ *See, e.g., City of Cincinnati v. Discovery Network*, 113 S. Ct. 1505, 1512 (1993) (holding that societal interests served by information in commercial speech); *Board of Trustees v. Fox*, 492 U.S. 469, 480 (1989) (“the free flow of commercial information is valuable enough to justify imposing on would-be regulators the costs of distinguishing . . . the harmless from the harmful”) (quoting *Zauderer v. Office of Disciplinary Counsel*, 471 U.S. 626, 646 (1985)); *Central Hudson Gas & Elec. v. Public Serv. Comm’n*, 447 U.S. 557, 567 (1980) (holding that suppressing advertising reduces information available for consumer decisions, defeats First Amendment’s purpose); *Bellotti*, 435 U.S. at 783 (commenting that commercial advertisement is constitutionally protected speech, furthers societal interest in free flow of commercial information).

¹³⁴ *Discovery Network*, 113 S. Ct. at 1515 n.21.

the government, should assess the commercial information's value.¹³⁵

Moreover, the Supreme Court's commercial speech cases support the proposition that begging, at the very least, is expression worthy of the First Amendment protections accorded commercial speech.¹³⁶ The beggars' solicitations fit within a broad commercial speech classification that includes "expressions related solely to the economic interests of the speaker and the audience."¹³⁷ Alternatively, begging may fall within the narrower characterization of commercial speech that includes proposals for commercial transactions.¹³⁸

2) The Evolution of the Commercial Speech Doctrine

In *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council*,¹³⁹ prescription drug consumers brought suit against the Virginia State Board of Pharmacy challenging a Virginia statute declaring that advertising prescription drug prices was unprofessional conduct for a licensed pharmacist. The Court, holding invalid the Virginia statute, noted that "speech which does 'no more than propose a commercial transaction'" is entitled to limited First Amendment protection.¹⁴⁰ The Court noted that the First Amendment protects commercial speech even though the speaker carries the message for a profit, and even though the message may involve "a solicitation to purchase or otherwise pay or contribute

¹³⁵ *Edenfield v. Fane*, 113 S. Ct. 1792, 1798 (1993).

¹³⁶ *Loper v. New York City Police Dep't*, 766 F. Supp. 1280, 1285 n.5 (S.D.N.Y. 1991) (cited with approval, *Loper v. New York City Police Dep't*, 802 F. Supp. 1029, 1038 (S.D.N.Y. 1992)).

¹³⁷ *Discovery Network*, 113 S. Ct. at 1513 (quoting *Central Hudson*, 447 U.S. at 561); see also *Central Hudson*, 447 U.S. at 579-80 (Stevens, J., concurring) (finding this definition "unquestionably too broad" because "whether this definition uses the subject matter of the speech or the motivation of the speaker as the limiting factor, it seems clear to me that it encompasses speech that is entitled to the maximum protection afforded by the First Amendment. . . . [E]ven Shakespeare may have been motivated by the prospect of pecuniary reward.").

¹³⁸ *Discovery Network*, 113 S. Ct. at 1513 (quoting *Board of Trustees v. Fox*, 492 U.S. 469, 473-74 (1989)).

¹³⁹ 425 U.S. 748, 748 (1976).

¹⁴⁰ *Id.* at 762 (quoting *Pittsburgh Press Co. v. Pittsburgh Comm'n on Human Relations*, 413 U.S. 376, 385 (1973) (holding that city's ordinance forbidding newspapers to carry "sex-designated advertising columns for nonexempt job opportunities" did not violate newspapers' First Amendment rights)).

money.”¹⁴¹ The Court held that the right of the press to publish the price of drugs outweighed Virginia’s interest in maintaining the professionalism of licensed pharmacists.¹⁴² In reaching this conclusion, the Court reasoned that the free flow of commercial information helps individual consumers make educated decisions and also serves a general public interest.¹⁴³

Almost fifteen years later, in *Central Hudson Gas & Electric v. Public Service Commission*,¹⁴⁴ the Court found that a state regulation, which banned an electrical utility from advertising to promote the use of electricity, violated the First Amendment. The *Hudson* Court established a four-part analysis for commercial speech cases.¹⁴⁵ First, the Court determines whether the expression is protected by the First Amendment: “For commercial speech to come within that provision, it . . . must concern lawful activity and not be misleading.”¹⁴⁶ Second, the Court “asks whether the asserted government interest is substantial.”¹⁴⁷ If the law passes these two steps, the Court then “determines whether the regulation directly advances the asserted governmental interest,” and whether it is more extensive than necessary to serve that interest.¹⁴⁸

Ten years later, in *Board of Trustees v. Fox*,¹⁴⁹ the Court refined the last prong of the *Hudson* standard by holding that there must be a “reasonable fit” between the state’s substantial interests served by its law and the speech restrictions.¹⁵⁰ Several lower federal courts have interpreted the *Fox* standard as decreasing the Court’s protection of commercial speech.¹⁵¹ However, two of the Court’s most recent

¹⁴¹ *Id.* at 761.

¹⁴² *Id.* at 756. The Court explained that “the protection afforded [by the First Amendment] is to the communication, to its source and to its recipients both.” *Id.*

¹⁴³ *Id.* at 762-65.

¹⁴⁴ 447 U.S. 557, 566 (1980).

¹⁴⁵ *Id.* at 571-72.

¹⁴⁶ *Id.* at 566.

¹⁴⁷ *Id.*

¹⁴⁸ *Id.*

¹⁴⁹ 492 U.S. 469, 480 (1989).

¹⁵⁰ *Id.* “What our decisions require is a ‘fit’ between the legislature’s ends and the means chosen to accomplish those ends — a fit that is not necessarily perfect, but reasonable; that represents not necessarily the single best disposition but one whose scope is ‘in proportion to the interest served’ . . . that employs not necessarily the least restrictive means but . . . a means narrowly tailored to achieve the desired objective.” *Id.* (citations omitted).

¹⁵¹ See, e.g., *Chicago Observer v. Chicago*, 929 F.2d 325 (7th Cir. 1991) (upholding Chicago’s ban on advertisements attached to newsracks); Don’s

commercial speech cases, *Discovery Network* and *Edenfield*, seem to discredit this interpretation. In *Discovery Network*, the Court held, in a 6-3 decision, that Cincinnati could not ban news racks containing free advertising publications to promote its interest in more aesthetic and safer sidewalks, while allowing news racks containing newspapers to remain.¹⁵² The Court rejected Cincinnati's argument that the ban on advertisement racks was constitutionally permissible because commercial speech is of low value.¹⁵³ The Court noted that this view "attaches more importance to the distinction between commercial and non-commercial speech" than First Amendment cases allow, and "seriously underestimates the value of commercial speech."¹⁵⁴ Justice Blackmun, in his concurrence, added that *Discovery Network* showed the "absurdity of treating all commercial speech as less valuable than all noncommercial speech."¹⁵⁵ Justice Blackmun noted that the advertisements, which contained information about adult education courses and real estate, had value beyond the offensive political slogan displayed in *Cohen v. California*, yet the Court accorded greater First Amendment protection in *Cohen*.¹⁵⁶ Justice Blackmun hoped that the Court would eventually abandon *Central Hudson's* analysis, in favor of giving full First Amendment protection "for truthful, noncoercive commercial speech about lawful activities."¹⁵⁷

The Court in *Discovery Network* also held that Cincinnati had not established a sufficient fit between its goals and its chosen means, as required in *Fox*.¹⁵⁸ The Court made clear that the law need not be the least severe to achieve the city's interest. However, the Court commented that "if there are numerous and obvious less-burdensome alternatives to the restriction on commercial speech, that is

Porta Signs v. City of Clearwater, 829 F.2d 1051 (11th Cir. 1987) (upholding Clearwater's ban on portable signs).

¹⁵² *City of Cincinnati v. Discovery Network*, 113 S. Ct. 1505, 1509 (1993).

¹⁵³ *Id.* at 1511.

¹⁵⁴ *Id.*

¹⁵⁵ *Id.* at 1520 (Blackmun, J., concurring).

¹⁵⁶ *Id.* at 1521 (Blackmun, J., concurring).

¹⁵⁷ *Id.* (Blackmun, J., concurring).

¹⁵⁸ *Id.* at 1514. The Court noted that the law's distinction bore no relationship to the city's asserted interest. *Id.* The Court stated that the advertising newsracks were "no greater an eyesore than the newsracks permitted to remain on Cincinnati's sidewalks." *Id.*

certainly a relevant consideration in determining whether the 'fit' between ends and means is reasonable."¹⁵⁹

In *Edenfield*, the Court, in an 8-1 decision, struck down a Florida regulation prohibiting certified public accountants from making any uninvited solicitation for new business, including telephone calls and personal visits.¹⁶⁰ The Court recognized at the outset that "this type of personal solicitation is commercial expression to which the protections of the First Amendment apply."¹⁶¹ Citing *Ohralik v. Ohio State Bar*, the Court noted that whatever detrimental aspects personal commercial solicitations contain, these aspects are not so inherent to personal solicitation that it loses all First Amendment protection.¹⁶² The Court in *Ohralik* held that states "may discipline lawyers for soliciting clients in person under circumstances likely to pose dangers that the State has a right to prevent."¹⁶³ However, the Court in *Edenfield* rejected the argument that *Ohralik* justified a blanket ban on accountants' solicitations.¹⁶⁴ Rather, the *Edenfield* Court explained that *Ohralik* upheld a preventative rule justified only in situations "inherently conducive to overreaching and other forms of misconduct."¹⁶⁵

The *Edenfield* Court found that in-person solicitation by accountants posed none of the same dangers the Court found with lawyer

¹⁵⁹ *Id.* at 1510 n.13 (citing *Board of Trustees v. Fox*, 492 U.S. 469, 480 (1989)).

¹⁶⁰ *Edenfield v. Fane*, 113 S. Ct. 1792, 1796 (1993). The Court limited its decision to accountants' solicitation of business clients, thus not deciding whether accountants may constitutionally be barred from soliciting individuals. See *Bates v. State Bar of Ariz.*, 433 U.S. 350, 384 (1977) (holding that First Amendment protects "truthful advertisement concerning the availability and terms of routine legal services").

¹⁶¹ *Edenfield*, 113 S. Ct. at 1797.

¹⁶² *Id.* (citing *Ohralik v. Ohio State Bar Ass'n*, 436 U.S. 447, 464 (1978)) (stating that the "harmful solicitation" in *Ohralik* was "inherently conducive to overreaching and other forms of misconduct"); see also *United States v. Kokinda*, 497 U.S. 720, 725 (1990) ("Solicitation is a recognized form of speech protected by the First Amendment.").

¹⁶³ *Ohralik*, 436 U.S. at 449.

¹⁶⁴ *Edenfield*, 113 S. Ct. at 1802.

¹⁶⁵ *Id.* (quoting *Ohralik*, 436 U.S. at 464). The rule was justified in *Ohralik* based on certain "unique features of in-person solicitation by lawyers that were present in the circumstances of that case." *Id.* (quoting *Zauderer v. Office of Disciplinary Counsel*, 471 U.S. 626, 641 (1984)). *Ohralik* involved an attorney offering his services to two eighteen-year-old accident victims, one of whom was hospitalized when the lawyer visited her. *Ohralik*, 436 U.S. at 466-67.

solicitation in *Ohralik*.¹⁶⁶ In addition, the *Edenfield* Court found that the state failed to prove that the solicitation ban sufficiently advanced the state's valid goals of protecting consumers from fraud and safeguarding the accountants' independence.¹⁶⁷ Therefore, the Court concluded that the blanket ban on accountants' unsolicited solicitations violated the First Amendment.

3) The Beggars' Expressive Activities as Commercial Speech

The First Amendment protection accorded commercial speech should also logically apply to protect beggars' solicitations from blanket bans on begging. Like the electric utility's advertisements in *Central Hudson*, beggars' expression serves their economic interests, and also "furthers the societal interest in fullest dissemination of information."¹⁶⁸ Just as advertisers disseminate information that consumers use to make private economic decisions, beggars disseminate information to influence decisions about the allocation of

¹⁶⁶ *Edenfield*, 113 S. Ct. at 1802-03 ("Unlike a lawyer, a CPA is not 'a professional trained in the art of persuasion'. . . . While the clients in *Ohralik* were approached at a moment of high stress and vulnerability, the clients Fane wishes to solicit meet him in their own offices at a time of their choosing. If they are unreceptive to his initial telephone solicitation, they need only terminate the call. . . . In contrast with *Ohralik*, it cannot be said that under these circumstances, personal solicitation by CPAs 'more often than not will be injurious to the person solicited.'") (quoting *Ohralik*, 436 U.S. at 466).

¹⁶⁷ *Id.* at 1800. The Court stressed that, when the government seeks to restrict commercial speech, it "must demonstrate that the harms it recites are real and that its restriction will in fact alleviate them to a material degree." *Id.* (citing *Zauderer*, 471 U.S. at 648-49 (overturning attorney reprimand for violating Disciplinary Rules, noting that "broad prophylactic rules may not be so lightly justified if the protections afforded commercial speech are to retain their force")); see also *Bolger v. Young Drug Products*, 463 U.S. 60, 73 (1983) (finding ban on mailing unsolicited contraception advertisement does not directly advance parents' interest in controlling education of their children); *In Re R.M.J.*, 455 U.S. 191, 206-07 (1982) (finding that private reprimand of attorney for including in mailing non-misleading information not authorized by Bar rules failed constitutional requirement that state regulate commercial speech "with care and in a manner no more extensive than reasonably necessary to further substantial interests"); *Central Hudson Gas & Elec. v. Public Serv. Comm'n*, 447 U.S. 557, 569 (1980) (holding that ban on promotional advertising by public utility does not advance governmental interest in fair rate structure); *Friedman v. Rogers*, 440 U.S. 1, 15-16 (1979) (upholding restriction on use of trade names by optometrists because "State's interest in protecting the public from the deceptive and misleading use of optometrical trade names is substantial and well demonstrated").

¹⁶⁸ *Central Hudson*, 447 U.S. at 561-62.

resources.¹⁶⁹ Although beggars only communicate some of the relevant facts regarding the problems of homelessness and indigency, “the First Amendment presumes that some accurate information is better than no information at all.”¹⁷⁰ Moreover, the public’s right to receive this information is compromised by a begging ban. The beggar is a prime source of enlightenment regarding the plight of the homeless.¹⁷¹

In addition, beggars’ solicitations, if not charitable solicitation, are properly characterized as commercial speech. The Court in *Fox* stated that commercial speech is found when people “propose a commercial transaction.”¹⁷² In *Discovery Network*, which involved the free distribution of commercial handbills,¹⁷³ the Court held that a transaction may involve a profit and still receive First Amendment protection.¹⁷⁴ *Virginia Pharmacy* established that commercial speech is protected even though it involves a solicitation to pay or contribute money.¹⁷⁵

The only arguably missing element in what otherwise seems to be a traditional commercial transaction is that beggars sell an intangible product. Nevertheless, the beggars’ transactions are important

¹⁶⁹ *City of Seattle v. Webster*, 802 P.2d 1333, 1343 (Wash. 1990), *cert. denied*, 111 S. Ct. 1690 (1991).

¹⁷⁰ *Central Hudson*, 447 U.S. at 562 (quoting *Bates v. State Bar of Ariz.*, 433 U.S. 350, 374 (1977)).

¹⁷¹ In *Bolger*, 463 U.S. at 67-68, the Court stated that communications can “constitute commercial speech notwithstanding the fact that they contain discussions of important public issues”

¹⁷² *Board of Trustees v. Fox*, 492 U.S. 469, 473 (1989) (citing *Virginia Bd. of Pharmacy v. Virginia Citizens Consumer Council*, 425 U.S. 748, 762 (1976) (quoting *Pittsburgh Press Co. v. Pittsburgh Comm’n on Human Relations*, 413 U.S. 376, 385 (1973))).

¹⁷³ *City of Cincinnati v. Discovery Network*, 113 S. Ct. 1505, 1508 (1993).

¹⁷⁴ Speech “is protected even though it is carried in a form that is ‘sold’ for profit.” *Discovery Network*, 113 S. Ct. at 1512 (citing *Smith v. California*, 361 U.S. 147, 150 (1959) (overturning bookstore proprietor’s conviction for unknowing possession of book later found obscene, noting that “[i]t is of course no matter that the dissemination takes place under commercial auspices”)); *Joseph Burstyn, Inc. v. Wilson*, 343 U.S. 495, 501 (1952) (overturning law denying film license based on censor’s conclusion that film was sacrilegious, noting that First Amendment protects motion pictures even though large-scale business conducted for profit); *Murdock v. Pennsylvania*, 319 U.S. 105, 111 (1943) (overturning conviction of Jehovah’s Witnesses for selling religious material, indicating that mere fact religious literature is sold “does not transform evangelism into a commercial enterprise”).

¹⁷⁵ *Discovery Network*, 113 S. Ct. at 1512 (citing *Virginia Pharmacy*, 425 U.S. at 761-62).

to both beggars and passersby. The beggars offer a part of themselves when they extend their empty cups. The generous donor purchases the satisfaction and peace of mind that comes from helping another human being.

In addition, it seems incongruous to assume that the Court would hold that the distinction between protected and unprotected speech turns on whether beggars sell, and passersby purchase, a tangible product or service. However, if the Court drew this distinction, all beggars would need to do is to sell a tangible good such as a handmade drawing or a single flower that passersby could then wear to signify their assistance to the beggars' cause.¹⁷⁶

Begging also meets the threshold requirement of the *Hudson* test for First Amendment protection — that begging “at least concern lawful activity and not be misleading.”¹⁷⁷ Sitting or standing in a public place and asking for money is normally viewed as lawful.¹⁷⁸ Most people have asked a stranger for money to make a telephone call. In addition, beggars' speech is not misleading. The beggars' pleas are simple and direct. They are homeless, they are destitute, and they need assistance.

Furthermore, unlike the solicitation by the attorney in *Ohralik*, begging implicates none of the governmental interests the Court has found valid to uphold regulation in commercial speech cases. First, begging does not involve a governmental interest in preventing the dangers of “overreaching and other forms of misconduct” that justify a blanket ban on individual solicitation.¹⁷⁹ In contrast with an attorney, a beggar is not likely characterized as one “trained in the art of persuasion.” Second, although a passerby may not choose the time of solicitation, she is also not approached at a time of “high stress and vulnerability” like the accident victims in *Ohralik*.¹⁸⁰ Third, if the passerby is unreceptive to the beggar's

¹⁷⁶ During the Depression, poor people sold pencils on street corners. The modern day equivalent seems to be the “sale” of newspapers by the homeless for a \$1.00 “donation” in metropolitan cities like Chicago and San Francisco.

¹⁷⁷ Commercial speech is misleading if it is false, actually misleads someone, or contains a “significant possibility” that it will mislead the audience. *Friedman v. Rogers*, 440 U.S. 1, 13 (1978); *see also In re R.M.J.*, 455 U.S. 191, 203 (1982) (using term “inherently misleading” to describe commercial speech that meets “significant possibility” standard).

¹⁷⁸ Obviously, some anti-begging ordinances represent a legislative attempt to make this conduct unlawful.

¹⁷⁹ *See Ohralik v. Ohio State Bar Ass'n*, 436 U.S. 447, 464 (1978).

¹⁸⁰ *Edenfield v. Fane*, 113 S. Ct. 1792, 1803 (1993) (citing *Ohralik*, 436 U.S. at 465).

solicitation, she can walk away. Under these circumstances, begging can not be found probably injurious to the person solicited.¹⁸¹ Moreover, ordinances that ban begging lack a sufficient fit between the states' asserted goals and the means chosen to accomplish those ends.¹⁸² Governments may pursue numerous less-burdensome alternatives than a complete ban on all begging, such as statutes that regulate fraudulent, aggressive, or disruptive panhandling.

Finally, blanket bans on begging that entirely suppress commercial speech are reviewed by the Court with special care, because a speech ban may hide from public view the underlying governmental policy.¹⁸³ The Court in *Central Hudson* noted that "in recent years this Court has not approved a blanket ban on commercial speech unless the expression itself was flawed in some way, either because it was deceptive or related to unlawful activity."¹⁸⁴ Begging is not deceptive, and the donation of money to the poor is not unlawful. Therefore, blanket bans on the beggars' commercial speech cannot be constitutionally condoned. If commercial speech is constitutionally protected, begging is also protected.¹⁸⁵

¹⁸¹ See *Ohralik*, 436 U.S. at 465 n.25 (citing *Cohen v. California*, 403 U.S. 15, 21 (1970)).

¹⁸² See *Board of Trustees v. Fox*, 492 U.S. 469, 480 (1989) (adopting time, place, and manner test for commercial speech cases from *Ward v. Rock Against Racism*, 491 U.S. 781 (1989)); Russell W. Galloway, *Basic Free Speech Analysis*, 31 SANTA CLARA L. REV. 883, 935 n.296 (1991) (noting that "scrutiny of ends in commercial speech cases is essentially the same as in time, place, and manner cases").

¹⁸³ *Central Hudson Gas & Elec. v. Public Serv. Comm'n*, 447 U.S. 557, 566 n.9 (1980).

¹⁸⁴ *Id.* Many of the Court's cases finding blanket bans on commercial speech unconstitutional involved bans on personal solicitation. See, e.g., *Peel v. Attorney Registration & Disciplinary Comm'n*, 496 U.S. 91, 110-11 (1990); *Shapero v. Kentucky Bar Ass'n.*, 486 U.S. 466, 476 (1988); *Zauderer v. Office of Disciplinary Counsel*, 471 U.S. 626, 638 (1985); *Bates v. State Bar of Ariz.*, 433 U.S. 350, 384 (1977).

¹⁸⁵ *City of Seattle v. Webster*, 802 P.2d 1333, 1343 (Wash. 1990) (noting that both Florida Court of Appeals in *C.C.B. v. State*, 458 So. 2d 47, 48-50 (Fla. Dist. Ct. App. 1984), and Judge Meskill, dissenting in *Young v. New York City Transit Auth.*, 903 F.2d 146, 164-168 (2d Cir. 1990), *cert. denied*, 498 U.S. 984 (1990), realized that "cases holding that commercial speech is protected under First Amendment also precluded holding that begging is unprotected"), *cert. denied*, 111 S. Ct. 1690 (1991).

3. Begging as Protected Expressive Conduct

Some beggars do not verbalize their pleas for assistance using either written or spoken words. Rather, these beggars sit silently on street corners, or doze off, with the curb as their pillow, letting their presence express their plea. They place a cup or other receptacle for donations beside them. Because these beggars do not engage in "pure speech," their activities are not protected as either a charitable solicitation or as commercial speech.

However, the First Amendment also protects the expressive aspects of beggars' conduct. The Supreme Court has made it clear that government has a freer hand in restricting expressive conduct than in restricting written or spoken words.¹⁸⁶ However, the First Amendment protects expressive conduct if it contains sufficient elements of communication.¹⁸⁷ For example, in *Tinker v. Des Moines*

¹⁸⁶ *R.A.V. v. City of St. Paul*, 112 S. Ct. 2538, 2568 (1992); *Texas v. Johnson*, 491 U.S. 397, 406 (1989).

¹⁸⁷ *R.A.V.*, 112 S. Ct. at 2568 (Stevens, J., concurring) (citing *Texas v. Johnson*, 491 U.S. at 406 (noting that expressive conduct may be regulated more freely than written or oral communication); *United States v. O'Brien*, 391 U.S. 367, 376 (1968)). In *O'Brien*, the Court assumed that a protestor who burned his draft card on the steps of a courthouse during a 1966 anti-Vietnam War rally was engaging in expressive conduct. *O'Brien*, 391 U.S. at 376. However, the Court found that a statute forbidding the destruction of draft cards did not violate the protestor's free speech rights and "substantially further[ed] the smooth and proper functioning of the [draft] system." *Id.* at 381. In reaching this conclusion, the Court held that "a government regulation is sufficiently justified if it is within the constitutional power of the Government; if it furthers an important or substantial government interest; if the governmental interest is unrelated to the suppression of free expression; and if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest." *Id.* at 377.

In subsequent applications of the *O'Brien* test, the Court has "highlighted" the importance of the requirement that the "governmental interest in question be unconnected to expression" and seems to have adopted that requirement as a threshold inquiry. *Texas v. Johnson*, 491 U.S. at 407. See *infra* notes 280-318 and accompanying text for an analysis of this "threshold inquiry." Once this requirement has been satisfied, the Court has indicated that the *O'Brien* standard is substantially equivalent to that applied to time, place, or manner restrictions. *Id.* See *infra* notes 369-98 and accompanying text for an analysis of the constitutionality of anti-begging ordinances as time, place or manner restrictions. See also *International Soc'y For Krishna Consciousness v. Lee*, 112 S. Ct. 2711, 2720-21 (1992) (Kennedy, J., concurring) (noting that "[t]he confluence of the two tests is well demonstrated by a case like this [involving restrictions on solicitation by a non-profit religious organization], where the government regulation at issue can be

Independent Community School District,¹⁸⁸ the Court recognized the expressive nature of black armbands worn by high school students to protest the Vietnam War. In *Amalgamated Food Employees Union Local 590 v. Logan Valley Plaza*,¹⁸⁹ the Court found expressive conduct in a union's peaceful picketing of a supermarket to protest unfair labor practices.¹⁹⁰

In *Spence v. Washington*,¹⁹¹ the Court stated the test to determine whether particular conduct possesses sufficient communicative elements to enjoy First Amendment protection. First, the actor must possess an intent to convey a particularized message.¹⁹² Second, the surrounding circumstances must create a great likelihood that

described with equal accuracy as a regulation of the manner of expression, or as a regulation of conduct with an expressive component"); *Clark v. Community for Creative Non-Violence*, 468 U.S. 288, 298 (1984) (noting that "the four-factor standard of *United States v. O'Brien* . . . for validating a regulation of expressive conduct in the last analysis is little, if any, different from the standard applied to time, place, or manner restrictions") (citation omitted).

¹⁸⁸ 393 U.S. 503 (1969).

¹⁸⁹ 391 U.S. 308, 313-14 (1968).

¹⁹⁰ The Court has found that a wide variety of other actions are also protected by the First Amendment. *See, e.g.*, *Wooley v. Maynard*, 430 U.S. 705, 715 (1977) (covering automobile license plate containing New Hampshire's State motto "Live Free Or Die," protected conduct because First Amendment protects individual's right to hold point of view different from majority); *Cohen v. California*, 403 U.S. 15, 18 (1971) (reversing conviction under California penal statute for offensive conduct on grounds that wearing jacket into courthouse that read "Fuck the Draft" was protected because "[t]he only 'conduct' which the State sought to punish [was] the fact of communication"); *Brown v. Louisiana*, 383 U.S. 131, 141-42 (1966) (finding sit-in protesting segregation in "whites only" area of library protected by First Amendment because these rights not confined to verbal expression).

Lower federal courts have also found expressive conduct in a wide range of activities. *See, e.g.*, *United States v. Abney*, 534 F.2d 984, 985 (D.C. Cir. 1976) (holding that vigil by veteran protesting treatment by Veterans Administration sufficiently expressive to implicate First Amendment); *University of Utah Students Against Apartheid v. Peterson*, 649 F. Supp. 1200, 1204-05 (D. Utah 1986) (finding students' shanties to protest apartheid and school's investment policies were "symbolic expression"); *Crown Cent. Petroleum v. Waldman*, 486 F. Supp. 759, 768 (M.D. Pa. 1980) (holding that dealers closing gasoline stations to express dissatisfaction with Department of Energy policies constituted political speech); *Vietnam Veterans Against the War v. Morton*, 379 F. Supp. 9, 12 (D.D.C. 1974) (finding that Vietnam veterans engaged in expressive conduct by establishing symbolic campsite at Capitol).

¹⁹¹ 418 U.S. 405, 410-11 (1974).

¹⁹² *Id.*

the message will be understood by those who view it.¹⁹³ In *Spence*, the Court considered whether the actions of an anti-war protestor constituted expressive conduct. The protestor hung an American flag, with a peace-symbol pinned to the field of stars, upside down from his apartment window to protest the 1970 Cambodia invasions and the Kent State shootings. The Court found that the protestor's conduct was intended to communicate a specific message, and that message could be reasonably understood by others.¹⁹⁴ In *Texas v. Johnson*,¹⁹⁵ the Court applied the *Spence* test to strike down a statute that made it a crime to burn the United States flag, holding that flag burning is expressive conduct protected by the First Amendment.¹⁹⁶ In addition, the Court found that the plaintiff's flag burning at the 1984 Republican Convention in Dallas was expressive and overtly political, and thus "sufficiently imbued with elements of communication to implicate the First Amendment."¹⁹⁷

The Second Circuit in *Young* commented that the beggars' message to "exact money from those whom they accost" fell "far outside the scope of protected speech under the First Amendment."¹⁹⁸ In applying the *Spence* test, the *Young* Court asserted that begging was not inseparably intertwined with a particular message. Rather, the court found that people beg to collect money.¹⁹⁹ The *Young* court also asserted that it was unlikely that subway passengers who witness the conduct understand the particular message.²⁰⁰ Thus, the *Young* Court found that begging failed the *Spence* test, and would not enjoy First Amendment protection as expressive conduct.

Once again, the *Young* decision is difficult to understand in light of the Supreme Court's decisions in *Tinker*, *Logan Valley*, *Spence* and

¹⁹³ *Id.*

¹⁹⁴ *Id.*

¹⁹⁵ 491 U.S. 397 (1989).

¹⁹⁶ *Id.* at 406. This 5-4 decision angered many Americans. "Fury over the decision was widespread, and politicians strove to outdo each other in patriotic chest thumping. The legal import of the decision, meanwhile, seemed to be that the Court was scraping the butter of free-speech protection over still more bread." Paul Reidinger, *The Expressionists: When Is Conduct Speech?*, A.B.A. J., Aug. 1990, at 90.

¹⁹⁷ *Texas v. Johnson*, 491 U.S. at 406.

¹⁹⁸ *Young v. New York City Transit Auth.*, 903 F.2d 146, 152 (2d Cir. 1990) ("Common sense tells us that begging is much more 'conduct' than it is 'speech.'"), *cert. denied*, 498 U.S. 984 (1990).

¹⁹⁹ *Id.* at 153.

²⁰⁰ *Id.* at 153-54.

Texas v. Johnson. Begging is inherently expressive and conveys an objectively obvious political message. Beggars sitting in a public place with tin cups at their feet convey the message that they and others like them lack the basic necessities to survive. A beggar's message is expressive and political, and thus "sufficiently imbued with elements of communication to implicate the First Amendment."²⁰¹ The beggars' unspoken requests for assistance reminds each person who passes by that people are homeless and live in poverty. Each time beggars appeal for assistance, they act as living reminders of the social problems of increasing homelessness and poverty, and of the inability of the government to adequately care for society's less fortunate members.²⁰²

Furthermore, the beggars' message is more particular and more readily understood by even an uninformed viewer than the meaning behind the black armband in *Tinker*, the peaceful picketing in *Logan Valley*, the peace-symbol clad flag in *Spence*, or the flaming flag in *Texas v. Johnson*.²⁰³ In *Clark v. Community For Creative Non-Violence*, the Court assumed that the demonstrators sleeping in Washington, D.C. parks to protest homelessness engaged in expressive conduct.²⁰⁴ Justice Marshall's dissent in *Clark*, which describes that ordinary citizens would likely understand the political message intended by the sleeping demonstrators, applies just as eloquently to disheveled beggars, sitting or sleeping in many of our nation's cities.²⁰⁵

²⁰¹ *Texas v. Johnson*, 491 U.S. 397, 406 (1989).

²⁰² *Loper v. New York City Police Dep't*, 999 F.2d 699, 704 (2d Cir. 1993) (commenting that "the presence of an unkempt and disheveled person holding out his or her hand or a cup to receive a donation itself conveys a message of need for support and assistance").

²⁰³ See *Texas v. Johnson*, 491 U.S. at 405-06; *Spence v. Washington*, 418 U.S. 405, 410 (1974); *Tinker v. Des Moines Indep. Community Sch. Dist.*, 393 U.S. 503, 505 (1969); *Amalgamated Food Employees Union Local 509 v. Logan Valley Plaza*, 391 U.S. 308, 313-14 (1968).

²⁰⁴ 468 U.S. 288, 293 (1984). However, the Court upheld the constitutionality of a National Park regulation forbidding the demonstrators from camping in its parks because the regulation "narrowly focuses on the Government's substantial interest in maintaining the parks in the heart of our Capital in an attractive and intact condition, readily available to the millions of people who wish to see and enjoy them by their presence." *Id.* at 296.

²⁰⁵ *Id.* at 305-06 (Marshall, J., dissenting). Marshall wrote that the public would understand the protesters' message, because of "the remarkably apt fit between the activity in which respondents seek to engage and the social problem they seek to highlight. By using sleep as an integral part of their mode of protest, respondents 'can express with their bodies the poignancy of

In addition, whenever a passerby chooses to donate money to the beggar, she shows that the beggars' message is understood by others.²⁰⁶ Also, the donation is expressive conduct on the part of the passerby, because it conveys a message of concern for the beggar's plight, understood both by the beggar and by any other observer.²⁰⁷ If a passerby tries to ignore the beggar by averting her eyes and walking on, she is left with an indelible reminder of the beggars' plight. As noted by the trial court in *Young*, the unsettling appearance and message conveyed by the beggar gives the conduct its expressive quality.²⁰⁸ The fact that this expression is objectionable to others does not diminish its First Amendment protection.²⁰⁹

The Supreme Court reaffirmed that objectionable expression is entitled to some First Amendment protection in *Barnes v. Glen Theatres*.²¹⁰ The Court held in *Barnes* that nude dancing, although offensive to many people, contained expression protected by the First Amendment.²¹¹ The Court found that the First Amendment protected "erotic dancing" despite the fact that the strippers' pay was directly related to the number of drinks they induced their

their plight. They can physically demonstrate the neglect from which they suffer with an articulateness even Dickens could not match.'" *Id.* (quoting *Community For Creative Non-Violence v. Watt*, 703 F.2d 586, 601 (D.C. Cir. 1983) (Edwards, J., concurring)).

²⁰⁶ A beggar's expressive conduct can be understood by a passerby, even if the individuals do not speak the same language. In one incident, an Indian beggar, who was a polio victim, "used the universal language — empty fingers raised to the lips to show hunger" to communicate with a tourist, who understood the expressive gesture and gave the beggar a dollar bill. Vijay Joshi, *Tougher Times Loom For India's Beggars*, HONOLULU ADVERTISER, Dec. 11, 1992, at E10.

²⁰⁷ If the beggar's message was not understood by other observers, authorities could rarely show probable cause to arrest a homeless person for violating an anti-begging ordinance. Authorities would not be able to ascertain when the regulation was being violated.

²⁰⁸ *Young v. New York City Transit Auth.*, 729 F. Supp. 341, 358-59 (S.D.N.Y. 1990), *rev'd & vacated*, 903 F.2d 146 (2d Cir. 1990), *cert. denied*, 498 U.S. 984 (1990).

²⁰⁹ See *R.A.V. v. City of St. Paul*, 112 S. Ct. 2538, 2559 (1992) (White, J., concurring) ("The mere fact that expressive activity causes hurt feelings, offense, or resentment does not render the expression unprotected."); *FCC v. Pacifica Found.*, 438 U.S. 726, 745 (1978) (noting that "[t]he fact that society may find speech offensive is not a sufficient reason for suppressing it. Indeed, if it is the speaker's opinion that gives offense, that consequence is a reason for according it constitutional protection.").

²¹⁰ 111 S. Ct. 2456 (1991).

²¹¹ *Id.* at 2460.

audience to purchase.²¹² However, the Court held that the protection was outweighed by public decency statutes designed to protect morals and public order.²¹³ Thus, the Court upheld an Indiana law that banned complete public nudity and required strip-teasers to wear pasties and a G-string.²¹⁴

It is almost beyond comprehension that the First Amendment protects aspects of a nude dancer's erotic message, but not the heartrending message of an impoverished beggar. It is difficult to argue that the erotic message is more worthy of constitutional protection than individual solicitation on behalf of the homeless. The logical result from the Court's decision seems to be that beggars should dance, or strip, for their solicitations to be protected.²¹⁵ Moreover, begging does not present the same risk of offending public decency as presented by nude barroom dancers. Therefore, in light of *Barnes*, begging should at least receive First Amendment protection as an expressive activity.

4. Begging as not Within any of the Categorical Exceptions to Protected Speech

The Supreme Court has repeatedly stated that "freedom of expression is made inviolate by the First Amendment, and, with only rare and stringent exceptions, may not be suppressed"²¹⁶

²¹² *Id.*

²¹³ *Id.*

²¹⁴ In discussing the *Barnes* case, Stanford Law School Professor Gerald Gunther commented: "I found it much more important that the court said that a state assertion of an interest in public morality is enough to trump the claim of free speech. That is scary. It tells us that what the majority says is offensive is enough." Aaron Epstein, *Court's Shift is Complete 6-3 or 5-4, Moderates are Outvoted*, S.J. MERCURY NEWS, June 30, 1991, at 4A. Professor Gunther's concern also applies to begging. Beggars are offensive to many people. Nevertheless, silencing beggars will not solve the problems of homelessness and poverty.

²¹⁵ See, e.g., *Ward v. Rock Against Racism*, 491 U.S. 781, 790 (1989) (holding that music protected by First Amendment); *Edwards v. South Carolina*, 372 U.S. 229, 233 (1963) (granting First Amendment protection to "boisterous," "loud," and "flamboyant" cheering and singing); *Carew-Reid v. Metropolitan Transp. Auth.*, 903 F.2d 914, 916, 919 (2d Cir. 1990) (upholding constitutionality of a ban on amplifiers on subway platforms but recognizing that First Amendment protects music as expression); *Goldstein v. Town of Nantucket*, 477 F. Supp. 606, 609 (D. Mass. 1979) (finding that street singer's acceptance of contributions does not dilute First Amendment protection).

²¹⁶ *Richmond Newspapers v. Virginia*, 448 U.S. 555, 575-76, 585 (1980) (citing *Brown v. Glines*, 444 U.S. 348 (1980)) (upholding regulation requiring

The Court identified narrowly limited classes of speech that may be prevented or punished without raising constitutional problems almost fifty years ago in *Chaplinsky v. New Hampshire*.²¹⁷ The speech classifications include lewd and obscene speech, profanity, libelous and insulting speech and “‘fighting words’ — those that by their utterance inflict injury or tend to incite an immediate breach of the peace.”²¹⁸ The Court holds that these expressions are not within

military personnel to obtain approval from their commanders before circulating petitions on Air Force bases, as protecting a substantial government interest in maintaining military duty and discipline unrelated to suppression of free speech).

²¹⁷ 315 U.S. 568 (1942).

²¹⁸ *Id.* at 571-72; *see also* *Schenck v. United States*, 249 U.S. 47, 52 (1919) (affirming conviction of defendants for disseminating circulars to obstruct recruiting and enlistment, noting that “[t]he most stringent protection of free speech would not protect a man in falsely shouting fire in a theatre and causing a panic”); GERALD GUNTHER, *CONSTITUTIONAL LAW* 994 (12th ed. 1991) (noting that “bribery, perjury, and counseling to murder are widely considered unprotected by the First Amendment”); *cf.* *New York v. Ferber*, 458 U.S. 747, 763-64 (1982) (upholding statutory ban on distribution of child pornography because “the evil to be restricted so overwhelmingly outweighs the expressive interests” and “bears so heavily and pervasively on the welfare of children engaged in its production . . . it is permissible to consider [child pornography] as without the protection of the First Amendment”); *FCC v. Pacifica Found.*, 438 U.S. 726, 746 (1978) (finding that “[a]lthough these [dirty] words ordinarily lack literary, political, or scientific value, they are not entirely outside the protection of the First Amendment”).

Legal scholars have asserted that the *Chaplinsky* formulation has been narrowed by a series of later decisions to reach only speech that tends “to incite an immediate breach of the peace.” *See, e.g.*, LAWRENCE TRIBE, *AMERICAN CONSTITUTIONAL LAW* 929 (2nd ed. 1988) (indicating that Court’s decision in *New York Times Co. v. Sullivan*, 376 U.S. 254, 269 (1964), “inevitably called into question the whole structure of First Amendment rights erected on the *Chaplinsky* foundation, and ever since, that structure has been coming apart”). Indeed, since *Chaplinsky*, the Court has not upheld a single conviction for uttering “fighting words.”

Nonetheless, the Court has, either explicitly or implicitly, reaffirmed the fighting words doctrine in every case subsequent to *Chaplinsky*. In 1971, in *Cohen v. California*, 403 U.S. 15, 20 (1971), the Court included both prongs of the test in its formulation of the “fighting words” doctrine. The following year, in *Gooding v. Wilson*, 405 U.S. 518, 523 (1972), the Court explicitly stated, “[o]ur decisions since *Chaplinsky* have continued to recognize state power constitutionally to punish ‘fighting’ words under carefully drawn statutes . . .” and “[w]e reaffirm that proposition today.” The Court also cited both prongs of *Chaplinsky* in overturning a regulation restricting speech in *Lewis v. City of New Orleans*, 415 U.S. 130, 132 (1974) (holding that “[the regulation] plainly has a broader sweep than the constitutional definition of

the area of constitutionally protected speech,²¹⁹ or that First Amendment protection does not extend to them.²²⁰ Although Court decisions have narrowed the scope of the traditional categorical exceptions for defamation²²¹ and for obscenity,²²² the Court's opinion in *R.A.V.* made it clear that "a limited categorical approach has remained an important part of our First Amendment jurisprudence."²²³

Begging does not fit within any of these exceptions. The beggar's plea for help does not defame anyone. Nor does a beggar's

'fighting words' announced in *Chaplinsky* . . . and reaffirmed in *Gooding* . . . namely, 'those words which by their very utterance inflict injury or tend to incite an immediate breach of the peace.')

(quoting *Chaplinsky*, 315 U.S. at 571-72).

It would seem that if the Court intended to eliminate a portion of the *Chaplinsky* test, it would not continue to use words that it no longer considered good law. Indeed, in *Hustler Magazine v. Falwell*, 485 U.S. 46, 56 (1988), the Court reaffirmed the injury prong in *Chaplinsky* as one of the few exceptions to speech not protected by the First Amendment. Finally, in *R.A.V. v. City of St. Paul*, 112 S. Ct. 2538, 2542 (1992), the Court refused petitioner's request to modify the scope of the *Chaplinsky* formulation.

²¹⁹ *Roth v. United States*, 354 U.S. 476, 483-85 (1957) (holding that "obscenity is not within the area of constitutionally protected speech or press" and reviewing guarantees of freedom of expression in effect at time of Constitution's ratification, concluding that "[i]n light of this history, it is apparent that the unconditional phrasing of the First Amendment was not intended to protect every utterance"); see also *Beauharnais v. Illinois*, 343 U.S. 250, 266 (1952) (upholding Illinois' criminal libel law and finding that "libelous utterances" not "within the area of constitutionally protected speech"). But see *R.A.V.*, 112 S. Ct. at 2543 (noting that any assertion that category of expression is "not within the area of constitutionally protected speech" must be "taken in context" and is not "literally true").

²²⁰ *Bose Corp. v. Consumers Union of United States*, 466 U.S. 485, 504 (1984) ("there are categories of communication and certain special utterances to which the majestic protection of the First Amendment does not extend").

²²¹ *New York Times Co. v. Sullivan*, 376 U.S. 254, 269 (1964) (noting that laws prohibiting "advocacy of unlawful acts, breach of the peace, obscenity, . . . and the various other formulae for the repression of expression, [including defamation] can claim no talismanic immunity from constitutional limitations").

²²² *R.A.V.*, 112 S. Ct. at 2562 (Stevens, J., concurring) (defining obscenity as expression that "'appeal[s] to the prurient interest, . . . depict[s] or describe[s], in a patently offensive way, sexual conduct, [and] taken as a whole, lack[s] serious literary, artistic, political, or scientific value'") (quoting *Miller v. California*, 413 U.S. 15, 24 (1973)).

²²³ *Id.* at 2543; see also *Burson v. Freeman*, 112 S. Ct. 1846, 1860 (1992) (Scalia, J., concurring) ("Nothing . . . in this Court's precedents warrants disregard of this longstanding tradition.").

message fall within the obscenity category, because it does not appeal to prurient interests, or depict or describe sexual conduct in a patently offensive way, and does not lack serious political value.²²⁴ The beggar's request for money also does not constitute "fighting words" because it does not tend to incite an immediate breach of the peace or inflict injury.²²⁵ Compared to "fighting words," beggars' humble pleas for help express ideas about poverty and homelessness. Begging makes society aware that, even in America, citizens are forced to seek handouts.

If begging does not fall within these narrowly limited classes of unprotected speech, then the Court would have to find that personal solicitation constitutes a new category of unprotected speech to uphold a ban on begging. This result seems very unlikely because the Court strictly construes the existing categories of unprotected speech.²²⁶ Justice Stevens has noted that, rather than broadening the categories of unprotected speech, "the history of the categorical approach is largely the history of narrowing the categories of unprotected speech."²²⁷ Thus, the Court will probably not classify begging as an unprotected form of expression.

II. THE CONTEXTS OF BEGGARS' EXPRESSIVE ACTIVITIES

A. Introduction

The preceding examination of begging's content and character leads to the conclusion that begging is protected by the First Amendment. However, that conclusion does not mean that a homeless person is free to beg at will. A court determining the con-

²²⁴ See *Miller*, 413 U.S. at 24.

²²⁵ Nor does the beggar's speech fall within the underlying reasons for denying protection to "fighting words." The *R.A.V.* Court explained that the reason fighting words are categorically excluded from the protection of the First Amendment is not that "they constitute 'no part of the expression of ideas' but only that they constitute 'no essential part of any exposition of ideas.'" *R.A.V.*, 112 S. Ct. at 2544 (quoting *Chaplinsky v. New Hampshire*, 315 U.S. 568, 572 (1942) (emphasis in original)). "Fighting words [or other unprotected speech] sometimes . . . are quite expressive indeed." *Id.* (citing *Chaplinsky*, 315 U.S. at 572).

²²⁶ *Id.* at 2567 (Stevens, J., concurring).

²²⁷ *Id.* Justice Stevens also commented that "[t]his evolution . . . indicates that the categorical approach is unworkable and the quest for absolute categories of 'protected' and 'unprotected' speech ultimately futile." *Id.* Stevens predicted that the Court will eventually discard the approach, noting that "[t]he quest for doctrinal certainty through the definition of categories and subcategories is, in my opinion, destined to fail." *Id.* at 2566.

stitutionality of begging must next consider the site of the begging activities, or what Justice Stevens in *R.A.V.* referred to as the “context” of First Amendment activities.²²⁸ The purpose of begging is to obtain as much money as possible, so beggars try to solicit as many people as possible. Therefore, beggars solicit at locations where the public congregates, such as parks or fairs, or at sites where the public must pass in transit, such as sidewalks, streets and other transportation nodes like airports, subway stations, bus terminals or train depots.²²⁹ Virtually all of these locations are public facilities. A complete First Amendment analysis of this issue must determine in what type of forum the beggar solicits, to establish the level of scrutiny that the anti-begging ordinance must meet to pass constitutional muster.

Paradoxically, the Court seems to have maximized the right of a beggar, or anyone, to speak, write, or engage in expressive conduct, yet has minimized the public arenas where such activities may occur. The Court has achieved this puzzling dichotomy by finding that more and more public places are non-public fora. In a non-public forum, the government is free to regulate protected speech on a merely rational basis. If this trend continues, all the First Amendment protections for begging come to naught, because beggars would be unable to reach the public with their pleas for assistance. This would not present a problem merely for beggars. The same problem would be faced by any other group that expresses views to the public in these fora, and that lack the money or the political connections to gain access to more sophisticated media.

B. *The Contexts of Beggars' Expressive Activities*

In *International Society for Krishna Consciousness v. Lee*, the Court described its forum-based approach to assessing governmental restrictions placed on the use of its property. The Court articulated a three-part analysis.²³⁰ If governmental property has traditionally

²²⁸ *Id.* at 2569 (Stevens, J., concurring); see also *Frisby v. Schultz*, 487 U.S. 474, 479 (1988) (noting that Court's First Amendment analysis also considers location to determine speaker's rights) (citing *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 44 (1983)); *New York v. Ferber*, 458 U.S. 747, 778 (1982) (Stevens, J., concurring) (the “question whether a specific act of communication is protected by the First Amendment always requires some consideration of both its content and its context”).

²²⁹ See *International Soc'y For Krishna Consciousness v. Lee*, 112 S. Ct. 2701, 2707 (1992) (describing historic speech activity at transportation nodes).

²³⁰ *Id.* at 2705-06 (citing *Perry*, 460 U.S. 37, 45-46 (1983)).

been available for public expression, speech regulations for these fora receive the highest scrutiny. If government property is a designated public forum, speech regulations also receive the highest scrutiny. If the property does not fall within these two categories, speech regulation is subject to a more limited standard of review. Here, the regulation need only be reasonable, and not based on disagreement with the speaker's viewpoint.²³¹

The Court originally established this forum analysis in *Perry Education Ass'n v. Perry Local Educators' Ass'n*.²³² The *Perry* Court defined traditional public fora as places that have been devoted to assembly or debate, whether by long tradition or by government fiat.²³³ The *Perry* Court noted that streets and parks have been available throughout history for assembling, communicating thoughts between citizens, and discussing public questions.²³⁴ Justice Souter, in his concurrence in *Krishna*, emphasized that a public street is always considered a public forum.²³⁵ Thus, if beggars' expressive

²³¹ *Id.*

²³² *Perry*, 460 U.S. 37, 45-46 (1983). In *United States v. Kokinda*, 497 U.S. 720 (1990), the Court described the tripartite framework to determine how First Amendment interests are analyzed with respect to government property:

Regulation of speech activity on governmental property that has been traditionally open to the public for expressive activity, such as public streets and parks, is examined under strict scrutiny. . . . Regulation of speech on property that the Government has expressly dedicated to speech activity is also examined under strict scrutiny. . . . But regulation of speech activity where the Government has not dedicated its property to First Amendment activity is examined only for reasonableness.

Id. at 726-27.

²³³ *Perry*, 460 U.S. 37, 45 (1983).

²³⁴ *Perry*, 460 U.S. at 45; *see also* *Burson v. Freeman*, 112 S. Ct. 1846, 1850 (1992) (citing parks, streets, and sidewalks as examples of "quintessential public forums"); *Krishna*, 112 S. Ct. at 2706 (citing *Cornelius v. NAACP Legal Defense and Educ. Fund*, 473 U.S. 788, 800 (1985) (defining traditional public forum as property that has as "a principal purpose . . . the free exchange of ideas")); *Hazelwood School Dist. v. Kuhlmeier*, 484 U.S. 260, 267 (1988) (holding that high school newspaper was not public forum, commenting that "public schools do not possess all of the attributes of streets, parks, and other traditional public forums"); *Amalgamated Food Employees Union Local 590 v. Logan Valley Plaza*, 391 U.S. 308, 315 (1968) ("streets, sidewalks, parks, and other similar public places are so historically associated with the exercise of First Amendment rights that access to them for the purpose of exercising such rights cannot constitutionally be denied broadly and absolutely").

²³⁵ *Krishna*, 112 S. Ct. 2711, 2724 (Souter, J., concurring in part and dissenting in part) ("No particularized inquiry into the precise nature of a

activities occur on a public street, or in a public park, governmental regulation of protected speech must pass strict scrutiny, and would be constitutional only if narrowly drawn to serve a compelling state interest.²³⁶

A designated or limited purpose public forum was defined in *Perry* as public property that the state has opened for use by the public as a place for expressive activity.²³⁷ In *United States v. Kokinda*, Justice Brennan, in his dissent, mentioned university meeting facilities and school board meetings as examples of state-created semi-public fora.²³⁸ In *Krishna*, the Court made clear that the government “does not create a public forum by inaction” or by permitting members of the public “to visit a place owned or operated by the government.”²³⁹ Nor does public property become a public forum “simply because members of the public are permitted to come and go at will.”²⁴⁰ Rather, the decision to create a public forum must be made by “intentionally opening a nontraditional forum for public discourse.”²⁴¹ To determine whether the government intended to designate a forum as public, the Court looks to the policy and practice of the government, as well as the property’s compatibility with expressive activity.²⁴²

specific street is necessary; *all public streets* are held in the public trust and are properly considered traditional public fora.”) (emphasis added) (quoting *Frisby v. Schultz*, 487 U.S. 474, 481 (1988)); *see also* *United States v. Grace*, 461 U.S. 171, 177 (1983) (discussing public fora).

²³⁶ *Krishna*, 112 S. Ct. 2701, 2705; *R.A.V. v. City of St. Paul*, 112 S. Ct. 2538, 2563, 2566 (1992) (Stevens, J., concurring).

²³⁷ *Perry Educ. Ass’n v. Perry Local Educators’ Ass’n*, 460 U.S. 37, 45 (1983).

²³⁸ *United States v. Kokinda*, 497 U.S. 720, 741 (1990) (Brennan, J., dissenting).

²³⁹ *Krishna*, 112 S. Ct. at 2706 (quoting *Greer v. Spock*, 424 U.S. 828, 836 (1976)) (holding that military base was non-public forum despite fact that it was continuously open to public, visited by 66,000 civilian and military vehicles per day, and was crossed by ten paved roads and a public highway).

²⁴⁰ *Krishna*, 112 S. Ct. 2711, 2711 (O’Connor, J., concurring) (quoting *United States v. Grace*, 461 U.S. 171, 177 (1983) (upholding distributing leaflets and peaceful picketing with sign containing text of First Amendment on public sidewalk as part of political protest)).

²⁴¹ *Krishna*, 112 S. Ct. 2701, 2706; *Kokinda*, 497 U.S. at 730. Both *Krishna* and *Kokinda* quote *Cornelius v. NAACP Legal Defense and Educ. Fund*, 473 U.S. 788, 802 (1985) (holding that government charity drive not designated public forum because government’s consistent policy had been to carefully limit participants).

²⁴² *Perry Educ. Ass’n v. Perry Local Educators’ Ass’n*, 460 U.S. 37, 46 (1983).

The non-public forum was defined by *Perry* as public property that “is not by tradition or by designation a forum for public communication.”²⁴³ The Court in *Krishna* explained that the location of property bears on whether a forum is public or non-public. Separation from acknowledged public areas, the Court noted, may serve to indicate that the separated property is special, and subject to greater restriction.²⁴⁴ Justice O’Connor, concurring in *Krishna*, noted that “when government property is not dedicated to open communication the government may — without further justification — restrict use to those who participate in the forum’s official business.”²⁴⁵ Whether a site is a non-public forum has generally been a straightforward inquiry, because the Court has been confronted with cases that involve a discrete, single-purpose forum.²⁴⁶

In *Kokinda*, for example, the Court considered a discrete, single-purpose facility. The expressive activities in *Kokinda* took place on a post office sidewalk that was the sole means customers could use to

²⁴³ *Id.* The Court found that the forum in *Perry*, a school mail system used by faculty members, students, and one teachers’ union, was non-public. *Id.* A rival teachers’ union sought access to the mail system in the course of challenging the union in power. The Court found that the school district had not created a designated public forum because the school principal authorization to use the system had to be obtained from the school principal on a case-by-case basis. *Id.* at 47. The Court noted that there was no suggestion that the general public had been permitted access to the system and held that “[t]his type of selective access does not transform government property into a public forum.” *Id.*

²⁴⁴ *Krishna*, 112 S. Ct. at 2706 (citing *Grace*, 461 U.S. at 179-80).

²⁴⁵ *Krishna*, 112 S. Ct. 2711, 2711 (O’Connor, J., concurring) (quoting *Perry*, 460 U.S. at 53).

²⁴⁶ *Id.* at 2712 (O’Connor, J., concurring); see also *Cornelius*, 473 U.S. at 806 (holding that Combined Federal Campaign charity drive not public forum); *City Council v. Taxpayers for Vincent*, 466 U.S. 789, 814 (1984) (stating that Los Angeles’ utility poles, used to post political candidates’ campaign signs, were not public fora because there was no “traditional right of access respecting such items as utility poles for purposes of their communication”); *United States Postal Serv. v. Council of Greenburgh Civic Ass’ns*, 453 U.S. 114, 128 (1982) (finding household mail boxes non-public fora because of “neither historical nor constitutional support for the characterization of a letterbox as a public forum”); *Adderley v. Florida*, 385 U.S. 39, 47 (1966) (finding that county jail premises and non-public jail driveway, where 300 college students demonstrated against classmate’s arrest, were non-public fora because there was “no evidence at all that on any other occasion had similarly large groups of the public been permitted to gather on this portion of the jail grounds for any purpose”).

travel from the parking lot to the post office building.²⁴⁷ The sidewalk lay entirely on Postal Service property.²⁴⁸ A Postal Service regulation prohibited soliciting alms and contributions on postal premises. The regulation expressly permitted political speech and the distribution of literature soliciting support, including money contributions, provided there was no in-person solicitation for immediate payments.²⁴⁹ The Democratic Party set up a table on the sidewalk near the entrance to the post office to solicit immediate, in-person contributions, sell books and subscriptions and distribute literature. When the Democratic Party members refused to leave, they were arrested and convicted of violating the regulation.²⁵⁰ The Court held that, as applied, the regulation did not violate the First Amendment.²⁵¹

In reaching its decision, the Court first determined that the sidewalk was not a traditional public forum.²⁵² The Court looked at the location and purpose of the property to determine whether it was a public or non-public forum.²⁵³ The Court held that it was reasonable for the Postal Service to prohibit solicitation because it has determined that solicitation creates significant interference with Congress' mandate to ensure effective and efficient distribution of the mails.²⁵⁴

The forum inquiry in *Krishna*, however, was not similarly straightforward, because the fora in that case were three multi-purpose airport terminals in the New York City area.²⁵⁵ In fact, only four members of the Court²⁵⁶ joined with Chief Justice Rehnquist in holding that these airports were non-public fora. In *Krishna*, the Court determined that these airport terminals were non-public fora because neither tradition nor purpose allow airport terminals to satisfy the *Perry* standards for a public forum.²⁵⁷ The opinion noted that airports have only recently achieved their contemporary size

²⁴⁷ *United States v. Kokinda*, 497 U.S. 720, 723 (1990).

²⁴⁸ *Id.*

²⁴⁹ *Id.* at 738-39.

²⁵⁰ *Id.* at 723.

²⁵¹ *Id.* at 723.

²⁵² *Id.* at 727.

²⁵³ *Id.* at 728-29.

²⁵⁴ *Id.* at 732.

²⁵⁵ *International Soc'y For Krishna Consciousness v. Lee*, 112 S. Ct. 2701, 2703 (1992). These airports included John F. Kennedy International Airport, La Guardia Airport, and Newark International Airport. *Id.*

²⁵⁶ Justices White, O'Connor, Scalia, and Thomas.

²⁵⁷ *Krishna*, 112 S. Ct. at 2708.

and character, and thus have not been traditionally used for expressive activity.²⁵⁸ Thus, airport terminals could not be considered traditional public fora under *Perry*.

The *Krishna* Court also found that the government had not designated the airport terminals as public fora. It noted that only recently have charitable and religious groups used airport terminals as a forum for solicitation. "Thus, the tradition of airport activity does not demonstrate that airports have historically been made available for speech activity."²⁵⁹ Moreover, airport operators' frequent and continuing litigation to stop solicitation activities demonstrates that airport terminals have not been intentionally opened by their operators to solicitors.²⁶⁰

²⁵⁸ *Id.* at 2706.

²⁵⁹ *Id.*

²⁶⁰ *Id.* at 2706-07. Justice Kennedy concurred in the judgment upholding the airports' authority to regulate solicitation; however, his analysis of the fora issue differed in "substantial respects" from the majority's. *Krishna*, 112 S. Ct. 2711, 2715 (Kennedy, J., concurring). In Kennedy's view, the areas outside the passenger security zones, such as the corridors and shopping areas, constituted public fora. *Id.* In fact, Justice Kennedy opined that the Court's finding that airport terminals were non-public fora "was flawed at its very beginning." *Id.* at 2716. He felt that the proper "inquiry must be an objective one, based on the actual, physical characteristics and uses of the property." *Id.* Justice Kennedy felt that his position was supported by the fact that, in the Court's public-forum cases, the Justices "discuss and analyze these precise characteristics." *Id.* (citing *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 46-48 (1983); *Cornelius v. NAACP Legal Defense and Educ. Fund*, 473 U.S. 788, 804-06 (1985); *United States v. Kokinda*, 497 U.S. 720, 727-29 (1990)).

Justice Kennedy felt that the proper analysis of whether a transportation node was a public forum included the following:

The most important considerations in this analysis are whether the property shares physical similarities with more traditional public forums, 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. . . . The possibility of some theoretical inconsistency between expressive activities and the property's uses should not bar a finding of a public forum, if those inconsistencies can be avoided through simple and permitted regulations.

Id. at 2718.

Applying this analysis, Justice Kennedy felt that the public areas in airports where the *Krishnas* solicited were public fora because they were "open to the public without restriction." *Id.* at 2719. Justice Kennedy also opined that it was "apparent from the record, and from the recent history of airports, that

In determining that the airports in *Krishna* constituted non-public fora, the Court explicitly left open the issue of what other transportation nodes (or perhaps, other airports)²⁶¹ would be considered non-public fora.²⁶² The Court noted that each facility required separate examination to determine whether transportation necessities are compatible with the expressive activity at issue.²⁶³

Many crucial differences distinguish the airports in *Krishna* from the transportation nodes most frequently used by beggars for their expressive activities. Unlike airports, where solicitation by charities and religious groups has only recently become common practice, other transportation nodes have been subject to charitable solicitation for a long time. In fact, many religious organizations specifically target travelers waiting in bus or train stations for their solicitation and recruitment activities.²⁶⁴

Furthermore, most anti-begging ordinances permit use of public facilities for solicitation by organized charities.²⁶⁵ Thus, the government makes these transportation nodes available for the activity that the beggar wishes to pursue by approving solicitations for charitable causes. Through this authorization, the government has tac-

when adequate time, place, and manner regulations are in place, expressive activity is quite compatible with the uses of major airports." *Id.*; see also *id.* at 2724-25 (Souter, J., concurring in part and dissenting in part) (agreeing that the airports' public areas in *Krishna* qualify as public fora).

²⁶¹ In *Krishna*, Justice Souter made clear that he would not automatically find all airports to be non-public fora. "But to find one example of a certain property type (e.g., airports, post offices, etc.) that is not a public forum is not to rule out all properties of that sort. One 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." *Id.* at 2724 (citation omitted).

²⁶² *Krishna*, 112 S. Ct. 2701, 2707 ("To blithely equate airports with other transportation centers, therefore, would be a mistake.").

²⁶³ *Id.* For example, airports have greater security requirements than other transportation nodes, and limit public access to particular areas. *Id.* (citing 14 C.F.R. § 107.11(f) (1991) and UNITED STATES DEPT. OF TRANSPORTATION NEWS RELEASE, Office of the Assistant Secretary for Public Affairs, January 18, 1991 (reporting that for four month period the Federal Aviation Administration required airports to limit access to areas normally open to public)).

²⁶⁴ See, e.g., *Molko v. Holy Spirit Ass'n for the Unification of World Christianity*, 252 Cal. Rptr. 122, 129-31 (1988) (upholding cause of action for fraud and intentional infliction of emotional distress when plaintiffs, contacted by Unification Church at bus stations, were induced by misrepresentation into entering coercive atmosphere that led them to join Church), *cert. denied*, 490 U.S. 1084 (1989).

²⁶⁵ See 21 N.Y.C.C.R.R. § 1050.6(c) (1983).

itly acknowledged that parts of the facility are appropriate fora for this activity. If the government has expressly dedicated the property for public discourse by allowing solicitation by licensed and registered charitable organizations, it has created a designated public forum under *Perry*.²⁶⁶ Under the Court's forum analysis, the government cannot "permit organized charities, but not beggars, to rattle a cup full of change as one passes by."²⁶⁷ Moreover, unlike the frequent litigation brought by airport operators that indicates airport terminals have not been intentionally opened for solicitation as public fora, very few cases have challenged group solicitation in other transportation nodes. Only *Young* and *Wolin*, both from the Second Circuit, have considered this issue at the federal appellate level. In *Young*, the court stated that New York's subway system was a non-public forum. In contrast, the *Wolin* court found that the New York bus terminal was a public forum.²⁶⁸ Cases challenging solicitation in airports, however, have reached the courts of the Fifth, Seventh, Eighth, Ninth and District of Columbia Circuits, and these courts have found that airports in Chicago, Dallas-Fort Worth,

²⁶⁶ *Perry Educ. Ass'n v. Perry Local Educators Ass'n*, 460 U.S. 37 (1983).

²⁶⁷ *Young v. New York City Transit Auth.*, 903 F.2d 146, 168 (2d Cir. 1990) (Meskill, J., concurring in part and dissenting in part), *cert. denied*, 498 U.S. 984 (1990).

In upholding the right of anti-war demonstrators to conduct speech activities in New York Port Authority's Bus Terminal, the Second Circuit noted in *Wolin v. Port of New York Auth.*, 392 F.2d 83 (2d Cir. 1968), *cert. denied*, 393 U.S. 940 (1968), that the Authority's admission of charity solicitors shows "the ease with which the Terminal accommodates different forms of communication. To deny access to political communication seems an anomalous inversion of our fundamental values." *Id.* at 90. The court noted that "[t]he Terminal building is an appropriate place for expressing one's views precisely because the primary activity for which it is designed is attended with noisy crowds and vehicles, some unrest and less than perfect order." *Id.*

²⁶⁸ In *Young*, the court noted that the Transit Authority "never intended to designate sections of the subway system . . . as a place for begging and panhandling." *Young*, 903 F.2d at 162. In *Wolin*, the court described the bus terminal as "one of the busiest passageways in the country" and "something of a small city — but built indoors, with its 'streets' in effect set atop one another, and vehicles operating under, above, and to the side, not unlike some futuristic design for urban living." *Wolin*, 392 F.2d at 89-90; *see also* *Carew-Reid v. Metropolitan Transp. Auth.*, 903 F.2d 914, 919 (2d Cir. 1990) (concluding that amplifier ban is reasonable time, place, or manner regulation and, therefore, did not "address the question whether the subway platforms constitute traditional, designated, or limited public forums").

Los Angeles, St. Louis and Washington, D.C., constitute public fora.²⁶⁹

Despite these distinctions between the airport terminals in *Krishna* and other transportation nodes frequently used by beggars, the forum analysis of the majority of the Court in *Kokinda* and the “categorical approach” of the plurality in *Krishna* have the potential to greatly expand the number and type of facilities classified as non-public fora.²⁷⁰ This expansion would substantially limit the locations where beggars can solicit. Although the *Krishna* Court reaf-

²⁶⁹ See *Jamison v. City of St. Louis*, 828 F.2d 1280, 1283 (8th Cir. 1987) (holding that public concourse of St. Louis Airport was public forum because the “character, pattern of activity, and nature of purpose . . . make it an appropriate place for the communication of views”), *cert. denied*, 485 U.S. 987 (1988); *Jews for Jesus v. Board of Airport Comm’rs*, 785 F.2d 791, 795 (9th Cir. 1986) (holding that Central Terminal Area of Los Angeles International Airport is traditional public forum and noting that “[e]very circuit which has confronted the issue has reached the same conclusion”), *aff’d on other grounds*, 482 U.S. 569 (1987); *United States Southwest Africa/Namibia Trade & Cultural Council v. United States*, 708 F.2d 760, 766 (D.C. Cir. 1983) (finding that District of Columbia’s two airports constituted public fora, commenting that “[w]hatever commonsense [sic] differences may exist in the forms of free speech allowable in airports, as opposed to parks and streets, an unusual consensus of judicial, legislative, and administrative opinion would classify the public areas of National and Dulles squarely within the public forum family”); *Fernandes v. Limmer*, 663 F.2d 619, 626 (5th Cir. 1981) (finding that Dallas-Fort Worth terminal buildings were public fora, noting that “[i]t is now generally well established that airport terminals . . . are public forums in which efforts to regulate speech or religious activity must comport with First Amendment guarantees”), *cert. dismissed*, 458 U.S. 1124 (1982); *Chicago Area Military Project v. Chicago*, 508 F.2d 921, 925 (7th Cir. 1975) (holding that terminal buildings of Chicago’s O’Hare Airport should be considered public fora since “perhaps 90,000 transients” per day “are freely admitted to the public areas . . . not only in connection with air travel, but also for shopping, dining, sightseeing, or merely to satisfy their curiosity”), *cert. denied*, 421 U.S. 992 (1975).

²⁷⁰ Justices Blackmun, Stevens, Kennedy, and Souter, concurring in *Krishna*, showed serious misgivings about the Court’s categorical approach to public forum analysis. *International Soc’y For Krishna Consciousness v. Lee*, 112 S. Ct. 2711, 2715 (1992). Justice Kennedy felt that the Court’s categorical approach was “contrary to the underlying purposes of the public forum doctrine” which were to ensure freedom of expression. He explained that a “fundamental tenet of our Constitution is that the government is subject to constraints which private persons are not. The [public forum] doctrine vindicates that principle by recognizing limits on the government’s control over speech activities on property suitable for free expression.” *Id.* at 2717. “[U]nder the proper circumstances,” Justice Kennedy indicated that he “would accord public forum status to other forms of property, regardless of its ancient

firmed that parks and streets are regarded as traditional public fora,²⁷¹ these sites are becoming increasingly inopportune locations for beggars to reach many people. Parks are frequently the scene of criminal activities, leading to a marked decrease in the use of the parks by the public. Public streets are also of little use to beggars confronted with heavy, fast-moving traffic.²⁷² The traditional small-town scene of American citizens strolling down picturesque streets no longer exists in modern urban society. Many people use sidewalks today only to get from their cars to their destination and back again. Thus, public sidewalks, before considered public fora, are

or contemporary origins and whether or not it fits within a narrow historic tradition." *Id.* at 2718.

Justice Souter agreed with Justice Kennedy's criticisms of the Court's categorical approach. He explained his viewpoint regarding the proper analysis as follows:

The designation of a given piece of public property as a traditional public forum must not merely state a conclusion that the property falls within a static category including streets, parks, sidewalks and perhaps not much more, but must represent a conclusion that the property is no different in principle from such examples, which we have previously described as "archetypes" of property from which the government was and is powerless to exclude speech. . . . [T]he enquiry may and must relate to the particular property at issue and not necessarily to the "precise classification of the property."

Id. at 2724 (Souter, J., concurring in part and dissenting in part) (citing *Frisby v. Schultz*, 487 U.S. 474, 480 (1988)).

²⁷¹ *Krishna*, 112 S. Ct. 2701, 2706; *Krishna*, 112 S. Ct. 2711, 2718 (Kennedy, J., concurring) ("I agree with the Court that government property of a type which by history and tradition has been available for speech activity must continue to be recognized as a public forum.").

²⁷² Justice Kennedy recognized that the Court's categorical approach in *Krishna* would lead to a decrease in the opportunity for solicitation and other expressive activities. "[O]ur failure to recognize the possibility that new types of government property may be appropriate forums for speech will lead to a serious curtailment of our expressive activity." *Id.* at 2717 (Kennedy, J., concurring). He elaborated: "We have allowed flexibility in our doctrine to meet changing technologies in other areas of constitutional interpretation and I believe we must do the same with the First Amendment." *Id.* at 2718 (citation omitted).

Justice Souter recognized this social transformation when he commented that treating public fora as "closed by their description as 'traditional' . . . has no warrant in a Constitution whose values are not to be left behind in the city streets that are no longer the only focus of our community life." *Id.* at 2724 (Souter, J., concurring in part and dissenting in part). "If that were the line of [the Court's] direction, we might as well abandon the public forum doctrine altogether." *Id.*

now subject to reclassification, based on *Kokinda*, as non-public fora.²⁷³ This reclassification provides beggars with little opportunity to solicit monetary assistance, and allows a compassion-fatigued judiciary to find a modern-day sidewalk more like a non-public single purpose walkway in *Kokinda*, than the traditional public sidewalks in the Court's previous cases.²⁷⁴

If the Court determines that a facility is a non-public forum, then the beggars' speech may be regulated far more rigorously than in either a traditional or a designated public forum. The Court noted in both *Krishna* and *Kokinda* that the Government's decision to restrict access to a non-public forum need only be reasonable — it need not be the most reasonable or the only reasonable limitation.²⁷⁵ Given the Court's expansive definition of "reasonable," it seems doubtful that an anti-begging ordinance restricting speech in a non-public forum would be overturned on the grounds that the government lacked a reasonable basis for the regulation.²⁷⁶

²⁷³ *United States v. Kokinda*, 497 U.S. 720, 727 (1990).

²⁷⁴ *Id.*

²⁷⁵ *Id.* at 730 (quoting *Cornelius v. NAACP Legal Defense and Educ. Fund*, 473 U.S. 788, 808 (1985); *Krishna* 112 S. Ct. 2701, 2708 (quoting *Cornelius*, 473 U.S. at 808)). In *Cornelius*, the Court noted that "control over access to a non-public forum can be based on subject matter and speaker identity so long as the distinctions drawn are reasonable in light of the purpose served by the forum and are viewpoint neutral." *Cornelius*, 473 U.S. at 806 (citing *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 49 (1983)). In applying this standard, the Court found that the President "could reasonably conclude" that excluding advocacy groups from access to federal workplaces during the Combined Federal Campaign would prevent campaign disruption. *Id.* at 809-11.

²⁷⁶ Justice O'Connor, concurring in *Krishna*, gave some slight hope that even under the relaxed "reasonable basis" test, a blanket ban on begging might not be constitutional. She argued that, if airports (or transportation nodes) are not public fora, this "does not mean that the government can restrict speech in whatever way it likes. The Government, even when acting in its proprietary capacity, does not enjoy absolute freedom from First Amendment constraints." *Krishna*, 112 S. Ct. 2711, 2712-13 (O'Connor, J., concurring) (quoting *Kokinda*, 497 U.S. at 725). She explained that the "reasonableness inquiry . . . is not whether the restrictions on speech are 'consistent with . . . preserving the property' for air travel . . . but whether they are reasonably related to maintaining the multipurpose environment that the Port Authority has deliberately created." *Id.* at 2713 (quoting *Perry*, 460 U.S. at 50-51).

Moreover, the Court might find an anti-begging ordinance unconstitutional based on the second prong of the reasonableness test — that the statute was "an effort to suppress the [beggars'] expressive activities due to disagreement with their views." See *infra* notes 284-339 and accompanying text (regarding

Such Court deference to the government's regulation of begging would leave the government with "almost unlimited authority to restrict speech on its property by doing nothing more than articulating a non-speech-related purpose for the area." This approach would leave almost no room to develop new public fora absent the government's approval.²⁷⁷ Therefore, the government would become the sole arbiter of speech curtailment, "unconstrained by an independent duty to respect the speech its citizens can voice there."²⁷⁸ This exclusive power "allows the government to tilt the dialogue heard by the public, to exclude more marginal voices," including beggars.²⁷⁹

Homeless beggars provide a compelling example of the marginal voices the public forum doctrine should protect. Beggars have no access to more sophisticated media apart from the rare newspaper interview. Their only opportunity to gather and speak with others who may help them occurs in public places where people congregate. Consequently, beggars must seek out other public areas, like transportation nodes, to voice their pleas for financial assistance.

whether anti-begging ordinances are viewpoint-based or viewpoint-discriminatory).

²⁷⁷ *Krishna*, 112 S. Ct. 2711, 2716 (Kennedy, J., concurring). Justice Kennedy pointed out that under the majority's view "the authority of the government to control speech on its property is paramount, for in almost all cases the critical step in the Court's analysis is a classification of the property that turns on the government's own definition or decision." *Id.*

²⁷⁸ *Id.*

²⁷⁹ *Id.* at 2720 (Kennedy, J., concurring). In fact, Justice Kennedy explained that "[o]ne of the primary purposes of the public forum is to provide persons who lack access to more sophisticated media the opportunity to speak." *Id.* at 2723. "Public places are of necessity the locus for discussion of public issues At the heart of our jurisprudence lies the principle that in a free nation citizens must have the right to gather and speak with other persons in public places." *Id.* at 2716-17 (Kennedy, J., concurring). "The liberties protected by [the forum] doctrine derive from the Assembly, as well as the Speech and Press Clauses of the First Amendment, and are essential to a functioning democracy." *Id.* at 2116. "The right of speech protected by the [public forum] doctrine . . . comes not from a Supreme Court dictum but from the constitutional recognition that the government cannot impose silence on a free people." *Id.* at 2717.

III. THE NATURE AND SCOPE OF ANTI-BEGGING ORDINANCES

A. *The Nature of Anti-Begging Ordinances*

1. Introduction

The nature and scope of anti-begging ordinances must be examined in order to determine whether the regulations are constitutionally permissible.²⁸⁰ The nature of anti-begging ordinances determines whether the regulations impermissibly restrict the content of the speech or the viewpoint of the speaker. At a minimum, the homeless can probably successfully challenge the nature of anti-begging ordinances, such as the regulation in the *Young* case, which ban begging by individuals for themselves while permitting such solicitation by individuals for charitable groups.²⁸¹ These regulations prohibit speech on the basis of both the speech content and the speaker's viewpoint. Challenging the nature of such anti-begging ordinances seems to offer the best avenue for beggars, and other disfavored speakers, to surmount the potential hurdles imposed by the Court's increasingly restrictive public forum doctrine. If the Court finds that the contexts of the beggars' expressive activities constitute non-public fora and the government's ordinance has a reasonable basis, the regulation still fails under the First Amendment if it is viewpoint-based.²⁸² Similarly, if the Court finds that begging occurs in public fora, an anti-begging ordinance would not be a constitutional time, place and manner regulation if found content-based or viewpoint-based.²⁸³ Even if the beggars' expressive activities are not protected by the First Amendment, an

²⁸⁰ *R.A.V. v. City of St. Paul*, 112 S. Ct. 2538, 2568-69 (1992) (Stevens, J., concurring).

²⁸¹ See 21 N.Y.C.C.R.R. § 1050.6(c) (1983); see, e.g., ARIZ. REV. STAT. ANN. § 13-2905(A)(3) (West 1991) (prohibiting begging "unless specifically authorized by law"); LA. REV. STAT. ANN. § 14:107(3) (West 1992) (providing that prohibition against begging or soliciting alms "shall not apply to persons soliciting alms for bona fide religious, charitable or eleemosynary organizations with the authorization thereof"); N.Y. PENAL LAW § 240.35(6) (McKinney 1991) (prohibiting loitering or remaining in any transportation facility for purpose of soliciting "unless specifically authorized to do so").

²⁸² *Krishna*, 112 S. Ct. 2701, 2705-06.

²⁸³ *R.A.V.*, 112 S. Ct. at 2544 (quoting *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989)). The Court in *R.A.V.* stressed the importance of this threshold inquiry: the Court has "upheld reasonable 'time, place, or manner' restrictions, *but only if* they are 'justified *without reference to the content of the regulated speech.*'" *Id.* (emphasis added).

anti-begging ordinance would be constitutional only if it does not restrict the speech based on its content.

2. Anti-Begging Ordinances as Content-Based and Viewpoint-Based Regulations of Protected Speech

Assuming that begging constitutes expression protected by the First Amendment, the Court's scrutiny initially considers whether the statute distinguished between prohibited and permitted speech by its content.²⁸⁴ An ordinance is content-based if it is directed at a person's point of view or if it is directed at the subject matter of the communication.²⁸⁵ As the Court noted in *R.A.V.*, content-based regulations are presumptively invalid.²⁸⁶ If an anti-begging ordinance is found to be content-based, the government must show that the regulation is necessary to serve a compelling state interest and that it is narrowly drawn to achieve that end.²⁸⁷

²⁸⁴ *Frisby v. Schultz*, 487 U.S. 474, 481 (1988).

²⁸⁵ *R.A.V.*, 112 S. Ct. at 2543-44 n.4 (citing *Carey v. Brown*, 447 U.S. 455 (1980), as noting that "the First Amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter, or its content").

²⁸⁶ *R.A.V.*, 112 S. Ct. at 2542. In determining whether an ordinance is content-based or content-neutral, the Court inquires whether the government has adopted a regulation of speech because of disagreement with the message it conveys. Government regulation of expressive activity is content-neutral so long as it is "justified without reference to the content of the regulated speech." *Ward*, 491 U.S. at 791 (quoting *Clark v. Community for Creative Non-Violence*, 468 U.S. 288, 293 (1984)).

²⁸⁷ *Boos v. Barry*, 485 U.S. 312, 321 (1988) (finding unconstitutional statute barring critical displays within 500 feet of foreign embassy because regulation focused on shielding diplomats from criticism and was not justified by state interests in avoiding visual clutter and protecting embassy security); *see infra* notes 314-18 and accompanying text (discussing Court's repeated failure to find compelling governmental interest in preventing non-captive audience from offensive speech or conduct).

In other contexts, the Court has found that a variety of asserted governmental interests did not satisfy the stringent test of strict scrutiny. *See, e.g.*, *Eichman v. United States*, 496 U.S. 310, 319 (1990) (protecting "physical integrity" of the flag not a state interest that satisfies strict scrutiny); *Sable Communications of Cal. v. FCC*, 492 U.S. 115, 126 (1989) (finding that FCC's ban on non-obscene, indecent dial-a-porn messages violated First Amendment because adult access ban far exceeds "the compelling interest in protecting the physical and psychological well-being of minors"); *Texas v. Johnson*, 491 U.S. 397, 417 (1989) (promoting respect for flag not sufficient to satisfy strict scrutiny); *FEC v. National Conservative Pol. Action Comm.*, 470 U.S. 480, 498 (1985) (invalidating statute imposing criminal sanctions on political committee spending over \$1000 on candidate because state's interest supports

Most anti-begging ordinances are content-based speech restrictions because they permit beggars to speak as vehemently as they wish, as long as they abstain from including a casual plea for financial assistance. Thus, a violation hinges entirely on what beggars say. Because anti-begging ordinances regulate speech on the basis of the message conveyed, these statutes are content-based.

Furthermore, as the district court noted in *Loper*, these regulations allow the organized charity to solicit on the street while preventing the unorganized beggar from doing so.²⁸⁸ Thus, anti-begging ordinances are “directed at the content of . . . expression”²⁸⁹ The court explained that such regulations are content-based because they treat side-by-side solicitors differently. If the solicitor is an organized charity, the solicitation is permitted. If the solicitor is a beggar, the solicitation is criminal.²⁹⁰ Thus, under most anti-begging ordinances, if a beggar is a member of a charitable organization, such as a church, the beggar could solicit the same money on behalf of her church without violating most anti-begging ordinances.²⁹¹ In effect, the ordinances allow a solicitor for a recognized charity to say “give my charity money,” but they forbid a beggar to say “give me money.” As the Court made clear in *R.A.V.*, the government may not regulate speech based on hostility

regulating only large aggregations of wealth); *Buckley v. Valeo*, 424 U.S. 1, 58-59 (1976) (finding that governmental interest in safeguarding integrity of electoral process not sufficiently compelling to uphold federal statute placing ceilings on campaign expenditures and candidate’s personal expenditures); *NAACP v. Button*, 371 U.S. 415, 444 (1963) (finding Virginia’s interest in insuring high professional standards not sufficiently compelling to justify preventing pro bono civil rights attorneys from soliciting litigation).

On the other hand, the Court has found the strict scrutiny standard satisfied by sufficient governmental interests in other cases. *See, e.g.*, *Austin v. Michigan Chamber of Commerce*, 494 U.S. 652, 666 (finding compelling state interest banning corporate contributions); *Board of Directors v. Rotary Club*, 481 U.S. 537, 549 (1987) (finding that California’s Unruh Act could require Rotary Clubs to admit women, because abridging group’s associational rights was justified by state’s compelling interest in eliminating discrimination against women).

²⁸⁸ *Loper v. New York City Police Dep’t*, 802 F. Supp. 1029, 1047 (S.D.N.Y. 1992), *aff’d*, 999 F.2d 699 (2d Cir. 1993).

²⁸⁹ *Id.*

²⁹⁰ *Id.* at 1040; *see also Loper*, 999 F.2d 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.”).

²⁹¹ The beggar could either keep the money for his or her personal needs (with the church’s approval) or turn the donations over to the church, which could then return all or a part of the contributions to the beggar.

or favoritism toward the underlying message.²⁹² Thus, the government could not prohibit individual solicitation because of hostility to the beggar's message, nor could the government permit individual solicitation for an organized charity because it favored the charitable cause.

The Second Circuit in *Young* found the New York Transit Authority's anti-begging ordinance content-neutral because the ordinance did not regulate begging based on disagreement with the message conveyed. Rather, the court stated that the ordinance served legitimate governmental interests unrelated to the suppression of any message.²⁹³ In his concurrence in *Krishna*, Justice Kennedy noted that the solicitation regulation in *Krishna* was also a content-neutral rule that served a significant governmental interest.²⁹⁴ However, crucial differences distinguish the anti-begging ordinance in *Young* from the solicitation regulation in *Krishna*. Rather than restricting all individual solicitation, like the anti-begging ordinance in *Young*, the Port Authority's regulation in *Krishna* prohibited only solicitation containing continuous or repetitive fraud and duress.²⁹⁵ Justice Kennedy concluded that, because the regulation was directed at fraud and duress and not at a particular message, idea, or form of speech, the regulation was content-neutral.²⁹⁶ Justice Kennedy made it clear, however, that if the regulation prohibited all speech requesting contributions, he would instead conclude that the regu-

²⁹² *R.A.V. v. City of St. Paul*, 112 S. Ct. 2538, 2545 (1992).

²⁹³ *Young v. New York City Transit Auth.*, 903 F.2d 146, 159 (2d Cir. 1990), *cert. denied*, 498 U.S. 984 (1990). In reaching this decision, the *Young* court noted:

Quite apart from any particularized idea or message it might arguably possess, begging poses significant dangers to the subway system. The conduct threatens passenger well-being and safety as well as disrupts the system's smooth operation. These dangers, independent of the alleged communicative character of begging, give rise to the regulation. Even if begging had no communicative character at all, these independent dangers would be just as real, and consequently, there would remain a substantial governmental interest in prohibiting the conduct in the subway.

Id.

²⁹⁴ *International Soc'y For Krishna Consciousness v. Lee*, 112 S. Ct. 2711, 2722 (1992) (Kennedy, J., concurring).

²⁹⁵ *Krishna*, 112 S. Ct. 2701, 2704.

²⁹⁶ *Krishna*, 112 S. Ct. 2711, 2722 (Kennedy, J., concurring). It was thus "apparent" to Justice Kennedy that the "justification for the solicitation ban [was] unrelated to the content of speech or the identity of the speaker." *Id.*

lation was “a direct, content-based restriction of speech in clear violation of the First Amendment.”²⁹⁷

In contrast to the solicitation ban in *Krishna*, most anti-begging ordinances, like the New York Transit Authority’s regulation in *Young*, prohibit all personal solicitations by individuals. In *Burson v. Freeman*, the Court held that content-based regulations include prohibitions against public discussion of an entire topic.²⁹⁸ The Court explained in *R.A.V.* that content discrimination may indicate that the government can drive certain ideas or viewpoints from the marketplace.²⁹⁹ This governmental ability is apparent in the case of the homeless, who are perhaps less able than any other cognizable group to voice their perspective and are thus most vulnerable to having their ideas and viewpoints driven from the marketplace. Thus, anti-begging ordinances that prohibit all personal contribution requests would appear to constitute direct, content-based restrictions in violation of the First Amendment.³⁰⁰

²⁹⁷ *Id.* at 2721 (Kennedy, J., concurring); *see also* *Loper v. New York City Police Dep’t*, 999 F.2d 699, 705 (2d Cir. 1993) (finding statute “not content neutral because it prohibited all speech related to begging”).

²⁹⁸ *Burson v. Freeman*, 112 S. Ct. 1846, 1850 (1992) (citing *Consolidated Edison Co. v. Public Serv. Comm’n*, 447 U.S. 530, 537 (1980)); *see also* *Simon & Schuster, Inc. v. New York Crime Victims Bd.*, 112 S. Ct. 501, 512 (1991) (striking down New York’s “Son of Sam” law requiring that income from works describing crime of accused or convicted criminal be deposited in escrow account because content-based statute “has singled out speech on a particular subject for a financial burden that it places on no other speech and no other income”); *City of Cincinnati v. Discovery Network*, 113 S. Ct. 1505, 1516-17 (1993) (finding that Cincinnati statute banning newsracks containing “commercial handbills” while permitting newsracks containing newspapers was “by any commonsense understanding of the term . . . content-based” because “sweeping ban . . . bars from [Cincinnati’s] sidewalks a whole class of constitutionally protected speech”).

²⁹⁹ *R.A.V. v. City of St. Paul*, 112 S. Ct. 2538, 2546 (1992); *see also* *Leathers v. Medlock*, 111 S. Ct. 1438, 1444 (1991) (upholding Arkansas statute imposing sales tax on cable television services, but not print media, because tax did not “distort the market for ideas” by targeting only “a small number of speakers”); *FCC v. League of Women Voters of Cal.*, 468 U.S. 364, 384 (1984) (noting that content-based regulation “denies one group of persons the right to address a selected audience on ‘controversial issues of public policy’” and may reflect “an impermissible attempt ‘to allow a government [to] control . . . the search for political truth’”) (quoting *Consolidated Edison Co. v. Public Serv. Comm’n of N.Y.*, 447 U.S. 530 (1980)); *Police Dep’t of Chicago v. Mosley*, 408 U.S. 92, 96 (1972) (noting that government “may not select which issues are worth discussing or debating in public facilities”).

³⁰⁰ *See* *Edenfield v. Fane*, 113 S. Ct. 1792, 1801 (1993) (noting that “proposition” that “flat ban on commercial solicitation could be regarded as a

Moreover, unlike the solicitation regulation in *Krishna*, most anti-begging ordinances are also viewpoint-based because they regulate speech based on the speaker's identity. When considering content-based regulations, the Court has distinguished between subject matter restrictions on expression and viewpoint restrictions, and has indicated that the latter are particularly pernicious.³⁰¹ Justices have described viewpoint discrimination as "censorship in its purest form,"³⁰² and have indicated that regulations restricting a speaker's viewpoint require "particular scrutiny, in part because such regulation often indicates a legislative effort to skew public debate on an issue."³⁰³ In such a case, the First Amendment is "plainly offended."³⁰⁴

Many members of the public probably disagree with the viewpoint of beggars. In the minds of the compassion-fatigued public, the viewpoint of the homeless is that they should receive a handout. The public is increasingly hostile to the homeless, and is less willing to provide assistance, to listen to pleas for help, or to see homeless individuals begging in public areas. The testimony at the public hearings in the *Young* case left little doubt that many New Yorkers

content-neutral time, place, or manner restriction on speech" was "open to serious doubt"); *Blair v. Shanahan*, 775 F. Supp. 1315, 1324 (N.D. Cal. 1991) (finding that California Penal Code § 647(c) prohibiting begging "in any public place or in any place open to the public" was content-based).

³⁰¹ *R.A.V.*, 112 S. Ct. at 2568 (Stevens, J., concurring); *Mosley*, 408 U.S. at 96.

³⁰² *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 62 (1983) (Brennan, J., dissenting).

³⁰³ *R.A.V.*, 112 S. Ct. at 2568 (Stevens, J., concurring) (citing *Schacht v. United States*, 398 U.S. 58, 63 (1970) (overturning as prior restraint statute prohibiting wearing American military uniform in theatrical production if portrayal discredits armed forces)). Scrutiny is at its highest where "the legislature's suppression of speech suggests an attempt to give one side of a debatable public question an advantage in expressing its views to the people." *Id.* at 2568 (Stevens, J., concurring) (quoting *First Nat'l Bank of Boston v. Bellotti*, 435 U.S. 765, 785-86 (1978)); see also *Clark v. Community for Creative Non-Violence*, 468 U.S. 288, 313 (1984) (describing the "general prohibition against content-based regulations" as "an essential tool of First Amendment analysis" because "it helps to put into operation the well-established principle that 'government may not grant the use of a forum to people whose views it finds acceptable, but deny use to those wishing to express less favored or more controversial views'" (quoting *Mosley*, 408 U.S. at 95-96 (1972))).

³⁰⁴ *R.A.V.*, 112 S. Ct. at 2568 (Stevens, J., concurring) (quoting *Bellotti*, 435 U.S. at 785-86).

wanted to rid their city of its homeless citizens.³⁰⁵ One way for legislators to respond to their compassion-fatigued constituents is to pass a viewpoint-based ordinance forbidding homeless individuals from begging. This ordinance would fail under a First Amendment challenge because it appears to be a legislative attempt to skew public debate on an issue by prohibiting beggars from expressing their views to others.³⁰⁶

Moreover, a content-based anti-begging ordinance may be challenged as a violation of the Equal Protection Clause of the Fifth and Fourteenth Amendments. In *City of Chicago v. Mosley*, the Court held unconstitutional a statute exempting labor picketing from a ban on peaceful picketing because the statute's discrimination among pickets was based on the protest's content.³⁰⁷ The Court analyzed the discriminatory terms in the ordinance under the Equal Protection Clause.³⁰⁸ Because the government must allow all points of view equal opportunity to be heard, the Court recognized that First Amendment principles may be relevant to an equal protection claim challenging distinctions that affect protected expression.³⁰⁹ The Court reaffirmed in *Burson* that content-based restrictions raise Fourteenth Amendment equal protection concerns, and a "content-based regulation of speech in a public forum is valid only if it can survive strict scrutiny."³¹⁰

³⁰⁵ See *Young v. New York City Transit Auth.*, 903 F.2d 146, 149-50 (2d Cir. 1990) (discussing study initiated in 1988 by New York Transit Authority, concerning "quality of life problems" experienced by subway riders), *cert. denied*, 498 U.S. 984 (1990).

³⁰⁶ Unlike the St. Paul regulation in *R.A.V.*, anti-begging ordinances do not select for prohibition only "those . . . words that communicate ideas in a threatening (as opposed to a merely obnoxious) manner. Rather, [they] proscribe[] . . . words of whatever manner that [constitute begging]." See *R.A.V.*, 112 S. Ct. at 2549. As the *R.A.V.* Court noted: "Selectivity of this sort creates the possibility that the city is seeking to handicap the expression of particular ideas." *Id.*; see also *United States v. Kokinda*, 497 U.S. 720, 736 (1990) (finding that "[n]othing" in Postal Service's regulation suggested an intention "to discourage one viewpoint and advance another. . . . By excluding all . . . groups from engaging in [solicitation] the Postal Service is not granting to 'one side of a debatable public question . . . a monopoly in expressing its views.'" (emphasis added) (citations omitted).

³⁰⁷ *Mosley*, 408 U.S. at 102.

³⁰⁸ *Id.* at 94-95 (recognizing that equal protection claim closely intertwined with First Amendment interests).

³⁰⁹ *Id.* at 96.

³¹⁰ *Burson v. Freeman*, 112 S. Ct. 1846, 1850-51 n.3 (1992); see also *Carey v. Brown*, 447 U.S. 455, 461-62 (1980); *Brown v. Louisiana*, 383 U.S. 131, 143

Under strict scrutiny, the public's reported disdain and hostility toward beggars and their viewpoints fails to justify a content-based anti-begging ordinance under either a free speech or an equal protection analysis.³¹¹ As the Court noted in *Burson*, "we have long recognized that 'the fact that society may find speech offensive is not a sufficient reason for suppressing it.'"³¹² The Court has also made it

(1966); *Blair v. Shanahan*, 775 F. Supp. 1315, 1325 (N.D. Cal. 1991) (quoting *Carey*, 447 U.S. at 460); *Parr v. Municipal Court*, 3 Cal. 3d 861 (1971), *cert. denied*, 404 U.S. 869 (1971). In *Parr*, the California Supreme Court invalidated an ordinance prohibiting sitting and lying on public land, enacted to curtail an influx of hippies into Carmel. The court found the ordinance unconstitutional because it discriminated against "an ill-defined social caste whose members are deemed social pariahs by the city fathers." *Id.* at 870.

³¹¹ For example, applying strict scrutiny to a content-based regulation in a free speech context in *Texas v. Johnson*, the Court struck down a Texas statute that rendered desecration of the flag unlawful. Noting that the statute was directly "aimed at protecting onlookers from being offended by the ideas expressed by the prohibited activity," the Court commented: "If there is a bedrock principle underlying the First Amendment, it is that the 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, 411, 414 (1989). Similarly, in *Department of Agric. v. Moreno*, 413 U.S. 528 (1973), the Court invalidated a content-based regulation in an equal protection context. In *Moreno*, Congress had reacted to public hostility toward "hippies and hippie communes" by enacting the Food Stamp Act of 1971, which excluded welfare recipients living with unrelated individuals from receiving food stamps. *Id.* at 534. In overturning the statute, the Court noted that "if the constitutional conception of 'equal protection of the laws' means anything, it must at the very least mean that a bare congressional desire to harm a politically unpopular group cannot constitute a legitimate governmental interest." *Id.* The Court found that "unrelated persons" did not rationally further the governmental interest in "the prevention of fraud" and, instead, created an "irrational classification in violation of the equal protection component of the Due Process Clause of the Fifth Amendment." *Id.* at 537-38.

³¹² *Burson*, 112 S. Ct. at 1866 (quoting *Hustler Magazine v. Falwell*, 485 U.S. 46, 55 (1988) (requiring nationally known minister to prove actual malice to recover damages for intentional infliction of emotional distress from cartoon parody, because outrageousness standard "runs afoul of [the Court's] longstanding refusal to allow damages to be awarded because the speech in question may have an adverse emotional impact on the audience")); *see also* *United States v. Eichman*, 496 U.S. 310, 318-19 (1990) (reversing defendant's conviction for burning American flag during political protest in violation of Flag Protection Act of 1989, noting that although "desecration of the flag is deeply offensive to many. . . . [p]unishing desecration of the flag dilutes the very freedom that makes this emblem so revered, and worth revering"); *Erznoznik v. City of Jacksonville*, 422 U.S. 205, 210 (1975) ("much that we encounter offends our esthetic, if not our political and moral, sensibilities . . .

clear that mere public intolerance or animosity can never form the basis to limit constitutional freedoms.³¹³

The Court has also held in numerous cases that the governmental interest in protecting non-captive audiences from offense, such as those who pass by a beggar, are not sufficiently compelling to satisfy strict scrutiny. For example, in *Cohen v. California*, the Court held that the government's interest in protecting an audience from exposure to profanity was not compelling because offended onlookers could simply avert their eyes.³¹⁴ Applying this rationale, the Court in *Erznoznik v. City of Jacksonville* struck down a ban on showing films containing nudity at a drive-in theater visible from a public street. Neither the government's asserted interest in protecting traffic safety nor the viewer's privacy rights were found sufficient to satisfy strict scrutiny.³¹⁵ In reaching this conclusion, the Court added that the statute failed to ban other scenes equally likely to distract drivers and that a drive-in theater screen was not so obtru-

the Constitution does not permit government to decide which types of otherwise protected speech are sufficiently offensive to require protection for the unwilling listener or viewer"); *Street v. New York*, 394 U.S. 576, 579, 592 (1969) (noting that "[i]t is firmly settled that under our Constitution the public expression of ideas may not be prohibited merely because the ideas are themselves offensive to some of their hearers"); *Murdock v. Pennsylvania*, 319 U.S. 105, 116 (1943) (invalidating ordinance requiring religious solicitors to pay license tax as violating First Amendment, noting that "a community may not suppress . . . the dissemination of views because they are unpopular, annoying or distasteful").

³¹³ See *Coates v. City of Cincinnati*, 402 U.S. 611, 615 (1971) ("[The] First and Fourteenth Amendments do not permit a State to criminalize exercise of right of assembly simply because its exercise may be 'annoying' to some people."); *Terminiello v. Chicago*, 337 U.S. 1, 4 (1949) (noting that speech "may indeed best serve its high purpose when it induces a condition of unrest, creates dissatisfaction with conditions as they are, or even stirs people to anger. Speech is often provocative and challenging [and] may . . . have profound unsettling effects as it presses for acceptance of an idea.").

³¹⁴ *Cohen v. California*, 403 U.S. 15, 21 (1971). The Court explained that the government's ability to shut off speech depended on "a showing that substantial privacy interests are being invaded in an essentially intolerable manner." *Id.* Commenting on the rationale behind its decision in *Cohen*, the Court in *Erznoznik v. City of Jacksonville* noted that "the Constitution does not permit government to decide which types of otherwise protected speech are sufficiently so offensive to require protection for the unwilling listener or viewer [T]he burden normally falls upon the viewer to 'avoid further bombardment of [her] sensibilities simply by averting [her] eyes.'" 422 U.S. 205, 210-11 (1975) (quoting *Cohen*, 403 U.S. at 21).

³¹⁵ *Erznoznik*, 422 U.S. at 212, 215.

sive that an unwilling individual could not avoid exposure.³¹⁶ The Court held that the limited privacy interests people possess on the public streets could not justify censorship of otherwise protected speech based on its content.³¹⁷

The rationale behind the *Cohen* and *Erznoznik* decisions would apply to a passerby approached by a begger on the public streets, in a park, or in a subway station. In rejecting an argument that solicitation by a beggar violates a citizen's right to privacy, the district court in *Loper* described the many options available to a non-captive solicitee. The court noted that the person can turn away, shake her head before the expression is uttered, avert her eyes and refuse to acknowledge the speaker, or listen to the message and then decide how to respond to the speaker's personal appeal.³¹⁸ Beggars are not so obtrusive that an unwilling individual cannot avoid their solicitation. Moreover, it is clear that the alternative view would allow a compassion-fatigued public to silence beggars simply to serve their personal predilections.

3. Anti-Begging Ordinances as Content-Discriminatory and Viewpoint-Discriminatory Regulations of Unprotected Speech

Even if the *Young* decision's implication is correct that begging constitutes unprotected speech, the Court in *R.A.V.* established a limit upon the government's ability to prohibit proscribable speech based on the speech's content.³¹⁹ The Court noted that while

³¹⁶ *Id.* at 212-13.

³¹⁷ *Id.*; see also *Carey v. Brown*, 447 U.S. 455, 471 (1988) (finding that protecting privacy at home not enough to justify content-based regulation criminalizing all picketing, except labor picketing, near schools and residences); *Consolidated Edison Co. v. Public Serv. Comm'n*, 447 U.S. 530, 541-42 (1980) (striking down ban on billing inserts containing controversial policy discussions because First Amendment prevents government from prohibiting speech as intrusive unless captive audience cannot avoid it).

The Court has, however, stressed the importance of protecting captive audiences from offensive communications, especially in their own homes. See, e.g., *Frisby v. Schultz*, 487 U.S. 474, 485 (1988) (noting that unwilling listeners may be protected within their own homes); *Carey*, 447 U.S. at 471 ("The State's interest in protecting the well being, tranquility, and privacy of the home is certainly of the highest order in a free and civilized society.").

³¹⁸ *Loper v. New York City Police Dep't*, 802 F. Supp. 1029, 1045 (S.D.N.Y. 1992), *aff'd*, 999 F.2d 699 (2d Cir. 1993).

³¹⁹ *R.A.V. v. City of St. Paul*, 112 S. Ct. 2538, 2545 (1992). The Court pointed out that none of their previous cases "even involved, much less considered and resolved, the issue of content discrimination through

unprotected speech can be regulated under the First Amendment, these categories of speech are not entirely invisible to the Constitution.³²⁰ Government may not enact content discrimination for reasons unrelated to the message's distinctively proscribable content.³²¹ Thus, even if personal solicitation by a beggar somehow falls within a category of unprotected speech, government may not proscribe only certain types of begging, such as begging by individuals for themselves, while permitting other types of begging, such as begging by individuals for a charity, based on content.³²²

In explaining the limits on content-based regulation of proscribable speech, the Court gave several examples of permissible and impermissible regulations. First, the Court noted that the state can ban expressive activity for the activity it contains, but not for the ideas it expresses. For instance, burning a flag in violation of an ordinance against outdoor fires is punishable, but not burning a flag in violation of an ordinance against dishonoring the flag.³²³

regulation of 'unprotected speech. . . .' *Id.* at n.5. The Court further found that "the prohibition against content discrimination . . . applies differently in the context of proscribable speech than in the area of fully protected speech." *Id.* at 2545. The *R.A.V.* Court explained:

[T]he exclusion of "fighting words" [or begging] from the scope of the First Amendment simply means that, for purposes of that Amendment, the unprotected features of the words are, despite their verbal character, essentially a "nonspeech" element of communication. Fighting words are thus analogous to a noisy sound truck: Each is . . . a "mode of speech" . . .; both can be used to convey an idea; but neither has, in and of itself, a claim upon the First Amendment. As with the sound truck, however, so also with fighting words [or begging]: The government may not regulate use based on hostility — or favoritism — towards the underlying message expressed.

Id. (citing *Niemotko v. Maryland*, 340 U.S. 268, 282 (1951)).

³²⁰ *Id.* at 2543.

³²¹ *Id.*

³²² The Court in *R.A.V.* made this distinction clear when it stated that "our cases surely do not establish the proposition that the First Amendment imposes no obstacle whatsoever to regulation of particular instances of such proscribable expression, so that the government 'may regulate [them] freely.'" *Id.* (quoting *R.A.V.*, 112 S. Ct. at 2552 (White, J. concurring)) (alteration in original). As the Court noted, "[t]hat would mean that a city council could enact an ordinance prohibiting only those legally obscene works that contain criticism of the city government or, indeed, that do not include endorsement of the city government. Such a simplistic, all-or-nothing-at-all approach to First Amendment protection is at odds with common sense and with our jurisprudence as well." *Id.*

³²³ *Id.* at 2544 (citing *Texas v. Johnson*, 491 U.S. 397, 406-07 (1989)).

Thus, begging in violation of an ordinance against standing too close to the edge of the subway platform might be punishable, but not begging in violation of an ordinance against individual solicitation. Second, the Court explained that the government's power to prohibit speech based on one unprotected content element (e.g., obscenity) does not provide the government with the power to proscribe it based on other elements.³²⁴ Therefore, if a beggar yelled obscenities with a request for assistance, the government could proscribe the obscene part of her speech, but it could not proscribe the non-obscene part.³²⁵

Anti-begging ordinances also constitute viewpoint discrimination. In considering the St. Paul ordinance proscribing bias-oriented crimes, the Court found that it contained viewpoint discrimination. The ordinance's effect would be to place restrictions on the speech from one point of view that the opposite view need not observe.³²⁶ Because anti-begging ordinances would allow critics of beggars to speak at their pleasure against giving money to the homeless, but require the homeless to curtail their speech, the ordinance contains a viewpoint-based distinction.

The majority in *R.A.V.* indicated that three circumstances permit content-based regulation of unprotected speech under the Consti-

³²⁴ *R.A.V.*, 112 S. Ct. at 2544.

³²⁵ Applying these principles to the St. Paul, Minnesota, Bias-Motivated Crime Ordinance that prohibited, *inter alia*, racist activities, including cross-burning on public or private property, the Court concluded that the regulation was "facially unconstitutional." *R.A.V.*, 112 S. Ct. at 2547 (citing St. PAUL, MINN., LEGIS. CODE § 292.02 (1990)). Although as construed by the Minnesota Supreme Court, the ordinance reached only those expressions constituting "fighting words," the regulation prohibited "fighting words" only if "addressed to one of the specified disfavored topics" of race, color, creed, religion or gender. *Id.* The United States Supreme Court held that the "First Amendment does not permit St. Paul to impose special prohibitions on those speakers who express views on disfavored subjects." *Id.* These same principles demonstrate that prohibiting begging based on hostility towards the homeless individual's "disfavored" message of destitution and despair cannot be permitted consistent with the Constitution.

³²⁶ The Court noted the ordinance went "even beyond mere content discrimination, to actual viewpoint discrimination . . . [because] 'fighting words' that do not themselves invoke race, color, creed, religion, or gender — aspersions upon a person's mother, for example — would seemingly be usable *ad libitum* in the placards of those arguing in favor of racial, color, etc. tolerance and equality, but could not be used by that speaker's opponents . . . St. Paul has no such authority to license one side of a debate to fight freestyle, while requiring the other to follow Marquis of Queensbury Rules." *Id.* at 2547-48.

tution. First, content-based distinctions are constitutional if the distinction's basis is the same reason the entire class of speech is unprotected.³²⁷ Second, these distinctions are allowed if the classification's nature allows no realistic possibility that official suppression of ideas is afoot.³²⁸ Third, content distinctions may be drawn if the affected speakers are associated with particular secondary speech effects, so that the regulation is justified without reference to the content of the speech.³²⁹ The Court found that none of these exceptions applied to the statute at issue in *R.A.V.*³³⁰

These exceptions also do not apply to an ordinance that bans begging while permitting solicitation by charitable organizations. First, personal solicitation by beggars is not the reason the entire class of speech is proscribable. The Court has repeatedly protected personal solicitation on behalf of charities and religious organizations.³³¹ Second, the government may seek to suppress beggars and their ideas due to compassion fatigue.³³²

³²⁷ *Id.* at 2545. For example, a statute making it illegal to threaten President Clinton's life would be constitutional "since the reasons why threats of violence are outside the First Amendment (protecting individuals from the fear of violence [and] . . . the disruption fear engenders. . .) have special force when applied to the person of the President." *Id.* at 2546. Justice White felt that this exception "swallows the majority's rule." *Id.* at 2556 (White, J., concurring). Moreover, he felt that it should certainly apply to the St. Paul ordinance since "'the reasons why [fighting words] are outside the First Amendment . . . have special force when applied to [groups that have historically been subjected to discrimination].'" *Id.* (alteration in original) (quoting the majority opinion, *R.A.V.*, 112 S. Ct. at 2546).

³²⁸ *Id.* at 2547.

³²⁹ *Id.* at 2546 (quoting *Renton v. Playtime Theatres*, 475 U.S. 41, 48 (1986) (holding that zoning restriction applicable to adult movies theatres was content-neutral because it was aimed only at secondary effects of theatres, rather than intending "to suppress . . . the expression of unpopular views")). The *R.A.V.* Court noted, for example, that a state could constitutionally permit obscene live performances except those involving minors. *R.A.V.*, 112 S. Ct. at 2546. Justice White suggested as an example that, without this exception, Title VII hostile work environment claims would be unconstitutional unless the statute banned all harassment in the workplace, not just sexual harassment. *Id.* at 2557 (White, J., concurring).

³³⁰ *Id.* at 2548-49. Justice White described the majority's list of "*ad hoc* exceptions" as "an effort to anticipate some of the questions that will arise from its radical revision of First Amendment law." *Id.* at 2556 (White, J., concurring).

³³¹ See *supra* notes 96-108 and accompanying text (discussing *Schaumburg* and its progeny).

³³² See *supra* notes 21-23, 32-35 and accompanying text.

Finally, like the St. Paul ordinance, anti-begging ordinances regulate begging based on the primary effect of the speech — its persuasive (or repellent) force.³³³ Anti-begging ordinances are not directed only to the secondary effects of the beggar's expressive activities. The government could pursue other alternatives to deal with the secondary effects of begging, such as traffic congestion, coercive conduct and fraudulent solicitation.³³⁴ Notably, the Court in *R.A.V.* questioned whether a statute that prohibits, rather than merely regulates, a specified category of speech could ever be considered as directed only to the secondary effects of such speech.³³⁵ Moreover, adverse reactions from people solicited by the beggar are not the kind of secondary effects that justify a content-based restriction. As the Court made clear in *R.A.V.*, the listener's reaction to speech is not a secondary effect that can justify content-based regulation.³³⁶

³³³ *R.A.V.*, 112 S. Ct. at 2550.

³³⁴ The Court noted in *R.A.V.* that “[t]he existence of adequate content-neutral alternatives thus ‘undercut[s] significantly’ any defense of such a statute, . . . casting considerable doubt on the government’s protestations that ‘the asserted justification is in fact an accurate description of the purpose and effect of the law’. . . .” *Id.* (quoting *Burson v. Freeman*, 112 S. Ct. 1846, 1859 (1992) (Kennedy, J., concurring)); *see also* *Boos v. Barry*, 485 U.S. 312, 329 (1988) (finding that consideration by Congress of less restrictive alternatives undercut significantly defense and gravely weakened claim that statute sufficiently narrowly tailored); *Minneapolis Star & Tribune Co. v. Minneapolis Comm’r of Revenue*, 460 U.S. 575, 586 (1983) (invalidating use tax on products used by newspapers and finding asserted state interest of raising revenues “unpersuasive” because alternative means could achieve same interest without raising First Amendment concerns); *infra* notes 371-88 and accompanying text (discussing less restrictive alternatives to blanket ban on begging).

³³⁵ *See R.A.V.*, 112 S. Ct. at 2549 (“Even assuming that an ordinance that completely proscribes, rather than merely regulates, a specified category of speech can ever be considered to be directed only to the secondary effects of such speech, it is clear that the St. Paul ordinance is not directed to secondary effects . . .”).

³³⁶ *Id.* (quoting *Boos*, 485 U.S. at 321).

The Court's conclusion regarding the ordinance in *R.A.V.* applies with equal force to anti-begging ordinances.

In fact the only interest distinctively served by the content limitation is that of displaying the city council's special hostility towards the particular biases thus singled out. That is precisely what the First Amendment forbids

Let there be no mistake about our belief that burning a cross in someone's front yard is reprehensible. But St. Paul has sufficient

Therefore, according to the majority's discriminatory content analysis in *R.A.V.*, even if individual solicitation by a beggar is not protected by the First Amendment, the government cannot proscribe only certain types of individual solicitation (e.g., by a homeless beggar) while permitting individual solicitation by other individuals (e.g., by a fundraiser for a charitable organization). However, the *R.A.V.* opinion also seems to indicate that, as long as the government proscribes all individual solicitation, the regulation would pass constitutional muster.³³⁷ This result would seem to fail

means at its disposal to prevent such behavior without adding the First Amendment to the fire.

R.A.V., 112 S. Ct. at 2550 (footnote omitted).

³³⁷ Justice Stevens, joined by Justice White, argued that this part of the majority's opinion set "forth a new First Amendment principle that prohibition of constitutionally proscribable speech cannot be 'underinclusiv[e]'. . . a First Amendment 'absolutism' whereby 'within a particular "proscribable" category of expression, . . . a government must either proscribe *all* speech or no speech at all.'" *Id.* at 2562 (Stevens, J., concurring). Justice Stevens felt that this "aspect of the Court's ruling fundamentally misunderstands the role and constitutional status of content-based regulations on speech, conflicts with the very nature of First Amendment jurisprudence, and . . . "severely contorts the fabric of settled First Amendment law." *Id.* at 2562-64. Justice White elaborated on both the legal inconsistencies and the practical difficulties with the majority's decision:

It is inconsistent to hold that the government may proscribe an entire category of speech because the content of that speech is evil . . . but that the government may not treat a subset of that category differently without violating the First Amendment; the content of the subset is by definition worthless and undeserving of constitutional protection.

Id. at 2553 (White, J., concurring) (citation omitted).

Justice White felt that the majority's reasoning left "two options to lawmakers attempting to regulate expressions of violence: (1) enact a sweeping prohibition on an entire class of speech (thereby requiring 'regulat[ion] for problems that do not exist'); or (2) not legislate at all." *Id.* at 2555 (alteration in original); *see also id.* at 2560 (Blackmun, J., concurring) (criticizing Court for deciding that "a State cannot regulate speech that causes great harm unless it also regulates speech that does not (setting law and logic on their heads)"); *City of Cincinnati v. Discovery Network*, 113 S. Ct. 1505, 1525 (1993) (Rehnquist, J., dissenting) (commenting that Court's decision in overturning Cincinnati's statute banning newsracks containing "commercial handbills" while permitting newsracks containing newspapers, "places the city in the position of having to decide between restricting more speech — fully protecting speech — and allowing the proliferation of newsracks on its street corners to continue unabated. It scarcely seems logical that the First Amendment compels such a result.").

under the Court's holdings in *Schaumburg* and its progeny.³³⁸ This result would also harm the beggar because no one would be permitted to solicit money on behalf of the homeless and the indigent. Furthermore, this result seems contrary to both logic and what was formerly thought to be settled First Amendment jurisprudence.³³⁹

B. *The Scope of Anti-Begging Ordinances*

1. Introduction

If a court finds that an anti-begging ordinance restricting beggars' expressive activities in a public forum is content-neutral, the scope of the regulation must also be examined. The Court must determine whether the regulation restricts speech more broadly than necessary to accomplish the proffered governmental interest. Anti-begging ordinances are particularly vulnerable to constitutional challenge of their scope because they are frequently drafted as broad, prophylactic rules. Such rules are inherently suspect because they often result in the suppression of protected speech.³⁴⁰ Even so, at least twenty states and Washington, D.C. passed laws that

³³⁸ See *supra* notes 96-108 and accompanying text (discussing *Schaumburg* and cases following).

³³⁹ In fact, the "content discrimination" analysis of the majority in *R.A.V.* was not without its critics on the Court. For example, Justice Stevens commented in his concurrence: "Stated directly, the majority's position cannot withstand scrutiny." *R.A.V.*, 112 S. Ct. at 2566 (Stevens, J., concurring). He described the majority's "revision of the[ir] categorical approach" as "an adventure in a doctrinal wonderland" that had turned "First Amendment law on its head. . . ." *Id.* at 2562-64. He also felt that the effect of the Court's analysis was to provide the same sort of protection to fighting words as is currently provided to core political speech. *Id.* at 2564-65.

Justice White also castigated the majority's opinion in his concurrence:

[T]he Court's theory does not work and will do nothing more than confuse the law. . . . Its decision is an arid, doctrinaire interpretation, driven by the frequently irresistible impulse of judges to tinker with the First Amendment. The decision is mischievous at best and will surely confuse the lower courts. I join the judgment, but not the folly of the opinion.

Id. at 2558-60 (White, J., concurring).

Justice Blackmun, concurring, expressed "regret" at the opinion of the majority which he felt "signals one of two possibilities: It will serve as precedent for future cases, or it will not. Either result is disheartening." *Id.* at 2560 (Blackmun, J., concurring).

³⁴⁰ See *Riley v. National Fed'n of the Blind*, 487 U.S. 781, 801 (1988) ("Broad prophylactic rules in the area of free experiences are suspect.") (quoting *NAACP v. Button*, 371 U.S. 415, 438 (1963)).

impose broad, prophylactic bans on solicitation by individuals for themselves, often as part of a statute regulating other conduct. For example, many states prohibit begging as part of anti-vagrancy ordinances.³⁴¹ Six of these states prohibit begging as part of anti-loitering statutes.³⁴² Connecticut, Massachusetts and Mississippi regard begging as *prima facie* evidence that the person is a tramp.³⁴³ A

³⁴¹ See, e.g., CONN. GEN. STAT. ANN. § 53-340 (West 1990) (“[Vagrants include] all beggars who go from door to door or beg in the highways.”); D.C. CODE ANN. § 22-3302(6) (1981) (defining a vagrant as “any person wandering abroad and begging, or who goes about from door to door or places himself in or on an highway, passage, or other public place to beg or receive alms”); KAN. CRIM. CODE ANN. § 21-4108 (Vernon 1990) (“Vagrancy is: . . . (e) Deriving support in whole or in part from begging.”); LA. CODE CRIM. PROC. ANN. art. 107 (West 1992) (“The following persons are and shall be guilty of vagrancy: . . . (3) Able-bodied persons who beg or solicit alms”); MINN. STAT. ANN. § 609.725(4) (1992) (finding that “a person who derives support in whole or in part from begging” is a vagrant); MISS. CODE ANN. § 97-35-37 (West 1992) (“[vagrants include] . . . (g) Every able-bodied person who shall go begging for a livelihood”); NEV. REV. STAT. ANN. § 207.030(1)(d)-(e) (Michie 1986) (defining vagrant as person who “accosts other persons in any public place . . . for the purpose of begging or soliciting alms” or “[g]oes from house to house begging food, money or other articles”); VT. STAT. ANN. tit. 13, § 3901 (1991) (“A [vagrant is] a transient person, roving from place to place and living without visible means of support, who begs.”); WIS. STAT. ANN. § 947.02 (West 1991) (“Any of the following are vagrants . . . (4) A person . . . who derives part of his support from begging or as a fortune teller or similar imposter.”).

³⁴² See, e.g., ALA. CODE § 13A-11-9(a)(1) (1992) (noting that person commits crime of loitering if he loiters, remains or wanders about in public place for purpose of begging); ARIZ. REV. STAT. ANN. § 13-2905(A)(3) (1991) (defining loitering as being “present in a public place to beg”); ARK. CODE ANN. § 5-71-213(3) (Michie 1987); COLO. REV. STAT. ANN. § 18-9-112(2) (West 1991) (stating that a “person commits [loitering] if he: (a) Loiters for the purpose of begging”); DEL. CODE ANN. tit. 11, § 1321(4) (1991) (noting that person loiters when he wanders around in public place for purpose of begging); N.Y. PENAL LAW § 240.35(1) (McKinney 1991) (defining loiterer as someone who “remains or wanders about in a public place for the purpose of begging”). In a separate part of its anti-loitering statute, New York also defines loitering as “remain[ing] in any transportation facility . . . for the purpose of soliciting . . .” N.Y. PENAL LAW § 240.35 (McKinney 1991).

³⁴³ CONN. GEN. STAT. ANN. § 53-336 (West 1990) (tramps include “[a]ll transient persons who rove about from place to place begging. . . . Any act of beggary . . . by any person not a resident of this state, shall constitute *prima facie* evidence that such person is a tramp”); MASS. GEN. L. ch. 272, § 63 (1992) (“Whoever . . . roves about from place to place begging . . . shall be deemed a tramp. An act of begging or soliciting alms, whether of money, food, lodging or clothing . . . shall be *prima facie* evidence that such person is a tramp.”); MISS. CODE ANN. § 97-35-29 (1991) (“any male persons over 16 years of age, and not blind, who shall go about from place to place begging

beggar commits disorderly conduct by soliciting in Hawaii, Michigan and North Carolina.³⁴⁴ Georgia finds that beggars disrupt state employees.³⁴⁵ Utah imposes an oxymoronic fine of up to seventy-five dollars for begging.³⁴⁶ Moreover, at least six states specifically prohibit the use of minors for begging in state dependency statutes³⁴⁷ or in regulations prohibiting minors from engaging in that occupation.³⁴⁸ As of February of 1992, at least thirteen of the states

and asking subsistence by charity . . . shall be held to be tramps.”). Mississippi’s statute may violate the Equal Protection Clause of the Fifth and Fourteenth Amendments, because it applies only to men.

³⁴⁴ HAW. REV. STAT. § 711-1101(e) (1985) (“A person commits the offense of disorderly conduct if, with intent to cause physical inconvenience or alarm by a member . . . of the public, or recklessly creating a risk thereof, he . . . [i]mpedes or obstructs, for the purpose of begging or soliciting alms, any person in any public place”); MICH. COMP. LAWS ANN. § 750.167(h) (West 1992) (defining as “disorderly” a “person found begging in a public place”); N.C. GEN. STAT. § 14-444(a)(5) (1991) (finding person to be “disruptive in public” who is “begging for money or other property” when intoxicated).

³⁴⁵ GA. CODE ANN. § 50-9-9 (Harrison 1992) (finding beggars disrupt “state employees” if, “without the express written consent of the Director of the Georgia Building Authority . . . any person beg[s], panhandle[s], [or] solicit[s] . . . within any buildings or on the grounds, sidewalks or other ways owned by or under the control of the state”).

³⁴⁶ UTAH CODE JUDICIAL ADMIN. app. C, ch.2, Uniform Fine/Bail Schedule (Michie 1992) (setting fine for begging); UTAH ADMIN. R. 620-605-1 (1989) (“[b]egging is prohibited”).

³⁴⁷ See, e.g., GA. CODE ANN. § 19-7-4 (1993) (defining one of the “criteria for loss of parental custody” as occurring “if the child has been begging”); MO. REV. STAT. § 210.380 (1992) (providing that “[e]very minor who frequents any street, alley or other place for the purpose of begging or receiving alms, or who shall have no permanent place of abode” is considered a dependent minor); NEV. REV. STAT. § 201.090(1) (1986) (defining “neglected child,” “delinquent child” or “child in need of supervision” as “any person less than 18 years of age . . . [w]ho is found begging, receiving or gathering alms, or who is found in any street, road or public place for the purpose of so doing”).

³⁴⁸ See, e.g., CAL. LAB. CODE § 1308 (West 1992) (finding “any person” guilty of misdemeanor who “having the care, custody, or control of any minor under the age of 16 years . . . causes, procures, or encourages the minor to engage in . . . begging”); MISS. CODE ANN. § 294.043 (1992) (“No child under sixteen years of age shall be employed or permitted to work in any street occupation connected with . . . begging”); NEV. REV. STAT. § 609.210(1) (1986) (finding guilty of misdemeanor “[e]very person who employs . . . exhibits . . . any minor . . . in begging, receiving alms, or in any mendicant occupation”); N.Y. ARTS & CULT. AFF. LAW § 35.07(1)(c) (McKinney 1992) (finding it “unlawful for any person to employ, use, or exhibit any child under sixteen years of age . . . in begging or receiving or soliciting alms in any manner or under any pretense, or in any mendicant occupation”).

that do not prohibit begging as a matter of state law granted statutory authority to city councils,³⁴⁹ municipal authorities,³⁵⁰ or parks and recreation boards³⁵¹ to prohibit begging.³⁵² Several major cities have used this statutory authority to prohibit begging.³⁵³

The scope of blanket bans on begging may be subject to constitutional challenge on two grounds. First, blanket bans may be challenged as unconstitutional prior restraints because they completely silence the beggars' speech. Second, if a blanket ban on begging is not a prior restraint, the regulation's scope may still be challenged as an unconstitutional limitation on the time, place or manner of solicitation in a public forum. Under this standard, the government may only impose reasonable, content-neutral restrictions on the time, place and manner of protected speech if the regulation is narrowly tailored to serve a significant governmental interest and leaves open alternative channels for communication.³⁵⁴

In addition, the scope of an ordinance that does not impose a blanket ban on begging, but instead attempts to regulate only beggars' objectionable conduct, may be subject to constitutional challenge on due process grounds. This ordinance may be void for vagueness if it fails to state with sufficient precision the unlawful conduct. The Court requires precision in this area so that beggars

³⁴⁹ See, e.g., N.H. REV. STAT. ANN. § 47-17 (Supp. 1990) (noting that city has power to enact laws to retain and punish street beggars); N.C. GEN. STAT. § 160A-179 (1991) (stating that "city may by ordinance prohibit or regulate begging").

³⁵⁰ See, e.g., ILL. REV. STAT. ch. 65, para. 11-5-4 (1992); MONT. CODE ANN. § 7-32-4304 (1989); NEB. REV. STAT. § 15-257 (1987); N.J. STAT. ANN. § 40-48-1(7) (West Supp. 1989); N.D. CENT. CODE § 40-05-01(43) (1989); OHIO REV. CODE ANN. § 715.55B (Anderson 1992); WASH. REV. CODE § 35.22.280(34) (1987); WYO. STAT. § 15-1-103(a) (xvii) (Supp. 1990).

³⁵¹ W. VA. CODE § 8-21-10 (1990) (proscribing begging in public parks).

³⁵² See also, Hershkoff & Cohen, *supra* note 32, at 896 n.5 (citing *Young v. New York City Transit Auth.*, 729 F. Supp. 341, 354 n.23 (S.D.N.Y. 1990) (listing 12 states with such ordinances as of 1989), *rev'd & vacated*, 903 F.2d 146, 152 (2d Cir. 1990), *cert. denied*, 498 U.S. 984 (1990)).

³⁵³ See Diamond, *supra* note 20, at A1 (indicating that twelve major cities passed measures to curb begging during the period of 1988 to 1990); Knapp, *supra* note 42, at 407 n.15 (specifying that as of 1991, the following major cities had passed such regulations: Atlanta, Georgia; Chicago, Illinois; Miami, Florida; and Phoenix, Arizona).

³⁵⁴ *International Soc'y For Krishna Consciousness v. Lee*, 112 S. Ct. 2711, 2720-21 (1992) (Kennedy, J., concurring) (quoting *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989); *Clark v. Community for Creative Non-Violence*, 468 U.S. 288, 293 (1984)).

will know what conduct is prohibited, and authorities will not arbitrarily enforce the regulation against disfavored groups, such as the homeless.

2. Blanket Bans on Begging as Prior Restraints

The Court has noted on numerous occasions that the First Amendment's purpose is to prevent prior restraints on publications.³⁵⁵ Ordinances banning begging are nearly identical to classic prior restraints by judicial injunction, because the regulations are *a priori* determinations by the government that factual information should not be disseminated. In *Ward*, the Court explained that prior restraints give "public officials the power to deny use of a forum in advance of actual expression."³⁵⁶ A blanket ban on begging authorizes governmental suppression of beggars' speech before its expression. Thus, a blanket ban on begging might be found to be a prior restraint, and would constitute "the most serious and least tolerable infringement on First Amendment rights."³⁵⁷ The Court has repeatedly stated that prior restraints come before the Court bearing a heavy presumption against their constitutionality.³⁵⁸ As Justice Brennan explained in *Richmond*

³⁵⁵ *Nebraska Press Ass'n v. Stuart*, 427 U.S. 539, 557 (1976) (citing *Near v. Minnesota*, 283 U.S. 697, 706, 723 (1931) (finding that court order restraining media from publishing or broadcasting accounts of confessions made by defendant violated First Amendment because "the heavy burden imposed as a condition to securing a prior restraint was not met"))).

³⁵⁶ *Ward*, 491 U.S. at 795 n.5 (quoting *Southeastern Promotions v. Conrad*, 420 U.S. 546, 553 (1975) (finding that denial of municipal theatre for production of "Hair" was impermissible prior restraint, reasoning that "the danger of censorship and of abridgment of our precious First Amendment freedoms is too great where officials have unbridled discretion over a forum's use"))).

³⁵⁷ *Nebraska Press Ass'n*, 427 U.S. at 559.

³⁵⁸ *Bantam Books v. Sullivan*, 372 U.S. 58, 70 (1963) (holding unconstitutional as prior restraint Rhode Island commission that informally censored books as "objectionable" for sale to youths because system "provides no safeguards whatever against suppression of nonobscene and constitutionally protected matter"); see also *Nebraska Press Ass'n*, 427 U.S. at 570, 588 (Brennan, J., concurring); *Miami Herald Publishing Co. v. Tornillo*, 418 U.S. 241, 259 (1974) (White, J., concurring) (holding that state could not constitutionally require newspaper to print reply of defamed candidate because "[a]ccording to [the Court's] accepted jurisprudence, the First Amendment erects a virtually insurmountable barrier between government and the print media so far as government tampering, in advance of publication, with news and editorial content is concerned"); *Organization for a Better Austin v. Keefe*, 402 U.S. 415, 420 (1971) (finding prior restraint on

Newspapers v. Commonwealth of Virginia,³⁵⁹ “[c]ustomarily, First Amendment guarantees are interposed to protect communication between speaker and listener. When so employed against prior restraints, free speech protections are almost insurmountable.” Consequently, the Court has found prior restraints unconstitutional in a variety of factual contexts.³⁶⁰ In fact, the Court has never upheld a prior restraint on pure speech.³⁶¹

Nevertheless, the Court has frequently denied that First Amendment rights are absolute and has consistently rejected the proposi-

picketing and passing out literature not justified by designating conduct as invasion of homeowner’s privacy).

³⁵⁹ 448 U.S. 555, 586-587 (Brennan, J., concurring).

³⁶⁰ See, e.g., *Times-Picayune Publishing Corp. v. Schulingkamp*, 419 U.S. 1301, 1306-08 (1974) (upholding stay of trial court order restraining publication of information regarding rape-murder trial since order “impose[d] significant prior restraints on media publication” that were “both pervasive and of uncertain duration” and included “limitations on the timing as well as the content of the media publication”); *Carroll v. Princess Anne*, 393 U.S. 175, 181 (1968) (holding that injunction against public rally by members of “white supremacist” group, without a hearing, constitutes unconstitutional prior restraint that “suppresses the precise freedom which the First Amendment sought to protect against abridgement”); *Freedman v. Maryland*, 380 U.S. 51, 57-58 (1965) (overturning statute requiring submission of motion pictures to censorship board before release, holding that requirement “avoids constitutional infirmity only if it takes place under procedural safeguards designed to obviate the dangers of a censorship system,” noting that “only a procedure requiring a judicial determination suffices to impose a valid final restraint”); *Joseph Burstyn, Inc. v. Wilson*, 343 U.S. 495, 505 (1952) (overturning as prior restraint New York’s Education Law that forbade commercial showing of any motion picture without license, which could be denied based on censor’s conclusion that film was “sacrilegious,” finding that “the state has no legitimate interest in protecting any or all religions from views distasteful to them which is sufficient to justify prior restraints upon the expression of those views . . . whether they appear in publications, speeches or motion pictures”); *Grosjean v. American Press Co.*, 297 U.S. 233, 250 (1936) (invalidating, as impermissible prior restraint, discriminatory state tax on advertising revenues of newspapers when purpose was to penalize publishers of certain newspapers).

³⁶¹ When confronted with such a restraint in *New York Times Co. v. United States*, 403 U.S. 713 (1971) (the “Pentagon Papers” case), the Court held that newspapers could not be prohibited, even during a time of armed conflict in Viet Nam, from publishing documents classified “TOP SECRET.” The Court held that the press was privileged to print the contents of the documents despite the government’s argument that publication would cause “grave, irreparable injury to the nation.” *Id.* at 714; see also *id.* at 725 (Brennan, J., concurring).

tion that a prior restraint can never be employed.³⁶² For example, in *Near v. Minnesota*,³⁶³ the Court found unconstitutional a statute imposing a prior restraint on publication of an anti-Semitic newspaper. However, the Court hypothesized that there might be circumstances where speech meriting constitutional protection might nevertheless be suppressed before publication based on a sufficiently compelling governmental interest.³⁶⁴ For example, the Court stated that “[n]o one would question but that a government [in time of war] might prevent actual obstruction to its recruiting service or the publication of the sailing dates of transports or the number and location of troops.”³⁶⁵ This so-called “military security exception” was later construed in *New York Times v. United States* to require proof that dissemination of the Pentagon Papers would result in “direct, immediate, and irreparable damage to our Nation or its people.”³⁶⁶

³⁶² *Nebraska Press Ass’n v. Stuart*, 427 U.S. 539, 570 (1976).

³⁶³ 283 U.S. 697 (1931).

³⁶⁴ *Id.* at 716.

³⁶⁵ *Id.*

³⁶⁶ *New York Times*, 403 U.S. at 730 (White, J., concurring); see also *United States v. The Progressive, Inc.*, 467 F. Supp. 990, 994 (W.D. Wis. 1979) (applying exception to restrain journal from publishing article containing technical details of hydrogen bomb construction).

The Court has upheld prior restraints regulating the time, place and manner of expression regarding acts that are verbal in nature, such as parades, if they do not unduly limit the opportunity for expression. See, e.g., *Brown v. Glines*, 444 U.S. 348, 355 (1960) (upholding Air Force regulation requiring servicemen to obtain approval before circulating petitions on base because regulation restricted “speech no more than is reasonably necessary to protect the substantial governmental interest” in maintaining military effectiveness); *Cox Broadcasting Co. v. Cohn*, 420 U.S. 469, 474 (1975) (upholding narrowly-drawn parade permit law). But see *Shuttlesworth v. City of Birmingham*, 394 U.S. 147, 151 (1969) (overturning conviction of African-American minister for leading civil rights march in violation of Alabama regulation requiring parade permit because “without narrow, objective and definite standards to guide the licensing authority,” statute was unconstitutional prior restraint); *Niemotko v. Maryland*, 340 U.S. 268, 273 (1951) (finding permit denial for Bible talks in city park was unconstitutional prior restraint because city lacked standards in issuing licenses, holding that “the completely arbitrary and discriminatory refusal to grant the permits was a denial of equal protection.”). A final group of permitted exceptions, to suppress obscenity or incitements to violence or revolution by force, have “come to be interpreted as situations in which the ‘speech’ involved is not encompassed within the meaning of the First Amendment.” *Nebraska Press Ass’n*, 427 U.S. at 590 (Brennan, J., concurring).

In *New York Times*, the Court overturned a prior restraint even when the dissemination of information could cause grave national injury. Thus, the government probably could not meet its heavy burden to show sufficient justification to defend an anti-begging ordinance that the Court finds is a prior restraint.³⁶⁷ In addition, anti-begging ordinances do not involve military security concerns, like those discussed in *Near*. Thus, if the Court considers a blanket ban on begging a prior restraint, it would find the regulation unconstitutional.³⁶⁸

3. Blanket Bans on Begging as Regulations of the Time, Place or Manner of Beggars' Protected Speech in a Public Forum

a. Introduction

If the Court finds that blanket bans on begging are not prior restraints, these regulations remain subject to constitutional challenge as invalid restrictions on the time, place or manner of solicitation in a public forum. The broad scope of blanket bans makes them particularly vulnerable to constitutional challenge that they are not narrowly tailored to serve a significant governmental interest. The requirement that an ordinance be narrowly tailored ensures that a protected speech regulation eliminates no more speech than necessary to remedy the particular "evil."³⁶⁹ To pass constitutional scrutiny, the ordinance must not "deny or unwarrant-

³⁶⁷ *New York Times*, 403 U.S. at 714 (quoting *Organization for a Better Austin v. Keefe*, 402 U.S. 415, 419 (1971)).

³⁶⁸ Moreover, if anti-begging ordinances are regarded as penal sanctions rather than as prior restraints, the Court's balancing test will weigh heavily in favor of allowing the beggar to disseminate truthful information. The Court in *Daily Mail* made it clear that whether that statute was defined as a prior restraint or as a penal sanction was not dispositive, because penal sanctions also require the highest form of state interest to sustain their constitutionality. *Smith v. Daily Mail Publishing Co.*, 443 U.S. 97, 100-02 (1979); *see also Florida Star v. B.J.F.*, 491 U.S. 524, 541 (1989) (noting that whether Florida statute is viewed as prior restraint or as penal sanction, "punishment may lawfully be imposed, if at all, only when narrowly tailored to a state interest of the highest order"). Thus, the state is unlikely to meet its burden under either definition, and a blanket ban on begging would probably be found unconstitutional.

³⁶⁹ *Frisby v. Schultz*, 487 U.S. 474, 485 (1988) (finding against anti-abortion picketers seeking to overturn city ordinance imposing ban on picketing individual residences because city had substantial interest in allowing residents with no ready means of avoiding picketers to be free of objectionable speech); *NAACP v. Button*, 371 U.S. 415, 438 (1963) ("Precision of regulation must be the touchstone in an area so closely touching our most precious freedoms.").

edly abridge . . . the opportunities for the communication of thought and the discussion of public questions”³⁷⁰ Because the governmental interests most frequently proffered to justify anti-begging ordinances could be accomplished by regulating objectionable conduct, without prohibiting all begging, blanket bans are subject to constitutional challenge as an insufficiently tailored speech restriction.

b. Blanket Bans on Begging as not Narrowly Tailored to Serve Significant Governmental Interests

The governmental interests most frequently advanced to justify blanket bans on begging at transportation nodes, or in the nation’s streets and parks, include such potentially significant concerns as alleviating congestion, prohibiting coercive or threatening begging, and preventing fraudulent solicitation.³⁷¹ For example, the New York Transit Authority in *Young* asserted that begging “threatens passenger well-being and safety” and “disrupts the [subway] system’s

However, the narrow-tailoring requirement does not mandate that the government employ the “least restrictive or least intrusive means of achieving an end. The regulation must be reasonable and must not burden substantially more speech than necessary.” *International Soc’y for Krishna Consciousness v. Lee*, 112 S. Ct. 2711, 2722 (Kennedy, J., concurring) (citing *Ward v. Rock Against Racism*, 491 U.S. 781 (1989)). The *Ward* Court stated: “the requirement of narrow tailoring is satisfied ‘so long as the . . . regulation promotes a substantial government interest that would be achieved less effectively absent the regulation.’ . . . [T]he regulation will not be invalid simply because a court concludes that the government’s interest could be adequately served by some less-speech-restrictive alternative.” *Ward*, 491 U.S. at 799-800 (quoting *United States v. Albertini*, 472 U.S. 675, 689 (1985)).

³⁷⁰ *Richmond Newspapers v. Virginia*, 448 U.S. 555, 581-82 n.18 (1980) (citing *Cox v. New Hampshire*, 312 U.S. 569, 574 (1941) (upholding state law requiring special license for parade on public street)); *see also* *Clark v. Community for Creative Non-Violence*, 468 U.S. 288, 309-10 (1984) (Marshall, J., dissenting) (commenting that “First Amendment requires the Government to justify every instance of abridgment. . . . If the Government cannot adequately justify abridgment of protected expression, there is no reason why citizens should be prevented from exercising the first of the rights safeguarded by our Bill of Rights.”).

³⁷¹ In *Loper*, the Circuit Court noted that panhandlers have been known to block the sidewalk, threaten those who do not give them money and “make false and fraudulent representations to induce passers-by to part with their money.” *Loper v. New York City Police Dep’t*, 999 F.2d 699, 701 (2d Cir. 1993).

smooth operation.”³⁷² The Port Authority advanced similar interests in *Krishna* to justify regulating leafletting and solicitations by a religious organization in the airport terminals. The governmental interests cited in *Krishna* included alleviating the disruption of business and congestion caused by the Krishnas’ activities, preventing duress or coercion of air travelers, and stopping fraudulent solicitation.³⁷³

However, the asserted governmental interests in a future case challenging begging in a public forum cannot be evaluated in the abstract. The government must establish the validity and sufficiency of its interests in each future case because mere apprehension of difficulties is inadequate to overcome the right to free expression.³⁷⁴ In addition, these interests must be evaluated in light of the character and context of the beggars’ expressive activities in order to determine their significance in a particular case. The Court found the governmental interests in *Krishna* constituted a reasonable basis for regulating the Krishna’s solicitation methods in an airport terminal. The result might well be different if applied to the solicitation methods of beggars in a public forum based on the time, place and manner standard, which requires a significant governmental interest.

More importantly, even a significant governmental interest in a future case must be served by a narrowly tailored regulation. A

³⁷² *Young v. New York City Transit Auth.*, 903 F.2d 146, 159 (2d Cir. 1990), cert. denied, 498 U.S. 984 (1990). In discussing these interests, the *Young* court noted: “In our estimation, the regulation at issue here is justified by legitimate, indeed compelling, governmental interests.” *Id.* at 158.

³⁷³ *Krishna*, 112 S. Ct. 2701, 2707-09 (1992).

³⁷⁴ *Clark*, 468 U.S. at 311 (Marshall, J., dissenting). Even if passersby claimed to be fearful of the beggars, this, in itself, would not be enough to justify a blanket ban on begging. Over sixty years ago, in *Whitney v. California*, Justice Brandeis commented: “Fear of serious injury cannot alone justify suppression of free speech and assembly. Men feared witches and burnt women. It is the function of speech to free men from the bondage of irrational fears.” 274 U.S. 357, 376 (1927) (Brandeis, J., concurring) (upholding constitutionality of California’s Criminal Syndication Act on free speech, due process and equal protection grounds, affirming defendant’s conviction for organizing Communist Labor Party); see also *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 435, 448-50 (1985) (overturning city’s denial of special use permit for group home for mentally retarded despite community concerns, noting that “mere negative attitudes, or fear, unsubstantiated by factors which are properly cognizable in a zoning proceeding, are not permissible bases for treating a home for mentally retarded differently from apartment houses . . . and the like”).

blanket ban on begging will likely fail this step.³⁷⁵ For example, congestion problems in most transportation nodes could also be alleviated by limiting the areas where begging was permitted or prohibiting begging at times when the facility is most crowded.³⁷⁶ A regulation prohibiting beggars from soliciting during subway rush hours or at the place where a bus is momentarily due to arrive might pass constitutional scrutiny. Justice Souter, concurring in part and dissenting in part in *Krishna*, felt that the majority's conclusion that the Constitution forbids a ban on the sale, as well as the distribution, of leaflets "puts to rest respondent's argument that congestion justifies a total ban on solicitation."³⁷⁷ Although Justice Souter acknowledged that there may be "congested locations where solicitation could severely compromise the efficient flow of pedestrians, the proper response would be to tailor the restrictions to those choke points."³⁷⁸ As Justice Kennedy commented in his concurrence in *Krishna*, "[i]nconvenience does not absolve the government of its obligation to tolerate speech. The First Amendment is often inconvenient."³⁷⁹

Similarly, coercive, threatening or intimidating acts, if clearly defined, "may be constitutionally prohibited by a statute that does

³⁷⁵ Justice Souter stated that the Court's "cases do not provide government with plenary authority to ban solicitation just because it could be fraudulent." *Krishna*, 112 S. Ct. 2711, 2726 (Souter, J., concurring in part and dissenting in part). He noted that "more than a laudable intent to prevent fraud [was] required to sustain [a] ban" on solicitation like the regulation in *Krishna* (or in many anti-begging ordinances). *Id.*; see also *Riley v. National Fed'n of the Blind*, 487 U.S. 781, 800 (1988) ("In contrast to the prophylactic, imprecise, and unduly burdensome rule . . . more benign and narrowly tailored options are available. For example, . . . the State may vigorously enforce its antifraud laws to prohibit professional fundraisers from obtaining money on false pretenses or by making false statements.").

³⁷⁶ For example, in *Loper* Judge Sweet opined that bans on begging "immediately outside ATMs" or within "a ten-block radius from Grand Central Station during the rush hour no doubt might constitute . . . reasonable time, place, and manner restriction[s]." *Loper v. New York City Police Dep't*, 802 F. Supp. 1029, 1040 (S.D.N.Y. 1992), *aff'd*, 999 F.2d 699 (2d Cir. 1993).

³⁷⁷ *Krishna*, 112 S. Ct. at 2725 n.1 (Souter, J., concurring in part and dissenting in part).

³⁷⁸ *Id.*

³⁷⁹ *Id.* at 2719 (Kennedy, J., concurring); see also *Chicago v. Terminiello*, 337 U.S. 1, 4 (1949) (noting that "freedom of speech . . . is nevertheless protected against censorship or punishment, unless shown likely to produce a clear and present danger of a serious substantive evil that rises far above public inconvenience, annoyance or unrest").

not limit the freedom of speech of some citizens.”³⁸⁰ In fact, states already have statutes that prohibit such threatening acts as assault, battery or breach of the peace.³⁸¹ Justice Kennedy, concurring in *Krishna*, noted that the federal government also has successfully adopted regulations to deal with the serious problems associated with solicitation.³⁸² For example, the Federal Aviation Authority permits the solicitation of funds in Washington, D.C. airports, but has adopted special rules to prevent coercive, harassing or repetitious behavior.³⁸³ If states and municipalities enact this type of regulation, then blanket bans on begging are unnecessary to deal with the misconduct of individual beggars. In rejecting arguments that California’s anti-begging ordinance was needed to protect the public from aggressive panhandling, the *Blair* court noted that to pro-

³⁸⁰ *Krishna*, 112 S. Ct. at 2722 (Kennedy, J., concurring).

³⁸¹ In *Blair v. Shanahan*, 775 F. Supp. 1315, 1324 (N.D. Cal. 1991), the court noted that California has “a plethora of content-neutral statutes with which the population at large may be protected from threatening conduct.” As examples, the *Blair* court cited several sections of the California Penal Code. *Blair*, 775 F. Supp. at 1324 n.10; CAL. PENAL CODE § 240 (West 1988) (prohibiting assault); *id.* § 242 (prohibiting battery); *id.* § 415(1)-(3) (prohibiting disturbing the peace by challenging someone to a fight, disturbing another by loud noise or using offensive words). The district court in *Loper* noted that the “overbearing beggar” in New York might violate a state statute prohibiting “general harassment” while a “beggar shaking down people in parking lots is both trespassing . . . and extorting.” *Loper*, 802 F. Supp. at 1046 (citing N.Y. PENAL LAW § 240.25(3) (McKinney Supp. 1993) (prohibiting general harassment); *id.* §§ 140.05-140.17 (prohibiting trespassing); *id.* § 155.05(2)(e) (prohibiting extortion)).

The Second Circuit in *Loper* pointed out that a panhandler is guilty of disorderly conduct if she “uses obscene or abusive language or obstructs pedestrians or vehicular traffic” with “intent to cause public inconvenience, annoyance or alarm.” *Loper v. New York City Police Dep’t*, 999 F.2d 699, 702 (2d Cir. 1993) (citing N.Y. PENAL LAW §§ 240.20(3), (5) (McKinney 1989)). A New York beggar “who accosts a person in a public place with intent to defraud” commits “fraudulent accosting” while a panhandler who uses “physical menace” to intentionally place another person “in fear of physical injury” is guilty of “menacing.” *Loper*, 999 F. 2d at 702 (citing N.Y. PENAL LAW § 165.30(1) (McKinney 1989); *id.* § 120.15 (McKinney Supp. 1993)).

³⁸² *Krishna*, 112 S. Ct. at 2721 (Kennedy, J., concurring).

³⁸³ *Id.* at 2722 (citing 14 C.F.R. §§ 159.94(e)-(h) (1993) (prohibiting, *inter alia*, the following problems associated with solicitation: “threatening gestures, or . . . language directed at another person in a manner intended to harass that other person;” “intentionally touching or making physical contact with another person” and “repeatedly attempting to . . . solicit funds from another person when that other person has indicated to the solicitor that he or she does not wish to . . . make a donation”)).

tect the public “from intimidation, threats or coercion simply does not require that a form of speech, possessing obvious political relevance and pertinence to the community, which is of crucial public importance to those that express the speech, be precluded.”³⁸⁴

Finally, even the governmental interest in preventing fraud can be better served by measures less intrusive than a direct prohibition on solicitation. The state can directly punish fraud.³⁸⁵ For example, rather than banning all begging, states could adopt laws pun-

³⁸⁴ *Blair*, 775 F. Supp. at 1324. In *Organization for a Better Austin v. Keefe*, 402 U.S. 415, 419 (1971), the Court held that the “claim that . . . expressions were intended to exercise a coercive impact . . . does not remove them from the reach of the First Amendment.” The *Keefe* Court considered that, because coercive speakers (like some beggars) intended to influence their listeners by their activities, their role was “not fundamentally different from the function of a newspaper.” *Id.* In addition, even if a particular beggar is insistent “a pedestrian on the street or airport concourse can simply walk away or walk on.” *Krishna*, 112 S. Ct. at 2725 (Souter, J., concurring in part and dissenting in part). For this reason, Justice Souter felt that the government’s claimed interest in *Krishna* in “preventing coercion was weak to start with.” *Id.* He pointed out that the “First Amendment inevitably requires people to put up with annoyance and uninvited persuasion.” *Id.* at 2725 n.1. Moreover, Justice Souter recalled that the Court has protected speech in a “far more coercive context than [an airport], that of a black boycott of white stores in Claiborne County, Mississippi.” *Id.* at 2725 (Souter, J., concurring in part and dissenting in part) (citing *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 910 (1982) (holding boycotters not liable for white merchants’ business losses resulting from boycotters’ peaceful activities because “[s]peech does not lose its protected character . . . simply because it may embarrass others or coerce them into action”). Justice Souter concluded that, absent “any type of coercive conduct, over and above the merely importunate character of the open and public solicitation, that might justify a ban, . . . the regulation [in *Krishna*] cannot be sustained to avoid coercion.” *Id.* at 2726 (Souter, J., concurring in part and dissenting in part) (citing *United States v. O’Brien*, 391 U.S. 367 (1968); *Claiborne Hardware*, 458 U.S. at 912).

³⁸⁵ *Village of Schaumburg v. Citizens for a Better Env’t*, 444 U.S. 620, 637-38 (1979) (“The Village 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.”). In *Krishna*, Justice Souter pointed out that the Court’s “cases do not provide government with plenary authority to ban solicitation just because it could be fraudulent.” *Krishna*, 112 S. Ct. at 2726 (Souter, J., concurring in part and dissenting in part); see also *Riley v. National Fed’n of the Blind*, 487 U.S. 781, 792 (1988) (acknowledging that, although “the interest in protecting charities (and the public) from fraud [was] . . . a sufficiently substantial interest to justify a narrowly tailored regulation,” such interest did not justify speech restriction when state had other means to prevent fraud, such as antifraud statutes and disclosure requirements for charities).

ishing fraudulent panhandling, while leaving nonfraudulent solicitation unregulated. Justice Kennedy, concurring in *Krishna*, found that the Port Authority's regulation was narrowly tailored because, unlike blanket bans on begging, it did not burden any broader category of speech than fraud and duress, and only prohibited this behavior if continuous or repetitive.³⁸⁶ Anti-begging ordinances could be patterned after the Port Authority's regulation to target only continuous or repetitive solicitation that results in congestion or fraud or commuter intimidation. These less restrictive alternatives, which focus on the targeted evils without banning protected First Amendment activities, demonstrate that a total ban on begging is not necessary to achieve asserted governmental interests. The Court in *Board of Airport Commissioners of Los Angeles v. Jews for Jesus*,³⁸⁷ unanimously struck down a regulation that prohibited all First Amendment activities in the Los Angeles International Airport. The Court found no justification for this ban even if the airport was a nonpublic forum, "because no conceivable governmental interest would justify such an absolute prohibition of speech."³⁸⁸

c. Anti-Begging Ordinances as Foreclosing Alternative Channels of Communication

Finally, most anti-begging ordinances are also subject to constitutional challenge because they do not offer ample alternative means of solicitation to the politically powerless poor. The avenues of social and political interaction open to the homeless are extremely limited. The Court in *Clark* noted that, although the homeless are numerically significant, they are "politically powerless inasmuch as they lack the financial resources necessary to obtain access to many of the most effective means of persuasion."³⁸⁹ Consequently, public fora like subway stations or bus depots offer invaluable avenues of communication that are uniquely conducive to the successful expression of the beggars' social message and pleas for assistance. Studies prior to the enactment of the anti-begging ordinance in *Young* revealed that approximately 3,500,000 commuters passed through the New York subway system on an average work day.³⁹⁰

³⁸⁶ *Krishna*, 112 S. Ct. at 2722 (Kennedy, J., concurring).

³⁸⁷ 482 U.S. 569 (1987).

³⁸⁸ *Id.* at 575.

³⁸⁹ *Clark v. Community for Creative Non-Violence*, 468 U.S. 288, 304 n.4 (1984).

³⁹⁰ *Young v. New York City Transit Auth.*, 903 F.2d 146, 149 (2d Cir. 1990), *cert. denied*, 498 U.S. 984 (1990).

Similarly, the airports in the *Krishna* case served over 78 million passengers.³⁹¹ Thus, the New York subway system and the Port Authority's airports represent particularly appropriate fora for the beggars' form of expression, because they offer a uniquely diverse cross-section of listeners. Indeed, as Justice Kennedy noted in his concurrence in *Krishna*: "It is the very breadth and extent of the public's use of airports that makes it imperative to protect speech rights there."³⁹²

Justice Kennedy also explicitly noted that, unlike a ban on begging, the Port Authority's regulation did not prohibit all solicitation. The Krishnas could distribute pre-addressed envelopes so potential contributors could mail their donations.³⁹³ Although this may be an ample alternative channel for a financially solvent, well-organized corporation like the International Society for Krishna Consciousness,³⁹⁴ this channel is not feasible for an indigent beggar with no permanent address. If the Port Authority enforced its regulation against the homeless, that would be tantamount to prohibiting all solicitation. Justice Kennedy would apparently find such a result constitutionally impermissible. He felt that the Port Author-

³⁹¹ *Krishna*, 112 S. Ct. at 2719 (Kennedy, J., concurring); see also *Wolin v. Port of N.Y. Auth.*, 392 F.2d 83, 90-91 (2d Cir. 1968) (noting that more than 200,000 persons per day go through Port Authority's bus terminal, making it appropriate place for anti-war demonstrator to "communicate his anti-war protest to the general public" because it was place "where the relevant audience may be found"), *cert. denied*, 393 U.S. 940 (1968).

³⁹² *Krishna*, 112 S. Ct. at 2719 (Kennedy, J., concurring). Recognizing the importance of reaching the public, the *Krishna* Court felt that the Port Authority regulation left open ample alternative channels for communication because the religious group was free to solicit on the sidewalk area outside the terminals, which were "frequented by an overwhelming percentage of airport users," thus, "the resulting access of those who would solicit the general public is quite complete." *Krishna*, 112 S. Ct. 2701, 2709.

³⁹³ *Krishna*, 112 S. Ct. 2711, 2723 (Kennedy, J., concurring).

³⁹⁴ Justice Souter, in his opinion in *Krishna*, felt that the Port Authority's solicitation regulations did *not* leave open ample alternative channels of communication *even* for the affluent International Society for Krishna Consciousness:

A distribution of preaddressed envelopes is unlikely to be much of an alternative. The practical reality of the regulation, which this Court can never ignore, is that it shuts off a uniquely powerful avenue of communication for organizations like the International Society for Krishna Consciousness, and may, in effect, completely prohibit unpopular and poorly funded groups from receiving funds in response to protected solicitation.

Id. at 2727 (Souter, J., concurring in part and dissenting in part).

ity's "flat ban on the distribution or sale of printed material must . . . fall in its entirety."³⁹⁵ Limiting beggars to soliciting by pre-addressed, return envelopes would close the marketplace of ideas to the homeless and the indigent, leaving speech open only to those able to fund themselves.

If beggars are banned from soliciting in places where the public congregates, like airports, subways and bus stations, the homeless will have no chance to communicate their desperate messages. Chief Justice Rehnquist in *Barnes* observed that requiring dancers to don pasties and G-strings was a modest imposition and the minimum necessary "to achieve the state's purpose of protecting societal order and morality."³⁹⁶ The imposition did not deprive the dance of its message, it only made the message less graphic.³⁹⁷ A ban on begging is not a modest imposition on the beggars' message. Rather, it deprives beggars of the opportunity to deliver their message, and it deprives some beggars of their only chance for survival.³⁹⁸

4. Anti-Begging Ordinances as Violating Due Process

Finally, if the Court finds that blanket bans on begging are unconstitutional regulations of the time, place and manner of the beggars' expressive activities, legislatures may respond by enacting new ordinances purporting to regulate only the beggars' objectionable conduct.³⁹⁹ In fact, many cities have passed ordinances regulating "aggressive" or "coercive" panhandling.⁴⁰⁰ The circuit court

³⁹⁵ *Id.* at 2723 (Kennedy, J., concurring). In reaching this conclusion, Justice Kennedy noted that a law that distinguishes between sales and distribution closes the marketplace of ideas to the less affluent, leaving speech as the preserve of those who can fund themselves. *Id.* at 2723-24.

³⁹⁶ *Barnes v. Glen Theatres*, 111 S. Ct. 2456, 2463 (1991).

³⁹⁷ *Id.*

³⁹⁸ In *Young*, the Court found that "what [was] ultimately at stake [was] nothing more than a limitation on the place where adult films may be exhibited." *Young v. American Mini Theatres*, 427 U.S. 50, 71 (1976). The Court should also find that what is at stake with a blanket ban on begging is not merely a limitation on the place where beggars can solicit. Rather, a complete ban on begging may deny the beggar any place to solicit and would keep the homeless, and the public problem they represent, out of sight and out of mind.

³⁹⁹ In fact, San Francisco's "Aggressive Panhandling" statute was enacted as a direct result of the district court's decision in *Blair*. See *Blair v. Shanahan*, 775 F. Supp. 1315 (N.D. Cal. 1991).

⁴⁰⁰ See, e.g., DALLAS, TEX., CITY CODE § 31-35 (1991) (prohibiting "solicitation by coercion," including "persist[ing] in a solicitation after the

in *Loper* gave an indication that such statutes might be found constitutional. The court commented that “both the organizational solicitor and the individual solicitor are prosecutable for conduct that oversteps the bounds of peaceful begging.”⁴⁰¹ However, even an anti-begging ordinance that merely attempts to regulate a beggar’s objectionable conduct may still be unconstitutionally void for vagueness under the Due Process Clause of the Fifth and Fourteenth Amendments.⁴⁰²

The void-for-vagueness test requires that a law give a person of ordinary intelligence the ability to understand what acts are prohibited, so that she may act accordingly, and that the law provide explicit standards to prevent “arbitrary and discriminatory enforcement.”⁴⁰³ In *Papachristou v. City of Jackson-*

person solicited has given a negative response” and “engag[ing] in conduct that would reasonably be construed as intended to compel or force a solicited person to accede to demands”); SAN FRANCISCO, CAL., MUN. CODE § 120-1 (1992) (making it “unlawful for any person on the streets, sidewalks, or other places open to the public . . . to harass or hound another person for the purpose of inducing that person to give money or other thing of value. . . . an individual . . . harasses or hounds another . . . when the solicitor closely follows the solicitee and requests money or other thing of value, after the solicitee has expressly or impliedly made it known to the solicitor that the solicitee does not want to give money or other thing of value to the solicitor”); SEATTLE, WASH., MUN. CODE § 12A-12-015 (1992) (prohibiting pedestrian interference by aggressively begging “with intent to intimidate another person into giving money or goods”); *see also* Knapp, *supra* note 42, at 408 n.15 (noting that Minneapolis (Minnesota) and Tulsa (Oklahoma) have similar statutes regulating begging); Roger Conner, *Aggressive Panhandling Laws: Do These Statutes Violate The Constitution? No: A Solution To Intimidation*, A.B.A. J., June 1993, at 41 (stating that prohibited conduct under recently enacted “[a]ggressive begging laws. . . include: following before, after, or during the course of asking for money; touching people or screaming at them while asking for money; accosting or blocking the passage of someone while asking for money; asking for money in a confined space such as a bank lobby or a subway tunnel; or asking for money in a clearly inappropriate, threatening or intimidating setting, such as in front of an automated teller machine”).

⁴⁰¹ *Loper v. New York City Police Dep’t*, 999 F.2d 699, 706 (2d Cir. 1993).

⁴⁰² The Due Process Clause of the Fifth Amendment to the United States Constitution provides, in pertinent part: “No person shall be . . . deprived of life, liberty, or property, without due process of law.” U.S. CONST. amend. V; *see also* Jordan Berns, Note, *Is There Something Suspicious About The Constitutionality Of Loitering Laws?*, 50 OHIO ST. L.J. 717 (1989).

⁴⁰³ *Grayned v. City of Rockford*, 408 U.S. 104, 108 (1972) (invalidating portion of ordinance prohibiting picketing but upholding portion prohibiting disruptive noise near school, noting that “vague laws may trap the innocent by not providing fair warning”); *see also* *Coates v. City of Cincinnati*, 402 U.S. 611,

ville,⁴⁰⁴ the Court found unconstitutional an imprecise anti-vagrancy law.⁴⁰⁵ The law at issue placed virtually “unfettered discretion” in the hands of the police because it permitted arrest on suspicion of past or future criminality.⁴⁰⁶ The Court explained that laws lacking standards to control the exercise of discretion are dangerous. They provide a convenient tool for “harsh and discriminatory enforcement by local prosecuting officials, against particular groups deemed to merit their displeasure.”⁴⁰⁷ The Court noted that a vague vagrancy or loitering law may disguise convictions that could not be obtained with the real, but undisclosed, grounds for arrest.⁴⁰⁸

Because of these concerns, the Court has called for a more stringent vagueness test when statutes threaten to inhibit the exercise of constitutionally protected rights, such as the right of free speech or of association.⁴⁰⁹ The doctrine applies with particular force when

614 (1971) (striking down criminal statute prohibiting conduct that was “annoying” to passersby, concluding that “[c]onduct that annoys some people does not annoy others,” thus defendant would have to guess what conduct is prohibited); *Lanzetta v. New Jersey*, 306 U.S. 451, 453 (1939) (overturning on vagueness grounds anti-gangster ordinance, defining gang as “two or more persons,” noting that “[n]o one may be required at peril of life, liberty or property to speculate as to the meaning of penal statutes. All are entitled to be informed as to what the State commands or forbids.”).

⁴⁰⁴ 405 U.S. 156 (1972).

⁴⁰⁵ *Papachristou*, 405 U.S. at 156-57 n.1 (citing JACKSONVILLE, FLA., CODE § 26-57 (1972) as providing that “[r]ogues and vagabonds, or dissolute persons who go about begging . . . shall be deemed vagrants”).

⁴⁰⁶ *Papachristou*, 405 U.S. at 164. The Court described such vagrancy laws as “useful to the police” because they function as “nets making easy the roundup of so-called undesirables” and rejected arguments that “vagrants” constitute probable criminals. *Id.* at 171. The Court also noted that the statute “makes criminal activities which by modern standards are normally innocent” making it difficult for people to recognize that their actions might be subject to criminal penalties. *Id.* at 163.

⁴⁰⁷ *Papachristou*, 405 U.S. at 170 (quoting *Thornhill v. Alabama*, 310 U.S. 88, 97-98 (1940) (overturning conviction of labor union president, based on Alabama statute prohibiting loitering and picketing, finding that regulation “sweeps within its ambit . . . activities that in ordinary circumstances constitute an exercise of freedom of speech . . . [and] readily lends itself to harsh and discriminatory enforcement by local prosecuting officials against particular groups deemed to merit their displeasure”)); *see also* *Goldman v. Knecht*, 295 F. Supp. 897, 906-07 (D. Colo. 1969).

⁴⁰⁸ *Papachristou*, 405 U.S. at 169.

⁴⁰⁹ *Village of Hoffman Estates v. Flipside*, 455 U.S. 489, 499 (1982) (upholding ordinance requiring business to obtain license for sale of items used with marijuana, but noting that “perhaps the most important factor

the challenged statute affects First Amendment rights. An unclear law regulating speech might deter an individual from engaging in speech or other protected expression.⁴¹⁰

The Court may find an imprecise ordinance that regulates beggars' conduct void for vagueness, either because the law does not permit ordinarily intelligent beggars to know what conduct is prohibited, or because it does not prevent compassion-fatigued police officers from arbitrarily enforcing the regulation against the homeless. In *Young*, the plaintiffs argued at the district court level that a state law banning loitering for the purpose of panhandling in Grand Central Terminal was a pretext for evicting the homeless and destitute from the terminal.⁴¹¹ In response, the New York Attorney General argued that the state law prohibited loitering for the purpose of begging, not begging itself.⁴¹²

In *Young*, Judge Sand found that the statute failed to define and give sufficient notice of the proscribed conduct, and therefore violated the Due Process Clause of the Constitution of the State of New York.⁴¹³ Judge Sand noted that a person could loiter and not beg, or beg and not loiter.⁴¹⁴ On appeal, however, the Second Circuit determined that the district court lacked jurisdiction to hear the loitering charge.⁴¹⁵

affecting the clarity that the Constitution demands of a law is whether it threatens to inhibit the exercise of constitutionally protected rights"); see also *Smith v. California*, 361 U.S. 147, 151 (1959) ("[S]tricter standards of permissible statutory vagueness may be applied to a statute having a potentially inhibiting effect on speech; a man may the less be required to act at his peril here, because the free dissemination of ideas may be the loser.").

⁴¹⁰ *Hoffman Estates*, 455 U.S. at 499.

⁴¹¹ *Young v. New York City Transit Auth.*, 729 F. Supp. 341, 349 (S.D.N.Y. 1990), *rev'd & vacated*, 903 F.2d 146 (2d Cir. 1990), *cert. denied*, 498 U.S. 984 (1990). The New York statute provided as follows: "A person is guilty of loitering when he . . . [l]oiterers, remains or wanders about in a public place for the purpose of begging." N.Y. PENAL LAW § 240.35(1) (McKinney 1989).

⁴¹² *Young*, 729 F. Supp. at 349-350.

⁴¹³ *Id.* at 350.

⁴¹⁴ *Id.*

⁴¹⁵ *Young*, 903 F.2d at 163. A vagueness claim was also raised against New York's anti-loitering statute in *Loper*. However, because that court found the law violated the First Amendment, it was "not necessary for the Court to address" the Fourteenth Amendment claim. *Loper v. New York City Police Dep't*, 802 F. Supp. 1029, 1037-39 (S.D.N.Y. 1992), *aff'd*, 999 F.2d 699 (2d Cir. 1993); see also *State ex rel. Williams v. City Court of Tucson*, 520 P.2d 1166, 1170 (Ariz. Ct. App. 1974) (rejecting vagueness and overbreadth challenge to statute similar to law in *Young*, holding that person of ordinary intelligence would understand that "begging" would refer "to the solicitation of money or

A similar constitutional challenge could be mounted against municipal ordinances that ban “solicitation by coercion” or “aggressive panhandling” because they fail to clearly define and give sufficient notice of the conduct proscribed, and thus violate beggars’ due process rights.⁴¹⁶ For example, Dallas’ coercive solicitation regulation prohibits “persist[ing] in a solicitation after the person has given a negative response”⁴¹⁷ and San Francisco’s “aggressive panhandling” law forbids “closely follow[ing] the solicitee and request[ing] money” after the solicitee has “expressly or impliedly made it known that” she does not want to give money.⁴¹⁸ Both the ordinances fail to clearly specify what conduct violates the regulation. Do beggars persist in a solicitation if they explain how or why the government has failed to assist them? Do they persist if they remember every parent’s admonition to say “please”? Do beggars “closely follow” a solicitee if they cross the street at the same corner? Or do beggars have to remain stationary until the solicitee is no longer in the vicinity?

The ordinances also fail to define precisely what action on the part of the solicitee would constitute a negative response or what would make it known that the solicitee does not want to give money. Do solicitees have to say “no” or shake their heads to give a negative response? Do solicitees “impliedly” say no simply by walking on? How are beggars to know if such solicitees are refusing to give money or if they simply did not see or hear the beggars’ requests?

The imprecision in both ordinances also allows virtually unfettered discretion for police in enforcing these laws. Regulations like those enacted by Dallas and San Francisco might well result “in a regime in which the poor and the unpopular are permitted to

other valuable consideration without giving consideration in return”); *State v. Hundley*, 142 S.E. 330, 332 (N.C. 1928) (upholding statute forbidding begging or solicitation of funds on streets or in public places without permit because governing body issuing permits did not have arbitrary power to discriminate among applicants).

⁴¹⁶ See Helen Hershkoff, *Aggressive Panhandling Laws—Do These Statutes Violate The Constitution? Yes: Silencing The Homeless*, A.B.A. J., June, 1993, at 40 (noting that anti-begging ordinances and aggressive panhandling regulations, “like loitering laws to which they are historically related,” raise serious due process concerns because intended to silence homeless).

⁴¹⁷ DALLAS, TEX., CITY CODE § 31-35, *supra* note 400.

⁴¹⁸ SAN FRANCISCO, CAL., MUN. CODE § 120-1, *supra* note 400.

'stand on a public sidewalk . . . only at the whim of any police officer,'” and thus would violate the Constitution.⁴¹⁹

CONCLUSION

This Article's in-depth analysis of begging's constitutionality leads to the conclusion that a beggar's legal life is much like her everyday life — a struggle for survival at every turn. The Court's complicated First Amendment law has created a jurisprudential quicksand that may sink the already floundering homeless beggar into constitutional oblivion. A beggar's success in winning one part of a constitutional challenge to an anti-begging ordinance can be trumped by losing a later point.

Although the Court would likely extend its expansion of protected speech in cases like *Barnes, R.A.V.*, and *Discovery Network*, to protect beggars' expressive activities, this issue has not yet been decided in beggars' favor. However, if the Court ultimately decides that beggars' speech is protected, it may be a hollow victory. The Court's apparent deference to the government's ability to regulate speech in public places in *Krishna* would foreclose beggars from exercising their First Amendment rights in many places where they could reach people who might respond to their pleas.

Similarly, beggars may successfully challenge an anti-begging ordinance as a content-based or viewpoint-based regulation of individual solicitation. However, that victory would be short-lived if the constitutional quagmire created by the *R.A.V.* decision is extended to its logical conclusion. Under that decision, a legislature can cure a content-based ordinance's constitutional flaw by passing a new regulation prohibiting all forms of solicitation. Not only would the beggars' voices remain silenced by such an ordinance, but so would

⁴¹⁹ *Papachristou v. City of Jacksonville*, 405 U.S. 156, 170 (1972) (quoting *Shuttleworth v. Birmingham*, 382 U.S. 87, 90 (1965) (overturning defendant's conviction under anti-loitering statute that “literally read . . . says that a person may stand on a public sidewalk in Birmingham only at the whim of any police officer. . . . The constitutional vice of so broad a provision needs no demonstration”)); *see also* *Kolender v. Lawson*, 461 U.S. 352, 357-8 (1983) (citing *Smith v. Goguen*, 415 U.S. 566, 574 (1974) (overturning defendant's conviction for wearing American flag sewn to seat of trousers because statute failed to “draw reasonably clear lines between the kinds of nonceremonial treatment that are criminal and those that are not”)); *Grayned v. City of Rockford*, 408 U.S. 107, 108-09 (1971) (explaining that vague law “impermissibly delegates basic policy matters to policemen, judges, and juries for resolution on an *ad hoc* and subjective basis, with the attendant dangers of arbitrary and discriminatory application”).

the voices of others who solicit on behalf of beggars and similar disadvantaged groups.

Beggars might be able to avoid this result by successfully challenging a blanket ban on solicitation as a prior restraint or as an unconstitutional regulation of the time, place, and manner of beggars' protected expression. However, the beggars' success might be negated by the enactment of a statute purporting to regulate only the beggars' objectionable conduct, but drafted broadly enough that compassion-fatigued authorities could enforce the ordinance against the homeless. The homeless beggars' future battles will likely challenge such aggressive panhandling statutes as unconstitutional violations of due process.

Thus, the Court's future interpretations of the First Amendment will have far-reaching, and perhaps devastating, consequences for the homeless. A compassionate judiciary may represent the last chance for the survival of America's homeless citizens as well as for other impoverished and subordinated groups. Unfortunately, even the last bastion of hope for the indigent, the Supreme Court, may be falling victim to public opinion and compassion fatigue. Legal experts see an emerging emphasis on the needs of majorities rather than the rights of minorities, and a growing deference to Congress, state governments and state courts.⁴²⁰ With the departure of liberal Justice Thurgood Marshall, and the appointment of Justice Clarence Thomas, the Court appeared to have lost the lone dissenting voice to champion the cause of the poor. As one legal commentator wrote at the time, "the present lineup on the Supreme Court, it is widely agreed, will not engage in any ground-breaking discovery of a governmental right to individual support."⁴²¹ This dire prediction may, however, be affected by the retirement of Justice Byron White, which gave President Clinton his first chance to appoint more liberal Justices to the Court. Bruce Fein, a conservative Court commentator, opined that if President Clinton appointed a Justice with leadership abilities, "that person may be able to forge coalitions with the Court's centrists, [leading to] more liberal [decisions] on such issues as abortion, homosexual rights, affirmative action and the First Amendment."⁴²² Legal experts anticipate that Justice

⁴²⁰ Epstein, *supra* note 214, at 6A.

⁴²¹ Presser, *supra* note 24, at 60.

⁴²² Henry J. Reske, "Pragmatic" White Retires, A.B.A. J., May 1993, at 16.

Ruth Bader Ginsburg, who has filled Justice White's position, will provide this leadership.⁴²³

Unfortunately, even the most empathetic judiciary cannot solve the problems of urban poverty and homelessness. The Second Circuit in *Young* opined that "it is not the role of this court to resolve all the problems of the homeless, as sympathetic as we may be."⁴²⁴ Douglas Lasdon, Executive Director of the Legal Action Center for the Homeless, who brought the *Young* action on behalf of two homeless men and a class of indigents, commented that "[i]t's hard to get real excited about winning the right to beg. Silencing poor people will not solve hunger or homelessness. It's been our hope that the public will focus their attention on the reason people beg."⁴²⁵

The sanctioning of compassion fatigue should not be condoned. As District Court Judge Sweet noted in his *Loper* opinion, "[i]f some portion of society is offended, the answer is not in criminalizing those people . . . but addressing the root cause of their existence. The root cause is not served by removing them from sight, however; society is then just able to pretend they do not exist a little longer."⁴²⁶ Until society can resolve the problems of homelessness, the judiciary should be careful not to banish those whose very presence indicates the need to address these problems. The First Amendment must protect against compassion fatigue or any other force that attempts to silence the voice of the destitute and lead the homeless to become permanent constitutional castaways.

⁴²³ See, e.g., *Top Court Moving To Middle Ground*, S.J. MERCURY NEWS, June 28, 1993, at 1E (quoting Georgetown University Law Professor David Cole ("The effect of White's replacement [by Ginsburg] is the further solidification of the center.")).

⁴²⁴ *Young v. New York City Transit Auth.*, 903 F.2d 146, 156-57 (2d Cir. 1990), cert. denied, 498 U.S. 984 (1990).

⁴²⁵ Jason DeParle, *Subway Panhandlers See Little From Legal Victory*, N.Y. TIMES, Jan. 29, 1990, at B1.

⁴²⁶ *Loper v. New York City Police Dep't*, 802 F. Supp. 1029, 1046 (S.D.N.Y. 1992), aff'd, 999 F.2d 699 (2d Cir. 1993).

