BROTHER, CAN YOU SPARE A DIME?: THE PANHANDLER'S FIRST AMENDMENT RIGHT TO BEG

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I. INTRODUCTION

A ride on a New York Metropolitan Transit Authority Shuttle subway train traveling between Grand Central Station and Times Square may reveal a poster with the following heading: "Panhandling on the subway is illegal. No matter what you think. Give to the charity of your choice, but not on the subway."[1] Beneath this heading, the poster bears the following thoughts:

> Uh oh, come on, not me, not me. Oh pleeeeze don't come stand in front of me. Asking for money, great. Now the whole car's staring. What do I do? What do I do?? I know. I'll pretend I'm reading my book. Look. I feel bad. I really do. But hey, it's my money. And how do I know what your going to spend it on anyway? I don't. Sorry. No money from me.[2]

The poster has been displayed following a Second Circuit decision[3] upholding a New York statute making panhandling illegal in New York City subways.[4]

The number of homeless individuals has increased dramatically in recent years.[5] One such individual is Robert E.[6] Robert has lived on the New

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[1]Metropolitan Transit Auth. (1994).

[2]*Id.*

[3]Young v. New York City Transit Auth., 903 F.2d 146 (2d Cir. 1990).

[4]N.Y. PENAL LAW § 240.35 (McKinney 1993). The statute at issue in *Young* again was upheld by the Criminal Court in New York in People v. Schrader, Civ.A.Nos. 94N020237, 94-528, 1994 WL 580206 (N.Y. Crim. Ct. Sept. 9, 1994). For a more detailed discussion of *Schrader*, see *infra* notes 75-80 and accompanying text.

[5]Clark v. Community for Creative Nonviolence, 468 U.S. 288, 304 n.4 (1984) (Marshall, J., dissenting) ("Estimates on the number of homeless persons in the United States range from two to three million."); Ellen Perlman, *Down on Begging; Cities Try to Tame Pushy Panhandlers,* CRANE COMMUNICATIONS, INC., Oct. 10, 1993, at 3 ("The number of down-on-their-luck people begging for money, harassing pedestrians and setting

York City streets for almost four years, and his only source of income is the change he receives from pedestrians who are traveling on the streets and subway platforms.[7] On an average day, Robert may collect between seven or eight dollars. When asked whether he felt comforted that the New York City ordinance against panhandling[8] in public places, as opposed to non-public places like subways, had been held unconstitutional,[9] Robert answered that he did not know a law existed prohibiting begging.[10] Robert added: "[i]t makes no difference to me if [panhandling] is against the law, I need to ask people for money in order to survive."[11]

It has been noted that the general public increasingly has become weary of panhandlers like Robert E. and often feel harassed and threatened by such

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up shop on sidewalks has escalated in many cities in recent years."); Gibbons, *Begging: To Give or Not to Give*, TIME, INC., Sept. 5, 1988, at 71 ("No one even knows how many beggars there are, though estimates run as high as 5,000 in New York City, 1,500 in Chicago.").

[6]Robert is a homeless person who panhandles and lives in midtown Manhattan. Interview with Robert E., homeless person, in New York, NY (March 27, 1994). Robert is a white male, approximately 42 years old, and walks with a slight swagger. *Id.* Robert was interviewed in late March 1994 in front of a subway terminal off Eighth Avenue, Manhattan. *Id.* Most of New York City's homeless are single men and women who feel threatened, ashamed, and angered at the general public because of their plight. *News Forum with Gabe Pressman: Homeless* (NBC television broadcast, Nov. 26, 1993).

[7]Interview with Robert E., homeless person, in New York, NY (March 27, 1994).

[8]Panhandling has been defined as follows: "to stop people on the street and ask for money often telling a hard-luck story," "to accost on the street and beg from," and "to get (as money) by panhandling." Blair v. Shanahan, 795 F. Supp. 309, 310 n.1 (N.D. Cal. 1992) (quoting WEBSTER'S THIRD NEW INTERNATIONAL UNABRIDGED DICTIONARY 1630 (1971)).

[9]Loper v. New York City Police Dep't, 999 F.2d 699 (2d Cir. 1993) (invalidating a New York penal law rendering it unlawful to loiter, remain, or wander about in a public place for the purpose of begging, because it violated the First Amendment).

[10]*See It Begs the Point*, NEWSDAY, INC. (city ed.), Oct. 6, 1992, at 38. The ignorance regarding the anti-panhandling statute does not end with the potential perpetrators, but extends to law enforcement officers as well. *Id. Newsday* stated that the federal court ruling which called begging a form of free speech that is protected under the First Amendment would have a symbolic effect. *Id.* The article further noted that police officers rarely enforced a state's obscure anti-begging statute and that most did not know there was such a law. *Id.*

[11]*See supra* note 6 for interview with Robert E.

panhandlers.[12] Over thirty-five states and many municipalities have enacted statutes prohibiting begging in public places.[13] These prohibitions imply that

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[12]Dale Fuchs, *Harassment or Survival*, NEWSDAY, INC. (city ed.), Oct. 2, 1992, at 6. For example, Kathy Elturk, age 24, of Queens, New York said that "when [panhandlers] come up to you, you feel like if you don't talk to this person, give them money, they're going to physically harm you." *Id.* Additionally, it has been contended that many people who panhandle tend to frighten women with small children. *Id.*

The New York City Police asserted that residents are intimidated and local businesses suffer accordingly when beggars are present. Loper v. New York City Police Dep't, 999 F.2d 699, 701 (2d Cir. 1993). The police further noted that beggars tend to congregate in front of banks, bus stops, automated teller machines, and parking lots and frequently engage in conduct that can be described as "intimidating" and "coercive." *Id.* Moreover, the New York City Police have reported that panhandlers follow and threaten people if they do not give the panhandler money. *Id.*

[13]Approximately thirty-five states and more than a dozen cities have enacted panhandling laws. Perlman, *supra* note 5, at 3. *See, e.g.*, ALA. CODE § 13A-11-9(a)(1) (1975) ("A person commits the crime of loitering if he: . . . [l]oiters, remains or wanders about in a public place for the purpose of loitering . . . ."); ARIZ. REV. STAT. ANN. § 13-2905(A)(3) (1993) ("A person commits loitering if such person intentionally: . . . [i]s present in a public place to beg, unless specifically authorized by law."); ARK. CODE ANN. § 5-71-213 (Michie 1987) ("A person commits the offense of loitering if he lingers or remains . . . [i]n a public place or on the premises of another for the purpose of begging . . . ."); CAL. PENAL CODE § 647(c) (West 1992) ("Every person who commits any of the following acts is guilty of disorderly conduct, a misdemeanor: . . . [w]ho accosts other persons in any public place or in any place open to the public for the purpose of begging or soliciting alms. . . ."); COLO. REV. STAT. § 18-9-112(2)(a) (1993) ("A person commits a class one petty offense if he: [l]oiters for the purpose of begging."); CONN. GEN. STAT. ANN. § 53-336 (West 1993) ("All transient persons who rove from place to place begging . . . shall be deemed tramps . . . ."); DEL. CODE. ANN. tit. 11, § 1321(4) (1992) ("A person is guilty of loitering when: . . . [h]e loiters, remains or wanders about in a public place for the purpose of begging . . . ."); D.C. CODE. ANN. § 22-3302(6) (1993) ("The following classes of persons shall be deemed vagrants in the District of Columbia: . . . [a]ny person wandering abroad and begging . . . ."); KAN. STAT. ANN. § 21-4108(e) (1992) ("Vagrancy is . . . [d]eriving support in whole or in part from begging."); MASS. GEN. LAWS ANN. ch. 272, §§ 63, 66 (West 1992) ("Whoever . . . roves about from place to place begging . . . shall be prima facie evidence that such person is a tramp."); MICH. COMP. LAWS. § 161(1)(h) (West 1993) ("A person is a disorderly person if . . . [a] person [is] found begging in a public place . . . ."); MINN. STAT. ANN. § 609.725(4) (West 1992) ("Any of the following are vagrants and are guilty of a misdemeanor: . . . [a] person who derives support in whole or in part from begging . . . ."); MISS. CODE ANN. §§ 97-35-29, 37 (1991) ("Any male person over sixteen years of age . . . who shall go about from place to place begging . . . shall be held to be a tramp."); NEV. REV. STAT. ANN. § 207.030(1)(d) (1991) (A vagrant is "[e]very person who . . . [a]ccosts other persons in any public place or in any place open to the public for the purpose of begging or soliciting alms . . . ."); N.Y. PENAL LAW § 240.35 (McKinney 1992) (same); WISC. STAT. ANN. § 947.02 (West 1993) ("Any of the

begging is not a protected form of free speech guaranteed by the First Amendment.[14] Constitutional challenges to these statutes, however, have been sparse for several reasons. First, the poor and indigent have limited, if any, resources to bring such a challenge.[15] Second, police officers typically do not arrest panhandlers but, instead, use the statutes as authority to disperse the panhandlers.[16] Finally, when these types of claims actually are adjudicated, courts often dismiss the suit without ever examining the First Amendment issue.[17]

Given the nature of this social dilemma,[18] it is important to determine

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following are vagrants . . . [a] person known to be a professional gambler or known as a frequenter of gambling places or who derives part of his support from begging . . . ."). Several other states have authorized municipalities to enact ordinances to prevent begging. *See, e.g.*, ILL. ANN. STAT. ch.65, § 11-5-4 (Smith-Hurd 1993) ("The corporate authorities of each municipality may prevent vagrancy, begging, and prostitution."); N.C. GEN. STAT. § 153A-126 (1992) ("A county may by ordinance prohibit or regulate begging or otherwise canvassing the public for contributions for the private benefit of the solicitor or any other person."); S.D. CODIFIED LAWS ANN. § 9-29-10 (1993) ("A municipality may regulate the practice of begging.").

[14]The First Amendment provides that "Congress shall make no law . . . abridging the freedom of speech . . . ." U.S. CONST. amend. I. For a full discussion of the First Amendment right to freedom of speech as it affects beggars, see *infra* notes 24-113 and accompanying text.

[15]C.C.B. v. State of Florida, 459 So.2d 47, 48 (Fla. Dist. Ct. App. 1984) ("We find a dearth of cases in our state to give us guidance and would opine that such scarcity is due to this particular segment of society not having the ability or wherewithal to pursue the challenge.").

[16]Paul Moses & Michael Powell, *Begging Ban Out; Law Against Loitering is Overturned*, NEWSDAY, INC., Oct. 2, 1992, at 6 ("Although police arrest just a handful of beggars each year — only six arrests for "peaceful" begging have been recorded since 1986 . . . countless more [beggars] are told to move along, or are threatened with arrest when their behavior is deemed unruly."); Loper v. New York City Police Dep't, 999 F.2d 699, 701 (1993) ("Although it is conceded that very few arrests are made and very few summonses are issued for begging alone, officers do make frequent use of the statute as authority to order beggars to move on.").

[17]*See* City of Seattle v. Webster, 802 P.2d 1333 (1990) (upholding an ordinance against panhandling without analyzing the First Amendment rights of beggars because the court limited its examination to overbreadth, vagueness, and equal protection challenges.).

[18]While the exact number of homeless in New York City is not available, it is estimated that over 86,000 homeless will pass through homeless shelters in New York. *News Forum with Gabe Pressman: Homeless* (NBC television broadcast, Nov. 26, 1993).

whether begging should be afforded First Amendment protection and, if so, whether competing interests would outweigh such First Amendment protection. Part II of this Comment will examine whether panhandling is a protected form of free speech by analyzing decisions that have addressed the issue, most notably *Loper* and *Young*, and analogous Supreme Court cases.[19] Further, this section will propose that a court must conclude that panhandling is speech warranting First Amendment protection.[20] Part III will focus upon the level of judicial scrutiny which should be applied to restrictions on panhandling and will determine that the right to beg must be balanced against competing governmental interests in specific places. Further, this section will apply the appropriate level of scrutiny to cases adjudicating panhandling statutes. Ultimately, this Comment will suggest that governmental interests may outweigh the beggar's right to expression in non-public fora.

II. BEGGING AS A PROTECTED FORM OF EXPRESSION

To be afforded First Amendment protection, begging[21] first must be

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Further, the homeless problem in New York has increased dramatically in recent years. *Id.*

[19]*See infra* notes 81-98 and accompanying text for full analysis of Supreme Court cases.

[20]*See infra* notes 99-113 and accompanying text.

[21]For purposes of this Comment, the term "begging" does not include aggressive behavior that may amount to breach of the peace or disorderly conduct. *See, e.g.*, SEATTLE, WASH., MUNICIPAL CODE § 12A.12.015 (1993) (defining aggressive begging as: "to beg with the intent to intimidate another person into giving money or goods"). Rather, the term will be limited to passive behavior, e.g., holding out a cup or a hand.

The distinction between passive and aggressive behavior, however, is sometimes difficult to determine. For example, in National Anti-Drug Coalition, Inc. v. Bolger, 737 F.2d 717 (7th Cir. 1984), the court quoted that:

> The solicitation of alms and contributions is an inherently more aggressive form of conduct . . . than is the expression of ideas.
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> Since the act of soliciting alms or contributions usually has as it[s] objective an immediate act of charity, it has the potentiality for evoking highly personal and subjective reactions. Reflection usually is not encouraged and the persons solicited often must make a hasty decision whether to share his resources with an unfamiliar organization while under the eager gaze of the solicitor.

classified as speech. Courts addressing this issue essentially can be divided into two groups. Some courts have refused to classify begging as speech, determining that begging is more *conduct* than speech and, therefore, lacking expression.[22] Conversely, other courts have categorized panhandling as speech because it conveys a *message* worthy of First Amendment protection.[23]

A. CASES SPECIFICALLY REVIEWING THE FIRST AMENDMENT RIGHTS OF PANHANDLERS TO SOLICIT FUNDS FROM THE PUBLIC

Although the Supreme Court of the United States has not addressed the First Amendment rights of the individual beggar or panhandler who solicits funds from the public, the Court of Appeals for the Second Circuit recently has considered this issue.[24] In the first of two cases, *Young v. New York City Transit Authority*,[25] the Second Circuit reviewed an organization's challenge on the constitutionality[26] of several New York City rules and regulations that prohibited begging and panhandling in the subway, but permitted solicitation for charitable, religious, or political causes in

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Id. at 726 (quoting 43 Fed. Reg. 38,824 (1978)) (emphasis omitted). Nonetheless, this Comment will assume that all speech discussed herein is passive speech.

[22]*See, e.g.*, Young v. New York City Transit Auth., 903 F.2d 146 (2d Cir. 1990) (noting that begging did not contain sufficient expression to warrant First Amendment protection); Ulmer v. Municipal Court for the Oakland Piedmont Judicial Dist., 127 Cal. Rptr. 445 (Cal. Ct. App. 1976) (finding that begging is not speech because it is devoid of information and opinion).

[23]*See, e.g.*, Loper v. New York City Police Dep't, 999 F.2d 699 (2d Cir. 1993) (concluding that begging implicates either expressive conduct or a communicative activity); Roulette v. City of Seattle, 850 F. Supp. 1442 (W.D. Wash. 1994) (finding that begging was entitled to First Amendment protection relying on Supreme Court charitable solicitation cases and other similar court decisions).

[24]*See* Loper v. New York City Police Dep't, 999 F.2d 699 (2d Cir. 1993); Young v. New York City Transit Auth., 903 F.2d 146 (2d Cir. 1990).

[25]903 F.2d 146 (2d Cir. 1990).

[26]In particular, the organization representing homeless people asserted that the prohibition against begging and panhandling in the New York City subway system violated the beggar's right to free speech provided under the First Amendment of the United States Constitution. *Id.* at 147.

designated areas of the subway system.[27] The Transit Authority argued that panhandling was not expression warranting First Amendment protection.[28]

Contrary to the district court,[29] the Second Circuit held that begging and panhandling, whether with or without words, is devoid of any particular message or emotion and, therefore, is unprotected under the First Amendment.[30] The court opined that "in determining 'whether particular conduct possesses sufficient communicative elements to bring the First Amendment into play,' it would examine 'whether [a]n intent to convey a particularized message was present, and [whether] the likelihood was great that the message would be understood by those who viewed it."[31] Under this analysis, the Second Circuit focused upon the conduct of begging,

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[27]*Id.* (citing N.Y. COMP. CODES R. & REGS. tit. 21 § 1050.6 (1989); N.Y. PENAL LAW § 240.35 (McKinney 1993)). The regulation at issue in the case stipulated that no person may "loiter[], remain[] or wander[] about in a public place for the purpose of begging." N.Y. PENAL LAW § 240.35(1) (McKinney 1993). The New York City Transit Authority created the regulation to facilitate safe, efficient, and reliable subway transportation. *Young*, 903 F.2d at 149.

[28]*Id.* at 147. The Transit Authority further contended that the subway was not a designated public forum, and that the Authority's regulation was a reasonable time, place, and manner restriction. *Id.*

[29]The District Court for the Southern District of New York concluded that begging is a type of speech which must be accorded the full protection of the First Amendment. Young v. New York City Transit Auth., 729 F. Supp. 341 (S.D.N.Y. 1990). The district court determined that panhandlers convey a particular message, asserting that a beggar reminds pedestrians that some people live in poverty, lack the essentials for survival, and are in need. *Id.* at 352. Additionally, the court concluded that begging for oneself was no different than solicitations made by organized charities, which have been upheld by the Supreme Court of the United States. *Id.* at 353.

[30]*Young*, 903 F.2d at 154. *Cf.* Cohen v. California, 403 U.S. 15, 26 (1971) (concluding that expression "conveys not only ideas capable of relatively precise, detached explication, but otherwise inexpressible emotions as well").

[31]*Young*, 903 F.2d at 153 (quoting Spence v. Washington, 418 U.S. 405 (1974)). In *Spence*, the Supreme Court adopted a two-part test to determine whether expressive conduct is protected by the First Amendment. *Spence*, 418 U.S. at 410. The Court first asked whether the actor intended to convey a particularized message. *Id.* at 410-11. Next, the Court queried whether a bystander would likely understand the message conveyed. *Id.* Both parts of the Court's test, nonetheless, examine the fundamental purposes of the First Amendment: "(1) individual self-fulfillment; (2) the advancement of knowledge and the discovery of truth; (3) participation in decision-making by all members of society; and (4) maintenance of the proper balance between stability and change." *Id.*

rather than the speech itself.[32] The Second Circuit determined that begging failed to convey any particular message other than asking for money,[33] incidental speech that is not sufficient expression to warrant First Amendment protection.[34]

In 1993, however, the Second Circuit in *Loper v. New York City Police Department*[35] held that begging implicates expressive conduct or communicative activity, entitling it to First Amendment protection.[36] Therein, the court reviewed whether a statute prohibiting begging in a public place was constitutional.[37] Although it found that begging may not always involve the transmission of a particularized social or political message, the court explained that begging usually contains some communication of that nature.[38] The court specifically noted that begging indicated a need for survival and that the presence of the individual beggar indicated a need for support and assistance.[39] Further, the court determined that it could not

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[32]*Young*, 903 F.2d at 154. The court relied upon common sense in determining that begging was more conduct than speech. *Id.* The court quoted the language of then Circuit Judge Scalia, stating "[t]hat this should seem a bold assertion is a commentary upon how far judicial and scholarly discussion of this basic constitutional guarantee has strayed from common and common-sense understanding." *Id.* at 153 (citing Community for Creative Non-Violence v. Watt, 703 F.2d 586, 622 (D.C.Cir. 1983)). *See also Watt*, 703 F.2d at 622 (rejecting the notion that sleeping in public parks is expressive conduct about the plight of the homeless) (Scalia, J., dissenting), *rev'd sub nom.* Clark v. Community for Creative Non-Violence, 468 U.S. 288 (1984).

[33]*Id.* at 154. The court noted that the *only* message begging conveys is that beggars want money from those they approach.

[34]*Id.* ("[P]assengers generally understand this generic message [but] . . . it falls far outside the scope of protected speech under the First Amendment.").

[35]Loper v. New York City Police Dep't, 999 F.2d 699 (2d Cir. 1993).

[36]*Id.* at 704 (citing Anthony J. Rose, Note, *The Beggar's Free Speech Claim*, 65 IND. L.J. 191, 200-02 (1989)).

[37]*Id.* at 701. The statute provided that: "[a] person is guilty of loitering when he: 1. Loiters, remains or wanders about in a public place for the purpose of begging . . . ." N.Y. PENAL LAW § 240.35(1) (McKinney 1989).

[38]*Id.*

[39]*Id.* at 704. The court espoused that:

distinguish between the message conveyed by charitable organizations and that of the individual beggar.[40] Recognizing that solicitations by both charitable organizations and beggars involve some form of communicative activity, the court concluded that begging was a potential communication because charitable organizations assert the needs of others and beggars assert their personal needs.[41]

The Second Circuit distinguished its earlier decision in *Young*, which upheld a regulation prohibiting begging in the subways.[42] The *Loper* court opined that it did not base its decision in *Young* on the distinctions between speech and conduct but, instead, rested its decision on the fact that begging in the confines of the subway disrupted and startled passengers and created the risk of serious accident, something that could not be tolerated in the subway system.[43]

Other district courts also have considered similar statutes. For example, the District Court for the Western District of Washington recently addressed

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> Begging frequently is accompanied by speech indicating the need for food, shelter, clothing, medical care, or transportation. Even without particularized speech, however, the presence of an unkempt and disheveled person holding out his or her hand or a cup to receive donations itself conveys a message of need for support and assistance.

Id.

[40]*Id.* Asserting much the same argument the district court asserted in *Young*, *cf. supra* note 29, the Second Circuit in *Loper* asserted: "we see little difference between those who solicit for organized charities and those who solicit for themselves in regard to the message conveyed. The former are communicating the needs of others while the latter are communicating their personal needs. Both solicit the charity of others." *Loper*, 999 F.2d at 704.

[41]*Id.* The court, however, restricted its analysis to the facts of the case because it determined that the ordinance restricted speech in a public forum. *Id.* *See infra* note 159 and accompanying text for a further analysis of fora.

[42]*See supra* notes 185-90 and accompanying text for discussion of *Young*.

[43]*Loper*, 999 F.2d at 702. The *Loper* court emphasized that the subway was fast moving and crowded. *Id.*

the constitutionality of Seattle's "aggressive begging" statute[44] in *Roulette v. City of Seattle.*[45] The court asserted that the statute did not prohibit the passive request for money, but rather, prohibited the physical intimidation of pedestrians.[46] Relying on Supreme Court charitable solicitation cases[47] and other similar decisions, the court found that peaceful begging was entitled to some First Amendment protection.[48]

Similarly, the District Court for the Northern District of California addressed the First Amendment rights of an individual who solicited for himself in *Blair v. Shanahan.*[49] In *Blair*, a former panhandler sought to

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[44]Roulette v. City of Seattle, 850 F. Supp. 1442, 1444 (W.D. Wash. 1994) (defining aggressive begging as: "to beg with the intent to intimidate another person into giving money or goods" (citing SEATTLE, WASH., MUNICIPAL CODE § 12A.12.015 (1993))).

[45]850 F. Supp. 1442 (W.D. Wash. 1994).

[46]*Id.* at 1444. The statute also defines the word beg as: "to ask for money or goods as charity, whether by words, bodily gestures, signs or other means." *Id.* at 1445 (quoting SEATTLE, WASH., MUNICIPAL CODE § 12A.12.015(A)(3)). The statute prohibited aggressive begging which was defined as "to beg with the intent to intimidate another person into giving money or goods." *Id.* (quoting SEATTLE, WASH., MUNICIPAL CODE § 12A.12.015(A)(1)).

[47]*Id.* at 1451 (citing Schaumburg v. Citizens for a Better Environment, 444 U.S. 620 (1980) (holding that solicitation to pay or contribute money was within First Amendment protection)). *See infra* notes 81-98 and accompanying text for a discussion of Supreme Court cases analyzing the right to charitable solicitation.

[48]*Roulette*, 850 F. Supp. at 1451 (citing Loper v. New York City Police Dep't, 999 F.2d 699 (1993) (establishing that begging constitutes communicative activity); Blair v. Shanahan, 775 F. Supp. 1315 (N.D. Cal. 1991) (recognizing that begging constitutes protected speech)).

The principal challenges to the ordinance which the court addressed were based on overbreadth and vagueness. *Roulette*, 850 F. Supp. at 1451. The plaintiffs contended that the language of the statute was overbroad because it regulated activities which constituted an exercise of freedom of speech. *Id.* at 1452. The court held that the statute was not overbroad because it limited its construction to prohibit only those threats which would make an ordinary person fearful of harm. *Id.* at 1453. Moreover, the court found that in limiting the construction of the statute any possibility of vagueness was eliminated. *Id.*

Ultimately, the court held that to the extent the statute prohibited only threats that would make a reasonable person fearful of harm it was neither overbroad nor vague. *Id.*

[49]775 F. Supp. 1315 (N.D. Cal. 1991).

declare a California begging statute[50] unconstitutional.[51] In determining that begging was entitled to constitutional protection, the court first recognized that the speech interest in begging for oneself is indistinguishable from those interests inherent in solicitations by charitable organizations.[52] The court listed several messages conveyed by panhandlers.[53] First, the court stated that panhandling clearly conveys information regarding the beggar's plight.[54] Second, the court asserted that "begging gives the speaker an opportunity to spread his views and ideas on . . . the way our society treats its poor and disenfranchised."[55] Finally, the court contended that the beggar's communication can change the listener's view of his relationship with and obligations to the indigent.[56]

Next, the court emphasized that it was irrelevant that many beggars never actually convey information to their listeners.[57] The court noted that in

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[50]*Id.* at 1317. The statute provided in relevant part that anyone "[w]ho accosts other persons in any public place or in any place open to the public for the purpose of begging or soliciting alms" is guilty of a misdemeanor. CAL. PENAL CODE § 647(c) (West 1986).

[51]Additionally, Plaintiff brought a civil rights action seeking compensatory and punitive damages against the city, the police chief, and police officers for constitutional violations he allegedly suffered under the begging statute. *Blair*, 775 F. Supp. at 1318. Plaintiff alleged that his civil rights were violated when he was arrested five times by the San Francisco Police Department and charged with violating California Penal Code § 647(c). *Id.* The city moved for summary judgment on a number of underlying issues. *Id.* at 1317. The court ultimately granted the city's motion on the First Amendment and civil rights counts. *Id.* at 1328.

[52]*Id.* at 1322 (citing Schaumburg v. Citizens for a Better Env., 444 U.S. 620 (1980); Secretary of the State of Maryland v. Munson Co., 467 U.S. 947 (1984); Riley v. National Fed. of the Blind, Inc., 487 U.S. 781 (1988)). *See infra* notes 81-98 and accompanying text for discussion of Supreme Court charitable organization cases.

[53]*Blair*, 775 F. Supp. at 1323. The court expressly refused to be bound by the Second Circuit's holding in *Young* because that decision was not binding. *Id.*

[54]*Id.* at 1322.

[55]*Id.* at 1322-23.

[56]*Id.* at 1323. The Court specifically stated that "[b]egging does considerably more than 'propose a commercial transaction.' Like other charitable requests, begging appeals to the listener's sense of compassion or social injustice, rather than to his economic self-interest." *Id.* (quoting Hershkoff & Cohen, *Begging to Differ: The First Amendment and the Right to Beg*, 104 HARV. L. REV. 896, 908 (1991)).

[57]*Id.* at 1323.

most instances charitable solicitors,[58] while they better articulate their message than beggars,[59] still fail to educate, persuade, or enlighten their listeners.[60] In so concluding, the court espoused that the "First Amendment should not be limited to the articulate."[61] Additionally, the court found that a beggar's speech is not rendered unprotected simply because the beggar represents himself and keeps the money he receives.[62] The focus of the First Amendment's protection, the court concluded, depends upon the type of speech conveyed, not the organization promoting the message.[63] Accordingly, the court determined that begging was speech entitled to First Amendment protection.[64]

Several state courts have also addressed the First Amendment rights of an individual beggar who solicits for himself. For instance, in *Ulmer v.*

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[58]*See infra* note 81-98 and accompanying text for a full discussion of charitable organization cases.

[59]The court found that professional fund-raisers, whose speech is protected under the First Amendment, are similar to beggars because their primary motive is to exact money from their listeners. Blair v. Shanahan, 775 F. Supp. 1315, 1324 (N.D. Cal. 1991).

[60]*Id.*

[61]*Id.*

[62]*Id. See also* Riley v. National Federation of the Blind of N.C., Inc., 487 U.S. 781, 801 (1988) ("It 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."); Virginia State Bd. of Pharmacy v. Virginia Consumer Council, 425 U.S. 748, 761 (1976) (finding that speech is protected despite the fact that it is carried out for profit and that it may involve some form of solicitation to purchase, pay, or contribute money).

[63]*Blair*, 775 F. Supp. at 1323. The court compared this capacity of informing the public to that found in the AIDS context. *Id.* The court found 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." *Id.* at 1323 n.8.

This analysis also was applied by the Court in First Nat'l Bank of Boston v. Bellotti, 435 U.S. 765 (1978), where the Court held that the First Amendment protects a banking association's right to publicize its views on a referendum proposal. *Id.* at 784. The Court posited that the identity of the source of speech, whether a corporation, association, union, or individual, is irrelevant because the true worthiness of speech rests with its capacity for informing the public. *Id.* at 777.

[64]*Blair*, 775 F. Supp. at 1324.

Municipal Court for the Oakland Piedmont Judicial District,[65] the California Court of Appeals upheld a state penal statute that made it unlawful to accost another for the purpose of begging or soliciting alms.[66] The plaintiffs argued that the statute was unconstitutional because it was overbroad, or alternatively, vague.[67] In reviewing the legislative history of the statute, the court noted that the act's purpose was to prevent an individual from accosting others and that the statute was not intended to apply to blind or crippled persons standing or sitting on the sidewalk.[68] The court stated that "[b]egging and soliciting for alms do not necessarily involve the communication of information or opinion; therefore, approaching individuals for that purpose is not protected by the First Amendment."[69]

In *C.C.B. v. State of Florida*,[70] however, the Florida District Court of Appeals invalidated a Jacksonville, Florida ordinance that prohibited begging

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[65]127 Cal. Rptr. 445 (Cal. Ct. App. 1976).

[66]*Id.* at 446. Section 647 of the Code, enacted in 1961, states that one "[w]ho accosts other persons in any public place or in any place open to the public for the purpose of begging or soliciting alms" is guilty of disorderly conduct. CAL. PENAL CODE § 647 (West 1961).

[67]*Ulmer*, 127 Cal. Rptr. at 446-47.

[68]*Id.* at 447 (citing Appendix to the Journal of the Assembly, Reg. Sess. 1961, Vol. 2, 1959-61 Report of Assembly Interim Committee on Criminal Procedure at 12-13). The court's reference to legislative history suggests that if the statute were to prohibit all forms of begging, including solicitations from people sitting in wheelchairs or blind persons standing on the sidewalk, it would have likely held otherwise. *Id.*

[69]*Id.* The statute at issue in *Ulmer* again was challenged in People v. Zimmerman, 19 Cal. Rptr. 2d 486 (Cal. App. Dep't Super. Ct. 1993). In *Zimmerman*, the court refused to apply the California district court's rationale in *Blair*, which determined that begging was speech entitled to Constitutional protection. *Id.* at 490. Instead, the *Zimmerman* court elected to apply the court's reasoning in *Ulmer*. *Id.* at 491. The *Zimmerman* court held that the statute was not unconstitutional because it only proscribed conduct of an individual who begs, not the message that the individual conveys. *Id.* at 489. That some speech may be accompanied with the conduct, the court noted, did not place the activity within the reach of the First Amendment. *Id.* Additionally, the court found that solicitations by charitable organizations were distinguishable from begging because charitable solicitations communicate information, disseminate, and propagate views and ideas and advocate causes, while the object of begging is the transfer of money. *Id.* at 489-91.

[70]458 So.2d 47 (Fla. Dist. Ct. App. 1984).

in public places as violating the First Amendment.[71] In addressing Petitioner's assertion that the statute failed to precisely state standards preventing those activities which were protected by the First Amendment,[72] the court held that the total prohibition of begging was overbroad and hence, unconstitutional.[73] The court further explained that individuals using their own hands and voice for sustenance and welfare should be permitted to so do without government intrusion.[74]

More recently, in *People v. Schrader*,[75] the Criminal Court of the City of New York upheld the same New York City Transit Authority Rule at issue in *Young*.[76] In contrast to the Second Circuit holding in *Young*, however, the *Schrader* court determined that begging was speech entitled to Constitutional protection.[77] Essentially, the *Schrader* court agreed with the Second Circuit's reasoning in *Loper*,[78] noting that there was little difference between the rights of those who solicit for charitable organizations and those who solicit for themselves.[79] Accordingly, the *Schrader* court declared that "[n]o rational distinction can be made between the message involved,

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[71]*Id.* at 49. The ordinance provides that: "[i]t shall be unlawful . . . for anyone to beg or solicit alms in the streets or public places of the city or exhibit oneself for the purpose of begging or obtaining alms." *Id.* at 48 (quoting JACKSONVILLE, FLA., MUNICIPAL ORDINANCE § 330.105).

[72]*Id.* Respondent, the state of Florida, alleged that the regulatory scheme was not overbroad or in conflict with the Constitution. *Id.* Specifically, Respondent asserted that the statute, which provided that "no charitable organization shall solicit property or financial assistance without having first registered with the consumer affairs office and having obtained a permit," was not overbroad. *Id.* (citing JACKSONVILLE, FLA., MUNICIPAL ORDINANCE § 404.102).

[73]*Id.* at 49.

[74]*Id.* at 47. The court opined that because charity begins in the home, it is rational to permit the less fortunate in our society to apply self help. *Id.* at 48.

[75]Civ.A.Nos. 94N020237, 94-528, 1994 WL 580206 (N.Y.City Crim.Ct. Sept. 9, 1994)

[76]*Id.* at *9. *See supra* notes 25-34 and accompanying text for a full discussion of *Young*.

[77]*Schrader* at *3.

[78]*See supra* notes 35-43 and accompanying text for a full analysis of *Loper*.

[79]*Schrader* at *3.

whether the person standing on the corner says 'Help me, I'm homeless' or 'Help the homeless.'"[80]

B. THE SUPREME COURT'S CHARITABLE ORGANIZATION CASES

The Supreme Court of the United States has yet to examine whether begging is a form of speech entitled to First Amendment protection. The Court has, however, analyzed the analogous issue of whether representatives of organized charities are permitted to solicit donations. A notable case is *Schaumburg v. Citizens for a Better Environment*,[81] wherein the Court examined whether an ordinance that prohibited door-to-door or on-street solicitation of contributions by charitable organizations,[82] that do not allocate seventy-five percent of their receipts for "charitable purposes," violated the First Amendment.[83] The Court struck down the ordinance,

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[80]*Id.*

[81]444 U.S. 620 (1979). Justice White delivered the opinion of the Court and was joined by all the Justices except Justice Rehnquist, who filed a separate dissenting opinion. *Id.* at 639.

[82]Charitable organizations were defined in the Schaumburg Village Code as "[a]ny benevolent, philanthropic, patriotic, not-for-profit, or eleemosynary group, association or corporation, or such organization purporting to be such, which solicits and collects funds for charitable purposes." *Id.* at 623 n.2 (quoting SCHAUMBURG, ILL., VILLAGE CODE ch. 22, art. III, §§ 22-19).

Black's Law Dictionary has defined charitable organizations to include:

> Corporations, and any community chest, fund, or foundation, organized and operated exclusively for religious, charitable, scientific, testing for public safety, literary, or educational purposes, or to foster national or international amateur sports competition . . . or for the prevention of cruelty to children or animals, no part of the net earnings of which inures to the benefit of any private shareholder or individual . . . .

BLACK'S LAW DICTIONARY 234 (6th ed. 1990).

[83]*Schaumburg*, 444 U.S. at 625 (citing SCHAUMBURG, ILL., VILLAGE CODE ch. 22, art. III, §§ 22-1 to -24). Section 22-20(g) of the ordinance provided that an organization could not receive a permit to solicit funds unless it allocated seventy five percent of amounts received for "charitable purposes." *Id.* (citing SCHAUMBURG, ILL., VILLAGE CODE ch. 22, art. III, § 22-20(g)). Charitable purposes excluded: "(1) [s]alaries or commissions paid to solicitors; (2) [a]dministrative expenses of the organization, including but not limited to, salaries, attorney's fees, rents, telephone, advertising expenses, contributions to other organizations and persons, except as a charitable contribution and related expenses incurred as administrative or overhead items." *Id.* at 624 (quoting SCHAUMBURG, ILL., VILLAGE

determining that solicitations by charitable organizations, in fact, are worthy of First Amendment protection.[84] Specifically, the Court found that solicitations by charitable organizations warrant First Amendment protection when the organization's primary purpose is to provide services and funding to the indigent, needy, or other groups that deserve charity.[85] The Court opined that such charitable solicitation is usually intertwined with speech regarding views on economic, political, or social issues and, thus, is deserving of First Amendment protection.[86]

The Court more recently struck down similar statutes that attempted to regulate solicitations by charitable organizations in *Secretary of State of*

CODE ch. 22, art. III, § 22-20(g)).

[84]*Schaumburg*, 444 U.S. at 632. The Court also concluded that the statute was unconstitutional because it was overbroad. *Id.* at 634. The Court reasoned that the ordinance purported to prohibit a substantial category of charities and that the seventy-five percent rule could not be applied consistently with the First and Fourteenth Amendments. *Id.*

[85]*Id.*

[86]*Id.* In so concluding, the Court reasoned that:

> [C]haritable appeals for funds, on the street or door to door, involve a variety of speech interests — communication of information, the dissemination and propagation of views and ideas, and the advocacy of causes — that are within the protection of the First Amendment. Soliciting financial support is undoubtedly subject to reasonable regulation but the latter must be undertaken with due regard for the reality that solicitation is characteristically intertwined with informative and perhaps persuasive speech seeking support for particular causes or for particular views on economic, political, or social issues, and for the reality that without solicitation the flow of such information and advocacy would likely cease. Canvassers in such contexts are necessarily more than solicitors for money.

Id.

The Court recognized the Village of Schaumburg's concern in implementing the seventy-five percent rule to prevent fraud, but the Court nonetheless found that the goal could have been better served with a more narrowly tailored ordinance that did not interfere with the First Amendment rights of charitable organizations. *Id.* at 636.

Justice Rehnquist's dissenting opinion in *Schaumburg* did not contemplate whether charitable solicitations implicated speech. *Id.* at 639-45 (Rehnquist, J., dissenting). Instead, the Justice determined that the ordinance should have been upheld based on the difficulty in defining which groups in a community are charitable organizations and, determining the proper authority to examine that definition. *Id.* at 644 (Rehnquist, J., dissenting).

Maryland v. Munson,[87] and *Riley v. National Federation of the Blind*.[88] In *Munson*, the Court invalidated a Maryland statute[89] prohibiting a charitable organization, in connection with any fund-raising activity, from paying expenses of more than twenty-five percent of the total amount raised.[90] Despite a provision in the statute stating that the restriction may be waived if it would have a detrimental effect on the organization's fund-raising ability, the Court struck down the statute as unconstitutional because of the possible encroachment on free speech.[91] The Court explained that the simple possibility of a waiver did not save the statute because only "financial necessity," not the *desire* to spend money or disseminate *information* as part of the fund-raising activity, would be protected by execution of the waiver.[92] Stated simply, the Court found the statute to be indistinguishable from the one it previously struck down in *Schaumburg*.[93]

In *Riley*,[94] the Court invalidated a North Carolina Charitable Solicitations Act compelling fund-raisers to: (1) provide potential donors with information specifying the percentage of funds to be distributed to the

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[87]467 U.S. 947 (1984).

[88]487 U.S. 781 (1988).

[89]*Munson*, 467 U.S. at 950 n.1 (citing MD. CODE ANN. BUS. REG. § 103A et seq. (1984)). Section 103D provides, in relevant part: "(a) A charitable organization other than a charitable salvage organization may not pay or agree to pay as expenses in connection with any fund-raising activity a total amount in excess of [twenty-five percent] of the total gross income raised or received by reason of the fund-raising activity . . . ." *Munson*, 467 U.S. at 950 n.1 (quoting MD. CODE ANN. BUS. REG. § 103D (1984)).

[90]*Munson*, 467 U.S. at 950 n.2. Munson, a professional fund-raiser who regularly charged customers in excess of twenty-five percent of the gross amount raised, challenged the statute after one of its clients was threatened with prosecution by the Secretary of the State of Maryland for failing to comply with its provisions. *Id.* at 950-51.

[91]*Id.* at 968. In determining that the charitable solicitation implicated speech protected by the First Amendment, the Court quoted its earlier language in *Schaumburg*. *See supra* note 86.

[92]*Munson*, 467 U.S. at 966-67.

[93]*Id.* at 968. For a more detailed analysis of *Munson*, see Jeffrey T. Zachmann, Note, Secretary of State v. Joseph H. Munson Co.: *State Regulation of Charitable Fund-raising Costs*, 5 PACE L. REV. 489 (1985).

[94]487 U.S. 781 (1988).

charity,[95] (2) carry a license,[96] and (3) maintain a "reasonable fee" schedule.[97] Responding to a coalition of professional fund-raisers, charitable organizations, and potential donors that challenged the Act on First Amendment grounds, the Court, striking down the statute, reiterated its reasoning in *Schaumburg* and *Munson* that solicitation of charitable contributions is protected speech.[98]

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[95]Section 131C-16.1 of the Act asserted that before a professional fund-raiser may solicit any funds from potential donees, he must provide the participants with the following information:

> (1) His name;
> (2) The name of the professional solicitor or professional fund-raising counsel by whom he is employed and the address of his employer; and
> (3) The average of the percentage of gross receipts actually paid to the persons established for a charitable purpose by the professional fund-raising counsel or professional solicitor conducting the solicitation for all charitable sales promotions in this State by that professional fund-raising or professional solicitor for the past [twelve] months, or for all completed charitable sales promotions where the professional fund-raising counsel or professional solicitor has been soliciting fund for less than 12 months.

Id. at 784 n.2 (quoting N.C. GEN. STAT. § 131C-16.1 (1986)).

[96]Section 131C-6 of the Act stated: "[a]ny person who acts as a professional fund-raising counsel or professional solicitor shall apply for and obtain an annual license from the Department of [Human Resources], and shall not act as a professional fund-raising counsel or professional solicitor until after obtaining such license." *Id.* at 786 n.4 (quoting N.C. GEN. STAT. § 131C-6 (1986)).

[97]*Id.* at 785. Section 131C-17.2 of the statute explained that for a twenty percent fee calculated on the charity's gross receipts is a reasonable and non-excessive fee. N.C. GEN. STAT. § 131C-17.2 (1986). Conversely, the statute stated that the fee between twenty and thirty-five percent of gross receipts presumably was excessive and unreasonable if the party challenging the fee establishes that the "solicitation does not involve the dissemination of information, discussion, or advocacy relating to public issues as directed by the person established for a charitable purpose which is to benefit from the solicitation." *Id.* A professional fund-raiser could have rebutted the presumption if he established that the fee was necessary to disseminate information or was related to advocating public issues directed by the charity, or the ability of the charity to solicit or communicate significantly would be diminished. N.C. GEN. STAT. § 131C-17.2(a)-(d) (1986).

[98]*Riley*, 487 U.S. at 787, 798.

C. BEGGING IS VERBAL EXPRESSION

By analyzing the cases that directly examined panhandling statutes in conjunction with the Supreme Court's trilogy of cases that reviewed charitable organizations, it is clear that begging is more verbal expression than it is conduct.[99] When a beggar stands with his hand out and asks for money, he engages in speech protected by the First Amendment because he is conveying a message. Moreover, the physical appearance of the beggar adds to his verbal expression in that he exhibits the need for assistance.[100] The combination of appearance and the request for money expresses the beggar's need for financial support and allows the recipients to evaluate their feelings regarding the way in which society handles its less fortunate. Accordingly, those courts that specifically have addressed this issue correctly have determined that begging is speech entitled to First Amendment protection.[101] Thus, if and when the Supreme Court convenes on this controversy, it should also conclude that begging is speech within the First Amendment.

Even if begging is considered more conduct than speech,[102] such conduct nonetheless must be afforded First Amendment protection. The Supreme Court specifically has recognized conduct as speech on several occasions.[103] For example, the Court has recognized that the following acts convey expressive conduct: the burning of the United States flag;[104]

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[99]*See* Anthony J. Rose, *The Beggar's Free Speech Claim*, 65 IND. L.J. 191, 201 (1989) (noting that "[t]he beggar's clothing, demeanor, and appearance attest to the validity of her verbal request for funds, but the primacy of the spoken (or written) word to her activity places the beggar within the court's preferred mode of communication.") (alteration in original).

[100]*See* Rose, *supra* note 99, at 201 (asserting that "the beggar actually speaks, and the nonverbal aspects of her communication only add to the spoken message.").

[101]*See supra* notes 35, 45, 49 and accompanying text for a discussion of *Loper*, *Roulette*, and *Balir*.

[102]*See* Young v. New York City Transit Auth., 903 F.2d 146 (2d Cir. 1990).

[103]*See* Texas v. Johnson, 491 U.S. 397 (1989); Tinker v. Des Moines Indep. Community Sch. Dist., 393 U.S. 503 (1969); Brown v. Louisiana, 383 U.S. 131 (1966).

[104]Texas v. Johnson, 491 U.S. 397 (1989). In *Johnson*, the Court held that a protestor who burned the United States flag during a political march at a Republican National Convention was protected by the First Amendment, deeming the conduct expressive. *Id.* at 420. The demonstrators in *Johnson* handed out literature and made speeches, protesting

the wearing of black arm bands;[105] and a silent sit-in.[106] In all of these

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the policies of the Reagan Administration and several Dallas-based companies. *Id.* at 399. The demonstrators marched, chanted slogans, and staged "die-ins" intended to dramatize the consequences of nuclear war. *Id.* On several occasions, the demonstrators spray-painted buildings and turned over potted plants. *Id.* Petitioner, however, did not participate in any of these activities. *Id.* Petitioner argued that the Texas statute, that made it a crime to "intentionally or knowingly desecrate . . . a state or national flag," violated the First Amendment because the statute infringed upon his free speech. *Id.* (citing TEX PENAL CODE ANN. § 42.09 (1989)).

The Supreme Court determined that the conduct was expressive, thereby permitting Petitioner to invoke the First Amendment in challenging the statute. *Id.* at 403. Justice Brennan, writing for the Court, recognized that the Court has long been willing to extend the First Amendment privilege beyond the spoken or written word. *Id.* The Justice stated that the standard that has been adopted by the Court is whether the conduct is "sufficiently imbued with elements of communication to fall within the scope of the First . . . Amendment." *Id.* (citing Spence v. Washington, 418 U.S. 405, 409 (1974)). This standard is analyzed, the Court noted, in terms of the intent to convey a particularized message and the likelihood that the message was understood by those who viewed it. *Id.* The Court ultimately based its decision on the context in which the conduct occurred and found that "[t]he expressive, overtly political nature of [the] conduct was both intentional and overwhelmingly apparent." *Id.* at 407.

[105]Tinker v. Des Moines Indep. Community Sch. Dist., 393 U.S. 503 (1969). Therein, several high school students were suspended for wearing black arm-bands as a symbol for opposition to the Vietnam War. *Id.* at 504. A rule forbidding the wearing of such arm-bands had been adopted by school officials two days before the students' action, in anticipation of the protest. *Id.* The Court held that the prohibition on arm-bands violated the students' First Amendment rights. *Id.* at 505-06. The Court emphasized that what was being suppressed was not "actually or potentially disruptive conduct," but rather, something that was nearly "pure speech." *Id.* at 505. In discussing constitutional guarantees, Justice Fortas, writing the opinion of the Court, stated the following:

> The Constitution says that Congress (and the States) may not abridge the right to free speech. This provision means what it says. We properly read it to permit reasonable regulation of speech connected activities in carefully restricted circumstances. But we do not confine the permissible exercise of First Amendment rights to a telephone booth of the four corners of a pamphlet, or to supervised and ordained discussion in a school classroom . . . .
>
> In the circumstances of the present case, the prohibition of the silent, passive witness of the arm-bands, as one of the children called it, is . . . [not] offensive to the constitution's guarantees.

Id. at 513-14 (alteration in original).

cases there was little doubt from the facts and circumstances of the conduct that a clear and particularized political or social message was conveyed by those who viewed it.[107] Further, one constitutional scholar has commented that, in those cases, the conduct and the expression were inextricably joined.[108]

Begging conveys an even stronger message than flag burning, wearing arm-bands in protest of war, or peaceful picketing because begging also expresses an individual's right and need for survival. Most individuals who

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[106]Brown v. Louisiana, 383 U.S. 131 (1966). In *Brown*, five African-American men were arrested and convicted for breach of peace after they refused to leave a library. *Id.* at 135. The statute under which they were accused read:

> Whoever with intent to provoke a breach of the peace, or under circumstances such that a breach of the peace may be occasioned thereby: (1) crowds or congregates with others . . . in . . . a . . . public place or building . . . and who fails or refuses to disperse and move on, when ordered so to do by any law enforcement officer . . . or any other authorized person . . . shall be guilty of disturbing the peace.

LA. REV. STAT. ANN § 14:103.1 (West 1962). Petitioners orchestrated a sit-in protesting the Audubon Regional Library's policies in Clinton, Louisiana, that prohibited blacks from retrieving books at the local branch. *Brown*, 383 U.S. at 135. African-Americans only were permitted to receive books from a bookmobile if they had a registration card. *Id.* at 136. Petitioners were convicted for breaching the peace although they had not said a word. *Id.* In addition, at the time of the sit-in, there were no other patrons in the library who could have been disturbed by Petitioners' conduct. *Id.* at 142.

Petitioners challenged the convictions based on First and Fourteenth Amendment principles. *Id.* The Court held that the rights were not limited to verbal expression but extended to peaceful and orderly protest by silent and reproachful presence. *Id.* Justice Fortas, writing for the Court, noted that the accuseds' actions were within the statute's scope; therefore, the convictions could not be upheld because the statute was used to deliberately limit the free exercise to protest. *Id.*

Peaceful picketing by union members of a supermarket in a large shopping center to protest unfair labor practices also has been upheld as protected conduct. *See* Amalgamated Food Employees Union Local 509 v. Logan Valley Plaza, Inc., 391 U.S. 308, 313 (1968) (holding that picketing involves elements of both speech and conduct that is protected by the First Amendment).

[107]LAURENCE TRIBE, AMERICAN CONSTITUTIONAL LAW § 12-7, at 827 (2d ed. 1988) (quoting John Hart Ely, *Flag Desecration: A Case Study in the Roles of Categorization and Balancing in First Amendment Analysis*, 88 HARV. L. REV. 1482, 1495-96 (1975)).

[108]Professor Tribe noted that "the expressive behavior is '100% action and 100% expression.'" TRIBE *supra* note 107, at 827.

beg are so doing to collect money to survive.[109] As previously explained, the request for money conveys a social and/or political message. Therefore, such acts express, among other things, an individual's hunger and need for shelter, health care, and transportation.[110] The conduct and its expression, hence, are inextricably intertwined and entitled to First Amendment protection.[111]

Moreover, the Supreme Court has found that soliciting for financial support is "characteristically intertwined with informative and perhaps persuasive speech seeking support for particular causes or for particular views on economic, political, or social issues . . . and that without solicitation the flow of such information and advocacy would likely cease."[112] To hold otherwise would undermine the communication of the individual beggar's plight and the dissemination and propagation of views

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[109]*See, e.g.*, Young v. City of New York Transit Auth., 903 F.2d 146, 153 (2d Cir. 1990) (finding that any given beggar may have "[a]n intent to convey a particularized message, such as 'Government benefits are inadequate;' 'I am homeless;' or '[t]here is a living to be made in panhandling.'").

[110]*See also* Joseph M. Yoo, *Second Circuit Summaries, Selected New Decisions by the U.S. Court of Appeals*, N.Y.L.J., Aug. 16, 1993, p.2 (stating that *Loper* struck down a statute that unconstitutionally limited people's rights to express their need for food, clothing, medical care, and transportation).

[111]*See* TRIBE, *supra* note 107, at 827.

[112]Schaumburg v. Citizens for a Better Env't, 444 U.S. 620, 632 (1979). *See also* International Soc'y for Krishna Consciousness v. Lee, 112 S. Ct. 2701, 2705 (1992) (recognizing religious solicitations as a form of free speech protected by the First Amendment); United States v. Kolinda, 497 U.S. 720, 725 (1990) (plurality) (acknowledging that solicitation is a form of protected speech); Heffron v. International Soc'y for Krishna Consciousness, Inc., 452 U.S. 640, 647 (1981) (observing that the First Amendment protects the right to disseminate oral and written religious views and doctrines); Jamison v. Texas, 318 U.S. 413, 417 (1943) (contending that "[a] state might not prevent the collection of funds for a religious purpose by unreasonably obstructing or delaying their collection.").

Professor Laurence Tribe also noted that "[a]ctivities such as leafleting and solicitation are by tradition and function so closely linked with free expression that the Court has properly scrutinized restrictions upon those activities with special care, without pausing to establish at the outset that the restrictions operate in a public forum." TRIBE, *supra* note 107, at 988 (citations omitted). *See also* Helen Hershkoff & Adam S. Cohen, *Begging to Differ: The First Amendment and the Right to Beg*, 104 HARV. L. REV. 896, (1991) (contending that "[t]he beggar's speech, like expression sold for profit, remains enlightening despite its pecuniary purpose.").

and ideas that are within the protection of the First Amendment.[113] Based on the foregoing, a court should conclude that begging is speech warranting First Amendment protection.

III. LEVEL OF JUDICIAL SCRUTINY

The determination that begging constitutes speech, however, does not end the First Amendment analysis. A court must also analyze whether a given statute prohibiting begging will pass judicial scrutiny. The constitutionality of a governmental regulation that allegedly abridges free speech depends upon whether the regulation is content-based or content-neutral and the nature of the forum involved.[114]

Governmental regulations abridging free speech generally can be placed into two broad categories. The first is content-based, in which the Government attempts to regulate the ideas or information contained in the speech or its general subject matter.[115] The second category does not target a particular message; rather, the Government's regulation incidentally interferes with particular communication.[116]

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[113]*Id.*

[114]Cornelius v. NAACP Legal Defense and Educ. Fund, Inc., 473 U.S. 788, 800 (1985).

[115]The Supreme Court has addressed content-based regulations on several occasions. For example, in Cohen v. California, 403 U.S. 15 (1971), the Court reversed Defendant's conviction under a statute that forbid disturbing the peace or quiet of any neighborhood after the defendant wore a jacket baring the words "F—k the Draft." *Id.* at 22-26. Finding that Defendant's conviction was based solely on the content of the communication, the Court invalidated the statute. *Id.* at 18.

Similarly, in Consolidated Edison v. Public Serv. Comm'n, 447 U.S. 530 (1980), the Court struck down a state regulation prohibiting utilities from including inserts discussing the desirability of nuclear power in their monthly billing statements. *Id.* at 537-40. The Court explained that the regulation directly was related to the content of the message conveyed. *Id.* at 536. Moreover, the Court noted that the Commission did not "pretend that its action [was] unrelated to the content or the subject matter of bill inserts." *Id.* at 537. Accordingly, the Court found that the regulation was directed against the content of the ideas. *Id.*

[116]Professor Laurence Tribe describes this category of governmental regulation as actions "aimed at noncommunicative impact but nonetheless having adverse effects on communicative opportunity." TRIBE, *supra* note 107, at 792.

For an example of a governmental ban on distributing leaflets in an effort to curb littering, see Schneider v. State, 308 U.S. 147 (1939) (striking ban on the grounds that the Government had less restrictive alternatives, such as, prohibiting littering directly); a city

If a content-based regulation falls within the former category and seeks to restrict the particular ideas or information contained in the regulation, or to prohibit its general subject matter, the regulation will be subject to very exacting judicial review or "strict scrutiny."[117] To survive the constitutional scrutiny, the State must show that the content-based regulation serves "a compelling state interest and is narrowly drawn to achieve that end."[118] The principle underlying such prohibitions against content-based regulations is that the Government may not suppress a particular idea merely because society believes that the idea is offensive or disagreeable.[119] Accordingly, the State's burden in showing a compelling interest is very high,[120] and consequently, if a panhandling statute is deemed to be content-based, it will generally be struck down as violating the First Amendment.[121]

For example, in *Loper*, the Second Circuit held that a statute prohibiting panhandling in public places was content-based because it precluded all speech related to begging and, therefore, focused upon the expression of begging.[122] Applying strict scrutiny, the Second Circuit found that the Government's asserted interest in maintaining order was not sufficiently compelling to prohibit beggars from communicating with their fellow

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ordinance prohibiting the use of trucks that emit "loud and raucous noises," see Kovacs v. Cooper, 336 U.S. 77 (1949) (upholding the ban because the municipality's interest in avoiding distractions to traffic, and in protecting the quiet and tranquility of its inhabitants was sufficient to justify the regulation); and an ordinance prohibiting the door-to-door distribution of literature to protect residents from annoyance and harassment, see Martin v. Struthers, 319 U.S. 141 (1943) (striking the ordinance because less restrictive means may have been used).

[117]*See* Simon & Schuster v. New York Crime Victims Bd., 112 S. Ct. 501 (1991).

[118]*Simon & Schuster*, 112 S. Ct. at 509 (quoting Arkansas Writers' Project, Inc. v. Ragland, 481 U.S. 221, 231 (1987)); Chad v. City of Fort Lauderdale, Florida, Civ.A.No. 936970, 1994 WL 475834 (S.D. Fla. June 20, 1994).

[119]*Simon & Schuster*, 112 S. Ct. at 509.

[120]Regan v. Time, Inc., 468 U.S. 641, 648-49 (1984) ("Regulations which permit the Government to discriminate on the basis of the content of the message cannot be tolerated under the First Amendment.").

[121]Loper v. New York City Police Dep't, 999 F.2d 699 (2d Cir. 1993).

[122]*Id.* at 705.

citizens.[123] Additionally, the court determined that the statute was not narrowly tailored because other statutes could have been applied to regulate the alleged conduct causing the disorder, while allowing the act of begging generally.[124] Concluding that the regulation could not be justified by the Government, the court found that the statute violated the First Amendment.[125]

In contrast to the Second Circuit's holding in *Loper*, approximately a year later, the District Court for the Southern District of Florida, in *Chad v. City of Fort Lauderdale, Florida*,[126] held that a Florida statute[127] prohibiting soliciting, begging, and panhandling on Fort Lauderdale's beach and its abutting sidewalk was a content-neutral regulation.[128] In so finding, the court noted that the principal inquiry in determining whether the regulation was content-neutral was if the Government sought to regulate the

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[123]*Id.* at 704. The New York City Police Department argued that the statute was content-neutral and that it was enacted to maintain order. *Id.* at 700. Specifically, the Police Department contended that as beggars congregate they become more aggressive and, thus, intimidate local residents. *Id.* The Police Department further asserted that beggars often block entrances to stores and sidewalks, thereby inhibiting the ability of pedestrians to walk freely. *Id.* at 701. The court found that the Police Department's interests were not compelling because there were other statutes that provide the authority to prevent and punish this conduct. *Id.*

[124]*Id.* at 705. For example, the court determined that a person may be arrested for harassment if he "follows another person in or about a public place or places or repeatedly commits acts that place the other person in reasonable fear of physical injury." *Id.* at 701-02 (citing N.Y. PENAL LAW § 240.25 (McKinney Supp. 1993)).

[125]*Id.*

[126]Civ.A.No. 936970, 1994 WL 475834 (June 20, 1994).

[127]*Chad*, at *1 (citing FORT LAUDERDALE, FLA. BEACH RULE 7.5) ("Soliciting, begging or panhandling on [Fort Lauderdale's beach] is prohibited.").

[128]*Chad*, at *6. Plaintiffs brought suit on behalf of an estimated 5,000 homeless people in Broward County, Florida. *Id.* at *1. Plaintiffs argued that the statute violated the First Amendment because they had a right to solicit, beg, and panhandle on the Fort Lauderdale beaches. *Id.* at *1. Specifically, Plaintiffs alleged that the rule violated their rights because it completely banned protected communicative conduct based on the content of the message. *Id.*

speech because it disagreed with a particular view.[129] In answering this question, the court opined that the controlling consideration was the aim of the Government to maintain safety on the beach and to preserve the recreational activity.[130] Such an aim, the court explained, was proper because it advanced the purpose of the beaches which is recreational pleasure and enjoyment.[131] Further, the court espoused that a regulation is content-neutral if it can be "justified without reference to the content of the regulated speech."[132] The court determined that the regulation was content-neutral because it applied to all persons who chose to solicit, beg, or panhandle on the beaches and adjacent sidewalks regardless of their agenda.[133]

Evidently, the holdings both in *Loper* and *Chad* indicate that the courts are split as to whether statutes prohibiting panhandling are content-based or content-neutral. Of the two cases, however, the holding in *Chad* is more sound because when a municipality enacts an evenhanded ordinance to prohibit begging or panhandling, it is not attempting to regulate any particular message that the beggar is conveying. The municipality's principal justification is not to regulate a particular agenda, but rather, to maintain safety.[134] If a court determines that a regulation forbidding panhandling is content-based, however, a municipality may overcome the constitutional requirement by directly prohibiting the potential conduct, e.g., harassment, coercion, and intimidation, without mentioning the term "begging."[135]

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[129]*Id.* (citing Clark v. Community for Creative Non-violence, 468 U.S. 288, 294 (1984)). In analyzing whether the regulation was content-based or content-neutral, the court also addressed whether the rule prohibited conduct in a public forum. *Id.* at *6. The court concluded that the beach and adjacent sidewalk was a non-public forum. *Id.* at *5. For a further analysis of fora, see *infra* notes 159-67 and accompanying text.

[130]*Id.*

[131]*Id.* at *5.

[132]*Id.* (quoting *Clark*, 468 U.S. at 293).

[133]*Id.* at *6. The court additionally recognized that the statute did not appear to ban the distribution of literature or the exercise of other free speech rights. *Id.*

[134]*Chad*, at *6.

[135]By directly prohibiting the conduct associated with some forms of panhandling, a municipality may overcome the *Loper* court's determination that an ordinance prohibiting begging in public places is a content-based regulation because it served to prohibit both speech and expressive conduct on the basis of the message conveyed. Loper v. New York City Police Dep't, 999 F.2d 699, 705 (2d Cir. 1993).

A. CONTENT-NEUTRAL REGULATIONS AS APPLIED TO CONDUCT CONTAINING SPEECH AND NON-SPEECH ELEMENTS

When the Government's interest in regulating conduct is unrelated to the conduct's expressive content, courts apply a balancing test, in which the Government's interest is weighed against the individual's interest in using the particular mode of expression.[136] Under the Supreme Court's test established in *United States v. O'Brien*,[137] conduct that combines both speech and non-speech elements may be regulated if four distinct requirements are met: (1) the regulation is within the constitutional power of the Government; (2) the regulation furthers an "important or substantial governmental interest"; (3) that interest is unrelated to the suppression of free expression; and (4) the "incidental restriction" on First Amendment freedoms is "no greater than is essential to the furtherance" of the governmental interest.[138]

In *Young*, the Second Circuit reviewed the regulation banning panhandling and begging in subways to determine whether it was content-neutral and, if so, whether it would survive the *O'Brien* test.[139] Initially, the Second Circuit found that even if begging were to possess some form of

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[136]*See* United States v. O'Brien, 391 U.S. 367 (1968).

[137]391 U.S. 367 (1968). In *O'Brien*, Petitioner and several others burned their draft cards in protest of the Vietnam war. *Id.* at 369. The protesters were convicted under a statute making it a crime to "knowingly destroy[] [or] knowingly mutilate[]" a draft card. *Id.* at 370. Petitioner argued that the act was symbolic speech protected by the First Amendment. *Id.* The Court held that even if the conduct were symbolic speech, such conduct combined both speech and non-speech elements that could be regulated under the four-part test. *Id.* at 376. The Court held that all four of the requirements were met because: (1) the regulation was within the constitutional power of the Government; (2) the regulation furthered the important and substantial governmental interest "in assur[ing] the continuing availability of issued Selective Service certificates"; (3) the governmental interest was unrelated to the suppression of free expression; and (4) the incidental restriction on First Amendment freedoms was no greater than was essential to the furtherance of the interest because no "alternative means . . . would more precisely and narrowly assure the continuing availability of issued Selective Service certificates than a law which prohibits their wilful mutilation or destruction." *Id.* at 377-82.

[138]*Id.* at 382.

[139]Young v. New York City Transit Auth., 903 F.2d 146, 157 (2d Cir. 1990) (citing *O'Brien*, 391 U.S. 367 (1968)).

communicative expression,[140] the regulation at issue did not target the communicative nature of the speech or conduct.[141] The court decided that the regulation was "content-neutral," thereby meeting the *O'Brien* test's third prong, because it proscribed a particular conduct which served a governmental interest not related to suppressing free expression.[142] Such a regulation, the court posited, was subject to a relaxed level of judicial scrutiny, requiring that the court weigh the extent to which the expression is inhibited against the governmental interest sought to be protected.[143]

Next, the court employed the *O'Brien* test's second prong and considered whether the interest sought to be advanced by the Government, specifically preventing harassment, intimidation, and threats by panhandlers, was

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[140]*Id.* For a discussion on how the majority in *Young* determined that begging was not speech accorded First Amendment protection, see *supra* notes 25-34 and accompanying text.

[141]*Young*, 903 F.2d at 157.

[142]*Id.* In deciding that the regulation was content-neutral, the court noted that the principal inquiry was whether "the [G]overnment has adopted a regulation of speech because of disagreement with the message it conveys." *Id.* at 158 (citing Ward v. Rock Against Racism, 491 U.S. 781 (1989)). The real analysis, the court espoused, was whether "the dangers relied on as justification for the regulation arise at least in some measure from the alleged communicative content of the conduct." *Id.* at 158-59. In its analysis, the court used two Supreme Court cases with which to compare. *Id.* For example, the court found that in Cohen v. California, 403 U.S. 15 (1971), the California penal statute used to convict Petitioner for wearing a jacket into a courthouse with the words "F—k the Draft" was unconstitutional because the statute sought to punish "the fact of communication." *Young,* 903 F.2d at 159. In contrast to *Cohen,* the *Young* court determined that in United States v. O'Brien, 391 U.S. 367 (1968), the governmental interest in preserving the selective service system justified convicting a draftee for burning his draft card because Petitioner was convicted for "the noncommunicative impact of [his] conduct, and for nothing else." *Young,* 903 F.2d at 159. In *Young*, the court concluded that the Government's prohibition of panhandling in the subway was for reasons "completely unrelated to the alleged communicative impact of the conduct." *Id.* The court reasoned that there was nothing in the legislative history of the statute nor the record to suggest that the Government sought to proscribe a particular message or idea. *Id.* In fact, the court held to the contrary, noting that the regulation was "simply not directed at any expressive aspect of the proscribed conduct." *Id.*

[143]*Young*, 903 F.2d at 159 ("To be weighed in balance are, on the one hand, the extent to which the communicative activity is in fact inhibited; and, on the other hand, the values, interests, or rights served by enforcing the inhibition." (citing TRIBE, *supra* note 107, at 979)).

substantial.[144] The court determined that the city had an interest in protecting the millions of people that ride the subways and providing them with a reasonably safe, convenient, and peaceful means of public transportation.[145] Accordingly, the court concluded that the regulation was justified by a legitimate and substantial governmental interest.[146]

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[144]*Id.* at 158. In particular, the court noted the following:

> A majority of the subway's over three million daily passengers perceive begging and panhandling to be "intimidating," "threatening," and "harassing." The conduct often involves "unwanted touching [and] detaining" of passengers. The police have great difficulty distinguishing between "panhandling and extortion." Begging is "inherently aggressive" to the "captive" passengers in the close confines of the subway atmosphere . . . . [B]egging in the subway often amounts to nothing less than assault, creating in the passengers the apprehension of imminent danger. Additionally, begging in the subway raises legitimate concerns about public safety. The conduct "disrupts" and "startles" passengers, thus creating the potential for a serious accident in the fast-moving and crowded subway environment.

Id. The Government's interest in subway passenger safety may arguably be insufficient. One commentator noted that the *Young* court failed to adequately establish that passengers are intimidated by beggars. Grace L. Zur, *Young v. New York City Transit Authority: Silencing the Beggars in the Subways,* 12 PACE L. REV. 359, 394 (1992) (arguing that the majority never addressed whether people felt harassed or intimidated by representatives of charitable organizations). The author, however, failed to consider the realities that passengers would feel comforted in subways without panhandlers. *Compassion and Contempt*, NEWSDAY, INC. (city ed.), May 11, 1990, at 3 ("Most straphangers . . . said they are intimidated by people begging. . . . [When the] Metropolitan Transportation Authority [asked] about the quality of life in the subways, riders ranked panhandling and homelessness among the top two issues that affect their comfort underground.").

[145]*Young*, 903 F.2d at 158. In analyzing the governmental interest, the court determined that the regulation was justified because it was not for the benefit of powerful and privileged patrons. *Id.* Instead, the court found that the subway was "the primary means of transportation for literally millions of people of modest means, including hard-working men and women, students and elderly pensioners who live in and around New York City and who are dependent on the subway for the conduct of their daily affairs." *Id.*

[146]*Id.* The Second Circuit conceded that the first *O'Brien* requirement genuinely was not at issue. *Id.* The court noted that the Transit Authority had a statutory mandate to enact rules "governing the conduct and safety of the public as it may deem necessary, convenient or desirable, . . . including without limitation rules relating to the protection or maintenance of such facilities [and] the conduct and safety of the public." *Id.* (quoting N.Y. PUB. AUTH. LAW § 1204 (McKinney 1982)). *See supra* note 142 for the Second Circuit's discussion of the second prong of *O'Brien.*

Finally, the court turned to the *O'Brien* test's fourth prong, which requires that the total prohibition of begging and panhandling in the subways be no greater than what is essential to further the Government's interest.[147] The court noted that to warrant the prohibition, the statute would have to be no greater than is essential to further the Government's interest[148] and that it would have to "leave[] open ample alternative channels of communication."[149] The court concluded that the regulation only restricted begging and panhandling as was necessary to promote a significant governmental interest and that such an interest effectively could not be achieved without the regulation.[150] Moreover, the court determined that

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[147]*Young*, 903 F.2d at 159-60. The court noted that "it is now well-settled that regulations restricting the time, place and manner of expressive conduct do not violate the First Amendment 'simply because there is some imaginable alternative that might be less burdensome.'" *Id.* at 159 (quoting United States v. Albertini, 472 U.S. 675 (1985)).

[148]*Id.* at 160. The district court, however, found that there already were statutes prohibiting the conduct that the regulation intended to proscribe. Young v. New York City Transit Auth., 729 F. Supp. 341 (S.D.N.Y. 1990). Specifically, the district court found that:

> [D]ifferent [Transit Authority] regulations . . . already prohibit conduct which has "the reasonably intended effect of annoying, alarming or inconveniencing others, or otherwise tend[s] to create a breach of peace," . . . which "interferes with the provision of transit service or obstruct[s] the flow of traffic on facilities or conveniences,". . . or which "causes or may tend to cause harm or damage to any person . . . ."

Id. at 359 (citations omitted). Accordingly, the district court concluded that the Transit Authority had less restrictive means in which to pursue its interests. *Id.*

The Second Circuit nonetheless rejected the district court's determination that the statute was not a reasonable time, place, and manner restriction because there were less restrictive alternatives. *Id.* Rather, the majority asserted that the regulation was not invalid because the Government's interest could have been served with less restrictive alternatives. *Young*, 903 F.2d at 146 (citing Ward v. Rock Against Racism, 491 U.S. 781, 797 (1989)).

[149]*Young*, 903 F.2d at 160. The Second Circuit found that while there may be "some imaginable alternative that might be less burdensome," the Government's interest could not be achieved effectively without the regulation. *Id.* at 159-60 (citations omitted).

[150]*Id.* at 161.

beggars and panhandlers were left with ample alternative channels to convey their message.[151]

Reaching a contrary conclusion two years later in *Loper*, the Second Circuit reviewed a similar regulation banning panhandling in all public places and determined that the regulation was not content-neutral and, therefore, subject to strict scrutiny.[152] Nevertheless, the court posited that even if it were to apply the relaxed level of scrutiny espoused in *O'Brien*, the regulation still would fail three of the *O'Brien* test's prongs.[153] First, the court addressed the third prong and asserted that a total prohibition on begging in the streets cannot be characterized as an incidental limitation on speech because it serves to silence both speech and expressive conduct on the basis of the message.[154] Further, in discussing the *O'Brien* test's second prong the court determined that the State did not have a compelling interest because if it did, the State would not permit solicitations on city streets by individuals representing charitable organizations registering with the State.[155] Finally, in analyzing the *O'Brien* test's fourth prong, the Second Circuit found that the Government's interest was greater than was necessary because it "sweeps within its overbroad purview the expressive conduct and speech that the Government should have no interest in stifling."[156]

The Second Circuit's application of the *O'Brien* test both in *Young* and *Loper* was reasonable. The court properly determined that the subway

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[151]*Id.* at 160-61. The majority specifically explained that "[i]t is untenable to suggest . . . that absent the opportunities to beg and panhandle in the subway system, [beggars] are left with no means to communicate to the public about needy persons." *Id.* at 160.

[152]*Loper*, 999 F.2d at 704-05. For the Second Circuit's strict scrutiny analysis, see *supra* notes 122-25 and accompanying text.

[153]*Loper*, 999 F.2d at 705. The court simply did not address the first *O'Brien* prong.

[154]*Id.*

[155]*Id.* (citing N.Y. EXEC. LAW § 172 (McKinney 1993)). The Police Department argued that the interest of the Government was preventing "fraud, intimidation, coercion, harassment and assaultive conduct that is said frequently to accompany begging by individual street solicitors who do not solicit on behalf of any organization." *Id.*

[156]*Id.* at 705-06. The Second Circuit reasoned that there already existed statutes that prohibited the conduct sought to be regulated. *Id.* at 705. For example, the Police may arrest a beggar if he uses obscene language or obstructs pedestrian or vehicular traffic with the intent to cause public inconvenience, annoyance, or alarm. *Id.* at 702 (citing N.Y. PENAL LAW §§ 240.20(3), (5) (McKinney Supp. 1989)).

regulation was no greater than necessary to further the Transit Authority's interest because panhandlers had ample opportunity to convey their messages in the public streets, sidewalks, and parks.[157] Conversely, a total prohibition against panhandling in all public places, especially passive begging, is greater than necessary to further the State's interest because the beggar is left with no alternate time, place, or manner in which to convey his or her message.[158]

B. FORUM ANALYSIS

The analysis of whether a government regulation can be upheld if it incidentally burdens speech also is contingent upon whether the expression takes place in a public or non-public forum.[159] Streets, sidewalks, and parks are traditional examples of public fora.[160] More recently, the Supreme Court has determined that public fora include facilities created for the primary purpose of public communication, such as government meeting places[161] and municipal theaters.[162] Conversely, a non-public forum is

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[157]*See supra* notes 139-51 and accompanying text for discussion of the Second Circuit's application of the *O'Brien* test in *Young*.

[158]*See supra* notes 152-56 and accompanying text for discussion of the Second Circuit's application of the *O'Brien* test in *Loper*.

[159]Some property, such as schools and libraries owned by the Government, also have been labelled as semi-public. In such cases, the Court has permitted more regulation of speech than in public fora. The basic test for such places is whether the speech regulated is incompatible with the normal activity of the particular place or the time. *See* Brown v. Louisiana, 83 U.S. 131, 141 (1966) (reversing the conviction of a silent sit-in by black demonstrators in a library, noting that the First Amendment included "the right in a peaceable and orderly manner to protest by silent and reproachful presence, in a place where the protestant has every right to be . . ." as long as their activities did not disturb others); Grayned v. Rockford, 408 U.S. 104 (1972) (upholding an anti-noise ordinance around a school to permit the basic educational function to proceed undisturbed).

[160]*See generally* Hague v. C.I.O., 307 U.S. 496, 515 (1939) ("[U]se of the streets in public places [for assembly and debate of public questions] has, from ancient times, been a part of the privileges, immunities, rights and liberties of citizens.").

[161]*See* City of Madison, Joint Sch. Dist. v. Wisconsin Employment Relations Comm'n, 429 U.S. 167 (1976) (asserting that school board meeting held open to the general public could not exclude teachers).

a facility that traditionally has not been utilized for expressive activity, such as airport terminals,[163] prisons,[164] military bases,[165] courthouses,[166] and buses.[167]

As previously noted, the Supreme Court specifically has not addressed whether restrictions on panhandling will be upheld. In 1992, however, the Court addressed a similar issue in *International Society for Krishna Consciousness, Inc. v. Lee*[168] when it considered whether airport terminals operated by a public authority constituted a public or non-public forum.[169] In *Lee,* the Port Authority of New York and New Jersey enacted a regulation prohibiting the solicitation of airport visitors, as well as the distribution of literature, in Newark, La Guardia, and John F. Kennedy International airport terminals.[170] Plaintiff, a non-profit religious organization requiring members to solicit funds for the support of the organization and to distribute

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[162]Southeastern Promotions, Ltd. v. Conrad, 420 U.S. 546 (1975) (finding that city theater could not exclude a production of a play, even though other privately held theaters were available in the city).

[163]International Soc'y for Krishna Consciousness, Inc. v. Lee, 112 S. Ct. 2701 (1992) (determining that an airport terminal was not a public forum).

[164]Adderley v. State of Fla., 385 U.S. 39 (1966) (holding that jailhouses are not public fora because they serve the limited purpose of housing prisoners).

[165]Greer v. Spock, 424 U.S. 828 (1976) (upholding a ban of political speakers on military bases because the primary purpose of the bases was to train soldiers, not to provide a public forum).

[166]United States v. Grace, 461 U.S. 171 (1983) (suggesting, in *dictum*, that the Supreme Court building and its grounds were like the military bases in *Greer* and, hence, were not a public forum).

[167]Lehman v. Shaker Heights, 418 U.S. 298 (1974) (concluding that city owned buses were not public fora).

[168]112 S. Ct. 2701 (1992).

[169]*Id.* at 2704.

[170]*Id.*

literature, argued that the ordinance unconstitutionally burdened free speech in a public forum.[171]

Chief Justice Rehnquist, writing for a fragmented majority,[172] concluded that airport terminals were non-public fora and found that the ban on face-to-face solicitation was both reasonable and constitutional.[173] Chief Justice Rehnquist determined that airport terminals were not public fora because a terminal is a modern structure that traditionally has not been utilized for expressive activity.[174] The Chief Justice declared that the Government could, accordingly, regulate solicitation in airport terminals because such conduct is disruptive of the intended function of the

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[171]*Id.* The Supreme Court issued two majority opinions and placed the concurring and dissenting opinions of both cases after the second opinion. International Soc'y for Krishna Consciousness, Inc. v. Lee, 112 S. Ct. 2701 (1992); Lee v. International Soc'y for Krishna Consciousness, 112 S. Ct. 2709 (1992). The first decision issued by the Court will be discussed because it is relevant.

In the second decision, however, a segmented majority determined that the distribution prohibition violated the First Amendment, regardless of whether the airport terminals were considered public fora. Lee v. International Soc'y for Krishna Consciousness, 112 S. Ct. 2709 (1992) (per curiam). Chief Justice Rehnquist dissented and was joined by Justices Scalia and Thomas. *Id.* at 2710 (Rehnquist, C.J., dissenting).

[172]Justices White, O'Connor, Scalia, and Thomas joined the Chief Justice. International Soc'y for Krishna Consciousness, Inc. v. Lee, 112 S. Ct. 2701 (1992). Justice O'Connor also filed a concurring opinion. *Id.* at 2711 (O'Connor, J., concurring). Justice Kennedy filed an opinion concurring in judgment, in which Justices Blackmun, Stevens, and Souter joined. *Id.* at 2715 (Kennedy, J., concurring). Justice Souter filed a dissenting opinion in which Justices Blackmun and Stevens joined. *Id.* at 724 (Souter, J., dissenting).

[173]*Id.* at 2701. In 1981, the International Society for Krishna Consciousness challenged a similar statute in Minnesota which required the sale, solicitation, and distribution of literature to be distributed from assigned booths at a state fair. Heffron v. Int'l Soc'y for Krishna Consciousness, 452 U.S. 640 (1981). In *Heffron*, the Court noted that the grounds at the state fair were a "limited" public fora and distinguished it from traditional public fora, such as streets and parks. *Id.* at 655. The Court determined that the fair grounds were a "limited" public fora because "it exists to provide a means for a great number of exhibitors temporarily to present their products or views, be they commercial, religious, or political, to a large number of people in an efficient fashion." *Id.* The court held that the State's interest in maintaining orderly crowd movement was sufficient to regulate the expressive conduct. *Id.*

[174]*Lee*, 112 S. Ct. at 2706.

facility.[175] Further, the Chief Justice found that the prohibition protected the users of the terminals from unwarranted interference, and that airport officials would suffer considerable hardship if forced to monitor solicitors' activities.[176]

Next, the Court determined that the walkways outside airport terminals were public fora and, thus, qualified as ample alternative channels of communication.[177] The solicitors, the Court reasoned, had substantial opportunity to canvass the general public on the walkways, especially due to the high frequency of terminal visitors traversing those areas.[178] Accordingly, the Court concluded that the solicitation restriction in the terminal was reasonable to effectuate the Government's interest in preventing congestion.[179]

The *Lee* decision added to free speech jurisprudence a second tier of analysis onto the initial query of whether the regulation in question is content-based or content-neutral. Therefore, even when a regulation is found to be content-neutral,[180] if the restricted expression occurs in a public

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[175]*Id.* at 2706-07. The Court concluded that the Port Authority management considers the purpose of an airport terminal to be "the facilitation of passenger air travel." *Id.* at 2707.

[176]*Id.* at 2708. The Court noted that "[t]he skillful, and unprincipled, solicitor can target the most vulnerable, including those accompanying children or those suffering physical impairment and who cannot easily avoid the solicitation." *Id.* The Court also mentioned that there is a threat of fraud through the concealment of the solicitor's affiliation. *Id.*

[177]*Id.* at 2709.

[178]*Id.* The Court relied on an affidavit submitted on behalf of the airport stating that "no more than [three percent] of air travellers passing through the terminals are doing so on intra-terminal flights, [e.g.,] transferring planes." *Id.* (citing Sloane Supp. Aff. ¶ 14, 2 App. 515-16).

[179]*Id.* Justice O'Connor concurred in the majority's judgment, noting that airports were not traditional public fora. *Id.* at 2711 (O'Connor, J., concurring). Justice Kennedy, in a separate opinion, concurred in the Court's judgment, finding that airports were public fora, but asserted that the regulation constituted a valid time, place, and manner restriction. *Id.* at 2715 (Kennedy, J., concurring). Justice Souter, in a vigorous dissenting opinion, contended that airports were public fora and that the regulation was not an acceptable time, place, and manner restriction. *Id.* at 2724. (Souter, J., dissenting).

[180]A content-based regulation targeting a particular message will be subject to stricter judicial review, as discussed earlier, and will invariably violate the First Amendment. *See supra* notes 114-21 and accompanying text.

forum, the government regulation also must allow adequate alternate channels of communication[181] and serve a compelling governmental interest.[182]

1. THE PUBLIC FORA ANALYSIS APPLIED TO PANHANDLER STATUTES

In determining whether a content-neutral statute regulating expression in a public forum leaves open adequate alternate channels of communication and also serves a compelling governmental interest, the Supreme Court has held that the governmental interest will not be satisfied by mere administrative convenience.[183] The following is a list of legitimate governmental interests

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[181]The availability of alternative channels of communication alone, however, is not sufficient to make the regulation valid. TRIBE, *supra* note 107, at 982.

[182]International Soc'y for Krishna Consciousness, Inc. v. Lee, 112 S. Ct. 2701 (1992). *See also* TRIBE, *supra* note 107, at 992.

[183]The Supreme Court has held that a strong governmental interest existed where the Government sought: to protect unwilling listeners from being forced to hear or see a particular message, Frisby v. Schultz, 487 U.S. 474 (1988); to keep thoroughfares free from traffic, Cox v. Louisiana, 379 U.S. 536 (1965); and to promote aesthetic objectives, Los Angeles v. Taxpayers for Vincent, 466 U.S. 789 (1984). Arguably, these interests reflect those espoused by the Government when it enacts statutes prohibiting panhandling in public places.

In *Frisby*, the Court upheld an ordinance that effectively prohibited anti-abortion activists from picketing the residence of a doctor who performed abortions. *Frisby*, 487 U.S. at 488. The Court concluded that the municipality may ban picketing and demonstrations in front of a single residence to protect a resident's right to be free of unwanted messages at home. *Id.* at 484-86.

The Supreme Court, in *Cox*, implied that even a governmental need to keep streets free for ordinary traffic may justify *limited* regulation of demonstrators or marchers (e.g., a requirement that they use a street that is not a main boulevard). *Cox*, 379 U.S. at 558. In *Cox*, the police arrested a civil rights demonstrator for breach of the peace after he, along with approximately 2,000 other demonstrators, were forced to separate from 100-300 individuals gathered on the opposite side of the street. *Id.* at 539-40. The Court stated that an individual could not, "contrary to traffic regulations, insist upon a street meeting in the middle of Times Square at rush hour as a form of freedom of speech or assembly." *Id.* at 554. Governmental authorities, the Court noted, "have the duty and responsibility to keep their streets open and available for movement." *Id.* at 554-55.

The *Cox* Court explicitly declined to decide the constitutionality of a uniform, non-discriminatory statute forbidding access to all streets and other public facilities for parades and meetings. *Id.* Several decisions since *Cox,* however, make it unlikely that streets may be completely closed to such activity, even if the ordinance is applied in a non-discriminatory manner. *See* cases cited in TRIBE, *supra* note 107, at 986 n.3. The rationale behind these decisions is that the requirements of the First Amendment only can be satisfied by providing access to such fora because they are a crucial aspect of the

asserted in enacting statutes prohibiting begging in public places: keeping streets and sidewalks free of congestion; deterring the visual blight that accompanies the congregation of panhandlers; and protecting pedestrians from hearing, seeing, and being intimidated by beggars.[184]

In *Loper*, the Second Circuit concluded that the Government's interest in preventing "fraud, intimidation, coercion, harassment and assaultive conduct" could be enforced by other statutes that specifically regulated these interests directly.[185] For example, the court noted that an individual is guilty of menacing if he or she follows another person in a public place or repeatedly commits acts that cause the other person to reasonably fear injury.[186] Additionally, the court espoused that the police may arrest an individual for disorderly conduct in New York if he or she intentionally causes public inconvenience, annoyance, or alarm by using obscene or abusive language or by obstructing pedestrians or vehicular traffic.[187] The peaceful solicitation of funds in public places, the court posited, carried no harm that the Government purports to address in enacting the statute.[188]

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freedom of expression. *Id.*

The governmental interest in promoting aesthetic objectives was upheld in *Taxpayers for Vincent*. *Taxpayers for Vincent*, 486 U.S. at 804. Therein, the Court held that the prevention of visual blight justified Los Angeles in completely banning the posting of signs on public property. *Id.* at 794. The particular type of public property at issue in *Taxpayers for Vincent* was utility poles. *Id.* Although the Court found that the utility poles did not constitute a public forum, the Court suggested that even in a public forum context, visual blight can constitute a significant governmental interest. *Id.* The Court concluded that the promotion of aesthetic objectives is a valid governmental concern, noting that "municipalities have a weighty, essentially aesthetic interest in proscribing intrusive and unpleasant formats for expression." *Id.* at 790.

[184]Loper v. New York City Police Dep't, 999 F.2d 699, 701-02 (2d Cir. 1993). In *Loper*, the New York City Police Department argued that the statute prohibiting begging in public places was enacted to maintain order. *Id.* at 701.

[185]*Id.* at 705.

[186]*Id.* at 702 (citing N.Y. PENAL LAW § 120.15 (McKinney Supp. 1993)).

[187]*Id.* (citing N.Y. PENAL LAW § 240.20(3),(5) (McKinney 1989)). *See also* N.Y. PENAL LAW § 165.30(1) (McKinney 1989) (maintaining that a beggar who accosts a person in a public place with the intent to defraud is guilty of fraudulent accosting); N.Y. PENAL LAW § 120.15 (McKinney Supp. 1993) (providing that a panhandler is guilty of menacing if he or she intentionally places or attempts to place another person in fear of physical injury).

[188]*Loper*, 999 F.2d at 704.

Accordingly, the court struck down the statute because it failed to comport with the requirements of the First Amendment.[189]

The Second Circuit in *Loper* properly determined that the public forum requirements were not met. A statute completely banning panhandling in all public places does not leave open alternate channels in which a beggar may convey a message. Further, such a statute's reach or prohibition is greater than is essential to protect the Government's interests. As surmised by the *Loper* court, the governmental interest sought to be protected could be served by statutes that directly penalize the alleged harmful conduct.[190]

2. THE NON-PUBLIC FORA ANALYSIS APPLIED TO PANHANDLER STATUTES

To survive First Amendment analysis, a content-neutral regulation that impairs expression in non-public fora will be subject to limited review.[191] The Government may limit speech in the non-public forum even if less restrictive alternatives are readily available or if the restriction chosen is reasonable.[192]

For example, in *Chad*, the District Court of Florida determined that the beach and its adjacent sidewalk was a non-public forum[193] and, therefore, the statute prohibiting begging, panhandling, and soliciting was subject to limited review.[194] The court noted that the City's asserted interest was in maintaining the aesthetics of the beach and keeping the walkways free of

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[189]*Id.* at 706.

[190]*Id.* at 702.

[191]International Soc'y for Krishna Consciousness, Inc. v. Lee, 112 S. Ct. 2701, 2705 (1992).

[192]*Id.* The Court also concluded that the regulation also must not "suppress the speaker's activity due to disagreement with the speaker's view." *Id.* at 2705-06.

[193]The court determined that a traditional public forum was one that provided for the free exchange of ideas. Chad v. City of Fort Lauderdale, Fla., Civ.A.No. 936970, 1994 WL 475834 at *4 (June 20, 1994) (citing *Lee*, 112 S. Ct. at 2706). The abutting sidewalk's principal purpose, the court espoused, was not the free exchange of ideas but, rather to provide access to and from the beach. *Id.* Further, the court asserted that the sidewalk can not be a traditional public forum because it was constructed two years ago. *Id.*

[194]Chad v. City of Fort Lauderdale, Fla., Civ.A.No. 936970, 1994 WL 475834 (June 20, 1994).

congestion.[195] Hence, the court held that the restriction was reasonable in light of the interest being served.[196]

Similarly, the Second Circuit in *Loper*, analyzed whether a statute prohibiting panhandling in public places would pass the relaxed level of judicial scrutiny applicable to non-public fora, requiring only a reasonable governmental interest.[197] The police argued that the statute was essential to attack the evils associated with begging on the streets in New York City.[198] The statute, the court proclaimed, did not serve to advance a reasonable governmental interest because there were other statutes that could effectively regulate such conduct.[199]

In comparing the two aforementioned cases, it is clear that subways and airport terminals are very different from streets and sidewalks. Subways and airport terminals are not public fora because they are modern developments that have not traditionally been used for expressive activity.[200] Moreover,

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[195]*Id.* at *5.

[196]*Id.* The court noted that solicitation could disrupt beach patrons and frustrate the intended purpose of the beach, to provide recreational pleasure and enjoyment. *Id.* The court further explained that the regulation did not have to be the most reasonable or the only reasonable alternative. *Id.*

[197]Loper v. New York City Police Dep't, 999 F.2d 699, 702 (1993) (citing United States v. O'Brien, 391 U.S. 367, 376-77 (1968)).

[198]*Id.* at 701. The police contended that the statute would prohibit beggars from "intimidating" and "coercing" pedestrians. *Id.*

[199]*Id.* at 705. *See supra* note 187 for New York statutes.

[200]International Soc'y for Krishna Consciousness v. Lee, 112 S. Ct. 2701, 2706 (1992). In *Lee*, Chief Justice Rehnquist stated that airport terminals never had the principal purpose of the free exchange of ideas. *Id.* Chief Justice Rehnquist, relying on Hague v. VIO, 307 U.S. 496, 515 (1939), which held that streets and parks were traditional fora for the communication of views, emphasized that a traditional public forum is property where the principal purpose is the free exchange of ideas. *Lee*, 112 S. Ct. at 2706. The Court further stipulated that a traditional public forum cannot be created by government inaction, and that one is not created "whenever members of the public are permitted freely to visit a place owned or operated by the Government." *Id.* (quoting Greer v. Spock, 424 U.S. 828, 836 (1976)). The Court determined that an affirmative act that "intentionally open[s] a nontraditional forum for public discourse" must occur to convert a non-public forum into a public forum. *Id.* (quoting Cornelius v. NAACP Legal Defense and Educ. Fund, 473 U.S. 788, 802 (1985)). Chief Justice Rehnquist further stated that the location of the property also may be a factor in determining the appropriate standard for assessing the speech restriction. *Id.* Accordingly, the Court explained, property separated from recognized public areas may connote a special enclave, and thus, be subject to greater

these fora do not qualify as public because their operations do not open them to public discourse and they have never been places used for the free exchange of ideas.[201] The regulation of speech in these non-public fora only is warranted simply if the governmental interest sought to be protected is reasonable. If the expressive activity that is regulated disrupts the intended function of the facility and panhandlers are left with ample alternate channels to convey their message, the regulation should be upheld.

IV. CONCLUSION

It cannot be gainsaid that when Robert E. passively requests money from pedestrians or holds out his hand, he exhibits some form of speech protected by the First Amendment. The fact that a beggar's appearance may not be appealing does not strip the solicitation of its communicative quality. When an individual panhandles, he conveys information regarding his plight and expresses his views and ideas about the method in which the general public treats its indigent population. Further, the beggar informs others about his individual need for food, shelter, medical care, and transportation. Moreover, as a result of the beggar's acts, the recipient of a request for charity may be forced to reassess the societal treatment of the homeless, thus implying that the beggar may not be the only person who benefits from the communication.

The communicative expression in panhandling for oneself is indistinguishable from the solicitations by charitable organizations, which have been upheld by the Supreme Court.[202] There is little difference between what charitable organizations purporting to help the homeless do on behalf of the homeless populace and what beggars do for themselves — begging simply is solicitation by a charitable organization on its smallest scale. In fact, the proportional benefits of giving to a beggar are greater than those when giving to a charitable organization.[203] Hence, passive begging,

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restriction. *Id.* (citing United States v. Grace, 461 U.S. 171, 179-80 (1983)).

[201]*Id.* at 2706-07.

[202]*See supra* notes 81-98 and accompanying text for discussion of Supreme Court cases addressing charitable organizations.

[203]For example, in charitable organizations, only a portion of the funds received ultimately benefit the recipient because the funds must be used for administrative expenses. In contrast, funds given directly to the beggar are utilized completely by the individual. *See supra* notes 83-90 and accompanying text.

in and of itself, should be recognized as expression protected under the First Amendment.

As First Amendment expression, begging would be afforded certain protections. For example, a content-based regulation that prohibits the expression of begging only would be upheld if it survived the most exacting level of scrutiny.

Simply because a regulation is content-neutral, however, does not exempt it from the possibility of being subject to strict scrutiny. Where a content-neutral regulation affects the expression of begging, the Supreme Court has concluded that the forum in which the expression occurs will determine the level of scrutiny. In a non-public forum, the Court reasoned that the Government's interest need only be reasonable. For example, a regulation prohibiting begging in a subway system that prevents harassing or intimidating other citizens clearly infringes the beggar's First Amendment right; however, the interest of the millions of individuals who utilize the subway system are sufficiently reasonable to infringe upon the beggar's First Amendment right to freedom of expression.[204]

When a government regulation attempts to prohibit First Amendment expression in a public forum, however, the expression is afforded the most protection. The Supreme Court has concluded that such a regulation will only be upheld if the Government's interest in prohibiting the conduct is compelling and the regulation is narrowly tailored to achieve that end.[205] In the caselaw thus far that has addressed statutes specifically prohibiting begging, the Government has asserted as its interest the protection of pedestrians on public streets and sidewalks and in parks from intimidation and harassment by individuals like Robert E.[206] Simply attempting to protect pedestrians from what effectively amounts to a minor inconvenience, however, will never rise to the level of a compelling interest, such that the Government will be allowed to prohibit a citizen like Robert E. from exercising his First Amendment right in expressing his indigence and basic need to survive. Thus, unless the Government introduces an interest that is

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[204]Recall, this factual scenario is very similar to that found in *Young*. *See supra* notes 141-51 and accompanying text. Although this analysis may sound utilitarian, it is not intended as such because the beggar is still left with ample alternate channels in which to convey his message. Thus, such a government regulation does not foreclose all avenues of expression.

[205]*See supra* notes 180-90 and accompanying text (providing an in-depth analysis of First Amendment expression in a public forum).

[206]This statement represents the general assertion made by the Police Department in *Young*. *See supra* note 185 and accompanying text.

sufficiently compelling — clearly an appropriately difficult task — individuals like Robert E. never should be precluded, excluding reasonable time, place, and manner restrictions, from exercising their First Amendment right of expression in public fora.