PUNISHING THE MESSENGER FOR THE MESSAGE: AN ANALYSIS OF THE CRIMINALIZATION OF PANHANDLING

When cities such as St. Louis, Missouri, and Fort Lauderdale, Florida resort to spraying edible garbage with chlorine in order to purge the urban poor from their cities,[1] one sees that local governments are willing to take drastic measures to solve the unique problems posed by a large indigent population. This Note will examine one such measure: the attempt to silence the poor by criminalizing begging. This Note will center on the Second Circuit Court of Appeals decision to keep begging illegal in *Young v. New York City Transit Authority*[2] ("*Young II*"), and its ramifications for the urban poor and the First Amendment.

Young II has faced a great deal of criticism in the past year, most recently in *Loper v. New York City Police Dept.*,[3] which held that the State of New York's anti-begging statute[4] was unconstitutional.[5] *Young II* remains the focal point of the judicial debate over a beggar's free speech rights, however, for the inevitable appeal of the thoughtful opinion in *Loper* will be brought in the same court which reversed the similarly thoughtful opinion of *Young I*. The future of the beggar's free speech right is uncertain, and now is the crucial

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[1] Marshall Ingwerson, CHRISTIAN SCIENCE MONITOR, Jan. 30, 1987, at 3.

[2] Young v. New York City Transit Authority, 729 F. Supp. 341 (S.D.N.Y. 1990) (henceforth *Young I*), *rev'd and vacated*, 903 F.2d 146 (2d Cir. 1990) (henceforth *Young II*), *cert. denied*, 111 S. Ct. 516 (1990). *Young I* held that begging is protected speech and consequently enjoined an ordinance barring panhandlers from New York Transit Authority (TA) facilities. The District Court ruled that the ordinance constituted an overbroad proscription of the right to free expression. *Young I* at 360. On appeal, the Second Circuit reversed the District Court by holding that panhandling is not protected speech. *Young II*, 903 F.2d at 153-54. The Court of Appeals distinguished the communicative aspects of begging as "expressive conduct" and not "speech." *Id.* at 154. While the appellate court reasoned that expressive conduct is protected by the Constitution if intended to convey a specific message, the court ruled that the act of begging is not generally intended "to convey a 'particularized message' " deserving constitutional protection. *Id.* at 153-54.

This Note defines "begging" as peaceful, nonharassing behavior and uses "begging" and "panhandling" interchangeably.

[3] 802 F. Supp. 1029 (S.D.N.Y. 1992).

[4] N.Y. PENAL LAW § 240.35(1) (McKinney 1989) provides that: "A person is guilty of loitering when he: 1. Loiters, remains or wanders about in a public place for the purpose of begging . . . ."

[5] For other judicial criticisms of *Young II*, *see, e.g.*, Blair v. Shanahan, 775 F. Supp. 1315 (N.D. Cal. 1991) (California anti-begging statute violates First and Fourteenth Amendments); City of Seattle v. Webster 802 P.2d 1333, 1343 (Wash. 1990) (Utter, J., concurring and dissenting) (arguing that *Young* is an "untenable" opinion).

time to analyze the mistakes of *Young II*, so that other courts can avoid them in the future.

Part I of this Note will establish a "lens," or framework for analysis, which can be used to view the question of whether begging implicates free speech concerns[6] by exploring the history of anti-begging laws to determine their original purposes and discussing how these old rationales fit the use of such laws today. Using this lens, Part I will argue that begging is supported by rationales of the First Amendment and thus qualifies as a First Amendment right.

Part II views the decision in *Young* through the lens created in Part I. Specifically, Part II examines whether begging falls under the umbrella of protected charitable solicitation, whether it is speech or conduct, and whether it can be properly regulated by the time, place, and manner restrictions proposed by the New York City Transit Authority (TA). In short, the lens created in Part I reveals the errors in the reasoning of *Young* and highlights the validity of begging as a free speech claim.

I. BEGGING AND FREE SPEECH: A METHOD OF ANALYSIS

A. *A Historical Overview of Begging Laws*

Understanding the historical development of anti-begging statutes is important for a number of reasons. A historical perspective offers a glimpse of the cultural roots which lie at the foundations of contemporary constitutional doctrines. Additionally, courts rely on precedent to justify current decisions.[7] Consequently, understanding past rationales will show precisely what evils past legislatures were trying to combat, or, conversely, what good they were trying to promote. Understanding the past allows us to determine if today's use of such statutes makes sense in light of the reasoning behind its creation. If present rationales have changed, perhaps the scope and content of the law should be changed as well.

As far back as 1388, English statutes outlawed begging.[8] Anti-begging laws were initially provisions in vagrancy statutes with "three basic justifications for punishing vagrancy."[9] The first justification was essentially a "legislative imposition of the protestant ethic,"[10] or, as an American court once termed it,

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[6] U.S. CONST. amend. I ("Congress shall make no law . . . abridging the freedom of speech"); Gitlow v. New York, 268 U.S. 652, 666 (1925) (incorporating First Amendment freedom of speech into Due Process Clause of Fourteenth Amendment, thereby subjecting individual states to free speech limitations of the United States Constitution).

[7] *Young I*, 729 F. Supp. at 353-54 (court looks to the history of begging statutes); *Loper*, 802 F. Supp. at 1032 (court discusses history of begging statutes).

[8] 3 JAMES F. STEPHEN, A HISTORY OF THE CRIMINAL LAW OF ENGLAND, 268 (London, MacMillan 1883).

[9] Gary U. Dubin & Richard H. Robinson, *The Vagrancy Concept Reconsidered: Problems and Abuses of Status Criminality*, 37 N.Y.U. L. REV. 102, 102-03 (1962).

[10] *Id.* at 102.

the "economic truth that industry is necessary for the preservation of society."[11] In other words, the laws required people to work for the good of society. The second justification concerned protecting "decent citizens of the community" from the "sordid individuals who infest our stations such as the dirty, disheveled, besotted characters whose state is but a step short of intoxication."[12] The final reason, still articulated today, was to prevent crime.[13] The supposed direct relationship between vagrancy and crime typically stemmed from a dismal view of the poor who wandered as vagrants: "He [the vagrant] is a thief, a robber, often a murderer, and always a nuisance."[14]

An analysis of vagrancy laws and their anti-begging provisions would not be complete, therefore, without noting their original socio-economic justifications. The decay of feudalism, which served to anchor laboring classes to the soil, left numerous laborers poor and destitute.[15] In 1349 and 1350, Parliament passed the Statutes of Laborers[16] to do what the fading economic system could not: keep the laboring population in government-mandated living arrangements. "[P]rovisions as to vagrancy were practically punishments for desertion."[17] Wages and residences for laborers were fixed;[18] the poor had their place and had to stay there. Should the poor choose to wander, the punishment could be death.[19]

These "makeshift legislative substitutes for serfdom"[20] also abolished begging. In 1388, a statute was passed which proscribed begging, but distinguished between beggars who were "able to labour" and those "impotent to serve."[21] This distinction, although regarded by some as the "origin of . . . poor law,"[22] did not necessarily treat the impoverished well. Those classified as

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[11] State v. Hogan, 58 N.E. 572, 573 (Ohio 1900).

[12] People v. Bell, 204 Misc. 71, 74, 125 N.Y.S.2d 117, 119 (Nassau County Ct.), *aff'd*, N.E.2d 821 (N.Y. 1953).

[13] Dubin & Robinson, *supra* note 9, at 103.

[14] *Hogan*, 58 N.E. at 574. Although one author has noted that such negative "descriptions are no longer useful in assessing the relevant social concern and must be read with an appreciation of historical circumstances by which they are elicited," Dubin & Robinson, *supra* note 9, at 103 n.11, not all would agree with this view. *See Young II* at 156 (". . .begging and panhandling in the subway amounts to nothing less than a menace to the common good").

[15] Dubin & Robinson, *supra* note 9, at 104 n.19 (citing Forrest W. Lacey, *Vagrancy and Other Crimes of Personal Condition*, 66 HARV. L. REV. 1203, 1206 (1953)).

[16] *Id.* at 104 n.22 (citing Statute of Labourers, 23 Edw. 3 c. 1 (1349); 25 Edw. 3, c. 1 (1350)).

[17] 3 STEPHEN, *supra* note 8, at 274.

[18] *Id.*

[19] *Id.* at 270-71 (offenders of vagrancy statutes could have an ear cut off and repeat offenders could be hanged).

[20] Dubin & Robinson, *supra* note 9, at 105.

[21] *Id.* at 105 n.25 (citing Statute of Labourers, 12 Rich. 2 (1388)). *See also* 3 STEPHEN, *supra* note 8, at 268.

[22] 3 STEPHEN, *supra* note 8, at 269.

"impotent to serve" were forced to stay in towns which chose to accept them and could not wander outside those limits.[23] These laws did not specify exactly what would happen to these people if no city or town accepted them.[24] Later statutes required town magistrates to license the "impotent poor" to beg within certain local limits and continued to ban begging by anyone able to work.[25]

This overview of early begging ordinances provides an understanding of modern attitudes toward begging in two ways. First, vagrancy legislation in the United States, including those statutes which specifically mention begging, closely follows the English models and has existed since colonial times.[26] Second, and more importantly, this overview serves as a starting point for analyzing the evolution of the legal, cultural, and socio-economic justifications for these statutes.[27] The Supreme Court has already commented in the vagrancy context that "the 'theory of the Elizabethan Poor Laws no longer fits the facts.' The conditions which spawned these laws may be gone, but the archaic classifications remain."[28] These "archaic classifications" focus on individual characteristics (such as idleness) and acts (such as begging).[29] But disturbing questions remain: if these "archaic classifications" remain without the rationales which spawned them, what rationales exist today to keep these statutes in the books? Conversely, have these rationales been put into a modern context and simply exist in an updated form? The following section offers an overview of poverty today and explores the modern rationales for anti-begging statutes.

B. *Begging and Urban Poverty Today*

1. The Urban Poor

Advocates have argued that there were between two and three million homeless people in the United States by the mid-1980s.[30] Approximately 33.1 million people lived below the poverty line in 1985[31] and figures indicate that the poor are getting poorer.[32] Additionally, the urban poor have faced tremendous difficulties in obtaining food and shelter. The United States Conference

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[23] *Id.* at 268.

[24] *Id.*

[25] *Id.* at 270.

[26] Forrest W. Lacey, *Vagrancy and Other Crimes of Personal Condition*, 66 HARV. L. REV. 1203, 1206 (1953).

[27] *See* Lloyd L. Weinreb, *The Complete Idea of Justice*, 51 U. CHI. L. REV. 752, 807-09 (1984) (law should evolve into a more compassionate sociological process).

[28] Papachristou v. City of Jacksonville, 405 U.S. 156, 161-62 (1972) (footnotes and citations omitted).

[29] Lacey, *supra* note 26, at 1208-9.

[30] Peter B. Edelman, *The Next Century of Our Constitution: Rethinking Our Duty to the Poor*, 39 HAST. L.J. 1, 9 (1987) (citing congressional hearings and reports).

[31] *Id.* at 11 (citing Bureau of Census Reports).

[32] *Id.* at 12 (citing Center on Budget and Policy Priorities).

of Mayors determined that in 1989, in nearly three-fourths of the Conference's cities, emergency food facilities turned away the needy because of insufficient resources.[33] In New York alone, over a quarter of a million adults suffer from chronic hunger, while over half a million more routinely go hungry.[34]

Various reasons have been offered to explain such extensive poverty. Macroeconomic policy and the unhealthy economy, inadequate schooling, racism and discrimination, insufficient child care services, severely inadequate public benefits, and failures of individual capacity and responsibility are all cited as causes of poverty.[35] Others have pointed to the deinstitutionalization of mentally ill patients, lack of low-income housing, and the bureaucratic requirements of public benefit programs.[36] The homeless themselves often blame unemployment, family crises, and eviction as the main reasons for their homelessness.[37] Due in large part to the "diverse causes of homelessness, the stereotype of the street dweller as an older alcoholic male has lost much of its validity."[38] In fact, the "overwhelming majority" of the homeless are not homeless by choice.[39]

Many of the homeless and/or poor beg to survive. One in three homeless persons surveyed in Chicago received income which very likely came from begging.[40] Other studies estimate that twelve to fourteen percent of the homeless beg.[41] Regardless of the percentages, the fact remains that many of today's urban poor rely on begging for survival,[42] so criminalizing this source of income leaves the impoverished in our society in a cycle of hunger and helplessness.

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[33] U.S. Conference of Mayors, A Status Report on Hunger and Homelessness in America's Cities: 1989, 3 (December, 1989) (cited in Brief for National Coalition for the Homeless as Amicus Curiae at 19, *Young*, 111 S. Ct. 516 (1990)) (henceforth, "Amicus Brief").

[34] *Id.* at 20 (footnote omitted).

[35] Edelman, *supra* note 30, at 19.

[36] Paul Ades, *The Unconstitutionality of "Antihomeless" Laws: Ordinances Prohibiting Sleeping in Outdoor Public Areas as a Violation of the Right to Travel*, 77 CAL. L. REV. 595, 599-600 (1989); Charles F. Knapp, *Statutory Restriction of Panhandling in Light of Young v. New York City Transit: Are States Begging Out of First Amendment Proscriptions?*, 76 IOWA L. REV. 405, 406 n.7 (1991).

[37] Anthony J. Rose, *The Beggar's Free Speech Claim*, 65 IND. L.J. 191, 198-99 n.47 (1989) (citation omitted).

[38] Ades, *supra* note 36, at 601; Rose, *supra* note 34 at 199 n.47 (citation omitted).

[39] *Id.* at 601 (footnote omitted).

[40] P. ROSSI, DOWN AND OUT IN AMERICA: THE ORIGINS OF HOMELESSNESS 108 (1989) (cited in Amicus Brief, *supra* note 33, at 21).

[41] Amicus Brief, *supra* note 33, at 21. Charities have also not served as the resources for the needy. "In 1989, only 8.1% of total charitable contributions went to social services for the needy." *Id.* at 31. (footnote omitted).

[42] C. CATON, HOMELESS IN AMERICA 163 (1990) (today homeless must resort to begging for survival) (cited in Knapp, *supra* note 33, at 406 n.9).

2. Current Government Responses: Old and New Rationales

Government proposals on how to deal with the problems of urban poverty have ranged "from the benign to the sinister."[43] On the positive side, federal and state governments have set aside resources to provide funding for public shelters and general relief programs.[44] Local government efforts, on the other hand, have been sporadic and "have largely failed to alleviate the homelessness problem."[45] At one time, New York City took the intriguing step of empowering selected city authorities to commit to institutions homeless individuals who refused to go voluntarily to a city shelter and who did not pass an on-the-spot psychological examination.[46] A New York appellate court upheld the policy's constitutionality.[47] In Miami, a federal court judge recently ordered the city to provide two "safe zones" where homeless people can eat and sleep without being arrested.[48] The ruling was in response to a lawsuit filed by the American Civil Liberties Union, claiming "Miami rounded up the homeless to get them off the streets to protect the city's image during such events as the New Year's Orange Bowl parade which is televised nationwide and brings throngs of tourists to the city."[49]

Other proposals, however, show a remarkable degree of insensitivity to the plight of the urban poor and suggest that the old rationales for criminalizing the actions of the poor are not as "archaic" as the Supreme Court believes. In Fort Lauderdale, a city commissioner proposed ending the problem of the poor foraging in garbage for food by topping the garbage with rat poison.[50] In Los Angeles, a public official suggested putting the homeless on a barge in Los Angeles Harbor.[51] Many cities have used zoning ordinances to shut down private shelters which technically violate the law.[52] Numerous cities have begun to rely on statutes which prohibit sleeping in public areas in order to remove

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[43] Rose, *supra* note 34, at 192.

[44] Ades, *supra* note 36, at 601 n.414 (citation omitted), 602. *But see* Helen Hershkoff & Adam S. Cohen, *Begging to Differ: The First Amendment and the Right to Beg*, 104 HARV. L. REV. 896, 898 n.12 (1991) (noting that the White House has been less than sympathetic to the homeless).

[45] Ades, *supra* note 36, at 602 (describing the inadequacies of public shelters).

[46] Maria L. Campi, Note, *Building a House of Legal Rights: A Pleas for the Homeless*, 59 ST. JOHN'S L. REV. 530, 543 n.77 (1985) (citation omitted).

[47] Anonymous v. N.Y.C. Health and Hosp. Corp., 523 N.Y.S.2d 71, 87, *appeal dismissed as moot*, 520 N.E.2d 515 (N.Y. 1988).

[48] *Pottinger v. City of Miami*, No. 88-2406-CIV-ATKINS, 1992 U.S. Dist. LEXIS 17640 at *1 (S.D. Fla. Nov. 16, 1992).

[49] Doug Phillips, *Miami Must Create Zones For the Homeless*, Reuters, Limited, Nov. 17, 1992, AM cycle. The ruling has been appealed by Miami mayor Xavier Suarez, who claims the order was "too broad." Agence France Presse, *Miami Mayor to Appeal Order to Create Safe Zones For Homeless*, News, Nov. 18, 1992.

[50] Nancy R. Gibbs, *To Give or Not to Give*, TIME, Sept. 5, 1988, at 68, 74.

[51] *Id.*

[52] Ades, *supra* note 36, at 603.

the homeless from their municipalities.[53] Some cities have relied on vagrancy laws to solve the problems created by the urban poor.[54] However, the Supreme Court cast a shadow over this last method in 1972 when it declared vagrancy laws unconstitutionally vague.[55] Loitering laws have also come under attack, mostly on grounds of vagueness and unreasonableness,[56] or because they grant too much arbitrary power to the police.[57] Lately, municipalities have focused on anti-begging provisions.[58]

The rationales for this new emphasis on anti-begging provisions have become increasingly clear: state and local governments want to "push the problem of homelessness out of the public sight."[59] There are numerous reasons for this intolerance. Local business people claim that the presence of the homeless harm their businesses, cities fear that the poor will drain their municipal resources, and local residents feel that the presence of the poor in their communities lowers the quality of life.[60] This quality of life argument is usually articulated as fear of crime and unsanitary conditions, and repulsion by the habits of the poor and homeless.[61]

Unfortunately, society's views of the poor and begging have undergone little revision in the past centuries. In 1834, a New Hampshire reverend preached that "pauperism is the consequence of willful error, of shameful indolence, of vicious habits."[62] In 1986, Edwin Meese, counselor to President Reagan and later Attorney General, stated that people go to soup kitchens "because the

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[53] *See generally*, Ades, *supra* note 36, at 595-96 (noting that Los Angeles, Dallas, St. Petersburg, Santa Barbara, Long Beach, and others use these statutes to drive the homeless out of their jurisdictions).

[54] *Id.* at 604.

[55] Papachristou v. City of Jacksonville, 405 U.S. 156 (1973).

[56] Kolender v. Lawson, 461 U.S. 352 (1983); Shuttlesworth v. Birmingham, 382 U.S. 87 (1965).

[57] For example, the New York Court of Appeals ruled unconstitutionally vague a statute banning loitering in major New York transportation centers. People v. Bright, 520 N.E.2d 1355 (N.Y. 1988). It is not unreasonable to assume that once law enforcement officials lost this weapon against the homeless, they turned their focus to the creation and enforcement of anti-begging statutes.

[58] Knapp, *supra* note 36, at 406 n.90 (citation omitted) (noting that Seattle, Atlanta, New York City, Chicago, Miami, Phoenix, Minneapolis, and Tulsa all regulated panhandling). *See also Young I*, 729 F. Supp. 341 at 354 (noting twenty-five states regulate begging).

[59] Knapp, *supra* note 36, at 406; *see also* Clifford J. Levy, *Tompkins Square Park Reopens Amid Tensions*, N.Y TIMES, Aug. 26, 1992, at B3 (homeless protest reopening of New York park with curfews designed to keep the homeless from sleeping in the park and "overwhelming public spaces").

[60] Ades, *supra* note 36, at 603.

[61] *Id.*

[62] Thomas Ross, *The Rhetoric of Poverty: Their Immorality, Our Helplessness*, 79 GEO. L.J. 1499, 1505 (footnote omitted) (1991).

food is free and that's easier than paying for it."[63] Some states still prohibit begging by those who are able to work,[64] and apparently feel comfortable with the idea that those who can work should work and not beg. These examples represent nothing more than a secular rehabilitation of the protestant work ethic rationale developed in England six centuries ago.[65] Unfortunately, as high unemployment rates demonstrate, just because one can work does not mean that one will be able to find work.

Although our society is not based on feudalism, the tactics adopted today continue to isolate the poor for a similar reason: a dislike of the poor so intense that city representatives have the audacity to joke that the poor should be put on a barge or eat rat poison.[66] While past English parliaments wanted to tie poor serfs to the land, current American legislatures want to isolate the poor and send them elsewhere, far away from the city limits.[67] This isolation seeks to keep the poor where they belong, far away from taxpaying businesses that support cities and people who live in them.[68]

Traditional anti-begging ordinances were a means of controlling the poor. Most municipalities feel the need to control the poor again and are relying on old rationales in anti-begging provisions. Yet these rationales, based mainly on segregation along a wealth continuum, have outlived their historical context (i.e., the decline of feudalism) are based on misconceptions about the poor, and belie the evolution of compassion for the poor evidenced in the modern welfare state.[69] "When the members of the segregated group are defined by their differences from those in a dominant position in society, the very act of segregation suggests not simply difference but also deviance."[70] In this manner, legislatures, courts, and society in general create a lens through which one sees the poor through stereotypes of difference, deviance, and moral weakness without bothering to dig deeper into the facts of their plight or their rights as citizens.[71] This Note seeks to avoid these stereotypes so that we may see the beggar's situation and rights more clearly.

Because the poor face difficulty in merely surviving, the costs of suppressing their means of survival are high. To take away one of the main methods by which beggars communicate and obtain money for survival leaves them

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[63] Jonathan Fuerbinger, *Homeless Are Not a Duty of U.S., Reagan Aide Says*, N.Y. TIMES, Feb. 19, 1986, at A18.

[64] Dubin & Robinson, *supra* note 9, at 112-13.

[65] *See supra* note 9 and accompanying text.

[66] *See supra* notes 50-51 and accompanying text.

[67] Hershkoff & Cohen, *supra* note 44, at 910-11 (homeless typically quarantined); *see also*, Clifford J. Levy, *Tompkins Square Park Reopens Amid Tensions*, N.Y. Times, Aug. 26, 1992, at B3.

[68] Ades, *supra* note 36, at 617-19 (focusing on anti-sleeping laws aimed at the homeless).

[69] *See supra* note 27 and accompanying text.

[70] Ross, *supra* note 62, at 1540 (citation omitted).

[71] *Id.* at 1503, 1540-41.

unheard and unfed.[72] Consequently, protecting the poor requires not only that a right to beg be established, but also that a rationale be developed to protect this right if it conflicts with other rights.

C. *Is There a Right to Beg?*

This section will examine three values which have guided courts and commentators in interpreting the First Amendment: self-realization, enlightenment, and democratic governance.[73] The fit between begging and these values indicates that begging deserves First Amendment protection.

1. Self-Realization

Self-realization refers "either to development of the individual's powers and abilities — an individual 'realizes' his or her full potential — or to the individual's control of his or her own destiny through making life-affecting decisions — an individual 'realizes' the goals in life that he or she has set."[74] A desper-

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[72] Amicus Brief, *supra* note 33, at 2 (noting that denying the poor a right to beg "would be the denial of the most fundamental of all human rights, the right to survive"). *See also Young I*, 729 F. Supp. at 348 (acknowledging that the plaintiffs rely on begging for survival).

The concept of "survival" or "substinence" income is beyond the scope of this paper. Such a right, whether based on "the very structure of the Constitution as compact that creates our American community or on government's actions in helping to create the severe poverty that persists amid our affluence," would face difficult odds even before a liberal Supreme Court. Edelman, *supra* note 30, at 3, 7. In 1980, the Supreme Court took the position that the legislature has no responsibility to "equalize the condition of the poor." Harris v. McRae, 448 U.S. 297, 316 (1980). A legislature, however, may not place economic barriers in the path of an individual who wishes to exercise a fundamental right. *Id.* at 316-17. The argument in this Note focuses on the First Amendment because of its special applicability to the beggar's condition, but it does rely on survival to illustrate the harm of an anti-begging ordinance and the need for begging among today's poor. In these important senses, begging and survival are linked to free speech. This Note only assumes what other constitutions and governing documents make explicit, namely that legislative actions should not contribute to the death of its innocent citizens who happen to be poor. *See The Basic Laws of the Federal Republic of Germany*, Article 1 ("The dignity of man should be inviolable. To respect and protect it shall be the duty of all state authority."); United Nations, *Universal Declaration of Human Rights*, Article 25, in *Basic Documents on Human Rights* (I. Brownlie ed. 1981) ("Everyone has the right to a standard of living adequate for the health and well-being of himself and of his family, including food, clothing, housing and medical care and necessary social services. . . ."). *See also* Edelman, *supra* note 30, at 19-23; Campi, *supra* note 46, at 549-50.

[73] Hershkoff & Cohen, *supra* note 44, at 898-904. This section owes a debt of gratitude to the foundation laid by Hershkoff and Cohen, the original litigators of the *Young* case, and their interpretation of Martin H. Redish's *The Value of Free Speech*, 130 U. PA. L. REV. 591 (1982).

[74] Martin H. Redish, *The Value of Free Speech*, 130 U. PA. L. REV. 591, 593

ate[75] person's attempt to beg fits both definitions. First, as mentioned earlier, the daily existence for the urban poor is a fight for survival.[76] How one defines realizing "full potential" or one's "goals in life" means something different to a beggar than it does to a federal judge. Having money to get away from the cycle of poverty that an urban beggar faces allows a hope of escape, an escape that can lead to a better use of the poor person's powers and abilities in the future. Second, the goals of a beggar's life must often center on day-to-day concerns. Begging can lead to money that will provide shelter on a given night.

Self-realization also concerns the "basic human desire for recognition."[77] In a society which isolates the poor,[78] validating the fact that one's problems are common problems and are known to others allows one to recognize oneself as a member of society and attempt to break the bonds of indifference and ignorance.[79] The principle of self-recognition is based on "the premise of individual dignity and self-choice."[80] Begging allows individuals to reach out to his or her

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(1982).

[75] The focus here is on the poor and needy beggar, which empirically represents a very large majority of beggars. *See* Part I.B.1. There no doubt exists some small number of wealthy beggars. *See, e.g.*, Peter S. Canellos, *No Finding That Guzelian Was Coerced*, BOSTON GLOBE, Dec. 10, 1991, at 1 (detailing the story of Mary Guzelian, a Boston street person who often begged but left $400,000 to her state representative and his aide upon her death). This minority of beggars may feel that begging is a worthy way of life or choose to make a living from begging. If so, the value of self-realization of their ambitions is especially important to them. If they beg in a peaceful, nonthreatening manner and obey proper time, place, and manner restrictions, I submit that allowing the self-realization of their goals outweighs any state interest in stopping their begging. Furthermore, their actions may fall within protected speech as charitable solicitation. *See infra* Part II.A.

If some beggars choose to beg solely as a political statement to express concern about the way that the homeless have been treated by society or to protest anti-begging statutes, such symbolic actions implicate enlightenment and democratic governance values. *See infra* Parts I.C.2 and I.C.3. Protection of this type of symbolic speech would vary according to the protestors' methods. Did the actors intend to convey a specific message? Did the circumstances surrounding the activity create a great likelihood that those who view the conduct will be able to perceive the intended message? *See* Spence v. Washington, 418 U.S. 405 (1974). *See also* United States v. O'Brien, 391 U.S. 367 (1968) (government regulation may impose restrictions on expressive conduct if four-part test met); Clark v. Community for Creative Non-Violence, 468 U.S. 288 (1984) (demonstrators who sought to convey the plight of the homeless by sleeping in public park not allowed to do so if the conduct may be constitutionally regulated); *infra* Part II.B.

[76] *See supra* note 72.

[77] Procunier v. Martinez, 416 U.S. 396, 427 (1974) (Marshall, J., concurring).

[78] Hershkoff & Cohen, *supra* note 44, at 910-11 (the nation's traditional response to the poor "has been quarantine").

[79] Joseph Raz, *Free Expression and Personal Identification*, 11 OXFORD J. OF LEGAL STUD. 303, 311 (1991).

[80] Cohen v. California, 403 U.S. 15, 24 (1971).

community in a manner that the individual deems appropriate. In fact, begging may be the *only* appropriate manner in which the urban poor reach out to society,[81] primarily because begging symbolizes their material needs and provides an opportunity for people to stop and engage in personal or political discussions on city streets or subways with the urban poor. Begging is an easy way to gain access to another person's ear.

Finally, it must be noted that people express themselves in different ways. How one chooses to communicate cannot be cavalierly dismissed because of its uniqueness.[82] To disallow speech which can provide self-realization is to deny the self-respect which comes from free expression.[83] Begging allows the beggar to enlist the help of others to fulfill her needs.

2. Enlightenment

The First Amendment seeks to protect "the widest possible dissemination of information from diverse . . . sources."[84] Beggars bear a social message which should not be suppressed. A beggar's "entire person speaks of poverty and suffering; she is tangible evidence of failure, be it her own or society's."[85] A beggar's appeal, no matter how simple, provides a comment on numerous social issues. The beggar shows the lack of care society exhibits towards its marginal members, including the lack of adequate housing, public benefits, and/or underfunded drug and alcohol abuse programs.[86]

The enlightenment values "[hold] that free expression 'is not only an aspect of individual liberty — and thus a good unto itself — but also is essential to the common quest for truth and the vitality of society as a whole.' "[87] The beggar may use begging to engage the listener in a conversation about the plight of the poor and may also challenge the listener's assumptions about the social responsibility members of a community owe one another.[88] The beggar's entreaty can challenge the listener in other ways as well. One's response to a beggar may be guilt or self-inquiry. It may lead one to wonder how a society with so much can have so many people starving on its streets. One can leave a meeting with a beggar wondering what one, or one's congressperson, can do to

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[81] Sally A. Specht, Note, *The Wavering, Unpredictable Line between "Speech and Conduct: The Fate of Expressive Conduct after Young v. New York Transit Authority, 903 F.2d 146 (2d Cir. 1990)*, 40 J. OF URB. & CONTEMP. L. 173, 189 (1991) (beggars have little money or choice to get money by means other than begging).

[82] *See* Cohen, 403 U.S. at 18 (the words "Fuck the draft" affixed to a jacket are protected because of the wearer's need to "express himself").

[83] Hershkoff & Cohen, *supra* note 44, at 903.

[84] Citizens Publishing Co. v. United States, 394 U.S. 131, 139-40 (1969) (quoting Associated Press v. United States, 326 U.S. 1, 20 (1945) (Harlan, J., concurring)).

[85] Rose, *supra* note 37, at 205.

[86] *Id.*

[87] Hershkoff & Cohen, *supra* note 44, at 898 (quoting Bose Corp. v. Consumers Union of United States, 466 U.S. 485, 503-04 (1984)).

[88] *Id.* at 899.

help. In such scenarios, a collective search for truth has begun.

Furthermore, "public portrayal and expression of forms of life validate the styles of life portrayed."[89] We live in a world of "urban anonymity" in which "people depend more than ever on public communication to establish a common understanding of the ways of life" common in society.[90] If the urban poor did not (or could not) beg, the average person's knowledge of their plight would diminish significantly. "Society will neither perceive nor correct social and political ills if the evidence of their existence is suppressed."[91] The poor do not have access to mass communication devices or advertisement agencies, and therefore their message must be conveyed orally, with the graphic nature of their situation supplying much of the message.[92] Begging allows an interaction which educates the listener, allows the beggar to receive feedback, and provides "an essential element in the process of cultural transmission, preservation, and renewal."[93]

One argument against the enlightenment value of begging is that it is merely a request for money rather than communication of an idea.[94] But the fact that begging contains a pecuniary purpose does not render it meaningless. Much speech, such as the expression of ideas through motion pictures, is motivated by personal gain, yet is still protected.[95] In the case of begging, asking for money only increases the power of the message and its likelihood of being understood, for it is an act of desperation consistent with the beggar's message of deprivation.

3. Democratic Governance

Democratic governance is grounded in the belief that democratic order is "akin to a town meeting in which people 'meet as political equals' and have a 'duty to think [their] thoughts, to express them, and to listen to the arguments of others.' "[96] Begging fulfills this role by alerting the general public and society's decisionmakers to the facts and conditions of poverty from a firsthand source.[97] Prohibiting begging will prohibit this flow of information.

It must be remembered that the beggar is politically powerless. A homeless person who has no permanent address cannot vote and thus cannot readily fight the criminalization of begging through the political process. The beggar's political protection generally comes from advocates who take up the cause of

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[89] Raz, *supra* note 79, at 310.

[90] *Id.* at 312.

[91] Rose, *supra* note 37, at 206.

[92] Raz, *supra* note 79, at 312; Hershkoff & Cohen, *supra* note 44, at 900.

[93] Raz, *supra* note 68, at 312.

[94] *Young II*, 903 F.2d 146 at 154.

[95] Hershkoff & Cohen, *supra* note 44, at 900.

[96] *Id.* at 901 (quoting A. MIKLEJOHN, POLITICAL FREEDOM: THE CONSTITUTIONAL POWERS OF THE PEOPLE 24 (1965)).

[97] *Id.*

the poor.[98] Silencing the beggar and throwing her in jail if she begs would isolate the beggar further from her political liaison.[99] Some would characterize begging as being solely concerned with private need and not the public good; consequently, allowing begging would not aid the process of governance.[100] Such arguments not only underestimate the uniqueness of the beggar's voice, but also underestimate how political order is shaped. As noted earlier, the beggar brings firsthand knowledge into her communication with the listener.[101] A member of the general public or even an advocate for the homeless cannot fully comprehend the life of the homeless unless she speaks to the homeless. Begging, not television commercials or newspaper ads, is how beggars communicate their views on these matters.[102] Begging offers the means to approach and explain to a stranger the desperateness of one's situation and need for money. Even if the beggar's motives are selfish, communication and an exchange of information still occur. Furthermore, "selflessness has never been a prerequisite of protected speech."[103] The First Amendment "embraces the right to participate in the building of the whole culture,"[104] not just electoral decisions or town meeting-type debates. The beggar's voice on the subway platform promotes democratic governance.

D. *Should Begging Be Protected?*

If begging is a constitutional right, as the previous section argued, it does not follow that the right should be protected. What if the beggar's protected actions infringe upon the rights of others? What factors should we consider in judging the superiority of claims? The answer lies in understanding how majoritarian preferences and individual rights should be weighed in the realm of First Amendment rights.

1. Free Speech and Majoritarian Preferences

Those "constitutional rights that we call fundamental, like the right of free speech," serve as safeguards against the government "in the strong sense."[105] The government may override a right such as free speech only "when necessary to protect the rights of others, or to prevent catastrophe, or even to obtain a clear and major public benefit."[106] If the government tried to defeat a right

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[98] Rose, *supra* note 37, at 210.

[99] *Id.* (arguing that this isolation should cause beggars to received heightened judicial protection as a discrete and insular minority).

[100] Hershkoff & Cohen, *supra* note 44, at 902.

[101] *See supra* note 81 and accompanying text.

[102] *See infra* notes 232-37 and accompanying text.

[103] Hershkoff & Cohen, *supra* note 44, at 902.

[104] THOMAS EMERSON, THE SYSTEM OF FREEDOM OF EXPRESSION 7 (1970).

[105] RONALD DWORKIN, TAKING RIGHTS SERIOUSLY 191 (1977).

[106] *Id.* Defining "the rights of others" as well as when the necessity arises to protect those rights has always been the daunting task of liberal legal theory. *See* Joseph W.

with less, the concept of constitutional rights would be valueless. If the government could defeat rights merely by pointing to a speculative chance that the community would benefit, almost any right could be defeated at any time. Such a result, as legal philosopher Ronald Dworkin has stated, would not be taking rights seriously: "There would be no point in the boast that we respect individual rights unless that involved some sacrifice, and the sacrifice in question must be that we give up whatever marginal benefits our country would receive from overriding these rights when they prove inconvenient."[107]

This is not to say that an individual should sacrifice her *individual* rights just because they conflict with another's rights. Dworkin posits the following test in such situations: "Someone has a competing right to protection, which must be weighed against an individual right to act, if that person would be entitled to demand that protection from his government on his own title, as an individual, without regard to whether a majority of his fellow citizens joined in the demand."[108] As an example of a non-individual right, Dworkin cites a person's desire for quiet in a public place — "the justification for these laws, if they can be justified at all, is the common desire of a large majority," not a personal right of an individual against the government.[109]

Thus, the argument that even if begging is a constitutional right, the government may ban it outright[110] because begging may cause some damage to the general public[111] fails for a number of reasons. First, such a conclusion

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Singer, *The Legal Rights Debate in Analytical Jurisprudence from Bentham to Hohfeld*, 1982 WIS. L. REV. 975, 980, 985, 1059 (1982) (noting that liberal political theory is founded on a contradiction between "the principle that individual may legitimately act in their own interest to increase their wealth, power, and prestige at the expense of others and the principle that they have a duty to look out for others and to refrain from acts which hurt them"; because legal decisions revert to this fundamental contradiction "we have no alternative but to decide each case in light of competing goals and interests"). Consequently, where a court draws its baselines concerning what it will or will not regulate will determine what it will and will not accept. In this light, one must bear in mind that numerous unjust decisions have depended on questionable baselines and rhetoric. *See, e.g.*, Korematsu v. United States, 323 U.S. 214 (1944) (upheld internment of Japanese-Americans during World War II); Dred Scott v. Sandford, 60 U.S. (19 How.) 393 (1857) (upheld Fugitive Slave Laws). As one commentator has noted, we "must wonder whether our legal choices about poverty will bring on us and our children the tragedy and shame that historically have attended those who take the shelter of rhetoric in a storm of human suffering." Ross, *supra* note 62, at 1546-47. This section of the Note seeks to articulate some principles which can guide a court's baseline formation.

[107] DWORKIN, *supra* note 105, at 193; *see also Loper*, 802 F. Supp. at 1031.

[108] DWORKIN, *supra* note 105, at 194.

[109] *Id.* at 195.

[110] I do not mean to imply that proper time, place, and manner restrictions could not apply to begging. On the contrary, I see them as something of a solution. *See infra* Part II.C.1.

[111] *See generally Young II*, 903 F.2d 146 (2d Cir. 1990).

allows the majority to work its will against an individual's constitutional right. Consequently, it fails to take rights seriously, for it allows the potential for marginal benefit to society to cast aside rights society determined were important enough to warrant some societal sacrifice. Second, this argument allows a speculated emergency or high benefit to overcome an existing right. "If we allow speculation to support the justification of emergency or decisive benefit, then, again, we have annihilated rights."[112]

There are other dangers in the aforementioned argument other than not taking rights seriously. A total ban on criminalization of a type of speech can also serve as an insult to the speaker.[113] Such criminalization "expresses official, authoritative disapproval and condemnation of the style of life of which the censored communication is a part."[114] As noted earlier, begging can be essential to the urban poor's survival.[115] Begging allows the poor, who are often seen as repulsive by others,[116] an opportunity to initiate conversation, advocate their views, and make contact with other members of society. Consequently, a total ban on begging criminalizes the poor's way of life, hampers their ability to identify with society, and denies them full membership in society. The beggar is seen, but not heard; allowed to be pitied, but not allowed to better her lot through soliciting money.[117]

When dealing with a group's free speech rights, "we cannot deny them sovereignty over defining what their way of life is, and what is integral to it."[118] The issue here is not whether the government must *approve* of begging; by banning begging the government sends a message that it will not *tolerate* this type of lifestyle.[119] In so doing, the government refuses to validate what the urban poor often have no choice but to do, thereby marginalizing this segment of society even further and denying them the dignity every member of society deserves. But, one might ask, why does dignity matter?

2. Human Dignity and Political Equality

The idea of rights against the government "is a complex and troublesome practice that makes the government's job of securing the general benefit more

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[112] DWORKIN, *supra* note 100, at 195.

[113] Raz, *supra* note 79, at 313. Raz's arguments refer to content-based censorship, which is, one could argue, exactly what the Transit Authority of New York City seeks. *See infra* Part II.C.2.

[114] Raz, *supra* note 79, at 313.

[115] *See supra* note 72 and accompanying text.

[116] *Young II*, 903 F.2d 146, 156 (2d Cir. 1990).

[117] *See generally* Raz, *supra* note 79, at 313-16.

[118] *Id.* at 318. Neither this Note's argument nor Raz's assumes that all speech should be protected all the time. The definition of begging used in this essay is a passive, nonthreatening one. Certainly harassing or intimidating behavior can be curtailed by means other than a total ban.

[119] *Id.* at 315-16.

difficult and more expensive."[120] Two pillars uphold the concept of rights against the government. First, human dignity supposes "that there are ways of treating a man that are inconsistent with recognizing him as a full member of the human community, and holds that such treatment is profoundly unjust."[121] Second, political equality supposes "that the weaker members of a political community are entitled to the same concern and respect of their government as the more powerful members have secured for themselves."[122]

Some may find this position ironic. One might ask, "How is begging dignified?" The answer lies in the exploration of the beggar's contemporary life, which was explored earlier.[123] For many of today's urban poor, begging is a matter of survival; thus, any attempt at living a better life is intertwined with human dignity. Human beings have dignity because of the capacity for moral choice.[124] To deny their moral choice, especially when no competing individual right is at stake, refuses to recognize the autonomy of human beings and thus compromises the respect due to all human beings.[125] The beggar survives by the speech of begging. Financially, she may gather enough money to eat. Personally, she may advocate the cause of the homeless or make connections with other members of society and reaffirm her membership therein. By affirming her moral capacity to choose to speak and better her situation, the beggar affirms her sense of moral dignity.[126]

Consequently, if a constitutional right such as free speech "represents the majority's promise to the minorities that their dignity and equality will be respected,"[127] then begging should not be criminalized unless (1) it is not a right, or (2) an equally strong, competing, and fundamental right exists.[128] As explained earlier, begging fits into the theoretical models used to define protected speech.[129] Furthermore, the rationales for anti-begging ordinances concern majoritarian preferences, not individual, constitutional right concerns.[130] In essence, it "is arrogant for the majority to suppose that the orthodox methods of expression are the proper ways to speak, for this is a denial of equal

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[120] DWORKIN, *supra* note 105, at 198.

[121] *Id.*

[122] *Id.* at 198-99.

[123] *See supra* Part I.A.

[124] STEVEN M. SHIFFRIN, THE FIRST AMENDMENT, DEMOCRACY, AND ROMANCE 114-15 (1990).

[125] *Id.* at 117.

[126] *Id.* at 123.

[127] DWORKIN, *supra* note 105, at 205.

[128] *Id.* at 200. A third factor is mentioned by Dworkin, namely if the cost for making begging free speech is higher than the costs society accepts in having free speech as a constitutional right. *Id.* Because I doubt it can logically be argued that viewing begging as free speech will cause structural damage to a democratic society, I have eliminated discussion of Dworkin's third factor.

[129] *See supra* Part I.C.

[130] *See supra* notes 106-12 and accompanying text.

concern and respect."[131] By protecting begging, the poor are treated as full members of the human community whose concerns are as worthy of our attention as those of any other member.

E. *Summation*

For many of the poor, if they cannot obtain money through begging, they will starve. This fact is as true now as it was in the 1300s. Similarly, society's desire to control the poor has weathered the ebb and flow of time. In the 1300s, the English sought to keep the poor working on feudal estates, even though the economic system was crashing.[132] Today, we want the poor out of our sight, away from businesses and taxpayers. Municipalities want them to stop clogging the subways platforms and sleeping on the streets. The best way of achieving this is to silence the poor and to take away their economic incentive to speak and to educate.

But if the poor are silenced, we do not see their problems as clearly. They may not enlighten us about their situation, they may not take positive steps to advocate for their needs, and they may not interact in society in order to bolster their self-worth and validate their lives. In short, they may not do the things free speech was meant to provide and protect. We violate their human dignity and political equality each time we try to silence them "for the good of society." We let majoritarian preferences crush constitutional rights at the expense of those who need those rights most.

II. A CRITIQUE OF *YOUNG*

The historical and contemporary analysis of anti-begging ordinances and the philosophical exploration of First Amendment theory demonstrates that begging is protected by the First Amendment and offers a background to critique the court's reasoning in *Young II*.[133] *Young II* was denied certiorari by the Supreme Court, but the quest to determine its ramifications is far from over. Numerous courts have criticized *Young II* directly or indirectly.[134] Foremost among these critics is *Loper*,[135] where the District Court for the Southern District of New York was faced with a challenge to New York's penal statute on begging in public places and held that the statute violated the First Amendment.

Furthermore, the Supreme Court may have cast new light on the future of

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[131] DWORKIN, *supra* note 105, at 201.

[132] Dubin & Robinson, *supra* note 9, at 104-05.

[133] For an overview of the holdings in *Young*, *see supra* note 2.

[134] *See, e.g.*, Blair v. Shanahan, 775 F. Supp. 1315 (N.D. Cal. 1991) (California anti-begging statute violates First and Fourteenth Amendments); City of Seattle v. Webster 802 P.2d 1333, 1343 (Wash. 1990) (Utter, J., concurring and dissenting) (arguing that *Young* is an "untenable" opinion).

[135] 802 F. Supp. 1029 (S.D.N.Y. 1992).

begging in *Intern. Soc. for Krishna Consciousness v. Lee* ("*ISKCON*"),[136] where the International Society for Krishna Consciousness challenged the Port Authority of New York City's regulation forbidding the repetitive solicitation of money as well as leafletting within any of the terminals of the three major airports it controlled. *ISKCON* was divided into two separate opinions. In one, the Supreme Court held that the prohibition on solicitation of contributions in a nonpublic forum satisfied the First Amendment,[137] and in the other, held that a ban on the distribution of literature in the airport terminals violated the First Amendment.[138]

Part II of this Note focuses on three of the issues which most concerned the courts in *Young I* and *Young II*: (1) whether begging is protected charitable solicitation; (2) whether begging is speech or conduct; and (3) whether the anti-begging ordinance satisfies time, place, and manner limitations.[139] The analysis in Part I makes clear why *Young II* was improperly decided.

A. *Charitable Solicitation*

A natural and revealing starting point in analyzing *Young II* is to determine how the court reached the conclusion that a beggar's solicitation is significantly different from the constitutionally protected entreaty of a charity. The seminal case concerning the issue of charitable solicitation and free speech is *Village of Schaumberg v. Citizens for a Better Env't.*[140] In *Schaumberg*, the Supreme Court stated that charitable solicitations "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."[141] The Court did not decide, however, whether the First Amendment right to solicit charity includes the right to solicit charitable contributions for one's own needs.[142]

The district court in *Young* was forced to decide this question of charitable solicitation and relied on three cases to do so. First, the district court turned to *Schaumberg*. Because the Supreme Court in *Schaumberg* struck down a statute which prohibited solicitation of contributions by charitable organizations that did not use at least seventy-five percent of their receipts for charitable purposes, the district court concluded that the Supreme Court was "implying that a solicitation which was not intended to benefit directly another person

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[136] 112 S. Ct. 2701 (1992).

[137] 112 S. Ct 2701 (1992) (No. 91-155) (hereinafter *ISKCON I*).

[138] 112 S. Ct. 2709 (1992) (No. 91-339) (hereinafter *ISKCON II*).

[139] There are other questionable aspects of the decision which are beyond the scope of this Note, among them whether the subway is a public forum. *See Young II*, 903 F.2d at 161-62.

[140] 444 U.S. 620 (1980).

[141] *Id.* at 632.

[142] Only one appellate court has faced this issue to date, and it ruled that an individual is equally deserving of First Amendment protection. C.C.B. v. State, 458 So. 2d 47, 48, 50 (Fla. Dist. Ct. App. 1984).

could still warrant protection."[143] In *Secretary of the State of Md. v. Joseph H. Munson Co.*,[144] the Supreme Court again struck down a solicitation statute. Because of these decisions, the district court inferred "that the speech associated with solicitation may require protection even if much of the money solicited was never intended to reach a suitable recipient of charity."[145] In the third case the district court relied upon, *Riley v. National Fed'n of the Blind of N.C.*,[146] the Supreme Court held that even though the solicitor presumably only intended to help himself, charitable solicitations such as those undertaken by a professional fundraiser were "inextricably intertwined with otherwise fully protected speech."[147]

An examination of these three charitable solicitation cases leads to a number of conclusions.[148] First, begging implicates the same "speech interests" noted in *Schaumberg*, which closely resemble the three speech interests upon which courts usually focus: communication of information (similar to enlightenment), the dissemination and propagation of view and ideas (similar to self-realization), and the advocacy of causes (similar to democratic governance).[149] The plaintiffs' and intervenor's affidavits in *Schaumberg* both reflected these interests.[150] Plaintiff Walley stated that he "ask[s] people for money" and sometimes "tell[s] them what it's like to be homeless."[151] Similarly, plaintiff Young stated that he "many times" responded to questions such as "why are you asking for money and why should I give it to you?"[152] Intervenor Gilmore stated that "in addition to being a means of support, [my request for money] is a way in which I communicate my belief that the government is not doing enough to protect poor citizens and provide them with food and shelter.[153] Communicating the experience of homelessness, disseminating the idea that the government is not doing enough, and attempting to justify the donations beggars request are all acts which place begging under the ambit of charitable solicitation and free speech. Indeed, one who organizes a charity to solicit on

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[143] *Young I*, 729 F. Supp. at 351.

[144] 467 U.S. 947 (1984).

[145] *Young I*, 729 F. Supp. at 351.

[146] 487 U.S. 781 (1988).

[147] *Id.* at 795-96.

[148] While this Note has focused on charitable solicitation cases, others have taken different paths in examining the beggar's situation. *See* Hershkoff & Cohen, *supra* note 44, at 908-09 (noting that begging might be entitled to commercial speech protection); *but see Loper*, 802 F. Supp. 1038 (arguing that begging "might" be entitled to protection as commercial speech, but to do so would ignore the "understood *quid pro quo* that commercial speech seeks and the lack of such a desire in charity").

[149] *Schaumberg*, 444 U.S. at 632.

[150] Petition for Writ of Certiorari for William B. Young et. al., app. F, Young v. New York City Transit Authority, 111 S. Ct. 516 (1990) (No. 90-591) (hereinafter "Petition").

[151] *Id.* at 8.

[152] *Id.* at 3.

[153] *Id.* at 11.

behalf of the poor could not do much more, and the charity would generate overhead costs that would not go to the charity's objective.[154]

Another rationale for providing free speech protection for charitable solicitation concerns the fact that the solicitor/speaker needs the donation for continued survival.[155] "[I]f beggars could not ask for money they would probably engage in fewer conversations with passersby," which would impermissibly chill much, if not all, of their speech.[156] The Supreme Court has stated that "without the funds obtained from solicitation from various fora, the organization's continuing ability to communicate its ideas and goals may be jeopardized."[157] This is true for the beggar, who must survive in order to continue delivering her message.[158]

The Court of Appeals in *Young II* relied on two factors to distinguish begging from charitable solicitation. First, the Court of Appeals implied, but did not fully discuss, that the beggar's entreaty is distinguishable from that of an organized charity.[159] Yet both speak to passersby, request donations, and explain why they want or need the money, and how they intend to use it.[160] Other courts have made the connection between a beggar's solicitation and that of an organized charity.[161] The district court judge who weighed the evidence found that "[t]o argue that solicitations for money by beggars have less communicative content than solicitations by organized charities is to differentiate more on the basis of the source of the speech than on its content."[162] Such distinctions, the district court held, are not constitutionally permissible.[163]

The second factor upon which the *Young II* court relied to remove begging

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[154] Knapp, *supra* note 36, at 417.

[155] Rose, *supra* note 37, at 208.

[156] *Blair*, 775 F. Supp. at 1322 n.6.

[157] Cornelius v. NAACP Legal Defense and Educational Fund, Inc., 473 U.S. 788, 799. *See also* Rose, *supra* note 37, at 208 n.89 (1985) (canvassing and solicitation are the best way for the poor to get money).

[158] Additionally, without the money obtained through begging, the first hand knowledge that comes from the beggar may be lost to the public. Rose, *supra* note 37, at 208.

[159] *See Young II*, 903 F.2d 155.

[160] *See generally* Petition, *supra* note 150, at app. F.

[161] *See Loper*, 802 F. Supp. at 1037 (the message between begging and charities "is the same, and that message is entitled to First Amendment protection"); *Blair*, 775 F.Supp. at 1322-23 ("Begging can promote the very speech values that entitle charitable appeals to constitutional protection," such as conveying information, spreading views, and establishing a relationship with the listener); *Webster*, 802 P.2d at 1342 ("A beggar's speech also informs the public about significant facts of social existence. . . . Even the statement 'I am hungry' communicates a fact of social existence of some relevance to public discourse.") (Utter, J., concurring and dissenting).

[162] *Young I*, 729 F. Supp. at 352.

[163] First Nat'l Bank v. Bellotti, 435 U.S. 765, 777 (1978) ("The inherent worth of speech in terms of its capacity for informing the public does not depend upon the identity of its source. . .").

from the scope of charitable solicitation addressed the alleged intimidating or harassing behavior by beggars in the subway. The Court of Appeals' interpretation of the "*Schaumberg* trilogy" holds that "there is a sufficient nexus between solicitation by *organized charities* and a 'variety of speech interests' to invoke protection under the First Amendment."[164] The reason that organized charities deserve such constitutional protection is that "[w]hile organized charities serve community interests by enhancing communication and disseminating ideas, the conduct of begging and panhandling in the subway amounts to nothing less than a menace to the common good."[165] This theme resonates throughout the opinion, which describes begging in the subway as "inherently harmful," "intimidating," "threatening," "transgressive conduct," and "harassing."[166] Additionally, the majority states that "while there can be no doubt that giving alms is virtuous, in the Western tradition the virtue is best served when it reflects an 'ordered charity.' "[167] The majority's support for this barrage on the poor was Chief Justice Rehnquist's sole dissent in *Schaumberg* and the TA's finding that subway passengers consider begging as harassing and threatening.[168] The approach that the Court of Appeals used was a short cut: the court's subjective interpretation of the "Western tradition" and its view that *all* beggars are different, deviant, and dangerous preordained its answer to the legal issue.[169]

Interestingly, the Second Circuit has backed away from giving *Young II* conclusive reign over the issue of whether begging is protected speech. In *Loper*,[170] the district court faced a challenge to New York's penal statute on begging in public places. Despite the strong language in *Young II*,[171] the *Loper* court held that *Young II*'s distinctions between charities and beggars was dicta, and that the recent Supreme Court decision in *ISKCON* "cast doubt on the Second Circuit's distinction."[172] Relying on the fact that each of the justices in *ISKCON* recognized that the Krishnas' solicitation was entitled to First Amendment protection, and its own judgment that the "only difference" between the beggar and the Krishnas "is the eventual ends of the funds contributed," the *Loper* court determined that begging deserves equal First Amendment protection.[173]

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[164] *Young II*, 903 F.2d at 155 (emphasis supplied).

[165] *Id.* at 156.

[166] *Id.* at 149, 154, 156, 158.

[167] *Id.* at 156.

[168] *Id.*

[169] *See* Ross, *supra* note 62, at 1508, 1541 (noting that accepting rhetoric about the poor at face value allows decision makers to make the poor's suffering "intellectually coherent").

[170] 802 F. Supp. 1029 (S.D.N.Y. 1992).

[171] *See Young II* at 154 ("Speech simply is not inherent to the act [of begging]; it is not of the essence of the conduct.").

[172] *Loper*, 802 F. Supp. at 1036.

[173] *Id.* at 1037.

Although this argument is appealing, it is not without holes. *ISKCON* merely assumed the Krishnas' entreaty was protected speech without explaining *why* it was protected.[174] The focus of the case concerned prohibiting speech in a public forum, not defining charitable solicitation.[175] The case did not expand on the *Schaumberg* trilogy, the authority the Court of Appeals used in *Young II*. Therefore, the Court of Appeals is left with the judgment of the district court that the beggar's entreaty is similar to that of a charity. This same determination by the district court in *Young I*[176] did not stop the Court of Appeals from reversing that decision and determining that begging is a "menace to the common good." In short, the pattern of the *Young* litigation may be easily repeated: the district court weighs the evidence sympathetically toward the plight of the beggar,[177] while the Court of Appeals reverses the decision by finding, in essence, that begging is an evil which society may choose to sanction altogether.[178]

One aid to the *Loper* appeal, however, is that other courts have been troubled by the Second Circuit's approach in *Young II*. In *Blair v. Shanahan*, the United States District Court for the Northern District of California refused to follow *Young II* and found an anti-begging statute in violation of the First and Fourteenth Amendments of the United States Constitution.[179] In addition to finding a nexus between charitable solicitation and the beggar's entreaty,[180] the *Blair* court found the *Young* court's description of the beggar and the quality of her actions "disturbing."[181] Finding that "a speaker is no less a

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[174] *ISKCON I*, 112 S. Ct. at 2705.

[175] Indeed, the Court merely cited to *Schaumberg* and a few other cases, and then moved into its " 'forum-based' approach for assessing restrictions that the government seeks to place on the use of its property." *Id.*

[176] *Young I*, 729 F. Supp. at 352 ("While often disturbing and sometimes alarmingly graphic, begging is unmistakably informative and persuasive speech").

[177] Comparing the diction in *Young II* and *Loper* foreshadows the result in each case. In *Loper*, Judge Sweet describes the "plight" of the homeless, who "seek alms," *Loper*, 802 F. Supp. at 1034, not "accost" through "inherently harmful," "intimidating," or "threatening" actions, *Young II*, 903 F.2d at 149, 154, 156. Begging is not a "menace to the common good," *Young II* at 156, but an act which, if suppressed, "merely masks the underlying disorder." *Loper* at 1030. Indeed, Judge Sweet may have been alluding to *Young II* when he wrote that the difference between the solicitation of a beggar and a charity is the "pejorative sense [in which] 'begging' is used." *Id.* at 1037.

[178] An interesting argument, not mentioned on appeal, is the standard of review for the district court's findings in *Young I*. If the district court's finding in *Young I* that there "has been no showing that plaintiffs' solicitations will inevitably contain more belligerent or threatening language [than that of an organized charity]", *Young I*, 729 F. Supp. at 352, then it would appear that this finding of fact would be governed under a "clearly erroneous" standard. Fed. R. Civ. P. 52(a).

[179] *Blair*, 775 F. Supp. 1315 (N.D. Cal. 1991).

[180] *Id.* at 1322.

[181] *Id.* at 1323 n.9.

speaker because he or she is paid to speak"[182] and "within certain limits, the First Amendment protections depend on the type of speech, and not on the organization promoting the message,"[183] the district court held that "First Amendment protections should not be limited to the articulate."[184] Similarly, in a passionate dissent in *City of Seattle v. Webster*,[185] Washington Supreme Court Justice Utter found the *Young II* decision "untenable," because the "Second Circuit majority relied upon the public's negative reaction to the homeless as the basis for its decision."[186]

The *Young II* court also erred because it let majoritarian preferences crush individual dignity and autonomy. If begging falls within the rubric of charitable solicitation, it deserves protection.[187] What the majority of the Court of Appeals overlooked, and what the affidavits of the plaintiffs and intervenor clearly demonstrated,[188] is that not all begging involves harassment and intimidation. Furthermore, it is precisely this peaceful begging that contains speech interests, for requests are entangled with statements of fact and value that are otherwise protected.[189] For example, the statements, "I am hungry. Please give me a quarter," and "The government will not help me. Would you help me?" each express a fact and a value, respectively. They are trying to increase general understanding by expressing personal feelings, not just giving a basic fact.[190] Banning a peaceful beggar from articulating personal feelings or attempting to increase the general understanding of a situation serves as a direct affront to personal autonomy and dignity. It deprives the speaker of an emotional release and the listener of a message she may want to hear.[191] It is precisely these concerns that the First Amendment was designed to protect.

One response to this argument states that prohibiting begging means merely banning asking for money, not banning the homeless from speaking entirely. Yet this response ignores the fact that a beggar's First Amendment activity depends on her requests for money. As Justice Meskill of the Court of Appeals stated in his dissent in *Young II*, "To suggest that these individuals, who are obviously struggling to survive, are free to engage in First Amendment activity

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[182] *Id.* at 1323 (quoting *Riley*, 487 U.S. at 801).

[183] *Id.*

[184] *Id.* at 1324.

[185] *See supra* note 134. *Webster* concerned a pedestrian interference ordinance which banned "aggressive" begging. Seattle Municipal Code 12A.12.015 (1987). The defendant in *Webster* was charged with pedestrian interference for asking for spare change on a Seattle street corner at 11:10 pm on a Sunday night.

[186] *Id.* at 1343.

[187] *See supra* notes 140-45 and accompanying text.

[188] *See* Petition, *supra* note 150, at app. F.

[189] *See generally* KENT R. GREENAWALT, SPEECH, CRIME, AND THE USES OF LANGUAGE 43-44, 70-71 (1989) (detailing the protections of statements of fact and value and the effect of intertwined requests).

[190] *Id.* at 47.

[191] *Id.* at 43-44.

in their spare time ignores the harsh reality of the life of the urban poor."[192] The homeless people who brought this action were fighting not only for their right of expression, but also for their right to survive.[193] The fact that one has chosen, often by necessity, to express oneself through the process of peaceful begging should not make one's message less valuable, for majoritarian preferences should not shape the form of minority expression. A dominant culture has no right to "force those groups who do not share its mores to conform to its way of thinking, acting, and speaking," especially when the minority has done no wrong.[194] In short, beggars in the subway depend on begging as a form of speech in addition to a means of survival. To ban this form of speech, especially when the difference between a peaceful beggar and an organized charity is solely the source of the communication, silences the poor for no good reason.

Furthermore, the majority of the Court of Appeals did not see fit to examine the sometimes absurd results of their decision. The effect of the TA's ordinance allowed the government to determine who will serve as the spokesperson for the poor by denying the poor that role. The poor cannot speak out on their own behalf, but must get an organization to act as their intermediary and to beg for them. The poor must then depend on that intermediary for survival.[195] The irony of this situation is that a solicitor for the poor may say, "Help the poor, for they are hungry," while a poor person standing right next to the solicitor cannot express this same view about herself or her life.[196] Consequently, the dignity of the urban poor, as well as the immediacy of the message, is lost through a government-imposed mouthpiece. Judge Meskill's fear that the Court of Appeals would hold that "an individual's plight is worthy of less protection in the eyes of the law than the interests addressed by an organized group,"[197] has come true.

B. *Speech versus Conduct and the Symbolism of Begging*

The Court of Appeals stated that "common sense tells us that begging is much more 'conduct' than 'speech.' "[198] As the previous discussion demonstrates, however, unraveling the communication from the entreaty is a difficult

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[192] *Young II*, 903 F.2d at 166 (Meskill, J., concurring in part and dissenting in part).

[193] Amicus Brief, *supra* note 33, at 2. *See also supra* note 72.

[194] *Cf.* FCC v. Pacifica Foundation, 438 U.S. 726, 777 (1978) (Brennan, J., dissenting) ("[T]he Court's decision [in *Pacifica*] may be seen for what, in the broader perspective, it really is: another of the dominant culture's inevitable efforts to force these groups who do not share its mores to conform to its way of thinking, acting, and speaking.").

[195] *See Young I*, 729 F. Supp. at 353.

[196] *Id.*

[197] *Young II*, 903 F.2d at 167 (Meskill, J., concurring in part and dissenting in part).

[198] *Young II*, 903 F.2d at 153.

task, especially when one considers that begging is usually a *spoken* appeal from one person to another.[199] Indeed, the Supreme Court has declined "to separate the component parts of charitable solicitations from the fully protected whole."[200] The Court of Appeals nevertheless "relied on Supreme Court cases having no relevance to the question of whether opening one's mouth to ask for money should be considered speech."[201] Instead, it chose to rely on the symbolic conduct of begging. Yet even in situations where the communication can be separated from the entreaty, such as a beggar rattling a cup filled with change, speech elements are clearly present. Consequently, when the government prohibits begging, "[t]he only 'conduct' which . . . [it seeks] to punish . . . [is] the fact of communication."[202]

The test in a situation where both the elements of speech and conduct are present, first articulated in *Spence v. Washington*,[203] asks "whether an 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."[204] The Court of Appeals believed "with or without words, that the object of begging and panhandling is the transfer of money."[205] Consequently, "speech . . . is not inherent to the act; it is not the essence of the conduct."[206] Furthermore, the Court of Appeals, without much analysis, dismissed the idea that the actions of a beggar could likely be understood, apparently because "begging in the subway is experienced as transgressive conduct whether devoid of or inclusive of an intent to convey a particularized message," and therefore passengers enter verbal exchanges with a beggar with an "apprehensive state of mind."[207]

The Court of Appeal's analysis of the *Spence* test ignores many vital factors. First, the beggar's purpose and message do not start or stop with the entreaty for money, regardless of whether that entreaty is verbal or nonverbal. The graphic depiction of need that a beggar conveys remains, because the

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[199] *See* Hershkoff & Cohen, *supra* note 44, at 908 ("[B]egging appeals to the listener's sense of compassion. . . .").

[200] *See Riley*, 487 U.S. at 796. *See also Loper* 802 F. Supp. at 1038 (noting that "attempting to draw . . . lines" between expression and conduct in the context of a blanket ban on begging, "would be an exercise in futility"). Significantly, the *Loper* court implied that this would be the case "regardless of where it takes place." *Id.* at 1038 n.10.

[201] *Webster*, 802 P.2d at 1343 (Utter, J., concurring and dissenting). The Court of Appeals relied on a flag burning case, Texas v. Johnson, 491 U.S. 397 (1989), and a case about sleeping as a form of political protest, Clark v. Community for Creative Non-Violence, 468 U.S. 288 (1984).

[202] *Young II*, 903 F.2d at 159 (quoting Cohen v. California, 403 U.S. 15, 18 (1974)).

[203] 418 U.S. 405 (1974).

[204] *Id.* at 410-11; *see also* United States v. O'Brien, 391 U.S. 367 (1968).

[205] *Young II*, 903 F.2d at 154.

[206] *Id.*

[207] *Id.*

beggar receives money precisely because of the need she portrays.[208] The beggar intends to say, "Look at me. I am in need. Please help me." Once she conveys this message, the beggar may or may not receive a donation and may or may not be able to talk to the solicitee about the beggar's life or the beggar's role in society. The message is still conveyed, however, for this message, a form of speech, is the true essence of the conduct. In other words, the initial intent is to convey a message of need.[209] Only then does the opportunity to obtain money to satisfy this need arise. Consequently, this act satisfies the first prong of the *Spence* test, which requires that there be an intent to convey a message.

The second prong of the *Spence* test, that a good likelihood exists that those who view the message would understand it, is also satisfied by the action. There simply is no evidence that *all* passengers are so "apprehensive" that they cannot understand a message as simple as "I am in need." Furthermore, the "apprehension" people feel from a beggar could come from a variety of sources, such as pity, scorn, or guilt.[210] Whatever the feeling, it is a feeling of reaction: a message has affected the solicitee which has caused the pity, scorn, or guilt. Furthermore, it is unclear why apprehension would blind one's eyes and shut off one's mind. The message conveyed is not complex, but it is a message nonetheless which is particularized and easily understood. Solicitees are very likely to understand the beggar's message, which satisfies the second prong of the *Spence* test.

The result of the court's interpretation of the *Spence* test is not surprising when one analyzes the court's attitude toward the poor and their begging. As noted earlier, courts have described begging as "inherently harmful," "intimidating," "threatening," "transgressive conduct," and "harassing."[211] To the Second Circuit, beggars do not approach someone, they "accost" them.[212] Earlier, this Note explained some of the origins of why "society has generally viewed beggars with disdain."[213] Unfortunately, this view has not changed all that much since society first instituted anti-begging laws to control the poor.[214] The court seems more intent on judging the messenger than examining the message. How else can one explain the court's willingness to ban all begging because some are too aggressive in their approach?

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[208] Knapp, *supra* note 36, at 415 (noting that beggars intend to inspire a guilty reaction in the "haves" of society to give to the "have nots").

[209] *Id.*

[210] Rose, *supra* note 37, at 199 (noting that in an age of "checkbook charity" giving to a beggar is not "sanitized" and is therefore threatening).

[211] *See supra* note 162.

[212] *Young II*, 903 F.2d at 154.

[213] Rose, *supra* note 37, at 198.

[214] *Compare Young II*, 903 F.2d at 156 *with* State v. Hogan, 58 N.E. 572, 574 (Ohio 1900) (vagrants are "always a nuisance").

C. *The O'Brien Standard*

Because the Court of Appeals believed that the TA's regulation was not directed at the communicative nature of the conduct, it held that the regulation need not be "justified by the substantial showing of need that the First Amendment requires."[215] Instead, the court held that the effect on speech was incidental to the regulation of the harassing conduct of beggars.[216] Consequently, the proper standard, according to the Court of Appeals, comes from *United States v. O'Brien*,[217] in which the defendant and some of his colleagues ceremonially burned their draft cards on the steps of a municipal building in Boston, with the intent to communicate opposition to the Vietnam War. *O'Brien* held that a regulation may proscribe particular conduct in order to protect a "governmental interest . . . unrelated to the suppression of free expression. . . ."[218] It was this standard, in its most deferential form, that allowed the Court of Appeals to overrule *Young I*.

In announcing what would later become known as the incidental regulation test, the *O'Brien* court held that, in order to sustain a governmental regulation against a free speech challenge, the government must show first, that the regulation "is within the Constitutional power of the Government"; second, the governmental interest is "unrelated to the suppression of free expression"; third, the regulation furthers a "substantial governmental interest"; and fourth, the regulation is "no greater than is essential to the furtherance of that interest."[219] The first prong of the test has been explored throughout this Note. As for the other three prongs, they deserved greater scrutiny than the court was willing to provide.

1. Important or Substantial Government Interest

The Court of Appeals stated that the two main aims of the TA's anti-begging regulation were to ease congestion on the subways and to stop beggars from harassing people on the subway.[220] If easing congestion were the main concern, it seems regulating the time, place, and manner of begging would do away with the problem. If harassment were the main concern, it would seem that by banning conduct that harasses, menaces, impedes traffic or otherwise causes harm,[221] the TA would solve the problem and make this statute unnec-

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[215] Texas v. Johnson, 491 U.S. 397, 406 (1989) (quoting Community for Creative Non-Violence v. Watt, 703 F.2d 586, 622-23 (D.C. Cir. 1983)) (Scalia, J., dissenting).

[216] *Young II*, 903 F.2d at 154 ("We do not accept, however, that this incidental speech is one and the same as the conduct being regulated.").

[217] 391 U.S. 367 (1968).

[218] *Id.* at 377.

[219] *Id.*

[220] *Young II*, 903 F.2d at 148-50.

[221] *Young I*, 729 F. Supp. at 358. The TA has regulations that prohibit conduct that: intends to annoy, alarm, or inconvenience others, or that otherwise breaches the peace, N.Y. COMP. CODES R. & REGS. tit. 21, § 1050.7(i) (1985) (amended 1990); interferes

essary. Consequently, when evaluating the real government interest, it is important to note that the TA, which had adequate means at its disposal to deal with the harassment of its patrons, nevertheless chose to regulate a specific group, beggars, with its new regulations. At the same time, the TA left its premises open to organized charities, artistic performers, and practically anyone else with a message to convey.[222]

With these facts in mind, another government motive comes to light. In California, legislators have admitted that statutes proscribing sleeping in public places were passed with the intention of ridding municipalities of the homeless.[223] In New York, those who beg on the subway are predominantly poor and homeless.[224] Many use the twenty-four hour subway system as their home, sleeping in subway cars and warm platforms during New York's harsh winter months.[225] As New York's homeless population continues to grow at an alarming pace, the prevalence of homeless in subways has become an unsettling phenomenon to many users of subway riders.[226] The problem the TA faced if it wanted to improve the "atmosphere" on the subway quickly became apparent: how does one get the poor out of the subways if they paid to get into the subways? The easy answer is to criminalize what beggars need to do in order to survive. As the statute stands today, as soon as a homeless person begs, even peacefully and quietly, she may be thrown out on the street, out of the sight of the busy subway commuters who complain of her presence. In essence, the presence of the homeless would be diffused.

The fact that this rationale was not directly addressed by the Court of Appeals shows that the level of scrutiny used when addressing the rights of the politically powerless in our society is pitifully low. When classes can be targeted because of who they are, rather than what they do, no minority is ever safe from arbitrary interference in their lives. For precisely this reason, the level of scrutiny for the rights of the poor and powerless should be less deferential and more probing so as to discover the real reasons behind the regulation.

The Supreme Court has muddied the waters of public solicitation further with its opinion in *ISKCON*.[227] *ISKCON* is distinguishable from *Young* on two fronts: (1) it was "uncontested" in *ISKCON* that the solicitation was a

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with transit service or obstructs traffic, N.Y. COMP. CODES R. & REGS. tit. 21, § 1050.6(a) (1985) (amended 1990); or damages any person, N.Y. COMP. CODES R. and REGS. tit. 21, § 1050.7(k) (1985) (amended 1990).

[222] N.Y. COMP. CODES R. & REGS. tit. 21, § 1050.6(c) (1985) (amended 1990).

[223] Ades, *supra* note 36, at 619.

[224] Amicus Brief, *supra* note 33, at 19-33; Mary Talbot, *New York: 'The Wind Will Rattle Your Bones'*, NEWSWEEK, Dec. 2, 1991 at 28 (describing the harsh conditions for the homeless of New York City in the winter months).

[225] Talbot, *supra* note 224, at 28.

[226] *Id.*

[227] 112 S. Ct. 2701 (1992).

form of speech protected by the First Amendment,[228] and (2) the solicitation in question was permitted on the sidewalks outside the terminal buildings,[229] unlike *Young*, where begging on the street was illegal at the time of the decision.[230] The core issue in *ISKCON* thus became defining a public forum in order to determine just how much protection the Krishna's form of solicitation could have. Conversely, in *Young*, the issue of the subway as a public forum was reduced to dicta.[231]

Nonetheless, a great deal can be learned about defining important and substantial government interests from the five opinions[232] in *ISKCON*. By deciding that an airport terminal is not a public forum, the ban need only pass a "reasonableness" test.[233] Justice Rehnquist, in some ways echoing his sole dissent in *Schaumberg*, found banning solicitation and leafletting reasonable. Justice Rehnquist found dangers of disruption, duress, fraud, and congestion in the act of solicitation[234] and found leafletting posed similar risks as well as safety hazards from litter and monitoring difficulties.[235] Justice O'Connor found the dangers of solicitation to "ring of common sense",[236] but held that leafletting was more "mechanical" and did not pose any threat to the orderly running of an airport terminal.[237]

The opinions which found the airport to be a public forum were also divided as to the government interests involved. Justice Kennedy believed that the dangers of solicitation could survive either a time, place and manner test or an *O'Brien* test, but selling literature or leafletting could not pass either test.[238] Justice Souter, joined by Justices Blackmun and Stevens looked deeper into the government's motives. Justice Souter noted that the "proper response" to a congestion problem "would be to tailor the restrictions to those choke points."[239] Justice Souter found no proof of coercion in this case and noted

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[228] *Id.* at 2705.

[229] *Id.* at 2704.

[230] N.Y. PENAL LAW § 240.35(1) (McKinney 1990 & Supp. 1992).

[231] *Young II*, 903 F.2d at 161 (whether the subway is a public forum is "not necessary to our holding in this case."). Another Second Circuit court has reached the same conclusion. *See Loper*, 766 F. Supp. at 1283 n.2. For this reason, a public forum analysis is not within the scope of this paper.

[232] *ISKCON* was divided into two segments. *ISKCON I* banned solicitation. Chief Justice Rehnquist wrote for the majority, Justice O'Connor concurred in a separate opinion, as did Justice Kennedy. Justice Souter dissented. *ISKCON II* allowed leafletting. Justice Rehnquist dissented from this decision. *See supra* notes 137-38 and accompanying text.

[233] *ISKCON*, 112 S. Ct. at 2705-08.

[234] *Id.* at 2708-09.

[235] *Id.* at 2710 (Rehnquist, J., dissenting).

[236] *Id.* at 2713 (O'Connor, J., concurring and dissenting) (citing United States v. Kokinda, 497 U.S. 720, 734 (1990)).

[237] *Id.* at 2713 (O'Connor, J., concurring and dissenting).

[238] *Id.* at 2720-23 (Kennedy, J., concurring and dissenting).

[239] *Id.* at 2725 n.1 (Souter, J., dissenting).

that "speech does not lose its protected character . . . simply because it may embarrass others or coerce them into action."[240] Significantly, Justice Souter looked to "the practical reality of the situation"[241] and determined that the regulation "shuts off a uniquely powerful avenue of communication"[242] for a potentially unpopular and poorly funded group.[243]

It is precisely this "practical reality" that should define important and substantial government interests in an *O'Brien* analysis. While other opinions were hypothesizing about the potential safety hazards that dropped litter could pose[244] or the effect that carrying luggage could have on turning down a solicitor's appeal,[245] only Justice Souter's dissent recognized that the existence of other effective avenues of communication belies a government claim that its regulation is so substantial or important that it must be accepted.[246] While *ISKCON* may demonstrate that *Young* would not have been treated kindly by the Supreme Court had they accepted certiorari, it also shows that the marginal voices of society would have found some support.

In *Loper*, the "practical reality" of the situation was explored in depth. In response to the government's argument that the statute in question promoted "public order," the Court noted that a better course for the police would be to focus on statutes which prohibit any transgressive behavior associated with begging.[247] As to the argument that enforcing the law would allow the police to "reestablish order" in society by arresting those who act in a way some in society may find "offensive,"[248] the Court had stern words:

> A peaceful beggar poses no threat to society. The beggar has arguably only committed the offense of being needy. The message one or one hundred beggars sends society can be disturbing. If some portion of society is offended, the answer is not in criminalizing those people, debtor's prisons being long gone, but addressing the root cause of their existence.[249]

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[240] *Id.* at 2725 (Souter, J., dissenting) (quoting NAACP v. Claiborne Hardware Co., 458 U.S. 886, 910 (1982). In the context of panhandling, other courts also have not been impressed with the coercion rationale. *See Blair*, 775 F. Supp. at 1324 ("Protecting the public from intimidation, threats, or coercions simply does not require that a form of speech . . . which is of crucial importance to those that express the speech, be precluded").

[241] *ISKCON*, 112 S. Ct. at 2727 (Souter, J., dissenting).

[242] *Id.*

[243] *Id.*

[244] *Id.* at 2710 (Rehnquist, J., dissenting).

[245] *Id.* at 2713-14 (O'Connor, J., concurring and dissenting).

[246] *Id.* at 2725-27.

[247] *Loper*, 802 F. Supp. at 1045-46.

[248] *Id.* at 1046. This theory, proposed by Professor George Kelling, is often called the "Broken Windows" theory. *Id.* The rationale behind it focuses on improving the quality of life by eliminating symbols of disorder such as broken windows.

[249] *Id.* The Court also rejected the argument that a ban on begging would limit fraud. *Id.* at 1046-47. The Court, echoing *ISKCON*, held that this "vague allegation cannot support a blanket ban on speech." *Id.* at 1047.

One can only hope that the Second Circuit Court of Appeals will be as probing in its determination of governmental intent and the ramifications of that intent as its district courts have been.

2. Content Neutrality

The Court of Appeals in *Young* began its analysis of content-neutrality by stating that "the principal inquiry in determining content neutrality . . . is whether the government has adopted a regulation of speech because of disagreement with the message it conveys."[250] What this test ignores is whether the government adopts a regulation of speech because of disagreement with (or even dislike of) the conveyer of the message, in this case, the urban poor of New York City. The better test would find that a regulation is *not* content-neutral if "on its face . . . [it] accords preferential treatment to the expression of views on one particular subject. . . ."[251] The regulation in *Young* authorized "solicitation for religious or political causes" and "solicitation for charities" that meet certain registration and licensing requirements,[252] but expressly prohibits begging and panhandling.[253] Thus, on its face, the statute gives preferential treatment.[254] Additionally, if the government argues that the distinction in the regulation does not depend on the speaker but on the actions of the speaker, one is tempted to ask why no studies were conducted to determine whether organized charities caused congestion or harassment.[255]

In short, it appears that the TA "singled out begging for disfavored treatment because of its conviction that a stranger's request for money for herself is inherently threatening and intimidating, while a stranger's request for money for someone else is not."[256] But this distinction focuses directly on content; "help me" is threatening while "help the poor" is not. Consequently, the regulation accords preferential treatment to the expression of views on one particular subject,[257] and does not maintain the evenhandedness and neutrality necessary to satisfy this test.[258]

Even if the government could effectively argue that the greater incidence of harassment of subway patrons by beggars justifies the facial bias, a justified facial bias does not eliminate discriminatory effects which eliminate neutrality. Although the Supreme Court has been reluctant to consider the discriminatory

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[250] *Young II*, 903 F.2d at 158 (quoting Ward v. Rock Against Racism, 491 U.S. 781, 791 (1989)).

[251] Cary v. Brown, 447 U.S. 455, 460-61 (1980). *See also* Petition, *supra* note 150 at 19.

[252] 21 N.Y. COMP. CODES R. & REGS. tit. 21, § 1050.6 (c) (1985) (amended 1990).

[253] *Id.* at § 1050.6(b)(2).

[254] *See Loper*, 802 F. Supp. at 1039-40 (holding N.Y. Penal Law § 240.35(1), upon which the TA's regulation is based, is not content neutral).

[255] *Young II*, 903 F.2d at 167 (Meskill, J., concurring and dissenting).

[256] Petition, *supra* note 150, at 19.

[257] *Id.*

[258] *Id.*

effects of facially content-neutral laws,[259] ignoring this disparate impact allows majoritarian preferences to shape the form of minority expression.[260] For example, a content-neutral regulation that restricts an inexpensive mode of communication will fall most heavily upon relatively poor speakers and the points of view that such speakers typically espouse.[261] The urban poor do not have the money to take out an ad in a newspaper, and if they attempt to talk to commuters, police officers may accuse them of begging anyway. Additionally, a ban on begging, especially in the winter months when many homeless people have no other warm place to go, jeopardizes the survival of the poor.[262] They must choose between staying in the relative warmth of the subway and begging for money to provide their life's essentials.

Because the content-neutrality test constitutes the threshold subtest,[263] it must be analyzed carefully, for the determination of content-neutrality generally decides the level of scrutiny. If the facially different treatment between beggars and charities can only be justified by what the beggars say or who they are, strict scrutiny is required. If regulating conduct is truly the goal, a disparate impact on communication so severe that the poor lose their voice should not be treated as neutral government decisionmaking that is "unrelated to the suppression of free expression."[264]

3. Narrowly Tailored Means

The Supreme Court has held that the requirement of "narrow tailoring is satisfied 'so long as the . . . regulation promotes a substantial government interest that would be achieved less effectively absent the regulation.' "[265] The Court added, however, that "this standard does not mean that a time, place or manner regulation may burden substantially more speech than necessary to further the government's legitimate goals."[266] The Court of Appeals in *Young II* ignored the "substantially more speech than necessary" language in its determination of whether the regulation was narrowly tailored,[267] and, consequently, avoided discussing the broader ramifications of a complete ban on begging.

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[259] William E. Lee, *Lonely Pamphleteers, Little People, and the Supreme Court: the Doctrine of Time, Place, and Manner Regulations of Expression*, 54 GEO. WASH. L. REV. 757, 767 (1986).

[260] *Id.* at 768.

[261] Clark v. Community for Creative Non-Violence, 468 U.S. 288, 314 n.14 (Marshall, J., dissenting) (1984).

[262] Talbot, *supra* note 225, at 28.

[263] David S. Day, *The Incidental Regulation of Free Speech*, 42 U. MIAMI L. REV. 491, 527 (1988).

[264] *O'Brien*, 391 U.S. at 377.

[265] *Rock Against Racism*, 491 U.S. at 782-83..

[266] *Id. See also* Schad v. Borough of Mount Ephraim, 452 U.S. 61, 70 (1981) (holding that courts must examine less restrictive alternatives).

[267] *Young II*, 903 F.2d at 159-61; *see also* Petition, *supra* note 150, at 22.

The first problem with the Court of Appeals' analysis is that by tightening the scope of the ban from a complete ban on begging to a narrow time, place, and manner restriction, the benefits to free speech would greatly outweigh any diminished effect of the statute.[268] As noted earlier, the TA has a breach of peace statute, a statute criminalizing interfering or obstructing the flow of traffic on the subway, and a statute prohibiting actions which may cause harm or damage to other persons.[269] Certainly these three statutes, if rigorously enforced, would allow the TA to accomplish all of the goals of the anti-begging statute.[270] Consequently, an avenue which would allow peaceful begging while allowing law enforcement officials to closely monitor the beggars would be a time, place, and manner restriction more sensitive to First Amendment concerns than a total ban. As the court in *Blair* noted, a "narrowly-drawn statute would define the proscribed acts with relation to the threats or intimidation to be avoided and not with relation to protected speech. It is speech that the state bars with this statute, not threatening or intimidating encounters in public space."[271] In short, a total ban on all begging, peaceful as well as harassing, is so overinclusive that it should not be tolerated by any standard of review.[272]

The Court of Appeals also concluded that the harm to the homeless by this statute was minimal, for there was no showing that the remaining avenues of communication open to the beggars were inadequate.[273] The availability of alternatives is not the same as the availability of suitable alternatives. One must look to any loss in a speaker's autonomy, added cost, and the loss in the ability to reach the intended audience.[274] Also, the alternative should be objectively and practically equal as well as effective.[275] Even if the alternative is adequate, the regulation must still narrowly advance an interest sufficient to justify the burden on expression.[276]

Using this analysis, no alternative avenue of communication is adequate. Begging on the streets above the subways is not as safe or feasible, and, until *Loper* was decided, just as illegal.[277] In the cold winter months, the Court of Appeals asks the homeless to beg and communicate above ground, an area

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[268] Lee, *supra* note 256, at 798.

[269] *See supra* note 221.

[270] The goals specifically mentioned in *Young II* are stopping the impediment of traffic and the harassing of passengers. *Young II*, 903 F.2d at 167 (Meskill, J., concurring and dissenting).

[271] *Blair*, 775 F. Supp. at 1324-25.

[272] Texas v. Johnson, 491 U.S. at 410 (existence of a statute specifically prohibiting breaches of the peace "tends to confirm that Texas need not punish . . . flag desecration in order to keep the peace.").

[273] *Young II*, 903 F.2d at 160.

[274] Lee, *supra* note 256, at 809-10.

[275] Harold L. Quadres, *Content-Neutral Public Forum Regulations: The Rise of the Aesthetic State Interest, the Fall of Judicial Scrutiny*, 37 HAST. L.J. 439, 481 (1986).

[276] *Loper*, 802 F. Supp. at 1040-41. *See also* Lee, *supra* note 256, at 810 n.323.

[277] N.Y. Penal Law § 240.35(1) (McKinney's 1990 & Supp. 1992).

where their begging is less effective and the cold takes its toll.[278] Furthermore, in this case, the subway is rich in symbolic value and becomes part of the message.[279] The Supreme Court has already recognized that context may provide meaning to action.[280] In New York, the homeless live in the subways that millions of New Yorkers pass through daily. It is where they eat, sleep, and, as even the Court of Appeals mentions, where they often die.[281] A homeless person begging in the subway leaves a message to the solicitee: "This may be your means of travel, but, for me, it is the parameters of my life."[282] The beggar creates a powerful message by interweaving begging with the medium of the subway. A communicator's autonomy should allow her to choose her medium when the state has feasible and effective means to control the message in that medium.

Finally, the Court refused to analyze, in the name of judicial deference, the depth of commitment on the part of the TA to solving some of these problems by other means.[283] Currently, it is very difficult to examine means when courts barely examine the government's interest.[284] It may be easier for a city to tailor its objective to fit the means rather than vice versa. Having the court weigh the substantiality rather than just the legitimacy of a state's interest[285] would help to balance the speech interests with sincere government interests. This type of "heightened scrutiny could involve a less restrictive alternatives analysis, a comprehensive plan analysis, or the Court's own narrowly tailored standard, with a degree of scrutiny that truly tests the degree of over- or under-inclusiveness of the state's regulations."[286] The minimum scrutiny used in this case never brings us to a greater level of understanding of the government's motives. Instead, the proof that the TA offered was almost exclusively passenger surveys stating that there was a general apprehension concerning

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[278] Amicus Brief, *supra* note 33, at 14-15.

[279] FCC v. Pacifica Foundation, 438 U.S. 726, 774 (1978) (Brennan, J., dissenting).

[280] Spence v. Washington, 418 U.S. 405 (1974).

[281] *Young II*, 903 F.2d at 150.

[282] Talbot, *supra* note 225, at 28 (noting that many homeless people choose to live and sleep in the subways).

[283] Quadres, *supra* note 272, at 472.

[284] *See generally* Day, *supra* note 260, at 528 (courts require little more than a showing of a legitimate government interest).

[285] This Note's focus on the state's interest is not meant to imply that the audience itself has no interest in the constitutionality of anti-begging statutes. Time, place, and manner restrictions, as well as anti-harassment statutes and the like, should allow the audience to control their reception of the beggar's message and avert their eyes if necessary. *Loper*, 802 F. Supp. at 1042-45. Because these means give control to the audience, and because the beggar has an interest in disseminating her message, a balance can be struck which would protect the beggar's free speech claim and an individual's right to privacy when in the public sphere. *See also*, Part I.D.1, *supra*.

[286] *See* Quadres, *supra* note 272, at 472. *See also Schaumberg*, 444 U.S. at 636; *Metromedia*; 453 U.S. at 531 (Brennan, J., concurring); *Schad*, 452 U.S. at 67-77.

beggars.[287] Allowing this to serve as the essential proof of government intent, especially when this court's decisions will make it more difficult for the homeless to survive, takes judicial deference to a dangerous extreme at the expense of individual rights.

CONCLUSION

Sometimes sacrifices have to be made in order to protect rights which society holds dear.[288] The sacrifices inherent in allowing begging are not great. Harassing behavior should be punished, but not by quelling speech. Speech which leads to a captive audience can be regulated by allowing begging with certain time, space, and manner constraints.[289] By diffusing the dangers to society of begging, the sacrifices of accepting begging are negligible.

This conclusion is not so easily reached when one feels that "begging and panhandling in the subway amounts to nothing less than a menace to the common good,"[290] as the Second Circuit maintains. Such a conclusion may have been believable to the English Parliament in 1388, but it hardly makes sense in a time when most of the homeless are not homeless by choice, but beg in order to survive. While the Second Circuit seems comfortable defining the "common good," it erred in determining whether begging fits under the umbrella of free speech. Begging is speech which allows self-realization, enlightenment, and democratic self-governance. It cannot be distinguished from charitable solicitation. It is, therefore, a constitutional right which speculative and judgmental conclusions as to the "common good" cannot frustrate.

"Society's marginal members should not be made to trace their freedom as the price for the majority's reluctance to confront" the difficult problems which homelessness poses.[291] The urban poor should not have to sacrifice their dignity by not being allowed to ask for help. If this is what the "common good" requires, then perhaps it is time to include the poor in our definition of the common person and to stop punishing the messenger for the message that the needy are not always responsible for their need.

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[287] *Young II*, 903 F.2d at 149-50.

[288] *See supra* note 106 and accompanying text.

[289] For a sample regulation which seeks to accomplish this result, *see* Knapp, *supra* note 36, at 423.

[290] *Young II*, 903 F.2d at 156.

[291] Rose, *supra* note 37, at 228 (noting that "preventing annoyance and preserving middle-class property values" are not enough justification to criminalize begging).

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