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Notes and Comments

***Young v. New York City Transit Authority:* Silencing the Beggars in the Subways**

I. Introduction

At 5 p.m. the rush-hour ticket line at New York City's Port Authority Bus Terminal wove through the customary wretched carnival of mendicants. One beggar twirled like a crazed ballerina from commuter to commuter, caressing people's shoulders and prodding their bellies with a beseeching hand. Another rolled his wheelchair up against the commuters' feet and tugged at their sleeves. A third stretched across a counter in a weirdly feline gesture, trying to intercept the change coming back to Mike Farrell, 50, of Ringwood, N.J. "No!" howled Farrell, loud enough to make heads turn. "It's the only way you can get through to them," he explained.¹

In May 1990, the Second Circuit found yet another way to "get through to them" in *Young v. New York City Transit Authority*.² The court was required to address the First Amendment rights afforded beggars³ and panhandlers⁴ in the New York City subway system. The court reviewed an amended transit authority regulation, title 21, section 1050.6 of the New York Compilation of Codes, Rules, and Regulations (21 N.Y.C.R.R. §

1. Priscilla Painton, *New York City, U.S.A.: Shrugging Off The Homeless; The nation's toughest urbanites lose patience with the down-and-out*, TIME, April 16, 1990, at 14.

2. 903 F.2d 146 (2d Cir.), cert. denied, 111 S. Ct. 516 (1990).

3. "Beggar" has been defined as "[o]ne who lives by begging charity, or who has no other means of support than solicited alms." BLACK'S LAW DICTIONARY 155 (6th ed. 1990).

4. The definition of "panhandler" is "an able-bodied street beggar." WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 1630 (3d ed. 1976).

1050.6),⁵ which continued the Transit Authority's long-standing ban against begging and panhandling in the New York City subway system, but was revised to allow qualified charitable organizations to solicit funds in certain areas.⁶

In a two to one decision, the Second Circuit held the regulation constitutional.⁷ This decision reversed the holding of the district court, which had held 21 N.Y.C.R.R. § 1050.6 to be a reasonable time, place, and manner restriction and had permanently enjoined enforcement of the regulation in the New York City transit system.⁸ The Court of Appeals expressed "grave doubt" that begging and panhandling were forms of speech protected by the First Amendment.⁹ It held that even if these activities were worthy of First Amendment protection, this regulation would still be reasonable given the substantial governmental interest in maintaining passenger safety and the availability of alternative forums in which beggars could express themselves.¹⁰ In November 1990, the United States Supreme Court denied the plaintiffs' petition for certiorari.¹¹

As the first federal decision addressing the First Amendment rights of beggars, this case is likely to serve as precedent for future decisions. Indeed, there are only a limited number of state court decisions addressing the First Amendment rights of beggars and panhandlers.¹² It has been suggested that the dearth of cases may be due to the beggars' lack of financial resources to pursue court action to enforce their constitutional rights.¹³

It is questionable whether this decision will be able to provide strong guidance for factually similar cases. The Court of Appeals' decision is fraught with weaknesses. The decision fails to take a definitive position in addressing the issue of whether

5. N.Y. COMP. CODES R. & REGS. tit. 21, § 1050.6(6) (1976).

6. *Young*, 903 F.2d 146.

7. *Id.* at 164.

8. *Young v. New York City Transit Auth.*, 729 F. Supp. 341 (S.D.N.Y. 1990).

9. *Young*, 903 F.2d at 161.

10. *Young*, 903 F.2d at 157, 161.

11. *See Young v. New York City Transit Auth.*, 111 S. Ct. 516 (1990).

12. *See infra* notes 82-98 and accompanying text.

13. *See C.C.B. v. State*, 458 So. 2d 47, 48 (Fla. Dist. Ct. App. 1984). In addressing the lack of cases in the state of Florida, the Florida District Court of Appeal "opine[d] that such scarcity is due to this particular segment of society not having the ability or wherewithal to pursue the challenge." *Id.* at 48.

begging is a protected First Amendment activity. The decision also fails to deal with the inefficiency and possible ineffectiveness of the judgment with respect to enforcement.

Section II of this Note provides the background law concerning solicitation by charitable organizations and by individuals soliciting funds for themselves. Section III discusses the facts, procedural history, and Court of Appeals' decision in *Young v. New York City Transit Authority*. Section IV analyzes the Court of Appeals' reasoning with respect to both the majority and dissenting opinions. Section V concludes that while the court's holding banning begging and panhandling in New York City's subway system may be proper in light of the governmental interest in passenger safety, the weaknesses in the decision raise questions concerning its value as precedent. The Supreme Court, by refusing to hear the case or provide any comment explaining its reasons for denying certiorari, has only delayed passing judgment on what it will ultimately have to decide, namely, the First Amendment rights due beggars and panhandlers in public areas of the United States.

II. Background

A. *The First Amendment*

The First Amendment of the United States Constitution defines the extent to which Congress may limit an individual's right to free speech: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances."¹⁴

Justice Cardozo once referred to freedom of speech as "the matrix, the indispensable condition of nearly every other form of freedom."¹⁵ It has been suggested that freedom of speech should occupy a preferred position,¹⁶ though not an absolute one.¹⁷ In

14. U.S. CONST. amend. I.

15. *Palko v. Connecticut*, 302 U.S. 319, 327 (1937).

16. *Clark v. Community for Creative Non-Violence*, 468 U.S. 288, 309-10 (1984) (Marshall, J., dissenting). The dissent argued:

The First Amendment requires the Government to justify every instance of abridgment. That requirement stems from our oft-stated recognition that the

any case, it is undeniable that the First Amendment is of paramount importance given its effect on individual freedom.¹⁸

Since the enactment of the First Amendment, however, the proper interpretation of the Framers' intent has often been subject to debate.¹⁹ Specifically, the debate has addressed what constitutes speech.²⁰ Not all conduct constitutes speech that is protected by the First Amendment.²¹ Just because it may be possible to find a "kernel" of expression in almost every activity

First Amendment was designed to secure "the widest possible dissemination of information from diverse and antagonistic sources," and "to assure the unfettered interchange of ideas for the bringing about of political and social changes desired by the people." . . . If the Government cannot adequately justify abridgment of protected expression, there is no reason why citizens should be prevented from exercising the *first* of the rights safeguarded by our Bill of Rights.

Id. (citations omitted and emphasis in original). See *Murdock v. Pennsylvania*, 319 U.S. 105, 115 (1943) ("Freedom of press, freedom of speech, freedom of religion are in a preferred position.").

17. See *Cohen v. California*, 403 U.S. 15, 19 (1971) ("The First and Fourteenth Amendments have never been thought to give absolute protection to every individual to speak whenever and wherever he pleases, or to use any form of address in any circumstances that he chooses.").

18. See *Stromberg v. California*, 283 U.S. 359, 369 (1931) ("The maintenance of the opportunity for free political discussion to the end that government may be responsive to the will of the people and that changes may be obtained by lawful means, an opportunity essential to the security of the Republic, is a fundamental principle of our constitutional system.").

19. See JOHN E. NOWAK, RONALD D. ROTUNDA, AND J. NELSON YOUNG, *CONSTITUTIONAL LAW* 833 (3d ed. 1986) (proposing that many of the problems with interpretation of the First Amendment may be attributed to the lack of records in the House or Senate at the time of its ratification).

20. Speech has been defined as "the act of speaking; communication or expression of thoughts in spoken words." WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 2189 (3d ed. 1976).

21. Although the Court recognizes the communicative nature of conduct, when conduct involves more than just the communication of ideas it may still be vulnerable to state regulation. See, e.g., *United States v. O'Brien*, 391 U.S. 367 (1968) (burning of draft card held to be conduct not worthy of First Amendment protection); *Adderly v. Florida*, 385 U.S. 39 (1966) (holding student demonstrators protesting a schoolmates' arrest to be conduct not protected by First Amendment because the students were blocking a jail driveway and trespassing on nonpublic property and the state has right to control use of its own property for its own purpose); *Cox v. Louisiana*, 379 U.S. 559 (1965) (upholding a statute which prohibits picketing near a courthouse as a valid regulation of conduct and not violative of free expression given the possibility that judges and juries could be influenced by demonstrators); but see *Spence v. Washington*, 418 U.S. 405 (1974) (attaching peace symbol to flag held to be protected conduct); *Brown v. Louisiana*, 383 U.S. 131 (1966) (holding silent demonstration by five black people in public room of library concerning segregation policy to be protected conduct).

does not mean that this "kernel" is sufficient to bring the activity within First Amendment protection.²² Justice Scalia has implied that common sense should play a role in determining whether First Amendment protection should be afforded to different forms of speech.²³ The First Amendment affords protection to individuals to "speak, write, print or disseminate information or opinion"²⁴ Thus, "[r]egulation of conduct bearing no necessary relationship to the freedom to speak, write, print or distribute information or opinion does not abridge the guarantees of the First Amendment."²⁵ In addition, the government has the right to protect its citizens from unwanted exposure to certain methods of expression, such as those that create a public nuisance.²⁶

22. *Dallas v. Stanglin*, 490 U.S. 19, 24 (1989). The First Amendment issue in *Stanglin* concerned a city ordinance which restricted admission in certain dance halls to persons between the ages of fourteen and eighteen. The statute was challenged as a violation of the First Amendment freedom of association because the ordinance prohibited people in these age groups from expressive association with people in other age groups. The Court found that the activity of the patrons was merely recreational dancing and, therefore, the statute was not an infringement of the petitioners' First Amendment right of association. *Id.*

23. *Community for Creative Non-Violence v. Watt*, 703 F.2d 586, 622 (D.C. Cir. 1983) (Scalia, J., dissenting). In *Watt*, demonstrators, in an effort to bring attention to the plight of the homeless, challenged a park service anti-camping regulation which prohibited sleeping in certain areas around the nation's capital. The majority held this expressive conduct to be protected by the First Amendment. In his dissent, Justice Scalia stated, ". . . scholarly discussion of this basic constitutional guarantee has strayed from common and common-sense understanding." *Id.* at 622. He also stated that although the Constitution provides "special protection against all laws that impinge upon spoken or written communication[,] . . . to extend *equivalent* protection against laws that affect actions which happen to be conducted for the purpose of 'making a point' is to stretch the Constitution not only beyond its meaning but beyond reason, and beyond the capacity of any legal system to accommodate." *Id.*

24. *Ulmer v. Municipal Court for Oakland-Piedmont* J.D., 127 Cal. Rptr. 445, 447 (Cal. Ct. App. 1976).

25. *Id.*; see *Breard v. Alexandria*, 341 U.S. 622, 641-45 (1951) (upholding ordinance prohibiting door-to-door solicitation except by occupant consent); *Schneider v. State*, 308 U.S. 147, 160-65 (1939) (invalidating city ban on all distribution of leaflets).

26. *Members of the City Council of Los Angeles v. Taxpayers for Vincent*, 466 U.S. 789, 805 (1984) (upholding city prohibition on the posting of all signs on public property).

B. Speech vs. Conduct

1. What "Speech" is Protected by the First Amendment?

The courts have established different tests to determine whether certain activities should be protected under the freedom of speech doctrine.²⁷ In order for expressive conduct to be protected as a form of speech under the First Amendment, the two-prong test developed by the Supreme Court in *Spence v. Washington*²⁸ must be applied. The first prong of the test requires a court to determine whether there exists an intent to convey a "particularized message."²⁹ The second prong requires a determination as to whether the likelihood is great that the message being conveyed will be understood by those who are exposed to it.³⁰ Expressive conduct is speech worthy of First Amendment protection when both prongs are satisfied.³¹

27. See R. George Wright, *The Unnecessary Complexity of Free Speech Law and the Central Importance of Alternative Speech Channels*, 9 PACE L. REV. 57, 59-88 (1989) (discussing the myriad of tests developed by the courts to determine whether free speech restrictions should be imposed).

28. 418 U.S. 405 (1974).

29. *Id.* at 410.

30. *Id.*

31. The defendant in *Spence* hung the United States flag out of his apartment window. The flag was positioned upside down and a peace symbol was taped to it. The defendant claimed that he had displayed the flag in this manner in protest against current events, specifically, the invasion of Cambodia and the Kent State University killings. He claimed that in displaying the flag in this manner, he was trying to convey the message that the flag was a symbol of peace, not of war and violence. *Id.* at 408.

The lower courts convicted Spence of violating an "improper use" statute, which prohibited displaying the United States flag with anything attached to it. *Id.* The Supreme Court reversed the conviction concluding that the defendant's act "was not [one] of mindless nihilism. Rather, it was a pointed expression of anguish by appellant about the then-current domestic and foreign affairs of his government. . . . [I]n the surrounding circumstances the likelihood was great that the message would be understood by those who viewed it." *Id.* at 410-11.

In applying the two-prong test to the facts of the case, the Court found the first prong of the test to be satisfied. Since the timing of the defendant's activity was almost simultaneous with the events in Cambodia and Kent State, the Court found the defendant's intent to convey a message clearly established. The Court also found that it was likely that the majority of citizens who saw the flag would understand the defendant's message. *Id.* at 410-11. Moreover, the Court found that no state interest was impaired by the defendant's activity because the tape was removable, the flag was privately owned, and the message was clear. The Court found that there was no risk of misleading viewers that the defendant's view was endorsed by the government. As a result, the defendant's actions were worthy of protection. *Id.* at 412-13.

2. *Judicial Review of Government Restrictions of Speech*

Once it has been established that the activity being considered is a form of expressive conduct, one must then determine what level of scrutiny the judiciary should apply in evaluating the regulation restricting the activity. There are two different levels of scrutiny used in the analysis of government restrictions on expressive conduct.³² The first level of scrutiny, commonly referred to as strict scrutiny, is appropriate for laws which are directed at the communicative nature of the conduct;³³ these are content-based restrictions. Such laws can only be justified upon a showing of a *compelling* governmental interest.³⁴ The second level of scrutiny is appropriate for laws which proscribe specific conduct in order to protect a governmental interest that is unrelated to the suppression of free expression;³⁵ these are content-neutral restrictions. Under this test, a prohibition of speech can be held reasonable upon a showing of a *substantial* governmental interest.³⁶

3. *The O'Brien Test*

In *United States v. O'Brien*,³⁷ the Supreme Court held that "when 'speech' and 'nonspeech' elements are combined in the same course of conduct, a sufficiently important governmental interest in regulating the nonspeech element can justify incidental limitations on First Amendment freedoms."³⁸ The *O'Brien*

32. Tribe refers to these two levels as track one and track two, or the "two track" analysis. LAURENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW* § 12-2 (2d. ed. 1988).

33. *Texas v. Johnson*, 491 U.S. 397, 406 (1989) (overturning a conviction under a Texas statute prohibiting the desecration of the American flag on an unconstitutional as applied basis).

34. *Id.* at 403.

35. *Id.*

36. *United States v. O'Brien*, 391 U.S. 367, 377 (1968).

37. *Id.*

38. *Id.* at 376. In *O'Brien*, the defendant burned his draft card in public to express antiwar beliefs and encourage others to adopt those beliefs. *Id.* Under § 462(b)(3) of the Universal Military Training and Services Act of 1948, as amended in Congress in 1965, a person "who forges, alters, knowingly destroys, knowingly mutilates, or in any manner changes any such certificate" is guilty of an offense under the statute. 50 U.S.C. app. § 462(b) (1965). *O'Brien* was convicted under this statute for burning his Selective Service Registration Certificate. *O'Brien*, 391 U.S. at 369. *O'Brien* challenged the constitutionality of the Act. The Court found that the government interest in maintaining an efficient selective service system outweighed the defendant's right of free expression in this situa-

Court set forth four factors which must be satisfied in order to justify a government regulation restricting First Amendment rights. Specifically, a government regulation is justified:

[1] if it is within the constitutional power of the Government; [2] if it furthers an important or substantial governmental interest; [3] if the governmental interest is unrelated to the suppression of free expression; and [4] if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest.³⁹

Whereas the first and fourth factors of the *O'Brien* test are not difficult for a court to determine, factors two and three require more careful scrutiny. The second factor, the advancement of a substantial governmental interest, involves a subjective determination by the court. The third factor of the *O'Brien* test suggests a content-neutral requirement. This is the "threshold inquiry"⁴⁰ of the analysis,⁴¹ and it requires the court to determine "whether the dangers relied on as justification for the regulation arise at least in some measure from the alleged communicative content of the conduct."⁴²

4. *Forum Considerations*

The type of forum in which the conduct takes place will also be considered when determining whether the First Amendment restriction is justified.⁴³ There are three types of forums: tradi-

tion. *Id.*

39. *Id.* at 377.

40. *Texas v. Johnson*, 491 U.S. at 407. See *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989). "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. . . . A regulation that serves purposes unrelated to the content of expression is deemed neutral, even if it has an incidental effect on some speakers or messages but not others." *Id.*

41. *Johnson*, 491 U.S. at 407.

42. *Young*, 903 F.2d at 158-59.

43. See, e.g., *Frisby v. Schultz*, 108 S. Ct. 2495 (1988).

To ascertain what limits, if any, may be placed on protected speech, we have often focused on the "place" of that speech, considering the nature of the forum the speaker seeks to employ. Our cases have recognized that the standards by which limitations on speech must be evaluated "differ depending on the character of the property at issue."

Id. at 2499 (quoting *Perry Educ. Ass'n v. Perry Local Educator's Ass'n*, 460 U.S. 37, 44 (1983)). See also *Cornelius v. NAACP Legal Defense & Educ. Fund*, 473 U.S. 788, 799

tional public forums, designated public forums, and nonpublic forums.⁴⁴ Traditional public forums include places which by "long tradition or by government fiat" have been devoted to assembly and debate.⁴⁵ Public streets and parks are examples of traditional public forums.⁴⁶ If a forum is public, free speech can only be restricted "when the exclusion is necessary to serve a compelling state interest and the exclusion is narrowly drawn to achieve that interest."⁴⁷

A public forum may also be created "by government designation of a place . . . for use by the public at large for assembly and speech, for use by certain speakers, or for the discussion of certain subjects."⁴⁸ However, a public forum is not created by "inaction or by permitting limited discourse. . . . [There must be an intentional] opening of a nontraditional forum for public discourse."⁴⁹ In an area that has been designated a public forum, "speakers cannot be excluded without a compelling government interest."⁵⁰

The third type of forum, non-public forums, involves "public property which is not by tradition or designation a forum for public communications."⁵¹ United States mailboxes and military forts are examples of non-public forums.⁵² The Second Circuit Court of Appeals held in *Gannett Satellite Information Network v. Metropolitan Transportation Authority*⁵³ that the public areas of a train station could also fall under this third cate-

(1985) ("Even protected speech is not equally permissible in all places and at all times.").

44. *Perry*, 460 U.S. at 45.

45. *Id.*

46. *Id.*

47. *Cornelius v. NAACP Legal Defense & Educ. Fund*, 473 U.S. 788, 800 (1985) (holding that a nonpublic forum did not require government showing of compelling interest). *See also* *United States v. Grace*, 461 U.S. 171 (1983) (finding no compelling interest which would justify restriction on picketing on public sidewalks surrounding Supreme Court building); *but see* *Members of the City Council of Los Angeles v. Taxpayers for Vincent*, 466 U.S. 789 (1984) (upholding ordinance prohibiting posting campaign signs on street light posts because of the compelling government interest in aesthetics and the environment).

48. *Cornelius*, 473 U.S. at 802.

49. *Id.*

50. *Id.* at 800.

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

52. *Id.*; *see also* *Greer v. Spock*, 424 U.S. 828 (1976).

53. 745 F.2d 767 (2d Cir. 1984).

gory.⁵⁴ "Public property, . . . which is neither a traditional nor a designated public forum, can still serve as a forum for First Amendment expression if the expression is appropriate for the property, and is not 'incompatible with the normal activity of a particular place at a particular time.'"⁵⁵

In order to determine whether a particular expression is appropriate for a public property, one looks to see whether "the expression is relevant to the property or if the property provides the relevant audience."⁵⁶ If the court determines that "the expression is inappropriate for the property or is incompatible with the intended use of the property, then the expression may be totally barred and the property is considered a 'non-forum.'"⁵⁷

5. *Time, Place, and Manner of Restrictions*

Courts will also uphold certain limitations on expression concerning time, place, and manner which are valid and justifiable.⁵⁸ Once a regulation is categorized as a time, place, or manner restriction, the courts employ several tests to determine whether the governmental restriction is valid. These tests include whether the restriction serves a significant governmental interest, whether it is narrowly tailored to serve that interest, and whether alternative forums exist.⁵⁹ Applying these tests,

54. *Id.* at 773.

55. *Id.* at 773 (citing *Eastern Connecticut Citizens Action Group v. Powers*, 723 F.2d 1050, 1054 (2d Cir. 1983)) (quoting *Grayned v. City of Rockford*, 408 U.S. 104, 116 (1972)).

56. *Id.* at 773 (quoting *Wolin v. Port of New York Auth.*, 392 F.2d 83, 90 (2d Cir.), *cert. denied*, 393 U.S. 940 (1968)).

57. *Id.*; *See also Perry*, 460 U.S. at 46-49.

58. For a discussion of the public forum doctrine and time, place, and manner restrictions, see Sara Simrall Rorer, *Noncommercial Door-To-Door Solicitation and the Proper Standard of Review for Municipal Time, Place, and Manner Restrictions*, 55 *FORDHAM L. REV.* 1139 (1987); 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, 760 (1986) (suggesting that the court's scrutiny of the regulations being examined should be heightened in order to ensure First Amendment protection).

59. *See Wright, supra* note 27, at 59-88 (discussing the myriad of tests developed by the courts to determine whether free speech restrictions should be imposed, focusing primarily on the alternative forum consideration of time, place, and manner analyses). *Id.*

courts have held that a state may

reasonably regulate the time, place and manner of engaging in solicitation in public places in order to prevent fraud or undue harassment of passersby [However] the state must recognize that individuals in public places cannot expect the same degree of protection from contact with others as they are entitled to in their own homes.⁶⁰

C. *Constitutional Protection of Begging?*

The constitutional protection afforded the act of begging, in which an individual solicits for himself, is still an unsettled issue in the American court system. There is little case law in this area.⁶¹

The rights of representatives of organized charities to solicit funds, however, is not as unsettled an issue. In 1980, the Supreme Court held in *Village of Schaumburg v. Citizens for a Better Environment*⁶² that solicitation by charitable organizations is worthy of First Amendment protection.⁶³ In *Schaum-*

60. *People v. Fogelson*, 577 P.2d 677 (1978); see also *Clark v. Community for Creative Non-Violence*, 468 U.S. 288 (1984). In *Clark*, the petitioners obtained a permit to conduct a demonstration relating to homeless issues in two parks in Washington, D.C. *Id.* at 291-92. They pitched tents in the parks but were denied permission to sleep in the tents. *Id.* at 292. This denial was based on the fact that camping in national parks was restricted to designated camp grounds. *Id.* The petitioners claimed that sleeping in the parks was a form of expression and that denial of this right was an infringement on their First Amendment freedoms. *Id.* The Court upheld the time, place, and manner restriction with respect to the plaintiff's symbolic conduct, finding the regulation to be content neutral and supported by a substantial government interest (maintaining the parks in good condition). *Id.* at 295, 298-99. The Court also noted the existence of available alternative channels in which the plaintiffs could communicate their message. *Id.* at 295.

61. Anthony J. Rose, Comment, *The Beggar's Free Speech Claim*, 65 IND. L.J. 191, 193-95 (1989). The author proposes that the lack of case law addressing the First Amendment right of the beggar is partially due to the lack of commitment by the criminal justice system to convict beggars for begging ordinance violations. *Id.* For those cases that are not dismissed and do go to trial, the author notes that these cases are often given low priority status among both prosecutors and judges, which often results in the foreclosure of the opportunity of appellate review. *Id.*

The author also notes that beggars typically lack the finances and the necessary information to challenge an ordinance. Further, ordinances prohibiting begging have strong roots in history and hence often carry a presumption of validity. *Id.* One final practical reason explaining the lack of begging cases is that the cases can often be decided without the need for the court to address the First Amendment issue. *Id.*

62. 444 U.S. 620 (1980).

63. The term "charitable organizations" has been defined as

burg, the Court evaluated the constitutionality of a village ordinance which prohibited door-to-door or on-street solicitation of contributions by charitable organizations unless they allocated at least seventy-five percent of their receipts to charity.⁶⁴ The Court found the ordinance to be overbroad and thus unconstitutional.⁶⁵

The Court determined that the seventy-five percent rule could not be applied to organizations whose primary goal is the dissemination of information and gathering of support for a cause, rather than gathering and distributing money for the poor.⁶⁶ The Court noted that fundraising is worthy of First Amendment protection when its goal is communicating ideas and gathering support for causes.

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

[c]orporations, and any community chest, fund, or foundation, organized and operated exclusively for religious, charitable, scientific, testing for public safety, literary, or educational purposes . . . no part of the net earnings of which inures to the benefit of any private shareholder or individual, no substantial part of the activities of which is to carry on propaganda, or otherwise attempting, to influence legislation.

BLACK'S LAW DICTIONARY 212 (5th Ed. 1979) (quoting I.R.C. § 501(c)(3)).

64. *Schaumburg*, 444 U.S. at 635; SCHAUMBURG, ILL., VILLAGE CODE ch. 22, art. III, §§ 22-1 to -24 (1975). Section 22-20(g) of the ordinance required an organization to provide proof that 75 percent of the proceeds will be allocated directly to charitable purposes prior to issuing the organization a permit. Charitable purposes did not include: "(1) salaries or commissions paid to solicitors; (2) administrative expenses of the organization, including, but not limited to, salaries, attorneys' fees, rents, telephone, advertising expenses, contributions to other organizations and persons, except as a charitable contribution and related expenses incurred as administrative or overhead items." SCHAUMBURG, ILL., VILLAGE CODE ch. 22, art. III, § 22-20(g) (1975).

65. *Schaumburg*, 444 U.S. at 635.

66. *Id.*

rily more than solicitors for money.⁶⁷

Absent a showing by the village of a "sufficiently strong, subordinating interest," the Court held that a seventy-five percent rule could not be sustained because it was a "direct and substantial limitation on protected activity."⁶⁸

The Supreme Court struck down similar statutes that attempted to regulate the activity of charitable solicitation in two later cases, *Secretary of State of Maryland v. Joseph H. Munson Co.*⁶⁹ and *Riley v. National Federation of the Blind*.⁷⁰ In *Munson*, the Court invalidated a Maryland statute which prohibited allocating more than twenty-five percent of the funds raised to be used for expenses.⁷¹ This restriction could be waived if it were shown to have a significantly detrimental effect on the charitable organization's ability to raise contributions.⁷² Despite the waiver provision, the Court held the statute unconstitutional

67. *Id.* at 632.

68. *Id.* at 636. The Court specifically noted that the 75 percent rule prevented those organizations that are primarily aimed at advocacy or public interest rather than soliciting of financial support from qualifying for a permit under the ordinance. In addition, although the Court recognized the village's legitimate interest in preventing fraud through the implementation of the 75 percent rule, it held that this goal could be accomplished through the enactment of narrowly drawn ordinances that did not interfere with the First Amendment rights of charitable organizations. *Id.*

69. 467 U.S. 947 (1984).

70. 487 U.S. 781 (1988).

71. *Munson*, 467 U.S. at 968. *Munson*, a professional fundraiser, challenged the statute after several of his customers were hesitant to continue their business relationship with him. *Munson* charged these customers more than 25 percent of their gross receipts and the Secretary of State had informed one of these groups that it would prosecute if the group failed to comply with the 25 percent limitation. *Id.*

72. *Id.* at 962. The statute reads in pertinent part:

A charitable organization other than a charitable salvage organization may not pay or agree to pay as expenses in connection with any fundraising activity a total amount in excess of 25 percent of the total gross income raised or received by reason of the fund-raising activity. The Secretary of State shall, by rule or regulation in accordance with the "standard of accounting and fiscal reporting for voluntary health and welfare organizations" provide for the reporting of actual cost, and of allocation of expenses, of a charitable organization into those which are in connection with a fund-raising activity and those which are not. The Secretary of State shall issue rules and regulations to permit a charitable organization to pay or agree to pay for expenses in connection with a fund-raising activity more than 25% of its total gross income in those instances where the 25% limitation would effectively prevent the charitable organization from raising contributions.

MD. ANN. CODE art. 41, § 103D (1982).

given the possible infringement on free speech privileges.⁷³ Although the Court recognized that the waiver provision might result in fewer First Amendment infringements, the percentage requirement was held to be defective under the *Schaumburg* rationale.⁷⁴

In *Riley v. National Federation of the Blind*,⁷⁵ a coalition of professional fundraisers, charitable organizations, and potential charitable donors challenged the constitutionality of the North Carolina Charitable Solicitations Act.⁷⁶ They claimed that several provisions of the Act infringed on their First Amendment freedoms.⁷⁷ Specifically, the Act established a "reasonable fee" schedule⁷⁸ and required that the fundraisers provide potential donors with information concerning the percentage of funds that are actually directed to charity.⁷⁹ The Act also required profes-

73. *Munson*, 467 U.S. at 968.

74. *Id.* For an in-depth discussion of *Munson*, see Jeffrey T. Zachmann, Note, *Secretary of State v. Joseph H. Munson Co.: State Regulation of Charitable Fundraising Costs*, 5 PACE L. REV. 489 (1985).

75. 487 U.S. 781 (1988).

76. *Id.*

77. *Id.*

78. Under § 131C-17.2 of the statute, a fee of 20 percent or less of the gross receipts collected would be reasonable; a fee between 20 and 30 percent would be unreasonable absent a showing that the solicitation involved the "dissemination of information, discussion, or advocacy relating to public issues as directed by the [charitable organization] which is to benefit from the solicitation;" and a fee of 35 percent or more was presumably unreasonable. However, the fundraiser was allowed to rebut the presumption by showing either that the fee was necessary because it involved the dissemination of information or advocacy relating to public issues directed by the charity or because the ability of the charity to solicit or communicate would be significantly diminished. N.C. GEN. STAT. § 131C-17.2(a)-(d) (1986).

79. Section 131C-16.1 states in pertinent part:
During any solicitation and before requesting or appealing either directly or indirectly for any charitable contribution a professional solicitor shall disclose to the person solicited:

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

N.C. GEN. STAT. § 131C-16.1 (1986).

sional fundraisers to obtain a license to solicit; volunteer fundraisers, however, were allowed to solicit immediately after submitting an application for a license.⁸⁰ Recognizing the constitutional protection afforded charities under the First Amendment, the Court held the statute to be an unconstitutional burden on free speech.⁸¹

There are a limited number of state court decisions addressing the First Amendment rights of the individual beggar or panhandler who solicits funds from the public for himself. In *Ulmer v. Municipal Court for Oakland-Piedmont J.D.*,⁸² the California Court of Appeal upheld a California penal law which prohibited an individual from accosting another in a public place for the purpose of begging.⁸³ The challengers argued that the statute was overbroad or, in the alternative, vague and indefinite.⁸⁴ The court reasoned that the purpose of the statute was to "protect members of the public forum from the annoyance of being approached."⁸⁵ Using the word "accost" excluded the "blind or crippled person who merely sits or stands by the wayside" or other passive beggars.⁸⁶ The court held that since "[b]egging and soliciting for alms [does] not necessarily involve the communication of information or opinion . . . approaching individuals for that purpose is not protected by the First Amendment."⁸⁷

The Florida District Court of Appeal afforded First Amendment protection to begging in *C.C.B. v. State*.⁸⁸ In *C.C.B.*, a city ordinance prohibited all forms of begging or soliciting funds by

80. Section 131C-6 states: "Any person who acts as a professional fund-raising counsel or professional solicitor shall apply for and obtain an annual license from the Department [of Human Resources], and shall not act as a professional fund-raising counsel or professional solicitor until after obtaining such license." N.C. GEN. STAT. § 131C-6 (1986).

81. *Riley*, 487 U.S. at 798.

82. 127 Cal. Rptr. 445 (Cal. Ct. App. 1976).

83. CAL. PENAL CODE § 647(c) (West 1961) ("Every person who commits any of the following acts is guilty of disorderly conduct, a misdemeanor: . . . (c) Who accosts other persons in any public place or in any place open to the public for the purpose of begging or soliciting alms.").

84. *Ulmer*, 127 Cal. Rptr. at 447.

85. *Id.*

86. *Id.* The court reviewed the legislative history of the Act and noted that the Act was intended to control the begging problem by prohibiting specific acts, and that any regulation of the passive beggar or solicitor was left to local ordinances. *Id.* at 447.

87. *Id.*

88. 458 So. 2d 47 (Fla. Dist. Ct. App. 1984).

individuals for themselves, whether in the streets or other public areas.⁸⁹ The court invalidated the statute and found it to be more intrusive than necessary given its total ban on begging.⁹⁰ Disagreeing with the reasoning in *Ulmer*, the court noted that "a municipality under its police power may regulate and restrain certain activities which threaten the public health, safety and welfare, but the power to restrain and regulate does not include the power to *prohibit* an activity which is not a nuisance per se."⁹¹ Furthermore, the court noted that "[p]rotecting citizens from mere annoyance is not a sufficient compelling reason to absolutely deprive one of a First Amendment right."⁹² Given a sufficient showing of governmental interest a regulation may restrict the right of an individual to exercise his freedom of speech, but may not absolutely prohibit such activity.⁹³

Solicitation by an individual for the purpose of obtaining charitable donations for her own individual use was also addressed in *People v. Tosch*.⁹⁴ In *Tosch*, a vehicular statute prohibited individuals from soliciting in the road and stopping cars to solicit rides or business. However, the statute allowed certain qualified charitable organizations to do so under certain circumstances.⁹⁵ The court held that "a State may treat different clas-

89. *Id.* JACKSONVILLE, FLA., MUNICIPAL ORDINANCE § 330.105 stated: "It shall be unlawful and a class C offense for anyone to beg or solicit alms in the streets or public places of the city or exhibit oneself for the purpose of begging or obtaining alms."

90. *C.C.B.*, 458 So. 2d at 50.

91. *Id.* (emphasis in original). The court held that "a total prohibition of begging or soliciting alms for oneself is an unconstitutional abridgment of the right to free speech as guaranteed by the first and fourteenth amendments of the Constitution of the United States and article I, section 4 of the Constitution of the State of Florida." *Id.*

92. *Id.*; see also *Coates v. Cincinnati*, 402 U.S. 611 (1971) (holding a ban on sidewalk gatherings which were "annoying" to passersby to be unconstitutionally vague).

93. *C.C.B.*, 458 So. 2d at 50.

94. 501 N.E.2d 1253 (Ill. 1986).

95. *Id.* at 1255. Under section 11-1006, subsection (c), of the Illinois Vehicle Code: No person shall stand on a highway for the purpose of soliciting contributions from the occupant of any vehicle except within a municipality when expressly permitted by municipal ordinance. Solicitation on highways within this state shall be allowed only at intersections where all traffic is required to come to a full stop. The soliciting agency shall be:

1. registered with the Attorney General as a charitable organization. . . ;
2. engaged in a statewide fund raising activity; and
3. liable for any injuries to any person or property during the solicitation which is causally related to an act of ordinary negligence of the soliciting agent.

ILL. REV. STAT. ch. 95 ½, paras. 11-1006(c)(1)-(3) (1985).

ses of persons differently, and absent a fundamental right may differentiate between persons similarly situated if there is a rational basis for doing so.”⁹⁶ The defendant failed to rebut the reasonableness of the legislature’s determination that solicitation by charitable organizations provides benefits to the public “which offset the risks inherent in solicitation on the highway.”⁹⁷ Therefore, the court held the statute’s classification was “reasonably related to a legitimate governmental objective” and, thus, the statute was constitutionally valid.⁹⁸

III. *Young v. New York City Transit Authority*

A. *Facts and Procedural History*

On November 28, 1989, the Legal Action Center for the Homeless (LACH)⁹⁹ filed suit in federal district court against the New York Transit Authority (TA) and the Metropolitan Transit Authority (MTA).¹⁰⁰ LACH represented itself and two homeless men, who represented a class of homeless and needy people that beg and panhandle in the New York City subway system.¹⁰¹ The suit was commenced in response to the TA’s re-

96. *Tosch*, 501 N.E.2d at 1256.

97. *Id.* at 1257. The court noted that “[w]hether the course chosen by the General Assembly to achieve a desired result is either wise or the best means available is not a proper subject of judicial inquiry.” *Id.* at 1257 (quoting *Garcia v. Tully*, 377 N.E.2d 10 (Ill. 1978)).

98. *Tosch*, 501 N.E.2d at 1257.

99. The Legal Action Center for the Homeless is a nonprofit organization providing various legal and social services to homeless people. *Young v. New York City Transit Auth.*, 729 F. Supp. 341, 345 n.2 (S.D.N.Y. 1990).

100. *Young*, 729 F. Supp. 341 (S.D.N.Y. 1990). The court noted: Plaintiffs originally named as defendant the MTA, the TA, Metro-North Commuter Railroad Company . . . , and Robert Kiley, Chairman of the TA, the MTA, and Metro-North. The MTA, a public benefit corporation consisting of chairman and sixteen other members appointed by the Governor with Senate advice and consent, has responsibility for the continuation, development and improvement of commuter transportation and other services related thereto in a district encompassing the city of New York and the counties of Dutchess, Nassau, Orange, Putnam, Rockland, Suffolk and Westchester.

Id. at 345 n.3 (quoting N.Y. PUB. AUTH. LAW §§ 1262-64 (McKinney 1982 & Supp. 1990)).

101. *Id.* at 345. A description of the plaintiffs, William B. Young, Jr. and Joseph Walley, is provided in the brief for the plaintiffs-appellees:

Named plaintiff William B. Young, Jr. is homeless and frequently sleeps in public shelters. If he can afford to, he rents a room for the night. He survives by asking people for charity, and by unloading trucks and doing other work when he is able.

cent amendment of 21 N.Y.C.R.R. § 1050.6,¹⁰² which was amended to permit organized charities to solicit funds in the subway system under certain circumstances, but continued to ban beggars and panhandlers.¹⁰³ Approximately one week prior to the effective date of the amended regulation, "Operation Enforcement"¹⁰⁴ was launched to inform the public of the new rules

He does not currently receive any welfare, except for food stamps. He speaks with people and asks them for money in subway stations, such as Grand Central, Times Square, Herald Square, Union Square, Columbus Circle, Pennsylvania Station, the World Trade Center and the Port Authority Bus Terminal. He also solicits money on subway platforms and on the underground streets that connect stations and platforms. . . .

With the money he earns soliciting he purchases the basic necessities of life, i.e., food, shelter, clothing, transportation, and medicine. Since he does not receive public assistance, he is not on Medicaid. He has a bleeding ulcer and high blood pressure. He often needs to take four pills each day for his ulcer and two pills for his blood pressure. The ulcer pills cost about twenty dollars for a bottle of thirty and the blood pressure pills cost about seven dollars for a bottle of thirty. . . .

Named plaintiff Joseph Walley has been homeless and sleeping in shelters or parks for over four and one-half years. He is fifty years old and unable to find work. He receives food stamps and public assistance at the rate of ninety-one dollars and fifty cents (\$91.50) every two weeks. When he sleeps in a public shelter this amount is reduced to twenty-one dollars and fifty cents (\$21.50). . . .

Mr. Walley solicits money throughout the subway system, in the stations, on the underground streets between stations and platforms, and on the platforms, including Pennsylvania Station, Port Authority Bus Terminal, Grand Central, Times Square, Herald Square and Columbus Circle. . . .

Brief for the Plaintiffs-Appellees at 6, *Young v. New York City Transit Auth.*, 903 F.2d 146 (2d Cir. 1990) (Nos. 90-7115, 90-7137, and 90-7183).

102. Prior to its amendment, the statute prohibited any person, unless "duly authorized" by the TA, from soliciting "upon any facility or conveyance . . . alms, subscription or contribution for any purpose." N.Y. COMP. CODES R. & REGS. tit. 21, § 1050.6(b) (1976).

103. The statute was amended by the addition of a new provision which authorized certain nontransit uses. These newly permissible uses included "public speaking; distribution of written materials; solicitation for charitable, religious or political causes; and artistic performances, including the acceptance of donations." N.Y. COMP. CODES R. & REGS. tit. 21, § 1050.6(c) (1985).

Furthermore, certain time, place, and manner restrictions were placed on the amended statute, prohibiting the newly authorized nontransit uses from areas "not generally open to the public and in subway cars." In addition, "[w]ith the exception of leafletting or distributing literature, campaigning, public speaking or similar activities with no sound production device and no physical obstruction, non-transit uses were also prohibited within twenty-five feet of a token booth or within fifty feet from the marked entrance to an TA office or tower." *Young*, 729 F. Supp. at 344.

104. "Operation Enforcement" was an information campaign launched by the TA on

in the transit system.¹⁰⁵ Initially, the plaintiffs claimed that the prohibition of begging and panhandling in the subway system violated First Amendment rights to free speech, as well as due process and equal protection.¹⁰⁶ The plaintiffs also claimed that the TA regulation violated the First and Fourteenth Amendments of the United States Constitution¹⁰⁷ and Article I, §§ 6, 8,

October 17, 1989. The TA distributed 1.5 million pamphlets warning that "anyone violating the new rules governing behavior in the transit system would be 'subject to arrest, fine and/or ejection.'" *Young*, 729 F. Supp. at 344-45.

Panhandling and begging were included in the list of prohibited acts. In addition, more than 20,000 posters helped publicize the campaign. One line on each of the posters stated that panhandling or begging "would lead to arrest, fine and/or ejection." *Id.* at 345.

105. Plaintiffs Young and Walley were among the first to feel the new rules' effects when they "were ejected from several of the TA's stations for soliciting charity shortly after the commencement of Operation Enforcement." Brief for the Plaintiffs-Appellees at 3, *Young v. New York City Transit Auth.*, 903 F.2d 146 (2d Cir. 1990) (Nos. 90-7115, 90-7137, and 90-7183).

106. *Young*, 729 F. Supp. at 345. The Plaintiffs alleged that the regulations and rules were violative of their First Amendment rights to free speech both on their face and as applied. Furthermore, they argued that the regulations were anti-loitering provisions, and as such not only were violative of their due process rights but also served as a pretext for evicting them and other homeless people similarly situated from the defendants' jurisdiction. *Id.* at 349. In their amended complaint, the plaintiffs stated:

Defendants have violated plaintiffs' federal and state constitutional rights. Defendants have promulgated various rules, regulations and laws that ban members of the plaintiff class from asking for charity, even as some of these allow all others to ask for money for any charitable, religious or political cause. They amount to a vague, overbroad, and content-based ban of speech in public forums, which serve no legitimate government interest and which provide no alternative means of communication, and thereby violate plaintiffs' rights of free speech. In addition, they are an unconstitutional prior restraint on speech, which vests unfettered discretion in defendants to censor or permit speech. There is no rational basis, moreover, for distinguishing between homeless or needy people, a politically disfavored group, and all others soliciting for charity. The intended purpose is simply to oust the homeless or needy from bus or subway stations or platforms, and other public forums. This denies them equal protection of the law. In addition, the penal law creates a status offense and is void for vagueness. Finally, the rulemaking power delegated to some of the defendants does not include within its scope the authority to make rules so intrusive of fundamental rights, and to the extent it purports to, is unconstitutional.

Amended Complaint for the Plaintiffs at 2, *Young v. New York City Transit Auth.*, 729 F. Supp. 341 (S.D.N.Y. 1990) (No. 89 Civ. 7871).

107. The Fourteenth Amendment of the Constitution states:

SECTION 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privi-

and 11 of the New York State Constitution,¹⁰⁸ as well as 42 U.S.C. § 1981¹⁰⁹ and § 1983.¹¹⁰ The plaintiffs did not challenge the TA regulation as an unconstitutional time, place, and manner restriction.¹¹¹

At oral argument on December 1, 1989, LACH argued that begging was worthy of protection by the First Amendment because communication inevitably results when a homeless or needy person extends his hand.¹¹² LACH also argued that there was no distinction between solicitation by organized charities and solicitation by private individuals.¹¹³

leges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the law.

U.S. CONST. amend. XIV, § 1.

108. Article 1 of the New York State Constitution states in pertinent part as follows:

§ 6. No person shall be deprived of life, liberty or property without due process of law. . . .

§ 8. Every citizen may speak, write and publish his sentiments on all subject, being responsible for the abuse of that right; and no law shall be passed to restrain or abridge the liberty of speech or of the press. . . .

§ 11. No person shall be denied the equal protection of the laws of this state or any subdivision thereof. No person shall, because of race, color, creed or religion, be subjected to any discrimination in his civil rights by any other person or by any firm, corporation, or institution, or by the state or any agency or subdivision of the state.

N.Y. CONST., art. I, §§ 6, 8, 11.

109. 42 U.S.C. § 1981 (1970) provides:

Equal rights under the law. All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other.

110. 42 U.S.C. § 1983 (1988) provides:

Civil action for deprivation of rights. Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

111. *Young*, 729 F. Supp. at 345, 356 n.28.

112. *Id.* at 345.

113. *Id.* "LACH challenged as unconstitutional the regulation's distinction between solicitation for charitable, religious, or political causes and solicitation of alms by private

In response to the district court's concern over several vague and ambiguous phrases in the regulation,¹¹⁴ the TA revised the regulation to specifically state that "[n]o person shall panhandle or beg upon any facility or conveyance."¹¹⁵ Additionally, under § 1050.6(c), the revised regulation identified what the requirements were for obtaining a permit for "charitable solicitation."¹¹⁶ In response to the plaintiffs' motion, the court granted a temporary restraining order prohibiting the TA from enforcing § 1050.6 pending the outcome of its decision.¹¹⁷

The court then wrote to the state attorney general, *sua sponte*, inviting him to intervene.¹¹⁸ The court questioned the constitutionality of New York Penal Law § 240.35(1),¹¹⁹ a loitering statute.¹²⁰ After Attorney General Robert Abrams declined to intervene in the suit,¹²¹ the court directed the plaintiff to file an amended complaint challenging the New York statute and naming Attorney General Abrams as a defendant.¹²² The court then granted a motion filed by the Legal Aid Society to intervene on behalf of Sheron Gilmore,¹²³ another homeless person.¹²⁴

individuals. On this basis, LACH argued that the total ban on begging and panhandling in the subway system was constitutionally impermissible." *Id.*

114. The district court questioned whether the statute could survive a constitutional challenge for vagueness in distinguishing between "solicit alms" and "solicit for charitable purposes." The court also questioned whether provisions had been made to accommodate the phrase that soliciting would be prohibited "unless duly authorized by the Authority." Specifically, the court questioned whether any procedural standards had been set up by the TA for the granting or denial of such authority. *Id.*

115. N.Y. COMP. CODES R. & REGS. tit. 21, § 1050.6(b)(2) (1989).

116. *Id.* § 1050.6(c).

117. *Young*, 729 F. Supp. at 346.

118. *Id.*

119. Section 240.35(1) states that "[A] person is guilty of loitering when he . . . [l]oiterers, remains or wanders about in a public place for the purpose of begging." N.Y. PENAL LAW § 240.35(1) (McKinney 1979).

120. *Young*, 729 F. Supp. at 346.

121. *Young*, 903 F.2d at 151.

122. *Id.*

123. The brief for the plaintiff-intervenor describes Sheron Gilmore as a needy New York resident who "relies in part on money she collects by begging to provide herself with food and other life necessities. . . . She also solicits money that she uses for carfare to take her to a medical clinic, which she reports to regularly for treatment for a respiratory ailment." Brief for the Plaintiff-Intervenor at 2, 5, *Young v. New York City Transit Auth.*, 903 F.2d 146 (2d. Cir. 1990) (Nos. 1170, 1171, and 1202).

124. The motion by the Legal Aid Society was opposed by the TA and LACH on the grounds that Ms. Gilmore was a member of the class of people already represented by plaintiffs Walley and Young and that her intervention was not necessary. The district

On December 27, 1989, the plaintiffs filed an amended complaint, challenging the constitutionality of the loitering statute, § 240.35(1), and naming Robert Abrams, the Long Island Railroad, and Port Authority as defendants.¹²⁵

At the direction of the court the plaintiffs again amended the complaint on January 22, 1990, to include the chairman and all twelve commissioners of the Port Authority as defendants. The plaintiffs also changed the word "homeless" in the original class description to "all needy persons" who live in New York and beg or panhandle in the transit facilities.¹²⁶

The district court issued its decision on January 25, 1990.¹²⁷

court, however, stated that "the case is a very difficult and important case and . . . the court would welcome the additional resource which the Legal Aid Society can provide." *Young*, 903 F.2d at 151.

125. *Id.* The challenge to § 240.35(1) was based on the defendants' claim that the transit police, in carrying out their duties as peace officers, were merely enforcing this section of the state penal law. *Young*, 729 F. Supp. at 346. In their amended complaint, the plaintiffs stated:

Defendants' content-based ban on solicitation of charity by the homeless or needy, whether pursuant to 21 N.Y. Comp. Codes R. & Regs. tit. 21, §§ 1050.6, 1220.16 (Rule 9 of the "World Trade Center and Port Authority Bus Terminal, Revised Rules and Regulations"), 1220.25 and 1290.3, N.Y. Penal Law § 240.35, or any other law, rule or regulation, which discriminates against plaintiffs, by prohibiting them from asking for charity, but allowing others to do so, violates the First and Fourteenth Amendments to the United States Constitution, Article I, §§ 8 and 11 of the New York State Constitution, and 42 U.S.C. §§ 1981 and 1983.

Amended Complaint for the Plaintiffs at 19-20, para. 49, *Young v. New York City Transit Auth.*, 729 F. Supp. 341 (S.D.N.Y. 1990) (No. 89 CIV. 7871 (LBS)).

With respect to the addition of the Long Island Railroad and the Port Authority of New York as defendants in the action, the Port Authority has jurisdiction over both the Port Authority Bus Terminal and the World Trade Center. The Long Island Railroad is a subsidiary of the MTA. The plaintiffs asserted that various rules of the World Trade Center and the Port Authority violated the New York State and the United States Constitution. Specifically, the plaintiffs cited N.Y. COMP. CODES R. & REGS. tit. 21, § 1220.16 (1973) ("No person shall solicit funds or contributions for any purpose at the [Port Authority Bus] Terminal without permission") as well as N.Y. COMP. CODES R. & REGS. tit. 21, § 1220.25 (1973) ("No person, unless duly authorized by the Port Authority, shall, in . . . the [Port Authority Bus] Terminal . . . solicit alms") and N.Y. COMP. CODES R. & REGS. tit. 21, § 1290.3 (1973) ("No person at the World Trade Center, unless duly authorized in writing by the Port Authority, shall . . . solicit funds for any purpose"). *Young*, 729 F. Supp. at 347 n.9.

Although the Port Authority claimed that it issued permits on a first-come, first-served basis, the plaintiffs noted that because the Port Authority interpreted § 240.35(1) to prohibit begging and panhandling, the Port Authority did not issue any permits for these activities. *Id.* at 347.

126. *Young*, 729 F. Supp. at 347.

127. *See id.* Judge Leonard Sand wrote the opinion for the court.

The court granted the plaintiffs' motions to include all twelve commissioners and to change the name of the class of people being represented in the suit.¹²⁸ The court held § 240.35(1) of the New York Penal Law to be violative of the due process clause of the New York State Constitution.¹²⁹

After rejecting the claim that § 240.35(1) was a necessary predicate for regulating begging, the court proceeded to consider the constitutional validity of the Transit Authority and Port Authority regulations, 21 N.Y.C.R.R. § 1050.6 (Transit Authority) and 21 N.Y.C.R.R. §§ 1220.16, 1220.25, and 1290.3 (Port Authority).¹³⁰ The court began its analysis by addressing whether begging and panhandling were activities worthy of First Amendment protection.¹³¹ Basing its decision heavily on the Supreme Court's holding in *Schaumburg v. Citizens for a Better Environment*,¹³² the court held that begging was a form of speech worthy of protection under the First Amendment.¹³³

128. *Id.* at 347. The new class was defined as "all needy persons who live in the State of New York, who are or will be asking or soliciting others for charity for their own benefit in the train, bus or subway stations of New York City or all other places within the jurisdiction of the defendants where this is presently prohibited." *Id.*

129. *Id.* at 349. In reaching this conclusion, the court relied on the due process test for loitering statutes used by the New York State Court of Appeals in *People v. Bright*, 71 N.Y.2d 376, 520 N.E.2d 1355, 526 N.Y.S.2d 66 (1988). Under this test, statutes are upheld only if "they either prohibit loitering for a specific illegal purpose or loitering in a specific place of restricted access." *Id.* at 1355. Because a public place cannot be considered a place of restricted access and because the court found that begging by itself was not unlawful conduct, the court held § 240.35(1) to fail this test. *Young*, 729 F. Supp. at 349.

130. *Young*, 729 F. Supp. at 350.

131. *Id.*

132. 444 U.S. 620 (1980).

133. *Young*, 729 F. Supp. at 360. Specifically, the court noted that "a meaningful distinction cannot be drawn for First Amendment purposes between solicitations for charity and begging." *Id.* at 352. Focusing on the meaning of the word "charity," the court noted that there was nothing in the dictionary which suggested that money given to a soliciting beggar did not qualify as charity. *Id.* at 353. Therefore, the court noted that whether a donation is solicited by a needy person or a fundraiser would not be a factor in determining whether the solicitation was for charity. *Id.* Instead, the court proposed that in determining whether something should be categorized as charity it would be more appropriate to look at the motive and intent of the donor, not that of the donee or recipient. *Id.* at 353 n.21. By looking only to the intent of the recipient in distinguishing between charitable and noncharitable solicitation, the court noted that it would be conceivable that one could prevent one needy person from begging or panhandling for himself, but would have to allow the activity if two needy people were to work together, each soliciting funds for the other. *Id.* at 353.

After holding that begging was worthy of protection under the First Amendment, the court proceeded to determine the proper forum classification for the subway system. The question to be decided was whether the transit system areas at issue were traditional or designated public forums.¹³⁴ After reviewing precedent in this area, the court held that the transit system was a designated public forum.¹³⁵ A time, place, and manner analysis by the court then demonstrated that the governmental interests asserted by the defendants were not tailored narrowly enough to justify the restricted conduct.¹³⁶

134. *Id.* at 356.

135. *Id.* at 359. In reaching this conclusion that the subway system was a designated public forum, the court determined that the Second Circuit's decision in *Gannett Satellite Info. Network v. Metropolitan Transp. Auth.*, 745 F.2d 767, 773 (2d Cir. 1984), which held that MTA stations are neither designated nor traditional public fora, was of little precedential value because the decision was issued prior to the amendment of the TA regulation at issue in this case. *Id.* at 357. The *Gannett* court held that "MTA stations to be appropriate forums for newsrack newspaper sales, but that placing a licensing fee levied on these newsracks was a permissible manner restriction given the substantial government interest in raising revenue." *Id.* at 357 n.33.

Instead, the court found its primary support in classifying the subway system as a designated public forum from the Second Circuit's 1968 decision in *Wolin v. Port of New York Auth.*, 392 F.2d 83, 89-91 (2d Cir. 1968), *cert. denied*, 393 U.S. 940 (1968). In *Wolin*, the court held the Port Authority Terminal to be an appropriate forum for distributing leaflets, carrying signs, and engaging in discussions with those passing through the terminal. *Id.* The *Wolin* court determined the terminal to be an ideal environment for First Amendment activity given the many people who passed through each day. *Id.* at 90-91. Based on this rationale, the district court in *Young* found it to be indisputable that the Port Authority as well as all transit facilities similar to it had become public fora. *Young*, 729 F. Supp. at 356.

136. With respect to the TA's interest in protecting the public from harassment and intimidation, the court concluded that neither the TA regulation nor the Port Authority's refusal to issue permits to beggars was narrowly tailored to serve the asserted government interest. *Id.* at 358. First, the court noted that no attempt had been made by either group to distinguish between the passive and aggressive beggar. *Id.* The district court also noted that the TA had other regulations at its disposal to prohibit any aggressive activity in the subway system. *Id.* Furthermore, the court noted that no attempt had been made to identify which areas of the subway system were more prone to passenger intimidation. *Id.*

Accordingly, the court concluded:

While the government has an interest in "preserving the quality of urban life, . . ." and in protecting citizens from "unwanted exposure to certain methods of expression which may legitimately be deemed a public nuisance, . . . this interest must be discounted where the regulation has the principal effect of keeping a public problem involving human beings out of sight and therefore out of mind. Indeed, it is the very unsettling appearance and message conveyed by the beggars that gives their conduct its expressive quality. Of course, the fact that expression is "objec-

In accordance with its decision, the district court preliminarily enjoined the defendants from enforcing "any prohibition on begging, panhandling or soliciting alms" pursuant to 21 N.Y.C.R.R. §§ 1050.6, 1220.25, 1290.3, 1220.16 and 240.35(1) of the New York Penal Law.¹³⁷ On February 2, 1990, the court converted the preliminary injunction to a permanent injunction.¹³⁸ In addition, the court ordered that pending the outcome on appeal, begging and panhandling in the subway system would be allowed under the same time, place, and manner restrictions as those for charitable organizations under § 1050.6(c).¹³⁹

On February 7, 1990, the United States Court of Appeals for the Second Circuit granted a stay of the district court's judgment pending the Court of Appeals' decision on appeal.¹⁴⁰

B. Opinion of the United States Court of Appeals for the Second Circuit

The Second Circuit, in a two to one decision,¹⁴¹ reversed the district court's judgment, holding it highly unlikely that begging was a form of speech worthy of First Amendment protection.¹⁴² After applying the *O'Brien* test to the facts of the case, the court upheld the constitutionality of 21 N.Y.C.R.R. § 1050.6 and vacated the district court's order enjoining enforcement of the regulation.¹⁴³ The court also dismissed the portion of the complaint

tionable to some . . . does not diminish its protected status. . . ."

Id. at 358-59 (quoting *City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41, 50 (1986)); see *Members of The City Council of Los Angeles v. Taxpayers for Vincent*, 466 U.S. 789, 805 (1984); *Young v. American Mini Theatres*, 427 U.S. 50, 85 (1976) (Stewart, J., dissenting).

Moreover, the court concluded that any fear asserted by the TA regarding possible fraudulent activity by the individual beggars was not a relevant issue. *Young*, 729 F. Supp. 359. The court noted when a donor gives money to a beggar, he can be confident that in all likelihood, the beggar will keep the money. *Id.* at 359.

137. *Young*, 729 F. Supp. at 360. Because the Port Authority regulations relied upon the validity of § 240.35(1), these regulations were found to be unconstitutional. *Id.* at 359.

138. *Young v. New York City Transit Auth.*, 903 F.2d 146, 152 (2d Cir. 1990).

139. *Id.*

140. *Id.*

141. Judge Altimari wrote the opinion for the majority in which Judge Timber joined. Judge Meskill wrote a dissenting opinion.

142. *Id.* at 153.

143. *Id.* at 164.

challenging § 240.35(1) of the New York Penal Law.¹⁴⁴

1. *The Majority*

The court noted that case law supports the proposition that not all expressive conduct constitutes speech which is protected by the First Amendment.¹⁴⁵ The court held that a "common sense" analysis of begging supports a conclusion that this activity resembles "conduct" more than it does "speech."¹⁴⁶ In applying the test established in *Spence v. Washington*¹⁴⁷ to the conduct of begging, the court concluded that begging is not "inseparably intertwined with a 'particularized message,' and that most individuals are not [begging] to convey any social or political message."¹⁴⁸ Rather, they beg to collect money.¹⁴⁹ The court noted that there hardly seems to be a 'great likelihood' that the subway passengers who witness the conduct are able to discern what the particularized message might be."¹⁵⁰

The court contrasted *Young* with *Texas v. Johnson*,¹⁵¹ *Tinker v. Des Moines Independent Community School District*,¹⁵² and several other cases.¹⁵³ In each of these cases, the court found the conduct conveyed a clear expressive message worthy of First Amendment protection.¹⁵⁴ The atmosphere of

144. *Id.*

145. *Id.* at 152. The court cited *United States v. O'Brien*, 391 U.S. 367, 376 (1968), which rejected the "view that an apparently limitless variety of conduct can be labeled 'speech' whenever the person engaging in the conduct intends thereby to express an idea." *Young*, 903 F.2d at 152-53.

146. *Young*, 903 F.2d at 153. The court supported this by quoting Justice Scalia's dissent in *Community for Creative Non-Violence v. Watt*, 703 F.2d 586, 622 (D.C. Cir. 1983): "That this should seem a bold assertion is a commentary upon how far judicial and scholarly discussion of this basic constitutional guarantee has strayed from common and common-sense understanding." *Young*, 903 F.2d at 153.

147. 418 U.S. 405 (1974). See *supra* notes 28-31 and accompanying text for a discussion of the test set forth by the Court in *Spence*.

148. *Young*, 903 F.2d at 153 (quoting *Spence*, 478 U.S. at 410-11).

149. *Id.*

150. *Young*, 903 F.2d at 153-54.

151. See *supra* note 33 and accompanying text.

152. 393 U.S. 503, 505 (1969) (involving students wearing black armbands in protest of Vietnam War).

153. *Young*, 903 F.2d at 152-54.

154. Other cases mentioned by the court were *Amalgamated Food Employees Union Local 509 v. Logan Valley Plaza Inc.*, 391 U.S. 308 (1968) (involving union members picketing peacefully in shopping center to protest unfair labor practices), and *Brown v.*

the New York subway system, however, was not found to be conducive to any possible message a beggar may try to convey.¹⁵⁵ Even though the court recognized that one can find "some kernel of expression in almost every activity . . . such a kernel is not sufficient to bring the activity within the protection of the First Amendment. Furthermore, any conversation would be incidental — speech is not necessary to, nor is it inherent to, the act of begging."¹⁵⁶

The court found the district court's reliance on the trilogy of charitable organization cases — *Schaumburg v. Citizens for a Better Environment*,¹⁵⁷ *Maryland v. Joseph H. Munson*¹⁵⁸ and *Riley v. National Federation of the Blind*¹⁵⁹ — to be misplaced

Louisiana, 383 U.S. 131 (1966) (involving five black people conducting a library sit-in to protest the segregation policy of the library). *Young*, 903 F.2d at 153.

155. *Young*, 903 F.2d at 154. The court of appeals held that "begging in the subway is experienced as transgressive conduct whether devoid of or inclusive of an intent to convey a particularized message." *Id.* The court reached its conclusion based on information provided primarily through a passenger study conducted by the TA in 1988. *Id.* The TA study addressed "quality of life problems" experienced by subway passengers while in the subway system and stated that beggars in the subway contribute to the public's perception that the subway system is dangerous. *Id.* at 149.

Part of the TA study included a survey conducted by Peter Harris, which confirmed the additional hazards perceived by riders because of the presence of beggars. *Id.* The Harris survey also found that two-thirds of all subway passengers have been intimidated into giving money to beggars and panhandlers. *Id.*

An outside consulting firm retained by the TA confirmed that begging and panhandling is a problem in the subway system. The court of appeals discussed the conclusions reached by Professor George Kelling, president of the consulting firm, in its opinion:

[B]ehavior such as begging generates "high levels of fear in the passengers, thereby discouraging use of the system." . . . Open city streets allow pedestrians what sociologists term "fate-control", or the ability to avoid and move away from an intimidating person. To the contrary, subway riders enjoy considerably less fluidity of movement and ability to control what happens to them. Whether standing in the crush of riders in a speeding subway car, waiting among the pressing masses on a platform, or swarming with the throng through a maze of mezzanines, staircases and ramps, the rider feels "captive". As a result . . . "in the subway environment, begging is inherently aggressive even if not patently so." In addition . . . begging not only intimidates passengers, but also "has the serious potential of creating an accident and injuring many people." . . . [T]he act of placing a cup before persons is often disruptive, startling and potentially dangerous.

Id. at 149-50.

156. *Id.* at 154. (quoting *Dallas v. Stanglin*, 488 U.S. 861 (1989)).

157. 444 U.S. 620 (1980).

158. 467 U.S. 947 (1984).

159. 487 U.S. 781 (1988).

because none of these cases discussed begging.¹⁶⁰ The court distinguished organized solicitation for charities from begging.¹⁶¹ The court reasoned that the primary goal of begging is to obtain money, whereas organized charities are concerned with disseminating information and gathering support.¹⁶² According to the majority, "there is a sufficient nexus between solicitation by organized charities and a 'variety of speech interests' to invoke protection under the First Amendment;" this same nexus, however, does not exist with begging.¹⁶³ The court noted that begging, unlike charitable solicitation, is not necessarily "intertwined with speech."¹⁶⁴

The court noted that the TA clearly distinguished between beggars and charitable organizations when it amended § 1050.6.¹⁶⁵ In amending the regulation, "based on its experience, the TA drew a distinction between the harmful effects caused by individual begging and the First Amendment interests associated with solicitation by organized charities."¹⁶⁶ The TA determined that while solicitation by organized charities could be contained to certain areas in the subway system, "the problems posed by begging and panhandling could be addressed by noth-

160. *Young*, 903 F.2d at 155. The court noted:

The district court apparently assumed that the outcome of the three Supreme Court cases would have been the same if, instead of involving door-to-door solicitation by organized charities, they had involved begging and panhandling in the subway. We think that the district court misconstrued the line of reasoning that underpins the trilogy. . . . [N]either *Schaumburg* nor its progeny stand for the proposition that begging and panhandling are protected speech under the First Amendment.

Id.

161. *Id.* at 155-56.

162. *Id.* at 156.

163. *Id.* at 155.

164. *Id.*

165. *Id.* at 156. Specifically, the court of appeals brought attention to the results of the TA study examined by the district court. This study provided the court of appeals with proof that "subway passengers experience begging as intimidating, harassing and threatening. Moreover, the passengers perceive that beggars and panhandlers pervade the system. . . . Nowhere in the record is there any indication that passengers felt intimidated by organized charities." *Id.*

166. *Id.* These interests include communication of information, dissemination and propagation of views, and advocacy of causes. *Id.* Absent solicitation by charity, it is possible that the flow of such information would cease. *Id.* at 155 (quoting *Schaumburg*, 444 U.S. at 632).

ing less than the enforcement of a total ban.”¹⁶⁷

The court also noted that throughout history there have been restraints on the places where beggars may beg.¹⁶⁸ A review of the historical treatment of beggars led the court to conclude that “virtue is best served when it reflects an ‘ordered charity.’”¹⁶⁹

The court also addressed the constitutionality of the statute under the premise that begging was a form of communication.¹⁷⁰ The court’s analysis under this premise still led it to conclude that the statute is constitutionally valid.¹⁷¹ The court examined the facts under the *O’Brien* test¹⁷² and reasoned that the ban was appropriate given the strong governmental interest in providing a safe subway environment and the alternative forums available for begging.¹⁷³

167. *Young*, 903 F.2d at 156.

168. *Id.* In its review of the treatment of beggars in history, the court of appeals stated:

We are not unaware that the giving of alms has long been considered virtuous in our Western tradition. In antiquity the humanist and jurist, Cicero, said of Caesar: “Of all thy virtues none is more marvelous and graceful than charity.” Some centuries later the Christian thinker, Augustine of Hippo, observed that it is essential to the virtue that “charity obeys reason, so that charity is vouchsafed in such a way that justice is safeguarded, when we give to the needy.” In Medieval times the Jewish philosopher, Moses Maimonides, espoused a charity such that “no contribution should be made without the donor feeling confident that the administration is honest, prudent and capable of management.” The district court itself stated that “[i]n early English common law, begging by those able to work was prohibited, but beggars who were unable to work were licensed and restricted to specific areas.” Thus, while there can be no doubt that giving alms is virtuous, in the Eastern tradition there is also no doubt that the virtue is best served when it reflects an “ordered charity.” It does not seem to us that the TA’s regulation of solicitation and ban on begging are inconsistent with the concept.

Id. at 156.

169. *Id.*

170. *Id.* at 157.

171. *Id.* at 161.

172. See *United States v. O’Brien*, 391 U.S. 367 (1968). For a discussion of the four *O’Brien* factors, see *supra* notes 37-42 and accompanying text. The *Young* court determined that the *O’Brien* test would be appropriate since the government interest (i.e. passenger safety) in enacting the regulation was unrelated to the suppression of free expression. *Young*, 903 F.2d at 157.

173. With respect to the four *O’Brien* factors, the court of appeals held that the first factor, requiring that the regulation be within the constitutional power of the government, was not at issue in the case. *Id.* at 158. With respect to the second factor, requiring that the regulation further an important or substantial governmental interest, the court found that the regulation served to advance substantial governmental interests. The gov-

Disagreeing with the district court, the Court of Appeals found that the subway system is not a public forum.¹⁷⁴ The Court of Appeals noted that "[i]n the face of Operation Enforcement, there can be no doubt that the TA intended to continue its long-standing prohibition of begging and panhandling even after revising the regulation to permit solicitation by organizations."¹⁷⁵ The court reasoned that permitting limited discourse does not turn a nontraditional forum into an open public forum:

[I]t is permissible for the TA to limit solicitation in the subway system to organizations. "[A] public forum may be created by government designation of a place or channel of communication for use by the public at large for assembly and speech, for use by certain speakers, or for the discussion of certain subjects."¹⁷⁶

The court also dismissed the plaintiffs' constitutional challenge of § 240.35 of the New York Penal Law.¹⁷⁷ First, the Court of Appeals held that the district court did not have jurisdiction to decide the issue due to the failure of the plaintiffs to allege an actual case or controversy as required under Article III of the United States Constitution.¹⁷⁸ Further, the Court of Appeals de-

ernment has a substantial interest in protecting the multitude of people (estimated at over three million) who ride the subway daily, the majority of whom feel threatened and intimidated by beggars and panhandlers. *Id.* The court also noted that the conduct of beggars is disruptive and could contribute to accidents in the system. *Id.* Therefore, the court found that the TA's conclusion that begging is "alarmingly harmful conduct" was not unreasonable, and that "the district court's analysis reflected an exacerbated deference to the alleged individual rights of beggars and panhandlers to the great detriment of the common good." *Id.*

With respect to the third *O'Brien* factor, requiring that the governmental interest be unrelated to the suppression of free expression, the court found that the government interests in enacting the regulation were indeed not related to the suppression of free expression, and were, therefore, content neutral. *Id.* In applying the facts of the case to the fourth factor, requiring the restriction on the First Amendment freedom at issue to be no greater than is necessary to the furtherance of the government interest involved, the court found that the exigencies created by begging and panhandling in the subway warranted the complete prohibition of the conduct. *Id.* at 159.

174. *Id.* at 161 (citing *Gannett Satellite Info. Network v. Metropolitan Transp. Auth.*, 745 F.2d 767, 773 (2d Cir. 1984)).

175. *Young*, 903 F.2d at 161.

176. *Id.* (quoting *Cornelius v. NAACP Legal Defense & Educ. Fund*, 473 U.S. at 802). See also *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 36, 46 n.7 (1983) (a designated public forum "may be created for a limited purpose such as use by a certain group").

177. *Young*, 903 F.2d at 162.

178. *Id.* at 162.

terminated that the district court would not have had subject matter jurisdiction over the issue even if the plaintiffs had alleged a justiciable case or controversy.¹⁷⁹

2. *The Concurrence/Dissent*

Judge Meskill concurred with the majority's decision regarding § 240.35 of the New York Penal Law.¹⁸⁰ Judge Meskill also agreed that common sense should be used in the court's First Amendment analysis.¹⁸¹ However, he believed that a true common sense analysis indicated that both beggars and representatives of organized charities have only one goal in mind when they solicit funds in the subway system — obtaining money.¹⁸² Given this common goal, Judge Meskill argued that under *Schaumburg* beggars deserve the same First Amendment protection as organized charities.¹⁸³

According to Judge Meskill, *Schaumburg* did not hold that speech is necessary for charitable solicitation to be protected under the First Amendment.¹⁸⁴ The dissent reasoned:

[C]harities receive countless donations without engaging in any discussion whatsoever with the typical donor rushing to catch a train. . . . First Amendment protection attaches to all charitable solicitation, whether or not any speech incident to the solicitation actually takes place, because a sufficient nexus exists between a charity's expression of ideas and its fundraising.¹⁸⁵

179. *Id.* at 163-64. "The fact that the TA's prohibition on begging is unconnected to the New York Penal Law deprives the [plaintiffs'] claims of the requisite 'common nucleus of operative fact' for the exercise of pendent jurisdiction." *Id.* at 164. See *United Mine Workers v. Gibbs*, 383 U.S. 715, 725 (1966); *United States v. Town of North Hempstead*, 610 F.2d 1025, 1029-30 (2d Cir. 1979).

180. *Young*, 903 F.2d at 164 (Meskill, J., concurring in part, dissenting in part).

181. *Id.*

182. *Id.*

183. *Id.* at 165.

184. *Id.* Judge Meskill noted that if speech were a required element for charitable solicitation, it is unlikely that the fundraising activity of any charitable solicitor in the subway system would be protected. *Id.* at 164. It is commonly known that many of these solicitors receive donations without any exchange of words between the donor and themselves because the donors are often hurrying to the catch their trains. *Id.*

185. *Id.* The court described this nexus by pointing out that representatives of organized charities often have the opportunity to explain and discuss the purpose and goals of their respective charity. *Id.*

Under this rationale, the dissent emphasized that begging is worthy of the same First Amendment protection as solicitation by organized charities.¹⁸⁶ Judge Meskill further supported this conclusion by noting that beggars often speak with people to inform them of their struggle to survive and the plight of the homeless.¹⁸⁷ Therefore, there is no distinction between beggars who speak when begging and those who do not, just as there is no distinction between representatives of charitable organizations who speak when soliciting funds and those who do not.¹⁸⁸ Because charitable organizations are protected by the First Amendment, beggars should be protected as well.¹⁸⁹

Judge Meskill agreed with the majority that the regulations were content neutral.¹⁹⁰ However, he disagreed that the *O'Brien* test was the proper standard to be applied.¹⁹¹ He agreed with the district court that begging should be a protected activity in the same way that charitable solicitation is protected. Therefore, any direct restriction should be "subjected . . . to exacting First Amendment scrutiny."¹⁹² The dissent pointed out that the *O'Brien* test and the time, place, and manner test are similar and, therefore, either could be used.¹⁹³ Judge Meskill noted, however, that *O'Brien* is usually used with cases involving sym-

186. *Id.*

187. *Id.* The dissent cited the individual affidavits of plaintiffs Young, Walley, and Gilmore in support of this conclusion. Each of the three plaintiffs stated in their affidavits that they often discuss the problems of the homeless and needy people of New York with the people whom they approach for money. *Id.* at 165.

188. *Id.*

189. *Id.*

Any attempt to distinguish between beggars who hold signs or engage in discussions and those who simply ask for money would be unrealistic. Accordingly, if First Amendment protection extends to charitable solicitation unaccompanied by speech, as it apparently does, it must extend to begging as well. . . . To hold otherwise would mean that an individual's plight is worthy of less protection in the eyes of the law than the interests addressed by an organized group.

Id. at 165-67.

190. *Id.* at 166. "Defendants have offered substantial evidence to support their claim that the regulations are aimed at the secondary effects of begging such as increased crime and traffic congestion, rather than at any message conveyed by the beggars." *Id.*

191. *Id.* The dissent questioned whether the more "relaxed" standard of *O'Brien* should automatically be applied simply because the regulation is deemed to be content neutral. *Id.*

192. *Id.* (quoting *Riley v. National Fed'n of the Blind*, 487 U.S. 781, 798 (1988)).

193. *Young*, 903 F.2d at 66 (Meskill, J., dissenting).

bolic conduct, not expressive conduct.¹⁹⁴

Because Judge Meskill believed that the fourth element of the *O'Brien* test was specifically geared to a symbolic speech analysis, he chose to apply a time, place, and manner test to the expressive conduct involved in *Young*. Under this analysis, Judge Meskill found the regulation invalid.¹⁹⁵ He noted that the TA had created a limited public forum "by designating certain areas of the subway system in which charitable solicitation may take place."¹⁹⁶

The *Young* dissent also agreed with the district court that *Gannett Satellite Information Network v. Metropolitan Transportation Authority*¹⁹⁷ was of little precedential value.¹⁹⁸ *Gannett* held that commuter stations were neither traditional nor designated public forums.¹⁹⁹ The TA's subsequent amendment, however, specifically designated subways as public forums.²⁰⁰ Judge Meskill therefore proposed that the standard for transportation facilities set up in *Wolin v. New York Authority*²⁰¹ was applicable.²⁰² *Wolin* suggested that Port Authority Bus Ter-

194. Judge Meskill referred specifically to *Ward v. Rock Against Racism*, 491 U.S. 781, 797 (1989), where the Court referred to *O'Brien* as "the case in which we established the standard for judging the validity of restrictions on expressive conduct." *Id.* Judge Meskill stated that the protected expression in the case at bar was the "beggar's speech incident to their solicitation of alms, not symbolic conduct." *Young*, 903 F.2d at 166 (Meskill, J., dissenting).

195. *Id.*

196. *Id.* Judge Meskill noted:

The TA clearly has created a limited public forum by designating certain areas of the subway system in which charitable solicitation may take place. The majority emphasizes that the TA never intended to open the subway to begging, and that the grant of selective access does not create a public forum for all purposes. While the government's intent is "critical" to the determination that a limited public forum was created . . . the fact is defendants intended to open, and did open, certain areas to solicitation by organized charities.

Id. at 166.

Because Judge Meskill argued that the TA opened certain areas for organized charities, making these areas designated public forums, these areas are, therefore, also appropriate for the beggar. *Id.* at 167. He felt that there was no difference between the type of speech carried on by organized charities and the speech of the beggar for First Amendment purposes. *Id.*

197. 745 F.2d 767 (2d Cir. 1984).

198. *Young*, 903 F.2d at 167.

199. 745 F.2d at 773.

200. *Young*, 903 F.2d at 167.

201. 392 F.2d 83, 88-91 (2d Cir.), *cert. denied*, 393 U.S. 940 (1968).

202. 903 F.2d at 167.

minal was a public forum.²⁰³ Since the majority did not dispute *Wolin*, the dissent reasoned that it was still valid.²⁰⁴

Judge Meskill then addressed whether the regulation could survive the appropriate level of scrutiny. "Content-neutral regulations like the ones in question will be upheld as reasonable time, place, or manner restrictions if they are 'narrowly tailored to serve a significant government interest, and leave open ample alternative channels of communication.'" ²⁰⁵ Judge Meskill argued that although significant governmental interests were present, the regulation was not narrow enough for a content-neutral restriction.²⁰⁶ The dissent acknowledged that the prevention of passenger harassment by beggars and panhandlers, as well as preservation of quality of life and the maintenance of a safe transit system, are important.²⁰⁷ Judge Meskill noted that no distinction had been made in the regulation between the passive blind man and the harassing beggar.²⁰⁸ Therefore, "the regulations are not narrowly tailored to achieve these [significant] interests because they burden a substantial amount of speech that does not implicate the TA's interests."²⁰⁹ Moreover, the TA had failed to show that passengers perceive beggars as "belligerent or frightening"²¹⁰ and had failed to show that passengers do not feel harassed when approached by representatives from organized charities.²¹¹

Hence, the dissent argued that the TA should only be allowed to prohibit specific conduct that adversely affects passenger safety, and should address the safety concerns of passengers by restricting beggars to the same areas where charitable solicitation is allowed.²¹² Judge Meskill acknowledged, however, that if the regulation had not been amended to allow charitable organizations to solicit funds in the subway, no public forum would

203. *Id.* (citing *Wolin*, 392 F.2d at 88-91).

204. *Young*, 903 F.2d at 167.

205. *Id.* (quoting *Perry Educ. Ass'n v. Perry Local Educators' Ass'n* 460 U.S. 36, 45 (1983)).

206. *Young*, 903 F.2d at 167.

207. *Id.*

208. *Id.*

209. *Id.*

210. *Id.* at 168.

211. *Id.*

212. *Id.*

have been created. Had the regulation been reviewed under those circumstances, he would have upheld the regulation's validity.²¹³

C. *The United States Supreme Court*

On November 26, 1990, the Supreme Court of the United States denied certiorari for *Young v. New York City Transit Authority*.²¹⁴ No comments or dissents regarding the Court's decision were publicly reported.²¹⁵

IV. Analysis

The majority decision has significant weaknesses.²¹⁶ The Court of Appeals' decision to prohibit begging and panhandling in the subway may be justified given the substantial governmental interests of passenger safety and the right of passengers to be free from harassment.²¹⁷ However, the reasoning of the majority lacks clarity and conviction, and is an unrealistic holding be-

213. *Id.*

214. 111 S. Ct. 516 (1990).

215. *Id.*

216. Media reactions to the court's decision support both sides of the argument. See *Correct Decision to Ban Beggars*, S.F. CHRON., May 14, 1990, at A18 (final ed.):

Free speech is a precious right and to say it does not apply to some activities in public places is a decision not to be taken lightly. But in this case the court is correct in deciding that aggressive begging is not free speech. It can constitute a threat to personal safety and liberty.

A subway system exists to move passengers quickly and safely. Passengers have the right to use the trains and stations without harassment. This means that a BART passenger should be able to open his or her wallet or purse in a public place to buy a ticket without fear.

Id.; but see Kempton, *Charity, Thy Cup is Empty*, NEWSDAY, May 13, 1990, at 3:

A few of those hissings and slitherings that intimate the presence of the snakes of meanness of spirit are rather too audible in the cadences sounded in U.S. Court of Appeals Judge Frank X. Altimari's affirmation of the New York City Transit Authority's ban on panhandling on its subways. . . .

In essence, the Court of Appeals has ruled that individuals cannot beg in the subways, but that organized charities can. Every schoolboy ought by now to be familiar with Anatole France's observation that the law in its majestic equality forbids both the rich and the poor to sleep under bridges. We must now adjust that doctrine's revision into: "The law's commonsensical inequity henceforth forbids the penniless and licenses the propertied to beg in the subway."

Id.

217. *Young*, 903 F.2d at 168 (Meskill, J., dissenting).

cause it presents enforcement problems.²¹⁸

The majority decision is weak in its failure to distinguish in a convincing manner the difference between solicitation by charitable organizations and begging for oneself.²¹⁹ The majority decision expressed "grave doubt" that begging could be a constitutionally protected form of speech. The court based its decision on a trilogy of charitable organization cases and "common sense."²²⁰ In support of its position, however, it offered a conclusory opinion that a beggar extending his hand is not communicating a message worthy of First Amendment protection to the same degree as a representative of an organized charity soliciting funds.²²¹

The court correctly noted that *Schaumburg* held that even representatives of charitable organizations who solicit without speaking are protected under the First Amendment.²²² Indeed, there appears to be very little difference, if any at all, between the silent solicitor representing a charitable organization and the silent beggar passively standing in the subway.

The majority decision is further weakened by its application of the *O'Brien* test.²²³ First, an application of the *O'Brien* test would have been unnecessary if the majority had supported its assertion that begging is unworthy of First Amendment protection, rather than merely expressing "grave doubt" as to its protected status. In addition, because the *O'Brien* test is usually applied to cases involving symbolic conduct, it is questionable whether the *O'Brien* test is appropriate in this case.²²⁴ Finally,

218. See *infra* notes 245-47 and accompanying text.

219. *Id.* Judge Meskill concluded that his argument by once again expressing his concern with the majority's failure to distinguish charitable solicitation from begging: "I simply fail to see why the TA should be able to permit organized charities, but not beggars, to rattle a cup full of change as one passes by." *Id.*

220. *Id.* at 153-56.

221. *Id.*

222. *Id.* at 165.

223. See *supra* notes 167-68 and accompanying text.

224. See GERALD GUNTHER, CONSTITUTIONAL LAW 1174 (11th ed. 1988) ("[T]he Warren Court's symbolic speech decisions suggest not only uncertainty but also instability of doctrinal foundations."); John H. Ely, *Flag Desecration: A Case Study in the Roles of Categorization and Balancing in First Amendment Analysis*, 88 HARV. L. REV. 1482, 1486 n.17 (1975) (noting that nothing in the Court's response to the substantiality requirement suggests that this requirement will not always be satisfiable); William E. Lee, *Lonely Pamphleteers, Little People, and the Supreme Court: The Doctrine of Time*,

the validity of the *O'Brien* test itself has been questioned as well.²²⁵

However, even assuming that an application of the *O'Brien* test was appropriate, the majority failed to show that the weight of the government's interest in passenger safety was sufficient.²²⁶ The majority also failed to show that people are intimidated by beggars.²²⁷ The court based its conclusion on only one TA study.²²⁸ Furthermore, the majority never addressed whether people feel intimidated or harassed by representatives of charitable organizations.²²⁹

However, the dissent weakened its own analysis when it failed to reconcile its decision with the opposite conclusion reached by the Supreme Court in *Clark v. Community for Creative Non-Violence*.²³⁰ In *Clark*, a regulation prohibiting sleeping in nondesignated parks was upheld in light of the government's

Place, and Manner Regulations of Expression, 54 GEO. WASH. L. REV. 757, 784 (1986) (noting that the court in *O'Brien* only concluded that the governmental interest was not imaginary).

225. GUNTHER, *supra* note 218.

226. *Young*, 903 F.2d at 168 (Meskill, J., dissenting).

227. *Id.*

228. GUNTHER, *supra* note 218. In response to the results of the study, the plaintiffs submitted an affidavit from Robert N. Bontempo, an assistant professor at Columbia Graduate School of Business, a purported expert in survey and methodology research. Mr. Bontempo's affidavit offered harsh criticism of the methodology used in the study:

The TA Survey contains several critical flaws which are the hallmark of a biased instrument. The TA Survey is most accurately interpreted, not as an impartial attempt to uncover the public's attitudes, but rather as a slanted instrument designed to provide support for a predetermined point of view. . . . The role intimidation plays in giving, however, is completely misrepresented by [Mr. Harris'] reliance on the responses to these questions. . . . [T]he TA Survey only gave the respondents the option of reporting degrees of intimidation. . . . In summary, there are various technical flaws in the TA Survey which artificially inflate the complaints against the homeless. Despite this, the TA Survey Report clearly shows that the public views beggars more with sympathy than fear. If panhandling has any deleterious effects on the transit system, according to the survey those effects are not of concern to the vast majority of subway riders. The vast majority of riders do not want increased police sanctions against beggars, and clearly consider other problems such as loud radios, delays, and dirt as far more serious problems in the subway.

Affidavit of Robert N. Bontempo, *Young v. New York City Transit Auth.*, 729 F. Supp. 341 (S.D.N.Y. 1990) (No. 89 CIV. 7871).

229. *Young*, 903 F.2d at 161.

230. 468 U.S. 288 (1984).

interest in maintaining the parks in good condition.²³¹ The regulation in *Clark* was a blanket prohibition which affected all types of individuals who might choose to sleep in the park.²³² Similarly, the regulation in *Young* was directed at all types of beggars, both the passive and the aggressive.²³³ According to the Supreme Court, the blanket regulation in *Clark* was not overbroad.²³⁴ In addition, the government interest in *Clark* was recognized by the Court without requiring any justification by the state.²³⁵

Given the volatile and controversial nature of free speech issues in general, any court decision is bound to receive both positive and negative reactions.²³⁶ As expected, the majority's decision was welcomed by subway passengers, but viewed as heartless²³⁷ by the homeless.²³⁸ Although the court used only one TA study as evidence of passenger intimidation, the court's finding that passengers are intimidated and feel harassed by beggars and the homeless appears to be well-substantiated in the media.²³⁹

231. *Id.* at 298-99.

232. *Id.* at 290.

233. *Young*, 903 F.2d at 160.

234. *Clark*, 468 U.S. at 296-97.

235. *Id.* at 296.

236. See Wright, *supra* note 26, at 57. The author noted:

Free speech case law permits the government to impose a wide range of restrictions on a similarly wide variety of forms of speech. Even if we were all to agree on the precise purposes of, or functions served by the free speech clause, as well as on what constitutes speech in the first place, correctly deciding many cases involving government restriction would still be unavoidably difficult.

Id.

237. *Id.* (Perhaps this heartlessness stems from the fact that "the catchall name homeless . . . throws together in one menacing bundle not only destitute people who need shelter but also AIDS victims, the mentally ill, drug and alcohol abusers, and street predators of all kinds.").

238. See Carlyle Douglas, *Freedom to Beg Ends at Turnstile*, N.Y. TIMES, May 13, 1990 § 4 at 7 ("In a ruling called hard-hearted by the homeless but welcomed by thousands of straphangers, a Federal Appeals court ruled that constitutional free speech guarantees do not cover requests for spare change."); see also *Compassion and Contempt*, NEWSDAY, May 11, 1990, at 3 (city ed.) (most straphangers are pleased with the ruling).

239. See Painton, *supra* note 1 ("Defenders of the homeless realize they face a growing public relations problem."); *Compassion and Contempt*, NEWSDAY, May 11, 1990, at 3 (city ed.) ("Most straphangers . . . said they are intimidated by people begging. . . . In a 1988 survey by the Metropolitan Transportation Authority about the quality of life in the subways, riders ranked panhandling and homelessness among the top two is-

The weaknesses in the majority decision may preclude it from providing guidance to other communities facing similar problems. Authorities in San Francisco were closely watching the outcome of *Young* for a possible solution on how they might deal with homeless beggars in the Bay Area Rapid Transit System.²⁴⁰ Subsequent to the *Young* decision, a similar case was filed in San Francisco.²⁴¹ More recently, the District of Columbia police force used *Young* to support the rehabilitation of an old and rarely used law to arrest panhandlers who solicit in affluent neighborhoods.²⁴²

The court's decision not only fails to provide guidance to other jurisdictions, but it also fails to provide the homeless and needy beggars with clear guidance concerning their rights. Initially, in October 1989, stronger enforcement measures were taken to remove beggars from the subway system.²⁴³ In February 1990, however, the beggars were told that their panhandling activities in the subway system were forms of expression protected by the First Amendment.²⁴⁴ The May 1990 Court of Appeals de-

sues that affect their comfort underground. . . .").

240. See *Correct Decisions to Ban Beggars*, S.F. CHRON., May 14, 1990, at A18 ("In recent months BART General Manager Frank J. Wilson has taken steps to clean up the stations and trains and assign more police. The appellate court's decision shows that BART is acting properly. Commuters have the constitutional right to be left alone and ride in peace.").

241. *Panhandlers Hope Supreme Court Will Be Generous*, L. A. TIMES, May 12, 1990, at A18 (home ed.).

A similar case has been filed in federal court in San Francisco, where Celestus Blair Jr., a formerly homeless man arrested five times for begging, has challenged the city's enforcement of a 1961 California law that bans accosting others to solicit alms. He argues that he did nothing more than ask people to help. . . . [The] attorney representing Blair . . . believes the cases in New York and California are the only ones testing the issue in federal court.

Id.

242. *Upset by Beggars, Washington is Arresting Them*, N.Y. TIMES, Nov. 7, 1990, at A20. In response to complaints by the public regarding panhandlers in the streets, police employed an old but still valid law to arrest nine panhandlers. Given the decision by the court of appeals in *Young*, the Washington police department remained confident that the law was constitutional. *Id.* An ACLU spokesman asserted, however, that it was likely that the organization would challenge the ordinance. *Id.* Focusing on the impossibility of distinguishing between the activity of individual beggars and organized charities, Mr. Spitzer stated: "If somebody says to you, Buddy, can you spare a dime?, that's no less free speech than if he says, Buddy, can you spare a dime for cancer research?" *Id.*

243. See N.Y. TIMES, *supra* notes 100-101 and accompanying text.

244. See *Young v. New York City Transit Auth.*, 729 F. Supp. 341, 352 (S.D.N.Y. 1990).

cision banned beggars again.²⁴⁵ In light of the Supreme Court's denial of certiorari, this issue appears to be settled.²⁴⁶ In actuality, however, the rights of beggars remain in dispute because *Young* failed to provide a definitive answer regarding the First Amendment protection of begging.²⁴⁷ The court's decision creates a critical enforcement problem. As soon as the Court of Appeals issued its decision, the TA police prepared for immediate enforcement. The plan primarily consisted of either ejecting beggars or issuing summonses.²⁴⁸ The effectiveness of the plan was immediately called into question, as some considered the plan merely a way to move the beggars to another place, rather than a solution to the problem.²⁴⁹ The practicalities of enforcement were also questioned.²⁵⁰ Concern was expressed that the lack of

245. See *Young v. New York City Transit Auth.*, 903 F.2d 146, 164 (2d Cir. 1990).

246. In June 1991, the Kings County Supreme Court upheld the constitutionality of the New York Transit Authority regulation under the New York State Constitution. Relying in part on the *Young* decision, the court rejected claims that the regulation violated the free speech, due process, and equal protection provisions of the New York State Constitution. *Walley v. New York City Transit Auth.*, N.Y.L.J., June 7, 1991, at 31, col. 2.

247. See *When "Brother Can You Spare A Dime?" is a Crime*, THE INDEPENDENT, Dec. 7, 1990, at 19. The article notes that supporters of the homeless are determined not to be silenced by the Court's affirmation of the transit regulation. *Id.* Given the increasingly aggressive attempts by government officials to enforce the antivagrancy statutes in the District of Columbia and continued attempts to control begging in San Francisco, the article predicts that eventually the Supreme Court will have to address the issue of First Amendment rights of beggars. *Id.* An ACLU spokesperson predicted that "[t]he Supreme Court is going to be asked to hear this issue many times over the next few years and to make up its mind." *Id.*

248. *Panhandlers Hope Supreme Court Will Be Generous*, L.A. TIMES, May 12, 1990, at A18, (home ed.) ("[A] spokesman for the 3,700-member transit authority police force, said that in the wake of the appeals court decision his agency has been 'reinforcing and informing our members that we expect them to vigorously pursue the panhandling problem.'"). See *Freedom to Beg Ends at Turnstile*, N.Y. TIMES, May 13, 1990, § 4, at 7 ("[A] crackdown would begin this week. . . . [P]olice officers were instructed to eject all beggars from trains and subway stations and to arrest or issue summonses to those who intimidated passengers. Transit officials said officers would be redeployed from administrative duties and concentrated on trains where panhandling is especially obnoxious.").

249. See *Panhandlers Hope Supreme Court Will Be Generous*, L.A. TIMES, May 12, 1990, at A18 (home ed.) (TA spokesman states: "We're not saying this is going to be a cure-all. . . . We may just be moving the problem somewhere else.").

250. See *How to Handle Subway Begging*, NEWSDAY, May 18, 1990, Viewpoints, at 76 (city ed.):

Arrests don't make much sense. Begging . . . is not a heinous crime, and cops have better things to do. . . . Summonses are often pointless because how can cops make sure a beggar shows up in court. . . . [If you eject them] what's to stop them

guidelines on how much force could be used might put passengers in danger during the ejection process.²⁵¹ Another concern was that the TA police's primary duty should be combatting crime in the subway.²⁵² Six months of ineffective enforcement shows that the TA's plan is both inefficient and unworkable.²⁵³

By failing to adequately enforce its own decision, but reserving the state's right to remove the homeless, the Court of Appeals' decision might be seen as merely another slight against the homeless, rather than the passenger safety measure it purports to be.²⁵⁴ Further, one could interpret the Supreme Court's decision to deny certiorari as a further blow to this unfortunate group of people. By granting certiorari, the Supreme Court could have remedied the weaknesses in the Court of Appeals decision.²⁵⁵ Instead, the Supreme Court chose to remain silent.²⁵⁶

from walking to the next station and coming right back in?

Id.; see also Thomas A. Repetto, *About Crime*, *NEWSDAY*, June 5, 1990, at 58:

Despite all the arguments in favor of keeping beggars out, however, the new enforcement efforts are likely to fail. First, there are the practical problems. A beggar or other disorderly person ejected from a train or platform is liable simply to enter another. If he or she is arrested, the courts will probably give short shrift to what judges traditionally have seen as a minor matter. Indeed the cop's time in processing arrests of beggars will cost more than a routine fine, which the city in any event would have little chance of collecting.

Id.

251. See *Transit Police to Eject Subway Panhandlers*, *N.Y. TIMES*, May 31, 1990, at B1, (final ed.) ("[T]ransit officers who attended the roll-call said that it was clear to them that they should remove panhandlers at any cost, but they said that such rigorous enforcement would take them off trains and away from subway platforms, at the expense of riders' safety.").

252. See *Compassion and Contempt*, *NEWSDAY*, at 3 (city ed.) (TA should not bother with panhandlers; rather, they should concern themselves with stopping robberies in the subway.).

253. See Linda Greenhouse, *Ban is Left Intact on Subway Begging*, *N.Y. TIMES*, Nov. 26, 1990, at A1. The article notes that the original plan to remove beggars was not a solution to the problem of begging in the subway because the beggars returned to the transit system immediately after ejection. *Id.* As a result, a new case-management approach has been designed, where professional social workers and community organizations will work with homeless to get them to shelters and provide follow-up help after the TA police eject them from the subway system. *Id.* Some have criticized this method as a solution that came "too late," while others have predicted that this new plan will prove to be equally ineffective. *Id.* A spokesperson for LACH commented: "[W]e're not going to solve the real problems by passing out sandwiches." *Id.*

254. After all, as was noted in *Upset By Beggars, Washington is Arresting Them*, *N.Y. TIMES*, Nov. 7, 1990, at A20, "people aren't panhandling for fun."

255. Early reports published immediately after the Court of Appeals' decision predicted further legal discussion of the issue. See *Panhandlers Hope Supreme Court Will*

One could argue that the silence of the Supreme Court justices supports the Court of Appeals' ban on begging in the New York City subway system and encourages further restrictions on begging in public areas throughout the country.²⁵⁷

V. Conclusion

In upholding the constitutionality of the TA regulation in *Young v. New York City Transit Authority*,²⁵⁸ the Court of Appeals has provided a way in which to silence beggars and panhandlers in the New York City subway system. Furthermore, by denying certiorari, the Supreme Court has placed its stamp of approval on the Court of Appeals decision.²⁵⁹

In recognizing the potential impact of its decision, the Court of Appeals stated: "[I]t is not the role of this court to resolve all the problems of the homeless, as sympathetic as we may be."²⁶⁰ Although it may not be the court's role to solve the problems of the homeless, it is critical that the court does not contribute to the problems of this unfortunate group by issuing flawed and unsound decisions.

As a result of the *Young* decision, the First Amendment rights of New York City's beggars have been silenced without adequate justification. However, given the increasing number of beggars and homeless in the United States, it is likely that the issue of beggars' First Amendment rights will receive further treatment by the courts in the future. Ultimately, the Supreme

Be Generous, L.A. TIMES, May 12, 1990, at A18 ("Homeless advocates say they expect to appeal this case to the U.S. Supreme Court, where it could be the first federal test of whether the Constitution affords protection to an occupation that dates back earlier than biblical times."); *Freedom to Beg Ends at Turnstile*, N.Y. TIMES, May 13, 1990, § 4, at 7, col. 3 (opining that the matter will probably be pursued to Supreme Court).

256. The failure of any of the Justices to comment on the decision to deny certiorari was interpreted by at least one representative of the media to mean that none of the Justices felt strongly enough to publicly voice their dissents, given the possibility that any of them did in fact dissent. *A Last Word for Some Silenced Beggars*, WASH. POST, Dec. 8, 1990, at A21 (final ed.).

257. *See Court Lets Stand Ban on Begging in New York Subway*, PROPRIETARY TO THE UNITED PRESS INTERNATIONAL, Nov. 26, 1990 ("Advocates for the homeless claim the court's refusal to review the policy could have a chilling impact on individual rights of the destitute across the nation.").

258. 903 F.2d 146 (1990).

259. 111 S. Ct. 516 (1990).

260. *Young*, 903 F.2d at 156-57.

Court will be forced to deal with the issue of whether begging is a protected First Amendment activity. It is unfortunate that the Court does not feel compelled at this time to publicly voice its opinion.

*Grace L. Zur**

* Dedicated to the memory of my mother, Hilde Paulina Zur.