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BEGGING AND THE FIRST AMENDMENT: *YOUNG v. NEW YORK CITY TRANSIT AUTHORITY**

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INTRODUCTION

In 1989 the Legal Action Center for the Homeless brought an action on behalf of two homeless men, William Young, Jr., and Joseph Walley, and a class of homeless persons, to enjoin a total ban by the New York City Transit Authority against personal begging in the city's subway properties.[1] In 1990 the plaintiffs' lawyers persuaded Judge Leonard Sand of the Southern District of New York to accept their argument that, as the court put it:

> The simple request for money by a beggar or panhandler cannot but remind the passer-by that people in the city live in poverty and often lack the essentials for survival. Even the beggar sitting in Grand Central Station with a tin cup at his feet conveys the message that he and others like him are in need. While often disturbing and sometimes alarmingly graphic, begging is unmistakably informative and persuasive speech.[2]

Judge Sand let a genie out of the bottle of First Amendment doctrine labeled "expression-by-conduct-combined-with-words" when he concluded:

> Believing that the challenged provisions, which totally ban solicitations of charity for the benefit of the solicitor in areas controlled by

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* 903 F.2d 146 (2d Cir.) (before Altimari, Timbers and Meskill, JJ.; opinion per Altimari, J.; dissent per Meskill, J.), *rev'g* 729 F. Supp. 341 (S.D.N.Y.), *cert. denied*, 111 S. Ct. 516 (1990).

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[1] A third plaintiff, Sheron Gilmore, represented by the Legal Aid Society, intervened in the case. The term "personal begging" is used in this article as a synonym for panhandling, or soliciting money for one's own use. The term "eleemosynary" contributions or solicitations refers to contributions or solicitations for what are commonly thought of as "organized charities" such as hospitals and other social services. The term "charitable" is used as it is in cases such as Village of Schaumburg v. Citizens for a Better Env't, 444 U.S. 620 (1980), to refer to general nonprofit purposes, including those of advocacy.

[2] 729 F. Supp. 341, 352 (S.D.N.Y. 1990).

> the defendants which are well recognized to be places where First Amendment rights may be exercised, violate the constitutional rights of the plaintiff class, we grant the motion for a preliminary injunction.[3]

The genie had been hidden in the bottle for a long time. There had always been an obvious element of expression—the bald use of words—in personal begging; it had assumed potential, although unrealized, importance through the line of recent Supreme Court decisions emphasizing First Amendment protections for solicitations on behalf of organized charities.[4] Yet the court had never declared that personal begging enjoyed First Amendment protection; until the *Young* case our legal system generally had continued to espouse its traditional view that personal begging was a nuisance which the government had full power to control.[5]

The majority of a panel of the United States Court of Appeals for the Second Circuit vigorously reaffirmed that tradition in a decision reversing the district court in the strongest language, holding that "[w]hile organized charities serve community interests by enhancing communication and disseminating ideas, the conduct of begging and panhandling in the subway amounts to nothing less than a menace to the common good."[6] The majority came close to denying any vitality to the First Amendment argument, saying:

> The only message that we are able to espy as common to all acts of begging is that beggars want to exact money from those whom they accost. While we acknowledge that passengers generally understand this generic message, we think it falls far outside the scope of protected speech under the First Amendment.[7]

As a matter of public and academic debate, at least, it seems that the Second Circuit decision is not going to succeed

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[3] 729 F. Supp. at 360. The court of appeals subsequently converted the preliminary to a permanent injunction. 903 F.2d at 152.

[4] Riley v. Nat'l Fed'n of the Blind of North Carolina, 487 U.S. 781 (1988); Secretary of State of Maryland v. Joseph H. Munson Co., 467 U.S. 947 (1984); Village of Schaumburg v. Citizens for a Better Env't, 444 U.S. 620 (1980).

[5] 729 F. Supp. at 353-56; 903 F.2d at 156.

[6] 903 F.2d at 156.

[7] *Id.* at 154. The majority qualified this somewhat by also analyzing the regulations as restrictions of time, place or manner. *Id.* at 152. But the substance of the decision does reject the analysis of begging as speech.

entirely in stuffing the genie back in the bottle. The question why personal begging is so different in law from solicitation for organized charities, if indeed it is, is too intriguing, and the significance of the question in symbolizing the relation between the destitute and the state is too striking, for the issues to be entirely laid to rest by one decision.

The question of First Amendment theory—the status of personal begging as a form of expression—and the socio-political symbolism of the decision always must have been the main concerns, because it was clear that the case, even in its victorious version in the district court, was of only marginal practical utility to the plaintiffs. In the first place, personal begging does not represent any substantial solution to the problems of the homeless. As Douglas Lasdon of the Legal Action Center for the Homeless said wryly after the district court decision, "It's hard to get real excited about winning the right to beg."[8] Quite apart from that, the district court allowed only a limited practical scope for solicitation of any sort, permitting it to be excluded from the trains themselves, areas adjacent to token booths, and at the entrances and exits to escalators and elevators.[9] Thus at best, severe limitations were imposed upon the already economically feeble endeavor of begging.

Nevertheless, the great public interest in the case indicates that its importance as a public and a theoretical issue is not negligible. Not content with its partial victory, the New York City Transit Authority sought the complete interdiction of personal begging, considering it of sufficient importance to appeal the district court decision, and the Second Circuit agreed to the extent of reversing it with language that almost completely denied validity to the First Amendment claim. Following that decision, newspapers reported that local officials in other cities were undertaking actions against panhandling.[10] Apart from the potential practical effects, the legal and political questions posed by the case will not disappear; the New York Times illustrated how uneasy many people were about the issues by writing two edito-

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[8] DeParle, *Subway Panhandlers See Little from Legal Victory*, N.Y. Times, Jan. 29, 1990, at B1, col. 4.

[9] 729 F. Supp. at 360. The plaintiffs did not contest these limitations on appeal.

[10] Savage, *New York Ban on Begging is Let Stand by High Court*, L.A. Times, Nov. 27, 1990, at 19, col. 1; Marshall, *Panhandling: Problem or a Pain*, USA Today, June 11, 1990, at 3A.

rials, one criticizing the district court decision and a later one criticizing the Second Circuit for being too hard on the rights of beggars.[11] Those doubts are understandable: the theoretical question posed by the First Amendment proves, as we shall see, quite elusive. This was a close case, poised over some hidden fault lines in the terrain of First Amendment doctrine. In my view, as will appear more clearly in what follows, there is an element of protected free expression in the act of personal begging, contrary to the opinion expressed in the court of appeals decision. It is a right, however, that the Transit Authority has the power to regulate quite stringently, although not, perhaps, in just the way that the court of appeals approved.

I. THE BACKGROUND OF THE CASE

As every New York City subway rider knows, personal begging exploded as a social problem during the eighties, together with other problems of the homeless. At that time, the Transit Authority already had a long-standing ban on soliciting money, including personal begging, anywhere on its property.[12] In addition, regulations prohibited and still prohibit conduct that has:

> "[T]he reasonably intended effect of annoying, alarming, or inconveniencing others, or otherwise tend[s] to create a breach of the peace,"[13] which "interferes with the provision of transit service or obstruct[s] the flow of traffic on facilities or conveniences,"[14] or which "causes or may tend to cause harm or damage to any person . . . ."[15]

Nevertheless, in 1988, the Authority began a study of "quality of life" problems in the subway, particularly those posed by the prevalence of homelessness. It undertook surveys of passengers, finding that they were concerned about and felt harassed and intimidated by panhandling. It engaged a consulting firm, led by

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[11] *Riders' Rights, Beggars' Rights*, N.Y. Times, Jan. 31, 1990, at A26, col. 1 (criticizing the district court decision); *Subway Overkill*, N.Y. Times, May 14, 1990, at A16, col. 1 (criticizing the court of appeals decision).

[12] N.Y. COMP. CODES R. & REGS. tit. 21, § 1050.6(b) (1976) [hereinafter 1976 Regulations].

[13] 729 F. Supp. at 358 (quoting 1976 Regulations § 1050.7(i)); 903 F.2d at 152 (same).

[14] 729 F. Supp. at 358 (quoting 1976 Regulations § 1050.6(a)); 903 F.2d at 152 (same).

[15] 729 F. Supp at 358 (quoting 1976 Regulations § 1050.7(k)); 903 F.2d at 152 (same).

sociologist George Kelling, who found, among other things, that "[i]n the subway environment, begging is inherently aggressive even if not patently so."[16] Before beginning a program of systematic enforcement of its regulations, the Authority held hearings to refine the existing rules.

The Authority amended the regulation that prohibited the solicitation of alms or contributions. Whether as a result of the hearings, or on advice of counsel, the Authority sought to isolate forms of expression that were obviously protected under the First Amendment and to permit them in very limited areas of the subway properties. The regulation that was finally litigated afforded individuals an opportunity—away from trains, booths and escalators—to speak, perform artistically, distribute literature, and solicit money for religious and political causes as well as for a large class of charities, while it prohibited personal begging.[17] It seems clear that the Authority did this with the

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[16] 903 F.2d at 150 (quoting from Affidavit of George Kelling).

[17] N.Y. COMP. CODES R. & REGS. tit. 21, § 1050.6(b)-(c) (1989) (quoted in 729 F. Supp. at 345-46). The regulations provided:

> (b) No person, unless duly authorized by the Authority, shall engage in any commercial activity upon any facility or conveyance. Commercial activities include (1) the advertising, display, sale, lease, offer for sale or lease, or distribution of food, goods, services or entertainment (including the free distribution of promotional goods or materials), and (2) the solicitation of money or payment for food, goods, services or entertainment. No person shall panhandle or beg upon any facility or conveyance.
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> (c) Except as expressly authorized and permitted in this subdivision, no person shall engage in any non-transit uses upon any facility or conveyance. Non-transit uses are noncommercial activities that are not directly related to the use of a facility or conveyance for transportation. The following non-transit uses are authorized and permitted by the Authority, provided they do not impede transit activities and they are conducted in accordance with the rules governing the conduct and safety of the public in the use of the facilities of New York City Transit Authority Manhattan and Bronx Surface Transit Operating Authority: public speaking; distribution of written noncommercial materials; artistic performances, including the acceptance of donations; solicitation for religious or political causes; solicitation for charities that (1) have been licensed for any public solicitation within the preceding twelve months by the Commissioner of Social Services of the City of New York under § 21-111 of the Administrative Code of the City of New York or any successor provision; or (2) are duly registered as charitable organizations with the Secretary of State of the State of New York under § 172 of the New York Executive Law or any successor provision, or (3) are exempt from federal income tax under § 501(c)(3) of the United States Internal Revenue Code or any successor provision. Solicitors for such charities shall provide, upon request, evidence that such charity meets one of the preceding qualifications.

aim—ultimately successful in the court of appeals—of avoiding substantial constitutional controversy about the regulations.

If the Authority had never differentiated between personal begging and solicitations for eleemosynary and political purposes—if the Authority had simply forbidden all face-to-face solicitations of money—the justifications for the regulations would have been rather different. A case brought against the Authority would then have presented clearly the issue of power to control solicitations of money in the confined quarters of the subway. That hypothetical case, which I shall call the "primordial" case, illuminates some of the problems in the *Young* case that are harder to see when the distinctions built into the final version of the Authority's regulations favoring "ordered charity"[18] are drawn into the litigation.

II. The Power to Regulate Solicitation of Money in the Transport System

It is clear that some activities that are protected by the First Amendment, such as face-to-face solicitation for political, religious and social welfare causes, would have been forbidden on Transit Authority property under the primordial regulation.[19] Nevertheless, the regulation system might well have been upheld under existing Supreme Court precedent, either as a regulation of the place and manner of speech, or as a regulation of speech in a limited public forum.

A. *Restrictions of Place and Manner*

It is well settled that regulations of place or manner that are directed at some legitimate regulatory interest, but touch upon activities protected by the First Amendment, may be justified, if they are neutral as to the content of the speech; if they serve a substantial governmental interest to which they are narrowly tailored; and if there are ample alternative channels of commu-

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The case also concerned Port Authority of New York regulations, N.Y. Comp. Codes R. & Regs. tit. 21, §§ 1220.16, .25, 1290.3 (1973). 729 F. Supp. at 359.

[18] 903 F.2d at 156.

[19] *See, e.g.*, Village of Schaumburg v. Citizens for a Better Env't, 444 U.S. 620, 632 (1980) ("[C]haritable appeals for funds, on the street or door to door, involve a variety of speech interests . . . that are within the protection of the First Amendment.").

nication.[20] The first and last of these requirements are relatively simple to meet in the primordial case. In its original form, the Authority's regulation appears to have been content-neutral because it operated against all forms of person-to-person solicitation; and there were, of course, alternative channels of solicitation on the city streets.[21]

The argument that the regulation served substantial governmental interests is strong, although it presents some problems to which we shall return later in this article.[22] Judge Meskill, dissenting in the court of appeals decision, summarized the interests as "protection of the public from harassment, preservation of the quality of life, and maintenance of a safe transit system . . . ."[23] Judge Meskill, however, and Judge Sand in the district court, using arguments that would have been applicable also to the primordial form of the regulation—excluding all face-to-face solicitation for whatever purpose—claimed that a principal defect in the regulation was that it was not narrowly tailored to reach these legitimate government aims. They both pointed out that there was no showing that the Authority's other previous regulations, directed specifically against annoyance, harm and obstruction, were not sufficient to meet these purposes.[24] In other words, the Authority was at all times free to act under its regulations against solicitors who really were aggressive or disruptive; Judges Sand and Meskill claimed that a regulation prohibiting direct solicitation was not "narrowly drawn" in comparison with these provisions.

This argument seems doubtful under recent Supreme Court cases that have taken a restrictive view of the requirement to

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[20] See Clark v. Community for Creative Non-Violence, 468 U.S. 288 (1984); Ward v. Rock Against Racism, 491 U.S. 781 (1989).

[21] 903 F.2d at 160 ("no showing in this case that the remaining avenues of communication are inadequate").

[22] *See* notes 58-67 and accompanying text *infra*.

[23] 903 F.2d at 167. These arguments were presented, of course, with respect to the regulations finally litigated. However, there is no distinction as to the government interest to be served by restrictions on face-to-face solicitation between the primordial, nondiscriminatory, content-neutral version and the final version which isolated personal begging.

[24] 903 F.2d at 168 (existing regulations permit the Authority to prevent "harassing, intimidating behavior"); 729 F. Supp at 358 (citing 1976 Regulations § 1050.7(i), .6(a), .7(k)). See text accompanying notes 13-15 *supra* for relevant portions of these regulations.

tailor regulations narrowly when they touch upon protected expression. Consider *Clark v. Community for Creative Non-Violence*,[25] which upheld federal rules regulating camping in the national parks when the rules were invoked to prohibit a demonstration by homeless people who sought to sleep in a park in Washington, D.C., as a form of symbolic protest. Discussing the argument that the regulation could have been better drawn to achieve the government's interest, the Court said:

> [T]he Park Service's decision to permit nonsleeping demonstrations does not, in our view, impugn the camping prohibition as a valuable, but perhaps imperfect, protection to the parks. If the Government has a legitimate interest in ensuring that the National Parks are adequately protected, which we think it has, and if the parks would be more exposed to harm without the sleeping prohibition than with it, the ban is safe from invalidation under the First Amendment as a reasonable regulation of the manner in which a demonstration may be carried out.[26]

The regulatory problem in *Ward v. Rock Against Racism*[27] is perhaps structurally closer to the problem attacked by the Transit Authority. In *Rock Against Racism* the City of New York had insisted on having its own sound engineer control the volume of music at a concert held in a public park, whereas the concert sponsors argued that it was sufficient for the city to set standards of volume and to cut off the concert if it became too loud. The Supreme Court said:

> It is undeniable that the city's substantial interest in limiting sound volume is served in a direct and effective way by the requirement that the city's sound technician control the mixing board during performances. Absent this requirement, the city's interest would have been served less well, as is evidenced by the complaints about excessive volume generated by respondent's past concerts.[28]

In other words, when a genuine regulatory problem is presented, the authorities are justified in intervening more strongly to get hands-on control over the problem.

It is a close question whether the Authority's primordial

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[25] 468 U.S. 288 (1984). *Clark* was relied on by the court of appeals for a similar point. 903 F.2d at 158.

[26] 468 U.S. at 297.

[27] 491 U.S. 781 (1989). *Ward* was relied on by the court of appeals. 903 F.2d at 159-60.

[28] 491 U.S. at 800.

regulation excluding all face-to-face solicitation of money was narrowly tailored within the meaning of these cases. If solicitation presented a problem of harassment and obstruction, the cases seem to say, then it was enough that the Authority crafted a regulation generally designed to control those dangers, even if courts would have preferred a regulation specifically directed at those dangers and no others. This argument is especially strong if, as in *Rock Against Racism*, the proposed alternative might let some of the forbidden activities slip through. Such was arguably the case with the regulations that Judges Sand and Meskill thought sufficient: they would have penalized harassment and obstruction but would have required an individualized finding in each case. Under those regulations, acts of solicitation that violated the regulations, but about which the passenger did not go to the trouble of complaining to the Authority, would fall outside the scope of enforcement of the regulation.

In *Rock Against Racism* the Court specifically held:

> [T]hat a regulation of the time, place or manner of protected speech must be narrowly tailored to serve the government's legitimate content-neutral interests but that it need not be the least-restrictive or least-intrusive means of doing so. Rather, the requirement of narrow tailoring is satisfied "so long as the . . . regulation promotes a substantial governmental interest that would be achieved less effectively absent the regulation."[29]

The distinction seems to imply that the government is free to apply a regulation that deals with a problem systematically, even if it is possible to conceive of a regulation that is less restrictive, albeit less effective at reaching the legitimate aims of the regulation. So in the case of the arguments made by Judge Sand in the district court as well as by Judge Meskill in the court of appeals, while the older Transit Authority regulations against harassment and obstruction might not be the least intrusive means of attacking the problem, nevertheless, the broader prohibition against solicitation might have been "narrowly tailored" in the sense that it would be more effective.

It is true, as Justice Kennedy pointed out in *Rock Against Racism*, that a time, place or manner regulation is narrowly tailored " 'only if each activity within the proscription's scope is an

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[29] *Id.* at 798-99 (quoting United States v. Albertini, 472 U.S. 675, 689 (1985)).

appropriately targeted evil.' "[30] It seems that the Transit Authority had some such doctrinal point in mind when it changed its primordial regulation to allow some limited scope for solicitation by organized charity or for political or religious purposes while maintaining a total ban on personal begging. In short, the Authority may have feared that the latter were not "appropriately targeted evils." But that change was appropriate only if one or both of two conditions were met: 1) The permitted solicitations did not present problems of harassment or congestion similar to those of personal begging, or 2) The permitted solicitations were entitled to First Amendment protection, while the forbidden personal begging was not. If one or both of these conditions were not met, then the new regulation was in danger of being discriminatory and no longer content-neutral, as the district court found. As to the first of these two possibilities—that the permitted "charitable" solicitations presented no social problem—there was no evidence in the record at all. As Judge Meskill pointed out in his dissent in the court of appeals, the Transit Authority had directed all its research to the effects of "solicitation" generally, without differentiating among types of solicitation.[31] The question came down, therefore, to whether personal begging enjoyed First Amendment protection; the court of appeals held that it did not.

B. *Limited Public Forum*

The district court found that the areas of the subway properties away from trains, booths and special sources of congestions were a "designated public forum," that is, a forum that had been opened by the government generally for communicative use.[32] That decision depended in part on the fact that the Authority had permitted other forms of solicitation, and in part on decisions such as *Wolin v. Port of New York Authority*,[33] which recognized a right to communicate in Port Authority terminals without deciding about a right to importune persons for money. Although it was not necessary to its holding, the court of appeals in dictum rejected the conclusion that certain areas of

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[30] *Id.* at 800 (quoting Frisby v. Schultz, 487 U.S. 474 (1988)).
[31] 903 F.2d at 167 n.1.
[32] 729 F. Supp. at 356-58.
[33] 392 F.2d 83 (2d Cir.), *cert. denied*, 393 U.S. 940 (1968).

the subway constituted a limited public forum.[34]

The conflict is not difficult to understand, nor to justify from either side, because the Supreme Court's jurisprudence concerning limited or nonpublic forums is so fragmented that it comes close to being unpredictable.[35] Using the primordial case, however, it is possible to pick out some sources that illuminate the problems in the *Young* litigation.

In *Cornelius v. NAACP Legal Defense and Education Fund*[36] the Supreme Court upheld a government policy that excluded political and advocacy groups from a charity drive directed at federal employees, on the ground that the inclusion of such groups might make the charity drive as a whole less effective. Holding that the drive was a nonpublic forum, the Court ruled:

> Control over access to a nonpublic forum can be based on subject matter and speaker identity so long as the distinctions drawn are reasonable in light of the purpose served by the forum and are viewpoint neutral.[37]

It does not seem very difficult to argue that, although the confined space of the subway might appropriately be used for some sorts of communication, stopping people for money could be set apart as posing special problems. The Supreme Court supported that position in *United States v. Kokinda*.[38] There the Court held that a sidewalk built as an entrance to a U.S. Post Office was not designated as a public forum for the solicitation of funds, even for clearly political purposes. The Court said:

> Whether or not the [U.S. Postal] Service permits other forms of speech, which may or may not be disruptive, it is not unreasonable to prohibit solicitation on the ground that it is unquestionably a particular form of speech that is disruptive of business. Solicitation impedes the normal flow of traffic.[39]

Although *Kokinda* was not available as a precedent in *Young*,

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[34] 903 F.2d at 161-62.

[35] *See* United States v. Kokinda, 110 S. Ct. 3115, 3126 n.1 (1990) (Brennan, J., dissenting).

[36] 473 U.S. 788 (1985). *Cornelius* was relied on by the district court, 729 F. Supp. at 356, as well as the court of appeals, 903 F.2d at 161.

[37] 473 U.S. at 806.

[38] 110 S. Ct. 3115 (1990).

[39] *Id.* at 3123.

having been decided a few weeks after the Second Circuit's decision in *Young*, there were certainly straws in the wind that the Supreme Court was impatient with the putative right of solicitors to stop people in crowded places. In *Heffron v. International Society for Krishna Consciousness, Inc.*,[40] for example, the Court had upheld a state regulation requiring a religious group to confine its activities to a booth in a fairgrounds, reasoning that allowing solicitors to circulate freely was likely to create disorder and confusion.[41] In an earlier case, *Lehman v. City of Shaker Heights*,[42] the Court upheld limitations on the types of advertisements permitted by a municipality in its public transportation system, partly out of consideration of the transportation system as a business, and partly out of solicitude for the traveling public, which was compelled to look at whatever the municipality permitted. Similarly, if the Transit Authority permitted the solicitation of money, everyone using the subway was necessarily going to be subjected to such solicitation; it might, then, according to *Lehman* be constitutionally acceptable to forbid it.

The sketch in the last few pages of some of the Supreme Court precedents concerning time, place and manner regulations as well as limited public forums indicates that there were substantial arguments for excluding face-to-face solicitations for money from the subway system altogether, as the Transit Authority had done before it amended its regulations to the form that was litigated in *Young*.[43] That conclusion casts in high relief the real problem in the case, as the district court and the dissent in the Second Circuit saw it: The amended regulations discriminated against beggars in favor of "ordered charity." Judges Sand and Meskill, as we have seen, did argue that the Transit Authority regulations were not narrowly drawn,[44] but what seems to have bothered them most was the lingering sense

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[40] 452 U.S. 640 (1981).

[41] *Id.* at 653.

[42] 418 U.S. 298 (1974).

[43] I do not mean to claim that this hypothetical case would have had to be decided in the Authority's favor. It would not have been difficult to argue for the plaintiffs that none of the precedents involved a total ban on solicitation, at least up until *Kokinda*, see notes 38-39 and accompanying text *supra*. My only point is that the Authority would have had a good case to support its primordial regulation.

[44] *See* notes 23-31 and accompanying text *supra*.

that the regulations were not fair.

III. The New York City Transit Authority's Regulations Favoring 'Ordered Charity'

While the Transit Authority accorded privileged status to solicitations for religious or political purposes and for certain classes of organized charities, it chose to offer no protection at all to personal begging. It thus forced a decision about whether personal begging, taken in isolation, has any First Amendment element to it.

Basing their decisions on the line of cases beginning with *Village of Schaumburg v. Citizens for a Better Environment*,[45] Judge Sand in the district court and Judge Meskill, dissenting, in the court of appeals, both thought that personal begging, fully as much as organized charity, is speech for purposes of the First Amendment.[46] In the most telling part of its decision, the majority in the court of appeals rejected the view that the "*Schaumburg* trilogy" lumps together for First Amendment purposes everything that might be pulled under the linguistic umbrella of "charity."[47]

Those decisions are indeed very far afield from personal begging. They all address a similar problem: in each case, supposedly in an attempt to prevent fraud, the government sought to specify limitations on how the money solicited by fund raisers was to be spent. In every case, the government sought to limit the amounts that could be taken by the fund raiser; in *Schaumburg*, seventy-five percent had to be devoted to "charitable purposes" rather than administrative costs,[48] while in *Riley v. National Federation of the Blind of North Carolina*, "reasonable fees" were set by the state for professional fundraisers.[49] The governments were seeking to distinguish organizations that were really run for private profit from those that spent the largest part of their funds on purposes vaguely designated "charity."

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[45] 444 U.S. 620 (1980). *See* note 4 and accompanying text *supra*.

[46] 729 F. Supp. at 352; 903 F.2d at 165.

[47] 903 F.2d at 154-57 (citing Riley v. National Fed'n of the Blind of North Carolina, 487 U.S. 781 (1988); Secretary of State of Maryland v. Joseph H. Munson Co., 467 U.S. 947 (1984); Village of Schaumburg v. Citizens for a Better Env't, 444 U.S. 620 (1980)).

[48] 444 U.S. at 620.

[49] 487 U.S. at 781.

The difficulty with the regulatory schemes was that they effectively redefined "charity" in a skewed way so as to favor bland eleemosynary purposes; the regulations had the effect of penalizing advocacy groups, as well as those bringing notice to some entirely new charitable cause, or to an old cause through new fund-raising devices.[50] The regulations were neither content-neutral nor narrowly tailored to the problem of fraud.

The substance of those decisions, then, as the Supreme Court said in *Schaumburg*, is that:

> [S]oliciting 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.[51]

These cases lend little support to the cause of personal begging. They are concerned with the fact that the regulations discriminated against clearly protected speech, without separating carefully those charitable solicitations that the government might have an interest in regulating;[52] they do not tell us, however, whether personal begging falls into the latter class.

On the other hand, there is some support in the language of the cases for the views of Judge Sand and Judge Meskill.[53] The uncertainty in the meaning of the *Schaumburg* line of cases forces us to examine just what the First Amendment interest is in charitable solicitation. Those cases underscored that the "message" protected by the First Amendment could not be separated from the act of soliciting money. This is most obviously the case where the solicitation is made on behalf of a political or religious belief, where a button or a leaflet is sold, or where money is simply given to carry on the cause. In the case of a solicitation for purely eleemosynary purposes—for the continuing support of a hospital or a school, for example—the solicitation also brings the giver into solidarity with the cause; and it

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[50] *See, e.g., Riley*, 487 U.S. at 792 (such regulations "might well drive professional fund raisers out of North Carolina").

[51] *Schaumburg*, 444 U.S. at 622.

[52] *See, e.g., Munson*, 467 U.S. at 966.

[53] 729 F. Supp at 351-52; 903 F.2d at 165.

does that, of course, whether the solicitation spells out the cause or says nothing more than, say, "Give to the school for the blind." As to this latter class of cases Judge Sand and Judge Meskill found no material distinction from personal begging; for example, asking money for the blind as a class could not, they implied, be distinguished from a beggar asking for money because he is blind. Both requests appeal to the giver's sympathies because someone else is in need.

In its effort to show that the conduct in personal begging is not protected by the First Amendment, the majority in the Second Circuit drew upon *Spence v. Washington*.[54] Conduct could be protected communication, the majority said, when " 'an intent to convey a particularized message was present, and . . . the likelihood was great that the message would be understood by those who viewed it.' "[55] The argument is that the beggar does not convey a particularized message, and that if he has one, the subway rider does not get it.

This argument seems successfully to distinguish personal begging from communicative conduct that is clearly covered by the First Amendment; however, the argument runs the risk of sweeping some organized eleemosynary solicitations away with personal begging. Like the majority's argument that the only "object of begging and panhandling is the transfer of money,"[56] this one does not quite solve the case because it is arguably true that the object of *most* solicitations is the transfer of money, and that the communication of ideas is often incidental or even merely implied.

The district court thus was able to draw upon sources much like those used by the majority in the court of appeals to reach a diametrically opposed conclusion:

> Both solicitors for organized charities and beggars approach passers-by, request a donation, and perhaps explain why they want the

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[54] 418 U.S. 405 (1974).

[55] 903 F.2d at 153 (quoting *Spence*, 418 U.S. at 410-11).

[56] 903 F.2d at 154. It is interesting that the court of appeals made no argument that personal begging is "commercial speech." The reason may be that even commercial speech may not be regulated without meeting stringent requirements not far removed from the time, place and manner requirements for noncommercial speech. *See* Central Hudson Gas & Elec. Corp. v. Public Svc. Comm. of New York, 447 U.S. 557 (1980). Thus it would have been difficult for the majority to reach its conclusion through labeling personal begging as "commercial" and other charitable appeals as "noncommercial."

> money. The conduct of both types of solicitors, as well as what they actually say, may often be quite similar. Although the beggars' entreaties may be more personal, emotionally charged and highly motivated, the substance is in essence a plea for charity. There has been no showing that plaintiffs' solicitations will inevitably contain more belligerent or threatening language . . . .[57]

The district court's position shows, that while the cases cited by the majority in the court of appeals can be read to support its position, they do not make for a knockdown argument. Thus we must ask what it is in the case that actually drove the court of appeals to disagree so strongly with the district court.

IV. The Beggar and the Sociologist

To buttress its finding that personal begging is "nothing less than a menace to the common good,"[58] the majority in the Second Circuit drew on survey evidence offered by the Transit Authority that riders "feel harassed and intimidated by panhandlers" and on the opinion of sociologist George Kelling,[59] who stated:

> My earlier research, observations in the subway, and review of relevant research has convinced me that the problems created by disorder in the subway are serious. Public disorder such as drunkenness, panhandling, public urination, aggressive horseplay by youths, and other such behavior creates in citizens the sense that things are out of control and that nobody cares. These circumstances, in turn, embolden persons so inclined to be increasingly obstreperous - even aggressive and criminal. As a consequence, such behavior threatens the viability of the subway system by generating high levels of fear in the passengers, thereby discouraging use of the system.[60]

Professor Kelling is one of the leading proponents of the contemporary view that keeping a sense of "order," as much as preventing and solving crimes in the narrow sense, is an essential attribute of effective police work. In collaboration with James Q. Wilson, he wrote a noted essay, *Broken Windows*, in

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[57] 729 F. Supp at 352.

[58] 903 F.2d at 156.

[59] 903 F.2d at 149-50. As previously noted, the evidence did not distinguish between personal begging and other solicitations in any clear way. *See* note 31 and accompanying text *supra*.

[60] 903 F.2d 149-50 (quoting Affidavit of George Kelling, para. 6. (dated December 11, 1989)).

which the authors argue that signs of disorder and decay, such as broken windows in neighborhoods, lead not only to a sense of unease and loss of control on the part of citizens, but actually lead to such loss of control in fact, in the form of vandalism and more serious crime.[61] As they wrote:

> The citizen who fears the ill-smelling drunk, the rowdy teenager, or the importuning beggar is not merely expressing his distaste for unseemly behavior; he is also giving voice to a bit of folk wisdom that happens to be a correct generalization - namely, that serious street crime flourishes in areas in which disorderly behavior goes unchecked. The unchecked panhandler is, in effect, the first broken window. Muggers and robbers, whether opportunistic or professional, believe they reduce their chances of being caught or even identified if they operate on streets where potential victims are already intimidated by prevailing conditions. If the neighborhood cannot keep a bothersome panhandler from annoying passers-by, the thief may reason, it is even less likely to call the police to identify a potential mugger or to interfere if the mugging actually takes place.[62]

Such opinions have been influential, creating a shift in emphasis in law enforcement to "quality of life" problems, which, although they may seem to create minor unpleasantness at first glance, are in this view actually criminogenic. Such theories are beginning to find their place even in constitutional doctrine, in cases such as *City of Renton v. Playtime Theatres, Inc.*[63] where the Supreme Court held that zoning regulations could be specifically directed against "adult" motion picture houses, even when the films were not shown to be obscene, if the films could be demonstrated to have "secondary effects" that were likely to injure the quality of urban life.[64]

It seems to me that the majority in *Young* was drawing on that bit of "folk wisdom" which Kelling and Wilson approve, finding a direct connection between panhandling and urban de-

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[61] Kelling & Wilson, *Broken Windows*, ATLANTIC MONTHLY, Mar. 1982, at 29. *See also* Kelling, *Acquiring a Taste for Order: The Community and Police*, 33 CRIME & DELINQUENCY 90 (1987).

[62] Kelling & Wilson, *supra* note 61, at 34.

[63] 475 U.S. 41 (1986).

[64] The majority in *Young* made very little use of *Renton*. *See* 903 F.2d at 160. Under *Young*'s holding, even if personal begging were granted some element of protected speech, if it could be shown to have baneful "secondary effects," it could be singled out for special treatment. Possibly, this argument was not used because the evidence in *Young* failed to distinguish between the effects of personal begging and other solicitations.

cay as well as crime. The latter are problems that the Transit Authority is now apparently trying to attack indirectly by interdicting some of the obvious signs of "disorder," such as personal begging. The majority in the court of appeals, quite simply, agreed that panhandling is a social and criminogenic problem. For them it was a matter of "common sense,"[65] as they put it, rather than of formal proof, to distinguish the corrosive effects of personal begging from other charitable solicitations.

Kelling and Wilson were not so cavalier. They frankly recognized that order-keeping, viewed apart from the elaboration of formal legal rights and duties, presents problems of "equity" in law enforcement for which they offered no easy answers. As they put it, "many of us who watch over the police are reluctant to allow them to perform, in the only way they can, a function that every neighborhood desperately wants them to perform."[66] On the facts in *Young*, there are at least two problems of equity presented by the beggars in the subway. One is that some of them really are in need and may have no better way than begging to get money. Another is that the effects of what they do are not clearly separable from the effects of other solicitations for money. Kelling and Wilson, I take it, together with the majority of the court of appeals, would say that perfect equity is not to be found in society; in any case it is more essential to save society from decay through disorder than to ensure an equitable society.

Judge Sand in the district court had drawn just the opposite conclusion from the problem of equity in the case: the special treatment of the panhandlers stuck in his craw. He wrote:

> While the government has an interest in "preserving the quality of urban life," *City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41, 50 (1986), and in protecting citizens from "unwanted exposure to certain methods of expression which may legitimately be deemed a public nuisance," *Members of the City Council of L.A. v. Taxpayers for Vincent*, 466 U.S. 789, 805 (1984), 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 "objectionable to some . . . does not dimin-

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[65] 903 F.2d at 153.

[66] Kelling & Wilson, *supra* note 61, at 35.

ish its protected status . . . ." *Young v. American Mini Theatres*, 427 U.S. at 85 (Stewart, J., dissenting).[67]

Judge Sand put his finger on some of the most disturbing implications of the "quality of life" approach to law-enforcement, and of cases like *Playtime Theatres* that are its progeny. The approach deals with social problems by removing them from the community. But merely removing them from sight may then come to be a chief aim of municipal policy. And, from the First Amendment point of view, the virtues of effective speech—that it arouses people, that it forces them to look at things anew, that it tells them unpleasant things they hate to listen to—suddenly become suspect. A principal attribute of the desired "quality of life" under contemporary conditions is peace of mind, and that is just what the most effective free expression is designed to upset.

V. Is Begging Speech?

In the course of making this point, Judge Sand constructed an interesting category of speech for which he recognized protection under the First Amendment; a category under which personal begging could find First Amendment shelter. Finally, we must focus on that category, to which the court of appeals refused to give recognition, to try to see which of the courts was right.

It seems that Judge Sand was saying, in effect, that one may give information about a social artifact not only by talking about it, or by forming an organization to promote or change it, but simply by representing it, by embodying the phenomenon. It is not so difficult to think of phenomena that fit this description, such as music, painting or athletics. We recognize that people may play music or paint, and ask to be paid for doing so, as well as write books about the arts, or organize art and music schools, museums and concerts. People may play games, and charge admission to watch them, as well as promote or talk about them. Rituals may also fit this description; by definition, in their performance they embody through symbolic action the ideas they express. The marriage ceremony does not just talk about marriage; it marries people. Such symbolic actions are commonly

[67] 729 F. Supp. at 358-59.

viewed as expression that is eligible for protection under the First Amendment. The action may fail to attain the protection because of some concomitant effect that is thought to be anti-social; but even in that instance we do not (except in the case of obscenity) ordinarily say that the expressive element has disappeared. Instead we say that a state policy has supervened to overcome the First Amendment interest.[68]

It is equally easy to think of social problems as being represented by those who actually suffer from these problems. In some cases, it is clear that there would be no First Amendment protection; the thief does indeed display the social problem of thievery by taking my money, but we do not argue that he has some First Amendment right to take it. The element of anti-social action overwhelms any communicative content of the exercise of thievery. In other cases where the communicative element is strong and the anti-social conduct is missing, the reason for the person to communicate her problem may also be missing; we might learn a lot about welfare by watching the life of a welfare mother, but there is no reason for her to let us invade her privacy to watch her life. In the case where people ask us for money because they are poor, or have some insoluble problem, they let us see into that problem because they want us to help them. This is pure speech in the sense that it can be answered without more, and without any effect on the life of the person accosted who can simply pass on, ask questions, or give money.[69] Indeed, it is difficult to think of a workable example of communication by representation that fits the description better than begging.

Speech in this sense is not captured in the phrases drawn

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[68] *See, e.g.*, Employment Div., Oregon Human Resources Dep't v. Smith, 494 U.S. 872 (1990) (upholding a state regulation against a Native American peyote ritual).

[69] *See* P. CHEVIGNY, MORE SPEECH: DIALOGUE RIGHTS AND MODERN LIBERTY 99-100 (1988).

> [Speech] is expressive action that speaks to the mind through an argument, using the word in the sense of a symbolic action that conveys an intention, even when the argument is presented in something as simple as a schema or an image. The essence of the notion of 'speech' for purposes of political protection is that it puts forth an argument that must be understood, that is susceptible to explanation or response through other arguments before any other sort of action is taken.

Id. at 202.

from *Spence v. Washington*,[70] that in order to be protected, speech must intend "to convey a particularized message," under conditions where the likelihood is great that the message will be understood by those who see it. Nevertheless, looked at from the point of view suggested above, it is apparent that the *Spence* definition is too narrow, encompassing the discursive, the descriptive, even the polemical, and slighting the representational. And yet it is equally clear that much expression that we accept as protected under the First Amendment cannot be adequately captured by the *Spence* formula, at least as narrowly conceived.

Judge Sand made the point that expression by representation is extremely vivid, more so than a mere description, somewhat in the way that a game is more vivid than a radio broadcast of a game, a painting more vivid than a description of the painting. In the case of a social problem like poverty, the nature of the problem may make the representation quite upsetting, and even objectionable. But that, of course, does not deprive it of its status as expression; quite the contrary.

CONCLUSION

I conclude, then, that personal begging does have a strong element of protected speech in it. Insofar as the majority of the court of appeals may have accepted this, it seems to me they were saying, in effect, that the element of anti-social conduct outweighed the representational value of the act for purposes of telling us something about the problems of poverty and homelessness. In this respect, as Professor Kelling might say, begging is more like the case of stealing discussed above, in the sense that it tends to destroy the fabric of society. That may be the case, and it may be possible to prove that it is the case. But let us hope that it cannot be proved merely by the fact that a passerby is offended by the sight of beggars, because he cannot bear to be reminded that some people are insane, addicted, or just plain down on their luck. That would come too close to saying that an action may be "anti-social" and therefore regulated out of existence even if it communicates something true about society—a conclusion completely at odds with the spirit of the First Amendment.

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[70] 418 U.S. 405 (1974). *See* notes 54-55 and accompanying text *supra*.