Indiana Law Journal

Volume 65 | Issue 1 Article 9

Winter 1989

The Beggar's Free Speech

Anthony J. Rose
Indiana University School of Law

The Beggar's Free Speech Claim

ANTHONY J. ROSE*

INTRODUCTION

> The law, in its majestic equality, forbids the rich as well as the poor to sleep under bridges, to beg in the streets, and to steal bread.
>
> Anatole France[1]

> And if thy brother be waxen poor, and his means fail with thee; then thou shalt uphold him: as a stranger and a settler shall he live with thee.
>
> *Leviticus* 25:35[2]

The contrast between the Bible's command and Anatole France's sarcastic comment introduces the troublesome dilemma presented by restrictions affecting the underclass, and underscores the law's frequent divergence from its moral aspirations. As Margaret Rosenheim wrote in 1969, "the public is—and has been—divided and ambivalent about the proper response to dependent persons. Beggars, paupers, public assistance recipients—call them what we may—sorely tax both public purse and private conscience."[3] One sees this ambivalence today in the debate over America's "homeless problem," which has raised the subsidiary question "should we give to beggars?"[4]

As reported in the popular media, the number of persons living on the streets has risen dramatically in recent years.[5] Municipalities are struggling

---

* J.D. Candidate, 1990, Indiana University School of Law at Bloomington; A.B., 1986, University of Michigan.

1. A. FRANCE, LE LYS ROUGE [THE RED LILY] (1891), *quoted in* J. BARTLETT, FAMILIAR QUOTATIONS 655 (15th ed. 1980).

2. THE HOLY SCRIPTURES (from the Masoretic Text, Jewish Publication Society of America, Philadelphia, 1955).

3. Rosenheim, Shapiro v. Thompson: *"The Beggars Are Coming to Town,"* 1969 SUP. CT. REV. 303.

4. *See, e.g.,* Gibbons, *Begging: To Give or Not to Give,* TIME, Sept. 5, 1988, at 68 [hereinafter TIME].

> [A] backlash against beggars is smoldering across the country. Its chief spokesman is New York Mayor Ed Koch, who is urging people to help banish the panhandlers by refusing to give them anything. Koch avers that . . . people would do better to give to established charities . . . to ensure that the money be used to help people in need "and not go simply for booze and drugs."

Id.

5. *See, e.g., id.* ("The streets of America's cities have become desperate crossroads. To walk any distance at all is to run a gauntlet of beggars of every imaginable description with every conceivable need. . . . In Los Angeles a pedestrian can be approached six times on one block."); *id.* at 71 ("No one even knows how many beggars there are, though estimates run as high as 5,000 in New York City, 1,500 in Chicago."); *see also* Clark v. Community for Creative Non-Violence, 468 U.S. 288, 304 n.4 (1984) (Marshall, J., dissenting) ("Estimates on the number of homeless persons in the United States range from two to three million.").

not only to help the indigent, but also to assuage citizens who have grown irritated with frequent requests for money.[6] Despite many proposals ranging from the benign to the sinister,[7] issues remain unresolved: Are restrictions on begging wise, effective, or even constitutional?[8] Would regulation achieve its desired results, or would it merely treat the symptoms of larger systemic problems?[9] This Note addresses one issue in the current debate: Whether ordinances criminalizing begging are allowable under the federal Constitution. More specifically, this Note evaluates the beggar's claim to first amendment protections of free speech.[10]

Part I first discusses the sparse legal authority addressing first amendment claims in the begging context, and then presents general principles to guide the analysis. Part II addresses the issue of whether begging is "speech" within the meaning of the first amendment. Part III presents the significance of the public sidewalk as the locus in question, and evaluates the characterization of begging as traditional public forum activity. Finally, Part IV takes up the two-track core of first amendment doctrine, and applies it to two examples of begging ordinances.

I. THE ANALYTICAL FRAMEWORK

Very few cases consider the beggar's claim to first amendment protection. However, from the existing cases, and from general first amendment principles, one may glean a framework for addressing the beggar's rights.

---

6. *See* TIME, *supra* note 4, at 74 ("Where once the beggars were viewed as largely helpless and harmless, their growing number and confrontational tactics have put many city dwellers on the defensive.").

7. *See id.* ("In Fort Lauderdale a city commissioner suggested rat poison as a topping for local garbage to discourage foraging. A member of the Los Angeles County board of supervisors advocated placing the homeless on a barge in Los Angeles Harbor.").

8. *See* Rosenheim, *supra* note 3, at 327.

> It has often been asserted that the character of a society may be measured by its response to the problem of poverty. In our own day, in sharp contrast to earlier ages, we confront "the paradox of poverty in the midst of plenty." . . . [Subsequently] comes the painful discovery of . . . how deep-rooted are our assumptions, and how limited our imagination on the subject of reform.

Id.

9. *See Tell Us What You Think: Should We Give to Panhandlers?*, GLAMOUR, Jan. 1989, at 50.

> "Swiping at panhandlers ignores the reasons people are forced to beg," says Robert Hayes, counsel to the National Coalition for the Homeless. Advocates like Hayes urge citizens to direct their anger instead at the system that has failed these Americans: inadequate programs for the mentally ill and drug addicted, and a shortage of low-income housing. Says Hayes, "It's legitimate to give a dollar or give a sandwich, to write your congressman or volunteer your time. But the important thing is that people do something."

Id.

10. The first amendment provides, in pertinent part, "Congress shall make no law . . . abridging the freedom of speech . . . . " U.S. CONST. amend. I.

A. The Scarcity of Legal Precedent

The handful of cases which address constitutional challenges to begging restrictions leaves much unsettled. In 1928, the North Carolina Supreme Court, in *State v. Hundley,*[11] upheld a municipal ordinance making it unlawful to beg or solicit funds on the streets or in public places without a permit. The court reasoned that the governing body empowered to issue the permits did not have the arbitrary power to discriminate among applicants, and that a charitable organization whose application had been denied lost neither religious liberties nor the ability to pursue happiness.[12] In 1976, in *Ulmer v. Municipal Court,*[13] a California Court of Appeal upheld a California statute criminalizing the "accosting" of another for the purpose of soliciting alms.[14] In denying first amendment protection, the court reasoned that begging or soliciting for alms was not necessarily involved with the communication of information or opinion.[15] In 1984, however, the Florida District Court of Appeal, in *C.C.B. v. State,*[16] struck down an absolute ban on begging as unconstitutionally intrusive on free speech rights. The Florida court distinguished *Ulmer* on the ground that C.C.B. (a child) had not "accosted" anyone, and cited the California legislature's committee report in support of the distinction.[17] Taken together, *Ulmer* and *C.C.B.* suggest that an individual has a first amendment right to solicit alms for himself, although this right is not absolute. With only these few cases, the precise contours of the beggar's right remain unclear.

There are several reasons for the "dearth of cases."[18] First, the criminal justice system is not committed to obtaining convictions for violations of begging ordinances. Police officers do not consistently arrest beggars, but

---

11. 195 N.C. 377, 142 S.E. 330 (1928).

12. *Id.* at 380-81, 142 S.E. at 332.

13. 55 Cal. App. 3d 263, 127 Cal. Rptr. 445 (1976).

14. CAL. PENAL CODE § 647 (West 1988). Enacted in 1961, the statute provides: "Every person who commits any of the following acts is guilty of disorderly conduct, a misdemeanor . . . (c) [one] [w]ho accosts other persons in any public place or in any place open to the public for the purpose of begging or soliciting alms." *Id.*

15. *Ulmer,* 55 Cal. App. 3d at 266, 127 Cal. Rptr. at 447.

16. 458 So. 2d 47 (Fla. Dist. Ct. App. 1984).

17. *Id.* at 49 (quoting *Ulmer,* 55 Cal. App. 3d at 266, 127 Cal. Rptr. at 445 (citing 2 Assem. J. Appendix (1961 Reg. Sess.) Assem. Interim Comm. Rep. (1959-1961) Crim. Proc. 12-13)).

> [The California statute] is framed in this manner in order to exclude from one ambit of the law the blind or crippled person who merely sits or stands by the wayside, the Salvation Army worker who solicits funds for charity on the streets at Christmas time and others whose charitable appeals may well be left to local control.

Id.

18. *Id.* at 48.

instead employ ordinances selectively as a threat,[19] the majority of these selective arrests dismissed before formal charges are filed.[20] Even should the case proceed to trial, it typically rates low priority among both prosecutors and judges.[21] This system has two effects: Police detain defendants for a short period, and the trial courts foreclose the opportunities for significant appellate review.

A second reason for the scarcity of first amendment begging cases is that beggars rarely challenge an ordinance, probably because they lack the necessary information and funds to do so.[22] Third, begging laws have ancient historical roots,[23] and their validity may generally be viewed as

---

19. TIME, *supra* note 4, at 74 ("Some officials admit that the ordinances are hard to enforce but are useful as a threat.").

Selective enforcement invites immediate criticism because of the inherent discretion, and because of the opportunities created for the harassment of indigents. *See* Cox v. Louisiana, 379 U.S. 536 (1965).

> It is clearly unconstitutional to enable a public official to determine which expressions of view will be permitted and which will not or to engage in invidious discrimination among persons or groups either by use of a statute providing a system of broad discretionary licensing power or, as in this case, the equivalent of such a system by selective enforcement of an extremely broad prohibitory statute.

Id. at 557-58; *see also* Carrizosa, *Court Won't Block San Francisco Police Use of Obstruction Law,* L.A. Daily J., Mar. 14, 1985, at 1, col. 4.

> [ACLU attorney Amital Schwartz] said the difference between this case and the old vagrancy laws that have been declared void for vagueness is that San Francisco police are using a legitimate statute [CAL. PENAL CODE § 647(c)] "and then just not prosecuting the cases. The result is the same as in the '50s and '60s—the police harass people and put them out of commission for a while without having to submit the cases to prosecution or the test of due process in court."

Id.

20. Carrizosa, *supra* note 19, at 1, col. 4 ("Justice Harry Low acknowledged that 94 percent of the arrests for obstructing a public sidewalk are dismissed before formal charges are filed.").

21. *Id.*

22. *See C.C.B.,* 458 So. 2d at 48 ("We find a dearth of cases in our state to give us guidance and would opine that such scarcity is due to this particular segment of society not having the ability or wherewithal to pursue the challenge.").

23. As early as 1530, England proscribed begging without a license in a statute entitled: "An Act directing how aged, poor, and impotent persons, compelled to live by alms, shall be ordered, and how vagabonds and beggars shall be punished." 22 Hen. 8, ch. 12 (1530). The statute mandated that beggars obtain a license from their regional Justice; the failure to obtain such a license was punishable by flogging, or three days in the stocks with bread and water only. *Id.; see also* Papachristou v. City of Jacksonville, 405 U.S. 156, 161-62 (1972).

> The breakup of feudal estates in England led to labor shortages which in turn resulted in the Statutes of Laborers, designed to stabilize the labor force by prohibiting increases in wages and prohibiting the movement of workers from their home areas in search of improved conditions. Later vagrancy laws became criminal aspects of the poor laws. The series of laws passed in England on the subject became increasingly severe. But the "theory of the Elizabethan poor laws no longer fits the facts." The conditions which spawned these laws may be gone, but the archaic classifications remain.

Id. (footnotes and citations omitted).

unquestionable. Fourth, a court reviewing a begging law may not reach the first amendment issue. *Decker v. Fillis*[24] is an example.

Decker involved a Salt Lake City vagrancy ordinance that outlawed begging, as well as other acts including wandering the streets without any lawful business.[25] The court acknowledged the ordinance's "chilling effect" on the rights of free movement, but dismissed the cognate effect on free speech as "speculative."[26] Despite declaring much of the ordinance invalid, the court spared the begging provision, noting "[we refrain] from passing upon any of the other provisions of the ordinance because they are not thrown into question by the allegations of the complaint in this case. Indeed, a number of subdivisions seem hardly subject to serious question."[27] The court's bald dictum, which implicitly approves the begging provision, holds no value as precedent. A serious deliberation of the beggar's free speech claim is left to the future.

Finally, even if a first amendment issue is raised by a litigant and acknowledged by a court, the court may rest its judgment solely on grounds of overbreadth or vagueness.[28] While these doctrines should weigh heavily against begging restrictions,[29] they are separate from the core of first amendment doctrine, and are thus beyond the scope of this Note.

B. First Amendment Principles and the Beggar's Condition

Municipalities have both a duty and the regulatory power "to protect the well-being and tranquility of a community."[30] However, the United States

---

24. 306 F. Supp. 613 (D. Utah 1969) (mem.).

25. The court held that the ordinance violated substantive due process under the fourteenth amendment, reasoning that the ordinance permitted police to enforce the statute selectively without any distinction between lawful and unlawful conduct, subjecting the indigent to a greater possibility of arrest. *Id.* at 617.

26. *Id.*

27. *Id.*

28. *See, e.g.*, People v. Fogelson, 21 Cal. 3d 158, 577 P.2d 677, 145 Cal. Rptr. 542 (1978).

> There can be little question that the ordinance challenged here lends itself to a substantial number of unconstitutional applications. This ordinance purports to regulate a very broad range of solicitation activities—including the acts of seeking, begging or soliciting custom, patronage, sales, alms or donations "in any manner or for any purpose." . . . [I]t is evident that the ordinance reaches substantial areas of protected speech and religious activity.

Id. at 164, 577 P.2d at 680-81, 145 Cal. Rptr. at 545-46 (footnotes and citations omitted); *see also* NAACP v. Button, 371 U.S. 415 (1963).

29. *See, e.g.*, Broadrick v. Oklahoma, 413 U.S. 601 (1973).

> It has long been recognized that the First Amendment needs breathing space and that statutes attempting to restrict or burden the exercise of First Amendment rights must be narrowly drawn and represent a considered legislative judgment that a particular mode of expression has to give way to other compelling needs of society.

Id. at 611-12; *see also* Hopkins, *Panhandling Law is Vague, Judge Agrees*, Seattle Post-Intelligencer, Nov. 18, 1988, at B1, col. 2.

30. Kovacs v. Cooper, 336 U.S. 77, 83 (1949).

Constitution sharply circumscribes municipal authority.[31] Specifically, municipalities are subject to the first amendment through the fourteenth amendment.[32]

First amendment rights are not absolute,[33] but they do occupy a special position in constitutional law.[34] They require a governing body to justify its regulations with a sufficiently important interest,[35] and to draft its

---

31. *See, e.g.,* City of Blue Island v. Kozul, 379 Ill. 511, 41 N.E.2d 515 (1942).

> A municipality may enact regulations in the interest of public safety, health, welfare or convenience, within the limits permitted by law, but in every case this power to regulate must be so exercised as not, in attaining a permissible end, unduly to infringe the freedom protected by the United States constitution . . . .

Id. at 520, 41 N.E.2d at 520; *see also* Cantwell v. Connecticut, 310 U.S. 296 (1940); Schneider v. State, 308 U.S. 147 (1939).

32. *E.g.,* Lovell v. City of Griffin, 303 U.S. 444 (1938).

> Freedom of speech and freedom of the press, which are protected by the First Amendment from infringement by Congress, are among the fundamental personal rights and liberties which are protected by the Fourteenth Amendment from invasion by state action. It is also well settled that municipal ordinances adopted under state authority constitute state action and are within the prohibition of the amendment.

Id. at 450 (citations omitted).

33. *E.g.,* Cohen v. California, 403 U.S. 15, 19 (1971) ("[T]he 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."); Breard v. Alexandria, 341 U.S. 622 (1951).

> The First and Fourteenth Amendments have never been treated as absolutes. Freedom of speech or press does not mean that one can talk or distribute where, when and how one chooses. Rights other than those of the advocates are involved. By adjustment of rights, we can have both full liberty of expression and an orderly life.

Id. at 646; Murdock v. Pennsylvania, 319 U.S. 105, 110 (1943) ("The manner in which [door to door solicitation for religious proselytizing] is practiced at times gives rise to special problems with which the police power of the states is competent to deal. But that merely illustrates that the rights with which we are dealing are not absolutes." (citations omitted)).

34. *Murdock,* 319 U.S. at 115 ("Freedom of press, freedom of speech, freedom of religion are in a preferred position.").

35. *See* Clark v. Community for Creative Non-Violence, 468 U.S. 288, 309-10 (1984) (Marshall, J., dissenting).

> The First Amendment requires the Government to justify *every* instance of abridgment. That requirement stems from our oft-stated recognition that the 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 also* Hynes v. Mayor of Oradell, 425 U.S. 610, 628 (1976) (Brennan, J., concurring in part).

> I recognize that there are governmental interests that may justify restraints on free speech. But in the area of First Amendment protections, "[t]he rational connection between the remedy provided and the evil to be curbed, which in other contexts might support legislation against attack on due process grounds, will not suffice . . . . Accordingly, whatever occasion would restrain orderly

regulations with precision and definiteness,[36] so as not to intrude on protected activity or "chill" its exercise.[37]

The first amendment, at its core, is dedicated to the policy of ensuring an open and free debate of political problems.[38] The amendment is premised on the belief that democracy will flourish, and better government will result, if access to the "marketplace of ideas"[39] remains unrestrained.[40] To effect first amendment policies, the Supreme Court has given the amendment's broad language a correspondingly broad meaning,[41] and has developed a

---

discussion and persuasion, at appropriate time and place, must have clear support in public danger, actual or impending."

Id. (quoting Thomas v. Collins, 323 U.S. 516, 530 (1945)).

36. *Fogelson,* 21 Cal. 3d at 165-66, 577 P.2d at 681, 145 Cal. Rptr. at 546.

> The state may . . . reasonably regulate the time, place and manner of engaging in solicitation in public places. The state may also reasonably and narrowly regulate solicitations in order to prevent fraud or to prevent undue harassment of passersby or interference with the business operations being conducted on the property. However, in the area of First Amendment freedoms, including constitutionally protected forms of solicitation, the touchstone of regulation must be precision—narrowly drawn standards closely related to permissible state interests.

Id. (footnote and citations omitted); *see Hynes,* 425 U.S. at 620.

> The general test of vagueness applies with particular force in review of laws dealing with speech. "[S]tricter standards of permissible statutory vagueness may be applied to a statute having a potentially inhibiting effect on speech; a man may the less be required to act at his peril here, because the free dissemination of ideas may be the loser."

Id. (quoting Smith v. California, 361 U.S. 147, 151 (1959)).

37. *Fogelson,* 21 Cal. 3d at 163-64, 577 P.2d at 680, 145 Cal. Rptr. at 545 ("While it is crucial that persons not be punished for having exercised their rights of free speech and religion, it is equally important that they not be deterred from such conduct." (footnote omitted)).

Criminal statutes carry additional fourteenth amendment burdens because the deprivation of constitutional liberties is directly at stake. *See* Houston v. Hill, 482 U.S. 451, 460 (1987) ("Criminal statutes must be scrutinized with particular care; those that make unlawful a substantial amount of constitutionally protected conduct may be held facially invalid even if they also have legitimate application." (citations omitted)); *see also* Kolender v. Lawson, 461 U.S. 352 (1983).

38. *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.").

39. Abrams v. United States, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting) ("[T]he best test of truth is the power of the thought to get itself accepted in the competition of the market, and that truth is the only ground upon which their wishes safely can be carried out. That, at any rate, is the theory of our Constitution.").

40. *See* Ross v. Gore, 48 So. 2d 412, 415 (Fla. 1950) (en banc) (the court, quoting Thomas Jefferson, stated, "[t]he force of public opinion cannot be resisted, when permitted freely to be expressed. The agitation it produces must be submitted to. It is necessary to keep the waters pure.").

41. *Cf.* Martin v. City of Struthers, 319 U.S. 141, 152 (1943) (Frankfurter, J., concurring with reservation).

> From generation to generation fresh vindication is given to the prophetic wisdom of the framers of the Constitution in casting it in terms so broad that it has adaptable vitality for the drastic changes in our society which they knew to be inevitable, even though they could not foresee them.

Id.

complex doctrine designed to incorporate the amendment's proscription into many different settings.[42] Whatever the framers' "original intent," the first amendment has expanded to encompass broad social concerns. It now prescribes a policy of tolerance for unfamiliar and disagreeable views,[43] and perhaps places a premium on ideas that challenge the status quo.[44] The first amendment thus protects the individual's right to speak, even when facing an unwilling or unlistening audience.[45]

In contrast to the tolerance historically afforded first amendment activities, society has generally viewed the beggar with disdain.[46] This antagonism may be misdirected, because it is based on an insensitive misunderstanding of the reasons that people turn to the streets.[47] Responding

---

42. American Future Sys., Inc. v. Pennsylvania State Univ., 752 F.2d 854, 871 (3d Cir. 1984) (Adams, J., concurring).

> The diversity of First Amendment analyses has developed precisely as a result of the Amendment's scope and importance. The Amendment is broadly phrased because the potential for violations of a speaker's or listener's rights to expression and information are manifold; the various doctrines that have evolved demonstrate an effort to apply the Amendment in a wide range of contexts, implicating innumerable competing interests and interlocking issues.

Id.

43. *See Murdock,* 319 U.S. at 116 ("Plainly a community may not suppress, or the state tax, the dissemination of views because they are unpopular, annoying, or distasteful."); *Martin,* 319 U.S. at 143 ("The authors of the First Amendment knew that novel and unconventional ideas might disturb the complacent, but they chose to encourage a freedom which they believed essential if vigorous enlightenment was ever to triumph over slothful ignorance." (footnote omitted)); *Abrams,* 250 U.S. at 630 (Holmes, J., dissenting) ("[W]e should be eternally vigilant against attempts to check the expression of opinions that we loathe and believe to be fraught with death, unless they so imminently threaten immediate interference with the lawful and pressing purposes of the law that an immediate check is required to save the country.").

44. *See* Terminiello v. Chicago, 337 U.S. 1 (1949).

> [Speech] may indeed best serve its high purpose when it induces a condition of unrest, creates dissatisfaction with conditions as they are, or even stirs people to anger. Speech is often provocative and challenging. It may strike at prejudices and preconceptions and have profound unsettling effects as it presses for acceptance of an idea.

Id. at 4.

45. *See, e.g., Cohen,* 403 U.S. at 15; *see also infra* notes 140-44 and accompanying text.

46. *See* Rosenheim, *supra* note 3, at 306 ("In America: 'poverty itself is slightly disreputable, and being on welfare somewhat more disreputable . . . [and] the "hard core" [of demoralized and immoral poor] is further along on a range of disrepute.'" (quoting Matza, *Poverty and Disrepute,* in CONTEMPORARY SOCIAL PROBLEMS 620 (2d ed. 1966)) (brackets and ellipses in original)); *id.* at 306 n.18 ("As for the virtuous poor, one can pity them, of course, but one cannot possibly admire them." (quoting O. WILDE, SOUL OF MAN UNDER SOCIALISM (1910) (unpaged))); *see also* 60 AM. JUR. 2D *Peddlers, Solicitors, and Transient Dealers* § 26 (1987) ("[T]he occupations or activities of peddling, soliciting, and transient or itinerant dealing are . . . frequently referred to with contempt, especially in older legal writings.").

47. Much attention has been directed lately toward the homeless in America. While some overlap may exist between beggars and homeless people, the two should be kept distinct. To the extent that homeless people share the life of the street, however, their experience may offer insight into the beggar's background and motivations. In its study of homelessness in

to beggars with criminal regulation takes aim at people who, through unfortunate circumstances, have been turned out onto the sidewalk; their ability to subsist depends on the amount of freedom they are granted to "find a way." Lawmakers and courts must be watchful of the propensity for criminalization because ordinances designed to achieve legitimate goals may "gnaw and impair" the delicate liberties guaranteed by the Constitution.[48] One must remember that "'[h]istory indicates that urges to do good have led to the burning of books and even to the burning of 'witches.'"[49] A beggar may be an inconvenience and an annoyance to others, but at least part of this irritation may stem from the fact that the beggar arouses within the viewer simultaneous feelings of pity, scorn, and guilt. "In an era of checkbook charity, when people are asked for money at every turn—at the office, in the mail, over the phone, over the canapes—[giving to a beggar] is the one time the gesture is not sanitized. People give to the person in need. There but for the grace of God [go I]."[50]

Seattle, Washington, the Church Council of Greater Seattle reported:

> The stereotype of the grizzled street alcoholic does not conform to the reality of homelessness today. There is not a typical homeless person. There is, instead, a wide range of people who are homeless whose most common characteristic is their lack of income. In fact, one of the alarming realities is how normal many homeless people seem. . . . [T]he five major reasons people requested shelter in 1986 were:
>
> | | |
> |---|---|
> | *Unemployment* | *29%* |
> | *Family crisis/eviction* | *22%* |
> | *Alcoholism* | *21%* |
> | *Domestic Abuse* | *15%* |
> | *Mental Illness* | *13%* |

CHURCH COUNCIL OF GREATER SEATTLE, HOMELESSNESS: THE GROWING CRISIS: A REPORT TO THE CHURCHES AND THE COMMUNITY, at 5 (1987).

48. *Hundley*, 195 N.C. at 377, 142 S.E. at 330 (Clarkson, J., dissenting).

> "[I]t is for every court to see that that liberty is not encroached upon and that freedom gnawed and impaired by any experimental legislation however well meant. So when legislation does enter that uncertain domain, the fact that it is there must bring to it condemnation." . . . [A]genc[ies] for good should be encouraged and allowed to pursue their high ideals of reclaiming the human wreckage. Charity should not be canned. "Main Street" requirements should not hamper the poor.

Id. at 388, 142 S.E. at 335 (quoting in part *Ex parte* Dart, 172 Cal. 47, 55, 155 P. 63, 66 (1916)).

49. Beauharnais v. Illinois, 343 U.S. 250, 274 (1952) (Black, J., dissenting).

50. TIME, *supra* note 4, at 70. Advocates of criminal constraints on begging may justify restrictions by contending that giving handouts "mocks the work ethic." *Id.* ("To [help support a beggar] mocks the work ethic, fosters dependence, corrodes individual dignity and compounds the problem: the more handouts, the more hands are out."). While such an ethic is doubtless necessary for the maintenance of a healthy economy and an effective government, it is far from evident that street people would find employment if government removed their access to handouts. *See* Brief of Amicus Curiae American Civil Liberties Union of Washington at 35, City of Seattle v. Webster, *appeal docketed*, No. 88-1-02856-3 (Wash. Ct. App. 1988).

> The studies reveal that the societal assumptions are usually wrong. The trait of homelessness is immutable. Employers are reluctant to hire persons who have

Courts have recognized their unique role in preserving the rights of the underprivileged from governmental intrusion.[51] Particularly when the right of access to basic human needs is threatened by government action, a court should review the threat with its protective role resolutely in mind.[52] Courts should work to check the legislative response of criminalizing bothersome behavior.

II. Is Begging Speech?

A beggar claiming first amendment protections must first demonstrate the amendment's applicability.[53] Initially, this requires a definition of "begging." For purposes of this Note, "begging"[54] is limited to non-aggressive activity.[55] The line between "passive" and "aggressive" begging may be

---

lived for days or weeks on the street in the only set of clothes they have left. Sufficient beds, showers, care, clothes, and laundry facilities are not available to aid the homeless in returning to mainstream society.

Id.

51. *See infra* notes 99-100 and accompanying text.

52. *See, e.g.,* Rosenheim, *supra* note 3, at 331. In Shapiro v. Thompson, 394 U.S. 618 (1969), the Supreme Court invoked strict scrutiny to invalidate a durational residence requirement for Welfare eligibility. The Court reasoned that such a requirement restricted the right of interstate migration because of the potential denial of food, shelter, and other necessities of life. Rosenheim notes that "*Shapiro* struck to the core of the equality theory in relying upon poverty—absence of 'the very means to subsist'—as the major premise by which to evaluate the classification of residents according to durational periods in the jurisdiction." Rosenheim, *supra* note 3, at 331 (quoting in part *Shapiro,* 394 U.S. at 627) (footnote omitted).

53. *See, e.g.,* Clark v. Community for Creative Non-Violence, 468 U.S. 288 (1984).

> Although it is common to place the burden upon the Government to justify infringements on First Amendment interests, it is the obligation of the person desiring to engage in assertedly expressive conduct to demonstrate that the First Amendment even applies. To hold otherwise would be to create a rule that all conduct is presumptively expressive . . . . [W]e decline to deviate from the general rule that one seeking relief bears the burden of demonstrating that he is entitled to it.

Id. at 293 n.5.

54. *See* 10 C.J.S. *Beg* ("[T]o ask as a favor, and hence to beseech; entreat or supplicate with humility or earnestness; more specifically, to ask for as a charity, especially habitually or from house to house.").

55. To the extent that an individual beggar employs aggressive means of solicitation, her actions may border on assault, and a municipality's interest in intervention will increase accordingly.

In October 1987, the City of Seattle, Washington adopted an ordinance making "aggressive begging" punishable by a $500 fine, a 90 day jail term, or both. Seattle, Wash., Mun. Code § 12A.12.015 (c)(A)(1) (1987). Titled "Pedestrian interference," the ordinance proscribes begging "with intent to intimidate another person . . . ." *Id.* This ordinance is believed to be the first of its kind in the country. *See* Hopkins, *supra* note 29, at B1, col. 2.

Municipalities, however, must be careful if they wish to follow Seattle's lead. The Seattle ordinance is subject to constitutional question on vagueness grounds because it "centers around the mental state of the actor," instead of punishing his acts. *Cf.* Brief of Amicus Curiae American Civil Liberties Union of Washington at 9-10, City of Seattle v. Webster, *appeal docketed,* No. 88-1-02856-3 (Wash. Ct. App. 1988) (even if, arguendo, "intent to intimidate"

difficult to draw, as successful solicitation may require a certain measure of assertiveness,[56] but the begging activity as described herein would ordinarily fall short of "disorderly conduct" or "breach of the peace."[57] It is in this non-threatening sense that this Note employs the word "begging."

In order to receive donations, the beggar must make known her state of need. To this end, she will employ both words and conduct. The Supreme Court has extended first amendment protection to non-verbal communication in limited circumstances involving so-called "symbolic speech."[58] While it is debatable whether the unspoken elements of the beggar's message fall within the ambit of this doctrine, the symbolic speech cases should not control the analysis of the beggar's claim;[59] the beggar actually speaks, and the non-verbal aspects of her communication only add to the spoken message. The beggar's clothing, demeanor, and appearance attest to the validity of her verbal request for funds, but the primacy of the spoken (or written) word to her activity places the beggar within the Court's preferred mode of communication.[60] Begging is verbal expression, not simply conduct,

---

implicates the requisite *actus reus*, the ordinance "is nonetheless void for vagueness."). A Seattle Municipal Court has held the ordinance unconstitutional in part, albeit on other grounds. *See* Hopkins, *supra* note 29, at B1, col. 2 ("[T]he law . . . is well intentioned but cannot be allowed to stand because it does not clearly spell out what behavior is allowed and what is prohibited when it comes to blocking city sidewalks.").

56. *See* National Anti-Drug Coalition, Inc. v. Bolger, 737 F.2d 717 (7th Cir. 1984).

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

Id. at 726 (quoting 43 Fed. Reg. 38,824 (1978)) (emphasis in original omitted).

57. However, begging is sometimes included in a disorderly conduct ordinance. *See, e.g.*, MEMPHIS, TENN., CODE § 22-12 (1986) ("Disorderly Conduct [includes a person who] . . . (7) Stations himself on the streets or follows pedestrians for the purpose of soliciting alms, or who solicits alms on the streets unlawfully.").

58. *See, e.g.*, Spence v. Washington, 418 U.S. 405 (1974).

> [A]ppellant did not choose to articulate his views through printed or spoken words. It is therefore necessary to determine whether his activity was sufficiently imbued with elements of communication to fall within the scope of the First and Fourteenth Amendments. . . . [T]he nature of appellant's activity, combined with the factual context and environment in which it was undertaken, lead to the conclusion that he engaged in a form of protected expression.

Id. at 409-10; *see also* Tinker v. Des Moines School Dist., 393 U.S. 503 (1969).

59. The issue involved in *Clark*, 468 U.S. at 288 (i.e. whether sleeping in connection with a demonstration is expressive conduct), is much more difficult than the issue presented in this context. Whatever communicative value it may have had in the context of a demonstration on behalf of the homeless, sleep itself is non-verbal, and ordinarily transmits no message. Begging, on the other hand, primarily involves words. Thus it is unnecessary to focus on the beggar's conduct for purposes of this analysis.

60. *See* 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, 804 (1986)

and ordinances restricting begging implicate core first amendment concerns.

III. The Effect of the Public Forum

A. *The Public Forum Doctrine*

The level of judicial scrutiny given to regulations affecting speech varies according to the location of the expression.[61] By distinguishing among locations, a court can accommodate competing uses of property. Courts can reserve certain locations for their primary use, while opening other locales to a variety of expressive activity. Simply labeling the location does not control the outcome of a case,[62] but it does greatly affect the courts' balancing of competing interests.

("[A] possible explanation of the *Clark* Court's refusal to seriously consider the symbolic importance of sleeping is the Court's bias in favor of words as a communicative mode."); *cf.* Ely, *Flag Desecration: A Case Study in the Roles of Categorization and Balancing in First Amendment Analysis,* 88 HARV. L. REV. 1482, 1491 (1975) ("Something about O'Brien's case caused the Court to adopt an approach much less protective of first amendment interests than that put forth in *Brandenburg.* The explanation for this difference is not that Brandenburg was actually talking—moving his mouth and uttering words—whereas O'Brien was expressing himself nonverbally.").

61. *See* 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)); Lee, *supra* note 60, at 761 ("[C]ertain public properties are appropriate places for expression."); *see also* H-CHH Assocs. v. Citizens for Representative Gov't, 193 Cal. App. 3d 1193, 238 Cal. Rptr. 841 (1987) (Hanson, J., concurring and dissenting), *cert. denied,* 108 S. Ct. 1248 (1988).

> Federal First Amendment cases link the standard of review to the type of property used by those seeking to exercise their rights of expression. . . . The federal standard of review changes according to the position a particular type of public property occupies along a "spectrum" of various places in which First Amendment activity occurs.

Id. at 1223-24, 238 Cal. Rptr. at 861.

62. *See* Dienes, *The Trashing of the Public Forum: Problems in First Amendment Analysis,* 55 GEO. WASH. L. REV. 109, 115 (1986) ("While one might quarrel with the balance struck in particular public-forum cases, there is at least a real effort to articulate the competing interests involved. Characterization of the place as part of the public forum is not determinative of the outcome."); Farber & Nowak, *The Misleading Nature of Public Forum Analysis: Content and Context in First Amendment Adjudication,* 70 VA. L. REV. 1219, 1234 (1984) ("Constitutional protection should depend not on labeling the speaker's physical location but on the first amendment values and governmental interests involved in the case."). *See generally,* Kalven, *The Concept of the Public Forum:* Cox v. Louisiana, 1965 SUP. CT. REV. 1, 13 (citizens have "a kind of First-Amendment easement" to speak on public streets).

The "public forum doctrine" identifies three types of fora for first amendment activity, and employs them as "analytical shorthand"[63] when evaluating the strength of a first amendment claim. At one end of the spectrum, where expressive activity receives the greatest protection, are "traditional public fora" which include streets, sidewalks, and parks.[64] Next are "designated public fora," which consist of "public property which the State has opened for use by the public as a place for expressive activity,"[65] such as municipal theaters and university meeting facilities.[66] In these locations, expression receives the same protection as in traditional public fora, as long as the government chooses to keep the property open for first amendment activity. Finally, in "non-public fora," such as military bases or United States mailboxes,[67] the government may restrict expression "as long as the regulation on speech is reasonable and not an effort to suppress expression merely because public officials oppose the speaker's view."[68]

---

63. Cornelius v. NAACP Legal Defense and Educ. Fund, Inc., 473 U.S. 788, 820 (1985) (Blackmun, J., dissenting) ("[T]he public forum, limited-public-forum, and nonpublic forum categories are but analytical shorthand for the principles that have guided the Court's decisions regarding claims to access to public property for expressive activity.").

64. *See Perry,* 460 U.S. at 45 (streets and parks occupy one end of the spectrum where the "rights of the State to limit expressive activity are sharply circumscribed."); International Soc'y for Krishna Consciousness v. City of Baton Rouge, 876 F.2d 494, 497 (5th Cir. 1989) ("The government's ability to permissibly restrict expressive activity in a public forum is very limited."); Estiverne v. Louisiana State Bar Ass'n, 863 F.2d 371 (5th Cir. 1989).

> Traditional public forums are places which "by long tradition or by government fiat have been devoted to assembly or debate." The state's efforts to exclude speakers from such traditional public forums are subject to rigorous first amendment scrutiny. A content-based exclusion may be enforced only when the regulation is necessary to serve a compelling state interest and is narrowly drawn to achieve that interest and a content-neutral time, place, and manner restriction may be enforced only when the regulation is narrowly tailored to achieve a significant government interest.

Id. at 376 (quoting, in part, *Cornelius,* 473 U.S. at 802) (footnote and citation omitted); *see also* United States v. Kokinda, 866 F.2d 699 (4th Cir. 1989), *cert. granted,* 110 S. Ct. 47 (1989).

> Sidewalks, too, are presumptively public forums. The peaceful expression of protest on the streets and sidewalks of this country have effectively brought issues of social import to public attention. . . . What the debate has lacked in decorum, it has supplied in vitality, and it is important to the dialogue of a democratic system. . . . [S]idewalks should remain available for the speakers, as access to the public's ear and pursestring would otherwise be incomplete.

Id. at 701; Amalgamated Food Employees Local 590 v. Logan Valley Plaza, Inc., 391 U.S. 308, 315 (1968) ("[S]treets, sidewalks, parks, and other similar public places are so historically associated with the exercise of First Amendment rights that access to them for the purpose of exercising such rights cannot constitutionally be denied broadly and absolutely.").

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

66. *See, e.g.,* Widmar v. Vincent, 454 U.S. 263 (1981) (university meeting facilities); Southeastern Promotions, Ltd. v. Conrad, 420 U.S. 546 (1975) (municipal theater).

67. *See* United States Postal Serv. v. Council of Greenburgh Civic Ass'ns, 453 U.S..114 (1981) (mailboxes); Greer v. Spock, 424 U.S. 828 (1976) (military bases).

68. *Perry,* 460 U.S. at 46.

Speech in the traditional public forum receives the greatest constitutional protection in part because the forum is often a speaker's last resort. Because it provides the least expensive channel for communication,[69] the "poorly financed causes of little people"[70] require unrestrained access to the traditional public forum. Without free admission, those with "access to more elaborate (and more costly) channels of communication"[71] would monopolize public discussion by drowning out the other speakers.

The traditional public forum's hallowed place in first amendment doctrine stems from Justice Roberts' concurring opinion in *Hague v. Committee for Industrial Organization.*[72] Roberts wrote:

> Wherever the title of streets and parks may rest, they have immemorially been held in trust for the use of the public and, time out of mind, have been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions. Such use of the streets and public places has, from ancient times, been a part of the privileges, immunities, rights, and liberties of citizens . . . .[73]

The Court has consistently protected the traditional public forum as the "end of the spectrum" where "the rights of the State to limit expressive activity are sharply circumscribed."[74] The Court has also invariably described streets and sidewalks as traditional public forum locations.[75] Further, if a distinction need be drawn between a street and a sidewalk, the latter would

---

69. *See* Farber & Nowak, *supra* note 62, at 1234.

> Public sidewalks . . . are generally places where the government's interests are rather weak, given the diverse uses of sidewalks. At the same time, because sidewalks and streets have often served as forums of last resort for those who cannot afford other media of expression, the first amendment interest at stake may be especially high. Consequently, the balance may well tilt in favor of free speech more often when a sidewalk is involved than when some other place is involved.

Id. (footnotes omitted).

70. Martin v. City of Struthers, 319 U.S. 141, 146 (1943).

71. L. TRIBE, AMERICAN CONSTITUTIONAL LAW, § 12-21, at 689 (1978).

72. 307 U.S. 496 (1939). *See* Dienes, *supra* note 62, at 111 (explaining the impact of Justice Roberts' concurring opinion on first amendment jurisprudence).

73. *Hague,* 307 U.S. at 515-16.

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

75. *See Frisby,* 108 S. Ct. at 2495.

> [W]e have repeatedly referred to public streets as the archetype of a traditional public forum. . . . No particularized inquiry into the precise nature of a specific street is necessary; all public streets are held in the public trust and are properly considered traditional public fora. . . . [The] ordinance must be judged against the stringent standards we have established for restrictions on speech in traditional public fora . . . .

Id. at 2499-500; *see also Cornelius,* 473 U.S. at 820 ("Public streets and parks fall into [the] category [of public fora]."); United States v. Grace, 461 U.S. 171, 179 (1983) ("Sidewalks, of course, are among those areas of public property that traditionally have been held open to the public for expressive activities and are clearly within those areas of public property that may be considered, generally without further inquiry, to be public forum property.").

prevail as more deserving of first amendment protection.[76] Thus, a regulation designed to restrict speech on the sidewalk must survive rigorous judicial inquiry.

B. Begging is a Traditional Public Forum Activity

Implicit in the Court's treatment of regulations affecting speech on the street or sidewalk is the notion that speech must be "traditional public forum activity" in order to receive heightened first amendment protection. It is not enough that expressive activity is present within a public forum. To invoke heightened scrutiny, there must be: (1) speech, (2) in a public forum, (3) amounting to "traditional public forum activity."

The third element essentially measures the strength of the speech as first amendment activity in light of the location. The issue is thus whether speech, occurring within the traditional public forum, is entitled to elevated public forum protection.

Begging is entitled to first amendment protection under the traditional public forum doctrine. Three considerations indicate the constitutional importance of the beggar's speech: the beggar's implicit expression of a social message,[77] the Supreme Court's protection of charitable solicitation,[78] and the beggar's political powerlessness.[79]

1. The Beggar's Social Message

While the beggar's speech amounts, on the surface, to a mere request for funds, her appeal necessarily includes a communication of far greater import. Her entire person speaks of poverty and suffering; she is tangible evidence of failure, be it her own or society's. She is living testament to a shortage of emergency shelter space, underfunded alcohol and drug abuse programs, and the lack of sufficient low-income housing.[80] She can be said to represent the underclass and all it must endure: prejudice, discrimination, violence, and exploitation. She evidences society's unwillingness to care adequately for its marginal members.

---

76. ACORN v. City of Phoenix, 798 F.2d 1260 (9th Cir. 1986).

> A pedestrian ordinarily has an entitlement to be present upon the sidewalk or on the grounds of a park and thus is generally free at all times to engage in expression and public discourse at such locations. . . . [M]ore so than with sidewalks or parks, courts have recognized a greater governmental interest in regulating the use of city streets.

Id. at 1267.

77. *See infra* notes 80-82 and accompanying text.

78. *See infra* notes 83-98 and accompanying text.

79. *See infra* notes 99-102 and accompanying text.

80. *See* TIME, *supra* note 4, at 71-72 ("The single greatest reason for the growing ranks of panhandlers, many experts agree, is the desperate shortage of affordable housing.").

Numerous social issues are bound in the beggar's simple appeal. Actual communication of a social message, however, depends in part on the sensitivity of the listener. Only one predisposed to the wider message will receive it; others will hear only the solicitation. Moreover, the beggar may not even intend to convey a social message. Were the beggar to claim first amendment protection solely on the basis of her implicit expression, prevailing doctrine would likely dismiss the claim. When the Supreme Court has recognized the communicative aspect of non-verbal speech, it has relied on both the speaker's intent and the audience's perception as necessary elements.[81] As an independent first amendment argument, the beggar's implicit expression fails to contain either of these elements.

When advanced in support of the claim to public forum protection, however, the beggar's implicit expression remains a forceful and compelling consideration. Silencing the beggar will not alleviate her problems—it will only hide them from public view. Society will neither perceive nor correct social and political ills if the evidence of their existence is suppressed. If one premise of the first amendment is a commitment to facilitating the discussion of social issues as a means toward their solution, then extending first amendment protection to the beggar's implicit communication is justified. It is best for the public welfare, as well as for the policies of the Constitution, to resist "[t]he eternal temptation . . . to arrest the speaker rather than to correct the conditions about which he complains."[82]

2. The Protection of Charitable Solicitation

A second factor bearing on begging's nature as traditional public forum activity is the precedent protecting the free speech rights of charities in their solicitation for funds. The Supreme Court has extended broad constitutional

---

81. *See* Texas v. Johnson, 109 S. Ct. 2533, 2539 (1989) ("In deciding whether particular conduct possesses sufficient communicative elements to bring the First Amendment into play, we have asked whether '[a]n intent to convey a particularized message was present, and [whether] the likelihood was great that the message would be understood by those who viewed it.'" (quoting Spence v. Washington, 418 U.S. 405, 410-11 (1974))); *see also* Clark v. Community for Creative Non-Violence, 468 U.S. 288, 304-05 (1984) (Marshall, J., dissenting).

> The Court has previously acknowledged the importance of context in determining whether an act can properly be denominated as "speech" for First Amendment purposes and has provided guidance concerning the way in which courts should "read" a context in making this determination. The leading case is *Spence* . . . . The Court looked first to the intent of the speaker—whether there was an "intent to convey a particularized message"—and second to the perception of the audience—whether "the likelihood was great that the message would be understood by those who viewed it."

Id. (quoting *Spence*, 418 U.S. at 410-11) (citation omitted).

82. Houston v. Hill, 482 U.S. 451, 465 n.15 (1987) (citing Younger v. Harris, 401 U.S. 37, 65 (1971) (Douglas, J., dissenting)).

protection to charitable solicitation,[83] recognizing that it frequently involves the dissemination of ideas.[84] The Court has not yet applied this reasoning to the case of an individual soliciting for herself.[85] However, there is no justification for a distinction between an organization's soliciting for the welfare of "others," and the "others"' soliciting for themselves.[86] Judges have questioned the distinction before,[87] but it remains largely unanswered.

---

83. The Court has characterized charitable solicitation as involving a variety of speech interests that are fully deserving of first amendment protection. This is so even if the solicitor is a professional fundraiser whose activities are "entirely commercial" and "whose job is, simply put, figuring out how to raise money for charities." Riley v. National Fed'n of the Blind, 108 S. Ct. 2667, 2682 (1988) (Rehnquist, C.J., dissenting); *see id.* at 2672-73.

This protection is not absolute, however. *See* Ohralik v. Ohio State Bar Ass'n, 436 U.S. 447, 457 (1978) ("Unlike a public advertisement, which simply provides information and leaves the recipient free to act upon it or not, in-person solicitation may exert pressure and often demands an immediate response, without providing an opportunity for comparison or reflection."); Wisconsin Action Coalition v. City of Kenosha, 767 F.2d 1248, 1251 (7th Cir. 1985) ("A municipality has the power to regulate the activities of canvassers and solicitors if the regulation is in furtherance of a legitimate governmental objective."); New York City Unemployed and Welfare Council v. Brezenoff, 742 F.2d 718, 720 (2d Cir. 1984) ("Charitable solicitations that are used to support speech and the dissemination of information are clearly within the First Amendment's protection of speech. This does not mean, however, that charitable solicitations may not be regulated or even prohibited in appropriate circumstances."); People v. Fogelson, 21 Cal. 3d 158, 577 P.2d 677, 145 Cal. Rptr. 542 (1978).

> The state may . . . reasonably regulate the time, place and manner of engaging in solicitation in public places. The state may also reasonably and narrowly regulate solicitations in order to prevent fraud or to prevent undue harassment of passersby or interference with the business operations being conducted on the property. However, in the area of First Amendment freedoms, including constitutionally protected forms of solicitation, the touchstone of regulation must be precision—narrowly drawn standards closely related to permissible state interests.

Id. at 165-66, 577 P.2d at 681, 145 Cal. Rptr. at 546.

84. *See Riley,* 108 S. Ct. at 2673 ("Our prior cases teach that the solicitation of charitable contributions is protected speech . . . ."); *id.* at 2675 ("[F]ree and robust debate cannot thrive if directed by the government. We perceive no reason to engraft an exception to this settled rule for charities."); *Kokinda,* 866 F.2d at 703 ("Solicitation, like leafletting, is an expressive activity and, as such, is within the protection of the First Amendment."); People v. French, 762 P.2d 1369, 1374-75 (Colo. 1988) ("[S]peech pertaining to charitable solicitation is entitled to the highest constitutional protection, and may be regulated only when narrowly tailored to achieve a compelling state interest."); *see also* Secretary of State v. Joseph H. Munson Co., 467 U.S. 947, 967-68 (1984); Village of Schaumburg v. Citizens for a Better Env't, 444 U.S. 620, 636 (1980).

85. Only one appellate court has faced this issue to date, and it ruled that an individual *is* equally deserving of 1st amendment protection. C.C.B. v. State, 458 So. 2d 47, 48 (Fla. Dist. Ct. App. 1984) ("Ordinance 330.105 is unconstitutionally overbroad by its abridgment in a more intrusive manner than necessary, of the first amendment right of *individuals* to get or solicit alms for *themselves.*" (emphasis in original)).

86. This distinction is frequently drawn in municipal solicitation regulations. *See, e.g.,* National Anti-Drug Coalition, Inc. v. Bolger, 737 F.2d 717, 725 (7th Cir. 1984) (regulation proscribing the solicitation of alms, while making an explicit exception for "national organizations which are wholly non-profit in nature [and] which are devoted to charitable or philanthropic purposes . . . and local charitable and other non-profit organizations." (quoting 38 Fed. Reg. 27,824-25 (1973))).

87. *See, e.g.,* State v. Hundley, 195 N.C. 377, 142 S.E. 330 (1928) (Clarkson, J., dissenting).

The reasons behind a rule should define its applicable limits. In the begging context, the relevant inquiry is whether the reasons behind the protection of organized solicitation would be served if the same protection were extended to individuals. The protection of charitable solicitation rests primarily on two rationales: (1) the solicitor/speaker requires the donation for continued survival, and (2) solicitation for funds is typically commingled with the expression of views or information.

The first reason for the protection of charitable organizations is their dependence on funds for continued existence.[88] As the Court has stated, "without the funds obtained from solicitation from various fora, the organization's continuing ability to communicate its ideas and goals may be jeopardized."[89] This reasoning applies to the beggar's situation, for she explicitly appeals for sustenance. Her advocacy relies on handouts for survival in an even more visceral sense than an organization.[90] Thus, under the first rationale, there is no reason to distinguish the beggar's activity from that of a charitable organization.

> Could the governing body of the city pass an ordinance in reference to the regulation and use of the streets allowing the newsboys to sell on the streets the morning paper and not the evening paper, or vice versa? Is the little fellow who sells the paper less annoying than the good women soliciting alms for sweet charity's sake? The governing body declaring one worthy and the other unworthy. I say no.

Id. at 382, 142 S.E. at 333; *cf. Martin,* 319 U.S. at 141 (Murphy, J., concurring).

> [I]f the city can prohibit canvassing for the purpose of distributing religious pamphlets [which it cannot do according to the majority opinion], it can also outlaw the door to door solicitations of religious charities, or the activities of the holy mendicant who begs alms from house to house to serve the material wants of his fellowmen and thus obtain spiritual comfort for his own soul.

Id. at 151. *But see* People v. Fogelson, 21 Cal. 3d 158, 168-69, 577 P.2d 677, 683, 145 Cal. Rptr. 542, 548 (1978) (Mosk, J., concurring).

> If defendant was actually seeking aid for needy children, his conduct could be regulated and proscribed. It has been held that begging and soliciting for alms do not enjoy absolute constitutional protection. . . . [W]hile the instant municipal ordinance falters because of constitutional infirmity, it is not impossible for the city to reasonably regulate the public conduct of mendicants, including those who purport to be motivated by religious fervor.

Id. (relying on Ulmer v. Municipal Court, 55 Cal. App. 3d 263, 127 Cal. Rptr. 455 (1976)) (citation omitted).

88. *See Riley,* 108 S. Ct. at 2676, 2679.

89. *Cornelius,* 473 U.S. at 799. This idea is related to the notion of preserving access to less expensive modes of communication. Many organizations employ canvassing and solicitation as the cheapest and most efficient way to acquire funding for continued advocacy. *See, e.g., Wisconsin Action Coalition,* 767 F.2d at 1251 ("Although the Court has at times criticized door-to-door solicitation, it may be the case that door-to-door canvassing, distribution of literature and solicitation are entitled to special solicitude because they are less expensive means of communicating ideas than feasible alternatives and therefore important alternatives for many groups in our society."); New York Pub. Interest Research Group, Inc. v. Village of Roslyn Estates, 498 F. Supp. 922 (E.D.N.Y. 1979); *see supra* notes 69-71 and accompanying text.

90. The beggar also relies on handouts for her personal survival, but the first amendment is more concerned with the preservation of expression than with the preservation of life.

The Supreme Court first stated the second rationale—the "intertwining" of speech and solicitation—in *Village of Schaumburg v. Citizens for a Better Environment*.[91]

> [C]haritable appeals for funds, on the street or door to door, involve a variety of speech interests—communication of information, the dissemination and propagation of views and ideas, and the advocacy of causes—that are within the protection of the First Amendment. Soliciting financial support is undoubtedly subject to reasonable regulation but the latter must be undertaken with due regard for the reality that solicitation is characteristically intertwined with informative and perhaps persuasive speech seeking support for particular causes or for particular views on economic, political, or social issues, and for the reality that without solicitation the flow of such information and advocacy would likely cease. Canvassers in such contexts are necessarily more than solicitors for money.[92]

The Court's concern in *Schaumburg* was with the overbreadth of regulations aimed at solicitation; that they may inadvertently act to silence expression regarding the cause or issue for which the funds are requested.[93] One could argue that in the beggar's case the solicitation is the entire message, that there is no "cause" or "issue" intertwined with the request for funds.[94] The beggar's appeal, this argument would maintain, is simply an unadorned plea for money that can be regulated without fear of abridging protected speech.

However, the "appeal without a cause" argument ignores a basic point. The beggar *is* the cause. Apart from her implicit expression of a social message,[95] the beggar conveys information regarding the true extent of her individual need in the appeal itself. The ultimate target of the donation stands directly before the would-be donor. The beggar soliciting for herself has eliminated the middleman.[96] It would be nonsensical to protect the right of the New York City Unemployed and Welfare Council[97] to solicit on behalf of homeless persons while denying a homeless person the right to solicit on her own behalf.

---

91. 444 U.S. 620 (1980).

92. *Id.* at 632.

93. *See, e.g.*, ACORN v. City of New Orleans, 606 F. Supp. 16, 20 (E.D. La. 1984) ("Solicitation of financial support, like other protected expression, is subject to reasonable regulation. This regulation, however, must be designed and enforced in a manner which does not intrude upon the rights of free speech."); *id.* at 21-22 ("An ordinance which prohibits all solicitation for funds in all streets and on all neutral grounds . . . sweeps too broadly.").

94. *But see supra* notes 80-82 and accompanying text.

95. *See id.*

96. The Supreme Court has noted that donations given directly to the poor can sometimes be more valuable than contributions to a charitable organization. *Cornelius*, 473 U.S. at 809 ("[T]he President could reasonably conclude that a dollar directly spent on providing food or shelter to the needy is more beneficial than a dollar spent on litigation that might or might not result in aid to the needy.").

97. *See New York City Unemployed and Welfare Council*, 742 F.2d at 718.

To refuse to extend the protection afforded organized solicitation to the organizations' beneficiaries would offend logic. It would also offend the Constitution, which is designed to protect individual rights, including the right to self-expression. Requiring citizens to form groups in order to enjoy first amendment guarantees would contradict the policies of the first amendment itself.

By including individuals within the scope of the charitable solicitation doctrine, courts would effectuate the policies motivating the charitable solicitation doctrine. When the Supreme Court says "[w]e have held the solicitation of money by charities to be as fully protected [as] the dissemination of ideas,"[98] it should be understood to include individuals for themselves within its definition of "charities."

3. The Beggar's Political Powerlessness

A third factor working to strengthen the beggar's claim to protection under the public forum doctrine is her inability to combat a criminalizing ordinance through the political process.[99] "[H]omeless persons are likely to be denied access to the vote since the lack of a mailing address or other proof of residence within a State disqualifies an otherwise eligible citizen from registering to vote."[100] The beggar's only protection comes from others—concerned citizens who advocate reforms and judges who scrutinize regulations for constitutional infirmities. Because sidewalk beggars can be (and are) excluded from the political process, and because removing them from view would isolate them from would-be advocates, a court should provide beggars with heightened judicial protection.[101]

The judicial policy of safeguarding "little people,"[102] the precedent of protecting charitable solicitation, and the social issues implicit in the beggar's speech combine to provide ample support for a court to view the beggar's speech as "traditional public forum activity." As in the context of organized solicitation, restrictions on begging warrant first amendment scrutiny under the Supreme Court's two-track analysis.

---

98. *Riley,* 108 S. Ct. at 2681 (Scalia, J., concurring in part and concurring in judgment).

99. *See Clark,* 468 U.S. at 304 n.4 (Marshall, J., dissenting) ("Though numerically significant, the homeless are politically powerless inasmuch as they lack the financial resources necessary to obtain access to many of the most effective means of persuasion.").

100. *Id.*

101. *Cf.* United States v. Carolene Products, 304 U.S. 144, 153 n.4 (1938) ("[P]rejudice against discrete and insular minorities may be a special condition, which tends seriously to curtail the operation of those political processes ordinarily to be relied upon to protect minorities, and which may call for a correspondingly more searching judicial inquiry.").

102. *See Martin,* 319 U.S. at 146.

IV. The Two-track Analysis

As described above,[103] a speaker's location plays a major role in determining the level of scrutiny a court will apply in evaluating regulations affecting speech. However, the appropriate level of scrutiny is also "tied to whether the statute distinguishes between prohibited and permitted speech on the basis of content."[104] So called "content-based" regulations are subject to more exacting judicial review than are "content-neutral" regulations.[105] This portion of first amendment doctrine has thus been dubbed the "two-track" analysis.[106]

A. Overview of the Two Tracks

If a regulation is content-based, or not "unrelated to the suppression of free expression,"[107] it is subject to one of two alternative methods of evaluation recognized by the Supreme Court. First, the Court may apply the "categorization" analysis, under which a law will be upheld if the "content" of the regulated speech falls into an established category of unprotected speech, such as "fighting words" or "obscenity."[108] The Court may also uphold a law if the speech content is of a "lower value," such as "commercial speech."[109] Second, and alternatively, the Court may invoke

---

103. *See supra* notes 61-68 and accompanying text.

104. Frisby v. Schultz, 108 S. Ct. 2495, 2500 (1988).

105. *See* International Soc'y for Krishna Consciousness v. City of Baton Rouge, 876 F.2d 494 (5th Cir. 1989).

> Content-based regulations must be necessary to serve a compelling state interest and be narrowly drawn to achieve that end; content-neutral regulations of time, place, and manner of expression are enforceable if they are narrowly tailored to serve a significant government interest, and leave open ample alternative channels of communication.

Id. at 497. *Compare* Police Dep't v. Mosley, 408 U.S. 92 (1972) (content-based regulation) *with* United States v. O'Brien, 391 U.S. 367 (1968) (content-neutral regulation).

106. *See, e.g.,* Dienes, *supra* note 62, at 116; Ely, *supra* note 60, at 1482. This distinction between "content-based" and "content-neutral" stems from *O'Brien,* 391 U.S. at 367.

107. *O'Brien,* 391 U.S. at 377. *See also* Ely, *supra* note 60, at 1482.

108. *See, e.g.,* Chaplinsky v. New Hampshire, 315 U.S. 568 (1942) (fighting words); Roth v. United States, 354 U.S. 476 (1957) (obscenity); *see also* Cohen v. California, 403 U.S. 15, 24 (1971) ("[W]e cannot overemphasize that, in our judgment, most situations where the State has a justifiable interest in regulating speech will fall within one or more of the various established exceptions . . . to the usual rule that governmental bodies may not prescribe the form or content of individual expression."); J. Nowak, R. Rotunda & N. Young, Constitutional Law § 16.47, at 975-76 (3d ed. 1986).

109. *See* Farber & Nowak, *supra* note 62, at 1228-29.

> The [cases in the 1970s] established that the government had no general authority to proscribe speech simply because the content of that speech interfered with societal or governmental goals. Rather, the government could proscribe only speech falling into certain precise categories, which, briefly summarized, included: (1) speech that created a clear and present danger of illegal behavior,

"strict scrutiny," under which the government may justify a content-based regulation only by demonstrating that the law is "necessary" to further a "compelling" governmental interest.[110] A critical, and often dispositive, part of this inquiry is whether the government has employed the "least speech-restrictive means" available to accomplish its goal.[111] While the Supreme Court has upheld laws under the categorization analysis, it has not yet done so under strict scrutiny.

If the Court finds a regulation to be "content-neutral," however, the analysis is considerably more deferential.[112] The content-neutral analysis

---

particularly physical violence; (2) obscenity; (3) defamation; (4) false or misleading commercial speech; and (5) child pornography. Categorization is now generally accepted by all the Justices when reviewing true governmental censorship entailing proscription of speech because of its content; occasional discord is due only to the confusion between censorship and situational restraints.

Id.

110. *See, e.g.,* United States v. Belsky, 799 F.2d 1485, 1488 (11th Cir. 1986); Lee, *supra* note 60, at 782-83.

Whatever ambiguity may exist between a "substantial" interest and a "compelling" interest, it is clear that the Court currently requires a compelling governmental interest in cases involving a serious restriction on First Amendment rights, such as a content-based exclusion from a public forum. . . . [T]he balance usually will be struck in favor of governmental interests. The Court reserves serious scrutiny for analyzing whether the regulation advances the government's interests and whether the restriction is narrowly drawn.

Id.; see also Farber & Nowak, *supra* note 62, at 1220-21.

In a classic, or quintessential, public forum, such as a park or a sidewalk, the Court strictly scrutinizes a content-based regulation to see whether it is narrowly drawn to serve a compelling governmental interest. The Court also requires a compelling interest to justify any blanket prohibition of all speech.

Id.

111. *See* Riley v. National Fed'n of the Blind, 108 S. Ct. 2667, 2674 (1988) ("[T]he First Amendment's command [is] that government regulation of speech must be measured in minimums, not maximums."); Shelton v. Tucker, 364 U.S. 479, 488 (1960).

[T]his Court has held that . . . [a] legitimate and substantial . . . purpose cannot be pursued by means that broadly stifle fundamental personal liberties when the end can be more narrowly achieved. The breadth of legislative abridgment must be viewed in the light of less drastic means for achieving the same basic purpose.

Id.; Wisconsin Action Coalition v. City of Kenosha, 767 F.2d 1248, 1255 (7th Cir. 1985) ("If there is a less restrictive alternative to a challenged regulation, then the regulation appears to unnecessarily interfere with First Amendment activity and is not as narrowly drawn as it could be."); ACORN v. City of Frontenac, 714 F.2d 813, 818 (8th Cir. 1983) ("Since constitutional principles require that the regulation be narrowly drawn to further the legitimate governmental objective, the proponent of the regulation must demonstrate that the government's objectives will not be served sufficiently by means less restrictive of first amendment freedoms." (footnote omitted)); Green v. Village of Schaumburg, 676 F. Supp. 870, 873 (N.D. Ill. 1988) ("The least restrictive means test requires the Village to show 'an actual connection between the restriction and the served interest' and the absence of 'alternative limitations' which would further the interest at lesser cost to First Amendment rights." (quoting *Wisconsin Action Coalition,* 767 F.2d at 1257)); H-CHH Assocs. v. Citizens for Representative Government, 193 Cal. App. 3d 1193, 1207, 238 Cal. Rptr. 841, 850 (1987) ("To be reasonable, such regulations must neither be vague nor subjectively over- or underinclusive.").

112. *See, e.g.,* Grayned v. City of Rockford, 408 U.S. 104 (1972).

consists of balancing, in an ad hoc fashion, the speaker's interests against those of the government.[113] In a public forum, the balancing is performed with a "thumb" on the speaker's side of the scale.[114] A regulation will be upheld if it is "narrowly drawn,"[115] serves a "substantial" governmental interest,[116] and "leaves open ample alternative channels of communica-

---

> [G]overnment has no power to restrict [expressive] activity because of its message [but] reasonable "time, place, and manner" regulations may be necessary to further significant governmental interests, and are permitted. . . . A demonstration or parade on a large street during rush hour might put an intolerable burden on the essential flow of traffic, and for that reason could be prohibited . . . . The crucial question is whether the manner of expression is basically compatible with the normal activity of a particular place at a particular time. . . . Free expression "must not, in the guise of regulation, be abridged or denied."

Id. at 115-17 (citations omitted).

113. Cornelius v. NAACP Legal Defense and Educ. Fund, Inc., 473 U.S. 788, 817-18 (1985) (Blackmun, J., dissenting).

> [T]he Court has observed that the right to engage in expressive activity on public property is not absolute, and must be balanced against interests served by the other uses to which the property is put. Accordingly, the Court has held that the government may regulate the time, place, and manner of the expressive activity in order to accommodate the "interest of all" members of the public to enjoy the use of the public space, and in order to treat fairly all those who have an equal right to speak on the property.

Id.; see also Clark v. Community for Creative Non-Violence, 468 U.S. 288, 293 (1984); United States v. Grace, 461 U.S. 171, 177 (1983); Perry Educ. Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37, 45 (1983); Heffron v. International Soc'y for Krishna Consciousness, 452 U.S. 640, 647-48 (1981); Dienes, *supra* note 62, at 115 ("Use of the public forum concept acknowledges that significant First Amendment values are implicated and that government must therefore regulate in light of those values. But the government interest in regulating speech, even in the 'traditional public forum,' is also acknowledged; competing uses of the forum must be reconciled.").

114. *See* Lee, *supra* note 60, at 805.

115. *See* Members of the City Council v. Taxpayers for Vincent, 466 U.S. 789 (1984).

> Here, the substantive evil—visual blight—is not merely a possible by-product of the activity, but is created by the medium of expression itself. . . . [T]he application of the ordinance in this case responds precisely to the substantive problem which legitimately concerns the City. The ordinance curtails no more speech than is necessary to accomplish its purpose.

Id. at 810; *see also* City of Watseka v. Illinois Pub. Action Council, 796 F.2d 1547, 1563 (7th Cir. 1986) (Coffey, J., dissenting) ("[A] statute is 'narrowly tailored' if it strikes directly at the source of the problem, i.e., a problem 'created by the medium of expression itself.'" (quoting *Taxpayers for Vincent,* 466 U.S. at 810)); *id.* at 1566 ("Under the narrowly tailored test, as properly applied . . . the court must identify the harm the statute seeks to regulate . . . and the First Amendment right . . . to determine whether the problem is caused by the medium of expression itself.").

116. *Taxpayers for Vincent,* 466 U.S. at 821 (Brennan, J., dissenting).

> The Court's first task is to determine whether the ordinance is aimed at suppressing the content of speech, and, if it is, whether a compelling state interest justifies the suppression. If the restriction is content-neutral, the court's task is to determine (1) whether the governmental objective advanced by the restriction is substantial, and (2) whether the restriction imposed on speech is no greater than is essential to further that objective. Unless both conditions are met the restriction must be invalidated.

Id. (citations omitted).

tion."[117] This lower level of scrutiny is justified on the ground that the regulation only affects a certain physical manner of expression;[118] inconvenience being the speaker's only cost.[119] In general, the Court has had little trouble upholding these "time, place, and manner" regulations.[120]

---

117. *See Clark,* 468 U.S. at 293; *Grace,* 461 U.S. at 177; ACORN v. City of Phoenix, 798 F.2d 1260, 1265 (9th Cir. 1986); Farber & Nowak, *supra* note 62, at 1238-39; J. NOWAK, R. ROTUNDA & N. YOUNG, *supra* note 108, at 970-71.

> [W]hen the Court reviews time, place, or manner restrictions, it really is engaging in a two-step form of analysis. First, it seeks to determine whether the regulation is in fact an attempt to suppress content because of its message. A content-based restriction of this type will be upheld only if the Court can find that the content fits within a category of speech unprotected by the first amendment. If the regulation is not an attempt to censor content, the Court will go on to determine whether the incidental restriction on speech is outweighed by the promotion of significant governmental interests. Although this method of analysis is sometimes stated as a least restrictive means test when phrased in terms of a general principle, the analysis really assesses whether the regulation leaves open ample means for communication of the message and thus is not an unnecessary or gratuitous suppression of communication.

Id.; see also Lee, *supra* note 60, at 800.

> The inquiry into alternative channels is a critical part of the analysis of time, place, and manner regulations. The availability of alternatives affects the Court's perception of discriminatory effects, the strength of the governmental interests necessary to justify the restriction, and the degree of scrutiny applied to whether the regulation narrowly advances the governmental interest.

Id.

118. *See Taxpayers for Vincent,* 466 U.S. at 812 ("[Here,] nothing in the findings indicates that [the restricted activity] is a uniquely valuable or important mode of communication, or that appellee's ability to communicate effectively is threatened by ever-increasing restrictions on expression."); ACORN v. City of Phoenix, 798 F.2d at 1267.

> The Phoenix ordinance does not ban solicitation of contributions altogether, but rather regulates the locale and permissible targets for such activity. Moreover, it imposes no restrictions on other forms of communication, such as oral advocacy or distribution of literature, even to occupants of vehicles. Thus, the ordinance is properly analyzed as a form of time, place, and manner regulation.

Id.; Farber & Nowak, *supra* note 62, at 1237 ("So long as the governmental regulation is uniformly applied, regulation of the physical attributes of speech poses relatively little threat to first amendment values . . . .").

119. *See* Farber & Nowak, *supra* note 62, at 1237 ("[I]nconvenience [to certain people's ability to express themselves in their most preferable physical manner] hardly seems a radical intrusion into individual autonomy.").

120. *See id.* at 1219; *see, e.g.,* Consolidated Edison v. Public Serv. Comm'n, 447 U.S. 530, 536 (1980) ("[W]e have emphasized that time, place, and manner regulations must be 'applicable to all speech irrespective of content.'" (quoting Erznoznik v. City of Jacksonville, 422 U.S. 205, 209 (1975))); Redish, *The Content Distinction in First Amendment Analysis,* 34 STAN. L. REV. 113, 123 (1981) ("[W]hen a regulation purports to affect all equally and is designed to avoid harms unrelated to the content of expression . . . the Court has engaged in extremely limited scrutiny."); Lee, *supra* note 60, at 790-92.

> This minimal level of scrutiny, however, offers scant protection to First Amendment rights. It is generally triggered by the Court's determination that a regulation poses only an incidental burden on expression. And that determination is frequently based upon a superficial consideration of the availability of alternative means of communication, and in cases such as *Clark,* a discounting of the symbolic value of a particular manner of expression. . . . Once the Court finds

B. Evaluation of Content-based Regulations

A flat ban on begging is content-based in that it distinguishes alms solicitation from solicitation for other purposes.[121] Prohibitions on charitable solicitation are generally content-based, in that the regulation turns on whether the speaker requested money.[122] In both types of cases, what the speaker said will determine his criminal guilt or innocence. The government's purpose is not unrelated to the suppression of free expression.

1. Categorization Analysis

Under the categorization analysis, only the "commercial speech" category might be relevant to begging. Speech deemed "commercial" receives a lower level of constitutional protection than does "pure" speech.[123] Restrictions on commercial speech must "directly advance[] the governmental interest asserted," and must not be "more extensive than is necessary to serve that interest."[124] The rationale behind providing *any* protection to commercial

---

> that a regulation is facially content neutral, it is unlikely to hold the regulation unconstitutional.

Id. But see Prus v. City of Chicago, 711 F. Supp. 469 (N.D. Ill. 1989). In *Prus,* the court held unconstitutional an ordinance which limited the size, colors, and content of nonilluminated outdoor advertising signs in single family residence districts. *Id.* The ordinance did not directly advance state interests of traffic safety and esthetics, and did not leave open ample alternative channels of communication. *Id.*

The two-track doctrine is subject to manipulation. In City of Renton v. Playtime Theatres, 475 U.S. 41 (1986), the Supreme Court evaluated a content-neutral restriction by inquiring whether the regulation served "a substantial government interest" and allowed for "reasonable alternative avenues of communication." *Id.* at 49.

121. An example of such a flat ban is found in a Portland, Oregon ordinance that proscribes any form of begging: "It is unlawful for any person, while on a street or in a public place, by speech, manner, or conduct to beg or solicit another to give him money or other charity." PORTLAND, OR., CITY CODE § 14.24.040 (1984).

122. *See* Carreras v. City of Anaheim, 768 F.2d 1039, 1048 (9th Cir. 1985); Alternatives for Cal. Women, Inc. v. County of Contra Costa, 145 Cal. App. 3d 436, 450, 193 Cal. Rptr. 384, 393 (1983).

123. *See* Bolger v. Youngs Drug Prods. Corp., 463 U.S. 60, 64-65 (1983) ("[W]e have held that the Constitution accords less protection to commercial speech than to other constitutionally safeguarded forms of expression."); *id.* at 68 (protection accorded to commercial speech is "qualified but nonetheless substantial"); Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n, 447 U.S. 557 (1980).

> [T]he full panoply of First Amendment protections [is available] for . . . direct comments on public issues. There is no reason for providing similar constitutional protection when such statements are made only in the context of commercial transactions. . . . This Court's decisions on commercial expression have rested on the premise that such speech, although meriting some protection is of less constitutional moment than other forms of speech.

Id. at 563 n.5; Ohralik v. Ohio State Bar Ass'n, 436 U.S. 447, 455-56 (1978); National Funeral Servs., Inc. v. Rockefeller, 870 F.2d 136, 145 (4th Cir. 1989) ("This statute, however, regulates purely commercial speech, speech not worthy of the first amendment's fullest protection.").

124. *Central Hudson,* 447 U.S. at 566.

speech is preserving the consumers' right to receive information about the availability and the qualities of products and services.[125] The doctrine extends the "marketplace of ideas" notion to the economic market. While the government theoretically carries the burden of justifying its law,[126] even a content-based regulation will be evaluated under a less rigorous standard if the speech is deemed "commercial."[127]

The Court has defined commercial speech in two ways: as expression related solely to the economic interests of the speaker and its audience,[128] or as speech that merely proposes a commercial transaction.[129] Economic motivation does not alone render speech "commercial,"[130] just as the inclusion of political commentary does not by itself render the speech "pure."[131] While the beggar does not propose a commercial transaction, his expression is chiefly motivated by economic concerns. Thus, the second definition of commercial speech does not apply, while the first definition might.

Despite this economic element, begging regulations are properly analyzed under the strict standards of the solicitation doctrine, not the relaxed standards of the commercial speech category. The commercial speech doctrine's scope is limited to speech relating to the sale of products and services. Conversely, soliciting for charity "does more than inform private economic decisions and is not primarily concerned with providing information about

---

125. *Id.* at 561-62 ("Commercial expression not only serves the economic interest of the speaker, but also assists consumers and furthers the societal interest in the fullest possible dissemination of information."); *see* Note, *Recent Development: Trends in First Amendment Protection of Commercial Speech,* 41 VAND. L. REV. 173, 181 (1988) ("The Court concluded that because the free flow of commercial information is indispensable to making economic decisions, such advertising served the basic first amendment goal of enlightened public decisionmaking in a democracy and thus was entitled to first amendment protection.").

126. *See Bolger,* 463 U.S. at 71 n.20; Bigelow v. Virginia, 421 U.S. 809, 826 (1975).

127. *See Bolger,* 463 U.S. at 64; *Central Hudson,* 447 U.S. at 564 n.6.

> Two features of commercial speech permit regulation of its content. First, commercial speakers have extensive knowledge of both the market and their products. Thus, they are well situated to evaluate the accuracy of their messages and the lawfulness of the underlying activity. In addition, commercial speech, the offspring of economic self-interest, is a hardy breed of expression that is not "particularly susceptible to being crushed by overbroad regulation."

Id. (citation omitted).

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

129. *Id.; see Bolger,* 463 U.S. at 66; *see also* Pittsburgh Press Co. v. Pittsburgh Comm'n on Human Relations, 413 U.S. 376, 385 (1973).

130. *See Bolger,* 463 U.S. at 66-67; Pleasant v. Lovell, 876 F.2d 787, 795 (10th Cir. 1989) ("[T]he presence of some commercial activity does not change the standard of first amendment review, although commercial activity might make the challenged state action less disruptive of the political message.").

131. *Cf. Bolger,* 463 U.S. at 58; *Central Hudson,* 447 U.S. at 563 n.5; J. NOWAK, R. ROTUNDA & N. YOUNG, *supra* note 108, at 907.

the characteristics and costs of goods and services."[132] Charitable solicitation thus holds a place in first amendment doctrine independent of the commercial speech category.[133] As a form of charitable solicitation, begging may be "commercially motivated," but it lies outside of the "commercial speech" category. As with organized solicitation, restrictions on begging are subject to strict scrutiny.

2. Strict Scrutiny

A government may advance several purposes to justify the inherently content-based regulation of begging. For example, municipalities may claim an interest in the prevention of fraud and annoyance, or the protection of citizens' privacy and "quality of life." Strict scrutiny, however, will likely invalidate regulations designed to further any of these objectives.

An ordinance designed to prevent fraud is content-based because its concern is with speech content: it asks whether the beggar's speech is fraudulent. Courts have acknowledged the prevention of fraud as an "important" governmental objective, and have even suggested that it may be "compelling."[134] Nevertheless, courts have frequently invalidated ordinances where the means chosen to accomplish this objective were not the least restrictive available.[135] Not all beggars are as they appear; some are indeed

---

132. Village of Schaumburg v. Citizens for a Better Env't, 444 U.S. 620, 632 (1980); *see* Indiana Voluntary Firemen's Ass'n v. Pearson, 700 F. Supp. 421 (S.D. Ind. 1988) (applying full first amendment scrutiny to a disclosure requirement governing professional solicitors and charitable solicitations, court held that even if information required to be disclosed was clearly commercial in nature, lesser "commercial speech" standard did not apply).

133. *See Riley,* 108 S. Ct. at 2672-73; *Pearson,* 700 F. Supp. at 435 ("[Charitable] solicitation [is] not a 'variety of purely commercial speech' and [is] thereby entitled to the entire panoply of protections afforded by the first amendment." (quoting *Village of Schaumburg,* 444 U.S. at 632)).

134. *See Ohralik,* 436 U.S. at 447.

> [A]ppellant has conceded that the State has a legitimate and indeed "compelling" interest in preventing those aspects of solicitation that involve fraud, undue influence, intimidation, overreaching, and other forms of "vexatious conduct." . . . We agree that protection of the public from these aspects of solicitation is a legitimate and important state interest.

Id. at 462; *see also* ACORN v. City of Frontenac, 714 F.2d at 817 ("A municipality certainly has the power, even the duty, to regulate activities within its borders to lessen the opportunities for crime against its residents and their property. Similarly, a municipality may regulate activities in the interest of preventing undue annoyance of its residents."); Conlon v. City of North Kansas City, 530 F. Supp. 985, 988 (W.D. Mo. 1981) ("The Court does not question the right of the municipality to protect its citizens from harassment, fraud and deceptive practices.").

135. *See Riley,* 108 S. Ct. at 2676 ("[W]e do not suggest that states must sit idly by and allow their citizens to be defrauded. North Carolina has an anti-fraud law, and we presume that law enforcement officers are ready and able to enforce it."); *see also Heffron,* 452 U.S. at 664 (Blackmun, J., concurring in part and dissenting in part); *Village of Schaumburg,* 444

"con men"[136] who have homes, are on welfare, or feel that they can make more money by begging than by working. However, an absolute ban on begging is over-inclusive because it inevitably sweeps into more non-fraudulent than fraudulent begging. Most states have laws criminalizing the acquisition of money through fraud, and courts will likely hold that a municipality should simply enforce this state law as a less restrictive means of preventing fraud than a prohibition against begging.

Prohibiting begging to prevent annoyance is similarly a regulatory effort based on the content of speech. The municipality has determined that begging is more annoying to citizens than other types of messages. While "a municipality may regulate activities in the interest of preventing undue annoyance of its residents,"[137] the first amendment's policy of tolerance prevents a court from adjudging such an interest "compelling."[138] "Speech is often provocative and challenging . . . . [But it] is nevertheless protected against censorship or punishment, unless shown likely to produce a clear and present danger of a serious substantive evil that rises far above public inconvenience, annoyance, or unrest."[139] The preservation of first amendment rights demands a certain measure of sacrifice.[140] The amendment's commitment to free and unfettered speech would be seriously eroded if governments were allowed to prohibit a certain type of speech deemed annoying to some of society's members because of its content. To be sure, courts have recognized limited situations in which the rights of the unwilling audience have been allowed to predominate over those of the speaker. These include circumstances in which privacy interests are at stake,[141] and where

---

U.S. at 637-38; Schneider v. State, 308 U.S. 147, 164 (1939).

> Conceding that fraudulent appeals may be made in the name of charity and religion, we hold a municipality cannot, for this reason, require all who wish to disseminate ideas to present them first to police authorities for their consideration and approval, with a discretion in the police to say some ideas may, while others may not, be carried to the homes of citizens . . . . Frauds may be denounced as offenses and punished by law. Trespasses may similarly be forbidden.

Id.; Massachusetts Fair Share, Inc. v. Town of Rockland, 610 F. Supp. 682, 689 (D. Mass. 1985) ("[T]he defendant could simply enforce their existing consumer fraud, trespass, burglary and other penal laws without unconstitutionally restricting the first amendment rights of the plaintiffs.").

136. *See* TIME, *supra* note 4, at 68.

137. ACORN v. City of Frontenac, 714 F.2d at 817.

138. *See* Coates v. City of Cincinnati, 402 U.S. 611, 615 (1971) ("[M]ere public intolerance or animosity cannot be the basis for abridgment of these Constitutional freedoms.").

139. City of Houston v. Hill, 482 U.S. 451, 461 (1987) (quoting Terminiello v. City of Chicago, 337 U.S. 1, 4 (1949)).

140. *See* United States v. Kokinda, 866 F.2d 699, 705 (4th Cir. 1989), *cert. granted,* 110 S. Ct. 47 (1989) ("The First Amendment protects the speaker and not the sensibilities of those who would object to the speech."); Wirta v. Alameda-Contra Costa County Transit Dist., 68 Cal. 2d 51, 62, 64 Cal. Rptr. 430, 437 (1967) ("Annoyance and inconvenience . . . are a small price to pay for preservation of our most cherished right.").

141. *Illinois Pub. Action Council,* 796 F.2d at 1578 (Coffey, J., dissenting) ("The ability

the audience is held "captive."[142] Solicitation on the public sidewalk, however, raises neither of these concerns. "[W]e have . . . consistently stressed that 'we are often "captives" outside the sanctuary of the home and subject to objectionable speech.'"[143] The first amendment requires that annoyed passersby "effectively avoid further bombardment of their sensibilities simply by averting their eyes"[144] and walking away from the beggar.

Another governmental interest advanced to support begging regulation is the preservation of a city's "quality of life." This is an expansive interest that considers property and business values as well as municipal aesthetics. The concern is that because beggars are an eyesore, their presence near storefronts will offend potential customers. Consequently, the displeased customers will stop patronizing the establishments, thus driving down property values. A regulation of this type may be content-neutral to the extent that it is aimed at the secondary effects of expression and not the expression itself. However, such a regulation may be content-based, in that it singles out a certain form of expression as particularly inclined to create "secondary effects."

Nevertheless, in "adult" theatre zoning cases, the Supreme Court has shown great deference to city legislators' efforts to control "local sleaze" by treating regulations furthering municipal aesthetics as content-neutral, and upholding the laws as reasonable time, place, and manner restrictions.[145] In *Young v. American Mini Theatres,*[146] a plurality of the Court held that a city could permissibly restrict the location of adult movie theaters,

---

of government, consonant with the Constitution, to shut off discourse solely to protect others from hearing it is . . . dependent upon a showing that substantial privacy interests are being invaded in an essentially intolerable manner." (quoting *Cohen,* 403 U.S. at 21)).

142. *See Bolger,* 463 U.S. at 72; *Consolidated Edison,* 447 U.S. at 542; *Erznoznik,* 422 U.S. at 209.

143. *Cohen,* 403 U.S. at 21 (quoting Rowan v. Post Office Dept., 397 U.S. 728, 738 (1970)).

144. *Id.*

145. *See, e.g., Playtime Theatres,* 475 U.S. at 48 ("The ordinance by its terms is designed to prevent crime, protect the city's retail trade, maintain property values, and generally 'protec[t] and preserv[e] the quality of [the city's] neighborhoods, commercial districts, and the quality of urban life,' not to suppress the expression of unpopular views." (citation omitted)); Young v. American Mini Theatres, 427 U.S. 50, 71 (1976) (plurality opinion) ("[T]he city's interest in attempting to preserve [or improve] the quality of urban life is one that must be accorded high respect."); Note, *supra* note 125, at 196.

> The [*Playtime Theatres*] Court [in upholding a city ordinance prohibiting adult motion picture theaters from locating within 1000 feet of any residential zone, single or multiple family dwelling, church, park, or school] cited crime prevention, maintenance of property values, protection of retail trade, and preservation of the quality of urban life among the values that the city sought to advance by enacting the ordinance. Furthermore, because the ordinance was deemed content-neutral . . . the ordinance did not violate the principle that a state may not grant the use of a forum to persons whose views the state finds acceptable but deny use to persons wishing to express less favored or more controversial views.

Id.

146. 427 U.S. 50 (1976).

bookstores, and similar establishments. The plurality justified its holding in part on the low expressive value of adult films under the categorization analysis.[147]

As discussed above,[148] however, the beggar's speech deserves the full protection of the public forum doctrine. The government's argument that its regulation is aimed merely at "secondary effects" is not as persuasive when there is no "lower value speech" at issue. While the Court may attempt to follow the adult theatre cases and uphold a begging law as an acceptable method of improving a city's "quality of life," it should recognize that a ban on begging in the interests of aesthetics is regulation based on content. Under the strict scrutiny appropriate for content-based regulations, the governmental end of aesthetics is not compelling enough to justify the abridgment of a beggar's free speech rights.[149] Even if the free speech and aesthetic interests were equally compelling,[150] the means chosen to advance the government interest must be viewed with suspicion because of the public forum considerations and because of the danger of a disproportionate impact on the poor.

Regulations based on the content of the beggar's expression will probably not meet constitutional scrutiny, regardless of the justification asserted by the government. The categorization analysis is inapplicable because begging is charitable solicitation rather than commercial activity. Strict scrutiny will likely invalidate laws designed to prevent fraud, because state fraud laws provide a less restrictive means for combatting deceitful behavior. Preventing annoyances to passersby is not a compelling interest. And preserving the "quality of life," while perhaps warranting the abridgment of lower value

---

147. *See id.* at 61 ("[T]here is surely a less vital interest in the uninhibited exhibition of material that is on the borderline between pornography and artistic expression than in the free dissemination of ideas of social and political significance . . . ."); *id.* at 70 ("[F]ew of us would march our sons and daughters off to war to preserve the citizen's right to see 'Specified Sexual Activities' exhibited in the theaters of our choice.").

148. *See supra* notes 77-102 and accompanying text.

149. *See Taxpayers for Vincent,* 466 U.S. at 822-23 (Brennan, J., dissenting).

> Of course, all would agree that the improvement and preservation of the aesthetic environment are important governmental functions, and that some restrictions on speech may be necessary to carry out these functions. But a governmental interest in aesthetics cannot be regarded as sufficiently compelling to justify a restriction of speech based on an assertion that the content of the speech is, in itself, aesthetically displeasing.

Id. (citation omitted). *But see Prus,* 711 F. Supp. 469. In *Prus,* the court declined to hold aesthetics to a "compelling" standard, but rather applied a lower level of scrutiny, stating: "It is clear that both traffic safety and aesthetics are *substantial* state interests." *Id.* at 470 (emphasis added).

150. *See* Robins v. Pruneyard Shopping Center, 23 Cal. 3d 899, 908, 592 P.2d 341, 346, 153 Cal. Rptr. 854, 859 (1979) ("To protect free speech and petitioning is a goal that surely matches the protection of health and safety, the environment, aesthetics, property values and other societal goals that have been held to justify reasonable restrictions on private property rights.").

speech, is not sufficient justification when expressive value is a subordinate issue.

C. *Evaluation of Content-neutral Regulations*

The paradigm of a content-neutral restriction on begging is probably an ordinance framed as a "traffic control" measure.[151] Such regulations are unrelated to the suppression of free expression in that their chief concern is with the safe and orderly passage of pedestrians, rather than with the message of one who blocks the way.

In contrast to content-based regulations, "regulation of form and context may strike a balance between the advocate's right and the recipient's interest in the quality of his environment."[152] Content-neutral regulations thus deserve greater judicial latitude. The Supreme Court has held that content-neutral regulations need only be "narrowly drawn" to serve "significant" governmental interests, while leaving open ample alternative means of communication.[153] The balancing test, however, must be applied earnestly

---

151. *See, e.g.,* MINNEAPOLIS, MINN., CHARTER & CODE OF ORDINANCES tit. 15, § 385.65 (1988). Titled, "Interference with pedestrian or vehicular traffic," the ordinance provides in part:

> No person, in any public or private place, shall use offensive, obscene or abusive language, or grab, follow or engage in conduct which reasonably tends to arouse alarm or anger in others, or walk, stand, sit, lie, or place an object in such a manner as to block passage by another person or a vehicle, or to require another person or a driver of a vehicle to take evasive action to avoid physical contact.

Id.; see also Grayned, 408 U.S. at 115-17; Cantwell v. Connecticut, 310 U.S. 296, 308 (1940).

> When clear and present danger of riot, disorder, interference with traffic upon the public streets, or other immediate threat to public safety, peace, or order, appears, the power of the State to prevent or punish is obvious. Equally obvious is that a State may not unduly suppress free communication of views, religious or other, under the guise of conserving desirable conditions.

Id.; *Schneider,* 308 U.S. at 160.

> Municipal authorities, as trustees for the public, have the duty to keep their communities' streets open and available for movement of people and property, the primary purpose to which the streets are dedicated. So long as legislation to this end does not abridge the constitutional liberty of one rightfully upon the street to impart information through speech or the distribution of literature, it may lawfully regulate the conduct of those using the streets.

Id.; *Baton Rouge,* 876 F.2d at 494 (upholding ordinance restricting people from soliciting business from occupants of vehicles on any street or roadway as narrowly tailored to achieve the municipality's legitimate interest in regulating the flow of traffic); Ely, *supra* note 60, at 1487 ("[T]he state[] [has] perfectly legitimate and expression-unconnected interests in keeping thoroughfares clear and controlling crowds, noise and litter . . . .").

152. *Bolger,* 463 U.S. at 84 (Stevens, J., concurring in the judgment).

153. *See Grace,* 461 U.S. at 177; *Consolidated Edison,* 447 U.S. at 535; *Village of Schaumburg,* 444 U.S. at 637.

to detect hidden content-based regulation, and to give proper regard to the factors weighing in the balance of a particular case.[154]

"Channeling" regulations, which direct expressive activity to designated places within a city, are generally acceptable.[155] However, even if regulation of the beggar's activity is properly subject to channeling analysis, that analysis should protect the beggar. When traditional public forum activity is involved, the Court performs the balancing test with a "thumb" on the speaker's side of the first amendment balance.[156] In other words, the Court gives the speaker's interest special weight, and tends to reject the government's arguments that alternative means of expression exist. In the public forum, then, channeling regulations must carry an even greater burden under the theory that "one is not to have the exercise of his liberty of expression in appropriate places abridged on the plea that it may be exercised in some other place."[157] This dictum was cited often in older Supreme Court opinions, but has been undermined by the modern "channeling" cases. Nevertheless, its revival may be appropriate for serious consideration of the beggar's claim.

Moreover, one of the major assumptions of channeling regulations is the existence of ample alternative channels for the communicative activity.[158]

---

154. *See Kokinda,* 866 F.2d at 704.

> Outright prohibition of a medium of expression will always prove the easier and more efficient course. Yet liberty itself is no efficient concept, and the rights of citizens and interests of government are best reconciled not by total bans, but through finespun accommodations. That, at least, has been the historic premise of First Amendment balancing, of the requirement that government use the least drastic means of curtailing free expression, and of "time, place, and manner" as a mediating device.

Id.; see also Lee, *supra* note 60, at 758 n.8.

> Not all content-neutral time, place, and manner regulations receive a low level of scrutiny. As Professor David Goldberger notes, "Judicial scrutiny is more accurately characterized as falling on a continuum . . . . [T]he Court varies the level of scrutiny to accommodate the particular facts under review." Factors that influence the degree of scrutiny courts will apply to content-neutral regulations include the regulations' impact on communicative opportunities, whether a public forum is involved, and whether a conventional means of communication is used.

Id. (quoting Goldberger, *Judicial Scrutiny in Public Forum Cases: Misplaced Trust in the Judgment of Public Officials,* 32 BUFFALO L. REV. 175, 177 (1983)) (citations omitted).

155. *See, e.g., American Mini Theatres,* 427 U.S. at 50.

156. *See* Lee, *supra* note 60, at 805; *see also id.* at 759-60 ("The Court is hostile towards content-based exclusions from public forums, and has closely scrutinized even content-neutral restrictions on the use of public forums." (footnote omitted)); *cf. id.* at 782 ("[B]ecause the Court believes that content-neutral time, place, and manner restrictions do not affect free expression adversely, it has applied the less demanding standard of substantial governmental interest." (footnote omitted)).

157. *Schneider,* 308 U.S. at 163.

158. *See, e.g.,* Project 80'S, Inc. v. City of Pocatello, 857 F.2d 592 (9th Cir. 1988); *see also* Redish, *supra* note 120, at 89 ("The reason that time-place-manner regulations are generally unobjectionable is that they presume the existence of alternative avenues of expression, alternatives that are by definition unavailable in the case of absolute regulation.").

Such an assumption, however, forgets that the beggar retains *no* alternatives for expressing his need for support when his access to the sidewalk is curtailed.

Judges and commentators have criticized the deferential review afforded content-neutral regulations for ignoring the discriminatory effects that time, place, and manner restrictions can have on some speakers,[159] especially the poor.[160] Given the judicial policy of protecting "little people,"[161] a court should search a regulation closely when it will directly affect the impoverished.[162]

---

159. *See Clark,* 468 U.S. at 313-14 (Marshall, J., dissenting) ("The consistent imposition of silence upon all may fulfill the dictates of an even handed content-neutrality. But it offends our 'profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open.'" (quoting New York Times Co. v. Sullivan, 376 U.S. 254, 270 (1964))); Lee, *supra* note 60, at 770.

> One possible explanation of the Court's unwillingness to consider the discriminatory effects of facially neutral regulations is its recognition that speaker- or content-based exceptions to time, place, and manner regulations could be unconstitutional or at least unmanageable. . . . Because the Court places paramount importance on the concept of content neutrality, it is unlikely that the Court will exempt certain communicators from facially neutral rules that create discriminatory effects.

Id. (footnote omitted).

160. *See Clark,* 468 U.S. at 313-14 n.14 (Marshall, J., dissenting).

> A content-neutral regulation that restricts an inexpensive mode of communication will fall most heavily upon relatively poor speakers and the points of view that such speakers typically espouse. . . . [T]his case . . . lends credence to the charge that judicial administration of the First Amendment, in conjunction with a social order marked by large disparities in wealth and other sources of power, tends systematically to discriminate against efforts by the relatively disadvantaged to convey their political ideas. In the past, this Court has taken such considerations into account in adjudicating the First Amendment rights of those among us who are financially deprived . . . .

Id.; see also Lee, *supra* note 60, at 806 ("In addition to symbolic purposes, communicators select places or modes of expression because of factors such as cost and the ability to reach the relevant audience. . . . [F]or poorly financed communicators, some alternatives will be inadequate.").

161. New York Pub. Interest Research Group, Inc. v. Village of Roslyn Estates, 498 F. Supp. 922 (E.D.N.Y. 1979).

> [T]o require prior consent is to require a canvasser to contact individual homeowners prior to canvassing by some other means, perhaps by the mails or telephone. To impose that added burden on those "little people" with "poorly financed causes" would be to effectively prohibit them from soliciting altogether. First Amendment rights may not be so restricted.

Id. at 930; *see also Wisconsin Action Coalition,* 767 F.2d at 1251; Lee, *supra* note 60, at 764-65.

> Courts should be skeptical of facially neutral time, place, and manner regulations. The late Professor Harry Kalven observed, "We would do well to avoid the occasion for any new epigrams about the majestic equality of the law prohibiting the rich man, too, from distributing leaflets or picketing." Inexpensive media—such as leaflets, parades, street demonstrations, and picketing—are simply more important to poorly financed communicators than to the wealthy.

Id. (footnotes omitted).

162. *See* Lee, *supra* note 60, at 765 ("On rare occasions, the [Supreme] Court has been

Further, existing decisions regarding content-neutral regulations show that time, place, and manner restrictions on begging warrant more exacting judicial scrutiny. While several cases have acknowledged "traffic control" to be a "substantial" governmental interest, each of these cases contains elements distinguishable from the beggar's situation. In *Heffron v. International Society for Krishna Consciousness,*[163] the Supreme Court observed that "it is apparent that the State's interest in the orderly movement and control of . . . an assembly of persons is a substantial consideration."[164] However, the Court also mentioned that "consideration of a forum's special attributes is relevant to the constitutionality of a regulation since the significance of the governmental interest must be assessed in light of the characteristic nature and function of the particular forum involved."[165]

The particular forum involved in *Heffron* was a state fair where the municipality faced uncommon crowd control problems. The Court itself preserved the distinction between the fair and a public street or sidewalk:

> A street is continually open, often uncongested, and constitutes not only a necessary conduit in the daily affairs of a locality's citizens, but also a place where people may enjoy the open air or the company of friends and neighbors in a relaxed environment. . . . The flow of the crowd

---

sensitive to the discriminatory effects of facially neutral regulations. . . . [However] the Court generally has not considered [such effects]." (construing *Clark,* 468 U.S. at 288, *Taxpayers for Vincent,* 466 U.S. at 789, and *Heffron,* 452 U.S. at 640)); *see also Taxpayers for Vincent,* 466 U.S. at 812 n.30.

> Although the Court has shown special solicitude for forms of expression that are much less expensive than feasible alternatives and hence may be important to a large segment of the citizenry . . . this solicitude has practical boundaries, *see, e.g.,* Kovacs v. Cooper, 336 U.S. 77, 88-89 (1949) ("That more people may be more easily and cheaply reached by sound trucks . . . is not enough to call forth constitutional protection for what those charged with public welfare reasonably think is a nuisance when easy means of publicity are open."). *See also* Metromedia, Inc. v. San Diego, 453 U.S. at 549-50 (Stevens, J., dissenting in part) (ban on graffiti constitutionally permissible even though some creators of graffiti may have no equally effective alternative means of public expression).

Id.; Lee, *supra* note 60, at 757-58 ("Although the 'lonely pamphleteer,' 'little people,' and 'workingman's means of communication' are powerful images in the Supreme Court's First Amendment rhetoric, recent decisions reveal that the Court gives 'only the most cursory' scrutiny to time, place, and manner regulations of inexpensive forms of communication." (footnotes omitted)).

163. 452 U.S. at 640.

164. *Id.* at 650. Indeed, the Court based its holding on this interest:

> Petitioners assert two other state interests in support of the Rule. First, petitioners claim that the Rule forwards the State's valid interest in protecting its citizens from fraudulent solicitations, deceptive or false speech, and undue annoyance. Petitioners also forward the State's interest in protecting the fairgoers from being harassed or otherwise bothered, on the grounds that they are a captive audience. In light of our holding that the Rule is justified solely in terms of the State's interest in managing the flow of the crowd, we do not reach whether these other two purposes are constitutionally sufficient to support the imposition of the Rule.

Id. at 650 n.13 (citations omitted).

165. *Id.* at 650-51.

> and demands of safety are more pressing in the context of the Fair. As such, any comparisons to public streets are necessarily inexact.[166]

Similarly, in *Metromedia, Inc. v. City of San Diego,*[167] the Supreme Court held the interest in traffic safety to be substantial.[168] Using similar logic, the Fifth Circuit, in *International Society for Krishna Consciousness v. City of Baton Rouge,*[169] upheld an ordinance restricting the solicitation of donations from the occupants of stopped motor vehicles. These cases, however, were concerned with vehicular rather than pedestrian traffic. The Fifth Circuit, like the *Heffron* Court, justified its holding in part on the continued availability of the sidewalk as a forum for solicitation.[170] As these courts correctly imply, the governmental interest in controlling traffic is of dubious "substantiality" when the sidewalk is the relevant location.

Justice Blackmun, concurring and dissenting in *Heffron,* indicated that solicitation presents inherently greater threats to traffic control than does the ordinary dissemination of ideas or literature: "[S]ales and the collection of solicited funds not only require the fairgoer to stop, but also 'engender additional confusion . . . because they involve acts of exchanging articles for money, fumbling for and dropping money, making change, etc.'"[171] Lower courts have occasionally employed this language as justification for upholding solicitation regulations.[172] As in *Heffron,* however, these courts distinguished the public sidewalk from the forum in question, expressed doubts about extending their holding to that locale, and cited the sidewalk's continued availability as an alternative forum.[173] Further, Justice Blackmun's concerns are simply inapplicable to begging, as there is usually no exchange and no change to be made when one gives to a beggar.

The interest in traffic control stems from a municipality's interest in the comfort and convenience of its citizens. With regard to residential homes, the comfort and convenience interest is "substantial" because privacy interests are at stake.[174] However, on the sidewalk,[175] where first amendment

---

166. *Id.* at 651.

167. 453 U.S. 490 (1981).

168. *Id.* at 509.

169. 876 F.2d 494 (5th Cir. 1989).

170. *Id.* at 498 ("The ordinance prohibits only the solicitation of funds from occupants of motor vehicles. It does not prohibit solicitation of funds from pedestrians, door-to-door canvassing, or telephone solicitations."); *see also* ACORN v. City of Phoenix, 798 F.2d at 1271; National Anti-Drug Coalition, Inc. v. Bolger, 737 F.2d 717, 720-21 (7th Cir. 1984).

171. *Heffron,* 452 U.S. at 665 (Blackmun, J., concurring in part and dissenting in part) (quoting International Soc'y for Krishna Consciousness v. Heffron, 299 N.W.2d 79, 87 (Minn. 1980), *rev'd,* 452 U.S. 640 (1980)).

172. *See Belsky,* 799 F.2d at 1489-90; *National Anti-Drug Coalition,* 737 F.2d at 726-27.

173. *See Belsky,* 799 F.2d at 1489 n.9; *National Anti-Drug Coalition,* 737 F.2d at 728-29.

174. Hynes v. Mayor of Oradell, 425 U.S. 610, 619 (1976).

> There is . . . no absolute right under the Federal Constitution to enter on the private premises of another and knock on a door for any purpose, and the police

interests are at stake,[176] one must endure a certain measure of annoyance.[177]

---

power permits reasonable regulation for public safety. We cannot say . . . that door-to-door canvassing and solicitation are immune from regulation under the State's police power, whether the purpose of the regulation is to protect from danger or to protect the peaceful enjoyment of the home.

Id.; see also Gregory v. City of Chicago, 394 U.S. 111, 118 (1969) (Black, J., concurring).

> [N]o mandate in our Constitution leaves States and governmental units powerless to pass laws to protect the public from the kind of boisterous and threatening conduct that disturbs the tranquility of spots selected by the people either for homes . . . or for public and other buildings that require peace and quiet to carry out their functions, such as courts, libraries, schools, and hospitals.

Id.

175. *See Erznoznik,* 422 U.S. at 209 ("[S]elective restrictions have been upheld only when the speaker intrudes on the privacy of the home, or the degree of captivity makes it impractical for the unwilling viewer or auditor to avoid exposure." (citation and footnote omitted)); Murdock v. Pennsylvania, 319 U.S. 105, 116 (1943).

> [T]he present ordinance is not directed to the problems with which the police power of the state is free to deal. It does not cover, and petitioners are not charged with, breaches of the peace. They are pursuing their solicitations peacefully and quietly. Petitioners, moreover, are not charged with or prosecuted for the use of language which is obscene, abusive, or which incites retaliation. Nor do we have here . . . state regulation of the streets to protect and insure the safety, comfort, or convenience of the public. Furthermore, the present ordinance is not narrowly drawn to safeguard the people of the community in their homes against the evils of solicitations.

Id. (citation omitted); *see also supra* notes 139-40 and accompanying text.

176. Kirkwood v. Loeb, 323 F. Supp. 611 (W.D. Tenn. 1971).

> The Court is not unmindful of the City's interests in keeping its streets and sidewalks open for proper use and for maintaining a peaceful, crime-free society wherein all persons may enjoy freedom from fear of assault and harm. However, these interests must also accommodate and be balanced against the constitutional liberty of all individuals to be peaceably upon the public thoroughfares. While the City has a legitimate interest in regulating traffic, both pedestrian and vehicular, and in maintaining law and order, it must do so in a manner not encroaching upon individual freedoms.
>
> This issue has most often arisen in cases which involved the rights of individuals to access to the streets for the purpose of exercising First Amendment freedoms of speech and peaceful assembly. There is also the right to be upon the public streets which is broader than the right to be upon the streets to disseminate information and peaceably assemble to redress grievances. These rights are not themselves absolute nor beyond reasonable restraint, but the right to use the public thoroughfares cannot be at the whim or caprice of a policeman.

Id. at 615 (citation omitted).

177. *See Kokinda,* 866 F.2d at 702.

> First Amendment activities, conducted on busy pedestrian walkways such as this one, may cause some inconvenience to the flow of traffic. It is, however, the volume of traffic that makes sidewalks a particularly public and therefore appealing forum for public discourse. Surely congestion and inconvenience are not the end of the matter. The First Amendment requires that society tolerate some inconvenience in public forums to protect the values of free expression. If expressive activities were limited to the corners of parks where no one goes, there would be no public forum doctrine.

Id.; see also Erznoznik, 422 U.S. at 210-11 ("Much that we encounter offends our aesthetic, if not our political and moral, sensibilities. Nevertheless, the Constitution does not permit government to decide which types of otherwise protected speech are sufficiently offensive to

The nation's founders chose not to "exalt order at the cost of liberty."[178] The above-cited courts' efforts to preserve the public sidewalk as an alternative forum were based on this insight. Thus, content-neutral restrictions on begging that promote comfort and convenience should fail if they do not reserve the sidewalk as an available alternative for beggars. As the court in *C.C.B. v. State*[179] stated,

> The City's alleged legitimate and compelling interest is its duty and responsibility under its police power to . . . prevent the blocking of vehicle and pedestrian traffic. That lofty goal must be measured and balanced against the rights of those who seek welfare and sustenance for themselves, by their own hand and voice rather than by means of the muscle and mouths of others. We have learned through the ages that "charity begins at home," and if so, the less fortunate of our societal admixture should be permitted, under our system, to apply self help.[180]

While content-neutral regulations are generally evaluated under relaxed scrutiny, the Court should nevertheless strengthen its review when traditional public forum activity is involved. Unlike most speakers, sidewalk beggars cannot be outlawed on the assumption that ample alternatives exist for them to make their pleas. Begging ordinances framed as traffic control measures, while facially neutral, should be held unconstitutional because the government's interests are not substantial enough to meet the required burden. Begging poses no greater threat to orderly pedestrian movement than does everyday speech, and the individual's interest in seeking the means to his survival surely outweighs the government's interest in facilitating sidewalk traffic.

---

require protection for the unwilling listener or viewer."); People v. Fogelson, 21 Cal. 3d 158, 166 n.8, 577 P.2d 677, 681 n.8, 145 Cal. Rptr. 542, 546 n.8 (1978).

> [I]t is important to 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. "The man who goes . . . to a public place must expect to meet and mingle with all classes of people. He cannot ask, to suit his caprice or prejudice or social views, that this or that man shall be excluded because he does not wish to associate with them."

Id. (quoting *In re* Cox, 3 Cal. 3d 205, 224, 474 P.2d 992, 1005, 90 Cal. Rptr. 24, 37 (1970)).

178. *Cf. Consolidated Edison,* 447 U.S. at 595 (Rehnquist, J., dissenting). Justice Rehnquist, however, would not accord "liberty" status to every activity occurring on the street:

> Nor do I think those who won our independence, while declining to "exalt order at the cost of liberty," would have viewed a merchant's unfettered freedom to advertise in hawking his wares as a "liberty" not subject to extensive regulation in light of the government's substantial interest in attaining "order" in the economic sphere.

Id.

179. 458 So. 2d 47 (Fla. Dist. Ct. App. 1984).

180. *Id.* at 48.

CONCLUSION

The proper response to the begging problem is not to make it criminal. Beggars seek only sustenance, and they employ speech as the means toward achieving it. Because this speech occurs in the public forum and is sufficiently akin to other protected types of expression, it deserves the greatest judicial protection. Legislators cannot, consistent with the first amendment, stifle the message of suffering. Content-based regulations will almost always fail to pass constitutional muster, and traditionally deferential content-neutral measures should receive a more searching inquiry to account for the lack of ample alternatives for expression and the disproportionate impact on the needy.

Municipalities should respond to their citizens' complaints, but prohibiting begging will not make the "problem of the street people" disappear. Criminalization may be expedient, but it cannot be justified on the basis of preventing annoyance and preserving middle-class property values. Society's marginal members should not be made to trade their freedom as the price for the majority's reluctance to confront a perplexing problem. The Constitution was designed to prevent just such abuses. If its "pigeonholes"[181] do not provide adequate protection, then perhaps its spirit will tilt the balance in favor of individual freedom and dignity.

---

181. *See* Leedes, *Pigeonholes in the Public Forum,* 20 U. RICH. L. REV. 499 (1986); Dienes, *supra* note 62, at 110.

> [J]udicial opinions embodying conceptualistic, categorical analyses reflect under-the-table definitional balancing. Legal outcomes depend on whether the speech is placed in or out of the category, on what pigeonhole of law is determined to apply. In the process, free speech values tend to be minimized or ignored; government interests tend to be emphasized and exaggerated.

Id.

SYMPOSIUM

Paul Bator: Legislative and Administrative Courts Under Article III

INDIANA LAW JOURNAL
VOLUME 65, NUMBER 2