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The Wavering, Unpredictable Line Between “Speech” and Conduct: The Fate of Expressive Conduct After *Young v. New York City Transit Authority*, 903 F.2d 146

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THE WAVERING, UNPREDICTABLE LINE
BETWEEN "SPEECH" AND CONDUCT: THE
FATE OF EXPRESSIVE CONDUCT AFTER
*YOUNG v. NEW YORK CITY TRANSIT
AUTHORITY*, 903 F.2d 146 (2d Cir. 1990)

The first amendment to the United States Constitution protects the right to freedom of speech.¹ This fundamental right has been construed to include much more than spoken and written words: it protects ideas,² the solicitation of funds,³ and expressive conduct.⁴

1. The first amendment provides: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press, or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances." U.S. CONST. amend. I.

2. The first amendment protects the right to embrace and receive ideas. *See, e.g.*, *Board of Educ. v. Pico*, 457 U.S. 853, 866-69 (1982) (holding that school boards may not remove books from school libraries simply because they dislike the ideas contained in them); *Kleindienst v. Mandel*, 408 U.S. 753, 762-63 (1972) (the Constitution protects the right to receive information and ideas, regardless of their value to society); *Stanley v. Georgia*, 394 U.S. 557, 564 (1969) (same); *Martin v. Struthers*, 319 U.S. 141, 143 (1943) (the Constitution protects distribution of literature by Jehovah's Witnesses' irrespective of the ideas and views expressed therein).

3. *See, e.g.*, *Riley v. National Fed. of the Blind of N.C., Inc.*, 487 U.S. 781 (1988) (holding that the first amendment protects the solicitation of charitable contributions by an organization); *Secretary of State v. J.H. Munson Co.*, 467 U.S. 947 (1984) (same); *Village of Schaumburg v. Citizens for a Better Env.*, 444 U.S. 620 (1980) (same); *Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 761 (1976) (noting that oral solicitation requesting money is protected); *Buckley v. Valeo*, 424 U.S. 1, 25 (1976) (holding that political contributions are protected by the first amendment).

4. *See, e.g.*, *Cohen v. California*, 403 U.S. 15 (1971) (extending first amendment protection to an obscene sign on jacket in protest of the draft); *Tinker v. Des Moines Indep. Community School Dist.*, 393 U.S. 503 (1969) (upholding the right to wear black armbands to protest military action in Vietnam); *Amalgamated Food Employees v. Logan Valley Plaza, Inc.*, 391 U.S. 308 (1968) (holding that the first amendment protects picketing); *Brown v. Louisiana*, 383 U.S. 131, 142 (1966) (noting that first amendment rights are not limited to verbal expression); *James v. Board of Educ. of Central Dist. No. 1*, 461 F.2d 566 (2d Cir.) (same), *cert. denied*, 409 U.S. 1042 (1972); *West Virginia State Bd. of Educ. v. Barnette*, 319 U.S. 624, 632 (1943) (noting that a salute to the American flag constitutes communicative conduct). *See generally* T. EMERSON, THE

Protection of the latter has been grudgingly invoked and is afforded less protection against governmental regulation.⁵ It remains unclear what type of conduct is sufficiently expressive to warrant first amendment protection.⁶ In *Young v. New York City Transit Authority*,⁷ the Second Circuit Court of Appeals held that begging and panhandling do not constitute protected expressive conduct.⁸ Consequently, the prohibition of such conduct in the New York City subway system does not violate the first amendment.⁹

In *Young*, the New York Transit Authority prohibited begging and panhandling in the subway system.¹⁰ The Transit Authority later amended the regulation to allow limited solicitation by charitable, religious or political organizations in the subway system.¹¹ Homeless individuals, however, were still prohibited from soliciting contributions

SYSTEM OF FREEDOM OF EXPRESSION 80 (1970) (the author suggests that to determine whether an element is speech or conduct under the first amendment, consideration should be given to the predominant element constituting the conduct).

5. Spoken and written words are given greater first amendment protection than non-speech conduct. See *Texas v. Johnson*, 491 U.S. 397, 404 (1989) (the Government has greater freedom to restrict expressive conduct than the written and spoken word); *City of Dallas v. Stanglin*, 490 U.S. 19 (1989) (same); *United States v. O'Brien*, 391 U.S. 367, 376-77 (1968) (same); *Cox v. Louisiana*, 379 U.S. 536, 555 (1965) (conduct is not afforded the same protection as pure speech).

Although first amendment rights may be preferred, their protection is not absolute. See *Brown v. Peyton*, 437 F.2d 1228, 1231 (4th Cir. 1971) (noting that first amendment rights are not unlimited and the state has the authority to impose reasonable restrictions); *Thomas v. Collins*, 323 U.S. 516, 529-30 (1945) (the first amendment protects labor relations discussions); *Stromberg v. California*, 283 U.S. 359, 368-69 (1931) (the state may punish freedom of speech abuse through the exercise of its police power).

6. The first amendment is applicable to the states through the fourteenth amendment. See, e.g., *Virginia State Bd. of Pharmacy*, 425 U.S. 748, 748 n.1 (1976) (same); *Bigelow v. Virginia*, 421 U.S. 809, 811 (1975) (same); *Schneider v. New Jersey*, 308 U.S. 147, 160 (1939) (same).

7. 903 F.2d 146 (2d Cir. 1990). Petition for certiorari to the Supreme Court of the United States is currently pending.

8. *Id.* at 154. See *infra* notes 10-16 and accompanying text for discussion of the facts.

9. *Young*, 903 F.2d at 164. The court held that even if it assumed begging and panhandling constituted expressive conduct, the New York City Transit Authority's regulation was reasonable. *Id.* at 161.

10. *Id.* at 148; N.Y. COMP. CODES R. & REGS. tit. 21, § 1050.6(b) (1976).

11. *Young*, 903 F.2d at 149. This was added in a subsequent amendment to the original regulation, as N.Y. COMP. CODES R. & REGS. tit. 21, § 1050.6(c) (1989). This amendment provides that solicitation for charitable, religious or political causes is prohibited on subway trains in areas not entirely open to the public, within a specified distance from a token booth or entrance to an Authority office or tower. *Id.* The

under the regulation.¹² The Transit Authority adopted the ban on solicitation as an attempt to alter the public's negative perception that the subway system is dangerous and fraught with beggars.¹³

Plaintiffs filed suit challenging the Transit Authority's regulation prohibiting begging and panhandling in the subway as an unconstitutional violation of their first amendment rights.¹⁴ The district court held that begging constituted protected "speech" and permanently enjoined the Transit Authority from enforcing the regulation.¹⁵ The Second Circuit Court of Appeals reversed and held that begging enjoys no first amendment protection because such conduct bears no relationship to any particularized message.¹⁶

Transit Authority amended N.Y. COMP. CODES R. & REGS. tit. 21, § 1050.6(b) and (c). The amended rule provides:

(b) No person, unless duly authorized by the Authority, shall engage in any commercial activity upon any facility or conveyance. Commercial activities include (1) the advertising, display, sale, lease, offer for sale or lease, or distribution of food, goods, services or entertainment (including the free distribution of promotional goods or materials), and (2) the solicitation of money or payment for food, goods, services or entertainment. No person shall panhandle or beg upon any facility or conveyance.

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

12. To better effectuate the longstanding ban on begging and panhandling in the subway system, the Transit Authority commenced "Operation Enforcement" to increase public awareness of prohibition. *Young*, 903 F.2d at 149.

13. The Transit Authority undertook a study on the perceived problems experienced by the approximately 3.5 million daily passengers who use the subway system. *Id.* at 149. The study revealed that begging contributes to the public's perception that the subway is "fraught with hazard and danger." *Id.* Moreover, the study found that two-thirds of the subway riders have been coerced into giving beggars money. *Id.* Begging and panhandling in the subway system were distinguished from doing the same on streets since the public is better able to avoid beggars on a street than in the constricted passageways of the subway system. *Id.* at 150. See generally Gibbons, *Begging: To Give or Not to Give*, TIME, Sept. 5, 1988, at 68 ("The sense of threat (of panhandling) is strongest of all in the subway, the city's roaring underworld, where beggars play on the tight, visceral fear of passengers riding the trains.").

14. 729 F. Supp. 341 (S.D.N.Y. 1990). The Legal Action Center for the Homeless filed a class action suit on behalf of itself and two homeless men, William B. Young and Joseph Walley, as representative plaintiffs for homeless and needy who earn their means of support through begging and panhandling in the New York City subway system. *Id.* at 345.

15. 729 F. Supp. at 359, 360. The district court concluded that the conduct of begging included sufficient communicative aspects to merit first amendment protection. Furthermore, the court stated there is no real distinction between solicitation of funds by a charitable organization and an analogous request by an individual on his own behalf. *Id.* at 352.

16. *Young*, 903 F.2d at 164. The court vacated the district court's permanent in-

First amendment rights are fundamental and occupy a superior status in our society.¹⁷ The first amendment protects both the freedom to believe and the freedom to act.¹⁸ Although the freedom to believe is absolute, the freedom to act is subject to regulation for the protection of society.¹⁹ Any regulation of action must be reasonable²⁰ and cannot unduly infringe upon individual liberty.²¹ Absent a compelling governmental interest, freedom of expression must predominate.²² Unfortunately, the Supreme Court has yet to articulate an explicit test for determining when conduct becomes so intertwined with expression that it is accorded the protected status of symbolic speech.²³

One of the first cases to extend first amendment protection to expressive conduct was *Stromberg v. California*.²⁴ In *Stromberg*, a member

junction against the subway system. *Id.* The *Young* court was asked to decide the constitutionality of the New York Penal Law under the due process clause of the New York State Constitution. First, the court determined that the litigants had not established an actual "case or controversy" required by article III of the United States Constitution. *Id.* at 162. Next, the court assumed that even if a case or controversy had been established, the court lacked pendent jurisdiction over the issue. *Id.* at 163.

17. *But see* *Brown v. Peyton*, 437 F.2d 1228, 1231 (4th Cir. 1971) (noting that first amendment rights are not absolute; the state has authority to impose restrictions).

18. *See Cantwell v. Connecticut*, 310 U.S. 296, 303-04 (1940) (noting that the freedom of conscience beliefs are absolute); *see also* *McDaniel v. Paty*, 435 U.S. 618, 626-27 (1978) (noting that the first amendment includes the freedom to vocalize and practice beliefs).

19. *See Cantwell*, 310 U.S. at 303-04; *see also* *McDaniel*, 435 U.S. at 626-27.

20. *See Cantwell*, 310 U.S. at 304 (striking down a regulation barring ministers from candidacy for convention delegates because the first amendment protects the freedom of belief); *see also* *McDaniel*, 435 U.S. at 628 (same).

21. *Spence v. Washington*, 418 U.S. 405, 417 (1974) (Rehnquist & White, J.J., dissenting) (citing *Chaplinsky v. New Hampshire*, 315 U.S. 568, 571 (1942)).

22. *United Steelworkers v. Sadlowski*, 457 U.S. 102 (1982).

23. Nimmer, *The Meaning of Symbolic Speech Under the First Amendment*, 21 UCLA L. REV. 29, 30 (1973).

24. 283 U.S. 359 (1931). *Stromberg*, perhaps the catalyst for the extension of first amendment application to nonverbal conduct, was followed by other cases where expressive conduct was deemed protected. *See Tinker v. Des Moines Indep. Community School Dist.*, 393 U.S. 503 (1969) (upholding the right to wear black armbands to protest American involvement in the Vietnam War); *Brown v. Louisiana*, 383 U.S. 131, 141-42 (1966) (upholding the right to conduct a silent sit-in at a library because first and fourteenth amendment freedom of speech rights "are not confined to verbal expression"); *James v. Board of Educ. of Central Dist. No. 1*, 461 F.2d 566 (2d Cir. 1972) (upholding the right to wear black armbands to protest American involvement in the Vietnam War), *cert. denied*, 409 U.S. 1042 (1972) (same).

of the Young Communist League²⁵ was convicted under a California statute that prohibited the display of the Communist flag in symbolic opposition to the United States government.²⁶ The United States Supreme Court reversed the conviction, holding that the first amendment protected the display of the Communist flag, and stated that the opportunity for free political expression is fundamental to our constitutional system.²⁷ Accordingly, the Court held that the statute was an impermissible restraint on the exercise of free speech.²⁸

In a decision seemingly contrary to *Stromberg*, the Supreme Court developed a test to regulate nonspeech conduct in *United States v. O'Brien*.²⁹ In *O'Brien*, the defendant publicly burned his draft card to protest the Vietnam War.³⁰ The district court convicted O'Brien of violating a federal statute which made the intentional destruction of a draft card a criminal offense.³¹ The First Circuit Court of Appeals reversed the conviction, holding that O'Brien's act of burning the selective service card was protected "speech" under the first amendment.³²

25. The Young Communist League is an international organization associated with the Communist Party. *Stromberg*, 283 U.S. at 362.

26. *Id.* at 360. The relevant statute provided, in pertinent part:

Any person who displays a red flag, banner or badge or any flag, badge, banner, or device of any color or form whatever in any public place or in any meeting place or public assembly, or from or on any house, building or window as a sign, symbol or emblem of opposition to organized government or as an invitation or stimulus to anarchistic action or as an aid to propaganda that is of a seditious character is guilty of a felony.

CAL. PENAL CODE § 403a (West 1919) (repealed 1933).

27. *Stromberg*, 238 U.S. at 369.

28. *Id.* at 368. In his dissent, Justice Butler emphasized that the question of whether the display of the flag is protected by the first amendment was not before the Court. *Id.* at 376.

29. 391 U.S. 367 (1968). The *O'Brien* Court distinguished *Stromberg* on the grounds that the statute at issue there was directly aimed at the suppression of communication; therefore, it could not be upheld as a regulation of noncommunicative conduct. *O'Brien*, 391 U.S. at 382. See *supra* note 26 and accompanying text for a discussion of the statute in *Stromberg*.

30. *O'Brien*, 391 U.S. at 369.

31. *Id.* at 369. The defendant burned his selective service certificate in violation of § 462(b) of the Universal Military Training and Service Act of 1948 which makes it a criminal offense for anyone to forge, alter, knowingly destroy or mutilate their selective service certificate. *Id.* at 370. The district court noted that the Universal Military Training and Service Act of 1948 did not violate the first amendment on its face. *Id.* at 370-71.

32. *O'Brien v. United States*, 376 F.2d 538, 541 (1st Cir. 1967). *But cf.* *Smith v. United States*, 368 F.2d 529 (8th Cir. 1966) (upholding the Universal Military Training

The Supreme Court reversed and upheld both the statute and the conviction.³³ The Court rejected the notion that an unlimited array of conduct constitutes protected "speech" whenever the person performing the conduct intends to convey an idea.³⁴ Moreover, the Court held that when "speech" and "non-speech" elements are incorporated into a specific act, the government can impose reasonable restrictions on the protected component if it can articulate a sufficient interest in regulating the "non-speech" component.³⁵ Thus, the Court determined that O'Brien's conduct in burning his draft card was not sufficiently expressive to constitute "speech" within the meaning of the first amendment.³⁶

The Court explained the rationale for protecting expressive conduct in *Spence v. Washington*.³⁷ In an attempt to associate the American flag with peace instead of war and violence, the defendant in *Spence* temporarily affixed a peace symbol to a flag he owned and hung it from his apartment window.³⁸ The defendant was convicted of violating a

and Service Act in the face of the same constitutional claims); *United States v. Miller*, 367 F.2d 72 (2d Cir. 1966), cert. denied, 386 U.S. 911 (1967) (Douglas, J., dissenting).

33. *O'Brien*, 391 U.S. at 386.

34. *Id.* at 376. See also *Spence v. Washington*, 418 U.S. 405 (1974) (to determine whether activity is protected by the first amendment, courts look at whether the conduct contains sufficient communicative elements).

35. *O'Brien*, 391 U.S. at 376. The Court held that the government regulation may impose restrictions on expressive conduct if: (1) it is within the constitutional power of the Government; (2) it furthers an important or substantial governmental interest; (3) the governmental interest is unrelated to the suppression of free expression; and (4) the incidental restriction on alleged first amendment freedoms is not greater than that necessary to further the asserted governmental interest. *Id.* at 377. These four prongs are referred to as the "*O'Brien* test."

In his concurring opinion, Justice Harlan made clear that *O'Brien* did not foreclose first amendment claims when an expressive barrier prevents the "speaker" from communicating with a specific group of people he could not legally reach in another way. *Id.* at 388-89 (Harlan, J., concurring). Harlan noted, however, that this was not a concern in *O'Brien* because O'Brien had other means by which to communicate his message. *Id.* at 389 (Harlan, J., concurring).

36. *Id.* at 376. The Court noted that even if such conduct constituted "speech" within the meaning of the first amendment, the regulation on the protected expression satisfied the four prongs of the *O'Brien* test. See *supra* note 35 and accompanying text for discussion of the *O'Brien* test.

37. 418 U.S. 405 (1974). See J. NOWAK, R. ROTUNDA & J. YOUNG, CONSTITUTIONAL LAW 989 (3d ed. 1986) (noting a transition seems to have occurred from the Court's distinction between speech and conduct in *O'Brien* to a balancing test of first amendment interests against other governmental interests in *Spence*).

38. *Spence*, 418 U.S. at 405. Spence hung the altered flag to protest the invasion of

state statute which forbade the display of the United States flag with an attached symbol or figure.³⁹ The Supreme Court reversed the conviction because the defendant's activity was sufficiently communicative to merit first amendment protection.⁴⁰ The Court examined Spence's activity in conjunction with its context, and articulated a two-part test to determine when conduct may be protected as "speech."⁴¹ First, the actor must intend to convey a specific message; and second, the circumstances surrounding the activity must create a great likelihood that those who view the conduct will be able to perceive its intended message.⁴² Because Spence hung the altered flag to protest unpopular military action in Vietnam, the Court concluded that his conduct constituted a form of protected expression.⁴³

In 1980, the Supreme Court extended the freedom of expression to charitable solicitations in *Village of Schaumburg v. Citizens for a Better Environment*.⁴⁴ In *Village of Schaumburg*, the Court struck down an ordinance which forbade charitable solicitations by organizations that do not use at least seventy-five percent of their receipts for "charitable purposes."⁴⁵ Citizens for a Better Environment, a nonprofit organiza-

Cambodia and the killings at Kent State University—events which occurred a few days prior to his arrest. *Id.*

39. *Id.* at 407. Spence was charged with violating the state's "improper use" statute. *Id.*

40. *Id.* The Court also took into consideration the fact that the flag was owned by appellant, displayed on private property and the fact that Spence did not engage in disorderly conduct. *Id.*

41. *Id.* at 409-10. The Court determined that because appellant altered the flag to protest recent political events, his conduct was sufficiently expressive. *Id.* at 410.

42. *Spence*, 418 U.S. at 410, 411. See Nimmer, *supra* note 23, at 37 n.36 (explaining that although an actor may intend his conduct to convey a message, the incidental non-meaning effect should not divest the conduct of first amendment protection). *But cf.* Note, *Symbolic Conduct*, 68 COLUM. L. REV. 1091, 1117 n.35 (1968) (arguing that there must be no intent other than communicative intent in order to receive first amendment protection).

43. *Spence*, 418 U.S. at 410.

44. 444 U.S. 620, *reh'g denied*, 445 U.S. 972 (1980). For a discussion of charitable solicitations, see Comment, *Charitable Solicitation and the First Amendment: Village of Schaumburg v. Citizens for a Better Environment*, 21 URB. L. ANN. 273, 285 (1981) (noting that the Supreme Court in *Village of Schaumburg* failed to clearly articulate the requisite elements for the extension of first amendment protection to charitable solicitations).

45. *Village of Schaumburg*, 444 U.S. at 639. "Charitable purposes" did not include solicitation expenses, salaries, overhead and other administrative expenses. *Id.* at 624.

The Village enacted the ordinance to prevent fraud. *Id.* at 636. The Court noted that the substantial governmental interests in protecting the public from fraud, crime and

tion supporting environmental programs, routinely canvassed door-to-door to distribute literature, answer questions and solicit contributions.⁴⁶ The organization's educational function was an important factor that led the Court to strike down the ordinance and hold that solicitation and educative speech are inherently intertwined.⁴⁷ Consequently, charitable appeals for funds involve a variety of speech interests that invoke the first amendment's protection.⁴⁸

undue annoyance were only peripherally related to the constraint. *Id.* at 636. These interests could be better served by means less intrusive than a direct ban on charitable solicitation. *Id.* at 637.

Thus, the Court in *Village of Schaumburg* demonstrates that the burden of proof is on the government to show that the regulation of charitable solicitation is necessary to protect a compelling government interest. *Id.* at 636. *But see*, National Found. v. City of Fort Worth, 415 F.2d 41, 46 (5th Cir. 1969) (placing the burden of proof on the charitable organization to show that the ordinance is not necessary to protect a significant governmental interest), *cert. denied*, 396 U.S. 1040 (1970). *See generally* Comment, *supra* note 44, at 284 (concluding that the Court's decision in *Village of Schaumburg* is consistent with the Court's history of qualifying the power of government to regulate free speech interests).

In post-*Village of Schaumburg* cases, the Supreme Court has consistently extended first amendment protection of freedom of speech to the charitable solicitation of funds. For example, in *Riley v. National Fed'n of the Blind of N.C., Inc.*, 487 U.S. 781 (1988), the Court held that state regulation of charitable solicitation by professional fundraisers violated the first amendment. *Id.* at 791. The Court declared, "[t]he first amendment mandates we presume that speakers, not the government, know best both what they want to say and how to say it" and that the purpose of the first amendment is to deter the government from assuming a "guardianship of the public mind." *Id.* The Court feared that banning solicitation would thwart the flow of information peculiarly connected with such solicitation and advocacy would cease. *Id.* at 796. *See also* *Secretary of State v. Joseph H. Munson Co.*, 467 U.S. 947 (1984) (striking down a state statute limiting charities' expense payments to twenty-five percent of amount as an impermissible restraint on freedom of speech).

46. *Village of Schaumburg*, 444 U.S. at 624, 626. *See also* *Hynes v. Mayor of Oradell*, 425 U.S. 610 (1976) (to protect the public from crime and excessive hindrances, door-to-door solicitation is subject to reasonable restrictions).

47. *Village of Schaumburg*, 444 U.S. at 632. *But cf.* *Breard v. Alexandria*, 341 U.S. 622 (upholding a criminal ordinance that prohibited door-to-door solicitation of magazine subscriptions without a homeowner's request because the homeowner's privacy interest outweighs the publisher's interest), *reh'g denied*, 342 U.S. 843 (1951).

48. *Village of Schaumburg*, 444 U.S. at 632. These protected "speech interests" are deemed to be the informative elements, the expression of ideas and viewpoints, and the promotion of causes. *Id.* *See also* *Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 761 (1976) (declaring that speech is protected "even though it may involve a solicitation to purchase or otherwise pay or contribute money") (emphasis added). *See generally* *Cantwell v. Connecticut*, 310 U.S. 296, 304 (1940) (striking down a statute that outlawed the solicitation of money or objects of value by any organization without prior approval declared invalid).

The *Village of Schaumburg* Court ascertained that it is clear that the Supreme

In *Clark v. Community for Creative Non-Violence*,⁴⁹ the Supreme Court bypassed the issue of whether sleeping in tents constituted expressive conduct.⁵⁰ In *Clark*, the Community for Creative Non-Violence sought to demonstrate the plight of the homeless in violation of a National Park Service regulation that banned camping in national parks outside of designated campgrounds.⁵¹ The Court of Appeals for the District of Columbia held that prohibiting protesters from sleeping in tents would significantly impinge upon their first amendment rights.⁵² The Supreme Court reversed, holding that although sleep may constitute expressive conduct,⁵³ it may be subject to reasonable regulation.⁵⁴ Thus, even though symbolic expression is able to pass the

Court's history of cases protect speech utilized to solicit payments or contributions. *Village of Schaumburg*, 444 U.S. at 633. See *Bates v. State Bar of Ariz.*, 433 U.S. 350, 379 (1977) (stating that attorney advertising is entitled to first amendment protection); *New York Times Co. v. Sullivan*, 376 U.S. 254, 265-66 (1964) (holding that expression does not lose its constitutional protection simply because it is a paid advertisement).

In contrast, Justice Rehnquist's dissent in *Village of Schaumburg* supported the view that a mere monetary request is not protected and that homeowners should be shielded from such panhandlers. *Village of Schaumburg*, 444 U.S. at 644 (Rehnquist, J., dissenting).

49. 468 U.S. 288 (1984).

50. *Id.* at 293.

51. *Id.* at 292. The group desired permission to sleep in Lafayette Park, located across from the White House. *Id.* at 289. The National Park Service relied upon 36 C.F.R. §§ 50.19(e)(8) and 50.27(a) (1983) (statute regulating temporary structure use and camping).

52. *Community for Creative Non-Violence v. Watt*, 703 F.2d 586 (D.C. Cir. 1983). The district court stated below that the Supreme Court has not sanctioned an "unwavering first amendment line between speech and conduct." *Id.* at 592 n.13.

53. *Clark*, 468 U.S. at 293. The *Clark* Court stated, "We need not differ with the view of the Court of Appeals that overnight sleeping in connection with the demonstration is expressive conduct protected to some extent by the first amendment. We assume, for present purposes, but do not decide, that such is the case." *Id.* Cf. *United States v. O'Brien*, 391 U.S. 367, 376 (1968) (holding that assuming *arguendo* that the alleged communicative aspect is sufficient to be protected does not necessarily imply that the act is protected).

54. *Clark*, 468 U.S. at 293. The regulation in *Clark* satisfied the four-part *O'Brien* test. First, the regulation was justified without reference to the content of the regulated speech. Second, the regulation was narrowly tailored to serve a significant governmental interest. Third, the restriction was reasonable. Finally, the regulation left open alternative means of communication. *Id.*

The *Clark* Court reasoned that any expression may be restricted by reasonable time, place, and manner restrictions. *Id.* at 293. See also Comment, *National Park Service Regulations Prohibiting "Camping" as Applied to Demonstrators Who Wish to Sleep in Public Parks Does Not Violate First Amendment Rights: Clark v. Community for Creative Non-Violence*, 10 T. MARSHALL L.J. 667 (1984).

Spence test,⁵⁵ it may be forbidden or limited if the conduct itself may be constitutionally regulated.⁵⁶

Recently, however, the Supreme Court extended the first amendment's protection to purely symbolic conduct in *Texas v. Johnson*.⁵⁷ In *Johnson*, a protester was convicted of burning an American flag in violation of a Texas statute that prohibited the intentional desecration of the flag.⁵⁸ Johnson burned the flag during the Republican National Convention in protest to the policies of the Reagan administration.⁵⁹ The Texas Court of Criminal Appeals reversed Johnson's conviction, recognizing that Johnson's conduct constituted protected symbolic speech.⁶⁰ The United States Supreme Court affirmed, holding that Johnson's burning of the flag constituted expressive conduct.⁶¹ The *Johnson* Court deemed the flag to be "[p]regnant with expressive con-

55. For a discussion of the *Spence* test, see *supra* note 42 and accompanying text.

56. *Clark*, 468 U.S. at 293. Conduct can be regulated if the regulation is narrowly drawn to further a substantial governmental interest, and if the interest is unrelated to the suppression of free speech. *Id.* (citing *O'Brien*, 391 U.S. at 367).

57. 491 U.S. 397 (1989). *But see* *County of Allegheny v. ACLU*, 492 U.S. 573 (1989) (a divided Court decided that the display of a creche violated the first amendment's establishment clause).

58. *Johnson*, 491 U.S. at 398. Johnson was convicted of violating the Texas Penal Code which defines desecration as physical mistreatment which the actor knows will seriously offend any persons likely to observe or discover the action. TEX. PENAL CODE ANN. § 42.09 (b) (Vernon 1989).

59. *Johnson*, 491 U.S. at 398.

60. *Johnson v. State*, 755 S.W.2d 92 (Tex. Crim. App. 1988).

61. *Johnson*, 491 U.S. at 397. The Court applied the *Spence* test. See *supra* notes 41-42 and accompanying text for a discussion of *Spence*. The Court compared Johnson's actions to a number of different actions deemed expressive by the Court in the past. *Johnson*, 491 U.S. at 404. See *United States v. Grace*, 461 U.S. 171, 176 (1983) (extending first amendment protection to picketing for cause); *Schacht v. United States*, 398 U.S. 58 (1970) (extending first amendment protection to individuals wearing American military uniforms in protest of Vietnam War); *Tinker v. Des Moines Indep. Community School Dist.*, 393 U.S. 503, 505 (1969) (students wearing black armbands to protest American involvement in Vietnam constituted expressive conduct); *Amalgamated Food Employees v. Logan Valley Plaza, Inc.*, 391 U.S. 308, 313-14 (1968) (extending first amendment protection to picketing for cause); *Brown v. Louisiana*, 383 U.S. 131, 141-42 (1966) (blacks conducting a sit-in in a "whites only" area to protest school segregation deemed expressive).

The *Johnson* Court also noted the particular communicative nature of the flag. *Johnson*, 491 U.S. at 404. See, e.g., *Spence v. Washington*, 418 U.S. at 409-10 (1974) (attaching a peace sign to the flag constitutes expressive conduct); *West Virginia State Bd. of Educ. v. Barnette*, 319 U.S. 624, 632 (1943) (saluting the flag is protected conduct); *Stromberg v. California*, 283 U.S. 359, 368-69 (1931) (display of the Communist flag is protected conduct).

tent.”⁶² Refusing to conclude that every action taken with respect to the flag is expressive, the Court took into account the context⁶³ in which the flag burning occurred.⁶⁴ Because Johnson acted to protest the policies of the Reagan administration, the Court viewed the flag burning as being sufficiently imbued with the elements of communication to warrant first amendment protection.⁶⁵

The *Johnson* decision reconfirms the need to scrutinize the governmental interest underlying a restriction of expressive conduct.⁶⁶ The fundamental principle underlying the first amendment is that the government may not prohibit the expression of an idea merely because society finds the idea itself offensive or disagreeable.⁶⁷ Furthermore, the *Johnson* Court emphasized that an important rationale behind the

62. *Johnson*, 491 U.S. at 405. The Court stated that the flag symbolizes the United States like the letters found in the word “America.” *Id.*

63. The Court’s approach mirrored the analytic framework laid out in *Spence*, 418 U.S. at 409 (relying on the context in which the conduct occurs to determine whether first amendment protection will be afforded). *See supra* notes 37-43 and accompanying text.

64. *Johnson*, 491 U.S. 397, 405.

65. *Id.* (citing *Spence*, 418 U.S. at 409).

66. *Id.* at 407. The Government’s asserted interests included: (1) preventing breaches of the peace; and, (2) preserving the flag as a symbol of national unity. *Id.* As for the State’s first concern, the Court held that the offensive nature of a certain expressive conduct does not necessarily imply that observers will be provoked to disturb the peace. *Id.* at 409. The Court next held the State’s second interest invalid because it related to the “suppression of free expression.” *Id.* at 410. Thus, the State’s interest in preserving the flag as a symbol of national unity did not justify a criminal statute prohibiting political expression. *Id.* at 420.

The Court concluded that Johnson was convicted for his objection to the policies of this country—expression fundamental to our first amendment values. *Id.* at 411. *See, e.g.*, *Boos v. Barry*, 485 U.S. 312 (1988) (the first amendment reflects a profound national commitment to the principle that debate on public issues should be uninhibited and wide open).

67. *Johnson*, 491 U.S. at 414. The courts have not yet recognized an exception to this principal. *Id.* *See, e.g.*, *Hustler Magazine, Inc. v. Falwell*, 485 U.S. 46, 55-56 (1988) (holding that the state’s interest in protecting public figures from emotional distress is not sufficient to deny first amendment protection to speech that is patently offensive); *City Council v. Taxpayers for Vincent*, 466 U.S. 789, 804 (1984) (noting that the government may not regulate speech in order to favor certain ideas at the expense of others); *Carey v. Brown*, 447 U.S. 455, 462-63 (1980) (state statute favoring one viewpoint over another impermissible); *Grayned v. Rockford*, 408 U.S. 104, 115 (1972) (noting that the government cannot restrict activity merely because of its message); *Brown v. Louisiana*, 383 U.S. 131, 142-43 (1966) (participation of blacks in a sit-in at a public library constitutionally protected); *Stromberg v. California*, 283 U.S. 359, 368-69 (1931) (display of Communist flag protected).

constitutional freedom of speech guarantee is the desire to incite controversy.⁶⁸ The Court noted that the purpose of the first amendment may be best served when it creates dissatisfaction with the status quo and incites citizens to action.⁶⁹

Cognizant of the Supreme Court's pronouncement in *Johnson*, the court in *Young v. New York City Transit Authority*⁷⁰ confronted a claim that panhandling in the subway constituted expressive conduct. In *Young*, the court concluded that begging is not protected expressive conduct,⁷¹ rejecting the district court's position that a needy person

68. The *Johnson* Court also noted that the "emotive impact of speech on its audience is not a 'secondary effect'" unrelated to the content of the expression itself. *Johnson*, 491 U.S. at 412 (citing *Barry*, 485 U.S. 312 (1988)).

69. 491 U.S. at 408-09. Precedents recognize that a principle function of free speech under our system of government is to invite dispute. It may best serve its purpose when it induces a condition of unrest, creates dissatisfaction with conditions as they are, or even stirs people to anger. *Id.* at 409 (citing *Terminello v. Chicago*, 337 U.S. 1, 4 (1949)). See also *Falwell*, 485 U.S. at 55-56 (first amendment protects ad parody caricature); *Coates v. Cincinnati*, 402 U.S. 611, 615 (1971) (striking down statute that prohibited "annoying" conduct); *Tinker v. Des Moines Indep. School Dist.*, 393 U.S. 503, 508-09 (1969) (schoolchildren's wearing of black armbands to protest the government's policy is protected); *Cox v. Louisiana*, 379 U.S. 536, 551 (1965) (civil rights demonstration near courthouse is protected conduct).

70. 903 F.2d 146 (2d Cir. 1990). See *supra* notes 10-17 and accompanying text for a detailed outline of the facts. Two lower court decisions not taken into account by the *Young* court but related to the constitutionality of begging regulations are *Ulmer v. Municipal Court*, 55 Cal. App. 3d 263, 127 Cal. Rptr. 445 (1976) and *C.C.B. v. State*, 458 So. 2d 47 (Fla. Dist. Ct. App. 1984). In *Ulmer*, the defendant was charged with "accosting another in a public place for the purpose of begging or soliciting for alms." *Ulmer*, 55 Cal. App. 3d at 265, 127 Cal. Rptr. at 446. The court held that because conveying information or ideas is not integral to the conduct of begging, first amendment protection will not be extended to protect such conduct. *Id.* at 266, 127 Cal. Rptr. at 447. The *C.C.B.* court distinguished the statute at issue in *Ulmer* from a total prohibition on beggars. *Id.* at 49-50. In making its determination, the *C.C.B.* court noted the statute in *Ulmer* only applies to those individuals who actually "accost" others and does not apply to those who merely sit around and do not approach the public for money. *Id.* at 49 (citing *Ulmer*, 55 Cal. App. 3d at 266, 127 Cal. Rptr. at 445). The *C.C.B.* court declared that "a total prohibition of begging or soliciting alms for oneself is an unconstitutional abridgement of the right to free speech" and that "protecting citizens from mere undue annoyance is not a sufficient compelling reason to absolutely deprive one of a first amendment right." *Id.* at 49 (citing *Coates*, 402 U.S. 611 (1971)).

71. *Young*, 903 F.2d at 153. The court concluded that speech is not inherent in the act of begging, nor is it a necessary part of the conduct. *Id.* at 154. Although the scope of this case comment is limited to the question of whether the activities of begging and panhandling constitute expressive conduct, the holding in *Young* does not ultimately rest on the distinction between speech and conduct, but on the satisfaction of the four elements of the *O'Brien* test. See *supra* notes 33-36 and accompanying text for a discussion of the *O'Brien* test; see also *infra* note 86 for a discussion of the different levels of

communicates when he extends his hand.⁷² The Second Circuit upheld the panhandling regulation on three separate grounds. The court first concluded that panhandlers do not have the intent to convey an idea, and even if they did, it is unlikely that the public would be able to ascertain the message.⁷³ Next, the court declared that not all conduct is speech.⁷⁴ Finally, the court concluded that begging and panhandling are not sufficiently similar to charitable solicitation so as to warrant first amendment protection.⁷⁵

The court first applied the *Spence* test⁷⁶ and determined that the element of intent was not satisfied by the conduct of begging and panhandling in the subway system.⁷⁷ In reaching its conclusion, the court stated that most individuals do not beg in order to communicate a specific message, but merely do so to collect money.⁷⁸ The court further determined that even if the beggar had the requisite intent to convey a specific message, it is unlikely that subway passengers would be able to discern the precise message.⁷⁹

judicial scrutiny the courts apply in determining the validity of governmental regulations which have an impact on the exercise of free speech.

72. *Young*, 903 F.2d at 150. Appellees accepted that the restrictions in the amended regulation were constitutionally valid. *Id.*

73. *See infra* notes 76-79 and accompanying text.

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

75. *See infra* notes 83-86 and accompanying text.

76. *See supra* note 42 and accompanying text for a discussion of the *Spence* test.

77. *Young*, 903 F.2d at 153. The *Spence* test was then applied with the conclusion that begging is not inherently intertwined with a "particularized message" and, the likelihood was not great that the message would be understood by those who viewed it. *Id.* at 153-54. The court expressed doubt as to whether begging and panhandling in subways have a sufficiently communicative character to justify constitutional protection. *Id.* at 153. *See Spence*, 418 U.S. at 410-12 (altered flag hung in protest to political event constituted protected expression); *Texas v. Johnson*, 491 U.S. 397, 405 (1989) (flag deemed to be "[p]regnant with expressive content.").

78. *Young*, 903 F.2d at 153.

79. *Id.* at 153-54. The court determined that even when an individual intends to communicate a particularized message through the act of begging, the context of the situation may deprive the conduct of any expressive element deserving of first amendment protection. *Id.* at 154.

The *Young* court acknowledged that although subway passengers generally understand the "generic message" expressed by begging, it falls far outside the scope of protected speech under the first amendment. *Id.* The Supreme Court declared in *City of Dallas v. Stanglin*, 490 U.S. 19, 25 (1989), "[i]t is possible to find some kernel of expression in almost every activity a person undertakes . . . but such a kernel is not sufficient to bring the activity within the protection of the first amendment." *Id.*

Second, the court applied the *O'Brien* test,⁸⁰ and rejected the position that all conduct can be labeled “speech” whenever the person intends to express an idea.⁸¹ The court reasoned that unlike inherently expressive conduct such as flag burning, begging in the subway is viewed as deviant behavior irrespective of an intent to convey a specific message.⁸²

Finally, the court reasoned that begging is not sufficiently analogous to the charitable solicitation deemed protected in *Village of Schaumburg*.⁸³ The court distinguished charitable solicitation from begging because charitable solicitation has a “sufficient nexus” with a variety of first amendment interests.⁸⁴ According to the court, organized charities serve the public good by enhancing communication and disseminating ideas, while panhandling in the subway is merely a “menace to the common good.”⁸⁵ Therefore, the *Young* court held that begging and panhandling are not sufficiently expressive to merit first amendment protection.⁸⁶

80. *United States v. O'Brien*, 391 U.S. 367, 376 (1968).

81. *Young*, 903 F.2d at 152-53. In addition, appellants challenged the constitutionality of the distinction between solicitation for charitable religious or political causes and solicitation of alms by private individuals. *Id.* at 150. Consequently, appellants asserted that the total ban on begging and panhandling in the subway system is constitutionally impermissible. *Id.*

82. *Id.* at 154. (“The case at bar is therefore unlike one where . . . the communication allegedly integral to the conduct is itself thought to be harmful” (quoting *O'Brien v. United States*, 391 U.S. 367, 382 (1968))).

83. *Id.* at 156. The court rejected the district court’s finding that there is no meaningful distinction between charitable solicitations and begging. *Id.* at 155. The district court relied on *Riley v. National Fed. of the Blind of N.C., Inc.*, 487 U.S. 781 (1988) (“our prior cases teach that the solicitation of charitable contributions is free speech . . .”); *Secretary of State v. Joseph H. Munson Co.*, 467 U.S. 947 (1984) (percentage restriction on charitable solicitation is unconstitutional); *Village of Schaumburg v. Citizens for a Better Env.*, 444 U.S. 620 (1980) (dissemination of information in charitable solicitation considered an important factor). *Young*, 903 F.2d at 152. The Second Circuit referred to these cases as the “*Schaumburg* trilogy.” *Id.* at 154. The dissent in *Young* did not see a distinction between charitable solicitation and begging. *Id.* at 164 (Meskill, J., dissenting).

84. *Id.* at 155. The Transit Authority amended the regulation to allow solicitation by organized charities in certain areas of the subway. *Id.* This is consistent with the *Village of Schaumburg* reasoning.

85. *Id.* at 156. The government may shield citizens from exposure to various forms of expression which may decrease aesthetic values or be deemed to be a public nuisance. *City Council v. Taxpayers for Vincent*, 466 U.S. 789, 805 (1984). Although the public perceives that beggars and panhandlers pervade the system, there is no evidence that passengers feel similarly coerced by charitable organizations. *Young*, 903 F.2d at 156.

86. The *Young* court concluded that even if begging is communicative in nature, the

In dissent, Judge Meskill argued that the first amendment recognizes no distinction between charitable solicitation by organized charities and solicitation by beggars.⁸⁷ The dissent interpreted the *Village of Schaumburg* Court's analysis to confer first amendment protection upon all charitable solicitations, whether it be by an organized charity or by a homeless individual.⁸⁸ The dissent further argued that beggars and panhandlers engage in protected conduct because they often orally communicate with potential donors about the problems of the homeless, the inadequacies of public shelters, and the inefficiencies of New York City's social service system.⁸⁹ Because the first amendment would protect a beggar who holds a sign declaring, "I am homeless" or "I am hungry," it is unrealistic to distinguish between beggars who hold signs communicating a written message, and those who express their message orally.⁹⁰ To hold that a beggar's individual plight is less worthy of protection than the same interest asserted by an organized charity clearly offends the spirit of the Supreme Courts' prior holdings.⁹¹

governmental interest was sufficient to withstand the appropriate level of judicial scrutiny. *Id.* at 157. See generally L. TRIBE, AMERICAN CONSTITUTIONAL LAW § 12-2 (2d ed. 1988). Tribe suggests that there are two levels or "tracks" of judicial scrutiny: (1) government restriction of ideas or information aimed at communicative impact will be unconstitutional unless the message poses a clear and present danger; and (2) government can impose regulations aimed at the noncommunicative impact while asserting other interests. The latter governmental interest must only meet the test of not unduly restricting the flow of information and ideas. *Id.* § 12-2 at 789-92.

The *Young* court determined that the latter, or second "track", is the appropriate test. *Young*, 903 F.2d at 157. Consequently, the court applied the lower level of scrutiny in determining that the restriction on begging and panhandling in the subway system did not unduly restrict the free flow of ideas. See generally L. TRIBE, *supra*, at § 12-2.

87. *Young*, 903 F.2d at 164 (Meskill, J., dissenting).

88. *Id.* at 165. In the dissent's view, begging constitutes speech protected by the first amendment. *Id.* at 168. Although the dissent concedes that this "speech" may be regulated to achieve the asserted governmental interests, it may not be entirely banned. *Id.*

89. *Id.* at 165.

90. *Id.* In his dissent, Judge Meskill argues that because first amendment protection extends to charitable solicitation unaccompanied by speech, it must also extend to begging and panhandling. *Id.* See *Riley v. National Fed. of the Blind of N.C., Inc.*, 487 U.S. 781, 789 (1988) (citing the *Village of Schaumburg* Court's refusal "to separate the component parts of charitable solicitations from the fully protected whole"); see also *Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 764 (1976) (holding commercial speech to be protected although "not all commercial messages contain the same or even a very great public interest element").

91. *Young*, 903 F.2d at 167 (Meskill, J., dissenting). The dissent found it difficult to

The *Young* court's reluctance to equate the conduct of begging and panhandling with speech reflects a common fear: courts are afraid that if they are too lenient with the first amendment standards for expressive conduct, all conduct will be characterized as "speech".⁹² In response to that fear, the *Young* court failed to make a logical extension of clearly defined first amendment doctrine.

Access to unrestrained political discussion is a fundamental principle of our constitutional system.⁹³ The Court consistently adopts the principle that the government may not prohibit the expression of an idea merely because it offends society.⁹⁴ The *Young* decision, however, attempts to restrict the presence and conduct of beggars simply because society finds them offensive. Admittedly, not all conduct deserves first amendment protection.⁹⁵ The Supreme Court, in *O'Brien*, certainly did not intend to give the courts and the government a lethal weapon to eliminate the protection of expressive conduct under the guise of pretextual governmental interests.⁹⁶

Moreover, the Supreme Court has unequivocally declared that the solicitation of money is entitled to first amendment protection.⁹⁷ The

reconcile how the Transit Authority could allow an organized charity to collect money to help the plight of the homeless, yet refuse to allow the assertion of the same interest exerted by the beggars. *Id.*

Furthermore, the dissent expressed concern that there is no evidence of the extent, if any, of the harassment felt by passengers when approached by organized charities in the pursuit of their solicitation of money. *Id.* at 168.

92. Note, *supra* note 42, at 1113 & n.125 (courts often assume that the conduct at bar is speech; however, in practice, the Court is fearful that all conduct might be deemed speech). See *United States v. O'Brien*, 391 U.S. 367, 376 (1968) (court willing to assume that destroying a draft card is speech); *United States v. Miller*, 367 F.2d 72, 79 (1966) (same).

93. *Stromberg v. California*, 283 U.S. 359, 369 (1931).

94. *Texas v. Johnson*, 491 U.S. at 408 (1989). See, e.g., *Boos v. Barry*, 485 U.S. 312 (1988) (plurality opinion). The Supreme Court reasoned that the impact of speech on others is related to the content of the expression itself and therefore should not undermine first amendment concerns. *Id.* at 321. See also *supra* notes 67-69 and accompanying text.

95. "We cannot accept the view that an apparently limitless variety of conduct can be labeled 'speech' whenever the person engaging in the conduct intends to express an idea." *O'Brien*, 391 U.S. at 371. See also *Spence v. Washington*, 418 U.S. 405, 409 (1974) (same).

96. See *supra* notes 29-36 and accompanying text for discussion of the *O'Brien* decision.

97. See, e.g., *Riley v. National Fed. of the Blind of N.C., Inc.*, 487 U.S. 781 (1988) (solicitation of charitable contributions by an organization is protected under the first amendment); *Village of Schaumburg v. Citizens for a Better Env't*, 444 U.S. 620, 633

Young court, however, characterized the *Village of Schaumburg* analysis to include a test requiring a "sufficient nexus" between solicitation by organized charities and a variety of speech interests requiring the dissemination of information, messages, and ideas.⁹⁸ Although the public may not be educationally enhanced through its interaction with beggars, these individuals have the potential to convey messages similar to those of an organized charity. In reality, the public's interaction with beggars does reveal an important social and political message: it makes the public aware of the plight of the homeless.⁹⁹ Frequently, begging is the only way that homeless individuals are able to express themselves because beggars are often uneducated and penniless,¹⁰⁰ lacking the necessary means to express their message.¹⁰¹ Perhaps the resulting increased social awareness will form the impetus for future action. One thing is for certain: suppression of this vital form of expression will only result in public ignorance and governmental inaction.¹⁰²

As a matter of policy, if the constitutional guarantee of freedom of speech is not to be trivialized, the government cannot suppress expres-

(1980) (speech is protected even though it may involve a solicitation to purchase or otherwise pay or contribute money); *Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 761 (1976) (same); *Buckley v. Valeo*, 424 U.S. 1, 25 (1976) (the right to make a political contribution is protected under the first amendment). See also *supra* note 3 and accompanying text.

98. *Young*, 903 F.2d at 155.

99. *Id.* at 165 (Meskill, J., dissenting).

100. Many of the beggars are also homeless. Cockburn, *Begging for Mercy*, NEW STATESMAN & SOC'Y, Sept. 23, 1988, at 14. Studies have shown that in New York City, only 45% of the male and 54% of the female homeless individuals had completed high school. R. ROPERS, THE INVISIBLE HOMELESS: A NEW URBAN ECOLOGY 36 (1988). Cf. F. REDBURN AND T. BUSS, RESPONDING TO AMERICA'S HOMELESS 31 (1986) (only 30.8% of the Ohio homeless sample had completed high school, while 17.3% had completed only one to eight years of school). See generally Note, *The Beggar's Free Speech Claim*, 65 IND L.J. 191, 210 (1989) (arguing that because homeless beggars are not included in the political process and are unable to vote because they do not have a mailing address, the court should impose heightened judicial scrutiny to regulations impinging on their first amendment rights).

101. "Symbolic conduct has been called 'the poor man's printing press' without the power, prestige, and financial resources to publicize their written or verbal message, action is the only way for many people to effectively convey their views to a wide group of people." Note, *First Amendment Protection of Ambiguous Conduct*, 84 COLUM. L. REV. 467, 471 (1984).

102. See, e.g., *Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748 (1976) (condemning the state's attempt to achieve its goal by keeping people in ignorance).

sive conduct merely to avoid a minor public inconvenience. The Second Circuit's decision in *Young v. New York City Transit Authority*¹⁰³ that begging and panhandling do not constitute protected first amendment expression has the potential to create a wavering, unpredictable line between protected solicitation of funds by an organization and the charitable solicitation of funds by an individual. The *Young* decision has the potential to thwart the free expression of many individuals occupying a similar position in society who are attempting to advance their interests in the best way they are capable—through symbolic conduct.

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103. 903 F.2d 146 (2d Cir. 1990).

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