

PANHANDLING IN SUBWAYS AND THE FIRST AMENDMENT: YOUNG V. NEW YORK CITY TRANSIT AUTHORITY

Eric Dvoskin

For beggars in New York City, pleading for money is often a daily reality. This entreaty for alms is a cry that can be heard throughout the city. Although beggars are allowed to solicit alms on the streets, they have been denied this right in one significant area: the subway. The Metropolitan Transportation Authority (MTA) Board proscribes begging anywhere on its property because, they contend, subway riders find it intimidating. It does, however, allow solicitation by organized charities, artists, and public speakers in these areas. The difference rests on two ideas: that charitable solicitation leads to speech that is clearly protected by the First Amendment, while begging does not; and that begging is inherently anti-social—disorderly, aggressive, and obstreperous. In drawing these distinctions, the United States Court of Appeals for the Second Circuit has abrogated beggars' speech rights under the First Amendment.

In August 1989, the MTA Board instituted regulations that proscribed begging and panhandling in the subways (later amended to include "alms, subscription, or contribution for any purpose") but permitted "solicitation for charitable, religious or political causes" as well as "public speaking, distribution of literature, and artistic performances" for money (Young 148). These regulations followed an extensive study conducted on behalf of the MTA concerning "quality of life problems experienced by subway riders" (Young 149).

Eric Dvoskin is a member of the class of 2008 at Columbia University majoring in Political Science and specializing in American Politics.

1. N.Y. Comp. Codes R. & Regs. Tit. 21, 1050.6(b) (1976). In addition, regulations prohibit conduct that has "the reasonably intended effect of annoying, alarming, or inconveniencing others, or otherwise tend[s] to create a breach of the peace" which "interferes with the provision of transit service or obstruct[s] the flow of traffic on facilities or conveniences," or which "causes or may tend to cause harm or damage to any person" (Chevigny 528).

The study was commissioned to ascertain the problems associated with the dramatic increase in the number of beggars during the 1980s in New York City (Chevigny 528). What were once seen as inconsequential infractions now received vigorous scrutiny due to the “broken window” theory of crime, which is predicated on the idea that when petty crimes go unpunished, criminal activity of all kinds increases (Chevigny 540).

With this idea in mind, the study found that passengers perceived the subway to be “fraught with hazard and danger” and felt “intimidated into giving money to beggars”; “it [was] difficult from a police perspective to draw the fine line between panhandling and extortion” (Young 149). Finally, the study noted that passengers constitute a captive audience that cannot readily avoid beggars and that begging is inherently anti-social. These problems discouraged use of the subway system, notwithstanding the 3.5 million people who, at the time, used it daily.

In November, the Legal Action Center for the Homeless sued the Transit Authority (TA) on behalf of two homeless men, William Young and Joseph Walley, in the United States District Court for the Southern District of New York. They asserted that prohibiting begging and panhandling in the New York City subways violates the free speech clause of the First Amendment to the U.S. Constitution. The plaintiffs did not argue that the TA was not permitted to place reasonable limits on a beggar’s ability to solicit alms, but rather that begging is indistinguishable from soliciting by charitable organizations. The District Court ruled in favor of the plaintiffs and held that the TA’s regulation violated the constitutional rights of the beggars. The Court reasoned that “begging was sufficiently communicative to warrant protection under the First Amendment as a form of solicitation” (Kaufman 1804). Furthermore, the Court decided that the TA had designated the subway as a public forum by allowing charitable organizations to solicit there; in addition, it found that “the TA had not asserted a sufficient interest to outweigh the speech right protected by the First Amendment, and that the regulation was not narrowly tailored to achieve the TA’s stated goals” (Kaufman 1804).

In *Young v. New York City Transit Authority* (1990), the Appeals Court reversed, holding that “begging is much more ‘conduct’ than it is ‘speech’” because begging is not sufficiently expressive and is potentially dangerous (Young 153). Accordingly, the link between charitable and personal solicitation that the District Court employed in its analysis broke down. The Appeals Court highlighted that the TA had not designated the subways as a public forum open to all speakers, but only to certain speakers, such as charitable organizations that solicited for money. Finally, the Court ruled that even if begging were communication worthy of First Amendment protection, the TA’s regulation survived the lenient scrutiny reserved for regulations that are nondiscriminatory and intended to fulfill a legitimate government purpose, in this case to protect the safety of the subway riders.

The relationship between begging and charitable solicitations raises a question about how the government treats the poor, which underlines the active debate within the legal community concerning the constitutional justification for begging in public places (Chevigny 527). Verdicts delivered across the United States in similar cases in the past have been mixed, and thus offer little sense of an emerging consensus on the issue. In *CCB v. State* (1984), for example, a Florida city prohibited all forms of begging or soliciting funds by individuals for themselves in public. The court ruled that the regulation was more intrusive than necessary to promote public safety, health, and welfare, given its total ban on begging. The court noted that “protecting citizens from mere annoyance is not a sufficiently compelling reason to absolutely deprive one of a First Amendment right” (qtd. in Zur 374). By contrast, in *Ulmer v. Municipal Court for Oakland-Piedmont J.D.* (1976), a California Court of Appeals held that an individual could not accost another in a public place for the purpose of begging (Zur 373).

Contrary to what the New York Court of Appeals reasoned, certain elements of expression within the conduct of begging should be subject to time, place, and manner restrictions rather than completely banned by the TA. Furthermore, the legal test developed by the Supreme Court to govern expressive conduct cases

glosses over too many forms of expression that merit protection under the First Amendment.

BEGGING VS. OTHER CHARITABLE SOLICITATIONS UNDER THE SCHAUMBURG TRILOGY

The District Court found that begging is a form of speech indistinguishable from the speech of a solicitor for charity. It was unable to “distinguish charitable solicitations and begging on the basis of the ‘diminished communicative content of begging, the difference between the relative intents of the two types of solicitors, and the historical treatment of begging’” (Young 152). The judge used a trilogy of Supreme Court rulings, collectively known as *Schaumburg* (1980), as a precedent for this case. In *Schaumburg*, the Court was asked to adjudicate the constitutionality of a regulation requiring charities that solicit door-to-door to disburse at least 75 percent of their receipts to the needy. The other two cases considered similar regulatory schemes. The Court ruled that the requirement unduly burdened the free speech rights of the solicitors. The Court reasoned:

Charitable appeals for funds, on the street or door-to-door, involve a variety of speech interests—communication of information, the dissemination and propagation of view 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 the 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 (*Schaumburg v. Citizens for Better Environment*).

In sum, the Court found that, as solicitors go from door-to-door, they often discuss the problems that beneficiaries of the charities face; that the dissemination of these ideas is dependent upon the charities; and that, without these solicitors, the ideas that the charities raise would go unheard. Even if the money does not actually go toward the intended recipients of charity, the speech interests are significant enough to warrant protection. The Court protects the conduct because it might lead to speech that is clearly protected by the First Amendment.

Furthermore, the Court considered distinguishing between begging and soliciting for charity on the basis of intent. The Court dismissed the idea that the recipient of a charitable solicitation is, by definition, a third party (Kaufman 1812). Even though the beggar benefits, he is still obtaining “charity.” This conclusion does not simply rest on the definition of charity. The Court reached this conclusion by arguing that there has been little historical difference between personal solicitation and eleemosynary solicitation: in both cases, the solicitor is asking for charity, even if the recipient of that charity is different, and is disseminating information.

With this reasoning, the District Court found that begging might engender speech. Begging is both revealing and persuasive; beggars announce to their audience what it is like to be homeless, express their views on public programs designed to assist them, and advocate the cause of the homeless. Furthermore, even without verbalizing it, the beggar “conveys the message that he and others like him are in need” (Young 353). In terms of the plea for charity, the purpose of the request is similar to solicitations of charitable organizations. Once it is established that the message is the same, any attempt to differentiate between speakers would be unconstitutional.

The Appeals Court overturned the District Court’s ruling based on the *Schaumburg* precedent. The Appeals Court wrote that begging can be differentiated from charitable solicitations and is not conduct that engenders speech (Young 154). The Supreme Court had reasoned that door-to-door charitable solicitations were the only means of spreading certain political messages, but those

factors were absent in this case. In addition, the Appeals Court assumed that because people do not feel threatened by charitable solicitors, their message is likely to be conveyed, whereas the message of beggars is likely to be obscured by the anti-social nature of their conduct. Finally, the majority wrote, “while organized charities serve community interests by enhancing communication and disseminating ideas, the conduct of begging and panhandling in the subway amounts to nothing less than a menace to the common good” (Young 156).

The regulation enacted in *Schaumburg* was intended to prevent fraudulent activity by fundraisers. It was struck down because it infringed on speech that is clearly protected by the Constitution (Chevigny 539). Regardless of whether or not someone persuades an individual to give money, the message itself is embodied in the inquiry. Soliciting money for the homeless as a group cannot be differentiated from a homeless person pleading for money because he is homeless. Although the conduct reviewed in *Schaumburg* is not directly analogous to begging, it is sufficiently similar to conclude that the free speech concerns of the beggar and the charitable solicitor are indistinguishable.

EXPRESSIVE CONDUCT AND CONDUCT UNDER SPENCE

Having dismissed the claim that begging, like charitable solicitations, engenders speech, the Appeals Court considered whether or not begging is a form of expressive conduct. The Court’s methodology is predicated on a distinction between speech and conduct. In terms of definition, speech is verbal communication, whereas conduct is an action without communication. Speech is essential to democracy and should be as unburdened as possible, but conduct should be subject to much greater restrictions. Supreme Court Justice Thurgood Marshall explains the fundamental purpose of the First Amendment as follows:

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 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 (qtd. in *Zur* 362).

Any conduct that fails to meet these requirements is not sufficiently expressive to warrant First Amendment protection and should be classified as unexpressive conduct.

Distinguishing between expressive and unexpressive conduct is particularly challenging when a court can discern a number of messages within any given act. *Spence v. Washington* (1974) demonstrates the difficulty of making this distinction. In *Spence*, the Court adjudicated the constitutionality of a statute that prohibited flag desecration when the city government of Washington, D.C. compelled an individual to remove an upside-down peace sign he had attached to the American flag, and eventually overruled any objections on the grounds that flag desecration is illegal. In testimony, Spence said he wanted “people to know that I thought America stood for peace” (*Spence v. Washington*). To draw the distinction between expressive and unexpressive conduct, the Appeals Court asks two questions formulated by the Supreme Court: “whether an intent to convey a particularized message was present, and whether the likelihood was great that the message would be understood by those who view it” (*Spence v. Washington*). Thus, conduct can only be considered expressive if it is both specifically tailored to and understood by the intended audience. In *Spence*, the Supreme Court pointed out that the peace sign on the flag could have referred to the violence at Kent State or the Vietnam War. Given the political context in which Spence conducted himself, the

audience was likely to understand the particular message a peace sign conveys.

In *Young*, the only message common to beggars as a group that the Appeals Court could ascertain was a plea for money. In other expressive conduct cases such as *Tinker v. Des Moines Independent Community School* (1969), which ruled on the constitutionality of a prohibition on wearing black armbands in high schools in protest of the Vietnam War in, “there was little doubt from the circumstances of the conduct that it formed a clear and particularized political and social message” (Young 153). If begging does form a message, it would be that the beggars want money. The Appeals Court decided that it does not warrant full First Amendment protection because this message is essential neither to disseminate a political, artistic, or scientific truth, nor to communicate an inexpressible emotion. Further, due to the confining circumstances of the subway, the beggars’ message fell on unreceptive ears. Since begging fails the *Spence* test, it is not expressive conduct for legal purposes and thus should not be allowed First Amendment protection.

The reasoning behind the *Spence* test is not that the government must restrain itself from limiting speech, but rather that it has greater abilities to limit aberrant conduct. However, by requiring the Courts to find a “particularized message” that is “likely to be understood,” a court must overlook a vast amount of expressive conduct that might otherwise be protected—a highly subjective process. Indeed, *Spence* might have intended to convey any number of messages: outrage against atrocities committed in the Vietnam War, the President’s policies, or the degeneration of America, to name a few. As Lawrence Tribe, a Constitutional Law professor, writes, “any...finding of speech versus conduct announces the Court’s conclusion rather than analysis” (827). It is impossible to draw a hard and fast distinction between expressive conduct and unexpressive conduct.

Moreover, the *Spence* test does not account for the possibility that one can convey a message with one’s body, as opposed to mere speech. For example, a firsthand examination of the New York City subway system inspires the common observations that

beggars are often ill or disabled, sometimes missing limbs or eyes. A beggar's appearance is a message in and of itself—one delivered visually rather than verbally. Encounters with beggars can be uncomfortable; some people will avert their eyes. It is all too clear that the First Amendment was designed to protect exactly this kind of message. *Spence* fails to recognize begging as expressive conduct because begging is not a particularized message, but one conveyed by the beggar's body.

The Appeals Court was particularly swayed by the idea that the anti-social nature of begging and the disorder of the subway would prevent people from understanding a beggar's message even if it existed. However, it is crucial to note that a focus on beggars *as a group* fails to separate anti-social beggars, whose message people would prefer to avoid, from passive beggars who convey a message that people would be willing to receive. The Court is correct to say that not every instance of begging will convey a message; likewise, the Court protects flag burning as a valid method by which one can communicate any number of messages, given the restrictions of *Spence*. Nevertheless, the Court must look at each individual case to make this determination, whereas the TA has completely forbidden begging. In looking at beggars as a group, the TA failed to recognize that there is a substantial difference between potentially dangerous anti-social beggars and passive beggars who are simply begging alms for their survival.

In *Texas v. Johnson* (1989), the Courts found that flag burning itself was not a dangerous activity, but that the government was trying to restrict the message thereby conveyed. The Appeals Court argued that "unlike burning a flag, wearing a black armband, sitting, or marching," begging is always experienced as "transgressive conduct" (Young 154). In this instance, the Court of Appeals overlooked how disruptive all of those activities actually are. Nonviolent resistance is a form of civil disobedience, which by definition implies violating acceptable norms because the resisters find those norms unacceptable. Copious evidence from the civil rights movement proves that all of those tactics can be patently transgressive or experienced as such.

Although the Appeals Court applied the *Spence* test faithfully to this case, *Spence* is, itself, a flawed test, and therefore the Court failed to note that begging can be a form of expressive conduct. Begging does not deliver one particularized message, but many messages at the same time, which indicate the beggars' need for money and shelter, or the failure of the government and passersby to recognize their situation. The Court tacitly admits as much when it writes that begging makes people uncomfortable. Simply because the message is displayed by an individual's presence, it should not be prevented from receiving First Amendment protection, especially when the message could be displayed passively.

THE O'BRIEN TEST

The conclusion of the *Spence* test would have been enough to seal the fate of the beggars. However, the Appeals Court offered an alternative analysis that assumes *arguendo* that begging is expressive conduct. When a constitutional right is infringed upon, the government applies strict scrutiny. This standard was developed to give constitutional rights—in this case, the right to freedom of speech—the most protection from government intrusion. Once it was assumed that conduct is expressive, the Court applied the *O'Brien* test, an example of strict scrutiny. According to *O'Brien*, a regulation is justified under four conditions: “if it is within the constitutional power of the government, if it furthers an important or substantial governmental interest, if the governmental interest is unrelated to the suppression of free expression, and if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest” (*United States v. O'Brien*, 1968).

The regulation was deemed justified under the first condition because it is well established that it is within the constitutional powers of the government to regulate problems arising on public property. Under the second condition of the test, the Court found that the regulation did advance a “substantial” government interest: the study conducted on behalf of the TA had found that “a major-

ity of the subway passengers perceive begging to be intimidating, threatening, and harassing” (*Young* 158). Thus, the Court argued that the TA had rational reasons to believe begging is harmful conduct that can only be contained by a total ban.

Had the government found that passengers considered all forms of begging to be harassment, the TA’s argument for a total ban would have been stronger. However, the study conducted made no distinction between passive and anti-social begging, nor did it attempt to determine whether passersby perceive charitable solicitors as menacing or intimidating. They assumed, instead, that they do not. Such shortcomings undermine the case for a total ban on begging. By supposing that charitable solicitation is not as bothersome as passive begging, the Court reveals its inherent bias against beggars.

Paul Chevigny highlights that the goal of the study was to find “quality of life” problems in the subway. George Kelling, the sociologist who conducted the survey for the TA, writes in his affidavit:

My earlier research, observations in the subway, and review of relevant research has convinced me that the problems created by disorder in the subway are serious. Public disorder such as drunkenness, panhandling, public urination, anti-social horseplay by youths, and other such behavior creates in citizens the sense that things are out of control and that nobody cares. These circumstances, in turn, embolden persons so inclined to be increasingly obstreperous—even anti-social and criminal. (qtd. in Chevigny 540)

Because disorder leads to crime, Kelling argues that the solution to criminal activity is to restore a sense of order, a view embodied in the “broken window” theory of crime. According to this theory, begging is anti-social behavior, a symptom of more widespread social disorder. Even if begging and charitable solicitations carry the same message, there is an inherent difference in who is doing the speaking. If “broken windows” and begging lead to chaos, then logic dictates that there is no equitable way to enforce the law

without sacrificing a well-ordered society.

When analyzing this situation, we must weigh the rights of the individual against the rights of the community. For the Appeals Court, Chevigny argues, "it is more essential to save society from decay through disorder than to ensure an equitable society" (542). The principles embodied in the U.S. Constitution suggest that the government should yield to the hope that freedom of speech will engender order and equity rather than to its fear of creating chaos. As First Amendment jurisprudence has often stated, the government cannot cure social problems by forcibly removing them from the community.

The third and principle condition of the *O'Brien* test requires that a government regulation make no attempt to restrict the content of someone's speech. In *Texas v. Johnson*, the majority writes:

The government generally has a freer hand in restricting expressive conduct than it has in restricting the written or spoken word...It may not, however proscribe particular content because it has expressive elements...It is, in short, *not simply the verbal or nonverbal nature of the expression, but the governmental interest at stake*, that helps to determine whether a restriction on that expression is valid (*Texas v. Johnson*, 1989, emphasis added).

The emphasis on government interest has at its base Holmes' doctrine of the "marketplace of ideas," which holds that unfettered access to information and vigorous argumentation will elicit the truth, and, as such, the government should not infringe on the freedom of speech by barring access to certain speakers, ideas, or places. The government can regulate the content of a speaker's message that is harmful or has less value than political speech. This form of speech, which is often obscene and slanderous, may "present [the] danger of immediate evil or an intent to bring it about" (*Brandenburg v. Ohio*, 1969). For example, in *Texas v. Johnson*, the Supreme Court ruled that a regulation banning flag burning was unconstitutional. The majority wrote, "If there is a

bedrock principle underlying the First Amendment, it is that the Government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable" (*Texas v. Johnson*).

To analyze the third condition, a court begins by examining the statute and the government's intent through circumstantial evidence. The most important question is whether "the regulation target[s] the particular content of a speaker's message, or merely has an incidental effect on the communication" (Kaufman 1817). Here, the burden of proof rests on the government. In this case, the Appeals Court found that the government was attempting to shield passengers from harassment and intimidation, a danger that does not emerge from the communicative content of the speech. The regulation was not directed at speech and, therefore, is deemed content neutral; in other words, even though the regulation incidentally affects the speech, the regulation is directed at the non-speech elements, not its content.

The parties to the case did not contest this conclusion. On its face, the government was not attempting to regulate the message that beggars convey; in fact, they thought there was no message at all. However, there is some circumstantial evidence that the regulation was directed at the communicative content of the speech, albeit inadvertently. Since the government had already outlawed aggressive conduct such as harassment, menacing, and extortion, beggars could already be punished for passenger intimidation. However, the Appeals Court emphasized repeatedly that subway passengers perceive even passive begging as annoying; in asking for charity, beggars force passersby to consider their moral commitment to helping others when the social services of the government have failed. The regulation is unconstitutional if the Appeals Court deemed begging to be a form of passenger intimidation based on the fact that the beggar's message may be one with which passengers might be uncomfortable.

In *Tinker v. Des Moines School District*, students wore black armbands as a form of protest against the Vietnam War. Counsel for the school alleged that the school sought to restrict the manner

of expression, but not the message itself. The evidence showed that the school allowed similar ideological symbols. The Supreme Court reasoned the absence of suppression of other ideological symbols displayed in a similar manner suggested the schools sought to prohibit the message rather than the manner of delivery. Similarly, in the case of the subway ban, because the government failed to look into other safety concerns that might arise from similar acts, such as charitable solicitation, we may infer that the motivation is suspect.

Because the TA fails to specify the particular hazards that are posed by begging but not other forms of solicitation, this suggests that the government suppressed the beggars' communication and attempted to insulate transit riders from their message. In light of this, a complete ban on the speech and the conduct might seem misguided. The ardor with which someone speaks and the desperation in his voice create a dynamic marketplace of ideas. If the result of demanding money is that a person becomes uncomfortable with watching and encountering the plight of the poor, then the marketplace is working to disseminate a political message that must be protected.

The fourth and final condition of the *O'Brien* test requires a regulation to be narrowly tailored. Judge Meskill, who dissented in the Appeals Court decision, argued that because there were already rules prohibiting aggressive conduct, additional regulations were excessive (Young 168). The Judge was relying on the decisions in *Clark v. Community for Creative Non-Violence* (1984) and *Ward v. Rock Against Racism* (1989). In *Clark*, the Supreme Court upheld federal park regulations when they were invoked to prohibit a group of beggars from sleeping in a public park as a form of symbolic protest. The Court reasoned:

The Park Service's decision to permit non-sleeping demonstrations does not, in our view, impugn the camping prohibition as a valuable, but perhaps imperfect, protection to the parks. If the Government has a legitimate interest in ensuring that the National Parks are adequately protected,

which we think it has, and if the parks would be more exposed to harm without the sleeping prohibition than with it, the ban is safe from invalidation under the First Amendment as a reasonable regulation of the manner in which a demonstration may be carried out" (qtd. in Chevigny 532).

Similarly in *Ward*, the New York City government sought to have its own sound engineer regulate the volume of a concert held in Central Park. The concert sponsors argued that the city could set a limit for the volume and the concert sponsor's own engineers could meet the standard. The Supreme Court writes:

It is undeniable that the city's substantial interest in limiting sound volume is served in a direct and effective way by the requirement that the city's sound technician control the mixing board during the performances. Absent this requirement, the city's interest would have been served less well (qtd. in Chevigny 532).

The Court ruled in favor of the city, reasoning that given a genuine regulatory interest, the government can intervene with a regulation sufficiently restrictive to curtail the problem effectively. However, the scope of the regulation must include only the targeted evil. In the case of the TA's total ban on panhandling, the district judge and the dissent in the Appeals argued that pre-existing regulations prohibiting harassment would suffice to curtail anti-social begging, and that the police could distinguish between passive and anti-social beggars, as they had always done in the past. Accordingly, the new regulations were not narrowly tailored. The findings in *Clark* and *Ward* suggest that the Supreme Court might have ruled that the scope of the regulation was too broad because passive begging was not the targeted evil.

The regulations would not pass the *O'Brien* test because they fail the third and fourth conditions. Limiting the harm of anti-social begging is a substantial interest, but the regulation must be content-neutral and must only proscribe the conduct that is

harmful. Because the TA did not conduct a study to prove the difference between organized charitable solicitations and personal solicitations, the TA discriminates in favor of organized charities and, therefore, the regulation is not content neutral. To be equitable, the government should either authorize or proscribe both types of charitable solicitations. Because the TA authorized charitable solicitation, it should authorize personal solicitation. Furthermore, the regulation is not narrowly tailored because passive begging, which is expressive and harmless, is not an evil that the government seeks to curtail but is still within the scope of the regulation.

CONCLUSION

Begging is a profoundly expressive form of speech and is a crucial means of subsistence for the most destitute members of this society. The Courts erred in distinguishing personal solicitation from eleemosynary solicitation. The substance of both requests is a plea for money, a cause that demands the protection of the First Amendment.

The Appeals Court applied Supreme Court precedent faithfully when it applied the inadequate *Spence* test to differentiate expressive conduct from pure conduct. The Court maintained that one cannot convey a message through one's physical appearance. Yet seeing the symptoms of illness and hearing the story of a suffering person is a distressing reminder of the government's failures—a message that undoubtedly falls under the protection of the First Amendment.

The vigorous defense of the TA by the Court of Appeals suggests a willingness to discriminate against personal begging in the name of shielding passersby from the social ills around them. Discussing the failure of the government to provide beggars with social services provides an authentic and personal voice to locate the debate. Against the important information a beggar passively conveys, it is necessary to weigh the anti-social conduct of some beggars. A blanket ban on begging violates the free speech clause of the First Amendment because it does not distinguish anti-

social begging from passive begging. A regulatory scheme that differentiates between anti-social and passive begging would allay concerns about violating the First Amendment.

Kelling has suggested that begging destroys the fabric of society and is a form of inherently dangerous conduct. This may be true in some cases, but it ought to be proven. The American public should be assured that its judicial system would never prevent the public from witnessing conduct that offends its sensibilities. Unfortunately, there is ample evidence that the government attempts to do just that. When the TA prohibits beggars from soliciting in the subways, it cuts the most destitute members of this society off from a source of subsistence and silences their already weak voice.

Works Cited

- Brandenburg v. Ohio*, 395 U.S. 444 (1969).
CCB v. State, [458 So. 2d 47 (Fla. Dist. Ct. App. 1984)].
 Chevigny, P. G. *Begging and the First Amendment: Young v. New York City Transit Authority* {903 F.2d 146 (2d Cir. 1990)}. *Brooklyn Law Review* v. 57 (Summer 1991): 525–545.
Clark v. Community for Creative Non-Violence, 468 U.S. 288 (1984).
 Index to Legal Periodicals Full Text. H.W. Wilson. 9 Dec. 2006 <<http://hwwilsonweb.com>>.
 Johnson, Aaron. *The Second Circuit Refuses to Extend Beggars a Helping Hand: Young v. New York City*.
 Kaufman, Stephanie M. *The speech/conduct distinction and First Amendment protection of begging in subways*. *Young v. New York City Transit Authority*. 729 F. Supp 341. *The Georgetown Law Journal* v. 79 (August 1991): 1803–1830.
Spence v. Washington, 418 U.S. 405 (1974).
Schaumburg v. Citizens for Better Environment, 444 U.S. 620 (1980).
Texas v. Johnson, 491 U.S. 397 (1989).
Tinker v. Des Moines Independent School District. 393 U.S. 503 (1969).
 Tribe, Lawrence. *American Constitutional Law*. Mineola, N.Y.: Foundation Press, 1988.
Ulmer v. Municipal Court for Oakland-Piedmont J.D., [127 Cal. Rptr. 445 (Cal. Ct. App. 1976)].
United States v. O'Brien, 391 U.S. 367 (1968).
Ward v. Rock Against Racism, 491 U.S. 781 (1989).
Young v. New York City Transit Authority {903 F.2d 146 (2d Cir. 1990)}.
 Zur, G. L., *Young v. New York City Transit Authority* {903 F.2d 146 (2d Cir. 1990)}: silencing beggars in the subways. *Pace Law Review* v. 12 (Spring 1992): 59–401.