

THE FUNDRAISERS, THE BEGGARS, AND THE HUNGRY: THE FIRST AMENDMENT  
RIGHTS TO SOLICIT DONATIONS, TO BEG FOR MONEY, AND TO SHARE FOOD

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*[. . .] [S]ome [. . .] citizens feel annoyed or guilty when faced with an indigent beggar, and that there is criminal conduct on the streets. Feelings of annoyance or guilt, however, cannot outweigh the exercise of First Amendment rights.<sup>1</sup>*

INTRODUCTION

One of the most exciting features of the Occupy movement is the emergence of economic injustice as an issue in mainstream American political discourse. Commentators have declared that “Occupy Wall Street has changed the national conversation,” and even inside the Beltway, the movement has brought poverty and economic inequality into the center of mainstream political discourse.<sup>2</sup> If these commentators are right, advocates of reform may have an opportunity to begin to dismantle the financial engines that sustain massive economic inequality in the United States. It is crucial that the movement maintains its focus and applies its energy toward advocating for a core principle: that a just economic system should provide security, stability, and opportunity for all.

The economic inequality that drove protestors into public parks across the country is not a new development. Poverty is deeply entrenched in American society, and millions of Americans directly suffer from its effects. According to the U.S. Census Bureau, between January 2004 and December 2006, 28.9 percent of the US population was in poverty for at least two months.<sup>3</sup> Ten million people entered poverty during that time period, and 8.6 million approached the federal poverty line.<sup>4</sup>

Poverty holds the most vulnerable in the strongest grip. The Census Bureau reported that children had a higher poverty rate than adults.<sup>5</sup> They also stayed poor longer than adults did.<sup>6</sup>

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<sup>1</sup> Berkeley Cmty. Health Project v. City of Berkeley, 902 F.Supp. 1084, 1095 (N.D. Cal. 1995).

<sup>2</sup> Arianna Huffington, *Occupy Wall Street has changed the national conversation*, CHICAGO TRIBUNE (Jan. 4, 2012), <http://www.chicagotribune.com/news/politics/sns-201201041800—tms—ahuffcoltq--m-a20120104jan04,0,6073728.column>; *Complete Transcript of the October 21, 2011 edition of ‘Countdown with Keith Olbermann’* (Oct. 21, 2011), <http://current.com/shows/countdown/blog/complete-transcript-of-the-october-21-2011-edition-of-countdown-with-keith-olbermann> (guest Paul Krugman saying “[A] group of people started camping out in Zuccotti Park, and all of a sudden the conversation has changed significantly towards being about the right things. It’s kind of a miracle.”).

<sup>3</sup> US CENSUS BUREAU, DYNAMICS OF ECONOMIC WELL-BEING: POVERTY, 2004-2006 2 (2011), *available at* <http://www.census.gov/hhes/www/poverty/publications/dynamics04/P70-123.pdf>.

<sup>4</sup> *Id.* at 5.

<sup>5</sup> *Id.* at 3 (“Children under 18 years had a higher episodic poverty rate (36.4 percent) and a higher chronic poverty rate (4.8 percent) than adults. The median length of a poverty spell for children under 18 years (5.2 months) was longer than the median length of a poverty spell for adults 18 to 64 years (4.2 months) but shorter than the median spell

Female-householder families had a higher poverty rate than other families.<sup>7</sup> African Americans were disproportionately impoverished.<sup>8</sup> Even deeper down the mineshaft of misfortune are those without a permanent home. The National Law Center on Homelessness and Poverty estimates that 3 million people experience homelessness each year.<sup>9</sup> The same organization estimates that 1.3 million of those in poverty each year are children.<sup>10</sup>

Perhaps worse than the fact that so many millions still suffer from profound poverty is the prevalence of laws that actively seek to erase them from the public spaces that are very nearly the last place they can go. The National Coalition for the Homeless released a report in 2009 that identified a range of creative ways that local governments try to drive the homeless out of their public parks, streets, and sidewalks.<sup>11</sup> Many towns and cities criminalize sitting, sleeping, or storing goods in public places.<sup>12</sup> Many selectively enforce “more neutral laws, such as loitering, jay-walking, or open container laws, against homeless persons.”<sup>13</sup> Cities and towns have adopted laws that punish begging “in order to move poor or homeless persons out of a city or downtown area.”<sup>14</sup> A growing number of jurisdictions have passed laws that “restrict groups sharing food with homeless persons in public spaces.”<sup>15</sup> Laws such as these are pervasive throughout the United States. The study found that between one third and one half of the cities surveyed had enacted some form of anti-homelessness law.<sup>16</sup> Prohibitions on begging, for example are very common: 47 percent of the cities surveyed prohibited begging in particular public places, 49 percent prohibited “aggressive panhandling,” and 23 percent banned begging city-wide.<sup>17</sup> These laws deny the poor the right to use public spaces as freely as those who have no need to beg. These laws only burden those who to need to beg or to sleep on benches. Unfortunately, however, the Supreme Court of the United States has repeatedly declared that it will give wide discretion to governments that pass laws targeting individuals based on poverty. As Stephen Loffredo explains,

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length of adults 65 and over (6.7 months).”).

<sup>6</sup> *Id.* at 8 (“While children made up about 26 percent of the total population, they represented approximately 33 percent of those who were poor at least 2 months and about 45 percent of those who were poor for the entire 36 months.”).

<sup>7</sup> *Id.* at 3-4 (“People in female-householder families had a higher episodic poverty rate (51.8 percent), higher chronic poverty rate (9.7 percent), and longer median poverty spell (6.4 months) than people in married -couple families.”).

<sup>8</sup> *Id.* at 8 (“Blacks were 12.5 percent of the entire population, 19.6 percent of the population with at least one poverty spell, and 37.6 percent of the chronically poor.”).

<sup>9</sup> NATIONAL LAW CENTER ON HOMELESSNESS AND POVERTY, HOMELESSNESS & POVERTY IN AMERICA, <http://www.nlchp.org/hapia.cfm> (last visited May 4, 2011).

<sup>10</sup> *Id.*

<sup>11</sup> NATIONAL COALITION FOR THE HOMELESS, HOMES NOT HANDCUFFS 9-12 (2009), <http://www.nlchp.org/content/pubs/2009HomesNotHandcuffs1.pdf>.

<sup>12</sup> *See id.* at 9.

<sup>13</sup> *Id.* at 10.

<sup>14</sup> *Id.*

<sup>15</sup> *Id.*

<sup>16</sup> *See id.* at 10.

<sup>17</sup> NATIONAL COALITION FOR THE HOMELESS, *supra* note 11, at 10.

Two decades ago, the Supreme Court held that the constitutional claims of poor people would be assessed under so-called rationality review. The judiciary must broadly defer to political outcomes in the area of “economics and social welfare.” . . . [E]ven explicit legislative discrimination against poor people does not trigger heightened judicial scrutiny.<sup>18</sup>

The Supreme Court held in *San Antonio Independent School District v. Rodriguez* that discrimination based on wealth was not grounds for heightened scrutiny under the Equal Protection Clause.<sup>19</sup> The Court found that the poor did not share the same characteristics as groups that do receive heightened protection. According to the Court, “the system of alleged discrimination and the class it defines have none of the traditional indicia of suspectness: the class is not saddled with such disabilities, or subjected to such a history of purposeful unequal treatment, or relegated to such a position of political powerlessness as to command extraordinary protection from the majoritarian political process.”<sup>20</sup> Consequently, the Court refused to add wealth to the list of kinds of discrimination that are suspect.

Whether the Court decided rightly is highly contested. For example, Watson argues that the homeless do meet the criteria of a suspect class and that the Supreme Court should declare the homeless to be such a class deserving heightened scrutiny.<sup>21</sup> She identifies consequences of declaring that homelessness is a suspect class.<sup>22</sup> However, “the Supreme Court has clearly refused to extend special judicial protection to poor people, including the homeless, by repeatedly reciting that poverty is not a suspect class.”<sup>23</sup> Because of this rule that gives substantial deference to cities, challenging laws that target the poor under the Equal Protection Clause is a difficult proposition.

The Occupy protests aim to confront these economic and legal structures that keep so many in deep poverty. However, there is a growing risk that the national conversation that the Occupy movement has sparked could be redirected towards debates about the protestors themselves. Much of the legal action around Occupy has been channeled towards defending the First Amendment rights of protestors. Focusing exclusively on protestors and their rights to protest could siphon energy away from the original purpose of Occupy.

This paper argues that the First Amendment can make a contribution to the Occupy movement beyond protecting the right to protest. The First Amendment protection of freedom of speech can also be an important tool for promoting economic justice. Advocates can frame activities on behalf of the very poor, including soliciting donations, or providing food, as protest activities deserving of First Amendment protection. Thus, the First Amendment can offer a mechanism to challenge certain laws that target the poor. By developing these First Amendment challenges, advocates for equality can confront and perhaps defeat laws that Equal Protection doctrine cannot address.

First, this paper examines the First Amendment protection for the right of charitable organizations to solicit contributions. This right today is relatively uncontroversial and conforms to our traditional intuitions about what the First Amendment ought to protect. It provides the basis for more controversial First Amendment rights.

Second, the paper examines the right of the destitute to beg for money. This right is more contested than the right of organizations to solicit contributions. By analogizing begging for money to soliciting donations, courts have extended the First Amendment protection recognized for charities. The outer limits of the right are not clear, and the right is still challenged by laws

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<sup>18</sup> Stephen Loffredo, *Poverty, Democracy and Constitutional Law*, 141 U. PA. L. REV. 1277, 1278 (1993).

that ban “aggressive panhandling” or require licenses for panhandling. I argue that courts recognizing First Amendment protection for the right to beg are right to do so.

Third, the paper examines a more recent struggle over prohibitions on sharing food in public parks. I propose that First Amendment protection for food sharing should be extended just as it was for soliciting donations and begging. By conducting large group food distributions, organizations have been able to simultaneously feed needy people and raise awareness about poverty in America. Unfortunately, courts have a mixed record of providing First Amendment protection for sharing food. I argue that the First Amendment is and should be a tool to defend food sharing.

The goal of this paper is to identify how the First Amendment’s protection for free expression has grown, and to suggest how advocates can continue to help it grow. It traces how First Amendment protection that emerged for charitable solicitation came to encompass begging as well. It presents the first salvos in the struggle to carry the First Amendment’s protection for charities and begging towards providing protection for political protests that are carried out by giving free food to the needy.

With decisions like *Citizens United*, the First Amendment protects the access of wealthy corporations to our elections more and more aggressively. The First Amendment can and should be a tool to promote access of the poor to our public spaces at least as aggressively.

## II. THE RIGHT TO SOLICIT DONATIONS

There is no doubt today that the First Amendment protects the right to solicit donations for charity. The Supreme Court established the parameters of First Amendment protection for the right to solicit donations in a trilogy of cases: *Schaumburg v. Citizens for a Better Environment*,<sup>24</sup> *Secretary of State of Maryland v. Joseph H. Munson Co.*,<sup>25</sup> and *Riley v. National Federation of the Blind of North Carolina*.<sup>26</sup> In the foundational *Schaumburg* decision, the Supreme Court struck down a municipal ordinance that required charitable organizations to get a permit before they could solicit donations door-to-door in their community.<sup>27</sup> The Court struck down the law because the municipality did not have a strong enough interest in imposing a substantial limitation on the protected activity of soliciting donations door-to-door.<sup>28</sup>

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<sup>19</sup> 411 U.S. 1, 28 (1973) (listing requirements for a suspect classification).

<sup>20</sup> *Id.*

<sup>21</sup> See Jennifer E. Watson, Note, *When No Place is Home: Why the Homeless Deserve Suspect Classification*, 88 IOWA L. REV. 501, 515-33 (2002-03).

<sup>22</sup> *Id.* at 533.

<sup>23</sup> *Id.* at 512.

<sup>24</sup> 444 U.S. 620, 622 (1980) (finding that soliciting for a charity is protected speech under the First Amendment). See also *Illinois ex rel. Madigan v. Telemarketing Assocs.*, 538 U.S. 600, 617 (2003) (affirming *Schaumburg* and clarifying that while the First Amendment protects charitable solicitation, it does not protect against fraudulent solicitation).

<sup>25</sup> 467 U.S. 947 (1984).

<sup>26</sup> 487 U.S. 781 (1988).

<sup>27</sup> 444 U.S. 620 at 638-39.

<sup>28</sup> See *id.*

The Court first inquired whether soliciting donations is actually expression protected by the First Amendment. It held that solicitation is protected expression because it is intertwined with important political communication from solicitors to those being solicited. The court explained:

[S]olicitation is characteristically intertwined with informative and perhaps persuasive speech seeking support for particular causes or for particular views on economic, political, or social issues, and for the reality that without solicitation the flow of such information and advocacy would likely cease. Canvassers in such contexts are necessarily more than solicitors for money.<sup>29</sup>

The Court then held that the town's permit requirement was unconstitutionally overbroad. The ordinance only allowed charitable organizations that could demonstrate that "at least seventy-five percent of the proceeds of such solicitations will be used directly for the charitable purpose of the organization."<sup>30</sup> The Court found that there were certain classes of organizations that would be impermissibly barred from soliciting contributions by this law. For example, the petitioners' organization raised money to pay canvassers to go door-to-door to distribute literature and convince individuals of the organization's political agenda. The Court reasoned that the "75-percent limitation is a direct and substantial limitation on protected activity that cannot be sustained unless it serves a sufficiently strong, subordinating interest that the Village is entitled to protect."<sup>31</sup> The Village claimed that the law was justified by its interest to prevent fraud and annoyance, but the Court disagreed. It conceded that preventing fraud is a substantial interest, but one that was only "peripherally promoted by the 75-percent requirement and [which] could be sufficiently served by measures less destructive of First Amendment interests."<sup>32</sup>

Justice Rehnquist dissented from the opinion. His argument about why solicitation should not be protected under the First Amendment is a recurring argument in begging and food-sharing cases. And in fact it foreshadowed the future debates over protection for begging. He wrote:

I believe that the Court overestimates the value, in a constitutional sense, of door-to-door solicitation for financial contributions and simultaneously underestimates the reasons why a village board might conclude that regulation of such activity was necessary . . . I believe that a simple request for money lies far from the core protections of the First Amendment as heretofore interpreted. In the case of such solicitation, the community's interest in insuring that the collecting organization meets some objective financial criteria is indisputably valid. Regardless of whether one labels noncharitable solicitation "fraudulent," nothing in the United States Constitution should prevent residents of a community from making the collective judgment that certain worthy charities may soli-

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<sup>29</sup> *Id.* at 632.

<sup>30</sup> *Id.* at 624.

<sup>31</sup> *Id.* at 636.

<sup>32</sup> *Id.*

cit door to door while at the same time insulating themselves against panhandlers, profiteers, and peddlers.<sup>33</sup>

Although the right to solicit does not directly arise out of what is known as public forum doctrine, understanding that the laws that restrain expressive activity in traditional public fora are particularly suspect is crucial to understanding how the First Amendment should protect solicitation. Public forum doctrine applies to much more than charitable solicitations, but the link between solicitation and public forum law is illustrated by *International Society for Krishna Consciousness Inc. v. Lee*.<sup>34</sup> In that case, the Port Authority of New York City banned the solicitation of funds in airport terminals.<sup>35</sup> The International Society for Krishna Consciousness challenged the law, claiming that it violated their First Amendment right to solicit donations.<sup>36</sup>

The Court explained that different standards of review apply for restrictions on expression that occur in different places. In places that have “traditionally been available for public expression,” restraints are subject to “the highest scrutiny.”<sup>37</sup> In this case, the Court ruled that airport terminals were not public fora, and so the limitation did not receive the highest scrutiny.<sup>38</sup> As a result, the restriction imposed on solicitations only needed to “satisfy a requirement of reasonableness.”<sup>39</sup> The Court concluded that the restriction was reasonable because of the inconvenience to passengers of the solicitation.<sup>40</sup>

Through these cases, solicitations for charity in public fora receive a high level of First Amendment protection. And despite Justice Rehnquist’s objections in *Schaumburg*, this protection now also extends to soliciting charitable contributions for oneself—an activity also known as begging.

### III. THE RIGHT TO BEG FOR MONEY

The right to beg for money may not seem to be within the traditional sphere of First Amendment speech. Asking a stranger on the street for money—whether the money is for food, shelter, a cigarette, or anything else—seems at first to be very different from demanding political change or criticizing government action. That was the conclusion of one of the first federal appeals courts to consider the issue.<sup>41</sup> However, since the 1990s, courts have gradually recognized First Amendment protection for begging. And we should be glad that they have. The most traditional kinds of First Amendment speech, such as publishing or protesting, are privileged activities that are mostly available to individuals with sufficient time, money, and other material resources.<sup>42</sup> And as the Supreme Court expands First Amendment protection for spending money to influence elections, the First Amendment may be developing a bias towards protecting the activities of the wealthiest the most.<sup>43</sup> After *Schaumburg*, the First Amendment covered requests for donations to charitable organizations. If the First Amendment were not able to reach requests for money that a person needed to use himself, a double standard would have crept into First Amendment doctrine: if you are asking for money for an established charity, and you are a volunteer or a salaried solicitor who does not need the money herself, the First Amendment will protect you, but if you are asking for money for yourself because you need it, the First Amendment is un-

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<sup>33</sup> *Id.* at 644. (Rehnquist, J., dissenting).

<sup>34</sup> 505 U.S. 672, 677-78 (1992).

<sup>35</sup> *See id.* at 675-76.

<sup>36</sup> *Id.* at 676.

available. Fortunately, courts have slowly recognized that there is at least some protection for solicitation on behalf of one's self.

*A. Begging Is Protected Expression, and Total Prohibitions are Unconstitutional*

One of the first opinions to directly address the First Amendment protection for the right to beg was the Second Circuit's decision in *Young v. NYC Transit Authority*.<sup>44</sup> In 1989, the New York City Metro Transit Authority passed a regulation that banned begging in subways but permitted certain other non-transit activities, including "solicitation for charitable, religious or political causes."<sup>45</sup> The Legal Action Center for the Homeless filed a lawsuit claiming that the law violated, among other rights, the First Amendment right to free speech.<sup>46</sup>

The Second Circuit held that the regulation did not violate the First Amendment.<sup>47</sup> It first inquired whether begging receives any First Amendment protection at all, and decided that it probably did not. The court explained that "[c]ommon sense tells us that begging is much more 'conduct' than it is 'speech.'"<sup>48</sup> Relying on *Texas v. Johnson*,<sup>49</sup> the court asked whether beggars intended to convey a particularized message and whether there is a great likelihood that those receiving the message will understand it.<sup>50</sup> The court decided that neither part of the test was satisfied: "the only message we are able to espy as common to all acts of begging is that beggars want to exact money from those whom they accost."<sup>51</sup>

<sup>37</sup> *Id.* at 678.

<sup>38</sup> *Id.* at 680.

<sup>39</sup> *Id.* at 683.

<sup>40</sup> *Id.* at 685.

<sup>41</sup> See *infra* discussion at note 51

<sup>42</sup> See, e.g., extensive debates about privilege at Occupy protests around the country, including: John Chasnoff & Sandra Tamari, *Addressing Oppression, Racism and Privilege in the Occupy Movement*, NEW LEFT PROJECT (Oct. 15, 2011), [http://www.newleftproject.org/index.php/site/print\\_article/addressing\\_oppression\\_racism\\_and\\_privilege\\_in\\_the\\_occupy\\_movement](http://www.newleftproject.org/index.php/site/print_article/addressing_oppression_racism_and_privilege_in_the_occupy_movement); Kai Wright, *Here's to Occupying Wall Street! (If Only That Were Actually Happening)*, COLORLINES (Oct. 5, 2011), [http://colorlines.com/archives/2011/10/heres\\_to\\_occupying\\_wall\\_street\\_if\\_only\\_that\\_were\\_actually\\_happening.html](http://colorlines.com/archives/2011/10/heres_to_occupying_wall_street_if_only_that_were_actually_happening.html) ("There are literally millions of people who have been kicked out of their homes [...] and ] caught in predatory debt traps [...] They are [...] overwhelmingly and not in the least bit coincidentally black people. And I suspect that until we build our politics around their participation, we will continue to miss the point."); *The Wednesday Weight-in: Occupy Wall Street and Confronting Privilege*, FEMINISTING (Oct. 5, 2011), <http://feministing.com/2011/10/05/the-wednesday-weight-in-occupy-wall-street-and-confronting-privilege/>.

<sup>43</sup> See *Citizens United v. FEC*, 130 S. Ct. 876 (2010).

<sup>44</sup> 903 F.2d 146 (2d Cir. 1990).

<sup>45</sup> *Id.* at 148.

<sup>46</sup> *Id.*

<sup>47</sup> *Id.* at 164.

<sup>48</sup> *Id.* at 153.

<sup>49</sup> 491 U.S. 397, 404 (1989) ("In deciding whether particular conduct possesses sufficient communicative elements to bring the First Amendment into play, we have asked whether '[a]n intent to convey a particularized message was present, and [whether] the likelihood was great that the message would be understood by those who viewed it.'")

<sup>50</sup> *Young*, 903 F.2d at 152.

<sup>51</sup> *Id.* at 154.

Assuming for the sake of argument that begging is expressive, the court also applied the *O'Brien*<sup>52</sup> test to the ban on panhandling.<sup>53</sup> It found that the statute did not violate the requirements of *O'Brien* because the court felt that there was a substantial government interest in preventing harassment that accompanies begging.<sup>54</sup> Furthermore, the court felt that a law banning begging was not targeted directly at any particular message.<sup>55</sup> Begging, according to the court, was simply conduct that the city was well within its authority to proscribe.

The law in the Second Circuit transformed with the Circuit's landmark decision in *Loper v. NYC Police Department*.<sup>56</sup> After *Young*, New York City police enforced a complete prohibition on panhandling in public in New York City.<sup>57</sup> A class action lawsuit on behalf of "all 'needy persons who live in the State of New York, who beg on the public streets or in the public parks of New York City'" challenged the constitutionality of the ban.<sup>58</sup>

The court analyzed whether begging is protected expression just as it had done in *Young*. But in a dramatic reversal, the court adamantly declared begging to be expression worthy of First Amendment protection.<sup>59</sup> The court proclaimed, "it cannot be gainsaid that begging implicates expressive conduct or communicative activity."<sup>60</sup> Citing *Village of Schaumburg v. Citizens for a Better Environment*, the court recognized that there is no legitimate First Amendment distinction that governments or courts can make between speech for charitable organizations and begging. The court explained,

We see little difference between those who solicit for organized charities and those who solicit for themselves in regard to the message conveyed. The former are communicating the needs of others while the latter are communicating their personal needs. Both solicit the charity of others. The distinction is not a significant one for *First Amendment* purposes.<sup>61</sup>

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<sup>52</sup> United States v. *O'Brien*, 391 U.S. 367, 376-77 (1968) (establishing a test to determine which level of scrutiny the Court should employ in cases where speech and nonspeech elements are present in conduct because the Court held that "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").

<sup>53</sup> *Young*, 903 F.2d at 157 (stating the test as "[p]ursuant to *O'Brien*, 'a government regulation is sufficiently justified' when: (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 no greater than is essential to the furtherance of that interest.').

<sup>54</sup> *Id.* at 158.

<sup>55</sup> *Id.* at 168.

<sup>56</sup> See 999 F.2d 699, 705 (2d Cir. 1993) (holding that a New York statute prohibiting loitering in public places for purposes of begging violated the First Amendment).

<sup>57</sup> Peter A. Barta, Note, *Giuliani, Broken Windows, and the Right to Beg*, 6 GEO. J. ON POVERTY L. & POL'Y 165 (1999). The law stated, "A person shall be guilty of loitering when he: 1. Loiters, remains or wanders in a public place for the purpose of begging." *Loper*, 999 F.2d at 701 (citing N.Y. Penal Law § 240.35(1) (McKinney 1989)).

<sup>58</sup> *Loper*, 999 F.2d at 701.

<sup>59</sup> *Id.* at 704.

<sup>60</sup> *Id.*

<sup>61</sup> *Id.* at 704.

Furthermore, begging, according to the court, carries a particular social message.<sup>62</sup> Simply seeing and hearing a person begging imparts a message that requires passers-by to consider the beggar's plight. Even if a beggar does not accompany a request for money with a statement about his need for shelter, food, or other support, "the presence of an unkempt and disheveled person holding out his or her hand or a cup to receive a donation itself conveys a message of need for support and assistance."<sup>63</sup>

The court applied the public forum doctrine and subjected the law to strict scrutiny.<sup>64</sup> Restraints on speech in places that are traditionally open to public expression receive the highest scrutiny. The streets, parks, and city sidewalks to which the ordinance applied are among the spaces that "have immemorially held in trust for the use of the public" and public expression.<sup>65</sup> Restraints on speech in traditional public fora are valid only if either the restraint "is necessary to serve a compelling state interest and is narrowly tailored to achieve that end," or if the restraint can be characterized as "regulations of the time, place and manner of expression which are content-neutral, are narrowly tailored to serve significant government interests, and leave open ample alternate channels of communication."<sup>66</sup>

The restraint on begging failed this test. It was not content-neutral because "it prohibits all speech related to begging."<sup>67</sup> Unlike *Young*, the court here felt that begging itself is an expressive message, and targeting begging is targeting a particular message—the request for money.

Nor was it necessary to serve a compelling state interest or narrowly tailored. The law banned all begging to address the problems of separate crimes (i.e. fraud and harassment) that the city said were connected to begging.<sup>68</sup> The city defended its law as necessary to prevent the crime and other evils to which begging leads.<sup>69</sup> The city made arguments to defend its statute that are familiar to advocates for homeless individuals. The court reported that "[t]he City Police regard the challenged statute as an essential tool to address the evils associated with begging on the streets of New York City."<sup>70</sup> The police argued that begging harms commerce when "[r]esidents are intimidated and local businesses suffer accordingly."<sup>71</sup> Other conduct of panhandlers is more serious; "[p]anhandlers have been known to block the sidewalk, follow people down the street and threaten those who do not give them money" and, also, "[i]t is said that they often make false and fraudulent representations to induce passers-by to part with their money."<sup>72</sup> With a hint of sarcasm, the Circuit court summarized the city's argument by stating that

[t]he City Police advance the theory that panhandlers, unless stopped, tend to increase their aggressiveness and ultimately commit more serious crimes. Ac-

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<sup>62</sup> Arguably, this rationale fails the *Texas v. Johnson* test that only provides First Amendment protection for speech where the speaker intends to deliver a particularized message.

<sup>63</sup> *Loper*, 999 F.2d at 704.

<sup>64</sup> *Id.*

<sup>65</sup> *Id.* at 703 (citing *Hague v. CIO*, 307 U.S. 496, 515 (1939)).

<sup>66</sup> *Id.* (citing *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 45 (1983)).

<sup>67</sup> *Id.* at 705.

<sup>68</sup> *Loper*, 999 F.2d at 701.

<sup>69</sup> *Id.*

<sup>70</sup> *Id.*

<sup>71</sup> *Id.*

<sup>72</sup> *Id.*

According to this theory, what starts out as peaceful begging inevitably leads to the ruination of a neighborhood. It appears from the contentions of the City Police that only the challenged statute stands between safe streets and rampant crime in the city.<sup>73</sup>

Though preventing crimes such as fraud and harassment is a substantial government interest, banning begging was too broad a prohibition than was necessary. The regulation was consequently a violation of the First Amendment.<sup>74</sup>

*Loper* remains arguably the most significant and most expansive circuit court decision recognizing the First Amendment protection for begging, but other courts have also recognized that begging is expression. Even before *Loper*, a district court in California found that begging is expressive conduct and struck down a prohibition on begging, though the appeals court did not make a decision on the law's validity under the First Amendment.<sup>75</sup> The challengers successfully convinced the court that constitutional protection for charitable solicitation (the kind recognized in *Schaumburg v. Citizens for a Better Environment*) could not be withheld from begging. The court explained:

Begging can promote the very speech values that entitle charitable appeals to constitutional protection. A request for alms clearly conveys information regarding the speaker's plight. Begging gives the speaker an opportunity to spread his views and ideas on, among other things, the way our society treats its poor and disenfranchised. And in some cases, a beggar's request can change the way the listener sees his or her relationship with and obligations to the poor. "Begging does considerably more than 'propose a commercial transaction.' Like other charitable requests, begging appeals to the listener's sense of compassion or social justice, rather than to his economic self-interest." . . . That many beggars fail to so inform or affect their listeners is irrelevant. Many charitable solicitors fail to educate, enlighten, or persuade their listeners.<sup>76</sup> Other federal and state courts have also applied *Loper's* protection for the right to beg within their own jurisdictions.<sup>77</sup>

The Supreme Court has still never held whether begging is protected expression. Nor has it explained exactly what test should apply to begging. However, there are hints that the Supreme Court would find it to be protected if it were required to decide. In *Nixon v. Shrink Mo. PAC*, the majority of the Supreme Court accepted a campaign finance limitation.<sup>78</sup> Justices Kennedy and Thomas sharply dissented, complaining that such limitations on election spending should be invalid, considering the scope of First Amendment protection for other activities. Their dissent cited *Loper* and opined, "the Courts of Appeals have followed our lead and concluded that the First Amendment protects, for example, begging, shouting obscenities, erecting tables on a sidewalk, and refusing to wear a necktie."<sup>79</sup> Their criticism appears to accept First Amendment protection for begging. If Justices Kennedy and Thomas are willing to accept First Amendment protection for begging, it seems likely that if the highest court hears the question, a majority will agree that begging is expression that deserves at least some form of First Amendment scrutiny.

### *B. Indirect or Limited Restraints on Begging Are Still Common*

Prohibitions on begging that are more limited than the city-wide law in *Loper* remain common and are frequently upheld. They can take many forms, including explicit prohibitions of

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<sup>73</sup> *Id.*

begging in certain areas, prohibitions of certain conduct related to begging, or more indirect restraints such as requiring permits for panhandling.

Several courts have upheld prohibitions on begging in narrowly defined areas. In *McFarlin v. DC*, the DC Court of Appeals allowed an ordinance that banned begging at subway stops.<sup>80</sup> The court cited to *Loper* and recognized that begging had been recognized as protected expression.<sup>81</sup> However, the court did not decide the question for its own jurisdiction, but only assumed that begging is protected activity and upheld the ordinance anyway. It reasoned that a subway stop is not a public forum.<sup>82</sup> Therefore, heightened public forum scrutiny was not necessary. Instead a more relaxed standard was appropriate, and preventing begging in the subway entrance was reasonable way to keep order in a very busy “funnel” into the subway.<sup>83</sup>

The Court of Appeals of New York approved a law that barred panhandlers from soliciting at roadsides from people in their cars.<sup>84</sup> It assumed panhandling is protected expression, but that restraining the activity was content-neutral and a reasonable time, place, and manner regulation of the government’s interest in protecting safety and traffic flow on roadways.<sup>85</sup>

The Eleventh Circuit upheld Fort Lauderdale’s ban on begging in a beach area as a reasonable time, place, and manner restraint.<sup>86</sup> The Seventh Circuit permitted Indianapolis to ban panhandling at night.<sup>87</sup> In that case, the plaintiffs did not argue that the restraint on begging was

<sup>74</sup> *Id.* at 705-06.

<sup>75</sup> *See Blair v. Shanahan*, 775 F.Supp. 1315, 1325-26 (N.D. Cal. 1991) (“Solicitations for alms are not generally and frequently enough proxies for intimidating or coercive threats to justify this statute. This case falls squarely under the holding in *Carey*; the statute violates the Equal Protection Clause of the Fourteenth Amendment.”).

<sup>76</sup> *Id.* at 1322-23 (citation omitted).

<sup>77</sup> *See Gresham v. Peterson*, 225 F.3d 899, 907 (7th Cir. 2000) (upholding a partial ban on begging, explaining that it was “a far cry from the total citywide ban on all panhandling overturned by the court in *Loper*”); *Smith v. City of Fort Lauderdale*, 177 F.3d 954 (11th Cir. 1999) (upholding a regulation that proscribed begging on the beach and sidewalks because it was narrowly tailored to serve the City’s interest in providing a safe, pleasant environment); *Henry v. City of Cincinnati*, 2006 U.S. Dist. LEXIS 94704 at \*18 (S.D. Oh. 2006) (“After *Schaumburg*, lower federal courts and state courts have equated panhandling to charitable contributions, and analyzed them under the same framework”);

<sup>78</sup> *Nixon v. Shrink Mo. PAC*, 528 U.S. 377, 411-12 (2000).

<sup>79</sup> *Id.* at 412 (citing *Loper v. NYC Police Dept.*, 999 F.2d 699 (2d Cir. 1993)).

<sup>80</sup> 681 A.2d 440 (D.C. 1996).

<sup>81</sup> *Id.* at 447.

<sup>82</sup> *See id.* at 448 (“No one can fairly argue that the entranceway to (or point of egress from) a subway escalator-defined as the area within fifteen feet of the entrance-is a place whose principal purpose is the free exchange of ideas. Its primary purpose, indeed its only practical purpose, is as an area within which pedestrian traffic is funnelled onto the escalator. Moreover, it is not a ‘designated public forum’; WMATA has explicitly prohibited expressive activity within that limited area.”).

<sup>83</sup> *Id.*

<sup>84</sup> *People v. Barton*, 12 Misc.3d 322, 322-23 (N.Y. App. Term 2006). *Cf. People v. Hoffstead*, 28 Misc.3d 16 (N.Y. App. Term 2010) (striking down a prohibition against “loitering for the purpose of begging” was over-broad because it amounted to a “sweeping prohibition of all begging at all times.”).

<sup>85</sup> *Barton*, 12 Misc.3d at 329-30.

<sup>86</sup> *Smith*, 177 F.3d 954 (11th Cir. 1999).

<sup>87</sup> *Gresham*, 225 F.3d at 905-906 (7th Cir 2000) (“Colorable arguments could be made both for and against the idea the Indianapolis ordinance is a content-neutral time, place, or manner restriction [...] Because the parties here agree that the regulations are content neutral, we need not decide whether the Indianapolis ordinance can be justified with-

not content-neutral, so the court applied the intermediate public forum standard and found that the regulation was a reasonable time, place, and manner restraint that was “narrowly tailored to serve a significant government interest, and [left] open ample alternative channels for communication.”<sup>88</sup>

These cases demonstrate that the question of whether begging laws are content-neutral is unsettled. How a court answers that question heavily influences the outcome of the case. The Court of Appeals of New York and the Eleventh Circuit both found that the bans on begging were content-neutral, and therefore, the bans only received the intermediate level of public forum scrutiny. In contrast, *Loper* found that a city-wide ban on begging was not content-neutral. The Seventh Circuit found compelling arguments on both sides of the question but did not decide.<sup>89</sup> The Ninth Circuit certified the question to the California Supreme Court, which decided that under California law begging bans are content neutral.<sup>90</sup> Advocates will need to continue to assert that begging bans are not content-neutral if they hope to successfully challenge partial bans on begging.

Another common partial restraint on begging that courts have accepted is a prohibition of “aggressive panhandling.” Philadelphia has a typical statute:

Aggressive Conduct on the Sidewalk Prohibited:

- (a) Solicit money for any purpose on the public sidewalk in an aggressive manner, or accompanied by conduct, including but not limited to repeated begging, insistent panhandling, retaliatory comments, blockage of free passage of a pedestrian, touching or yelling at a pedestrian, confrontation or intimidation, which is likely to cause a reasonable person to fear bodily harm to oneself or another, or damage to or loss of property.
- (b) Solicit money for any purpose on the public sidewalk in any manner, within an eight foot (8') radius of any building entrance, or within an eight foot (8') radius of any vending cart.
- (c) Solicit money for any purpose on the public sidewalk in any manner, within a twenty foot (20') radius of any bank entrance or any automatic teller machine.<sup>91</sup>

The Seventh Circuit upheld a prohibition on aggressive panhandling in the same case in which it upheld the prohibition on all nighttime panhandling.<sup>92</sup> Additionally, the district court of Washing-

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out reference to the content of the regulated speech.”).

<sup>88</sup> *Id.* at 905 (citing *Perry*, 460 U.S. at 45).

<sup>89</sup> *Id.* at 906.

<sup>90</sup> *Los Angeles Alliance for Survival v. City of Los Angeles*, 224 F.3d 1076 (2000).

<sup>91</sup> PHILA. PA CODE § 10-611(4); *see also* Jason Leckerman, Comment, *City of Brotherly Love?: Using the Fourteenth Amendment to Strike Down an Anti-Homeless Ordinance in Philadelphia*, 3 U. PA. J. CONST. L. 540, 542 (2001) (“The Philadelphia ‘Sidewalk Behavior Ordinance’ prohibits many activities in which segments of the homeless population often engage: panhandling within eight feet of a building entrance or vending truck or within twenty feet of a bank entrance or an automated-teller machine, lying on the public sidewalk (except in a medical emergency), sitting on the sidewalk for more than thirty minutes in a two-hour period, and, in certain instances, aggressive panhandling.”).

ton upheld an aggressive panhandling ordinance, even though it struck down the part that it considered to be over-broad.<sup>93</sup>

Some laws indirectly limit begging by regulating the use of public space. However, courts are not in agreement on how to treat these laws. For example, the Ninth Circuit upheld a law banning sitting on public sidewalks.<sup>94</sup> The court reasoned that although sitting could sometimes be expressive, it was not “integral to, or commonly associated with, expression” and “subject to other valid legislation, homeless people remain free to beg on Seattle’s sidewalks.”<sup>95</sup> In contrast, the district court for the Northern District of California rejected a ban on sitting on public sidewalks as a violation of the First Amendment.<sup>96</sup> It found that “there are numerous instances” in which sitting could involve expression because sitting may be necessary for the disabled to engage in expression or to enable speakers to avoid blocking traffic.<sup>97</sup> This district court then applied the higher scrutiny public forum test and struck down the law because the law restrained sitting on sidewalks, which are traditional public fora.<sup>98</sup>

Yet another type of indirect limitation on panhandling requires that panhandlers secure a permit for their activity. For example, Howard County, Maryland requires licenses for “non-transit activities” on roadways, which includes panhandling on roadsides.<sup>99</sup> A person who wants to engage in such a non-transit activity in Howard County, which presumably includes panhandling, is only able to obtain four permits per year and is required to pay an application fee of \$100.00 for the privilege.<sup>100</sup> The limit on the number of permits allowed and the application process required are likely to have the effect of making begging impossible on roadsides.

These permit laws are subject to a set of cases dealing with laws that require licenses for engaging in First Amendment activity. These types of licenses are prior restraints on expression, and the Supreme Court, in *Forsyth County v. Nationalist Movement*, explained that “there is a ‘heavy presumption’ against the validity of a prior restraint”<sup>101</sup> Despite this presumption, “the Court has recognized that government, in order to regulate competing uses of public forums, may impose a permit requirement on those wishing to hold a march, parade, or rally.”<sup>102</sup> Forsyth County created an ordinance that required permits for activities like parades and demonstrations.<sup>103</sup> The ordinance was not content-neutral because the permit fee was based on the cost of the event to the county. Speech with certain content was more expensive because of the costs involved, and thus, these events incurred a higher fee.<sup>104</sup> The effect here was to charge a higher fee

<sup>92</sup> *Gresham*, 225 F.3d at 909.

<sup>93</sup> *Roulette v. City of Seattle*, 850 F. Supp. 1442, 1453 (D.Wash. 1994). The plaintiffs in this case also challenged an ordinance banning sitting down on sidewalks. The Court rejected the First Amendment argument, and the plaintiffs appealed the decision to the Ninth Circuit. *Roulette v. City of Seattle*, 97 F. 3d 300 (9th Cir. 1996).

<sup>94</sup> *Roulette*, 97 F. 3d at 303.

<sup>95</sup> *Id.*

<sup>96</sup> *Berkeley Cmty. Health Project v. City of Berkeley*, 902 F. Supp. 1084, 1091-95 (1995).

<sup>97</sup> *Id.* at 1093.

<sup>98</sup> *Id.*

<sup>99</sup> HOWARD COUNTY CODE, MD § 18.207(d)(2)(i) (2004).

<sup>100</sup> *Id.*

<sup>101</sup> *Forsyth Cnty., GA v. Nationalist Movement*, 505 U.S. 123, 130 (1992) (internal citation omitted).

<sup>102</sup> *Id.*

<sup>103</sup> *Id.* at 126-27.

<sup>104</sup> *Id.* at 134 (“It is clear, however, that, in this case, it cannot be said that the fee’s justification has nothing

to some speakers than to others because of the content of their speech. Similarly, Howard County's licensing requirement is arguably also not content neutral for the same reason because its fee makes it possible for speakers with greater resources to deliver their messages, but makes it impossible for those who do not have the resources to cover the application fee to solicit the donations they need to support the desired event.<sup>105</sup>

These examples demonstrate that while courts generally recognize panhandling as protected expression, they give a significant amount of discretion to local governments to impose partial restraints. This line of case law also demonstrates that there are many competing standards of review for restraints on begging. Laws requiring permits should be subject to the high standard of prior restraint scrutiny as in *Forsyth County*. While the Second Circuit determined that restraints on begging were not content-neutral and needed strict scrutiny, the Eleventh Circuit and New York's appeals court disagreed.<sup>106</sup> The Seventh Circuit would not decide.<sup>107</sup> To prevent the First Amendment from developing a bias towards protecting privileged speakers more than underprivileged ones, ensuring strong protection for the right to beg is important. The first phase of this campaign, convincing courts that begging is protected expression, has largely been won. The next phase must be to convince courts to apply higher levels of scrutiny to restrictions, and the cases demonstrate that this phase is far from complete.

#### IV. THE RIGHT TO GIVE AWAY FOOD

In the past few years, local governments have adopted yet another strategy for making public spaces uncomfortable for the poor. Local governments in cities across the United States have enacted laws that ban sharing food under certain conditions. The most burdensome are regulations on groups that regularly gather in public parks to provide free food to those in need. These laws share a great deal with laws banning begging. Similar to laws that ban begging, laws that regulate group feeding attempt to drive the poorest members of society out of the public's sight. Because the First Amendment limits laws banning begging, the First Amendment can be an important tool for challenging laws that ban sharing food.

##### *A. The Doctrine About How to Analyze the First Amendment's Application to Food Sharing is Unsettled*

Courts across the country have heard a handful of challenges to laws that ban or restrain public food distribution, and have reached inconsistent conclusions about how to understand the expressive content of food sharing. The circuitous history of the Eleventh Circuit's *First Vagabonds Church v. Orlando* illustrates the difficulty that judges are having deciding how to scrutinize bans on sharing food. In this case, the Eleventh Circuit considered the City of Orlando's ban

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to do with content") (internal citation and quotation marks omitted).

<sup>105</sup> See also *Freedman v. State of Maryland* 380 U.S. 51 (1965) (Law may not delegate overly broad licensing discretion to a government official); *Ward v. Rock Against Racism*, 491 U.S. 781 (1989); *Lady J. Lingerie v City of Jacksonville*, 176 F.3d 1358 (1999) (holding that a law providing discretion to an official to simply delay permit approval forever is invalid); cf. *Thomas v. Chicago Park District*, 534 U.S. 316 (2002) (finding that a permit requirement for public assemblies with more than 50 people to be a reasonable time, place, and manner restriction on expression).

<sup>106</sup> *Smith*, 177 F.3d 954 (11th Cir. 1999); *Barton*, 12 Misc.3d at 329-30 (N.Y.App. Term 2006).

<sup>107</sup> *Gresham*, 225 F.3d at 905-906 (7th Cir 2000).

on large group feedings.<sup>108</sup> As the challenge made its way from trial-level through the appeals process, each set of judges examining the law applied a different standard of review under the First Amendment. This case demonstrates that while there are compelling reasons to find that sharing food can be a highly expressive activity, there is no consensus about how to fit sharing food into modern First Amendment doctrine.

Orlando's law made it unlawful for anyone to participate in a large group feeding in a public park without a permit.<sup>109</sup> The ordinance also limited the number of permits an organization could receive to two per year per park.<sup>110</sup> The law particularly impacted two organizations that regularly provided food to the needy. The first organization, the First Vagabonds Church of God, provided food to its members who were mostly homeless. The second organization, Food Not Bombs is a charitable organization, which provided free food twice a week in an Orlando park. Food Not Bombs is a loosely organized international movement that distributes food to the hungry. By their own estimate, "there are over 1,000 chapters of Food Not Bombs active in over 60 countries in Europe, the Middle East, Africa, the Americas, Asia, Australia, and New Zealand" and they claim to be "active in nearly 500 cities in the United States."<sup>111</sup> The organization describes its strategy as that by sharing food, it is engaging in a political protest:

We recover food that would have been discarded and share it as a way of protesting war and poverty . . . Food Not Bombs is trying to motivate the public to focus our resources on solving problems like hunger, homelessness and poverty while seeking to end war and the destruction of the environment.<sup>112</sup>

In 2005, the Orlando chapter of Food Not Bombs began distributing food in Lake Eola Park in Orlando every Wednesday at 5:00 PM.<sup>113</sup> Starting in 2008, Food Not Bombs began offering free food on Mondays at 8:00 PM in 2008 in the same park.<sup>114</sup> The First Vagabonds Church of God joined Food Not Bombs in Lake Eola Park but later moved to another park nearby.

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<sup>108</sup> *First Vagabonds Church of God v. City of Orlando*, 578 F. Supp. 2d 1353 (M.D. Fla. 2008); *First Vagabonds Church of God v. City of Orlando*, 610 F. 3d 1274 (11th Cir. 2010); *First Vagabonds Church of God v. City of Orlando*, 638 F. 3d 756 (11th Cir. 2011).

<sup>109</sup> CITY OF ORLANDO, FL. CODE § 18A.09(2) (2006).

<sup>110</sup> *Id.*

<sup>111</sup> *Frequently Asked Questions*, FOODNOTBOMBS.NET, <http://www.foodnotbombs.net/faq.html> (Apr. 27, 2011).

<sup>112</sup> *Id.*

<sup>113</sup> *First Vagabonds Church*, 638 F. 3d at 758.

<sup>114</sup> *Id.*

Orlando city officials justified the law as a necessary tool for maintaining the Lake Eola Park. They testified that the law was intended to reduce the harm to Lake Eola Park from overuse and share the burden of large group feedings to other parks.<sup>115</sup> Food Not Bombs, First Vagabonds Church, and individual members of both organizations, brought a complaint challenging the ordinance. They claimed that the law violated Florida's Religious Freedom Restoration Act, the Free Exercise Clause of the First Amendment, the Free Assembly Clause of the First Amendment, the Due Process and Equal Protection clauses of the Fourteenth Amendment, and the Free Speech clause of the First Amendment.<sup>116</sup>

The district court struck down the law because it violated the First Amendment protections for free speech and free exercise of religion. The court dismissed the church's claim under Florida's Religious Freedom Restoration Act.<sup>117</sup> The court also dismissed the freedom of assembly claim.<sup>118</sup> Under the Free Exercise claim, the court found there was no rational basis for the statute and struck the statute down on those grounds in addition to on the grounds of the free speech violation.<sup>119</sup>

When it turned to the First Amendment Free Speech claim, the court first examined whether food sharing is expressive conduct. The court applied the two-part test from *Texas v. Johnson* that governs when conduct is sufficiently expressive to receive protection under the First Amendment.<sup>120</sup> Under *Texas v. Johnson*, conduct is sufficiently expressive to trigger First Amendment protection if there is "an intent to convey a particularized message" and if there is a great likelihood "that the message would be understood by those who viewed it."<sup>121</sup>

The court found that food sharing is expressive conduct. First, the plaintiffs satisfied the requirement that the speakers have "an intent to convey a particularized message" because the individuals who testified about the organization's message all "described the same basic substantive message" about the expressive content of sharing food.<sup>122</sup> Second, the plaintiffs satisfied the requirement that others understand their message because they provided testimony from individuals who had seen and understood their message.<sup>123</sup>

The court next decided that the ordinance was content-neutral because the ordinance applied equally to all large groups sharing food in Orlando's public parks.<sup>124</sup> The court was not convinced that the ordinance targeted a particular message, even though it acknowledged that "the Ordinance clearly appears to have been passed with the intent of limiting, or even eliminating" the plaintiffs' food sharing activities.<sup>125</sup> Citing to *US v. O'Brien*,<sup>126</sup> the district court explained that

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<sup>115</sup> *Id.*

<sup>116</sup> *Id.* at 762.

<sup>117</sup> *First Vagabonds Church*, 578 F. Supp. 2d at 1361.

<sup>118</sup> *Id.*

<sup>119</sup> *Id.*

<sup>120</sup> *Id.* at 1358 (citing *Texas v. Johnson*, 491 U.S. 397 (1989)).

<sup>121</sup> *Johnson*, 491 U.S. at 404 ("In deciding whether particular conduct possesses sufficient communicative elements to bring the First Amendment into play, we have asked whether '[a]n intent to convey a particularized message was present, and [whether] the likelihood was great that the message would be understood by those who viewed it.'").

<sup>122</sup> *First Vagabonds Church*, 578 F. Supp. 2d at 1358.

<sup>123</sup> *Id.*

<sup>124</sup> *Id.*

<sup>125</sup> *Id.* at 1359.

<sup>126</sup> 391 U.S. 367 (1968)

the ordinance was a content-neutral restraint on conduct containing speech and non-speech elements.<sup>127</sup> Therefore, to justify the ordinance, the court required the City of Orlando to demonstrate that its ordinance furthered “a substantial governmental interest and [that] the incidental restriction on [the plaintiffs’] First Amendment Freedoms [were] no greater than [was] essential to further that interest.”<sup>128</sup>

The City offered three possible substantial government interests for the law, but the court rejected them all. First, the City could not show that any crime actually arose as a result of the group feedings.<sup>129</sup> Second, the City could not show that littering was a problem at the group feedings; in fact, there was evidence that Orlando Food Not Bombs “clean[s] up when they are done and that they leave the park cleaner than it was when they arrived.”<sup>130</sup> Finally, the court did not believe that the City’s evidence for the overuse of parks because of Food Not Bombs was credible.<sup>131</sup> The court also criticized the ordinance for failing to even address the overuse problem since the ordinance did not limit the number of groups who could get permits on a single day or prevent different groups from holding large group feedings every day of the year.<sup>132</sup>

The court sharply criticized “the final, and perhaps real, though unstated, reason for the City’s adoption of this ordinance: [. . .] discouraging the homeless from congregating in downtown Orlando.”<sup>133</sup> The City, the court argued, was not actually dealing with the problem of homelessness, but instead stifling protected expression to shuffle the problem out of sight.<sup>134</sup> The court briefly mentioned that the suppression of speech was especially serious since it occurred in a park “which, from time immemorial, has been the traditional public forum for free speech.”<sup>135</sup>

Because the court found that there was no substantial government interest in adopting the ordinance, the court did not have to examine if the ordinance was narrowly tailored. Though the court mentioned the status of the park as a public forum, it did not engage in public forum analysis. Following *O’Brien*, the court held the ordinance violated the Free Speech Clause of the First Amendment.<sup>136</sup>

Two years later, the Eleventh Circuit reversed the district court.<sup>137</sup> The Circuit found for the City on all of the legal issues before the court: the Free Speech clause, the Free Exercise clause, the Due Process clause, the Equal Protection clause, and the Florida Religious Freedom Restoration Act.<sup>138</sup> The Eleventh Circuit concluded that the ordinance did not violate the First Amendment because Food Not Bombs’ food sharing was not expressive conduct. Similar to the

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<sup>127</sup> *First Vagabonds Church*, 578 F. Supp. 2d at 1359.

<sup>128</sup> *Id.* at 1360.

<sup>129</sup> *Id.*

<sup>130</sup> *Id.*

<sup>131</sup> *Id.*

<sup>132</sup> *Id.* The drafters of the ordinance may have been trying to avoid the constitutional problems of licenses for expressive activity by only allowing licenses to be denied for a single clear reason. *See supra* text accompanying note 95 (discussing licensing). Ironically, this provision helped lead the district court to the conclusion that the ordinance violated the First Amendment for a different reason. *Id.*

<sup>133</sup> *First Vagabonds Church*, 578 F. Supp. 2d at 1360-61.

<sup>134</sup> *Id.*

<sup>135</sup> *Id.*

<sup>136</sup> *Id.* at 1361.

<sup>137</sup> *First Vagabonds*, 610 F.3d at 1285.

<sup>138</sup> *Id.* at 1292.

district court, the Eleventh Circuit applied the test from *Texas v. Johnson* to determine if the conduct was expressive.<sup>139</sup> The court agreed that Food Not Bombs had the intent to communicate a message and satisfied the first prong of the *Johnson* test.<sup>140</sup> However, the court held that Food Not Bombs did not satisfy the second requirement that “the likelihood was great that the message would be understood by those who viewed it.”<sup>141</sup> The court first clarified that the test is an objective one: “we ask whether the reasonable person would interpret it as *some* sort of message.”<sup>142</sup> For that reason, the court discounted the statements of the mayor and police officer that they had understood that Food Not Bombs was expressing a political message.<sup>143</sup> Second, the court limited what it could consider pursuant to the test. The court declared that “the [hypothetical] observer, however, is deaf and blind to explanatory speech – T-shirts, buttons, banners, speaking, and so on – accompanying the conduct.”<sup>144</sup> Thus, the t-shirts, buttons, banners, statements, and other explanatory speech that Food Not Bombs engaged in along with sharing food could not be part of its evaluation of the expressive content of Food Not Bombs’ conduct.<sup>145</sup>

After declaring that the testimony of witnesses to the food sharing as expressive conduct was irrelevant and that it would ignore every aspect of the food sharing except the physical act of sharing food, the court held that the conduct was not clearly expressive to the “reasonable observer.”<sup>146</sup> The court found that a “reasonable observer” was unable to distinguish the conduct of Food Not Bombs from “a family having a reunion, a church intending to engage in a purely charitable act, a restaurant distributing surplus food for free instead of throwing it away, or an organization trying to engage in a form of political speech.”<sup>147</sup> After thus limiting the test for finding expressive conduct, the court concluded that the ordinance did not implicate enough expression to receive First Amendment scrutiny.<sup>148</sup> A lone dissenter, Judge Barkett, sharply criticized how the majority limited the *Johnson* test.<sup>149</sup> Judge Barkett argued that the court was wrong to strip the “reasonable observer” of her powers of reason and observation.<sup>150</sup> Perhaps Judge Barkett was not alone in questioning the legal merits of the majority’s decision, because the court soon reconsidered its conclusions.

In a turn that highlights the salience of the food sharing question to the current state of First Amendment law, the Eleventh Circuit vacated its decision and decided to rehear the case *en*

<sup>139</sup> *Id.* at 1282.

<sup>140</sup> *Id.* at 1282-83.

<sup>141</sup> *Id.* at 1282.

<sup>142</sup> *Id.* (emphasis in original).

<sup>143</sup> *First Vagabonds*, 610 F.3d at 1283 n.11.

<sup>144</sup> *Id.* at 1283.

<sup>145</sup> *Id.*

<sup>146</sup> *Id.* at 1284-85.

<sup>147</sup> *Id.* at 1284-85.

<sup>148</sup> *First Vagabonds*, 610 F.3d at 1285.

<sup>149</sup> *Id.* at 1294 (Barkett, J., dissenting).

<sup>150</sup> *Id.* (“[T]o reach its result, the majority deconstructs the expressive conduct and strips it of every component save the act of handing out food; but the Supreme Court has told us that we must analyze whether conduct is expressive by viewing what is observable as a whole – not by dividing and isolating it into parts . . . [I]n every case posing the question of whether conduct is protected under the First Amendment, the Supreme Court has viewed observable conduct as a whole, rather than in isolated parts.”)

*banc*.<sup>151</sup> The only issue to be briefed was the free speech question: “whether the ordinance as applied to Orlando Food Not Bombs violated the Free Speech Clause of the First Amendment.”<sup>152</sup>

The rehearing did not reach the conclusion that First Vagabonds Church, Food Not Bombs, and those they supported must have hoped for. The Eleventh Circuit again upheld the ordinance and found that it did not violate the First Amendment, but this time on the grounds that the ordinance satisfied scrutiny under *O’Brien* for restraints on expression.<sup>153</sup> The court examined the ordinance as a “reasonable time, place or manner” restraint under the *O’Brien* test.<sup>154</sup> Though the panel’s decision turned on the question of whether sharing food was expressive, the *en banc* court assumed, but did not decide, that “the feeding of homeless persons by Orlando Food Not Bombs is expressive conduct protected by the First Amendment.”<sup>155</sup> The court nevertheless concluded that the ordinance comported with the First Amendment.

The court first decided that the ordinance was a reasonable time, place, or manner restriction on speech.<sup>156</sup> The court held that the ordinance still provided Food Not Bombs with ample opportunity to engage in its activity.<sup>157</sup> The ordinance allowed Food Not Bombs to obtain two permits a year at each of the 42 other parks in downtown Orlando “for a total of 84 group feedings at parks within a two-mile radius of City Hall,” and to conduct unlimited feedings at any of the sixty-six parks outside of the downtown area.<sup>158</sup> The court did not consider the impact of having to constantly change locations on the group feeding or the importance of being at the particular park that they had chosen. The court also held that the ordinance was reasonable because it did not limit Food Not Bombs from conducting as many political rallies as the group liked. The court ignored the expressive content of the act of providing food.<sup>159</sup>

The court also concluded that the ordinance satisfied the *O’Brien* test.<sup>160</sup> Unfortunately it offered no analysis for its legal conclusions. First, the court stated the ordinance was clearly within the constitutional authority of the city to enact.<sup>161</sup> Second “the city has a substantial interest in managing park property and spreading the burden of large group feedings throughout a greater area and those interests are plainly served by the ordinance.”<sup>162</sup> Third, the city’s substantial interest was “unrelated to the suppression of speech.”<sup>163</sup> And last, because the city was in the best position to decide how best to manage its parks, “the incidental restriction of alleged free-

<sup>151</sup> First Vagabonds Church of God v. City of Orlando, 616 F.3d 1229 (11th Cir. 2010).

<sup>152</sup> First Vagabonds Church of God v. City of Orlando, 638 F.3d 756, 760 (11th Cir. 2011).

<sup>153</sup> *Id.* at 762 (“The ordinance is a valid regulation of expressive conduct that satisfies all four requirements of *O’Brien* . . .”).

<sup>154</sup> *Id.* at 761 (“Even when we assume that the feeding of homeless persons is expressive conduct, the ordinance, as applied to Orlando Food Not Bombs, is a reasonable time, place, or manner restriction.”).

<sup>155</sup> *Id.* at 756.

<sup>156</sup> *Id.* at 760.

<sup>157</sup> *Id.* at 761.

<sup>158</sup> *Id.* at 758.

<sup>159</sup> See, e.g., *Cohen v. California*, 403 U.S. 15, 26 (1971) (explaining, “much linguistic expression serves a dual communication function: it conveys not only ideas capable of relatively precise, detached explication, but otherwise inexpressible emotions as well.”). There is also expressive content in the medium in which a message is delivered.

<sup>160</sup> *First Vagabonds Church*, 638 F.3d at 762.

<sup>161</sup> *Id.*

<sup>162</sup> *Id.*

<sup>163</sup> *Id.*

doms under the First Amendment is not greater than necessary to further the interest of the City.”<sup>164</sup> The Eleventh Circuit did not even consider the applicability of public forum doctrine.

After the *en banc* rehearing, what is the law in Eleventh Circuit about whether sharing food is protected expression? The panel clearly decided it was not. However, the *en banc* opinion assumed but did not decide that it was protected expression. The Eleventh Circuit did not overrule its earlier ruling. However, the fact that the court also considered the next steps of the analysis suggests that the court’s commitment to the first ruling may not be especially strong. In the first hearing on the matter, the Eleventh Circuit conceded that it might be willing to find, with in another set of facts, that the act of feeding could be sufficiently expressive to receive First Amendment protection.<sup>165</sup> However, under the severely limited test the court adopted, which requires the court to examine only the act of feeding itself and none of the accompanying expression, such as banners or speech, it is difficult to imagine a set of facts that might convince this court to find feeding to be expressive.

The Orlando Food Not Bombs chapter insists they will keep feeding the homeless despite the ordinance.<sup>166</sup> One member told a reporter that the court’s decision did not dissuade the group from sharing food: “There is no real change—we’re here today, we’ll be here Sunday, we’ll be here next Wednesday.”<sup>167</sup> As of April 13, 2011, the City of Orlando had not yet decided how to enforce the ordinance, but the mayor expressed his intention to do so, and told the public, “I certainly hope that law-abiding citizens that are not out to make mischief would adhere to the ordinance.”<sup>168</sup> Although the court upheld the ordinance, there are still political obstacles to pushing Food Not Bombs and the homeless out of the parks. As a member of Food Not Bombs pointed out, “we vote.”<sup>169</sup>

Other challenges to food sharing restraints further demonstrate that there is no consensus about the reach of First Amendment protection for food sharing, either for the primary question of whether food sharing is protected or the secondary question of what standard of review should apply if it is protected expression. The Ninth Circuit upheld San Francisco’s system that required licenses for all large group food distribution events in parks in *McHenry v. Agnos* partially because it did not put any limits on the number of permits a group could receive.<sup>170</sup> Thus, the regulation did not have the effect of preventing Food Not Bombs from regularly engaging in its protests and group feedings.<sup>171</sup>

Keith McHenry is the co-founder and member of Food Not Bombs in San Francisco. Food Not Bombs distributed food for free to residents of San Francisco and advocated for the homeless and poor in San Francisco.<sup>172</sup> McHenry and Food Not Bombs did not comply with city

<sup>164</sup> *Id.*

<sup>165</sup> *First Vagabonds Church*, 610 F.3d at 1285 (asserting that the court is not persuaded by the circumstances of the particular case that the feeding conduct is expressive for First Amendment purposes, but acknowledging that it might find it to be so in other situations).

<sup>166</sup> Stephanie Coueignoux, *Food Not Bombs Continues to Feed Homeless*, CFNEWS13 (Apr. 13 2011), [http://cfnews13.com/content/news/cfnews13/.../Food\\_Not\\_Bombs\\_continues\\_to\\_feed\\_homeless](http://cfnews13.com/content/news/cfnews13/.../Food_Not_Bombs_continues_to_feed_homeless).

<sup>167</sup> *Id.* (quoting Mark Stephen).

<sup>168</sup> *Id.* (quoting Mayor Buddy Dyer).

<sup>169</sup> *Id.* (quoting Mark Stephen).

<sup>170</sup> *McHenry v. Agnos*, No. 92-15123, 1993 U.S. App. LEXIS 1356 at \*3 (9th Cir.).

<sup>171</sup> *Id.*

<sup>172</sup> *Id.* at \*1.

ordinances requiring permits and certain minimum sanitary conditions for the distribution of food.<sup>173</sup> The city enjoined McHenry and Food Not Bombs from distributing food, and McHenry brought a § 1983 lawsuit challenging the injunction and the permit requirement.<sup>174</sup> He claimed that “his distribution of food through [Food Not Bombs] constitutes expression protected by the First Amendment to the United States Constitution, and, consequently, that the permit ordinances constitute an unconstitutional burden on that expression.”<sup>175</sup>

Just like in *First Vagabonds Church*, the district court decided that sharing food was not expression, but on appeal the Ninth Circuit assumed, without deciding, that food sharing was protected expression.<sup>176</sup> Instead of deciding if the food distribution was expressive conduct, the court held that the restraints were content-neutral and that they were reasonable time, place, and manner restrictions.<sup>177</sup> It applied a four part test for reasonableness from *Clark v. Community for Creative Non-Violence*.<sup>178</sup> Under this test, restraints on expression are reasonable if (1) they are content-neutral; (2) they serve a significant government interest; (3) they are narrowly tailored to serve that interest; and (4) they “leave open ample alternative channels for communication of the information.”<sup>179</sup>

The Ninth Circuit found the ordinances were content-neutral because they required anyone distributing food to more than twenty-five people to get a license.<sup>180</sup> The government had a substantial interest in ensuring adequate food quality and sanitation.<sup>181</sup> Furthermore, the ordinances were narrowly tailored because the permit system for food distribution gave the city “leverage to ensure that food preparers adhere to minimum standards of health and sanitation. By maintaining a system of special use permits for its parks, the city can prevent the abuse of park property and balance the competing uses to which citizens put them.”<sup>182</sup> Finally, the court also found that the ordinances permitted alternative forms of communication.<sup>183</sup> Similar to the Eleventh Circuit, the Ninth Circuit in *McHenry* did not recognize that the act of feeding carries its own expressive content that cannot be conveyed with explanatory speech. The court wrote, “feeding the homeless in public parks is not the only way of calling attention to their plight.”<sup>184</sup>

The Ninth Circuit’s decision in this case is much more limited than the Eleventh Circuit’s decision in *First Vagabonds Church v. City of Orlando*. First, the Ninth Circuit opinion was non-precedential.<sup>185</sup> Additionally, the Ninth Circuit never decided whether food sharing was expressive conduct. And most importantly, the court noted that the ordinance at issue still allowed Food Not Bombs to continue sharing food.<sup>186</sup> The court pointed out that the ordinance only

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173 *Id.*

174 *Id.*

175 *Id.*

176 *Id.* at \*3-4.

177 *Id.*

178 468 U.S. 288, 293 (1984).

179 *McHenry*, 1993 U.S. App. LEXIS 1356 at \*4.

180 *Id.*

181 *Id.*

182 *Id.* at \*6-7.

183 *Id.* at \*7.

184 *Id.*

185 *Id.* at \*1.

186 *Id.* at \*7.

required Food Not Bombs to get a license and comply with the city's health codes. Unlike the license requirement in *First Vagabonds*, the licensing requirement in San Francisco did not put an absolute limit on the number of permits Food Not Bombs could receive each year.

The harshest law against food sharing was the law passed by the city of Las Vegas and eventually enjoined by the district court of Nevada. *Sacco v. City of Las Vegas* illustrates that while not only are different standards of review applied to similar ordinances, there is also significant variation among different food sharing ordinances.<sup>187</sup>

The city of Las Vegas passed a number of laws aimed at deterring homeless individuals from congregating in city parks. In 2006, the city council adopted a law that prohibited "the providing food or meals to the indigent for free or for a nominal fee."<sup>188</sup> The ordinance defined indigent persons as "a person whom a reasonable ordinary person would believe to be entitled to apply for or receive assistance under NRS Chapter 428."<sup>189</sup> When an American Civil Liberties Union (ACLU) attorney questioned the constitutionality of the ordinance and the practicality of deciding who is an indigent, the mayor of Las Vegas answered, "certain truths are self-evident . . . you know who's homeless."<sup>190</sup> Las Vegas also enforced a law requiring permits for any person hosting a group of twenty-five individuals or more.<sup>191</sup> The ACLU brought a challenge to the food sharing laws after a number of activists engaged in civil disobedience to protest the ordinance.<sup>192</sup>

The district court in Nevada enjoined enforcement of the ordinance banning sharing food with the indigent, but on other grounds than the First Amendment.<sup>193</sup> The court decided that sharing food was not inherently expressive conduct, and the ordinance still permitted them to chant, carry signs, or deliver their political message in other ways.<sup>194</sup> Furthermore, even when applying the four part test for content-neutral restraints on expression, the court concluded that the law was "content-neutral, narrowly tailored to serve the City's significant interests, and left undisturbed adequate alternative channels of communication."<sup>195</sup>

Regarding the permit requirement for large group events, the court decided that the law was a content-neutral regulation of the time, place, and manner of expression in the public forum of the park.<sup>196</sup> Citing *Ward v. Rock Against Racism*,<sup>197</sup> the court analyzed the law under the same four-part test for reasonable restraints on expression that the Ninth Circuit used in *McHenry*. It analogized the permit requirement in Las Vegas to those in the license cases discussed above: *Cox v. City of New Hampshire*<sup>198</sup> and *Forsyth County v. Nationalist Movement*.<sup>199</sup> The court concluded

<sup>187</sup> *Sacco v. Las Vegas*, Nos. 2:06-CV-0714-RCJ-LRL, 2:06-CV-0941-RCJ-LRL, 2007 WL 2429151 (D. Nev. Aug. 20, 2007).

<sup>188</sup> LAS VEGAS MUN. CODE § 13.36.055(a)(6).

<sup>189</sup> *Id.* (referencing LAS VEGAS MUN. CODE § 19.20.020).

<sup>190</sup> D. Matthew Lay, Note, *Do Not Feed the Homeless: One of the Meanest Cities for the Homeless Unconstitutionally Punishes So-Called "Enablers"*, 8 NEV. L.J. 740, 744 (2008).

<sup>191</sup> *Sacco*, 2007 WL at \*1.

<sup>192</sup> Lay, *supra* note 182 at 745.

<sup>193</sup> *Sacco*, 2007 WL 2429151 at \*3.

<sup>194</sup> Lay, *supra* note 182 at 755.

<sup>195</sup> *Sacco*, 2007 WL 2429151 at \*18.

<sup>196</sup> *Sacco v. City of Las Vegas*, 2007 LEXIS 2429151 at \*4 (D. Nev. Aug. 20, 2007).

<sup>197</sup> 491 U.S. 781 (1989).

<sup>198</sup> 312 U.S. 569 (1941).

<sup>199</sup> 505 U.S. 123 (1992).

that the permit system was reasonable and did not give excessive discretion to administrative officials.<sup>200</sup>

Although the legal outcome of the case may have been viewed unfavorably by advocates of the First Amendment and the rights of the homeless, the practical consequences of the case were not so bleak. The ACLU and the city reached a settlement to end the litigation.<sup>201</sup> Under the terms of the settlement, the city modified its rules regarding sharing food in the parks.<sup>202</sup>

*B. Advocates Challenging Food Sharing Laws Can Help Judges Navigate a Confusing Reef of Standards of Review*

The challenges to food sharing laws are ripe for advocates to continue pressing courts. Advocates may be able to convince judges to adopt a more permissive interpretation of the First Amendment's protection for political demonstrations that involve food sharing. The cases demonstrate that courts are unsure of how to handle the issue. Is sharing food expressive? If it is, does *O'Brien* apply? Or is content-neutral public forum reasonableness a more appropriate test? What about non-content-neutral public forum strict scrutiny? Through litigation and careful framing, advocates can help courts understand what many anti-food sharing laws are. They are laws that limit a particular kind of expression: sharing food with the poor to express dissent from contemporary society's attitude toward poverty. They target that particular message, and apply in the most public of public fora—the parks. Advocates can make distinctions between laws that simply require all food distribution to meet certain health standards and laws that make the activities of political organizations like Food Not Bombs illegal.

Doctrinally, the First Amendment should provide protection for at least some anti-food sharing laws, though different tests for First Amendment scrutiny will be appropriate for different kinds of food sharing laws. Convincing courts to apply the proper test is crucial. Analogizing food sharing laws to restraints on charitable contributions and begging can help advocates frame many food sharing laws as what they are: laws that criminalize a particular kind of expression on behalf of the homeless.

The first barrier that advocates must overcome is to demonstrate that sharing food is expressive conduct by applying the *Texas v. Johnson* test employed in *First Vagabonds Church*.<sup>203</sup> *Texas v. Johnson* provides a two-part test for whether conduct is sufficiently expressive to receive protection.<sup>204</sup> First, challengers must show they have “an intent to convey a particularized message.”<sup>205</sup> For members of Food Not Bombs and other organizations bringing these challenges, this subjective measure of intent will likely be satisfied. Second, the challengers must show there is a great likelihood that the message would be understood by those who view it.<sup>206</sup>

The Second Circuit's explanation in *Loper* for why begging is expressive conduct protected by the First Amendment also applies to food sharing. Like being asked for money, the

<sup>200</sup> Sacco, 2007 LEXIS 2429151 at \*5.

<sup>201</sup> Phil Hooper, *Putting the “Public” Back in Public Parks*, AMERICAN CIVIL LIBERTIES UNION OF NEVADA, <http://www.aclunv.org/blog/sacco> (June 15, 2010, 4:17 PM).

<sup>202</sup> *Id.*

<sup>203</sup> *First Vagabonds Church*, 578 F.Supp.2d at 1358.

<sup>204</sup> 491 U.S. 397, 404 (1989).

<sup>205</sup> *Id.*

<sup>206</sup> *Id.*

mere fact of seeing people queuing for free food is expressive. People who witness group feedings are forced to think about the plight of the homeless.

Group feedings by organizations such as Food Not Bombs or churches are even more expressive than asking passers-by for money. Group feedings are in fact more similar to the charitable solicitations that the Supreme Court recognized in *Shaumburg*. The expressive impact of begging is enhanced by the indirect effect that begging requires hearers to consider the social problem of poverty. In contrast, group feedings such as those by Food Not Bombs are explicit about the political content of their activity.<sup>207</sup> Evidently then, they are more like solicitors for charity who explain their activity is in support of political causes.

The fact that organizations such as Food Not Bombs are expressing their protest through an act that can also be utilitarian does not then mean that they are not protected by the First Amendment. The Supreme Court has recognized that other utilitarian conduct can be expressive. In *Clark v. Community for Creative Nonviolence*, the Supreme Court assumed that sleeping could be an expressive activity under the right circumstances.<sup>208</sup>

Other courts should not use the “reasonable observer” test the Eleventh Circuit applied in *First Vagabonds Church*. The Supreme Court requires courts to look at the whole expression, not the least expressive aspect of conduct. In *Texas v. Johnson*, the court decided that burning a flag was protected expression because of the explanatory speech that surrounded the conduct.

[In the case, the activists] burned an American flag as part – indeed, as the culmination – of a political demonstration that coincided with the convening of the Republican Party and its second nomination of Ronald Reagan for President. The expressive, overtly political nature of this conduct was both intentional and overwhelmingly apparent . . . In these circumstances, [the activists’] burning of the flag was conduct “sufficiently imbued with elements of communication.”<sup>209</sup>

The Supreme Court’s holding in *Rumsfeld v. FAIR* that universities treating military recruiters differently from other employers<sup>210</sup> was not expressive conduct does not change the requirement that courts must look at the whole context of the expression. In *FAIR*, the universities’ decision to treat military recruiters differently was only clearly expressing a political opinion when accompanied by explanatory speech.<sup>211</sup> An entity’s policies towards employees are not expressive in themselves, and the explanatory speech was not an integral part of the act of changing policy. In contrast, in *Texas v. Johnson* and challenges to food sharing laws by groups like Food Not Bombs, explanatory speech and expressive conduct are essential parts of the same political event. In *Texas v. Johnson*, burning a flag was an essential, culminating part of a political protest. Likewise, distributing food to the needy is an essential, culminating part of the regular protests that Food Not Bombs stages. In the Eleventh Circuit’s case, even the Mayor of Orlando, who was trying to prevent the group feedings, recognized they were a component of a political demonstration.

<sup>207</sup> *First Vagabonds Church*, 578 F.Supp.2d at 1358.

<sup>208</sup> 468 U.S. 288, 293 (1984) (assuming, though not deciding, that sleeping could be expressive activity).

<sup>209</sup> *Texas v. Johnson*, 491 U.S. at 406.

<sup>210</sup> 547 U.S. 47, 66 (2006) (“the expressive component of a law school’s actions is not created by the conduct itself but by the speech that accompanies it”).

<sup>211</sup> *Id.*

Furthermore, the Eleventh Circuit's test requires a court to engage in an analysis that is almost absurdly myopic. The court's test blinds and deafens its reasonable observer to the speech, banners, T-shirts and other communications that comprise essential parts of the food sharing conduct. Thus disabled, the Eleventh Circuit's observer is not reasonable at all. Reasonable implies the ability to use reason to respond appropriately to actual events. A reasonable observer could see a Food Not Bombs group feeding and would be capable of distinguishing it from a family reunion.

Thus, for good reason, the Supreme Court requires courts to look at the context in which expressive conduct occurs. Political demonstrations that include group feedings must receive protection under the First Amendment.

The next hurdle is to convince the court to apply public forum analysis rather than the more deferential *O'Brien* test. The *O'Brien* test allows governments to prohibit conduct in which speech and non-speech elements are mixed.<sup>212</sup> To justify the restraint, the government must satisfy four requirements:

[A] government regulation is sufficiently justified if [1] it is within the constitutional power of the Government; [2] if it furthers an important or substantial governmental interest; [3] if the governmental interest is unrelated to the suppression of free expression; and [4] if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest.<sup>213</sup>

Courts applying the *O'Brien* test have upheld both anti-begging laws and anti-food sharing laws. In *Young*, the Second Circuit applied *O'Brien* to the prohibition on begging in the subway and found that the test was satisfied.<sup>214</sup> The Eleventh Circuit, *en banc*, also found that if sharing food were protected expression, Orlando's restraint was justified under *O'Brien*.<sup>215</sup> It is important to remember that if a court applies *O'Brien*, a challenge to a food sharing law is not necessarily defeated. The district court in *First Vagabonds Church* found that the food sharing restraints were not narrowly tailored to a substantial government interest, and therefore failed the *O'Brien* requirements.<sup>216</sup> However, *O'Brien* is a more lenient standard for restraints than restraints based on the public forum doctrine.

Challenges to food sharing limits will likely be more successful if advocates can convince courts to apply the more rigorous public forum tests. The Second Circuit struggled with which of the two tests to apply to the anti-begging law in *Loper*, and implied that public forum analysis was more appropriate than the *O'Brien* test because the restraint on begging was not merely an "incidental" restraint on expression.<sup>217</sup> Advocates must show that food sharing restraints are not incidental restraints on expression. Laws that only require permits for all food sharing, but do not limit the number of permits a group can get are difficult to frame as more than "incidental" restraints on expression. However, laws that put absolute limits on the number of

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<sup>212</sup> *O'Brien*, 391 U.S. at 376.

<sup>213</sup> *Id.* at 377.

<sup>214</sup> *Young*, 903 F.2d at 157.

<sup>215</sup> *First Vagabonds Church of God v. City of Orlando*, 638 F.3d 756, 758 (11th Cir. 2011).

<sup>216</sup> *First Vagabonds Church*, 578 F.Supp.2d at 1360.

<sup>217</sup> *Loper*, 999 F.2d at 705.

permits an organization can get in a year, or laws that explicitly ban sharing food with the indigent should be seen as targeted at the expression of groups like Food Not Bombs. These laws are not incidental restraints that require them to conform to certain health standards. They are laws that target their particular kind of political activity that requires sharing food.

If a court is applying the public forum analysis, the final hurdle for challengers to the law is to convince the court that the restraint is not content neutral. If the restraint is content neutral, the court will apply an intermediate level of scrutiny based on cases such as *Ward v. Rock Against Racism* and *Clark v. Community for Creative Non-Violence*. These cases inquire as to whether content neutral restraints are reasonable time, place and manner restraints on speech in a public forum.<sup>218</sup>

This was the test that the Ninth Circuit applied in *McHenry v. Agnos*.<sup>219</sup> The Ninth Circuit explained that “restrictions are ‘reasonable’ provided that they are justified without reference to the content of the regulated speech, that they are narrowly tailored to serve significant governmental interest, and that they leave open ample alternative channels for communication of the information.”<sup>220</sup>

Laws that require permits for all large gatherings in parks should be evaluated under this test. Maintaining the health of parks is a government interest not related to the suppression of particular speech. Courts should not apply this test to laws that ban large group feedings or put absolute limits on the number of feedings a group may engage in. Though those laws apply to all large group feedings, it is often clear that the real target of the laws are group feedings which attract homeless individuals, such as the ones put on by Food Not Bombs. Such laws are therefore restraints targeted at certain messages.

Laws that limit the number of times an organization can have a permit for a group feeding directly target organizations like Food Not Bombs. These laws are analogous to a law the Supreme Court invalidated in *Forsyth County*.<sup>221</sup> In that case the government charged organizations for parade permits, and the amount of the fee was based on the amount the city would have to pay for security for the parade.<sup>222</sup> The result was that parades which expressed messages that provoked greater hostility, violence, or disruption from the public cost both the government and the parade organizers more.<sup>223</sup> The Supreme Court held that this differential treatment made the law not content-neutral.<sup>224</sup> Laws that limit the number of times an organization can hold a group feeding create similar differential treatment. Some groups will not be burdened at all by such a limit. But some groups, such as Food Not Bombs, have a political message to deliver that requires numerous regular group feedings. Occasionally protesting war and environmental destruction by giving out food is a very different message from protesting war and environmental destruction by making a sustained, long term commitment to devote time on multiple days of each week to pro-

<sup>218</sup> See generally *Ward v. Rock Against Racism*, 491 U.S. 781 (1989) (holding that the city requirement of performers to use sound equipment provided by the city did not violate free speech rights); *Clark v. Community for Creative Non-Violence*, 468 U.S. 288 (1984) (holding that the National Park Service did not violate the first amendment when they prohibited protestors from camping in a park); *Perry Educ. Ass’n v. Perry Local Educators’ Ass’n*, 460 U.S. 37, 45 (1983) (holding that deferential access to teachers’ mailboxes did not violate the equal protection clause).

<sup>219</sup> 1993 U.S. App. LEXIS 1356 at \*4.

<sup>220</sup> *Id.* (citing *Clark*, 468 U.S. at 293).

<sup>221</sup> *Forsyth*, 505 U.S. at 133.

<sup>222</sup> *Id.* at 134.

<sup>223</sup> *Id.*

<sup>224</sup> *Id.* at 134-35.

vide sustenance for the needy. The permit limit laws make the second message impossible to deliver.

If advocates can successfully convince the court that the law is not content-neutral (and not merely an incidental restraint),<sup>225</sup> then the court will apply a strict scrutiny test based on *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*.<sup>226</sup> This was the test that led the Second Circuit to limit its holding in *Young* and end the anti-begging law in its landmark *Loper* decision.<sup>227</sup> Under *Perry*, content based restraints on expression in “quintessential public forums” such as parks require a high level of justification.<sup>228</sup> The government “must show that its regulation is necessary to serve a compelling state interest and that it is narrowly drawn to achieve that end.”<sup>229</sup> Some, but not all, restraints on sharing food would be invalid under this test. The Las Vegas law that barred sharing food with the indigent in parks should be invalidated under this test.

The path through the numerous tests is winding, and it is made even more confusing by the inconsistent manner in which courts have applied them, often “assuming without deciding” issues or finding a law invalid under one test but continuing to find it valid under another “even if we were to apply” the other test. Courts need guidance in how to approach these issues uniformly, and advocates for the homeless have been and hopefully will continue to be eager to lead courts to apply tests that scrutinize food sharing laws with adequate strictness. The more similar restraints are to the laws banning charitable solicitations and the laws banning begging, the more rigorously the law requires courts to analyze them.

### *C. Challenges to Food Sharing Laws That Ultimately Fail to Change Judges' Minds About the Appropriate First Amendment Scrutiny Are Still Important*

*Sacco v. City of Las Vegas* and *McHenry v. Agnos* illustrate another impact litigation strategy that relies less on the legal outcome of the case than the publicity that a lawsuit can generate.<sup>230</sup> In *Sacco* the litigation led to pressure on the city to settle the lawsuit, and it settled by agreeing to reform its policies to allow food sharing to continue under more reasonable regulations. In *McHenry*, the litigation gave publicity to an issue that does not see headlines very often, and the members of Food Not Bombs may not be the only residents not voting for the Mayor because of his efforts to harm the poor and stifle the expression of Food Not Bombs. Even in jurisdictions where winning a challenge to a food sharing restraint may be difficult, the challenges still may still be useful because of the political pressure they can exert on elected officials and city administrators concerned about the cost and negative press of litigation.

## V. CONCLUSION

The First Amendment was not written with the “prolixity of a legal code.”<sup>231</sup> The restraints that it imposes on governments are not obvious from the text, and government actions that

<sup>225</sup> See *supra* text accompanying note 209.

<sup>226</sup> 460 U.S. 37, 45 (1983).

<sup>227</sup> *Loper*, 999 F.2d at 702.

<sup>228</sup> *Id.* at 703.

<sup>229</sup> *Id.*

<sup>230</sup> See *supra* text accompanying notes 164-95.

<sup>231</sup> *McCulloch v. Maryland*, 17 U.S. 316, 407 (1819).

were once unrestrained can be restrained in the future through new interpretations of the First Amendment. The history of the rights to solicit donations, beg for money, and give food demonstrate that sustained advocacy can convince judges to change their interpretations of what freedom of speech entails.

Equality has an important place in the First Amendment.<sup>232</sup> The First Amendment defends the public from governments that might seek to stifle the expression on which democracy depends. The First Amendment promotes a public sphere where democracy can thrive. Restraints on expression that only burden the poor exclude an entire class from that public sphere. They thus contravene the purpose of the First Amendment.

The restraints on begging and food sharing exclude specific groups and messages from the public sphere. Restraints on begging exclude those who rely on begging to express publicly their pleas for support. Worse, they allow governments to drive the very poor out of the public's sight and suppress their message about the reality of poverty in our communities. Restraints on food sharing burden the ability of organizations like Food Not Bombs to deliver a potent message on behalf of the poor. Simply informing people of their political message is not the same message as distributing food in conjunction with their other activities. For Food Not Bombs, the medium is the message.<sup>233</sup> Restraining their demonstrations allows governments to stifle their message.

The Occupy movement may have changed the conversation about economic injustice, but it has not yet changed the law. A complex system of restraints has spread across the United States and seeks to keep the poorest Americans out of (so-called) public spaces. The Occupy movement has embraced the First Amendment as a tool to protect their own rights to occupy public spaces.<sup>234</sup> The Occupy movement could also be a chance to engage the First Amendment to assault the laws that try to keep the poor out of places like Zuccotti Park.

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<sup>232</sup> See, e.g., Kenneth Karst, *Equality as a Central Principle in the First Amendment*, 43 U. CHI. L. REV. 20 (1975).

<sup>233</sup> Marshall McLuhan, *UNDERSTANDING MEDIA: THE EXTENSIONS OF MAN* 8 (1964).

<sup>234</sup> See James Barron and Colin Moynihan, *City Reopens Park after Protesters are Evicted*, N.Y. TIMES, (Nov. 15, 2011), [www.nytimes.com/2011/11/16/nyregion/police-begin-clearing-zuccotti-park-of-protesters.html?pagewanted=all](http://www.nytimes.com/2011/11/16/nyregion/police-begin-clearing-zuccotti-park-of-protesters.html?pagewanted=all) (discussing Occupy Protestors' First Amendment claims against eviction from Zuccotti Park).