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Comments: "Secondary Effects" Analysis: A Balanced Approach to the Problem of Prohibitions on Aggressive Panhandling

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"SECONDARY EFFECTS" ANALYSIS: A BALANCED APPROACH TO THE PROBLEM OF PROHIBITIONS ON AGGRESSIVE PANHANDLING

The streets of Baltimore, like those of other metropolitan areas across the country, have been besieged by a growing number of homeless people in recent years.[1] In response to the dangers posed by "aggressive panhandlers" to the city's social and economic well-being, the Baltimore City Council enacted Ordinance 275, the city's "Aggressive Panhandling Ordinance."[2] Following the enactment of

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1. Other such cities include: Austin, Tx.; Buffalo, N.Y.; New York City, N.Y.; San Francisco, Ca.; Los Angeles, Ca.; and Miami, Fl. *See* Robert Teir, *Maintaining Safety and Civility in Public Spaces: A Constitutional Approach to Aggressive Begging*, 54 LA. L. REV. 285 (1993).

   According to a report prepared for Baltimore Mayor Kurt L. Schmoke by the Downtown Partnership, the number of homeless individuals on the street on any given night in the city of Baltimore is estimated to be approximately 2,400. *See* DOWNTOWN SECURITY TASK FORCE REPORT, A PRESCRIPTION FOR PUBLIC SAFETY: A REPORT TO MAYOR KURT L. SCHMOKE, at 11 (Nov. 1991) [hereinafter SECURITY TASK FORCE REPORT]. According to the 1990 census, the city of Baltimore has 750,000 residents.

2. BALTIMORE, MD., CODE art. 19, § 249 (Supp. 1994) (enacted Dec. 22, 1993) [hereinafter "Aggressive Panhandling Ordinance"]. The "Aggressive Panhandling Ordinance" provides:

   > (b)(1) "Panhandling" means any act by which one person asks, begs or solicits alms from another or others in person, by requesting an immediate donation of money or other thing of value.
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   > (b)(2) "Aggressive panhandling" means panhandling which is accompanied by one or more of the following:
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   > (i) approaching, speaking to, or following a person in such a manner as would cause a reasonable person to fear bodily harm or the commission of a criminal act upon the person, or upon property in the person's immediate possession;
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   > (ii) touching another person in the course of panhandling without that person's consent;
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   > (iii) continuously panhandling from a person, or following the person, after the person has made a negative response;
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   > (iv) intentionally blocking or interfering with the safe passage of a person or a vehicle by any means, including unreasonably causing a person to take evasive action to avoid physical contact;
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   > (v) using obscene or abusive language following refusal;
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   > (vi) acting with the intent of intimidating another person into giving money or another thing of value.
   >
   > . . . .
   >
   > (d) It is unlawful for any person to engage in panhandling:
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   > (1) within ten feet of any automatic teller machine (ATM);
   >
   > (2) in any public transportation vehicle or at any bus, train, light

this ordinance, the American Civil Liberties Union (ACLU) filed suit on behalf of three homeless individuals[3] in federal district court, challenging the ordinance's constitutionality on First and Fourteenth Amendment grounds and seeking an injunction to prevent the city from enforcing the ordinance.[4] The suit alleged that Baltimore City Police Officers systematically harassed homeless individuals and threatened them with arrest and that the ordinance was enacted to serve as the cornerstone of a coordinated effort by city officials to drive the homeless from the downtown area.[5] In ruling on the city's

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rail, or subway station or stop;

(3) on private property or residential property if the owner, tenant or occupant has asked the person not to panhandle on the property, or has posted a sign on the property indicating soliciting or panhandling;

(4) from any operator or occupant of a motor vehicle that is in traffic on a public street, whether in exchange for cleaning the vehicles windows or otherwise; or

(5) from any operator or occupant of a motor vehicle on a public street in exchange for reserving a public parking space or directing the occupant to a public parking space.

(e) Penalties. Any person who violates the provisions of this section is guilty of a misdemeanor and, upon conviction thereof, shall be fined not more than one hundred dollars ($100) or imprisoned for not more than thirty days, or both, or if the person has been convicted of a violation of this section within the previous year, the person shall be fined not more than two hundred and fifty dollars ($250) or imprisoned for not more than ninety days, or both.

The Aggressive Panhandling Ordinance was held unconstitutional in Patton v. City of Baltimore, Civil No. S 93-2389 (D. Md. Aug. 19, 1994) (Memorandum Opinion on Motions and Cross-Motions for Summary Judgment).

3. Tico Patton, Ricardo Maddox, and Bernard Williams, the named plaintiffs in the action, all testified at their respective depositions that they had frequently experienced problems with both Baltimore City Police Officers and public safety guides. Patton and Maddox also indicated that they had been instructed to move along and to cease panhandling on numerous occasions and that they had also witnessed other panhandlers being instructed in a similar manner. *See Patton*, Civil No. S 93-2389, at 20, 22.
4. The lawsuit also named Baltimore's Downtown Partnership as a defendant and challenged the "move along" policy employed by the Partnership's hired "safety guides," alleging that the policy was used to systematically harass, threaten, and intimidate homeless individuals engaged in harmless, innocent conduct at the Inner Harbor and other places in the heart of the city's commercial downtown area.

   The Downtown Partnership's official policy regarding homeless individuals and aggressive panhandlers is contained in a written policy statement issued after the litigation in *Patton*. "That Policy provides that the Partnership's safety guides are only to interfere with the activities of homeless persons if: (1) they are obstructing pedestrian or vehicular access to sidewalks, streets or business premises; (2) they are engaging in illegal activity; or (3) they are engaging in behavior that is abusive or intimidating." *Id.* at 9-10.
5. *Id.* at 11-12.

motion for summary judgment, the United States District Court for the District of Maryland concluded that the Aggressive Panhandling Ordinance violated the Equal Protection Clause of the Fourteenth Amendment because its prohibitions targeted only the homeless and panhandlers.[6] This ruling has sent the city back to the drawing board in its attempt to draft legislation that strikes the appropriate balance between the needs of the homeless to solicit donations and the health, welfare, and public safety concerns implicated by aggressive panhandling.

This Comment first discusses the magnitude of the aggressive panhandling problem facing the city. This Comment then analyzes the current state of the law by examining the problems confronted by other cities that have attempted to restrict panhandling in a manner consistent with the demands of the First and Fourteenth Amendments. Finally, this Comment examines alternative approaches to the problems associated with drafting aggressive panhandling ordinances and suggests a course of action that the city of Baltimore should consider when redrafting the ordinance to reach a constitutional result.

I. THE PROBLEM OF AGGRESSIVE PANHANDLING

A. The Extent of the Problem

The citizens of Baltimore are confronted with beggars on an almost daily basis. A simple journey into the city, especially the downtown area, will inevitably result in at least one, if not several, interactions with homeless persons requesting money. Some of these individuals solicit in a passive and peaceful manner, usually either by holding a sign or cup. Others, however, use more aggressive tactics, such as coercion or intimidation, or choose to beg in locations where such solicitations are especially intimidating, such as at ATMs or near cars stopped in traffic.[7] On any given night, there are approximately 2,400 homeless individuals on the streets of Baltimore and only 1,200 beds available in the city's fifty-three shelters.[8] This housing shortage is accompanied by food shortages and by the

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6. *Id.* at 55, 65-67.
7. It is essential that the scope of the problem be properly delineated: "The problem is not the man who forgot to bring enough change for the bus . . . [or] the person who is really down and out on [his or] her luck, appealing to our sense of charity . . . in an unobtrusive manner." Teir, *supra* note 1, at 288. Rather, the problem is aggressive panhandling and the numerous and very real social harms closely associated with it. *Id.*
8. *Patton*, Civil No. S 93-2389, at 3 (citing SECURITY TASK FORCE REPORT at 11-12).

absence of adequate health and emergency services.[9] Although the city's growing homeless population is a tragic and unfortunate statement about the quality of modern urban life, it must be balanced against, and viewed in light of, the city's need and obligation to provide a "safe, clean, and aesthetically pleasing environment for its residents and visitors."[10] As with other threats to public safety and welfare, the city should be allowed to target the source of the threat and should subject it to constitutionally permissible regulation. Aggressive panhandling poses a threat to two interrelated interests: first, the continued vitality and growth of the city community; and, second, the safety and welfare of the public and of those who panhandle.

1. The Threat to Community Growth and Vitality

The problem of aggressive panhandling strikes at the community bond that holds a metropolitan area together. Increased numbers of aggressive panhandlers on city streets and in and around other public places—parks, tourist attractions, and entertainment venues, for example—contribute to the perception that the city is unsafe, unclean, and altogether unpleasant. Aggressive panhandling, and other conduct of the homeless, has been identified as a source of public anxiety for citizens, merchants, tourists, and individuals employed in Baltimore.[11]

As the experiences of other cities aptly demonstrate, when public areas that are designated for recreation, enjoyment, and community interaction suddenly become areas of frequent intimidation and intrusion, they quickly become areas that are shunned by the general public. City residents go elsewhere to shop or spend the day. Tourists become aware of the problem, avoid the city during vacation time, and take their dollars, needed by the city, somewhere else where the tourists can feel safe. Eventually, city residents reach their tolerance threshold and abandon the city for the safe haven of the suburbs. Baltimore can hardly afford either. The city only recently completed its revitalization of the Inner Harbor area of downtown[12] and, no

9. *Id.* at 3 (citing SECURITY TASK FORCE REPORT at 12).
10. *Id.* at 2.
11. *See id.* at 5 (citing SECURITY TASK FORCE REPORT at 11).
12. "What thirty years ago was a collection of decaying docks, empty sheds, and unsightly parking lots surrounding a debris-filled river has become the city's symbolic centerpiece, attracting millions of people a year." Brian Kelley & Roger K. Lewis, *What's Right and Wrong About Inner Harbor: A 1990s Take On Baltimore's Massive Downtown Revitalization Project*, 58 PLANNING, Apr. 1992, at 28. This project began in the 1950s through the cooperative efforts of business and political leaders armed with state and federal funding. Vincent & Ann Magnotta, *Baltimore Awakens to a Municipal Renaissance*, CHRISTIAN SCIENCE MONITOR, Jan. 8, 1981, at 10. The first phase began with the

doubt, would like to continue this process city-wide. It has also only recently begun to rehabilitate its reputation as a major mid-Atlantic commercial center and as a national tourist attraction.[13] The major gains of the recent past will be jeopardized should the city find itself powerless to address the problem of aggressive panhandling.

2. The Threat to Public Safety

Aggressive panhandling strikes fear into the hearts of individual citizens who have to deal with it on a daily basis. The fear created by panhandlers is not the product of irrationality, nor is it a knee-jerk reaction to the growing numbers of homeless beggars on city streets.[14] The fear is often the product of the more coercive and intimidating conduct of panhandlers who aggressively solicit donations and is precisely the type of public safety concern that the city's Aggressive Panhandling Ordinance is designed to address.[15]

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construction of Charles Center, a $1.75 million central business core, 33 acre complex containing 1.75 million square feet of office space, 400 apartments, shops, restaurants, underground parking for 4,000 vehicles, and a five-tower Hilton Hotel. *Id.* This phase was completed in 1963. *Id.*

The second phase of revitalization began in 1964 with the construction of Harborplace, a project of James W. Rouse which contains numerous specialty shops and restaurants. *Id.* Construction began in the same year on the Inner Harbor project, a 240-acre complex adjoining Charles Center and hugging the waterfront. This project included the thirty-story World Trade Center with observation deck, a new federal courthouse, the Maryland Academy of Science Exhibition Center and Museum, with planetarium, and several office buildings. *Id.* The Inner Harbor officially opened on July 2, 1980. Jane Seaberry, *Harbor Center Opens; Baltimore Opens Its Harborplace*, WASH. POST, July 2, 1980, at E1.

The final phase of the revitalization was completed with the addition of a $15 million aquarium, completed in 1981, and the construction of Oriole Park at Camden Yards, a baseball facility serving as the site of Baltimore Orioles home games, completed in 1992. *Id.*

13. Baltimore's main tourist attractions include: Oriole Park at Camden Yards, home of the Baltimore Orioles baseball franchise; the Inner Harbor, including the National Aquarium, Harborplace, the U.S.F. Constellation, and the Pier Six Concert Pavilion; the Star Spangled Banner Flag House; and Babe Ruth's Birthplace and Museum. *See* Eve Zibart, *In and Around the Ballpark*, WASH. POST, Apr. 3, 1992, at N6; *Patton*, Civil No. S 93-2389, at 2-3.
14. Teir, *supra* note 1, at 289; *id.* at n.12 (citing Loper v. New York City Police Dep't, 999 F.2d 699 (2d Cir. 1993) (noting that begging's effects range from "mere annoyance and inconvenience to genuine terror")).
15. The experiences of other cities indicate that threats and instances of violence have become inseparable components of begging. Indeed "aggressive panhandling" implies some kind of forceful approach or conduct beyond the ordinary request for a solicitation from a stranger; unfortunately, this extraordinary conduct often takes the form of violence or threats of violence. *See Begging Off: Humane Ways to Set Limits*, NEWSDAY, Feb. 1, 1990, at 68.

In addition to the intimidation of the individual through face-to-face encounters, aggressive panhandling is part of a more threatening social phenomenon: the perpetual cycle of decay that draws more serious criminal activity into a neighborhood or area.[16] A city's lack of effective deterrence may not only encourage panhandlers to become more aggressive but may also encourage increasingly aggressive criminal and predatory conduct by the criminal element. Once entrenched, these secondary effects of aggressive panhandling cannot be eliminated easily and can serve to hasten the overall decay of the entire community. This is a prospect that Baltimore simply cannot afford.

Finally, an often overlooked but no less important concern is the protection of those who panhandle. After all, homeless panhandlers are citizens, and the city is responsible for the public safety of all its inhabitants. Often, the most effective way to protect homeless panhandlers is to prohibit them from panhandling in certain places at certain times, regardless of the manner used to panhandle.[17] Such prevention was precisely what the Aggressive Panhandling Ordinance sought to accomplish.[18]

II. AN HISTORICAL PERSPECTIVE OF PROHIBITIONS ON BEGGING

Prohibitions and restraints on begging and panhandling have existed for several hundred years, both in Europe[19] and in the United

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16. This phenomenon is often described as the "Broken Windows" effect. The "Broken Windows" effect is a phrase coined by Professors James Q. Wilson and George Kelling, who, following a study of the effects of all varieties of disorderly behavior (including begging) on neighborhoods, concluded that

> [j]ust as unrepaired broken windows in buildings may signal that nobody cares and lead to additional vandalism and damage, so untended disorderly behavior may also communicate that nobody cares (or that nobody can or will do anything about the disorder) and thus lead to increasingly aggressive criminal and dangerous predatory behavior.

Teir, *supra* note 1, at 290 (quoting George L. Kelling, *Acquiring a Taste for Order: The Community and Police*, 33 CRIME & DELINQ. 90, 92 (1987)); *id.* at 290 n.19 (citing *Loper*, 802 F. Supp. 1029, 1034-35 (S.D.N.Y. 1992) (noting that "[r]eality and everyday experience confirm the 'Broken Windows' effect"), *aff'd*, 999 F.2d 699 (2d Cir. 1993)).

17. For example, the individual who panhandles places himself or herself in danger of serious bodily injury on busy streets and at intersections during rush hour. Accompanying this threat of injury is the fact that the individuals solicited are a captive audience—they are unable to avoid or escape the unwanted solicitation. Under these circumstances, the inherently coercive and intimidating effect of the solicitation is greatly magnified.
18. *See* Aggressive Panhandling Ordinance § a.
19. Teir, *supra* note 1, at 294 n.29 (citing Plato, THE LAWS, 11.90 (ordering that

States.[20] Although society's norms and attitudes changed during this time, the negative perception of begging has remained relatively constant.[21] The purposes of anti-begging laws, however, have undergone a continuous evolution throughout this country's history.

Consistent with its English heritage,[22] the United States first attempted to control vagrants and beggars by denying them all

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beggars be ostracized from the Market)); *id.* at 295 n.34 (citing Statute of Laborers, 23 Edw. 3, St. 1, ch. 7 (1349) (prescribing the death penalty for anyone in England who gave anything to an able-bodied beggar)); *id.* at 296 n.39 (citing 1 Edw. 6, ch. 3 (1547) (providing that a beggar who refused to work be branded with a "V" for vagabond and be enslaved)); *id.* (citing 14 Eliz. Ch. 5 (1572) (requiring that all beggars be "grievously whipped and burned through the gristle of the right ear" for a first offense and punished by death for a second offense)); *id.* at 297 (citing 39 Eliz. Ch. 4 (1597) (requiring counties to build houses of correction to hold "rogues, vagabonds, and sturdy beggars" until they were put to work or banished)); *id* (citing 17 Geo. 2, ch. 5 (1744) (dividing beggars into different classes and prescribing different terms of incarceration, ranging from six months to two years, for each class)).

20. *Id.* at 301 n.79, MASS. ST. 1788, ch. 21 (retaining the same classifications used in English statutes prohibiting begging, and utilizing the same classification scheme as English statute).

21. *See, e.g.,* ALA. CODE § 437-44 (1941) (repealed 1977) (including "common drunkards" in list of vagrants and excluding idleness resulting from strikes or lockouts as conditions of vagrancy); ARIZ. REV. STAT. ANN. § 13-991(1) (1956) (repealed 1977) (defining "idlers who are not Indians" as vagrants); DEL. CODE ANN. tit. 11, § 881 (1953) (repealed 1958) (describing idle wanderers as "tramps" and adding "all persons roaming about the country, commonly known as gypsies" to list of persons classified as vagrants); FLA. STAT. ch. 856.02 (1957) (repealed 1972) (condemning persons using juggling or unlawful games or plays); GA. CODE ANN. § 26-7101 (1953) (repealed 1968) (deeming persons found in possession of weapons or instruments with the intent to commit a crime as "rouges and vagabonds"); HAW. REV. STAT. § 314-1 (1955) (amended by HAW. REV. STAT. § 711-1101(1)(e) (1978)) (defining as vagrants "persons who practice hoopiopio, hoounauna, hoomanamana, anaana, or pretend to have the power of praying persons to death"); IND. CODE ANN. § 10-4603 (Burns 1956) (repealed 1976) (designating trespassers armed in buildings or threatening injury to the person or property of occupants of land or buildings as "tramps"); MASS. GEN. LAWS ANN. ch. 272, § 53 (West 1956) (amended 1973) (revising Elizabethan statute of 1788 by deleting references to rogues, vagabonds, jugglers, or common pipers and fiddlers); MICH. COMP. LAWS § 750.167 (1948) (amended 1956) (defining "window peepers" as vagrants); NEV. REV. STAT. § 207.030(10B) (1957) (defining "frequenters of law dens" as vagrants) (amended 1963); OKLA. STAT. ANN. tit. 21, § 1141(4) (West 1958) (repealed 1974) (defining "persons who act as callers of figures for dances in houses of ill fame" as vagrants); VA. CODE ANN. § 63-338, (Michie 1950) (repealed 1968) (defining nine classes of persons as vagrants, including "persons wandering or strolling about in idleness; persons from without the state found loitering within it with no visible occupation or means of subsistence and who are unable to give a reasonable account of themselves").

22. The English experience with begging and panhandling was filled with contra-

rights.[23] The Constitution of 1787 contained no exemption; it left the control of vagrants and beggars up to the states.[24] The states readily accepted this responsibility[25] and enacted a variety of vagrancy laws that typically contained a specific prohibition on begging and panhandling.[26]

Until the "Due Process Revolution" of the 1960s, most courts upheld vagrancy statutes and their broad prohibitions on begging and panhandling.[27] The statutes were justified by the view that

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diction. English laws addressing begging alternated between Draconian measures prescribing severe penalties, including death, and elaborate statutes differentiating between physically disabled persons who had to beg to survive and able-bodied persons who simply chose to beg rather than work. This alternating pattern persisted for several centuries and formed the basis for modern vagrancy laws in the United States. Teir, *supra* note 1, at 295-98; *id.* at 23 (citing JAMES F. STEPHEN, A HISTORY OF THE CRIMINAL LAW OF ENGLAND (1883) (addressing in great detail the various English approaches to criminalizing and punishing begging and vagrancy)); *supra* note 19.

23. The Privileges and Immunities Clause of the Articles of Confederation stated: "The free inhabitants of each of these States, *paupers, vagabonds, and fugitives from justice excepted*, shall be entitled to all the privileges and immunities of free citizens in the several States . . . ." Teir, *supra* note 1, at 300 n.77 (quoting the ARTICLES OF CONFEDERATION, ART. IV (1781) (emphasis added)).
24. It is black-letter constitutional law that where the Constitution is silent on an issue, the states have control. Norris v. City of Boston, 48 U.S. 283, 289 (1849).
25. Teir, *supra* note 1, at 300 (stating that "[b]y 1956, vagrancy statutes were in force in every state except West Virginia, where it was a common law crime"); *see also id.* at 300 n.78 (citing Caleb Foote, *Vagrancy-Type Law and Its Administration*, 104 U. PA. L. REV. 603, 609 (1956)); *supra* note 21.
26. Teir, *supra* note 1, at 301 n.84 (citing CAL. PENAL CODE § 647(c) (West 1988 & Supp. 1995) (punishing "[e]very beggar who solicits alms as a business"); *id.* at 302 n.89 (citing KAN. STAT. ANN. § 21-4108(e) (1988) (repealed 1992) (prohibiting "deriving support in whole or in part from begging")); *id.* at 302 n.96 (citing LA. REV. STAT. ANN. § 14:107(3) (West 1986 & Supp. 1995) (repealed 1992) (retaining the distinction between able-bodied and disabled beggars)); BALT. CITY, MD., CODE OF PUBLIC LAWS art. 4, § 24-2 (1980) (repealed 1994); *id.* at 302 nn.90-91 (citing MASS. GEN. LAWS ANN. ch. 272, §§ 63, 66 (West 1990) (including beggars in the definition of "tramps" and "vagrants")).
27. *See, e.g.*, State v. Superior Court, 535 P.2d 1299 (Ariz. 1975) (holding that statute prohibiting loitering or prowling upon the private property of another, without the consent of or lawful business with the owner or occupant thereof, was not unconstitutionally vague); *In re* Cregler, 363 P.2d 305 (Cal. 1961) (upholding constitutionality of vagrancy statute prohibiting persons having no visible or lawful means of support from loitering around railroad depot and other designated places or public gathering or assembly); Williams v. District of Columbia, 65 A.2d 924 (D.C. 1949); Johnson v. State, 202 So. 2d 852 (Fla. 1967) (upholding vagrancy statute prohibiting persons from "wandering or strolling around from place to place without any lawful purpose or object . . ."); Thistlewood v. Trial Magistrate for Ocean City, Worcester County, 236 Md. 548, 204 A.2d 688 (1964) (upholding constitutionality of city curfew

vagrancy was a "parasitic disease, which, if allowed to spread, w[ould] sap the life out of that upon which it fe[d]."[28] Modern courts have been inclined to reject this rationale[29] and have struck down several broad vagrancy statutes.[30] The loss of these broad prohibitions deprived the states of a powerful and effective weapon against begging. Consequently, in the face of the growing number of homeless and a reduced amount of revenue and financial resources, the states have had to find effective alternative methods by which to combat begging and panhandling. Many states have simply delegated legislative authority to cities and municipalities to promulgate regulations on begging, effectively "washing their hands" of the entire problem.[31] Thus, the current efforts of Baltimore and other cities in regulating or restricting begging are merely the latest in a long line of anti-begging measures stretching back into antiquity.

III. EXPERIENCE IS THE BEST TEACHER: HOW OTHER CITIES HAVE ATTEMPTED TO DRAFT LAWS PROHIBITING PANHANDLING

The City of Baltimore can consult statutory schemes enacted by other cities when it attempts to correct the constitutional infirmities

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ordinance); Martin v. State, 203 Md. 66, 98 A.2d 8 (1953) (upholding statute declaring "every person apprehended having upon him any picklock . . . crow, jack, or other implement, at places and under circumstances from which intent [to break and enter] may be presumed . . . shall be declared a vagabond"); Bevans v. State, 180 Md. 443, 24 A.2d 792 (1942) (same); Tinsley v. City of Richmond, 119 S.E.2d 488 (Va. 1961) (holding that city ordinance prohibiting loitering on streets or sidewalks by persons requested to move by police was valid exercise of police power and not unlawful delegation of legislative power); Morgan v. Commonwealth, 191 S.E. 791 (1937) (upholding statute defining "vagrant" as "persons who have no visible income lawfully acquired and who consort with idlers, gamblers, and the like . . ."); State v. Harlowe, 24 P.2d 601 (Wash. 1933).

28. Tier, *supra* note 1, at 301 n.86.
29. *See, e.g.*, Edwards v. California, 314 U.S. 160, 177 (1941).
30. *See* Papachristou v. City of Jacksonville, 405 U.S. 156 (1972) (holding that Florida's vagrancy ordinance violated the requirements of due process because it was unconstitutionally overbroad); Kolender v. Lawson, 461 U.S. 352 (1983) (holding that a California loitering statute punishing the failure by any person wandering the streets to produce credible identification when requested to do so by a police officer was too vague to satisfy the requirements of due process).
31. Eleven states currently authorize municipalities to deal with the problem of begging. Teir, *supra* note 1, at 302 (citing ARK. CODE ANN. § 14-54-1408 (Michie 1987); ILL. REV. STAT., ch. 24, para. 11-5-4 (1993); MONT. CODE ANN. § 7-32-4304 (1993); NEB. REV. STAT. § 15-257 (1991); N.H. REV. STAT. ANN. § 47:17 (1991 & Supp. 1994); N.C. GEN. STAT. § 160A-179 (1994); N.D. Cent. Code § 40-05-01(43) (1993 & Supp. 1991) (amended 1993); OHIO REV. CODE ANN. § 715.55B (Baldwin 1993); UTAH CODE ANN. § 10-8-51 (1992 & Supp. 1995); WASH. REV. CODE ANN. § 35.22.280(34) (West 1990 & Supp. 1995); WYO. STAT. § 15-1-103 (a)(xvii) (1992 & Supp. 1995)); *see also infra* note 35.

of its Aggressive Panhandling Ordinance brought to light in *Patton v. City of Baltimore*.[32] It may be difficult for Baltimore to glean clear guiding principles from the court decisions that have interpreted the schemes used by other states, however, because those schemes vary widely in their essential elements. Generally, cities and municipalities addressing the issue of panhandling have chosen one of three distinct enforcement options. Some have enacted "blanket bans," which prohibit all panhandling.[33] Others have enacted bans on all panhandling in specific areas.[34] Finally, still others have banned all "aggressive panhandling" by focusing on specific harmful, threatening, or intimidating conduct associated with panhandling.[35] This Comment examines the successes and failures of the various challenges to some of these statutes and ordinances in order to determine the ability of Baltimore's Aggressive Panhandling Ordinance to withstand similar challenges. The experience of other cities provides valuable information that will help Baltimore to formulate a solution that balances the city's interest in public safety and economic growth with the individual freedoms of beggars and panhandlers.

A. The Constitutionally Unsure Footing of "Blanket Bans" on Begging

By far, the most constitutionally dangerous position for a city or municipality to take is the complete ban on all begging. Cities

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32. *See infra* note 35.
33. These "blanket ban" cities include: Austin, Tx.; Buffalo, N.Y.; Chicago, Ill.; Fort Wayne, Ind.; Mobile, Ala.; San Francisco, Ca.; Miami, Fla.; Phoenix, Az.; and Newport News, Va. *See* Teir, *supra* note 1, at 303.
34. These cities include: Albuquerque, N.M. (in public view); El Paso, Tx. (in vehicles stopped at traffic lights); Indianapolis, Ind. (in public streets and parks); New York City, N.Y. (in subways and airports); and San Antonio, Tx. (in airports). *See* Tier, *supra* note 1, at 303 n.102.
35. *See* DALLAS, TEX., CITY CODE §§ 31-35 (1991) (prohibiting "solicitation by coercion . . . including persist[ence] in a solicitation after the person solicited has given a negative response"); D.C. CODE ANN. §§ 22-3311, 3312 (1993) (prohibiting begging in an aggressive manner on public or private property); MINNEAPOLIS, MINN., CHARTER & CODE OF ORDINANCES tit. 15 § 385.65 (1988) (prohibiting "[any] person, in any public place . . . from follow[ing] or engag[ing] in conduct which reasonably tends to arouse alarm or anger in others . . . or [to] block passage by another person or vehicle [or] to require another person or a driver . . . to take evasive action to avoid physical contact"); PORTLAND, OR., MUN. CODE § 14.24.040(a)(1987) (prohibiting "offensive physical contact . . . and caus[ing] or attempt[ing] to cause another person reasonably [to] apprehend that they will be subjected to any offensive physical contact, either to their person or to personal property in their immediate possession"); SEATTLE, WASH., MUN. CODE § 12A.12.015B (1987) (prohibiting aggressively begging and "obstruct[ing] pedestrian or vehicular traffic" and defining "aggressive begging" as "begging with intent to intimidate another person into giving money or goods").

adopting this approach make the calculated gamble that begging is not speech protected by the First and Fourteenth Amendments. Once a court finds that an individual's freedom of speech in a public forum has been implicated by government action, the proscribing statute or ordinance is viewed as presumptively unconstitutional and is only upheld if it can withstand the strictest of judicial scrutiny.[36]

In addition, absolute bans on begging tend to run afoul of the Fourteenth Amendment's mandate that all persons similarly situated be treated alike.[37] It is very difficult for a city or municipality to rationalize the distinction between beggars and solicitors for charities and non-profit organizations when identical conduct brings citation, arrest, and possibly incarceration to one and absolutely no penalty to the other.

In *Loper v. New York City Police Department,*[38] the United States Court of Appeals for the Second Circuit addressed the constitutionality of a New York statute prohibiting all begging in a public place.[39] The plaintiffs, Jennifer Loper and William Kaye, filed suit against the New York City Police Department, in the United States District Court for the Southern District of New York, seeking to enjoin the enforcement of the statute.[40] The district court concluded that the statute violated the First Amendment freedom of speech and entered summary judgment for the plaintiffs.[41] The Second Circuit

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36. The strict scrutiny test is employed only when governmental action impinges upon the exercise of a right explicitly or implicitly granted by the Constitution or creates a classification among citizens, like race for example, that is inherently suspect. *See, e.g.,* Korematsu v. United States, 323 U.S. 214 (1944) (indicating that race is a suspect criterion for legislative classifications). Anti-begging ordinances could conceivably trigger a strict scrutiny analysis on both First Amendment and Equal Protection grounds. Once a court concludes that begging is speech protected by the First Amendment, and is therefore within the fundamental right of free speech, the appropriate level of analysis is strict scrutiny. Where strict scrutiny is invoked, the classification will be upheld only if it is necessary to promote a compelling governmental interest. *See, e.g.,* Shapiro v. Thompson, 394 U.S. 618, 634 (1969) (applying strict scrutiny test to statute burdening fundamental right to travel), *overruled in part by* Edelman v. Jordan, 415 U.S. 651 (1974); McLaughlin v. Florida, 379 U.S. 184, 192 (1964) (applying strict scrutiny to race-based classification).

37. U.S. CONST. amend. XIV, § 1 ("No State shall . . . deny to any person within its jurisdiction the equal protection of the laws."); Plyler v. Doe, 457 U.S. 202, 216 (1982).

38. 999 F.2d 699 (2d Cir. 1993).

39. N.Y. PENAL LAW § 240.35(1) (McKinney 1989) provides, in relevant part:

> A person is guilty of loitering when he:
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> 1. Loiters, remains or wanders about in a public place for the purpose of begging[.]

40. *Loper*, 999 F.2d at 701.

41. Loper v. New York City Police Dep't, 802 F. Supp. 1029 (S.D.N.Y. 1992), *aff'd*, 999 F.2d 699, 701 (2d Cir. 1993). At first blush, *Loper* appears to

affirmed and, in support of this conclusion, noted that although the Supreme Court of the United States had not squarely addressed the issue of whether begging was speech protected by the First Amendment, the Court had decided cases involving public solicitations and fund raisers for charities.[42] Relying on *Village of Schaumburg v. Citizens for a Better Environment*[43] and its progeny, the Second Circuit concluded that solicitation was a form of constitutionally protected speech because it saw no principled distinction between individuals soliciting for organized charities and individuals soliciting for themselves with regard to the message conveyed.[44]

Having determined that the challenged statute prohibited constitutionally protected speech on public streets, a traditional public forum,[45] the court subjected the statute to strict scrutiny.[46] The court examined whether the statute necessarily served a compelling state interest and whether it was narrowly tailored to achieve that end.[47]

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indicate a startling about-face by the Second Circuit on the issue of begging as constitutionally protected speech, given its decision in Young v. New York Transit Auth., 903 F.2d 146 (2d Cir.), *cert. denied*, 498 U.S. 984 (1990). In *Young*, the court held that begging did not convey any recognizable message deserving First Amendment protection. *Id.* However, given that it had already prohibited all begging on New York's subway system in *Young*, the Second Circuit probably concluded that upholding the outright ban in all public areas in *Loper* would leave beggars without anywhere to beg. *Loper*, 999 F.2d at 699. The absence of clear Supreme Court precedent on the issue of where begging fits, if at all, in the scheme of the First Amendment, contributed to the *Loper* court's ultimate decision. *Id.*

42. *Id.* at 701, 703-04 (citing Riley v. National Fed'n of the Blind, 487 U.S. 781 (1988); Secretary of State of Md. v. Joseph H. Munson Co., 467 U.S. 947 (1984); Village of Schaumburg v. Citizens for a Better Env't, 444 U.S. 620 (1980)).

    In *Village of Schaumburg*, the Court struck down an ordinance prohibiting solicitation by charitable organizations that did not use at least 75% of their revenues for charitable purposes, explicitly holding that "charitable appeals for funds, on the street or door to door, involve a variety of speech interests—communication of information, the dissemination . . . [of] ideas, and the advocacy of causes—that are within the protection of the First Amendment . . . ." *Village of Schaumburg*, 444 U.S. at 632.

43. 444 U.S. 620 (1980).

44. *Loper*, 999 F.2d at 703-04. The court concluded that begging was protected speech because it usually involved the communication of a particularized social and political message, and was "accompanied by speech indicating the [beggar's] need for food, shelter, clothing, medical care, or transportation. Even without particularized speech . . . 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." *Id.* at 704.

45. *Id.* at 703; *see* Hague v. Comm. for Indus. Org., 307 U.S. 496 (1939).

46. *Loper*, 999 F.2d at 703; *see supra* note 36.

47. *Id.* at 704-05 (citing Perry Educ. Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37, 45 (1983)). This strict scrutiny test was required because the statute was proscribing protected speech in a public forum. *Id.* at 703.

The court placed great emphasis on the broad character of the statute and its total prohibition of all begging in all public places.[48] While noting that a state or local government could have a compelling interest in preventing the evils that are sometimes associated with begging, the court concluded: "[A] statute that totally prohibits begging in all public places cannot be considered 'narrowly tailored' to achieve that end."[49] The court determined that allowing such a broad prohibition to withstand judicial scrutiny would leave beggars with no alternative channels in which to communicate their plight to others.[50]

Finally, the Second Circuit held that even if strict scrutiny was not the proper test of the statute's constitutionality, the statute at issue could not be justified as a reasonable time, place, and manner restriction on speech because it was a content-based, overbroad restriction on speech.[51] A content-neutral statute, as defined by the court, is one that does not embrace, affect, or target a specific subset of speech for prohibition.[52] The court observed that the New York statute specifically targeted for prohibition all speech related to begging and, thus, would improperly prohibit such protected activities as solicitation of contributions and donations by both groups and individuals who were members of charitable, religious, or political organizations.[53] Therefore, the court deemed that the statute was not content-neutral.[54]

In a case more factually similar to the situation confronting the City of Baltimore, the United States District Court for the Northern District of California reached a different result. In *Joyce v. City of San Francisco*,[55] a class of homeless persons brought a class action

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48. *Id.*
49. *Id.* at 705.
50. *Id.* The court noted that the total prohibition of begging in public areas made the statute fundamentally different from regulations prohibiting all solicitations in the subways of New York City because the subway regulations did not prevent begging in public streets. *Id.*
51. *Id.* at 704-05. This test was first adopted by the Supreme Court in United States v. O'Brien, 391 U.S. 367 (1968). In *O'Brien,* the Court upheld the conviction of a Vietnam War protestor for burning his draft card. To survive constitutional attack under this test, the statute at issue must be capable of characterization as a regulation of the time, place, and manner of expression that is content neutral, is narrowly tailored to serve significant government interests, and leaves open alternative channels of communication. *Id.* at 376-77.
52. *See* Renton v. Playtime Theatres, Inc., 475 U.S. 41, 48 (1986).
53. *Loper*, 999 F.2d at 704-05.
54. *Id.* at 704-05.
55. 846 F. Supp. 843 (N.D. Cal. 1994). Although the statutory scheme at issue in *Joyce* concerned aggressive panhandling, it also restricted or prohibited a wide variety of other types of conduct completely unrelated to aggressive solicitations

suit against the City of San Francisco and sought a declaratory judgment that the city's Matrix Program singled out the homeless and unconstitutionally penalized them for engaging in various life-sustaining activities.[56] The plaintiffs alleged that the program vested too much discretion in the police officers charged with its enforcement.[57] The plaintiffs also sought a preliminary injunction to enjoin the enforcement of the Matrix Program pending a trial on the merits.[58] Plaintiffs mounted a two-pronged, constitutional attack on the Matrix Program and argued that it (1) violated the Eighth Amendment because it punished individuals for the involuntary status of homelessness and (2) violated the Equal Protection Clause of the Fourteenth Amendment because its enactment and enforcement were designed to invidiously discriminate against the homeless.[59] The court rejected each of these arguments in turn.[60]

First, the court declined to hold that homelessness, by itself, equalled a status and explained that the Supreme Court cases of *Robinson v. California*[61] and *Powell v. Texas*[62] did not require this

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like panhandling, and was, therefore, grouped with the broad begging prohibitions for purposes of this Comment.

56. The Matrix Program was instituted following a 1992 report from the San Francisco Mayor's Office of Economic Planning and Development, which attributed the city's sluggish economy to the conduct of the city's increasing homeless population. *Id.* at 846. The report described the program as "initiated to address citizen complaints about a broad range of offenses occurring on streets and in parks and neighborhoods . . . and a directed effort to end street crimes of all kinds." *Id.*

    The program was composed of two parts: (1) stringent enforcement of several criminal laws to deter behaviors of the homeless that made the city a less desirable place to live and work; and (2) a non-punitive component utilizing social and health care workers designed to familiarize the homeless with services and programs available to them, including sources of shelter and medical services. *Id.* at 846-47. The city's estimated spending to fund the non-punitive programs for fiscal year 1993-94 was $46.4 million. *Id.* at 848.

    Few Matrix-related offenses—which included public drinking and inebriation, camping or sleeping in public parks, and aggressive panhandling—resulted in arrest. In most instances, these violations only resulted in admonition by enforcing officers or in a citation. Any individuals who were arrested, however, were usually released on their own recognizance, or with credit for time served, and were released the following day. *Id.* at 846, 848-49.

57. *Id.* at 847.
58. *Id.* at 845.
59. *Id.* at 853, 858.
60. *Id.* at 858, 860.
61. 370 U.S. 660 (1962). In *Robinson*, the United States Supreme Court held that a statute punishing a person for the offense of "being a drug addict" violated the Eighth Amendment because a violation of the statute was predicated on the status of being addicted to narcotics, rather than upon any particular act. *Id.* at 666.
62. 392 U.S. 514, 532 (1968). In *Powell*, the United States Supreme Court held that a statute punishing the offense of "public drunkenness" did not violate

conclusion. The Matrix Program punished specific criminal conduct; the fact that the homeless, by virtue of their condition, were more likely to account for a disproportionate number of cited and detained individuals under the Matrix Program did not, in the court's opinion, mandate the conclusion that the program punished homelessness *per se*.[63] The court justified this conclusion by explaining that a contrary holding would have a "staggering" and "devastating" effect on constitutional jurisprudence because it would severely hamper state and local law enforcement efforts to ensure public safety and welfare and because it would constitute an inappropriate intrusion into state and local affairs and authority.[64]

The court gave short shrift to the contention that the Matrix Program violated the Equal Protection Clause. The court claimed that the plaintiffs failed to produce any evidence indicative of an invidious, discriminatory purpose to the city's enactment of the program or of discriminatory enforcement by the police.[65] The court greatly emphasized the strict enforcement guidelines and the continuing training and education provided to all police officers as strongly persuasive indicators that the city desired non-discriminatory enforcement of the Matrix Program.[66]

Two important concepts can be gleaned from the *Joyce* decision. First, that the weight of authority supports the conclusion that homelessness is not a protected status and that ordinances like San Francisco's (and Baltimore's) do not offend the Constitution by criminalizing certain conduct associated with the condition of being homeless.[67] As the *Joyce* court pointed out, the fact that homelessness

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the Eighth Amendment because it did not, as in *Robinson*, punish the status of being an alcoholic; rather, it punished a particular act—the conduct of being drunk in public.

63. *Joyce*, 846 F. Supp. at 857-58. *But cf.* Pottinger v. City of Miami, 810 F. Supp. 1551 (S.D. Fla. 1992) (appeal pending) (holding that homelessness is a status for which a person may not be punished under the Eighth Amendment).
64. *Joyce*, 846 F. Supp. at 858. If homelessness were judicially recognized as a status, almost any involuntary condition could be analogized to homelessness, and there would be no principled method to make necessary differentiations. Adoption of this position would "significantly limit the States in their efforts to deal with a widespread and important social problem and would do so by announcing a revolutionary doctrine of constitutional law that would also tightly restrict state power to deal with a wide variety of other harmful conduct." *Id.* (quoting Powell v. Texas, 392 U.S. 514, 537 (1968) (Black, J., concurring)).
65. *Id.* at 858-59. The court reasoned: "When the basic classification is rationally related, uneven effects upon particular groups within a class are ordinarily of no constitutional concern." *Id.* (quoting Personnel Adm'r of Mass. v. Feeney, 442 U.S. 256, 272 (1979)).
66. *Id.* at 859.
67. *But see Pottinger*, 810 F. Supp. 1551 (appeal pending) (holding that homelessness is a "status" for which a person may not be convicted under the Eighth Amendment).

is often an involuntary condition, similar to addiction to drugs or alcohol, does not justify the offensive and threatening conduct often associated with the condition.[68] As long as the ordinance in question does not directly punish a person for being homeless,[69] but instead punishes specific conduct in public areas, it will survive scrutiny under the Eighth Amendment.[70]

Second, it is much harder for a plaintiff to prove purposeful, invidiously discriminatory police enforcement of an anti-panhandling ordinance if the police officers have been given strict enforcement guidelines and, more importantly, have been given thorough training in constitutionally appropriate interaction with homeless individuals. Both of these precautions considerably reduce the police discretion in law enforcement. This reduction in police discretion makes it very unlikely that a content-neutral ordinance will be invalidated because of the disparaging effect that arbitrary and discriminatory enforcement has on the homeless. The reduction in discretion also helps to eliminate the appearance of targeting solely the homeless for enforcement and punishment.

B. Challenges to Restrictions on Begging in Particular Areas

Other cities have chosen to enact ordinances prohibiting begging in specific public areas and in areas open to the public. These enactments typically prohibit all begging, regardless of whether it is passive or aggressive in nature, in places where encounters with strangers are inherently more coercive than they would be on public streets.[71] Although the Supreme Court has not yet specifically addressed whether begging is protected speech under the First Amend-

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68. *Joyce,* 846 F. Supp. at 855.

69. For example, suppose City *X* passed an ordinance stating: "It shall be a crime for anyone to be found in a condition of homelessness anywhere within the boundaries of this city. Anyone found guilty of violating this ordinance shall be required to pay a fine not exceeding $100, or be sentenced to serve not more than thirty days in jail, or both."

    This ordinance would be plainly unconstitutional because it punishes the condition of being homeless, not any particular acts associated with being homeless. It is roughly akin to the medieval vagrancy statutes that were struck down on due process grounds by the United States Supreme Court in Papachristou v. City of Jacksonville, 405 U.S. 156 (1972) (holding that vagrancy ordinance was void for vagueness and placed unfettered discretion in hands of police).

70. *See* Powell v. Texas, 392 U.S. 514, 532 (1968); Joyce v. City of San Francisco, 846 F. Supp. 843, 857-58 (N.D. Cal. 1994); *see supra* note 62.

71. *See, e.g.,* D.C. CODE ANN. § 22-3312(b)-(d) (1994) (prohibiting begging at bus, train, or subway stations or stops; within ten feet of any automatic teller machine; or from any operator or occupant of a motor vehicle that is in traffic or on a public street).

ment, the Court has addressed the issue of whether municipalities and regulatory agencies can constitutionally prohibit begging in areas where the public seeks access to public transportation.

The first case to address whether begging could be the proper subject of governmental regulation was *Young v. New York City Transit Authority*.[72] In *Young*, an organization representing homeless individuals brought a class action suit challenging a transit authority regulation that prohibited begging and panhandling in New York City's subway system.[73] The United States Court of Appeals for the Second Circuit reversed the United States District Court for the Southern District of New York's[74] decision, which struck down the regulation as violative of the First Amendment.[75]

In its opinion, the court of appeals expressly held that begging was not speech protected by the First Amendment.[76] The court also held that begging was not the type of expressive conduct covered by the First Amendment by virtue of the fact that it lacked "[a]n intent to convey a *particularized message* . . . that . . . would be understood by those who viewed it."[77] The court stated that the common theme running through all acts of panhandling was the bare desire for money, which the court held was far outside the scope of protected speech under the First Amendment.[78] In contrast, the court recognized a sufficient nexus between solicitation by organized charities and a variety of speech interests to invoke the protections of the First Amendment.[79]

Given the lack of a definitive decision by the United States Supreme Court on whether begging is speech protected by the First

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72. 903 F.2d 146 (2d Cir. 1990).
73. The Transit Authority had maintained a long-standing ban on begging in the subway system pursuant to 21 N.Y.C.R.R. § 1050.6(b), which stated: "[N]o person, unless duly authorized . . . shall upon any facility or conveyance . . . solicit alms, subscription, or contribution for any purpose." In 1989, the Transit Authority held hearings to amend § 1050.6, resulting in the promulgation of § 1050.6(c), which permitted greater access to the transit system for certain non-commercial activities such as "public speaking; distribution of written materials; solicitation for charitable, religious or political solicitation; and artistic performances, including the acceptance of donations." 21 N.Y.C.R.R. § 1050.6(c). Place restrictions were imposed on these non-commercial uses of the subway system, but the long-standing prohibition on begging was left intact and panhandlers became the target of stricter enforcement efforts. *Young*, 903 F.2d at 148-49.
74. 729 F. Supp. 341 (S.D.N.Y. 1990).
75. *Young*, 903 F.2d 146 (2d Cir. 1990).
76. *Id.* at 152-54. The court stated that "common sense tells us that begging is much more 'conduct' than it is 'speech.'" *Id.* at 153.
77. *Id.* (quoting Texas v. Johnson, 491 U.S. 397, 404 (1989) (quoting Spence v. Washington, 418 U.S. 405, 410-11 (1974)).
78. *Id.* at 154.
79. *Id.* at 155.

Amendment, the court of appeals, in *Young*, offered an alternative basis for upholding the Transit Authority's regulations. The court reasoned that the regulation would be valid under the *United States v. O'Brien* time, place, and manner standard, even if begging were in fact constitutionally protected expression.[80] Under this standard, a restriction on free expression that is inseparably intertwined with conduct will be upheld if (1) the activity is a constitutionally proper subject for regulation, (2) the regulation furthers an important or substantial governmental interest unrelated to the suppression of free expression, and (3) any incidental restriction on First Amendment speech is no greater than that which is essential to further the asserted interest.[81]

The court of appeals recognized the Transit Authority's broad statutory power "to promulgate rules 'governing the conduct and safety of the public as it . . . [deemed] necessary, convenient, or desirable.'"[82] In addition, the court noted that the regulation at issue advanced the substantial and legitimate governmental interests of maintaining public safety and order on the public transit system.[83] The court then recognized that the requirement that the regulation be unrelated to the suppression of free expression essentially meant that it be content-neutral.[84] The court concluded that the subway-begging regulation was content-neutral because the justification for the regulation—the prevention of passenger intimidation and harassment—was completely unrelated to any message communicated by

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80. *Id.* at 157-59. See *supra* note 51 for a discussion of the *O'Brien* test.
81. *Id.* (quoting United States v. O'Brien, 391 U.S. 367 (1968)).
82. *Id.* at 158 (quoting N.Y. PUB. AUTH. LAW § 1204).
83. The court noted:

> A majority of the subway's over three million daily passengers perceive begging and panhandling to be "intimidating," "threatening," and "harassing" . . . involv[ing] "unwanted touching [and] detaining" of passengers. The police have great difficulty distinguishing between "panhandling and extortion." Begging is "inherently aggressive" to the "captive" passengers in the close confines of the subway atmosphere. Based on these facts . . . begging in the subway often amounts to nothing less than assault, creating in the passengers the apprehension of imminent danger. Additionally, begging in the subway raises legitimate concerns about public safety. The conduct "disrupts" and "startles" passengers, thus creating the potential for a serious accident in the fast-moving and crowded subway environment.

Id.

84. *Id.*; *see* Ward v. Rock Against Racism, 491 U.S. 781, 791 (1989) (holding that a "regulation that serves purposes unrelated to the content of expression is deemed neutral, even if it has an incidental effect on some speakers or messages but not others"); Clark v. Community for Creative Non-Violence, 468 U.S. 288, 295 (1984) (holding that regulation was content-neutral and was not being applied because of disagreement with the message it conveyed).

beggars.[85] Finally, the court held that the Transit Authority had demonstrated that the "only effective way to stop begging in the [subway] system was through the enforcement of a total ban."[86] The court noted that the regulation prohibited begging only in the subway; the regulation did not impose any prohibition upon begging and panhandling on the public streets and sidewalks of the city. Therefore, because of its narrow application, the regulation left open ample alternative avenues of communication.[87]

The landmark decision in *Young* set off a firestorm of controversy among legal scholars, the majority of whom have criticized the court's reasoning.[88] Criticism was not restricted to merely academic circles; several other courts addressing the constitutionality of restrictions on begging took exception with the holding in *Young*.

In *International Society for Krishna Consciousness, Inc. (ISKCON) v. Lee,*[89] a non-profit religious corporation brought an action challenging the restrictions of the Port Authority of New York and New Jersey on the distribution of literature and on the solicitation of donations and contributions in airport terminals.[90] Members of ISKCON performed a ritual known as sankirtan, which entailed going into public areas, disseminating religious literature, and soliciting funds to support the Hara Krishna religion.[91] The Port Authority

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85. *Young*, 903 F.2d at 159.
86. *Id.* at 160.
87. *Id.* The Second Circuit concluded that the Transit Authority's regulation left open ample alternative channels of communication because begging was not prohibited throughout all of New York City, but rather only in the subway. *Id.* In arriving at this conclusion, the court noted that the appellants had not suggested that "any barrier to delivering to the media, or to the public by other means, the intended message concerning the plight of the homeless" existed as a result of the regulation, or that the remaining avenues of communication were inadequate. *Id.* at 161 (quoting *Clark*, 468 U.S. at 295 (1984)); *see also* City of Renton v. Playtime Theatres, Inc., 475 U.S. 41, 53-54 (1986) (upholding city ordinance prohibiting adult movie theatres within 1,000 feet of any residential zone, family dwelling, church, park or school since it left 520 acres, or about five percent of the city land, available for such theatres) (discussed in greater detail, *infra*, Part IV(B)(1)).
88. *See, e.g.*, Helen Hershkoff & Adam S. Cohen, *Begging to Differ: The First Amendment and the Right to Beg*, 104 HARV. L. REV. 896 (1991); Susan Daniel, Note, *The Second Circuit Refuses to Extend Beggars a Helping Hand: Young v. New York City Transit Authority*, 69 WASH. U. L.Q. 969 (1991); Stephanie M. Kaufman, Note, *The Speech/Conduct Distinction and First Amendment Protection of Begging in Subways*, 79 GEO. L.J. 1803 (1991); Scott D. Sitner, Note, *Beggar's Banquet: The First Amendment Right to Beg*, 1991 DET. C.L. REV. 795 (1991).
89. 112 S. Ct. 2701 (1992).
90. *Id.* at 2703-04.
91. *Id.* at 2703 (quoting ISKCON v. Lee, 925 F.2d 576, 577 (2d Cir. 1991)).

regulation at issue prohibited the repetitive solicitation of money or distribution of literature inside the airport terminals.[92]

The United States Supreme Court, in a plurality opinion authored by Chief Justice Rehnquist, held that although ISKCON's solicitation was protected speech under the First Amendment,[93] the airport terminals at issue were neither traditional public fora nor designated public fora, locations where the protections of the First Amendment are at their peak.[94] The Court reasoned that airport terminals were not traditional public fora and that, unlike public streets and parks, they have not been held immemorially in trust for the use of the public to assemble, communicate, and discuss public issues and questions.[95] The Court explained that the airport terminal was a modern innovation and, therefore, that it could hardly constitute a place "'immemorially' . . . held in the public trust . . . for . . . expressive activity."[96] The Court also noted that it had only in recent years become a common practice for religious and non-profit organizations to use airports as a forum for the distribution of

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92. *Id.* at 2704. The regulation provided, in relevant part:

> 1. The following conduct is prohibited within the interior areas of buildings or structures at an air terminal if conducted by a person to or with passers-by in a continuous or repetitive manner:
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> . . . .
>
> c. Solicitation and receipt of funds.

Id. (quoting ISKCON v. Lee, 925 F.2d 576, 578-81 (1991)).

93. *Id.* at 2706-07. The Court stated: "It is uncontested that the solicitation at issue in this case is a form of speech protected under the First Amendment." *Id.* at 2705.

94. *Id.* at 2706-07. Under this forum-based approach, the character and nature of the property upon which the speech occurs is the focus of the Court's threshold inquiry. A regulation of speech on government or public property, like that on streets and public parks, has traditionally been available for public speech, expression, and the free trade of ideas, and has been subject to the highest judicial scrutiny. Such regulations are presumed to be unconstitutional, and survive constitutional challenge only if they are narrowly tailored to achieve a compelling governmental interest. *Lee*, 112 S. Ct. at 2705 (citing Perry Educ. Ass'n v. Perry Local Educators Ass'n, 460 U.S. 37, 45 (1983)).

A regulation of speech in a designated public forum—property that the government has set aside and specifically opened up for expressive activity to all or a portion of the public—is subject to the same constitutional restrictions as traditional public fora. *Id.* (citing Perry Educ. Ass'n v. Perry Local Educators Ass'n, 460 U.S. 37, 46 (1983)).

Finally, a regulation of speech on all public property that does not fall within either of the two above-listed categories is subject only to the limitation of reasonableness, so long as the regulation is not part of an effort to suppress the speaker's activity solely out of disagreement with the speaker's viewpoint. *Id.* at 2705-06 (citing Perry Educ. Ass'n v. Perry Local Educators Ass'n, 460 U.S. 37, 46 (1983)).

95. *Lee*, 112 S. Ct. at 2706.

96. *Id.* (quoting Hague v. Comm. for Indus. Org., 307 U.S. 496, 515-16 (1939)).

literature, the proselytizion of new members, and other similar activities.[97] In addition, the Court viewed the Port Authority's continued opposition to solicitation in the terminals through frequent litigation as belying any claim that the terminals were designated forums for expressive activity.[98] Therefore, the Port Authority's action was not subjected to heightened review and exacting scrutiny; it only had to meet the more moderate standard of reasonableness.[99]

Given the risks of duress and fraud inherent in face-to-face solicitations in places like airport terminals, where the individuals solicited are frequently on tight schedules, the Court held that the regulation was reasonable.[100] The Court emphasized that the Port Authority regulation did not prohibit all solicitation, but merely prohibited solicitation conducted inside the terminal area of the airport, an area where the potential for coercion is heightened.[101] The Court also emphasized that the sidewalk areas outside the terminals were left open for solicitation and for distribution of literature.[102]

C. Challenges to Aggressive Begging Statutes

Anti-aggressive begging statutes and ordinances are fast becoming the weapon of choice for cities and municipalities in their fight to preserve public safety, societal order, and some semblance of a viable economic base. This type of ordinance has garnered positive returns in its relatively few ventures into the judicial process.[103]

In *City of Seattle v. Webster*,[104] the Supreme Court of Washington became the highest state court to address the extent to which a state or municipality could constitutionally prohibit begging. In *Webster*, the court considered a Seattle ordinance[105] that lower state

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97. *Id.* (quoting 45 FED. REG. 35314 (1980)).
98. *Id.* at 2706-07.
99. *Id.* at 2708. The Court reaffirmed its statement, made in *United States v. Kokinda*, that the restrictions on speech on public property that was neither a traditional nor a designated public forum "need only be *reasonable*; it need not be the most reasonable or the only reasonable limitation." United States v. Kokinda, 497 U.S. 720, 730 (1990) (quoting Cornelius v. NAACP, 473 U.S. 788, 808 (1985)).
100. *Lee*, 112 S. Ct. at 2708. The Court noted that "delays may be particularly costly in [the airport] setting, as a missed flight . . . can result in hours worth of subsequent inconvenience." *Id.*
101. *Id.* at 2704.
102. *Id.*
103. *See, e.g.*, Roulette v. City of Seattle, 850 F. Supp. 1442 (W.D. Wash. 1994); City of Seattle v. Webster, 802 P.2d 1333 (Wash. 1990), *cert. denied*, 500 U.S. 908 (1991). *Contra* Blair v. Shanahan, 775 F. Supp. 1315 (N.D. Cal. 1991).
104. 802 P.2d 1333 (Wash. 1990), *cert. denied*, 500 U.S. 908 (1991).
105. SEATTLE MUN. CODE § 12A.12.015 provides, in relevant part:

> A. The following definitions apply in this section:

courts had held to be unconstitutionally vague and overbroad in violation of the First Amendment.[106] Respondent Webster also asserted an equal protection challenge, arguing that the ordinance was directed specifically at the homeless beggars in and around the Seattle metropolitan area.[107]

The Supreme Court of Washington reversed and held that the ordinance was neither overbroad nor vague by constitutional standards.[108] The court concluded that, under the statute, "aggressive panhandling" was a specific intent offense and, therefore, that the statute did not prohibit "innocent intentional acts which merely consequentially block traffic or cause others to take evasive action."[109] The court concluded that this intent element saved the ordinance from being vague or overbroad because the language of the ordinance "clearly indicate[d] that, before there c[ould] be a charge or conviction under the ordinance, a person must [have acted] with intent to block another's passage or with intent to cause a person or vehicle to take evasive action."[110] In the court's view, this specific intent requirement insured that constitutionally protected free speech activities, as well as innocent intentional acts, would not be swept within the ordinance's prohibitions.[111]

In addition, the court held that the ordinance did not violate the Equal Protection Clause because it applied equally to all individuals possessing the required criminal intent.[112] The court concluded that because the ordinance was facially neutral, and because Webster produced no evidence that he was in fact a homeless person, the ordinance was not directed specifically at the homeless.[113]

> 1. "Aggressively beg" means to beg with intent to intimidate another person into giving money or goods.
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> . . . .
>
> B. A person is guilty of pedestrian interference if . . . [that person] intentionally:
>
> . . . .
>
> 2. Aggressively begs.

Webster, 802 P.2d at 1337.

106. *Id.* at 1339.

107. The court rejected Webster's Equal Protection argument, holding that the Pedestrian Interference Ordinance was facially neutral. *Id.* at 1340. The court further indicated that the trial record failed to indicate that Webster was in fact a homeless person, and that such a bare record could not provide the basis to support the finding of an Equal Protection violation. *Id.*

108. *Id.* at 1338-40.

109. *Id.* at 1338.

110. *Id.*

111. *Id.* at 1337-38.

112. *Id.* at 1340.

113. *Id.* The Washington Supreme Court noted that it had recently upheld a similar ordinance against an equal protection challenge. *See* Seattle v. Stack, 784 P.2d

Seattle's Aggressive Begging Ordinance was later re-examined by a federal court in *Roulette v. City of Seattle*.[114] In *Roulette*, a diverse group of plaintiffs composed of homeless individuals and advocate groups for the homeless challenged the constitutionality of Seattle's ordinance.[115] Significantly, Seattle's Aggressive Panhandling Ordinance had been amended since the *Webster* decision. The amendments defined "intimidate" to mean "engag[ing] in conduct which would make a reasonable person feel fearful or compelled to give"[116] and added a list of circumstances that could be considered when determining whether a person possessed the intent to intimidate.[117] The United States District Court for the Western District of Washington rejected Plaintiffs' overbreadth challenge to the ordinance.[118]

As a preliminary matter, the district court, relying on the clear line of Supreme Court precedent that held that the speech of charitable solicitors was protected by the First Amendment,[119] explained that the city had conceded that begging, if done peacefully, was entitled to some degree of protection under the First Amendment.[120] The court then turned its attention to the heart of Plaintiffs' First Amendment challenge—that the ordinance was unconstitutionally overbroad because it "d[id] not aim specifically at evils within the allowable area of state control but, . . . swe[pt] within its ambit other activities that in ordinary circumstances constitute[d] an exercise of freedom of speech."[121] The court noted that the ordinance did not prohibit all begging; rather, it prohibited "only begging 'with the intent to intimidate . . . .'"[122] After analyzing the statute's definition of "intimidate," the court concluded that only begging that

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494 (Wash. 1989) (upholding Seattle's "prostitution loitering" ordinance). In addition, the court noted that "nothing in the [aggressive panhandling] ordinance refer[ed] to economic circumstances or residential status." *Webster*, 802 P.2d at 1340.

114. 850 F. Supp. 1442 (W.D. Wash. 1994).

115. *Roulette*, 850 F. Supp. at 1444.

116. SEATTLE MUN. CODE § 12A.12.015(A)(2).

117. *Id.* § 12A.12.015(C). This list includes: touching the person solicited, following the person solicited, persisting in the solicitation after a negative response has been given, and using profane or abusive language in the solicitation. *Id.*

118. *Roulette*, 850 F. Supp. at 1444, 1453.

119. Loper v. New York City Police Dep't, 999 F.2d 699, 701, 703-04 (2d Cir. 1993) (citing Riley v. National Fed'n of the Blind, 487 U.S. 781 (1988); Secretary of State of Md. v. Joseph H. Munson Co., 467 U.S. 947 (1984); Village of Schaumburg v. Citizens for a Better Env't, 444 U.S. 620 (1980)); *supra* note 42 and accompanying text.

120. *Roulette*, 850 F. Supp. at 1451. The court also noted that the City apparently found the Second Circuit's decision in *Loper* persuasive. *Id.*

121. *Id.* (quoting Thornhill v. Alabama, 310 U.S. 88, 97 (1940)).

122. *Id.* at 1452.

would make a person feel fearful or compelled to give was prohibited by the ordinance.[123]

The court recognized that this interpretation of the ordinance could be read to proscribe "speech other than those threats unprotected by the First Amendment," and was, therefore, of questionable constitutional validity.[124] Instead of overturning the ordinance because it was facially overbroad, however, the court opted to cure this defect with a limiting construction.[125] The court limited "intimidate" to mean "conduct which threatens the person solicited" and limited "compel" to mean "threat." The court further limited the ordinance's coverage to "prohibit only those threats which would make a reasonable person fearful of harm to his or her person or property."[126] Given the adoption of this construction, the court struck down the circumstances section of the ordinance because some of the circumstances described speech that was clearly protected by the First Amendment.[127]

Roulette explicitly demonstrates the requirement that an aggressive panhandling ordinance be very content-specific regarding the types of conduct within its scope, especially when the ordinance is targeting begging in public places or areas. More importantly, *Roulette* concretely illustrates the drafting problems associated with enacting any law that impinges upon constitutionally protected speech. If an ordinance does not contain a section listing or defining prohibited conduct with precision, the ordinance is susceptible to constitutional attack on the grounds of overbreadth and vagueness. On the other hand, a high degree of specificity in defining the prohibited conduct creates the perception that the ordinance is directed only at a specific class, which opens the door for an equal protection challenge.

In *Blair v. Shanahan*,[128] the United States District Court for the Northern District of California held that California Penal Code section 647(c), a state statute that prohibited accosting others in a public place or in any place open to the public for the purpose of begging,[129] violated both the First and the Fourteenth Amendments.[130]

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123. *Id.* at 1453.
124. *Id.* at 1452-53.
125. *Id.*
126. *Id.* at 1453.
127. *Id.* at 1454.
128. 775 F. Supp. 1315 (N.D. Cal. 1991), *cert. denied*, 115 S. Ct. 1698 (1995).
129. CAL. PENAL CODE § 647(c)(West 1977) provides in relevant part: Anyone "[w]ho accosts other persons in any public place or in any place open to the public for the purpose of begging or soliciting alms is guilty of a misdemeanor." *Blair*, 775 F. Supp. at 1317 n.1.
130. *Blair*, 775 F. Supp. at 1324-26.

In *Blair*, a former panhandler brought a civil rights action against the City of San Francisco and several of its police officers for arresting him in violation of California's anti-begging statute.[131] The court held that begging was protected speech under the First Amendment,[132] disagreeing with the Second Circuit's contrary holding in *Young*.[133] In stark contrast to *Young's* holding that begging was mere conduct, and not speech at all,[134] the *Blair* court concluded: "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."[135] The court held that the communication of these messages was sufficient to qualify begging as protected speech.[136] In criticizing the *Young* court's distinction between solicitations by organized charities and solicitation by individuals on their own behalf,[137] the court reasoned: "No distinction of constitutional dimension exists between soliciting funds for oneself and [soliciting funds] for charities."[138]

Because the California statute was a content-based restriction aimed specifically at speech in a public forum,[139] the court applied the strict scrutiny test enunciated in *Boos v. Barry*,[140] which required that the restriction on speech be "necessary to serve a compelling state interest and . . . narrowly drawn to achieve that end."[141] The court noted that in a prior case, the Court of Appeals of California determined that the essential purpose of section 647(c) was to avoid

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131. *Id.* at 1317.
132. *Id.* at 1324.
133. 903 F.2d 146, *cert. denied,* 498 U.S. 984 (1990).
134. *Young*, 903 F. Supp. at 153.
135. *Cf. Blair,* 775 F. Supp. at 1323 ("[C]ommon sense tells us that begging is much more 'conduct' than it is 'speech.'").
136. *Blair*, 775 F. Supp. at 1322-23.
137. The *Young* court recognized that "a sufficient nexus between solicitation by organized charities and a 'variety of speech interests' [existed] to invoke protection under the First Amendment." *Young*, 903 F.2d at 155.
138. *Blair*, 775 F. Supp. at 1322. In analyzing the distinction drawn by the Second Circuit, the court stated:

> Although many professional fund raisers undoubtedly believe in the causes they promote and genuinely seek to educate others about these causes, many professional fund raisers, like beggars, primarily seek to effect a transfer of money. That the pleas of a beggar or professional fund raiser may change the way his listeners think about their world is often only a desirable side effect. The professional fund raiser may present a clearer message to his listener than the beggar does. But First Amendment protection should not be limited to the articulate.

Id. at 1324.
139. *Id.*
140. 485 U.S. 312 (1988).
141. *Blair*, 775 F. Supp. at 1324 (quoting Boos v. Barry, 485 U.S. 312, 321 (1988)).

public "annoyance."[142] The city also asserted that section 647(c) protected the general public from "intrusive conduct which [wa]s threatening and coercive to those who [we]re accosted" and from "intrusive, coercive behavior."[143] While the court agreed that protecting the public from threatening and dangerous behavior was a compelling government interest, it concluded that section 647(c) was not necessary to achieve this goal.[144] The court concluded: "Any of the acts of coercing, threatening, or intimidating, if clearly defined, may be constitutionally punished . . . via a statute that does not limit the freedom of speech of some citizens,"[145] and stated that the state had "a plethora of content-neutral statutes" that could be utilized to curtail offensive conduct.[146] In addition, the court held that section 647(c) was not narrowly tailored to serve its alleged purposes because it did not, on its face or as applied, "require that an 'accost' be either threatening, intimidating, or coercive" before a person was subjected to a criminal penalty.[147]

Finally, the court held that section 647(c) violated the Equal Protection Clause of the Fourteenth Amendment because it "discriminate[d] between lawful and unlawful conduct based upon the content of . . . communication."[148] The court analogized section 647(c) to an Illinois statute, which banned all picketing on non-labor issues, that was struck down on equal protection grounds in *Carey v. Brown,*[149] and concluded that section 647(c) suffered the same constitutional deficiencies.[150]

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142. *Id.* at 1324 (citing Ulmer v. Municipal Court for Oakland-Piedmont Judicial Dist., 127 Cal. Rptr. 445, 447 (1976)).

143. *Id.*

144. "Protecting the public from intimidation, threats, or coercion simply does not require that a form of speech, possessing obvious political relevance and pertinence to the community, which is of crucial importance to those that express the speech, be precluded." *Id.*

145. *Id.*

146. The court listed several of these statutes, including: CAL. PENAL CODE §§ 211 (robbery); 240 (assault); 242 (battery); 415(1) (challenging to a fight); 415(2) (disturbing another by loud noise); 415(3) (use of offensive words); and 647(c) (willful and malicious obstruction of thoroughfares and public places). *Id.* at 1324 n.10.

147. The court interpreted "accost" to mean "[w]alking up to and approaching a passerby," and concluded that walking up to someone was not a "concrete enough proxy for a threat [or intimidation] to warrant this restriction on speech." *Id.* at 1324.

148. *Id.* at 1325 (quoting Carey v. Brown, 447 U.S. 455, 460 (1980)).

149. 447 U.S. 455 (1980).

150. "All 'accosts,' however defined, may be disruptive, but this statute does not bar all accosts. . . . The issue is not whether all beggars are treated alike, but whether all who approach others and speak to them first are treated alike. Manifestly, they are not." *Blair,* 775 F. Supp. at 1325.

Although the *Blair* court concluded that the statute at issue was riddled with constitutional deficiencies, the court made several important observations. First, it acknowledged that even though begging was protected First Amendment speech, a state or municipality could constitutionally regulate begging if it enacted a narrowly drawn statute or ordinance that punished or prohibited, not the speech element of begging, but only a clearly defined conduct element of begging.[151] Second, the court recognized that the protection of public safety from threatening or dangerous conduct and the maintenance of public order were compelling government interests.[152] Finally, the court noted that it was appropriate for legislative bodies to take the inherent differences between begging and other forms of speech into account when drafting a statute with the goal of reducing the "perceived evil of street intimidation for money."[153] Therefore, the holding is not as broad as it may seem at first blush. Basically, the court only condemned the structure of the statute at issue and did not really question the legitimacy of government attempts to control begging. The court simply held that the City of San Francisco failed to meet the burden of proof associated with a content-based restriction on speech. The outcome would likely have been different if the court had been confronted with a narrowly tailored and properly drafted anti-aggressive panhandling statute.

IV. ALTERNATIVE APPROACHES TO THE PROBLEM OF AGGRESSIVE PANHANDLING IN BALTIMORE

A. The Instant Case—Patton v. City of Baltimore

The district court in *Patton* based its holding—that Baltimore's Aggressive Panhandling Ordinance was unconstitutional—on the fact that it was a content-based restriction on free speech in a public forum, in violation of the Equal Protection Clause of the Fourteenth Amendment.[154] The court, clearly persuaded by the *Blair* court's reasoning, adopted that analysis.[155] First, the court conducted a First Amendment analysis of the ordinance and determined, in accordance

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151. *Id.* at 1324-25.
152. *Id.* at 1324.
153. This "court recognizes that there is the possibility that a request for a dollar, which when transcribed onto paper . . . may actually have been, depending [upon] the circumstances of the moment, intended to be, or perceived as, a *demand* for a dollar . . . . The people of San Francisco deserve, and are entitled to expect, police protection from any such intimidation, coercion, or threat for alms." *Id.*
154. Patton v. City of Baltimore, Civil No. S 93-2389, at 57-58, 65-67 (D. Md. Aug. 19, 1994).
155. *Id.* at 56.

with the weight of decided authority, that begging was protected speech under the First Amendment.[156] The court cited *Loper* and *Blair* with approval, noting that "the distinction between soliciting funds for oneself and for charities [wa]s not a distinction of constitutional dimension."[157]

The court then determined that the ordinance was content-based because only aggressive *panhandling*, or charitable solicitation for money for oneself, was prohibited.[158] The court noted that content-based speech restrictions were analyzed under both the Equal Protection and Due Process Clauses of the Fourteenth Amendment for constitutional infirmity.[159] The court applied the strict scrutiny test in both situations. Under the First Amendment analysis, to survive judicial scrutiny, a content-based restriction on speech must be "necessary to serve a compelling state interest and . . . narrowly drawn to achieve that end"[160] and finely tailored to serve substantial state interests, with sufficient justification for any distinctions it draws. The court recognized the subtle distinction between the strict scrutiny

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156. *Id.; see Blair*, 775 F. Supp. at 1322-24 ("This court finds that begging constitutes protected speech."); *Loper*, 999 F.2d at 704 ("While we indicated in *Young* that begging does not always involve the transmission of a particularized . . . message, . . . it seems certain that it usually involves some communication of that nature."); Chad v. City of Fort Lauderdale, 861 F. Supp. 1057 (S.D. Fla. 1994) (assuming, without deciding, that begging is expressive conduct protected by the First Amendment).

157. The court observed: "[P]anhandling, like other charitable solicitations, implicates a variety of speech interests, . . . [and] convey[s] information about the panhandler's need for food, clothing, shelter, or transportation but often . . . [also] convey[s] a message about how our society treats its poor, homeless [members]." *Patton*, Civil No. S 93-2389, at 56 (citing *Blair*, 775 F. Supp. at 1322-23).

158. The court noted:

> Persons who are not "panhandling," but are making other types of solicitations, such as requests for political contributions or commercial benefits, are not subjected to the ordinance's requirements. The ordinance therefore places greater burdens on the speech-related activities of some citizens, but not others, based solely upon the content of their speech.

Id. at 57-58.

159. *Id.* at 60-61. All equal protection challenges involving state action are analyzed under the Equal Protection Clause of the Fourteenth Amendment. United States v. Guest, 383 U.S. 745, 754 (1966). In addition, the prohibitions of the First Amendment, originally applicable only to the federal government, have been incorporated through the Due Process Clause of the Fourteenth Amendment, and are, thus, applicable to the state governments as well. Duncan v. Louisiana, 391 U.S. 145, 148 (1968); Fiske v. Kansas, 274 U.S. 380 (1927).

160. *Patton*, Civil No. S 93-2389, at 61 (quoting Perry Educ. Ass'n v. Perry Local Educators Ass'n, 460 U.S. 37, 45 (1983)).

analyses under the First and Fourteenth Amendments and their overlap in coverage.[161]

Under the First Amendment test, the court noted that Baltimore's ordinance was much more narrowly tailored than the ordinances and statutes in *Loper*, *Blair*, or *Roulette*, because it neither prohibited all begging in any public place, nor vaguely defined the types of offensive and threatening conduct that would subject a panhandler to criminal penalty.[162] Rather, the Baltimore ordinance struck "a constitutional balance between the rights of the solicitors and the solicited and certainly . . . [left] open ample alternate channels of communication."[163] The court concluded: "[A]ny person can beg on the streets of downtown Baltimore and they may do it for any purpose—the statute simply prohibits doing so in an aggressive manner."[164] In addition, the court determined that this narrow tailoring served the substantial and compelling interests of the city of Baltimore, namely, the protection of citizens and tourists from threatening, intimidating, or harassing behavior.[165] Therefore, the court held that the ordinance did not violate the First Amendment.[166]

The court held, however, that the ordinance violated the Equal Protection Clause of the Fourteenth Amendment because the distinction drawn between panhandlers and other solicitors was not supported by the city's substantial interest of preventing the public from the threatening and offensive behavior of panhandlers.[167] The court noted that the city had made no showing that panhandling was inherently more intimidating than other types of solicitations for money.[168] The court concluded that this poor fit between the city's

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161. The tests are grounded in distinctly different interests protected by the First and Fourteenth Amendments. The court recognized:

> [T]he First Amendment test that is applied to content-based restrictions on speech in traditional public fora focuses on whether there is a compelling interest requiring the government to limit certain speech and whether those limitations are narrowly tailored . . . to [promote] a compelling government interest. The Fourteenth Amendment test, in contrast, focuses on whether the discrimination between speakers engaged in comparable speech-related activities, based upon the content of their speech, is narrowly tailored to further a compelling government interest.

Patton, Civil No. S 93-2389, at 61-62 (citing Perry Educ. Ass'n v. Perry Local Educators Ass'n, 460 U.S. 37, 55 (1983); Carey v. Brown, 447 U.S. 455, 461 (1980)).

162. *Id.* at 64.
163. *Id.* at 63-64.
164. *Id.*
165. *Id.* at 62.
166. *Id.* at 65.
167. *Id.*
168. *Id.* at 66.

objectives and the discrimination included within the ordinance required the city to offer some other legitimately compelling interest for which the ordinance was finely tailored.[169] The city failed to meet this burden.

Interestingly, the court declined to adopt the *Blair* court's reasoning to its fullest extent, disagreeing with that court's conclusion that no prohibition on solicitation could withstand Equal Protection scrutiny.[170] The *Blair* court determined: "[A]ny such prohibition necessarily draws an impermissible distinction between those who ask strangers for money and those who ask strangers for directions, the time of day, or to sign a petition."[171] In response, the court noted that requests for money were inherently more threatening than requests for directions and that a request for a dollar could more likely be perceived as the demand for a dollar.[172] The court concluded, based upon its belief in varying degrees of intimidating behavior, that the Aggressive Panhandling Ordinance was distinguishable from the statute in *Blair* because it prohibited only begging made in an aggressive manner, which was inherently more disruptive and intimidating than other types of everyday speech made in an aggressive manner.[173]

Thus, in *Patton*, the district court "split the difference" in its analysis of the Aggressive Panhandling Ordinance. It held that the ordinance survived First Amendment scrutiny because it was drafted in a manner consistent with the high standards for content-based restrictions of speech in public fora.[174] However, the court also held that the ordinance did not survive the equal protection inquiry because the city failed to demonstrate a compelling interest justifying its discrimination among speakers in public fora.[175] Therefore, in order to remedy this defect, the city must offer some other legitimate compelling interest to which the statute is finely tailored. A secondary

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169. *Id.* at 67. The court noted that the constitutional defect of the ordinance might be remedied by amending it to include all aggressive solicitation of money, regardless of the solicitor's purpose or intended use of the money, thereby making the ordinance more consistent with the Equal Protection Clause. *Id.*

For the reasons stated in Part IV, *infra*, the court's proposed solution, if followed by the city, could actually greatly exacerbate the Aggressive Panhandling Ordinance's constitutional problems.

170. *Id.* at 68 (citing Blair v. Shanahan, 775 F. Supp. 1315, 1325 (1991)).

171. *Id.*

172. *Id.* at 69.

173. *Id.* at 65.

174. *Id.*

175. *Id.* The court correctly noted that the ordinance prohibited only aggressive solicitation of monies for a charitable purpose, and that the ordinance was not narrowly tailored to address the city's asserted objective of preventing the intimidation of tourists. *Id.* at 65-67.

effects analysis may, ultimately, be the appropriate remedial measure.

B. Alternative Approaches

The city of Baltimore now must decide which approach to take in order to cure the constitutional defects of its Aggressive Panhandling Ordinance. The district court's opinion in *Patton* has left the city in a difficult, Catch-22 situation, forcing the city to walk a fine line when addressing the interplay between free speech and equal protection.[176] Given the conclusion that begging is arguably constitutionally protected speech, the city must narrowly tailor the ordinance to survive First Amendment challenges. This narrow tailoring inevitably involves drawing distinctions and classifications between individuals in an effort to make the ordinance's prohibitions as clear and as precise as possible and to prevent the proscription of too much protected speech. These distinctions, however, open the ordinance up to constitutional attack because they destroy its content-neutrality and implicate the Equal Protection Clause by granting categorical exemptions from its prohibitions. In short, under the district court's reasoning in *Patton*, the ordinance must survive the strict scrutiny test under both the First and Fourteenth Amendments before a court will uphold its constitutionality.

The alternative approaches that follow acknowledge that the question of the constitutionality of restrictions on begging is, without a definitive ruling from the Supreme Court, wide-open for judicial and academic debate. In that vein, this portion of the Comment offers an alternative to the strict scrutiny analysis utilized by the *Patton* court, which would serve to balance the competing interests at stake—governmental responsibility for the physical and economic well-being of the public and an individual's right of free speech in a public forum. In addition, it attempts to point out the problems associated with the re-drafting approach suggested to the city by the *Patton* court.

1. The "Secondary Effects" Analysis of *City of Renton v. Playtime Theatres, Inc.*

In *City of Renton v. Playtime Theatres, Inc.*[177] the Supreme Court upheld, against First Amendment challenge, a city zoning ordinance that prohibited adult movie theaters within 1000 feet of private residences, educational facilities, or places of worship.[178] Even though the ordinance only applied to theaters that showed adult

176. *Id.*
177. 475 U.S. 41 (1986).
178. *Renton*, 475 U.S. at 49-51.

films, the Court held that the ordinance was content-neutral because its underlying purpose was not aimed at the suppression of speech or free expression—the showing of adult films—based on its content.[179] The Court concluded that the proper inquiry into the constitutionality of the zoning ordinance was "whether the . . . ordinance [was] designed to serve a substantial governmental interest [without] unreasonably limit[ing] alternative avenues of communication."[180] The Court readily concluded that Renton's "interest in attempting to preserve the quality of urban life [wa]s one that [had to] be accorded high respect."[181] The Court rejected the respondents' argument that the city's justifications for the ordinance were conclusory and speculative because the city enacted the ordinance without first conducting studies specifically related to its particular problems or needs that required the ordinance.[182]

In addition, the Court concluded that Renton's ordinance was narrowly drawn to affect only the category of theaters shown to produce the unwanted and harmful secondary effects and not to affect activities wholly unrelated to the problem facing the community.[183] Interestingly, the Court gave great deference to the city's conclusions that only adult theaters caused secondary effects, concluding that there was "no basis . . . for assuming that Renton w[ould] not, in the future, amend its ordinance to include other kinds of adult businesses . . . shown to produce the same kinds of

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179. *Id.* at 47. The Court noted that the zoning ordinance could not easily be classified as "content-based" or "content-neutral," but concluded:

> [T]he ordinance treats theaters that specialize in adult films differently from other kinds of theaters. Nevertheless . . . the . . . ordinance is aimed not at the *content* of the films shown at "adult motion picture theaters," but rather at the *secondary effects* of such theaters on the surrounding community. . . . The *predominant* concerns . . . [are] with the secondary effects of adult theaters, and not with the content of adult films themselves.

Id.

180. *Id.* at 50. The Court characterized this test as a form of time, place, and manner regulation. *Id.* at 46.

181. *Id.* at 50 (quoting Young v. American Mini Theaters, Inc., 427 U.S. 50, 71 (1976) (plurality opinion)).

182. *Id.* The Court explicitly held:

> Renton was entitled to rely on the experiences of . . . other cities . . . in enacting its adult theater zoning ordinance. The First Amendment does not require a city, before enacting such an ordinance, to conduct new studies or produce evidence independent of that already generated by other cities, so long as whatever evidence the city relies upon is reasonably believed to be relevant to the problem that the city addresses.

Id. at 51-52.

183. *Id.* at 52.

secondary effects as adult theaters."[184] Finally, the Court noted that reasonable alternative channels for communication were left open by the ordinance because it left almost five percent of the entire land area of the city as sites for adult theaters.[185]

a. Rejection of the Renton Approach in Patton

Baltimore's Aggressive Panhandling Ordinance possesses many of the same characteristics as the zoning ordinance upheld in *Renton*. These similarities present a strong argument that *Patton* could easily have been decided under the less stringent analysis employed in *Renton*.

First, the enactment of the panhandling ordinance, according to available legislative history, was motivated in part by the health and housing problems associated with homelessness.[186] The city justifiably needs to have a mechanism in place to combat these problems, which will no doubt worsen as the number of homeless in the city increases. Second, and more germane to the problem of aggressive panhandling, the ordinance was enacted to prevent a higher incidence of street crime, a well-documented secondary effect of an increase in an aggressive behavior, such as aggressive panhandling, in a particular area.[187] Finally, unlike anti-panhandling statutes from other jurisdictions, Baltimore's ordinance does not punish *all* panhandling.[188] Rather, it is narrowly tailored to address and punish begging that is accomplished through the utilization of aggressive, coercive, and threatening conduct.[189] Therefore, anyone can panhandle for any purpose on the streets of downtown Baltimore without fear of prosecution or punishment, unless he employs an aggressive manner.

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184. *Id.* at 53.
185. *Id.* at 53-54.
186. *Patton*, Civil No. S 93-2389, at 5 (citing SECURITY TASK FORCE REPORT at 13).
187. *Id.* (citing SECURITY TASK FORCE REPORT at 4, 11); *see* Tier, *supra* note 16 (discussing the "Broken Windows" effect).
188. *See* Loper v. New York City Police Dept., 99 F.2d at 702 (2d Cir. 1993) (New York statute prohibiting loitering in a public place for the purpose of begging); Blair v. Shanahan, 775 F. Supp. at 1318 (N.D. Cal. 1991) (California statute prohibiting accosting for the purpose of begging), *cert. denied*, 115 S. Ct. 1698 (1995).
189. *Patton*, Civil No. S 93-2389, at 63. The district court noted:

> [T]he . . . ordinance . . . is narrowly tailored to the government's compelling interest in protecting residents and visitors from threatening, intimidating, or harassing behavior. The statute is aimed directly at this interest by prohibiting panhandling accomplished by assault, . . . battery, . . . and extortion. . . . The restrictions on other conduct contained in the ordinance—following a person after that person has refused to give money, . . . interfering with a person's safe passage, . . . and directing obscene or abusive language toward that person . . . —recognize that such specifically defined conduct can often be interpreted as more than a mere "request" for money.

Id.

In deciding *Patton*, the district court considered, and ultimately rejected, the use of *Renton's* secondary effects rationale, holding that the ordinance was content-based and, therefore, applying a strict scrutiny analysis.[190] The court distinguished the instant case from *Renton* and concluded that the ordinance was enacted because city officials had determined that panhandling was "unpleasant and disturbing to the tourists and visitors in the Downtown District."[191] Characterizing this as a "type of secondary effect based upon the 'emotive impact' of panhandling,"[192] the court determined that the "secondary effects" rationale did not apply.[193]

b. The Solution

To persuade a court to rely on the *Renton* rationale, the City of Baltimore needs to restructure and enhance the ordinance's underlying legislative history. The implication of *Patton* is clear—the city presented the wrong secondary effects and rationale to persuade the court that the ordinance was content-neutral. By asserting only that the ordinance was enacted because panhandling was unpleasant and disturbing to the tourists and visitors in the downtown district,[194] the city sent up red flags to the court and brought the case squarely within the holding of *Boos v. Barry*.[195]

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190. *Id.* at 59-60.
191. *Id.* at 59 (citing SECURITY TASK FORCE REPORT at 11-13).
192. *Id.* (citing Boos v. Barry, 485 U.S. 312 (1988)).
193. *Id.* at 60. The district court reasoned that the city's asserted secondary effect (that panhandling created the perception that Downtown Baltimore was an unpleasant and unsafe place to visit) was based entirely upon the effect that begging has on its listener, which was not the type of "secondary effect" referred to by the Supreme Court in *Renton*. *Id.* at 59-60 (citing Boos v. Barry, 485 U.S. 312, 321 (1988)).
194. *Id.* at 59 (citing SECURITY TASK FORCE REPORT at 11-13).
195. *Id.* at 59-60. In *Barry*, the United States Supreme Court considered the constitutionality of a District of Columbia statute which prohibited (1) the display of signs critical of foreign governments within 500 feet of a foreign embassy, and (2) the congregation of individuals within 500 feet of a foreign embassy and not dispersing when ordered to do so. *Barry*, 485 U.S. at 316-17. Respondents argued that the *Renton* analysis was applicable to this set of circumstances, stressing that the statute's display clause was enacted to address a significant secondary effect—the United States' "obligation to shield diplomats from speech that offends their dignity." *Id.* at 320. The Court held that the *Renton* analysis was inapplicable to "[r]egulations that focus[ed] on the direct impact of speech on its audience" and that "[l]isteners' reactions to speech [we]re not the type of 'secondary effects' we referred to in *Renton*." *Id.* at 321. Significantly, in *Barry*, the Court noted that the respondents did not justify the regulation by pointing to "congestion, to interference with ingress or egress, to visual clutter, or to the need to protect the security of embassies." *Id.* Instead, they relied on the need to protect the dignity of

However, if the city can produce evidence of a correlation between an increase in panhandling in an area and an increase in the occurrence of serious street crime, it may be able to mount a more persuasive argument for the ordinance's content-neutrality in future cases. The city could obtain this evidence in a variety of different ways. It could conduct a study that compares the increase in the number of homeless individuals panhandling in the city with police records and reports regarding the crime rate in the city during that specific time period.[196] In addition, based on the Supreme Court's holding in *Renton*, city officials could obtain the same data from other cities and metropolitan areas across the country to bolster its findings.[197] In obtaining this data from sister cities, city officials

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ambassadors and embassy personnel by guarding them against speech critical of their respective governments. *Id.* The Court held that the impact of speech on the listener was not a "secondary effect" within the meaning of *Renton*. *Id.* This asserted justification focused only on the content of the speech and the direct impact of the speech on its listeners, an impermissible and insufficient secondary effect. *Id.*

196. *See* East Brooks Books, Inc. v. City of Memphis, 48 F.3d 220, 226 (6th Cir. 1995), *cert. denied*, 1995 WL 472074. In *East Brooks Books*, the Memphis City Council enacted a "licensing and zoning scheme on all sexually oriented businesses within the City of Memphis." *Id.* at 222. The ordinance was enacted "to regulate sexually oriented businesses to promote the health, safety, morals, and general welfare of the citizens of the city and to establish reasonable and uniform regulations to prevent the continued concentrations of sexually oriented businesses within the city." *Id.* (citing MEMPHIS TENN. CODE § 20-121(a)(1)). The preamble to the ordinance concluded that there were "serious secondary effects, such as crime and neighborhood deterioration, associated with the proliferation of sexually oriented businesses within the city." *Id.* The City Council reached these conclusions after reviewing reports prepared by the Memphis Vice Squad indicating unusually high numbers of arrests around sexually oriented businesses and impact studies utilizing data from other cities. *Id.*

197. The city should make a special effort to obtain data from Washington, D.C., given that city's experience with the homeless in general and, specifically, with panhandling and given the proximity and similarity between the two cities. In the 1980s, panhandling had become so bad in Washington, D.C. that forceful action was necessary to bring some relief to pedestrians, merchants and tourists. *See* Tracy Webb, *D.C. Targets Street Begging*, U.P.I., Apr. 20, 1991. When the aggressive panhandling problem first came to the attention of the police department, it decided to start using an old vagrancy-type ordinance to selectively arrest panhandlers in the Capitol Hill and Georgetown areas. Irvin Molotsky, *Upset By Beggars, Washington Is Arresting Them*, N.Y. TIMES, Nov. 7, 1990, at A20. This ordinance prohibited a person from "wandering abroad and begging, or [going] about from door to door or plac[ing] himself in or on any highway, passage or other public place to beg or receive alms." *See* Gabriel Escobar, *D.C. Police Declare Streets Off-Limits to Persistent Panhandlers*, WASH. POST, Nov. 8, 1990, at D1. Use of this ordinance gave D.C. police statutory authority to deal with aggressive and persistent panhandlers. *Id.*

should focus on the preventive purpose of the ordinance—that its enactment is necessary to prevent the situation in Baltimore from becoming one of dangerous street criminality and of pervasive threatening and coercive conduct and to prevent an overall decline in the quality of life in the city.[198]

Although enforcement of the "old" aggressive panhandling statute helped to alleviate the panhandling problem in isolated areas of the city, it did little to provide city-wide relief. In fact, the city-wide panhandling problem actually worsened, with aggressive beggars becoming a common and disturbing presence in most District neighborhoods and in some suburban communities with busy commercial areas. Linda Wheeler, *Panhandlers Tap Deep Pockets of Resentment*, WASH. POST, May 9, 1993, at B1. In fact, many residents began to feel as if certain thoroughfares of the city were nothing but "street[s] of hands and cups." *Id.* (quoting Dupont Circle resident Edward Grandis). In the suburbs, many panhandlers were found at major intersections and at Metro train stations, but the vast majority of panhandlers were located inside the city, asking "for 'spare change' in Georgetown, Dupont Circle, Adams-Morgan, Capitol Hill, and along commercial K and F streets." *Id.* The 1990 census indicated that there were 4,813 homeless persons in Washington, D.C., a city with a total population of 606,900, or 7.93 homeless individuals per 1000 city residents. Robert Collier, *Everybody's Problem: How Cities Around the Country Are Dealing With the Homeless*, S.F. CHRON., July 5, 1992, at Z1. Advocacy groups for the homeless, however, estimate Washington D.C.'s homeless population at in excess of 10,000. *Id.* Frustrated and tired, city residents felt overwhelmed, lacking confidence that city officials and police officers could protect them from aggressive panhandling. *Id.*

In addition to the sheer number of panhandlers on the city streets, police were confronted with a growing number of reported incidents of violent crimes involving panhandlers. One of the most serious incidents involved an attack on Angelo Pace, the owner of Anna Maria's restaurant near Dupont Circle, whose jaw was broken by a panhandler who refused to move away from his front door, followed him inside and attacked him. *Id.* As a result of this and numerous other attacks on citizens, the D.C. City Council enacted the Panhandling Control Act of 1993, emergency legislation designed directly to address and to punish aggressive panhandling. Morenike Efuntade, *Panhandlers Warned in Leaflets; New D.C. Law Bars Aggressive Behavior, Blocking Doorways*, WASH. POST, June 16, 1993, at C3. This new law prohibited aggressive panhandling, defined as: "continually begging after a person has made a negative response; touching someone without his consent or speaking to or following a person in a manner that would cause that person to fear bodily harm"; and blocking public doorways. *Id.*; *see also East Brooks Books*, 48 F.3d at 222 (noting that the Memphis City Council utilized studies of the impact of sexually oriented businesses on other cities in reaching its conclusion that legislative action was warranted to address the secondary effects of the proliferation of sexually oriented businesses within the city); World Famous Dudley's Food & Spirits, Inc. v. City of College Park, 458 S.E.2d 823, 825 (Ga. 1995) (noting that City of College Park-based ordinance prohibiting nudity in establishments where alcoholic beverages were served relied primarily upon secondary effects gleaned from "experiences" of other cities including Austin, Texas and Indianapolis, Indiana).

198. Significantly, in Tollis, Inc. v. San Bernardino County, 827 F.2d 1329 (9th

It is also of utmost importance that the studies obtained from these cities contain statistics regarding the incidence of street crime and the amount of revenue before and after their panhandling ordinances go into effect.[199] These statistics will be crucial if the city is to make the required cause and effect showing to justify the ordinance as a content-neutral restriction on speech. Finally, once these studies and statistics have been obtained, the city should incorporate them into the legislative history and refer to them often.[200] Incorporating the studies and statistics will inform reviewing courts of the ordinance's clear and unequivocal constitutional purpose—to restrict aggressive panhandling based upon the effects that it has on the community as a whole, and not upon the individual listener—a purpose totally unrelated to the restriction of free expression in a public forum.

2. Re-drafting the Aggressive Panhandling Ordinance to Include All Solicitations

Of course, the city could simply amend the ordinance to eliminate the distinction between aggressive panhandlers and other solicitors for money. This is precisely the remedy suggested by the United States District Court for the District of Maryland.[201] This solution would certainly remove the ordinance from the realm of equal

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Cir. 1987), the United States Court of Appeals for the Ninth Circuit struck down a municipal ordinance prohibiting the location of adult-oriented businesses within one thousand feet of residential land and other business and recreational establishments. The court applied the three-part *Renton* test and concluded that the ordinance at issue failed its third prong, which required reasonable alternative avenues of communication. *Id.* at 1332. Significantly, the court noted that the municipality had failed to establish that it relied upon "evidence permitting the reasonable inference that, absent such limitations, the adult theaters would have harmful secondary effects." *Id.* at 1333 (citing City of Renton v. Playtime Theatres, Inc., 475 U.S. 41, 52 (1986)). Of course, the problem in *Patton* was the Baltimore City Council's failure to allege and substantiate the existence of sufficiently compelling secondary effects. *See supra* text accompanying notes 183-85.

199. *See* East Brooks Books v. City of Memphis, 48 F.3d 220 (6th Cir. 1995) (justifying, with statistics, licensing and zoning scheme as a content-neutral restriction of speech).

200. If the City Council fails to take this crucial step, the result will be identical to that in Tollis, Inc. v. San Bernadino County, 827 F.2d 1329, 1333 (9th Cir. 1987) (striking down municipal ordinance prohibiting adult oriented businesses within one thousand feet of specified areas because municipality failed to establish reliance on evidence that such businesses would have harmful secondary effects on the community without such an ordinance).

201. *Patton*, Civil No. S 90-345, at 67 (D. Md. Aug. 19, 1994) (memorandum opinion).

protection challenge, but may in the long run subject the ordinance to serious challenge under the First Amendment.

As previously noted, Supreme Court precedent requires cities and municipalities to walk a fine line when enacting content-based ordinances restricting speech in public fora.[202] Once content-neutrality is lost, measures regulating protected speech could run afoul of the Constitution on two analytically distinct grounds: by restricting too little speech and by prohibiting too much speech.[203]

The district court's remedy would be of little help unless the ordinance were accepted as content-neutral. Although eliminating the distinction between aggressive panhandlers and other solicitors for money would indeed place the ordinance on more solid equal protection footing, it would also have the undesirable effect of broadening the ordinance's scope with regard to the First Amendment. The ordinance would then apply to all aggressive solicitation for money, a classification that would sweep within its purview political solicitors, professional fund raisers, and individuals soliciting for non-profit charitable organizations. The Supreme Court has explicitly recognized that each of these individuals enjoys a First Amendment right to solicit in public, subject to appropriate restrictions on the time, place, and manner of solicitation.[204] Broadening the ordinance's scope would not address the problems associated with the lack of content-neutrality.[205] Therefore, if the city follows the district court's advice, the city will be stuck with an ordinance prohibiting all aggressive solicitations in a traditional public forum, which will require judicial analysis under a strict scrutiny test by virtue of its content-based approach.

If a court engages in a strict scrutiny analysis, there is little chance that the amended ordinance's fortune would be any better than that of its predecessor. If the city could not make the required

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202. Carey v. Brown, 447 U.S. 455, 461-62 (1980); City of Ladue v. Gilleo, 114 S. Ct. 2038 (1994).

203. *Gilleo*, 114 S. Ct. at 2043.

204. Loper v. New York City Police Dep't, 999 F.2d 699, 704-05 (2d Cir. 1993); *see also infra* Part III. *A*.

205. After all, the ordinance was enacted to combat the particular evils associated with aggressive solicitation by panhandlers and other homeless individuals. *See Patton*, No. 90-345, at 5 (citing SECURITY TASK FORCE REPORT at 11). Broadening the ordinance to encompass all aggressive solicitation would make the secondary effects rationale much harder to justify on the basis of empirical data, *i.e.* data indicating the "evils" associated with aggressive political or charitable solicitation. Furthermore, there are statutes on the books that could be used to address the fraud and deceit concerns that are paramount when dealing with political or charitable solicitors that can be easily adapted to address the problem of aggressive panhandling by homeless individuals. *See* MD. CODE ANN., BUS. REG. §§ 6-601 to -620 (1992 & Supp. 1994).

showing that panhandling is inherently more intimidating than other types of solicitations for money, then, surely, there would be no way that the city could show that aggressive political and charitable solicitation is inherently more intimidating than other types of aggressive solicitations for money. In addition, under the Supreme Court's forum-based analysis, ordinances restricting or prohibiting political expression in a public forum are subjected to the most exacting degree of judicial scrutiny possible.[206] Very few, if any, ordinances will survive this degree of scrutiny.[207]

Further, by amending the ordinance in this manner, the city will have all but sacrificed any use of the *Renton* secondary effects approach. The *Renton* approach is the city's best chance to show that the ordinance is, in fact, content-neutral and that the ordinance should be examined under the more relaxed time, place, and manner analysis. If only aggressive panhandling were prohibited, the city could gather sufficient empirical data indicating the direct and indirect threat and danger that aggressive panhandling presents to Baltimore, its citizens, its tourists, and its economic base. However, if political and charitable solicitation were also prohibited, the city would then also have to show the inherent threats and dangers associated with those activities in order to avoid the conclusion that the ordinance is content-based. Few, if any, courts will be willing to take the *Renton* analysis this far. As a result, the ordinance will have lost its distinctive narrow tailoring, and the city will be left to defend a hopelessly overbroad ordinance against First Amendment attack. In essence, the ordinance will fare no better than the overbroad statutes in *Loper* and *Blair*.

V. CONCLUSION

Restrictions on begging and panhandling are the most recent in a long line of legislative enactments regulating the activities of private individuals to be challenged in the state and federal courts. Cities and metropolitan areas have struggled to find an appropriate way to ensure public safety and to maintain public order in the face of ever-growing numbers of homeless on their streets—one that will balance the interests of society and the rights and privileges of the individual.

However, as a result of *Patton v. City of Baltimore*, Baltimore's truly innovative and humanitarian approach cannot be enforced until the city re-drafts its Aggressive Panhandling Ordinance and broadens the realm of activities that could fall within its purview. Rather than

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206. *See* ISKCON v. Lee, 112 S. Ct. 2701, 2703-04 (1992).

207. Burson v. Freeman, 112 S. Ct. 1846, 1857 (1992) ("[A] law rarely survives [strict] scrutiny . . . .").

taking this drastic approach, the city should explore alternative methods for correcting the ordinance's constitutional deficiency, particularly the secondary effects approach outlined by the Supreme Court in *City of Renton* v. *Playtime Theatres, Inc.* The United States District Court for the District of Maryland rejected the *Renton* approach, in *Patton*, because there was a dearth of empirical data linking aggressive panhandling to the harmful secondary effects asserted by the city and because of the city's poor choice of secondary effects. The court did not, therefore, foreclose the city's use of the secondary effects option completely; rather, it merely objected to how the city used the option in that instance. The *Renton* approach is the best for Baltimore to employ in order to avoid being thrust into an inescapable constitutional thicket, while simultaneously attempting to balance the ever-conflicting interests of society and the individual.

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