A Buberian Approach to Constitutional Analysis: So That We May Be Able to Face Our Poorer Brethren Eye to Eye

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POORER BRETHREN EYE TO EYE

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In 1923, Martin Buber, one of the most renowned Jewish philosophers of the twentieth century,1 published his classic work, *I and Thou,*2 in which he explored the relationships between person and person3 and between person and community.4 In this and in numerous other works,5 Buber enunciated a philosophy that the relationships between person and person and between person and community should be relationships of mutual confirmation.6 Buber referred to his philosophy as the life of dialogue.7

In 1991, we, as a nation, will celebrate the bicentennial of the ratification of the Bill of Rights.8 The Bill of Rights has transcended its political origins9 to become the foundation and protec-

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3 See infra notes 26-75 and accompanying text.
4 See infra notes 76-95 and accompanying text.
6 See infra notes 48-57 and accompanying text.
9 The United States Constitution, as ratified in 1787, did not contain a Bill of Rights. See L. LEVY, CONSTITUTIONAL OPINIONS: ASPECTS OF THE BILL OF RIGHTS 105 (1986) [hereinafter CONSTITUTIONAL OPINIONS]. The omission of a Bill of Rights from the Constitution turned out to be the “most important obstacle in the way of its adoption by the states.” Id. The Anti-federalists attempted to use the omission of a Bill of Rights as a powerful weapon in their fight to defeat the ratification of the Constitution, *The Bill of Rights*, supra note 8, at 197, or as a reason to call a second convention which would in effect prevent ratification,
tor of human rights and freedoms. The Bill of Rights has become, in essence, a document of confirmation: a document that has confirmed the existence of the individual by protecting basic human rights and needs.

I suggest in this Essay that constitutional analysis, particularly in the area of individual rights where technical doctrine often overshadows individual rights and freedoms, must instead incorporate the philosophy of dialogue. The extent to which the philosophy of dialogue should influence the decision in a particular case can only be determined on a case-by-case basis.

id. at 312. Massachusetts, by a close vote, secured ratification by recommending a series of amendments "to remove the fears and quiet the apprehensions of a good many people of the commonwealth and government." H. Storing, The Constitution and the Bill of Rights, in Essays on the Constitution of the United States 33 (1978). After Massachusetts, every state but Maryland used this formula to ratify, including the crucial states of Virginia and New York. Id. at 33-34. Indeed, the Constitution was only ratified because the Federalists pledged to back subsequent amendments to the Constitution. The Bill of Rights, supra note 8, at 313.

When Madison proposed the preparation of a bill of rights to the First Congress in 1789, he did so chiefly to take advantage of the Federalist majority "to finish the unavoidable business of amendments in such a way as to move from the national agenda the major anti-federalist objections—and incidently to secure some limited but significant improvements in the Constitution, especially in securing individual rights." Storing, supra, at 35.

For a history of the political struggle out of which the Bill of Rights was born, see I. Brant, The Bill of Rights, Its Origin and Meaning (1965); The Bill of Rights, supra note 8; Constitutional Opinions, supra, at 72-134; B. Schwartz, The Great Rights of Mankind (1977); Storing, supra.


11 See, e.g., Texas v. Johnson, 190 S. Ct. 2533, 2540 (1989) (flag burning is expressive conduct and protected by first amendment); Brandenburg v. Ohio, 395 U.S. 444, 447 (1969) (advocacy of abstract doctrine of violent political change protected under freedom of speech clause of first amendment); Duncan v. Louisiana, 391 U.S. 145, 154-55 (1968) (sixth amendment right to trial by jury in criminal proceedings applicable to states); Griswold v. Connecticut, 381 U.S. 479, 481-86 (1965) (right of marital privacy and use of contraceptives within penumbras of specific guarantees of Bill of Rights); Gideon v. Wainwright, 372 U.S. 335, 343-44 (1964) (right to counsel guaranteed by sixth amendment); Mapp v. Ohio, 367 U.S. 643, 655 (1961) (prohibition of unreasonable searches and seizures of fourth amendment enforceable against states through fourteenth amendment); NAACP v. Alabama ex rel. Patterson, 357 U.S. 449, 466 (1958) (compulsory disclosure of membership lists violates members' association rights under first amendment); Louisiana ex rel. Francis v. Resweber, 329 U.S. 459, 463 (1947) (cruel and unusual punishment clause of eighth amendment applicable to states through fourteenth amendment); Cantwell v. Connecticut, 310 U.S. 296, 303 (1940) (Jehovah witness's playing of record attacking all religions as instruments of Satan protected under first amendment freedom of religion); De Jorge v. Oregon, 299 U.S. 353, 362 (1937) (participating in meeting held by Communist Party for lawful purpose protected under freedom of assembly clause of first amendment); Weeks v. United States, 223 U.S. 365, 392 (1914) (under fourth amendment, government may not use evidence obtained illegally by federal law enforcement officers in federal court).
I will begin by discussing the philosophy of Martin Buber generally. Then, to concretize the use and importance of the philosophy of dialogue in constitutional analysis, I will examine a recent case, *Young v. New York City Transit Authority.*\(^{12}\) In *Young*, the court addressed the issue of whether a total ban on begging or panhandling in the New York City transit system violated freedom of speech within the meaning of the first amendment.\(^{13}\) The district court found that the ban did violate the first amendment;\(^{14}\) however, on appeal, the Second Circuit Court of Appeals reversed this decision.\(^{15}\) Nothing explains the underlying reason for the different results in the two decisions more clearly than does Martin Buber’s philosophy of dialogue. Nothing supports more strongly my conclusion that Buber’s perspective remains critical to any constitutional analysis founded on justice.

I. **MARTIN BUBER AND THE PHILOSOPHY OF DIALOGUE**

Martin Buber’s philosophy of dialogue was, in part, a response to the time in which he lived, an age scarred by dehumanization and depersonalization.\(^{16}\) As a German-Jew, he witnessed and personally experienced this dehumanization.\(^{17}\) In spite of his experience, however, Buber “proclaimed that man can achieve authentic human existence.”\(^{18}\) He urged humankind to rehumanize its existence by turning to a life of dialogue.\(^{19}\)

The philosophy of dialogue was also Buber’s response to a

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\(^{13}\) Id. at 349. Other issues addressed by the court were whether the total ban on begging in the Port Authority Bus Terminal violated freedom of speech under the fourteenth amendment and whether the New York Penal Law section 240.35(1), which prohibits loitering in a public place for the purposes of begging, is violative of the due process clause of the New York State Constitution. Id.

\(^{14}\) Id. at 359.

\(^{15}\) See *Young*, 903 F.2d at 164.

\(^{16}\) B. MARTIN, supra note 1, at 247.

\(^{17}\) Goodman, *Dialogue and Hasidism: Elements in Buber’s Philosophy of Education*, 73 RELIGIOUS EDUC. 69, 70 (1978); see M. FRIEDMAN, MARTIN BUBER: THE LIFE OF DIALOGUE 9 (1976) (“With those who took part in [the Holocaust] in any capacity, I, one of the survivors, have only in a formal sense common humanity”). Buber believed that his age in history was an age of the impersonal: “In our age the I-It relation, giganticly swollen, has usurped, practically uncontested, the mastery and the rule.” M. BUBER, ECLIPSE OF GOD 129 (1952).


\(^{19}\) See B. MARTIN, supra note 1, at 250.
tragic personal experience. Martin Buber had studied mystical Hasidism and was considered a spiritual advisor. One day, a young man visited Buber seeking spiritual advice. Shortly thereafter, the young man committed suicide. In *Dialogue*, Buber recounted the visit, admitting that, although friendly toward the young man, Buber had failed to perceive his underlying need for confirmation that there is meaning in life. The young man had looked to find this meaning in the presence of Buber, as one “who, having taken his centre in meaning, communicated its activity, power, and reality.” Buber, however, had been unable to communicate his presence to the young man because his attachment to mysticism had closed Buber to the surrounding world.

As a result of the death of the young man, Buber turned away from mysticism and turned toward a philosophy of dialogue.

A. The I-Thou Relationship

According to Buber, the *I-Thou* relationship stands at the center of the life of dialogue. For him, a person does not exist as an *I* alone in the world. Rather, a person lives in the world in one of two primary relationships: the *I-Thou* relationship or the *I-It*

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20 *Dialogue*, supra note 7, at 13-14.
21 M. FRIEDMAN, supra note 17, at 50. “[Buber] did not meet [the young man’s] despair by a presence by means of which we are told that... there is meaning.” *Id.*
22 A. COHEN, MARTIN BUBER 45 (1957).
23 *Id.* at 42; M. FRIEDMAN, supra note 17, at 50. As a young man, Buber withdrew from the world for a period of five years to engage in an intensive study of Hasidism so that he could quell his experience of spiritual confusion. A. COHEN, supra note 22, at 41-42; see B. MARTIN, supra note 1, at 241-43. His study of Hasidism focused on its mystical side. *Id.* at 243. Mystical Hasidic teaching emphasizes “ecstatic prayer as the means whereby the individual may at rare moments attain unity with God.” *Id.*

At the time of the young man’s visit, Buber had become so self-preoccupied because of mysticism, that he could not open himself up to the young man’s need for help:

A human being is brought (how, one does not know, nor does it matter particularly) into one’s way or, as in this case, seeks one out. Presumably a man seeks a disclosure whether trivial or momentous—and, quite frequently, which is at the heart of the tragedy, is so beset that he cannot ask directly what his heart knows to ask. He is met by one (whom indeed he has sought) who is possessed by the consciousness of truth, indeed wrapped in truth, who yet, in his self-preoccupation, cannot look out upon his fellow.

A. COHEN, supra note 22, at 43-44.
24 M. FRIEDMAN, supra note 17, at 50; see *Dialogue*, supra note 7, at 14. “Since then I have given up the religious . . . or it has given me up.” *Id.*
25 M. FRIEDMAN, supra note 17, at 50; see A. COHEN, supra note 22, at 44-46.
26 *See Dialogue*, supra note 7, at 24-25.
relationship. Indeed, the I can only come into being “in the act of speaking one or the other of these primary words.”

The I-Thou relationship is a relationship in which each person turns to the other in the wholeness of being; each person becomes present to the other in the wholeness of being; and each person accepts the other as a unique human being. The I only really comes into being as one learns to say Thou. Central to the I-Thou relationship, therefore, is the requirement of a meeting between the I and Thou; for the I and Thou to become present to each other, the I “must go out to meet the Thou and step into direct relation with it, and the Thou responds to the meeting.” For Buber, the person who has not entered the world of the I and Thou has never truly lived because “[a]ll real living is meeting.”

While the I-Thou is the primary word of relation, the “I-It is the primary word of experiencing and using.” In the I-It relationship, the I does not turn to the Thou in the wholeness of being. Instead, the I separates itself from other persons, remaining outside of the relationship and seeking to secure some advantage from the other for itself. In short, in the I-It relationship, the I treats the other person as an object, a thing to be manipulated—an “it.” The parties to the relationship are not equal; one is superior, the other, inferior. This relationship is not genuine because it does not take place between the I and another, but within the I itself.

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28 Id. at 3-4. For Buber, “[t]here is no I taken in itself, but only the I of the primary word I-Thou and the I of the primary word I-It. When a man says I he refers to one or other of these.” Id. at 4.
29 M. Friedman, supra note 17, at 57.
30 I and Thou, supra note 2, at 11. “The primary word I-Thou can be spoken only with the whole being. Concentration and fusion into the whole being can never take place through my agency, nor can it ever take place without me. I become through my relation to the Thou; as I become I, I say Thou.” Id.
31 Id. at 28. “Through the Thou a man becomes I.” Id.; see M. Friedman, supra note 17, at 60 (interpreting this passage).
32 M. Friedman, supra note 17, at 59.
34 M. Friedman, supra note 17, at 57.
35 I and Thou, supra note 2, at 16-18; see M. Friedman, supra note 17, at 22-23.
36 I and Thou, supra note 2, at 24.
37 M. Friedman, supra note 17, at 62.
38 Winetrouth, supra note 18, at 54; see I and Thou, supra note 2, at 4, 22-23, 29-30.
39 Winetrouth, supra note 18, at 54; see I and Thou, supra note 2, at 23.
40 See I and Thou, supra note 2, at 5; M. Friedman, supra note 17, at 57. The I-It relationship is not in itself evil; indeed, it is essential in life. I and Thou, supra note 2, at 46.
According to Buber, both relationships are vital to human existence.\textsuperscript{41} Yet, Buber warned, "[I]n all the seriousness of truth, hear this: without \textit{It} man cannot live. But he who lives with \textit{It} alone is not a man."\textsuperscript{42}

\section*{B. Essential Characteristics of the Philosophy of Dialogue}

For Buber, the philosophy of dialogue was not merely a philosophy, but a way of life, with the \textit{I-Thou} relationship standing at its center. The life of dialogue has numerous aspects;\textsuperscript{43} I will now discuss some of the particularly relevant ones.

According to Buber, a precondition to the life of dialogue is distancing.\textsuperscript{44} In order to have an \textit{I-Thou} relationship, the \textit{I} must set the other at a distance, recognizing the other as an independent living being opposite to the \textit{I}.\textsuperscript{45} Only then can the \textit{I} enter into relationship with the other, accepting the other as a complete human being.\textsuperscript{46} The relationship entered into is one of "mutual confirmation, co-operation, and genuine dialogue."\textsuperscript{47}

\subsection*{1. Mutual Confirmation}

The \textit{I-Thou} relationship is first characterized by mutual confirmation. Every person wishes to have his presence confirmed by his fellow human beings.\textsuperscript{48} A self cannot grow and flourish unless it is confirmed by another self who is conscious of the confirmation and who also seeks confirmation.\textsuperscript{49} According to Buber, the "basis of man's life . . . is twofold, and it is one—the wish of every man to be confirmed as what he is, even as what he can become, by men; and the innate capacity in man to confirm his fellow men in this
way."

For the mutual confirmation of the I and Thou to be realized, each person must be "made present" to the other; one must imagine concretely what the other person at this very moment is wishing, feeling, perceiving, and thinking. Relation is fulfilled when the I experiences, in the particular approximation of the given moment, the experience of the other as the other experiences it.

When each person makes himself present to the other, he does so without imposing his own truth on the other; each I is aware of the other as essentially different, in a definite, unique way, and accepts the other, "so that in full earnestness I can direct what I say to [the other] as the person he is." At the same time, true confirmation is not necessarily an unqualified acceptance of the other, but, rather, an acceptance and wrestling with the other against the other's self.

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50 Id. at 67-68.
51 See id. at 70.
52 Id. For Buber, 
"[I]magining the real" . . . is not a looking at the other, but a bold swinging—demanding the most intensive stirring of one's being—into the life of the other. This is the nature of all genuine imagining, only that here the realm of my action is not the all-possible, but the particular real person who confronts me, whom I can attempt to make present to myself just in this way, and not otherwise, in his wholeness, unity, and uniqueness, and with his dynamic centre which realizes all these things ever anew.

M. BUBER, Elements of the Interhuman, in THE KNOWLEDGE OF MAN 72, 81 (1965) [hereinafter Elements of the Interhuman].

53 See Distance and Relation, supra note 44, at 71; see also Elements of the Interhuman, supra note 52, at 80 (awareness is perception of another's spirit which can only be done when other becomes "present").

54 Elements of the Interhuman, supra note 52, at 79; see M. FRIEDMAN, supra note 17, at 87.

55 Elements of the Interhuman, supra note 52, at 79. According to Buber,
[F]rom time to time I must offer strict opposition to his view about the subject of our conversation. But I accept this person, the personal bearer of a conviction, in his definite being out of which his conviction has grown—even though I must try to show, bit by bit, the wrongness of this very conviction. I affirm the person I struggle with: I struggle with him as his partner, I confirm him as creature and as creation, I confirm him who is opposed to me as him who is over against me.

Id. at 78; see Introductory Essay, supra note 47, at 29-30. To distinguish confirmation from acceptance, Buber stated:

I not only accept the other as he is, but I confirm him, in myself, and then in him, in relation to this potentiality that is meant by him and it can now be developed, it can evolve, it can answer the reality of life . . . . Let's take, for example, man and wife. He says, not expressly, but just by his whole relation to her, "I accept you as you are." But thus does not mean "I don't want you to change." But
The mutual confirmation by each person helps the other to become a self: "the inmost growth of the self is . . . accomplished . . . in the making present of another self and in the knowledge that one is made present in his own self by the other."66 "It is from one [person] to another that the heavenly bread of self-being is passed."67

2. Genuine Dialogue

According to Buber, there are three types of dialogue. First, there is "‘technical dialogue,’ which is prompted solely by the need of objective understanding."58 Second, there is “monologue” “in which two or more [persons] speak each with himself in strangely tortuous and circuitous ways and yet imagine they have escaped the torment of being thrown back on their own resources.”59 The I-It relationship is merely one of monologue.60 Finally, there is “genuine dialogue,” that is, the I-Thou dialogue.61

The I-Thou dialogue is genuine because each participant in the dialogue minds the other person as a present being and turns toward the other to establish a living, mutual relationship.62 The essential element of genuine dialogue is “the seeing of the other side” or the “experiencing of the other side.”63 A person “experiences the other side” by feeling a shared event “from the side of the person one meets as well as from one’s own side.”64 Buber refers to this experience as “inclusiveness”:65

the extension of one’s own concreteness, the fulfillment of the actual situation of life, the complete presence of the reality in which

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66 Distance and Relation, supra note 44, at 71.
67 Id.
58 Dialogue, supra note 7, at 19. An example of technical dialogue is explaining how a pump works. Winetrout, supra note 18, at 53.
69 Dialogue, supra note 7, at 19.
60 See id.
61 See id.
64 Friedman, Martin Buber’s Philosophy of Education, 6 Educ. Theory 95, 96 (1956).
65 See Education, supra note 63, at 97.
one participates. Its elements are, first, a relation of no matter what kind, between two persons, second, an event experienced by them in common, in which at least one of them actively participates, and, third, the fact that this one person, without forfeiting anything of the felt reality of his activity, at the same time lives through the common event from the standpoint of the other.66

Every I-Thou relationship “is characterized in more or less degree by the element of inclusion.”67

In genuine dialogue, then, each participant in the dialogue seeks to understand the view of the other participant without foregoing his own views and without imposing his views on the other.68 According to Buber, genuine dialogue has become more and more difficult to achieve, but the future of humanity depends upon its rebirth.69

3. Responsibility

For Buber, each person is called to responsibility in one’s particular biographical and historical hour.70 One must face this hour just as it is, in all of its senseless contradiction, and must answer the call of the hour from the depths of one’s being.71 The historical hour poses

a question wondrously tuned in the wild crude sound. And he, the Single One, must answer, by what he does and does not do, he must accept and answer for the hour, the hour the world, of all of the world, as that which is given to him, entrusted to him . . . . You must hear the claim, however unharmoniously it strikes your ear—and let no-one interfere; give the answer from the depths, where a breath of what has been breathed in still hovers—and let

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66 Id.
67 Id.
68 See Elements of the Interhuman, supra note 52, at 85.
69 See M. Buber, Between Man and Man 5-10, 20-21, 96-101 (R.G. Smith trans. 1965); M. Buber, The Knowledge of Man 76-77 (1965); M. Buber, Pointing the Way 222 (1957). In Elements of the Interhuman, Buber discussed additional requirements for genuine dialogue. See Elements of the Interhuman, supra note 52, at 85-88. First, the elements of “mutual confirmation” and “making present” must exist. Id. at 85. In addition, everyone who takes part in the dialogue must bring himself into it, that is, to say what is really on his mind without reservation. Id. at 85-86. Not all who participate in the dialogue actually need speak, “[b]ut each must be determined not to withdraw when the course of the conversation makes it proper for him to say what he has to say.” Id. at 87.
70 See M. Buber, The Question to the Single One, in Between Man and Man 40, 66 (R.G. Smith trans. 1965) [hereinafter Question to the Single One].
71 See id.
no-one prompt you.72

One who accepts the call of the historical hour and who responds to it from the depths of one's being is called a "great character."73

I call a great character one who by his actions and attitudes satisfies the claim of situations out of deep readiness to respond with his whole life, and in such a way that the sum of his actions and attitudes expresses at the same time the unity of his being in its willingness to accept responsibility.74

To Buber, the life of dialogue demands that the person responsibly engage in the social problematic of the real—unredeemed—world.75

C. Community and the Life of the Dialogue

In Paths in Utopia,76 Martin Buber stated that community is "the primary aspiration of all history."77 Indeed, in Buber's philosophy, the community and the life of dialogue are inextricably interwoven.78

For Buber, true community is based on "the sphere of direct, mutual relations [which exist] between man and man, [and] genuine dialogue in which each allows the other to exist in his unique otherness and responds to him in his wholeness and uniqueness."79 Central to the existence of a true community is the potentiality of I-Thou relationships.80 While Buber recognized that human community may incorporate I-It relationships,81 he believed that true

72 Id.
74 Id. Education is an essential part of the development of the person as one who is able to respond to the demands of his particular historical situation. See id. at 115-17. However, "[e]ducation does not mean only teaching, it is also direct relationship, the word spoken at every occasion." Misrahi, The Dialogue in Practice, New Outlook Middle Eastern Monthly 25, 34 (Oct.-Nov. 1966).
75 Woocher, supra note 33, at 242.
76 M. Buber, Paths in Utopia (1958).
77 Id. at 133.
78 Id. supra note 33.
80 Id.
81 See I and Thou, supra note 2, at 47, 48; Woocher, supra note 33, at 244. Woocher stated that, according to Buber, "No common life is possible for man in this world without the institutionalized structures and the means/end calculi which are necessary for economic,
community could not exist without the readiness for I-Thou, or mutually confirming relationships: “in human society at all its levels persons confirm one another in a practical way to some extent or other in their personal qualities and capacities, and a society may be termed human in the measure to which its members confirm one another.”

When referring to a multitude of individuals, Buber used the term the “essential We” to correspond “to the essential Thou on the level of self-being.” He defined the essential We as a community of several independent persons, . . . [t]he special character of [which] . . . is, in the holding sway within the We of an ontic directness which is the decisive presupposition of the I-Thou relation. The We includes the Thou potentially. Only men who are capable of truly saying Thou to one another can truly say We with one another.

According to Buber, only through the “essential We” can a person escape from the impersonal, nameless, faceless crowd which he termed the “one.”

Buber distinguished true community from individualism and collectivism. According to Buber, “[i]ndividualism sees man only in relation to himself, [whereas] collectivism does not see man at all, it sees only ‘society.’” True community, however, does not elevate the individual or the group, but elevates the relationship between person and person.

Buber believed that the crisis confronting modern society is that it has replaced the primacy of the personal relationship with political, and cultural continuity.” Id. at 175-76.

Buber held “the individual to be neither the starting point nor the goal of the human world.” A BELIEVING HUMANISM, supra note 86. At the same time, he asserted the “collective aims at holding in check the inclination to personal life.” Elements of the Interhuman, supra note 52, at 73.

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**Footnotes:**

83 *Distance and Relation, supra note 44, at 67.*
84 *M. BUBER, What is Man?, in BETWEEN MAN AND MAN 118, 175 (R.G. Smith trans. 1965) [hereinafter What is Man?].
85 *Id. at 175-76.*
86 *Id. at 177. “A man is truly saved from the ‘one’ not by separation but only by being bound up in genuine communion.” Id.*
87 *See id. at 200-05; see also Elements of the Interhuman, supra note 52, at 72-73 (discussing distinction between two realms); M. BUBER, On the Ethics of Political Decision, in A BELIEVING HUMANISM, My Testament 209 (M. Friedman trans. 1967) [hereinafter A BELIEVING HUMANISM] (“individualism” is catch phrase used when presence of persons of faith disturbs inner security).*
88 *What is Man?, supra note 83, at 200.*
89 *See id. Buber held “the individual to be neither the starting point nor the goal of the human world.” A BELIEVING HUMANISM, supra note 86. At the same time, he asserted the “collective aims at holding in check the inclination to personal life.” Elements of the Interhuman, supra note 52, at 73.*
the primacy of the individual or the group. Individualism and collectivism, for Buber, are “expression[s] of the same human condition . . . This condition is characterized by the union of cosmic and social homelessness” predominant in this modern era. Buber offers an alternative to individualism and collectivism—personal relation.

The fundamental fact of human existence is neither the individual as such nor the aggregate as such. Each, considered by itself, is a mighty abstraction. The individual is a fact of existence in so far as he steps into a living relation with other individuals. The aggregate is a fact of existence in so far as it is built up of living units of relation. The fundamental fact of human existence is man with man. What is peculiarly characteristic of the human world is above all that something takes place between one being and another the like of which can be found nowhere in nature . . . . It is rooted in one being turning to another as another, as this particular other being, in order to communicate with it in a sphere which is common to them but which reaches out beyond the special sphere of each. I call this sphere . . . the sphere of “between” . . . This reality, whose disclosure has begun in our time, shows the way, leading beyond individualism and collectivism, for the life decision of future generations. Here the genuine third alternative is indicated, the knowledge of which will help to bring about the genuine person again and to establish genuine community.

Genuine community cannot be achieved unless social institutions are influenced by a “thou-saying, responding spirit.” According to Buber’s theory, “[s]tructures of man’s communal life draw their living quality from the riches of the power to enter into relation.” Buber referred to the struggle between the thou-saying spirit and the world of objectified relationships as the quantum satis. Buber believed that the quantum satis “could be employed everywhere—in factories, offices, neighborhoods, government bureaus—in order to transform living and working alongside to living

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88 See M. Buber, What is Common to All, in THE KNOWLEDGE OF MAN 89, 97 (1965) [hereinafter What is Common to All].
89 What is Man?, supra note 83, at 200.
90 Id. at 202-05.
91 I AND THOU, supra note 2, at 50.
92 Id. at 49.
93 See Dialogue, supra note 7, at 37.
and working with.”

D. Speech and the Life of Dialogue

According to Buber, speech is the key to the relational orientation of his philosophy of dialogue. Real dialogue hinges upon the ability of persons to use some form of speech in order to “place themselves under the spell and power of the word.” Speech for Buber, therefore, includes not only the spoken word—although the spoken word is essential to his dialogical principle—but also “silent forms of address and communication, such as a glance, a nod and bodily responses... even though audible address may in fact be totally lacking.”

In his essay Distance and Relation, Buber asserted that speech is “[t]he great characteristic of men’s life with one another, [and] a witness to the principle of human life.” Through speech, persons express themselves in ways which Buber believes animals cannot, for animals can only call out—“announce themselves”—to other animals. The uniquely human ability to “speak to others... is based on the establishment and acknowledgment of the independent otherness of the other with whom one fosters” a relationship. At the same time, speech is that which bridges the distance between persons because central to speech is contact with the other and acceptance of otherness. Accordingly, “[i]f we ever reach the stage of making ourselves understood only by means of the dictograph, that is, without contact with one another, the chance of human growth would be indefinitely lost.”

Buber described speech between persons as relational: in our life with others, “the relation takes on the form of speech.” The life of dialogue hinges upon speech “spoken with the whole being,”

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95 Woocher, supra note 33, at 246; see Dialogue, supra note 7, at 36-39.

96 H. Stahmer, “SPEAK THAT I MAY SEE THEE!": THE RELIGIOUS SIGNIFICANCE OF LANGUAGE 184 (1968). “The world is spoken to human beings who perceive it, and the life of man is itself a dialogue.” Id. (quoting M. Buber, MAMRE 138 (1946)).

97 Id. at 189.

98 See infra notes 118-22 and accompanying text.

99 H. Stahmer, supra note 96, at 189.

100 Distance and Relation, supra note 44, at 68.

101 Id.

102 Id. at 68 n.1.

103 Id. at 68.

104 Id. at 69.

105 I AND THOU, supra note 2, at 101.
the speech of the I-Thou relationship.

Spirit in its human manifestation is a response of man to his Thou. Man speaks with many tongues, tongues of language, of art, of action; but the spirit is one, the response to the Thou which appears and addresses him out of the mystery. Spirit is the word. And just as talk in a language may well first take the form of words in the brain of the man, and then sound in his throat, and yet both are merely refractions of the true event, for in actuality speech does not abide in man, but man takes his stand in speech and talks from there; so with every word and every spirit. Spirit is not in the I, but between I and Thou. It is not like the blood that circulates in you, but like the air in which you breathe. Man lives in the spirit, if he is able to respond to his Thou. He is able to, if he enters into relation with his whole being. Only in virtue of his power to enter into relation is he able to live in the spirit.  

Thus, the sphere of relational speech between persons is the sphere of mutuality and reciprocity. Only in this sphere are the moments of relation here,

and only here, bound together by means of the element of the speech in which they are immersed. Here what confronts us has blossomed into the full reality of the Thou. Here alone, then, as reality that cannot be lost, are gazing and being gazed upon, knowing and being known, loving and being loved.

For Buber, it is only when I connect with another “essentially,” that is, “in such a way that he is no longer a phenomenon of my I, but instead is my Thou,” that I may experience the reality of speech with the other.  

Speech is critical not only to the existence of the I and Thou, but also to the existence of the true community, the essential We:

For the word always arises only between an I and a Thou, and the element from which the We receives its life is speech, the communal speaking that begins in the midst of speaking to one another.

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106 Id. at 39.
107 What is Common to All, supra note 89, at 106 (reciprocal sharing of knowledge is living “We”). Only in such reciprocity “does the primal word go backwards and forwards in the same form, the word of address and the word of response live in the one language, I and Thou take their stand not merely in relation, but also in the solid give-and-take of talk.” I AND THOU, supra note 2, at 102-03.
108 I AND THOU, supra note 2, at 103.
109 Question to the Single One, supra note 70, at 50-51.
Speech in its ontological sense was at all times present wherever men regarded one another in the mutuality of I and Thou; wherever one showed the other something in the world in such a way that from then on he began really to perceive it; wherever one gave another a sign in such a way that he could recognize the designated situation as he had not been able to before; wherever one communicated to the other his own experience in such a way that it penetrated the other's circle of experience and supplemented it as from within, so that from now on his perceptions were set within a world as they had not been before. All this flowing ever again into a great stream of reciprocal sharing of knowledge—thus came to be and thus is the living We, the genuine We . . . \(^\text{110}\)

In his essay, *What is Common to All*,\(^\text{111}\) Buber analyzed the meaning of Heracleitus's statement, "One should follow the common," and posited that, in communal life, persons should join together to build a common world through "human speech-with-meaning, the common logos."\(^\text{112}\) Only by mutual dialogic speech, accompanied as it is by all the ambiguities and frailties of the human situation, can persons discover the common logos.\(^\text{113}\)

With the common logos, however, "the response is responsibility."\(^\text{114}\) Today, persons choose to take refuge from responsibility in either individualism or collectivism.\(^\text{115}\) Such persons no longer really listen to the voice of the other and, therefore, they cannot know Thou, let alone We.\(^\text{116}\)

The fate of the community, and of humankind itself, depends upon the common logos, that is, speech-with-meaning.

\(^{110}\) *What is Common to All*, supra note 89, at 106.

\(^{111}\) Id.

\(^{112}\) Id. at 107. Buber found that: Heracleitus always remained in accord with the thoroughly sensuous living speech of his time. For this reason the logos, even in its highest sublimation, does not cease to be for him the sensuous, meaningful word, the human talk which contains the meaning of the true. Meaning can be in the word because it is in being. Thus, it stirs deep in the soul which becomes aware of the meaning; it grows in it and develops out of it to a voice which speaks to fellow souls and is heard by them, often, to be sure, without this hearing becoming a real receiving. And like the logos, so also the cosmos belongs to the common as to that in which men participate as in a common work.

\(^{113}\) Id. at 98.

\(^{114}\) H. Stahmer, supra note 96, at 209.

\(^{115}\) *What is Common to All*, supra note 89, at 108.

\(^{116}\) Id.
In our age, in which the true meaning of every word is encompassed by delusion and falsehood, and the original intention of the human glance is stifled by tenacious mistrust, it is of decisive importance to find again the genuineness of speech and existence as We. This is no longer a matter which concerns small circles that have been so important in the essential history of man; this is a matter of leavening the human race in all places with genuine We-ness. Man will not persist in existence if he does not learn anew to persist in it as a genuine We.\textsuperscript{117}

Buber emphasized that the genuineness of speech does not mean that participants to dialogue must always agree with, or even understand, one another. In one of his last major essays, \textit{The Word That Is Spoken},\textsuperscript{118} Buber stated that priority should be given to “that speech that occurs at a given moment.”\textsuperscript{119} Such speech has priority because “it does not want to remain with the speaker. It reaches out toward a hearer, it lays hold of him, it even makes the hearer into a speaker, if perhaps only a soundless one.”\textsuperscript{120} The notion that agreement or understanding is not a prerequisite to this living speech, reflects the fact that parties give meaning to the words spoken based upon their own personal existence.\textsuperscript{121} Indeed, for Buber, ambiguity or misunderstanding may be fruitful in giving new life to the dialogue.\textsuperscript{122}

\textsuperscript{117} \textit{Id.}
\textsuperscript{118} \textit{M. Buber, The Word That is Spoken,} in \textit{The Knowledge of Man} 110 (1965).
\textsuperscript{119} \textit{Id.} at 110. Buber distinguished three modes-of-being of language which are significant in human life. \textit{Id.} at 111-12. The first mode is called “present continuance” and refers to “the totality of what can be spoken in a particular realm of language [at a certain segment of time], regarded from the point of view of the person who is able to say what is to be said.” \textit{Id.} at 110. Second is “potential possession,” “the totality of what has ever been uttered in a certain realm of language, in so far as it [limits itself to] what can still today be lifted by a living speaker into the sphere of the living word.” \textit{Id.} at 110-11. The third mode is “actual occurrence—its spokenness, or rather being spoken—the word that is spoken.” \textit{Id.} at 111. While genuine dialogue draws from the first two spheres, for Buber, priority must be given to the third. \textit{Id.}
\textsuperscript{120} \textit{Id.} at 112.
\textsuperscript{121} \textit{See id.} at 112-15.
\textsuperscript{122} \textit{Id.} at 114. According to Buber:
From this it follows that it is not the unambiguity of a word but its ambiguity that constitutes living language. The ambiguity creates the problematic of speech, and it creates its overcoming in an understanding that is not an assimilation but a fruitfulness. The ambiguity of the word, which we may call its aura, must to some measure already have existed whenever men in their multiplicity met each other, expressing this multiplicity in order not to succumb to it. It is the communal nature of the logos as at once “word” and “meaning” which makes man man, and it is this which proclaims itself from of old in the communalizing of the spoken word that again and again comes into being.
II. Young v. New York City Transit Authority

In Young v. New York City Transit Authority, two homeless men, William Young and Joseph Walley, commenced a class action to enjoin the enforcement of certain regulations and laws banning begging and panhandling in the New York City Transit System and Port Authority facilities. The plaintiffs solicited money for themselves throughout the subway system, and, while doing so, frequently answered any questions passers-by might have had. The plaintiffs asserted that the bans against begging violated the first and fourteenth amendments of the United States Constitution and article 1, sections 6, 8, and 11 of the New York State Constitution.

The plaintiffs specifically challenged New York City Transit Authority ("TA") regulation 21 of the New York City Rules and Regulations ("N.Y.C.R.R.") section 1050.6, which in subsection (b) provides that "[n]o person shall panhandle or beg upon any facility or conveyance;" yet subsection (c) permits solicitation for religious and political causes as well as for charity by organizations that 

\[\text{(1) have been licensed for any public solicitation . . ., or (2) are duly registered as charitable organizations . . ., or (3) are}\]

\[\text{id. at 114-15.}\]


\[\text{124 Id. at 345. Other plaintiffs included the Legal Action Center for the Homeless and Sheron Gilmore. Id. at 341. The defendants included the New York City Transit Authority, the Metropolitan Transportation Authority of the State of New York, the Metro-North Commuter Railroad Company, the Long Island Railroad Company, The Port Authority of New York and New Jersey, Robert R. Kiley, as chairman of the preceding companies, and Robert Abrams, as Attorney General for the State of New York. Id.}\]

\[\text{125 Id. at 345.}\]

\[\text{126 Id.}\]

\[\text{127 Id.}\]

\[\text{128 Id. The original complaint, filed on November 28, 1989, named only the TA, the Metropolitan Transit Authority ("MTA"), Metro-North Commuter Railroad Company ("Metro-North") and Robert Kiley, chairman of the TA. Id.}\]

\[\text{129 Id. At the onset of the action, 21 New York Codes of Rules and Regulations section}\]

\[\text{1050.6(b) provided in pertinent part that "no person, unless duly authorized . . . shall upon any facility or conveyance . . . solicit alms, subscription or contribution for any purpose." [1990] 21 N.Y.C.R.R. § 1050.6(b). In August of 1989, the legislature added subsection (c), which granted greater utilization of the transit system for certain noncommercial activities, including solicitation for charitable causes, subject to specific time, place, and manner restrictions. Id. Subsection (c) was revised during the interim between the first oral argument on December 1, 1989 and the second oral argument on December 18, 1989. Young, 729 F. Supp. at 345-46.}\]

\[\text{130 [1990] 21 N.Y.C.R.R. § 1050.6(b).}\]
The plaintiffs did not challenge the TA's authority to apply time, place, and manner restrictions, as outlined in section 1050.6(c), to their conduct. Rather, they contested the "defendants' decision to distinguish the plaintiffs from others who permissively solicit contributions for charitable purposes."

The plaintiffs also challenged Port Authority of New York and New Jersey ("Port Authority") regulations, which govern the World Trade Center and the Port Authority Bus Terminal; one provision prohibits any person from soliciting funds for any purpose at the World Trade Center and Port Authority Bus Terminal without the Port Authority's permission. Finally, the plaintiffs challenged New York Penal Law section 240.35(1), which pro-

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111 Id. § 1050.6(c).
112 Young, 729 F. Supp. at 345.
113 These restrictions prohibited the "authorized" non-transit uses in areas not generally open to the public and in subway cars. With the exception of leafletting or distributing literature, campaigning, public speaking or similar activities with no sound production device and no physical obstruction, non-transit uses were also prohibited within twenty-five feet of a token booth or within fifty feet from the marked entrance to a TA office or tower.
114 Id. at 344.
115 Id. at 345. In order to inform the public of the revisions, the TA commenced "Operation Enforcement" in October of 1989 and distributed 1.5 million pamphlets, warning that anyone violating the rules would be subject to arrest, fine, and/or ejection. Id. at 344-45. The list of prohibited acts included "panhandling or begging." Id. at 345. Additionally, over 20,000 posters were prepared warning that panhandling and begging would lead to arrest, fine and/or ejection. Id. According to the plaintiffs, TA police had informed them that panhandling and begging were prohibited and that they could be arrested if caught doing so. Id. Both plaintiffs claimed that, since the commencement of Operation Enforcement, they were directed to vacate the subway platforms or cars on several occasions. Id.
116 Id. at 347. The Port Authority and the Long Island Railroad were added as defendants on December 27, 1989. Id. at 346-47. On January 22, 1990, the plaintiffs moved to include "all twelve Commissioners of the Port Authority as defendants, instead of only the Chairman of the Board of Commissioners." Id. at 347. This motion was granted. Id.
118 Young, 729 F. Supp. at 347.
119 Id. at 346; see N.Y. Penal Law § 240.35(1) (McKinney 1990). The Attorney General was added as a named defendant on December 27, 1989. Young, 729 F. Supp. at 346. The district court, sua sponte, had previously written to the New York State Attorney General providing him with the opportunity to intervene in this action. Young v. New York City Transit Auth., 903 F.2d 146, 151 (2d Cir.), cert. denied, 111 S. Ct. 516 (1990). This was done pursuant to the court's belief that the case "call[ed] into question the constitutionality of New York Penal Law § 240.35," and prompted by the defendants' assertion that the transit police, as duly authorized peace officers, were doing no more than enforcing New York Penal Law section 240.35(1). Young, 729 F. Supp. at 346. Since the Attorney General declined, the court instructed the plaintiffs to file an amended complaint challenging section 240.35 and naming the Attorney General as a defendant. Id.
vides, in pertinent part, that "[a] person is guilty of loitering when he . . . loiters, remains or wanders about in a public place for the purpose of begging." Because the Port Authority interprets section 240.35(c) as prohibiting begging and panhandling, it does not issue permits for these purposes in its facilities.

The district court granted the plaintiffs' motion to preliminarily enjoin the TA from enforcing 21 N.Y.C.R.R. 1050.6(b) and (c), and the Port Authority from enforcing 21 N.Y.C.R.R. sections 1220.16, 1220.25 and 1290.3 as violative of the first amendment, and section 240.35 of the New York Penal Code as violative of the New York State Constitution. The Second Circuit Court of Appeals reversed in part and vacated in part, and the United States Supreme Court denied certiorari.

A. The District Court Decision

The district court determined that the plaintiffs had satisfied the elements of "irreparable harm" and "balance of hardship" required for injunctive relief. The court also found the plaintiffs likely to prevail on the merits. It took judicial notice of the fact that cold winter temperatures await those beggars and panhandlers ejected from transit terminals and facilities pursuant to the regulations. In addition, the court acknowledged that the plaintiffs relied on begging and panhandling for their very survival.

139 Young, 729 F. Supp. at 347.
140 Id. at 360. During the first oral argument on December 1, 1989, defendants were enjoined from displaying and distributing additional posters to further implement Operation Enforcement. Id. at 345. After the second oral argument on December 18, 1989, the court temporarily restrained the defendants from enforcing the challenged rules insofar as they prohibited begging or panhandling in any areas in which the TA authorized charitable solicitation. Id. at 346.
141 Id. at 359.
142 Young, 903 F.2d at 148.
143 Young, at 111 S. Ct. 516 (1990).
144 Young, 729 F. Supp. at 348. The district court stated that plaintiffs seeking injunctive relief must "demonstrate that they will suffer an irreparable harm and either (i) that they are likely to prevail on the merits or (ii) that there exist[s] sufficiently serious questions going to the merits as to make them a fair ground for litigation and that the balance of hardships tips decidedly toward plaintiffs." Id.
145 Id.
146 Id. In addition, the court noted that "the Supreme Court has held that '[t]he loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury.' " Id. at 349 (quoting Elrod v. Burns, 427 U.S. 347, 373 (1976)). Thus, according to the court, by showing that enforcement of the challenged regulations violates
In holding that the TA regulations violated the first amendment of the Constitution, the court narrowed the issue to "whether a meaningful distinction can be drawn for First Amendment purposes between a professional fundraiser requesting a donation from a passer-by on behalf of a charitable organization [which has been found to be protected speech] and a similar request by a destitute person on his own behalf." In comparing the first amendment rights of the destitute with those of professional solicitors, the court found no significant distinction between the communicative aspects of either type of begging: "the inherent worth of speech in terms of its capacity for informing the public does not depend upon the identity of its source." The court reasoned that the conduct of both groups is quite similar; it essentially entails approaching passers-by, requesting donations, and perhaps offering an explanation of why the donation is needed. For the court, the conduct of both parties "is in essence, a plea for charity." Furthermore, to argue that "solicitations for money by beggars have less communicative content than solicitations by organized charities is to differentiate more on the basis of the source of the speech then on its content." Therefore, according to the court, "[w]hile often disturbing and sometimes alarmingly graphic, begging is unmistakably informative and

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their first amendment rights, the plaintiffs "will have demonstrated irreparable injury" and thus, "the balance of hardships tips decidedly in their favor." Id. 147

147 Id. The first issue the court decided was whether section 240.35 of the New York Penal Law violated the due process clause of the New York State Constitution. Id. Applying People v. Bright, 71 N.Y.2d 376, 520 N.E.2d 1355, 526 N.Y.S.2d 66 (1988), the court stated that loitering statutes will be upheld "only when they either prohibit[] loitering for a specific illegal purpose or loitering in a specific place of restricted access." Young, 729 F. Supp. at 349 (citation omitted). The court also held that, absent any provision of New York law and any clear indication of legislative intent proscribing begging, begging cannot be considered an "illegal purpose." Id. at 349-50.

148 Young, 729 F. Supp. at 352. The court examined several Supreme Court cases including Riley v. National Fed'n of the Blind of N.C., 487 U.S. 781 (1988), Secretary of the State of Md. v. Joseph H. Munson Co., 467 U.S. 947 (1984), and Schaumburg v. Citizens for a Better Env't, 444 U.S. 620 (1980), and observed "charitable solicitations such as those undertaken by professional fundraisers were 'inextricably intertwined with otherwise fully protected speech.'" Id. at 352. The district court additionally noted that the Supreme Court has implied that "a solicitation which was not intended to benefit directly another person could still warrant protection." Young, 729 F. Supp. at 351.

149 Young, 729 F. Supp. at 352.

150 Id.

151 Id.

152 Id.
persuasive speech.” The court further asserted that the activity in question, beggars requesting money, serves to remind the passers-by that numerous people in the city lack the necessities of life and live in utter poverty.

The court also concluded that the intent of the solicitor does not work to distinguish begging from charitable solicitations. Since charity is defined as “the provision of help or relief to the poor” or “something that is given to help the needy,” it is not relevant to consider who solicits the donation—the fundraiser or the recipient—in determining whether the donation is for charity. The district court therefore concluded that begging can be a form of expression protected by the first amendment.

The court then considered whether the New York City Transit System and the Port Authority were public fora for the purposes of first amendment protection. Following Wolin v. Port Authority of New York, in which the Second Circuit found that the Port Authority Terminal was an appropriate public forum for protected first amendment speech, the court held that the Port Authority Terminal and facilities similar to it are public fora. The court also determined that the New York City Transit System is a public forum. Because the TA’s regulations permit a broad spectrum of expression by any member of the public who wishes to be heard, the court concluded that the TA intended to open the forum to

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153 Id.
154 Id.
155 Id. at 353.
156 Id.

157 Id. According to the court, there is nothing historically to suggest that begging has been “universally viewed with the rancor and enmity of, say, obscenity.” Id. (citations omitted). Early English law prohibited begging by those able to work but not by those unable to work. Id. The crime of vagrancy in nineteenth century New York encompassed “solicitation of alms or charity by the ‘able bodied or sturdy’ and ‘wandering abroad and begging.’” Id. at 354. However, currently in the United States only 25 states have statutes pertaining to begging. Id. Thirteen of these statutes grant powers to various state authorities to regulate or punish begging (or some variation) but do not themselves proscribes begging. Id. Two statutes adopt the old common-law rule, four statutes resemble New York’s penal provision, and the rest proscribes either begging or some variation thereof. Id. In addition, several state courts have reached different results when statutory or regulatory provisions similar to the type at issue in this case have been considered. Id. The court stated that “[t]hese cases reveal that the constitutional protection afforded solicitation of money by beggars, as well as society’s general attitude toward begging, are far from resolved.” Id. at 355-56.

158 392 F.2d 83 (2d Cir.), cert. denied, 393 U.S. 940 (1968). The Wolin court held that the terminal was properly considered a public forum for the “distribution of leaflets, carrying placards, setting up card tables, and engaging in conversations with others.” Id. at 91.

159 Young, 729 F. Supp. at 356.
public assembly and debate.\(^{160}\)

Finally, the district court found that the TA and Port Authority regulations prohibiting all begging from all of their facilities were not narrowly tailored, either as time, place, or manner restrictions or as content-based exclusions, to serve a significant state interest.\(^{161}\) The court stated that although the state has an interest in protecting the public from harassment and intimidation, neither the TA nor the Port Authority attempted "to distinguish between an innocuous request for money and a threatening or intimidating demand."\(^{162}\) Nor was any attempt made to identify the specific vicinities where passers-by might be confronted with harassment and intimidation from beggars or where passers-by become a captive audience.\(^{163}\) The court noted here that the TA had previously promulgated regulations that expressly prohibited intimidating and harassing behavior.\(^{164}\)

While the government has an interest in "preserv[ing] the quality of urban life, . . . and in protecting citizens from 'unwanted exposure to certain methods of expression which may legitimately be deemed a public nuisance,' . . . this interest must be discounted where the regulation has the principle effect of keeping a public problem involving human beings out of sight and therefore out of mind. Indeed, it is the very unsettling appearance and message conveyed by the beggars that gives their conduct its expressive quality.\(^{165}\)

The expressive quality conveyed by a beggar's unsettling appearance and message does not lose its protected status simply because some people may find it objectionable.\(^{166}\)

B. The Second Circuit Decision

In reversing the lower court's decision, the Second Circuit examined the case from a different perspective. It focused on the problems associated with begging in the subways, especially the

\(^{160}\) Id. at 357.
\(^{161}\) See id. at 359.
\(^{162}\) Id. at 358.
\(^{163}\) Id.
\(^{164}\) Id.; see [1990] 21 N.Y.C.R.R. §§ 1050.6(a), 1050.7(i), 1050.7(k).
\(^{165}\) Young, 729 F. Supp. at 358 (citations omitted).
\(^{166}\) Id. at 358-59. Moreover, the court reasoned that the likelihood of deception and fraud are greatly diminished in this case because passers-by know that a beggar will most likely keep the money and, based on this knowledge, make a calculated decision that the individual is worthy in some respect to receive it. See id. at 359.
heightened fear of the commuting public. The court ultimately concluded that the regulations in question, reasonably constructed to address such problems, did not infringe on any potential communicative content of begging or panhandling.

Relying on a 1988 study initiated by the TA which, according to the court, disclosed that "begging contributes to a public perception that the subway is fraught with hazard and danger," the court stated that many passengers have complained of "unwanted touching, detaining, impeding," and intimidation from beggars demanding money. The court accepted the conclusions of an outside consulting company, retained during the study-process, that the passengers' begging-related fears discouraged the use of the transit system. As a result, begging was identified as inherently aggressive in the subway environment; it was also found to "ha[ve] the serious potential of creating an accident and injuring many people."

In examining the regulations' free speech implications, the court first found that begging does not constitute the kind of expressive conduct protected by the first amendment. It noted that the Supreme Court in Texas v. Johnson had "admonished against . . . label[ing conduct as] 'speech' whenever the person engaging in the conduct intends thereby to express an idea." Rather, the court set its task as considering whether begging involves "an intent to convey a particularized message . . . and

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167 Young, 903 F.2d at 149-50.
168 Id. at 158-59.
169 Id. at 149. The Second Circuit stated that additional evidence before the district court demonstrated that the subway system transports millions of passengers each day, its platforms are crowded, and its basic structural features are timeworn. Id. A research survey had revealed that two-thirds of the subway ridership have experienced intimidation which resulted in their giving money to beggars, whose pervading presence in the subway is a significant problem. Id. The survey also reported that "it is difficult from the police perspective to draw the fine line between panhandling and extortion." Id.
170 Id.
171 Id. at 149-50. According to the court, the consulting company found that on the open city streets people are able to avoid and move away from intimidating persons, but in the subway, the riders' movements are restricted and there is less ability to control what happens to them. Id. at 150.
172 Id. at 150. Statistics revealed that during a 10 month period in 1989, an average of six homeless persons per month died in the subway, including 15 who were hit by trains. Id.
173 Id. at 154.
175 Young, 903 F.2d at 152-53 (citing Johnson, 109 S. Ct. at 2539). The Young court also noted that the Johnson Court's caution that the government has more freedom to restrict expressive conduct than spoken or written words. Id. at 153.
whether the likelihood was great that the message would be understood by those who viewed it.\textsuperscript{176}

The Second Circuit found that speech is simply not the essence of this conduct.\textsuperscript{177} Begging is not inseparably intertwined with a particularized message; rather, it is an activity whose goal is the collection of money. Therefore, common sense, according to the court, dictates that begging is more conduct than speech.\textsuperscript{178} Furthermore, the court determined it likely that a passer-by will be unable to discern the content of a particular message even should one be offered.\textsuperscript{179} Unlike other forms of expressive conduct, "begging in the subways is experienced as transgressive conduct whether devoid of or inclusive of an intent to convey a particularized message."\textsuperscript{180} While the court did not doubt that begging may sometimes involve incidental speech,\textsuperscript{181} the court asserted that the only message commonly shared by all acts of begging is the desire "to exact money from those [accosted]"; thus, begging falls outside first amendment protection.\textsuperscript{182}

The Second Circuit strongly disagreed with the district court’s construction of Supreme Court precedent regarding the nexus between solicitation by organized charities and a "variety of speech interests" sufficient to invoke constitutional protection.\textsuperscript{183} The Second Circuit indicated that the district court’s inability to detect a distinction between such solicitation and begging led to its erroneous conclusion that begging should be similarly protected.\textsuperscript{184}

[T]he difference between begging and solicitation by organized charities . . . must be examined not from the imaginary

\begin{footnotesize}
\begin{enumerate}
\item[176] Id. (citation omitted) (emphasis omitted).
\item[177] Id.
\item[178] Id.
\item[179] Id. at 153-54.
\item[180] Id. at 154 (citation omitted).
\item[181] Id. The court stated:
\begin{quote}
\raggedright We do not doubt that the proscribed activity may sometimes involve speech and upon occasion even give rise to the exchange of speech. We do not accept, however, that this incidental speech is one and the same as the conduct being regulated. Actual speech which may arise as an incident to conduct is not at issue here. The regulation at stake does not prevent any individual from speaking to passengers. Further, the First Amendment protects speech and not every act that may conceivably occasion engagement in conversation.
\end{quote}
\item[182] Id.
\item[183] Id.
\item[184] Id. at 155. On the contrary, absent solicitation by organized charities, the flow of information would likely cease. Id.
\item[185] Id.
\end{enumerate}
\end{footnotesize}
heights of Mount Olympus but from the very real context of the New York City subway. While organized charities serve community interests by enhancing communication and disseminating ideas, the conduct of begging and panhandling in the subway amounts to nothing less than a menace to the common good.\textsuperscript{185}

The court therefore deferred to the TA’s judgment that the “problems posed by begging and panhandling could be addressed by nothing less than [their] total ban.”\textsuperscript{186}

Although recognizing that giving alms has long been considered virtuous, the court suggested that this “virtue is best served when it reflects an ‘ordered charity,’” consistent with the TA regulations.\textsuperscript{187} The court further indicated that its role is not to solve all the problems of the homeless, but merely to determine whether the TA may properly ban from the subway system that which it finds to be inherently harmful.\textsuperscript{188}

In its determination, the court applied the relatively lenient level of judicial scrutiny enunciated in United States v. O’Brien.\textsuperscript{189} The court thus upheld the regulations because they proscribed conduct whose governmental interest was unrelated to the suppression of free speech.\textsuperscript{190}

The court first held that the regulations were within the TA’s rule-making authority.\textsuperscript{191} Second, the court determined that the

\textsuperscript{185} Id. at 156 (citation omitted).

\textsuperscript{186} Id. The court found that the record disclosed evidence of passengers feeling intimidated by beggars only, not by organized charities. Id.

\textsuperscript{187} Id.

\textsuperscript{188} Id. at 156-57.

\textsuperscript{189} 391 U.S. 367 (1968); see Young, 903 F.2d at 157. Generally, this more lenient level of judicial scrutiny requires the court to balance the extent to which communicative activity is in fact inhibited against the values, interests or rights served by enforcing the inhibition. Id. The court noted that O’Brien states that “‘a government regulation is sufficiently justified’ when: (1) ‘it is within the constitutional power of the Government;’ (2) ‘it furthers an important or substantial governmental interest;’ (3) ‘the governmental interest is unrelated to the suppression of free expression;’ and (4) ‘the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest.’” Id.; see O’Brien, 391 U.S. at 377.

\textsuperscript{190} Young, 903 F.2d at 157. Government regulation of expressive conduct may abridge in one of two ways; “[a] law directed at the communicative nature of conduct must, like a law directed at speech itself, be justified by the substantial showing of need that the First Amendment requires,” or “[a]lternatively, a regulation may proscribe particular conduct in order to protect a ‘governmental interest . . . unrelated to the suppression of free expression.’” Id. (citation omitted).

\textsuperscript{191} Id. at 158. The court stated that the district court entirely passed over the plaintiffs’ claim that the regulation was outside the TA’s rule-making authority. Id. Nonetheless, according to the court, pursuant to New York Public Authority Law section 1204, the TA does
regulations advanced a substantial governmental interest in providing the public with reasonably safe, propitious, and benign means of public transportation.\textsuperscript{192}

Third, the court found that the governmental interests relied on in the regulation are unrelated to the suppression of free expression.\textsuperscript{193} The regulation does not facially restrict expression; nor does the record indicate that the TA's interest in prohibiting begging was in any way based on its objection to a particularized idea or message.\textsuperscript{194} Rather, the justifications giving rise to the regulation were passenger well-being and safety, as well as the smooth and efficient operation of the system, independent of any alleged communicative element.\textsuperscript{195}

The court concluded that "the exigencies created by begging and panhandling in the subway warrant the conduct's complete prohibition."\textsuperscript{196} Contrary to the district court, the Second Circuit found persuasive well-settled precedent that time, place, and manner restrictions on expressive conduct do not violate the first amendment, simply because a less burdensome alternative may exist.\textsuperscript{197}

Though regulations must be narrowly tailored to serve the government's legitimate content-neutral interests, the court found that "[t]he TA's judgment is consistent with the Supreme Court's rule that the 'narrow tailoring' requirement is satisfied 'so long as the... regulation promotes a substantial government interest that would be achieved less effectively absent the regulation.'"\textsuperscript{198} Additionally, the court stated that because the TA prohibits begging only in the subways, the TA's regulations left open ample alternative channels of communication.\textsuperscript{199}

\textsuperscript{192} Young, 903 F.2d at 158.
\textsuperscript{193} Id.
\textsuperscript{194} Id. at 158-59.
\textsuperscript{195} Id. at 159.
\textsuperscript{196} Id.
\textsuperscript{197} Id.
\textsuperscript{198} Id. at 160 (citation omitted).
\textsuperscript{199} Id. The court stated, "It is untenable to suggest, as do the plaintiffs, that absent the opportunity to beg and panhandle in the subway system, they are left with no means to communicate to the public about needy persons." Id. The court relied on the Supreme
The court next addressed, in dictum, the district court’s determination that the subway is a public forum in which begging and panhandling must be permitted.\textsuperscript{200} According to the court, the government creates a public forum “only by intentionally opening a nontraditional forum for public discourse.”\textsuperscript{201} The court asserted that the TA’s enforcement demonstrated its intent to continue its long-standing prohibition of begging and panhandling, notwithstanding the regulation’s revision to permit organizational solicitation.\textsuperscript{202} Furthermore, the TA could permissively “limit solicitation in the subway system to organizations.”\textsuperscript{203} The court explained: “A public forum may be created by government designation of a place or channel of communication for use by the public at large for assembly and speech, \textit{for use by certain speakers, or for the discussion of certain subjects}.\textsuperscript{204}” The court further maintained that the TA never intended to designate any portion of the subway system as an appropriate forum for begging and panhandling.

Nor does the amended regulation abrogate our holding in \textit{Gannett Satellite} that the subway system is not a traditional or designated public forum. The amended regulation demonstrates the TA’s concern to safeguard the system and to honor the First

\textsuperscript{200} Young, 903 F.2d at 160.

\textsuperscript{201} Id. (quoting Cornelius v. NAACP Legal Defense & Educ. Fund, 473 U.S. 788, 802 (1985)). The court further noted that “the Supreme Court has explained: ‘We will not find that a public forum has been created in the face of clear evidence of a contrary intent, \ldots nor will we infer that the government intended to create a public forum when the nature of the property is inconsistent with expressive activity.’” \textit{Id.} (quoting Cornelius, 473 U.S. at 803).

\textsuperscript{202} Id.

\textsuperscript{203} Id.

\textsuperscript{204} Id. (quoting Cornelius, 473 U.S. at 802 (emphasis in original)). The Second Circuit finally considered the district court’s determination that section 240.35(1) of the New York Penal Code violated the due process clause of the New York State Constitution. \textit{Id.} at 162. The court held that the issue was not within the district court’s jurisdiction because section 240.35(1) did not prohibit the plaintiffs from begging or panhandling; neither had they applied for a permit to beg from the Port Authority, thereby triggering a denial of permit based on section 240.35(1). \textit{Id.} at 163. Because the plaintiffs had demonstrated neither direct injury nor imminent danger of direct injury, the fundamental prerequisites of jurisdiction had not been satisfied; the court therefore vacated the district court’s holding. \textit{Id.} at 163-64.
Amendment. Confronted with the district court's holding, a cynic might remind the TA that "no good deed goes unpunished."205

Judge Meskill dissented from the majority opinion, asserting that begging is speech protected by the first amendment.206 He disagreed with the distinction in communicative content drawn by the majority between begging for one's self and solicitation for organized charities.207 He argued that because both beggars and organized charities who send representatives into the subway have the same primary goal, beggars deserve the same protections afforded to charitable organizations.208 In addition, Judge Meskill stated that a charity's representatives, similar to beggars, "often explain the purpose of ... [their] work to potential donors and perhaps engage in a discussion regarding social issues."209 Judge Meskill pointed out that the "[p]laintiffs . . . all state in their affidavits that they often speak with potential donors about subjects such as the problems of the homeless and poor, the perceived inefficiency of the social service system in New York and the dangerous nature of the public shelters in which they sometimes sleep."210 A beggar is also engaged in first amendment activity when holding a sign that reads, "'Help the Homeless' or 'I am hungry.'"211 He therefore concluded that the first amendment protects the speech and association inherent in these encounters.212

According to the dissent, the majority's suggestion that individuals are free to engage in first amendment activities so long as they do not request donations was rejected by the Supreme Court.213 While the majority acknowledged that a charitable organ-
ization would likely cease its advocacy and dissemination of ideas if unable to solicit donations, it failed to recognize that a beggar’s communicative activity is no less dependent on requests for money.\textsuperscript{214} Judge Meskill characterized the majority’s speculation that beggars could get jobs and spend their free time distributing leaflets or discussing issues of their plight with passengers as unsupported by the record and imperceptive of the harsh experience of life of the urban poor.\textsuperscript{215}

In addition, Judge Meskill identified the TA System and Port Authority Bus Terminal as limited public forums.\textsuperscript{216} By designating certain areas of the subway system as appropriate places for charitable solicitation, the TA has clearly created a limited public forum.\textsuperscript{217} Judge Meskill agreed with the district court that the precedential value of \textit{Gannett Satellite Information Network, Inc}. \textsuperscript{211} at 165-66 (Meskill, J., dissenting). Judge Meskill stated:

In the seclusion of a judge’s chambers, it is tempting to assume that beggars could obtain jobs and spend their free time distributing leaflets or buttonholing passersby in the subway to further the cause of the homeless and poor. The record in this case, however, permits no such speculation. Plaintiff Young states in his affidavit, for example, that he solicits money in the subway so that he can buy food, medicine and other essentials, and take the subway to the Bronx, where he sometimes earns enough money unloading trucks to rent a room for the night. He receives no public assistance. Plaintiff Walley, who is fifty years old, states that he solicits donations because he is unable to find work. If he sleeps in a shelter, he receives reduced public assistance of $21.50 every two weeks. Plaintiff Gilmore’s solicitation also is the result of her need for food and medical treatment. To suggest that these individuals, who are obviously struggling to survive, are free to engage in First Amendment activity in their spare time ignores the harsh reality of the life of the urban poor.

\textit{Id}. (Meskill, J., dissenting).

\textsuperscript{214} \textit{Young}, 903 F.2d at 165 (Meskill, J., dissenting).

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\textit{Id}. (Meskill, J., dissenting).

\textsuperscript{216} \textit{Id}. at 166-67 (Meskill, J., dissenting). In recognizing that the pervading presence of beggars in the subway presents a serious problem for the TA and contributes to the sense of chaos and frustration, Judge Meskill stated that had the TA not created a designated public forum in the subway by permitting charitable solicitation, he would have not had any problem with upholding the regulations. \textit{Id}. at 168 (Meskill, J., dissenting). But having done so, the TA should not be able to “permit organized charities, but not beggars, to rattle a cup full of change as one passes by.” \textit{Id}. (Meskill, J., dissenting).

\textsuperscript{217} \textit{Id}. at 166 (Meskill, J., dissenting). While governmental intent is critical to the determination that a limited public forum was created, Judge Meskill concluded that since begging is indistinguishable from charitable solicitation for first amendment purposes, the “[d]efendants therefore may not open the door to the latter while slamming it in the face of the former.” \textit{Id}. at 167 (Meskill, J., dissenting). Furthermore, the defendants failed to submit any evidence that charitable solicitation does not have the same adverse effects as they concluded begging to have. \textit{Id}. at 167 & n.1 (Meskill, J., dissenting). As a result, the “defendants’ contention that begging is not of the same general nature as solicitation by organized charities is nothing more than rank speculation.” \textit{Id}. at 167 (Meskill, J., dissenting).
Judge Meskill criticized the majority's construction that “holding the regulation content-neutral automatically means that it must be analyzed under . . . the ‘relaxed’ standard of United States v. O'Brien.” Since begging, like charitable solicitation, is protected speech, a New York direct restriction is subject to “exacting First Amendment scrutiny.”

In *Young*, however, the TA regulations were not narrowly tailored to achieve the defendants' interests; rather, Judge Meskill contended that the complete ban on begging “burden[s] a substantial amount of speech that does not implicate the TA's interests.” The regulation failed to distinguish between harmless passive begging and aggressive behavior which intimidates passengers. Significantly, the TA had not shown “that passengers perceive all, or even a large percentage, of people who solicit alms in the subway as belligerent or frightening.” Nor had the defendants demonstrated that passengers “do not feel harassed when approached by representatives of an organized charity.”

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218 745 F.2d 767 (2d Cir. 1984).

219 *Young*, 903 F.2d at 167 (Meskill, J., dissenting). According to the court, *Gannett* was decided prior to the TA's creation of a designated forum for charitable solicitation. *Id.* (Meskill, J., dissenting). Furthermore, Judge Meskill believed a re-examination of *Wolin*, 392 F.2d 83, was necessary because “those areas in which the Port Authority allows expressive activities to take place constitute a designated public forum for the same reasons set forth above with respect to the subway system.” *Young*, 903 F.2d at 167 (Meskill, J., dissenting).

220 *Young*, 903 F.2d at 166 (Meskill, J., dissenting) (citation omitted).


222 *Id.* (Meskill, J., dissenting). Judge Meskill argued that “[t]he protected expression in this case is the beggars' speech incident to their solicitation of alms, not symbolic conduct.” *Id.* (Meskill, J., dissenting).

223 *Id.* at 167 (Meskill, J., dissenting).

224 *Id.* at 168 (Meskill, J., dissenting).

225 *Id.* (Meskill, J., dissenting).

226 *Id.* (Meskill, J., dissenting).
III. A Buberian Approach to Young

Young is the quintessential example of a case in which the analysis of a constitutional issue requires a dialogical orientation. The legal arguments on each side of the first amendment issue and subissues in Young are very closely weighted. On the level of purely technical analysis, the decision could have been, and indeed was, decided in favor of either the needy plaintiffs or the defendants. However, mere technical analysis is insufficient; because the issue involved the potential denial of individual rights, and because its resolution will have far-reaching ramifications for the poor, the analysis requires an I-Thou approach. Constitutionally, the decision in Young could have effectively weakened or strengthened the voices of the weakest members of society—the destitute and the homeless. Moreover, Young could have helped or hurt their chances of survival by permitting or denying their access to warmer shelter as well as to monies that could be used for basic needs such as food and medicine.

A. District Court Decision and the Meskill Dissent

The district court's holding—as well as the Meskill dissent—in Young, reflect a dialogical orientation that can be seen as incorporating each of the philosophy's essential characteristics. First, confirmation is present. The very physical survival of the poor must be guaranteed or at least facilitated as a prerequisite to selfhood. Recognizing this, the district court took judicial notice of the cold weather awaiting beggars ejected from the transit system, and acknowledged that the homeless plaintiffs beg in the subway system to obtain funds for their basic needs.

In addition, the physical presence of the poor in the transit system communicates the reality of their experience of poverty to all. Begging in transit facilities reveals to each of us the true-to-life existence of the destitute and homeless: their need of a warmer place to stay during the cold weather, their need to beg for money, and the inadequacy of the welfare and social security systems to provide for all, or most, of their needs. Their presence enables us to imagine and empathize with what the poor must feel, perceive, and think. We can do so because we can see their surroundings and appearance, hear them or see them beg, and listen to them discuss—in spoken and written words, or even in the mere rattling of a cup—the reasons for begging. We may even have the opportunity
Neither the district court nor Buber himself would require us to give money to the beggar; the truth of the poor person is not forced upon us, but simply made apparent to us. We then can choose to engage in a struggle to learn the truth of each other’s existence, and perhaps, in some circumstances, even to rectify our indifference or the cause of the person’s poverty. Martin Buber’s notions of confirmation and genuine dialogue were given effect by the district court’s decision because the very existence of the poor person would have been made present to us, and because we are able to “see” or “experience” the other side.

Our historical hour presents the crises of poverty and homelessness. The issue in Young placed the court squarely in the midst of these crises. The district court heard and responded to responsibility’s call echoing from the subway system and bus terminal. It looked beyond the governmental interest in sheltering citizens from “unwanted exposure to certain methods of expression which may legitimately be deemed a public nuisance,” to the fact that the defendants asking that the government enforce regulations whose principal effect would keep “a public problem involving human beings out of sight and therefore out of mind.” The court also refused to turn a deaf ear to the call to responsibility, stating that beggars requesting money “cannot but remind [us] that people in the city live in poverty and often lack the essentials for survival.”

In looking beyond the government’s interest in preserving the quality of urban life and minimizing exposure to publicly annoying expression, the district court ignored the call of collectivism. It realized that true community cannot exist where the poor are placed out of sight and out of mind; it maintained instead that such community thrives only where the possibility of dialogue and meeting among all people—even the poor—is enhanced. The court permitted itself to be influenced by the “thou-saying, responding spirit,” and implicitly encouraged the quantum satis by refusing to deny first amendment protection to begging in transit facilities.

The district court’s holding that begging warrants first amendment protection comports with the key role of speech in Martin

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227 Young, 729 F. Supp. at 358 (quoting Members of the City Council v. Taxpayers for Vincent, 466 U.S. 789, 805 (1984)).
228 Id.
229 Id. at 352.
Buber's philosophy of dialogue. First, like Buber, the court understood that spoken words and conduct equally can constitute speech. Second, the court's finding that the inherent worth of speech does not depend on the speaker's identity, accords with the notion that all participants in the *I-Thou* dialogue are equal. Third, the district court acknowledged that speech can be a witness to the principle of human life, for begging demonstrates the principle of the human life of the extremely poor. Fourth, the district court understood that the potential interaction between the beggar and the passer-by could create the basis for true community; if we are forced to see and hear the beggar, we may be moved to do something about the problems of poverty and homelessness. Finally, the district court acknowledged that the mere possibility that we might misunderstand or disagree with the message conveyed by begging does not diminish the protection such speech deserves; in fact, the potential for miscommunication may entitle begging to greater protection.

The opinions of both the district court and Judge Meskill's dissent declined to elevate the needs of organizations, however charitable, over those of persons who are destitute; they each refused to create a distinction based on the status of the solicitor. As stated by Judge Meskill: "To hold otherwise would mean that an individual's plight is worthy of less protection in the eyes of the law than the interests addressed by an organized group. No court has ever so ruled." The linchpin of the district court's constitutional analysis was its admittedly dialogical orientation: "A true test of one's commitment to constitutional principles is the extent to which recognition is given to the rights of those in our midst who are the least affluent, least powerful and least welcome." Through its dialogical orientation, the district court achieved what should be the highest goal of the Bill of Rights: the confirmation of poor persons on the level of both basic human rights (including freedom of speech) and basic human needs (including warmer shelter and money for food, clothing, and medicine). The same cannot be said, however, of the Second Circuit decision.

B. Second Circuit Decision

In its language and reasoning, the Second Circuit decision re-

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290 Young, 903 F.2d at 167 (Meskill, J., dissenting).
231 Young, 729 F. Supp. at 360.
fects the world of the *I-It*: cold, objectified, and analytical. For example, the court stated:

> Common sense tells us that begging is much more "conduct" than it is "speech." As then Circuit Judge Scalia once remarked: "That this should seem a bold assertion is a commentary upon how far judicial and scholarly discussion of this basic constitutional guarantee has strayed from common and common-sense understanding." Here, what common sense beckons the law ordains.

. . . .

. . . The only message we are able to espy as common to all acts of begging is that beggars want to exact money from those whom they accost.\(^2\)

It further insisted that any difference [between begging and solicitation] must be examined not from the imaginary heights of Mount Olympus but from the very real context of the New York City subway. While organized charities serve community interests by enhancing communication and disseminating ideas, the conduct of begging and panhandling in the subway amounts to nothing less than a menace to the common good.\(^3\)

The court finally stated that "[t]he amended regulation demonstrates the TA's concern to safeguard the system and to honor the First Amendment. Confronted with the district court's holding, a cynic might remind the TA that 'no good deed goes unpunished.'"\(^4\)

In this *I-It* world, we do not turn to the poor with the wholeness of our being. Instead, we seek to separate ourselves by removing them from the transit system where their presence becomes too real to us. The poor, in the world of the *I-It*, are not human beings; rather, they are a "menace to the common good,"\(^5\) and a "public nuisance."\(^6\) Moreover, they are not even entitled to the same constitutional rights guaranteed to charitable organizations.

The Second Circuit decision ensures that the poor are not truly made present to us. We are not allowed to see or experience their real-life existence, their *sitz-in-leben*. The reality is that, par-

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\(^2\) *Young*, 903 F.2d at 153-54 (citations omitted).

\(^3\) *Id.* at 156 (citation omitted).

\(^4\) *Id.* at 162.

\(^5\) *Id.* at 156.

\(^6\) *Id.* (quoting Members of the City Council v. Taxpayers for Vincent, 466 U.S. 789, 805 (1984)).
particularly during the winter months, they must be in a warmer place, such as the subway station, and must solicit money. The court ignored their sitz-in-leben, stating that "the regulation at issue 'leave[s] open ample alternative channels of communication.' Under the regulation, begging is prohibited only in the subway, not throughout all of New York City." Moreover, the court went even further than the TA, which does not enforce section 1050.6 against the homeless when the temperature falls below thirty-two degrees fahrenheit.

The Second Circuit in Young flatly sidestepped answering the call of this historical hour which could have helped mitigate the problems of poverty and homelessness. The court disingenuously characterized the plaintiffs' request as imposing on the court the task of resolving all the problems facing the homeless. On the contrary, it was only being asked to recognize the constitutional rights of the poor as well as the decision's likely impact on their survival, and to extend first amendment protection to begging in transit facilities subject to reasonable time, place, and manner restrictions.

The Second Circuit's decision reflects the I-It world for several additional reasons. First, the court misperceived the intent of those who beg in the transit system as always intimidating or harassing the passengers solicited; similarly, the court misjudged the passengers' reaction as invariably fearful whether or not the poor person is intimidating. Evidence of this misconception is in the court's statement that "[t]he only message ... common to all acts of begging is that beggars want to exact money from those whom they accost." Second, the court exclusively relied on the TA's study to support its analysis, discussing at length the district court's lack of deference to the study. The Second Circuit itself failed to discuss an opposing affidavit by Robert N. Bontempo, which character-
ized the survey as seriously flawed and biased.\textsuperscript{242} Third, the court ignored the fact that the law already proscribes intimidating or harassing behavior, by the homeless or any one else.\textsuperscript{243} Further, the court disregarded the plaintiffs' agreement, existing from the outset, to be subject to reasonable time, place, and manner restrictions, which would exclude them from areas where their presence might be considered more intimidating by passengers.

The Second Circuit decision elevates the collective over the genuine \textit{We}. Purported “common sense” and “common understanding” influence the decision. Begging in transit facilities does not deserve protection because begging is a “menace” and a “detriment to the common good,” engendering fear in the commuting public. No consideration is given, however, to what is good for the homeless and destitute. Furthermore, the court did not consider the importance for the community of “the sphere of direct relations between [person and person], genuine dialogue in which each allows the other to exist in his unique otherness and responds to him in his wholeness and uniqueness.”\textsuperscript{244}

The court emphasized the needs of the subway's commuting patrons, thereby elevating the collective:

[The subway] is the primary means of transportation for literally millions of people of modest means, including hard-working men and women, students and elderly pensioners who live in and around New York City and who are dependent on the subway for the conduct of their daily affairs. They are the bulk of the subway's patronage, and the City has an obvious interest in providing them with a reasonably safe, propitious and benign means of public transportation. In determining the validity of the bans we must be attentive lest a rigid, mechanistic application of some legal doctrine gainsays the common good. In our estimation, the

\textsuperscript{242} See N.Y. \textsc{Penal Law} § 240.25 (McKinney 1989); \textit{see also supra} notes 137-39 and accompanying text (discussing Port Authority's interpretation of loitering statute).

\textsuperscript{243} See supra note 79.

\textsuperscript{244} Id. at 253. Further, Mr. Bontempo stated that the survey demonstrated that the public views beggars more with sympathy than fear. If panhandling has any deleterious effects on the transit system, according to the survey those effects are not of concern to the vast majority of subway riders. The vast majority of riders do not want increased police sanctions against beggars, and clearly consider other problems such as loud radios, delays, and dirt as far more serious problems in the subway.
regulation at issue here is justified by legitimate, indeed compelling, governmental interests. We think that the district court's analysis reflects an exacerbated deference to the alleged individual rights of beggars and panhandlers to the great detriment of the common good.\textsuperscript{245}

This troubling statement reveals that the court's concern extended to virtually every group but the poor and homeless. Furthermore, despite its exhortation against the mechanistic application of first amendment protection, the court mechanistically denied such protection to the poor and the homeless. In determining whether begging is speech or conduct\textsuperscript{246} and in deciding what standard of judicial scrutiny to apply,\textsuperscript{247} the Second Circuit relied on the precedent established in \textit{Clark v. Community for Creative Non-Violence},\textsuperscript{248} which itself denied first amendment protection to homeless persons sleeping in public parks outside the White House.\textsuperscript{249}

The Second Circuit's decision fails to promote genuine community because it does not create the readiness for \textit{I-Thou} relationships. Without genuine community, the poor and homeless will continue to be part of the "nameless, faceless crowd" and the problems of poverty and homelessness will remain unchanged.

The Second Circuit in \textit{Young} refused to grasp the essential revelatory, relational, and communal aspects of speech. Speech, for Buber, primarily concerns the manner in which persons address and reveal themselves to one another. Speech can take the form of written or spoken words or even of conduct; each is equally speech as long as it reveals the being of the person. According to the court, however, begging, being more conduct than speech, does not have sufficient communicative content to warrant first amendment protection, in that it does not send any particular social or political message; it communicates only the message to collect money.\textsuperscript{250} To the contrary, begging discloses to others an important revelation about the beggar: she needs help because of hunger, the cold, sickness, or mental illness. This is precisely the message that the plaintiffs Young and Walley seek to communicate through begging. Their affidavits clearly indicate that they do not intend to send a

\textsuperscript{245} \textit{Young}, 903 F.2d at 158.
\textsuperscript{246} \textit{Id.} at 153.
\textsuperscript{247} \textit{Id.} at 160.
\textsuperscript{249} \textit{Id.} at 295.
\textsuperscript{250} \textit{Young}, 903 F.2d at 154.
message of intimidation, despite the Second Circuit's assertion that begging is divested of any possible expressive message because of the subway's "special surrounding circumstances."261.

The plaintiffs' affidavits also demonstrate that begging can create the readiness for relationships with others. The plaintiffs Young and Walley stated that begging and panhandling sometimes occasion questions from, and conversations with, passengers about the particular problems of the plaintiffs as well as the general problems of poverty and homelessness. Indeed, some passers-by even evidence their disagreement with the message of beggars, saying, for example, that the beggar should find a job. This is precisely the living speech which Buber encouraged. In contrast, the Second Circuit stated that "the First Amendment protects speech and not every act that may conceivably occasion engagement in conversation."262

The living speech communicated by begging also helps to begin the building of a common logos through which the problems of poverty and homelessness can be addressed. Communal speaking is built because through begging, the beggar

show[s] the other something in the world in such a way that from then on he began really to perceive it; wherever one gave another a sign in such a way that he could recognize the designated situation as he had not been able to before; wherever one communicated to the other his own experience in such a way that it penetrated the other's circle of experience and supplemented it as from within, so that from now on his perceptions were set within a world as they had not been before.263

This, rather than "exact[ing] money from those they accost," is what is "common to all" acts of begging. Through "[a]ll this flowing ever again into a great stream of reciprocal sharing of knowledge—thus came to be and thus is the living We, the genuine We."264

The common logos demands a response: responsibility. The Second Circuit does not want to hear what the destitute can reveal to us through begging, as it does not want to be responsible for "solving all the problems" of poverty. It does not want to be influ-

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261 Id. "In the subway, it is the conduct of begging and panhandling ... that passengers experience as threatening [and] harassing." Id.
262 Id.
263 Id. What is Common to All, supra note 89, at 106.
264 Id.
enced by the "thou-saying spirit." Moreover, the court's decision enables each of us to turn a deaf ear to the call as well.

Speech is the great characteristic of human life. If solicitation of charity by an organization is speech, so too must be the solicitation of charity by individual human beings. There is no better evidence of the cosmic and social homelessness of our era than extending constitutional protection to organizations soliciting charity for needy persons but not to the needy human beings themselves.

CONCLUSION

Constitutional analysis, especially in the area of individual rights, needs to incorporate a dialogical orientation to assure that judicial decisions are truly just to all individuals, regardless of their economic status in life. If it had adopted such an orientation, the Second Circuit never would have arrived at its decision in Young.

Perhaps the error of the Second Circuit's decision can best be understood by considering a parable recounted by Buber:

When Levi Yitzhak became rav in Berditchev, he made an agreement with the leaders of the congregation that they were not to ask him to their meetings unless they intended to discuss the introduction of a new usage or a new procedure. One day they asked him to come to a meeting. Immediately after greeting them, he asked: "What is the new procedure you wish to establish?"

They answered: "From now on we do not want the poor to beg at the threshold. We want to put up a box, and all the well-to-do people are to put money into it, each according to his means, and these funds shall be used to provide for the needy."

When the rabbi heard this, he said: "My brothers, did I not beg you not to call me away from my studies and summon me to a meeting for the sake of an old usage or an old procedure?"

The leaders were astonished and protested: "But master, the procedure under discussion today is new!"

"You are mistaken," he cried. "It is age-old! It is an old, old procedure that dates back to Sodom and Gomorrah. Do you remember what is told about the girl from Sodom, who gave a beggar a piece of bread? How they took her and stripped her and smeared her naked body with honey, and exposed her for bees to devour, because of the great crime she had committed! Who knows—perhaps they too had a community box into which the well-to-do dropped their alms in order not to be forced to face
their poor brothers eye to eye."

Constitutional analysis has much to learn, indeed, from Martin Buber's life of dialogue.

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