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THE CONTINUED ILLEGALIZATION OF COMPASSION: *UNITED STATES v. MILLIS* AND ITS EFFECTS ON HUMANITARIAN WORK WITH THE HOMELESS

MATTHEW M. CUMMINGS*

Abstract: Every year, more cities enact food sharing restrictions that punish individuals who try to feed the homeless. These laws are often part of a general scheme to solve a city's homelessness problem by making life so unbearable for homeless men and women that they will be forced to move elsewhere. Humanitarian aid like food sharing, however, is a form of expressive conduct whereby the speaker communicates to a particular audience in need that he or she is willing to care for them. Additionally, the speaker's conduct may inform observers about a particular humanitarian dilemma or encourage them to become involved. In *United States v. Millis*, the Ninth Circuit failed to recognize an act of humanitarian aid for traveling immigrants as a form of protected speech, thereby opening the door to the creation of more harmful and unfair laws that suppress humanitarian aid.

INTRODUCTION

In *United States v. Millis*, Daniel Millis violated a federal environmental regulation—50 C.F.R. § 27.94(a)—by leaving half-gallon bottles of water along trails of the Buenos Aires National Wildlife Refuge to prevent needless dehydration deaths of migrants trying to cross the border from Mexico into the United States.¹ He argued that “humanitarian aid.

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¹ See *United States v. Millis*, 621 F.3d 914, 914–16 (9th Cir. 2010); Disposal of Waste, 50 C.F.R. § 27.94(a) (2010). In 1997, the Refuge Improvement Act created the National Wildlife Refuge System in order “to administer a national network of lands and waters for the conservation, management, and where appropriate, restoration of the fish, wildlife, and plant resources and their habitats within the United States for the benefit of present and future generations of Americans.” 16 U.S.C. § 668dd(a)(2) (2006). In administering this system, the Secretary of the Interior is required to ensure the purposes of each refuge are carried out and to “plan and direct the continued growth of the System in a manner that is best designed to accomplish the mission of the System.” *Id.* § 668dd(a)(4)(C)–(D). In accordance with this mandate, the secretary created federal regulations for the disposal of waste. See *Millis*, 621 F.3d at 917–18; 50 C.F.R. § 27.94. The regulation prohibits the following conduct:

tarian aid is never a crime,” but is that always the case?² As *Millis* demonstrates, a regulation clearly designed to protect the environment can sometimes unintentionally punish humanitarian efforts.³ Moreover, some laws may be less benign than they seem and may actually have been passed to prevent humanitarian efforts under the auspices of neutral environmental or public safety regulations.⁴ This is precisely the case in several U.S. cities where food sharing restrictions limit the ability of individuals and charities to give food to the homeless.⁵ These laws are disguised as regulations to prevent littering or provide for public safety and order but in many cases, they evince “an open hostility” to homeless and indigent populations.⁶

The littering, disposing, or dumping in any manner of garbage, refuse sewage, sludge, earth, rocks, or other debris on any national wildlife refuge except at points or locations designated by the refuge manager, or the draining or dumping of oil, acids, pesticide wastes, poisons, or any other types of chemical wastes in, or otherwise polluting any waters, water holes, streams or other areas within any national wildlife refuge

50 C.F.R. § 27.94(a). *Millis* was convicted under this provision for his activities with No More Deaths, “an organization that provides humanitarian aid to migrants,” including the “placement of water in the desert along frequently traveled routes for unlawful entrants into the United States.” *Millis*, 621 F.3d at 915.

² See *Millis*, 621 F.3d at 916.

³ See *id.* at 914–16 (demonstrating, implicitly, that *Millis*’s interest in preventing dehydration deaths of migrants conflicts with the government’s interest in protecting one of the country’s ten most threatened wildlife refuges).

⁴ See generally *Feeding Intolerance: Prohibitions on Sharing Food with People Experiencing Homelessness*, NAT’L LAW CENTER ON HOMELESSNESS & POVERTY & NAT’L COALITION FOR THE HOMELESS, 7, 10–17 (Nov. 2007), http://www.nationalhomeless.org/publications/foodsharing/Food_Sharing.pdf [hereinafter *Feeding Intolerance*] (providing examples of food sharing restrictions that were designed to stop individuals from feeding the homeless).

⁵ See *id.* For the purposes of this Comment, the term “homeless” refers to those persons who are “chronically homeless.” See *Fact Sheet: Chronic Homelessness*, NAT’L ALLIANCE TO END HOMELESSNESS, 1 (Feb. 2010), http://www.endhomelessness.org/files/1623_file_Fact_Sheet_chronic_2_1_2010.pdf. The Department of Housing and Urban Development defines a “chronically homeless” person as “an unaccompanied homeless individual with a disabling condition who has either been continuously homeless for a year or more, or has at least four (4) episodes of homelessness in the past three (3) years.” *Id.* at 1 n.4.

⁶ See *Feeding Intolerance*, *supra* note 4, at 7, 10–11 (explaining, for example, that Atlanta’s food sharing restrictions were implemented to “clean up the city,” Dallas’s food sharing restrictions were imposed for food safety and littering concerns, and Baltimore’s food sharing restrictions were enforced for public health reasons); see also D. Matthew Lay, Note, *Do Not Feed the Homeless: One of the Meanest Cities for the Homeless Unconstitutionally Punishes the So-Called “Enablers,”* 8 NEV. L.J. 740, 757 (2008) (noting that the “justification for the [Las Vegas food sharing] ordinance shifted depending on the circumstances” and the only person to provide evidence in support of the ordinance cited largely irrelevant evidence related to “the safety of the homeless . . . and the litter attendant to mobile feedings”).

Although the Ninth Circuit Court of Appeals decided in *Millis*'s favor, this Comment argues that the court's decision will enable cities to drive out homeless populations by creating anti-littering or public safety regulations, which will wrongly punish individuals and charities trying to provide the homeless with basic human necessities.⁷ Part I discusses the two compelling interests involved in the *Millis* case and the majority's unconvincing attempt to protect them. Part II illustrates the challenges facing homeless individuals as well as the similarities between the facts in *Millis* and the problems facing charitable efforts to help the homeless. Part III explains how the *Millis* decision protects a city's ability to enforce food sharing restrictions against individuals and charities that try to feed the homeless. Lastly, Part IV argues that the court could have protected the two compelling interests in *Millis*—the government's interest in protecting federal wildlife refuges and *Millis*'s interest in providing humanitarian aid—by declaring that humanitarian aid is a form of speech protected by the First Amendment.

I. *MILLIS*: THE DESIRE TO PROTECT TWO COMPELLING INTERESTS

In *Millis*, the Ninth Circuit faced a difficult decision—the court could either uphold a regulation designed to protect the nation's wildlife refuges or protect *Millis*'s right to engage in humanitarian aid.⁸ In the end, the Ninth Circuit reversed the judgment of the district court, thereby overturning *Millis*'s conviction.⁹ The court based its decision on the ambiguity of the regulation *Millis* violated, however, and not on the nature of his conduct.¹⁰ The result was an unconvincing majority opinion finding that the word “garbage” in 50 C.F.R. § 27.94(a) was ambiguous.¹¹ Judge Jay S. Bybee, in dissent, easily refuted this position on a variety of grounds.¹²

⁷ See *Millis*, 621 F.3d at 916 n.2. The court's focus on statutory construction and its statements in dicta protecting general littering policies may provide a roadmap for cities to codify their anti-homeless ambitions effectively through littering or public safety statutes. See *Feeding Intolerance*, *supra* note 4, at 10–17.

⁸ See *United States v. Millis*, 621 F.3d 914, 914–16 (9th Cir. 2010).

⁹ *Id.* at 918.

¹⁰ See *id.*; Disposal of Waste, 50 C.F.R. § 27.94(a) (2010).

¹¹ See *Millis*, 621 F.3d at 917.

¹² See *id.* at 919–24 (Bybee, J., dissenting). Judge Bybee found “no need to invoke the rule of lenity” because “[the regulation] can be understood by persons of ordinary intelligence.” *Id.* at 919. Bybee argued that the majority largely ignored the term “littering” and unnecessarily focused on the term “garbage,” despite the fact that *Millis*'s citation was for “littering in a National Wildlife Refuge.” See *id.* at 920. He argued, “[L]eaving plastic bottles in a wildlife refuge is littering under any ordinary, common meaning of the word.” *Id.*

Millis left water bottles in the refuge because of his involvement with the organization No More Deaths.¹³ No More Deaths seeks to prevent the unnecessary deaths of illegal immigrants crossing the border into the United States by providing them with humanitarian aid.¹⁴ In 2007 alone, because of the sweltering heat and increased California border security, 218 migrant bodies were found in the deserts of Pima County, Arizona.¹⁵ One way the organization attempts to mitigate this humanitarian tragedy is to place full bottles of water along frequently traveled immigration routes to help curtail dehydration and exposure deaths.¹⁶

On February 22, 2008, Millis and three other No More Deaths volunteers placed bottles of purified water along the trails of the refuge.¹⁷ Leaving water bottles along the trails of the refuge was not a careless act of littering, but rather a deliberate humanitarian effort to prevent the deaths of migrants.¹⁸ Nevertheless, Millis and the three other volunteers acted without a permit and a U.S. Fish and Wildlife Service officer

at 919. Furthermore, even if “garbage” were the key regulatory word, it must be defined as “discarded material” because “useless material” is too subjective. *See id.* at 921–22.

¹³ *See id.* at 915 (majority opinion).

¹⁴ *See id.*; Carol J. Williams, *Conviction in Migrant-Water Case Overturned*, L.A. TIMES, Sept. 3, 2010, at AA3; Ashby Jones, *Do-Gooder or Polluter? Ninth Circuit Lets Aid Worker Off the Hook*, WALL ST. J. L. BLOG (Sept. 3, 2010, 9:45 AM), <http://blogs.wsj.com/law/2010/09/03/do-gooder-or-polluter-ninth-circuit-lets-aid-worker-off-the-hook>.

¹⁵ *See* Nicole Santa Cruz, *Border Deaths Unabated*, L.A. TIMES, Aug. 24, 2010, at A1 (“In 2007, a record 218 bodies were found in Pima County. This year, the death toll could be worse. Already, authorities have recovered the remains of 170 migrants.”).

¹⁶ *See* Millis, 621 F.3d at 915. According to the organization’s website, “No More Deaths is an organization whose mission is to end death and suffering on the U.S./Mexico border through civil initiative: the conviction that people of conscience must work openly and in community to uphold fundamental human rights.” *History and Mission of No More Deaths*, NO MORE DEATHS, <http://www.nomoredeaths.org/Information/history-and-mission-of-no-more-deaths.html> (last visited May 8, 2011). When it was established in 2004, No More Deaths described its organizational mandate as follows:

[T]o provide water, food, and medical assistance to migrants walking through the Arizona desert; to monitor [U.S.] operations on the border and work to change [U.S.] policy to resolve the “war zone” crisis on the border; and to bring the plight of migrants to public attention. These goals were implemented by recruiting aid programs as well as supporting already-existing ones, by interfaith, humanitarian, peaceful, solidarity-building events, and by establishing camps for assistance, outreach and border monitoring. Under the No More Deaths umbrella, participating groups—staffed by volunteers—abided by clear medical and legal protocols and worked in concert to save human lives.

Id.

¹⁷ *See* Millis, 621 F.3d at 915–16.

¹⁸ *See* Williams, *supra* note 14; Jones, *supra* note 14.

issued *Millis* a citation for “Disposal of Waste” on a national wildlife refuge.¹⁹

Without question, the government had a legitimate reason to enforce a strict littering policy.²⁰ The refuge in which *Millis* was operating is located in Pima County, Arizona, near the Mexican border.²¹ It provides approximately 118,000 acres of “some of the southwest’s rarest habitats for seven endangered species, ten species of concern, and many other native plants and wildlife.”²² Unfortunately, the refuge is in danger because of a lack of funding and the need for rangers to spend eighty to one hundred percent of their time on border control enforcement.²³ The rangers are simply unable to stop littering, off-road vehicle crimes, or other acts capable of destroying the refuge’s fragile habitats.²⁴ By 2008, the destruction had become so widespread that the Buenos Aires National Wildlife Refuge became one of the ten most imperiled national wildlife refuges in the country.²⁵

It was against this factual backdrop that the Ninth Circuit found in *Millis*’s favor, although the court limited its decision strictly to the wording of 50 C.F.R. § 27.94(a).²⁶ The court reasoned that the term “garbage” within the regulatory scheme was “sufficiently ambiguous . . . that the rule of lenity should apply.”²⁷ The rule of lenity “requires courts to limit the reach of criminal statutes to the clear import of their text and construe any ambiguity against the government.”²⁸ The rule of lenity is

¹⁹ See *Millis*, 621 F.3d at 914–16.

²⁰ See *Williams*, *supra* note 14; *America’s Most Imperiled Refuges: Ten of the Most Vulnerable National Wildlife Refuges*, PUB. EMP. FOR ENVTL. RESPONSIBILITY, 11–13 (May 22, 2008) [hereinafter *America’s Most Imperiled Refuges*], http://www.peer.org/docs/nwr/08_22_5_imperiled_refuges_rpt.pdf (listing the Buenos Aires National Wildlife Refuge as one of the ten most threatened refuges).

²¹ See *Millis*, 621 F.3d at 919 (Bybee, J., dissenting); *Williams*, *supra* note 14; *Community Profile: Arivaca*, ARIZ. DEPARTMENT OF COMMERCE, 1 (2009), <http://www.azcommerce.com/doclib/commune/arivaca.pdf>.

²² *America’s Most Imperiled Refuges*, *supra* note 20, at 11; *Buenos Aires National Wildlife Refuge*, U.S. FISH & WILDLIFE SERVICE, 3 (Oct. 1999), http://library.fws.gov/refuges/buenos_aires.pdf. One of the endangered species in the refuge is the masked bobwhite quail; the Buenos Aires National Wildlife Refuge remains the last habitat for this wild bird within the United States. See *Millis*, 621 F.3d at 915 (majority opinion).

²³ See *America’s Most Imperiled Refuges*, *supra* note 20, at 12 (“Problems on the [U.S.]–Mexican border due to failed U.S. immigration policies are causing great damage to this refuge. Since 2006, over 3500 acres [have] been closed to public use, due to border-related problems.”).

²⁴ See *id.* at 11–12.

²⁵ *Id.* at 11.

²⁶ See *Millis*, 621 F.3d at 918; Disposal of Waste, 50 C.F.R. § 27.94(a) (2010).

²⁷ *Millis*, 621 F.3d at 918.

²⁸ *United States v. Romm*, 455 F.3d 990, 1001 (9th Cir. 2006) (citing authorities).

applicable “only where ‘after seizing every thing from which aid can be derived, the Court is left with an ambiguous statute.’”²⁹

The court considered the fact that water bottles have value to some people; it also took into account the dictionary definition of “garbage” as “food waste” or “discarded or useless material” and the definition of “discard” as “to get rid of, esp. as useless or unpleasant.”³⁰ Based on its analysis, the court concluded that it was unclear “whether purified water in a sealed bottle intended for human consumption meets the definition of ‘garbage.’”³¹ Therefore, the court found the meaning of “garbage” in 50 C.F.R. § 27.94(a) ambiguous enough to trigger the rule of lenity.³²

Judge Bybee, however, argued convincingly in his dissent that neither the intent nor the meaning of a regulation prohibiting littering in a wildlife refuge was in any way ambiguous.³³ According to Bybee, the majority overemphasized the term “garbage” when it was clear that the regulation intended to forbid the act of “littering.”³⁴ Although they contained purified water, Bybee argued, “The bottles are garbage because they are ‘discarded material,’ no matter the bottles’ potential value.”³⁵ Furthermore, Bybee found that state courts had dismissed claims that the terms “litter,” “garbage,” “waste,” or “refuse” were too vague in a number of previous cases.³⁶ Bybee’s reasoning is more persuasive and

²⁹ *Millis*, 621 F.3d at 917 (quoting *United States v. Nader*, 542 F.3d 713, 721 (9th Cir. 2008)).

³⁰ *See id.* (quoting MERRIAM-WEBSTER’S COLLEGIATE DICTIONARY 330, 480 (Frederick C. Mish et al. eds., 10th ed. 1996)).

³¹ *See id.*

³² *See id.* at 918.

³³ *See id.* at 919–23 (Bybee, J., dissenting). Judge Bybee stated, “Any item—whether a handbill advertising a land auction or a new high definition TV—brought into the wildlife refuge without the Service’s permission is litter, whether it has intrinsic value or not. It doesn’t belong on the wildlife refuge. The Service couldn’t have been more clear on this.” *Id.* at 921.

³⁴ *See Millis*, 621 F.3d at 920 (Bybee, J., dissenting). *Millis* was cited for “littering in a National Wildlife Refuge” and not for dumping garbage. *Id.* *Millis* even testified that refuge workers told him that “leaving ‘water jugs on that trail . . . constituted litter,’ and that he was ‘going to be cited for littering.’” *Id.*

³⁵ *See id.* at 921–22. Judge Bybee stated that the key feature of garbage was that it had been discarded: “The idea that garbage is ‘discarded,’ . . . comports with the everyday, common meaning of the term ‘garbage’ and is essential to its definition because it avoids a purely subjective inquiry into the material’s usefulness.” *See id.* at 921; *see also* *N. Ill. Serv. Co. v. EPA*, 885 N.E.2d 447, 552 (Ill. App. Ct. 2008) (“Whether an item has value has no bearing on whether it is discarded.”).

³⁶ *See Millis*, 621 F.3d at 923 n.6 (Bybee, J., dissenting); *see also* *State v. Clayton*, 492 So. 2d 665, 666–67 (Ala. Crim. App. 1986); *Sliney v. State*, 391 S.E.2d 114, 115 (Ga. 1990); *State v. Cox*, No. 92WM000017, 1993 WL 65457, at *1 (Ohio Ct. App. Mar. 12, 1993); *State*

well-supported than the majority's opinion, even though it failed to protect Millis' rights as a humanitarian.³⁷

II. THE SIMILARITIES BETWEEN *MILLIS* AND CHARITABLE EFFORTS TO FEED THE HOMELESS

Millis faced a problem similar to one that individuals and charities feeding the homeless face every day: possible punishment solely for trying to provide basic human necessities to impoverished people.³⁸ Unlike in *Millis*, however, the negative effect that laws have on the provision of humanitarian aid to the homeless is typically not accidental, but intentional.³⁹ Because homelessness can affect tourism, crime, public safety, and the overall local economy, cities often try to enforce laws that minimize the indigent population's visibility or even force the homeless to move elsewhere.⁴⁰ Many cities create food sharing restric-

v. Hood, 600 P.2d 636, 639 (Wash. Ct. App. 1979); *State v. Couch*, No. 2005AP1351, 2005 WL 3116313, at *3 (Wis. Ct. App. Nov. 23, 2005). Although the cases he cited were not binding on the Ninth Circuit, Judge Bybee found them to be examples of how "[s]tates have summarily dismissed the argument that the terms 'litter,' 'garbage,' 'waste,' or 'refuse' are too vague to pass constitutional muster." *Millis*, 621 F.3d at 923 n.6 (Bybee, J., dissenting); see also *Clayton*, 492 So. 2d at 666-67; *Sliney*, 391 S.E.2d at 115; *Cox*, 1993 WL 65457, at *1; *Hood*, 600 P.2d at 639; *Couch*, 2005 WL 3116313, at *3.

³⁷ See *Millis*, 621 F.3d at 918-24 (Bybee, J., dissenting). Judge Bybee provided several examples of cases where courts did not find the term "garbage" to be unreasonably vague. See *id.* at 921 & n.2, 923 & n.6; *Sliney*, 391 S.E.2d at 115; *Cox*, 1993 WL 65457, at *1. Judge Bybee further questioned the logic behind the majority's holding by stating,

[T]he majority would have the Service avoid using a term as common as "garbage" in its littering regulation. This is not what the rule of lenity requires. The rule of lenity "cannot dictate an implausible interpretation of a statute, nor one at odds with the generally accepted contemporary meaning of a term."

Millis, 621 F.3d at 923 (Bybee, J., dissenting) (quoting *Taylor v. United States*, 495 U.S. 575, 596 (1990)).

³⁸ See *Lay*, *supra* note 6, at 743-47 (discussing the legality of a Las Vegas ordinance that prohibited providing indigent people with food in parks); *Feeding Intolerance*, *supra* note 4, at 2; *Homes Not Handcuffs: The Criminalization of Homelessness in U.S. Cities*, NAT'L LAW CENTER ON HOMELESSNESS & POVERTY & NAT'L COALITION FOR THE HOMELESS, 9 (July 2009), http://www.nationalhomeless.org/publications/crimreport/crimreport_2009.pdf [hereinafter *Homes Not Handcuffs*] (discussing laws created to punish both the homeless and those who help them).

³⁹ See *Lay*, *supra* note 6, at 743-47; *Feeding Intolerance*, *supra* note 4, at 2; *Homes Not Handcuffs*, *supra* note 38, at 9.

⁴⁰ See Jason Leckerman, Comment, *City of Brotherly Love?: Using the Fourteenth Amendment to Strike Down an Anti-Homeless Ordinance in Philadelphia*, 3 U. PA. J. CONST. L. 540, 546 (2001) (explaining that cities perceive the homeless as an obstacle to revival). Enforcement of laws that remove the homeless is most severe during the tourist season. See Donald Saeling, Note, *Nowhere to Go: The Impacts of City Ordinances Criminalizing Homelessness*, 13

tions in order to deter individuals from assisting the homeless, with the ultimate goal of keeping the homeless out of city parks and public areas.⁴¹ Unfortunately, these laws only increase hardships for individuals who are already in desperate need of assistance.⁴² Over the years, society's feelings of sympathy toward the homeless have ranged from indifference, at best, to hostility, at worst.⁴³ Many people feel those who are

GEO. J. ON POVERTY L. & POL'Y 545, 552 (2006). Examples of such heightened enforcement include actions in Reno, Nevada before the annual increase in tourists, in New York City before the 2004 Republican National Convention, and in Little Rock, Arkansas before the opening of the Clinton Presidential Library. *See id.* During tourist season, homeless individuals go to the city parks and tourist attractions because these locations are where the most people are and thus where the homeless are more likely to receive money. *See* Leckerman, *supra*, at 541–42.

⁴¹ *See Homes Not Handcuffs*, *supra* note 38, at 14–15.

⁴² *See* Leckerman, *supra* note 40, at 546 (“Society’s economic and sociological shortcomings help cause and perpetuate homelessness”); Saelinger, *supra* note 40, at 550 (“[B]y virtue of their diminished access to the opportunities enjoyed by the majority of society, upward economic and social mobility is extremely difficult for the street homeless.”). Many shelters lack beds, forcing the shelters to turn many people away and leaving those people with no choice but to sleep on the streets. *See Hunger and Homelessness Survey: A Status Report on Hunger and Homelessness in America’s Cities*, U.S. CONFERENCE OF MAYORS, 15 (Dec. 2008), http://www.usmayors.org/pressreleases/documents/hungerhomelessnessreport_121208.pdf [hereinafter *Hunger and Homelessness Survey*] (“[C]ities occasionally must turn away individuals and families seeking shelter.”); *see also Homes Not Handcuffs*, *supra* note 38, at 8–9. According to the U.S. Conference of Mayors, eighteen percent of the homeless population in the United States in 2007 lived on the streets. *See Hunger and Homelessness Survey*, *supra*, at 16. Sadly, this trend has continued unabated—the number of homeless men and women continues to rise, and the situation is only expected to worsen in light of the foreclosure crisis, a general rise in poverty, and high overall unemployment. *See The Housing Crisis in Los Angeles and Responses to Preventing Foreclosures and Foreclosure Rescue Fraud: Hearing Before the Subcomm. on Hous. and Cmty. Opportunity of the H. Comm. on Fin. Servs.*, 111th Cong. 10 (2009) [hereinafter *The Housing Crisis*] (statement of Tanya Tull, President and Chief Executive Officer, Beyond Shelter). As a result of current economic conditions, an estimated 1.5 million additional people in California alone may become homeless over the next four years. *Id.* at 43 (statement of Caryn Becker, Policy Counsel, Center for Responsible Lending). At the 2008 U.S. Conference of Mayors, nineteen of the twenty-five cities surveyed reported an increase in homelessness and, on average, the cities reported a twelve percent increase. *See Hunger and Homelessness Survey*, *supra*, at 13. It is also estimated that at least 840,000 people are homeless on any given day and at least 2.5 to 3.5 million people will experience homelessness within a given year. *Homelessness in the United States and the Human Right to Housing*, NAT’L LAW CENTER ON HOMELESSNESS & POVERTY, at i (Jan. 14, 2004), <http://www.nlchp.org/content/pubs/HomelessnessintheUSandRightstoHousing.pdf>. Furthermore, one in every fifty children in America is homeless. NAT’L CTR. ON FAMILY HOMELESSNESS, AMERICA’S YOUNGEST OUTCASTS: STATE REPORT CARD ON CHILD HOMELESSNESS 15 (2009), available at http://www.homelesschildrenamerica.org/pdf/rc_full_report.pdf.

⁴³ *See* Saelinger, *supra* note 40, at 545–46. One reason many people support anti-nuisance laws or other laws that punish the behavior of homeless individuals is that people have become tired of caring about the issue. *See id.* at 545 n.5, 554 (referring to this problem as “compassion fatigue”); *see also* Gary Blasi, *And We Are Not Seen: Ideological and Political Barriers to Understanding Homelessness*, 37 AM. BEHAV. SCIENTIST 563, 569–75 (1994) (study-

homeless “choose” to be so.⁴⁴ In addition, early efforts to provide homeless men and women with low-income housing and shelters have given way to efforts designed to keep the homeless out of the community because of their effect on local businesses, crime, and property values.⁴⁵ The measures cities take to remove the homeless include actions that both directly and indirectly affect the homeless.⁴⁶ Measures or laws that directly punish the behavior of the homeless have drastically increased in the last few years; these include anti-nuisance laws, laws that prohibit sleeping, sitting, or storing personal belongings in public spaces, and police sweeps of areas where the homeless generally live.⁴⁷

The homeless are further burdened by laws with indirect effects—for example, some cities have enacted food sharing restrictions that punish individuals and charities for trying to provide food to the homeless.⁴⁸ When cities or towns create food sharing restrictions in public

ing the drastic shift in the nature of *New York Times* articles about the homeless over the course of the 1980s).

⁴⁴ See Saelinger, *supra* note 40, at 558 (noting courts and the public are “increasingly skeptical of the ‘helplessness’ of the homeless”). In reality, homelessness often is not a choice, and homeless people with alcohol or drug problems or mental disorders are sometimes unable to receive the help they need. *See id.* at 549 n.43. The homeless population’s situation is self-perpetuating—they are frequently excluded from shelters or homeless programs because of their mental health or substance abuse disorders and they are often prevented from acceptance into substance abuse treatment or mental health programs because they are homeless. *See id.*

⁴⁵ See Deirdre Oakley, *Housing Homeless People: Local Mobilization of Federal Resources to Fight NIMBYism*, 24 J. URB. AFF. 97, 98 (2002), available at <http://onlinelibrary.wiley.com/doi/10.1111/1467-9906.00116/pdf> (addressing the rise in “NIMBYism”—individuals claiming that homelessness is a problem that needs to be addressed but “not-in-my-backyard”); *see also* Saelinger, *supra* note 40, at 554–55 (discussing city efforts to make the homeless less visible).

⁴⁶ See Saelinger, *supra* note 40, at 550–53; *Homes Not Handcuffs*, *supra* note 38, at 9–10.

⁴⁷ See *Homes Not Handcuffs*, *supra* note 38, at 9–11. Comparing the 224 cities surveyed, there was a seven percent increase in public camping prohibitions, an eleven percent increase in anti-public loitering laws, a six percent increase in anti-public begging laws, and a five percent increase in aggressive panhandling prohibitions. *Id.* at 10–11. Police sweeps in areas where homeless sleep is a tactic cities employ to “to drive them out of those areas, frequently resulting in the destruction of individuals’ personal property such as important personal documents and medication.” *Id.* at 10. Additionally, the homeless have been burdened unfairly and disproportionately by more neutral laws—for example, open container laws, loitering laws, and public urination laws—because such laws are selectively enforced in areas with no public facilities. *See id.*

⁴⁸ *See id.* at 25. *See generally* *Feeding Intolerance*, *supra* note 4 (discussing the impact of food sharing restrictions and suggesting possible alternatives). Major cities that have recently enacted or enforced food sharing restrictions that may, or already do, negatively impact an individual’s or charity’s ability to feed the homeless include the following: Atlanta, Georgia; Baltimore, Maryland; Chattanooga, Tennessee; Cincinnati, Ohio; Dallas, Texas; Denver, Colorado; Fort Lauderdale, Florida; Fort Myers, Florida; Gainesville, Florida; Hempstead, New York; Jacksonville, Florida; Las Vegas, Nevada; Miami-Dade County,

spaces, homeless charities and individual humanitarians are prevented from best utilizing their finite resources to help the people most in need of their services.⁴⁹ Similar to the scenario in *Millis*, charities or religious organizations that focus on providing basic goods need to go where their efforts can have the most significant impact.⁵⁰ Most homeless shelters lack the proper resources to feed all those seeking food.⁵¹ Furthermore, many homeless must travel long distances to reach shelters, or they may be unable to reach the shelters at all due to “work conflicts, illness, disability, or lack of adequate public transportation.”⁵² If homeless charities and organizations are forbidden to provide food to the homeless in public spaces and parks because of ostensibly neutral food sharing restrictions, they are unable to fulfill their humanitarian mission.⁵³

Nevertheless, many cities restrict efforts to serve the homeless in public places, thereby thwarting such humanitarian activities, for the purpose of preventing the homeless from remaining in the area.⁵⁴ Proponents of these laws claim that sharing food with the homeless only enables them to remain homeless.⁵⁵ Not only is this justification misguided, but it is also flatly wrong.⁵⁶ The cause of a person’s homelessness is more likely tied to a lack of affordable housing, shelter space, available employment, services to help individuals with mental or physical illnesses, or substance abuse treatment services.⁵⁷ Providing the homeless with easy access to food greatly increases their chances of survival and allows them to focus on what they need to do to improve their quality of life.⁵⁸ Providing food does not promote homelessness.⁵⁹

Florida; Orlando, Florida; Pinellas Park, Florida; Portland, Oregon; San Francisco, California; Santa Monica, California; Sarasota, Florida; Tampa, Florida; West Palm Beach, Florida; and Wilmington, North Carolina. *Feeding Intolerance*, *supra* note 4, at 10–18.

⁴⁹ See *Feeding Intolerance*, *supra* note 4, at 6–7.

⁵⁰ See *id.*

⁵¹ *Id.* The efforts of food pantries are impeded by the same problems shelters face because most homeless people lack the necessary kitchen equipment to cook the food and many pantries can only give away one package of food per person, per month. *Id.* at 6.

⁵² *Id.* at 7.

⁵³ See *id.* (“Food sharing programs that reach out to those in public spaces may be the only way some homeless individuals can obtain healthy and safe food.”).

⁵⁴ See *Feeding Intolerance*, *supra* note 4, at 7.

⁵⁵ See *id.*

⁵⁶ See *id.*

⁵⁷ See *id.*

⁵⁸ See *id.* (“Depriving a person of food means that she must put all of her energy into obtaining food and less energy on improving other aspects of her life.”).

⁵⁹ See *Feeding Intolerance*, *supra* note 4, at 7.

III. THE UNNECESSARY BURDENS *MILLIS* IMPOSES ON EFFORTS TO FEED THE HOMELESS

The *Millis* decision may make it even more difficult for charities and individuals to provide food or basic provisions to the homeless.⁶⁰ The Ninth Circuit's opinion appears to reflect a desire to protect *Millis*'s actions without creating a precedent that might hinder the government's ability to enforce other littering policies.⁶¹ Nevertheless, the decision may negatively, albeit indirectly, affect efforts to provide aid to the homeless in a number of ways.⁶² First, the decision focused on the ambiguity of the statute rather than the underlying constitutional reasons for protecting *Millis*'s humanitarian activity.⁶³ Second, the decision had a very narrow scope.⁶⁴ Third, dicta indicated that *Millis* could have been charged under a clearer or more general regulation.⁶⁵ Lastly, the decision went so far as to provide examples of the kind of regulations under which *Millis* could have been convicted.⁶⁶ Although the decision ultimately overturned *Millis*'s conviction, it gave cities a blueprint for creating laws that punish individuals providing the homeless with basic human necessities, thereby arming cities with a weapon to wield against the homeless to keep them out of public spaces.⁶⁷

⁶⁰ See *United States v. Millis*, 621 F.3d 914, 918 (9th Cir. 2010) (noting that *Millis*'s conviction would be upheld if he had been cited for "abandonment of property or failure to obtain a special use permit" or charged under a more general littering policy). See generally *Feeding Intolerance*, *supra* note 4 (analyzing littering policies that restrict charitable efforts to feed the homeless); *Homes Not Handcuffs*, *supra* note 38 (discussing the problem of city-enacted littering policies designed to burden the homeless).

⁶¹ See *Millis*, 621 F.3d at 918 (declaring the court is only looking at a "narrow question"). The court noted that *Millis* likely could be charged under a different regulation, but noted that such a question was not presented in the case. *Id.* "The only question [was] whether the rule of lenity should be applied to the offense charged." *Id.* The court also stated that it was only considering the "narrow question . . . [of] whether the term 'garbage' within the context of the regulation was sufficiently ambiguous." *Id.*

⁶² See *id.* at 916 n.2, 918; see also *Feeding Intolerance*, *supra* note 4, at 2–18 (discussing food sharing restrictions that burden humanitarian efforts with the homeless); *Homes Not Handcuffs*, *supra* note 38, at 9–10 (providing examples of ostensibly neutral laws that impact homeless populations almost exclusively.).

⁶³ See *Millis*, 621 F.3d at 918.

⁶⁴ See *id.* The court noted that its decision did not extend to "any number of objects" that may be left in a refuge because "such items may well be prohibited by other regulations applicable to refuge lands" and recognized that it would have no problem upholding *Millis*'s conviction if he were cited for violating a more general littering policy. See *id.* at 916 n.2, 918 n.6.

⁶⁵ See *id.* at 918.

⁶⁶ See *id.* at 916 n.2, 918 n.6.

⁶⁷ See *id.* at 914–24; see also *Feeding Intolerance*, *supra* note 4, at 2–18 (discussing food sharing restrictions that burden humanitarian efforts with the homeless); *Homes Not Hand-*

Millis fails to protect humanitarian work because the majority decided the case solely on the ambiguity of the regulation's wording and not on *Millis*'s right to help those in need.⁶⁸ During his bench trial, *Millis* admitted to placing the bottles of water in the refuge, but he testified that leaving the bottles of water out was an act of humanitarian aid and, consequently, not a crime.⁶⁹ The majority implicitly refused to declare that humanitarian aid is a protected interest but it had no misgivings announcing it would have affirmed *Millis*'s conviction if the law were a general prohibition on littering.⁷⁰ The court also stated, "*Millis* likely could have been charged under a different regulatory section, such as abandonment of property or failure to obtain a special use permit."⁷¹ Such dicta communicates to cities that as long as the language of a regulation is clear, it can be enforced against someone trying to provide aid to those in need.⁷² Judge Bybee went further in dissent, providing the exact wording of a regulation even the majority agreed it would have upheld.⁷³ Therefore, although the court struck down part of a regulation that had the secondary effect of punishing humanitarian efforts, the decision will ultimately make it easier for cities to create similar regulations that intentionally punish humanitarian efforts like feeding the homeless.⁷⁴

cuffs, *supra* note 38, at 9–10 (providing examples of ostensibly neutral laws that impact homeless populations almost exclusively).

⁶⁸ See *Millis*, 621 F.3d at 918 (focusing only on the rule of lenity issue and thus declining, implicitly, to address issues such as constitutional protection for humanitarian work as a form of expressive conduct).

⁶⁹ See *id.* at 916.

⁷⁰ See *id.* at 916 n.2. The court declared,

We would have no problem affirming *Millis*'s conviction if, as [Judge Bybee's] dissent contends, § 27.94 prohibited littering in a wildlife refuge or disposing of or dumping garbage, refuse sewage, sludge, earth, rocks, or other debris. However, that is not the text of the regulation. Rather than generally prohibiting littering, § 27.94 governs Disposal of Waste.

Id. (internal quotation marks omitted).

⁷¹ *Id.* at 918. In a footnote, the decision listed items that are either important or basic necessities that would be donated to homeless individuals, declaring that abandoning such items would be prohibited. See *id.* at 918 n.6 ("[W]e do not hold that 'any number of objects (for example, sleeping bags, packaged food, clothing, flashlights, plastic bags, or shoes) can be left in the . . . refuge.'" (quoting *Millis*, 621 F.3d at 923 (Bybee, J., dissenting))).

⁷² See *id.* at 915–18.

⁷³ See *Millis*, 621 F.3d at 916 n.2; *id.* at 919 n.1 (Bybee, J., dissenting).

⁷⁴ See *id.* at 916 n.2, 918 (majority opinion); Lay, *supra* note 6, at 743–47; *Feeding Intolerance*, *supra* note 4, at 5–6; *Homes Not Handcuffs*, *supra* note 38, at 9.

IV. A SOLUTION TO THE *MILLIS* PROBLEM: DEFINING HUMANITARIAN AID AS FREE SPEECH

By defining Millis's actions as expressive conduct—a form of speech entitled to First Amendment protection—the Ninth Circuit could have prevented its decision from burdening or altogether precluding other forms of charity and humanitarian aid.⁷⁵ A reasonable observer would understand that Millis's conduct was an expression of his dissatisfaction with the United States' efforts to stop the dehydration deaths of migrants entering the country through the Arizona deserts.⁷⁶ Concededly, 50 C.F.R. § 27.94(a) is a content-neutral regulation supported by an important governmental interest.⁷⁷ The restriction, however, was broader than necessary with respect to the government's interest.⁷⁸ Additionally, the court could have explained how to word a less restrictive regulation that still managed to protect the government's interest.⁷⁹ The conduct of Millis and the other No More Deaths volun-

⁷⁵ See *Islamic Am. Relief Agency v. Unidentified FBI Agents*, 394 F. Supp. 2d 34, 51–54 (D.D.C. 2005) (finding that charitable donations to an organization for humanitarian efforts constituted free speech even if the organization funded terrorism, but upholding an Executive Order restricting such donations because the order passed intermediate scrutiny); *Lay*, *supra* note 6, at 756 (arguing that feeding the homeless is speech because of the various political motives).

⁷⁶ See *Texas v. Johnson*, 491 U.S. 397, 404 (1989) (recognizing expressive conduct as free speech); *Williams*, *supra* note 14; *Jones*, *supra* note 14. Following the decision, Millis stated, “The day we change our federal border policies to show respect for human life is the day I’ll feel vindicated.” *Williams*, *supra* note 14.

⁷⁷ See *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 624 (1994). A regulation is content-neutral if the legislative intent is neither to favor nor disfavor speech. See *id.* at 624. For a statute to be content-neutral, it must not restrict “either a particular viewpoint or any subject matter that may be discussed.” *Hill v. Colorado*, 530 U.S. 703, 723 (2000). Because the purpose of the regulation at issue in *Millis* was to prevent the disposal or abandonment of property in a wildlife refuge—that is, its aim was not to limit a particular viewpoint or subject matter—it could appropriately be considered content-neutral. See *United States v. Millis*, 621 F.3d 914, 918 (9th Cir. 2010). Also, given the imperiled status of the Buenos Aires National Wildlife Refuge and the government's desire to prevent further degradation of the habitat, the regulation pursuant to which Millis's citation was issued furthered an important governmental interest. See *America's Most Imperiled Refuges*, *supra* note 20, at 11–12.

⁷⁸ See *United States v. O'Brien*, 391 U.S. 367, 376–77 (1968) (holding that a content-neutral regulation must be no more restrictive than necessary); *Millis*, 621 F.3d at 918 (finding the purpose of the regulatory scheme was “to prevent the disposal or abandonment of unauthorized property on refuge land” and “the structure of the regulatory scheme achieves that end in a number of ways”). The court found that 50 C.F.R. § 27.94(a) “was not intended to be a comprehensive implementation of the Congressional mandate to minimize human impact on wildlife refuges; rather, it formed part of a larger regulatory scheme.” *Millis*, 621 F.3d at 918.

⁷⁹ See *O'Brien*, 391 U.S. at 376–77; *Millis*, 621 F.3d at 918. Millis argued that the regulation was not narrowly tailored because it did “not cover the dissemination of pure water in

teers communicated their dissatisfaction with U.S. immigration policies and their belief that those policies devalue human life.⁸⁰ Although the bottles themselves did not indicate their purpose explicitly, a reasonable observer aware of the problem of exposure deaths in Arizona—an issue that had made headlines across the nation—could infer the meaning of a series of unopened water bottles deliberately left along trails in the desert.⁸¹ Moreover, Millis communicated his affiliation with No More Deaths by openly displaying a “NoMoreDeaths.org” decal on the vehicle he used to distribute the water bottles.⁸²

Similarly, the act of feeding the homeless in public spaces is a protected form of expressive conduct.⁸³ Publicly feeding the homeless communicates to a reasonable observer, or the homeless individual being fed, that individuals should show compassion for those in need by providing them with basic human necessities.⁸⁴

The government’s interests in protecting the federal wildlife refuges or ensuring public safety and order may properly limit the right to free expression manifested in humanitarian efforts.⁸⁵ For example, 50 C.F.R. § 27.94(a) is a content-neutral regulation and its effect on Millis’s

sealed jugs for consumption by humans.” See *United States v. Millis*, No. CR 08-1211-TUC-CKJ, 2009 WL 806731, at *4 (D. Ariz. Mar. 20, 2009), *rev’d*, 621 F.3d 914 (9th Cir. 2010) (citing *Schneider v. New Jersey*, 308 U.S. 147 (1939)). Furthermore, Millis should not be cited for any water bottles that were found empty because the people who drank the bottles were the actual litterers. See *Schneider*, 308 U.S. at 162 (finding that anti-littering ordinances, which prohibit leaflet distribution, unconstitutionally infringe free speech rights because “[t]here are obvious methods of preventing littering” such as “the punishment of those who actually throw papers on the streets”). For the same reason, a charity that feeds the poor should not be cited for food left behind by a person the charity served. See *id.*

⁸⁰ See *supra* note 16 and accompanying text.

⁸¹ See *Johnson*, 491 U.S. at 404 (recognizing expressive conduct as free speech); Williams, *supra* note 14; Jones, *supra* note 14. See generally Maria Jimenez, *Humanitarian Crisis: Migrant Deaths at the U.S.-Mexico Border*, ACLU OF SAN DIEGO & IMPERIAL COUNTIES & MEX’S NAT’L COMMISSION OF HUM. RTS. (Oct. 1, 2009), http://www.aclu.org/files/pdfs/immigrants/humanitarian_crisisreport.pdf (referring to the problem of border-crossing deaths as a “humanitarian crisis”).

⁸² See *Millis*, 621 F.3d at 915 (“[Millis] also testified that he had raised the back window when [the officer] approached to make visible his ‘NoMoreDeaths.org’ decal.”). It can also be inferred that the bottles conveyed a message to the immigrants that at least some people were concerned for their well-being. See *Spence v. Washington*, 418 U.S. 405, 410–11 (1974) (per curiam) (recognizing “the expression of an idea through activity” if it is likely that those looking at the message would understand it).

⁸³ See Lay, *supra* note 6, at 753–58 (arguing that food sharing with the homeless is an expressive form of speech); *Homes Not Handcuffs*, *supra* note 38, at 25 (discussing the possibility that courts might find food sharing restrictions infringe upon free speech rights).

⁸⁴ See Lay, *supra* note 6, at 756.

⁸⁵ See discussion *supra* Part I.

expression was incidental.⁸⁶ Nevertheless, if conduct contains both speech and non-speech elements, even a content-neutral regulation must be struck down if the government's interest can be achieved by less restrictive means.⁸⁷ The regulation at issue in *Millis*, and city ordinances throughout the United States relating to littering or public health and safety, could achieve their purposes through less restrictive means.⁸⁸

In addition, content-neutral regulations cannot unreasonably limit alternative avenues of communication.⁸⁹ If individuals are prohibited from providing water directly to immigrants or giving food to the homeless in public places, then the individuals' humanitarian messages have no practical significance.⁹⁰ Regulations could be written less re-

⁸⁶ See *O'Brien*, 391 U.S. at 376 (finding that a law that incidentally limits free speech can be upheld if it protects "a sufficiently important governmental interest"); Disposal of Waste, 50 C.F.R. § 27.94(a) (2010).

⁸⁷ See *O'Brien*, 391 U.S. at 377; see also *Lay*, *supra* note 6, at 747 ("When a course of conduct combines speech and non-speech elements, the state may justify incidental limitations on First Amendment freedoms supporting a sufficiently important government interest in regulating the non-speech element."). The Court in *United States v. O'Brien* stated,

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

391 U.S. at 377.

⁸⁸ See *Millis*, 621 F.3d at 918 (finding that the intent of the regulatory scheme was to prevent the disposal or abandonment of property in a wildlife refuge); *Millis*, 2009 WL 806731, at *4 (noting defendant's argument, relying on *Schneider v. New Jersey*, that the regulation was not narrowly tailored); Williams, *supra* note 14 (stating that the court "also took note of *Millis*' practice of removing empty water bottles he found while on his missions"). For example, 50 C.F.R. § 27.94(a) could distinguish between (1) those who intend to return and retrieve abandoned property but who have either failed to declare that intent or have failed to retrieve the property within a reasonable period of time and (2) those who abandon property with no legitimate purpose and without an intent to return to retrieve the refuse. See *Millis*, 621 F.3d at 918.

⁸⁹ See *Clark v. Cmty. for Creative Non-Violence*, 468 U.S. 288, 293 (1984) (finding restrictions that infringe speech can only be valid if "they are justified without reference to the content of the regulated speech, that they are narrowly tailored to serve a significant governmental interest, and that they leave open ample alternative channels for communication of the information").

⁹⁰ See *Millis*, 621 F.3d at 915. *Millis*'s actions were not unlike the actions of another organization, Humane Borders, to which the U.S. Fish and Wildlife Service granted permission to leave drums of water on the refuge. See *id.* In fact, *Millis*'s more direct approach may have been more effective; the arresting officer in *Millis* testified that one of the drums was roughly two miles away. *Id.* Such a distance may have been too far or illegal immigrants may have been reluctant to travel to the drums out of fear of getting caught; moreover, these water stations have been systematically vandalized. See *id.*; Jimenez, *supra* note 81, at

strictively by providing for simple permit processes, requiring humanitarians to notify park rangers or city authorities of the locations of food or water dispensaries, and requiring the volunteers to return and retrieve leftover bottles or other refuse.⁹¹ These would not be unreasonable restrictions on humanitarian conduct.⁹²

Thus, prohibiting littering in wildlife refuges achieves governmental interests in the government's interest in ensuring public health and safety while also preserving humanitarians' fundamental right of expression.⁹³ By recognizing Millis's humanitarian efforts as expressive conduct protected by the First Amendment, the Ninth Circuit could have created a precedent that would not only protect the government's legitimate interest, but also shield charitable efforts to help the homeless.⁹⁴ If the act of providing water to immigrants, and by analogy the act of feeding the homeless, were considered forms of free speech, regulations such as 50 C.F.R. § 27.94(a), as well as a significant number of food sharing restrictions, might be invalidated.⁹⁵

39 ("[In late 2008], about 40 water stations were vandalized. Volunteers found cut flags, punctured water jugs and, in one case, a burned flag.")

⁹¹ See *Millis*, 621 F.3d at 915–16; Williams, *supra* note 14; *Feeding Intolerance*, *supra* note 4, at 2–19.

⁹² See *Millis*, 621 F.3d at 915–16; Williams, *supra* note 14; *Feeding Intolerance*, *supra* note 4, at 2–19.

⁹³ See *Millis*, 621 F.3d at 914–15; see also *O'Brien*, 391 U.S. at 377 (finding content-neutral regulations that accidentally infringe on speech must be no more restrictive than necessary to further a substantial governmental interest); *Schneider*, 308 U.S. at 162 (striking down a littering regulation that restricted speech because it was more restrictive than necessary to achieve its purpose); Lay, *supra* note 6, at 753–58 (arguing that food sharing restrictions infringe on free speech).

⁹⁴ See *Johnson*, 491 U.S. at 404 (recognizing expressive conduct as free speech); *Millis*, 621 F.3d at 914–15 (discussing the purpose of Millis's actions); Williams, *supra* note 14; see also Lay, *supra* note 6, at 743–47 (arguing that the food sharing restriction in Las Vegas violated the *O'Brien* test); *Feeding Intolerance*, *supra* note 4, at 2–18 (discussing food sharing restrictions that burden humanitarian efforts with the homeless).

⁹⁵ See *Turner Broad. Sys., Inc.*, 512 U.S. at 643. As the Supreme Court has noted, "[L]aws that by their terms distinguish favored speech from disfavored speech on the basis of the ideas or views expressed are content based," and so laws targeting food sharing might well be considered content based and thus subject to a higher level of scrutiny. See *id.* Even if it were proven that the food sharing restrictions were, in fact, content-neutral, it seems unlikely they would be upheld because they unreasonably limit the efforts to feed the homeless and do not employ the least restrictive means. See *Feeding Intolerance*, *supra* note 4, at 7–10, 18–19 (suggesting policy recommendations for cities to adopt in place of food sharing restrictions and discussing how "[f]ood sharing programs that reach out to those in public spaces may be the only way some homeless individuals can obtain healthy and safe food"). In addition, many anti-nuisance or begging statutes may be of dubious constitutionality. See Christine L. Bella & David L. Lopez, Note, *Quality of Life—At What Price?: Constitutional Challenges to Laws Adversely Impacting the Homeless*, 10 ST. JOHN'S J. LEGAL COMMENT. 89, 100 (stating that restrictions that regulate begging must meet the content-neutral standard).

CONCLUSION

The Ninth Circuit in *Millis* could have protected both the humanitarian efforts at stake and the government's interest in preserving national wildlife refuges if it had declared *Millis*'s actions to be expressive conduct protected by the First Amendment. Although the court overturned *Millis*'s conviction, its reasoning allowed for conviction on other grounds. Furthermore, the reasoning in *Millis* offers support for many cities' food sharing restrictions—laws that unfairly restrict the work of individuals struggling to feed homeless men and women. If the court had decided *Millis* on free speech grounds by finding that 50 C.F.R. § 27.94(a) was content-neutral but not the least restrictive means of advancing an important governmental interest, acts of humanitarian aid would be protected against unreasonable restrictions. Moreover, the majority would have overcome the criticisms found in Judge Bybee's dissent. Although there was a favorable outcome in *Millis*, the court should have recognized that *Millis*'s effort to aid migrants was a protected exercise of free expression communicating his compassion for others and urging society to respect the value of human life.

"The homeless have a strong interest in communicating their plight to the general public. Regulations that completely ban expressive conduct deprive a beggar of his or her ability to inform the public that economic and social conditions render it impossible for people to provide for themselves." *Id.* at 99.

