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The Panhandler's First Amendment Right: A Critique of *Loper v. New York City Police Department* and Related Academic Commentary

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THE PANHANDLER'S FIRST AMENDMENT RIGHT: A CRITIQUE OF *LOPER V. NEW YORK CITY POLICE DEPARTMENT* AND RELATED ACADEMIC COMMENTARY

*Peter Nichols**

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I. INTRODUCTION

The decision of the United States Court of Appeals for the Second Circuit in *Loper v. New York City Police Department*,¹ if it remains law, will continue the expansive tendency of twentieth century First Amendment jurisprudence and scholarship. This tendency has been complicated recently by the appearance of such issues as anti-abortion picketing² and campus speech codes, in which the traditional liberal enthusiasm for wider First Amendment protection and conservative resistance to it are reversed.³ *Loper* represents a

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1. 999 F.2d 699 (2d Cir. 1993).

2. *Madsen v. Women's Health Ctr.*, 114 S. Ct. 2516 (1994).

3. This phenomenon is reflected in books challenging the viability and value of free speech. See, e.g., STANLEY FISH, *THERE'S NO SUCH THING AS FREE SPEECH: AND IT'S A GOOD THING TOO* (1994); CASS R. SUNSTEIN, *THE PARTIAL CONSTITUTION* (1993); see also John O. McGinnis, *The Partial Republican*, 35 WM. & MARY L. REV. 1751 (1994) (reviewing CASS R. SUNSTEIN, *THE PARTIAL CONSTITUTION* (1993)).

traditional free speech controversy in this sense. The *Loper* doctrine will also figure in the increasingly intense debate over the state of our urban civilization. It is the latter aspect of public policy that gives the court's opinion its emotional impact. Although the case does not involve the violent crime and narcotics trafficking that have so ravaged and terrorized American cities, it does address one of their all too familiar aspects: the ubiquitous presence of street beggars or panhandlers. This presence remains somehow disconcerting to many law-abiding citizens, despite assurances from very distinguished sources that what they perceive as a blight is in fact harmless and should arouse compassion more than resentment. And when such assurances emanate from those adorned in the black raiment of adjudication, which bespeaks the stricture of law and the standard of civilized intercourse in a free society, the matter engenders a certain alarm. The overwhelming impulse is to respond on the issue of civic morality alone—to insist that a community, if it is to be happy and productive, cannot ask its members to run a gauntlet of more or less aggressive vagrants accosting them for money each time they leave their homes. Nor can such a response be deemed unnecessary, in light of the nostrums of social justice put forth with some passion by opponents of anti-begging statutes.⁴

The substantial body of scholarship now supporting a First Amendment right to beg often reflects a particular thesis concerning poverty in America. According to this thesis, ordinances against panhandling show callousness and have the objective of punishing, silencing and concealing the homeless. It seems that our society bears a heavy onus for the homeless population's very existence. The denial of First Amendment protection turns out to be the final blow. It relegates the homeless to the status of "constitutional castaways."⁵ It was bad enough that in the 1980s we elected Republican presidents, who were indifferent to the plight of society's most unfortunate persons,⁶ but to

4. See, e.g., Paul G. Chevigny, *Begging and the First Amendment: Young v. New York City Transit Authority*, 57 BROOK. L. REV. 525 (1991); Irah H. Donner, *Young v. New York City Transit Authority: The First Amendment Protects Flag Burners, Nazis, Professional Solicitors, and Commercial Advertisers: Did Our Framers Forget About the Poor?*, 59 TRANSP. PRAC. J. 152 (1992); Helen Hershkoff & Adam S. Cohen, *Begging to Differ: The First Amendment and the Right to Beg*, 104 HARVARD L. REV. 896 (1991); Nancy A. Millich, *Compassion Fatigue and the First Amendment: Are the Homeless Constitutional Castaways?*, 27 U.C. DAVIS L. REV. 255 (1994); Aaron Johnson, Note, *The Second Circuit Refuses to Extend Beggars a Helping Hand: Young v. New York City Transit Authority*, 69 WASH. U. L.Q. 969 (1991); Stephanie M. Kaufman, Comment, *First Amendment Protection of Begging in Subways*, 79 GEO. L.J. 1803 (1991); Charles F. Knapp, Comment, *Statutory Restriction of Panhandling in Light of Young v. New York City Transit: Are States Begging Out of First Amendment Proscriptions?*, 76 IOWA L. REV. 405 (1991); Anthony J. Rose, Note, *The Beggar's Free Speech Claim*, 65 IND. L.J. 191 (1989).

5. Millich, *supra* note 4, at 266-69.

6. Hershkoff & Cohen, *supra* note 4, at 898.

compound this mishap with laws preventing these people from begging on the public streets and subways is truly inhumane. Such laws, it is said, not only demonstrate a lack of empathy for the impoverished and an intolerance towards them but also represent a kind of cover-up.⁷ The ordinances against begging are intended to blot out the homeless, "to reduce their visibility."⁸ Beyond this, the proscription of panhandling constitutes a form of discrimination. The speech of the poor (understood as coeval with the class of derelicts who panhandle on streets and subways) alone is without protection.⁹ If it develops that citizens using the subways or public streets are unhappy about beggars accosting them, that unhappiness constitutes an unfortunate bias that the courts are bound to ignore.¹⁰ We are told that laws against panhandling do violence to the high moral principles of compassion and egalitarianism and that such laws indicate a malaise in the souls of those Americans who are not panhandlers and who object to their presence.

The foregoing makes it natural that someone attempt to offer a slightly different analysis of the anti-loitering statutes. Is their purpose really to effectuate a hard-heartedness towards the destitute? Is it not possible that laws against public begging are intended instead to preserve the modicum of public civility necessary to any successfully functioning society?¹¹ To address these questions thoroughly undoubtedly would be to overstep the bounds of this inquiry. It would involve examining the characteristics of the homeless, or more precisely, of the homeless who choose to beg.¹² It might even require determining whether all of those who beg really are homeless and destitute. This, in turn, would mean scrutinizing the portrait of the panhandlers entwined in the arguments of their legal, academic champions.¹³ The portrait tends to

7. Millich, *supra* note 4, at 259-61.

8. *Id.* at 259.

9. See, e.g., Donner, *supra* note 4, at 153; see also Lawrence Lessig, *The Regulation of Social Meaning*, 62 U. CHI. L. REV. 943, 1039-40 (1995) (suggesting that measures to limit panhandling are intended to impose a kind of social orthodoxy).

10. Donner, *supra* note 4, at 161-62.

11. Cf. THOMAS L. PANGLE, *THE ENNOBLING OF DEMOCRACY* 158-59 (1993); Robert C. Ellickson, *Controlling Chronic Misconduct in City Spaces: Of Panhandlers, Skid Rows and Public-Space Zoning*, 105 YALE L.J. 1165, 1173-78, 1181-84, 1246-48 (1996); Robert Teir, *Maintaining Safety and Civility in Public Spaces: A Constitutional Approach to Aggressive Begging*, 54 LA. L. REV. 285, 286-87, 294-95 (1993) (arguing that anti-begging ordinances are a constitutionally legitimate means by which a community may establish and maintain appropriate standards of public conduct); George Kelling, *Is There a Right to Beg?*, CITY J., Spring 1993, at 18-19. While generally supporting measures to control "public misconduct," Professor Ellickson's work also attempts to find economic "benefits" that may flow from begging. Ellickson, *supra*, at 1179-81.

12. This task has been undertaken adroitly in CHRISTOPHER JENCKS, *THE HOMELESS* (1994) and ALICE S. BAUM & DONALD W. BURNES, *A NATION IN DENIAL: THE TRUTH ABOUT HOMELESSNESS* (1993). See also Heather MacDonald, *San Francisco Gets Tough With the Homeless*, CITY J., Fall 1994, at 30, 34-35.

13. See, e.g., Millich, *supra* note 4, at 257-65 nn.1-21 (describing the homeless as formerly

be one of wholly functional, upstanding citizens forced into the streets by adverse economic circumstances.¹⁴ We might wonder whether this view of the panhandler applies to a few or to many persons.¹⁵ It perhaps is not the typical impression of anyone using a city street or subway. That impression often is one of drug addiction and alcoholism. It is sometimes one of apparently able-bodied but wastrel young men and women with white cups.¹⁶

productive members of society who have been forced into the streets by economic forces beyond their control).

14. *Id.* Similarly, a study cited in Anthony J. Rose's note on beggars' free speech attempts to show that "[t]he stereotype of the grizzled street alcoholic does not conform to the reality of homelessness today." Rose, *supra* note 4, at 199 n.47. The study assigns the following percentages to the reasons people of Seattle in 1986 requested shelter: Unemployment: 29%; Family Crisis/Eviction: 22%; Alcoholism: 21%; Domestic Abuse: 15%; Mental Illness: 13%. *Id.* Such statistics, as far as we can tell from this article, are based simply upon the reasons given by those requesting shelter, without any objective verification. There is no indication as to what the reason for the unemployment of the 29% so responding might have been. The implication is that the cited unemployment rate was unrelated to any of the other specified causes of homelessness (alcoholism, mental illness). Was drug abuse not a reason for anyone's homelessness in Seattle in 1986? See also BAUM & BURNES, *supra* note 12, at 116-17 (discussing the role of the news media and homeless advocates in perpetuating the notion that those in shelters or on the streets are just upstanding citizens afflicted with economic misfortune).

15. Cf. NEW YORK CITY COMMISSION ON THE HOMELESS, THE WAY HOME 6-30 (1992). The Commission observed, "Significant numbers of those without homes are people with physical, mental health and/or substance abuse problems." *Id.* at 9. Within the single homeless shelter population, drug testing proved positive in 65% of the cases. *Id.* at 28. "[S]lightly more than half (53%) of single shelter residents appear[ed] to have either a mental health or a self-reported drug abuse problem." *Id.* at 26. While these problems were found to be decidedly less commonplace among family shelter residents and the Commission certainly complained of economic causes, it noted that "the goal of welfare should be to help the recipient attain economic and social independence." *Id.* at 9. No one is likely to attain such independence by becoming a beggar on the public streets. The Commission's assertions regarding the connection between reduced federal funding and homelessness are assailed in JENCKS, *supra* note 12, at 98-99.

16. See, e.g., N.R. Kleinfeld, *Police Reach Out to the Homeless, But Often Find Efforts Rejected*, N.Y. TIMES, Nov. 16, 1994, at A1 (relating the reluctance of the homeless to accept offers from officers); Rita Kramer, *The Undeserving Poor*, WALL ST. J., Apr. 11, 1995, at A20 (recounting the author's recent efforts at enticing panhandlers to accept three nights lodging, food, clothing, counseling and further assistance instead of money); MacDonald, *supra* note 12, *passim* (describing the efforts of the San Francisco authorities to deal realistically with the homeless problem); David Seifman, *City Homeless Vanish If Asked to Prove Need*, N.Y. POST, July 28, 1994, at 11 (claiming that when the City of New York announced an eligibility screening of families applying for emergency shelter, 360 of 1075 families selected for such examination failed to appear); see also Heather MacDonald, *Hope for the Homeless?*, N.Y. TIMES, June 9, 1994, at A25 (supporting New York Mayor Giuliani's program for the homeless); Heather MacDonald, *The Homeless Rights Counterrevolution*, WALL ST. J., Nov. 30, 1994, at A18 (discussing the waning tide of sympathy for the homeless). But see Mary Brosnahan, *The Mayor's Empty Words*, N.Y. TIMES, June 9, 1994, at A25 (criticizing the Giuliani administration for introducing a program by which homeless families would be required to sign written plans for maintaining households, and prospective single shelter residents plans for mental health and drug treatment).

Of course, personal impressions vary and cannot by themselves form the basis of public policy. If the subject here were really homelessness and its remedy we might give more than perfunctory attention to the documentary evidence supporting one or the other analysis. The present concern, however, is the First Amendment. The reply to *Loper* and its academic defenders cannot be merely that such a holding sanctifies a public nuisance. For even if that were demonstrated to the satisfaction of an objective reader and even if it were shown that the problems of homelessness and poverty were better treated in ways other than protecting the street presence of beggars, the believers in the alleged right might reply that we pay a price for our constitutional liberties. They might suggest further that upholding the rights of despised and downtrodden is always unpopular, and that in *Loper*, the court braved the passions of a crime-ridden society in order to do its duty. It is necessary to deal with *Loper* and like decisions first and foremost with reference to the First Amendment issues that they present. Is panhandling protected speech? It is necessary, above all, to resist the tendency to separate the formalism of the law, the hermeneutics of *stare decisis* and statutory construction, from the discussion of controversial opinions.¹⁷ This tendency, like the politicization of judicial selection, implies the removal of whatever distinction is left between the political and judicial processes. It renders all constitutional debate a subterfuge, concealing a struggle over the extra-democratic formulation of policy.

The purpose of this article is to demonstrate that the doctrine espoused in *Loper*, and the academic writings that support it, represent an utter and lamentable distortion of First Amendment jurisprudence. Moreover, they have the effect of setting the Constitution at war with civic virtue and thereby with the best aspirations of the American people. The authors and defenders of *Loper* take the architectonic document of the American system, which must command the devotion of our citizens, and proclaim that it forces them to endure silently a mode of anti-social behavior each day of their lives.

II. THE SECOND CIRCUIT'S SOMEWHAT CONTRADICTIONARY CONTRIBUTION TO THE ISSUE

We shall begin with the two Second Circuit decisions addressing the question: *Loper* and *Young v. New York City Transit Authority*,¹⁸ its immediate predecessor. The *Young* opinion deals with panhandling in the

The Guillian program produced an immediate protest from such homeless advocates as Ms. Brosnahan.

17. Cf. Ernest J. Weinrib, *The Jurisprudence of Legal Formalism*, 16 HARV. J. L. & PUB. POL. 583 (1993) (arguing for the compatibility of morality and legal formalism).

18. 903 F.2d 146 (2d Cir. 1990).

subways. It denies First Amendment protection to subway beggars, but leaves open the possibility that panhandling might enjoy such protection on the public streets.¹⁹

The court in *Loper* holds that street begging is protected speech because it “usually involves some communication” akin to “a particularized social or political message,” namely “speech indicating the need for food, shelter, clothing, medical care or transportation.”²⁰ Furthermore, the beggar’s speech is no different from the solicitation of money for charities, which was held to be protected speech in *International Society for Krishna Consciousness, Inc. v. Lee*.²¹ The judges in *Loper* see “little difference between those who solicit for organized charities and those who solicit for themselves in regard to the message conveyed. The former are communicating the needs of others while the latter are communicating their personal needs.”²² Since “[b]oth solicit the charity of others,” the court concludes that “[t]he distinction is not a significant one for First Amendment purposes.”²³

Having found that begging is protected speech, the *Loper* panel determines that the New York public loitering statute impermissibly fails to impose the least obtrusive means of regulating its method and location. Specifically, if beggars commit “socially undesirable conduct” in the course of begging, the police can arrest them for other offenses such as harassment, disorderly conduct, fraudulent accosting and menacing.²⁴ It is therefore “ludicrous” to say that the ordinance against loitering for the purpose of begging is necessary to prevent such abuses.²⁵ The ordinance leaves open no “alternative channels of communication by which beggars can convey their messages of indigency” and so is different from the regulation in *Young*, which only kept them out of the subways.²⁶ The street is among the “quintessential public forums” in which “government may not prohibit all communicative activity.”²⁷ Finally, the court explains that the ordinance is not “content neutral because it prohibits all speech related to begging.”²⁸

Now, we must presume that the *Loper* court did not interpret the Penal Law section at issue as literally proscribing counsel for the plaintiff from discussing his case on the public streets, or as preventing a would-be beggar

19. *Id.* at 161.

20. *Loper v. New York City Police Dep’t*, 999 F.2d 699, 704 (2d Cir. 1993).

21. 505 U.S. 672 (1992).

22. *Loper*, 999 F.2d at 704.

23. *Id.*

24. *Id.* at 701-02.

25. *Id.* at 701.

26. *Id.* at 705.

27. *Id.* at 703 (quoting *Perry Educ. Ass’n v. Perry Local Educator’s Ass’n*, 460 U.S. 37, 45 (1983)).

28. *Id.* at 705 (emphasis added).

from remarking to his friend, or to anyone else, upon the law's injustice. Instead, the court surely means that the Penal Law section would prohibit all begging, or more precisely all "loitering for the purpose of begging."²⁹ Whether this is really pertinent to content neutrality, as previously defined, is another matter, to which we shall advert presently.

In making the above findings, the *Loper* panel claims to apply the standard for evaluating speech exercised in connection with conduct. This is the standard enunciated in the draft card-burning case, *United States v. O'Brien*:³⁰

[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.³¹

In *Loper*, the court devotes some attention to the *Young* opinion and its application of *O'Brien*. The *Young* opinion essentially says that panhandlers have alternative means of communicating their messages because "begging is prohibited only in the subway, not throughout all of New York City."³² The *Loper* court naturally emphasizes this one point. It provides the obvious basis for distinguishing *Young* and making it appear consistent with the First Amendment protection of street begging. To forbid panhandling in the subways is one thing, but to keep it off the streets as well is oppressive.

The *Young* opinion actually proceeds from the following analysis, which the court in *Loper* sees fit to ignore:

We initiate our discussion by expressing grave doubt as to whether begging and panhandling in the subway are sufficiently imbued with a communicative character to justify constitutional protection. The real issue here is whether begging constitutes the kind of "expressive conduct" protected to some extent by the First Amendment.

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."³³

29. *Id.* at 701.

30. 391 U.S. 367 (1968).

31. *Id.* at 377.

32. *Loper*, 999 F.2d at 702 (quoting *Young v. New York City Transit Auth.*, 903 F.2d 146, 160 (2d Cir. 1990)).

33. *Young*, 903 F.2d at 153 (quoting *Community for Creative Non-Violence v. Watt*, 703

In its elaboration of the “common and common-sense understanding” that panhandling is not protected speech, the *Young* court makes reference to the standard articulated in the flag-burning case, *Texas v. Johnson*,³⁴ and in *Spence v. Washington*.³⁵ These decisions state that the test for deciding when conduct constitutes First Amendment protected speech is “whether ‘[a]n intent to convey a particularized message was present, and [whether] the likelihood was great that the message would be understood by those who viewed it.’”³⁶ Using this standard, the *Young* opinion expressly rejects the notion that panhandling is protected speech: “[B]egging is not inseparably intertwined with a ‘particularized message.’ It seems fair to say that most individuals who beg are not doing so to convey any social or political message. Rather they beg to collect money.”³⁷ Even though some individual beggar may have a social message in mind, “there hardly seems to be a ‘great likelihood’ that the subway passengers who witness the conduct are able to discern what the particularized message might be.”³⁸ In rejecting the notion that the “message” of panhandlers is understood by its recipients, the court in *Young*, to some extent, does rely upon the circumstances of the New York City subways: “In the subway, it is the conduct of begging and panhandling, totally independent of any particularized message, that passengers experience as threatening, harassing and intimidating.”³⁹ Therefore, “[g]iven the passengers’ apprehensive state of mind, it seems rather unlikely that they would be disposed to focus attention on any message, let alone a tacit and particularized one.”⁴⁰ The court, nonetheless, makes clear that it views begging *per se* as fundamentally unrelated to communicative speech.

The only message that we are able to espy as common to all acts of begging is that beggars want to exact money from those whom they accost. While we acknowledge that passengers generally understand this

F.2d 586, 622 (D.C. Cir. 1983) (Scalia, J., dissenting), *rev’d*, 486 U.S. 288 (1984)).

34. 491 U.S. 397 (1989).

35. 418 U.S. 405 (1974).

36. *Johnson*, 491 U.S. at 404 (quoting *Spence*, 418 U.S. at 410-11). The Court appears to have abandoned the “particularized message” test in a more recent decision, *Hurley v. Irish-American Gay, Lesbian and Bisexual Group*, 115 S. Ct. 2338 (1995). The Court observes that “a narrow, succinctly articulable message is not a condition of constitutional protection, which if confined to expressions conveying a ‘particularized message,’ would never reach the unquestionably shielded painting of Jackson Pollock, music of Arnold Schönberg, or Jabberwocky verse of Lewis Carroll.” 115 S. Ct. at 2345 (citation omitted). Further decisions by the Court presumably will clarify whether the unqualified reversal of this criterion is intended.

37. *Young*, 903 F.2d at 153.

38. *Id.* at 153-54.

39. *Id.* at 154. See Teir, *supra* note 11, at 313-14.

40. *Young*, 903 F.2d at 154.

generic message, we think it falls far outside the scope of protected speech under the First Amendment. We certainly do not consider it as a "means indispensable to the discovery and spread of political truth."⁴¹

The court notes that the New York regulation does not prohibit the would-be beggars from speaking to subway passengers about poverty, social conditions or anything else. Rather, it prohibits a direct solicitation of funds from the passengers: "[T]he object of begging and panhandling is the transfer of money. Speech simply is not inherent to the act; it is not of the essence of the conduct."⁴²

The Second Circuit, therefore, has provided what are substantially contradictory analyses of the question at hand. The *Young* and *Loper* holdings could be reconciled, but only in their narrowest formulation. The facts of *Young* involve only subway begging, rendering the broader rejection of panhandling as protected speech *obiter dictum*. And yet, the detailed discussion in that opinion of the First Amendment status of panhandling and of the grounds for rejecting it as protected speech cannot be ignored. It has not been ignored. The *Young* court's underlying First Amendment interpretation is the object of the most severe academic criticism.

III. IS BEGGING PROTECTED SPEECH?

A. Objectives of the First Amendment

The essence of the *Loper* doctrine is that a beggar accosting passersby on the street is conveying a "particularized social or political message," thus commanding the protection of the First Amendment.⁴³ The premise of this determination is that the Amendment applies only to utterances characterized as having such a message. This viewpoint is congruent with the arguments known to the framers of the First Amendment and has been affirmed by the most illustrious exponents of free speech in subsequent generations. The First Amendment is, after all, a legal codification of Enlightenment discourse upon what Spinoza termed the "theological-political" problem and the related matter of free speech.⁴⁴ The history of this episode in western political

41. *Id.* (quoting *Whitney v. California*, 274 U.S. 357, 375 (1927) (Brandeis, J., joined by Holmes, J., concurring) (emphasis added), *overruled on other grounds by* *Brandenburg v. Ohio*, 395 U.S. 444 (1969)).

42. *Id.*

43. *Loper*, 999 F.2d at 704.

44. See Stanley Rosen, *Benedict Spinoza*, in *HISTORY OF POLITICAL PHILOSOPHY* 456, 463-75 (Leo Strauss & Joseph Cropsey eds., 1987); cf. WALTER BERNIS, *THE FIRST AMENDMENT AND THE FUTURE OF AMERICAN DEMOCRACY* 1-2, 22-23 (Regener Gateway 1985) (1976); FRANCIS CANAVAN, *FREEDOM OF EXPRESSION: PURPOSE AS LIMIT* 41-79, 143-52 (1984).

philosophy and its relationship to the Constitution has received its account and analysis elsewhere.⁴⁵ For present purposes, we need only recall the extent to which the freedom of speech tradition, before and after the enactment of the Bill of Rights, emphasized the preservation of diverse political opinion and learned discourse. The forging of enlightenment in an intellectually active society by the perpetual contention of truth, partial truth, and falsehood was ever the hope of free speech's most gifted exponents.⁴⁶

In its most famous expostulation, the case against the licensure or prior restraint of writings rested upon the contributions to society of unfettered rational inquiry and, above all, scholarly reflection.⁴⁷ Milton's *Areopagitica* was in fact most directed towards academic writings.⁴⁸ This is not intended to suggest that the speech or publication protected by the First Amendment should, on the basis of their historical antecedents, be confined to prose tracts or arguments on the subject of politics. Obviously, literary and other artistic works can and, through the centuries, have inspired thought and political change.⁴⁹ The free flow of information, including scientific knowledge, also emerges as a natural part of public discourse. The principle protects any written or verbal utterance that has the nature of or contributes to rational discussion. That fairly encompassing proposition, however, still implies the exclusion of certain sayings, writings, and demonstrative acts.

In Madison's very Lockean formulation, "a man has a property in his opinions and the free communication of them."⁵⁰ Furthermore, "[h]e has a property of peculiar value in his religious opinions, and in the profession and practice dictated by them."⁵¹ Madison identifies a property right in *opinions*, whether general or religious. Every verbal or written utterance, however, does not convey an opinion. Certainly every action does not, although lately, it seems that almost any deed or graphic display, short of robbery and murder, has such communicative intent as to command First Amendment protection. Madison's analysis may differ from those of his Enlightenment predecessors, but he plainly understands "speech" (apart from expressions of religious conviction) to be characterized by opinion or

45. E.g., CANAVAN, *supra* note 44, at 41-79, 143-52.

46. See, e.g., JOHN STUART MILL, UTILITARIANISM, LIBERTY, REPRESENTATIVE GOVERNMENT 83-123 (H.B. Acton ed., J.M. Dent & Sons 1984).

47. MILTON, *Areopagitica*, in THE PORTABLE MILTON 151-205 (Douglas Bush ed., Penguin Books 1977).

48. See CANAVAN, *supra* note 44, at 47; see also PANGLE, *supra* note 11, at 125-39, 158 (illuminating the connection between Milton's essay and its classical antecedents and the applicability of his and related ancient writings to our present intellectual life).

49. See CANAVAN, *supra* note 44, at 36.

50. James Madison, *Property*, NAT'L GAZETTE, Mar. 27, 1792, reprinted in 14 THE PAPERS OF JAMES MADISON 266, 266 (Robert A. Rutland et al. eds., 1983).

51. *Id.*; see also McGinnis, *supra* note 3, at 1758-73.

argument, rational at least in form, and against which counterargument is possible.⁵² Like them he leaves us with the problem of defining the type of speech to which the Amendment applies.⁵³

Our First Amendment jurisprudence did for some time recognize that the Amendment does not protect "the lewd and obscene, the profane, the libelous, and the insulting, or 'fighting' words—those which by their very utterance inflict injury or tend to incite an immediate breach of the peace."⁵⁴ This article of law certainly has been qualified, if not supplanted, by the succession of decisions since *Chaplinsky v. New Hampshire*, in which the preceding language first appeared. One innovation in the vocabulary of First Amendment adjudication that slightly antedates *Chaplinsky*, is the term "freedom of expression." This term may as well have replaced "freedom of speech" in the constitutional text, so often does it appear.⁵⁵ Many actions and displays

52. See THOMAS L. PANGLE, *THE SPIRIT OF MODERN REPUBLICANISM* 95 (1988) (analyzing Madison's intent in this passage as "to promote a spirited and admiring involvement in public life").

53. Partly relying upon Madison's article, McGinnis argues that rational discourse or "disinterested deliberation" in the Framers' understanding was not the basis for good government or free speech. McGinnis, *supra* note 3, at 1760-61, 1770-71. Rather, he points out that the Framers, while admiring "deliberation," believed that free speech was a property right, natural and absolute, regardless of the rationality of public debate. McGinnis, of course, is responding to recent attacks on freedom of speech by liberals who claim that this freedom is no longer performing its assigned function of assuring such deliberation. As McGinnis says, the origin and basis of the American system of government was a theory of natural right. This is the meaning of Jefferson's reference to "self-evident" truths near the beginning of the Declaration of Independence. Moreover, the Founders "treat love of liberty itself as an end and even as a kind of virtue." PANGLE, *supra* note 52, at 94-95. The inalienable rights to "life, liberty and the pursuit of happiness" indeed may include the liberty to express one's opinions freely. This is not to say, however, that the article of positive law known as the First Amendment, itself subject to judicial interpretation and amendment by legal procedure, constitutes something other than a means to effectuate the natural right. It is, furthermore, not to deny the Framers' hope that rational and disinterested deliberation would attend free speech, although they did indeed incorporate a variety of legal mechanisms to control the passions. See, e.g., *THE FEDERALIST*, No. 49, at 351 (James Madison) (Benjamin Fletcher Wright ed., 1974) ("But it is the reason, alone, of the public, that ought to control and regulate the government. The passions ought to be controlled and regulated by the government."); see also PANGLE, *supra* note 52, at 94-96. In other words, while it is true, as intimated by McGinnis, that the Framers did not rely upon "disinterested deliberation" alone to preserve freedom, they certainly preserved free speech, in part, to facilitate such deliberation. It is unnecessary to dispute this point in order to refute those who want to curtail free speech the moment they dislike the outcome of public debate. Rational deliberation is not their objective, but rather the unchallenged onrush of their egalitarianism.

54. *Chaplinsky v. New Hampshire*, 315 U.S. 568, 572 (1942); see BERNIS, *supra* note 44, at 188-228.

55. See CANAVAN, *supra* note 44, at xii, 153. Canavan's research suggests the term "freedom of expression" first appeared in *Bridges v. California*, 314 U.S. 252, 262, 265 (1941). The term "liberty of expression" appeared in *Schneider v. New Jersey*, 308 U.S. 147, 163 (1939).

of feeling that could not plausibly be called “speech” may nonetheless find First Amendment protection as “expression.”

Despite the foregoing tendency, there remains in our jurisprudence a vestige of the notion acknowledged both in the *Loper* opinion and in the scholarly writings defending its doctrine, namely, the notion that some definable articulate message must be discernable in First Amendment protected speech. This brings us to the central question suggested by the *Loper* opinion. Does begging, whether in the subway or on the street, constitute the sort of “speech” or “expression” that the First Amendment is supposed to protect?

B. Panhandling as Protected Speech: The Communication of “Need”

One need not look far to find an emphatically affirmative answer to the above question. The virtually unanimous legal academic community⁵⁶ now joins an increasingly sympathetic judiciary, with the *Young* panel constituting a rare exception.⁵⁷ Does this portend the ultimate adjudication of such a right by the Supreme Court?

That present First Amendment interpretation should differ from the earliest modern theory of free speech or from that of a few decades ago is perhaps not surprising. The law evolves, and the current generation of legal scholars and jurists will no doubt choose to have progressed from previous, less imaginative conceptions of free speech. Since, however, the *Loper* panel proceeded from the premise that protected speech must convey an intelligible message or idea,⁵⁸ it should be possible to analyze similarly the issue of panhandling.

The academic defenders of the constitutional right to beg, like the judges, feel compelled to find an articulate message in the mere solicitation of handouts on the streets. Their attempts to do so are sometimes a little

56. See sources cited *supra* note 4. But see Teir, *supra* note 11 (advocating minimum standards of public conduct).

57. E.g., Blair v. Shanahan, 775 F. Supp. 1315 (N.D. Cal. 1991), *aff’d in part, dismissed in part, remanded*, 38 F.3d 1514 (9th Cir. 1994); People v. Pitts, N.Y.L.J., Aug. 12, 1994, at 26 (Westbury Mun. Ct. Aug. 11, 1994). In *People v. Schrader*, 617 N.Y.S.2d 429 (N.Y. Crim. Ct. 1994), the court upheld the restriction of begging in the subway, affirmed that begging was protected speech, and criticized the *Young* opinion’s contrary sentiments. In *City of Seattle v. Webster*, 802 P.2d 1333, 1338 (Wash. 1990), *cert. denied*, 500 U.S. 908 (1991), the court upheld an ordinance prohibiting the blockage of vehicular traffic. It ruled that the ordinance did not prevent individuals from loitering along public thoroughfares as long as they did not intentionally obstruct them. See also *Roulette v. City of Seattle*, 78 F.3d 1425 (9th Cir. 1996) (upholding ordinance against sleeping or sitting on sidewalks during the daytime); *Streetwatch v. National R.R. Passenger Corp.*, 875 F. Supp. 1055 (S.D.N.Y. 1995) (enjoining defendant from ejecting homeless persons from Penn Station).

58. See Millich, *supra* note 4, at 259-61.

startling. It is one thing to feel sympathy for destitute persons. It is quite another to pretend that their every sound and movement conveys deep meaning. In all honesty, it may not have occurred to some of us that a lady holding a white paper cup and standing in front of a grocery store while chanting "Spare some change? Have a nice day" engages in "speech that adds to both societal and individual enlightenment" and that "provides information about poverty and the lives of poor people."⁵⁹ Still less did we appreciate that "her words are a page of current events '*worth a volume of logic.*'"⁶⁰ While it is true that some panhandlers have more to say than "Spare some change?" this turns out to be immaterial. For "even if the beggar conveys nothing more than that she wants the listener to give her money, this information contributes to the collective search for truth."⁶¹ In fact, "views about the way in which society should be ordered are implicit in the beggar's request for money." This is so because the beggar's "plea is a direct challenge to prevailing assumptions about the social responsibilities that members of a community owe to each other."⁶² The mere presence of the panhandler standing before us with hand outstretched is a symbolic enactment. It becomes something in the order of a Kabuki play, with that refreshing spontaneity that prior arrangement and rehearsal would imperil, directing the mind to the current social condition and so enjoying constitutional protection.⁶³

It is true that panhandlers sometimes attempt to persuade, or even cajole, their prospective benefactors. This, however, may not entirely justify the statement that "[t]he context of begging often constitutes an actual dialogue between beggar and donor in which the beggar often pleads the cause of the homeless and destitute."⁶⁴ The underlying premise again is that any utterance, encounter, or sight that directs the human mind to some social problem enjoys the protection of the First Amendment. If a dilapidated man holds out his hand or makes such a declaration as "I'm hungry! Can you help me?" and makes us think of poverty in America, then his presence, action, and utterances are all protected speech. They are as much so as an address by the Mayor of the City of New York on the subject, or as Victor Hugo's tale of Jean Valjean.⁶⁵

59. Hershkoff & Cohen, *supra* note 4, at 898.

60. *Id.* at 899 (quoting *New York Trust Co. v. Eisner*, 256 U.S. 345, 349 (1921)) (emphasis added).

61. *Id.*

62. *Id.*

63. Chevigny, *supra* note 4, at 543-44; *People v. Pitts*, N.Y.L.J., Aug. 12, 1994, at 26 ("People are enlightened when they see a beggar such as defendant Pitts. Their enlightenment is caused by their realization that the poor are real people who have real problems, who live in their neighborhood.").

64. Knapp, *supra* note 4, at 414.

65. VICTOR HUGO, *LES MISERABLES* (Dodd, Mead & Co. 1984) (1887). The example of

Can we really determine the applicability of the First Amendment on the basis of what impressions, rational or otherwise, an act or circumstance may trigger, regardless of whether the actor or creator of the circumstance exhibits any intention of speaking? The human mind is agile and reactive. Virtually any sight or sound—the birds chirping in the trees⁶⁶ or the sound of running water—can propel the mind through a series of thoughts, however related. If the sight of a destitute adult and her request for a handout constitute protected speech because they remind us of something else that could be the subject of rational discourse, then would the tears or appearance of her child (for beggars are sometimes known to appear with same) also constitute protected speech?

Are there not also conversations between robbers and kidnappers and their victims? Might such a conversation, or the act of robbery itself, not direct the victim's attention to the problem of crime in America? If the request for spare change is brought within the ambit of the First Amendment simply by virtue of the fact that such words are evocative of the problem of poverty, then why exactly are the words "Give me some change or I'll blow your head off," uttered in the same location (forum) at the same time not protected? Is it because of the obvious countervailing societal interest in preventing robbery? But under *Texas v. Johnson*, it is only when an utterance meets the threshold condition of being speech within the First Amendment that a court may consider whether the circumstances and logistics of the speech make it nonetheless subject to prohibition.⁶⁷ Is this unmistakably criminal utterance within the category of protected speech (because it might make us think of the problem of poverty) and subject to suppression only because it carries some other undesirable consequence? Is

Les Miserables indeed is invoked in Millich, *supra* note 4, at 265 n.20, to suggest that our society presents the same choices to its impoverished as did 19th Century France. Many societies have maintained laws against begging. See Teir, *supra* note 11, at 292-300. But ours does provide a few alternatives by which the life of a destitute person may be preserved and improved. See sources cited *supra* note 16.

66. The purpose of this analogy is not to denigrate the humanity of beggars, but only to demonstrate the implications of making "protected speech" of any sensory stimulus. "Speech" is a human attribute, not because animals are incapable of making sounds that convey pleasure or pain, but because only human beings can convey opinions of the good and the bad, the just and the unjust. As it once was put:

[M]an alone among the animals has speech. The voice indeed indicates the painful or pleasant, and hence is present in other animals as well; for their nature has come this far, that they have a perception of the painful and the pleasant and indicate these things to each other. But speech serves to reveal the advantageous and the harmful, and hence also the just and the unjust.

ARISTOTLE, *POLITICS* 37 (Carnes Lord trans., Univ. of Chicago Press 1984).

67. 491 U.S. at 403. See also *International Soc'y for Krishna Consciousness, Inc. v. Lee*, 505 U.S. 679 (1992) (stating that prohibiting the solicitation of religious contributions in a nonpublic forum is reasonable despite its First Amendment speech protection).

not the prospect of streets and subways populated by beggars also undesirable, even if less serious than robbery?

In *Loper*, the court found that the police could easily restrain the anti-social aspects of begging by enforcement of the Penal Law sections against harassment, disorderly conduct, menacing, and fraudulent accosting. It was "ludicrous" to suggest otherwise.⁶⁸ But does it make sense to say that panhandling constitutes protected speech, conveying an important message, and, at the same time, that these misdemeanor statutes may apply to it? If the beggar's request for money is protected speech under the First Amendment because it forces the listener to think about poverty, then why should the accuracy of the beggar's claims about himself be relevant? Thus far, commercial speech is the only variety to lose its First Amendment protection on the ground of factual inaccuracy.⁶⁹ The theory that panhandling is a form of commercial speech and, therefore, merits protection under the First Amendment will receive attention in due course, but for the moment, we may note that the New York fraudulent accosting statute is not directed at commercial speech in any previously acknowledged sense.⁷⁰ Rather, it addresses confidence games designed to separate the unwary from their money. No one contends that such machinations convey an important social message. If begging does convey one, it is difficult to fathom how it could lose its First Amendment protection on the basis of inaccurate representations about the financial condition of the speaker. Such a penal law section has applicability only because the act of begging, *per se*, has no declarative, informative, or disquisitional content, but is merely a request or a demand for money. And it is impossible to demonstrate that any utterance is protected speech under the First Amendment because, whatever its nature, it may make us think of something else that could be the subject of genuine protected speech.

68. *Loper*, 999 F.2d at 701-02.

69. See *Edenfield v. Fane*, 507 U.S. 761, 768-69 (1993); *Peel v. Attorney Disciplinary Comm'n*, 496 U.S. 91, 100 (1990); *Zauderer v. Office of Disciplinary Counsel*, 471 U.S. 626, 638 (1985); *In re R.M.J.*, 455 U.S. 191, 199-200 (1982); *Central Hudson Gas & Elec. v. Pub. Serv. Comm'n*, 447 U.S. 557, 566 (1980); *Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 771-72 (1976).

70. N.Y. PENAL LAW § 165.30 (McKinney 1988) provides:

1. A person is guilty of fraudulent accosting when he accosts a person in a public place with intent to defraud him of money or property by means of a trick, swindle or confidence game.

2. A person who, either at the time he accosts another in a public place or at some subsequent time or at some other place, makes statements to him or engages in conduct with respect to him of a kind commonly made or performed in the perpetration of a known type of confidence game, is presumed to intend to defraud such person of money or other property.

There are certainly efforts to deny that First Amendment protected speech need concern itself with the transmission of ideas at all.⁷¹ This argument, in the first place, would appear to be based upon the misinterpretation of a 1948 Supreme Court opinion, *Winters v. New York*,⁷² overturning the conviction of a book dealer for selling a crime magazine. The statute in that case, criminalizing, among other things, the publication of all “accounts of criminal deeds,” was broad enough to outlaw Dostoyevsky novels. In holding that the free press prohibition did not apply only to the “exposition” of ideas, the Court was merely stating that the ideas could be conveyed in a fictional or poetic form, as well as in a prose treatise.⁷³ The *Winters* Court saw “nothing of any possible value to society” in the magazines at issue.⁷⁴ The same judgment could be applied to any wholly foolish editorial or campaign speech, or to any artistic work that ineptly attempted to convey a silly view of things. The Court, moreover, indicated a sentence later that the publications in question would be subject to suppression if they were “lewd, indecent, obscene or profane.”⁷⁵ Thus, even *Winters* is consistent with the premise that whatever its merit, protected speech must have the *form* of either deliberative, informative, or narrative (including fictional) discourse.

The analysis of any First Amendment question is facilitated by first examining in isolation that which is alleged to be speech.⁷⁶ The threshold question must be whether some speech in the sense contemplated by the First Amendment is involved. Then, assuming it is, the question becomes whether the circumstances in which it occurs (time, place and manner) can be regulated for any identifiable public reason. The second part of this analysis, according to *Johnson*, requires that the court decide whether the regulation of what has been adjudged speech is “related to the suppression of free expression.”⁷⁷ Thus, in the case of expressive conduct, the question is whether the challenged regulation is directed at the expression itself or merely at its time, place and manner. The more lenient *O’Brien* standard is applied if the regulation is not directed at the expression.⁷⁸ In the instance

71. E.g., Donner, *supra* note 4, at 160-61. In this sense, the liberal commentators make common cause with those conservative ones who deny that the justification for freedom of speech is at all related to rational deliberation. See *supra* note 53.

72. 333 U.S. 507, 508-11 (1948).

73. *Id.* at 510.

74. *Id.*

75. *Id.*

76. See, e.g., *Texas v. Johnson*, 491 U.S. 397, 403-04 (1989) (holding that burning of the flag constituted expressive conduct which is protected by the First Amendment); *International Soc’y for Krishna Consciousness, Inc. v. Lee*, 505 U.S. 672, 679 (1992). See also Teir, *supra* note 11, at 321-24.

77. *Johnson*, 491 U.S. at 403.

78. *Id.*

of flag-burning, the *Johnson* Court found that the regulation was related to expression and that no "compelling state interest" justified its prohibition. But to repeat, the first question is whether protected speech is involved, which under our present law can include expressive conduct.⁷⁹

The Court in *Texas v. Johnson* made the primary test whether there was an attempt to convey a "particularized message" likely to be understood by the listeners. This requires asking if the allegedly protected utterance is by its nature subject to rational discourse, response, or meditation. If the utterance is a shout of "fire" in a crowded theater, for example, it would appear to admit of no discourse or argument, at least at the time it is made. Such speech is but a representation regarding factual circumstances of which the speaker claims to have unique knowledge. If it is true, it cannot immediately be considered or argued about by the listeners, except at peril of their lives. There is nothing for them to do except act upon the purported observation.⁸⁰ Thus, we might say that the words are not protected speech, since the purpose of rational discourse is not served by insulating them from criminal prohibition. If it should then appear that there is some public reason for regulating and indeed punishing such speech, such as preventing the loss of life by a stampede to the doors of a crowded theater, the state or locality may do so.⁸¹

79. This seems distorted in *Rose*, *supra* note 4, at 202. There, something called "public forum protection" is advanced as though it were immaterial what the alleged expression was. The author concedes that begging does not contain the elements of protected speech established for symbolic activity in *Johnson*: "As an independent First Amendment argument, the beggar's implicit expression fails to contain . . . these elements." *Id.* at 206. He goes on to assert: "When advanced in support of the claim to public forum protection, however, the beggar's implicit expression remains a forceful and compelling consideration." *Id.* No one doubts that the public streets have been a traditional forum for speech (a fact emphasized in *Loper*, 999 F.2d at 703), and that the regulation of "speech" there is subject to "the highest scrutiny." But it is first necessary to ascertain that "speech" is involved. The Amendment protects speech and speakers, not the infrastructure.

80. See LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW § 12.8, at 605 (1978).

81. This is not, to be sure, the analysis offered by Justice Holmes in *Schenck v. United States*, 249 U.S. 47 (1919). There the Court merely asserts that "the character of every act depends upon the circumstances in which it is done," and that speech may be criminalized when "the words used are used in such circumstances and are of such a nature as to create a clear and present danger that they will bring about the substantive evils that Congress has a right to prevent." *Id.* at 52. This maxim, which is no longer the law, see *infra* note 82, is broad enough to allow the prohibition of virtually any speech that at a particular time may have a bad effect. The leaflets involved in *Schenck* contained statements that the draft was unconstitutional and immoral, and exhorted the readers to assert their opposition. *Id.* at 51. Even assuming that this might constitute incitement of a specific act of draft evasion, there is no doubt that abstract advocacy, if effective, can generate a clear and present danger of many substantive evils. And yet, advocacy of positions on public policy is exactly what the First Amendment is supposed to protect.

A similar analysis can be applied to any of the inchoate crimes that involve speech: solicitation, incitement, and conspiracy. It has long been established in the law respecting these crimes⁸² that to utter any revolutionary doctrine as an abstract proposition is one matter; certainly such utterance admits of rational discourse and refutation. To incite a crowd to commit a specific violent act is altogether different. Such language of incitement is closer to voicing a command which does not have the character of an opinion expressed for discussion and thought. To solicit, in speech, a criminal act from an individual by asking that person to commit the act does not involve the First Amendment. In the same way, the actual request that a passer-by immediately hand over funds, though not heinous in the same manner as a criminal incitement or solicitation, is distinguishable from the abstract advocacy of a cause. It is true that any charitable solicitation also includes a request for funds. There is a certain difficulty in classifying any pure solicitation as protected speech under this analysis. But as discussed below,⁸³ the Supreme Court's rationale for deeming charitable solicitation protected speech is that it characteristically is accompanied by advocacy of a public cause.

A panhandler, by definition, does not solicit for the cause of the homeless. He is soliciting for one of their number—himself (assuming he really is homeless). Indeed, he cannot “earn his living” by merely arguing general propositions or charitable causes to passersby. That does not imply a constitutional right to beg. The First Amendment does not have as its precise purpose the assurance of pecuniary reward. It is true that commercial advertising now enjoys the status of protected speech. The rationale for this innovation, however, was that a purely economic interest on the part of a speaker or writer should not preclude First Amendment protection if his speech contains information of general interest.⁸⁴ A mercenary objective does not disqualify the speech from constitutional status. Nonetheless, the attainment of that objective is not the *sine qua non* of First Amendment protection. It is a constitutional liberty, not a means of making a living.⁸⁵

82. *E.g.*, *Brandenburg v. Ohio*, 395 U.S. 444 (1969) (per curiam); *cf.* *Dennis vs. United States*, 341 U.S. 494, 581-91 (1951) (Douglas, J., dissenting).

83. *See infra* pp. 285-88.

84. *Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 762 (1976).

85. *Cf.* Michael Kinsley, *Abortion-rights Demand Can Sour Health Reform*, N.Y. POST, May 31, 1994, at 19. Suggesting that abortion advocates refrain from demanding public financing, Kinsley observes: “Freedom of speech doesn’t get you a megaphone. Freedom of religion doesn’t buy you transportation to church. These are rights against government interference, not rights to a government-financed supply of the good in question.” *Id.* While this is not quite the same issue, the relevant point is that the preservation and exercise of a constitutional right need not imply pecuniary gain or subsidy. It helps us to reject the proposition that the panhandler’s expression is not free unless he makes money from it. Just as the First Amendment is not the

The *Loper* court apparently finds the New York statute violative of the First Amendment because "begging implicates expressive conduct or communicative activity."⁸⁶ This is perfectly reasonable insofar as any "expression" or "communication" or deed that may inspire the listener to conceive a "particularized social or political message" constitutes protected speech. If, however, the object of the First Amendment, as reflected in its historical antecedents, is to preserve political opinion and rational discourse (or opinion and rational discourse generally) in order to foster a speech that is disquisitional in nature and admits of reflection, disputation and response, then the classification of a panhandler's request for money as protected speech appears less than reasonable. Further, while we would expect the First Amendment to protect anyone's right to advocate the cause of the homeless, or generosity towards them, or any public policy that addresses the problem, a simple request for funds made by their intended recipient and directed at someone walking upon the streets itself appears to have no argumentative or rational content. The utterance is in the form of a mild (or not so mild) imperative, or a request for a favor, not a declarative statement with which one can agree or disagree. For this reason, it makes absolutely no sense to debate whether the New York anti-loitering statute is "content-neutral." The standard of content-neutrality is satisfied as long as the basis upon which the government regulates speech is not "disagreement with the message [the speech] conveys."⁸⁷ It is not possible to agree or disagree with a request for money, it is possible only to grant or refuse it. Panhandling *per se* has no articulate intellectual content, nor does it constitute news or information upon which one could formulate an argument or point of view.

C. The Charitable Solicitation Theory

Perhaps the most compelling argument offered by the *Loper* court and its defenders in the academic community is the analogy to charitable solicitation. In *Young*, the court dealt at length with an issue that the *Loper* panel also finds important; soliciting for charities in such public places as

right to a "government-financed supply" of anything, so it is not an assurance of material reward from the speech it protects.

86. *Loper*, 999 F.2d at 704.

87. *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989); *accord Clark v. Community for Creative Non-Violence*, 468 U.S. 288, 295 (1984) (stating that a prohibition is content-neutral if it is "not being applied because of disagreement with the message presented"). Mr. Teir seems somewhat taken in by the argument that ordinances preventing begging, but allowing other face-to-face discourse on the street initiated by strangers, are thereby not content-neutral. Teir, *supra* note 11, at 325-26. Actually, many forms of unsolicited discourse are illegal on the public streets. Robbery, drug-selling, and prostitution are the first few examples that come to mind. Someone has to express an opinion before "content-neutrality" becomes an issue.

subways. The *Loper* court relied upon the airport solicitation case of *International Society for Krishna Consciousness, Inc. v. Lee*,⁸⁸ while in *Young*, three other decisions: *Schaumburg v. Citizens for a Better Environment*,⁸⁹ *Secretary of State v. Joseph H. Munson Co.*,⁹⁰ and *Riley v. National Federation of the Blind, Inc.*,⁹¹ were the focus of attention. The *Young* court's distinction between solicitation by public charities and by panhandlers rests on two grounds. First, the Transit Authority indicated that regulating organized charitable solicitors in the subways was less problematic than controlling individual beggars. A second basis of distinction related to the status of panhandling and charitable solicitation as protected speech.

In *Young* the court observed that the difference between charitable solicitation and begging "must be examined not from the imaginary heights of Mount Olympus."⁹² Accordingly, "[w]hile 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."⁹³ The court also quoted Chief Justice Rehnquist's dissent in *Schaumburg*, stating: "[N]othing in the United States Constitution should prevent residents of a community from making the collective judgment that certain worthy charities may solicit . . . while at the same time insulating themselves against panhandlers, profiteers, and peddlers."⁹⁴

To the *Loper* panel and to the academic defenders of a First Amendment right to beg, no distinction exists between solicitation for a charitable or political organization and solicitation by beggars on a street corner. A beggar simply solicits for his favorite charity—himself. One commentator supports this insight with the following argument: (1) pursuant to the charitable solicitation cases, speakers' interests in making money do not vitiate their otherwise valid First Amendment rights; (2) to entertain such a distinction is to discriminate on the "basis of the speech's source"; (3) such a distinction leads "to the anomalous result that two homeless people could solicit donations for each other but a solitary homeless person could not solicit contributions for herself"; (4) the only difference between professional

88. 505 U.S. 672 (1992).

89. 444 U.S. 620 (1980); *see also* *Church of Soldiers of Cross of Christ v. Riverside*, 886 F. Supp. 721, 726 (C.D. Cal. 1995) (holding unconstitutional an ordinance against "aggressive solicitation" by a church and distinguishing this "charitable solicitation" by religious and political groups from begging).

90. 467 U.S. 947 (1984).

91. 487 U.S. 781 (1988).

92. *Young v. New York City Transit Auth.*, 903 F.2d 146, 156 (2d Cir. 1990).

93. *Id.*

94. *Id.* (quoting *Schaumburg*, 444 U.S. at 644 (Rehnquist, C.J., dissenting)) (alteration in original).

solicitors and beggars is that perhaps the former's "message is clearer," and First Amendment protection should not be limited to the "articulate"; (5) both charitable solicitors and beggars seek contributions for the benefit of "society's less fortunate members," with the donation showing support for "the recipient and her views"; (6) beggars, like charitable solicitors, are dependent for their living upon the solicitation of funds; and (7) if beggars were prevented from soliciting donations, "they would engage in fewer conversations with passersby," and therefore protected speech would be chilled.⁹⁵ It is necessary to respond point-by-point.

First, the decisions in *Schaumburg* and its progeny held that utterances involving "a variety of speech interests—communication of information, the dissemination and propagation of views and ideas, and the advocacy of causes—" are not excluded from First Amendment protection simply because they are also intended to elicit funds.⁹⁶ Noting specifically that charitable solicitation "characteristically [is] intertwined with informative and perhaps persuasive speech seeking support for particular causes or for particular views on economic, political, or social issues," the *Schaumburg* Court held that "[c]anvassers in such contexts are necessarily more than solicitors for money."⁹⁷ Furthermore, the Court stated that "charitable solicitation does more than inform private economic decisions."⁹⁸ In contrast, panhandlers are typically concerned only with eliciting private economic decisions from their intended benefactors. They want their donors to reach into their pockets, take out sums of money, and hand them over for the panhandlers' personal and immediate use. A panhandler's conduct generally is not aimed at alleviating the problem of global homelessness.

Second, the distinction between charitable solicitation and panhandling has nothing to do with the "source" of the utterance at issue. Although most organized charities would presumably avoid having the average panhandler as their representative, the same individual who stands on the street and begs could be the representative of a charitable solicitor. The distinction between the panhandler and the charitable solicitor has to do with the nature and purpose of their expression, not with who they are.

Third, a qualitative First Amendment difference exists because the beggar is only concerned with obtaining a handout for himself, and not with advocating any cause. This would not change because one panhandler includes another in his request for funds. We remain in the realm of requests

95. Millich, *supra* note 4, at 284-86; *see also* Knapp, *supra* note 4, at 416-18 (enumerating many of the same arguments).

96. *Schaumburg*, 444 U.S. at 632.

97. *Id.*

98. *Id.*

for charity to specific beneficiaries, on the basis of their physical presence, not the advocacy of any public issue.

Fourth, no one is suggesting that advocacy must be eloquent to be protected by the First Amendment. A beggar has an absolute First Amendment right to advocate, in an articulate or inarticulate fashion, any idea, notion, premise, belief or social cause he chooses. A mere request for a handout, even if made by Patrick Henry, would not constitute advocacy of anything. There are no views expressed in the act of street begging *per se* for the contributor to endorse.

Finally, begging should not be constitutionally protected because it is how panhandlers make their living. Prostitutes make their living by prostitution and confidence men by confidence scams. If we wish to have a civilized, decent society where life is peaceful and productive for those disposed to be so, it behooves us to “chill” the speech of derelicts loitering upon the public streets and bothering passersby. That is rather the idea. This is not to exclude any other means of helping the homeless to address, in particular, the substance abuse and mental health problems that frequently account for their condition. The public acts and programs best suited to treat these problems, and the efforts to restore the destitute to independent and fruitful lives, are, however, another issue.

D. The Commercial Speech Argument

The argument that begging is “commercial speech” also has support.⁹⁹ It attracts limited enthusiasm, implying slightly lower level of First Amendment scrutiny (that is to say protection) than the “charitable solicitation” theory.¹⁰⁰ To suggest that a panhandler holding up his cup and eliciting funds from a passerby is engaged in a commercial transaction requires the intimation that “[t]he generous donor purchases the satisfaction and peace of mind that comes from helping another human being.”¹⁰¹ We might ask whether giving a birthday cake to a five-year-old child is also a commercial transaction, or whether the theory would affect the imposition of gift taxes under the Internal Revenue Code.

When the Supreme Court extended the protection of the First Amendment to commercial speech, it found that the information disseminated in advertising is of value to the consumer and extends to such matters of public policy as abortion rights, environmentalism, and the balance of trade.¹⁰²

99. See *supra* note 69 and accompanying text.

100. See Rose, *supra* note 4, at 215-17.

101. Millich, *supra* note 4, at 295.

102. Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc., 425 U.S. 748, 763-65 (1976).

Such a rationale surely has no applicability to panhandling. The panhandler's benefactor is not a consumer deciding from which supplicant he can purchase the best "satisfaction and peace of mind." And once again, to suggest that street begging constitutes discourse on political affairs is to affront common sense.

IV. THE ABSENCE OF ALTERNATIVE FORUMS: THE AVAILABILITY OF ALTERNATIVE MEANS OF ENFORCEMENT

The conclusion that panhandling lacks the communicative content necessary to qualify as protected speech would render unnecessary an inquiry into the purpose of its regulation or the alternative means available. Since, however, the *Loper* court makes and repeats the assertion that beggars, if prevented from plying their "trade," have no other means of making their comment upon poverty in America, a brief reply is required. No one stops beggars from standing on soapboxes and inveighing against the world's ills from sunup until sundown to all who care to listen. No one inhibits them from marching in a demonstration with placards or from distributing leaflets, as they now, in New York City, display their newspaper, *Street News*.¹⁰³ In fact, the law denies panhandlers only the liberty to hustle money on the public street, not the right to practice advocacy in general. The statute declared unconstitutional in *Loper* made loitering for the purpose of begging a violation—not technically a crime. Its principal significance was not that of authorizing arrests and prosecutions, but of allowing the police to disperse panhandlers and to make them "move on."¹⁰⁴ If there is a less restrictive way to preserve civility on the public streets, then the *Loper* panel and its academic defenders have not defined it.

The *Loper* court does not seem particularly interested in the practical problems of controlling aggressive panhandling through the enforcement of statutes against harassment, menacing and fraudulent accosting. To bring cases under such theories requires the complaint and cooperation of a victim. Establishing the elements of fraudulent accosting,¹⁰⁵ in particular, demands a modicum of criminal investigation, not easily contributed into by an overburdened police force at such a low level of offense. Although a federal appeals court, not used to dealing with petty crimes, may find it "ludicrous" to suggest that there are practical problems in controlling street begging through misdemeanor statutes, anyone experienced in state law enforcement

103. See Teir, *supra* note 11, at 327.

104. See Kelling, *supra* note 11, at 19.

105. N.Y. PENAL LAW § 165.30 (McKinney 1988). The reader, unlike the federal court, may wish to consider the difficulty of applying such a statute to begging, after the courts determine that the act *per se* is constitutionally protected.

will know better. Having declared panhandling itself to be a protected liberty, we are asking the police to determine when it is done in an overly aggressive or obstreperous manner¹⁰⁶ or on the basis of provably false representations. We are asking them to intervene in the hope that the inevitable counter-charges of unconstitutional arrest are not ratified by the courts. In this day and age, police officers understandably may be a little wary of becoming defendants in civil actions and criminal prosecutions. They may fear the consequences of discerning poorly the distinction between constitutionally protected and unprotected panhandling.

V. CONCLUSION

This discussion has concerned a certain interpretation of the First Amendment and has attempted to demonstrate that it is a misinterpretation. In *Loper*, the court adopts a standard for extending the Amendment's protection: whether the alleged speech contains a "particularized social or political message."¹⁰⁷ The application of this criterion to panhandling does not justify the court's conclusion. The finding that beggars engage in political discourse when they stop people on the streets and ask them for money runs against ordinary experience and strains credulity. The mind may indeed turn to the subject of poverty, because of an encounter with a panhandler. It may even turn to the topics of civic disorder and criminality. All of the observable phenomena of the world, however, do not enjoy First Amendment protection, even if they can each inspire a train of thought. The mere request for a handout is not a comment upon anything.

The elaboration of the *Loper* doctrine in scholarly journals carries it to notable extremes. The sight of a panhandler, precisely because it is unpleasant, represents indispensable enlightenment. Those whom the beggar accosts need to be reminded of his plight. If they object, that reflects their insensitivity to the tragedy of homelessness, and to its injustice. They want

106. N.Y. PENAL LAW § 240.26 (McKinney Supp. 1996) provides, in pertinent part:

A person is guilty of harassment in the second degree when, with intent to harass, annoy or alarm another person:

.....

2. He or she follows a person in or about a public place or places; or

3. He or she engages in a course of conduct or repeatedly commits acts which alarm or seriously annoy such other person and which serve no legitimate purpose.

See also Charles Mitchell, Note, *Aggressive Panhandling Legislation and Free Speech Claims: Begging for Trouble*, 39 N.Y.L. SCH. L. REV. 697, 713-14 (1994) (opposing ordinances against panhandling yet acknowledging the difficulty of using harassment statutes to control it). In 1996, the New York City Council and Mayor Giuliani did enact Local Law No. 80, "against certain forms of aggressive solicitation." City of New York, N.Y., Local Law No. 80 (Sept. 26, 1996). The law, among other things, prohibits begging within ten feet of automated teller machines.

107. *Loper v. New York City Police Dep't*, 999 F.2d 699, 704 (2d Cir. 1993).

to "sweep it under the rug." In the apprehension of certain commentators, those resenting the presence of panhandlers are the ones deserving society's opprobrium. These arguments are implausible, to say the least, and antisocial in their tendency. We need hardly abandon our public spaces to the destitute and dysfunctional to be aware that they exist. The way out of their predicament surely is by not erecting a legal shield around their present habits and inflicting a punishment on the rest of society. The further contention, that ordinances against panhandling discriminate against the speech of the "poor," actually insults all those persons of limited means who do not resort to begging. It implies that their speech consists solely of requests for charity.

The argument that begging is not different in principle from charitable solicitation is of some limited interest. The act of solicitation, *per se*, is not disquisitional, argumentative or informative, whomever is to receive the funds solicited. Charitable solicitation, nonetheless, typically accompanies advocacy on behalf of the solicitor's cause. That cause is more general than that of his own pocketbook. That is the distinction that the Supreme Court's charitable solicitation decisions suggest.

Conjecture upon the fate of the *Loper* doctrine in other circuits or before the Court is, of course, difficult. The status of the "particularized message" standard after *Hurley v. Irish-American Gay Lesbian and Bisexual Group*¹⁰⁸ is perhaps one piece of the puzzle. Whatever the scope of First Amendment protection, the judiciary must maintain a discerning notion of that which actually constitutes the propagation of viewpoints and information. It should adopt a notion affirming common sense, or at least not affronting it. Above all, it should not use constitutional theory to gratify an egalitarian dogma, hampering the efforts of elected municipal officials to improve life in their cities. The solution to the problem of homelessness will not be found in the Constitution. The Constitution is there to organize a "system of ordered liberties," in which citizens may be confident that law-abiding endeavor will bring respect, prosperity, and a measure of tranquility.

108. 115 S. Ct. 2338 (1995); see *supra* note 36.

