Nichols, P. (1997). "The panhandler's First Amendment right: A critique of Loper v. New York City Police Department and related academic commentary." South Carolina Law Review, 48: 267-291.
©1997 South Carolina Law Review
Reprinted with permission from the South Carolina Law Review

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

Peter Nichols'

I. INTRODUCTION 267
II. THE SECOND CIRCUIT'S SOMEWHAT CONTRADICTORY CONTRIBUTION TO THE ISSUE 271
III. Is BEGGING PROTECTED SPEECH? 275
A. Objectives of the First Amendment 275
B. Panhandling as Protected Speech: The Communication of "Need" 278
C. The Charitable Solicitation Theory 285
D. The Commercial Speech Argument 288
IV. THE ABSENCE OF ALTERNATIVE FORUMS: THE AVAILABILITY OF ALTERNATIVE MEANS OF ENFORCEMENT . 289
V. CONCLUSION 290

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 picketing[2] 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

* Assistant Adjunct Professor of Political Science, Dowling College, Member of the New York Bar and former Manhattan Assistant District Attorney. Daniel S. Komansky, Esq. and Mr. David Mason contributed their comments upon earlier drafts of this manuscript. The conclusions herein are the author's own.

1. 999 F.2d 699 (2d Cir. 1993).
2. Madsen v. Women's Health Or., 114 S. Q. 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. Dormer, 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. Miilich, *Compassion Fatigue and the First Amendment; Are the Homeless Constitutional Castaways?,27V.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. Kaufinan, 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,* s.g.,Millich, supra note 4, at 257-65nn.1-21 (describing the homeless as fonnerly

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 for as we can tell from this article, are based sunply 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 die 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. 2X26.* 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 Al (relating the reluctance of the homeless to accept offers from officers); Rita Kramer, raeWufere/vjng *Poor,* WALL ST. J., Apr. 11,1995,atA20 (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 Seiftnan, *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 (supportingNew York Mayor Guilliani'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 Guilliani 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.

n. THE SECOND CIRCUIT'S SOMEWHAT CONTRADICTORY 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 Guilliani 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 mat begging is much more "conduct" than it is "speech." As then Circuit Judge Scalia once remarked: "That mis 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

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 becauseof 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.

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 mat 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).