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*LOPER v. NEW YORK CITY POLICE
DEPARTMENT** BEGS THE QUESTION:
IS PANHANDLING PROTECTED BY THE
FIRST AMENDMENT?

INTRODUCTION

A homeless man, dressed in tattered clothes so soiled that it is impossible to discern their original color, walks towards the southwest corner of Washington Square Park in Greenwich Village, New York City. His left hand holds a crumpled paper cup, while his right hand furiously searches his pockets for a match to light a cigarette he found in the grass. After the man successfully lights his cigarette, he begins his daily routine. He innocuously rattles his cup at passersby: "Spare some change?"

This scene is familiar to urban areas and is indicative of a serious problem that pervades the United States.¹ There are

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

¹ "[P]ersons are classified as homeless if they are living outside conventional dwellings, either spending nights in shelters for homeless persons or in locations that are not intended for dwellings and on the street, in abandoned houses, or in public places such as bus stations or hospital waiting rooms." PETER H. ROSSI, *WITHOUT SHELTER: HOMELESSNESS IN THE 1980'S* 4 (1989). Although the exact number of homeless people in the United States is unknown, estimates vary from 250,000 to 3,000,000. John Erickson & Charles Wilhelm, *Introduction to HOUSING THE HOMELESS* at xxvi (Jon Erickson & Charles Wilhelm eds., 1986); see also OFFICE OF POL'Y DEV. & RES., U.S. DEPT OF HOUSING & URBAN DEVELOPMENT, *A REPORT TO THE SECRETARY ON THE HOMELESS AND EMERGENCY SHELTERS* 8-21 (1984) (reviewing the extent of homelessness in America). This large range is indicative of how little is known about the homeless in the United States and how certain groups underestimate the seriousness of the problem. *Id.* at 7.

In January 1983, New York City was housing an average of 4676 homeless men and 636 homeless women in 18 facilities. 1 *HOMELESSNESS IN THE UNITED STATES* 132 (Jamshid Momeni ed., 1989). By January 1987, that number had increased to almost 9000 homeless men, and 1100 homeless women housed in 28 facilities. *Id.* The total number of homeless persons in New York State in 1983 was estimated to range between 45,000 and 63,000. *Id.* Homelessness is more widespread in New York City than in the rest of the state. New York City estimates that the city's homeless population grew more than 300% between the years 1981 and 1986. *Id.* In fiscal year 1987, New York City allocated \$238.9 million to remedy the homeless problem. *Id.* It is interesting to note that the five boroughs

virtually no major cities in the United States where pedestrians and cars are not confronted with such "panhandlers." In response to this problem, many states, including New York, have enacted statutes prohibiting all panhandling in the streets and other public areas of the city.² These statutes raise a critical question about whether a ban on begging³ deprives

of New York City, which contain 40% of New York State's total population, contain approximately 85% of the state's total homeless persons.

The racial and ethnic composition of the homeless in New York is an interesting aspect of the overall problem. Although only 13.7% of New York state's population is African American, over half (55.2%) of the state's homeless persons are African American. *Id.* Outside of New York City, the majority of homeless people are white. In a 1986 study done on the racial composition of homeless shelters, it was found that of 832 New York City shelter residents, 72% were African American. *Id.* It is evident that homelessness affects low-income groups generally and African Americans in particular. *Id.*

² The New York penal law provision states: "A person is guilty of loitering when he: 1. Loiters, remains or wanders about in a public place for the purpose of begging" N.Y. PENAL LAW § 240.35(1) (McKinney 1989).

Other state statutes proscribing begging include California's Penal Code § 647(c), which provides that anyone "[w]ho accosts other persons in any public place or in any place open to the public for the purpose of begging or soliciting alms is guilty of a misdemeanor." CAL. PENAL CODE § 647(c) (West 1988).

During the late 1980s, a backlash developed against the homeless. Citizens and politicians became increasingly frustrated by the government's failure to redress the growing problem. *See, e.g.,* Larry Tye, *Seeking Shelter, The Street People Are Finding Scorn*, BOSTON GLOBE, Aug. 27, 1990, at 1 (in cities across the country there is a backlash against the homeless due to the growing number and increasing assertiveness of the homeless, and a "compassion fatigue" resulting from the persistence of the homeless problem); *see also* Nancy R. Gibbs, *Begging: To Give or Not to Give*, TIME, Sept. 5, 1988, at 68 (quoting former New York Mayor Ed Koch's statement that "many people who panhandle just don't want to work for a living," as indicative of the growing public disdain towards beggars). *But see* 1 HOMELESSNESS IN THE UNITED STATES, *supra* note 1, at 131.

Homelessness is a creeping disease of our times, a disease that is spreading across our state and across the nation, leaving disruption and misery in its wake. Each new project, each new bed that we add, restores warmth and continuity to lives that have been drastically altered by the loss of a home.

Id. (quoting then-New York State Social Services Commissioner Cesar A. Perales)

³ The history behind anti-begging statutes is extensive. Beginning in the late sixteenth century, the goal of anti-begging statutes was to prevent able-bodied persons from remaining idle. *Loper v. New York City Police Dep't*, 802 F. Supp. 1029, 1032 (S.D.N.Y. 1992). William Blackstone wanted to minimize begging as it was not good for the economy: "Idleness in any person is also a high offence against the public economy." 4 WILLIAM BLACKSTONE, COMMENTARIES 161, 169 (Univ. of Chicago 1979) (1769). This contemptuous attitude towards begging proliferated during the late seventeenth century.

In both England and the United States, the local governments gave out stiff penalties to those caught begging. In England for example, then-Commissioner of

homeless persons of their first amendment right of freedom of speech.⁴ Central to this issue is whether begging constitutes speech.⁵ Some argue that begging is a form of speech because it communicates a message about the plight of the homeless.⁶ Others assert that begging is not protected speech because it merely conveys the desire to receive money, which traditionally has not been recognized as protected by the Constitution.⁷

These issues have merged in two recent Second Circuit cases. In *Loper v. New York City Police Department*,⁸ the Second Circuit determined that a statute criminalizing panhandling in the streets of New York violated the First Amendment. This Comment contrasts *Loper* to the Second Circuit's decision three years earlier in *Young v. New York City Transit Authority*,⁹ where the court upheld a statute that prohibited begging in New York City subways.¹⁰ The primary inconsis-

Trade John Locke created a penalty for begging under which all able-bodied men between the ages of 14 and 50 would be sent to sea under strict discipline for three years, and all men over 50 years of age or disabled would be sentenced to three years at hard labor at the House of Correction. MAURICE CRANSTON, JOHN LOCKE: A BIOGRAPHY 424-25 (1985). Females over the age of 14 who were caught begging would be sentenced to three months in the House of Correction, and any boy or girl under the age of 14 would be "soundly whipped." *Id.* Moreover, anyone caught with a counterfeit begging license would be punished by having his ears cut off. *Id.*

In 1788, New York State passed a law that classified disorderly persons as "all persons who go about from door to door or place themselves in the streets, highways or passages, to beg in the cities and towns." *Loper*, 802 F. Supp. at 1032 (quoting 2 LAWS OF THE STATE OF NEW YORK 643 (Weed Parsons 1886)).

⁴ The First Amendment provides in relevant part: "Congress shall make no law . . . abridging the freedom of speech . . ." U.S. CONST. amend. I.

⁵ "Speech" can be defined as "communica[ti]on and express[i]on; to make known." RANDOM HOUSE DICTIONARY 854 (1980). In *Spence v. Washington*, 418 U.S. 405 (1974), the Supreme Court created a standard to determine whether certain conduct constitutes "speech." See *infra* notes 47-52.

⁶ In *Young v. New York City Transit Auth.*, 903 F.2d 146 (2d Cir.), *cert. denied*, 498 U.S. 984 (1990), the Legal Action Center for the Homeless, as representatives of homeless plaintiffs, argued that "whenever a homeless and needy person is extending his hand, he is communicating" and such communication merits the protection of the First Amendment. *Id.* at 150.

⁷ In *Young*, the Second Circuit agreed with this characterization of begging. The court stated that "[i]t 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." 903 F.2d at 153.

⁸ 999 F.2d 699 (2d Cir. 1993).

⁹ 903 F.2d 146 (2d Cir.), *cert. denied*, 498 U.S. 984 (1990).

¹⁰ The ban on panhandling states that "[n]o person shall panhandle or beg upon any facility or conveyance." 21 N.Y. COMP. CODES R. & REGS. § 1050.6(b)(2)

tency between the two decisions is that the court in *Loper* held that panhandling is a form of expression that merits first amendment protection,¹¹ while the court in *Young* offered no such protection.¹²

This Comment argues that the Second Circuit's constitutional analysis failed to justify the differences between the facts of *Loper* and those of *Young*. As a result, the court has created two diametrically opposed principles, one that recognizes the expressive element of begging, and one that does not. Although the Second Circuit's decision in *Loper* is commendable, the Second Circuit must reconcile the conflicting precedent to provide adequate guidance as to what conduct is protected by the First Amendment.

Part I of this Comment explores the underlying goals and interests of the First Amendment and delineates the standards courts use to determine whether certain activities should be protected by the First Amendment. Part II discusses the significance of *Young*. Part III then examines the facts and substantive history of *Loper*. Part IV compares the Second Circuit's analysis in *Loper* with the *Young* decision and focuses on whether the court in *Loper* adequately justified its conclusion that begging is expression that deserves to be protected by the First Amendment.

I. FRAMEWORK OF FREEDOM OF SPEECH ANALYSIS

A. General Background

The First Amendment is unique because it is unqualified on its face.¹³ Unlike many of the other amendments included in the Bill of Rights, the First Amendment is definitive because it states that "Congress shall make *no* law . . . abridging the freedom of speech."¹⁴ The distinction between the First

(1985).

¹¹ 999 F.2d at 699.

¹² 903 F.2d at 146.

¹³ "The [First Amendment] is unequivocal and absolute." WILLIAM VAN ALSTYNE, INTERPRETATIONS OF THE FIRST AMENDMENT 22-23 (1984); see also GERALD GUNTHER, CONSTITUTIONAL LAW 994 (12th ed. 1991) ("As written, the First Amendment is simple and unqualified.").

¹⁴ U.S. CONST. amend. I. (emphasis added).

Amendment, as opposed to the Fourth and the Eighth Amendments, is that the latter amendments provide a qualified limit on governmental activity, whereas the First Amendment is a complete prohibition of the abridgement of speech.¹⁵ This distinction is important because it illustrates that freedom of speech analysis should commence with the basic assumption that any regulation of speech is violative of the express language of the Amendment.¹⁶

¹⁵ For example, the scope of the First Amendment is distinct from the Fourth Amendment, which only protects "the right of the people to be secure in their persons, houses, papers, and effects" against "unreasonable searches and seizures." U.S. CONST. amend. IV (emphasis added). The First Amendment is also distinguishable from the Eighth Amendment, which only proscribes punishment that is "cruel and unusual." U.S. CONST. amend. VIII (emphasis added); see also VAN ALSTYNE, *supra* note 13, at 22 (addressing the differences between these amendments). Although one could argue that the difference between the language of the amendments is merely semantic, a more plausible explanation is that the authors of the Bill of Rights were particularly concerned about governmental regulation of speech and sought to limit regulation as much as possible. In the spirit of the American Revolution against Great Britain, the framers of the Constitution were especially wary of suppressing dissenting opinions. ZECHARIAH CHAFEE JR., *FREE SPEECH IN THE UNITED STATES* 19-21 (1954). Thus, the goal of the drafters of the First Amendment was "to wipe out the common law of sedition, and make further prosecutions for criticism of the government, without any incitement to law-breaking, forever impossible in the United States of America." *Id.* at 21; see also *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964) (holding the Sedition Act of 1798, which banned criticism of the government, unconstitutional). In *Sullivan*, the Court stated:

Although the Sedition Act was never tested in this Court, the attack upon its validity has carried the day in the court of history. . . . [There has been] a broad consensus that the Act, because of the restraint it imposed upon criticism of government and public officials, was inconsistent with the First Amendment.

Id. at 276.

¹⁶ Any limitation on speech is counter-intuitive to a literal reading of the First Amendment. See, e.g., LAURENCE TRIBE, *AMERICAN CONSTITUTIONAL LAW* § 12-2, at 790 (2d ed. 1988) ("Any adverse government action aimed at communicative impact is presumptively at odds with the first amendment.").

The Supreme Court, in *Tinker v. Des Moines Indep. Community Sch. Dist.*, 393 U.S. 503 (1969), stated that the First Amendment's prohibition on government regulation must be taken seriously, and not simply treated as a theoretical ideal. *Id.* at 513. The Court stated:

[F]ree speech is not a right that is given only to be so circumscribed that it exists in principle but not in fact. Freedom of expression would not truly exist if the right could be exercised only in an area that a benevolent government has provided as a safe haven for crackpots. The Constitution says that Congress (and the States) may not abridge the right to free speech. This provision means what it says. We properly read it to permit reasonable regulation of speech-connected activities in

Although commentators have recognized the unequivocal nature of the First Amendment, the Supreme Court has nonetheless limited the scope of the Free Speech Clause. Inherent in free speech analysis is the conflict between an individual's right of free speech and society's interest in protecting itself from potential danger created by the exercise of that right. Addressing this conflict in *Schenck v. United States*,¹⁷ Justice Oliver Wendell Holmes concluded that the question in every free speech case is "whether 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."¹⁸ In balancing the "evil" created by the speech against the interests of the speaker or actor, courts face an onerous task since it may be impossible to "rank all possible evils" associated with certain conduct.¹⁹

carefully restricted circumstances. But we do not confine the permissible exercise of First Amendment rights to a telephone booth or the four corners of a pamphlet, or to supervised and ordained discussion in a school classroom.

Id.

¹⁷ 249 U.S. 47 (1919). In *Schenck*, the defendants were convicted of conspiracy to obstruct the draft in violation of the Espionage Act of 1917. The defendants had distributed a circular that argued that the draft was unconstitutional and urged individuals to exercise their "right to assert [their] opposition to the draft." *Id.* at 51. The Court determined that the convictions did not violate the First Amendment since the words created a "clear and present danger" of obstructing the war effort. *Id.* at 52.

¹⁸ *Id.* at 52. Holmes stated that one who falsely yells "Fire!" in a crowded theater creates a great risk of panicking the crowd, and thus such speech is not protected by the First Amendment. *Id.* *Schenck* is now used by courts as a tool to measure whether certain speech is protected by the First Amendment.

In *Frohwerk v. United States*, 249 U.S. 204, 206 (1919), a case decided one week after *Schenck*, Justice Holmes sought to explain the intent of the drafters of the First Amendment, and stated that:

[T]he First Amendment . . . obviously was not, intended to give immunity for every possible use of language. . . . We venture to believe that neither Hamilton nor Madison, nor any other competent person then or later, ever supposed that to make criminal the counselling of a murder . . . would be an unconstitutional interference with free speech.

Id. at 206.

Judge Learned Hand addressed the difficult balance between these two interests. See *United States v. Dennis*, 183 F.2d 201 (2d Cir. 1950) (upholding the convictions of members of the National Board of the Communist Party for conspiracy to teach and advocate the overthrow of the government), *aff'd*, 341 U.S. 494 (1951). In his opinion, Judge Hand stated that "[i]n each case [courts] must ask whether the gravity of the 'evil,' discounted by its improbability, justifies such invasion of free speech as is necessary to avoid the danger." *Id.* at 212.

¹⁹ VAN ALSTYNE, *supra* note 13, at 30. The drafters of the Bill of Rights indi-

B. *Interests Promoted by the First Amendment*

The First Amendment is based on the premise that the United States, as a free and democratic society, allows individuals to have independent ideas and opinions which neither the government nor other individuals have the right to control, censor or regulate.²⁰ Courts consider three factors in analyzing whether a certain activity deserves first amendment protection. These factors are whether the activity in question promotes: the enlightenment of society, the democratic system or self-actualization.²¹ The Supreme Court uses these three fac-

rectly gave the judiciary authority to deprive people of their constitutional right of free speech. The authority was based on a courts' conception of the "evil" that might result from certain conduct. This investment of power also "implicitly directs the courts to render a determination of what legislatures are constitutionally empowered to define as evil for purposes of criminalizing speech likely to produce that evil." *Id.* The more "evil" that the conduct creates, the more likely courts will uphold the regulation. *Id.*

²⁰ John Stuart Mill was one of the first scholars who addressed the notion that an individual's thoughts should be free from governmental intervention. Mill stated that:

No argument, we may suppose, can now be needed, against permitting a legislature or an executive, not identified in interest with the people, to prescribe opinions to them, and determine what doctrines or what arguments they shall be allowed to hear. . . . If all mankind minus one, were of one opinion, and only one person were of the contrary opinion, mankind would be no more justified in silencing that one person, than he, if he had the power, would be justified in silencing mankind.

John S. Mill, *On the Liberty of Thought and Discussion*, in *THE PRINCIPLES AND PRACTICE OF FREEDOM OF SPEECH* 37-38 (Haig A. Bosmajian ed., 1971).

²¹ See, e.g., Professor Gunther discusses several themes that pervade First Amendment jurisprudence. Gunther states that "[O]ne emphasizes the value of free speech in promoting individual self-expression and self-realization; the other stresses the value of freedom of expression for a system of . . . self-government." GUNTHER, *supra* note 13, at 998; see also THOMAS EMERSON, *THE SYSTEM OF FREEDOM OF EXPRESSION* 6 (1970).

Professor Tribe emphasizes that it is essential for an individual to have the opportunity to convey ideas, no matter how repugnant to others. *TRIBE, supra* note 16, at 785. He further contends that the "first amendment [is] essential to intelligent self-government in a democratic system." *Id.* Lastly, Professor Tribe acknowledges the very personal and private interest that individuals have in the First Amendment. *Id.*

Justice Brandeis delineated the primary concerns and goals of the First Amendment:

Those who won our independence . . . valued liberty both as an end and as a means. They believed liberty to be the secret of happiness and courage to be the secret of liberty. They believed that freedom to think as you will and to speak as you think are means indispensable to the dis-

tors as a guide in determining the constitutionality of governmental regulations that purportedly suppress free speech.

The first factor courts consider is the interest in the enlightenment of society. This interest stems from the belief that society should be a "market place of ideas;" individuals are exposed to as many ideas and interpretations as possible so that they may benefit from the free exchange of information.²² Enlightenment is founded on the notion that a person is only able to achieve truth if exposed to a wide variety of ideas and information.²³ Justice Holmes introduced the "market place of ideas" concept to first amendment jurisprudence in his dissent in *Abrams v. United States*,²⁴ where he stated that "the best test of truth is the power of thought to get itself accepted in the competition of the market."²⁵ This concept suggests that if individuals are able to freely debate and exchange ideas with one another, they will discover the most efficient way to solve societal problems. Thus Justice Holmes emphasized that the principle of free thought and speech is a salient foundation of the Constitution and that it is "not free thought for those who agree with us but freedom for the thought that we hate."²⁶

covery and spread of political truth; that without free speech and assembly discussion would be futile; that with them discussion affords ordinarily adequate protection against the dissemination of noxious doctrine; that the greatest menace to freedom is an inert people; that public discussion is a political duty; and that this should be a fundamental principle of the American government; . . . that the path of safety lies in the opportunity to discuss freely supposed grievances and proposed remedies; . . . Recognizing the occasional tyrannies of governing majorities, they amended the Constitution so that free speech . . . should be guaranteed.

Whitney v. California, 274 U.S. 357, 375-76 (1927) (Brandeis, J., concurring).

Integral to the idea of personal satisfaction is the importance of protecting expression, which does not necessarily involve speaking. For example, although a person may beg without speaking, the beggar may derive satisfaction out of the ability to express her anger and frustration. Without this freedom, the beggar is left with no avenue to convey her thoughts and feelings about her situation. See *infra* note 47 and accompanying text.

²² *TRIBE*, *supra* note 16, at 785-86.

²³ "One of the most important purposes of society and government is the discovery and spread of truth on subjects of general concern. This is possible only through absolutely unlimited discussion . . ." *CHAFEE JR.*, *supra* note 15, at 31; see also *TRIBE*, *supra* note 16, at 785-88.

²⁴ 250 U.S. 616, 624 (1919) (Holmes, J., dissenting); see also *infra* note 50.

²⁵ *Id.* at 630.

²⁶ *United States v. Schwimmer*, 279 U.S. 644, 655 (1929) (Holmes, J., dissenting).

The second factor that courts examine is whether or not the activity in question promotes and enhances the democratic system.²⁷ The drafters of the First Amendment encouraged all individuals to participate in the political process to ensure that varied interests were protected, not just those of the educated and upper classes. Alexander Meiklejohn, the architect of the "democratic governance" theory, contends that free speech must be protected by the First Amendment to guarantee intelligent self-government in a democratic system.²⁸ The Supreme Court, applying such a theory in *Cohen v. California*,²⁹ held that:

The constitutional right of free expression is powerful medicine in a society as diverse and populous as ours. It is designed and intended to remove governmental restraints from the arena of public discussion, putting the decision as to what views shall be voiced largely into the hands of each of us, in the hope that use of such freedom will ultimately produce a more capable citizenry and more perfect polity and in the belief that no other approach would comport with the premise of individual dignity and choice upon which our political system rests.³⁰

Implicit in this democratic concept is the assumption that individuals should be free to criticize the government's strengths and weaknesses. Judge Learned Hand expressed this idea, in *Masses Publishing Co. v. Patten*,³¹ as "the right to

²⁷ A democracy is defined as a "government in which supreme power is vested in the people and exercised by them or their elected representatives." RANDOM HOUSE DICTIONARY, *supra* note 5, at 242.

²⁸ ALEXANDER MEIKLEJOHN, *FREE SPEECH AND ITS RELATION TO SELF-GOVERNMENT* 27 (Kennikat Press 1972) (1948). Meiklejohn stressed the importance of different members of society meeting to discuss and express their political ideas with one another, no matter how different and conflicting those ideas may be. *Id.* at 55. He also emphasized that the United States is founded on the principle of self-government, where all individuals must be equally represented in the government to ensure that the government is truly run by the people. Meiklejohn stated that:

The primary social fact which blocks and hinders the success of our experiment in self-government is that our citizens are not educated for self-government. We are terrified by ideas, rather than challenged and stimulated by them. Our dominant mood is not the courage of people who dare to think. It is the timidity of those who fear and hate whenever conventions are questioned.

ALEXANDER MEIKLEJOHN: *TEACHER OF FREEDOM* 256 (Cynthia Stokes Brown ed., 1981) [hereinafter *TEACHER OF FREEDOM*].

²⁹ 403 U.S. 15 (1971).

³⁰ *Id.* at 24.

³¹ 244 F. 535 (S.D.N.Y.) (the production of a monthly revolutionary journal did

criticize either by temperate reasoning, or by immoderate and indecent invective." That right, he posited, is "the privilege of the individual in countries dependent upon the free expression of opinion as the ultimate source of authority."³²

The third factor courts use to guide their first amendment analysis is the promotion of self-realization (or self-actualization). This is defined as the human need to express oneself and to be recognized by others.³³ The Supreme Court has emphasized that the First Amendment is crucial to human development because, if individuals are unable to express themselves, their intellectual, social and personal growth will be stunted.³⁴ The Supreme Court explicitly has held that self-realization, which is based upon the "premise of individual dignity and choice,"³⁵ is a vital interest promoted by the First Amendment.

C. *What Conduct Constitutes Speech?*

Despite the unequivocal nature of the Free Speech Clause, courts considering the three factors discussed above have developed a myriad of tests, standards and criteria to determine what types of conduct are protected.³⁶ As a result, speech analysis has been widely criticized as a "hodgepodge of catego-

not violate the Espionage Act of June 15, 1917), *rev'd*, 246 F. 24 (2d Cir. 1917).

³² *Id.* at 539.

³³ Self-realization refers to "either [the] development of the individual's powers and abilities—an individual 'realizes' his or her full potential—or to the individual's control of his or her own destiny through making life-affecting decision—an individual 'realizes' the goals in life that he or she has set." Martin H. Redish, *The Value of Free Speech*, 130 U. PA. L. REV. 591, 593 (1982).

The Court has further recognized the importance of free speech to an individual's sense of self-worth and has noted that "a [human] spirit that demands self-expression . . . [fulfills] the basic human desire for recognition." *Procunier v. Martinez*, 416 U.S. 396, 427 (1974) (Marshall, J., concurring).

³⁴ *Procunier*, 416 U.S. at 427. Justice Marshall concluded that:

Such expression is an integral part of the development of ideas and a sense of identity. To suppress expression is to reject the basic human desire for recognition and affront the individual's worth and dignity . . . Such restraint may be 'the greatest displeasure and indignity to a free and knowing spirit that can be put upon him.'

Id. at 427-28 (quoting John Milton, *AREOPAGITICA* 21 (Everyman's ed. 1927) (1644)).

³⁵ *Cohen v. California*, 403 U.S. 15, 24 (1971).

³⁶ VAN ALSTYNE, *supra* note 13, at 21.

ries and tests . . . [and] . . . semantic distinctions and artificial rubrics."³⁷ It is, therefore, imperative to analyze the relevant tests and standards applied by courts to determine whether the Second Circuit's invalidation of section 240.35(1) of New York's Penal Law was proper.³⁸

When analyzing conduct, courts must first consider whether the act in question is sufficiently expressive so as to constitute "speech." The First Amendment does not contain an appendix that "authoritatively lists the varieties of speech within and without 'the' freedom of speech."³⁹ The leading case that guides courts in determining whether conduct is "speech" for the purposes of the First Amendment is *Spence v. Washington*.⁴⁰ In *Spence*, a college student hung a privately owned American flag, with a peace symbol taped to it, outside his window.⁴¹ The Court framed the issue as whether the student's activity was "sufficiently imbued with elements of communication to fall within the scope of the First and Fourteenth Amendments."⁴²

The *Spence* Court concluded that displaying an American flag with a peace symbol attached to it was conduct protected by the First Amendment.⁴³ The Court reasoned that the ex-

³⁷ *Loper v. New York City Police Dep't*, 802 F. Supp. 1029, 1041 (S.D.N.Y. 1992), *aff'd*, 999 F.2d 699 (2d Cir. 1993).

³⁸ *Loper*, 999 F.2d at 706. Part II will explore only those tests pertaining to governmental regulations of expressive conduct. Part II will also examine the interests that the First Amendment seeks to promote. This is an integral component of an examination of first amendment analysis because it is necessary to understand why certain tests advocate the protection of certain interests, but not others.

³⁹ VAN ALSTYNE, *supra* note 13, at 26.

⁴⁰ 418 U.S. 405 (1974). See generally Stephanie M. Kaufman, *The Speech/Conduct Distinction and First Amendment Protection of Begging in Subways*, 79 GEO. L.J. 1803, 1813-26 (1991).

⁴¹ The student claimed that he had hung the flag as a means of expressing his opinion that the United States stood for peace, despite its invasion of Cambodia and the Kent State incident. The student was convicted under a Washington State flag-misuse statute, which prohibited the exhibition of an American flag that had figures, symbols or drawings placed on it. See WASH. REV. CODE ANN. § 9.86.020 (West 1988); see also *Spence*, 418 U.S. at 406-07.

⁴² *Spence*, 418 U.S. at 409.

⁴³ *Id.* at 414-15. The Court cited to its decision in *United States v. O'Brien*, 391 U.S. 367 (1968), where the Court stated that "[w]e cannot accept the view that an apparently limitless variety of conduct can be labeled 'speech' whenever the person engaging in the conduct intends thereby to express an idea." *Id.* at 376. It was necessary for the Court to create a mechanism to separate those activities that the First Amendment did protect from those that it did not. See *supra*

pression of an idea through activity or conduct is protected by the First Amendment if the actor or speaker intends to convey a particularized message and the likelihood is great that the message would be understood by those who viewed it.⁴⁴ In *Spence*, the Court found that these two requirements were satisfied: the college student was trying to convey the message that he believed that the United States stood for peace, despite recent political turmoil, and "his message was direct [and] likely to be understood."⁴⁵ The *Spence* decision is central to the development of free speech jurisprudence because it provided first amendment protection to certain conduct, unaccompanied by words, that expressed an idea.

D. *Content-Neutral v. Content-Based Regulations*

There are two types of governmental regulation of speech.⁴⁶ The first type, called "content-based regulation,"⁴⁷

notes 60-63 and accompanying text.

⁴⁴ *Spence*, 418 U.S. at 411. The Court acknowledged the state's argument that there was a risk that those who viewed the flag would not understand that it stood for peace. The Court stated, however, that it was constitutional for people to have different views of what the American flag symbolized. "[The flag] evidences . . . unity and diversity . . . [and] carries in varying degrees a different message. 'A person gets from a symbol the meaning he puts into it, and what is one man's comfort and inspiration is another's jest and scorn.'" 418 U.S. at 413 (quoting *West Virginia State Bd. Educ. v. Barnette*, 319 U.S. 624, 632-33 (1943)).

Some skeptics hold that an activity that does not involve actual words cannot constitute "speech," and therefore question whether such activity should merit first amendment protection. *Spence* refutes this skepticism. See also *Clark v. Community For Creative Non-Violence*, 468 U.S. 288, 293 (1984) (sleeping in a national park to protest the country's homeless policies is expressive conduct protected to some extent by the First Amendment).

Other non-vocal activities that the Supreme Court has recognized as expressive conduct meriting First Amendment protection include: the burning of a United States flag by a protestor during a political march at the Republican National Convention, *Texas v. Johnson*, 491 U.S. 397 (1989); the wearing of black armbands by school students on certain days to protest the Vietnam war, *Tinker v. Des Moines Indep. Community Sch. Dist.*, 393 U.S. 503, 505 (1969); and a silent sit-in protesting a library's segregation policy. *Brown v. Louisiana*, 383 U.S. 131, 141-42 (1966).

⁴⁵ *Spence*, 418 U.S. at 415.

⁴⁶ See generally *TRIBE*, *supra* note 16, at 789-94.

⁴⁷ *TRIBE*, *supra* note 16, at 790. An example is a prohibition against any criticism of the government. See *New York Times v. Sullivan*, 376 U.S. 254 (1964) (holding the Sedition Act of 1798, proscribing criticism of the government, unconstitutional).

is directed at a particular activity that involves a message that the government disapproves of and seeks to suppress. The second type, called "content-neutral regulation,"⁴⁸ is directed at furthering certain goals unrelated to the speech, such that the limit on speech is only incidental. Although a content-neutral regulation does not target the actual message, it may have an adverse effect on an individual's ability to communicate ideas.

Content-based and content-neutral regulations are subject to different levels of scrutiny. Most content-based regulations are presumed to be violative of the First Amendment.⁴⁹ The Court has held that if a government regulation is content-based, the government "must show that [the regulation] is necessary to serve a compelling state interest and that it is narrowly drawn to achieve that end."⁵⁰ To uphold a content-

⁴⁸ *TRIBE*, *supra* note 16, at 789-90. An example of a content-neutral regulation is a government ban against loudspeakers in residential areas. *See Kovacs v. Cooper*, 336 U.S. 77 (1949) (a prohibition of loudspeakers was constitutional since the state had a compelling interest, unrelated to the suppression of speech, in protecting the neighborhood from loud and boisterous noise).

⁴⁹ *Widmar v. Vincent*, 454 U.S. 263, 269-70 (1981) (presumption of invalidity of regulations aimed at speech content); *see also TRIBE*, *supra* note 16, at 790.

The Court has emphasized that the goal of the First Amendment is to ensure that the "government has no power to restrict expression because of its message, its ideas, its subject matter, or its content." *Police Dep't of Chicago v. Mosley*, 408 U.S. 92, 95 (1972) (citations omitted) (an ordinance prohibiting all picketing, except by those involved in a labor dispute, was unconstitutional since it excluded certain picketers based on the message they conveyed to the public).

The Court generally is skeptical of regulations that prohibit unconventional or bizarre ideas. "If there is a bedrock principle underlying the First Amendment, it is that the government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable." *Texas v. Johnson*, 491 U.S. 397, 414 (1989) (overturning the conviction of a man who burned the American flag as part of a protest at the Republican National Convention since the Texas statute was aimed at the message the activity conveyed and the state's interest in preventing breaches of peace did not justify the conviction).

⁵⁰ *Abrams v. United States*, 250 U.S. 616, 624 (1919) (Holmes, J., dissenting). In *Abrams*, the Court affirmed the convictions of five Bolshevik sympathizers for violating the 1918 amendments of the Espionage Act that made it an offense to encourage people to protest against the war with Germany. *Id.* at 616. *Abrams* and several others threw leaflets (that denounced United States intervention in the Russian Revolution) out of a window, and urged people to protest U.S. shipments to anti-Soviet forces. The government argued that the pamphlets incited people to protest the war and, by lowering morale and support for the war, created the potential for defeat. *Id.* Applying the rationale used in *Schenck*, the Court upheld *Abrams's* conviction. *Id.* at 618. The Court conceded that the Espionage Act limited individuals' ability to express dissent towards the war effort, but agreed

based regulation, the Court requires a very close relationship between the state interest—the end goal—and the regulation—the means to that end. It is probable that a content-based regulation will be struck down if it “unnecessarily [reaches] expressive conduct.”⁵¹

To determine the constitutionality of a content-based regulation, the Court also examines whether an alternative means for furthering the state's interest exists.⁵² For instance, if the state's interest could be furthered by dialogue between opposing parties, rather than by a regulation that suppresses speech, the Court will strike the regulation as an unnecessary abridgment of free speech.⁵³ Moreover, the government cannot justify a content-based regulation by asserting that the message conveyed had been voiced already by other speakers or that the same message can be communicated in another time, place or manner.⁵⁴ Because the Court fears governmental con-

with the government that its interest in protecting the war effort was sufficiently compelling to justify this restraint on speech. *Id.* at 616.

In his dissent, Justice Holmes argued that the defendants' conviction should be overturned since there was no proof of actual intent to defeat the American war effort against Germany. There was only proof of Abrams's intent to help Russia and stop American intervention in the Russian Revolution. Indeed, Justice Holmes's vehement dissent in *Abrams* is praised as an eloquent exposition of the philosophical meaning of the First Amendment. Holmes emphasized the significance of the individual's freedom to exchange ideas with others and concluded that only “the present danger of immediate evil or an intent to bring it about” will justify regulating speech. *Id.* at 628. Justice Holmes stated: “In this case sentences of twenty years imprisonment have been imposed for the publishing of two leaflets that I believe the defendants had as much right to publish as the Government has to publish the Constitution of the United States now vainly invoked by them.” *Id.* at 629.

⁵¹ *TRIBE*, *supra* note 16, at 833; *see also* *Consolidated Edison Co. v. Public Serv. Comm'n*, 447 U.S. 530 (1980) (invalidating a public service commission order that prohibited a utility from including an insert in monthly billing envelopes that discussed controversial issues of public policy). In *Consolidated Edison*, the Court required the government to illustrate that the regulation was “a precisely drawn means of serving a compelling state interest.” *Id.* at 540; *see also* *Widmar v. Vincent*, 454 U.S. 263 (1981) (striking down a state university regulation that prohibited a religious student group from using university facilities because the university failed to show that the regulation was necessary to serve a compelling state interest and that it was narrowly drawn to achieve that end).

⁵² *TRIBE*, *supra* note 16, at 833-34.

⁵³ *TRIBE*, *supra* note 16, at 834; *see also* *Whitney v. California*, 274 U.S. 357, 377 (1927) (Justice Brandeis reasoned: “If there be time to expose through discussion the falsehood and fallacies, to avert the evil by the process of education, the remedy to be applied is more speech, not enforced silence.”).

⁵⁴ In determining whether a regulation is violative of the First Amendment, it

trol of the public's thought processes, content-based regulations are undoubtedly more difficult for the government to justify than content-neutral regulations.⁵⁵

When analyzing the constitutionality of a content-neutral regulation, the court balances the state's interest in regulating the activity against the degree to which the regulation affects an individual's freedom of speech.⁵⁶ In *United States v. O'Brien*,⁵⁷ the Supreme Court created a four-factor test to de-

is irrelevant whether other means of communicating the same idea exist. See, e.g., *Consolidated Edison*, 447 U.S. at 541 n.10 ("[W]e have consistently rejected the suggestion that a government may justify a content-based prohibition by showing that speakers have alternative means of expression."); see also *Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 757 (1976) (invalidating state ban on advertising of prescription drug prices); *Spence v. Washington*, 418 U.S. 405, 411 n.4 (1974) (rejecting argument that availability of other means for students to express similar ideas made any suppression of their speech "miniscule and trifling"). But cf. *Young v. New York City Transit Authority*, 903 F.2d 146 (2d Cir. 1990) (a total ban of begging in the subways was constitutional since beggars had the alternative means of begging in the streets).

⁵⁵ See, e.g., Geoffrey R. Stone, *Content Regulation and the First Amendment*, 25 WM. & MARY L. REV. 189 (1983) (if content-based regulations were not subject to a higher standard of review, the Court would be "effectively excising a specific message from public debate . . . [and] mutilat[ing] the thinking process of the community").

This distinction between content-based and content-neutral regulations has been widely criticized by those who argue that any type of government regulation on free speech should be subjected to a fairly high level of scrutiny. For example, Martin Redish argues that "[w]hile governmental attempts to regulate the content of expression undoubtedly deserve strict judicial review, it does not logically follow that equally serious threats to first amendment freedoms cannot derive from restrictions imposed to regulate expression in a manner unrelated to content." Martin H. Redish, *The Content Distinction in First Amendment Analysis*, 34 STAN. L. REV. 113, 150 (1981). Redish asserts that every governmental regulation of expression should be subjected to a "unified compelling interest analysis." *Id.*

⁵⁶ *Clark v. Community For Creative Non-Violence*, 468 U.S. 288 (1984). Tribe notes that:

even a wholly neutral government regulation or policy, aimed entirely at harms unconnected with the *content* of any communication, may be invalid if it leaves too little breathing space for communicative activity, or leaves people with too little access to channels of communication, whether as would-be-speakers or as would-be-listeners.

TRIBE, *supra* note 16, at 978.

⁵⁷ 391 U.S. 367 (1968). In *O'Brien*, the defendant was convicted after he intentionally burned his draft card to protest the Vietnam War. O'Brien was convicted under a statute that punished anyone who "forges, alters, knowingly destroys, knowingly mutilates, or in any manner changes any such [draft card]." *Id.* at 370 (quoting Universal Military Training and Service Act of 1948, 50 U.S.C. § 462(b) app. (1948)). O'Brien argued that the statute violated his first amendment right to express his views about the draft and the war. O'Brien candidly told the jury that

termine the constitutionality of a content-neutral regulation. To be upheld as a content-neutral, the regulation must be within the constitutional power of the Government; it must further an important or substantial governmental interest; it must be unrelated to the suppression of free expression;⁵⁸ and it must have an incidental restriction on first amendment freedoms that is no greater than is essential to the furtherance of that interest.⁵⁹

The *O'Brien* Court held that conduct having only some expressive elements did not necessarily merit the full protection of the First Amendment and may be subject to governmental regulation.⁶⁰ Where the expressive conduct involved

he burned his draft card in an effort to influence the public's opinion towards the war and had hoped that through his activity others would adopt his anti-war beliefs. *Id.* at 370.

⁵⁸ A regulation is unrelated to the suppression of free expression if the regulation's goal is not to stifle the message that the speech conveys and the suppression of the speech is incidental to the primary goal of the regulation. *Clark*, 468 U.S. at 294.

⁵⁹ *O'Brien*, 391 U.S. at 377. The Court in *O'Brien* characterized the statute as content-neutral and emphasized that the suppression of O'Brien's speech was incidental since the state's real motive was to protect the draft. *Cf. NLRB v. Fruit & Vegetable Packers Union*, 377 U.S. 58, 78-79 (1964) (Black, J., concurring) (statute proscribing picketing of stores violated the First Amendment since the statute did not further any governmental interest and was aimed solely at the particular views of the picketers); *Stromberg v. California*, 283 U.S. 359, 361 (1931) (striking down a statute that prohibited people from displaying any "flag, badge, banner, or device" to express their opposition to organized government).

In contrast to *O'Brien*, the Court in *Stromberg* characterized the statute as content-based because the government's interest was in fact to prohibit the communicative nature of the conduct. *Stromberg*, 283 U.S. at 368. The Court held that the statute was "aimed at suppressing communication," and thus could not be "sustained as a regulation of noncommunicative conduct." *O'Brien*, 391 U.S. at 382 (discussing *Stromberg*).

Professor Tribe disagrees with the Supreme Court's characterization of the statute in *O'Brien* as content-neutral. *TRIBE*, *supra* note 16, at 823. Tribe is skeptical as to whether the government's true motive in constructing the statute was to ensure the smooth and successful running of the Selective Service, and argues that the real motive behind the statute was to stifle any dissent against the war. He states that "the publicly visible evidence quite clearly shows that the [statute] would not have been enacted but for the purpose of suppressing dissent." *TRIBE*, *supra* note 16, at 823-25.

⁶⁰ *O'Brien*, 391 U.S. at 376. The Court held that "when 'speech' and 'nonspeech' elements are combined in the same course of conduct, a sufficiently important governmental interest in regulating the nonspeech element can justify incidental limitations on First Amendment freedoms." *Id.* The Court further stated: "[E]ven on the assumption that the alleged communicative element in O'Brien's conduct is sufficient to bring into play the First Amendment, it does not necessarily follow

the burning of draft cards, the Court found the regulation proper pursuant to Congress's power to raise and support armies and to create laws that are necessary and proper to achieve that end.⁶¹ Moreover, the Court determined that the government has a substantial interest in the prevention of the destruction of draft cards since it is vital for the country to have a "system for raising armies that functions with maximum efficiency and is capable of easily and quickly responding to continually changing circumstances."⁶² The statute also satisfied the third prong of the test since the goal of the regulation was unrelated to the suppression of O'Brien's free speech. The Court concluded that:

both the governmental interest and the operation of [the statute] are limited to the noncommunicative aspect of O'Brien's conduct. The governmental interest and the [statute] are limited to preventing harm to the smooth and efficient functioning of the Selective Service System. . . . For this noncommunicative impact of his conduct, and for nothing else, he was convicted.⁶³

Finally, the Court held that the statute was constitutional since it did not place any restriction on first amendment freedoms.

The Court expanded the four-factor *O'Brien* test in *Clark v. Community for Creative Non-Violence*.⁶⁴ In *Clark*, the Court held that a content-neutral regulation of oral and written expression is subject to reasonable time, place and manner re-

that the destruction of a registration certificate is constitutionally protected activity." *Id.*

⁶¹ *Id.* at 377 (citing *Lichter v. United States*, 334 U.S. 742, 755-58 (1948)).

⁶² *Id.* at 381.

⁶³ *Id.* at 381-82.

⁶⁴ 468 U.S. 288 (1984). *Clark* involved a National Park Service regulation that prohibited a group that included homeless people from sleeping in Washington D.C.'s Lafayette Park and Mall prior to a demonstration. The demonstration was intended to call attention to the plight of the homeless. Homeless people asserted that they would only participate in the demonstration if they could sleep in the park and Mall the night before. The ban was a clear limitation on the manner in which the protesters could demonstrate. The government argued that it had a legitimate interest in insuring that the parks were adequately protected and remained in an intact condition for the millions of people who visit Washington D.C. *Id.* at 296. The government also contended that if the protesters slept in the park and the Mall it would impede government efforts to keep these areas clean. *Id.* Although the Court determined that sleeping in the park was expressive conduct within the meaning of the First Amendment, the Court held that such a finding was not in itself sufficient to warrant first amendment protection. *Id.* at 293.

strictions as long as the regulation is narrowly tailored to serve a significant governmental interest.⁶⁵ The Court has interpreted "narrowly tailored" to mean that the governmental interest must be served by means that are substantially less intrusive of speech interests.⁶⁶ The regulation still may be constitutional, however, even if it is not the least-restrictive means available to fulfill the governmental interest.⁶⁷ Such regulations also must provide ample alternative channels for communication of the information.⁶⁸

⁶⁵ Courts usually require a showing by the government that its interest is substantial and worthy of infringing any expressive element of the conduct. Professor Tribe argues: "However neutral their intention with respect to speakers and messages, [content-neutral regulations] impact is anything but neutral, and government must therefore go a substantial distance to justify enforcing them." *TRIBE*, *supra* note 16, at 979-80.

⁶⁶ *Clark*, 468 U.S. at 299. The Court in *Clark* stated that it was "unmoved by the Court of Appeals' view that the challenged regulation is unnecessary, and hence invalid, because there are less speech-restrictive alternatives that could have satisfied the Government interest in preserving park lands." *Id.*

⁶⁷ See *Ward v. Rock Against Racism*, 491 U.S. 781, 798 (1989) (municipal noise regulation designed to ensure that musical performances at public concert stage did not disturb surrounding residents was a "content-neutral" time, place or manner regulation). The Court in *Ward* stated:

[A] regulation of the time, place, or manner of protected speech . . . need not be the least restrictive or least intrusive means of [serving the government's interest]. Rather, the requirement of narrow tailoring is satisfied "so long as the . . . regulation promotes a substantial government interest that would be achieved less effectively absent the regulation," . . . [and] the means chosen are not substantially broader than necessary to achieve the government's interest.

Id. at 798-800 (quoting *United States v. Albertini*, 472 U.S. 675, 689 (1985)).

⁶⁸ 468 U.S. at 293. The Court in *Clark* held that the ban on sleeping in the park did not violate the First Amendment. First, the Court determined that the ban was content-neutral because it was not aimed at the message conveyed by sleeping in the parks. *Id.* at 295. The Court noted that the ban narrowly focused on the government's substantial interest in maintaining the safety of these areas since it did not enjoin the actual demonstration. This buttressed the government's argument that the regulation was not directed to suppress any message that homelessness carries with it. The Court also stated that, despite the ban, the "intended message concerning the plight of the homeless" still could be delivered to the media and the public—through the use of signs, the presence of protestors on a day-and-night vigil, and through the erection of two symbolic tent cities. *Id.*

Similarly, in *Perry Education Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37 (1983), the Court held that the First Amendment was not violated when a union, which had been elected by public school teachers as its exclusive bargaining representative, was granted access to the interschool mail system while access was denied to a rival union. *Id.* at 44. The rival union argued that its right of freedom of speech was denied since it could not communicate to the teachers via the school's mail facilities.

E. *Offensive Speech is not Precluded from First Amendment Protection*

The Court consistently has held that certain conduct cannot be regulated or prohibited just because a distasteful message is associated with such conduct.⁶⁹ That is, once expressive conduct is deemed protected by the First Amendment, it is irrelevant whether the message integral to the activity is offensive to members of society.⁷⁰ In *Cohen v. California*,⁷¹ the Court analyzed the extent to which society at large should be protected from messages that might be considered distasteful. The *Cohen* Court overturned the defendant's conviction for disturbing the peace after he had walked into a courthouse wearing a jacket with the phrase "Fuck the Draft" printed on it.⁷²

The Court analyzed the collective-bargaining agreement in the context of a governmental regulation since the agreement was between the Board of Education—an arm of the government—and the union. The Court upheld the regulation as a reasonable time, place and manner regulation because the exclusion of the rival union served the compelling state interest of ensuring exclusive and adequate representation by the elected union, and there were substantial alternative channels that were available to the rival union, such as bulletin boards. *Id.* at 46-53; see also *Renton v. Playtime Theatres, Inc.*, 475 U.S. 41 (1986) (upholding a zoning ordinance that prohibited adult motion picture theatres from locating within 1000 feet of any residential zone, single- or multiple-family dwelling, church, park or school, since the city had a substantial interest in addressing the problems created by adult theaters).

The standard created by the Court in *Clark* is similar to the standard set out in *O'Brien* in that both sanction content-neutral regulations of speech, provided that they are narrowly drawn to further a substantial governmental interest that is unrelated to the suppression of free speech. The Court in *Clark* noted the ban on sleeping was also sustainable under the *O'Brien* four-factor standard, and stated that there is little if any difference between the *O'Brien* standard and the standard applied to time, place and manner restrictions. *Clark*, 468 U.S. at 298.

⁶⁹ See, e.g., *Texas v. Johnson*, 491 U.S. 397, 414 (1989) (flag desecration is expressive conduct protected by the First Amendment).

⁷⁰ *TRIBE*, *supra* note 16, at 940. *Tribe* states that "[the] presumption of the equality of ideas is a corollary of the basic requirement that the government may not aim at the communicative impact of expressive conduct." *Id.* at 940-41.

⁷¹ 403 U.S. 15 (1971).

⁷² The Court held that Cohen's conduct was protected by the First Amendment since he wore the jacket to express his animosity about the Vietnam war and the draft. The state argued that Cohen's conduct should be prohibited since his behavior had a tendency to provoke others to act violently or to disturb the peace. *Id.* at 16-17. The state also contended that the people within the courthouse, including young children, should not be forced to view the message on Cohen's jacket. The Court rejected these arguments and stated that when individuals leave the privacy of the home they take the risk of exposing themselves to unpleasant messages and

The Court created a standard to determine when particular conduct or a message is so repugnant that the government has a right to regulate or prohibit it. Before the government can regulate certain distasteful speech, the government must show that "substantial privacy interests are being invaded in an essentially intolerable manner" by the distasteful speech. "Any broader view . . . would effectively empower a majority to silence dissidents simply as a matter of personal predilections."⁷³

In *Cohen*, the Court was particularly concerned with regulations that silenced expression solely on the basis of the unconventional or unusual nature of the message. The Court emphasized that one of the tenets of the Constitution is "the right to criticize public men and measures—and that means not only informed and responsible criticism but the freedom to speak foolishly and without moderation."⁷⁴ The Court recog-

ideas. *Id.* at 20-21.

The Court concluded that although some people in the courthouse may have been offended by Cohen's message, these people "could effectively avoid further bombardment of their sensibilities simply by averting their eyes." *Id.* The state's interest in protecting people from unpleasant messages did not justify curbing Cohen's right to express his views towards the war. See also *Spence v. Washington*, 418 U.S. 405, 410 (1974) ("public expression of ideas may not be prohibited merely because the ideas are themselves offensive to some of their hearers"); cf. *City Council of Los Angeles v. Taxpayers for Vincent*, 466 U.S. 789, 805 (1984) (the government may "protect its citizens from unwanted exposure to certain methods of expression which may legitimately be deemed a public nuisance").

⁷³ *Cohen*, 403 U.S. at 21. The Court noted: "While the particular four-letter word being litigated here is perhaps more distasteful than most others of its genre, it is nevertheless often true that one man's vulgarity is another's lyric." *Id.* at 25. Since there was no evidence that Cohen's jacket incited people to violence, the state could not justify Cohen's conviction by claiming that the suppression was necessary to curtail public violence.

One year later the Court followed the reasoning of *Cohen* in *Police Dep't of Chicago v. Mosley*, 408 U.S. 92 (1972). In *Mosley*, the defendant was convicted for picketing near a school. The picketing consisted of simply holding a sign protesting discrimination against blacks. A city ordinance proscribed picketing within 150 feet of a school during school hours, unless the peaceful picketing involved a labor dispute. The Court held that the ordinance discriminated against certain picketers, such as the defendant, since it allowed certain messages to be voiced, while prohibiting others. *Id.* at 95-96.

Consistent with its reasoning in *Cohen* and *Mosley*, the Court has held that the government may not choose which messages are allowed to be voiced and heard. See, e.g., *Madison Joint Sch. Dist. v. Wisconsin Employment Relations Comm'n*, 429 U.S. 167 (1976) (school board could not prevent a non-union speaker from making a presentation at a public meeting that was called to discuss the board's labor relations).

⁷⁴ *Cohen*, 403 U.S. at 26 (quoting *Baumgartner v. United States*, 322 U.S. 665,

nized that, although Cohen's jacket was unconventional, the First Amendment is not limited to protecting only academic and rational thoughts.⁷⁵ Therefore, the First Amendment extended to Cohen's right to express his emotions and feelings about the war. If, in the interest of shielding individuals from offensive conduct, Cohen's jacket was not protected, the First Amendment essentially would be deprived of all value.

The Court did not ignore the privacy interests of those individuals exposed to Cohen's jacket. Instead, it made clear that, in the interests of the First Amendment, the observer or listener is the one who has the burden of "avert[ing] his eyes or plug[ging] his ears" to avoid lurid messages and "offensive intrusions which increasingly attend urban life."⁷⁶

673-74 (1944)); *see also* *Tinker v. Des Moines Indep. Community Sch. Dist.*, 393 U.S. 503, 511 (1969) (school regulation prohibiting arm-bands worn in protest of the Vietnam War was unconstitutional since the school failed to show that its action was caused by something more than a mere desire to avoid the discomfort and unpleasantness that accompany an unpopular viewpoint).

⁷⁵ *Cohen*, 403 U.S. at 26. In reversing Cohen's conviction, the Court stated that:

[M]uch linguistic expression serves a dual communicative function: it conveys not only ideas capable of relatively precise, detached explication, but otherwise inexpressible emotions as well. . . . [W]ords are often chosen as much for their emotive as their cognitive force. We cannot sanction the view that the Constitution, while solicitous of the cognitive content of individual speech, has little or no regard for that emotive function which, practically speaking, may often be the more important element of the overall message sought to be communicated.

Id.

Tribe also discusses the importance of emotive, as well as cognitive, messages in the context of the civil rights movement during the 1960s. Tribe concludes that not only did people march and picket to express their discontent because other modes of expression were prohibited, but these methods of expression were utilized also "because no other medium could adequately register either the intensity of their protest or the solidarity of the movement." *TRIBE, supra* note 16, at 840.

⁷⁶ *Cohen*, 403 U.S. at 21. The Court has been more sensitive to offensive speech that physically enters the home. *See, e.g.,* *Rowan v. United States Post Office Dep't*, 397 U.S. 728 (1970) (upholding addressee's statutory right to compel a mailer of erotic material to remove addressee's name from the mailing list and stop all future mailings); *Kovacs v. Cooper*, 336 U.S. 77 (1949) (upholding ordinance proscribing the use of sound trucks in a loud and raucous manner, in part because an individual in his home cannot escape the intrusion).

In contrast, an individual has an insubstantial privacy right in avoiding offensive expressions in public places, unless the person is unable to leave the situation without great burden. *See, e.g.,* *Lehman v. Shaker Heights*, 418 U.S. 298, 307 (1974) (Douglas, J., concurring) (commuters deemed captives of advertising on municipally owned buses).

The tests established by the Court in *O'Brien*, *Clark* and *Cohen* are at times difficult to reconcile. The Second Circuit was faced with such difficulties when it considered *Loper v. New York City Police Department*. These tests both facilitated and hindered the Second Circuit's decision.

II. *YOUNG V. NEW YORK CITY TRANSIT AUTHORITY*⁷⁷

On November 28, 1989, the Legal Action Center for the Homeless filed a complaint on its own behalf and on behalf of two indigents, William B. Young and Joseph Walley, challenging the constitutionality of a Transit Authority ("TA") regulation that prohibited panhandling in the New York City subway system.⁷⁸ The plaintiffs contended that, because begging was expressive conduct that deserved the protection of the First Amendment, the TA should be enjoined from enforcing the ban.⁷⁹ The TA argued that the regulation was valid because it served the state's compelling interest in ensuring safety on the subway system.⁸⁰ On January 25, 1990, the District Court for

⁷⁷ 903 F.2d 146 (2d Cir.), *cert. denied*, 498 U.S. 984 (1990). This Comment pays specific attention to *Young* apart from the previous background section because *Young* has such a significant and direct impact on the analysis and reasoning of *Loper*.

⁷⁸ *Id.* at 148. Young and Walley were representative plaintiffs for a class of homeless and needy people who ask for money in the subways of New York City. The complaint alleged that the regulation that prohibited begging in the subways, N.Y. COMP. CODES R. & REGS. tit. 21 § 1050.6. (1989), was violative of the plaintiffs' first amendment right of freedom of expression. *Young*, 903 F.2d at 148. Section 1050.6(b)(2) prohibits all solicitation for charity except by organizations that "(1) have been licensed for any public solicitation . . . or (2) are duly registered as charitable organizations." N.Y. COMP. CODES R. & REGS. tit. 21 § 1050.6(b)(2).

The Transit Authority ("TA") has the power, pursuant to section 1201 of the New York Public Authority Law, to create "regulations governing passenger conduct, in [an effort] to facilitate an effective, safe and reliable means of public transportation." *Id.* (citing N.Y. PUB. AUTH. LAW § 1204(5-a) (McKinney 1982 & Supp. 1990)).

⁷⁹ *Young*, 903 F.2d at 148. The Legal Action Center for the Homeless ("LACH") primarily argued that begging is expressive conduct protected by the First Amendment since "whenever a homeless . . . person is extending his hand, he is communicating" within the meaning of the First Amendment. *Id.*; 903 F.2d at 150. Moreover, LACH challenged the regulation's distinction between solicitation of money for charities and solicitation of money for homeless individuals.

⁸⁰ *Id.* at 149. In October 1989, in response to complaints about the presence of beggars in the subway, the TA created "Operation Enforcement," a program aimed at enforcing the prohibition of begging in the subways. As part of this program,

the Southern District of New York permanently enjoined the TA from enforcing the ban on begging and held that begging constitutes a form of speech meriting the full protection of the First Amendment.⁸¹

On appeal, the Second Circuit framed the issue similarly to the district court: whether begging constitutes "expressive conduct" deserving of first amendment protection.⁸² In *Young*, the majority opinion, written by Judge Altimari, concluded that begging was not "speech" deserving of first amendment protection because the only purpose of begging is to convey a desire for money and there is no particularized message involved. Thus, the court rejected the plaintiffs' argument that begging sends a message about the economic and social conditions of the homeless and ruled that the ban against begging was constitutional.⁸³

The majority addressed the distinction between begging and other types of charitable solicitation. The court held that the statute's distinction between begging and charitable solicitation was justified since organized charitable solicitation

the TA distributed over one million pamphlets that delineated eleven TA rules, including the "No panhandling or begging" rule. The pamphlets made clear to readers that those caught begging in the subways would either be arrested, fined and/or ejected from the subway station. *Id.*

⁸¹ *Young*, 729 F. Supp. 341 (S.D.N.Y.), *rev'd*, 903 F.2d 146 (2d Cir.), *cert. denied*, 498 U.S. 984 (1990). The district court held that there was no distinction between charitable solicitation, which was allowed under the statute, and panhandling, and therefore begging was protected by the First Amendment. *Id.* The district court relied upon the reasoning employed by the Supreme Court in *Schaumburg v. Citizens for a Better Env't*, 444 U.S. 620 (1980), in which the Court held that organized charitable solicitation constituted a type of speech protected by the First Amendment. *Id.* The district court held that the protection afforded to charitable solicitation should extend to begging since there is no practical distinction between the two activities. *Young*, 727 F. Supp. at 352.

⁸² *Young*, 903 F.2d at 147.

⁸³ The majority stated that "[t]he 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." *Id.* at 154. The court further noted: "It is possible to find some kernel of expression in almost every activity a person undertakes . . . but such a kernel is not sufficient to bring the activity within the protection of the First Amendment." *Id.* (citing *City of Dallas v. Stanglin*, 490 U.S. 19 (1989)).

The court acknowledged that even if a beggar conveys a particularized message, thus satisfying the first criteria established in *Spence*, that conduct still would fail under *Spence* because the likelihood that a passenger on the subway would understand or discern this message from the beggar's conduct is too slim. *Id.* at 153.

serves "community interests by enhancing communication and disseminating ideas," while begging in the subway "amounts to nothing less than a menace to the common good."⁸⁴ The court reasoned that even if panhandling was a form of expressive conduct within the boundaries of the First Amendment, the prohibition is still valid since beggars have alternatives—such as begging in other areas of the city—and the state has a legitimate interest in protecting subway riders from the dangers associated with begging in the confined areas of the subway.⁸⁵

Judge Meskill's forceful dissent in *Young* criticized the majority's distinction between begging and organized charitable solicitation.⁸⁶ Judge Meskill found that there was no "legally justifiable distinction" between begging for one's self and solicitation by organized charities.⁸⁷ Furthermore, he doubted

⁸⁴ *Id.* at 156; see also *City Council of Los Angeles v. Taxpayers for Vincent*, 466 U.S. 789, 805 (1984) (establishing that the government can "protect its citizens from unwanted exposure to certain methods of expression which may legitimately be deemed a public nuisance").

⁸⁵ *Young*, 903 F.2d at 158. The court characterized the prohibition of begging in the subways as content-neutral and applied the standard set out in *O'Brien* to determine whether the statute was constitutional. *Id.* at 157-59; see *supra* notes 56-59 and accompanying text. In applying the four-factor *O'Brien* test, the court determined that the TA has a statutory mandate to create laws to ensure the safety of the trains. The court concluded that the prohibition furthers a substantial governmental interest since so many passengers fear panhandlers and are dissuaded from using the subway because of the dangers associated with begging, such as being pushed onto the tracks. Thus the court held that the statute was justified since the government has a compelling interest in ensuring the safety of the subways. As to the third *O'Brien* requirement, the court held that the regulation was unrelated to the suppression of free expression since its goal is to improve the safety of the trains. In labelling the regulation as content-neutral, the court stated: "Even if begging had no communicative character at all, these independent dangers would be just as real, and consequently, there would remain a substantial governmental interest in prohibiting the conduct in the subway." *Young*, 903 F.2d at 159. As to whether the complete ban on begging was necessary to further the government's interests, the court concluded that a total prohibition was necessary due to the "exigencies created . . . in the subway." *Id.*

⁸⁶ Judge Meskill's dissent is integral to any discussion of *Young* and *Loper* since his analysis provides much of the same framework the Second Circuit used for its analysis in *Loper*.

⁸⁷ *Id.* at 164 (Meskill, J., dissenting). The dissent reasoned that: To hold [that begging is distinguishable from charitable solicitation for first amendment purposes] would mean that an individual's plight is worthy of less protection in the eyes of the law than the interests addressed by an organized group. No court has ever so ruled. Defendants therefore may not open the door to the latter while slamming it in the face of the former.

whether the majority correctly applied *O'Brien* to determine the constitutionality of the statute, noting that the *O'Brien* standard normally is used in cases involving symbolic conduct rather than speech. Judge Meskill concluded that, since the government was regulating the beggars' "speech incident to their solicitation of alms," and not its "symbolic conduct," *O'Brien* was not the correct standard to apply.⁸⁸ Instead, he argued that a "time, place and manner" analysis, as set forth in *Clark v. Community for Creative Non-Violence*, was the appropriate standard.⁸⁹ He also asserted that a complete ban is not narrowly tailored to achieve the state's interest in curtailing the dangers associated with begging, since the regulation prohibited all begging in the subway regardless of whether it is dangerous or frightening. Judge Meskill noted that the regulation prohibited aggressive begging, as well as begging by a "blind man rattling a cup full of change . . . which would hardly daunt the average New Yorker."⁹⁰ Thus, a complete ban placed a greater burden on speech than was necessary and was therefore unconstitutional.

III. HISTORY OF *LOPER V. NEW YORK CITY POLICE DEPARTMENT*⁹¹

A. *The District Court Decision*⁹²

On November 23, 1990, Jennifer Loper and William Kaye,

Id. at 167. Moreover, there was no evidence of record to prove that charitable solicitation does not create the same problems that begging creates. *Id.* The dissent's interpretation of *Schaumburg v. Citizens for a Better Env't*, 444 U.S. 629 (1980), differed from the majority's, finding that first amendment protection should be extended to all charitable solicitation "because a sufficient nexus exists between a charity's expression of ideas and its fundraising." *Young*, 903 F.2d at 165.

⁸⁸ 903 F.2d at 166.

⁸⁹ 468 U.S. 288, 294 (1984) (a regulation of the time, place or manner of an activity involving conduct intended to be communicative is constitutional where the regulation is narrowly drawn to further substantial governmental interests and provided that the interest is unrelated to suppression of free speech).

⁹⁰ 903 F.2d at 168.

⁹¹ 999 F.2d 699 (2d Cir. 1993).

⁹² The district court's decision in *Loper* is significant because it provides much of the background for the Second Circuit's affirmance. Additionally, the brevity of the Second Circuit's decision in *Loper* makes it imperative to analyze the district court's decision in *Loper* to adequately comprehend the Second Circuit's decision.

two indigents, filed a class action in the Southern District of New York.⁹³ In the complaint, they alleged that the New York City Police Department's⁹⁴ enforcement of New York Penal Law section 240.35(1)⁹⁵ violated the First, Eighth and Fourteenth Amendment. The district court held that section 240.35(1) of the New York Penal Law was unconstitutional in violation of the first amendment, and determined that the statute must be invalidated because begging is a form of expression that deserves first amendment protection.⁹⁶

⁹³ *Loper v. New York City Police Dep't*, 802 F. Supp. 1029 (S.D.N.Y. 1990), *aff'd*, 999 F.2d 699 (2d Cir. 1993). The plaintiff class consisted "of all those 'needy persons who live in the State of New York, who beg on the public streets or in the public parks of New York City,' where a 'needy person' is defined as 'someone who, because of poverty, is unable to pay for the necessities of life, such as food, shelter, clothing, medical care, and transportation.'" *Id.* at 1033. It should be noted that neither party knew the size of the plaintiff class.

⁹⁴ Summons statistics for the period 1986 to 1992 illustrate that the New York City Police Department has enforced N.Y. Penal Law § 240.35(1) against a significant number of persons who are presumably members of the plaintiff class. *Loper*, 802 F. Supp. at 1033.

On appeal, the defendants argued that the statute should be upheld because begging has no "expressive element protected by the First Amendment" and that "even if a speech interest is implicated in Plaintiffs' conduct, the government's interest in the maintenance of order outweighs the Plaintiffs' interest." *Loper*, 999 F.2d at 701.

The defendants also contended that Penal Law § 240.35(1) is a necessary tool to control many of the "evils that are associated with begging." 999 F.2d at 701. For example, there are instances where panhandlers have blocked people from walking on the sidewalk, followed people down streets, and threatened those who refuse to give them money. *Id.* The defendants espoused the theory that, "unless stopped, [panhandlers] tend to increase their aggressiveness and ultimately commit more serious crimes," which inevitably would lead to the destruction of neighborhoods. *Id.*

⁹⁵ Section 240.35(1) provides in pertinent part: "A person is guilty of loitering when he loiters, remains or wanders about in a public place for the purposes of begging." N.Y. PENAL LAW § 240.35(1) (McKinney 1989). Although there have been few arrests made pursuant to § 240.35(1), several police officers testified that the "[s]tatute is used . . . as a source of authority for restricting the Plaintiffs. . . ." *Loper*, 802 F. Supp. at 1034.

⁹⁶ *Loper*, 802 F. Supp. at 1038. This Comment focuses on the salient question of whether begging is a form of expression. Professor Tribe rejects the notion that there is in fact any meaningful distinction between conduct and speech. TRIBE, *supra* note 16, at 827. Tribe asserts that all conduct is a form of expression, and as such concludes that when the Supreme Court bases its decision on a distinction between speech and conduct, it is actually using a fictitious standard to justify its conclusion. *Id.* Tribe states that "much conduct is expressive Expression and conduct, message and medium, are thus inextricably tied together in all communicative behavior; expressive behavior is '100% action and 100% expression.'" *Id.*

The district court rejected the distinction between begging and organized charitable solicitation enunciated by the Second Circuit in *Young v. New York City Transit Authority*.⁹⁷ In *Young*, the Second Circuit had determined that, although organized charitable solicitation is protected by the First Amendment because it exposes society to new ideas, begging itself does not foster such a forum for the exchange of new ideas and thus can be prohibited.⁹⁸ Conversely, the district court in *Loper* stressed that there is no substantive difference between begging and organized charitable solicitation.⁹⁹ The court concluded that "[b]oth are charitable acts intended to provide someone with food, clothing, or shelter. . . . [The] message, though, is the same exact message the homeless beggar conveys. . . . and that message is entitled to First Amendment protection."¹⁰⁰

⁹⁷ See *supra* text accompanying notes 79-82.

⁹⁸ *Young*, 903 F.2d at 154. Charitable solicitation is generally protected by the First Amendment. See *Schaumburg v. Citizens for a Better Env't*, 444 U.S. 620 (1980) (Charitable appeals for funds involve a variety of speech interests, including communication of information and ideas, that are within the protection of the First Amendment.). The Court in *Schaumburg* stated that "regulation [of the solicitation of financial support] must give due regard to the reality that solicitation is characteristically intertwined with informative and perhaps persuasive speech seeking support for particular causes . . . and for the reality that without solicitation the flow of such information and advocacy would likely cease." *Id.* at 632.

⁹⁹ See *International Soc'y for Krishna Consciousness, Inc. v. Lee*, 112 S. Ct. 2701 (1992) (in-person solicitation by a not-for-profit religious corporation was entitled to first amendment protection); David Stoll, Comment, *Public Forum Doctrine Crashes at Kennedy Airport: International Society for Krishna Consciousness v. Lee*, 59 BROOK. L. REV. 1271 (1993) (discussing how a narrow majority of the Court in *Lee* found the airport terminals to be non-public forums).

Through its examination of *Lee*, which involved a religious sect whose members solicited funds in public places such as airports, the court in *Loper* concluded that the solicitation method used by the plaintiffs in *Lee* was very similar to the method used by beggars and thus should be entitled to first amendment protection. *Loper*, 802 F. Supp. at 1037. The court stated that "[b]oth [activities] involve the face-to-face solicitation of a potentially unsuspecting person walking down the street." *Id.*

¹⁰⁰ *Loper*, 802 F. Supp. at 1307. The court pointed out one difference between panhandling and charitable solicitation:

[O]rganized charities . . . 'solicit.' The destitute, however, 'beg' or 'pan-handle.' In this context, though, the terms are synonymous. . . . The only difference in meaning is in the pejorative sense 'begging' is used; that is, the act of begging has a message associated with it, and that message is discomforting.

. . . [T]he difference between giving a dollar to a homeless beggar, for

The court interpreted the total ban on begging as a content-based regulation. The court considered the ban directed at the actual message begging conveys, and that this message was one of the few banned in a city overflowing with social, commercial and political messages.¹⁰¹ The court concluded that since the regulation is aimed at the "content of a beggar's expressive conduct,"¹⁰² the regulation must be invalidated unless there is some "over-riding governmental interest."¹⁰³

The district court in *Loper* began by criticizing how courts have approached first amendment and free speech cases, and suggested that first amendment jurisprudence has become a cryptic web of tests and criteria.¹⁰⁴ The court concluded that

example, and the Coalition for the Homeless [organization] is largely semantic. . . . This message, though, is the same exact message the homeless beggar conveys.

Id. (citations omitted); see also *First Nat'l Bank of Boston v. Bellotti*, 435 U.S. 765, 777 (1978) (the inherent worth of speech in terms of its capacity for informing the public does not depend upon the identity of its source).

¹⁰¹ The court noted:

Walking through New York's Times Square, one is bombarded with messages. Giant billboards and flashing neon lights dazzle; marquees beckon; peddlers hawk; preachers beseech; . . . One generally encounters a beggar too. Of all these solicitors, though, the only one subject to a blanket restriction is the beggar.

Loper, 802 F. Supp. at 1039; see also *supra* notes 52-59 (discussing the analysis of content-based regulations).

¹⁰² *Id.* at 1040.

¹⁰³ *Id.*

¹⁰⁴ The court in *Loper* noted:

Courts and commentators often attempt to place First Amendment issues into neatly carved pigeonholes, from which one is released onto self-executing flight paths of analysis. By restricting issues and evoking shibboleths, courts resolve core issues without facing them and ultimately threaten the conceptual coherence of those First Amendment rights they are interested in protecting.

Id. at 1038-39. The court also emphasized:

More fundamentally, the fragmentation of the first amendment into a grab bag of rubrics under which different types of speech receive different degrees of protection exemplifies a propensity for pigeonholing as a method of deciding first amendment questions. Such a method masks the political dimension of the underlying choices by pretending to cabin judicial discretion within the limits established by the categories themselves. This sort of pigeonholing endangers the pigeon: if one parses first amendment doctrine too finely, one may soon discover that little protection for expression remains.

Id. at 1039 n.11 (quoting *TRIBE*, *supra* note 16, at 943-44). Other commentators have also been critical of how courts have dealt with first amendment cases:

[S]o complex has that subspecialty of the free speech clause become that

to successfully determine the constitutionality of Penal Law section 240.35(1), it is necessary to balance three interests:¹⁰⁵ the speaker's interests, the specific audience's interests, and the general public's interest.¹⁰⁶

The court first discussed the speaker's interest. The beggar has a great interest in communicating to the public the personal message about the dire homeless situation and in soliciting money from those who will listen.¹⁰⁷ The district court perceived this message to be that "social and economic conditions

the graphing of a single libel case now requires a chart that may need six to eight "fact categories"

. . . . However understandable or benign the cautionary instincts of the Supreme Court, there must be larger commonalities that cut across these cases and reduce the field of interesting controversy to more manageable size. And indeed, it turns out that there are. In fact, if one lays aside the Supreme Court's own caveats that suggest the free speech clause merely collects smithereens of technical first amendment subspecialties as in a basket, one may quickly discover that the essential differences among competing ways of formulating basic first amendment questions are not numerous at all. Once one sorts out the basic rival doctrines, they can then be reordered in a sequence that presents all of their fundamental differences very clearly.

VAN ALSTYNE, *supra* note 13, at 221-22.

¹⁰⁵ The court emphasized that the most important tool in free speech analysis is the balancing of the interests of society against the interest of the speaker, in a way that courts have failed to do in the past.

Although bound by the decisions referred to above, this case, and those that precede it, show that many of the distinctions and tools that have developed in First Amendment jurisprudence are nothing more than devices to avoid squarely facing the conflict between the First Amendment and the majoritarian will. . . . [S]peech distinctions all allow courts to avoid balancing the majority's will against the First Amendment's anti-majoritarian tenor.

. . . . Any First Amendment issue can be satisfactorily analyzed only if the demon is openly confronted and exorcised through an application of the balancing calculus Recognizing and grappling with the tension between the content of speech and the ideas behind it, on the one hand, and the security and privacy of the individual and society, on the other, are necessary and true to the Amendment's core.

Loper, 802 F. Supp. at 1041-42 (footnotes and citations omitted).

¹⁰⁶ *Id.* at 1042. The court defined the general public as "those members of the general public who are not part of the audience but nonetheless may be affected, directly or indirectly, by the speaker's act of expression." *Id.* at 1045. The court noted that there is also a fourth interest involved, that of the government in ensuring all three interests. *Id.* at 1042.

¹⁰⁷ *Id.*

and opportunities and governmental services are such that many people are unable to support themselves and must rely on the freely given alms of others in order to eke out an existence."¹⁰⁸ The court concluded that this is a "genuine and legitimate interest"—a beggar has the right to communicate to the public.¹⁰⁹

The court then balanced the beggar's interest with the audience's interest, which has two distinct parts. The first is the audience's right to be educated and have information readily available to it.¹¹⁰ The second is the audience's right to privacy and to be left alone so that individuals can "enjoy public facilities without interference" by the unpleasant pleas of the homeless.¹¹¹ The court relied heavily on the Supreme Court's decision in *Cohen v. California*¹¹² in deciding that the beggar's interest outweighs the audience's interest in this situation.¹¹³ Since the beggars did not invade society's substantial privacy interests in an intolerable manner, the statute was overbroad and therefore unconstitutional. The court in *Loper* emphasized that although society has the burden to protect the citizens from "any offense that the expressive act of begging may give rise to The burden is not upon the state to protect the audience by enforcing a blanket restriction on this kind of speech."¹¹⁴

The third goal of the First Amendment to be considered is the general public's interests to be free from the dangers associated with begging—such as aggressive panhandling, the

¹⁰⁸ *Id.*

¹⁰⁹ *Id.*

¹¹⁰ *Loper*, 802 F. Supp. at 1042. The court stated: "The First Amendment protects and promotes this interest [of the public] by fostering a climate in which information can flow freely from speakers to whom the listener can turn when she is in need of information." *Id.*

¹¹¹ *Id.*

¹¹² 403 U.S. 15 (1971).

¹¹³ *Loper*, 802 F. Supp. at 1043. The court in *Loper* implies that, much like the pedestrians in *Loper*, the people in *Cohen* were not trapped in the courthouse and were not forced to look at Cohen's jacket; they simply could have averted their eyes. The court analogized the pedestrians to the people in the courthouse and justified its decision by noting that citizens on the street can escape the possible offensiveness of begging by walking away from the beggar. *Id.* at 1044.

¹¹⁴ *Id.* at 1045. The Supreme Court has held that in most cases involving potentially offensive speech or conduct, the burden of protecting first amendment interests falls on the viewer, not the speaker or actor. *Id.*

disruption of traffic and the interference with commercial establishments¹¹⁵—and freedom from the fear of disorder, which may proliferate as a result of begging.¹¹⁶ In addressing these two interests, the court held that Penal Law section 240.35(1) was overbroad and therefore unconstitutional. As to whether the ban on begging curtails the dangers associated with such conduct, the court held that the ban was too broad since alternative ways existed to minimize dangers associated with begging.¹¹⁷ For example, other sections of the New York Penal Law could be used to prevent some of these dangers. Penal Law section 240.2(5) states that a “person is guilty of disorderly conduct when obstructing vehicular or pedestrian traffic.”¹¹⁸

As to whether a total ban is necessary to curb the fear begging creates, the court held that a total ban is unjustified since not all begging intimidates people or creates a disincentive for people to travel in certain areas of the city. The court stressed that although citizens are sometimes offended by the message that begging conveys, “the answer is not in criminalizing those people, . . . but [in] addressing the root cause of their existence. The root cause is not served by removing them from sight; however, society is then just able to pretend they do not exist a little longer.”¹¹⁹

After the court balanced the three interests, the court struck down the anti-begging statute as an unconstitutional violation of the First Amendment.¹²⁰ The court held that

¹¹⁵ *Id.*

¹¹⁶ *Id.* In arguing that begging should not be protected by the First Amendment, the defendants in *Loper* relied on the expert testimony of Professor George Kelling, who stressed that “beggars and panhandlers indicate to society that disorder has set in. A neighborhood with such people, in which there are broken windows, drug dealers, and youth gangs is threatening to the society precisely because of the indication of disorder.” *Id.* at 1034.

¹¹⁷ *Id.* at 1046.

¹¹⁸ N.Y. PENAL LAW § 240.2(5) (McKinney 1989).

¹¹⁹ *Loper*, 802 F. Supp. at 1046. In dictum, the court stated that a narrower ban on begging aimed at limiting the dangers associated with begging may be constitutional. *Id.*

¹²⁰ The court recognized the government’s interest in limiting the fear and paranoia created by panhandling. The court stressed, however, that the offensiveness of panhandling is not enough to justify a total ban. The court concluded that “[i]f there is a bedrock principle underlying the First Amendment, it is that the government may not prohibit the expression of an idea simply because society finds the idea itself offensive and disagreeable.” *Id.* at 1047 (citing *Texas v. Johnson*,

when people leave the privacy of the home, inevitably they are going to be confronted with messages and conduct that they find offensive but that people must learn to tolerate these disturbing messages in certain circumstances, such as when they are in public places. This is the "trade-off" and sacrifice that individuals must make when they leave their homes and enter a world in which other people may have conflicting viewpoints.¹²¹

B. *The Second Circuit Decision*

On July 29, 1993, the Second Circuit affirmed the district court's decision that struck down section 240.35(1) of the New York Penal Law.¹²² Consistent with the district court's decision, the Second Circuit came to the critical conclusion that begging does implicate expressive conduct and communicative activity deserving of first amendment protection.¹²³ The Second Circuit concluded that begging, whether or not accompanied by verbal speech, involves communication of a specific message that conveys the "need for food, shelter [and] clothing."¹²⁴ The court concluded that begging, like organized charitable solicitation, is expression meriting first amendment protection.¹²⁵

The court characterized the streets of New York as a traditional public forum.¹²⁶ Government property that is tradition-

¹²¹ *Id.* at 1047.

When leaving the insular security of one's home and becoming a participant in the world organized by society, one interacts with its elements. This necessarily includes those who have different viewpoints and backgrounds. Paying attention is not a requirement. . . . [I]f the disturbing message has substance, the hope is it will be heeded in due time, and society strengthened through resilience, not rigidity.

Id. Thus, although the government has a legitimate interest in protecting the public, the "interest in permitting free speech and the message begging sends about our society predominates." *Id.*

¹²² *Loper*, 999 F.2d 699 (2d Cir. 1993).

¹²³ *Id.* at 704.

¹²⁴ *Id.*

¹²⁵ *Id.* at 704. Similar to the district court, the Second Circuit relied on *Schaumburg v. Citizens for a Better Env't*, 444 U.S. 620 (1980), which struck down an ordinance that prohibited solicitation by charitable organizations that did not use at least 75% of their revenues for charitable purposes. See *supra* note 98 and accompanying text.

¹²⁶ *Loper*, 999 F.2d at 703. Because the streets and sidewalks of New York City

ally available for public expression¹²⁷ is considered a public forum, and any government regulation of speech taking place on a public forum will be "subject to the highest scrutiny."¹²⁸ Generally, the government may not proscribe any communicative activity in a public forum.¹²⁹ However, before the government may enforce a partial ban based on the content of the speech, it must demonstrate that the regulation both is necessary to serve a compelling state interest and is narrowly drawn to achieve such an end.¹³⁰ The defendants in *Loper* failed to satisfy this standard because, regardless of whether the state had a compelling interest in prohibiting begging, a total ban is not narrowly tailored to achieve that end. A total ban would leave beggars with no alternative means of expressing themselves; in effect, the ban would force them to silence their message.¹³¹

The *Loper* court also stressed that Penal Law section

fall into the category of public property traditionally held open to the public for expressive activity, they are public fora. *Id.* at 704.

¹²⁷ Property owned by the government that usually is considered public fora "includes streets and parks, which are said to 'have immemorially been held in trust for the use of the public.'" *Loper*, 999 F.2d at 703 (quoting *Hague v. CIO*, 307 U.S. 496, 515 (1939)).

¹²⁸ *International Soc'y for Krishna Consciousness, Inc. v. Lee*, 112 S. Ct. 2701, 2705 (1992) (a regulation prohibiting solicitation of funds in airline terminals operated by a public authority did not violate the First Amendment since the terminals were nonpublic fora and the regulation reasonably limited solicitation); *cf.* Stoll, *supra* note 99, at 1271 (discussing how "consistent throughout the early cases involving government property was an attempt by the Court to balance a desire to accommodate uninhibited speech, which is critical to a free society, against the need for the efficient operation of government").

¹²⁹ *Loper*, 999 F.2d at 703. *But see* Stoll, *supra* note 99, at 1275 ("a microscopic analysis of the various Court approaches reveals that the First Amendment continues to afford little protection to speakers on public property").

In addition to public fora and private fora, there is another type of forum called the "designated public forum." This type is a forum that is specifically designated by the government as a limited public forum. *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 46 (1983). A government regulation of speech on a designated public forum is subject to the same level of scrutiny used to evaluate regulations on public fora. *Id.*

¹³⁰ *Perry*, 460 U.S. at 45 (in traditional public fora such as public streets and parks, the government may not prohibit all communicative activity and to enforce a content-based exclusion the state "must show that its regulation is necessary to serve a compelling state interest and that it is narrowly drawn to achieve that end").

¹³¹ *Loper*, 999 F.2d at 705. The court stated that the regulation "does not leave open alternative channels of communication by which beggars can convey their messages of indignity." *Id.*

240.35(1) failed to advance any substantial and important governmental interests. The court found no real distinction between the prohibited acts of beggars and the sanctioned solicitation by organized charities.¹³² The court concluded: "[c]ertainly, a member of a charitable, religious or other organization who seeks alms for the organization and is also, as a member, a beneficiary of those alms should be treated no differently from one who begs for his or her account."¹³³ Furthermore, the court found that the government interests served by a ban on begging could be addressed by other penal law sections.¹³⁴

IV. ANALYSIS OF THE SECOND CIRCUIT'S FAILED ATTEMPT TO JUSTIFY *LOPER*

A. *The Second Circuit's Effort to Distinguish Young from Loper*

In invalidating Penal Law section 240.35(1) without over-

¹³² *Id.* The court concluded that the total ban:

in no way advances substantial and important governmental interests. If it did, the State would not allow, as it does, the solicitation of contributions on city streets by individuals who represent charitable organizations If individuals may solicit for charitable and other organizations, no significant governmental interest is served by prohibiting others for soliciting for themselves.

Id. (citations omitted).

¹³³ *Id.*; see also 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, 416 (1991).

¹³⁴ For example, laws forbidding harassment and disorderly conduct may apply. Harassment in the first degree is committed when one "follow[s] another person in or about a public place . . . or . . . repeatedly commit[s] act[s] which place[] such person in reasonable fear of physical injury." N.Y. PENAL LAW § 240.25 (McKinney Supp. 1994). Disorderly conduct is committed when one, "with intent to cause public inconvenience, annoyance or alarm . . . uses abusive or obscene language or obstructs vehicular or pedestrian traffic." N.Y. PENAL LAW § 240.20(3), (5) (McKinney 1989). Fraudulent accosting is committed when one "accosts a person in a public place with intent to defraud [that person] of money." N.Y. PENAL LAW § 165.30(1) (McKinney 1989). Menacing in the third degree is committed by one "who, by physical menace, intentionally places or attempts to place another person in fear of physical injury." N.Y. PENAL LAW § 120.15 (McKinney Supp. 1993). The court suggested that all of these sections could have adequately redressed the same dangers that § 240.35(1) seeks to prevent. The court noted that the above statutes prohibit conduct, whereas § 240.35(1) prohibits speech as well as conduct of a communicative nature. *Loper*, 999 F.2d at 702.

turning *Young*, the *Loper* opinion contained two separate, inconsistent sections. The first section discussed the factual distinctions between the two regulations,¹³⁵ and concluded that Penal Law section 240.35(1) must be struck down due to its broad territorial scope. The second section espoused the idea that begging is expressive conduct protected by the First Amendment since it sends a message "of need for support and assistance."¹³⁶ Although *Loper* superficially resolved the question of whether begging is protected by the First Amendment, the court was unclear about whether it overruled *Young* and, therefore, contributes further to the quagmire of free speech cases. *Loper* left the public with an unsettled, tenuous principle that will lead to litigation involving parties who are unsure whether begging implicates expressive conduct meriting first amendment protection.

In the first section of *Loper*, the Second Circuit factually distinguished the penal law provision involved from the Transit Authority regulation at issue in *Young*. The court in *Loper* emphasized that the TA regulation challenged in *Young* was constitutional because it furthered the state's substantial and important interest in curtailing the particular dangers associated with the isolated environment of the subway system.¹³⁷ Summarizing its *Young* decision, the court in *Loper* stated that: "We [found] that . . . begging in the . . . atmosphere of the subway 'disrupts and startles' passengers, thus creating the potential for a serious accident in the fast-moving and crowded subway environment."¹³⁸ The *Loper* court emphasized that the ban on panhandling in the subway was permissible because it left open alternative channels of communication.¹³⁹

¹³⁵ See *supra* note 79 for the regulation upheld in *Young* and *supra* note 2 for the regulation struck down in *Loper*.

¹³⁶ *Loper*, 999 F.2d at 704.

¹³⁷ 999 F.2d at 702 (emphasis added).

¹³⁸ *Id.* (citing *Young*, 903 F.2d at 158).

¹³⁹ *Id.* at 702. In appreciation of the similarities between *Loper* and *Young*, the court in *Loper* noted its previous statement that "[u]nder the [TA] regulation, begging is prohibited only in the subway, not throughout all of New York City. It is untenable to suggest . . . that absent the opportunity to beg and panhandle in the subway system, [beggars] are left with no means to communicate to the public about needy persons." *Id.* at 702 (citing *Young*, 903 F.2d at 160). The court alluded to the fact that, in *Young*, it already had been drawing a distinction between a limited ban and a total ban, coming to the conclusion that the former is permissive while the latter is unconstitutional due to their respective scopes. *Id.*

The *Loper* court further distinguished the cases challenging a total ban from those of a partial ban based on an analysis of the forums involved. The court characterized the sidewalks of New York City as "public property traditionally held open to the public for expressive activity."¹⁴⁰ In contrast, the Second Circuit in *Young* had characterized the subway system as a limited public forum.¹⁴¹ The *Young* court had relied on the reasoning of *Gannett Satellite Information Network, Inc. v. Metropolitan Transportation Authority*,¹⁴² in which the Second Circuit held that a subway is not a traditional or designated public forum.¹⁴³

The *Loper* court's reasoning becomes particularly problematic in the second section of its opinion, where the court contradicted its earlier conclusion in *Young*—that begging is not a form of expressive conduct¹⁴⁴—and held that begging *does* constitute communicative activity protected by the First Amendment. In contrast to its holding in *Young*, the court in *Loper* extended the reasoning of *Village of Schaumburg v. Citizens for a Better Environment*¹⁴⁵ to panhandling. The Supreme Court in *Schaumburg* held that organized charitable solicitation constituted a form of speech meriting first amendment protection.¹⁴⁶ In *Young*, the Second Circuit found a critical distinction between organized charitable solicitation and

¹⁴⁰ *Id.* at 704; see also *United States v. Grace*, 461 U.S. 171, 179-80 (1983) (sidewalks comprising the outer boundaries of the Supreme Court grounds are indistinguishable from other sidewalks in Washington D.C. and constitute a proper public forum).

¹⁴¹ *Young*, 903 F.2d at 162.

¹⁴² 745 F.2d 767 (2d Cir. 1984).

¹⁴³ 745 F.2d at 772-73; see also *United States Postal Serv. v. Council of Greenburgh Civic Ass'ns*, 453 U.S. 114, 129 (1981) ("it is the nature of the forum that we must examine in order to determine the extent to which expressive activity may be regulated"); Stoll, *supra* note 99, at 1403.

¹⁴⁴ *Loper*, 999 F.2d at 704. The court in *Young* concluded that "the conduct of begging and panhandling in the subway amounts to nothing less than a menace to the common good." *Young*, 903 F.2d at 156 (citing *City Council of Los Angeles v. Taxpayers for Vincent*, 466 U.S. 789, 805 (1984)).

Note that the court's conclusion in *Loper*, that begging is a form of expressive conduct, is not determinative of whether begging is protected by the First Amendment. The court first determined that begging is within the universe of "speech" that the First Amendment implicates; the court then went on to analyze whether this "speech" actually is protected by the First Amendment in this context.

¹⁴⁵ 444 U.S. 620 (1980); see *supra* note 82.

¹⁴⁶ 444 U.S. at 639.

panhandling: the former serves the legitimate purpose of communicating new ideas, while the latter has little, if any, societal value.¹⁴⁷ In contrast, in *Loper* the court recognized no significant free speech difference between begging and organized charitable solicitation.¹⁴⁸ The court in *Loper* emphasized that a regulation that allows charitable organizations to solicit yet proscribes begging for oneself serves no governmental interest.¹⁴⁹

In reaching its conclusion in *Loper*, the Second Circuit ignored its previous determination in *Young*. In concluding that begging is a form of expressive conduct, the *Loper* court stated:

While we indicated in *Young* that begging does not always involve the transmission of a particularized message, it seems certain that it usually involves some communication of that nature. Begging frequently is accompanied by speech indicating the need for food, shelter, clothing, medical care or transportation. *Even without particularized speech, however, the presence of an unkempt and disheveled person holding out his or her hand or cup to receive a donation itself conveys a message of need for support and assistance. We see little difference between those who solicit for organized charities and those who solicit for themselves in regard to the message conveyed. . . . Both solicit the charity of others. The distinction is not a significant one for First Amendment purposes.*¹⁵⁰

The above reasoning is antithetical to what the court held in *Young*.¹⁵¹ The court in *Loper* has essentially determined that begging is a form of conduct that, in and of itself, speaks about the economic and social conditions of the homeless. In contrast to its determination in *Young*, the court in *Loper* concluded that the mere presence of a homeless person sends a message warranting first amendment protection because it educates

¹⁴⁷ *Young*, 903 F.2d at 156. In rejecting the extension of *Schaumburg* to begging, the court in *Young* held that "*Schaumburg* . . . [does not] stand for the proposition that begging and panhandling are protected speech under the First Amendment. Rather [it] hold[s] that there is a sufficient nexus between solicitation by organized charities and a 'variety of speech interests' to invoke the protection under the First Amendment." *Id.* at 155.

¹⁴⁸ *Loper*, 999 F.2d at 704-05.

¹⁴⁹ *Id.* at 705.

¹⁵⁰ *Id.* at 704 (emphasis added) (citations omitted).

¹⁵¹ The court in *Young* concluded: "We . . . express[] grave doubt as to whether begging and panhandling in the subway are sufficiently imbued with communication character to justify constitutional protection." 903 F.2d at 153.

individuals about the personal needs of the homeless.¹⁵²

B. *Begging Sends a Valuable and Particularized Message*

Although the Second Circuit did not reach a decision that accorded with its precedent, it did reach a principled conclusion. *Loper* correctly held that begging is a form of expressive conduct that merits first amendment protection¹⁵³ since the conduct of begging satisfies the standard set out in *Spence v. State of Washington*.¹⁵⁴ Begging satisfies the first criteria of *Spence*. Begging sends a "particularized message," it conveys the inherent message of economic need. Although a beggar might not always be overtly aware that her activity sends a message about the economic, social and political conditions of the homeless, subconsciously the beggar knows that this activity is indicative of economic stratification in the United States. The Supreme Court has held that as long as the actor intends to convey a message that is understood by its recipients, the conduct is protected by the First Amendment.¹⁵⁵

Begging also satisfies the second criteria of the *Spence* test because of the great likelihood that the recipient of the message (the listener) will understand the beggar's message. When a person sees a beggar on the street, that person knows that the beggar illustrates the seriousness of the homeless problem. Although many individuals ignore beggars or scorn their message, these individuals are still conscious of the message being conveyed. A recipient of a beggar's plea cannot help but realize that the beggar's very existence demonstrates that the homeless problem is not being sufficiently rectified.

In the context of expressive conduct, begging is analogous to other activities that have been held to be protected by the First Amendment. For example in *Texas v. Johnson*¹⁵⁶ the Supreme Court struck down a flag desecration statute since it was aimed at expressive conduct that implicated first amend-

¹⁵² *Loper*, 999 F.2d at 704.

¹⁵³ Although this Comment criticizes the court's lack of explanation for its shift in position in *Young*, this Comment agrees with the court's conclusion that begging is conduct protected by the First Amendment.

¹⁵⁴ 418 U.S. 405 (1974); see *supra* notes 50-55 and accompanying text.

¹⁵⁵ See *supra* notes 42-45 and accompanying text.

¹⁵⁶ 491 U.S. 397 (1989).

ment protection. The court determined that flag burning sends an implicit message of political dissatisfaction.¹⁵⁷ Begging and flag desecration should be considered similar conduct in the context of the First Amendment. Initially it appears that neither act merits first amendment protection since "speech" in the traditional sense—that is, the oral or written word—is not involved. Applying the *Spence* criteria, however, it is apparent that both begging and flag desecration fall within the protection of the First Amendment since both activities send a particularized message to viewers who are more than likely to understand the message.

These two activities are also similar because both encompass the interests and goals that the First Amendment seeks to protect. The Supreme Court in *Texas v. Johnson* was concerned with giving citizens the opportunity to express their dissatisfaction with the government. The Court noted that its precedents demonstrate that a primary "function of free

¹⁵⁷ 491 U.S. at 409. In *Johnson*, the state had argued that allowing flag desecration will lead to increased disdain and disloyalty to the United States. The state argued that Johnson's activity would incite violence and that the regulation was justified since flag desecration carried with it the potential for a breach of peace. The Court held that expression that may offend an audience does not necessarily create the potential for disturbing the peace. *Id.*; see also *Hustler Magazine, Inc. v. Falwell*, 485 U.S. 46, 54-55 (1988) ("graphic depictions and satirical cartoons have played a prominent role in public and political debate. . . . From the viewpoint of history it is clear that our political discourse would have been considerably poorer without them."); *Coates v. Cincinnati*, 402 U.S. 611, 615 (1971) ("The First and Fourteenth Amendments do not permit a State to make criminal the exercise of the right of assembly simply because its exercise may be 'annoying' to some people."); *Tinker v. Des Moines Indep. Community Sch. Dist.*, 393 U.S. 503, 508-09 (1969) ("[O]ur history says that it is this sort of hazardous freedom—this kind of openness—that is the basis of our national strength and of the independence and vigor of Americans who grow up and live in this relatively permissive, often disputatious, society.").

In further rejecting the state's argument that flag burning would lead to violence, the Court in *Johnson* stated:

We are tempted to say, in fact, that the flag's deservedly cherished place in our community will be strengthened, not weakened, by our holding today. Our decision is a reaffirmation of the principles of freedom and inclusiveness that the flag best reflects, and of the conviction that our toleration of criticism such as Johnson's is a sign and source of our strength. . . . It is the Nation's resilience, not its rigidity, that Texas sees reflected in the flag—and it is that resilience that we reassert today. . . . The way to preserve the flag's special role is not to punish those who feel differently about these matters.

Johnson, 491 U.S. at 419.

speech . . . is to invite dispute. It may indeed best serve its high purpose when it induces a condition of unrest, creates dissatisfaction with conditions as they are, or even stirs people to anger."¹⁵⁸ Although begging may not "invite dispute" in the literal sense, begging, similar to flag desecration, serves the important first amendment function of allowing political and social debate.¹⁵⁹

Another Supreme Court decision illustrating the similarities between begging and other protected first amendment activities is *Brown v. Louisiana*.¹⁶⁰ *Brown* involved five African American men who, for the purpose of manifesting silent protest against a segregated library, entered the public room of the library and remained there for several minutes, despite the librarian's plea for them to exit the building. The men were subsequently arrested for violation of a Louisiana breach of peace statute.¹⁶¹ In *Brown*, the Court pointed out that it has repeatedly held that first amendment rights are not "confined to verbal expression" and that these rights "embrace appropriate types of action which certainly include the right in a peaceable and orderly manner to protest by silent and reproachful presence, in a place where the protestant has every right to be."¹⁶² Begging is similar to the protected activity in *Brown* because, as a form of protest against the inequities faced by beggars; begging is analogous to "protest by . . . reproachful presence."

Through applying the analysis employed in cases such as

¹⁵⁸ 491 U.S. at 408-09.

¹⁵⁹ See *supra* notes 27-32.

¹⁶⁰ 383 U.S. 131 (1966).

¹⁶¹ The statute made it a crime, "'with intent to provoke a breach of peace, or under circumstances such that a breach of peace may be occasioned thereby,'] to crowd or congregate in a public building and fail or refuse to disperse or move on when ordered to do so by a law enforcement officer or other authorized person." *Id.*

¹⁶² *Brown*, 383 U.S. at 142; see also *NAACP v. Button*, 371 U.S. 415, 428-29 (1963) (litigation is "a form of political expression" and activities related to such litigation are "modes of expression and association protected by the First and Fourteenth Amendments."); *NAACP v. Alabama*, 357 U.S. 449, 460 (1958) ("It is beyond debate that freedom to engage in association for the advancement of beliefs and ideas is an inseparable aspect of the 'liberty' assured by the Due Process Clause of the Fourteenth Amendment . . ."); *Stromberg v. California*, 283 U.S. 359, 369 (1931) ("Thus it was said that the clause 'might be construed to include the peaceful and orderly opposition to a government").

Texas v. Johnson and *Brown v. Louisiana*, it becomes evident that the Second Circuit in *Loper* accurately labeled begging as expressive conduct within the protection of the First Amendment. Similar to burning the American flag or wearing an arm-band to protest of the Vietnam war, begging expresses the actor's personal views towards an issue or concept that is important to him. The very core of the First Amendment would be destroyed if the beggar's message could not be expressed. If the beggar's message were suppressed, it would be damaging to both the beggar and to individuals in society who would be deprived of exposure to a wide array of messages.

C. *Loper was Correctly Decided Since Begging Furthers the Interests Promoted by the First Amendment*

Begging furthers the interests courts examine when determining whether conduct is protected by the First Amendment and, as such, it is crucial for it to be protected by the First Amendment.¹⁶³ One of the primary goals of the First Amendment is to expose all individuals to a myriad of ideas and opinions.¹⁶⁴ It is imperative therefore that society is well informed about the varying economic and social conditions that exist in this country. This includes being adequately aware of the condition of the homeless. Begging enlightens society about the pervasiveness of the country's homeless problem.¹⁶⁵ If indi-

¹⁶³ See *supra* notes 21-35 and accompanying text for discussion concerning the three interests and factors courts take into consideration when analyzing free speech cases.

¹⁶⁴ See *supra* text accompanying notes 33-35.

¹⁶⁵ Even if a beggar does not say anything specific about her living conditions, her presence in and of itself conveys a truthful message to society about how certain members of society are living. Begging forces people to realize and face the unpleasant notion that many people in today's society are starving and helpless. This Comment proposes that although some begging conveys a distasteful and pessimistic message about society, every member of society, whether wealthy or poor, has the responsibility to, at the very least, be aware of the conditions of the homeless.

Although some may argue that the enlightening value of begging is too subtle to be significant, "the First Amendment protects more than elite speech," [because] it is necessary to protect a varied dissemination of ideas to ensure that society is adequately enlightened." CHAFEE JR., *supra* note 15, at 31; see also *Citizen Publishing Co. v. United States*, 394 U.S. 131, 139-40 (1969) (the First Amendment "rests on the assumption that the widest possible dissemination of information from diverse and antagonistic sources is essential to the welfare of the pub-

viduals are deprived of information concerning this acute problem, a primary purpose of the First Amendment would be defeated.¹⁶⁶

Begging also promotes the values of a democratic system. Begging allows the homeless, a significant population of society,¹⁶⁷ to express their views about their personal situation

lic" (quoting *Associated Press v. United States*, 326 U.S. 1, 20 (1945)).

¹⁶⁶ John Stuart Mill asserted that society would be detrimentally uninformed if individuals were not exposed to ideas with which they may not agree. Mill contended that

[t]he greatest orator, save one, of antiquity, has left it on record that he always studied his adversary's case with as great, if not with still greater, intensity than even his own He who knows only his own side of the case, knows little of that. His reasons may be good, and no one may have been able to refute them. But if he is equally unable to refute the reasons on the opposite side; if he does not so much as know what they are, he has no ground for preferring either opinion. . . . He must be able to hear them from persons who actually believe them; . . . else he will never really possess himself in the portion of truth which meets and removes that difficulty.

MILL, *supra* note 20, at 51-52.

¹⁶⁷ See *supra* note 1. It is equally as important for the homeless to participate in the political process as it is for wealthier classes. Due to their lack of resources, one of the only ways a beggar can participate in the political process is through communicating her need for food and money; begging, in fact, is analogous to voting in that both express the actor's views towards the government.

Alexander Meiklejohn emphasizes the role the First Amendment plays in educating all individuals in society about the political process and one's political choices. He contends that the voter must be exposed to a wide array of ideas and opinions to make a well-informed decision at the polls. In discussing the various goals of the First Amendment, Meiklejohn states that:

[T]here are many forms of thought and expression within the range of human communications from which the voter derives the knowledge, intelligence, sensitivity to human values These, too, must suffer no abridgement of their freedom. . . .

. . . Education, . . . is the attempt to so inform and cultivate the mind and will of a citizen that he shall have the wisdom, the independence, and, therefore the dignity of a governing citizen. . . .

. . . .
. . . Public discussions of public issues, together with the spreading of information and opinion bearing on those issues, must have a freedom unabridged by our agents. Though [the state] govern[s] us, we, in a deeper sense, govern them. Over our governing, they have no power. Over their governing we have sovereign power.

TEACHER OF FREEDOM, *supra* note 32, at 250.

The freedom to beg is analogous to the freedom to vote in that both activities are demonstrative of the thoughts, opinions and concerns that exist in the beggar's or voter's mind. At the same time, the freedom of a beggar to express convictions about his economic and social condition further educates voters and allows them to become the intelligent and independent citizens. As the Supreme Court has noted:

and comment on the performance of elected officials. Since many homeless people lack the resources and capabilities to speak to their political representatives, panhandling provides one of the only mediums to express their political opinions; begging is one of the sole avenues for the homeless to participate in the political process and to express their pain, frustration and anger about their living conditions. If the homeless are deprived of the freedom to express themselves, the First Amendment's purpose of facilitating a democratic system and self-realization will be thwarted.

Begging also promotes the interests advocated by the First Amendment because it exposes politicians to first-hand knowledge of the homeless problem. Although many beggars are critical of the government's policies, critical opinions are very valuable to society and policymakers.¹⁶⁸ Public officials know, or should know, that many members of society empathize with the homeless and are watching the politicians respond to their problem. It is essential to the democratic process that public officials be exposed to the beggar's message since the message highlights the problems of current social and economic policies. Although ignoring the homeless may be a satisfactory solution to some, this is a short-term and inadequate method of addressing the problem. The presence of begging serves as an impetus to force policymakers to decide what type of legislation needs to be promulgated to rectify the homeless problem.¹⁶⁹

Though numerically significant, the homeless are politically powerless inasmuch as they lack the financial resources necessary to obtain access to many of the most effective means of persuasion. Moreover, homeless persons are likely to be denied access to the vote since the lack of mailing address or other proof of residence within a State disqualifies an otherwise eligible citizen from registering to vote.

Clark v. Community For Creative Non-Violence, 468 U.S. 288, 304 n.4 (1984) (Marshall, J., dissenting).

¹⁶⁸ A message does not need to be of high intellectual caliber to be protected by the First Amendment. In *Cohen v. California*, 403 U.S. 15 (1971), the Court held that:

We cannot lose sight of the fact that, in what otherwise might seem a trifling and annoying instance of individual distasteful abuse of a privilege, these fundamental societal values are fully implicated. That is why '[w]holly neutral futilities . . . come under the protection of free speech as fully as do Keats' poems or Donne's sermons.'

Id. at 25 (Frankfurter, J., dissenting) (quoting *Winters v. New York*, 333 U.S. 507, 528 (1948)).

¹⁶⁹ Our society, founded on the principle of individualism, is faced with the

D. *Loper Aggravates an Already Complicated Area of Free Speech Cases*

Loper has further complicated the area of free speech cases since the Second Circuit has shifted its position towards the expressive nature of begging without acknowledging its deviation from its prior position. The *Loper* decision presents society with the arduous task of discerning whether begging will be interpreted as expressive conduct protected by the First Amendment in future cases. It is insufficient for the Second Circuit to justify *Loper* simply by pointing to the totality of Penal Law section 240.35(1).¹⁷⁰ Rather, the Second Circuit should provide constructive and useful guidance to ensure that lower courts, as well as society, have a fairly intelligible idea whether and in what circumstances begging will be protected by the First Amendment. The *Loper* court's failure to justify its shift away from *Young* has serious implications, particularly as more states enact anti-panhandling statutes.¹⁷¹

Another detrimental aspect to the Second Circuit's decision in *Loper* is the court's blatant disregard of precedent and *stare decisis*. The court's decision runs afoul of the principle that instructs courts to adhere to past precedent¹⁷² and previously

question of whether the public has the duty to ensure the survival of others. The theory of individualism, supported by many members of society, is the notion that citizens do not have any duty to help others survive; everyone is responsible for themselves and their own sustenance. Helen Hershkoff & Adam S. Cohen, *Begging to Differ: The First Amendment and the Right to Beg*, 104 HARV. L. REV. 896, 897 (1991).

Another commentator asserts that every individual in society has a legitimate claim to economic security and "communal resources for bare subsistence." MICHAEL WALZER, SPHERES OF JUSTICE 79 (1983). Walzer argues that "[n]o community can allow its members to starve to death when there is food available to feed them; no government can stand passively by at such a time—not if it claims to be a government of or by or for the community." *Id.*

¹⁷⁰ See *supra* notes 138-41 and accompanying text.

¹⁷¹ In light of the proliferation of anti-panhandling statutes, it is unfortunate that the Second Circuit has failed to provide adequate guidelines for analyzing the constitutionality of these statutes. Although it would have been a difficult and challenging task, the Second Circuit should have at least discussed how a court should analyze whether a particular anti-begging statute was violative of the First Amendment.

¹⁷² Precedent is defined as "[a]n adjudged case or decision of a court, considered as furnishing an example or authority for an identical or similar case afterwards arising on a similar question of law. . . . Prior cases which are close in facts or legal principles to the case under consideration are called precedents." BLACK'S

decided principles of law.¹⁷³ Rather than creating a consistent and reliable standard of determining when begging is protected by the First Amendment, the court has intensified the already entangled web of free speech cases.¹⁷⁴ By creating one principle in *Young*, and contradicting this principle three years later in *Loper*, the Second Circuit has failed to reconcile whether the "mere presence" of a homeless person is conduct protected by the First Amendment.¹⁷⁵ The aftermath of the Second Circuit's decision in *Loper* exemplifies the very characteristics that *stare decisis* and precedent seek to avoid. Without guidance from the Second Circuit, it is likely that both courts and citizens will feel uncomfortable and unsatisfied with the Second Circuit's decision in *Loper*.¹⁷⁶

LAW DICTIONARY 1176 (6th ed. 1990).

¹⁷³ *Vasquez v. Hillery*, 474 U.S. 254, 265-66 (1986); see also *Payne v. Tennessee*, 501 U.S. 808, 827 (1991) ("*stare decisis* is the preferred course because it promotes the evenhanded, predictable, and consistent development of legal principles, fosters reliance on judicial decisions, and contributes to the actual and perceived integrity of the judicial process."); Michael Gerhardt, *The Role of Precedent in Constitutional Decisionmaking and Theory*, 60 GEO. WASH. L. REV. 68, 84 (1991) ("[B]ecause the Court is a critical interpreter of and a player in historical events, its precedents preserve, illuminate and provide a perspective on the nation's social, political and legal traditions."). But see *Smith v. Allwright*, 321 U.S. 649, 665 (1944) (when past decisions are poorly reasoned or unworkable "this Court has never felt constrained to follow precedent"); *Helvering v. Hallock*, 309 U.S. 106, 119 (1940) (*stare decisis* is not an "inexorable command," but rather a "principle of policy and not a mechanical formula of adherence to the latest decision").

¹⁷⁴ See *supra* notes 36-38 and accompanying text. There is already a myriad of categorical tests and standards employed to discern whether certain conduct implicates enough of a speech interest to bring it within the protection of the First Amendment.

¹⁷⁵ The result of overturning precedent is "chaos, lack of certainty regarding the durability of a number of individual freedoms, and/or proof positive that constitutional law is nothing more than politics carried on in a different forum." Gerhardt, *supra* note 176, at 70.

¹⁷⁶ See, e.g., Gerhardt, *supra* note 173, at 77. Gerhardt addresses the public's reaction when the Supreme Court decides to follow firmly established precedent. He states: "The public is more likely to retain confidence in the impartiality and consistency of the Court's decisionmaking if the reasons for the Court's choices are persuasive and if the Court generally adheres to principles that will reliably safeguard popular precedents." *Id.* Possibly, the Second Circuit's decision in *Loper* is the inevitable result of constitutional decision-making. Despite the importance of adhering to long-established precedent, numerous Supreme Court decisions in the area of individual rights either have been overruled, or narrowly distinguished. See *id.* at 98. Although this practice creates uncertainty about individual rights, the area of individual freedoms is so imbued with political and social influences that it is sometimes arduous for courts to reconcile certain distinctions and ambiguous shifts.

CONCLUSION

Despite *Loper*, the Second Circuit has not definitively answered the question of whether panhandling is expressive conduct protected by the First Amendment. Due to the court's lack of analytical justification for its shift toward such protection, it remains unclear what the result would be if a similar ban on begging was presented to either the Second Circuit or the Supreme Court for review. It is imperative that courts ensure that begging receives first amendment protection because society should be exposed to a beggar's message. Although it is not each individual's personal responsibility to ensure the livelihood of the homeless, society should be exposed to the important and socially informative message that begging sends.

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