

THE NEW CONSTITUTIONAL RIGHT TO BEG—IS BEGGING REALLY PROTECTED SPEECH?

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I. INTRODUCTION

The First Amendment, ratified in 1791, proscribes the government from "abridging the freedom of speech" of its citizens.¹ The interpretation of that simple phrase spans thousands of pages. The United States Supreme Court, the ultimate arbiter of the meaning of the clause in its myriad applications, has created various categories of speech and has assessed the constitutionality of government regulations of speech in the context of the category within which a particular type of speech falls. The closer the speech is to the core of the First Amendment's purpose, that is, to empower citizens to speak freely on political and social issues, then the greater is the degree of judicial scrutiny that must be applied to the regulation.

In *Loper v. New York City Police Department*,² the United States Court of Appeals for the Second Circuit was presented with the question: whether begging is protected expression within the meaning of the Free Speech Clause.³ That court, in complete disagreement with its own earlier ruling in *Young v. New York City Transit Authority*,⁴ held that begging falls within the protected speech category of in-person solicitation by or for charitable organizations and, as such, constitutes speech entitled to the highest degree

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1. U.S. CONST, amend. I.
2. 999 F.2d 699 (2d Cir. 1993).
3. *Id.* at 701.
4. 903 F.2d 146 (2d Cir.), *cert denied*. 498 U.S. 984 (1990).

of protection under First Amendment jurisprudence.⁵

The purpose of this Article is to set forth the City of New York's position, argued before the Second Circuit in *Loper*, that begging is not speech or expressive conduct protected by the First Amendment, but is the pure conduct of in-person solicitation of money for personal use.⁶ Even if a speech component can be implied in the in-person solicitation of money for personal use, that speech is not within the boundaries of the First Amendment's protection.⁷ At best, such speech falls within the outer perimeter of the First Amendment.⁸ In contrast, government interests documented in the *Loper* record justified a total ban on the conduct of begging on New York City streets.⁹

II. BACKGROUND OF THE DISPUTE

Prior to the *Loper* lawsuit, New York City officials determined that steps to regulate panhandling must be taken to alleviate the serious problem the panhandlers' conduct caused the residents and businesses in many neighborhoods.¹⁰ Panhandlers would often station themselves at automatic teller machines ("ATMs"), banks, stores, restaurants, parks, busy bus stops, and parking lots.¹¹ Residents, business owners, and community organizations repeatedly complained to the police in numerous precincts that they found the panhandlers in those areas to be intimidating, coercive, and detrimental to business.¹² Specific examples included: people frightened and coerced into giving money to panhandlers "peacefully" stationed in department store parking lots who offered "to protect" the shoppers' cars while they shopped; people frightened from using bank ATMs

5. *Loper*, 999 F.2d at 702-05. Compare *Young*, 903 F.2d at 155-57 with *Loper*, 999 F.2d at 704. In *Young*, the Second Circuit sustained, as not violative of the First Amendment, a New York City Transit Authority regulation banning all begging in the New York City subway system. *Young*, 903 F.2d at 154. The court there expressly ruled that begging does not fall within the category of solicitation for charitable purposes, a category of speech previously found to be protected by the First Amendment *id.* at 154-55; see *Village of Schaumburg v. Citizens for a Better Environment*, 444 U.S. 620, 633 (1980).

6. *Loper*, 999 F.2d at 701.

7. *Id.*

8. *Id.*

9. Appellants' Brief at 41, *Loper v. New York City Police Dep't*, 999 F.2d-699 (2d Cir. 1993) (No. 92-9127).

10. See, e.g., Joint Appendix at A707, *Loper v. New York City Police Dep't*, 999 F.2d 699 (2d Cir. 1993) (No. 92-9127).

11. Appellants' Brief at 6-7, *Loper* (No. 92-9127); Joint Appendix at A678-A714, A958-A987, *Loper* (No. 92-9127).

12. See *supra* note 11.

due to "unofficial doormen" (panhandlers) "peacefully" soliciting money close by; elderly persons and women with children intimidated into giving money to panhandlers for fear of harm to themselves or their children; and, finally, people frightened from using certain banks and stores due to panhandlers "peacefully" soliciting money outside the door."

Additionally, studies showed that panhandlers, who had found a good spot, were usually joined by others.¹⁴ Often, the sheer number of panhandler congregations was threatening to even the most seasoned urban residents.¹⁵ Unchecked begging was found to lead to more aggressive begging, which then led to an even greater level of street disorder.¹⁶

Police officers, through the new community policing initiative launched in the early 1990s, tried to develop strategies to respond to residents' and businesses' complaints of the harassing conduct by panhandlers.¹⁷ The New York City Police Department was guided by the theories articulated by Professor George Kelling, an expert in municipal policing.¹⁸ Professor Kelling conducted studies in many cities nationwide, including New York City, regarding the impact of low-level crime on residents' psyche.¹⁹

Professor Kelling hypothesized that the unchecked proliferation of low-level crime, such as open drug use, public intoxication, graffiti, panhandling, and prostitution causes fear and leads to the abandonment of public places.²⁰ Such crime leads to a further increase in the level of a neighborhood's disorder, and finally results in significant demoralization among residents.²¹ Professor Kelling labeled this situation the "Broken Windows" theory. Just as broken windows in a building lead to more serious vandalism and destruction, so too, disorderly behavior, left unchecked, signals local apathy

13. See *supra* note 11.

14. GEORGE L. KELLING, CITIZENS CRIME COMM'N OF NEW YORK CITY & REGIONAL PLAN ASS'N, MONOGRAPH: DOWNTOWN SAFETY, SECURITY AND ECONOMIC DEVELOPMENT (Downtown Research & Dev. Ctr. 1985) (incorporated in Joint Appendix at A527-A676, *Loper* (No. 92-912)) [hereinafter KELLING].

15. *Id.*

16. *tofer*, 999 F.2d at 701. The record submitted by New York City showed that this was particularly true on the upper West Side of Manhattan where residents were forced at times to pass a gauntlet of panhandlers who would congregate on popular corners and who would follow pedestrians who did not give money. Joint Appendix at A684-A702, *Loper* (No. 92-9127).

17. Joint Appendix at A678-A714, A958-A987, *loper* (No. 92-9127).

18. *Loper v. New York City Police Dep't*, 802 F. Supp. 1029, 1034 (1992), *aff'd*, 999 R2d 699 (2d Cir. 1993).

19. KELLING, *supra* note 14.

20. *Id.* at A511.

21. *Id.*

and leads to further societal disorder.²² The level of disorder slowly increases in intensity and quantity, and eventually results in the commission of more serious crimes and rampant fear among residents.²³

The New York City Police Department adopted a strategy to respond to the needs of the residents, yet sensitively deal with the panhandlers.²⁴ The foot patrol police repeatedly and consistently asked panhandlers to move along.²⁵ Begging arrests were rare—of the tens of thousands of arrests for various crimes since 1987, begging was the sole charge in only six cases.²⁶ In addition, City officials directed police officers to implement the "move-along" policy only in neighborhoods where community police officers had identified trouble spots due to residents' complaints, and only where the officers had firsthand knowledge of the problem.²⁷ Thus, the New York City Police Department enforced the State of New York's loitering-for-the-purpose-of-begging law by directing violators to move along and enforced it only in those areas where concentrations of panhandlers had become threatening and harassing to residents and businesses.²⁸

In his study of the New York City Police Department and panhandling in New York City, Professor Kelling opined, without contradiction by any contrary evidence, that New York State's anti-begging statute was an essential tool in maintaining order. Professor Kelling maintained that the statute was useful to stem the "Broken Windows" syndrome and, as enforced by the New York City Police Department, was fair to panhandlers.²⁹

HI. THE *LOPER* DECISION

The *Loper* suit was commenced in 1990 by plaintiffs Jennifer Loper and William Kaye, who came from upscale suburbs to the avant garde East Village in Manhattan, where the unusual is more

22. *Id.* at A514.

23. *Id.* Despite the documentary support for that theory, the intuitive sense of the "Broken Windows" theory and the adoption of the community policing model by the New York City Police Department and many other police departments nationwide, the Second Circuit summarily rejected the "Broken Windows" premise without any contradictory evidence submitted by the *Loper* plaintiffs. *Loper*, 999 F.2d at 701.

24. *Loper*, 802 F. Supp. at 1036.

25. *Id.*

26. *Id.* at 1034, 1036.

27. *Id.* at A684-A714; KELLING, *supra* note 14, at A520-A525.

28. *See supra* note 27.

29. KELLING, *supra* note 14, at A520-A525.

common than the usual.³⁰ They supported themselves by soliciting money from people on the streets and in the parks.³¹ Most of their solicitations were conducted without conversation, but instead consisted of a terse request for money or the thrust of an outstretched hand.³²

From time to time, police officers in the neighborhood would ask them to move on, but they were never arrested.³³ Loper and Kaye candidly conceded in their depositions that the occasional police move-on order did not deter or prevent them from begging a short while after the police left.³⁴

In their complaint, Loper and Kaye demanded declarations that the police directives to move along violated their First Amendment rights and that New York State's anti-begging statute was unconstitutional on its face.³⁵ Plaintiffs' request for class certification was granted and the class was identified as 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."³⁶ "Needy person" was 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."³⁷

"Beg" was not defined, but the plaintiffs conceded that many panhandlers do not use words when they beg and that there is unquestionably a conduct component in the act of physically approaching someone, actively or passively, and asking for money for any purpose.³⁸ The concededly difficult, principal question which confronted the court was whether the plaintiffs' actions were pure conduct or conduct that also implicated a speech interest entitled to

30. Joint Appendix at A37-A39, A120, *Loper* (No. 92-9127).

31. *Loper*, 802 F. Supp. at 1033.

32. The named plaintiffs testified at their depositions that, typically, when they did use words, they would say to passersby, "M[s]pare some change, Sir or Ma'am?" while sitting on a front stoop or standing on the sidewalk. Joint Appendix at A29-A109, A117-A213, *Loper* (No. 92-9127).

33. *Loper*, 802 F. Supp. at 1033.

34. Joint Appendix at A2-A109, *Loper* (No. 92-9127).

35. New York State's anti-begging provision is contained in § 240.35(1) of the New York State Penal Law:

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 § 24035(1) (McKinney 1988). Loitering is a violation which is punishable by fine or arrest and which may result in a maximum of 15 days in jail. *Id.* §§ 10.00(3), 70.15(4) (McKinney 1975).

36. *Loper*, 999 F.2d at 701.

37. *Id.*

38. Appellees' Brief at 5, *Loper* (No. 92-9127).

some level of protection under the First Amendment.³⁹

The United States Court of Appeals for the Second Circuit, without analysis, conclusively ruled that panhandling is expressive communication, tantamount to charitable solicitations by organized charities or groups.⁴⁰ The court stated:

We see little difference between those who solicit for organized charities and those who solicit for themselves in regard to the message conveyed. The former are communicating the needs of others while the latter are communicating their personal needs. Both solicit the charity of others. The distinction is not a significant one for First Amendment purposes.⁴¹

In so holding, the Second Circuit did a complete turnaround from its prior ruling in *Young*, in which the court had expressly rejected the plaintiffs' contention that begging was the equivalent of solicitation for or by charitable organizations.⁴² In fact, in *Young*, albeit in dictum, the Second Circuit stated: "[w]hether with or without words, the object of begging and panhandling is the transfer of money. Speech simply is not inherent to the act; it is not of the essence of the conduct."⁴³ In *Young*, the Second Circuit was unable to find a sufficient nexus between the solicitation conduct and speech interests to apply the protection to begging that had already been accorded to solicitation by charitable organizations.⁴⁴ Nevertheless, in *Loper*, the same court uncovered such a nexus.

The Second Circuit thus rejected New York City's argument, which was predicated on the language and holdings in a long line of United States Supreme Court cases, that panhandling was strictly the affirmative act of asking someone for money or the passive outreach of a hand or cup while in a park or public street.⁴⁵ That conduct,

39. *Loper*, 999 F.2d at 702.

40. *Id.* at 704.

41. *Id.*

42. *Young*, 903 F.2d at 155-57. Instead, the Second Circuit assumed, without deciding, that there was some expressive component in the conduct of begging. *Id.* at 157. Accordingly, the court applied the First Amendment analysis applicable to expression intertwined with conduct in reaching its ruling. *Id.*

In dictum, the Second Circuit discredited the district court's finding that the New York City subway system was a public forum and asserted its belief that it was not a public forum. *Id.* at 161. However, the Second Circuit expressly stated that the status of the subways was not a factor underlying its holding. *Id.*

43. *Id.* at 154.

44. See generally *Riley v. National Fed'n of the Blind of N.C., Inc.*, 487 U.S. 781 (1988); *Secretary of State of Md. v. Joseph H. Munson Co.*, 467 U.S. 947 (1984); *Village of Schaumburg v. Citizens for a Better Environment*, 444 U.S. 620 (1980). These cases are colloquially referred to as the "*Schaumburg* Trilogy."

45. *Loper*, 999 F.2d at 703-04; Appellants' Brief at 27-36, *Loper* (No. 92-

whether or not accompanied by words, was the act of in-person solicitation for the immediate payment of money for some unknown personal use. Because no express or implicit message was conveyed in the act of begging, the City argued that begging could be constitutionally prohibited.⁴⁶

Supporting New York City's position is the Supreme Court's oft-repeated statement articulated in *United States v. O'Brien*.⁴⁷ "We 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."⁴⁸ Therefore, the first inquiry in any case involving a message conveyed by conduct is whether, the "activity was sufficiently imbued with elements of communication to fall within the scope of the First and Fourteenth Amendments. . . ."⁴⁹

The test to decide if the conduct contains a message that is protected by the First Amendment is clearly set forth in *Spence v. Washington*.⁵⁰ In *Spence*, the Court stated that the actor must have "an intent to convey a particularized message" and "in the surrounding circumstances the likelihood was great that the message would be understood by those who viewed it"⁵¹ Further, "it is the obligation of the person desiring to engage in assertedly expressive conduct to demonstrate that the First Amendment even applies. To hold otherwise would be to create a rule that all conduct is presumptively expressive."⁵²

Two relatively recent Supreme Court cases further illustrate this point. In *City of Dallas v. Stanglin*,⁵³ the Supreme Court rejected a claim that recreational dancing contained an expressive element protected by the First Amendment, stating:

"[F]reedom of speech" means more than simply the right to talk and to write. It is possible to find some kernel of expression in almost every activity a person undertakes--for example, walking down the

9127).

46. Appellants' Brief at 27-36, *toper* (No. 92-9127).

47. 391 U.S. 367 (1968).

48. *Id.* at 376; *see also* *Texas v. Johnson*, 491 U.S. 397, 404 (1989); *Spence v. Washington*, 418 U.S. 405, 409 (1974); *Cox v. Louisiana*, 379 U.S. 536, 578 (1965) (Supreme Court emphatically rejected the notion that the First Amendment accords an equivalent level of freedom to those who choose to communicate by conduct rather than by words).

49. *Spence*, 418 U.S. at 409.

50. 418 U.S. 405 (1974).

51. *Id.* at 410-11.

52. *Clark v. Community for Creative Non-Violence*, 468 U.S. 288, 293 n.5 (1984).

53. 490 U.S. 19 (1989).

street or meeting one's friends at a shopping mall—but such a kernel is not sufficient to bring the activity within the protection of the First Amendment⁵⁴

In *Barnes v. Glen Theatre, Inc.*,⁵⁵ the Court upheld a total ban on public nudity, including nude dancing, which the plurality found was "expressive conduct within the outer perimeters of the First Amendment"⁵⁶ The Court expressly rejected the argument that "[p]eople who go about in the nude in public may be expressing something about themselves by so doing."⁵⁷ Justice Souter elaborated in his concurrence:

[Although such performance dancing is inherently expressive, nudity per se is not . . . [E]very voluntary act implies some such idea, and the implication is thus so common and minimal that calling all voluntary activity expressive would reduce the concept of expression to the point of the meaningless.⁵⁸

Plaintiffs Loper and Kaye demonstrated, by means of their affidavits and depositions, that their "intent" while they were engaged in panhandling, was to ask for money to be used for some personal use and not to convey any particular message of a political, social, or economic nature.⁵⁹ The uncontroverted evidence introduced by New York City and its Police Department further established that citizens who encountered panhandlers understood their conduct primarily as a request for money for the panhandlers' personal use;⁶⁰ there was no universal social message communicated by panhandlers. In fact, many residents reported that the message they received from panhandlers was a threat or coercion to give.⁶¹ Thus, as the Second Circuit had previously recognized with respect to the panhandlers in *Youngs* there was no message being conveyed by the plaintiffs in *Loper* other than that they wanted money from strangers for some unspecified personal use.⁶²

The mere fact that some panhandlers use words to demand money does not convert their conduct into speech that conveys a message. While language is usually used to express ideas, facts, or

54. *Id.* at 25.

55. 501 U.S. 560 (1991).

56. *Id.* at 566.

57. *Id.* at 570.

58. *Id.* at 581 (Souter, J., concurring).

59. See Joint Appendix at A22-A25, A29-A109, A117-A213, *Loper* (No. 92-9127); *Loper*, 802 F. Supp. at 1033.

60. See Joint Appendix at A678-A688, A704-A714, A958-A972, A981-A984, *Loper* (No. 92-9127).

61. *Id.*; see also *Loper*, 999 F.2d at 701.

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

emotions, in a narrow set of circumstances words constitute action rather than expression of an idea. The Oxford philosopher, John Langshaw Austin, long ago coined the term "performative utterance" to describe language that essentially was an action rather than an expression of an idea.⁶³

New York City's position was that the act involved in soliciting money from people on the street for unknown personal use, even when accompanied by words, was a performative utterance and was not intended to communicate information or ideas.⁶⁴ As such, the First Amendment was not implicated.⁶⁵ Just as no violation of the First Amendment exists for imposing civil or criminal liability for breaching contracts, making false warranties, agreeing to fix prices, or soliciting criminal activity, because words spoken in the course of such activities are part of the act which is proscribed,⁶⁶ no First Amendment protection applies to begging.

This is true notwithstanding the Supreme Court's broad statements in certain cases that solicitation itself is protected speech.⁶⁷ The Court's statements do not mean that the conduct of solicitation is speech. Instead, it is shorthand for what the Court has previously said—when a person is soliciting for a charity, political organization, religion, or other cause and imparting information during the act of solicitation, that informational speech is protected by the First

63. See THE ENCYCLOPEDIA OF PHILOSOPHY 90-91 (Paul Edwards, ed. 1972).

64. Appellants' Brief at 21, *Loper* (No. 92-9127); Appellants' Reply Brief at 6, *Loper* (No. 92-9127).

65. See *International Soc'y For Krishna Consciousness, Inc. v. Lee*, 112 S. Ct 2711, 2715 (1992) (Kennedy, J., concurring) (holding that in-person solicitation for the immediate payment of money for any purpose was a nonspeech element of expressive conduct and could be freely regulated) [hereinafter *Lee III*]; *International Soc'y for Krishna Consciousness, Inc. v. Lee*, 112 S. Ct. 2701, 2708-09 (1992) (upholding total ban in airport terminal of in-person solicitation of funds by a religious corporation, but finding unconstitutional the airport's ban on distribution of religious literature) [hereinafter *Lee I*]; *United States v. Kokinda*, 497 U.S. 720 (1990) (upholding total ban on in-person solicitation for immediate payment of money for any purpose on United States Post Office sidewalk even though other solicitation activity was permitted). See generally KENT GREENAWALT, *SPEECH, CRIME, AND THE USES OF LANGUAGE* 56-62 (1989).

The *Lee* decision was actually articulated in three opinions: *Lee I*, 112 S. Ct 2701 (1992) (affirming provision prohibiting solicitation of contributions in airport terminal); *Lee II*, 112 S. Ct 2709 (1992) (striking ban on distribution of literature in airport terminals); *Lee III*, 112 S. Ct 2711 (1992) (concurring and dissenting opinions).

66. See *R.A.V. v. City of St Paul*, 112 S. Ct 2538, 2561, 2563-64 (1992) (Stevens, J., concurring). See generally GREENAWALT, *supra* note 65, at 56-62.

67. See, e.g., *Kokinda*, 497 U.S. at 725; *Riley v. National Fed'n of the Blind of N.C., Inc.*, 487 U.S. 781, 788 (1988); *Secretary of State of Md. v. Joseph H. Munson Co.*, 467 U.S. 947, 959 (1984).

Amendment.⁶⁸ Thus, the conduct with which the speech is inextricably intertwined may not be proscribed, because to proscribe the conduct is to proscribe the protected speech.

The Supreme Court has taken a similar shorthand approach in some cases involving picketing. The Court has made broad statements that picketing is protected expression.⁶⁹ However, the Supreme Court has expressly acknowledged in other cases that picketing involves both the speech on the placard and the conduct of carrying the placard.⁷⁰ Indeed, where the picketing conduct has an illegal purpose, or constitutes illegal coercion, or contradicts state policy, it has been completely banned. Therefore, speech on a placard has not been protected when the connected act of picketing causes harm.⁷¹

Regarding in-person solicitation of money, the Supreme Court has found that the message being conveyed was essential to whether the solicitation conduct would be constitutionally protected.⁷² The

68. The Supreme Court in *Lee I*, for example, stated that "it is uncontested that the solicitation at issue in this case is a form of speech protected under the First Amendment" *Lee I*, 112 S. Ct. at 2705. However, in *Lee I* the majority's reasoning simply restated the Second Circuit's opinion that the Port Authority did not "dispute that [Lee's] in-person solicitation of contributions and distribution of religious literature are protected speech within the meaning of the First Amendment" *Lee*, 925 F.2d 576, 579 (2d Cir. 1990). The briefs to the Second Circuit in *Lee* make plain that the parties, including the Port Authority, all assumed that the in-person solicitation of funds by the religious corporation was protected conduct. See Brief of Respondent, *Lee*, 112 S. Ct. 2701 (1992) (Nos. 95-155, 91-339); Brief of Petitioner, *Lee*, 112 S. Ct. 2701 (1992) (Nos. 95-155, 91-339). Thus, in *Lee*, the Supreme Court was not presented with the issue of whether in-person solicitation for the immediate payment of money, alone, was a form of speech protected by the First Amendment. *Lee I*, 112 S. Ct. at 2704-05. The Second Circuit's statement that the parties in *Lee* agreed that begging was at least a form of speech, was, therefore, inaccurate. *Loper*, 999 F.2d at 703.

Other cases in which the Supreme Court repeated the broad statement that solicitation was protected speech involved solicitations conducted by political or charitable organizations, where, arguably, the protected speech relating to politics or charity was inextricably intertwined with the conduct of in-person solicitation for funds. *Kokinda*, 497 U.S. at 725; *Riley*, 487 U.S. at 788; *Munson*, 467 U.S. at 959; *Village of Schaumburg v. Citizens for a Better Environment*, 444 U.S. 620 (1980). The only speech interest involved in panhandling is the request for the money itself.

69. See, e.g., *Police Dep't of Chicago v. Mosley*, 408 U.S. 92, 99 (1972).

70. See, e.g., *Amalgamated Food Employees Union, Local 590 v. Logan Valley Plaza, Inc.*, 391 U.S. 308, 313 (1968); *Cox v. Louisiana*, 379 U.S. 536, 555 (1965).

71. See, e.g., *Logan Valley Plaza*, 391 U.S. at 314; *Building Serv. Employees Int'l Union, Local 262 v. Gazzam*, 339 U.S. 532, 538-39 (1950); *Giboney v. Empire Storage & Ice Co.*, 336 U.S. 490, 502 (1949).

72. See *Young v. New York City Transit Auth.*, 903 F.2d 146, 154-57 (2d Cir.), cert. denied, 498 U.S. 984 (1990).

Supreme Court stated in the *Schawnberg* trilogy and in other cases involving in-person solicitations for the immediate payment of money for charitable, political, or religious purposes, that solicitation conduct was protected because it was inextricably intertwined with some specific idea, belief, social message, or information being conveyed.⁷³ The Supreme Court did not hold there, or in any subsequent case, that absent those "speech interests," in-person solicitation for immediate payment of money was speech within the boundaries of the First Amendment.⁷⁴ Indeed, the Supreme Court specifically ruled in *Schaumburg* that "[c]anvassers . . . are necessarily more than solicitors for money" only where there is some recognized speech interest intertwined with the solicitor's conduct.⁷⁵

The public information message of charitable organizations forms the basis for the Supreme Court's First Amendment jurisprudence pertaining to solicitation of money for charitable purposes.⁷⁶ Absent that message, there is only pure conduct, subject to regulation.⁷⁷ Because the record in *Loper* revealed no universal social message conveyed by panhandling, panhandlers are "mere solicitors for money" and convey no speech interest. For that reason, and the strong government interests demonstrated by New York City (maintenance of order, prevention of coercion, duress, and fraud), the City argued that the law proscribing loitering for the purpose of begging

73. See, e.g., *Schaumburg*, 444 U.S. at 632; *Munson*, 467 U.S. at 959; *Riley*, 487 U.S. at 787.

74. Compare *Ohralik v. Ohio State Bar Ass'n*, 436 U.S. 447 (1978) with *In re Primus*, 436 U.S. 412 (1978) (giving IKS protection to the speech interest in lawyer's in-person solicitation of business for personal pecuniary gain than the speech interest in lawyer's in-person solicitation of clients on behalf of ACLU).

75. *Schaumburg*, 444 U.S. at 632; accord *Lee III*, 112 S. Ct 2711, 2721 (1992) (Kennedy, J., concurring) (Justice Kennedy viewed the personal solicitation for immediate payment of money as "an element of conduct interwoven with otherwise expressive solicitation" for religious purposes); *Riley*, 487 U.S. at 789; *Cornelius v. NAACP Legal Defense & Educ. Fund*, 473 U.S. 788, 799 (1985) (the "nexus between solicitation and the communication of information and advocacy of causes is present in the CFC as in other contexts"); *Munson*, 467 U.S. at 959; *Young*, 903 F.2d at 155 ("[Neither *Schaumburg* nor its progeny stand for the proposition that begging and panhandling are protected speech under the First Amendment. Rather, these cases hold that there is a sufficient nexus between solicitation by organized charities and a 'variety of speech interests' to invoke protection under the First Amendment").

76. *Cornelius*, 473 U.S. at 799; *Schaumburg*, 444 U.S. at 632; see also *Young*, 903 F.2d at 156.

77. See generally *RA.V. v. City of St Paul*, 112 S. Ct 2538, 2544 (1992) ("We have long held, for example, that nonverbal expressive activity can be banned because of the action it entails, but not because of the ideas it expresses—so that burning a flag in violation of an ordinance against outdoor fires could be punishable, whereas burning a flag in violation of an ordinance against dishonoring the flag is not").

was a reasonable regulation of conduct.⁷⁸

Even assuming a speech interest was implicated in the conduct of panhandling, the City argued alternatively that the First Amendment did not protect the speech or message of, "please spare some change," which is arguably intertwined with the conduct of begging.⁷⁹

In some of its recent decisions, the Supreme Court has concededly broadened the scope of the First Amendment.⁸⁰ However, the Court has not gone so far as to rule that every spoken word is protected speech. For example, some classes of speech, such as obscenity or defamation, have been found to be devoid of First Amendment protection. In fact, the Court's reasoning in recent cases retained the categorical approach to First Amendment analysis, which ascribed different levels of protection to different categories of speech. The further the category was from core First Amendment speech, such as political speech, the exposition of ideas, or the substance of a written work, the greater was the degree of regulation that the Court permitted.⁸¹

78. *Loper*, 802 F. Supp. at 1045-47; accord *Lee I*, 112 S. Ct at 2708; *Lee III*, 112 S. Ct at 2722 (Kennedy, J., concurring) (prevention of coercion, duress, and fraud from in-person solicitation for immediate payment of money by religious corporation found to be valid state interests to support total ban on such solicitation inside New York City area airport terminals); *United States v. Kokinda*, 497 U.S. 720, 732-34 (1990) (prevention of disruption, intrusiveness, and intimidation inherently caused by in-person solicitation for the immediate payment of money on United States Post Office sidewalk held to be substantial governmental interest to support total ban of such solicitation for any purpose); *City Council of Los Angeles v. Taxpayers for Vincent*, 466 U.S. 789, 805-07 (1984) (aesthetic interest in proscribing handbills posted on utility poles found significant enough to support total ban on posting even as applied to political campaign posters); *Hefron v. International Soc'y for Krishna Consciousness, Inc.*, 452 U.S. 640, 650 (1981) (government interest in maintaining order at public fair justified regulation limiting in-person solicitation of funds by a religious corporation to specified booths).

79. Appellant's Brief at 27-47, *Loper* (No. 92-9127).

80. See, e.g., *City of Ladue v. Gilleo*, 114 S. Ct 2038 (1994); *Edenfield v. Fane*, 113 S. Ct 1792 (1993).

81. See, e.g., *United States v. Edge Broadcasting Co.*, 113 S. Ct 2696 (1993) (total ban permitted on advertising of lottery results based on lesser protection afforded to commercial speech); *Edenfield*, 113 S. Ct at 1797 (over objections voiced by Justice Blackmun, the majority recognized the category of commercial solicitation and held that words spoken in a commercial context even though truthful and not misleading, are entitled only to middle-level protection; the Court also recognized that within categories, varying degrees of protection exist, depending on whether the speech involved is at the "margins of the category"); *R.A.V.*, 112 S. Ct at 2567 (Stevens, J., concurring in part); *Young v. American Mini Theatres, Inc.*, 427 U.S. 50, 70 (1976); *Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 771-72 n.24 (1976).

IV. FIRST AMENDMENT JURISPRUDENCE

The reality of First Amendment jurisprudence is that the strictest scrutiny is applied to government regulation of political speech, the exposition of ideas, or the substance of a written work.⁸² That level of scrutiny has been relaxed in varying degrees when applied to other types of speech or expression found to be within the boundaries of the First Amendment, such as indecent nonobscene speech or commercial speech.⁸³ When the protected speech is intertwined with conduct, even greater deference has been accorded government regulation of the conduct component, even though the regulation may infringe on the speech component.⁸⁴

The conduct of soliciting others for the immediate payment of money for personal use falls far from the core First Amendment value of "exposition of thought"⁸⁵ Solicitation is neither discussion, nor advocacy, nor the interchange of ideas on political, economic, religious, or social issues, nor a form of artistic expression.⁸⁶

Furthermore, solicitation does not rise to the level of commercial speech. The heart of the commercial speech doctrine is "the particular consumer's interest in the free flow of commercial information."⁸⁷ The Supreme Court has ruled that it is a "matter of public interest" that the numerous private economic decisions made by

82. See *R.A.V.*, 112 S. CL at 2542, 2567-68 (Stevens, L., concurring in part); *Simon & Schuster v. New York Crime Victims Bd.*, 112 S. O. 501, 509 (1991).

83. See *Edge Broadcasting Co.*, 113 S. Ct 2696; *R.A.V.*, 112 S. CL at 2567 (Stevens, J., concurring in part); *Young*, 427 U.S. at 70; *Virginia State Bd. of Pharmacy*, 425 U.S. at 771-72 n.24.

84. See, e.g., *United States v. Kokinda*, 497 U.S. 720 (1990) (upholding total ban on solicitation on United States Post Office sidewalk even as applied to the in-person solicitation of funds by a political organization); *Clark v. Community for Creative Non-Violence*, 468 U.S. 288 (1984) (sleeping outdoors on public park property properly banned even though it was part of symbolic public protest of homelessness); *Ohralik v. Ohio State Bar Ass'n*, 436 U.S. 447 (1978) (in-person solicitation of business by attorneys for their own pecuniary gain properly proscribed even though written advertising is constitutionally permitted as commercial speech); *United States v. O'Brien*, 391 U.S. 367 (1968) (criminal conviction for public draft-card burning upheld even though person concededly burned card to protest Vietnam War).

85. See generally *Metromedia, Inc. v. City of San Diego*, 453 U.S. 490, 505-06 n.12 (1981); *Chaplinsky v. New Hampshire*, 315 U.S. 568, 572 (1942).

86. See generally *New York Times Co. v. Sullivan*, 376 U.S. 254, 269 (1964); cf. *Roth v. United States*, 354 U.S. 476, 484 (1957); *Stromberg v. California*, 283 U.S. 359, 369 (1931).

87. *Virginia State Bd. of Pharmacy*, 425 U.S. at 763; see also *Edenfield v. Fane*, 113 S. CL 1792, 1797-98 (1993).

consumers be "intelligent and well informed."⁸⁸ "To this end, the free flow of commercial information is indispensable."⁸⁹

The test for identifying commercial speech is, therefore, whether the speech at issue seeks to "propose a commercial transaction."⁹⁰ That the communication has some financial or commercial aspect to it is not enough to render it "commercial" within the meaning of the commercial speech doctrine.⁹¹ Thus, only cases involving the promotion of a product or service have been found to be commercial speech by the Supreme Court.⁹²

Panhandlers' in-person solicitations of others for money for their personal use may result in a personal profit, but the panhandlers' conduct does not "propose a commercial transaction" within the meaning ascribed by the Supreme Court. Asking a citizen on the street for money involves no dissemination of information about who is producing, selling, or offering what product or service at what price. Instead, it is a bare request for money and does not fall within the commercial speech category of protected speech.⁹³

In a recently decided case, *Edenfield v. Fane*⁹⁴ the Supreme Court had occasion to rule upon a ban on in-person solicitation of business by certified public accountants.⁹⁵ Although the Court affirmed a ruling that the ban was unconstitutional, the Court did not hold that all in-person solicitation for business was protected by the First Amendment.⁹⁶ The Court articulated the test concerning the constitutionality of regulating solicitation as contingent upon "the identity of the parties and the precise circumstances of the solicitation."⁹⁷ The in-person solicitation of business in *Edenfield* provided

88. *Virginia State Bd of Pharmacy*, 425 U.S. at 765.

89. *Id.*; see also *Metromedia*, 453 U.S. at 505-06 n.12.

90. *Board of Trustees v. Fox*, 492 U.S. 469, 473-74 (1989) (quoting *Virginia State Bd. of Pharmacy*, 425 U.S. at 762).

91. *Pittsburgh Press Co. v. Pittsburgh Comm'n on Human Relations*, 413 U.S. 376, 384-85 (1973).

92. See, e.g., *Fox*, 492 U.S. 469 (tupperware party); *Posadas de Puerto Rico Assocs. v. Tourism Co. of P.R.*, 478 U.S. 328 (1986) (advertising that promoted casino gambling); *Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n*, 447 U.S. 557 (1980) (advertising that promoted use of electricity); *Bates v. State Bar of Ariz.*, 433 U.S. 350 (1977) (advertising legal clinic and prices for various legal services); *Virginia State Bd of Pharmacy*, 425 U.S. 748 (advertising drug prices).

93. See generally *Metromedia*, 453 U.S. at 505 n.12 (holding commercial speech in the nature of advertising is protected "because of the 'information of potential interest and value' conveyed").

94. 113 S. Ct 1792 (1993).

95. *Id.* at 1796.

96. *Id.*

97. *Id.* at 1802.

valuable information to consumers, permitted rational decision-making, and did not require immediate action by the person solicited.⁹⁸ The Court found those circumstances material to its holding.⁹⁹ Such circumstances are absent, however, when people are accosted on the street by panhandlers who seek money for some unknown personal use.

Finally, at the time of the ratification of the First Amendment in 1791, begging was prohibited in nearly all of the original states.¹⁰⁰ Eight of the fourteen states in the Union at the time the Bill of Rights was ratified in 1791 had laws prohibiting begging (Connecticut, Georgia, Massachusetts, New Hampshire, New York, Pennsylvania, South Carolina, and Virginia); Rhode Island, Vermont, New Jersey, and Maryland followed suit in 1796, 1797, 1799, and 1805.¹⁰¹ Additionally, in 1812, the District of Columbia enacted an anti-begging statute, signed by then-President James Madison, a drafter of the Constitution.¹⁰² Two hundred years after the adoption of the First Amendment, twenty-five states still have laws that either prohibit begging in some form, or expressly authorize the prohibition of begging.¹⁰³ Additionally, a number of state municipalities prohibit begging through local ordinances.¹⁰⁴

In accord with the understanding that "the First Amendment

98. *Id.* at 1803.

99. *Id.*

100. Record on Appeal (Joint Appendix), *to per* (No. 92-9127).

101. *Id.*

102. *See Cohens v. Virginia*, 19 U.S. 264, 276-89 (1821).

103. *See Young v. New York City Transit Auth.*, 729 F. Supp. 341, 354-55 (S.D.N.Y.), *rev'd*, 903 R2d 146 (2d Cir.), *cert. denied*, 498 U.S. 984 (1990).

104. *See, e.g.,* MEMPHIS, TENN., CODE § 22-12 (1986); PORTLAND, OR., CITY CODE § 14.24.040 (1984) (cited in Anthony J. Rose, *The Beggar's Free Speech Claim*, 65 IND. L.J. 191, 201, 215 (1989)). Further, of the five state courts to consider the validity of anti-begging statutes, four have upheld such laws against various constitutional attacks. *See City of Seattle v. Webster*, 802 P.2d 1333 (Wash. 1990); *Ubner v. Municipal Court for Oakland-Piedmont Judicial Dist.*, 127 Cal. Rptr. 445 (Cal. Q. App. 1976); *State ex. rel. Williams v. City Court of Tuscon*, 520 P.2d 1116 (Ariz. Ct App. 1974). Constitutional protection was found to extend to begging in *C.C.B. v. Florida*, 458 So. 2d 47 (Fla. Dist Ct. App. 1984).

The Federal District Court for the Western District of Washington recently upheld the constitutionality of two provisions of Seattle's Municipal Code: one proscribes sitting or lying on public sidewalks in certain commercial areas between the hours of 7:00 a.m. and 9:00 p.m. and the other proscribes aggressive begging. *Roulette v. City of Seattle*, 850 F. Supp. 1442 (W.D. Wash, 1994). The Federal District Court for the Northern District of California recently held unconstitutional, as violative of the First Amendment, California's anti-begging law, which proscribes "accosting" others for the purpose of soliciting alms. *Blair v. Shanahan*, 775 F. Supp. 1315 (N.D. Cal. 1991) (appeal dismissed as moot and remanded to district court to vacate decision).

was not intended to protect every utterance,"¹⁰⁵ New York City argued that the First Amendment does not include within its scope of protection the words spoken in requesting money in-person from others for unknown personal use.¹⁰⁶ As unprotected speech, New York City argued that it may regulate both the conduct and speech components of begging.¹⁰⁷

The City concluded that even assuming the existence of a protected speech interest in solicitation conduct for the immediate payment of money for personal use, that interest was within the outer perimeters of the First Amendment.¹⁰⁸ Therefore, such conduct may be subject to broader modes of regulation than might otherwise be impermissible.

Where the expressive component of the conduct is outside the center of recognized categories of protected speech, but arguably within the fringes of that category or the First Amendment generally, the protection given to that speech interest is substantially less than the protection given to speech squarely within the recognized scope of the First Amendment. Stated another way, the degree of free speech protection is commensurate with its position on the scale of First Amendment values.¹⁰⁹

105. *Roth v. United States*, 354 U.S. 476, 483 (1957).

106. Appellant's Brief at 32-36, *Loper* (No. 92-9127); cf. *City of Dallas v. Stanglin*, 490 U.S. 19 (1989) (recreational dancing, although containing some expressive content, is not expressive conduct within the scope of the First Amendment).

107. Appellant's Brief at 32-36, *Loper* (No. 92-9127).

108. *Id.*

109. Compare *Barnes v. Glen Theatre, Inc.* 501 U.S. 560 (1991) with *Texas v. Johnson*, 491 U.S. 397 (1989) (expressive component of nude dancing given far less protection than the expressive political message in flag-burning); compare *Ohralik v. Ohio State Bar Ass'n*, 436 U.S. 447 (1978) with *In re Primus*, 436 U.S. 412, 434 (1978) (the speech interest in lawyer's in-person solicitation of business for personal pecuniary gain given less protection than speech interest in lawyer's in-person solicitation of clients on behalf of the ACLU). See also *Young v. American Mini Theatres, Inc.*, 427 U.S. 50, 70 (1976) (society's interest in protecting erotic materials that have some arguably artistic value is of "a wholly different, and lesser, magnitude than the interest in untrammelled political debate that inspired Voltaire's immortal comment"); *Metromedia, Inc. v. City of San Diego*, 453 U.S. 490, 505-06 n.12 (1981) (in adopting Justice Stewart's concurrence in *Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council*, 425 U.S. 748 (1976), the Supreme Court stressed the importance of the difference between commercial price and product advertising and ideological communication because the latter was "integrally related to the exposition of thought" and was entitled to greater weight in assessing the various interests).

Even plaintiffs *Loper* and *Kaye* acknowledged that different weights or levels of protection may be given to speech interests within a given category of protected speech when they argued in their Memorandum of Law submitted to the District Court that begging "perhaps, does not have to survive the most 'ex-

In the case of speech intertwined with conduct, as with panhandling, the "government regulation is sufficiently justified if it is within the constitutional power of the Government; if it furthers an important or substantial governmental interest; if the governmental interest is unrelated to the suppression of free expression; and if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest."¹¹⁰ The limited protection to be accorded the speech at issue must be considered in assessing each of these factors.

With regard to panhandling, the Court's first hurdle is easily satisfied. It is within the state's police power to regulate for public safety, morality, peace and quiet, aesthetics, and law and order.¹¹¹ With regard to the Court's second hurdle, the ban on loitering-for-the-purpose-of-begging advances substantial governmental interests in maintaining order in public places, reducing citizens' fear, and preventing coercion, duress, and fraud. Facts supporting these interests were well documented in the affidavits of the Chief of the New York City Police Department, the sergeants in charge of community policing for six large precincts, the manager of a large bank branch, the manager of a large department store, and Professor George Kelling.¹¹² Indeed, the Supreme Court has acknowledged that soliciting funds in person is an inherently more intrusive, intimidating, and disruptive activity than is distributing literature, for example.¹¹³ The Court has further found that "face-to-face solicitation presents risks of duress that are an appropriate target of regulation. The skillful, and unprincipled, solicitor can target the most vulnerable, including those accompanying children or those suffering physical impairment and who cannot easily avoid the solicitation."¹¹⁴ Additionally, requests for immediate payment of money create a strong potential for fraud and coercion due to the lack of time for reflection.¹¹⁵ The Supreme Court has also expressly relied on the substantiality of the

acting judicial scrutiny' . . . that the regulation of solicitation by organized charities must . . ." Memorandum of Law in Support of Plaintiffs Motion for Summary Judgment at 8, *Loper v. New York City Police Dep't.*, 802 F. Supp. 1029 (S.D.N.Y. 1992), *aff'd*, 999 F.2d 699 (2d Cir. 1993) (No. 90-7546) (Feb. 4, 1991).

110. *United States v. O'Brien*, 391 U.S. 367, 377 (1968); *Young v. New York City Transit Auth.*, 903 F.2d 146, 157 (2d Cir. 1990).

111. *City Council of Los Angeles v. Taxpayers for Vincent*, 466 U.S. 789, 805 (1984); *Berman v. Parker*, 348 U.S. 26, 32-33 (1954).

112. Appellants' Brief at 6-7, *Loper* (No. 92-9127); Joint Appendix at A678-A714, A958-A987, *Loper* (No. 92-9127).

113. *United States v. Kokinda*, 497 U.S. 720, 734 (1990).

114. *Lee I*, 112 S. Ct. 2701, 2708 (1992).

115. *Id.*; *Lee III*, 112 S. Ct. 2711, 2722 (1992) (Kennedy, J., concurring).

government's interests in preventing coercion, duress, and fraud to uphold regulations banning all in-person solicitation of funds for any purpose (including political purposes) on a United States Post Office sidewalk,¹¹⁶ and in banning in-person solicitation of funds by anyone (including a religious corporation) inside New York City airport terminals.¹¹⁷

New York City argued that the substantiality of its interests in regulating panhandling was proven by facts in the court record, which were not present in cases already decided by the Supreme Court. For instance, in *United States v. Kokinda* and *International Society for Krishna Consciousness, Inc. v. Lee*, there was no actual proof of coercion or duress in the in-person solicitation conduct banned by the government.¹¹⁸ Nevertheless, the Supreme Court found that fraud, coercion, and duress are inherent in the in-person solicitation of money and ruled that the government had a substantial interest in regulating that conduct.¹¹⁹ In *Loper*, the City introduced concrete evidence of coercion, fear, and duress arising out of certain panhandling conduct.¹²⁰ Thus, the City argued, the substantiality of its interests was unassailable.

The Court's third hurdle—whether the regulation was content-neutral—was addressed by the Second Circuit in *Young*.¹²¹ The *Young* court set forth the two-pronged inquiry to be used in determining content-neutrality as (1) "[t]he principal inquiry . . . is whether the government has adopted a regulation of speech because of disagreement with the message it conveys"¹²² and (2) "whether the dangers relied on as justification for the regulation arise at least in some measure from the alleged communicative content of the conduct."¹²³ As in *Young*, there was nothing in the *Loper* record "to suggest even remotely" that the state's interests in controlling begging arose because of any objection to a particularized idea or message. Instead, the dangers to the public stemmed from the conduct of

116. *Kokinda*, 497 U.S. at 720.

117. *Lee I*, 112 S. Ct. 2701. Although the Supreme Court applied a more lenient standard of review for government regulations in *Lee* and *Kokinda* when it ruled in those cases that airports and walkways on United States Post Office property were not public fora, its discussion of the substantiality of the government's interests was unaffected by that more lenient standard of review.

118. See *Kokinda*, 497 U.S. at 755-56. (Brennan, J., dissenting); *Lee III* 112 S. Ct. at 2726 (Souter, J., dissenting in part).

119. See *supra* note 118.

120. Joint Appendix at A680, A686-A687, A706-A714, A958-A960, A965-A967, A971, A975, A981-A984, *Loper* (No. 92-9127).

121. *Young v. New York City Transit Auth.*, 903 F.2d 146, 158 (1990).

122. *Id.* at 158 (quoting *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989)).

123. *Id.* at 158-59.

begging and, as in *Youngs* such dangers were just as real, "[e]ven if begging had no communicative character at all."¹²⁴

Finally, the incidental infringement on the speech interest is no greater than is essential to the furtherance of the governmental interests. As is now well-established, government regulation of conduct or a mode of communication containing or projecting a speech interest need not be "the least restrictive means" to achieve the goal.¹²⁵ That a ban against a certain avenue or mode of communication—here, in-person solicitation for the immediate payment of money—is a total one, does not mean, ipso facto, that the ban is more extensive than necessary. The total ban must be assessed against the minimal protection that should be given to plaintiffs' "please spare some change" message, which is less than that accorded commercial speech. A complete ban may be found to be "narrowly tailored . . . if each activity within the proscription's scope is an appropriately targeted evil."¹²⁶ The substantive "evil" here is the conduct of in-person solicitation for the immediate payment of money for personal use, which itself can be disorderly, intrusive, and coercive. Thus, it is the only activity proscribed by Section 240.35(1) of the New York Penal Law.¹²⁷

Indeed, the Supreme Court has upheld total bans on various activities and modes of communication notwithstanding deleterious effects on business or significant infringements on political and other well-recognized protected forms of speech.¹²⁸ The City asserted a

124. *Id.* at 159 (relying on *United States v. O'Brien*, 391 U.S. 367 (1968)); see *Kokinda*, 497 U.S. at 736-37 (finding that the total ban on in-person solicitation of funds for any purpose was content-neutral because such a ban was intended to eliminate "unpleasant situation[s]" and not intended to "discourage one viewpoint and advance another").

125. *Board of Trustees v. Fox*, 492 U.S. 469, 477-81 (1989); *Ward*, 491 U.S. at 781, 798-99; *Clark v. Community for Creative Non-Violence, Inc.*, 468 U.S. 288, 299 (1984). A regulation must be "narrowly tailored to serve the government's content-neutral interests," but it need not be the least restrictive or least intrusive means of doing so." *Ward*, 491 U.S. at 798.

126. *Frisby v. Schultz*, 487 U.S. 474, 485 (1988).

127. N.Y. PENAL LAW § 240.35(1) (OlcKinney 1988).

128. E.g., *United States v. Edge Broadcasting Co.*, 113 S. O. 2696 (1993) (upholding a federal regulation banning the broadcast of lottery results in states that did not have lotteries, despite permitting such broadcasts in states which did have lotteries); *Lee I*, 112 S. Ct. 2701, 2708-09 (1992) (upholding total ban on in-person solicitation for funds inside New York City airport terminals, even though religious corporation's ability to collect money pursuant to a religious ritual was limited as a result); *Barnes v. Glen Theatre, Inc.*, 501 U.S. 560, 570-71 (1991) (upholding total ban on barroom nude dancing even though the dancing was found to be expressive conduct and there was no alternative way to dance nude in barrooms); *Kokinda*, 497 U.S. at 720 (upholding total ban on in-person solicitation of funds on United States Post Office sidewalk, even though

need for a total ban because innumerable circumstances existed where an individual may engage in panhandling in a way that might not be considered disorderly conduct or harassment or any other currently proscribed conduct, but which was, nevertheless, unacceptable behavior. For example, Section 240.35(1) provided the police with the following authority: to prevent the congregation of large numbers of "peaceful" panhandlers on a given block or any number of panhandlers outside specific locations such as stores, ATMs, banks, bus stops, restaurants, or subway entrances; to prevent someone from "peacefully" asking children for money; to prevent two or more individuals standing on either side of the entrance to an all night grocery at 5:00 a.m. from "peacefully" asking a would-be patron for money; to prevent someone from stationing himself close to the entrance to someone's home or apartment house and "peacefully" soliciting that person for money; to prevent someone from "peacefully" thrusting a cup in front of a frail, elderly woman; and to prevent a six-foot, three hundred-pound person from "peacefully" soliciting money from a five-foot, one hundred-pound person.¹²⁹ These are all examples of panhandling activity which would fall short of disorderly conduct, harassment, or any other currently proscribed conduct, but which society can nonetheless deem unlawful because it is intimidating or coercive, or could create public disorder. Thus, the City's position in *Loper* was that the steps taken to combat this evolving social problem were well-balanced to protect all the interests involved. However, the Second Circuit did not agree.

V. THE AFTERMATH OF THE *LOPER* RULING

In an attempt to meet the concerns articulated by the Second Circuit in *Loper*, and at the same time address the negative impacts of panhandling, a New York City Council member, in February

solicitation was by well-known political organization); *Arcara v. Cloud Books, Inc.*, 478 U.S. 697, 706 (1986) (despite devastating economic impact to owner and existence of less onerous means of enforcement, the total shutdown for a year of a bookstore selling protected category of books was upheld because proscribed sexual activity took place on premises); *Posadas de Puerto Rico Assocs. v. Tourism Co. of P.R.*, 478 U.S. 328 (1986) (upholding total ban on legal commercial advertising of gambling casinos to residents of Puerto Rico); *City Council of Los Angeles v. Taxpayers for Vincent*, 466 U.S. 789 (1984) (upholding total ban on the posting of flyers for political candidates on utility poles despite detrimental impact on underfunded candidate); *Metromedia, Inc. v. City of San Diego*, 453 U.S. 490, 498, 512 (1981) (finding a total ban on off-site billboard commercial advertising constitutional despite billboard owners' claims that such a ban would drive them out of business).

129. See N.Y. PENAL LAW § 240.35(1) (McKinney 1988).

1994, introduced a bill to ban aggressive begging on public streets, roadways, parks, and other public places.¹³⁰ Significantly, the bill's proposed declaration of intent stated that the real life experience of residents of New York City, when encountering many panhandlers, resulted in "intimidation, harassment and the disruption of both vehicular and pedestrian traffic."¹³¹ The declaration further asserted that the proposed ordinance was necessary to preserve the public order.¹³²

Thus, contrary to the view of the *Loper* plaintiffs, the Second Circuit, and many commentators, panhandling has been demonstrated to have a significant conduct component which New York City's residents and businesses have found to be intimidating and harassing in many situations.¹³³ The prohibitive legislation was not proposed out of insensitivity to the problems of the homeless. In fact, New York City is the only city in the United States which provides unrestricted emergency housing and food allowances to the homeless, has constructed or financed the creation of thousands of low-income housing units, and has an extensive social services network for the homeless. Notwithstanding those efforts, a need still exists to take action to address the problems presented by panhandling on the streets of New York City, because many residents and businesses daily experience genuine fear as a result of unchecked panhandling.

Based on the interest expressed in the *Loper* litigation by the government attorneys in San Francisco, Cleveland, Miami, and Seattle, the conduct of in-person solicitation of money for personal use

130. Proposed amendment to the New York City Administrative Code, § 10-136, Intro. No. 132, Feb. 1994. The bill defines aggressive begging as:

- (1) "Aggressive manner" shall mean:
 - (i) using violent or threatening gestures toward the person solicited;
 - (ii) touching another person in the course of asking, begging or soliciting alms, requesting money, soliciting charitable donations, or soliciting the sale of goods or services;
 - (iii) following someone before, after, or during asking, begging, or soliciting for alms, requesting money, soliciting charitable donations, or soliciting the sale of goods or services;
 - (iv) directing profane or abusive language toward the person solicited; or
 - (v) continuing to request, beg, or solicit alms, request money, solicit charitable donations, or solicit the sale of goods or services after the person to whom the request is directed has made a negative response.

Id. § 10-162(a)(1)(i) - (v).

131. *Id.*

132. *Id.*

133. Indeed, even the district court in *Loper* recognized that certain types of begging could be proscribed and that the government could permissibly ban begging at certain locations and at certain times. *Loper*, 802 F. Supp. at 1040.

on public streets is causing the same negative impact in many American cities as experienced by New Yorkers. Many cities are struggling to implement effective, but sensitive, controls of such conduct. Legislation such as that proposed to the New York City Council that is specifically directed at eliminating intimidating begging behavior, coupled with a sensitive application by law enforcement personnel, should be sustained as constitutional.