THE SECOND CIRCUIT REFUSES TO EXTEND BEGGARS A HELPING HAND: *YOUNG V. NEW YORK CITY TRANSIT AUTHORITY*

In *Young v. New York City Transit Authority*,[1] the United States Court of Appeals for the Second Circuit asserted that panhandling in the New York City subway system did not fall within the first amendment.[2] The court reasoned that panhandling was not expressive conduct and distinguished the *Schaumburg* trilogy of cases,[3] holding that the first amendment protects charitable solicitation. This treatment of panhandling

1. 903 F.2d 146 (2d Cir.), *cert. denied*, 111 S. Ct. 516 (1990).

2. *Id.* at 153-57. The Legal Action Center for the Homeless filed suit on behalf of itself and two homeless men as representatives of a class of needy persons who beg in the New York City subway. They challenged a New York City Transit Authority regulation prohibiting begging in the subway system. The regulation allowed solicitation for charitable, religious, or political causes in certain areas of the subway system. The New York City Transit Authority created the regulation to facilitate safe, effective, and reliable subway transportation. This ban on begging was partially responsive to a study finding that subway riders felt harassed and intimidated by beggars. The regulation also addressed the practical dilemma faced by police officers who had to distinguish between panhandling and extortion. *Id.* at 148-50.

The District Court held panhandling indistinguishable from charitable solicitation and, thus, was entitled to first amendment protection. *Id.* at 150-52. The Court of Appeals reversed, holding that even if panhandling was protected by the first amendment, the regulation in question did not violate the more lenient standard of review called for in this case. *Id.* at 157. The ban on panhandling was intended to further a governmental interest unrelated to the "communicative nature of conduct." *Id.* (quoting Texas v. Johnson, 109 S.Ct. 2533, 2540 (1989)). The regulation, therefore, was entitled to the standard of review employed in United States v. O'Brien, 391 U.S. 367 (1968). Pursuant to the *O'Brien* standard, the *Young* court concluded that the Transit Authority regulation did not violate the first amendment because: "(1) 'it is within the constitutional power of the Government;' (2) 'it furthers an important or substantial governmental interest;' (3) 'the governmental interest is unrelated to the suppression of free expression;' and (4) 'the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest.' " *Young*, 903 F.2d at 157 (quoting *O'Brien*, 391 U.S. at 377).

Prior to reaching this conclusion, however, the *Young* court discussed "whether begging constitutes the kind of 'expressive conduct' protected to some extent by the First Amendment." *Id.* at 153. The *Young* court concluded that most beggars had no intent to convey a particularized message and that observers were unlikely to understand any message beyond the desire for money. *Id.* at 153-54. *See infra* notes 55-62 and accompanying text. The *Young* majority then distinguished begging from charitable solicitation. *Young*, 903 F.2d at 155-57. *See infra* notes 63-66 and accompanying text. The dissent, however, agreed with the District Court that begging was indistinguishable from charitable solicitation and was entitled to first amendment protection. *Young*, 903 F.2d at 164. *See infra* note 64.

3. Riley v. National Fed'n of the Blind, Inc., 487 U.S. 781 (1988); Secretary of State v. Joseph A. Munson Co., 467 U.S. 947 (1984); Village of Schaumburg v. Citizens for a Better Environment, 444 U.S. 620 (1980)). Cornelius v. NAACP Legal Defense & Educational Fund, Inc., 473 U.S. 788 (1985) is a similar case. In *Cornelius*, the Supreme Court ruled that the first amendment protected

implies that begging in other contexts is unprotected[4] and confines *Schaumburg* to the charitable solicitation context.[5]

Panhandling or begging[6] may involve conduct (extension of a hand or cup) and speech (verbally asking for a handout). This activity is protected by the freedom of speech if: 1) a panhandler's request for money is commercial speech; 2) panhandling conveys a "particularized message;"[7] or 3) panhandling is so "inextricably intertwined with speech"[8] that it should be protected directly.[9] The *Young* court rejected all three and concluded that begging in the New York City subway was not a form of speech protected by the first amendment.[10]

In determining whether a particular activity is protected, one must ask exactly what the first amendment freedom of speech encompasses.[11] One could interpret the freedom of speech to protect only written or spoken words.[12] This view, however, is far from satisfactory.[13] The first amend-

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charitable solicitation of federal employees through the Combined Federal Campaign Form, a 30-word written statement.

4. *See infra* notes 70-73 and accompanying text.

5. *See infra* notes 81-82 and accompanying text.

6. The District Court cited various dictionaries and determined that panhandling and begging were synonymous. Young v. New York City Transit Auth., 729 F. Supp. 341, 350-351 (S.D.N.Y. 1990). This Recent Development affords the terms similar treatment.

7. *See infra* notes 36-41 and accompanying text.

8. L. TRIBE, AMERICAN CONSTITUTIONAL LAW, § 12-7, at 829 (2d ed. 1988).

9. *See, e.g.*, Village of Schaumburg v. Citizens for a Better Environment, 444 U.S. at 632 (charitable solicitations "involve a variety of speech interests . . . that are within the protection of the First Amendment").

10. *Young*, 903 F.2d at 154-56.

11. "Congress shall make no law . . . abridging the freedom of speech . . . ." U.S. CONST., amend. I. The first amendment freedom of speech is applied to the states through the fourteenth amendment due process clause. *See* Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc., 425 U.S. 748, 749 n.1 (1976).

12. *But see*, Henkin, *The Supreme Court, 1967 Term — Forward: On Drawing Lines*, 82 HARV. L. REV. 63, 79-80 (1968); Note, *First Amendment Protection of Ambiguous Conduct*, 84 COLUM. L. REV. 467, 469-71 (1984) [hereinafter Note, *Ambiguous Conduct*]. The first amendment also could be interpreted to protect only political speech. *See generally* Bork, *Neutral Principles and Some First Amendment Problems*, 47 IND. L. J. 1 (1971); A. MEIKLEJOHN, FREE SPEECH AND ITS RELATION TO SELF-GOVERNMENT (1948). *But see* M. NIMMER, NIMMER ON FREEDOM OF SPEECH § 3.01 at 3-2 - 3-9 (1984) (disputing this view). Those commentators who advocate first amendment protection for political speech alone claim that the first amendment is designed to protect discussions of problems properly dealt with by government. *Id.* at 3-6.

The Continental Congress, however, recognized the advancement of truth, science, morality, the arts, and the administration of government as important interests furthered by the first amendment. 1 JOURNALS OF THE CONTINENTAL CONGRESS 1774-1789 108 (Ford ed. 1904). Furthermore, the Supreme Court has noted these interests. *See* Herbert v. Lando, 441 U.S. 153, 186 (1979) (Brennan, J., dissenting); National Ass'n of Letter Carriers v. Austin, 418 U.S. 264, 288-289 n.2 (1974) (Doug-

ment's primary concern is the free expression of ideas,[14] not merely the free use of words.[15] As Professor Tribe points out, "[a]ll communication except perhaps that of the extrasensory variety involves conduct."[16] In fact, all communication is symbolic, whether consisting of conduct or the written or spoken word.[17] Speaking, after all, is nothing but the use of symbolic sounds, while writing is the use of symbolic markings.[18] If conduct both intends and does in fact communicate an idea, the first amendment should protect it.[19] Indeed, since at least 1931,[20] the Supreme Court has recognized that communicative conduct may be protected by the first amendment.[21]

The Supreme Court, however, has refused to extend first amendment protection to all conduct with some "kernel of expression."[22] The chal-

las, J., concurring); Rosenbloom v. Metromedia, 403 U.S. 29, 42 (1971) (plurality opinion); Curtis Publishing Co. v. Butts, 388 U.S. 130, 147 (1967) (plurality opinion); Roth v. United States, 354 U.S. 476, 484 (1957).

A simple example illustrates the importance of freedom of speech to science. In the Soviet Union, speech that may harm the courtry can be punished. J. LIEBERMAN, FREE SPEECH, FREE PRESS AND THE LAW 11 (1980). Of course, those in power decide what may harm the country. *Id.* In the 1930's, a Russian agronomist believed that plants could inherit characteristics they acquired while growing. *Id.* Although this belief was incorrect, other scientists were unable to disagree publicly because this theory was supported by those in power. *Id.* The result was serious harm to Soviet agriculture. *Id.*

Fortunately, the Supreme Court never has adopted the view that only political speech is protected. *See* M. NIMMER, *supra* at 3-3 n.5 (listing cases in which the Supreme Court has recognized non-political speech as falling under first amendment protection).

13. Henkin, *supra* note 12, at 80-82; Note, *Ambiguous Conduct*, *supra* note 12, at 471.

14. Abrams v. United States, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting).

15. M. NIMMER, *supra* note 12, § 3.06[B], at 3-42 - 3-43.

16. L. TRIBE, *supra* note 8, § 12-7, at 827. *See also* Henkin, *supra* note 12, at 79-80.

17. M. NIMMER, *supra* note 12, § 3.06[B], at 3-42. Indeed some speech is only conduct with no expressive content. *Id.* § 3.05, at 3-31.

18. *Id.* § 3.06[B], at 3-42.

19. Henkin, *supra* note 12, at 79. Such treatment of communicative conduct "enables a larger, more diverse group of people to communicate, promotes the communicaton of a wider variety of messages, and exposes a larger group of people to some communication." Note, *Ambiguous Conduct*, *supra* note 12, at 471.

20. Stromberg v. California, 283 U.S. 359, 361 (1931) (invalidating a state law prohibiting public display of "any flag, badge, banner or device . . . as a sign, symbol or emblem of opposition to organized government"). *See, e.g.*, Texas v. Johnson, 109 S. Ct. 2533, 2539 (1989) (invalidating a state law prohibiting desecration of the American flag).

21. *See* M. NIMMER, *supra* note 12, § 3.06[A], at 3-37 n.2 (listing contract, evidence, and trademark as other areas in which the law recognizes that conduct may be expressive).

22. *See* City of Dallas v. Stanglin, 109 S. Ct. 1591, 1595 (1989) ("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"); United States v. O'Brien, 391 U.S. 367, 376 (1968) ("We cannot accept the view that an apparently limitless variety of conduct

lenge, then, is to define conduct that is properly shielded by the freedom of speech. Subsequent courts have struggled[23] and continue to struggle with this problem.[24]

Prior to 1974, the Supreme Court had no real test for expressive conduct, relying instead on an alleged distinction between speech and conduct.[25] When denying first amendment protection to conduct, the Court employed the "speech plus" approach[26] and divided the questionable action into two parts: speech and conduct (the "plus").[27] Under this approach, the Court often sustained regulation of the conduct while prohibiting regulation of the speech.[28] Alternatively, the Court invoked the "pure speech" approach to protect the conduct in question.[29] Under this approach, the Court characterized the conduct as "akin to pure speech" and extended it the highest level of protection.[30]

This labeling process failed to explain the Court's analytical process; instead it merely announced the Court's conclusion that the conduct should or should not be protected.[31] The problem with this labeling ap-

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can be labeled 'speech' whenever the person engaging in the conduct intends thereby to express an idea").

23. In Edwards v. South Carolina, 372 U.S. 229 (1963), the Court determined that the first amendment protected a peaceful parade through state grounds. In Cox v. Louisiana, 379 U.S. 559, 564 (1965), however, the Court refused to extend the same degree of first amendment protection to essentially the same conduct as in *Edwards*. *See infra* notes 25-41 and accompanying text.

24. The struggle continues, as evidenced by the disagreement among the members of the Second Circuit panel in *Young*.

25. L. TRIBE, *supra* note 8, at 827; *See* Note, *Ambiguous Conduct*, *supra* note 12, at 473 (suggesting that the court followed three approaches to expressive conduct cases: (1) "fails anyway;" (2) "speech plus;" or (3) "pure speech". *See infra* notes 26-35 and accompanying text for a discussion of "speech plus" and "pure speech." The "fails anyway" method allowed the Supreme Court to avoid deciding whether the conduct was expressive. The Court instead would hold that, even if the act was expressive, it could not satisfy the level of scrutiny appropriate in the given case. Note, *Ambiguous Conduct*, *supra* note 12, at 473. For example, in United States v. O'Brien, 391 U.S. 367, 376-77 (1968), the Court assumed expressive conduct, but found no violation of the First Amendment. This is essentially the approach the *Young* court employed.

26. Note, *Ambiguous Conduct*, *supra* note 12, at 473.

27. *Id*. *See also* L. TRIBE, *supra* note 8, at 826. The phrase "speech plus" originated with Justice Frankfurter in Teamsters Local 695 v. Vogt, 354 U.S. 284, 289 (1957).

28. Note, *Ambiguous Conduct*, *supra* note 12, at 471. *But see* Brown v. Louisiana, 383 U.S. 131 (1966) (silent demonstration on public library premises is protected speech); Tinker v. Des Moines School Dist., 393 U.S. 503 (1969) (wearing black armbands to protest the Vietnam War is protected speech).

29. Note, *Ambiguous Conduct*, *supra* note 12, at 474.

30. *Id*.

31. L. TRIBE, *supra* note 8, at 827; Note, *Ambiguous Conduct*, *supra* note 12, at 475 ("Attempts to separate speech and conduct to determine which predominates in a particular act degenerate 'into question-begging judgements about whether the activity should be protected.' "(quoting

proach is that it rests on the assumption that activities can be separated into speech and nonexpressive conduct.[32] This premise is invalid because, as stated earlier, all communication contains an element of conduct.[33] The refusal not to extend first amendment protection to the conduct element thus begs the ultimate question of whether the conduct is expressive.[34] The Supreme Court, possibly recognizing these inconsistencies, finally abandoned this approach in 1974 when it decided *Spence v. Washington*.[35]

In *Spence* the Court adopted a two-part test to determine whether the first amendment protects expressive conduct. First, the Court asked whether the actor intended "to convey a particularized message." Second, the Court queried whether an observer would be likely to understand the intended message.[36] The first part focuses on the communicative intent of the actor, while the second focuses on the communicative nature of the action.[37] Both parts serve the underlying purposes of the first amendment: "(1) individual self-fulfillment; (2) the advance of knowledge and discovery of truth; (3) participation in decisionmaking by all members of society; and (4) maintenance of the proper balance between stability and change."[38]

The requirement that the actor intend to convey a particularized message promotes individual self-fulfillment and allows individual members of society to participate in the decisionmaking process.[39] The second *Spence* requisite, that the conduct actually convey the message

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Ely, *Flag Desecration: A Case Study in the Roles of Categorization and Balancing in First Amendment Analysis*, 88 HARV. L. REV. 1482, 1495 (1975)). *But see* T. EMERSON, THE SYSTEM OF FREEDOM OF EXPRESSION 290-298 (1970) (advocating separating expression and action to determine which element predominates).

32. Note, *Ambiguous Conduct*, *supra* note 12, at 474.

33. *See supra* notes 16-19 and accompanying text. "Expression and conduct, message and medium, are thus inextricably tied together in all communicative behavior." L. TRIBE, *supra* note 8, at 827.

34. Note, *Ambiguous Conduct*, *supra* note 12, at 475.

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

36. *Id.* at 410-11. The Supreme Court employed the *Spence* test as recently as 1989 in Texas v. Johnson, 109 S. Ct. 2533 (1989) (burning of United States flag during the Republican National Convention was expressive conduct protected by the first amendment).

37. Note, *Ambiguous Conduct*, *supra* note 12, at 476-77.

38. *Id.* at 477 n.62. *See also*, Note, *Constitutional Protection of Commercial Speech*, 82 COLUM. L. REV. 720, 730 (1982) ("The first amendment protects three distinct interests: those of the speaker, the listener, and the communications process itself"). There are, of course, other interests advanced by the first amendment freedom of speech. *See* M. NIMMER, *supra* note 12 § 1.01-1.04, at 1-2 - 1-54.

39. Note, *Ambiguous Conduct*, *supra* note 12, at 477.

intended, promotes the remaining interests of the first amendment.[40] Only when a message is actually communicated can knowledge be conveyed and can the act take any part in the balancing of stability and change.[41]

Certain conduct, however, is protected not because of its communicative nature, but because it gives rise to traditional first amendment activities.[42] This type of conduct, while noncommunicative in itself, is so fused with traditional first amendment activities that the Court has extended it first amendment protection. Expressive conduct and this type of noncommunicative conduct differ in that the latter creates opportunities for, and normally accompanies, traditional first amendment activities. In a line of cases beginning with *Village of Schaumburg v. Citizens for a Better Environment*,[43] the Supreme Court recognized charitable solicitation as one such type of protected conduct.[44]

In *Schaumburg*, the Court struck down a municipal ordinance that prohibited door-to-door solicitation unless the organization could show that at least 75 percent of the funds collected would be used for charitable purposes.[45] The Court reasoned that "solicitation is characteristically intertwined with informative and perhaps persuasive speech" and "that without solicitation the flow of such information and advocacy would likely cease."[46] In dictum, the Court extended this rationale from door-to-door fund-raising to charitable solicitation generally.[47]

In later cases,[48] the Supreme Court followed *Schaumburg*, but only relied on the nexus between charitable solicitation and traditional first

40. *Id.* at 478.

41. *Id.*

42. L. TRIBE, *supra* note 8, at 829 (listing distribution of leaflets and pamphlets, political canvassing, charitable solicitation, mailbox stuffing, picketing, civil rights demonstrations, communications with government and posting outdoor placards as examples of areas entitled to such protection).

43. 444 U.S. 620 (1980).

44. *See, e.g.*, *id.* at 632 (charitable solicitations "involve a variety of speech interests — communication of information, the dissemination and propagation of views and ideas, and the advocacy of causes — that are within the protection of the First Amendment").

45. *Id.* at 639.

46. *Id.* at 632.

47. *Id.* ("Prior authorities, therefore, clearly establish that charitable appeals for funds, *on the street or door to door*, involve a variety of speech interests . . . that are within the protection of the First Amendment.") (emphasis added).

48. Riley v. National Fed'n of the Blind, 487 U.S. 781 (1988); Secretary of State v. Joseph A. Munson Co., 467 U.S. 947 (1984).

amendment activities.[49] The *Schaumburg* line of cases, therefore, stands for the view that charitable solicitation often gives rise to protected speech[50] and, perhaps secondarily, that a charity's protected speech would be impossible without solicitation.[51] Significantly, *Schaumburg* and its progeny protect charitable solicitation not because it "convey[s] a particularized message"[52] that is likely to be understood,[53] but rather because such activity is "inextricably intertwined with speech."[54]

The *Young* court analyzed panhandling under the *Spence* test and refused to apply the *Schaumburg* approach.[55] Under the first *Spence* factor,[56] the *Young* court stated that most panhandlers have no intent to convey a particularized message.[57] Panhandlers have no social or political message to convey, but beg simply to collect money.[58] As to the second prong of the *Spence* test, the Court reasoned that even if a beggar

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49. In *Munson*, a professional fundraiser challenged a state statute virtually identical to the ordinance struck down in *Schaumburg*. *Munson*, 467 U.S. at 949-50. The Court protected the fundraising because these solicitations often give rise to protected activities such as the "dissemination of information, discussion, and advocacy of public issues." *Id.* (quoting Village of Schaumburg v. Citizens for a Better Environment, 444 U.S. 620, 635 (1980)). Similarly, in *Riley*, the Court struck down a state statute regulating the conduct of professional fundraisers engaging in charitable solicitation. *Riley*, 487 U.S. at 784. The *Riley* court again held that charitable solicitation is protected by the first amendment because charitable solicitation includes other elements of protected speech. *Id.* at 787-88.

50. *See Munson*, 467 U.S. at 959-60; *Schaumburg*, 444 U.S. at 632.

51. This justification may be less important since the Court did not repeat it in *Riley* or *Munson*.

52. Spence v. Washington, 418 U.S. 405, 410 (1974).

53. *Id.* None of the *Schaumburg* trilogy of cases applied the *Spence* test of expressive conduct. *See supra* notes 43-52 and accompanying text.

54. L. TRIBE, *supra* note 8, § 12-7, at 829.

55. Young v. New York City Transit Auth., 903 F.2d 146, 154-57 (2d Cir. 1990). The *Young* majority began its analysis by asserting "that begging is much more 'conduct' than it is 'speech.'" *Id.* at 153. This statement smacks of the "speech plus" approach employed by the Supreme Court prior to *Spence*. *See supra* notes 25-28 and accompanying text.

56. *See supra* notes 36-39 and accompanying text.

57. *Young*, 903 F.2d at 153. The *Young* court first stated that for conduct to satisfy this *Spence* requirement, it must be "inseparably intertwined with a 'particularized message.'" *Id.* This statement appears to create too high a standard. *Spence* simply required that *the actor* intend a "particularized message." *Spence*, 418 U.S. at 410-411. The *Young* court seemed to require that the conduct be commonly understood as communicating a particular message. *Young*, 903 F.2d at 154 (only message common to all acts of begging is the desire to extract money). Such a standard is too stringent for the first *Spence* factor, *see supra* notes 36-39 and accompanying text.

58. *Young*, 903 F.2d at 153-54. The *Young* court asserted that a message designed to collect money rather than to convey a social or political message was unprotected. *Id.* Such an assertion is inconsistent with the first amendment protection afforded commercial speech. *See, e.g.*, Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, 425 U.S. 748 (1976) (extending first amendment coverage to commercial speech). *See infra* notes 74-80 and accompanying text.

had the requisite intent, there is little likelihood that a "particularized message" would be understood.[59] The *Young* court therefore concluded that the first amendment protects neither verbal nor nonverbal begging.[60]

In reaching this conclusion, the *Young* court conceded that beggars effectively convey their requests for money. However, the Court asserted that such messages "fall[] far outside the scope of protected speech under the first amendment."[61] Thus, the court implicitly concluded that a beggar's plea does not propose a commercial transaction and is therefore not entitled to even the low level of first amendment protection reserved for commercial speech.[62]

The *Young* court then distinguished the *Schaumburg* trilogy of cases[63] on the ground that they involved a "nexus between solicitation and traditional first amendment activities" that panhandling lacks.[64] The *Young* court instead likened panhandling to a public nuisance[65] and implied that the first amendment does not protect speech amounting to a public nuisance.[66]

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59. *Young*, 903 F.2d at 154. The *Young* court pointed out that most subway passengers are unlikely to understand a particularized message because of the transgressive nature of begging. *Id.*

60. *Id.* The *Young* court stated that any speech concerning the plight of the homeless prompted by begging was not at issue. The occurrence of such speech supports the proposition that the conduct is inextricably intertwined with traditional first amendment activities. *See, e.g.*, Village of Schaumburg v. Citizens for a Better Environment, 444 U.S. 620 (1980). The primary reason for protecting such activity, after all, is precisely because it gives rise to protected speech.

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

62. *See, e.g.*, Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, 425 U.S. 748 (1976) (extending first amendment coverage to commercial speech); Posados De Puerto Rico Assocs. v. Tourism Co., 478 U.S. 328 (1986) (advertisements for casino gambling are a protected form of commercial speech).

63. *See supra* note 3.

64. *Young*, 903 F.2d at 155. The dissent in *Young* concluded that begging and charitable solicitation are legally indistinguishable. *Id.* at 164. The dissent pointed out that charitable solicitation is protected whether or not traditional first amendment activities actually occur. *Id.* at 165. Charitable solicitation is protected because it affords the charity an opportunity to discuss its views with potential donors and because it provides the funds necessary for the charity to continue its advocations. *Id.* Begging in the New York subway, according to the dissent, is exactly like charitable solicitation in these respects. *Id.* The dissent emphasized the plaintiffs' testimony that they frequently had conversations with subway riders while begging and that they needed the funds obtained in this manner to continue these conversations. *Id.* at 165-66. Although the dissent's argument is plausible, it misses the point. *See infra* notes 67-69 and accompanying text.

65. *Id.* at 156. The court articulated the difference between begging and charitable solicitation by organized charities as one of function: the latter "serve the community interests by enhancing communication and disseminating ideas, the conduct of begging and panhandling in the subway amounts to nothing less than a menace to the common good." *Id.*

66. *Young*, 903 F.2d at 154. The fact that begging is an inconvenience would bear on the reasonableness of the regulation, but it would not make begging unprotected. The assertion in

Although the *Young* court failed to explain the distinction between a public nuisance and legitimate first amendment activity, there is a fundamental difference between organized charitable solicitation and begging by the homeless.[67] *Schaumburg* held that charitable solicitation is protected because it often gives rise to traditional first amendment activities and because the funds solicited ultimately are used for that purpose.[68] Begging, however, is characterized by neither of these traits.

Organized charities exist to advocate some course of action, a goal that the first amendment seeks to protect.[69] The funds solicited by charities ultimately further this goal. Although beggars probably are more in need of donations than organized charities, beggars normally do not use solicited funds to advocate improvements for the homeless. Thus, begging is not inextricably bound-up with first amendment concerns.

The *Young* court's analysis most likely will deny first amendment pro-

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Young to the opposite effect is essentially unsupported. The *Young* court cited Members of the City Council of Los Angeles v. Taxpayers for Vincent, 466 U.S. 789, 805 (1984), and Kovacs v. Cooper, 336 U.S. 77, 83 (1949). *Young*, 903 F.2d at 156. These cases held that states could regulate speech that was a public nuisance even though such speech was protected by the first amendment. *Vincent*, 466 U.S. at 805; *Kovacs*, 336 U.S. at 83.

Similarly, the *Young* court's citation of the *Schaumburg* dissent as support for the proposition that a public nuisance is unprotected is misplaced. *Id.* at 156 (citing Village of Schaumburg v. Citizens for a Better Environment, 444 U.S. 620, 644 (1980) (Rehnquist, J., dissenting)). Justice Rehnquist was merely advocating that the regulation of door-to-door solicitation, an admittedly protected activity, did not exceed constitutionally permissible bounds. *Schaumburg*, 444 U.S. at 644.

In *Young*, there was evidence before the court that begging frequently occasioned conversations with passengers regarding conditions of the homeless. *Young*, 903 F.2d at 154, 165. The fact that these conversations occurred in an unpleasant manner should not affect the threshhold question of whether begging is protected speech. Indeed, the *Schaumburg* court did not consider the villagers' desire to be left alone in determining whether charitable solicitation should be protected. *Schaumburg*, 444 U.S. 620 (1980). If a sufficient nexus exists between begging and traditional first amendment activities, the court then can weigh competing interests to determine if the regulation is constitutional. *See, e.g.*, *id.* at 639 (holding regulation invalid because it was too tenuously related to the valid governmental interests).

Another question implicitly raised by the *Young* case is how a court is to determine whether a sufficient nexus exists. The Supreme Court seems to base these decisions on common knowledge rather than on specific evidence before the court. *Young*, 903 F.2d at 156. The *Young* court similarly disregarded specific evidence that conversations were frequent and concluded that begging does not enhance communication or dissemination of ideas. *Id.* at 154-56. *See* Rosenfeld, *Does Odysseus Ride the 'A' Train?*, N.Y. L. J., June 4, 1990, at 2 (suggesting that none of the learned judges who decided this case probably ever changed trains at Columbus Circle).

67. *See Young*, 903 F.2d at 155-56.

68. Village of Schaumburg v. Citizens for a Better Environment, 444 U.S. 620, 630 (1980).

69. *See supra* note 38 and accompanying text. Charities directly participate in the advance of knowledge and discovery of truth, assist more members of society to participate in decisionmaking and help maintain the proper balance between stability and change.

tection to begging everywhere.[70] Although *Young* placed great emphasis on the disruptive effect of panhandling in the subway system,[71] this effect had little bearing on the threshhold question of whether, under the *Spence* test, panhandling is expressive conduct entitled to first amendment protection.[72] The conclusion that most beggars intend no particularized message depends very little on where the begging actually takes place. Similarly, in few instances will an observer likely understand a particularized message even if one is intended. Thus, *Young* seems to foreclose claims that panhandling is expressive conduct, no matter where it takes place.[73]

The *Young* court also implicitly denied that a beggar's request for money is a form of commercial speech protected by the first amendment.[74] Future litigants, however, appear to have a plausible argument that panhandlers are engaging in protected commercial speech.

In *Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council*,[75] the Supreme Court protected commercial speech because it facilitates the free flow of information and resources throughout the economy.[76] The Court reasoned that our free market economy requires an educated consumer properly to allocate resources.[77] In addition, the free flow of commercial information enlightens opinions as to how the free enterprise system should be regulated or altered.[78]

The same first amendment interests that are served by protecting commercial speech[79] would be served by protecting a beggar's request for money. A prohibition on begging may prevent many people from learning about the prevalence and plight of the homeless. This in turn may lower the level of resources that otherwise would flow to the homeless

70. *See Panhandlers Hope Supreme Court Will be Generous*, L.A. Times, May 12, 1990, at A18, col. 1 (home ed.) (noting that a similar case has been filed in California); *Subway Begging: New York Advocates Seek Rehearing*, The Christian Science Monitor, May 30, 1990, at 8 (*Young* case will encourage communities across the nation to remove beggars from sight).

71. *Young*, 903 F.2d at 149-50, 154.

72. *Id.* at 152-157. *See supra* notes 35-41 and accompanying text.

73. Of course, certain circumstances could make begging expressive conduct. For example, a congregation of beggars in front of the White House could be expressive conduct under the *Spence* test (*see supra* notes 35-41 and accompanying text). Most forms of everyday begging, however, most likely will suffer the same fate as that in the New York subway.

74. *See supra* notes 61-62 and accompanying text.

75. 425 U.S. 748 (1976).

76. *Id.* at 764-65.

77. *Id.* at 765.

78. *Id.*

79. *See supra* notes 75-78 and accompanying text.

and may reduce support for aid to the homeless.[80] The *Young* decision failed to address this issue, and should pose no obstacle to future litigants in other jurisdictions.

The *Young* decision dealt a crippling blow to panhandlers everywhere. Because *Young* asserted that the first amendment does not protect begging, states are free to regulate or prohibit begging as they see fit. The only recourse left to beggars, at least in the Second Circuit, is to appeal to elected representatives.

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