EXCUSE ME JUDGE, CAN YOU SPARE A LITTLE SPEECH? FREEING THE BEGGAR'S RIGHT TO SOLICIT DONATIONS FROM CONTENT-BASED RESTRICTIONS IN THE TRADITIONAL PUBLIC FORUM

Aaron O'Brien*

I. INTRODUCTION

"When there is no truth, there is no kindness."
—Nachman of Bratslav

Karen Otterson, a 48-year old unemployed disabled resident of Springfield, Illinois receives only $736.00 in Social Security disability payments. [1] To make ends meet, she needs to panhandle five days a week in downtown Springfield, the busiest part of the City.[2] A typical day earns Ms. Otterson between $5.00 and $75.00 in donations.[3] The City of Springfield, however, prevents her from verbalizing her request to those passing by.[4] Accordingly, Ms. Otterson passively solicits donations using a sign that reads: "Please help panhandlers. God bless you. God bless your heart."[5] Ms. Otterson has received citations for violating this ordinance in the past.[6] Fearing further violations, she challenged the City's code, claiming the prohibition was an unconstitutional infringement on her

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* Aaron O'Brien is a third-year law student at Southern Illinois University School of Law, expecting his Juris Doctor in May 2016. First and foremost, he thanks his mother Rhonda O'Brien, father James O'Brien, and high school English tutor Kathy Clayman, for their commitment to building confidence in a once struggling young writer. He also thanks Professor Steven Macias, his faculty advisor, for his patience and guidance in developing this article. Next, Mr. O'Brien also thanks Tania Linares, his CC editor, for her meaningful feedback on various drafts. Finally, he thanks his friend and classmate, Steven Rodgers, who, although he was writing his own article at the time, always had time to listen to his friend's latest incarnation.

1. Otterson v. City of Springfield, No. 13-3316, 2013 U.S. Dist. LEXIS 153330, at *3 (C.D. Ill. Oct. 25, 2013).
2. *Id*.
3. *Id*. at * 4.
4. *Id*. (The city code prohibits any person from requesting in-person "an immediate donation of money or other gratuity.")
5. *Id*.
6. Otterson v. City of Springfield, 768 F.3d 713, 714 (7th Cir. 2014).

freedom of speech.[7] The Seventh Circuit in *Otterson v. City of Springfield* disagreed.[8]

Ms. Otterson is not alone in voicing her opposition to such laws. The federal courts have heard similar claims from others who seek to solicit monetary donations to make ends meet. These challenges have revealed a split among circuit courts over whether prohibiting such requests represent a content-based or content-neutral restriction on free speech in the public forum. The difference determines the standard of review the court will apply and the burden the government must overcome in order to show the law has not infringed on a beggar's right to speech.[9]

This comment takes the position that begging is pure speech conveying a message of neediness, and laws or ordinances prohibiting solicitation for immediate donations for items of value represent content-based restrictions that should be subject to strict scrutiny analysis. Section II reviews the historical and legal background surrounding aggressive panhandling ordinances. Section III argues that laws prohibiting requests for immediate donations of items of value are content-based restrictions on speech.

II. BACKGROUND

Aggressive panhandling is generally defined as "a request or demand for money which is accompanied by threatening, intimidating, or menacing behavior."[10] Governments typically justify these measures as "necessary to protect public health and safety, prevent crime, preserve economic vitality, and maintain the aesthetic quality of certain city areas."[11] This section reviews how aggressive panhandling laws relate to the history of anti-vagrancy laws targeting poor people. Part A discusses the historical motivations that influence the crafting of aggressive panhandling laws. Part B reviews the First Amendment principles that arise when reviewing aggressive panhandling measures. Part C reviews the conclusions courts have made thus far when applying those First Amendment principles to aggressive panhandling laws.

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7. *Id*.
8. *Id*.
9. *See infra* Part II.B.2.
10. Darryl C. Delmonico, *Aggressive Panhandling Legislation and the Constitution: Evisceration of Fundamental Rights—or Valid Restrictions Upon Offensive Conduct?*, 23 HASTINGS CONST. L.Q. 557, 562 (1996).
11. Maria Foscarinis, *Out of Sight-Out of Mind?: The Continuing Trend Toward the Criminalization of Homelessness*, 6 GEO. J. ON POVERTY L. & POL'Y 145, 151 (1999).

A. Anti-Panhandling Laws and Their Historical Perspective

Anti-panhandling measures are as old as cities themselves.[12] They have their roots in the anti-vagrancy laws of Elizabethan England, which sought to punish individuals for their economic idleness.[13] The decline of feudalism created labor shortages that threatened the growth of new industries.[14] Panhandling, among other activities, was evidence of one's economic idleness and detrimental to society's need to supply laborers to its under-staffed industries.[15] Society criminalized this behavior to show its disapproval and encourage participation in the labor force.[16] The American colonies, faced with the same pressing demand for labor to support the abundance of economic activity, imported these notions of the Elizabethan poor.[17] During the time of the American Revolution, many jurisdictions regulated the behavior associated with vagrancy, including begging.[18] These anti-vagrancy laws remained in effect in many American cities well in to the twentieth century.[19]

In *Papachristou v. City of Jacksonville* (1972) the Supreme Court struck down a Jacksonville, Florida anti-vagrancy ordinance, declaring it

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12. Robert C. Ellickson, *Controlling Chronic Misconduct in City Spaces: Of Panhandlers, Skid Rows, and Public-Space Zoning*, 105 YALE L.J. 1165, 1202 (1996) ("Plato urged the banishment of beggars; John Locke favored whipping panhandlers under age fourteen and sentencing older ones to hard labor; Karl Marx was famously scornful of the lumpenproletariat.").
13. Papachristou v. City of Jacksonville, 405 U.S. 156, 161–62 (1972) (reviewing the history of English vagrancy laws); *see also* Robert Teir, *Maintaining Safety and Civility in Public Spaces: A Constitutional Approach to Aggressive Begging*, 54 LA. L. REV. 285, 286 (1993); *see also* Jordan Berns, *Is There Something Suspicious About the Constitutionality of Loitering Laws?*, 50 OHIO ST. L.J. 717, 718 (1989) ("When these laws finally made their way to early America, they did so under the theory that society must have a means of removing the idle and undesirable from its midst before their potential for criminal activity is realized.") (quotations omitted).
14. *See* Ellickson, *supra* note 12, at 1210 ("English vagrancy statutes, initially enacted in the fourteenth century to control wages and prevent idleness, had evolved by the time of the American Revolution into a hodge-podge of controls on minor public offenses, including begging and sleeping in the open."); *see also id.* at 1182 (stating that begging "is likely to signal erosion of the work ethic").
15. *See* Teir, *supra* note 13, at 297 ("In England, the focus of vagrancy law changed from motivating unproductive members of society to work, to preventing crime.").
16. *See id.*
17. *See* Teir, *supra* note 13, at 300 ("Massachusetts's vagrancy statute of 1788 was closely patterned on the English law in effect at the time, and used the same classification of idle and disorderly persons, rogues and vagabonds, and incorrigible rogues. Other states appear to have based their definition of vagrants on the Elizabethan law of 1597, with its condemnation of jugglers, minstrels, idlers, etc."); *see also* Berns, *supra* note 12, at 717 ("The English vagrancy laws that were the precursor of American vagrancy laws were first instituted for economic reasons.").
18. *See* Teir, *supra* note 13, at 301 ("A common feature of these state statutes was a prohibition of beggars or begging.").
19. *See id.* at 300 ("By 1956, vagrancy statutes were in force in every state except West Virginia, where it was a common-law crime.").

unconstitutionally vague.[20] The city ordinance, the Court held, criminalized innocent conduct unaccompanied by evidence of criminal intent.[21] The imprecision of the law permitted police "unfettered discretion" in its enforcement.[22] Without specific guidelines for what conduct was unlawful, "[a] vagrancy prosecution [could have been a] cloak for a conviction which could not be obtained on the real but undisclosed grounds for the arrest."[23] This inevitably would have the effect of hushing the voice of society's non-conformists.[24]

Despite the Court's decision in *Papachristou*, state and local laws still reflected antipathy for the poor.[25] The 1980s saw an increase in homelessness in the United States, and with it, an increase in the number of poor individuals on city streets.[26] The increase in homelessness placed higher demands on the use of public spaces.[27] The increased use of these spaces by the poor created resentment on the part of the more affluent members of society.[28] Panhandling in particular was seen as dangerous, fraudulent, and an invasion of privacy.[29] Its very presence was evidence of the city's inability to maintain public order. [30]

To make public places more hospitable, cities were pressured to pass measures that responded forcefully to the perceived threat.[31] Since *Papachristou* and its progeny made criminalizing a person's economic

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20. 405 U.S. 156, 162 (1972).
21. *Id*. at 163.
22. *Id*. at 168.
23. *Id*. at 169.
24. *Id*. at 170.
25. Casey Garth Jarvis, *Homelessness: Critical Solutions to A Dire Problem; Escaping Punitive Approaches by Using A Human Rights Foundation in the Construction and Enactment of Comprehensive Legislation*, 35 W. ST. U. L. REV. 407, 419 (2008) ("With the drastic increase of homeless populations, cities became frustrated rather than sympathetic, causing a resurgence in old attitudes towards the displaced poor.").
26. Donald E. Baker, Comment, *"Anti-Homeless" Legislation: Unconstitutional Efforts to Punish the Homeless*, 45 U. MIAMI L. REV. 417, 421-22 (1991) ("Homelessness emerged in the early 1980's as one of this country's largest and most visible social problems. An alarming number of Americans are homeless, with estimates ranging from 250,000 to 3,000,000 persons.").
27. *See generally* Ellickson, *supra* note 12, at 1168 ("These open-access public spaces are precious because they enable city residents to move about and engage in recreation and face-to-face communication. But, because an open-access space is one everyone can enter, public spaces are classic sites for 'tragedy,' to invoke Garrett Hardin's famous metaphor for a commons.").
28. *See id.* at 1181 ("When being panhandled, a pedestrian of ordinary sensibility may feel some combination of: aggravation that his privacy has been disturbed, resentment that the panhandler's plea has a high probability of being fraudulent, and fear.").
29. *See id.* at 1182.
30. James Q. Wilson & George L. Kelling, *Broken Windows: The Police and Neighborhood Safety*, ATLANTIC MONTHLY, Mar. 1982, at 29, 31–32.
31. *See* Ellickson, *supra* note 25, at 419 (2008) ("With the drastic increase of homeless populations, cities became frustrated rather than sympathetic, causing a resurgence in old attitudes towards the displaced poor.").

status unconstitutional, cities adapted by passing ordinances that restricted or prohibited the very activities the poor were most likely to engage in.[32] Police enforced these laws with broad powers to conduct "vast arrest sweeps . . . [and] force the homeless to relocate . . . to neighboring towns."[33]

B. Principles of the First Amendment

Not surprisingly, aggressive panhandling laws have spurred much litigation, including speech rights in public places.[34] Resolving this conflict has aggravated the already difficult doctrine of content neutrality.[35] This section reviews the role content neutrality plays in First Amendment jurisprudence. Part 1 reviews the principles the First Amendment strives to achieve. Part 2 reviews the impact of forum analysis on analyzing speech issues. Part 3 reviews the current state of the doctrine of content neutrality.

1. Principles of the First Amendment

The First Amendment commands that Congress shall make no law abridging the freedom of speech.[36] Speech has been interpreted broadly to

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32. Casey Garth Jarvis, *Homelessness: Critical Solutions to A Dire Problem; Escaping Punitive Approaches by Using A Human Rights Foundation in the Construction and Enactment of Comprehensive Legislation*, 35 W. ST. U. L. REV. 407, 419 (2008) ("Because vagrancy and loitering laws no longer had constitutional authority, cities developed new creative approaches against their homeless populations. Cities were able to satisfy public hostilities toward homeless by enacting anti-camping ordinances."); *see also* Baker, *supra* note 26 at 431 ("The second category of anti-homeless legislation utilizes more specific, narrow language, such as a prohibition against 'sleeping on public streets and sidewalks' and 'remaining in parks after closing hours.' Courts have generally found this category of laws not unconstitutionally vague because they provide individuals with adequate notice regarding prohibited behavior and contain proper police guidelines to regulate enforcement. Although this type of legislation is not be [sic] unconstitutionally vague because it provides the requisite notice, it is unconstitutionally overbroad if it prohibits innocent, unoffending conduct that is beyond the state's police power to regulate.").

33. Jarvis, *supra* note 32, at 419.

34. Teir, *supra* note 13, at 321 ("The constitutionality of laws regarding begging has been challenged under the First Amendment, the Due Process Clause, and the Equal Protection Clause of the federal constitution.").

35. *See generally*, Wilson R. Huhn, *Assessing the Constitutionality of Laws That Are Both Content-Based and Content-Neutral: The Emerging Constitutional Calculus*, 79 IND. L.J. 801, 860 (2004) (arguing that the current categorical approach of content-based and content-neutral laws is not useful and that the Court is moving toward a "constitutional calculus" approach to analyze free speech claims.); *see* Steven J. Heyman, *Spheres of Autonomy: Reforming the Content Neutrality Doctrine in First Amendment Jurisprudence*, 10 WM. & MARY BILL RTS. J. 647, 656 (2002) (arguing that the doctrine of content neutrality remains useful as a way to safeguard individual expression and that a "more substantive approach" should be applied).

36. U.S. CONST. amend. I; *see* Near v. Minn., 283 U.S. 697, 701 (1931) (affirming the incorporation of the First Amendment against the States.); *see also* Heyman, *supra* note 35, at 656. First

include expression in general.[37] The right to free expression encompasses not just the speaker's right to speak but also the listener's right to receive the speech of others.[38] By protecting free expression, the First Amendment serves three underlying principles: enlightenment of society, the effective participation in the democratic system, and self-actualization.[39] These values are essential to a well-functioning and cohesive society.[40] When the government passes laws abridging the freedom of speech it impermissibly interferes with promoting these values.[41]

The First Amendment, however, does not foreclose the government's ability to regulate speech.[42] Free expression at times can conflict with other protected rights of society.[43] First, there are certain categories of speech whose content creates such imminent threats of danger and destruction of property that the government may proscribe the words used to communicate the message.[44] Outside of these few exceptions, government censorship of expression is impermissible.[45] Second, if the speech is protected expression, the government is permitted to regulate the time, place, and manner, but not the content of, that expression.[46]

Amendment jurisprudence is influenced by the classical liberal thought of the 17th Century. *Id.* Under classical liberalism, societies were formed to more efficiently manage conflicts over property. *Id.* Therefore, governments properly passed laws when those laws governed peoples' actions and relations. *Id.* Thoughts and beliefs, and speech as a manifestation of an individual's inner beliefs, were not actions and therefore not within the scope of governmental authority. *Id.*

37. *See* Olmstead v. United States, 277 U.S. 438, 478 (1928).

38. *See* Bd. of Educ. v. Pico, 457 U.S. 853, 866–67 (1982); Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc., 425 U.S. 748, 756–57 (1976); Kleindienst v. Mandel, 408 U.S. 753, 762–63 (1972); *see also* Conant v. Walters, 309 F.3d 629, 643 (9th Cir. 2002) ("It is well established that the right to hear—the right to receive information—is no less protected by the First Amendment than the right to speak.").

39. Elena W. Slipp, *Loper v. New York City Police Department Begs the Question: Is Panhandling Protected by the First Amendment?*, 60 BROOK. L. REV. 587, 593 (1994).

40. *See* Police Dep't of Chi. v. Mosley, 408 U.S. 92, 95 (1972); *see also* Huhn, *supra* note 35, at 656 (explaining that the classical liberal thought that influenced free speech jurisprudence viewed individual belief was an important component of personal autonomy).

41. *Mosley*, 408 U.S. at 95.

42. Brandenburg v. Ohio, 395 U.S. 444, 447 (1969) ("[T]he constitutional guarantees of free speech and free press do not permit a State to forbid or proscribe advocacy of the use of force or of law violation except where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action.").

43. Slipp, *supra* note 39, at 592.

44. Schenck v. United States, 249 U.S. 47, 52 (1919).

45. Chaplinsky v. N.H., 315 U.S. 568, 571–72 (1942) ("There are certain well-defined and narrowly limited classes of speech, the prevention and punishment of which have never been thought to raise any Constitutional problem. These include the lewd and obscene, the profane, the libelous, and the insulting or 'fighting' words—those which by their very utterance inflict injury or tend to incite an immediate breach of the peace.").

46. *See infra* II.B.2.

2. Forum Analysis

The fact the speech is protected under the First Amendment does not foreclose the government's ability to impose proper regulations that control the time, place, and manner of expression.[47] A proper regulation on the time, place, and manner of speech is determined through a "forum based approach."[48] This analysis takes into account the role the government serves in overseeing the forum and the forum's relationship to the impugned expression.[49] The extent to which speech may be limited depends on the balancing of these factors.[50]

There are three broad categories of forums: the traditional public forum, the designated public forum, and the nonpublic forum.[51] The traditional public forums are places which "by long tradition or by government fiat have been devoted to assembly and debate."[52] The government can also designate an open forum by opening its property to the public "as a place for expressive activity . . . even if it was not required to create the forum in the first place."[53] Government property, not a traditional public forum or designated as a public forum is, by default, a nonpublic forum for which facilitating expressive activity was not its primary purpose.[54]

The government's ability to regulate "expressive activity in a public forum" is limited.[55] Traditional public forums are "held in trust [by] the

47. Heffron v. Int'l Soc. for Krishna Consciousness, 452 U.S. 640, 647 (1981) ("It is . . . common ground . . . that the First Amendment does not guarantee the right to communicate one's views at all times and places or in any manner that may be desired."); *see also* Grayned v. City of Rockford, 408 U.S. 104 (1972) ("[Speech] activities . . . protected by the First Amendment, are subject to reasonable time, place, and manner restrictions.")

48. Int'l Soc'y for Krishna Consciousness v. Lee, 505 U.S. 672, 678 (1992) ("These cases reflect, either implicitly or explicitly, a 'forum based' approach for assessing restrictions that the government seeks to place on the use of its property."); *see also* Cornelius v. NAACP Legal Def. & Educ. Fund, 473 U.S. 788, 800 (1985) ("[T]he Court has adopted a forum analysis as a means of determining when the Government's interest in limiting the use of its property to its intended purpose outweighs the interest of those wishing to use the property for other purposes.").

49. *See* Greer v. Spock, 424 U.S. 828, 47 L. Ed. 2d 505, 96 S. Ct. 1211 (1976) (holding that speech in a traditional public forum cannot be regulated in the same way permissible on a military reservation, a limited forum).

50. *Id.*

51. Perry Educ. Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37, 45–6 (1983).

52. *Id.* at 45.

53. *Id.*

54. *See id.* at 46. Public property that is not by tradition or designation a forum for public communication is governed by different standards.

55. *Perry*, 460 U.S. at 45; *see also* Loper v. New York City Police Dep't, 999 F.2d 699, 703 (2d Cir. 1993) ("[I]t is the nature of the forum that we must examine in order to determine the extent to which expressive activity may be regulated."); *id.* ("The category of public property opened for expressive activity by part or all of the public is known as the designated public forum, which may be of a limited or unlimited character.").

public . . . for purposes of assembly, communicating thoughts between citizens, and discussing public questions."[56] City streets have particular characteristics that make them a suitable forum for communicative activity.[57] City streets are freely accessible and "often uncongested."[58] They are places where local citizens conduct their daily activities and feel a sense of comfort.[59] When in a public forum, it is common understanding that a listener may be confronted with speech that is uncomfortable or not welcomed.[60] Therefore, when in a traditional public forum, it is incumbent on the listener to avoid speech that is displeasing or offensive.[61] Allowing laws to be based on listener reactions encourages censorship because it chills opportunities for speech and infringes on the rights of those who wish to hear it.[62]

Forum analysis follows a three-part inquiry.[63] The analysis begins with whether the speech regulated is protected by the First Amendment.[64] If the speech is protected, the court next looks at the forum the speech is being regulated in.[65] After the forum is determined, the court then assesses the government's justifications for restricting speech in the relevant forum and whether those justifications satisfy the requisite standard of review.[66] Wrapped up in the standard of the review is a testing for whether the law has a censorial purpose.[67] Content neutrality is assessed, regardless of what forum the speech is being regulated in.[68] However, when speech is being regulated in a traditional or designated public forum, the outcome of the content neutrality analysis results in applying either the strict or intermediate scrutiny standard.[69]

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56. Hague v. CIO, 307 U.S. 496, 515 (1939).
57. *See Heffron*, 452 U.S. at 651 (disagreeing that fairgrounds were analogous to city streets because of their different characteristics).
58. *Id*.
59. *Id.*
60. Cohen v. Cal., 403 U.S. 15, 21 (1971).
61. *See id*. (stating the Court has "consistently stressed that 'we are often "captives" outside the sanctuary of the home and subject to objectionable speech'").
62. *Id*.
63. Cornelius v. NAACP Legal Def. & Educ. Fund, 473 U.S. 788, 797 (1985).
64. *Id*.
65. *Id*.
66. *Id*.
67. McCullen v. Coakley, 134 S.Ct. 2518, 2530 (2014) ("The content-neutrality prong of the Ward test is logically antecedent to the narrow-tailoring prong, because it determines the appropriate level of scrutiny.").
68. *See id.*
69. *See id.*

3. The Doctrine of Content Neutrality

The court uses the doctrine of content neutrality to determine whether a law is restricting expression with a censorial purpose.[70] A law is content-based when it "distinguish[es] favored speech from disfavored speech on the basis of the ideas or views expressed."[71] On the other hand, a law is content-neutral when its purpose is "justified without reference to the content of the regulated speech."[72] Both the reasons for enacting a law, as well as the language of the law are relevant to whether a content distinction is being made.[73]

When words of communication are targeted, the government is seeking to punish the communication of the ideas expressed.[74] However, when a law targets the conduct associated with the speech, a censorial motivation is unlikely.[75] For example, in *Renton v. Playtime Theaters* (1986) the Court held that a zoning ordinance was content neutral, even though it specifically pertained only to adult entertainment establishments.[76] The ordinance was concerned with limiting the impact that the disreputable behavior of patrons who visited adult entertainment establishments would have on property values in the area where these establishments existed.[77] The law's purpose was not related to the actual content expressed by these establishments but rather the behaviors of those who often attended adult entertainment establishments.[78]

In *Boos v. Barry* (1988) the Court held that a listener's reaction to speech is not a secondary effect which the government can justify a content neutral purpose.[79] In *Boos* the government argued a D.C. ordinance

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70. *See id*. (stating "[t]he government's purpose is" controlling when considering whether the government passed law because it disagreed with the affected speech's message); *see* Police Dep't of Chi. v. Mosley, 408 U.S. 92, 96 (1972) ("The essence of this forbidden censorship is content control."); *see also* Huhn, *supra* note 34, at 817.
71. Turner Broad. Sys. v. FCC, 512 U.S. 622, 643 (1994).
72. Ward v. Rock Against Racism, 491 U.S. 781, 791 (1989).
73. *See* McCullen v. Coakley, 134 S.Ct. 2518, 2531 (2014) (quoting Renton v. Playtime Theatres, Inc., 475 U.S. 41, 48 (1986)) (quotations omitted) (addressing whether the stated purpose of the law was "justified without reference to the content of the regulated speech"); *See also id.* (examining whether the law made content distinctions on its face).
74. Cohen v. Cal., 403 U.S. 15, 18 (1971) ("The conviction quite clearly rests upon the asserted offensiveness of the words Cohen used to convey his message to the public. The only "conduct" which the State sought to punish is the fact of communication.").
75. *See McCullen*, 134 S.Ct. at 2531 (holding at law that restricted protesting around entrances of abortion clinics was content neutral justification); *Ward*, 491 U.S. at 792 (requiring performers to use city sound technicians to ensure sound levels remained appropriate did affect the message or artistic vision of the Bandshell performances).
76. *Renton*, 475 U.S. at 47.
77. *Id.*
78. *Id.*
79. 485 U.S. 312, 321 (1988).

prohibiting picketing opposing the policies of foreign governments while outside their embassies was necessary to fulfill "international law obligation[s] [by] shield[ing] diplomats from speech that offends their dignity."[80] The Court reasoned that the government was making content distinctions between viewpoints by claiming the law's purpose was to protect the dignity of foreign diplomats.[81] Whether a foreign diplomat's dignity was offended depended upon whether the protestors' "picket signs [were] critical of the foreign government or not."[82] The effect of such an ordinance censored an entire topic from public discussion.[83]

A law is also content-based when, even though government claims a legitimate content neutral purpose, the law makes facial a distinction that discriminates on the basis of the speech's message or viewpoint.[84] In *Federal Communications Commission v. League of Women Voters*, the Court acknowledged that the purpose of the Public Broadcasting Act of 1967 was to protect noncommercial educational broadcasting stations from outside coercion by either the federal government or private speakers.[85] To this end, Congress forbade "any noncommercial educational broadcasting station which receive[d] . . . [federal funding] to engage in [any] editorializing."[86] The Court concluded that the law made a content distinction by prohibiting the broadcast of editorial comments but not program announcements and solicitations for contributions.[87] This content distinction represented a censorial intent on behalf of the government because enforcement of the section required authorities to "examine the content of the message . . . to determine whether" it contained an editorial commentary.[88]

In *Clark v. Community for Creative Non-Violence*, the Court reviewed whether a National Parks Service's regulation prohibiting sleeping in D.C. area parks violated the First Amendment when sleeping was used as an expressive component of a demonstration raising awareness to the plight of the homeless.[89] The court conceded that "reasonable time, place, or manner regulations normally have the purpose and direct effect of limiting

80. *Id*. at 320.
81. *Id*. at 318–19.
82. *Id*. at 318–19.
83. *Id*. at 319.
84. Turner Broad. Sys. v. FCC, 512 U.S. 622, 642–43 (1994) ("[T]he mere assertion of a content-neutral purpose [will not] be enough to save a law which, on its face, discriminates based on content.").
85. 468 U.S. 364, 384–85 (1984).
86. *Id*. at 366.
87. *Id*. at 364.
88. *Id*.
89. 468 U.S. 288, 289 (1984).

expression."[90] However, when the challenged regulation was enforced it applied only to the "use of park lands for living accommodations, such as sleeping."[91] This prohibition furthered the non-censorial purpose to protect the public parks from the damage and inaccessibility caused by permitting such behavior.[92] While sleeping was an expressive component to the Respondent's message, it was simply a means to express the message.[93] Protesters still had other means of expressing their message that did not require sleeping in public parks.[94] Since the prohibition against sleeping was not aimed at the message the Respondents wanted to convey, it was not making a content distinction.[95] Therefore, the law was content neutral.[96]

C. First Amendment Analysis of Aggressive Panhandling Laws

The Supreme Court has not yet considered whether panhandling for one's personal use qualifies as charitable solicitation for First Amendment purposes, let alone to what extent regulation of panhandling is proper in a traditional public forum.[97] Nonetheless, there is growing agreement that panhandling for personal use is protected speech.[98] Disagreement remains over whether the actual request for immediate donations for items of value represents the conduct associated with the speech or the content of the speech itself.[99]

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90. *Id.* at 294.
91. *Id.*
92. *Id.* at 297–98.
93. *Id.* at 295 ("Neither was the regulation faulted, nor could it be, on the ground that without overnight sleeping the plight of the homeless could not be communicated in other ways.").
94. *Id.* at 297–98.
95. *Id.* at 297–98.
96. *Id.* at 295.
97. Speet v. Schuette, 726 F.3d 867, 874 (6th Cir. 2013) ("While the United States Supreme Court has not, as Michigan correctly points out in its briefs, directly decided the question of whether the First Amendment protects soliciting alms when done by an individual, the Court has held—repeatedly—that the First Amendment protects charitable solicitation performed by organizations.").
98. Thayer v. City of Worcester, 755 F.3d 60, 68 (1st Cir. 2014) (stating that "[p]anhandling and solicitation of immediate donations convey messages of need"); *Speet*, 726 F.3d at 878 (holding "begging, or the soliciting of alms, is a form of solicitation that the First Amendment protects"); Clatterbuck v. City of Charlottesville, 708 F.3d 549, 553 (4th Cir. 2013) (holding that "the speech and expressive conduct that comprise begging merit First Amendment protection"); A.C.L.U. of Nevada v. City of Las Vegas, 466 F.3d 784, 797 (9th Cir. 2006) (holding an ordinance was unconstitutional because it overburdened the protected speech of charitable solicitation); ISKCON of Potomac, Inc. v. Kennedy, 61 F.3d 949, 953 (D.C. Cir. 1995) (holding "the solicitation of charitable contributions is protected speech").
99. *See* Otterson v. City of Springfield, Ill., 768 F.3d 713, 717 (7th Cir. 2014) ("[W]hat activates the prohibition is where a person says something (in the 'downtown historic district') rather than what position a person takes on a political or literary question."); *Thayer*, 755 F.3d at 67 ("[T]he text of the ordinances does not identify or affect speech except by reference to the behavior."); *ISKCON*,

1. Charitable Solicitation is Protected Speech

In *Schaumburg v. Citizens for a Better Environment* (1980), the Supreme Court held the First Amendment protects charitable solicitations.[100] Charitable solicitation is distinguishable from commercial speech because it "does more than inform private economic decisions and is not primarily concerned with providing information about the characteristics and costs of goods and services."[101] Requesting charitable support communicates important information such as "the dissemination and propagation of views and ideas, and the advocacy of causes."[102] These ideas have historically received First Amendment protection.[103] By soliciting for charity, an individual actively propagates the charity's message.[104] Further, soliciting donations during face-to-face encounters increases the opportunity for ideas to be exchanged.[105] Regulating this activity would no doubt limit the spread of historically protected content.[106]

Several Circuit courts have extended the principles of *Schaumburg* to panhandling.[107] Begging can communicate social and political messages.[108] The request for money conveys a "need for food, shelter, clothing, medical care or transportation."[109] The "unkempt and disheveled" person who requests money on the street is also a symbol of a need for support and assistance.[110] The fact that an individual is requesting this assistance to

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61 F.3d at 955 ("[T]he solicitation regulation does not . . . totally prohibit a type of expression or a specific message; rather, it merely regulates the manner in which the message may be conveyed."); *contra Clatterbuck*, 708 F.3d at 556 ([T]he ordinance "prohibits solicitations that request immediate donations of things of value, while allowing other types of solicitations."); *Speet*, 726 F.3d at 880 ([A] total prohibition on begging is not "tailored to the specific conduct . . . Michigan seeks to prohibit."); *ACLU*, 466 F.3d at 794 (handbills containing certain language may be distributed . . . while those containing other language may not.).

100. 444 U.S. 620, 633, 100 S.Ct. 826, 834 (1980).

101. *Id*. at 632; *see* Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, 425 U.S. 748, 771 n.24 (1976) (holding that the hardiness and objectivity of commercial speech makes a different standard applicable).

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

103. *Id.*

104. *Id.* at 630.

105. Cornelius v. NAACP Legal Def. & Educ. Fund, 473 U.S. 788, 798 (1985).

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

107. *See* Speet v. Schuette, 726 F.3d 867, 875 (6th Cir. 2013) ("Our sister circuits—the Second, Eleventh, and Fourth Circuits—[have] held that begging is a type of solicitation protected by the First Amendment.); *see also* Gresham v. Peterson, 225 F.3d 899, 904–05 (7th Cir. 2000) (holding that under *Schaumburg* panhandling is protected speech for First Amendment purposes).

108. Loper v. N.Y.C. Police Dep't, 999 F.2d 699, 704 (2d Cir. 1993).

109. *Id*.

110. *Id*.

fulfill his own particular needs rather than a charity is immaterial to the First Amendment.[111]

2. Charitable Solicitations for Immediate Monetary Donations

The Supreme Court has addressed the issue of panhandling for immediate donations three times, although none pertained to limiting panhandling in the traditional public forum.[112] In *Heffron v. International Society for Krishna Consciousnes*s the Court upheld a state regulation that restricted soliciting monetary donations at a state fair to a fixed location on the fairgrounds.[113] The Court held the regulation was not open to arbitrary discrimination because it applied "evenhandedly to all who wish to distribute and sell written materials or to solicit funds."[114]

The Court also elaborated on how a forum's characteristics affect the validity of a regulation limiting solicitation.[115] The fairgrounds encompassed a relatively small space, which included the use of city streets.[116] Respondents urged the Court to treat the fair's use of public streets as a traditional public forum.[117] The Court rejected this argument.[118] While the fairgrounds included the use of "public streets," they were sectioned off to facilitate the movement of large crowds to view a wide array of exhibitions.[119] Typically, public streets are "continually open, often uncongested, and . . . a place where people may enjoy the open air or the company of friends and neighbors in a relaxed environment."[120] In *Heffron* however, public streets were used temporarily to showcase exhibits and accommodate large crowds.[121] These characteristics placed a higher demand on safety, justifying the restriction on where solicitation could occur.[122]

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111. *Id*.
112. Heffron v. Int'l Soc. for Krishna Consciousness, 452 U.S. 640, 654 (1981) (holding that limiting solicitation to rented booths at state fairgrounds was permissible under the First Amendment); U.S. v. Kokinda, 497 U.S. 720, 737 (1990) (holding that prohibiting all fundraising on a sidewalk in front of a post office was permissible under the First Amendment); ISKCON, Inc. v. Lee, 505 U.S. 672, 685 (1992) (holding that prohibiting all solicitation and receipt of funds within an airport terminal was permissible under the First Amendment).
113. 452 U.S. at 644–45.
114. *Id*. at 649.
115. *Id*. at 651.
116. *Id*. at 650.
117. *Id*. at 651.
118. *Id*.
119. *Id*. at 650.
120. *Id*. at 651.
121. *Id*. Although Court did not outright call the state fair a non-public forum, its reasoning is consistent with such a conclusion.
122. *Id*.

In *International Society for Krishna Consciousness v. Lee*, the Court yet again faced solicitations for immediate donations in forums not purposed for public expression.[123] In *Lee*, the Port Authority of New York prohibited solicitation and receipt of funds in airport terminals.[124] The majority did not consider an airport a public forum because its main purpose was to facilitate the movement of passengers.[125] Therefore, the Port authority's regulation only needed to survive a reasonableness standard, which it easily did.[126]

In his concurrence, Justice Kennedy considered the airport a traditional public forum.[127] Following the forum analysis, Justice Kennedy assessed and then determined the regulation was content neutral.[128] Justice Kennedy interpreted the regulation to reach only the physical act of "solicitation[] for immediate payment of money."[129] In-person solicitations when combined with requests for immediate exchange of money created strong potential for "fraud and duress."[130] These negative consequences were exacerbated in airport terminals because they were confining environments, where travelers were often in a hurry and less able to avoid the unwanted pitch.[131] There was no content discrimination because the immediate physical exchange for money was merely one of several ways to obtain a charitable donation.[132] Alternative methods could advance the same message.[133] Therefore, the regulation was not targeting the message conveyed by the solicitation, or the solicitation itself, but only the physical exchange of money, which created the potential for fraud and duress.[134]

3. Actions vs. Words: The Circuit Split

In *Otterson v. City of Springfield*, the Seventh Circuit identified a circuit split involving anti-panhandling laws that "prohibit request for

123. 505 U.S. 672 (1992).
124. *Id.* at 674–75.
125. *Id*. at 680.
126. *Id.* at 679.
127. *Id.* at 698 (Kennedy, J., concurring) ("One of the places left in our mobile society that is suitable for discourse is a metropolitan airport. It is of particular importance to recognize that such spaces are public forums because in these days an airport is one of the few government-owned spaces where many persons have extensive contact with other members of the public.").
128. *Id.* at 704–05.
129. *Id.* at 704.
130. *Id.*
131. *Id.*
132. *Id.* at 705.
133. *Id.*
134. *Id.*

money or valuables to be handed over immediately" on public streets.[135] Each circuit agreed that panhandling was protected speech for First Amendment purposes.[136] However, the Circuits were divided over whether the actual request for immediate donations for items of value was conduct associated with the speech or the content of the speech itself.[137]

a. Content Neutral Restriction

The First, Seventh, and D.C. Circuits all held that a law prohibiting the request for immediate donation for items of value was a permissible content neutral distinction.[138] First, each ordinance served a content-neutral purpose.[139] Second, neither made a content distinction based on the

135. 768 F.3d 713, 714 (7th Cir. 2014) (city ordinance defining "panhandling as an oral request for an immediate donation of money"); *see* Thayer v. City of Worcester, 755 F.3d 60, 64 (1st Cir. 2014) (city ordinance defining solicitation as "using the spoken, written, or printed word, bodily gestures, signs, or other means of communication with the purpose of obtaining an immediate donation of money or other thing of value"); *see* Speet v. Schuette, 726 F.3d 867, 873 (6th Cir. 2013) (holding a state law which failed to define begging was ascribed its ordinary meaning, "the solicitation for alms."); *see* Clatterbuck v. City of Charlottesville, 708 F.3d 549, 552 (4th Cir. 2013) (city ordinance defining solicitation as a "request [for] an immediate donation of money or other thing of value from another person, regardless of the solicitor's purpose or intended use of the money or other thing of value"); *see* ACLU v. City of Las Vegas, 466 F.3d 784, 788 (9th Cir. 2006) (city ordinance defined solicitation as "to ask, beg, solicit or plead, whether orally, or in a written or printed manner, for the purpose of obtaining money, charity, business or patronage, or gifts or items of value for oneself or another person or organization"); *see* ISKCON of Potomac, Inc. v. Kennedy, 61 F.3d 949, 954 (D.C. Cir. 1995) (a city regulation prohibiting the "soliciting or demanding gifts, money, goods or services" is construed to mean an "in-person request for immediate payment").

136 *Thayer*, 755 F.3d at 68 (stating that "panhandling and solicitation of immediate donations convey messages of need"); *Speet*, 726 F.3d at 878 (6th Cir. 2013) (holding "begging, or the soliciting of alms, is a form of solicitation that the First Amendment protects"); *Clatterbuck*, 708 F.3d at 553 (holding that "the speech and expressive conduct that comprise begging merit First Amendment protection"); *ACLU*, 466 F.3d at 797 (holding an ordinance was unconstitutional because it overburdened the protected speech of charitable solicitation); *ISKCON*, 61 F.3d at 953 (holding "the solicitation of charitable contributions is protected speech").

137. *See Otterson*, 768 F.3d at 717 ("[W]hat activates the prohibition is where a person says something . . . rather than what position a person takes on a political or literary question."); *Thayer*, 755 F.3d at 67 ("[T]he text of the ordinances does not identify or affect speech except by reference to the behavior."); *ISKCON*, 61 F.3d at 955 ("[T]he solicitation regulation does not . . . totally prohibit a type of expression or a specific message; rather, it merely regulates the manner in which the message may be conveyed."); *contra Clatterbuck*, 708 F.3d at 556 (the ordinance "prohibits solicitations that request immediate donations of things of value, while allowing other types of solicitations"); *Speet*, 726 F.3d at 880 (a total prohibition on begging is not "tailored to the specific conduct . . . Michigan seeks to prohibit"); *ACLU*, 466 F.3d at 794 (handbills containing certain language may be distributed . . . while those containing other language may not).

138. *Otterson*, 768 F.3d at 717–8; *Thayer*, 755 F.3d at 71; *ISKCON*, 61 F.3d at 955.

139. *Otterson*, 768 F.3d at 714 (the purpose of the ordinance was to protect people from threating behavior); *Thayer*, 755 F.3d at 67 (the purpose of the ordinance was to prevent the "circumstances that raise a risk to safety or that compromise the volition of a person addressed to avoid

message or viewpoint.[140] For example, in *Otterson*, the Seventh Circuit held that no content distinction was made because "what activated the prohibition was where a person [said] something rather than the position a person [took]."[141] The fact the statute allowed for signs that made such request was not a content distinction but rather a regulation on the manner of communicating the message of neediness.[142] In *Thayer*, the First Circuit directly applied Justice Kennedy's reasoning in *Lee* to the ordinance at issue, holding that prohibiting "solicitations for immediate donations of money reflects the relationship between aggressive street behaviors and certain categories of messages."[143] Prohibiting the request of immediate donation targeted the abuses associated with the physical exchange of money.[144]

b. Content Based Restriction

On the other hand, the Fourth, Sixth, and Ninth Circuits held the prohibition on requests for the immediate donation of items of value was a content based distinction.[145] This was so, despite the government asserting a legitimate state interest.[146] Each ordinance made a content distinction by distinguishing what a person could solicit.[147] For example, in *Clatterbuck*

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solicitation."); *ISKCON*, 61 F.3d at 951 (the purpose of the Park Service regulation "is to conserve the scenery and the natural and historic objects and to provide for the enjoyment of the same in such manner and by such means as will leave them unimpaired for the enjoyment of future generations.") (alteration omitted).

140. *Otterson*, 768 F.3d at 717; *Thayer*, 755 F.3d at 67; *ISKCON*, 61 F.3d at 955.

141. *Otterson*, 768 F.3d at 717.

142. *See id.* at 716–17.

143. *Thayer*, 755 F.3d at 69.

144. *See id.*

145. The Michigan statute represents a unique case. The statute at issue was a state law on the books since 1929. *Speet*, 726 F.3d at 867. It was being challenged for its over breadth. *Id.* However, inherent in an over breadth ruling is a content distinction. *See* Gooding v. Wilson, 405 U.S. 518, 522 (1972) (holding that a law "must be carefully drawn or be authoritatively construed to punish only unprotected speech and not be susceptible of application to protected expression"). By prohibiting all begging regardless of associated conduct, the Michigan law censored the expression of issues protected by the First Amendment. *Speet*, 726 F.3d at 870.

146. *Speet*, 726 F.3d at 879 ("[T]he prevention of fraud and duress are substantial state interests."); *Clatterbuck*, 708 F.3d at 557 (the district court relied on the government's assertion that the ordinance's purpose was to protect people from a "heightened sense of fear or alarm, or might wish especially to be left alone." The Fourth Circuit however, could not evaluate this assertion because the "court may not consider any documents that are outside the complaint and the statements of the ordinance's purpose was not contained in the record" on a motion to dismiss.); ACLU v. City of Las Vegas, 466 F.3d 784, 793 (9th Cir. 2006) ("[T]he ordinance was enacted with the purpose of controlling the secondary effects of solicitation.").

147. *Clatterbuck*, 708 F.3d at 556 ("Whether the Ordinance is violated turns solely on the nature or content of the solicitor's speech: it prohibits solicitations that request immediate donations of things of value, while allowing other types of solicitations, such as those that request future

the Fourth Circuit held that an ordinance that prohibited "request[s] [of] immediate donations of things of value, while allowing . . . request[s] [for] future donations, or those . . . things which may have no value," favored the latter over the former.[148] In *ACLU*, the Ninth Circuit held that singling out requests for financial assistance for prohibition made a content distinction.[149] In *Speet*, the Sixth Circuit struck down a Michigan statute that made a content distinction because it prohibited an entire category of protected speech without any reference to the harmful conduct the State claimed was associated with its communication.[150]

These content distinctions could be used to censor the expression of certain messages or viewpoints.[151] In *Clatterbuck*, the Fourth Circuit held that it was "not implausible that the City singled out requests for immediate donations in an attempt to target the particular nuisance of beggars' speech but allow other types of solicitation to continue."[152] According to the Ninth Circuit, censorship was possible because enforcement of the ordinance required police officers to examine the language of handbills before determining whether the solicitation was permissible.[153] This gave police the opportunity to enforce the ordinance against a message they did not approve of.[154]

III. ANALYSIS

The history of aggressive panhandling laws demonstrate that such laws are motivated by a desire to: (1) protect that health, safety and use of a city's public spaces and (2) limit the contact homeless members of society will have with its more affluent ones. The doctrine of content neutrality is used to smoke out laws acting with the latter purpose. If a law is acting with a censorial intent, then strict scrutiny ensures that such a law will only

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donations, or those that request things which may have no 'value'—a signature or a kind word, perhaps."); *ACLU*, 466 F.3d at 794 ("Handbills with certain content pass muster; those requesting financial or other assistance do not.").

148. *Clatterbuck*, 708 F.3d at 556.

149. *ACLU*, 466 F.3d at 794 ("Handbills with certain content pass muster; those requesting financial or other assistance do not.").

150. *Speet*, 726 F.3d at 880.

151. *See ACLU*, 466 F.3d at 793 (9th Cir. 2006) (holding a "solicitation ordinance is content-based if either the main purpose in enacting it was to suppress or exalt speech of a certain content, or it differentiates based on the content of speech on its face") (citing City of Cincinnati v. Discovery Network, Inc., 507 U.S. 410, 429–30 (1993)).

152. *Clatterbuck*, 708 F.3d at 559–60.

153. *ACLU*, 466 F.3d at 795–96.

154. *See id.*

be upheld if it serves the most compelling of government interests in a narrowly tailored way.[155]

Part A argues that those circuits which held that aggressive panhandling laws represented content-neutral restrictions did not adequately consider how the characteristics of the public street influence the analysis. Part B demonstrates how, in the public forum, those laws make a content distinction by discriminating against the viewpoint of the poor. Part C argues strict scrutiny of aggressive panhandling laws is therefore necessary to promote the policy goals of the First Amendment with respect to the homeless.

A. Freedom in the Public Forum

In a forum analysis, as *Heffron* and *Lee* demonstrate, the characteristics of a particular forum are an important consideration in determining whether the regulation of speech in that forum is permissible. It is the difference in purpose between public and non-public forums that compel different treatment.[156] In fact, *Lee* relied on *Heffron* when it determined that an airport was nonpublic forum.[157] Both the state fairgrounds and airport terminals were designed with the purpose of moving people safely and efficiently through their respective premises. In *Heffron*, the Court even went so far as to explain why a fair ground deserved less protection that a public street. Public streets, the Court said, were "continually open, often uncongested, and . . . also a place where people may enjoy the open air or the company of friends and neighbors in a relaxed environment."[158] For these reasons, the state had a less compelling reason to regulate speech in a public forum.

In light of these considerations, Justice Kennedy's concurrence in *Lee* is not persuasive and reliance on it by the First, Seventh, and D.C. circuits is misplaced. Even though Justice Kennedy viewed airports as a public forum, he relied on those unique characteristics—ones the majority found to make airports a nonpublic forum—to conclude that in-person solicitation coupled with the physical exchange of money created a high potential for negative consequences. It was the confining environment and time schedules of airport terminals that made the physical exchange of money

155. This comment assumes that charitable solicitations for personal gain are protected speech even though the Supreme Court has not ruled on this matter because no Court of Appeals has held that such speech is not protected. *See supra* Part II.C.1.

156. *See supra* Part II.C.2.

157. *See* ISKCON v. Lee, 505 U.S. 672, 684 (1992) (citing *Heffron* for the proposition that solicitation can imped traffic flow in non-public forums).

158. Heffron v. Int'l Soc. for Krishna Consciousness, 452 U.S. 640, 651 (1981).

ripe for negative consequences. According to Justice Kennedy, the port authority regulation was content neutral because it was targeting the conduct that frustrated the airport from fulfilling its purpose, i.e. to get passengers on airplanes.

To this point, it is *Heffron*, and not Justice Kennedy's concurrence in *Lee* that provides a better framework to answer the question whether a prohibition on the request for the immediate donation of items of value represents a content-neutral or content-based distinction. The First and Seventh Circuits did not consider how the public forum of a street impacted the listener's burden to avoid speech they find distasteful. In doing so, they placed the burden on the speaker to restrict her speech, in a forum where the burden should have been on the listener to avoid the speech. It is fair to say the confining nature and dedicated purpose of airports or fairgrounds compel a different balancing of the private interest versus public speech. Yet, as the Ninth Circuit stated in *ACLU*, "it is essential to protect public places where traditional modes of speech and forms of expression can take place."[159]

Boos cautions legislatures that attempt to use listener reaction as secondary effect to limit speech on public streets. When in a traditional public forum, it is the listener who is required to avoid unpleasant speech. The First Amendment should not be restricted simply because street goers are uncomfortable ignoring a beggar or are inconvenienced by having to make a minor detour in their routes to avoid the beggar's message. While the personal appeal, indeed, makes the plea as persuasive as it does coercive, the public forum entitles the speaker to use this forum to spread his own message.

B. Smoking out the Censorial Intent

Aggressive panhandling laws that prohibit requests for immediate donations for items of value are wolves in sheep's clothing. They have the same purpose and effect as the status law struck down in *Papachristou* or the Elizabethan anti-vagrancy laws of old Europe. The cities in *Otterson* and *Thayer* justify their aggressive panhandling ordinances as protecting the general public from aggressive conduct, yet they target the very words a panhandler uses. As the Supreme Court held in *Cohen v. California*, when a law targets the words used to communicate, "[t]he only conduct which the State [seeks] to punish is . . . communication."[160] By prohibiting the

159. ACLU v. City of Las Vegas, 466 F.3d 784, 791 (9th Cir. 2006).
160. Cohen v. Cal., 403 U.S. 15, 18 (1971).

request for immediate donations, these laws punish the "spoken appeal made by one human being to another."[161]

The "secondary effects" analysis in *Renton* is not controlling because aggressive panhandling laws proscribe the words used to solicit donations and not related negative conduct. By targeting the request, these laws give police discretion to "examine the content of the message . . . to determine whether" the beggar uttered a prohibited request.[162] It is important to note that cities have other ways to control the consequences of aggressive panhandling aside from making the request illegal. As in *McCullen*, cities can set up zones where soliciting immediate donations for items of value causes the specific problems that raise concern. These provisions, while limiting where and when a beggar can solicit money, tailor the offense to the negative conduct that a city seeks to limit. Therefore, since many aggressive panhandling laws already contain these provisions, the inclusion of the additional provision prohibiting a verbal request raises the question of what else the law seeks to limit.

Prohibiting requests for the immediate donation of items of value censors the viewpoint of the poor. Soliciting immediate donations is the only practical form of charitable speech available for many homeless individuals.[163] Unlike the demonstrators in *Clark*, where prohibiting sleeping on the National Mall did not limit the ability to call attention to the demonstrator's message, a poor person's ability to solicit monetary assistance is significantly restricted by a law that prohibits verbal requests. It is impractical for the impoverished person to hand out pamphlets requesting future donations because either they have no home where the donation may be sent or immediate receipt of the financial contribution is urgent. Groups like professional charities and religious groups have the luxury of time to benefit from requests for future donations and therefore still have incentive to engage in this type of solicitation. Forcing beggars to rely on requests for future donations limits the benefit they receive from panhandling and limits their ability to spread their message of need.

Aggressive panhandling laws place the interest of organized charities above the needs of individuals.[164] This is not merely an incidental limitation, as was recognized in *Ward*. The Supreme Court recognizes that

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161. Helen Hershkoff & Adam S. Cohen, *Begging to Differ: The First Amendment and the Right to Beg*, 104 HARV. L. REV. 896, 908 (1991).

162. *See* FCC v. League of Women Voters, 468 U.S. 364, 383 (1984).

163. Kovacs v. Cooper, 336 U.S. 77, 102 (1949) (holding the poor "do not have enough money to own or control publishing plants, newspapers, radios, moving picture studios, or chains of show places"); *see also* Hershkoff & Cohen, *supra* note 161, at 907 (prohibiting begging "threatens to silence all those who have limited access to communicative resources").

164. Hershkoff & Cohen, *supra* note 161, at 907.

charitable solicitation is more effective when conducted "face-to-face."[165] By banning solicitations for the immediate donation of an item of value, the government discriminates on the basis of what viewpoint an individual may request assistance for and subordinates the autonomy of society's poorest members to that of its more affluent. As a result, the poor are isolated from mainstream society just like under the pre-*Papachristou* status laws and the Elizabethan anti-vagrancy laws of old Europe.

The Seventh Circuit in *Otterson*, intimated that the phrase "give me money now" does not communicate a message.[166] To the contrary, the phrase conveys quite an emphatic one. By stating she needs money now, the requester is conveying an urgent need for the money, possibly for food, shelter, clothing or other necessities. That message is more impactful and persuasive when delivered by someone who is personally suffering from poverty. It is settled law that charitable requests are protected speech and sufficiently intertwined with the kind of communication the First Amendment protects.[167] No court in the circuit split argued that *Schaumburg* should not be extended to panhandling for one's personal gain.[168] Since it is the words themselves that convey the message of charity, an aggressive panhandling law that regulates those words is content based.

C. Giving the Homeless Their Voice

The First Amendment provides a powerful antidote to our natural human inclination to avoid these uncomfortable truths. By allowing a beggar to request immediate donations of items of value, she engages those passing by with her poverty.[169] This engagement quality promotes the three underlying principles of the First Amendment's free speech clause.[170] The engagement function of speech is what gives speech its persuasive power. It gives individuals, otherwise separated by differences, the opportunity "to overcome their sense of estrangement and to consider the other's perspective."[171]

First, allowing a beggar to make request for an immediate donation of items of value enlightens society by confronting it with the realities of

165. *See* text accompanying note 105, *supra*.
166. Otterson v. City of Springfield, 768 F.3d 713, 717 (7th Cir. 2014).
167. *See* Part II.C.1.
168. *See* text accompanying note 136, *supra*.
169. Hershkoff & Cohen, *supra* note 161, at 915.
170. Slipp, *supra* note 39, at 593 ("These factors are whether the activity in question promotes: the enlightenment of society, the democratic system or self-actualization.").
171. Hershkoff & Cohen, *supra* note 161, at 914.

poverty.[172] Societal isolation is broken down when a person is confronted with a beggar on the street.[173] When an individual is confronted with a beggar it is impossible to ignore how poverty has affected that person.[174] This engagement yields several positive consequences.[175] The beggar's plea may persuade the stranger to donate to the beggar making the request.[176] Personally observing the effects of poverty may inspire the listener to volunteer in organized efforts that provide assistance to the poor.[177] Even negative exchanges with an unwilling listener can produce positive consequences. By requesting charity on public streets, the panhandler challenges the stigma society has placed on her and reminds the unwilling listener "of the human costs of poverty."[178]

Second, allowing beggars to request immediate donations for items of value helps to create more responsive government action. This exchange is not lost on city leaders. After all, it was the increased presence of homeless residents on city streets that spurred many cities to pass aggressive panhandling laws. However, passing laws to respond to this activity need not unconstitutionally limit the impoverished individual's right to request charity on public streets. When society is confronted and informed about the human cost of poverty, society can also choose to respond with more constructive measures.

Finally, allowing a beggar to request immediate donations for items of value furthers the goal of personal autonomy.[179] At the very least, through begging, the beggar is able to "reassert[] . . . the human being who lies beneath these dehumanizing thoughts and images."[180] When the beggar requests a donation she breaks the isolation society has imposed on her.[181] In doing so the beggar is able to speak about her condition on her terms and not the ones imposed on her by society. It is the beggar's request, and therefore her speech, that yields this result.

IV. CONCLUSION

Begging is speech that gives the poor a voice to challenge others to take notice and perhaps persuade them to help. A law that subordinates that

172. *Id.* at 915.
173. *Id.* at 912.
174. *Id.*
175. *Id.* at 914.
176. *Id.*
177. *Id.*
178. *Id.*
179. *Id.* at 915.
180. *Id.*
181. *Id.*

right to a government interest must demand strict scrutiny. The beggar requesting donations communicates the kind of social and economic messages the First Amendment has historically protected. It is the verbal request that conveys these messages. Cities can target the abusive conduct without referencing the verbal request associated with it. Therefore, when cities prohibit the solicitation for immediate receipt of items of value, the question begs, who does the city want to prevent from making this request? Such a question is one of content, and content distinctions are the essences of censorship. Aggressive panhandling laws that prohibit a panhandler from requesting immediate donations for items of value censor the truth about the human cost of poverty. Applying strict scrutiny frees the beggar's right to make verbal solicitations and allows kindness to flourish.