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Panhandling and the First Amendment

HOW SPIDER-MAN IS REDUCING THE QUALITY OF LIFE IN NEW YORK CITY

“The unchecked panhandler is, in effect, the first broken window.”¹

INTRODUCTION

Junior Bishop is not someone police would consider your typical “friendly neighborhood Spider-Man.”² In July 2014, in New York City’s Times Square, Bishop, who was dressed as Stan Lee’s famous superhero, harassed a woman for tips after he posed with her in a picture.³ When a New York City Police Department (NYPD) officer intervened, Bishop punched him in the face.⁴ Later that year, the NYPD arrested a woman dressed as Elmo for aggressive solicitation and posted a picture of the handcuffed character on Twitter.⁵ A caption accompanying the photograph read, “Just another typical day in Midtown South.”⁶ When walking along Manhattan’s famous crossroads, a pedestrian can spot not only costumed panhandlers but also topless women, called “desnudas,”⁷ and even a musician who strategically holds his guitar

¹ George L. Kelling & James Q. Wilson, *Broken Windows*, ATLANTIC MONTHLY, Mar. 1982, at 34.

² BadWolf, *Spiderman 1967 Cartoon Intro (with Lyrics)*, YOUTUBE (Dec. 13, 2012), <https://www.youtube.com/watch?v=A43sHQ9BKXg> [http://perma.cc/WV9U-TW84].

³ Ryan Sit & Thomas Tracy, *Man Dressed as Spider-Man Punches NYPD Cop in Times Square, Authorities Say*, N.Y. DAILY NEWS (July 27, 2014, 5:00 AM), <http://www.nydailynews.com/new-york/nyc-crime/man-dressed-spider-man-punches-nypd-times-square-article-1.1881561> [http://perma.cc/J6HJ-WLBV].

⁴ *Id.*

⁵ Jamie Schram & Aaron Feis, *Elmo in Handcuffs After Times Square Bust*, N.Y. POST (Sept. 16, 2014, 7:15 PM), <http://nypost.com/2014/09/16/elmo-in-handcuffs-after-times-square-bust/> [http://perma.cc/HC75-S9T3].

⁶ *Id.*

⁷ Colleen Wright, *The Desnudas of Times Square, Topless but for the Paint*, N.Y. TIMES (Aug. 14, 2015), <http://www.nytimes.com/2015/08/16/nyregion/the-desnudas-of-times-square-topless-but-for-the-paint.html> [http://perma.cc/JHD5-R3FP].

to make it appear that he is wearing nothing but a cowboy hat.⁸ These individuals ply their “talents” in an attempt to earn tips from the city’s visitors, often leaving their manners behind. One survey showed that 60% of those who work near Times Square have had distasteful interactions with the panhandlers.⁹

The Times Square panhandlers have earned the ire of the media and the city’s elected officials. Local newspapers have published apoplectic editorials and letters to the editor that bemoan how the panhandlers conduct themselves and draw allusions to the “seediness” that defined 1970s midtown Manhattan—when sex shops and X-rated theaters were all the rage.¹⁰ New York State Senator Brad Hoylman described the costumed street performers as “a cancer on Times Square that has to be excised soon.”¹¹ And, in the summer of 2015, Governor Andrew Cuomo stated that the activity “infring[es] on the investment that the state and the city made in [Times Square]” and that he believes it “has to be stopped.”¹² The problem that the panhandlers pose affects more than just midtown Manhattan. Recently, they have spread beyond Times Square and moved into other areas of the city, including Battery Park and Coney Island.¹³

⁸ See Turner Cowles, *How Times Square’s Naked Cowboy Makes \$150,000 a Year*, TIME (Oct. 6, 2015), <http://time.com/money/4060713/naked-cowboy-times-square-makes-money/> [http://perma.cc/Y7AC-699S].

⁹ David K. Li, *Times Square Leader Rails Against Creeps*, N.Y. POST (Oct. 4, 2015, 11:29 AM), <http://nypost.com/2015/10/04/times-square-leader-rails-against-creeps/> [http://perma.cc/N5TZ-J3KJ] (citing a survey that asked respondents whether they had ever experienced an “unpleasant interaction with either a solicitor or a costumed performer where they really felt intruded upon in a negative way”).

¹⁰ See, e.g., *Where the Money Is for Panhandlers* (Editorial), STATEN ISLAND ADVANCE (Aug. 28 2015, 9:11 AM), http://www.silive.com/opinion/index.ssf/2015/08/where_the_money_is_for_panhand.html [http://perma.cc/W48D-KRRV] (stating that the topless panhandlers have created an atmosphere that “has just a whiff of that old, 1970s-style Times Square seediness that Rudy Giuliani and Michael Bloomberg worked so hard to dispel”); Jack Hassid, Letter to the Editor, *Topless Women in Times Square*, N.Y. TIMES (Aug. 29, 2015), <http://www.nytimes.com/2015/08/30/opinion/topless-women-in-times-square.html> [http://perma.cc/23TV-VE3K] (describing Times Square as a “sterile, character-less Disney theme park”); Andrea Peyser, *Times Square’s Costumed Menaces Are the New Squeegee Men*, N.Y. POST (Aug. 1, 2014, 2:07 AM), <http://nypost.com/2014/08/01/its-time-to-crack-down-on-the-times-square-extortionists/> [http://perma.cc/96T3-ZCEL] (calling Times Square a “bizzaro Disneyland” and describing the costumed panhandlers’ conduct as “extortion”).

¹¹ Paula Duran, *Pols Promise a Solution Against “Elmo Bullies,”* OBSERVER (July 9, 2014, 1:49 PM), <http://observer.com/2014/07/pols-promise-a-solution-against-elmo-bullies/> [http://perma.cc/NL89-HPGM].

¹² Chester Soria, *Cuomo Calls Times Square Topless Panhandler Activity ‘Illegal,’* METRO (Aug. 19, 2015), <http://www.metro.us/new-york/cuomo-calls-times-square-topless-panhandler-activity-illegal/zsJohs---vOzLGp87jyJGs/> [http://perma.cc/8AUA-ZKDR].

¹³ Erin Durkin et al., *EXCLUSIVE: Aggressive Panhandling Costumed Characters Spread from Times Square to the Battery, Coney Island, Sparking Turf War*, N.Y. DAILY NEWS (Aug. 26, 2015, 2:30 AM), <http://www.nydailynews.com/new->

Regulating the costumed and bare-breasted panhandlers has become a priority for New York City Mayor Bill de Blasio and the New York City Council. In August 2015, de Blasio appointed a panel to find ways to rein in the city's unpleasant soliciting activity.¹⁴ This task force has made several recommendations, which include deploying a special police detail in Times Square, informing tourists about how to avoid unwanted contact with the panhandlers, and establishing "special zones" for solicitation.¹⁵ One year earlier, Councilman Andy King proposed legislation that would require costumed panhandlers to purchase licenses before soliciting and would further crack down on aggressive behavior.¹⁶ Mayor de Blasio has even considered tearing out the pedestrian plazas, which the city installed before he assumed office.¹⁷ In April 2016, the City Council passed a law limiting panhandling activity to certain designated areas.¹⁸

Law enforcement has struggled to bring order to Times Square because constitutional free speech protections limit what it can do to regulate panhandling. In an editorial to the *Wall Street Journal*, NYPD Commissioner William Bratton explained that police are in a position where they must deal with behavior that is "awful" but that courts have deemed to be "lawful."¹⁹ Bratton noted that, since the early 1990s, courts have limited the tools—specifically, laws prohibiting disorderly conduct, public nudity, and begging—that law enforcement can use to curb panhandling.²⁰ For example, in 1992, the New York Court of

york/panhandling-costumed-characters-spread-parts-nyc-article-1.2337391 [http://perma.cc/6XTX-5Q7R].

¹⁴ Mara Gay & Pervaiz Shallwani, *NYC Mayor Bill de Blasio Appoints Second Panel on Panhandling*, WALL ST. J. (Aug. 26, 2015, 8:43 PM), <http://www.wsj.com/articles/nyc-mayor-bill-de-blasio-to-appoint-second-panel-on-panhandling-1440621246> [http://perma.cc/9GW3-937A].

¹⁵ Mallory Hoff, *Mayor de Blasio's Times Square Task Force Releases Its Recommendations*, ABC7NY.COM (Oct. 1, 2015), <http://abc7ny.com/news/times-square-task-force-releases-its-recommendations/1010497/> [http://perma.cc/5PGX-HL6J].

¹⁶ N.Y.C. Council, Int. No. 0467-2014 (N.Y. 2014), <http://legistar.council.nyc.gov/LegislationDetail.aspx?ID=1903343&GUID=5A45C651-7373-4589-86B4-F77DD0FD5CFC&Options=ID|Text|&Search=costume> [http://perma.cc/X72D-U36U].

¹⁷ Michael M. Grynbaum & Matt Flegenheimer, *Mayor de Blasio Raises Prospect of Removing Times Square Pedestrian Plazas*, N.Y. TIMES (Aug. 20, 2015), <http://www.nytimes.com/2015/08/21/nyregion/mayor-de-blasio-raises-prospect-of-removing-times-square-pedestrian-plazas.html> [http://perma.cc/P4UV-DP34].

¹⁸ Mara Gay, *New York City Moves to Bring Order to Times Square, Restrict Panhandlers*, WALL ST. J. (Apr. 8, 2016, 12:08 AM), <http://www.wsj.com/articles/new-york-city-moves-to-bring-order-to-times-square-restrict-panhandlers-1460074231> [http://perma.cc/78MV-BEZ6].

¹⁹ William J. Bratton, *Policing 'Awful But Lawful' Times Square Panhandling*, WALL ST. J. (Sept. 4, 2015, 6:46 PM), <http://www.wsj.com/articles/policing-awful-but-lawful-times-square-panhandling-1441406768> [http://perma.cc/N69Y-GKPJ].

²⁰ *Id.*

Appeals indicated that it might violate equal protection to prohibit only women from going topless in public and—to avoid the constitutional question—construed an unlawful exposure statute to be inapplicable in a noncommercial setting.²¹ At around the same time, the Second Circuit concluded that panhandling was expressive conduct that warranted First Amendment protection.²² And more recently, a New York appellate court held that a criminal statute punishing “loitering for the purpose of begging” infringed the beggar’s free speech rights.²³

Rulings of this sort conflict with the NYPD’s approach to reducing the city’s crime rate during the past 25 years. This approach, known as Broken Windows policing, emphasizes that law enforcement should address quality-of-life violations—like panhandling—to create an environment that makes felonies less likely to occur.²⁴ Maintaining a sense of order and focusing on behavior that violates community social norms, the theory goes, leads to safer neighborhoods. The Big Apple is not alone in adopting quality-of-life policing strategies to curb panhandling. Recently, the National Law Center on Homelessness and Poverty published a survey of 187 cities and found that 24% had implemented citywide prohibitions on public begging, a 25% increase since 2011.²⁵ Similarly, 33% of the cities surveyed banned all loitering in public, which represented a 35% increase during the same time period.²⁶

Reconciling quality-of-life policing with First Amendment doctrine is the central aim of this note. While the U.S. Supreme Court has held that soliciting for charitable purposes is protected speech,²⁷ it has yet to rule whether the act of begging—approaching a stranger in public and requesting immediate and gratuitous cash payment for oneself—is itself constitutionally protected speech. Justice Kennedy’s concurring opinion in *International Society for Krishna Consciousness v. Lee* holds out the possibility that singling out and regulating “solicitation and receipt of funds” is a constitutional restriction on the means of speech, and not an

²¹ *People v. Santorelli*, 600 N.E.2d 232, 233-34 (N.Y. 1992).

²² *Loper v. New York City Police Dep’t*, 999 F.2d 699 (2d Cir. 1993).

²³ *People v. Hoffstead*, 905 N.Y.S.2d 736, 737 (N.Y. App. Term 2010).

²⁴ See generally Kelling & Wilson, *supra* note 1, at 29 (providing a framework for reducing crime by addressing quality-of-life issues).

²⁵ NAT’L LAW CTR. ON HOMELESSNESS AND POVERTY, NO SAFE PLACE: THE CRIMINALIZATION OF HOMELESSNESS IN U.S. CITIES 7, 8, 20, http://www.nlchp.org/documents/No_Safe_Place [<http://perma.cc/7Q7N-YQZ8>] (last visited May 17, 2016).

²⁶ *Id.* at 21.

²⁷ See, e.g., *Vill. of Schaumburg v. Citizens for a Better Env’t*, 444 U.S. 620, 632 (1980).

unconstitutional burden on a speaker's message, because banning the immediate physical exchange of money regulates conduct and not speech.²⁸ To date, two circuits have adopted similar reasoning,²⁹ but two others have explicitly rejected Kennedy's argument and held that the act of begging is itself part of the speaker's message and is subject to First Amendment protections.³⁰

If the Supreme Court has the opportunity to resolve this circuit split, it should accept Justice Kennedy's reasoning. The government has a legitimate interest in preserving the quality of life in urban areas. Cities like New York have invested significant resources to make their neighborhoods attractive to visitors and residents and should be allowed to ensure that those areas do not take on a carnival-like atmosphere. Even when the Court has overturned regulations on charitable door-to-door solicitation, it has recognized that the government has a "substantial" or "important" interest in protecting citizens from "fraud, crime, and undue annoyance."³¹ Panhandling threatens these interests in more pronounced ways than does door-to-door solicitation because solicitees cannot retreat into the comfort of their own homes or avoid panhandlers altogether by refusing to open their doors.³² To effectively vindicate its interests, the government must be allowed to separate the socially undesirable conduct (i.e., approaching an individual with the intent to receive money) from the messages that accompany it. Panhandlers still may communicate their

²⁸ *Int'l Soc'y for Krishna Consciousness, Inc. v. Lee*, 505 U.S. 672, 704-05 (1992) (Kennedy, J. concurring).

²⁹ *See Thayer v. City of Worcester*, 755 F.3d 60, 69 (1st Cir. 2014), *vacated*, 135 S. Ct. 2887 (2015) (citing Justice Kennedy for the proposition that "a ban on direct donations simply 'limit[s] the manner of expression to forms other than immediate receipt of money'" (quoting *Int'l Soc'y for Krishna Consciousness*, 505 U.S. at 704-05)); *ISKCON of Potomac, Inc.*, 61 F.3d at 954-55 (citing Justice Kennedy's *Lee* concurrence and concluding that a ban on "solicitation," defined as "includ[ing] only . . . in-person request for immediate payment," was a content-neutral restriction on the manner of expression).

³⁰ *See Norton v. City of Springfield*, 806 F.3d 411, 412-13 (7th Cir. 2015) (overruling previous decision where it approvingly cited Justice Kennedy's *Lee* concurrence and finding that ban on solicitation for immediate donations is a content-based speech restriction); *Speet v. Schuette*, 726 F.3d 867, 876 (6th Cir. 2013) (explicitly rejecting Justice Kennedy's *Lee* concurrence and holding that solicitation and receipt of payment cannot be separated for First Amendment purposes).

³¹ *Vill. of Schaumburg*, 444 U.S. at 636; *see also* *Watchtower Bible & Tract Soc'y of N.Y., Inc. v. Vill. of Stratton*, 536 U.S. 150, 164-65 (2002) (conceding the importance of the government's claimed interests in preventing fraud and crime and protecting a homeowner's privacy).

³² The Court indicated in *Village of Schaumburg* that allowing homeowners to opt out of unwanted solicitation by placing "No Solicitor" signs on their doors may have been a constitutional means of carrying out the government's substantial interest in protecting individuals from the potential fraud and unwanted annoyance that could accompany charitable solicitation. *Vill. of Schaumburg*, 444 U.S. at 639.

message (whatever it may be) if they are relegated to certain zones or are permitted to hold signs asking individuals for money. They simply should not be allowed to exert pressure, whether subtle or overt, on the public by physically approaching people and soliciting cash.

Part I of this note discusses the Broken Windows approach to policing, which revolutionized how law enforcement deals with quality-of-life issues, and analyzes how the theory potentially conflicts with basic First Amendment principles. Part II examines First Amendment doctrine, with an emphasis on the distinctions between covered and protected speech in the context of the Times Square panhandlers. Part III considers how several circuits have addressed whether the First Amendment protects panhandling. Part IV argues that prohibiting solicitation for the immediate physical exchange of money is within the government's power because such regulations do not target a speaker's message. This note concludes that if antipanhandling regulations are carefully drafted to leave alternatives for beggars to express their message, such regulations could be valuable methods for maintaining order in urban settings without violating a speaker's First Amendment rights.

I. BROKEN WINDOWS AND THE FIRST AMENDMENT

Before analyzing whether panhandling is sufficiently expressive to fall under the umbrella of the First Amendment's protection, it is helpful to place panhandling regulations in a larger context. This part explains the Broken Windows policing theory that justifies aggressively enforcing panhandling regulations and examines how Broken Windows potentially conflicts with the larger policy rationales behind protecting free speech in the first place.

A. *The Broken Windows Theory of Policing*

In 1982, George L. Kelling and James Q. Wilson published their seminal article on policing, "Broken Windows," in *Atlantic Monthly*.³³ Citing studies that examined the sources of public fear in urban communities, Kelling and Wilson found that, in high-crime neighborhoods, the public fears general community disorder as well as crime.³⁴ Members of the

³³ Kelling & Wilson, *supra* note 1, at 29.

³⁴ *Id.* at 29-30.

community express anxiety about not only violent people and criminals, but also about “disreputable or obstreperous or unpredictable people: panhandlers, drunks, addicts, rowdy teenagers, prostitutes, loiterers, the mentally disturbed.”³⁵ The behavior that such people exhibit in public threatens to undermine a community’s social fabric.

Kelling and Wilson argued that this social anxiety about public disorder is justified and that “untended” deviant or disreputable behavior leads to urban decay.³⁶ They concluded that, while disorder does not inevitably lead to higher crime rates, “disorder and crime are usually inextricably linked.”³⁷ This connection is due to public perception about the state of a particular neighborhood. To illustrate their point, Kelling and Wilson used the analogy of the broken window. If someone breaks a window and that window goes untended, it sends a message to the community that nobody cares about the broken window, and thus, more windows end up broken because there is no cost associated with engaging in the deviant activity.³⁸ Unchecked issues like panhandling and public drunkenness are analogous to the untended broken window. When panhandling goes unaddressed, the community signals to the panhandler that his disorderly and disreputable behavior will not be punished. And in neighborhoods where disorder is rampant, people tend to believe that crime is escalating, even if it is not.³⁹ As a result, they alter their behavior by using the streets less or avoiding others when they do go out in public.⁴⁰ This overarching sense of fear and lost community creates a fertile breeding ground for crime. As Kelling and Wilson put it, “Muggers and robbers, whether opportunistic or professional, believe they reduce their chances of being caught or even identified if they operate on streets where potential victims are already intimidated by prevailing conditions.”⁴¹ Disorder creates the conditions that allow criminals to thrive.

To Kelling and Wilson, the way to prevent urban decay is to restore order in the community.⁴² In communities where the number of disreputable people is disproportionately small, informal social controls may be an effective mechanism for

³⁵ *Id.* at 30.

³⁶ *Id.* at 31.

³⁷ *Id.*

³⁸ *Id.*

³⁹ *Id.* at 32.

⁴⁰ *Id.*

⁴¹ *Id.* at 34.

⁴² *Id.*

maintaining order.⁴³ Kelling and Wilson concluded, however, that in large urban communities, the order-maintenance function is one that necessarily belongs to the police.⁴⁴ They advocated for policing that prioritizes placing officers on foot patrol to enforce community norms and “return[s] to our long abandoned view that police ought to protect communities as well as individuals.”⁴⁵ This view rejects efforts to “decriminalize’ disreputable behavior that ‘harms no one,’” because allowing even a single instance of vagrancy or public drunkenness to go unchecked leads to a general atmosphere of disorder or, to use the analogy, “a thousand broken windows.”⁴⁶ In short, by focusing on disorder and minor offenses, police can create an environment that reduces major crimes.

Broken Windows theory heavily influenced law enforcement’s evolution in the United States over the past 25 years. In the early 1990s, Mayor Rudolph Giuliani and NYPD Commissioner William Bratton carried out what is perhaps the most famous example of Broken Windows policing. The city’s experiment started in the subway system when, in April 1990, Mayor David Dinkins named Bratton head of Transit Police.⁴⁷ At that time, disorder on the subways had led to the type of fear that Kelling and Wilson described in their article.⁴⁸ According to a 1985 *Los Angeles Times* article, New York experienced 14,000

⁴³ *Id.* at 36.

⁴⁴ *Id.* at 36-37.

⁴⁵ *Id.* at 38.

⁴⁶ *Id.* at 35.

⁴⁷ WILLIAM BRATTON & PETER KNOBLER, TURNAROUND: HOW AMERICA’S TOP COP REVERSED THE CRIME EPIDEMIC 142 (1998).

⁴⁸ Perhaps the event that most encapsulated this fear was the infamous Bernhard Goetz incident. On December 22, 1984, Goetz shot four young black men while riding the number 2 train in Manhattan. Max Kutner, *30 Years After Bernhard Goetz, A Subway Shooting Evokes Comparison*, NEWSWEEK (Mar. 13, 2015, 2:16 PM), <http://www.newsweek.com/30-years-after-bernhard-goetz-subway-shooting-evokes-comparisons-313689> [<http://perma.cc/F2LY-UKW5>]. He claimed that one of the teenagers approached him and told him, “Give me \$5.” *Id.* According to Goetz, the look on the teenager’s face made him fear for his life. *Id.* Following the shooting, many viewed Goetz as a vigilante hero who stood up to criminals in a way that the city was unable to do. *Id.* He was ultimately acquitted of the shooting on a theory of self-defense. Kirk Johnson, *Goetz is Cleared in Subway Attack; Gun Count Upheld; Acquittal Won in Shooting of 4 Youths—Prison Term Possible on Weapon Charge*, N.Y. TIMES (June 17, 1987), <http://www.nytimes.com/1987/06/17/nyregion/goets-cleared-subway-attack-gun-count-upheld-acquittal-won-shooting-4-youths.html?pagewanted=all> [<http://perma.cc/3J36-F25P>]. Goetz unsuccessfully ran for mayor in 2001, and in 2013, he was arrested for selling marijuana to an undercover police officer. Michael Schwartz, *Bernard Goetz, Man in ‘84 Subway Shooting, Faces Marijuana Charges*, N.Y. TIMES (Nov. 2, 2013), http://www.nytimes.com/2013/11/03/nyregion/bernard-goetz-man-in-84-subway-shooting-faces-marijuana-charges.html?_r=0 [<http://perma.cc/25VY-L3ZF>].

felonies in the underground transit system in a single year.⁴⁹ Robberies on the subway had increased by 48% in the two years before Bratton took over, leading to mass exodus from the system's use.⁵⁰ The situation was so dire that the Metropolitan Transit Authority Chairman—the very man who was in charge of running the city's subway system—told the press that he would not allow his son to ride the subway after dark due to his “anxiety” about crime.⁵¹ Influenced by Broken Windows, Bratton sought to alleviate this fear by cracking down on minor offenses, like fare evading, that occurred in the transit system.⁵² Bratton's approach resulted in a 22% drop in overall felonies on the subway, a 44% decrease in subway robberies, and a 50% decrease in fare evasion.⁵³ From 1990 through 1993, the drop in the transit system's overall crime rate outpaced crime reduction on the streets—where quality-of-life policing was less forceful.⁵⁴ The effects that Broken Windows policing has had on the subway system are still felt today. According to a recent Thompson Reuters Foundation survey, interviewees ranked New York City's subway system among the safest in the world.⁵⁵ While there were 17 major felonies on the subway per day in 1997, there were only 7 per day in 2013.⁵⁶ This reduction came despite an almost two million daily ridership increase in that same timespan.⁵⁷

⁴⁹ Charles J. Hanley, *In Subway Crime, N.Y. Still Leads the World*, L.A. TIMES (Mar. 17, 1985), http://articles.latimes.com/1985-03-17/news/mn-35322_1_subway-crime [<http://perma.cc/JHV7-75ND>].

⁵⁰ BRATTON & KNOBLER, *supra* note 47, at 143.

⁵¹ *Ravitch Keeps His Son Off Subways at Night*, N.Y. TIMES (Jan. 21, 1982), <http://www.nytimes.com/1982/01/21/nyregion/ravitch-keeps-his-son-off-subways-at-night.html> [<http://perma.cc/A58N-XWVS>].

⁵² BRATTON & KNOBLER, *supra* note 47, at 152; see also Jeffrey Bellin, *The Inverse Relationship Between the Constitutionality and Effectiveness of New York City “Stop and Frisk,”* 94 B.U. L. REV. 1495, 1503-04 (2014) (“Bratton had garnered attention as NYC Transit Police Commissioner by embracing the increasingly popular Broken Windows theory of policing: pouring resources into arresting minor offenders, like subway fare evaders, in the hope that a decrease in low-level ‘disorder’ would lead to fewer serious crimes.”).

⁵³ BRATTON & KNOBLER, *supra* note 47, at 180.

⁵⁴ WILLIAM J. BRATTON, N.Y. POLICE DEPT., BROKEN WINDOWS AND QUALITY-OF-LIFE POLICING IN NEW YORK CITY 2 (2015), http://www.nyc.gov/html/nypd/downloads/pdf/analysis_and_planning/qol.pdf [<http://perma.cc/V5US-JQQH>] (showing a 35.9% decrease in crime rates in the subway system but a 17.9% decrease in the rest of the city).

⁵⁵ Lisa Anderson, *EXCLUSIVE-POLL: New York City Transport Seen as Safest in World for Women*, THOMSON REUTERS FOUND. (Oct. 29, 2014, 12:01 AM), <http://www.trust.org/item/20141029000109-g20eo> [<http://perma.cc/MXC2-8LGM>].

⁵⁶ Sarah Ryley & Pete Donohue, *EXCLUSIVE: Safest and Riskiest Areas of New York's Subway System Revealed in Daily News Investigation*, N.Y. DAILY NEWS (June 22, 2014, 2:00 AM), <http://www.nydailynews.com/new-york/nyc-crime/daily-news-analysis-reveals-crime-rankings-city-subway-system-article-1.1836918> [<http://perma.cc/6E9X-LAKA>].

⁵⁷ *More Than 6 Million Customers Ride Subway on Five Separate Days in September*, METRO. TRANSIT AUTH. (Oct. 22, 2014), <http://www.mta.info/news-subway->

After he was elected Mayor of New York City in 1993, Rudy Giuliani selected Bratton as Police Commissioner of the NYPD because Giuliani believed in Broken Windows policing and was impressed by Bratton's success with the approach under Mayor Dinkins.⁵⁸ Giuliani and Bratton focused law enforcement efforts on quality-of-life issues, famously singling out "squeegee men"—panhandlers who would approach stopped motorists, "clean" their windows, and demand donations for these "services."⁵⁹ Bratton also placed officers on "beer and piss patrol," where they would look out for those who committed minor offenses (e.g., open container and public urination violations) so that police could stop the perpetrators and check them for identification.⁶⁰ During these stops, police would run the IDs for outstanding warrants and frisk the detainees for weapons.⁶¹ Police discovered that, in many instances, individuals who committed minor violations were also wanted for other crimes.⁶²

As a result of these tactics, the city experienced a 70% increase in misdemeanor arrests during the 1990s.⁶³ A decrease in crime rates in New York City accompanied this more aggressive policing. Between 1990 and 2015, homicides fell from 2,245 to 350, and the NYPD has reported that the rates of other crimes have diminished as well.⁶⁴ Interestingly, unlike other cities that experienced reductions in crime rates during this time period, New York City experienced a reduction in incarceration rates simultaneously with the decrease in crime.⁶⁵ That is because Broken Windows is a proactive theory of policing—emphasizing informal implementation of community norms and crime prevention—rather than a reactive theory of law enforcement that promotes the initiation of formal legal proceedings after

new-york-city-transit-ridership-record-breaking/2014/10/22/more-6-million-customers-ride [http://perma.cc/CU4N-XZCZ] (showing 4,132,332 riders on the peak ridership day in 1997 and 5,987,595 riders on the peak day in 2013).

⁵⁸ Eric Pooley & Elaine Rivera, *One Good Apple*, TIME, Jan. 15, 1996, at 54.

⁵⁹ George L. Kelling, *Why Did People Stop Committing Crimes? An Essay About Criminology and Ideology*, 28 FORDHAM URB. L.J. 567, 571 & n.10 (2000).

⁶⁰ Pooley & Rivera, *supra* note 58.

⁶¹ *Id.*

⁶² *Id.*

⁶³ David R. Francis, *What Reduced Crime in New York City*, NAT'L BUREAU OF ECON. RESEARCH, <http://www.nber.org/digest/jan03/w9061.html> [http://perma.cc/K52W-MS6Z] (last visited May 17, 2016).

⁶⁴ See Bellin, *supra* note 52, at 1520-21; Pervaiz Shallwani & Mark Morales, *NYC Officials Tout New Low in Crime, but Homicide, Rape, Robbery Rose*, WALL ST. J. (Jan. 4, 2016, 9:00 PM), <http://www.wsj.com/articles/nyc-officials-tout-new-low-in-crime-but-homicide-rape-robbery-rose-1451959203> [http://perma.cc/959T-3ZRM].

⁶⁵ See Bellin, *supra* note 52, at 1529.

crime occurs.⁶⁶ As a result, police prevent crime before it happens through active quality-of-life enforcement instead of spending resources investigating crime after the fact.

The City Council's recent bill ordering panhandlers to operate in certain zones is a perfect example of legislation that is driven by the premise underlying Broken Windows policing: that law enforcement has a responsibility to enforce community norms and deter disorderly or disreputable behavior. Law enforcement is so concerned with Spider-Man and the desnudas because allowing deviant behavior to go unaddressed will result in that behavior's proliferation. The panhandlers' expansion from Times Square to other areas of the city, and their increasingly aggressive behavior, serve as anecdotal evidence that the theory may in fact be reality.

While some scholarship has challenged the premises underlying Broken Windows and its effectiveness as a crime reduction strategy,⁶⁷ it undoubtedly remains an influential theory in the policing world. Despite running on a progressive platform in which he criticized the NYPD's "Stop and Frisk" program, Mayor de Blasio chose Bratton to serve as his police commissioner and has publicly affirmed the city's commitment to enforcing laws, like prohibitions on subway dancing and panhandling, that are designed to preserve a high quality of life.⁶⁸ Looking at Broken Windows theory's influence on community policing strategies

⁶⁶ See Bellin, *supra* note 52, at 1530-31.

⁶⁷ See, e.g., STEVEN D. LEVITT & STEPHEN J. DUBNER, *FREAKONOMICS* 136-44 (2005) (suggesting that legalized abortion may have played a larger role than policing strategies in reducing crime during the 1990s); Bernard E. Harcourt & Jens Ludwig, *Broken Windows: New Evidence from New York City and a Five-City Social Experiment*, 73 U. CHI. L. REV. 271, 276-77 (2006) (arguing that reduction in crime in New York City's high-crime neighborhoods during the 1990s was a "mean reversion" following the end of the city's crack epidemic and that moving people from disorderly to affluent neighborhoods does not reduce their criminal behavior according to a multicity study); Ana Joanes, Note, *Does the New York City Police Department Deserve Credit for the Decline in New York City's Homicide Rates? A Cross-City Comparison of Policing Strategies and Homicide Rates*, 33 COLUM. J.L. & SOCIAL PROBS. 265, 267 (2000) (arguing that crime is cyclical and using three index measures to show that crime in New York during the 1990s did not fall at a greater rate than other cities that employed different policing strategies). *But see* MALCOLM GLADWELL, *THE TIPPING POINT* 140-51 (2000) (arguing that Broken Windows contributed to an environmental change in New York City that played an important role in reversing the city's crime epidemic); GEORGE L. KELLING & WILLIAM H. SOUSA, JR., MANHATTAN INSTITUTE, *DO POLICE MATTER? AN ANALYSIS OF THE IMPACT OF NEW YORK CITY'S POLICE REFORMS* 8-9 (2001), http://www.manhattan-institute.org/pdf/cr_22.pdf [<http://perma.cc/P8S9-AX3D>] (running statistical regression analyses and concluding that "broken-windows" policing, as reflected by arrests for misdemeanor offenses, has exerted the most significant influence on trends in violent crime" when compared to changes in the economy, reductions in the crack trade, or demographics).

⁶⁸ Christopher Robbins, *De Blasio: Broken Windows Policing Is Here to Stay*, *GOETHAMIST* (July 28, 2014, 3:45 PM), http://gothamist.com/2014/07/28/de_blasio_broken_windows_policing_i.php [<http://perma.cc/ZG7T-U636>].

helps explain the government's visceral reaction to the Times Square panhandlers; it perceives them as threatening the city's quality of life. The government's responsibility to uphold the Constitution, however, limits the steps it may take to curb panhandling activity. The next section addresses concerns that Broken Windows theory's emphasis on preventive policing and maintaining order may conflict with liberty interests protected by the First Amendment.

B. The Apparent Conflict Between Broken Windows and the First Amendment

The conception of police as guardians of order and enforcers of community norms can potentially conflict with constitutional notions of individual liberty and equal protection. Kelling and Wilson themselves recognized this potential, particularly in the context of how police interact with citizens from minority groups.⁶⁹ After all, the majority tends to define community norms, so there is a risk that culturally marginalized groups will disproportionately become targets of law enforcement. Kelling and Wilson hoped that such consequences could be avoided through a meticulous officer selection process and quality police training.⁷⁰ The concern that proactive policing could single out racial minorities underscored U.S. District Court Judge Shira Scheindlin's opinion in *Floyd v. City of New York*, where she ruled that the NYPD "Stop and Frisk" policy violated the Fourth and Fourteenth Amendments.⁷¹ Judge Scheindlin emphasized that we as a society care not only about effectively reducing crime but also about protecting individual liberty. She wrote that "[m]any police practices may be useful for fighting crime—preventive detention or coerced confessions, for example—but because they are unconstitutional they cannot be used, no matter how effective."⁷² Judge Scheindlin recognized that the most effective crime reduction techniques could possibly threaten citizens' liberties.

⁶⁹ Kelling & Wilson, *supra* note 1, at 35 ("The concern about equity is more serious. We might agree that certain behavior makes one person more undesirable than another but how do we ensure that age or skin color or national origin or harmless mannerisms will not also become the basis for distinguishing the undesirable from the desirable? How do we ensure, in short, that the police do not become the agents of neighborhood bigotry? We can offer no wholly satisfactory answer to this important question.").

⁷⁰ *Id.*

⁷¹ *Floyd v. City of New York*, 959 F. Supp. 2d 540, 658-61 (S.D.N.Y. 2013).

⁷² *Id.* at 556.

One of those liberties is the freedom of speech, enshrined in the First Amendment.⁷³ There are several theories upon which free speech protections are justified. First, in a democratic republic like the United States, the free exchange of ideas is necessary to preserve self-governance.⁷⁴ Second, open competition in a marketplace of ideas is the best crucible for determining the truth.⁷⁵ Third, exposure to ideas that we disagree with teaches us to tolerate others when we are confronted with beliefs that we find undesirable.⁷⁶ Finally, free expression is an essential aspect of individual autonomy and the development of the human character.⁷⁷ These rationales behind the First Amendment all support the proposition that public outrage at a speaker's message does not justify abridging that individual's right to speak his mind. As the Supreme Court has noted, "[A] principal 'function of free speech [in our] . . . government is to invite dispute.'" ⁷⁸ That is why regulations of speech that target a speaker's message are presumptively unconstitutional.⁷⁹

Some of the principles underlying the Free Speech Clause may conflict with Broken Windows policing, which places a premium on order maintenance as a means of effectively reducing crime, usually at the expense of unpopular behavior (e.g., public drunkenness, panhandling, urinating on the street). It is possible to see how some of this unpopular behavior might also be minimally expressive. To use an example other than panhandling (which will be explored in more detail in Parts II and III), consider public urination. An individual may choose to relieve himself on a municipal building, for example, to protest against a certain government policy.⁸⁰ The individual in this case would seek to express his distaste for the government through his

⁷³ U.S. CONST. amend. I ("Congress shall make no law . . . abridging the freedom of speech . . .").

⁷⁴ CALVIN MASSEY, *AMERICAN CONSTITUTIONAL LAW: POWERS AND LIBERTIES* 850 (4th ed. 2012).

⁷⁵ *Id.*; see also *Abrams v. United States*, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting) ("[T]he theory of our Constitution [is] . . . that the best test of truth is the power of the thought to get itself accepted in the competition of the market . . .").

⁷⁶ MASSEY, *supra* note 74, at 851.

⁷⁷ *Id.*

⁷⁸ *Texas v. Johnson*, 491 U.S. 397, 408 (1989) (quoting *Terminiello v. Chicago*, 337 U.S. 1, 4 (1949)).

⁷⁹ *R.A.V. v. City of St. Paul*, 505 U.S. 377, 382 (1992).

⁸⁰ Professor Mark Tushnet uses ticket scalping as another example. While the justifications for prohibiting ticket scalping are about economics rather than preserving quality of life, it is possible to view the activity as minimally expressive. See Mark Tushnet, *Art and the First Amendment*, 35 COLUM. J.L. & ARTS 169, 174 n.16 (2012). As Tushnet explains, a libertarian may scalp tickets "as a way [to] subvert[] the regulatory state," thereby expressing opposition to perceived government overreach. See *id.* at 191.

actions, although most people would undoubtedly find the way he chose to do so repugnant. This is where the policy goals of Broken Windows policing and First Amendment theory conflict. As mentioned in Section I.A, Broken Windows theory is premised on the idea that police should proactively address the public's fear of disorder by informally reinforcing community norms against those who exhibit disreputable conduct.⁸¹ This "view that the police ought to protect communities as well as individuals"⁸² contrasts with the belief that individual citizens should have the right to freely express themselves, even if doing so makes the public feel uncomfortable. Tension arises when a community perceives a means of free expression as a threat to its quality of life.

The concern that proactive policing may conflict with the exercise of First Amendment rights is not a purely hypothetical one. In 2005, for instance, the New York Civil Liberties Union (NYCLU) released a report evaluating the way that the NYPD handled protests outside the Republican National Convention.⁸³ In that document, the NYCLU criticized the NYPD's "command and control" model for handling the demonstrations.⁸⁴ This approach, which the NYCLU claimed stemmed from a Broken Windows policing strategy, utilized techniques such as police barricades and the exercise of force against demonstrators for trivial legal violations.⁸⁵ Demonstrators sued New York City for violating their First Amendment rights by carrying out mass arrests during the rally and unreasonably detaining protesters.⁸⁶ The city ultimately settled the lawsuits for \$18 million.⁸⁷

The conflict between the goals of maintaining public order and protecting the right to self-expression is obvious in the context of political protests. After all, the protection of political

⁸¹ Kelling & Wilson, *supra* note 1, at 38.

⁸² *Id.*

⁸³ See generally CHRISTOPHER DUNN ET AL., N.Y. CIVIL LIBERTIES UNION, RIGHTS AND WRONGS AT THE RNC (2005), http://www.nyclu.org/pdfs/rnc_report_083005.pdf [<http://perma.cc/V2U2-YLPR>] (issuing a report criticizing the NYPD's handling of protests at the 2004 Republican National Convention).

⁸⁴ *Id.* at 11.

⁸⁵ *Id.*

⁸⁶ Complaint at 29, *Schiller v. City of New York*, No. 1:04-cv-07922-RJS-JCF (S.D.N.Y. Oct. 7, 2004), 2004 WL 5364646; First Amended Complaint at 21, *Dinler v. City of New York*, No. 04 Civ. 07921 (S.D.N.Y. Feb. 17, 2005).

⁸⁷ Erin Durkin & Daniel Beekman, *City Pays \$18 Million to Settle Lawsuits Stemming from 2004 Republican National Convention at Madison Square Garden*, N.Y. DAILY NEWS (Jan. 15, 2014, 10:50 PM), <http://www.nydailynews.com/new-york/city-pays-18m-settle-rnc-lawsuits-article-1.1581416> [<http://perma.cc/FPP3-RW95>].

speech is central to the First Amendment.⁸⁸ The importance of that speech requires the government to narrowly tailor any restrictions of political speech to further a compelling government interest.⁸⁹ Whether regulations of begging or panhandling implicate the First Amendment is less clear. Part II of this note explores First Amendment doctrine to consider whether panhandling is sufficiently expressive to receive protection. Here, however, it is easy to see the different values that Broken Windows policing (protecting communities from the negative effects of disorder) and the First Amendment (protecting individual freedom of expression) represent. Understanding these sometimes conflicting values is critical to determining just how far the government can go in regulating panhandling activity in Times Square without running roughshod over the Constitution.

II. FIRST AMENDMENT DOCTRINE

A. *Is Panhandling Covered by the First Amendment?*

1. Basic Doctrine

For the First Amendment to protect panhandling, it must *cover* panhandling to begin with. Questions of protection and coverage are not one and the same,⁹⁰ and if the First Amendment does not cover a particular activity, that activity is categorically not afforded protection.⁹¹ Even an activity that the First Amendment covers, however, may not be protected if the government's regulation satisfies the appropriate doctrinal test.⁹² The First Amendment's Free Speech Clause only covers a particular category of activity, "speech."⁹³ Therefore, for a

⁸⁸ See *Morse v. Frederick*, 551 U.S. 393, 403 (2007) ("Political speech, of course, is 'at the core of what the First Amendment is designed to protect.'" (quoting *Virginia v. Black*, 538 U.S. 343, 365 (2003))).

⁸⁹ See *Citizens United v. FEC* 558 U.S. 310, 340 (2010) ("Laws that burden political speech are 'subject to strict scrutiny,' which requires the Government to prove that the restriction 'furthers a compelling interest and is narrowly tailored to achieve that interest.'" (quoting *FEC v. Wis. Right to Life, Inc.*, 551 U.S. 449, 451 (2007))).

⁹⁰ See Tushnet, *supra* note 80, at 174-75.

⁹¹ See *id.* at 175 ("First Amendment analysis is simply irrelevant to activities not covered by the First Amendment.").

⁹² See *id.* For example, if activity is covered by the First Amendment, a court will look at whether the government's regulation is content neutral or content based. *Id.*

⁹³ *Texas v. Johnson*, 491 U.S. 397, 404 (1989); see also Frederick Schauer, *Categories and the First Amendment: A Play in Three Acts*, 34 VAND. L. REV. 265, 267-68 (1981) ("Not every case is a first amendment case. This is hardly a controversial observation, but it reveals that the first amendment is itself a category, or, more accurately, that it covers a category of behavior. . . . [W]e can begin by saying that, in an important way, it is the category of 'speech' that is set off by the first amendment for special protection.").

panhandling regulation to implicate free speech doctrine, panhandling must constitute speech.

While all conduct arguably contains some expressive elements (take the public urination hypothetical in Section I.B, for example), minimally expressive conduct is not considered speech for First Amendment purposes.⁹⁴ The Court has held, however, that certain conduct has “sufficient communicative elements to bring the First Amendment into play.”⁹⁵ In determining whether conduct falls within the scope of the First Amendment’s free speech protections, the prevailing test is “whether ‘[a]n intent to convey a particularized message was present, and [whether] the likelihood was great that the message would be understood by those who viewed it.’”⁹⁶ Flag burning is the quintessential example of expressive conduct. The Supreme Court has held that burning the American flag in protest is politically expressive activity that is sufficiently communicative to justify First Amendment coverage.⁹⁷ There is no question that someone who lights a flag on fire during a political rally intends to express displeasure with the government, and everyone who witnesses the act will understand the flag burner’s message. On the other hand, the First Amendment would probably not cover public urination. Even if someone urinates on a building in protest, a reasonable person would not likely understand the message that the urinating individual intends to convey. A law that is designed to maintain public order by prohibiting public urination would therefore be consistent with the First Amendment.

There are other expressive activities that the First Amendment categorically does not cover, even some that involve the spoken word. The Court has identified “well-defined and narrowly limited classes of speech, the prevention and punishment of which have never been thought to raise any Constitutional problem.”⁹⁸ Types of speech that are categorically denied First Amendment protection include obscenity,⁹⁹ child

⁹⁴ See, e.g., *Dallas v. Stanglin*, 490 U.S. 19, 25 (1989) (“It is possible to find some kernel of expression in almost every activity a person undertakes—for example, walking down the street or meeting one’s friends at a shopping mall—but such a kernel is not sufficient to bring the activity within the protection of the First Amendment.”).

⁹⁵ *Johnson*, 491 U.S. at 404.

⁹⁶ *Id.* (quoting *Spence v. Washington*, 418 U.S. 405, 410-11 (1974)).

⁹⁷ *Id.* at 406; see also *United States v. Eichman*, 496 U.S. 310, 315 n.4 (1990) (describing flag burning in protest as “concededly political speech”).

⁹⁸ *Chaplinsky v. New Hampshire*, 315 U.S. 568, 571-72 (1942).

⁹⁹ *Miller v. California*, 413 U.S. 15, 23 (1973) (“This much has been categorically settled by the Court, that obscene material is unprotected by the First Amendment.”). Material is obscene when (1) a trier of fact finds that “the average person, applying contemporary community standards [as opposed to national standards] would find that the

pornography,¹⁰⁰ true threats,¹⁰¹ incitement,¹⁰² and “fighting words.”¹⁰³ The Supreme Court has declined to add new categories to this narrow class in recent years.¹⁰⁴ If panhandling is sufficiently expressive to bring the First Amendment into play, the amendment will likely cover it.

Panhandling, which often involves the spoken word, seems to fit somewhere between flag burning and public urination on the scale of expressive conduct. The panhandler is, after all, expressing something—a desire to receive money—but the reason for engaging in the conduct may not be reasonably apparent. The Supreme Court has never ruled on whether panhandling is sufficiently expressive to warrant First Amendment protection.¹⁰⁵ The Court has found on several occasions, however, that the First Amendment protects charitable organizations’ right to solicit alms.¹⁰⁶ The Court in *Schaumburg v. Citizens for Better*

work, taken as a whole, appeals to the prurient interest”; (2) “the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law”; and (3) “the work, taken as a whole, lacks serious literary, artistic, political, or scientific value.” *Id.* at 24 (quoting *Kois v. Wisconsin*, 408 U.S. 229, 230 (1972); *A Book Named “John Cleland’s Memoirs of a Woman of Pleasure” v. Massachusetts*, 383 U.S. 413, 419 (1966)). Material appeals to the prurient interest when it has “a tendency to excite lustful thoughts.” *Roth v. United States*, 354 U.S. 476, 487 n.20 (1957).

¹⁰⁰ *New York v. Ferber*, 458 U.S. 747, 764 (1982) (holding that “the category of child pornography . . . like obscenity, is unprotected by the First Amendment”). Child pornography is “limited to works that visually depict sexual conduct by children below a [certain] age” and is categorically unprotected even if the depiction is not legally obscene. *Id.*

¹⁰¹ *Virginia v. Black*, 538 U.S. 343, 359 (2003) (including “[t]rue threats” in the classes of speech that are categorically unprotected by the First Amendment and defining true threats as “those statements where the speaker means to communicate a serious expression of an intent to commit an act of unlawful violence to a particular individual or group of individuals”).

¹⁰² *Brandenburg v. Ohio*, 395 U.S. 444, 447 (1969) (holding that the First Amendment “do[es] 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”).

¹⁰³ *Chaplinsky*, 315 U.S. at 572 (holding that “fighting” words fall in the narrow class of speech not afforded First Amendment protection). Fighting words are defined as those that a reasonable listener would take “as a direct personal insult or an invitation to exchange fisticuffs.” *Texas v. Johnson*, 491 U.S. 397, 409 (1989). Fighting words are thus distinguished from incitement because they instinctually cause a listener to inflict violence on the speaker. Incitement is different because it occurs when the speaker addresses a crowd, rather than another individual face-to-face, and causes the crowd to engage in imminent lawless action or commit violence against others. Burton Caine, *The Trouble with “Fighting Words”*: *Chaplinsky v. New Hampshire Is a Threat to First Amendment Values and Should Be Overruled*, 88 MARQ. L. REV. 441, 450-52 (2004).

¹⁰⁴ See *Brown v. Entm’t Merchs. Ass’n*, 564 U.S. 786, 790 (2011) (holding that violent “video games qualify for First Amendment protection”); *United States v. Stevens*, 559 U.S. 460, 472 (2009) (refusing to add “depictions of animal cruelty” to the categories of speech outside the scope of the First Amendment).

¹⁰⁵ *Speet v. Schuette*, 726 F.3d 867, 874 (6th Cir. 2013).

¹⁰⁶ See, e.g., *Riley v. Nat’l Fed’n of the Blind of N.C., Inc.*, 487 U.S. 781, 789 (1988); *Sec’y of State of Md. v. Joseph H. Munson Co.*, 467 U.S. 947, 959-60 (1984); *Schaumburg v. Citizens for Better Env’t*, 444 U.S. 620, 632 (1980).

Environment held that charitable door-to-door solicitation falls within the scope of the First Amendment because it “involve[s] a variety of speech interests” such as “communication of information, the dissemination and propagation of views and ideas, and the advocacy of causes.”¹⁰⁷ When seeking charitable contributions, canvassers who receive a salary from charitable organizations “are necessarily more than solicitors for money” because their activity is “characteristically intertwined” with speech advocating for different political or religious views.¹⁰⁸

That soliciting contributions for charitable purposes is protected speech does not necessarily mean that the act of actually receiving money at the time of solicitation is protected speech. There is some disagreement on this point among courts. In *Bery v. New York*, the Second Circuit considered a challenge to New York City’s general vendors license.¹⁰⁹ A group of artists challenged the licensing requirement, arguing that conditioning their ability to sell their wares upon obtaining a license violated the First Amendment.¹¹⁰ The City argued that peddling art is not conduct that implicates the First Amendment because it is not “inseparably intertwined with a ‘particularized message.’”¹¹¹ The Second Circuit disagreed, holding that the selling of a vendor’s own artwork conveyed the artist’s belief that the general public, and not only the rich, should have the opportunity to view and purchase art.¹¹² A struggling artist’s ability to express this message would be lost if he did not have the chance to sell his work.¹¹³ Like in *Schaumburg*, the expression and receipt of money were inextricable in this case.

In *State v. Chepilko*, a New Jersey state court arrived at the opposite conclusion.¹¹⁴ Chepilko was punished under an ordinance that made it illegal to sell merchandise on the Atlantic City boardwalk after he took pictures of tourists and sold the photographs to them.¹¹⁵ The court rejected his First Amendment claim because Chepilko’s primary purpose in selling the pictures was not artistic expression.¹¹⁶ Rather, his predominant intent was

¹⁰⁷ See, e.g., *Schaumburg*, 444 U.S. at 632.

¹⁰⁸ *Id.*

¹⁰⁹ *Bery v. City of New York*, 97 F.3d 689 (2d Cir. 1996).

¹¹⁰ *Id.* at 691.

¹¹¹ *Id.* at 695 (quoting *Young v. N.Y.C. Transit Auth.*, 903 F.2d 146, 153 (2d Cir. 1990)).

¹¹² *Id.* at 696.

¹¹³ *Id.*

¹¹⁴ *State v. Chepilko*, 965 A.2d 190, 192 (N.J. Super. App. Div. 2009).

¹¹⁵ *Id.*

¹¹⁶ *Id.* at 200.

to make money.¹¹⁷ Because he was not “genuinely and primarily engaged in artistic self-expression’ but ‘instead a chiefly commercial exercise,’” his conduct did not bring the First Amendment into play.¹¹⁸ In this case, Chepilko asking for money was not expressive conduct.

The Times Square panhandlers are more akin to Chepilko than the artists in *Bery* who sought to sell their wares. There are some news stories that reveal the panhandlers’ true intent: they want to make money. In an interview with the *New York Times*, Mey Ovalles, one of the desnudas, explained why she began walking bare-breasted in Times Square. After working at a restaurant in Miami, she discovered that she could make more money as a desnuda.¹¹⁹ She moved to New York and earns about \$300 a day in tips by taking photographs with tourists.¹²⁰ Ovalles considers her activity “like any other job in another place.”¹²¹ Times Square’s Naked Cowboy is even more successful. Thanks to some clever branding (he has trademarked the name “Naked Cowboy”)¹²² and advice from a financial advisor,¹²³ he makes \$150,000 a year.¹²⁴ A sign that one 36-year-old Times Square panhandler from Arkansas displays sums up the sentiment quite succinctly: “F—k You!!! Pay Me!!!!!!.”¹²⁵

Dressing in a costume or walking bare-breasted in Times Square may be a form of artistic expression that is entitled to First Amendment protection if it falls in the category of “performing art.”¹²⁶ Unlike charitable solicitation, however, it is

¹¹⁷ *Id.*

¹¹⁸ *Id.* (quoting *Mastrovincenzo v. City of New York*, 435 F.3d 78, 91 (2d Cir. 2006)).

¹¹⁹ Wright, *supra* note 7.

¹²⁰ *Id.*

¹²¹ *Id.*

¹²² *Naked Cowboy v. CBS*, 844 F. Supp. 2d 510, 513 (S.D.N.Y. 2012). The Naked Cowboy has contracted with a number of corporate sponsors and has used his brand to sell “T-Shirts, Postcards, Keychains, Shot Glasses, Music CDs, Pencils, Photos, and more.” *Id.* Apparently, “[a]ccording to the New York State tourism department [the Naked Cowboy] is ‘more recognizable than the Statue of Liberty.’” *Id.* (quoting Complaint at ex. B, *Naked Cowboy v. CBS*, 844 F. Supp. 2d 510 (S.D.N.Y. 2012)).

¹²³ *The Naked Cowboy Flaunts His Assets*, N.Y. MAG. (Feb. 20, 2008, 12:45 PM), http://nymag.com/daily/intelligencer/2008/02/the_naked_cowboy_flaunts_his_a.html# [<http://perma.cc/F2LR-LSJ6>].

¹²⁴ Cowles, *supra* note 8.

¹²⁵ Bruce Golding et al., ‘F—k You! Pay Me!’: Times Square’s New Welcome Wagon, N.Y. POST (July 9, 2015, 2:04 AM), <http://nypost.com/2015/07/09/this-vulgar-panhandler-is-times-squares-new-welcome-wagon/> [<http://perma.cc/FP56-Y345>].

¹²⁶ *Berger v. City of Seattle*, 569 F.3d 1029, 1036 n.4 (9th Cir. 2009) (“Music and performance art are forms of expressive activity protected by the First Amendment.” (citing *Schad v. Borough of Mount Ephraim*, 452 U.S. 61, 65 (1981) (“Entertainment, as well as political and ideological speech, is protected; motion pictures, programs broadcast by radio and television, and live entertainment, such as musical and dramatic works fall within the First Amendment guarantee.”))).

possible to separate that expression from the commercial activity a person undertakes when he or she asks for and receives money for personal use. Narrowly defining panhandling as “solicitation and the immediate receipt of money” can eliminate any First Amendment problems by removing the conduct from First Amendment coverage. While the Supreme Court has not resolved the question of whether panhandling is a form of expressive conduct that can be separated from the subsequent receipt of cash, Justice Kennedy’s concurring opinion in *International Society for Krishna Consciousness v. Lee* is informative.¹²⁷

2. *International Society for Krishna Consciousness v. Lee*

In *Krishna Consciousness*, the Court upheld a Port Authority prohibition on solicitation at an airport terminal.¹²⁸ Chief Justice Rehnquist, writing for the majority, applied a reasonableness standard in analyzing the prohibition’s constitutionality, finding that airports are not public forums.¹²⁹ The Court held that such a prohibition is reasonable because solicitation can disrupt business by altering the flow of traffic in the airport, and solicitors can take advantage of vulnerable travelers by means of fraud and duress.¹³⁰

Justice Kennedy concurred in the judgment. He disagreed with the Court’s characterization that an airport terminal does not constitute a public forum.¹³¹ He wrote, however, that a “ban on solicitation and receipt of funds” is either a “valid regulation of the time, place, and manner of protected speech in this forum, or else is a valid regulation of the nonspeech element of expressive conduct.”¹³² Kennedy agreed with the proposition that solicitation is a form of speech protected by the First Amendment.¹³³ If the ban targeted all solicitation, he would have struck it down.¹³⁴ But the regulation in *Krishna Consciousness* was narrower than that. It merely banned “solicitation and receipt of funds.”¹³⁵ This prohibition was aimed at conduct, specifically, the “physical exchange of money.”¹³⁶ Thus, Justice Kennedy concluded that “the

¹²⁷ Int’l Soc’y for Krishna Consciousness, Inc. v. Lee, 505 U.S. 672, 693 (1992) (Kennedy, J., concurring).

¹²⁸ *Id.* at 684-85.

¹²⁹ *Id.* at 683.

¹³⁰ *Id.* at 683-84.

¹³¹ *Id.* at 693 (Kennedy, J., concurring).

¹³² *Id.*

¹³³ *Id.* at 704 (Kennedy, J., concurring).

¹³⁴ *Id.*

¹³⁵ *Id.*

¹³⁶ *Id.* at 705 (Kennedy, J., concurring).

regulation permit[ed] expression that solicits funds, but limit[ed] the manner of that expression to forms other than the immediate receipt of money.”¹³⁷ Because in-person solicitation for an immediate exchange of cash heightens the risk that a solicited person would become the victim of fraud or duress, Justice Kennedy decided that the ban did not target a speaker’s message and was narrowly tailored to effectuate the government’s interest in avoiding the dangers of panhandling.¹³⁸

Justice Kennedy’s concurrence in *Krishna Consciousness* can be parsed in one of two ways. On the one hand, it stands for the proposition that the First Amendment does not cover panhandling—defined as solicitation for the immediate physical exchange of money—at all. Regulations that prohibit the physical exchange of cash do not target any particularized message. They target conduct. People ask for money for a variety of reasons. Some may seek the immediate receipt of funds for charitable purposes, while others may seek it to fund a political campaign. In either case, the physical exchange of money is not in any way inextricably linked to the message the “speaker” seeks to convey (either support for a charity or endorsement of a political candidate). Panhandling differs from something like burning a flag during a political demonstration, an act that falls within the scope of the First Amendment, in this regard. Unlike panhandling, the message associated with flag burning is immediately apparent to those who witness it.¹³⁹

Another way to read Justice Kennedy’s concurrence is that the First Amendment covers panhandling, but that panhandling is unprotected in the context of the Port Authority’s regulation. The Port Authority’s ban fit one of the doctrinal tests to determine that speech is unprotected; it was a content-neutral time, place, and manner restriction of covered speech (i.e., solicitation) or else was an incidental limitation on expressive conduct. In fact, that is how Kennedy actually described the ban, stating that it would satisfy either test and that both tests are almost indistinguishable doctrinally.¹⁴⁰

The Second Circuit articulated both views of panhandling two years earlier in *Young v. New York City Transit Authority*,

¹³⁷ *Id.*

¹³⁸ *Id.* at 706-07 (Kennedy, J., concurring).

¹³⁹ *Texas v. Johnson*, 491 U.S. 397, 405-06 (1989) (holding that while not all action taken with respect to the American flag is expressive, the “expressive, overtly political nature of [burning the flag in demonstration] was both intentional and overwhelmingly apparent”).

¹⁴⁰ *Int’l Soc’y for Krishna Consciousness*, 505 U.S. at 704 (Kennedy, J., concurring).

when it upheld a ban on begging in New York City's subway system.¹⁴¹ In *Young*, the court framed the primary question as "whether begging constitutes the kind of 'expressive conduct' protected to some extent by the First Amendment."¹⁴² The court held that the conduct was not protected, finding that "begging is not inseparably intertwined with a 'particularized message'"¹⁴³ and that "[s]peech simply is not inherent to the act" of begging.¹⁴⁴ It distinguished begging from charitable solicitation, finding that "[w]hile organized charities serve 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."¹⁴⁵ Under this approach, panhandling is not even speech for First Amendment purposes and is categorically excluded from coverage.

In the alternative, the *Young* court also found that, even assuming that begging has some communicative element (and thus warrants First Amendment coverage), prohibiting begging on the subway satisfies the test for regulating expressive conduct.¹⁴⁶ This test, and other doctrinal tests, such as those distinguishing between content-based and content-neutral restrictions on speech, determine when covered activity is protected by the First Amendment and are explored in the next section.

B. To What Extent, If Any, Is Panhandling Protected?

1. Content-Neutral vs. Content-Based Regulations

If panhandling is speech that the First Amendment covers, how may the government regulate it? There are two basic types of speech regulations: content-based and content-neutral restrictions. Content-based regulations target speech because of the speaker's message and are presumptively unconstitutional.¹⁴⁷ These regulations are subject to strict scrutiny, which means that they must be the least restrictive means of accomplishing a compelling government interest.¹⁴⁸ Conversely, a content-neutral regulation is one that is "justified without reference to the content

¹⁴¹ *Young v. N.Y.C. Transit Auth.*, 903 F.2d 146, 148 (2d Cir. 1990).

¹⁴² *Id.* at 153.

¹⁴³ *Id.*

¹⁴⁴ *Id.* at 154.

¹⁴⁵ *Id.* at 156.

¹⁴⁶ *Id.* at 161; *see also supra* note 67 and accompanying text.

¹⁴⁷ *R.A.V. v. City of St. Paul*, 505 U.S. 377, 382 (1992).

¹⁴⁸ *United States v. Playboy Entm't Grp., Inc.*, 529 U.S. 803, 813 (2000).

of the regulated speech.”¹⁴⁹ These regulations do not target a speaker’s message, but rather affect the “time, place, or manner” in which the speaker attempts to deliver that message.¹⁵⁰ Content-neutral speech restrictions that occur in public forums must be “narrowly tailored to serve a significant government interest[] and . . . leave open ample alternative channels for the communication of the information.”¹⁵¹ A regulation prescribing the decibel level at which a musician may perform in a public park would be a content-neutral regulation because it is aimed at the performance volume and not the music’s content.¹⁵² If the government targeted only rap music in its volume regulation, however, the regulation would be content-based because it targets a specific type of music.¹⁵³

The Supreme Court’s most recent explication of the distinction between content-based and content-neutral regulations came in *Reed v. Town of Gilbert*.¹⁵⁴ The *Reed* petitioners challenged a municipality’s ordinance that regulated the size and display period for different types of signs.¹⁵⁵ The ordinance prohibited outdoor sign displays anywhere in the city, but it exempted 23 sign categories.¹⁵⁶ Petitioners challenged the regulation, arguing that the ordinance’s differential treatment of their signs, which directed people to church gatherings, from other types of signs—like “political” or “ideological” signs—constituted an invalid content-based speech regulation.¹⁵⁷

The Court struck down the ordinance as facially content based.¹⁵⁸ In doing so, it rebuffed several of the government’s assertions that the regulation was content neutral. First, the Court rejected the contention that a facially content-based law could be content neutral so long as the government did not enact the law because it disagreed with the speaker’s message.¹⁵⁹ The desire to single out a particular message for disfavored treatment is a sufficient but not necessary condition to show that a

¹⁴⁹ *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989) (quoting *Clark v. Cmty. for Creative Non-Violence*, 468 U.S. 288, 293 (1984)).

¹⁵⁰ *Id.* (quoting *Clark*, 468 U.S. at 293).

¹⁵¹ *Id.* (quoting *Clark*, 468 U.S. at 293).

¹⁵² *Id.* at 803.

¹⁵³ In *Ward*, the Court held that music is speech protected by the First Amendment. *Id.* at 790. As a result, distinguishing between types of music in this situation would be presumptively invalid.

¹⁵⁴ *Reed v. Town of Gilbert*, 135 S. Ct. 2218 (2015).

¹⁵⁵ *Id.* at 2224-25.

¹⁵⁶ *Id.*

¹⁵⁷ *Id.* at 2224-26.

¹⁵⁸ *Id.* at 2227.

¹⁵⁹ *Id.* at 2228.

regulation is content based.¹⁶⁰ A court must inquire into the facial neutrality of the restriction prior to examining the government's purpose in enacting it.¹⁶¹ Second, the Court ruled that even if a speech restriction does not discriminate based on viewpoint, it is still content based if it singles out an entire subject for differential treatment.¹⁶² A law banning political speech, for example, would still be content based even if it applies to both conservative and liberal viewpoints. Lastly, the court rejected the proposition that because an ordinance is speaker- or event-based, the law is content neutral.¹⁶³ Because the sign ordinance was not the least restrictive means of achieving the government's purported interest in preventing eyesores or ensuring traffic safety, the Court found that it was unconstitutional.¹⁶⁴ The Court thus clarified the following rule for determining whether a regulation is content based: "regulation of speech is content based if a law applies to particular speech because of the topic discussed or the idea or message expressed."¹⁶⁵

While the circumstances in *Reed* made it easy to determine that the ordinance was content based, the line between content-based and content-neutral regulations is not always so well-defined. The Court's line of cases regarding statutes restricting speech outside abortion clinics makes this abundantly clear.¹⁶⁶ Most recently, in *McCullen v. Coakley*, the Supreme Court unanimously struck down a law that established a buffer zone prohibiting an individual from "knowingly stand[ing] on a 'public way or sidewalk' within 35 feet of an entrance or driveway" to an abortion clinic.¹⁶⁷ The Court divided, however, over whether a buffer zone outside an abortion clinic constituted a facially content-based restriction on speech or a content-neutral time, place, or manner restriction.¹⁶⁸ Those challenging the buffer zone argued that it was facially content based for two reasons: (1) the

¹⁶⁰ *Id.*

¹⁶¹ *Id.*

¹⁶² *Id.* at 2230.

¹⁶³ *Id.* at 2230-31.

¹⁶⁴ *Id.* at 2231-32.

¹⁶⁵ *Id.* at 2227.

¹⁶⁶ See *McCullen v. Coakley*, 134 S. Ct. 2518, 2531 (2014) (finding a buffer zone outside an abortion clinic to be a content-neutral speech restriction); *Hill v. Colorado*, 530 U.S. 703, 725 (2000) (upholding a buffer zone outside abortion clinics as a content-neutral speech regulation); *Madsen v. Women's Health Ctr., Inc.*, 512 U.S. 753, 762-63 (1994) (holding that an injunction restricting only the speech of anti-abortion protesters was not content based).

¹⁶⁷ *McCullen*, 134 S. Ct. at 2522, 2525, 2541 (quoting MASS. GEN. LAWS ch. 266, § 120E1/2(a), (b)).

¹⁶⁸ See *id.* at 2531; *id.* at 2543 (Scalia, J., concurring).

buffer zone only applied outside abortion clinics, thus discriminating against speech about abortion, and (2) it selectively exempted abortion clinic employees from the buffer zone, thus not only discriminating based on topic but also favoring a particular viewpoint.¹⁶⁹

Chief Justice Roberts, writing for the majority, held that the buffer zone was facially content neutral, even though it disproportionately affected speech about abortion.¹⁷⁰ A law is facially content based, the Court wrote, “if it require[s] ‘enforcement authorities’ to ‘examine the content of the message that is conveyed to determine whether’ a violation has occurred.”¹⁷¹ The incidentally disproportionate impact on speech about a particular subject did not render the statute content based, because a violation depended not on what a speaker said, but on where he stood.¹⁷² The majority also held that the selective exemption for abortion clinic employees did not make the statute content based. It only existed to allow employees, including counselors and maintenance workers, to do their jobs and was not designed to promote pro-abortion speech.¹⁷³ The Court found nothing in the record indicating that the abortion clinics authorized employees to speak about abortion in the buffer zone, but it suggested that if such authorization were given, it could support an as-applied challenge for viewpoint discrimination.¹⁷⁴

Justice Scalia, in a blistering dissent-like concurrence, argued that the buffer zone was facially content based. Unlike the majority, he concluded that the statute’s targeting only abortion clinics was strong evidence that the government sought to single out speech about a particular subject—abortion—for disfavored treatment.¹⁷⁵ He also insisted that an exemption for abortion clinic employees acting within the scope of their employment rendered the restriction facially content based.¹⁷⁶ Someone who works for an abortion clinic presumably supports abortion, and the exemption therefore favored that viewpoint over the viewpoint of silenced pro-life advocates, wrote Justice Scalia.¹⁷⁷ In essence, the key disagreement between the plurality and the

¹⁶⁹ *Id.* at 2530.

¹⁷⁰ *Id.* at 2531.

¹⁷¹ *Id.* (quoting *FCC v. League of Women Voters of Calif.*, 468 U.S. 364, 383 (1984)).

¹⁷² *Id.*

¹⁷³ *Id.* at 2533.

¹⁷⁴ *Id.* at 2534.

¹⁷⁵ *Id.* at 2544-45 (Scalia, J., concurring).

¹⁷⁶ *Id.* at 2546 (Scalia, J., concurring).

¹⁷⁷ *Id.*

concurrence was about how a court should determine whether a regulation is facially content based.

Reed and *McCullen* directly conflict, particularly when it comes to how the majority in *McCullen* scrutinized the buffer zone's selective exemption provision. As Justice Scalia mentioned in his concurrence, the majority "jump[ed] right over the prong that asks whether the provision 'draw[s] . . . distinctions on its face' and instead proceed[ed] directly to the purpose-related prong."¹⁷⁸ But *Reed* counseled that a court should consider facial distinctions *before* considering a regulation's purpose.¹⁷⁹ Also, *Reed*'s holding that defining speech by topic will subject a regulation to strict scrutiny is an oversimplification of the Court's First Amendment doctrine. The Court has held, for instance, that commercial speech, "that is, expression related solely to the economic interests of the speaker and its audience,"¹⁸⁰ is entitled to less protection than other types of speech.¹⁸¹ By making the distinction between commercial and noncommercial speech, the Court has found it permissible for the government to discriminate between subject matter, at least regarding certain topics. *Reed*'s holding that regulations treating speech differently based on topic are content based should not be understood to prevent the government from treating solicitation for immediate cash payment differently from other types of solicitation. The exchange of money is not itself communicative enough to allow a reasonable observer to understand the message the "speaker" is trying to convey. As a result, it is possible to separate the physical exchange of cash from the panhandler's message and regulate panhandling to serve the public's interest in preserving a decent quality of life.

2. Regulation of Expressive Conduct

Courts use a different doctrinal test to determine whether speech is protected when expressive and nonexpressive components are part of the same course of conduct. As with flag burning, there are some instances where the First Amendment covers expressive conduct. If communicative and

¹⁷⁸ *Id.* (quoting *McCullen*, 134 S. Ct. at 2531, 2533).

¹⁷⁹ *Reed v. Town of Gilbert*, 135 S. Ct. 2218, 2228 (2015).

¹⁸⁰ *Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n of N.Y.*, 447 U.S. 557, 561 (1980).

¹⁸¹ *Id.* at 562 ("[O]ur decisions have recognized 'the "common-sense" distinction between speech proposing a commercial transaction, which occurs in an area traditionally subject to government regulation, and other varieties of speech.'" (quoting *Ohralik v. Ohio State Bar Ass'n*, 436 U.S. 447, 455-56 (1978))).

noncommunicative components combine to form the same act, then “regulating the nonspeech element can justify incidental limitations on First Amendment freedoms.”¹⁸² The Supreme Court articulated the standard for regulating expressive conduct in *United States v. O’Brien*. According to the *O’Brien* test, the government may regulate sufficiently expressive conduct when (1) the regulation “is within the constitutional power of the Government,” (2) “it furthers an important or substantial government interest,” (3) that “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.”¹⁸³ In *O’Brien*, the Court upheld the conviction of a protester who burned his selective service certificate to demonstrate his opposition to the Vietnam War.¹⁸⁴ By engaging in such conduct, O’Brien violated a federal statute that made it unlawful to knowingly destroy or mutilate a selective service certificate.¹⁸⁵ The Court held that the law was a valid exercise of Congress’s constitutional power to raise armies, that it substantially furthered the proper functioning of the system Congress established to carry out that power, and that there were no narrower means the legislature could have chosen to ensure availability of the selective service certificates.¹⁸⁶ The statute was thus a justified incidental limitation on speech.

Functionally, the *O’Brien* test is similar to the traditional test for determining the validity of content-neutral regulations. Justice Kennedy, in his *Krishna Consciousness* concurrence, observed that similarity when he wrote “that the standards for assessing time, place, and manner restrictions are little, if any, different from the standards applicable to regulations of conduct with an expressive component.”¹⁸⁷ Thus, if panhandling is considered sufficiently expressive to warrant First Amendment protection, any regulation of panhandling that singles out a speaker’s message will be presumptively invalid. Alternatively, any incidental limitation of expression must be narrowly tailored to carry out a government interest and must leave open alternative channels of communication. Rather than viewing the

¹⁸² *United States v. O’Brien*, 391 U.S. 367, 376 (1968).

¹⁸³ *Id.* at 377.

¹⁸⁴ *Id.* at 370-72.

¹⁸⁵ *Id.* at 370.

¹⁸⁶ *Id.* at 381.

¹⁸⁷ *Int’l Soc’y for Krishna Consciousness, Inc. v. Lee*, 505 U.S. 672, 704 (1992) (Kennedy, J., concurring).

First Amendment as categorically leaving panhandling uncovered, several circuits have adopted this interpretation of Justice Kennedy's *Krishna Consciousness* concurrence.¹⁸⁸ As the next part will show, however, there is a circuit split regarding whether prohibiting solicitation and receipt of funds is a content-based or content-neutral regulation of speech.

III CIRCUIT RESPONSES TO JUSTICE KENNEDY'S *KRISHNA CONSCIOUSNESS* CONCURRENCE

The Supreme Court has never squarely decided whether the First Amendment protects panhandling in a public forum.¹⁸⁹ The circuits, however, are split on the issue. There are four circuit cases in which the courts have confronted Justice Kennedy's reasoning. This part describes those cases and explains how the Supreme Court's recent decision in *Reed* has thrown this area of law into disarray.

A. *Circuits Adopting Justice Kennedy's Reasoning*

Two circuits have explicitly accepted the reasoning in Justice Kennedy's *Krishna Consciousness* concurrence. In *ISKCON of Potomac, Inc. v. Kennedy*, the D.C. Circuit considered an as-applied challenge to a National Parks Department regulation that prohibited in-person solicitation of donations as well as sales of certain merchandise at the National Mall.¹⁹⁰ ISKCON received a permit to host an event on a 100-square-foot allotment of the park.¹⁹¹ The Parks Department revoked the permit after ISKCON violated the solicitation and sales bans.¹⁹²

¹⁸⁸ See *Thayer v. City of Worcester*, 755 F.3d 60, 69 (1st Cir. 2014) (concluding that the assumption that a "ban on immediate donations is a content distinction . . . finds scant support in the case law"); *ISKCON of Potomac, Inc. v. Kennedy*, 61 F.3d 949, 955 (D.C. Cir. 1995) (stating that a ban on in-person donations "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"); see also *Tushnet*, *supra* note 80, at 204 n.124 (noting "a pattern [among courts] in which activities such as panhandling and ticket scalping are held to be covered by the First Amendment, but that regulation of those activities (almost) certainly satisfies the applicable First Amendment standards").

¹⁸⁹ See *Speet v. Schuette*, 726 F.3d 867, 874 (6th Cir. 2013) ("[T]he United States Supreme Court has not . . . directly decided the question of whether the First Amendment protects soliciting alms when done by an individual."); *Gresham v. Peterson*, 225 F.3d 899, 903 (7th Cir. 2000) ("[T]he Supreme Court has not resolved directly the constitutional limitations on [panhandling laws] . . . as they apply to individual beggars.").

¹⁹⁰ *ISKCON of Potomac, Inc.*, 61 F.3d at 951.

¹⁹¹ *Id.* at 952.

¹⁹² *Id.* at 953.

In analyzing the solicitation ban, the court approvingly cited Justice Kennedy's *Krishna Consciousness* concurrence for the proposition that a prohibition on solicitation—defined as “an in-person request for immediate payment”—was a content-neutral speech restriction.¹⁹³ It also accepted the argument that the government had a legitimate interest in preserving the Mall's aesthetic value and protecting visitors from undue harassment.¹⁹⁴ The court ruled, however, that as applied, the regulation was not narrowly tailored because ISKCON's permit provided it access to such a small area of the park that the government's interests would not be advanced through the permit's revocation.¹⁹⁵ Panhandling in the parks would not be rampant as a result of its decision, the court suggested.¹⁹⁶ While the court ruled that prohibiting solicitation for immediate donations was content neutral, striking down the regulation's application for lack of narrow tailoring meant the court believed that the First Amendment at least covered panhandling.

In *Thayer v. City of Worcester*, the First Circuit, in an opinion written by Justice Souter (who was sitting on the court by designation), upheld two ordinances designed to deter panhandling.¹⁹⁷ One of the ordinances—which outlawed aggressive panhandling or solicitation—defined “soliciting” 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.*”¹⁹⁸ While the court conceded that panhandling for immediate donations could express a message of need,¹⁹⁹ it cited Justice Kennedy's *Krishna Consciousness* concurrence to assert that prohibitions on immediate donations were not distinctions based on a message's content.²⁰⁰ The court explained that just because certain behavior is associated with a particular subject does not mean that regulating that behavior amounts to a content distinction.²⁰¹ Censorial motive matters, said the court.²⁰² Even when regulating

¹⁹³ *Id.* at 954-55.

¹⁹⁴ *Id.* at 955.

¹⁹⁵ *Id.* at 956.

¹⁹⁶ *Id.*

¹⁹⁷ *Thayer v. City of Worcester*, 755 F.3d 60, 63 (1st Cir. 2014).

¹⁹⁸ *Id.* at 64 (emphasis added). The second ordinance prohibited someone from walking or standing on a traffic median unless done for some “lawful purpose.” *Id.* at 65. That ordinance is of little relevance to this note.

¹⁹⁹ *Id.* at 68 (citing *Int'l Soc'y for Krishna Consciousness, Inc. v. Lee*, 505 U.S. 672, 704-05 (1992) (Kennedy, J., concurring)).

²⁰⁰ *Id.* at 69.

²⁰¹ *Id.* at 68.

²⁰² *Id.*

expressive conduct disproportionately affects some messages and not others, the regulation is not content based if the government acts with the benign intent to merely eliminate undesirable consequences arising from the speech activity—as opposed to suppressing speech because the government disapproves of the message.²⁰³ After finding the ordinance content neutral, the court proceeded to reject the plaintiffs’ overbreadth, Equal Protection Clause, and vagueness challenges.²⁰⁴

Obviously, the First Circuit’s reasoning, which completely skipped over any discussion of whether the ordinance was facially content based and instead focused primarily on the legislature’s purpose in enacting the ban, is problematic given the Supreme Court’s recent decision in *Reed*. As mentioned in Section II.B, the Court in *Reed* held that a benign government motive for enacting a speech restriction does not render the restriction content neutral if it is facially content based. In light of *Reed*, the Supreme Court, in a one-paragraph opinion, vacated the First Circuit’s *Thayer* judgment and remanded the case for further proceedings.²⁰⁵

B. Circuits Rejecting Justice Kennedy’s Krishna Consciousness Reasoning

Unlike in *Thayer* and *ISKCON*, the Sixth Circuit, in *Speet v. Schuette*, failed to adopt Justice Kennedy’s argument that the immediate receipt of funds can be separated from general solicitation. At issue in *Speet* was a criminal statute that outlawed all begging.²⁰⁶ While the statute did not define begging, the court understood the term to mean “solicitation for alms.”²⁰⁷ By defining begging in this manner, the court created a conflict between *Schaumburg*’s holding that soliciting alms is “intertwined with informative and perhaps persuasive speech” and Justice Kennedy’s *Krishna Consciousness* concurrence—which suggested that solicitation and the physical exchange of cash could be separated for First Amendment purposes.²⁰⁸ The court found this conflict irreconcilable and sided with the *Schaumburg* characterization of solicitation as protected speech.

²⁰³ *Id.*

²⁰⁴ *Id.* at 72, 76.

²⁰⁵ *Thayer v. City of Worcester*, 135 S. Ct. 2887 (2015).

²⁰⁶ *Speet v. Schuette*, 726 F.3d 867, 870 (6th Cir. 2013).

²⁰⁷ *Id.* at 873.

²⁰⁸ *Id.* at 876 (quoting *Vill. of Schaumburg v. Citizens for a Better Env’t*, 444 U.S. 620, 632 (1980)).

The final court to explicitly consider Justice Kennedy's *Krishna Consciousness* concurrence was the Seventh Circuit in *Norton v. City of Springfield*. Like the First Circuit's opinion in *Thayer*, the Supreme Court's *Reed* decision also affected the outcome in this case. In *Norton*, the Seventh Circuit initially upheld an ordinance that prohibited panhandling in the city's downtown area.²⁰⁹ The ordinance defined "panhandling as an oral request for an immediate donation of money."²¹⁰ Stating that Justice Kennedy's concurrence in *Krishna Consciousness* would "likely [] carry the day" should the Supreme Court ever confront a case about regulating panhandling in a public forum, Judge Easterbrook, writing for the court, concluded that the regulation was content neutral.²¹¹ The Seventh Circuit noted that there were two categories of content-based regulations: those that "restrict[] speech because of the ideas it conveys" and those that "restrict[] speech because the government disapproves of its message."²¹² The city's regulation did not implicate either of these categories because requesting immediate donations "does not express an idea or message about politics, the arts, or any other topic on which the government may seek to throttle expression in order to protect itself or a favored set of speakers."²¹³ It simply prohibited anyone from orally asking for an immediate donation of money for any reason when they were downtown. Someone who wanted to ask for money could still do so by passively holding a sign.²¹⁴ Judge Easterbrook characterized the ordinance as a subject-matter rather than a content-based regulation.²¹⁵ Because the regulation was unconcerned with why a speaker solicited money, it was a content-neutral place-and-manner regulation that was only triggered when a person was in a particular location (i.e., downtown).

The Seventh Circuit postponed consideration of a rehearing petition until after the Supreme Court decided *Reed*.²¹⁶ Following *Reed*, the court granted the petition and, in another opinion by Judge Easterbrook, reversed itself.²¹⁷ Because the Supreme Court in *Reed* held that "regulation of speech is content based if a law applies to particular speech

²⁰⁹ *Norton v. City of Springfield*, 768 F.3d 713, 717-18 (7th Cir. 2014), *overruled on rehearing by* 806 F.3d 411 (7th Cir. 2015).

²¹⁰ *Id.* at 714.

²¹¹ *Id.* at 716.

²¹² *Id.* at 717.

²¹³ *Id.*

²¹⁴ *Id.* at 714.

²¹⁵ *Id.* at 717.

²¹⁶ *Norton v. City of Springfield*, 806 F.3d 411 (7th Cir. 2015).

²¹⁷ *Id.* at 413.

because of the topic discussed *or* the idea or message expressed,” the Seventh Circuit’s characterization of the ordinance as content neutral but subject-matter based was no longer valid.²¹⁸ The Springfield ordinance did treat speech differently based on topic, singling out oral requests for money for disfavored treatment. As such, it could no longer be viewed as content neutral, and because the government did not argue that it could satisfy strict scrutiny, the court granted the injunction.²¹⁹

Reed’s impact on these panhandling cases is readily apparent. It has eviscerated any chance of the circuits adopting Justice Kennedy’s *Krishna Consciousness* concurrence in cases that involve panhandling in a public forum. Yet the Court may eventually need to refine its decision in *Reed*. As already mentioned, the Court has never answered squarely whether regulations that single out solicitation for immediate donations in public forums are content-based restrictions on speech. *Reed* is inconsistent with the Court’s decisions in other areas of First Amendment law. First, as discussed in Section II.B.1, if any regulation that distinguishes speech based on topic is content based, how can *Reed* be squared with cases like *Central Hudson*, where the Court has held that commercial speech is entitled to less protection than noncommercial speech?²²⁰ Isn’t a regulation that treats commercial and noncommercial speech differently a distinction based on subject matter? *Reed* suggests that any such distinction would require strict scrutiny analysis. Second, *Reed* directly conflicts with the Court’s holding in *McCullen*.²²¹ Selective exemption for abortion clinic employees from the buffer-zone statute is a speaker-based distinction that would appear to render the statute content based. And yet the Court looked directly at the buffer zone’s purpose, ignoring the facial distinction, contrary to what it would later hold in *Reed*. These two decisions are inconsistent unless Justice Scalia was correct when he wrote that “[t]here is an entirely separate, abridged edition of the First Amendment applicable to speech against abortion.”²²² Part IV explains *Reed*’s potentially devastating implications for law enforcement efforts to rein in the negative impacts of panhandling and discusses why *Reed* is not necessarily consistent with First Amendment case law.

²¹⁸ *Id.* at 412 (quoting *Reed v. Town of Gilbert*, 135 S. Ct. 2218, 2227 (2015)).

²¹⁹ *Id.* at 413.

²²⁰ See *supra* Section II.B.1.

²²¹ See *supra* Section II.B.1.

²²² *McCullen v. Coakley*, 134 S. Ct. 2518, 2541 (2014) (Scalia, J., concurring).

IV. REGULATING PANHANDLING AFTER *REED*

Over 30 years ago, James Wilson and George Kelling explained in “Broken Windows” the negative impact that panhandling and other disorderly conduct can have on an urban community.²²³ Empirical evidence supports their theory and shows that individuals feel intimidated when they are approached by panhandlers and even avoid certain areas out of fear of being approached for money.²²⁴ In a Department of Justice (DOJ) Survey of San Francisco residents, 33% of those surveyed admitted to giving money to panhandlers out of intimidation, and 40% said they feared for their safety around panhandlers.²²⁵ Panhandling can also threaten the safety of panhandlers themselves.²²⁶ The same DOJ survey showed that half of all panhandlers report being mugged in a given year.²²⁷ They also often get into fights with other panhandlers over favorable territory.²²⁸

Evidence suggests that the Times Square panhandlers have engaged in the same deleterious conduct that was described in the DOJ survey. Polls have shown that many in the area have had negative interactions with the panhandlers.²²⁹ As the panhandlers have spread beyond Times Square, they have started engaging in turf wars. For example, on one occasion, Minnie Mouse and the Statue of Liberty broke out in fisticuffs over space in Battery Park.²³⁰ On another occasion, one panhandler who sought money for marijuana stabbed another panhandler in the face with a pen.²³¹ The government should not be powerless to rectify this kind of violence, and the panhandlers’ proliferation demonstrates that current regulations prohibiting aggressive panhandling are not effectively maintaining order in New York City.

The Supreme Court has recognized the state’s legitimate interest in “ensuring public safety and order, promoting the free flow of traffic on streets and sidewalks [and] protecting property

²²³ See Kelling & Wilson, *supra* note 1, at 33-34.

²²⁴ MICHAEL S. SCOTT, U.S. DEP’T OF JUSTICE, PANHANDLING 4 (2003), http://www.cops.usdoj.gov/html/cd_rom/inaction1/pubs/Panhandling.pdf [<http://perma.cc/GC6Q-2F9Z>].

²²⁵ *Id.*

²²⁶ *Id.* at 2.

²²⁷ *Id.*

²²⁸ *Id.*

²²⁹ See Li, *supra* note 9.

²³⁰ See Durkin et al., *supra* note 13.

²³¹ Ben Yakas, *Times Square “Weed Man” Arrested After Stabbing Times Square “Beer Man,”* GOTHAMIST (June 22, 2013, 11:55 AM), http://gothamist.com/2013/06/22/times_square_weed_man_arrested_afte.php [<http://perma.cc/TE2U-MHB2>].

rights.”²³² In *United States v. Kokinda*, the Supreme Court upheld a solicitation ban in effect in front of U.S. post offices.²³³ Because the sidewalk adjacent to post offices is not a public forum, the Court looked at whether the ban was reasonable and not motivated by the government’s disapproval of the speaker’s message.²³⁴ In holding that the regulation was reasonable, the Court made the following observations about the nature of in-person solicitation: “Solicitation impedes the normal flow of traffic,”²³⁵ “confrontation by a person asking for money disrupts passage and is more intrusive and intimidating than an encounter with a person [merely] giving out information,”²³⁶ and the “description of disruption and delay caused by solicitation rings of ‘common-sense.’”²³⁷ It also accepted the following finding from the final rule that regulated solicitation outside post offices:

Since the act of soliciting alms or contributions usually has as its objective an immediate act of charity, it has the potentiality for evoking highly personal and subjective reactions. Reflection usually is not encouraged, and the person solicited often must make a hasty decision whether to share his resources with an unfamiliar organization while under the eager gaze of the solicitor.²³⁸

Similar reactions to speech have led the Court to determine that two other speech categories receive no First Amendment protection at all: true threats and fighting words.²³⁹

²³² *McCullen v. Coakley*, 134 S. Ct. 2518, 2535 (2014).

²³³ *United States v. Kokinda*, 497 U.S. 720, 722-23 (1990).

²³⁴ *Id.* at 730. The level of scrutiny that a court will apply to a speech regulation occurring on government-owned property depends on whether the government operates the property as a proprietor or opens the space for public discourse. *Id.* at 725. There is a three-part framework for determining the level of scrutiny the court will apply. Speech regulations that occur on government property that has historically been open for public discourse (e.g., public streets and parks) are subject to strict scrutiny. *Id.* at 726. When the government has affirmatively dedicated property to First Amendment activity, regulations occurring on the property will also be subject to strict scrutiny. *Id.* at 726-27. Regulations that occur on public property that the government has not expressly dedicated to speech activity, however, will be upheld so long as they are reasonable. *Id.* at 727.

²³⁵ *Id.* at 733-34.

²³⁶ *Id.* at 734.

²³⁷ *Id.*

²³⁸ *Id.* at 733 (citing *Conduct on Postal Property*, 43 Fed. Reg. 38,824 (Aug. 31, 1978)).

²³⁹ See *Virginia v. Black*, 538 U.S. 343, 360 (2003) (stating that true threats are unprotected, even when the speaker does not intend to carry out the threat, because “a prohibition on true threats ‘protect[s] individuals from the fear of violence’ and ‘from the disruption that fear engenders’” (quoting *R.A.V. v. City of St. Paul*, 505 U.S. 377, 408 (1992))); *Chaplinsky v. New Hampshire*, 315 U.S. 568, 571-72 (1942) (defining fighting words as “those which by their very utterance inflict injury or tend to incite an immediate breach of the peace” due to their tendency to cause the listener to react violently against the speaker).

Panhandling is no less disruptive, intrusive, or intimidating in a pedestrian plaza like Times Square than it is outside a post office. True, Times Square is a public forum, so a more stringent standard of review will apply to regulating speech there. But the standard set forth in *Reed* makes it almost impossible for law enforcement to deal with panhandling's legitimately negative consequences. These negative consequences are not inherently linked to the speaker's message; rather, they result from the speaker's behavior towards other people. It does not matter whether the panhandler wants the money to feed his family, donate to charity, or buy drugs. It is a natural psychological reaction for people to feel intimidated when a stranger approaches them in a crowded place to ask for money.

The Court may have recognized the social ills that accompany panhandling, but its decision in *Reed* has rendered the government all but helpless to remedy them. The government is now in a Catch-22 situation. If it singles out the activity that causes the social harm—in this case soliciting accompanied by the physical exchange of money—it has made a content-based distinction because it differentiates between subject matter. Oral requests for immediate payment are banned, but requests for payment in the future are not. In this circumstance, narrow tailoring and leaving open ample alternative communication channels would be insufficient because content-based regulations receive strict scrutiny. The government's noncensorial purpose no longer plays a role in determining what doctrinal test to apply; it is relegated to the justification prong (i.e., whether the government has a sufficiently compelling government interest in regulating the speech).²⁴⁰ Given that the Court has only ever upheld a content-based restriction on otherwise protected speech in the context of national security, it is unlikely that a content-based restriction on panhandling will be justified under *Reed*.²⁴¹

²³⁹ See *Norton v. City of Springfield*, 806 F.3d 411, 412-13 (7th Cir. 2015).

²⁴⁰ See *id.* ("Our observation, that Springfield has attempted to write a narrowly tailored ordinance [defining panhandling as an oral request for an immediate donation of money] now pertains to the justification stage of the analysis rather than the classification stage." (citation omitted)).

²⁴¹ *Norton v. City of Springfield*, 768 F.3d 713, 716 (7th Cir. 2014), *overruled on rehearing by Norton v. City of Springfield*, 806 F.3d 411 (7th Cir. 2015) (noting that the justification prong of content-based regulations are "met in practice only by a need as serious as the battle against terrorists"). The Seventh Circuit in *Norton* was referring to *Holder v. Humanitarian Law Project*, in which the Court upheld a content-based speech restriction that prohibited providing material support to terrorist organizations. See *Norton*, 768 F.3d at 716 (citing *Holder v. Humanitarian Law Project*, 561 U.S. 1, 39 (2010)).

The flip side is that content-neutral restrictions must still be narrowly tailored.²⁴² As Justice Kennedy recognized in *Krishna Consciousness*, efforts to prohibit all solicitation would be plainly unconstitutional.²⁴³ That narrow tailoring requirement “thus becomes an engine of destruction, because every effort to narrow a rule will distinguish some speech from other speech and so . . . doom it.”²⁴⁴ What is a government to do?

If the Court takes the opportunity to consider a panhandling law similar to those at issue in *Norton* and *Thayer*, where solicitation is defined as a request for an immediate monetary donation, it should refine *Reed*. The Court in *Reed* found a subject-matter distinction sufficient to constitute a content-based regulation in the context of a sign ordinance. Distinguishing between types of signs is much different than regulating conduct, because the words on the sign do not combine communicative and noncommunicative elements of expression. In other words, there is no conduct involved. When the government regulates pure speech, the *Reed* rule should apply; if the government makes facial content-based distinctions, then it is unnecessary to look at the government’s purpose. When speech and nonspeech elements combine to form the same course of conduct, courts should focus primarily on the government’s purpose in regulating the speech. This would be consistent with *O’Brien*’s holding that “regulating the nonspeech element can justify incidental limitations on First Amendment freedoms.”²⁴⁵ When the government singles out panhandling for regulation, it is not targeting the speaker’s message. It is targeting the portion of his conduct that intimidates and delays others—his physical approach with the intent to receive cash. This would allow law enforcement to respond to the Times Square panhandlers more effectively.

Of course, any panhandling regulation would still need to be narrowly tailored to carry out the government’s interest. Blanket bans on solicitation would not be constitutional given *Schaumburg* and its progeny. But limiting the activity to certain zones or requiring solicitors to hold signs asking tourists to

²⁴² See *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989) (“[E]ven in a public forum the government may impose reasonable restrictions on the time, place, or manner of protected speech, provided the restrictions ‘are justified without reference to the content of the regulated speech, that they are narrowly tailored to serve a significant governmental interest, and that they leave open ample alternative channels of communication.’” (quoting *Clark v. Cmty. for Creative Non-Violence*, 468 U.S. 288, 293 (1984) (emphasis added))).

²⁴³ *Int’l Soc’y for Krishna Consciousness, Inc. v. Lee*, 505 U.S. 672, 704 (1992) (Kennedy, J., concurring).

²⁴⁴ *Norton*, 768 F.3d at 715.

²⁴⁵ *United States v. O’Brien*, 391 U.S. 367, 376 (1968).

approach them would achieve the government's legitimate objectives of preserving order and the flow of pedestrian traffic, as well as reduce possible instances of fraud or duress. The government also could not outright ban the panhandlers from wearing costumes or going topless. One can reasonably argue that engaging in those activities alone constitutes a form of artistic expression. But eliminating the economic incentive to engage in the activity would likely deter at least some of the panhandlers that swarm Times Square today.

CONCLUSION

Broken Windows policing and the First Amendment are not necessarily enemies. Regulating expressive conduct to target harmful behavior without singling out a particular message reconciles one with the other. We live in a pluralistic society. The policies behind protecting free speech in the first place—self-governance, truth-seeking, self-restraint, and respect for individual autonomy—require that we often tolerate people whom we find disagreeable. But that does not mean that the public must become victims of disorderly conduct. Spider-Man is reducing the quality of life in New York City with his antics. It is about time the law recognizes that we are not powerless to stop him.

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