

# **BEGGING THE (FIRST AMENDMENT) QUESTION: The Constitutionality of Arizona’s Prohibition of Begging in a Public Place**

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## ABSTRACT

In October 2013, the U.S. District Court for the District of Arizona issued a Declaratory Judgment in *Baldwin v. D’Andrea* that invalidated Arizona Revised Statutes section 13-2905(A)(3), which prohibits begging in public. The judgment was the product of a free speech challenge brought by the American Civil Liberties Union of Arizona (“ACLU”). The Attorney General for the State of Arizona had conceded that the law was unconstitutional and stipulated to the judgment.

This Article was completed shortly before the *Baldwin* case was filed in June 2013. It explores whether section 13-2905(A)(3) violates the free speech protections of the First Amendment to the U.S. Constitution. Its conclusion is consistent with *Baldwin*’s outcome: Arizona’s begging prohibition unconstitutionally suppresses protected speech and expression.

Although the *Baldwin* case answered the question whether section 13-2905(A)(3) would withstand a constitutional challenge, it did so without a written opinion that closely analyzed the law in question. This Article offers that analysis and explains why the U.S. Constitution does not allow Arizona to prohibit people from begging peacefully in public.

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## I. INTRODUCTION

In his essay *Feelings Homeless People Go Through*, Matthew Zavoras describes the shame and hopelessness that he experienced while being homeless for almost two years: “Some think your [sic] a lazy bum, drug addict, drink to [sic] much, etc. But those people have no idea until they are in your shoes. . . . It’s embarrassing in a way that your [sic] homeless because people treat you different.”<sup>1</sup>

In addition to experiencing judgment and shame, as Zavoras describes, homeless individuals also face criminal penalties for activities such as sleeping, camping, eating, sitting, and begging in public spaces.<sup>2</sup> The motive behind many of these measures appears to be to move homeless persons out of sight, or out of a given area.<sup>3</sup> According to a report by the National Law Center on Homelessness and Poverty, the trend of criminalizing homelessness is growing in the United States.<sup>4</sup> A review of 188 cities for prohibitions on activities associated with the homeless revealed a ten percent increase in prohibitions on loitering in particular public places, a seven percent increase in prohibitions on camping in particular public places, and a seven percent increase in prohibitions on begging or panhandling between 2009 and 2011.<sup>5</sup>

Homeless and destitute persons on Arizona streets and sidewalks represent serious problems in our community—poverty, drug abuse, and mental illness, to name a few.<sup>6</sup> Begging is one way that marginalized men and women in society remind citizens of these problems. Recognizing that many people speak of the poor with dehumanizing imagery that allows the community to escape responsibility, one article thoughtfully suggests that “[b]egging is a reassertion of the human being who lies beneath these

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1. Matthew D. Zavoras, *Feelings Homeless People Go Through*, WEBADDICT DESIGNS BLOG (July 16, 2011), <http://matthewzavoras.wordpress.com/2011/07/16/feelings-homeless-people-go-through/>.

2. NATIONAL LAW CENTER ON HOMELESSNESS AND POVERTY, CRIMINALIZING CRISIS: THE CRIMINALIZATION OF HOMELESSNESS IN U.S. CITIES 6 (2011), *available at* <http://www.google.com/url?sa=t&rc=tj&q=&esrc=s&source=web&cd=1&ved=0CC4QFjAA&url=http%3A%2F%2Fwww.nlchp.org%2Fcontent%2Fpubs%2F11.14.11%2520Criminalization%2520Report%2520%26%2520Advocacy%2520Manual%2C%2520FINAL1.pdf&ei=zuZEUq7WMYqtqgGsvYDoBQ&usg=AFQjCNGgBx3aN7W4QXOcEy6uPec7n8m2YQ&sig2=iKs9FnNQW5cyUb6HeIma2g&bvm=bv.53217764,d.aWM>.

3. *Id.*

4. *Id.* at 8.

5. *Id.*

6. *See* ARIZ. DEP’T OF ECON. SEC., HOMELESSNESS IN ARIZONA 2011 ANNUAL REPORT 5 (2011), *available at* [https://www.azdes.gov/InternetFiles/Reports/pdf/2011\\_homelessness\\_report.pdf](https://www.azdes.gov/InternetFiles/Reports/pdf/2011_homelessness_report.pdf).

dehumanizing thoughts and images. When a beggar begs, one member of a stigmatized group steps forward and, on a human level, engages a member of the mainstream in her problems and her life.”<sup>7</sup> Begging presents an ugly side of society that, for many, is uncomfortable to confront. In Arizona, one way that lawmakers attempted to deal with the discomfort is by prohibiting people from begging in public. However, the remedy of a broad prohibition on begging is not only superficial, but also unconstitutional.

This comment begins in Part II with an overview of vagrancy and loitering laws, which typically target the homeless. Part III analyzes the language and operation of Arizona’s “No-Begging-in-Public” statute. Part IV explains why the First Amendment protects begging. Part V applies First Amendment scrutiny to the Arizona statute and concludes that it violates the First Amendment’s guarantee of freedom of speech.

## II. VAGRANCY AND LOITERING LAWS

State and local governments have regulated or prohibited conduct traditionally associated with homelessness, such as vagrancy or begging, throughout our nation’s history.<sup>8</sup> For example, by the 1960s, almost every state had passed a law criminalizing vagrancy in some way.<sup>9</sup> Generally, a vagrancy statute defined “vagrants” as “dissolute persons who go about begging,” or “persons wandering or strolling around from place to place without any lawful purpose or object.”<sup>10</sup> The problem with a vagrancy prohibition, however, is that its broad scope reaches activities that are innocent, such as an insomniac’s nighttime stroll.<sup>11</sup> Finding it unclear which types of conduct make one a vagrant, the United States Supreme Court foreclosed vagrancy laws for unconstitutional vagueness in 1972.<sup>12</sup>

Since the Supreme Court largely invalidated vagrancy laws, local governments have attempted to control homeless and transient populations by passing ordinances and statutes that prohibit loitering or loitering for a specific purpose.<sup>13</sup> Loitering laws generally allow police to arrest

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7. Helen Hershkoff & Adam S. Cohen, *Begging to Differ: The First Amendment and the Right to Beg*, 104 HARV. L. REV. 896, 915 (1991).

8. Andrew J. Liese, *We Can Do Better: Anti-Homeless Ordinances as Violations of State Substantive Due Process*, 59 VAND. L. REV. 1413, 1420 (2006).

9. *Id.* at 1422.

10. *Id.*

11. *Papachristou v. City of Jacksonville*, 405 U.S. 156, 163 (1972).

12. *Id.* at 162.

13. Juliette Smith, *Arresting the Homeless for Sleeping in Public: A Paradigm for Expanding the Robinson Doctrine*, 29 COLUM. J.L. & SOC. PROBS. 293, 303 (1996); Frank J.

“individuals whose apparent and unexplained aimlessness” creates “the suspicion that they are about to commit a crime.”<sup>14</sup> In 1983, the Supreme Court ruled on a challenge to a loitering law that required an individual to provide identification and account for his purpose in wandering the streets.<sup>15</sup> The Court found that the law failed to establish minimal guidelines for law enforcement officers to follow; thus, it was void for vagueness.<sup>16</sup> More recently, the Supreme Court stated that “the freedom to loiter for innocent purposes is part of the ‘liberty’ protected by the Due Process Clause of the Fourteenth Amendment.”<sup>17</sup> Accordingly, local governments have rewritten loitering laws to provide more specific guidelines for police enforcement. Courts have generally upheld these more narrowly tailored loitering laws against due process challenges for vagueness.<sup>18</sup>

### A. *Loitering in Arizona*

The Supreme Court of Arizona has held that “[t]he word ‘loiter’ does not signify anything bad or criminal except when given that significance in a criminal ordinance or statute.”<sup>19</sup> In joining “loitering” with a second specific element, the legislature “sufficiently informs a person of common understanding as to what is forbidden.”<sup>20</sup> Accordingly, Arizona’s criminal code prohibits five types of conduct as unlawful loitering.<sup>21</sup> Four of these are: soliciting another person to engage in any sexual offense in an offensive manner;<sup>22</sup> engaging in the sale of merchandise or services in a transportation facility after a reasonable request to cease or without authorization;<sup>23</sup> gambling with cards or dice in a public place unless

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Wozniak, *Validity, Construction, and Application of Loitering Statutes and Ordinances*, 72 A.L.R. 5th 1, 1 (1999).

14. Liese, *supra* note 8, at 1422 n.50.

15. *Kolender v. Lawson*, 461 U.S. 352, 361 (1983); *see also* Liese, *supra* note 8, at 1422.

16. *Kolender*, 461 U.S. at 361.

17. *City of Chicago v. Morales*, 527 U.S. 41, 53 (1999). In this case, the Court held that Chicago’s “gang loitering ordinance” was unconstitutionally vague. The law required a police officer who observed a person whom the officer reasonably believed to be a gang member loitering in a public place with one or more persons, to order those persons to disperse, making the failure to obey a criminal act. *Id.* at 41–45.

18. Liese, *supra* note 8, at 1423.

19. *State v. Starr*, 113 P.2d 356, 357 (Ariz. 1941) (upholding a loitering statute limited to the grounds of any public school or within 300 feet thereof).

20. *State ex rel. Williams v. City Court of Tucson*, 520 P.2d 1166, 1168 (Ariz. Ct. App. 1974).

21. Ariz. Rev. Stat. § 13-2905 (2013).

22. § 13-2905(A)(1).

23. § 13-2905(A)(2).

specifically authorized by law;<sup>24</sup> and remaining on school grounds without legitimate reason for being there after a reasonable request to leave.<sup>25</sup> The fifth activity that constitutes unlawful loitering in Arizona is being present in a public place to beg.<sup>26</sup>

### III. LANGUAGE AND OPERATION OF ARIZONA'S "NO-BEGGING-IN-PUBLIC" STATUTE

Under Arizona Revised Statutes section 13-2905(A)(3), "[a] person commits loitering if such person intentionally: . . . [i]s present in a public place to beg, unless specifically authorized by law."<sup>27</sup> The legislature does not define the meaning of "beg."<sup>28</sup> Construing the term in a nearly identical, and since-amended Tucson City Ordinance, the Arizona Court of Appeals explained that the word "begging" refers to "the solicitation of money or other valuable consideration without giving consideration in return"—"undoubtedly what it would mean to a man of ordinary intelligence when read in the context of the subject ordinance."<sup>29</sup> Black's Law Dictionary defines "beg" as "[t]o request earnestly; to beseech . . . To ask for charity, esp. habitually or pitiably."<sup>30</sup> Section 13-2905(A)(3) specifically prohibits "[b]eing present to beg."<sup>31</sup> One violates this law any time he asks another person for charity in a public place—without regard to aggression, obscene language, or other disorderly conduct.<sup>32</sup>

The language "unless specifically authorized by law" suggests that in some situations, the state allows panhandlers and beggars to ask for money. However, no section of the Arizona Revised Statutes specifically authorizes

24. § 13-2905(A)(4).

25. § 13-2905(A)(5).

26. § 13-2905(A)(3).

27. *Id.*

28. The word "beg" only appears once in the Arizona Revised Statutes—where it is criminalized (but not defined) in section 13-2905. *See* Ariz. State Leg., <http://www.azleg.gov/SearchResults.asp?SearchedFrom=%2FArizonaRevisedStatutes.asp&SearchPhrase=beg&Scope=%2Fars>.

29. State ex rel. Williams v. City Court of Tucson, 520 P.2d 1166, 1170 (Ariz. Ct. App. 1974) (upholding the constitutionality of Tucson City Code § 11-33 against Fourteenth Amendment void for vagueness challenge).

30. BLACK'S LAW DICTIONARY 712 (9th ed. 2009).

31. § 13-2905(A)(3).

32. In Arizona, begging in public is a misdemeanor offense. *See* Ariz. Rev. Stat. § 13-2905(B) ("Loitering under subsection A, paragraphs 1, 2, 3, [and] 4 . . . is a class 3 misdemeanor."). State sentencing guidelines provide that an individual convicted of loitering to beg faces a jail term of up to thirty days. *See* Ariz. Rev. Stat. § 13-707(A)(3) ("The court shall fix the term of imprisonment within the following maximum limitations: . . . [f]or a class 3 misdemeanor, thirty days.").

begging or otherwise addresses the issue.<sup>33</sup> Since cities may regulate the use of streets, sidewalks, parks, and public grounds in Arizona,<sup>34</sup> a municipal body could presumably allow begging. In exploring this, one might consider whether the City of Phoenix has “specifically authorized” begging by law. An examination of the Phoenix Municipal Code answers this question with a resounding “no.”<sup>35</sup> The word “solicitation” as related to begging appears twice in Phoenix’s city code: in an ordinance which prohibits aggressive solicitation in public areas or near banks, ATMs, or bus stops; and in an ordinance which prohibits a person standing on a street from soliciting contributions from the occupants of vehicles.<sup>36</sup> Thus, at least within Arizona’s capitol and the sixth largest city in the United States, with more than 1.4 million residents and growing,<sup>37</sup> no person is specifically authorized to beg. Any person who chooses to do so faces a criminal conviction under Arizona law.

Maricopa County represents sixty percent of Arizona’s population and fifty percent of the state’s homeless population.<sup>38</sup> Booking records for Maricopa County Jail, located in Phoenix, reveal that police do make arrests for begging in public within Maricopa County. At least one hundred forty-seven individuals were arrested for loitering-to-beg between August 6, 2012 and August 6, 2013.<sup>39</sup>

#### IV. WHY THE FREE SPEECH CLAUSE OF THE FIRST AMENDMENT PROTECTS BEGGING

The United States Supreme Court has made it clear that the First Amendment’s free speech clause<sup>40</sup> protects solicitation for charity. The

33. *See supra* note 28.

34. ARIZ. REV. STAT. ANN. § 9-276(A)(1), (6).

35. Search of PHOENIX, ARIZ. MUN. CODE (on file with author). The Phoenix Municipal Code does not contain the word “beg.”

36. *See* PHOENIX MUN. CODE § 23-7, 36-131.01.

37. *Phoenix Facts*, OFFICIAL SITE OF THE CITY OF PHOENIX, <http://phoenix.gov/citygovernment/facts/index.html> (last visited Nov. 2, 2012).

38. ARIZ. DEP’T. OF ECON. SEC., HOMELESSNESS IN ARIZONA 2012 ANNUAL REPORT at 10 (2012), *available at* [https://www.azdes.gov/InternetFiles/Reports/pdf/des\\_annual\\_homeless\\_report\\_2012.pdf](https://www.azdes.gov/InternetFiles/Reports/pdf/des_annual_homeless_report_2012.pdf).

39. *Loitering-to-Beg Arrests—Maricopa County, Arizona*, WHOSARRESTED.COM, <http://www.whosarrested.com/arizona/maricopa-county/charges/loitering-to-beg/6> (last visited Aug. 7, 2013).

40. “Congress shall make no law . . . abridging the freedom of speech . . .” U.S. CONST. amend. I. “Under the Fourteenth Amendment, city ordinances are within the scope of this limitation on governmental authority.” *Members of the City Council v. Taxpayers for Vincent*, 466 U.S. 789, 792 n.2 (1984).

Court has long “protected speech even though it is in the form of . . . a solicitation to pay or contribute money.”<sup>41</sup> Although the Court has not explicitly extended constitutional protection to begging, it has held that the First Amendment protects a charity's efforts to solicit contributions.<sup>42</sup> Further, the Court declines to relegate charitable solicitation to the minimally-protected category of commercial speech.<sup>43</sup>

The Supreme Court has not stated that persons soliciting charitable donations must be acting in concert with a formal organization in order for their speech to be protected by the First Amendment. There is little difference between those who solicit for organized charities and those who solicit for themselves with respect to the message conveyed. Both solicit charity: the former are communicating the needs of others while the latter are communicating their personal needs.<sup>44</sup> Thus, the Court is likely to agree that an individual's solicitation of alms falls within the scope of the First Amendment.<sup>45</sup>

Lower federal courts have found that begging is protected speech, noting that the interest of individuals begging in a public place involves the effort to communicate their social status and needs in an attempt to solicit contributions. Namely, the Second, Fourth, Seventh, Ninth, and Eleventh Circuits have extended the First Amendment to begging.<sup>46</sup> The Seventh Circuit discussed the issue in *Gresham v. Peterson*, involving a challenge to an Indianapolis anti-begging ordinance. While ultimately ruling that the law was not unconstitutionally vague, the court did find that begging is protected speech:

Beggars at times may communicate important political or social messages in their appeals for money, explaining their conditions related to veteran status, homelessness, unemployment and disability, to name a few. Like the organized charities, their messages cannot always be easily separated from their need for money. While some communities might wish all solicitors,

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41. *Bates v. State Bar of Ariz.*, 433 U.S. 350, 363 (1977) (internal citations omitted).

42. *Int'l Soc'y for Krishna Consciousness, Inc. v. Lee*, 505 U.S. 672, 677 (1992).

43. *Schaumburg v. Citizens for a Better Env't.*, 444 U.S. 620, 632 (1980) (“[B]ecause charitable solicitation does more than inform private economic decisions and is not primarily concerned with providing information about the characteristics and costs of goods or services, it has not been dealt with in our cases as a variety of purely commercial speech.”).

44. *Loper v. N.Y.C. Police Dept.*, 999 F.2d 699, 704 (2d Cir. 1993).

45. Robert C. Ellickson, *Controlling Chronic Misconduct in City Spaces: of Panhandlers, Skid Rows, and Public-Space Zoning*, 105 YALE L.J. 1165, 1229 (1996).

46. *Clatterbuck v. Charlottesville*, 708 F.3d 549, 553 (4th Cir. 2013); *ACLU of Nevada v. Las Vegas*, 466 F.3d 784, 792 (9th Cir. 2006); *Gresham v. Peterson*, 225 F.3d 899, 904 (7th Cir. 2000); *Smith v. Fort Lauderdale*, 177 F.3d 954, 956 (11th Cir. 1999); *Loper v. N.Y.C. Police Dept.*, 999 F.2d 699, 704 (2d Cir. 1993).



beggars and advocates of various causes be vanished from the streets, the First Amendment guarantees their right to be there, deliver their pitch and ask for support.<sup>47</sup>

In 1993, the Second Circuit also held that begging is protected speech, when it ruled in *Loper v. New York City Police Department* that the following provision of the New York Penal Law was unconstitutional: “A person is guilty of loitering when he . . . [l]oiterers, remains or wanders about in a public place for the purpose of begging.”<sup>48</sup> The court explained that it found no significant distinction between begging for one's own needs and soliciting on behalf of a charity:

Begging frequently is accompanied by speech indicating the need for food, shelter, clothing, medical care or transportation. Even without particularized speech, however, the presence of an unkempt and disheveled person holding out his or her hand or a cup to receive a donation itself conveys a message of need for support and assistance. We see little difference between those who solicit for organized charities and those who solicit for themselves in regard to the message conveyed. The former are communicating the needs of others while the latter are communicating their personal needs. Both solicit the charity of others. The distinction is not a significant one for First Amendment purposes.<sup>49</sup>

The *Loper* decision influenced the Eleventh Circuit when it evaluated the constitutionality of a Fort Lauderdale, Florida restriction on begging in the city beach area. Explaining its analysis in *Smith v. City of Fort Lauderdale*, the court referred to the Second Circuit's decision when stating that “begging is speech entitled to First Amendment protection.”<sup>50</sup> In this case, the court found that the Fort Lauderdale ordinance did not violate free speech guarantees because the city still allowed begging in streets, on sidewalks, and in other public areas throughout the city, mitigating the suppression of begging in the beach area.<sup>51</sup>

The Ninth Circuit addressed the issue in a challenge to a Las Vegas ordinance prohibiting solicitation in various locations throughout the city. The ordinance expressly prohibited “any requests whether written or oral for charity, business or patronage.”<sup>52</sup> Although the case focused on the

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47. *Gresham*, 225 F.3d at 904.

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

49. *Id.* at 704.

50. *Smith v. City of Fort Lauderdale*, 177 F.3d 954, 956 (11th Cir. 1999).

51. *Id.* at 956–57.

52. *Am. Civil Liberties Union of Nevada v. City of Las Vegas*, 466 F.3d 784, 788 (9th Cir. 2006).

distribution of handbills in the city, the law defined solicitation broadly so as to include begging.<sup>53</sup> The Ninth Circuit granted First Amendment protection to the conduct enumerated in the statute, noting that “[i]t is beyond dispute that solicitation is a form of expression entitled to the same constitutional protections as traditional speech.”<sup>54</sup> The Ninth Circuit determined that the ordinance failed the appropriate standard of review for a restriction on protected First Amendment activity and ruled it unconstitutional.<sup>55</sup>

Most recently, the Fourth Circuit has also stated that the First Amendment protects the speech and expressive conduct that comprise begging.<sup>56</sup> The plaintiffs in the Fourth Circuit alleged that the city of Charlottesville, Virginia adopted an ordinance proscribing begging in certain areas of the city “in order to restrict the right of the impoverished to solicit funds for their own well-being.”<sup>57</sup> The court agreed that begging is communicative activity within the protection of the free speech clause of the First Amendment.<sup>58</sup>

#### A. *Arizona State Court Precedent*

In 2011, the Arizona Court of Appeals extended First Amendment protection to panhandling.<sup>59</sup> In *State v. Boehler*, police in downtown Phoenix cited three men for violating Phoenix City Code section 23-7(B)(4), which made it unlawful to “vocally ‘solicit any money or other thing of value, or to solicit the sale of goods or services’ after dark in a public area.”<sup>60</sup> The officers were implementing an undercover program to enforce section 23-7(B)(4).<sup>61</sup> Timothy Boehler had been sitting on a

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53. *Id.*

54. *Id.* at 792.

55. *Id.* at 797.

56. *Clatterbuck v. City of Charlottesville*, 708 F.3d 549, 553 (4th Cir. 2013) (reversing and remanding the district court’s dismissal of the challenge to a city ordinance restricting the right to beg near a shopping mall).

57. *Id.* at 552.

58. *Id.* at 553.

59. *State v. Boehler*, 262 P.3d 637, 641 n.4 (Ariz. Ct. App. 2011). Parties in *Boehler* appeared before the Arizona Court of Appeals Division I. The Arizona Court of Appeals Division II treats decisions of its coordinate court as “highly persuasive and binding, unless [it is] convinced that the prior decisions are based upon clearly erroneous principles, or conditions have changed so as to render these prior decisions inapplicable.” *State v. Patterson*, 218 P.3d 1031, 1037 (Ariz. Ct. App. 2009) (internal citations omitted).

60. *Boehler*, 262 P.3d at 638 (citing PHOENIX CITY CODE § 23-7(B)(4) (2003), *invalidated by Boehler*, 262 P.3d at 645).

61. *Id.* at 638.

sidewalk as undercover police officers walked by after an Arizona Diamondbacks baseball game, and he asked the officers if they could spare some change.<sup>62</sup> Nearby, Frank Simpson approached two different undercover officers on the street and said to them, “I’m homeless, on the streets. Can you spare some change?”<sup>63</sup> Soon after, officers walked past Clyde Davis, who was sitting on stairs leading to a public parking garage. Davis asked one of the officers, “Can you help me out? Can you spare some change?”<sup>64</sup> There were no reports that any of the three defendants behaved aggressively or even impolitely.<sup>65</sup>

Boehler, Simpson, and Davis were convicted in Phoenix City Court of violating the municipal ordinance prohibiting begging in public after dark.<sup>66</sup> On appeal, the defendants convinced the Arizona Court of Appeals that the underlying law effected an unconstitutional restriction on protected speech, since “the First Amendment does not allow the City to restrict speech in a public forum merely because listeners might prefer not to hear a message that may annoy them or make them uneasy.”<sup>67</sup> Therefore, according to the court, general concerns about the effect that even non-aggressive, peaceful requests for donations could have on passersby at night did not justify the law.<sup>68</sup>

### B. *Arguments that Begging is not Protected Speech*

One might argue that begging is purely commercial speech, deserving less First Amendment protection than other expression.<sup>69</sup> Commercial speech is considered to be part of the realm of trade and industry that is subject to expansive government regulation and reduced First Amendment protection. The Supreme Court explains that this type of speech results from “economically motivated decisions by investors and customers,” and not from an individual person’s desire to speak.<sup>70</sup>

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62. *Id.*

63. *Id.*

64. *Id.*

65. *Id.* at 638–39.

66. *Id.*

67. *Id.* at 645 (citing *Erznoznik v. City of Jacksonville*, 422 U.S. 205, 209 (1975)).

68. *Id.* at 644.

69. *See Va. State Bd. Of Pharmacy v. Va. Citizens Consumer Council, Inc.*, 425 U.S. 748, 762 (1976) (commercial speech does “no more than propose a commercial transaction” (quoting *Pittsburg Press Co. v. Human Relations Comm’n*, 413 U.S. 376, 385 (1973) (internal quotation marks removed))).

70. *Hershkoff & Cohen, supra* note 7, at 907 (quoting *Federal Election Comm’n v. Massachusetts Citizens for Life, Inc.*, 479 U.S. 238, 258 (1986)).

Begging speech is not commercial speech because it does more than propose a commercial transaction—it appeals not to the listener’s economic self-interest, but to his sense of compassion and empathy.<sup>71</sup> The Supreme Court has held that charitable solicitations involve a variety of speech interests protected by the First Amendment, and thus have not been dealt with as “purely commercial speech.”<sup>72</sup> Begging communicates need and is intertwined with a social message. Further, some people ask not for money, but for food or work. By prohibiting begging in public, Arizona’s law prohibits more than a proposed commercial transaction—the law prohibits individuals from publicly expressing their needs. Since the law does not define or narrow “begging,” a police officer could arrest a homeless person who stands on the corner yelling no more than “I need help.” Surely this speech is more than merely a proposed commercial transaction.

In *Riley v. National Federation of the Blind of North Carolina, Inc.*,<sup>73</sup> the Supreme Court held that a charitable solicitation is fully protected expression even though a paid solicitor keeps part of the money he collects as a fee, because speech does not “retain[ ] its commercial character when it is inextricably intertwined with otherwise fully protected speech.”<sup>74</sup> Like the paid charitable solicitor, the beggar appeals to the listener’s sense of compassion while he makes a request that is in part a plea for personal funds. The charitable nature of the appeal brings the begging outside of the scope of mere commercial speech.<sup>75</sup>

Others may argue that begging is simply conduct rather than speech and therefore not protected by the First Amendment.<sup>76</sup> A beggar could simply hold out his hand, or walk toward a passerby to ask for money, or stand behind his hat with a sign, and not say a word.<sup>77</sup> However, the Supreme Court holds that actions pursuant to a charitable solicitation are themselves expressive activities protected by the First Amendment: activities such as entering onto a stranger’s property and ringing his doorbell<sup>78</sup> and distributing pamphlets<sup>79</sup> are protected in the context of charitable solicitation.<sup>80</sup> The argument that begging is unprotected conduct is

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71. *Id.* at 908.

72. *Riley v. Nat’l Fed’n of the Blind of N.C., Inc.*, 487 U.S. 781, 788 (1988) (quoting *Village of Schaumburg v. Citizens for a Better Env’t*, 444 U.S. 620, 632 (1980)).

73. 487 U.S. 781 (1988).

74. *Id.* at 796.

75. Herschkoff & Cohen, *supra* note 7, at 908.

76. *Id.*

77. *See id.*

78. *See Martin v. City of Struthers*, 319 U.S. 141, 149 (1943).

79. *See id.* at 143.

80. Herschkoff & Cohen, *supra* note 7, at 908.

inconsistent with these decisions, each of which involves one human being asking another for money. If peaceful picketing and leafleting are expressive activities involving “speech” protected by the First Amendment,<sup>81</sup> then surely sitting on a street corner with a sign that reads “Hungry” is as well. The distinction is only whether the solicitor requests the money or food on behalf of others or on his own behalf.<sup>82</sup>

One case that denies First Amendment protection to panhandling is *Young v. New York City Transit Authority*,<sup>83</sup> decided in the Second Circuit before *Loper*. In *Young*, the court described the object of panhandling as the simple transfer of money, with no speech inherent to the act or essence of the conduct.<sup>84</sup> One commentator, setting forth the City of New York’s position, criticized this holding’s later displacement: “In *Young*, the Second Circuit was unable to find a sufficient nexus between the solicitation conduct and speech interests to apply the protection to begging that had already been accorded to solicitation by charitable organizations. Nevertheless, [three years later,] in *Loper*, the same court uncovered such a nexus.”<sup>85</sup>

The Second Circuit did not distinguish *Young* and *Loper* based on the question of whether begging speech should be protected, but rather distinguished them based on the place in which the law applied. The *Young* court expressed doubt that begging and panhandling constituted protected expressive conduct, but did not rule on the issue since it found that the regulation being challenged was constitutional either way.<sup>86</sup>

*Young* dealt with a limited forum in which the law applied<sup>87</sup> while the *Loper* decision required a citywide public forum analysis.<sup>88</sup> *Young* questioned the constitutionality of a regulation prohibiting begging and panhandling in the New York City Subway System—not throughout all of New York City.<sup>89</sup> Because begging can disrupt and startle passengers, the court found that the behavior could potentially cause a serious accident in the fast-moving and crowded subway environment.<sup>90</sup> Applying the “more

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81. *United States v. Grace*, 461 U.S. 171, 176 (1983).

82. *Hershkoff & Cohen*, *supra* note 7, at 908–09.

83. *Young v. N.Y.C. Transit Auth.*, 903 F.2d 146, 161 (2d Cir. 1990).

84. *Id.* at 154.

85. Fay Leoussis, *The New Constitutional Right to Beg—Is Begging Really Protected Speech?*, 14 ST. LOUIS U. PUB. L. REV. 529, 534 (1995).

86. *Young*, 903 F.2d at 161.

87. *Id.*

88. *Loper v. N.Y.C. Police Dep’t*, 999 F.2d 699, 702 (2d Cir. 1993).

89. *Young*, 903 F.2d at 161.

90. *Id.*

lenient level of judicial scrutiny”<sup>91</sup> for First Amendment analysis, the Second Circuit found that the law banning panhandling in the limited forum of the subways was constitutional.

While the subway is not an open forum for public communication,<sup>92</sup> the sidewalks of New York City are in the category of public property traditionally held open to the public for expressive activity.<sup>93</sup> Resulting from this distinction, the court in *Loper* first answered the question left open in *Young* and held that begging constitutes communicative activity that is protected by the First Amendment;<sup>94</sup> then it applied a stricter level of scrutiny to the law because it prohibited begging throughout the entire City.<sup>95</sup>

## V. EVALUATING THE CONSTITUTIONALITY OF ARIZONA’S BEGGING PROHIBITION

In June 2013, the American Civil Liberties Union of Arizona filed *Baldwin v. D’Andrea*, a suit challenging Arizona’s panhandling law in U.S. District Court. The complaint alleged that section 13-2905(A)(3) was a facially unconstitutional suppression of protected speech.<sup>96</sup> Instead of defending the law, Arizona’s Attorney General agreed that the law violated citizens’ right to free speech.<sup>97</sup> Accordingly, the government stipulated to a

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91. *Id.* at 157.

92. *Loper*, 999 F.2d at 703. The Third Circuit had previously ruled that public transit facilities are “public property which is not by tradition or designation a forum for public communication.” *Gannett Satellite Info. Network, Inc. v. Metro. Transp. Auth.*, 745 F.2d 767, 772–73 (3d Cir. 1984).

93. *Loper*, 999 F.2d at 704.

94. *Id.*

95. *Id.* at 703.

96. Complaint for Declaratory and Injunctive Relief for Violation for Plaintiffs’ Free Speech Rights at 1–2, *Baldwin v. D’Andrea*, No. 3:13-cv-08161 (D. Ariz. filed June 25, 2013) 2013 WL 3655631; *see also* Cindy Carcamo, *In Arizona, crackdowns on homeless prompt criticism*, L.A. TIMES (Jul. 27, 2013), <http://www.latimes.com/news/nationworld/nation/la-na-ff-arizona-homeless-20130719,0,3890805.story>. In 1974, a Tucson City ordinance that resembled the current Arizona statute survived a constitutional challenge for vagueness and overbreadth before the Arizona Court of Appeals. *State ex rel. Williams v. City Court of Tucson*, 520 P.2d 1166, 1171 (Ariz. Ct. App. 1974). Under then-Tucson City Code section 11-33, “A person [was] guilty of loitering when he: (1) Loiter[ed], remain[ed] or wander[ed] about in a public place for the purpose of begging.” *Id.* at 1167. The constitutional challenge in *Williams* did not go beyond vagueness and overbreadth: the plaintiff made no claim that the government was violating his First Amendment right to free speech, and the court made no ruling that begging is not protected speech. *Id.*

97. Howard Fischer, *Judge Signs Order to Allow Begging in Arizona*, ARIZ. DAILY SUN (Oct. 5, 2013), [http://azdailysun.com/news/local/state-and-regional/judge-signs-order-to-allow-begging-in-arizona/article\\_2fe9e77e-2d87-11e3-8ad4-0019bb2963f4.html](http://azdailysun.com/news/local/state-and-regional/judge-signs-order-to-allow-begging-in-arizona/article_2fe9e77e-2d87-11e3-8ad4-0019bb2963f4.html).

Declaratory Judgment “that A.R.S. 13-2905(a)(3) is facially unconstitutional and void under the First and Fourteenth Amendments of the United States Constitution, and under Section 6, Article 2 of the Arizona Constitution.”<sup>98</sup> The District Court’s order enjoined law enforcement from “in any manner enforcing the provisions of Ariz. Rev. Stat. § 13-2905(a)(3).”<sup>99</sup> The order summarily rejected the law pursuant to the parties’ stipulation, without discussing precedent or constitutional standards.<sup>100</sup>

Under section 13-2905(A)(3), an individual could face criminal charges for begging in a variety of places, including streets and parks, both of which are “government property . . . traditionally available for public expression.”<sup>101</sup> Such fora are said to “have immemorially been held in trust for the use of the public and, time out of mind, have been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions.”<sup>102</sup> The Supreme Court has listed “sidewalks,” where most begging presumably occurs, “separately as an additional example of traditional public fora, rather than as wrapped up in a broad definition of the word ‘streets,’” but categorized as public fora nonetheless.<sup>103</sup> The Ninth Circuit noted that “[a] pedestrian ordinarily has an entitlement to be present upon the sidewalk or on the grounds of a park and thus is generally free at all times to engage in expression and public discourse at such locations.”<sup>104</sup>

Although the Supreme Court *has* allowed exceptionally strict controls on speech in public areas, it has limited these restrictions to “narrowly selected public spaces where peacefulness is essential,” such as “schools, courthouses, embassies, polling places, medical facilities, and private homes.”<sup>105</sup> Arizona’s law, however, broadly applies to a person who is “present in a public place,”<sup>106</sup> and is not limited to spaces where the public

98. Judgment and Permanent Injunction at 1, Baldwin v. D’Andrea, No. 3:13-cv-08161 (D. Ariz. filed Oct. 4, 2013).

99. *Id.*

100. *See id.* at 1–2.

101. Int’l Soc’y for Krishna Consciousness, Inc. v. Lee, 505 U.S. 672, 678 (1992).

102. Loper v. N.Y.C. Police Dep’t, 999 F.2d 699, 703 (2d Cir. 1993) (quoting Hague v. CIO, 307 U.S. 496, 515 (1939)). At least one commentator criticizes Supreme Court Justices’ tendency to assert in the broadest terms that streets, sidewalks, and parks fit into the traditional public form classification, relying on Justice Roberts’ “overly broad dictum in Hague.” Robert C. Ellickson, *Controlling Chronic Misconduct in City Spaces: of Panhandlers, Skid Rows, and Public-Space Zoning*, 105 YALE L.J. 1165, 1232 (1996).

103. ACORN v. City of Phx, 798 F.2d 1260, 1266 (9th Cir. 1986), *overruled by* Comite de Jornaleros de Redondo Beach v. City of Redondo Beach, 657 F.3d 936, 942 (9th Cir. 2011) (citing United State v. Grace, 461 U.S. 171, 177 (1983)).

104. *Id.* at 1267 (upholding as constitutional Phoenix ordinance which prohibited fund solicitation from occupants of vehicles stopped at intersections).

105. Ellickson, *supra* note 45, at 1233.

106. Ariz. Rev. Stat. § 13-2905(A)(3) (2013).

interest compels order to which begging could potentially pose a threat—such as the subways, as the Second Circuit discussed in *Young*.<sup>107</sup> Like the law struck down in *Loper*, which applied to all of New York City, the Arizona law regulates speech on all public property traditionally available for public expression.<sup>108</sup>

Courts apply the strictest scrutiny to regulations that discriminate based on the subject matter of speech.<sup>109</sup> A content-based restriction on speech must be necessary to serve a compelling state interest and narrowly drawn to achieve that end.<sup>110</sup> Courts apply less scrutiny to a statute with content-neutral restrictions: the restriction on speech or expression does not have to represent the least restrictive means of achieving a state goal, but must be narrowly tailored to serve a “significant” or “legitimate government interest” and leave open ample alternative channels of communication.<sup>111</sup>

In *Ward v. Rock Against Racism*,<sup>112</sup> the Supreme Court established that the principal inquiry in distinguishing a content-based law from a content-neutral law in speech cases is “whether the government has adopted a regulation of speech because of disagreement with the message it conveys.”<sup>113</sup> If the law is motivated by distaste for the message of the speech, it is a content-based restriction. If the restriction applies to all speech regardless of the message, it is content-neutral.

The proper analysis for section 13-2905(A)(3) depends on whether it imposes a content-based or content-neutral regulation on speech. Courts have not agreed on whether blanket prohibitions of begging are content-based or content-neutral.<sup>114</sup> For purposes of this paper, the content-neutrality of Arizona’s law will be assumed in order to apply the less stringent test for constitutionality. It is appropriate to adopt the Arizona Court of Appeals

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107. *Young v. N.Y.C. Transit Auth.*, 903 F.2d 146, 157 (2d Cir. 1990).

108. *See Loper v. N.Y.C. Police Dep’t*, 999 F.2d 699, 702–03 (2d Cir. 1993).

109. *State v. Boehler*, 262 P.3d 637, 641 (Ariz. Ct. App. 2011) (citing *Burson v. Freeman*, 504 U.S. 191, 197 (1992)).

110. *Perry Ed. Ass’n v. Perry Local Educators’ Ass’n*, 460 U.S. 37, 45 (1983) (citing *Carey v. Brown*, 447 U.S. 455, 461 (1980)).

111. *Hill v. Colorado*, 530 U.S. 703, 726–27 (2000).

112. *Ward v. Rock Against Racism*, 491 U.S. 781, 781 (1989).

113. *Id.* at 791.

114. *Boehler*, 262 P.3d at 642; compare *Loper v. N.Y.C. Police Dep’t*, 999 F.2d 699, 705 (2d Cir. 1993) (statute content-based because it prohibited all speech related to begging), and *ACLU of Nevada v. City of Las Vegas*, 466 F.3d 784, 794 (9th Cir. 2006) (ordinance that banned any solicitation of money or business in a downtown area was content-based) with *Gresham v. Peterson*, 225 F.3d 899, 906 (7th Cir. 2000) (parties stipulated that regulation was content-neutral), and *Smith v. City of Fort Lauderdale, Fla.*, 177 F.3d 954, 956 (11th Cir. 1999) (statute was content-neutral); see also *Gresham*, 225 F.3d at 905 (“Colorable arguments could be made both for and against the idea that [an] Indianapolis ordinance [targeting panhandling] is a content-neutral . . . restriction.”).



reasoning in *Boehler* when examining section 13-2905(A)(3): “[w]e need not try to reconcile these precedents [that conflict in their classifications of begging prohibitions as content-based or content-neutral], however, because even if we assume the prohibition . . . is content-neutral, it cannot survive constitutional scrutiny.”<sup>115</sup> In other words, section 13-2905(A)(3) is unconstitutional even under the less stringent test.

#### A. *Applying the Test*

In a public forum, the government can impose a content-neutral restriction on protected speech if the law: (A) serves a legitimate state interest; (B) is narrowly tailored to serve that interest; and (C) leaves open ample alternative channels of communication.<sup>116</sup> While the regulation does not need to be the least restrictive or least intrusive means of serving legitimate, content-neutral interests, it may not burden substantially more speech than is necessary to further the government’s legitimate interests.<sup>117</sup> As long as the means chosen are not substantially broader than necessary to achieve the government’s interest, the law “will not be invalid simply because the interest could be adequately served by some less-restrictive alternative.”<sup>118</sup>

##### 1. Does Section 13-2905(A)(3) Serve a Significant State Interest?

While being begged for money makes many people uncomfortable, the Supreme Court has made clear that “[i]f there is a bedrock principle underlying the First Amendment, it is that the Government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable.”<sup>119</sup> Nonetheless, the Court recognizes the unwilling listener’s interest in avoiding unwanted communication. The “right to be let alone” has been characterized as “the most comprehensive of rights and the right most valued by civilized men.”<sup>120</sup> A person has a right to be free from “persistence, importunity, following and dogging.”<sup>121</sup> A state could legitimately use the “right to be let alone” as a basis for prohibiting

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115. *Boehler*, 262 P.3d at 643.

116. *Perry Ed. Ass’n v. Perry Local Educators’ Ass’n*, 460 U.S. 37, 45 (1983).

117. *Ward v. Rock Against Racism*, 491 U.S. 781, 798–99 (1989).

118. *Id.* at 800.

119. *Hershkoff & Cohen*, *supra* note 7, at 909 (citing *Texas v. Johnson*, 491 U.S. 397, 398 (1989)).

120. *Hill v. Colorado*, 530 U.S. 703, 716–17 (2000) (quoting Justice Brandeis’s dissent in *Olmstead v. United States*, 277 U.S. 438, 478 (1928)).

121. *American Steel Foundries v. Tri-City Cent. Trades Council*, 257 U.S. 184, 204 (1921).

aggressive begging or continued solicitation after an individual expresses disinterest.

In *State v. Boehler*, the Arizona Court of Appeals evaluated a ban on begging at night, and agreed that there is a compelling state interest in promoting safety in its public areas after dark.<sup>122</sup> Section 13-2905(A)(3)'s complete ban on begging not only prohibits begging after dark, but also aggressive begging near ATM machines, on public transportation, outside hospitals, or other public spaces where a more serious crime or a safety risk may present itself. In these situations, when panhandling could turn from mere annoyance or discomfort to danger, the law promotes a significant state interest in safety and order.

Assuming that section 13-2905(A)(3)'s intent is to promote public safety,<sup>123</sup> the law serves a legitimate state interest because it captures aggressive and harassing behavior. Moving to the next inquiry, however, reveals that the law prohibits too much speech.

## 2. Is Section 13-2905(A)(3) Narrowly Tailored?

To satisfy the narrow tailoring requirement, the state must show that the remedy it has adopted does not burden substantially more speech than is necessary to further its legitimate interest.<sup>124</sup> Here, the statute is not narrowly tailored to promote public safety.

The *Boehler* court struck down a Phoenix ordinance criminalizing panhandling after dark for being constitutionally overbroad.<sup>125</sup> The law specified the type of begging (vocal) and the time (after dark), yet was still found to be unconstitutional as an overbroad restriction on speech. In making this conclusion, the court noted that the ordinance “would prohibit

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122. *State v. Boehler*, 262 P.3d 637, 643 (Ariz. Ct. App. 2011).

123. The Arizona legislature added this law as part of a large Arizona criminal code revision in 1977. See H.R. 33-2054, 1st Sess. (Ariz. 1977). There is no Senate fact sheet/summary for 1977 HB 2054, nor Senate minutes available. E-mail from Denise Cortez, Arizona State Senate Resource Center (Mar. 7, 2013, 09:06 AM PST) (on file with author). A speaker at the Arizona House of Representatives' Committee on the Judiciary explained the chapter in which the begging statute is found—Offenses Against the Public Order—“is almost identical with present law in most places.” *Minutes of Meeting: Hearing on H.B. 2054 Before the H. Comm. On Judiciary*, 33rd Leg., 1st Sess. 32 (Ariz. Jan. 27, 1977) (statement of Steve Twist, Staff Attorney from the League of Arizona Cities and Towns). Other legislative history from the Arizona House of Representatives as provided by the Clerk of the House does not shed light on the legislative intent behind section 13-2905(A)(3). See H.R. 33-2054, 1st Sess. (Ariz. 1977). Thus, the author's presumption of the state's interest in forbidding begging in public is based on court decisions, legal scholarship, and common sense.

124. *Ward v. Rock Against Racism*, 491 U.S. 781, 798–99 (1989).

125. *Boehler*, 262 P.3d at 644.

both a cheery shout by a Salvation Army volunteer asking for holiday change and a quiet offer of a box of Girl Scout cookies by a shy pre-teen if either were uttered on a street corner after dark.”<sup>126</sup> The law applied “regardless of whether a vocal solicitation was harassing, abusive, or threatening,” and without distinguishing “between solicitations that take place in dark alleyways and solicitations that occur in lighted buildings or well-illuminated street corners.”<sup>127</sup> Therefore, the court reasoned that the burden that the ordinance imposed on protected speech was not narrowly tailored to further the City of Phoenix’s legitimate purpose.<sup>128</sup>

The Arizona statute at issue is even broader than the unconstitutionally overbroad Phoenix ordinance struck down in *Boehler*. Unlike the Phoenix ordinance, section 13-2905(A)(3) does not even narrow the criminal behavior to a particular type of begging (*e.g.*, vocal, aggressive, near an ATM, etc.) or to hours after dark. Like the Phoenix ordinance invalidated in *Boehler*, the statute restricts significantly more speech than is necessary to protect a legitimate interest of promoting safety.

The Ninth Circuit, which has appellate jurisdiction over the District of Arizona, recently provided new insight as to how it might address a challenge to section 13-2905(A)(3) brought in federal court. In *Valle del Sol v. Whiting*, the court evaluated Arizona’s interest in a law that makes it illegal for a motor vehicle occupant “to hire or attempt to hire a person for work at another location from a stopped car that impedes traffic, or for a person to be hired in such a manner.”<sup>129</sup> In effect, the law prevents day laborers from finding work.<sup>130</sup> Arizona claims that the law is necessary to address traffic safety concerns.<sup>131</sup> Though this case deals with commercial speech, the court’s analysis is nonetheless helpful here.<sup>132</sup>

The court recognized the legitimacy of a First Amendment challenge to the law, because it restricts and penalizes the commercial speech of day laborers and those who seek to hire them.<sup>133</sup> The court noted generally that restricting speech should be the government’s tool of last resort; thus, the availability of obvious less-restrictive alternatives renders a speech

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126. *Id.* at 643–44.

127. *Id.* at 644.

128. *Id.* at 645 (citing *Erznoznik v. City of Jacksonville*, 422 U.S. 205, 209 (1975)).

129. *Valle del Sol v. Whiting*, 709 F.3d 808, 813 (9th Cir. 2013).

130. *Id.*

131. *Id.* at 817.

132. *See id.* at 826 (stating that the test for restrictions of commercial speech is substantially similar to the test for validity of time, place, and manner restrictions; thus, it was useful to refer to a prior case involving non-commercial solicitation speech).

133. *Id.*

restriction overly broad.<sup>134</sup> Because preexisting Arizona law contains obvious, less-restrictive alternatives to the day labor provisions, the law is overinclusive and restricts more speech than necessary to serve Arizona's interest in promoting traffic safety.<sup>135</sup>

It therefore follows that, because a number of Arizona laws could be used to address legitimate safety concerns associated with begging, the Ninth Circuit would likely find section 13-2905(A)(3) overinclusive. “It is ludicrous . . . to say that a statute that prohibits only loitering for the purpose of begging provides the only authority that is available to prevent and punish all the socially undesirable conduct incident to begging.”<sup>136</sup> Like in *Valle del Sol*, a number of Arizona laws provide an alternative to furthering the state's interest in safety without restricting speech.<sup>137</sup> There is no need for a blanket ban on begging in public in order to prevent dangerous behavior.

The option of arresting panhandlers for harassment, disorderly conduct, or stalking makes section 13-2905(A)(3) overly restrictive of speech:

- Harassment: “A person commits harassment if, with intent to harass or with knowledge that the person is harassing another person, the person . . . [c]ontinues to follow another person in or about a public place for no legitimate purpose after being asked to desist [or] [r]epeatedly commits an act or acts that harass another person.”<sup>138</sup>
- Disorderly conduct: “A person commits disorderly conduct if . . . such person: [e]ngages in fighting, violent, or seriously disruptive behavior; or . . . [u]ses abusive or offensive language or gestures to any person in a manner likely to provoke immediate physical retaliation by such person . . . ”<sup>139</sup>
- Stalking: “A person commits stalking if the person . . . engages in a course of conduct that is directed toward another person and if that conduct . . . [w]ould cause a reasonable person to fear for that person's safety.”<sup>140</sup>

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134. *Id.*

135. *Id.* at 828.

136. *Loper v. N.Y.C. Police Dep't*, 999 F.2d 699, 701 (2d Cir. 1993).

137. *See also id.*, at 701–02.

138. ARIZ. REV. STAT. ANN. § 13-2921 (A)(2), (3) (2013).

139. § 13-2904 (A)(1) & (3).

140. § 13-2923 (A)(1). For a panhandler to meet the criminal “course of conduct” for the purposes of criminal stalking under this statute, he would have to “[maintain] visual or physical proximity to a specific person or [direct] verbal, written or other threat, whether express or

Although Arizona does not need to employ the *least* restrictive alternative to promoting its goal of public safety, “it may not select an option that unnecessarily imposes significant burdens on First Amendment-protected speech.”<sup>141</sup> The alternatives of criminal harassment, disorderly conduct, and even stalking are less restrictive on speech yet still encompass the undesirable behavior that Arizona seeks to prevent through the loitering-to-beg statute. The state could even create an “aggressive solicitation” statute.

The City of Phoenix prohibits aggressive solicitation in its city ordinances, under chapter 23, “Morals and Conduct.”<sup>142</sup> Under Phoenix City Code section 23-7, Phoenix lawmakers clearly indicate what particular behavior with regard to begging is illegal under the ordinance. For example, the law’s definition of “aggressive manner” includes that which is likely to cause a reasonable person to fear imminent bodily harm or is “reasonably likely to intimidate the person being solicited into responding affirmatively to the solicitation.”<sup>143</sup> The ordinance iterates specific acts that are prohibited in the context of solicitation and is tailored to capture only aggressive and offensive behavior.

Despite the fact that it survived a Fourteenth Amendment void-for-vagueness challenge in 1974,<sup>144</sup> the City of Tucson, Arizona later abandoned a blanket begging prohibition. The restriction now operates much more narrowly, prohibiting only “aggressive solicitation.”<sup>145</sup> The fact that Tucson had enacted a broad ordinance, successfully defended it in court, and then later elected to narrow it weakens the argument that it is legitimately in the public interest to prohibit all begging.

In effect today, Tucson’s ordinance provides an example of a narrowly-tailored begging law that prohibits the *specific* solicitation conduct that the

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implied, to a specific person on two or more occasions over a period, of time, however short.” *Id.* at (C)(1)(a)(i).

141. *Comite de Jornaleros de Redondo Beach v. City of Redondo Beach*, 657 F.3d 936, 950 (9th Cir. 2011).

142. PHOENIX, ARIZ., MUNICIPAL CODE § 23-7 (2013).

143. *Id.*

144. *State ex rel. Williams v. City Court of Tucson*, 520 P.2d 1166, 1168 (Ariz. Ct. App. 1974). This case did not involve a First Amendment challenge.

145. TUCSON, ARIZ. CODE OF ORDINANCES § 11-33. This law, unlike the state statute, defines the proscribed behavior and justifies the law with legislative findings. *See id.* at (a)–(b). In its ordinance, Tucson even goes so far as to explain that “[t]he law is not intended to limit any person from exercising the constitutional right to solicit funds. . . . Rather, its goal is to protect citizens from the fear and intimidating accompanying *certain kinds* of solicitation that have become an unwelcome and overwhelming presence in the city.” *Id.* at (c) (emphasis added).

government has a legitimate interest in preventing. The Tucson ordinance is notable for including elements the Arizona law lacks: an explanation of the law's purpose, which is to protect citizens from fear and intimidation caused by certain kinds of solicitation;<sup>146</sup> the recognition that soliciting funds from the public is a constitutionally-protected activity;<sup>147</sup> detailed definitions of solicitation and aggressive solicitation;<sup>148</sup> and generally, an attempt to criminalize only behavior that is threatening or offensive.<sup>149</sup>

Judge Krucker, dissenting in *Williams*, posed a hypothetical situation making it clear that Tucson's since-amended ordinance was not a narrowly tailored means of carrying out the government's interest:

[I]magine the following situation at the corner of Congress and Stone in downtown Tucson: [(1)] a group of Salvation Army workers soliciting contributions; (2) a blind man playing his accordion with a tin cup available for contributions; and (3) a group of 'hippie-type' individuals engaged in like conduct. No one would dispute that they are all doing the same thing, namely, remaining in a public place for the manifest purpose of begging.<sup>150</sup>

Arizona's statute as it stands presents the same lack of narrow tailoring. The law criminalizes "begging" but provides no definition of "begging" for the purposes of the statute. The legal definition of "beg"<sup>151</sup> encompasses conduct that the statute does not except from its reach—such as Salvation Army volunteers asking for change during the holiday season. This is conduct that the legislature would have had no constitutional basis to criminalize, since the Supreme Court has explicitly held soliciting donations for charity as protected under the First Amendment,<sup>152</sup> and because peaceful begging poses no danger to public safety.

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146. TUCSON § 11-33(a).

147. *Id.* at (c).

148. *Id.* at (b), (d), (e).

149. *Id.* at (b), (c), (e); TUCSON, ARIZ. CODE OF ORDINANCES § 11-33.1.

150. *State ex rel. Williams v. City Court of Tucson*, 520 P.2d 1166, 1172 (Ariz. Ct. App. 1974) (Krucker, J., dissenting).

151. "To request earnestly; to beseech. . . . To ask for charity, esp. habitually or pitiably." BLACK'S LAW DICTIONARY (9th ed. 2009).

152. *See Int'l Soc'y for Krishna Consciousness, Inc. v. Lee*, 505 U.S. 672, 677 (1992). If "begging" for the purposes of the statute is applied only to the homeless or otherwise destitute individuals, and not individuals such as Salvation Army volunteers at Christmas, then the question of equal protection under the Fourteenth Amendment comes into play. That discussion is outside the scope of this comment.

3. Does Section 13-2905 (A)(3) Leave Alternate Means to Communicate?

Under the third prong of the test for a content-neutral restriction on protected speech,<sup>153</sup> the Arizona law also fails to be constitutional because it does not provide alternative means of communicating requests for donations to passersby. The law, in effect, prohibits begging throughout the state of Arizona and leaves individual homeless and destitute persons without the means to ask passersby for help.<sup>154</sup> There is only one way a needy person can solicit help from passersby in city streets, parks, and other public fora—by begging for it. A court *could* find alternate means of communication if begging were indeed “specifically authorized by law,” in a certain time, place, or manner, as provided by the statute itself. However, as illustrated in Part II, at least in Phoenix, laws to authorize begging do not exist.

## VI. CONCLUSION

The recent *Baldwin v. D’Andrea* case confirmed this Article’s conclusion that begging is protected speech and that Arizona may not constitutionally proscribe all begging in public. The State of Arizona should be commended for stipulating to the order invalidating section 13-2905(A)(3), instead of attempting to defend the law.

As of a 2011 survey, at least fifty American cities have city-wide prohibitions on begging.<sup>155</sup> Advocates in other jurisdictions should challenge these laws. Not only is arresting people for doing no more than peacefully begging in public just plain wrong, but it also offends our Constitution.

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153. *Perry Educ. Ass’n v. Perry Local Educators’ Ass’n*, 460 U.S. 37, 45 (1983).

154. *See Loper v. N.Y.C. Police Dep’t*, 999 F.2d 699, 702 (2d Cir. 1993).

155. *See* NATIONAL LAW CENTER ON HOMELESSNESS AND POVERTY, *CRIMINALIZING CRISIS: THE CRIMINALIZATION OF HOMELESSNESS IN U.S. CITIES*, ADVOCACY MANUAL 42 (2011), *available at* <http://www.google.com/url?sa=t&rc=1&q=&esrc=s&source=web&cd=1&ved=0CC4QFjAA&url=http%3A%2F%2Fwww.nlchp.org%2Fcontent%2Fpubs%2F11.14.11%2520Criminalization%2520Report%2520%26%2520Advocacy%2520Manual%2C%2520FINAL1.pdf&ei=zuZEUq7WMYqtqgGsvYDoBQ&usq=AFQjCNGgBx3aN7W4QXOcEy6uPec7n8m2YQ&sig2=iKs9FnNQW5cyUb6HeIma2g&bvm=bv.53217764,d.aWM>.