



RESTORING PUBLIC ORDER

# A Guide to Regulating Panhandling



by Kent S. Scheidegger



*With Introductions by*  
**James Q. Wilson and**  
**George L. Kelling**

CRIMINAL JUSTICE LEGAL FOUNDATION



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## *Part I*

# LEGAL BACKGROUND

## **Introduction**

From the beginning of village life in America—that is, from the seventeenth century almost to the present—it was generally understood that the chief duty of (at first) night watchmen and (later on) of police officers was to maintain order. People living in close quarters would often create nuisances for each other by being loud or rowdy, disposing of human and animal wastes in public, carousing drunkenly at night, or carelessly tending fires. Communal life was interdependent life; people had to temper their behavior to the needs and feelings of others if a decent communal life was to be possible. Most of that tempering occurred spontaneously, but some of it required official discipline. The watchman or the officer provided that discipline.

Only during the last few decades has a radically different view of the police function taken hold in America. Today our relations to each other in public spaces are officially defined in terms of individual rights rather than common needs. It is understood, of course, that people ordinarily will respect one another's desire to be free of nuisance behavior, but when that respect is absent and the police are summoned, the officer is now limited to stopping behavior that clearly violates a criminal statute and is instructed to do so in ways that impose the fewest burdens on the rights of the offender.

As a result of a series of court cases and various interest-group pressures, the police are formally or informally instructed to treat a community as an assemblage of individuals bearing rights rather than as a group of neighbors sharing interests. Accordingly, strict limitations have been placed on the power of the police to control public drunkenness, common vagrancy,

abusive language, and charitable solicitations. While one can acknowledge the laudable motives of those who supported these restrictions, their cumulative effect in some places has been to make communal life in public spaces unbearable.

No single act of panhandling, loitering, or public drunkenness is especially worrisome, but a series of such acts carried on simultaneously by many people is felt by most citizens to be deeply threatening. Yet the law often treats this problem as if it were a set of isolated, individual behaviors no one of which is harmful, and therefore no one of which deserves punishment. The law takes no official notice of the cumulative effects of collective behaviors of this sort.

The results can be seen in many urban areas. There are neighborhoods that have become inhospitable and even menacing, destructive of any prospect of a decent and civilized street life, because of the presence of many panhandlers and vagrants who boisterously or abusively ply their trade. Citizens are rightly upset by a state of affairs that makes them feel that they are prisoners in their own homes, offices, or cars, while dangerous people are free to use the streets at will.

What is especially unfortunate is that this state of affairs need not exist. For nearly three centuries it did not: public authorities maintained in most urban areas a modicum of public order. In the process of doing this, they sometimes acted arbitrarily, illegally, or violently. Laws and court rulings to curb arbitrary, illegal, or unnecessarily violent action are desirable. But these new limitations went, in many cases, far beyond what is necessary to protect essential rights. Instead, they in effect decriminalized the creation of a public nuisance. Even worse, many city officials believed that the laws and court rulings went further than in fact they did, and so they abandoned any reasonable effort to maintain order. These officials were not simply inhibited by the existence of rights, they were intimidated by the mere assertion of rights.

In this booklet, the Criminal Justice Legal Foundation provides a realistic, thoughtful guide for mayors, city councils, and police chiefs who want practical advice on how to curb one especially annoying public nuisance—panhandling that is abusive,



persistent, or threatening. It reviews the law on this matter and suggests a draft ordinance that strikes a reasonable balance between the right of free speech and the right of the public to use public spaces in comfort and civility.

Cities need not throw up their hands and say, “nothing can be done” or, “the courts have tied our hands.” There is much that can be done, and there are good reasons for thinking that the courts will approve it.

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## A. Uncertainty and Development of the Law.

When a city decides to do something about public order, the first question is “will we get sued?” The answer, inevitably, is yes. Any effort to restrict panhandling will be met with vigorous opposition from well-organized, well-funded, and extremely litigious organizations. Their point of view is shared by a significant minority of judges, particularly in the federal courts. It is therefore impossible to write a panhandling ordinance that will not be challenged. It is also impossible to guarantee that an ordinance will withstand challenge, even though it may, in reality, be perfectly valid.

The case of the state fair “booth rules” illustrates the latter point. State fairs around the country adopted rules restricting solicitation to rented booths. New York’s rule was upheld as constitutional by the federal district court,<sup>1</sup> but struck down by the federal court of appeals.<sup>2</sup> The Supreme Court declined to intervene in that case,<sup>3</sup> but it later upheld substantially the same regulation in another case from Minnesota.<sup>4</sup> Thus, the New York State Fair lost its case, even though its regulation had been perfectly proper the entire time.

The best we can do, then, is to analyze the existing cases and suggest ordinances that we believe to be constitutional. A municipality which considers panhandling to be a problem and wishes to deal with it must do so with the certainty that the ordinance will be challenged and the possibility it will be struck down. Only by taking these risks can we develop the case law to settle the constitutional questions.

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1. *International Society for Krishna Consciousness, Inc. v. Barber*, 506 F. Supp. 147 (N.D.N.Y. 1980).
  2. *International Society for Krishna Consciousness, Inc. v. Barber*, 650 F. 2d 430 (CA2 1981).
  3. *Barber v. International Society for Krishna Consciousness, Inc.*, 451 U. S. 971 (1981).
  4. *Heffron v. International Society for Krishna Consciousness, Inc.*, 452 U. S. 640 (1981).

## B. “Vagrancy” and Its Problems.

In times past, police dealt with public disorder by arresting people for “vagrancy.”<sup>5</sup> There were serious legal problems with this approach.

Crimes are generally defined as a bad act combined with a bad intent.<sup>6</sup> Vagrancy, however, was different. In the reign of Henry VIII, Parliament made it a crime to “be vagrant.”<sup>7</sup> In 1824, Parliament provided for the punishment of “idle and disorderly persons.”<sup>8</sup> Begging was not directly prohibited as an unlawful act, but instead was the means for determining that one would be “deemed an idle and disorderly person.”<sup>9</sup> These acts were widely copied and expanded in the United States.

These acts were far out of the mainstream of criminal law and obviously directed at politically powerless groups. It was hardly surprising that they incurred the wrath of the courts in the criminal law revolution of the 1960’s and 1970’s. In the case of *In re Newbern*,<sup>10</sup> the California Supreme Court held that a law defining vagrancy as being a “common drunk” was too vague to be enforced. The United States Supreme Court struck down a statute making it a crime to be a drug addict, rather than prohibiting using or possessing drugs, in *Robinson v. California*.<sup>11</sup> In *Cox v. Louisiana*<sup>12</sup> and *Shuttlesworth v. Birmingham*,<sup>13</sup> the high court struck down laws that gave police excessive discretion as to who would be allowed to demonstrate and who would be required to move on. Finally, in *Papachristou v. Jacksonville*,<sup>14</sup>

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5. James Q. Wilson & George L. Kelling, *The Police and Neighborhood Safety*, The Atlantic, March 1982, at 30.
  6. See, e.g., Cal. Penal Code § 20: “In every crime or public offense there must exist a union, or joint operation of act and intent, or criminal negligence.”
  7. 22 Hen. 8, ch. 5 (1530).
  8. Vagrancy Act, 5 Geo. 4, ch. 83 (1824).
  9. *Id.* § 3.
  10. 53 Cal. 2d 786, 350 P. 2d 116 (1960).
  11. 370 U. S. 660 (1962).
  12. 379 U. S. 536 (1965).
  13. 382 U. S. 87 (1965).
  14. 405 U. S. 156 (1972).

the high court struck down a vagrancy law so sweepingly broad that, by its literal terms, a person out for a leisurely, aimless stroll could be classified as a “vagrant.”

From these cases and others, an attitude has developed among many lawyers that public order laws in general are prohibited, or at least suspect. That is not true. In the absence of an impact on a specific constitutional right, discussed in the next section, the police power of the state remains available to define and punish the *acts* which the legislative body deems harmful to the public welfare. In the *Newbern* case cited above, for example, Newbern was remanded for trial for being drunk in public, a violation of a city ordinance which was not vague and which punished an act rather than a status.

The problems of the old vagrancy laws are readily avoided. Punish acts, not status. Define the act clearly enough that people need not guess whether a particular act is legal. Do not give the police authority to arrest disfavored people for acts which others do all the time. In the wake of the *Newbern* case, California replaced its “vagrancy” statute with a “disorderly conduct” statute,<sup>15</sup> which largely fixes these problems.

In the case of panhandling, which is the specific focus of this booklet, a more difficult question arises. Panhandling typically involves a spoken request, and the issue of freedom of speech therefore enters the picture.

### C. Panhandling and Free Speech.

“Hey buddy, can you spare some change?” is undeniably speech. Freedom of speech is one of our most cherished constitutional liberties. Freedom, however, is not absolute license. The Supreme Court has “rejected the notion that a city is powerless to protect its citizens from unwanted exposure to certain methods of expression which may legitimately be deemed a public nuisance.”<sup>16</sup> In addition to not letting people yell “fire” in crowded

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15. Cal. Penal Code § 647.

16. *City Council of Los Angeles v. Taxpayers for Vincent*, 466 U. S. 789, 805 (1984).

theatres,<sup>17</sup> society may also limit expression in other ways. The Supreme Court has formulated a number of tests, discussed below, but a common thread runs through them. A restriction which discriminates among viewpoints, favoring some expressions and disfavoring others because of the views expressed, will be struck down.<sup>18</sup> Restrictions which attempt to accommodate competing interests through evenhanded regulations applicable to all are more likely to be upheld.

### 1. *Public forums and other public property.*

One area in which the government has greater leeway to regulate is in the management of property which is not a public forum. A line of Supreme Court cases recognizes that not all publicly-owned property is available for the exercise of First Amendment rights. The government may, within reason, regulate speech on special-purpose property in order to carry out the function of that property.

For the purpose of invoking this rule, property is either a “traditional public forum,” a “designated public forum,” or a “nonpublic forum.”<sup>19</sup> The traditional public forums are primarily streets, sidewalks, and parks, where people who wish to express their views have done so since time immemorial. A designated public forum is one which the government has chosen to make available to the public. A nonpublic forum is one which government chooses to use only for its own communications or which is not used for communication at all.

The law is now reasonably clear that governments have broad authority to restrict or prohibit solicitation on their nonpublic forum property. In *United States v. Kokinda*,<sup>20</sup> the Supreme Court upheld a Postal Service regulation<sup>21</sup> prohibiting solicitation

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17. See *Schenk v. United States*, 249 U. S. 47, 52 (1919) (Holmes, J.).

18. *Vincent*, note 16, at 804.

19. See *Perry Education Assn. v. Perry Local Educators' Assn.*, 460 U. S. 37, 45-46 (1983).

20. 111 L. Ed. 2d 571, 110 S. Ct. 3115 (1990).

21. 39 C. F. R. § 232.1(h)(1) (1989).

on post office grounds. However, the Court was divided as to the reason for the regulation's validity. The plurality opinion held that the post office grounds were not a public forum, while Justice Kennedy believed that the restriction was valid even if the grounds were a public forum.

*International Society for Krishna Consciousness, Inc. v. Lee*<sup>22</sup> is the Supreme Court's latest word on solicitation. A majority held that the New York area airports are not public forums and that a ban on "the solicitation and receipt of funds" is constitutional. Justice Kennedy reasserted his position from *Kokinda* that a prohibition on in-person solicitation for the immediate payment of money may be valid even in a public forum.

*Krishna* seems to give a green light to banning solicitation in transportation facilities. If JFK Airport is not a public forum, it is difficult to imagine what public transportation facility is. The airport was open to the public without restriction, and it had broad thoroughfares lined with stores, much like a city street.<sup>23</sup> Cities should be aware, however, that the Port Authority prevailed on the public forum question only by the narrowest of margins. A city which wishes to keep its transportation facilities out of the "public forum" category should limit nontransportation activities in them to the absolute minimum.

There seems to be some confusion as to whether solicitations by organized charities can or must be permitted by a governmental authority which wishes to ban panhandling. Language in the *Schaumburg* case<sup>24</sup> has led some people to believe that charitable solicitation has a special place and must be permitted. The New York subway regulation, for example, initially banned all solicitation but was amended to permit organized charities to solicit.<sup>25</sup>

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22. 120 L. Ed. 2d 541, 112 S. Ct. 2101 (1992).

23. *Id.*, 120 L. Ed. 2d, at 564, 112 S. Ct., at 2719 (Kennedy, J., concurring in the judgment).

24. *Schaumburg v. Citizens for a Better Environment*, 444 U. S. 620 (1980).

25. *Young v. New York City Transit Authority*, 903 F. 2d 146, 148-149 (CA2), *cert. denied*, 112 L. Ed. 2d 528, 111 S. Ct. 516 (1990).

Although New York did prevail in the subway case, we believe that the safer course is to prohibit all in-person solicitation for the immediate payment of money in transportation facilities. One of the three judges dissented in that case, saying that “[h]ad the TA’s regulations continued to bar all charitable solicitations in the subways, I would vote to uphold them . . . .”<sup>26</sup> In the state fair case, the Supreme Court placed considerable emphasis on the fact that the prohibition applied equally to all would-be solicitors.<sup>27</sup> The post office and airport cases also involved total bans. In light of the Supreme Court’s recent move away from categories of speech and toward a critical examination of discrimination against disfavored viewpoints,<sup>28</sup> we consider an exemption for organized charities to be risky.

## 2. *Time, place, and manner restrictions.*

The Supreme Court has long recognized that government may regulate certain aspects of expression. These aspects are typically referred to as “time, place, and manner.” The Court has recognized that “restrictions of this kind are valid provided [1] that they are justified without reference to the content of the regulated speech, [2] that they are narrowly tailored to serve a significant governmental interest, and [3] that they leave open ample alternative channels for communication of the information.”<sup>29</sup>

The first part of the test means that the regulation must not be a means for suppressing a particular point of view.<sup>30</sup> “The principal inquiry . . . is whether the government has adopted a regulation of speech because of disagreement with the message it conveys.”<sup>31</sup>

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26. *Young*, note 25, at 168 (Meskill, J., dissenting).

27. *Heffron*, note 4, at 649.

28. See *R.A.V. v. St. Paul*, 120 L. Ed. 2d 305, 112 S. Ct. 2538 (1992).

29. *Clark v. Community for Creative Non-Violence*, 468 U. S. 288, 293 (1984) (numbers added).

30. *Heffron*, note 4, at 649.

31. *Ward v. Rock Against Racism*, 491 U. S. 781, 791 (1989).

A restriction on panhandling should have little difficulty passing this part of the test. The state fair case established that an evenhanded restriction on all would-be solicitors is “content neutral” for this purpose.<sup>32</sup> Advocates of unrestricted panhandling often contend that panhandlers convey a message about social conditions.<sup>33</sup> Whether that is true or not, it cannot be credibly contended that suppression of that message is the reason cities seek to regulate panhandling.<sup>34</sup>

The second part requires a significant state interest and tailoring of the regulation to serve that interest. This will likely be the most hotly debated point. Advocates of unrestricted panhandling frequently assert that removing unsightly homeless people from view is the object of the regulation.<sup>35</sup> That is, of course, not the purpose. The purpose is to permit people to use streets, sidewalks, and public transportation free from the borderline robbery and pervasive fraud which characterize so much of today’s panhandling. Regulations should be tailored to this purpose and not sweep more broadly than is necessary.

In implementing this test, the Supreme Court has given substantial deference to the government’s determination of what is necessary. “Narrowly tailored” is not the same thing as “least restrictive means.”<sup>36</sup> A regulation is not invalid simply because the challenger or the judge can conceive of a narrower regulation which arguably may accomplish the same end. It is sufficient that the “regulation promotes a substantial government interest that would be achieved less effectively absent the regulation.”<sup>37</sup>

The last requirement is that the regulation leave open alternate channels of communication. Prohibition of aggressive or

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32. *Heffron*, note 4, at 648-649.

33. See, e.g., *Young v. New York City Transit Authority*, 729 F. Supp. 341, 352 (S.D.N.Y.), *rev’d*, 903 F.2d 146 (CA2 1990).

34. See *Young*, note 25, at 159.

35. See, e.g., *Chevigny, Begging and the First Amendment: Young v. New York City Transit Authority*, 57 *Brook. L. Rev.* 525, 543 (1991).

36. *Ward*, note 31, 798.

37. *Id.*, at 799.



fraudulent panhandling easily meets this test, as does prohibition of panhandling in limited places, such as transportation facilities. A complete ban on panhandling in a city would present a close question. To the extent that panhandling communicates a message about the adequacy of social services, there are certainly more than ample alternative ways to express that message. The fact that the alternatives may be less dramatic does not render the regulation invalid.<sup>38</sup>

### 3. *Expressive conduct.*

Although the verbal request is speech, panhandling involves a substantial amount of conduct. Approaching the target or blocking the sidewalk is conduct. So is the actual receipt of the money.<sup>39</sup> Government has considerable latitude to regulate conduct, even where the conduct has an expressive component.

In *United States v. O'Brien*,<sup>40</sup> the draft-card burning case, the Supreme Court established a four-part test for regulations of expressive conduct:

“[A] government regulation is sufficiently justified if it is within the constitutional power of the Government; if it furthers an important or substantial governmental interest; if the governmental interest is unrelated to the suppression of free expression; and if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest.”<sup>41</sup>

Although phrased somewhat differently, this test is practically the same as the time, place, and manner test. Nearly all regulations will pass both tests or neither.<sup>42</sup>

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38. See *Clark*, note 29, at 295.

39. *Thomas v. Collins*, 323 U. S. 516, 540 (1945).

40. 391 U. S. 367 (1968).

41. *Id.*, at 377.

42. See *Clark*, note 29, at 298.

#### 4. Commercial speech.

Commercial speech receives less First Amendment protection than does noncommercial speech.<sup>43</sup> Although commercial speech normally involves the sale of goods and services, the Supreme Court has on one occasion defined it more broadly as “expression related solely to the economic interests of the speaker and its audience.”<sup>44</sup> Since panhandling relates solely to a proposed transfer of money from the listener to the speaker, it would seem to fit this definition. The argument to the contrary is based on a series of cases holding that charitable solicitation is not commercial where it is “intertwined” with advocacy.<sup>45</sup> Whether panhandling is commercial speech is at present an unresolved question.

Commercial speech which is unlawful or misleading can be banned outright.<sup>46</sup> There is no First Amendment problem with criminalizing false or misleading representations by panhandlers. Indeed, such conduct constitutes the well-established crime of theft by false pretenses.<sup>47</sup>

Other commercial speech may be limited so long as the government has a substantial interest which is directly advanced by the regulation, and the regulation is no broader than necessary. This test differs from the time, place, or manner and expressive conduct tests in that the regulation may go directly to the content of the speech.

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43. *Ohralik v. Ohio State Bar Assn.*, 436 U. S. 447, 456 (1978).

44. *Central Hudson Gas & Electric Corp. v. Public Service Comm'n of New York*, 447 U. S. 557, 561 (1980).

45. *Schaumburg*, note 24; *Secretary of State of Md. v. Joseph H. Munson Co.*, 467 U. S. 947 (1984); *Riley v. National Federation of Blind of N.C., Inc.*, 487 U. S. 781 (1988).

46. See *Virginia Pharmacy Bd. v. Virginia Citizens Consumer Council, Inc.*, 425 U. S. 748, 771-772 (1976); *San Francisco Arts & Athletics v. U.S. Olympic Committee*, 483 U. S. 522, 535, n. 12 (1987).

47. See 2 W. LaFare & A. Scott, *Substantive Criminal Law* § 8.7, at 382-383 (1986).

## D. Outright prohibition of panhandling.

Some cities have expressed an interest in prohibiting panhandling entirely within the city, rather than imposing time, place, and manner regulations. The legal status of such a ban is unsettled. The only completed case squarely on point is from a Florida appellate court, which struck down the ordinance.<sup>48</sup> At the time of this writing, there is pending litigation in New York regarding the constitutionality of New York Penal Law § 240.35(1), which prohibits loitering for the purpose of begging.<sup>49</sup> This is very nearly a complete ban. The district court has ruled against the constitutionality of the statute.

Two positions might be taken to support such a ban. First, the federal court of appeals in the New York subway case suggested that panhandling is conduct rather than speech and therefore not within the First Amendment's protection.<sup>50</sup> Also, if panhandling is commercial speech,<sup>51</sup> a complete ban may be upheld if it sweeps no more broadly than necessary to serve a substantial governmental interest, with the term "necessary" being loosely applied.<sup>52</sup>

If the first approach is finally accepted by the courts, a complete ban will be upheld. However, we consider the "commercial speech" variant to be more likely to prevail. For a complete ban to be upheld, it would be necessary to show that lesser restrictions are inadequate. At the present time, it is doubtful whether such a showing can be made. We therefore recommend that cities first try the lesser restrictions described in part III of this booklet. If they prove inadequate, that proof will support the case for a complete ban.

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48. *C.C.B. v. State*, 458 So. 2d 47, 50 (Fla. App. 1984).

49. *Loper v. New York City Police Dept.*, 802 F. Supp. 1029 (S.D.N.Y. 1992).

50. See *Young*, note 25, at 152-154.

51. See p. 12, above.

52. See *Board of Trustees of the State University of New York v. Fox*, 492 U. S. 469, 476-477 (1989).



## *Part II*

# RESTRICTIONS IN PAST AND PENDING CASES

### **Introduction**

A demand for order is surging through American cities. Citizens are wearying of exactions of “individual rights” by bellicose prostitutes, aggressive panhandlers, menacing drug dealers, boisterous drunks, irascible youth, and dangerously disturbed persons adrift in society. Radical libertarians—often with the aid of sympathetic media—portray this demand for restoration of civility as the actions of a tyrannous majority seeking to repress politically powerless groups; the poor, the homeless, prostitutes, racial and ethnic minorities, and disturbed persons.

Rights advocates have legitimate concerns. The civil rights revolution of the 1960’s was long overdue; responses by courts during the last 30 years in overturning laws that granted police, prosecutors, courts, juvenile institutions, and mental hospitals relatively unbridled authority over *classes* of persons—vagrants, for example—were appropriate.

But like so many revolutions, the rights revolution carried its own excesses. Rights became absolute. Freedom came to mean doing what one pleased, regardless of civic obligations, the impact of one’s own behavior on the rights of others, or its impact on neighborhoods and communities. The awesome guarantees of the Constitution were not only trivialized to protect boorishness and incivility, but contorted to camouflage intimidation, threat, and fraud.

Citizens intuitively understand, however, that the goal of restoring order is neither repression of the powerless nor mere social “tidiness;” rather, citizens seek to improve the quality of life

in neighborhoods. Most importantly, they have long known what social scientists have only recently documented: disorder is either a precursor to or accompanies serious crime.

My involvement in this issue resulted from an article I wrote with James Q. Wilson that is popularly known as “Broken Windows.”<sup>53</sup> We argued that just as an unrepaired broken window is a sign that no one cares and invites more damage, so unattended disorderly behavior also signals that nobody is concerned and leads both to more disorderly behavior and to serious crime. Additionally, we claimed that disorder left unattended leads to a breakdown of community control, ultimately undermining the fabric of urban life and social intercourse.

In 1989, partially as a result of “Broken Windows,” I became a consultant to the Metropolitan Transportation Authority, the parent organization of New York City’s subway and its Transit Police Department (TPD), to assist with what was referred to broadly in the media, as well as TPD and transit staff, as the “homeless problem.” The task before us was to define a problem, devise policies to address that problem, gain public understanding both of the problem and the appropriateness and potentials of various remedies, implement those policies and remedies, and defend those policies morally and legally. Out of this experience, principles emerged that may be of use to cities and governmental agencies attempting to address problems of disorder on city streets and in other public spaces.

First, to emphasize what has been noted earlier, the only proper target for order maintenance activities is behavior, not status. In the New York City subway system, the initial formulation of the problem was “the homeless.” After study, it was clear that while homelessness was a social problem, it was not *the* problem causing fear among passengers. The problem was the *behaviors* of the group of persons, some of whom were homeless, but certainly not all. One of the most bothersome of these behaviors was panhandling, but it also included lying down in

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53. James Q. Wilson & George L. Kelling, *The Police and Neighborhood Safety*, The Atlantic, March 1982, at 29-38.

public spaces, public urination and defecation, farebeating (jumping turnstiles), and other such behaviors, all of which violated existent, enforceable subway rules.

Second, maintaining order raises important moral issues about which people feel strongly. The vast majority of the stakeholders in the transportation system, which include New York's political leadership, users of the system (consumers), employees whose task it is to deal with the problems of disorder (police and other transit staff), and media representatives, wanted assurance that dealing with the problems of disorder in the subway recognized and was sensitive to the moral issues raised by homelessness, hunger, and need. This did not mean that subway staff and police should become social workers or that the subway should be turned into a gigantic flophouse; the subway system's constituencies wanted assurances that police and transit staff would try to link the genuinely needy with services and that, if need be, transit officials would go to heroic efforts to be humane in their handling of needy persons. This was not only right, it was good strategy—both externally and internally. Externally, getting and maintaining the high moral ground was essential to maintain public support and to develop judicial approval for order maintenance activities. Internally, it was necessary to ensure that police officers and other criminal justice officials did not view themselves as society's "dirty workers," doing what had to be done to "scumbags" and other demonized "undesirables." They needed an explicit, widely recognized base of authority that was rooted in morality, legality, and constitutionality.<sup>54</sup>

Third, despite fears that definitions of disorder divide citizens and lead to the imposition of the values of a dominant majority on powerless minorities, surveys and focus groups of transit users of all backgrounds demonstrated that a broad consensus existed about what constitutes disorderly behavior and what should be done about it. Moreover, despite charges of advocates that

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54. For a detailed account of an early attempt to manage disorder in the New York's subway, see George L. Kelling, *Reclaiming the Subway*, New York: The City Journal, Volume 1, Number 2, Winter 1991, at 17-28.

enforcing standards of behavior in the subway pits blacks and other people of color against whites, and rich against poor, this simply was not the case; many users of the subways—those who *must* use the subway—are the working poor of all races who desire to travel to and from their work in a civil and non-threatening transit environment—and who *deserve* such quality public services.<sup>55</sup>

Fourth, those who are responsible for developing laws and policies about complex problems like panhandling must communicate with the general public as clearly, simply, and directly as possible. Unfortunately, sloganism and inaccurate language abound. “Homelessness in the subway” is an example: everybody supposedly knows what is meant by the phrase. Not so. True, some of the people who are categorized as homeless are. Many others who look and behave like the homeless are hustlers and scam artists who prey on the pity and/or fear other subway users feel. Others are drug users and the disturbed who cannot or will not live in homes or shelters or make use of social services. Likewise, legal concepts like freedom of speech, individual rights, and civil rights are complicated, and they need to be rigorously understood and applied. None are absolute. All are enjoyed within a context of social and civic obligation.<sup>56</sup>

Fifth, attempts to maintain order will be challenged. In the case of the subway, *legal* challenges came from homeless advocates who challenged the anti-panhandling section of the subway rules.<sup>57</sup> However, bureaucratic challenges resulted as well: from unions who feared for the health, safety, and professional status of their constituents; from managers who doubted that anything could be achieved to improve the subway environment; from

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55. For similar conclusions regarding disorder in neighborhoods, see Wesley Skogan, *Disorder and Decline: Crime and the Spiral of Decay in American Neighborhoods*, New York: Free Press, 1990.

56. For a discussion of the problems of language when discussing concepts like individual and civil rights, see Mary Ann Glendon, *Rights Talk: The Impoverishment of Political Discourse*, New York: Free Press, 1991.

57. See generally *Young v. New York City Transit Authority*, 903 F. 2d 146 (CA2 1990).



attorneys who questioned the constitutionality of behavioral restrictions; and from staff who were morally perplexed about just what the proper responsibility of a transit system was to the poor and genuinely homeless. Likewise, some politicians and sister governmental agencies either challenged the efforts or attempted to duck or stonewall the issue. Some challenges were of good faith and high moral intent, despite being, from my point of view, ill-advised and short-sighted. Others were less principled. Some managers simply did not want to bother; some unionists wanted to use the crisis to their bargaining advantage; some lawyers simply did not want to risk losing a case or an appeal; and some advocates wanted to keep the “homeless” literally “under the noses of New Yorkers” for political purposes, regardless of the day-to-day consequences for genuinely poor persons or the long-term consequences to the transit system.

Sixth, as a consequence of five above, leaders and managers must “mean it.” Restoring order will be hard work. Properly defining the issues will take rigorous social and legal research and policy analyses. Communicating with the public will be difficult; media responses will often be ambivalent at best. Getting the commitment of police and law enforcement agencies will be troublesome: some already feel terribly overburdened and fail to understand the linkages between disorder and serious crime—at least at the operating level. There will be losses along the way. Advocates can create confrontations in which police and law enforcement agencies can be made to appear petty or mean. Shibboleths such as “freedom of speech,” “individual rights,” “concentrate on serious crimes,” and “police brutality” will be thrown up with little acknowledgement of the complexity of the issues that are encoded in the phrases. Some courts will intervene—at times properly, aborting ill-conceived laws and programs—at other times improperly, failing to understand the issues or capitulating to what they perceive as their political interests. In New York City, advocates obtained a court injunction that seriously threatened early efforts; however, that was subsequently

overcome and the effort was sustained.<sup>58</sup> Nonetheless, the hard work paid off: order is being restored in the subway.

Finally, confronted with advocates, dug-in staff or bureaucracies, and unpredictable media—the hosts of obstacles that constitute the hard work described above—it will be easy for leaders to become intolerant. It is important for them to understand that the legitimate demand for order can also have its excesses. Neighborhoods and citizen groups can be petty and mean as well as hospitable and protective. The values that advocates of increased order are attempting to maintain include respect for diversity. In New York's subways this means that the obligation of the police is not just to maintain order, but also to encourage tolerance and respect. Police and criminal justice agencies must represent similar values on city streets and other public spaces as well.

What impact has increased order maintenance had in the subway? Ejections for rule violations have tripled since the efforts have been fully implemented. Arrests for misdemeanors are up dramatically, although arrests for felonies have remained steady. While it is early and subways are different than city streets, the TPD's increased order maintenance activities correlated with a drop in a crime that was five to six times faster than the drop in Part I crime<sup>59</sup> reported in the city at large. Today, riders in the New York City subway have 1/3 less chance of being robbed than 2½ years ago when the possibility on any given day was 1 in 50,000. This was accomplished without an increase in citizen complaints of police abuse. Similar results have been obtained by other Metropolitan Transportation Authority railroads—the Metro North Railroad in Grand Central Station and the Long Island Railroad in Penn Station—which adopted policies similar to the subways. Likewise, the Port Authority Bus Terminal, which

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58. *Young v. New York City Transit Auth.*, 729 F. Supp. 341 (S.D.N.Y. 1990), *rev'd*, 903 F.2d 146 (CA2 1990).

59. "Part I crimes" are criminal homicide, forcible rape, robbery, aggravated assault, burglary, larceny, auto theft, and arson. Bureau of Justice Statistics, *Sourcebook of Criminal Justice Statistics—1991*, 742-743.

adopted rules and regulations and enforcement policies like the MTA's, are enjoying comparable declines in serious crime.

Citizens are demanding a return to the full concept of civil liberties: the natural liberties of American citizens protected by the Constitution *shorn of the excesses that invade the equal rights of others*.<sup>60</sup> It is possible to do so without violating the rights of individual citizens. Preliminary indications in New York are that order maintenance, aside from protecting the rights of *all* citizens, reduces serious crime as well.

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60. *Black's Law Dictionary*, "Civil Liberties," 223 (5th ed. 1979).

## Statutory Language in Specific Cases.

For the benefit of those drafting statutes and ordinances in this area, we reproduce here the specific language of the enactments which were upheld or struck down in some of the leading cases. Along with each enactment, we cite the case dealing with validity of the enactment.

### 1. *Complete ban.*

“It shall be unlawful and a class C offense for anyone to beg or solicit alms in the streets or public places of the city or exhibit oneself for the purpose of begging or obtaining alms.”

Jacksonville Municipal Ordinance § 330.105.

This ordinance was held unconstitutional in *C.C.B. v. State*.<sup>61</sup>

“A person is guilty of loitering when he:

“(1) Loiters, remains or wanders about in a public place for the purpose of begging.”

New York Penal Law § 240.35(1).

Although phrased in terms of loitering, this statute seems to be a complete ban on panhandling. It is difficult to see how one could panhandle without either remaining or “wander[ing] about.” This statute was declared unconstitutional by a federal district court in *Loper v. New York City Police Dept.*<sup>62</sup> It is likely that the city will appeal.

### 2. *Accosting while soliciting.*

“Every person who commits any of the following acts is guilty of a misdemeanor: . . . (c) who accosts other persons in any public place or in any place open to the public for the purpose of begging or soliciting alms.”

California Penal Code § 647(c).

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61. 458 So. 2d 47, 50 (Fla. App. 1984).

62. 802 F. Supp. 1029 (S.D.N.Y. 1992).

This statute was upheld by a state appellate court in *Ulmer v. Municipal Court*.<sup>63</sup> However, it was declared unconstitutional by a federal district court in *Blair v. Shanahan*.<sup>64</sup> The *Blair* case is presently on appeal. We believe that the *Ulmer* decision is correct and that *Blair* was wrongly decided. This statute is permissible “manner” regulation. It only prohibits accosting people for solicitation. Standing in one place and soliciting passers-by is legal under this statute.

### 3. *Obstructing traffic.*

“B. A person is guilty of pedestrian interference if . . . [that person] intentionally:

“1. Obstructs pedestrian or vehicular traffic . . . .”

Seattle Municipal Code 12A.12.015(B)(1).

This ordinance was upheld against a panhandler’s claim that it was unconstitutional on its face in *Seattle v. Webster*.<sup>65</sup> The fact that the obstruction must be intentional was a key factor in the decision.

### 4. *Particular places.*

#### a) Airports.

“1. The following conduct is prohibited within interior areas of buildings or structures at an air terminal if conducted by a person to or with passers-by in a continuous or repetitive manner.

\* \* \*

“(c) The solicitation and receipt of funds.”

Airport Rules and Regulations, the Port Authority of New York and New Jersey, Chapter III (applicable to JFK, La Guardia, and Newark airports).

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63. 55 Cal. App. 3d 263, 127 Cal. Rptr. 445 (1976).

64. 775 F. Supp. 1315 (N.D. Cal. 1991).

65. 115 Wash. 2d 635, 802 P. 2d 1333 (1990).

This regulation was upheld in *International Society for Krishna Consciousness, Inc. v. Lee*.<sup>66</sup> The majority held that the airports were not public forum. Justice Kennedy held that this was a permissible manner regulation, because only solicitation for immediate payment is prohibited. Handing out envelopes for mail-in donation, for example, is allowed.

b) Post Offices.

“Soliciting alms and contributions, campaigning for election to any public office, collecting private debts, commercial soliciting and vending and displaying or distributing commercial advertising on postal premises are prohibited.”

39 Code of Federal Regulations § 232.1(h)(1) (1989).

This regulation was upheld by the Supreme Court in *United States v. Kokinda*.<sup>67</sup> The plurality held that the post office and its grounds are not a public forum, and that the regulation was reasonable. Justice Kennedy concurred on the basis that, even though he believed the sidewalk leading into the post office *was* a public forum, the regulation’s prohibition of solicitation for immediate payment of money was a permissible regulation of the manner of speech.

c) State Fairs.

“Sale or distribution of any merchandise, including printed or written material except under license issued [by] the [Minnesota Agricultural] Society and/or from a duly licensed location shall be a misdemeanor.”

Minnesota State Fair Rule 6.05, authorized by Minn. Stat. § 37.16 (1980).

The licensed locations were fair booths, which were “rented to all comers in a nondiscriminatory fashion on a first-come, first-served basis.” As so applied, the Supreme Court upheld the regulation in *Heffron v. International Society for Krishna Conscious-*

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66. 120 L. Ed. 2d 541, 112 S. Ct. 2701 (1992).

67. 111 L. Ed. 2d 571, 110 S. Ct. 3115 (1990).

ness, Inc.<sup>68</sup> The fact that the rule applied evenhandedly to all would-be solicitors was important to the decision.<sup>69</sup>

d) Subways.

“(b) No person, unless duly authorized by the Authority, shall engage in any commercial activity upon any facility or conveyance. Commercial activities include (1) the advertising, display, sale, lease, offer for sale or lease, or distribution of food, goods, services or entertainment (including the free distribution of promotional goods or materials), and (2) the solicitation of money or payment for food, goods, services or entertainment. No person shall panhandle or beg upon any facility or conveyance.

“(c) Except as expressly authorized and permitted in this subdivision, no person shall engage in any non-transit uses upon any facility or conveyance. Non-transit uses are noncommercial activities that are not directly related to the use of a facility or conveyance for transportation. The following non-transit uses are authorized and permitted by the Authority, provided they do not impede transit activities and they are conducted in accordance with the rules governing the conduct and safety of the public in the use of the facilities of New York City Transit Authority Manhattan and Bronx Surface Transit Operating Authority; public speaking; distribution of written noncommercial materials; artistic performances, including the acceptance of donations; solicitation for religious or political causes; solicitation for charities that (1) have been licensed for any public solicitation within the preceding twelve months by the Commissioner of Social Services of the City of New York under § 21-111 of the Administrative Code of the City of New York or any successor provision; or (2) are duly registered as charitable organizations with the Secretary

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68. 452 U. S. 640 (1981).

69. See *id.*, at 649.

of State of the State of New York under § 172 of the New York Executive Law or any successor provision; or (3) are exempt from federal income tax under § 501(c)(3) of the United States Internal Revenue Code or any successor provision. Solicitors for such charities shall provide, upon request, evidence that such charity meets one of the preceding qualifications.”

New York Compiled Codes, Rule & Regulations, tit. 21 § 1050.6(b)-(c) (1989).

This regulation was declared unconstitutional by a federal district court but upheld by a 2-1 decision of the Court of Appeals.<sup>70</sup> The dissenting judge felt that the exemption for political, religious, and charitable causes transformed the subway into a public forum and hence opened it to panhandling. Compare *Kokinda* and *Krishna*, above, where flat bans on *all* in-person solicitation for immediate payment were upheld.

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70. *Young v. New York City Transit Authority*, 903 F. 2d 146 (CA2 1990).



## *Part III*

# SUGGESTED ORDINANCE

In the preceding parts of this booklet, we have discussed the reasons for regulating panhandling, the legal background, and the outcomes of some specific cases. For those cities that wish to move forward in this area, this part suggests specific language which has been drafted to avoid the problems of earlier enactments, while still providing the tools to deal with the problem.

The first five sections of the suggested ordinance prohibit aggressive panhandling and fraudulent solicitation, without an outright ban on panhandling. A cautious strategy would be to stop at that point. A more aggressive strategy would be to adopt a permit system. Section six suggests language for cities willing to devote the necessary resources for this approach.

§ 1. **Definitions.** “Panhandling,” for the purpose of this chapter, is any solicitation made in person requesting an immediate donation of money. Purchase of an item for an amount far exceeding its value, under circumstances where a reasonable person would understand that the purchase is in substance a donation, is a donation for the purpose of this chapter. Panhandling does not include passively standing or sitting with a sign or other indication that one is seeking donations, without addressing any solicitation to any specific person other than in response to an inquiry by that person.

♦ COMMENT: This section defines panhandling but does not prohibit it. For the reasons stated earlier,<sup>71</sup> the constitutionality of an outright ban is questionable. The definition treats individual beggars and organized charities alike. The Salva-

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71. Part I. D., above.

tion Army and similar solicitations are excluded from the definition by the particularly nonthreatening manner in which they solicit and not by their status as charities.

§ 2. **Time of Panhandling.** Any person who panhandles after sunset or before sunrise is guilty of a misdemeanor.

♦ COMMENT: Nighttime is inherently more dangerous and more frightening. Panhandling at night is therefore inherently more coercive.

§ 3. **Place of Panhandling.** Any person who panhandles when the person solicited is in any of the following places is guilty of a misdemeanor:

- a) At any bus stop or train stop;
- b) In any public transportation vehicle or facility;
- c) In any vehicle on the street; or
- d) On private property, unless the panhandler has permission from the owner or occupant.

♦ COMMENT: It is often said in defense of panhandling that the person solicited can simply say “no” and walk away.<sup>72</sup> There are many instances where he cannot. Users of public transportation are particularly vulnerable. Vehicles stuck in traffic or stopped at lights are also captive audiences. In New York’s Central Park, drivers must pay extortion money to aggressive panhandlers who remember which cabs do not give and attack them.

This section also enables private property owners to keep panhandlers off their property. There are some state court decisions which equate large shopping centers to public streets for the purpose of political and religious advocacy,<sup>73</sup> but this line of cases has not yet been extended to panhandling.

§ 4. **Manner of Panhandling.** Any person who panhandles in any of the following manners is guilty of a misdemeanor:

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72. See *Heffron*, note 4, 452 U. S., at 657, n. 1 (Brennan, J., dissenting in part.)

73. *Robins v. Pruneyard Shopping Center*, 23 Cal. 3d 899, 592 P. 2d 341 (1979), *affirmed in Pruneyard Shopping Center v. Robins*, 447 U. S. 74 (1980).

- a) By coming within three feet of the person solicited, until that person has indicated that he does wish to make a donation;
- b) By blocking the path of the person solicited along a sidewalk or street;
- c) By following a person who walks away from the panhandler;
- d) By using profane or abusive language, either during the solicitation or following a refusal;
- e) By panhandling in a group of two or more persons; or
- f) By any statement, gesture, or other communication which a reasonable person in the situation of the person solicited would perceive to be a threat.

▼ COMMENT: Aggressive panhandling is by far the worst kind. Any person who gives out of fear of the panhandler rather than a genuine desire to donate has, in reality, been robbed. Professor Kelling found that two-thirds of *all* riders of the New York subway have been intimidated into giving.<sup>74</sup> This is a staggering toll of victimization. It explains the great wave of public support for Bernhardt Goetz, the “subway vigilante.”

This section addresses some of the ways that a panhandler can impose subtle duress without using the kind of overt force or threat which would support a prosecution for robbery.

#### § 5. **False or Misleading Solicitation.**

- a) Any person who knowingly makes any false or misleading representation in the course of soliciting a donation is guilty of a misdemeanor. False or misleading representations include, but are not limited to, the following:
  - 1) Stating that the donation is needed to meet a specific need, when the solicitor already has sufficient funds to meet that need and does not disclose that fact;

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74. *Young*, note 25, at 149.

- 2) Stating that the donation is needed to meet a need which does not exist;
- 3) Stating that the solicitor is from out of town and stranded, when that is not true;
- 4) Wearing a military uniform or other indication of military service, when the solicitor is neither a present nor former member of the service indicated;
- 5) Wearing or displaying an indication of physical disability, when the solicitor does not suffer the disability indicated;
- 6) Use of any makeup or device to simulate any deformity; or
- 7) Stating that the solicitor is homeless, when he is not.

▼ COMMENT: A person who solicits money by misleading representations is attempting the crime of theft by false pretenses. Such conduct is indisputably within the power of the state to prohibit. An ordinance specifically tailored to fraudulent solicitation and listing some of the more common ruses can simplify the task of police and prosecutors.

- b) Any person who solicits a donation stating that the funds are needed for a specific purpose and then spends the funds received for a different purpose is guilty of a misdemeanor.

▼ COMMENT: This is probably the single most common fraud. This subdivision simplifies prosecution by eliminating the requirement that the panhandler intends to spend the money on something else at the time he receives it.

- c) This section establishes a single offense. Evidence which establishes beyond a reasonable doubt that the defendant violated the section is sufficient for conviction and need not establish which subdivision was violated.

▼ COMMENT: A panhandler who solicits money for food and promptly buys drugs instead has violated either subdivision

(a)(1), if he had the drug money before soliciting, or (more likely) subdivision (b), if he spent the food money on drugs. This problem is very similar to the annoying old question of whether a thief committed larceny, embezzlement, or theft by false pretenses.<sup>75</sup> A unified statute is the answer. As long as the defendant is clearly guilty of one, the distinctions between them are immaterial.<sup>76</sup>

#### § 6. Permit Requirement.

- a) No person shall panhandle on five or more days in a single calendar year without a permit issued by the police department. A person who has been issued a permit shall keep it on his person at all times while panhandling and show it to any peace officer upon request. No person whose permit has been revoked shall panhandle for a period of two years following the revocation. Any person who violates this subdivision is guilty of a misdemeanor.
- b) The police department shall issue the permit, without fee, to any eligible person who presents himself at the central police station, states his true name, presents a photo identification or signs a declaration under penalty of perjury that he has no such identification, and permits himself to be photographed and fingerprinted.
- c) A person is ineligible for a permit if and only if within the past five years he (1) has been convicted of two or more violations of this chapter, (2) has had a permit revoked pursuant to subdivisions (e) or (f) of this section, or (3) has been convicted of two or more offenses under the law of any jurisdiction which involve aggressive or intimidating behavior while panhandling or false or misleading representations while panhandling.

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75. See LaFave, note 47, § 8.8(c).

76. See, e.g., *People v. Nor Woods*, 37 Cal. 2d 584, 586, 233 P. 2d 397 (1951).

- d) If the police department is unable to determine eligibility within 24 hours of the application, the department shall issue a permit good for 30 days and determine eligibility for a regular permit before the temporary permit expires. The regular permit shall expire three years from the date of issuance. Along with the permit, the police department shall give the applicant a copy of this chapter.
- e) Any person who makes any false or misleading representation while applying for a permit under this section is guilty of a misdemeanor. Upon conviction of violation of this subdivision, the police department shall revoke any permit issued to the defendant under this section.
- f) If a permit is issued to a person under this section and that person subsequently commits and is convicted of a violation of any provision of this chapter, the police department shall revoke the permit.

♦ COMMENT: A large portion of the panhandling in many areas is done by a small number of “regulars” who panhandle as an occupation. Cities routinely require permits to engage in occupations, and the Supreme Court has stated quite expressly that once a speaker “undertakes the collection of funds . . . he enters a realm where a reasonable registration or identification requirement may be imposed.”<sup>77</sup>

This example limits the permit requirements to the “regulars,” defined as panhandling on five different days in a year, for two reasons. First, it reduces the administrative burden on the police, limiting the permit requirement to the group for which it is most needed. Second, it exempts that exceedingly rare beggar whose story about being from out of town and stranded is actually true.

Charging a fee for the permit would raise serious constitutional questions.<sup>78</sup> We recommend that no fee be charged.

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77. *Thomas v. Collins*, 323 U. S. 516, 540 (1945).

78. See *Murdock v. Pennsylvania*, 319 U. S. 105 (1943); *Forsyth County v. Nationalist Movement*, 120 L. Ed. 2d 101, 112 S. Ct. 2395 (1992).

Without a permit requirement, enforcement of the law against aggressive and fraudulent panhandling would be difficult, if not impossible. After convicting a panhandler of a violation, he would be back on the street after a light sentence, doing it again. With a permit system, a conviction of aggressive or fraudulent panhandling leads to ineligibility or revocation of the permit. From that point, the police can arrest that person for panhandling alone. Thus, the difficulty of proof to establish the substantive violation need only be surmounted once or twice per panhandler.

The sample ordinance requires two violations to be ineligible for a permit. While the old axiom holds that ignorance of the law is no excuse, it would be unduly harsh to apply that principle here. The first violation provides fair warning. Once a permit is issued, however, the panhandler is given a copy of the law and has actual notice. (A city should make some provision for illiterates and non-English speakers.) From that point, one violation warrants a revocation.

The permitting process consists mainly of identification and a records check. Provisions must be made for people who have no identification.<sup>79</sup> A false statement of identity or of not having identification is a violation and a ground for revocation.

The main problem in implementing the permit system is resources. Where a city has already adopted community-based policing and where it has an active and aroused downtown merchant community, identifying the “regulars” should present little problem. There will still, however, be the administrative burden of issuing the permits and prosecuting the violations. If the city is really committed to restoring the people’s right to use the streets and transportation facilities without fear of aggressive panhandlers, the permit system offers the best chance of achieving that goal.

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79. See *Kolender v. Lawson*, 461 U. S. 352 (1983).

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