# New Approaches to Street Disorder Attracting Support from Cities, Approval by Courts

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## Introduction

This report is in fulfillment of Grant 95 - IJ - CX - 0050 from the National Institute of Justice, Office of Justice Programs, U.S. Department of Justice. It is the result of a three part research project: A review of case law affecting street disorder enforcement, six case studies from cities faced with litigation or the threat of litigation, and a national survey of police departments concerning the prevalence of disorder ordinances and their enforcment.

Part I of the report contains the Executive Summary, a review of the case law concerning disorder enforcement and the Constitution, reports of the six case studies, and model ordinances based on this research. Part II contains the results of the survey of police departments concerning the prevalence of order maintenance laws across the U.S., with technical appendices.

# Executive Summary

## INTRODUCTION: DISORDER & CRIME

Street disorder is a growing topic of concern in many American cities. Police departments, mayors, city councils and prosecutors are facing an increased demand for action on panhandling, graffiti, camping in urban parks, sidewalk interference, excessive noise, public urination, street drug and prostitution markets and loitering..

This renewed interest in an old set of problems stems, in part, from the ambitious efforts under way in virtually every major city to revitalize central business districts and older commercial strips. The civic leaders involved in downtown renewal recognize that safe, secure and civil public spaces are vital to their success. The introduction of community policing has also played a part. Once officers begin to ask, they discover that "low level crimes" are very important to the residents, small business owners, office workers, shoppers and tourists who are the life blood of central cities. Finally, research over the past twenty years related to the now well known "Broken Windows" theory [1] has provided a firm intellectual foundation for increased attention to quality of life issues.

> "Serious street crime flourishes in areas in which disorderly behavior goes unchecked. The unchecked panhandler is, in effect, the first broken window. Muggers and robbers, whether opportunistic or professional, believe they reduce their chances of being caught or even identified if they operate on the streets where potential victims are already intimidated by prevailing conditions. If the neighborhood cannot keep a bothersome panhandler from annoying passers by, the thief may reason, it is even less likely to call the police to identify a potential mugger or to interfere if the mugging actually takes place."
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> James Q. Wilson and George L. Kelling, "The Police and Neighborhood Safety," *The Atlantic* (March 1982).

A handful of localities have been sued for using new or existing laws to combat street disorder offenses. Although, for the most part, the cities have defended their street disorder laws successfully, the challenges and the surrounding publicity have raised questions about the constitutionality of these laws. Some cities, fearing expensive lawsuits, have been hesitant to

aggressively enforce their existing laws, or to adopt new ones.

Recent experience shows, however, that cities can adopt order maintenance laws and strategies that the courts will approve should a lawsuit occur. The best way to insure against adverse court rulings is to use the problem solving techniques that have grown out of community and problem oriented policing. By analyzing the problem and its effect on all stakeholders, gathering relevant data, considering alternatives and focusing on specific troublesome behavior, local officials are finding solutions that fit with *both* common sense and court scrutiny.

To give local leaders guidance on how to carry out disorder enforcement strategies within the constitutional guidelines established by the courts, a three-part study was conducted with the support of the National Institute of Justice: (1) a survey of 512 municipal police departments; 2) a review of all recent court rulings on the major street disorder issues; and (3) case studies of six cities affected by litigation: New York, Seattle, Atlanta, Las Vegas, Dallas and San Francisco.

## A WORD ON TERMINOLOGY

In public debates and media accounts, the terms "homeless" and "street people" are often used interchangeably. Similarly, the assumption is often made that "homelessness" and "street disorder" involve the same people. However, most of the homeless people in the U.S. do not engage in the behaviors that irritate or offend their fellow citizens. Street people who are the most troublesome violators are not homeless. The problems obviously overlap, but failing to distinguish between them not only confuses decision makers. It weakens public support for programs urgently needed by the homeless and destitute in our communities.

## MAJOR FINDINGS FROM PERF'S SURVEY OF POLICE DEPARTMENTS

We designed the survey research to answer three questions: Do the large municipalities have local ordinances on certain antisocial behaviors? If so, how and to what extent are these ordinances enforced? And what are the factors that affect enforcement? The targeted behaviors

included panhandling, public intoxication, disorderly conduct, sitting and/or lying on sidewalks, public sleeping, unauthorized camping, improper soliciting for day labor opportunities, unlicensed vendors, dumpster diving, and loitering by juveniles in public places at night. The survey included questions on quantitative measures of enforcement, such as summonses issued and arrests made. Additionally, respondents were asked to provide subjective estimates of the seriousness of various problems in their city. They were also asked to write comments providing additional information about conditions in their municipality and factors affecting their enforcement practices.

The Police Executive Research Forum (PERF), in conjunction with the Center for the Community Interest, mailed the questionnaire in the spring of 1996 to all police departments (512) in municipalities with populations of 50,000 or more. The response rate was very high: 388 (75.8%) completed the surveys. Most of the responding agencies provided comments or sent copies of their ordinances. The quantitative and qualitative data generated a wealth of information about conditions in various jurisdictions, the complexity of the issues involved in addressing order-maintenance problems and the police response. Listed below are a few of the major findings.

***Nature of the Problem.*** Although most of the survey questions did not address the characteristics of the individuals who contribute to these conditions, the written comments reveal that they often attribute them to those who are homeless, mentally ill, substance abusers, transients or homeless. Overall, 41% of the respondents reported that the presence of street people was a problem in their municipality. Although these problems are not confined to major urban areas, the perceived seriousness of the problem was positively associated with the size of the population. Respondents in 71% of jurisdictions with populations of 500,000 or higher said that there was a problem, compared with 51.3% in jurisdictions with a population of 250,000 to 499,999, and over one-third (36.9%) in cities with fewer than 250,000 people.

Overall, about one-fourth of the respondents (27.4%) reported that panhandling was a problem; however, the rate rose to 68% for participants in cities with populations of at least 500,000. Over one-third (36.6%) of the respondents said that they had local ordinances against panhandling in

public places, while 19.8% stated that their ordinances specifically prohibited aggressive panhandling. Additionally, some ordinances include provisions banning panhandling at designated locations, such as banks and automatic teller machines, parks, beaches, office buildings or stores. Thirty-seven cities reported enacting panhandling ordinances between 1990 and 1996.

"Open container", public intoxication and anti-camping ordinances are quite common. "Open container"ordinances are designed to deter people from drinking alcoholic beverages in public. The overwhelming majority (77.8%) of the reporting agencies indicated that they had a local ordinance prohibiting this behavior. Thirty-nine percent of the responding agencies stated they have a local ordinance against public intoxication. Just over one-third (36.3%) of the participants reported having an ordinance placing restrictions on camping.

***Enforcement.*** Police officers have considerable discretion in handling order-maintenance and disorder conditions. The qualitative data from the survey suggests that they invoke these ordinances frequently, but on an informal basis. The offender is typically warned and asked to move along, thus resolving the situation, if only temporarily. However, because the officer is not required to file a report, there is no record of this interaction. As a result, the data from this survey pertaining to the number of summonses issued and arrests made for various offenses underestimate the extent to which local ordinances are used to address such problems. Nevertheless, the data suggest that some municipalities enforce disorderly conduct and public intoxication ordinances aggressively. Panhandlers may be summoned or arrested under these laws, while illegal camping may be addressed using trespass laws.

***Juvenile Curfew Laws.*** In response to the question "To what extent is the presence of juveniles hanging out in public places late at night a problem in your municipality?," almost two-thirds (63.1%) reported that it was a problem. Similarly, 245 of the responding agencies indicated that their jurisdictions have juvenile curfew laws. Ninety-four respondents said that they had adopted the curfew laws between 1993 and 1996, which suggests that there has been a strong recent trend to enact these ordinances.

Those respondents who reported having juvenile curfew laws were asked to evaluate the effectiveness of the ordinances in "addressing the problems posed by juveniles hanging out in public places late at night." Roughly one out of four (22.4%) of these respondents rated their curfew as "not effective" or "slightly effective." Forty-two percent rated it as "somewhat effective," and 31% said it was "very effective" or "highly effective."

## RECENT COURT DECISIONS ON STREET DISORDER ORDINANCES

The actual number of legal challenges filed to test disorder ordinances is relatively small when compared to much-litigated topics such as the Americans with Disabilities Act or the First Amendment. Also, no urban disorder case has been accepted for review by the U.S. Supreme Court. Nonetheless, clear patterns have begun to emerge from the cases which have been completed to date.

The case law can be divided into four categories: panhandling controls, controls on camping, sidewalk use, and "multi-faceted" urban quality of life enforcement programs. Because more recent cases have dealt with panhandling, more information on this first category is included than on the others.

***Panhandling Controls.*** Prohibitions on begging date back to the English common law. In recent years, courts have held that panhandling is a form of protected speech. Thus, when New York City recently attempted to enforce an old law that essentially banned all panhandling, the Second Circuit Court of Appeals rejected the ordinance as an infringement on the First Amendment. The same result occurred in Massachusetts.

While city-wide bans on all begging are therefore constitutionally suspect, the courts have consistently held that "reasonable time, place and manner" regulation of panhandling is permissible. For example, bans on "aggressive" panhandling have been approved by federal courts in Seattle, Atlanta, Santa Monica and Dallas.

***Constitutional challenges typically made against quality-of-life ordinances***

*Makes the status of homelessness a crime:* Typically used against public camping and public sleeping ordinances, and against comprehensive-pronged enforcement programs. *The argument*: the law is making it a crime to be homeless, since (a) homeless persons cannot avoid violating the law, (b) the law is only enforced against the homeless, or (c) the government's purpose is to "drive out" the homeless. *Courts' response:* Not applicable where ordinances focus on behavior.

*Freedom of Speech:* Typically used against panhandling controls, also arises in the context of sidewalk obstruction, and multi-pronged enforcement programs. *The argument*: panhandling is protected speech, other conduct (e.g. sidewalk obstruction or public camping) is expressive conduct (i.e., a protest of social conditions). *Courts' response:* most have held that panhandling is speech, but ordinances that place "reasonable time place and manner" limits are acceptable; other behaviors have not been given First Amendment protection.

*Right to travel:* Typically used against public sleeping and camping ordinances and multi-pronged enforcement programs. *The argument*: Since destitute persons would be unable to stay in a community without violating such ordinances, they are being unlawfully prevented from exercising their right to travel. *Courts' response:* Has not yet been accepted by any appellate court.

*Due Process:* May be used against any disorder statute. *The argument*: the conduct creates no harm to others and is thus beyond the power of government to regulate. *Courts' response:* Has yet to be successful in a disorder case at the appellate level.

*Equal Protection:* Typically used against all disorder statutes. *The argument:* Disorder laws are discriminatory because (a) they have a disparate impact on those who live on the street, or (b) they are deliberately targeted at homeless persons. *Courts' response:* Have not been willing to treat homeless like a racial minority for purposes of Equal Protection clause. Thus, the laws are constitutional so long as adopted in pursuit of a reasonable governmental objective.

Restrictions for locations where panhandling presents special problems have also been approved, ranging from subways, airports, state fair grounds and post offices. To the extent that future judges follow their peers, panhandling bans in locations that are inherently provocative (near automatic teller machines) or crowded (beach front boardwalks) appear to be on firm constitutional footing.

Several innovative area bans have not yet resolved by the courts: Las Vegas put a huge, expensive glass canopy over the main central business district thoroughfare on which a light show is displayed hourly each night, then banned panhandling under the canopy. A new Santa Monica law says panhandlers may not be intoxicated and must not approach to within three feet from their targets. The City Council of Berkeley, California banned all panhandling at night as inherently threatening. (After a Federal District Court enjoined the ordinance and the city appeals, the decision was vacated by consent of both parties after the City agreed to keep the aggressive panhandling ban but eliminate the nighttime restriction.

***Urban Camping, Public Sleeping, Sidewalk Obstruction.*** Ordinances that restrict public sleeping in specific places, such as the immediate surroundings of public buildings and monuments or heavily-used urban parks, and those that prohibit camping (or the colonization of public spaces) have thus far have been approved in every instance. The use of trespass laws to break up concentrations of people who set up encampments on public land has also been approved.

However, where cities have attempted to defend older laws banning public sleeping in an entire city, the record is mixed. Some courts agree with the theory that sleep is essential to life; Due Process is violated, therefore, for persons who have no access to any place to sleep on private or public property in an entire community.

Seattle and other jurisdictions have also banned people from sitting or lying on sidewalks in business districts during business hours. These efforts have been upheld by the Ninth Circuit Court of Appeals.

Many other laws can be used as a part of quality-of-life enforcement efforts, including ordinances on excessive noise, dumping the contents of public trash cans and automobile cruising. While constitutional arguments have been made against all of these, courts have been uniformly hostile.

***Multi-Faceted Enforcement.*** Several cities, including San Francisco and New York City, have approached street disorder by intensively enforceing of an array of existing laws affecting street behavior. Often this stepped-up enforcement is accompanied by increased referrals for services for alcoholics, drug addicts and the mentally ill.

Two cities, San Francisco and Huntsville, have been sued for implementing such a multi-faceted approach. In each case the plaintiffs alleged the real purpose was to drive the homeless out of certain areas of the city, in violation of the Due Process, Equal Protection and Free Travel rights of homeless persons. However, in both cases the court found that the ordinances targeted behavior, not the homeless. Both courts approved of the power of cities to institute comprehensive strategies to reduce disorder by enforcing public conduct laws that apply to everyone, including the destitute and the homeless.

## CASE STUDY CONCLUSIONS

While the patterns of decided cases are reasonably clear, there is not yet a U.S. Supreme Court opinion, and there are few state supreme court decisions. Until these higher courts have acted, individual trial court judges are free to go against the trend if he or she chooses. Unlike other more settled areas of the law, cities that face lawsuits must be prepared to educate and persuade judges on disorder enforcement.

In order to better understand how communities should proceed to minimize the chances of adverse court rulings, the research team visited six cities that had either faced legal challenges, or were fashioning innovative laws and strategies in response to recent court decisions. Each visit included interviews with public officials and a wide variety of non-governmental leaders, including both supporters and critics of disorder enforcement.

*The experience of these cities offers seven lessons for those who want to be effective, within constitutional boundaries, and successful in any court challenge:*

***Summary of sites visited***

| *CITY* | *ISSUES* | *OUTCOME OF LITIGATION* |
|---|---|---|
| New York | Panhandling | Total begging ban rejected, prohibition on panhandling in subways upheld, new "aggressive" panhandling legislation enacted--no challenge thus far. |
| Seattle | Sidewalk obstruction | City prevailed in U.S. Court of Appeals. |
| Atlanta | Loitering and theft in parking lots | Judge refused preliminary injunction; case pending. |
| Las Vegas | Panhandling | No panhandling litigation, hand billing limitations and t-shirt sales limitations upheld at Federal District Court. Handbilling prohibition on appeal. |
| Dallas | Encampment | City lost in District Court on sleeping ban, won on enforceability of state trespass law. Court of Appeals held plaintiff lacked standing. Other city ordinances, including panhandling control, upheld. |
| San Francisco | Comprehensive Approach | City won in 9th District Court; Federal appeals court dismissed lawsuit and vacated trial court decision |

**Collaborative problem-solving works — in practice and in court.** The problem-solving processes that have emerged from community oriented policing — gathering data, conducting a thorough analysis, identifying and consulting with all stakeholders and making decisions in a collaborative fashion — often lead to lasting solutions that do not involve controversies and court cases. *It is important to go through these steps and also to document the process* in order to reassure a judge in the unlikely event of future litigation.

**Law enforcement must focus on behavior, not status.** It is what people on the street do, not who they are or what they represent, that can be regulated by cities. For example, in San Francisco, the Matrix program focused on public sleeping, public urination, prostitution and low-level drug dealing. According to the reviewing judge, all of these are behaviors the community can reasonably regulate. If a judge perceives that a city's effort is aimed at "getting the homeless off the street," he or she may block otherwise legitimate law enforcement.

Conducting a careful analysis that focuses on the problem behavior will help public officials avoid the common mistake of equating quality-of-life crimes with homelessness. In all of the case studies, police agreed that many disorderly persons are not homeless, and conversely, that most homeless people do not engage in behaviors that trouble their fellow citizens. To conflate the problems of homelessness and public disorder invites disapproval from the courts and also may diminish public support for both law enforcement and the programs needed to address the many serious problems of homeless and destitute people.

**Be prepared.** Although the odds of being sued are not great, there is not much cities can do to eliminate the risk altogether. If local legal advocates for the homeless vigorously oppose order maintenance, the community will end up in court. However, the chances of a city winning in court are much greater if an initiative is carefully thought through, tailored to the problem at hand and based on legal precedent. A strong factual record demonstrating the problem, careful consultation with concerned parties and public hearings may have a significant impact on a judge. Preparing to be sued also means reviewing older ordinances. Cities that, in haste, use ordinances that overreach or are outdated, may pay a price in court.

**Offer assistance to disorder offenders who *are* homeless or addicted.** Communities can obtain and hold the moral high ground making sure that, in the process of developing solutions, the plight of destitute people, alcoholics, drug addicts and the mentally ill is included in the definition of the "problem" to be solved. The court decisions do not suggest that such community-wide efforts are constitutionally required. However, the participants in our study indicated that it helped them maintain public support and persuade reluctant judges.

**Disorder enforcement requires fine tuning to be effective.** New standards of public conduct often take hold quickly. One city reported that the day after an aggressive panhandling ordinance was adopted, panhandlers appeared with signs announcing "Non-Aggressive Panhandler." Often a modest level of enforcement,with a minimum of arrests, was sufficient to modify the behavior of street people . Nonetheless, architects of an effective approach to street disorder must pay attention to the rest of the criminal justice system, educating prosecutors and judges on the need

for appropriate penalties for repeat offenders. When police and offenders discover that the judiciary will not back up the police in the caseof repeat offenders, police will eventually give up on enforcement -- formal or informal. There is a need for real penalties for violators of disorder laws, both for deterrence and for maintaining police support. In this area, community courts hold tremendous promise.[2]

**Do not overlook the possibilities for partnerships with social service providers.** We observed (particularly in Seattle and Dallas) that city leaders who did not stereotype the service providers and instead engaged them in the problem-solving process reaped important benefits. Many of those who work with the homeless and destitute recognize the difference between homelessness and street disorder, and make a conscious effort to avoid enabling self-destructive behavior. Cities that reach out to service providers may find that they have important allies when they go to court, as Seattle did.

**Law enforcement officials are likely to face sustained demands for dealing with disorder and quality-of-life issues.** A common theme in conversations with residents, small business persons and civic leaders in the six cities we visited was a sense of urgency. Active, high-level efforts are under way to renew older business districts and prevent a further withdrawal of people and resources. The people involved in these efforts are convinced that effectively combating urban street disorder is essential to their success. Where disorder enforcement has been most successful, local leaders are are convinced that it is an important factor in economic development. Word of their successes can only spur demand for similar efforts elsewhere.

## IMPLICATIONS FOR FUTURE RESEARCH

**Informal controls.** Our research confirmed the observations of others (Kelling and Coles) that most street order maintenance involves the informal reinforcement of social norms. More research is needed on how police use such tools to address quality-of-life problems without citing or arresting offenders.

**Sanctions.** More research is also needed on the effectiveness of low-level sanctions, such as brief community service sentences or small fines, particularly upon chronic offenders. In addition, more data on public support for such sentences would be of interest.

**Police referrals for social services.** There is a need to know more about the information and skills police require in order to make effective referrals for social services. Disorder enforcement brings police into direct contact with people who are untreated alcoholics, drug addicts and/or mentally ill. This contact provides an opportunity for an "intervention" that is both in the interest of the individual and the community. Police are in a position to encourage and facilitate entry into treatment for addiction, mental illness and other disorders. How often do they try or succeed?

**Effectiveness of detoxification programs.** Anecdotal evidence from our work suggests that chronic inebriates constitute a very large portion of the population that violate street disorder laws. Some communities have "de-criminalized" public intoxication so that officers are powerless to act unless the person commits another offense. Others have laws on the books permitting an arrest for public intoxication. Finally, a small group of cities have something similar to Portland's "person down" ordinance. This approach permits social workers and health workers (police are involved only if the person resists or threatens violence) to treat persons who are intoxicated and down on the street by taking them to a health facility for evaluation, detoxification and the opportunity to voluntarily enter drug or alcohol treatment. A qualitative analysis of the level of street disorder in cities with these different approaches would be very helpful.

**Business Improvement Districts (BIDS).** We found anecdotal evidence that BID'S have had remarkable success in working with police to reduce disorder and crime. More rigorous evaluation of BID programs, and comparison between the various components of BID programs (security, cleaning, tourist assistance) would also be helpful to city officials and downtown business owners.

**Impact of "Don't Give" campaigns.** Several cities, including Seattle and New York (in the subways) have launched educational and promotional campaigns to discourage citizens from giving money directly to panhandlers. Others have established "meal voucher" programs to help ensure that donations to panhandlers are used for food instead of drugs or alcohol. There is currently no available data on the effectiveness of these programs.

## CONCLUSIONS

The economic health of central cities and older commercial districts is a critical issue in most urban areas of the United States, drawing enormous investments of civic leadership and capital from both the public and private sectors. Street disorder problems, if left unresolved, directly threaten these efforts.

Fortunately, it *is* possible for cities to adopt and enforce disorder laws within constitutional boundaries. Cities must utilize statutes and enforcement techniques that focus on specific problematic behaviors, not the mere presence of persons who are poor or "different." The most powerful finding of this study, however, is the link between community policing and effective, constitutional disorder enforcement. Community policing at its best is focuses on specific problems, uses analysis and data, includes all stakeholders and involves a search for creative alternatives. It is these very steps that maximize the chances of judicial approval in the unlikely circumstance of litigation.

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The full report of this project is available from the National Criminal Justice Reference Center, P.O. Box 6000; Rockville, MD 20849-6000; tel: 800-851-3420 or e-mail askncjrs@aspensys.com. Ask for NIJ. Separate legal "backgrounders" on individual issues, complete with model ordinances, are available from the Center for the Community Interest (202-785-7844).

## ENDNOTES

1. James Q. Wilson and George L. Kelling, "The Police and Neighborhood Safety," *The Atlantic* (March 1982), 29-38. More recently, see George L. Kelling and Catharine Coles, *Fixing Broken Windows: Restoring Order and Reducing Crime in Our Communities* (New York: Free Press, 1996).

2.These courts ensure that some real penalty is applied. Although the penalties, such as a few days worth of community service, may not seem like much, it is more than what most offenders actually face (e.g., no consequences at all or unpaid citations). Conveniently, some of the community service sentences can be served in the mail room set up in the basement of the court. Another promising non-incarceration penalty is the disclosure of disorder convictions to social service providers, who can counsel with and deny services to those putting a burden on their communities.

## REVIEW OF THE LEGAL LITERATURE

### I. Introduction: Quality of Life issues in the Urban Landscape

New York City experienced a drastic reduction in crime after cracking down on fare-beating and panhandling in its subways, "squeegee-men" intimidating motorists, and camping in Manhattan's parks. Las Vegas is bringing people downtown again after prohibiting handbilling, vendor sales, and begging on its main thoroughfare. Seattle has stemmed the decline of its downtown in part through a series of order maintenance ordinances addressing how its sidewalks are used. These efforts, paralleling those in cities from Eugene to Fort Lauderdale, are part of a national trend to re-establish a semblance of order, comfort, and security in urban public spaces.

The efforts arise from a consensus that communities benefit from public spaces that are sufficiently attractive to act as public meeting places. Such places also facilitate commerce, enable community interaction, and make cities more desirable places to live, work, recreate, and shop. This cannot work, however, if sidewalks are obstacle courses of beggars, drunks, vagrants, or littered with trash, human waste, or the belongings of addicts. Many self-styled "homeless advocates" and civil libertarians have championed the "right" to live on the street, sleep in the public place of one's choosing, beg in any place and in any manner one pleases, and to be exempt from standards of conduct that apply to others. However, such "rights" could have harmful side-effects , enabling harmful lifestyles and substance abuse, while doing nothing to steer individuals to recovery and responsibility. And, while the homeless continue to suffer, host communities would be harmed, neighborhoods deteriorate, and people gradually abandon urban centers.

Without new policies, a walk down a commercial street, or a seat at an outdoor restaurant, can mean confronting a steady stream of people cadging spare change. With substance abuse and an increase in numbers, many beggars are becoming more aggressive. The result is an intimidating blockade of sidewalks and many stores, forcing customers and pedestrians away.

In many urban parks, visitors may find themselves competing for a spot on a bench with someone sleeping there, or with personal belongings. Children may find anything from crack vials, to old needles, to used condoms and human feces. Many people feel that parks have been diverted from their purpose of providing a common meeting ground where all people feel comfortable.

The decline in street order maintenance causes direct and indirect harms. Face-to-face solicitations for money are often intimidating, harassing, and cumbersome. Urban camping can colonize parks intended for general use, blockade sidewalks, and leave litter and health hazards in their wake.[1]

Furthermore, both problems affect the quality of urban life, the general feeling of comfort, aesthetics, security, and freedom people should have in urban public spaces. When these feelings decline, the vitality of a city's commercial and residential life is affected, as is the desirability of the area to work, live, or raise a family. Property values go down, and businesses close. Office and residential properties remain vacant for increasingly long periods of time.[2]

Street-level disorder also leads to more violent crime. The "Broken Windows" theory, originally advanced by Professors James Q. Wilson and George Kelling, explained that, if public spaces are disorderly, unkept, or intimidating, people avoid them, thereby making them inviting areas for predators. On the other hand, when places appear welcoming and comfortable, the law-abiding public takes them as their own, and crime goes down. This proves true time and time again, from the subways of New York to the streets of Atlanta.

In sum, street order maintenance bears on the economy, comfort levels, aesthetics, and crime rates of urban areas.

Cities have two choices. They can choose to do nothing, letting their public spaces deteriorate and the population exodus to continue. Many cities chose this route due to inertia, a feeling that doing anything else challenges their political and moral beliefs, or they are under the thumb of litigious advocacy groups that strenuously oppose nearly all standards of public conduct.

Other cities work to reverse this trend. With a combination of proper legislation, fair-minded law enforcement, and a "tough love" approach by social service providers for the

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[1]Other urban quality of life issues that have recently produced a spate a legislation and litigation include excessive noise, late night loitering by juveniles, automobile cruising, open-air drug and prostitution markets, and the proliferation of street vendors. CCI assists community groups and local governments on these issues as well.

[2]*See* GEORGE L. KELLING AND KATHERINE COLES, FIXING BROKEN WINDOWS: RESTORING ORDER IN AMERICAN CITIES (1996).

homeless, urban communities are reclaiming their public spaces as both safe and civil, where residents and visitors alike will voluntarily spend their time. These communities have decided to cease tolerating misbehavior in their public spaces. And, they want to re-establish order without a return to the discrimination and arbitrariness of the past. They are doing so while respecting the constitutional rights Americans hold dear.

This paper examines the legislative response to three urban quality of life problems: urban camping, sidewalk use, panhandling, and the responses of the courts to these efforts. The legal discussion is preceded by an introduction to the advocates who challenge these measures, and a brief description of the homeless population and the problems that bring them to the streets.

## III. The Factual Background

### A. What Homelessness is Not

One of the crucial problems cities (and city attorneys) confront in defending urban quality of life initiatives is that judges, and the general public, often misunderstand the nature and causes of homelessness. Too often, they have accepted the assumption that the problem lies with the economy or the lack of "affordable housing."[3]

The reason for the decline in the supply of low-income housing is a hotly debated subject. But economic dislocation, at the personal or market level, drives very few people to live on heating grates. In fact, when homeless individuals or families are placed in housing without first addressing the problems that underlie their inability to maintain themselves in stable housing, they often leave and return to the streets or shelters within short periods of time.[4]

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[3]*See* Brief for *Amicus,* National Law Center on Homelessness and Poverty, Berkeley Community Health Project v. City of Berkeley, (9th Cir., No. 95-16060); *see also* D. SNOW AND L. ANDERSON, DOWN ON THEIR LUCK: A STUDY OF HOMELESS STREET PEOPLE (1993), at 237 ("between 1973 and 1979, 91% of the nearly one million housing units renting for $200 per month or less nationally disappeared from the rental market").

[4]*See* ANDREW M. CUOMO, THE WAY HOME: A NEW DIRECTION IN SOCIAL POLICY 5 (1992); Aff. of Dr. Donald Burnes and Alice Baum, Joyce v. City and County of San Francisco, No. C-93-4149 (N.D. Cal., August 18., 1995), *vacated as moot* 87 F.3d 1320 (9th Cir. 1996). Dr. Burnes and Ms. Baum are the authors of A NATION IN DENIAL: THE TRUTH ABOUT HOMELESSNESS (1993). It is a misconception to assume that it is always the homeless who are panhandling for money. A report on homelessness and panhandling in Baltimore notes that, in a 25-day observation of panhandling, only a small percentage of the panhandlers were confirmed homeless. "*Panhandling in Downtown Baltimore,*" unpublished memorandum of the Downtown Partnership of Baltimore (1994), at 6. Similarly, in a survey of panhandlers in Philadelphia, 48% of the respondents indicated that they lived "in apartments, with relatives, or rooming houses."

Just as the provision of housing is not workable as the solution to the problem of homelessness, neither is the legal advocates' argument that, absent housing, people should be permitted to live on the streets. Permitting seriously troubled people to live and camp on the streets amounts to a public provision of rent-free and unsafe housing, a viable option to seeking help, and a subsidization of debilitating substance abuse habits.[5]

B. Who are the Homeless?

Homeless advocacy groups, in legislation and litigation battles, repeatedly equate homelessness with poverty, recalling such images as the poor immigrants of the late 19th and early 20th centuries, the "Okie's," and the victims of the Great Depression. This paints a picture that is seriously misleading.

Authors Donald Burnes and Alice Baum note that:

> By perpetuating the myth that the homeless are merely poor people in need of housing, the advocates reinforce and promote the most pernicious stereotypes about poverty in America. Poor people in America do not live on the streets, under bridges, or in parks, do not carry all of their belongings in shopping carts or plastics bags, wear layers of tattered clothing, pass out or sleep in doorways, urinate or defecate in public places, sleep in their cars or in encampments, do not harass or intimidate others, ask for money on the streets, physically attack city workers and residents, and do not wander the streets shouting at visions and voices. This, [however,] is what the public sees when they see the homeless.[6]

In fact, the people urban residents and visitors see on the streets are there because of serious personal problems. National data from over 100 studies show that between 65-85% of all street people suffer from alcoholism, drug addiction, some form of mental illness, or a combination of the three.[7]

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Id. at 8; quoting N. Goldenberg, Press Release: Center City District Releases Survey of Panhandlers (Dec. 9, 1993).

[5]*See* HENRY AARON AND CHARLES SCHULTZE, SETTING DOMESTIC PRIORITIES: WHAT GOVERNMENT CAN DO (1992), n. 3 at 72; BURNES AND BAUM, *supra* note 15.

[6]Aff. of Dr. Donald Burnes and Alice Baum, Joyce v. City and County of San Francisco, No. C-93-4149 (N.D. Cal., Aug. 18., 1995) *vacated as moot* 87 F.3d 1320 (9th Cir. 1996).

[7]*Id.* Other numbers vary, but tell the same story. A Brookings Institution study estimated that one third of all homeless people suffer from mental illness and 48% "reported using illegal

It is this population, regardless of their access to shelter, that is inhabiting city sidewalks, parks, and bus stops.[8] It is these seriously troubled individuals who store personal belongings in public areas or set up "camp" with sleeping bags or tents in parks designed to be used by the general public. And it is the problems created by this troubled population that fair-minded and compassionate cities - acting with their heads as well as their hearts - are trying to address. These efforts do not, contrary to the rhetoric of some opponents, criminalize homelessness, but foster the quality of urban life by prohibiting certain behavior in certain public places. All people are capable of being good citizens and are capable of obeying these new laws. Indeed the homeless have demonstrated that they, like everyone else, can and will obey a city's laws. At times it seems that only their lawyers see them as helpless and inherently anti-social.

## IV. The Constitutionality of Urban Camping Restrictions

Urban parks and squares are public property, intended for specific uses. To ensure that they can fulfill their function, cities have the authority to regulate parks.[9] Park closure times, for example, are ways in which cities regulate park use to ensure that they are clean and safe. [10] Prohibiting people from sleeping in parks (or determining in which parks they may sleep) is likewise a regulation which is within cities' jurisdiction. In Clark v. Center for Creative Nonviolence, the Supreme Court determined that the government interest in regulating parks is sufficiently compelling to ban overnight sleeping even though, under the peculiar facts of that

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drugs or having been treated for drug abuse." AARON AND SCHULTZ, *supra* note 16, at 65-66; quoted from BURT AND COHEN, "REVIEW OF RESEARCH ON HOMELESS PERSONS," at 41. Reporting similar results, a 27-month survey by the U.S. Conference of Mayors concluded that 25% of homeless people are mentally ill and 44% are substance abusers. David Whitman with Dorian Friedman and Laura Thomas, *The Return of Skid Row*, U.S. NEWS AND WORLD REP., 29 (Jan. 15, 1990) at 27-29. These authors also point out that since 1986 "alcoholics and drug abusers have grown faster than any other segment of the homeless population." *Id.*

[8]There is little national consensus about the number of homeless individuals in the U. S. The estimates range from 250,000 to 350,000, the range reported in the federal effort to count the homeless population in 1984, to more than 3 million (or more than 1% of the American population), figures introduced in Congressional testimony by Mary Ellen Hombs and Mitch Snyder of the Community for Creative Non Violence. Hombs and Snyder, A Forced March to Nowhere, xvi; U.S. Department of Housing and Urban Development, 1984 Report to the Secretary, at 18.

[9]*See, e.g,* Simmons v. Los Angeles, 63 Cal.App.3d 455, 468 (1976) (a city "has inherent authority to control, govern and supervise its own parks").

[10]People v. Trantham, 161 Cal.App.3d Supp.1 (1984) (park closure ordinances are a legitimate exercise of authority in regulating the use of public space).

case, the sleeping may have constituted political speech.[11]

A. Bans on Sleeping and the Eighth Amendment Syllogism

1. The Reach of Robinson v. California

Most cities that have set out to control urban camping have not prohibited all public sleeping. Rather, they have aimed their ordinances at sleeping in inappropriate places, or have prohibited "camping," defined as sleeping with the accouterments of camping.[12]

A prohibition on all public sleeping runs into constitutional trouble because people have to sleep. And, if one does not own, rent, or have lawful access to private property, one must then sleep in public. The syllogism goes like this:

* Homelessness is involuntary;
* People have to live somewhere;
* People have to perform necessary biological functions, including sleeping;

* Therefore, to prohibit public sleeping, a city criminalizes the "status" of being homeless.

The syllogism, is true, at least in some cases. Consequently, punishing the act of sleeping in public, by someone who truly has no other choice, could punish the combination of both being and not having shelter. This appears to be a status crime under the Eighth Amendment.[13]

In Robinson v. California, the appellant was convicted of being addicted to narcotics, without any evidence that he had performed any act - such as using, buying, or selling drugs - within the state. The United States Supreme Court overturned the conviction on the grounds that punishment based on the status of addiction violates the Eighth Amendment's proscription on cruel and unusual punishment.[14]

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[11]468 U.S. 288 (1984).

[12]*See, e.g*, SANTA ANA ORD. § 10-402; WEST HOLLYWOOD MUN. CODE. § 4801(8)(a); Long Beach Ord No. C-6984; SANTA MONICA ORD. NO. 1620; FULLERTON MUN. ORD. 10-92; BEVERLY HILLS MUN. CODE § 93-0-2165.

[13]*See* Robinson v. California, 370 U.S. 660 (1962).

[14]*Id.* at 667; U.S. CONST., Amd. VIII.

The Supreme Court's subsequent holding in Powell v. Texas,[15] explained the narrow holding of Robinson: that "criminal penalties may be inflicted only if the accused has committed some act, has engaged in some behavior, which society has an interest in preventing, or perhaps in historical common law terms, has committed some actus reus."[16] In Powell, the Court upheld the conviction of a chronic alcoholic for public intoxication.[17]

Just as the defendant in Robinson argued that he could not, at the moment of his arrest, avoid being an addict, truly homeless individuals cannot avoid sleeping in public, at least to the extent that there is not a property owner willing to allow them on to his/her property to sleep there.[18]

This, however, is not the only answer to this questions, and I reach it with some hesitation. Cities could argue that sleeping is an "actus reus," and that there is no obligation to provide people with a place to sleep. Such prohibitions apply, by their terms, to all who sleep in public spaces, be they homeless or not. Additionally, laws against theft could, at times, punish the combination of being and not having goods, money, or labor to exchange for food.

Indeed, if the "involuntariness" of homelessness means a carte blanche exception to the reach of the criminal law, then the cat may be truly be let out of the bag. Drinking to excess is also lawful if done privately, as is performing natural bodily functions and having consensual sex. If the involuntary status of homelessness calls upon certain people to engage in these activities in public as well, it would seemingly leave each jurisdiction with a constitutional requirement to have two sets of laws, one for the domiciled and one for the homeless.

Still, the Eighth Amendment syllogism appears to hold logically. A separate question is whether this prevents jurisdictions from prohibiting public sleeping in their city code. The Eighth Amendment could be limited to providing a defense for particular individuals when they can demonstrate that they had no other choice but to violate the ordinance. Such an ordinance would then be facially constitutional and could be applied to anyone who had an alternative to violating the public sleeping ordinance.

The issue may be purely one of constitutional debate. Most jurisdictions are likely to

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[15]Powell v. Texas, 392 U.S. 814 (1968) (plurality decision).

[16]*Id.* 392 U.S. at 833.

[17]*Id.*

[18]Even the Robinson court's sunrise is subject to question, as addiction can be overcome, albeit with considerable difficulty. The Court's real objection seems to have been the possibility of an arrest without any drug activity, or arresting a non-drinking alcoholic after ten years of sobriety.

conclude that sleeping prohibitions unnecessarily go too far.[19] While I am an ardent promoter and defender of urban quality of life initiatives, I wonder about the public purpose of preventing a four year old from falling asleep her crib, or what calls for the arrest of a businesswoman who dozes off after eating her lunch on a park bench. It seems preferable to target legislation at the types of public sleeping that are creating community harms, such as blockaded sidewalks, shanty towns, and colonizations of parks. This calls for focusing on how and where public sleeping occurs.

2. The Limits of the Eighth Amendment Argument

The general principle that people cannot be punished on the basis of their "status," unfortunately, has been blown way out of proportion by the advocacy groups, and used in contexts that unhinge it from its logical foundation.

First, the Eighth Amendment does not require that states and cities limit their criminal law to voluntary conduct. "Involuntariness" was irrelevant to the Robinson decision. Indeed, Justice Marshall, the author of the plurality opinion in Powell, expressly warned against extending Robinson to create a constitutional theory that "involuntary" behavior could not be punished consistent with the Eighth Amendment. Justice Marshall stated that, "the most troubling aspect of this case, were Robinson be extended to meet it, would be the scope and content of what could only be a constitutional doctrine of 'involuntariness' or 'compulsion,' which would be fundamentally inconsistent with "traditional common-law concepts of personal accountability and essential considerations of federalism."[20]

Robinson and its Eighth Amendment doctrine instead focuses on physical impossibility. Subsequent cases have emphasized that even a helplessly addicted drug user may constitutionally be punished for drug use, even if the compulsion to use drugs is severe.[21] Powell and Robinson thus do not prevent the state from punishing overt acts that are contrary to the public interest, even if the acts are made more likely because of his status. Thus, whether homelessness is or is not a "status" could be deemed irrelevant, providing a city's ordinance only reaches a person's conduct. In other words, the Constitution does not absolve anyone of the "concepts of personal accountability," or the consequences of harmful conduct.

Second, to be covered by any Eighth Amendment necessity defense, one must be more

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[19]Not all. *See* DALLAS CITY CODE § 331-13(a); Johnson v. City of Dallas, 860 F. Supp. 344 (N.D. Tex. 1994), *rev'd on standing grounds*, 61 F.3d 442 (5th Cir. 1995).

[20]*Id.* at 535.

[21]*See, e.g.,* United States v. Moore, 486 F.2d 1139 (D.C. Cir. 1973) ("it is the craving which may not be punished under the Eighth Amendment, and not the acts which give rise to that craving").

than homeless. If someone has an option of a place to go, the syllogism breaks down. And, rejecting shelters because they demand sobriety, insist upon prayer, or cleaning a kitchen, or a curfew, does not count.

Third, urban camping ordinances and prohibitions on camping in specific parks do not violate the Eighth Amendment. These measures, rather than reach potentially innocuous behavior, are aimed at conditions that take over public spaces. One must sleep, true - but one can choose where to sleep. There is no constitutional right to sleep in the public place of one's choice. If this were not the case, the closing time at Arlington National Cemetery and the National Zoo would be unconstitutional. The convenience of Union Square in San Francisco, Jackson Square in New Orleans, or the grass underneath a downtown freeway in Dallas does not require these cities to make these places available to the street population for sleeping.[22]

Similarly, one must sleep, but one need not do so with the indicia of camping, such as shopping carts filled with belongings, bedrolls, etc. By this logic, anti-camping ordinances should survive Eighth Amendment scrutiny, as they have.[23]

Finally, in order to evoke the Eighth Amendment at all, one must be the subject of a criminal prosecution and punishment.[24] An Eighth Amendment violation cannot be created merely by passing an ordinance and there can be no facial challenges to alleged "status offenses." Rather, an individual must not only be devoid of any choice but also must violate the ordinance and be actually "punished" before raising a claim. This standing requirement frustrates those eager to rush into federal court.

B. Prohibitions on Urban Camping and Regulating Where Public Sleeping May Occur

As I noted, the necessity argument implicit in the Eighth Amendment challenges only applies to the act of sleeping, not to camping. The Supreme Court of California[25] and a federal District Court agreed.[26]

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[22]*See infra.*, Section B.

[23]*Id.*

[24]Johnson v. City of Dallas, 61 F.3d 442 (5th Cir. 1995), *but see* Tobe v. City of Santa Ana, 892 P.2d 1145 (Cal. 1995), Joyce v. City and County of San Francisco, 846 F. SUPP.. 843 (N.D. Cal. 1994).

[25]Tobe v. City of Santa Ana, 892 P.2d 1145 (1995).

[26]*See* supra note 36. The district court in *Joyce* upheld San Francisco's Matrix Program against several constitutional challenges in two decisions, one rejecting a preliminary injunction, and one granting the City summary judgment.

San Francisco's Matrix Program involved enforcing numerous quality of life ordinances against such things as camping on public lands, obstruction of sidewalks, public urination and defecation, etc.[27] In response to the plaintiff's arguments that homelessness was a status in the sense that it was caused by a variety of involuntary factors, the Joyce court concluded that depicting homelessness as a status "is by no means self-evident" and of "questionable merit in light of concerns implicating federalism and the proper role of the Court in such adjudications."[28] The Court eventually declined to answer that question, ruling that sleeping at parks where sleeping is prohibited is conduct, and therefore subject to regulation.[29]

In Tobe v. City of Santa Ana,[30] the California Supreme Court reviewed the constitutionality of a Santa Ana city ordinance that prohibited "urban camping" and the storage of personal property by private individuals in designated public areas. The Court of Appeals of California had previously sided with the respondents and invalidated the ordinance, holding that the ordinance violated the Eighth Amendment because it imposed punishment for the "involuntary status of being homeless."[31]

The California Supreme Court reasoned that neither the language of the Santa Ana ordinance nor the evidence in the case supported the claim that a person may be convicted just because he was homeless, or was stricken by poverty. Instead, the Court found the ordinance to punish conduct, which individuals can control, rather than the status of homelessness. Following the precedents set by the Supreme Court in Robinson and Powell, the Court held that the Eighth Amendment does not prohibit punishment of acts derivative of a person's status.

Notably, the Court distinguished a constitutional right to pursue the necessities of life, such as sleeping, which is protected under the Eighth Amendment, and the manner in which these necessities are pursued. The latter is subject to individual control and choice, and even the homeless can therefore be regulated under the state's police power.

The distinction between sleeping and camping also explains, in part, why San Francisco

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[27]While the Matrix program was upheld as constitutional, the program was suspended by Mayor Willie Brown upon his taking office as Mayor of San Francisco. This led the Ninth Circuit to vacated the district court decision as moot and dismiss the case. 61 F.3d 442 (1995).

[28]*Joyce*, at 816.

[29]*Joyce*, final order.

[30]892 P.2d 1145 (1995).

[31]Tobe v. City of Santa Ana, 27 Cal.Rptr. 386 (Cal.App. 1994), *rev'd*, 892 P.2d 1145 (Ca. 1995).

and Santa Ana prevailed in court, but Miami did not. In Pottinger v. City of Miami,[32] the court enjoined the Miami police from arresting the homeless for "acts such as sleeping, eating, lying down or sitting" in all areas of the city.[33]

Crucial to the court's holding was an observation that enforcement of the ordinances "bans homeless individuals from all public areas and denies them a single place where they can be without violating the law."[34] To the contrary, under the Santa Ana Ordinance and San Francisco's Matrix Program, the homeless remained free to use public property on the same terms with the other members of the community. These measures, and those like them, do not prevent anyone from entering public property, or from merely falling asleep.

In sum, restrictions of where public camping may occur regulate only conduct, not status. These ordinances reflect a local government's traditional role of regulating public conduct and public spaces, to protect and enhance the general welfare of the citizenry. Enforcement of these laws falls squarely within Powell and does not offend the Eighth Amendment.

C. The Right to Travel and Urban Camping Legislation

Restrictions on urban camping restrictions are also challenged as a violation of the right to travel.[35] This offends not only clear precedent interpreting this judicially discovered right, it offends the English language as well.

The constitutional right to travel does not "endow citizens with a 'right to live or stay where one will.' [The right to travel] does not confer immunity against local trespass laws and does not create a right to remain without regard to the ownership of the property on which he chooses to live or stay...."[36] The right to travel, unenumerated in the Constitution, has been used by the federal courts to strike down measures that directly restrict or punish interstate

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[32]Pottinger v. City of Miami, 810 F.Supp. 1551 (S.D. Fla. 1992).

[33]*Id.* at 1584.

[34]*Id.* at 1581. The decision, albeit limited, may be of no precedential value anyway. The Eleventh Circuit has consistently declined to approve it, and has sent the case back to the district court on two occasions so far. 73 F.3d 1154 (11th Cir. 1996).

[35]Harry Simon, *Towns Without Pity: A Constitutional and Historical Analysis of Official Efforts to Drive Homeless Persons From American Cities,* 66 TUL. L. REV. 631 (1992).

[36]Davison v. City of Tuscon, 924 F.Supp. 989, 994 (D.Ariz. 1996) (quoting Tobe v. City of Santa Ana, 892 P.2d 1145, 1165 (Cal. 1995)).

movement,[37] and measures that discriminate against recent migrants to a state.[38]

Camping restrictions do neither. They treat all people the same, regardless of when they moved into a state. Although the existence of such laws may effect the desirability of a city as a place to move to, this does not implicate the right to travel.[39]

Indeed, if it were otherwise, everything from gun control laws to the quantity of welfare benefits to sodomy laws would violate the right to travel, because some people's decision whether to move into a state may depend upon the existence (or absence) of these laws.

Finally, whatever the word "travel" might mean, it seems far-fetched to apply it to lying dormant on a public sidewalk or city park.[40]

D. Vagueness Challenges to Urban Camping Ordinances

Anti-camping measures define "camping" so that the average citizen understands what is being prohibited, and in a manner that provides law enforcement officers with reasonably clear guidelines as to which actions are prohibited. This decreases the possibility that an ordinance will be enforced in an arbitrary or discriminatory manner.[41]

Vagueness, more often than not, is the constitutional assertion made by challengers who are desperate to use the courts to veto a legislative judgment. In fact, City Councils generally use words average people can understand. All that the Constitution requires is that a law be sufficiently clear so that a person may know what is prohibited and that a practical construction

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[37]Crandall v. Nevada, 73 U.S. (6 Wall.) 35, 46 (1868) (invalidating tax on traveling outside of state); Edwards v. California, 314 U.S. 160 (1941) (invaliding statute prohibiting assisting the migration of an indigent into California).

[38]Shapiro v. Thompson, 394 U.S. 618, 627 (1969) (invalidating durational requirement for welfare benefits); Memorial Hospital v. Maricopa County, 415 U.S. 250 (1974) (invalidating durational requirement for free hospital care).

[39]Village v. Belle Terre v. Boras, 416 U.S. 1 (1974) (upholding single-family zoning ordinance against right to travel challenge); *see also* People v. Scott, 26 Cal. Rptr.2d 179 (1993) (upholding West Hollywood camping ordinance).

[40]*See* BLACK'S LAW DICTIONARY 1500 (6th ed. 1990) (defining travel as going "from one place to another" and a "voluntary change of place").

[41]*See* Kolender v. Lawson, 461 U.S. 352 (1983); *see also* Papachristou v. City of Jacksonville, 405 U.S. 156 (1972); United States v. Jariss, 347 U.S. 612 (1954); Thornhill v. Alabama, 310 U.S. 88 (1940).

can be given to its language.[42]

In Clark v. Community for Creative Nonviolence, the Supreme Court ruled that the Park Service's definition of "camping" was not unconstitutionally vague.[43] Other courts have similarly supported the claim that "camping" can be adequately defined. For example, a court upheld the conviction of a person who had spent one night sleeping in a park.[44] This court affirmed that the conviction was a valid application of a camping ordinance and that a "reasonable fact finder"[45] could ascertain the difference between someone "camping" in the park and someone using it for a picnic or afternoon of relaxation.

The California Supreme Court agreed, finding that there was "no possibility that any law enforcement agent would believe that a picnic in a park constitutes 'camping'" within the meaning of the Santa Ana ordinance.[46]

E. Equal Protection Considerations

The homeless are not a suspect class, despite repeated attempts by advocacy groups to convince courts that they should be. Consequently, laws which place a burden on the homeless more than those who are not homeless do not warrant much judicial scrutiny.[47]

Urban camping and similar ordinances should easily survive equal protection scrutiny because they are rationally related to the interests of protecting public safety and economic vitality, and preserving parks and other public spaces for the uses for which they were

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[42]*See* LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW (2d ed. 1986), at 684; Walker v. Superior Court, 763 P.2d 852 (Cal. 1988).

[43]468 U.S. at 292, n.4, and 300.

[44]United States v. Muser, 873 F.2d 1513 (D.C. Cir. 1989); United States v. Thompson, 864 F.2d 188 (D.C. Cir. 1988).

[45]*Muser*, at 1519. Another court found that a prohibition on erecting a "building, hut, hotel, shanty, tent, or other structure" is not vague. *See* ACORN v. City of Tulsa, 835 F.2d 735, 742-44 (10th Cir. 1987); *see also* People v. Davenport, 222 Cal.Rptr. 736 (Cal.App. 1985) *cert. denied* 574 U.S. 1141 (1986) (upholding a no-camping ordinance against vagueness and overbreadth challenge).

[46]Tobe v. City of Santa Ana, 892 P.2d 1145 (1995).

[47]*See* Lindsey v. Normet, 405 U.S. 45 (1972) (housing based classifications not suspect); *see also* Kadrmas v. Dickenson Public Schools, 487 U.S.450 (1988) (wealth-based classifications are not suspect); San Antonio v. Rodriguez, 411 U.S. 1 (1973) (same).

intended. As one federal court noted, these measures address real urban problems that come with homeless encampments, included drug sales, public elimination of bodily wastes, vandalism, litter, "as well as a host of other crimes by and against homeless people."[48]

Current model camping ordinances are not constructed or written to exclude the homeless from public parks - indeed, they are not designed to exclude anyone from using and enjoying parks. Rather, they are an attempt to prevent people from using parks and similar public spaces for purposes for which they were not intended (i.e., as a place of residence, kitchen, an bathroom), and to keep them open and accessible to all.

**V. Sidewalk Use Ordinances**

An issue with similar implications to the anti-camping ordinances are prohibitions on sitting or lying down on city sidewalks. Permitting individuals to block busy city sidewalks creates multiple problems. First, residents and tourists are driven away from the community's public facilities and commercial attractions. People choose to go elsewhere to meet, shop, and dine because they fear the unsafe environment that is created and wish to avoid the obstacle-course like gauntlets. Secondly, the pedestrians who choose to stay and walk around those individuals obstructing the walkways put themselves at risk by walking into the street. This is particularly true for the elderly, the blind, and those confined to a wheelchair. Furthermore, cities become abandoned by residents and passersby who find the environment created by sidewalk sitters to be undesirable.

The Seattle City Council passed an ordinance which prohibits a person from sitting or lying on a public sidewalk in commercial areas during business hours.[49] The Seattle ordinance was challenged by a group of plaintiffs, including homeless people and a street musician, who sometimes sit on sidewalks. This group brought suit in federal court challenging the constitutionality of the Sidewalk Ordinance. The constitutional challenge was rejected, both by the trial court[50] and by the Ninth Circuit.[51] Since then, many cities are considering similar ordinances.

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[48]Joyce v. City and County of San Francisco, No. C-93-4149 (N.D. Cal., August 18., 1995), *vacated as moot* 87 F.3d 1320 (9th Cir. 1996).

[49]SEATTLE MUN. CODE § 15.48.040-.050.

[50]Roulette v. City of Seattle, 850 F. Supp. 1442 (W.D. Wa 1994), *aff'd* 97 F.3d 300 (9th Cir. 1996).

[51]Roulette v. City of Seattle, 97 F.3d 300 (9th Cir. 1996). The plaintiff in Seattle have subsequently carried this litigation into state court, thus far without success. Seattle v. McConahy, No. 36995-4-1 (Wash.App.).

The constitutional challenge to sidewalk use ordinances such as the one in Seattle consist of many claims. These assertions include alleged violations of: substantive due process, the right to travel, free speech, equal protection, and procedural due process.

The most sweeping assertion by challengers to these measures is that they violate substantive due process requirements because sidewalk use measures are without a legitimate governmental interest, prohibiting only harmless conduct. However, there are two legitimate interests addressed by such an ordinance that have been recognized by federal courts - pedestrian safety and urban quality of life. The Seattle Court went so far as to classify the governmental interest in sidewalk use ordinances as *substantial*.[52] Specifically, the court said the City of Seattle's substantial interest was "protecting public safety by keeping the sidewalks clear of pedestrian hazards" and "promoting the economic health of its commercial areas." Therefore, there is a legitimate governmental interest rationally related to the sidewalk ordinance's prohibitions.[53]

Another assertion used to challenge sidewalk use ordinances is that they infringe the constitutional right to travel. As discussed above, the constitutional right to travel protects citizens against direct restrictions on, or punishment for, movement or migration between states, or discrimination against new entrants to a state.[54] None of those interests are implicated by a Seattle-style sidewalk use ordinance which treats residents and visitors alike, and which places no burden on freedom of movement about the city.

Furthermore, ordinances like the one in Seattle leave open other public places in commercial districts such as parks, plazas, and alleys in which those who desire may sit or lie down without violating the law. In addition, these individuals may sit on the sidewalks at night, and on sidewalks in non-commercial areas.

Challengers to sidewalk use ordinances also claim that these laws restrict free speech rights because they reach activity which the challengers believe is expressive. The Seattle court declined to accept this characterization, stating that "the act of sitting or lying is not necessarily

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[52]*Roulette*, 850 F. SUPP.. 1442, 1448 (citing Seeley v. State, 655 P.2d 803, 808 (Ariz. App. 1982) (Phoenix ordinance forbidding lying, sleeping, or sitting in public rights of way except in emergencies is not a violation of the constitutional right to travel)).

[53]A federal district court in Nevada has recently recognized the strong public interest in maintaining the free flow of pedestrian traffic in denying a preliminary injunction in a challenge to a Clark County ordinance that prohibits handbilling on the Las Vegas Strip. S.O.C., Inc. V. Clark County, No. CV-S-97-0123-LDG (RJJ) (D. Nev. Mar. 4, 1997).

[54]*See supra* Part IV.C.

related or inextricably linked to the speech or expressive conduct."[55] Some opponents of sidewalk use ordinances argue that the mere presence of the destitute-looking persons on sidewalks constitutes speech, in that, from this conduct, the public should be informed of society's alleged failure or inability to address certain social needs.[56] However, this argument mischaracterizes the purpose of sidewalk use ordinances, which is not to stifle any message or rid the city of its homeless, but rather to safeguard the designated commercial districts. Furthermore, the opponents of these measures are not all homeless, and therefore, it is illogical to conclude that cities turning to these measures are suppressing any unique political statement.

In Berkeley, though, a federal court accepted the remarkable argument, holding that sitting on the sidewalk is speech, but lying on the sidewalk is not.[57] The Court never did say what was being expressed -- nor did the Court see fit to enlighten us as why the act of sitting down on the sidewalk flows with expression, but lying down does not. This decision pre-dated the Ninth Circuit decision in the Seattle case, and was subsequently vacated by the district court after the Ninth Circuit decision was announced.[58]

## VI. The Constitutionality of Panhandling Controls

### A. Types of Panhandling Restrictions

Many cities have adopted measures aimed at aggressive panhandling and panhandling where it is particularly intrusive[59]. Aggressive panhandling is often defined as: touching,

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[55]*Roulette*, 850 F.Supp. 1442, 1449.

[56]It is highly doubtful that being sprawled out on the sidewalk is expression of a level protected by the First amendment. As the Supreme Court has noted, [i]t is possible to find some kernel of expression in almost every activity a person undertakes--for example, walking down a street or meeting one's friend at a shopping mall--but such a kernel is not sufficient to bring the activity within the protection of the First Amendment." Dallas v. Stanglin, 490 U.S. 19, 25 (1989).

[57]Berkeley Community Health Project v. City of Berkeley, 902 F. SUPP.. 1084 (N.D. Cal. 1995).

[58]A Phoenix ordinance prohibiting sitting or lying down on all sidewalks in the city was upheld. Seeley v. Arizona, 655 P.2d 808 (Ariz.App. 1982).

[59]A 1996 survey by the CCI determined that just over one third of the 504 largest cities in the United States had panhandling control ordinances as of mid-1996. Cities with panhandling control measures include Washington, Baltimore, Cincinnati, Atlanta, Seattle, San Francisco,

following, standing in someone's way, asking again after a clear "no" has been given, and begging while intoxicated.

Other cities are going further in more recent ordinances, prohibiting direct solicitations for money where they would be particularly intrusive, such as on public transportation vehicles, near banks, public toilets, and near ATM machines. They are also banning solicitations of people in cars, near entrances to buildings, on beaches, and prohibiting fraudulent panhandling. The latter includes misrepresenting the intended use of the money and misrepresenting whether one is homeless.[60] These efforts, after a bumpy start, are now being accepted by courts.

B. Supreme Court Guidance

In Village of Schaumburg v. Citizens for a Better Environment[61], the Supreme Court ruled that charitable solicitation is so closely intertwined with speech that "solicitation to pay or contribute money" is protected under the First Amendment. However, it has not been the case that all direct solicitations for cash have been diligently protected by the Supreme Court. Rather, the Court has seen these as fundamentally different from other forms of expression, prompting it to uphold restrictions on where direct solicitations for money can occur in three (of three) recent cases.

In the first of these cases, only one year after Village of Schaumburg, the Supreme Court upheld a prohibition on the solicitation of funds at a state fairgrounds, except by those with a licensed booth.[62]

In United States v. Kokinda,[63] the Court considered a Postal Service regulation prohibiting solicitation of contributions on sidewalks outside of post offices. The Court found that face-to-face solicitation could be prohibited, given its disruptive nature.[64]

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Santa Barbara, Long Beach, Philadelphia, New York, Phoenix, Seattle, San Francisco, Santa Barbara, Long Beach, Sacramento, Raleigh, New Haven, and Santa Cruz. In addition, the Los Angeles City Council is currently considering a panhandling control measure.

[60]Solicitation control ordinances have been adopted in Berkeley, San Francisco, Riverside, Seattle, Atlanta, Baltimore, Washington, Raleigh, Dallas, Austin, Santa Barbara, Santa Cruz, New Haven, Phoenix, New York, etc.

[61]444 U.S. 620, 633 (1980).

[62]*See* Heffron v. Int'l Soc. of Krishna Consciousness, Inc., 452 U.S. 640 (1981).

[63]*Kokinda,* 497 U.S. 720 (1990).

[64]*Id.* at 3123.

Although the case did not directly deal with street panhandling, the Court nevertheless offered some rather clear views on the subject, commenting that:

> "as residents of metropolitan areas know from daily experience, confrontation by a person asking for money disrupts passage and is more intrusive and intimidating than an encounter with a person giving out information."[65]

The Court thus firmly distinguished the dissemination of information, which contributes to the public discourse, from mere begging, because of the absence of any substantive message, and the disruption, obtrusiveness, fear, and intimidation that begging causes.

Moving from post offices to airports, the Court upheld a regulation of the Port Authority of New York and New Jersey banning "solicitation and receipt of funds" in a "continuous or repetitive manner" within airport terminals.[66] The plurality opinion, authored by the Chief Justice, was centered on four justices' conclusion that the airport is not a "traditional public forum," because, unlike the public streets, the Port Authority has never considered the free exchange of ideas to be one of its principal purposes.[67]

Although the "public forum" category applies to cities' parks and sidewalks, the plurality's basis for upholding the regulation as reasonable is relevant to the sidewalk panhandler: it found that face-to-face solicitation impedes pedestrian traffic and presents risks of coercion and fraud.[68] These same risks are presented by the daily scourge of aggressive and intrusive panhandling.

Justice Kennedy, who disagreed with the plurality's public forum analysis, nonetheless viewed the ban on face-to-face solicitation as either a "narrow and valid regulation of the time, place, and manner of protected speech in this forum or else is a valid regulation of the nonspeech element of expressive conduct."[69] He characterized the restriction as a time, place, or manner restriction because it did not prohibit all speech that solicits funds, only "personal solicitations for immediate payment of money," and as a restriction of a nonspeech elements because, like

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[65] *Id.*

[66] Int'l Soc. for Krishna Consciousness v. Lee, 505 U.S. 672 (1992).

[67] *Id.* at 682-683.

[68] *Id.* at 683-684. Three justices dissented, writing that they believed airports were public fora that should have been open to all speakers, including those who wanted to solicit money. These three justices would have struck down the ban in the absence of coercion or fraud, which suggests that even these dissenters are open to ordinances controlling *aggressive* panhandling.

[69] *Id.* at 693 (Kennedy., J., concurring).

street begging, it was "directed only at the physical exchange of money."[70]

Furthermore, Justice Kennedy found the restriction to be content-neutral, in that it was aimed at the conduct element of the exchange of money and not at any particular message. He added that it was narrowly tailored, in that it did not "burden any broader category of speech or expressive conduct than is the source of the evil sought to be avoided."[71]

Thus the Supreme Court, although it has not heard a straight forward begging case, has strongly indicated that there is ample room for regulation on where panhandling is permitted.

C. Panhandling Restrictions Federal Courts:

1. The New York Cases

In 1990, the United States Court of Appeals for the Second Circuit upheld a New York City Transit Authority Regulation prohibiting begging and panhandling on the city's subway system.[72]

The Circuit Court expressly held that panhandling is not speech protected by the First Amendment.[73] The Court viewed begging, not in terms of a spoken appeal, but rather as a physical transfer of money, stating that "common sense tells us that begging is much more 'conduct' than it is 'speech."[74] It focused on the lack of "an intent to convey a particularized message," and the unlikelihood that any message "would be understood by those who viewed it."[75]

The Young court also covered its flank, offering that, even if begging were protected expression, the regulation would be valid under the standard enunciated in United States v. O'Brien.[76] Under the O'Brien test, a limitation of expression combined with conduct is valid if it is within the constitutional power of the government, it furthers an important or substantial government interest, the governmental interest is unrelated to the suppression of free expression,

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[70]*Id.* at 705.

[71]*Id.* at 707.

[72]Young v. New York City Transit Authority, 903 F.2d 146, 148 (2d Cir. 1990) (citing 21 N.Y.C.R.R. § 1050.6).

[73]*Id.* at 152-54.

[74]*Id.* at 153.

[75]*Id.* at 153 (quoting Spence v. Washington, 418 U.S. 405, 410-11 (1974)).

[76]*Id.* at 157.

and any incidental restriction on alleged First Amendment freedoms is no greater than needed to further that interest.[77]

The Court implicitly recognized that the regulation was within the Transit Authority's power. The second prong of the test led the court to proclaim that begging in the subway "often amounts to nothing less than assault, creating in the passengers the apprehension of imminent danger " and was thus within the government's interest to protect.[78]

The scope of Young did not prove to be very broad. In Loper v. New York City Police Dept., a separate panel of the same Court of Appeals ruled that a prohibition on all begging in the state is unconstitutional. [79] At the same time, the trial court decision affirmed by the Second Circuit not only left open the possibility that more narrowly tailored ordinances would pass constitutional scrutiny, it explicitly stated that "a ban on aggressive begging would probably survive scrutiny, as would a complete ban on begging in certain areas, such as outside of automatic teller machines."[80] The New York law before the Court, though, was rejected because it "cuts off all means of allowing beggars to communicate their message of solicitation."[81]

2. Santa Monica and Fort Lauderdale

The City of Santa Monica, long a mecca for the homeless and those acting like them, concluded that it was perfectly consistent to carry out its long standing commitment to the less fortunate while at the same time imposing minimum standards of public conduct. The city passed a panhandling control ordinance, similar in scope to many others.

The Santa Monica ordinance included a variety of time, place, and manner restrictions, including prohibitions on solicitations of individuals in automobiles, and prohibitions on soliciting within three feet of an individual unless they consent.[82] The ordinance was challenged in federal court on First Amendment grounds, where plaintiffs argued that the ordinance was not content-neutral, that it was overbroad, that it did not leave open sufficient alternative means of communication, and that it placed too much discretionary enforcement power in the hands of the

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[77]*Id.* (quoting United States v. O'Brien, 391 U.S. 367 (1968)).

[78]*Id.* at 158.

[79]Loper v. New York City Police Dept, 802 F.Supp.1029 (S.D.N.Y.1992), *aff'd*, 999 F.2d 699 (2d Cir. 1993).

[80]*Id.* at 1040.

[81]*Id.*

[82]SANTA MONICA MUN. CODE §§ 4.54.010-4.54.040 (1994).

police. The Court rejected the plaintiff's contentions and upheld the ordinance declaring: "Even assuming that the provisions are narrowly tailored to serve the significant governmental interest of preventing harassment and intimidation, and the provisions leave open ample alternate channels for solicitation."[83]

Fort Lauderdale also successfully resisted a challenge to its park rule prohibiting solicitations on the city's beaches and the abutting sidewalks.[84] Plaintiff's sought a preliminary injunction to prevent the enforcement of the park rule on the grounds that it violated the First Amendment. The Court rejected this contention. The Court declared that the City of Fort Lauderdale had a valid governmental interest in protecting the beach stating that maintenance of "a safe beach or 'tourist zone' is of paramount concern to the financial future and growth of the City," that it is "City's chief asset, " and an "integral part of the City's economic development plans."[85] In addition to recognizing economic interests as a legitimate grounds for restricting panhandling, the Court noted: "Public property does not become a public forum simply because members of the public may come and go at will. The government, just as private property owners, may maintain property under its control for the use to which it is lawfully dedicated."[86]

3. Berkeley

Berkeley, in response to a growing panhandling problem, passed one of the most far-reaching panhandling control ordinances in the country. In addition to the standard controls included in many of the ordinances discussed above, Berkeley went a step farther and prohibited all panhandling in the city at night. A federal district court found this provision to be unconstitutional and enjoined enforcement of the ordinance pending review by the Ninth Circuit.[87]

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[83]Doucette v. City of Santa Monica, CV 95-1136-WDK, slip op. at 2, (C.D. Cal. Sep. 30, 1996).

[84]Chad v. City of Fort Lauderdale, 861 F. Supp. 1057 (1994).

[85]*Id.* at 1063.

[86]*Id.* at 1061 (internal citations omitted) (citing Naturist Society v. Fillyaw, 958 F.2d 1515, 1522 (11th Cir. 1992)).

[87]Berkeley Community Health Project v. City of Berkeley, 902 F. SUPP.. 1084 (N.D. Cal. 1995) *appeal docketed* (9th Cir., No. 95-16060). After a local election changed the makeup of the City Council, the city settled the lawsuit. In return for an award of attorney's fees and the city dropping the prohibition on begging at night, the plaintiff's agreed to vacating the District Court order. The new ordinance now prohibits aggressive solicitation as well as solicitation near an ATM machine.

D. Time, Place, and Manner: The Legal Standard

Tailored solicitation control ordinances must fulfill four requirements in order to be constitutionally sound. They must (1) be neutral in content; (2) be narrowly tailored; (3) serve a significant governmental interest; and (4) leave open ample alternative channels of communication.[88]

1. Content Neutrality

The first - and often the most troublesome - requirement of regulations on speech is that they must be content-neutral. That is, they must be written so that they do not discriminate against a particular message. In United States v. Kokinda, the Supreme Court upheld a Postal Service regulation which prohibited the solicitation of donations on the sidewalks near the entrances to post offices.[89] The court previously determined that prohibitions on solicitation are content-neutral because they apply to anyone who solicits, and are not intended to target a particular message or exchange of ideas.[90]

The solicitation restrictions, adopted in New Haven, Atlanta, Berkeley, Washington, and San Francisco, apply to all solicitors equally, regardless of whether they are soliciting donations for a religious group, an AIDS services organization, or in order to purchase food. Provided that a solicitor abides by the time, place, and manner restrictions of the ordinance, he or she is free to solicit for any cause or to speak on any subject. No message is discriminated against, and all speakers remain free to express themselves on any issue they choose. These measures are therefore content-neutral.

Two federal district court judges in California have recently resisted this trend. In Berkeley, the same federal court that accepted the First Amendment argument that sitting on the sidewalk is speech, held that measures aimed at how direct solicitations for money are conducted are not content-neutral.[91] Similarly, in a case from Riverside, California, a federal district court struck down that city's controls on panhandling, because of the deemed content based nature of

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[88]*O'Brien*, 319 U.S.367 (1968); Int'l Society for Krishna Consciousness, Inc. v. City of Baton Rouge, 876 F.2d 494, 497 (5th Cir. 1989).

[89]*Kokinda*, 497 U.S. 720 (1990).

[90]Heffron v. Int'l Soc. of Krishna Consciousness, Inc., 452 U.S. 640, 648 (1981).

[91]Berkeley Community Health Project v. City of Berkeley, 902 F. SUPP.. 1084 (N.D. Cal. 1995) appeal docketed (9th Cir., No. 95-16060).

the regulation.[92]

The courts may ultimately include the U.S. Constitution; however, this view seems unlikely to survive in the Appellate Courts.

2. Narrow Tailoring

In order to be considered narrowly tailored, it is not necessary that a statute create no burden on other activities: "It is now well-settled that regulations restricting the time, place or manner of expressive conduct do not violate the First Amendment 'simply because there is some imaginable alternative that might be less burdensome on speech."[93]

Ordinances aimed at aggressive solicitation and solicitation where it is particularly intrusive reach only conduct that is harassing, coercing, intimidating, or threatening. Furthermore, they leave open ample opportunities for non-confrontational methods of solicitation, from an open palm to an outright demand, as long as the panhandler does not make his appeal in the proscribed manner.

3. Governmental Interest

Solicitation controls are aimed at protecting the public from intimidation and in ensuring the vitality of urban life. Courts have no trouble finding these interests to be pressing and legitimate.[94] A federal court in Baltimore found such an interest to be compelling.[95]

## VII. CONCLUSION

The recently decided cases, with a handful of exceptions, accept the view that restrictions on urban camping and aggressive panhandling are aimed at fostering community life and the safety and civility of the public spaces that support it. Individuals very well may have the right to ask others for money or to sleep in public. But they do not have the right to do so in a manner that infringes on the interests of others or of the community as a whole. The ordinances discussed in this paper represent a balanced answer to pressing urban problems. It is my view that the approach is respectful of constitutional rights, conducive to the recovery of street addicts,

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[92]Church of the Soldiers of the Cross of Christ v. City of Riverside, No. CV-94-8047 (C.D. Cal., Mar. 12, 1995).

[93]Young, 903 F.2d at 159 (quoting United States v. Albertini, 472 U.S. 675, 689 (1985)).

[94]*See, Roulette*, 97 F.3d 300; Ulmer v. Municipal Court, 27 Cal. Rptr. 445 (1976).

[95]Patton v. City of Baltimore, No. S 93-2389 (D. Md., Aug. 18,1994).

and dedicated to welcoming, attractive, and safe streets and parks for all.

## LIST OF KEY URBAN QUALITY OF LIFE CASES

### PANHANDLING

United States v. Kokinda, 497 U.S. 720 (1990).

Loper v. New York City Police Department, 802 F. Supp. 1029 (S.D.N.Y. 1992), *aff'd*, 999 F.2d. 699 (2nd Cir. 1993).

Young v. New York City Transit Authority, 729 F. Supp. 341 (S.D.N.Y. 1990), *rev'd*, 903 F.2d 146 (2nd Cir. 1990), *cert. denied*, 498 U.S. 984 (1990).

Berkeley Community Health Project v. City of Berkeley, 902 F. Supp. 1084 (N.D. Cal. 1995), *appeal pending*.

Doucette v. Butts, 955 F. Supp. 1192 (C.D. Cal. 1997).

Chad v. City of Fort Lauderdale, 861 F. Supp. 1057 (S.D. Fla. 1996).

Joyce v. City and County of San Francisco, No. C-93-4149-DLJ, (N.D. Cal. Aug. 18, 1995), *vacated as moot*, 87 F.3d 1320 (9th Cir. 1996).

### CAMPING

Johnson v. City of Dallas, 61 F.3d 442 (5th Cir. 1995).

Tobe v. City of Santa Ana, 892 P.2d 1145 (Cal. 1995).

### SIDEWALK USE

Roulette v. City of Seattle, 850 F. Supp. 1442 (W.D. Wa 1994), *aff'd*, 97 F.3d 300 (9th Cir. 1996).

# ATLANTA CASE STUDY

## INTRODUCTION

One of Atlanta's primary motivations for enacting quality of life ordinances was to protect its downtown core, particularly in preparation for the 1996 Summer Olympics. Atlanta's downtown serves as a community meeting place for those of different classes and races. However, increasing disorder, particularly aggressive begging, has lead many Atlanta residents and tourists to avoid the shops, restaurants, and other attractions in the area.

In developing ordinances to combat aggressive begging and theft from parked cars, the city has sought to formulate effective laws which respect the constitutional rights of its citizens. Further, the city has sought to ensure that the ordinances limit anti-social behaviors, without targeting any group of people, or violating the freedom of expression of citizens. Atlanta is unique in that its anti-aggressive panhandling law guarantees the right to passively panhandle.

Nonetheless, the city's solutions to disorder problems remain, to some degree, blocked by a judiciary uncomfortable with sentencing repeat disorder offenders to jail. There is some hope that revised disorder laws and a planned community court will provide a sentencing solution satisfactory to the judiciary and effective in providing a deterrent to those who violate Atlanta's order maintenance laws.

## ATLANTA'S STREET DISORDER PROBLEM

### INTRODUCTION

One of the key elements in Atlanta's downtown economy is the hospitality industry. Downtown is where the convention center and many of the city's major hotels are located. For the hospitality industry to thrive, Atlanta has to be seen by out-of-towners as a safe and pleasant place to visit. One police official who interacts regularly with downtown businesses explains: "They are not worried about violent crime; they are worried about the perception of violent crime. If visitors are panhandled twice, they don't feel that the neighborhood is safe." The officer also noted that panhandlers are probably one of the top three things that bring the perception of safety down. The others are poor street lighting and vacant buildings.

Because of the city's large number of out of town visitors, Atlanta gets a lot of what local police call "transient victims." According to a police official, "tourists come in, they attend a conference, they become a victim, and they are gone." Even if these out of towners take the time to contact police and file a complaint, they have long since left town by the time of trial.

Like other big cities, Atlanta does have a violent crime problem, but this type of crime is usually limited to certain areas, away from downtown. But the impact of the minor crimes on downtown, police say, is quite serious.

Several people we met with in Atlanta suggested that the street disorder problem contributed to the decision of Atlanta's branch of the Federal Reserve to move out of downtown-

-the only federal reserve branch not in a downtown area in its host city. In addition, interviews with Atlanta's business executives suggest that if the street disorder problems are not resolved, the large downtown Macy's department store may close. Macy's customer surveys have identified the ring of panhandlers that shoppers must pass through in front of the store's entrance as a major factor in declining sales.

If Macy's does decide to close, it could have a dramatic negative impact on downtown. Other businesses see department stores as a bellwether of a city's commitment to maintaining a healthy downtown. This was the experience of the District of Columbia, which lost two of its three major downtown department stores over a three year period. Without improvement in the disorder problem, both large retail outlets and their thousands of employees are at risk.

## PANHANDLING

Panhandling, in particular, became a problem for hotels. Guests were approached by people asking for money while getting out of taxis or coming through the hotel entrance. The result, according to the hotel industry representative, was that people preferred to stay outside of downtown. Even those that stayed downtown tended to avoid shopping in the area. Downtown hotels had to charter vans to take guests to suburban department stores up to thirty minutes away so that the guests could avoid the two-minute walk to Atlanta's downtown stores.

A representative from the hotel industry says that he hears complaints all day long about panhandling from hotel general managers. He is most concerned about eliminating what he

referred to as "the 50 or so professional panhandlers." He expresses frustration that the police know who these professional panhandlers are and yet can't control them. Their continued presence on the streets, he believes, "create a perception that Atlanta is not safe. The perception is much worse than the reality."

The continued presence of the panhandlers has had an impact on Atlanta's downtown hotel occupancy rate, according to the hotel industry representative. The conventions still come to Atlanta, but they increasingly are staying outside of downtown. The hotel occupancy rate is 65% downtown, while outside downtown it is around 80%.

Another form of panhandling that is common in Atlanta are the "tour guides." They offer to show tourists around and afterwards they ask for a couple of dollars. A police commander from downtown commented, "Some say it's not panhandling, but it is. It's asking for money on the street. There have been cases where, if tourists say no, their wallets are stolen." Also a problem in Atlanta are "squeegee men," who hang out under highway overpasses or at traffic lights. They attempt to wash windows for a charge from stopped motorists.

The representative from the hotel industry said that the city needed to make their current aggressive panhandling law stronger. In pursuing a new aggressive panhandling law, businesses, according to the hotel industry representative, "want to create a zone so a person coming out of the taxi coming into the hotel doesn't have to be confronted immediately with that type of thing." The problem is, he says, "that for aggressive panhandling you need to have a victim. A

conventioneer is not going to come back to prosecute a panhandler complaint. The panhandlers know that--that's why they target tourists."

## THEFT FROM PARKED CARS

Petty theft, usually from parked cars, is also a serious problem. According to police, approximately 25% of these incidents are a result of the theft of mobile phones from cars. Apparently, people leave the phones on their seats and thieves break the window and steal them. The cost of replacing the broken window is often more than the phones are worth. The thieves sell the phones for a few dollars to cell phone "clone" makers.

The preexisting parking lot ordinance[1] required police to wait for offenders to break into the car, and tied the police's hands in trying to intervene before a thief commits the crime. This policy drove the larceny rate up. In addition, the damage to the car is more expensive to repair than the value of any goods stolen.

Another problem with the existing parking lot ordinance is that the witness for the offense is usually a parking lot attendant or the parking lot owner who is unlikely to have the flexibility in their schedule to show up at a court hearing. The only cases that tend to be prosecuted are those few where a police officer actually witnesses the crime and can present testimony at trial.

## HOMELESS ISSUES

Police and business community representatives report that the homeless problem in Atlanta has receded, in part due to all the pre-Olympics construction. A lot of homeless used to sleep in Hurt Park and other downtown parks. In addition, police have begun enforcing a park curfew which prevents sleeping in the park. Sleeping at night in some of the city's covered parking lots remains a problem.

However, some of those who work directly with the homeless say that the problem in Atlanta is getting worse, not better. A director of a large food bank, which provides food to forty organizations which feed the homeless and poor, says that not only are there more homeless in the city, their profile has changed since the 1980s: "Twenty years ago the typical homeless person was a white, forty-something alcoholic. Now the profile is minority, more children, more drug abusers, and more that are violent." He says that many of the homeless stay in shelters overnight, but then come out of them during the day. Some go on and off welfare and work intermittently. The homeless that work use day labor pools. Many homeless, he explained, do temporary work, particularly in preparation for the Olympics. "There's a lot of work, just not steady work."

Besides sleeping in parks, parking lots and shelters, some of Atlanta's homeless are spending the night at the airport. Atlanta's Hartsville International Airport became a place for homeless people to sleep.[2] According to police, there are about 125 homeless people who sleep in the atrium of the airport every night. It is a particularly difficult problem because it is not uncommon for airplane passengers to have to sleep at the airport if there flight is delayed. One

of the local newspapers did a story on the problem in which they interviewed some of the homeless people. They told the reporter that they ride MARTA all day and proceed on the last run to the airport at night. Once at the airport, the article said, the homeless use the public restrooms and curl up and sleep on a bench at night.

Previously Atlanta has also had a problem with homeless encampments. In 1988 there was an encampment behind the CNN Center, next to a railroad station. About 25 homeless people made the encampment their home. However, prior to the 1988 Democratic Convention, Atlanta's Department of Sanitation bulldozed the area and, according to police, the encampment was not reestablished.

**JUVENILE LOITERING**

Another disorder concern is juveniles hanging out, particularly in and around Underground Atlanta and cruising in automobiles.[3] Their presence, usually in large groups, creates, (according to police) both the perception, and the reality of danger. One police officer said his department, "needs the ability to remove them, both as a public safety hazard and as a hazard to themselves." The area outside Underground Atlanta is poorly lit, adding to peoples fears. Although Underground Atlanta is located is only a few blocks from the center of downtown, the area is one with a significantly higher crime rate. Visitors from out of town are, police say, frequently targeted by the criminal element.

This problem is one that occurs both at night and during the day. The police official said

that the city's police department "does more with truants than curfews. We pick them up at Underground Atlanta and take them back to their schools."

Automobile cruising is different. The problem it creates is mostly traffic congestion, although it also keeps customers away from businesses along the cruising strip.

## JUDICIAL BREAKDOWN

Atlanta has had on the books for several years ordinances limiting aggressive panhandling, and regulating loitering near parking lots. However, these older ordinances have failed to sufficiently resolve Atlanta's disorder problem.

According to the Police Department, the Solicitor's[4] Office, and the Law Department the police are willing to enforce the ordinances, but when they get to court they face judges that do not support the ordinances and are reluctant to use limited jail space for nonviolent offenders of disorder laws.

Police insist that they recognize the need for Atlanta to maintain street disorder. One police commander reported that his officers regularly interact with neighborhood business owners and residents. These citizens are constantly asking the officers to do something about panhandlers and others hanging out on the street. Officers do make arrests. But, police say, the result is "routine dismissals at the court level for completely unknown reasons."

According to a senior official in the Solicitor's Office,

***"when the officer arrests the offender and puts the person in the court system, and goes back on the beat, the offender is back before he is--that's a problem. We work with the officers and try to help them do the best they can in making a case, but we realize what they may be up against in the court system."***

Under the current ordinances, only about 10% of cases are successfully prosecuted. And, according to the Solicitor's Office, most of those 10% are the result of a plea bargain where the offender only serves a day or two in jail. The Solicitor's Office official says, "the police are frustrated, they are looking for standards, guidance, for certainty. They want uniformity at the court. They say one day a judge lets cases go forward and the next day a different judge throws the case out. They say to me, 'You are the solicitor, can't you get all the judges together on this?'"

A senior official in Atlanta's Law Department[5] echoes the comments of the other agency officials. He said, "the city was having a hard time winning panhandling cases--they were all getting thrown out because judges were reluctant to convict. The ordinance was in effect, useless." The officials also noted that since disorder cases have been continually dismissed by the judges, police have reduced their enforcement of the ordinances--not wanting to waste their time.

In response to a question about why Atlanta's judges who oppose the disorder laws have not struck down the laws, the justice explained that, "what it takes to get something struck down is a provision that is significant enough for it to get a hearing, and a lawyer or public defender who is willing to take it up." What ends up happening, the judge explained, is that the cases under statutes which judges believe are unconstitutional "get resolved" before they get on the judges calender. Meaning that the cases are dismissed because they have little chance of successful prosecution in the court rooms of judges who have a history of opposition to the law.

Another Municipal Court Justice said he understood that "the business community and the city are frightened by the ability of people to move to the suburbs and build in the suburbs. Things are much worse now than they were thirty years ago," he admitted. However, he also said that criticism of the judiciary from the business community was not helpful. He said, "if you label the court with being the problem, it's not helpful, you have lost the battle."

A senior attorney at the Public Defender's Office[6] agreed that, "The judges will not enforce some of these laws, even if police make arrests." He added that in particular,

> ***we all have problems with the new parking lot ordinance because it allows arrest based on suspicion. These laws need to adhere to the Fourth and Fourteenth Amendment, due process laws and the uniformity clause of the Constitution. We Cannot arrest a person on suspicion. These ordinances have not passed Constitutional muster.***[7]

The senior attorney at the Public Defender's Office agrees with the judges who believe that peering into cars or walking through parking lots is not sufficient cause for arrest. He says, "it's another thing if you pry the car open. Then you have a good case. This is what we have told the City Attorney's Office." In their view then, the police should have to wait until damage is done to cars.

The aggressive panhandling law has also faced criticism. According to the senior attorney in the Public Defender's Office, "they are only arresting people for panhandling in downtown Atlanta, they are not arresting people in the suburbs." He did not say how much panhandling goes on in other areas.

The senior attorney also says that there have been arrests of individuals who have only politely asked for money: "That does not violate the ordinance. In these cases, the judge dismisses the case because the guy is not guilty. The ordinance requires the person to use some sort of force."

The senior attorney from the Public Defender's office concludes that aggressive begging is subjective and that "the law is basically unenforceable. Officer cannot testify as to what the victim said, that violates his Sixth Amendment right of confrontation." He says bluntly, "I think this particular ordinance is unreasonable. We will challenge the law if we have the

opportunity."[8]

The director of Atlanta's nonprofit food bank, who is also a coordinator of several initiative to provide housing and other assistance to the city's homeless, strongly objects to Atalanta's use of disorder ordinances to cope with homeless-related problems. He says that:

> ***what they have done in Atlanta is try to address the appearance of the homeless problem through passing aggressive panhandling laws, rather than dealing with systemic issues. Using the criminal justice system to deal with the homeless problem is inappropriate. That is not to say that aggressive panhandling shouldn't be dealt with. But then again, everybody knows that most of the people that aggressively panhandle are not homeless.***

## DRAFTING NEW ORDINANCES

A member of the Atlanta City Council, with the support of Atlanta's business community and the advice of an outside nonprofit consultant,[9] sought to amend and update the city's panhandling and parking lot ordinances.

The City Council's Public Safety Administration Committee held public hearings. A representative of the Task Force for the homeless expressed concern that the parking lot ordinance would be used to get the homeless off the street. However, the Council member who introduced the legislation assured her and the public that the ordinances were designed to reduce

auto theft and automobile break-ins and had nothing to do with the homeless.

The new parking lot ordinance, she said, would allow a homeless person to sit or lie down in a parking lot and not even come under the purview of the ordinance. The ordinance, she explained, "only targets conduct of someone attempting to enter an automobile, or loitering or prowling around several automobiles so that it gives rise to a reasonable suspicion by the law enforcement." In addition, the ordinance does not allow a police officer to make an arrest unless they give the suspect an opportunity to offer an explanation of their behavior.

A senior official in the city's Solicitor's Office testified at the public hearing "that the ordinance was well researched and, although the ordinance contains some compromises from a law enforcement perspective, these certainly are compromises we can live with. Our position is that the ordinance is constitutional."

The Solicitator's Office official noted that the ordinance tracks, almost word for word, the Georgia State statute on loitering and prowling, which has been upheld twice by the state Supreme Court. If the ordinance is challenged, he said, the court system is going to see that the language is familiar. The offical added that the issues covered by the ordinance represent, "one of the few areas in which the state has delegated to the cities the authority to promulgate ordinances without pre-emption problems." The Solicitor's Office also promised to provide roll call training in police precincts to help officers understand proper enforcement of the ordinance.

The senior official from the Solicator's Office agreed with the sponsor of the legislation that the parking lot ordinance would not target the homeless or poor. "The average poor person is not prowling the parks. This ordinance targets people here in Atlanta who get up every morning and spend all day breaking into cars," he said.

There was also an effort to revise the city's panhandling ordinance. The former panhandling law was subject to different interpretations. It is unclear how and when the current law applies in those cases where a person is asked to buy something from a panhandler and refuses.

The revisions will also help resolve evidentiary problems in court caused by the requirement that witnesses, who are often tourists, have to testify in person. The new law includes evidentiary standards allowing photographs to be submitted as evidence. It also lets law enforcement officials, or "ambassadors" employed by the business community, to serve as witnesses--without requiring the victim to appear in court. The senior official from the Solicitor's Office said that these changes seem reasonable. "After all," he said, "there are categories of cases where the victim is not in court--such as murder. Domestic violence cases are also being prosecuted without the victim's testimony."

The senior official from the Solicitor's Office commented, "I think we were the victim of a bit of manipulation by the homeless advocates. Because as far as we were concerned, the ordinances were crime control issues, not a homeless issue. We mentioned nothing about the

homeless." The senior official from the Solicitor's Office said that new laws were needed in Altanta to protect public places such as parks, streets, and sidewalks. "For example," he explains,

> ***if a park is for recreation and leisure it should be zoned so that public could truly enjoy what has been set aside for public use and does not allow these public areas to be overun by people that want to take the public space and make it their homes. Well, why can't I come here and play catch with my son. You say its public space and you talk about your freedom, but my freedom has been restricted because I am not able to utilize this public space for what it was intended.***

## CONCLUSION: THE ROAD AHEAD

Since our site visit, Atlanta has successfully updated their panhandling and parking lot ordinance. Thus far these new and improved ordinances have withstood legal challenge, although litigation is ongoing. Another potential solution to Atlanta's disorder problems is the creation of a New York style community court.

The panhandling ordinance was challenged on freedom of speech and equal protection claims similar to those used in other cities (and discussed in other case studies submitted as part of this project). The parking lot trespass bill was challenged as unconstitutionally vague, and as a restriction on basic liberty rights.

The plaintiffs and their homeless advocacy supporters were unsuccessful in locating pro bono counsel in Atlanta. They instead turned to Ropes & Gray, a large Boston law firm. That firm filed a complaint weighing it at over one hundred pages, and sent a large team of lawyers to the initial hearings in the case.

A federal district court judge has declined to enjoin enforcement of these ordinances. The litigation, as well as settlement talks continue.

In the meantime, the Atlanta City Council has also adopted an anti-automobile cruising ordinances, which marks out certain zones of the city where such activity is prohibited. It also adopted an ordinance prohibiting lying or sitting down on certain commercial sidewalks, prevents sleeping in downtown parks, and prevents "urban camping" anywhere in the city. The collection of these ordinances makes Atlanta one of the cities with the strongest street order maintenance legislation in the country. Community courts put violators of quality of life laws to work to improve the quality of life through community service sentences. Also, the community can address some of the addiction and health concerns of many of the ordinance violators. The senior official at the City Solicitor's office has been promoting community courts. He says, "what I like about community courts is you get the best of both worlds. You get the punishment for people who are intentionally and consciously violating the law, and you get treatment for those that need help." He also believes that community courts send an appropriate message to the community. It says, "we are punishing offenders and we are cleaning up this district by taking grafitti off the wall and rehabilitating properties. I would really like to take a look at a

community court."

1. Since our site visits Atlanta has enacted a new parking lot ordinance that appears to be easier to enforce and more effective at deterring theft from cars. Efforts to update this law, and the panhandling law, are discussed later in this case study.

2. The city's rail transportation system (MARTA) reaches the airport.

3. This is an underground retail and restaurant complex which has become popular with locals and tourists.

4.The Solicitor's Office has the responsibility of prosecuting misdemeanor offenses. The Solicitor's Office is responsible for prosecuting violations of city ordinances, with authority to sentence only up to six months. The Office has jurisdiction to pursue appeals from convictions in municipal court. If someone files a lawsuit for violation of their civil rights, that litigation is defended by the city's Law Department. The Solicitor's Office is much smaller and less broad than Law Department. The Law Department is the corporate attorney for the City of Atlanta and is responsible for all civil matters related to the city. The city's criminal justice system it is quite fractured. There is a Municipal Court for the city of Atlanta, with the Solicitor's Office as the prosecuting body. If there is an action in Municipal Court related to the conviction under a municipal ordinance, an appeal would be handled by the city's solicitor's office. There also is an Atlanta traffic court. It has a separate set of judges, at a different location. It also has a solicitor. They handle all matters related to traffic.

5. The city is sued, on average, once every other day. Because of charter, the City Attorney (who heads the Law Department), has literally 20 bosses--the Mayor and 19 members of the City Council. No one individual has any greater authority than anyone else. The office also handles traditional duties (bond issues, advising on departmental or bureau issues and helping to draft legislation).

6. According to a senior attorney at the Public Defender's Office, about 20% of their work load is related to defending street order maintenance related cases. It used to be higher. The municipal court used to have what they called a drunk court for people arrested for public drunkenness, urinating in public, and similar things. We would have 50-100 people in a courtroom on a Monday morning. Most of the people charged with these crimes still ask for a lawyer. They would plead guilty and then contact the Public Defender's Office for help in getting out of jail. Now that the courts are taking drivers licences defendants plead not guilty and then ask for an appeal. They contact the Public Defender's Office who prepares a public affidavit, and they are back out on the street. According to the senior attorney, "if they plead not guilty they know they have the right to appeal. It does not matter if the evidence is overwhelming or not, they still have a right to the first judicial review." The appeal is from the Municipal to Superior Court. In 1992, this attorney said, he handled 32 of these types of cases, two of which went to the Court of Appeals. The issue there was not necessarily public drunkenness, but whether or not the court

had properly respected the rights of these people, the senior attorney said.

7. The ordinance has, thus far, survived constitutional challenge.

8. However, numerous cities have enforced similar measures.

# DALLAS: REMOVAL OF ENCAMPMENTS ON PUBLIC PROPERTY

## THE LAYOUT OF THE CITY

Like many Sunbelt cities, Dallas has a downtown with large commercial office buildings, but little by way of retail, housing, or vibrant street life. Although many people work in downtown Dallas, city leaders have been concerned that few choose to shop, recreate, stay in a hotel, or eat there. Also like other Sunbelt cities, efforts have recently been initiated to improve the city's downtown, bring housing and retail back, as well as to increase the market for commercial office space.

These efforts were beginning to bear fruit in the early 1990s, with visible improvements to the squares, sidewalks, and public transportation facilities downtown.

East of downtown lies the neighborhood of Deep Ellum. The area served as the home of many African-Americans in the 19th century. Indeed, freed slaves gave the area its name, from the way "Elm" Street was pronounced at the time.

By 1980, the area was becoming an integrated, chic area, slowly gentrifying, with some restaurants, nightlife spots, and loft apartments. The area was beginning to attract new residents and visitors, and beginning to replace vacant storefronts with small businesses.

## THE SHANTYTOWN AND ITS EFFECTS

Leaders in both Deep Ellum and downtown Dallas were deeply concerned, however, about a growing shantytown that had developed underneath the freeway that separated the two areas. By 1992, the shantytown had grown to over 200 residents.

The encampment produced many problems. First, it was unsightly. Those driving by saw what looked liked a refugee camp, complete with littered needles, human waste, broken bottles, and assorted garbage. Sanitation was abysmal. The area contained cardboard shacks, and lacked plumbing, proper cooking facilities, or running water. The shantytown was populated by the homeless, drug addicts, and prostitutes, in addition to homeless persons.

The people that resided in the shantytown rarely stayed there during the day. Rather, they went into the streets of Deep Ellum, to panhandle, to drink, to harass, to loiter, or to lie on the sidewalk drunk. The effect was devastating to the struggling businesses and residents of the area. Customers told store owners that they liked the store, but were tired of being harassed and intimidated by the people blockading the entrances.

The Deep Ellum businesses recognized that they were competing for customers with private shopping areas, such as large shopping malls and shopping strips in outlying areas, that had no such problems. In those areas, there were no panhandlers, no one sleeping or lying down on the sidewalks, no one drinking at street corners. Furthermore, getting to these areas did not involve driving by a unsightly, perhaps even dangerous disorder hot spot.

The spill-over reached the green area outside the city's new main library, located across the street from the I.M. Pei-designed City Hall. This area too saw camping, litter, public drinking, sanitation problems, and anti-social conduct. Inside the library, patrons and staff had to contend with people using the bathroom in inappropriate ways, as well as rude and insolent conduct. The library eventually responded by adopting and enforcing rules of conduct, applicable to all, keeping the facility open to all.

The residents, store owners, and property owners of Deep Ellum wanted something done about the shantytown. For years, neighborhood and business groups wrote and called City Hall, including City Council members, the Mayor's Office, the City Manager's Office, and the police.

Nothing was done. And, with the inaction, the shantytown grew and the problems in Deep Ellum continued. Investment dried up, as did the number of shoppers and potential residents in the area. Furthermore, an increasing number of panhandlers and loiterers began appearing in the city's downtown. Plans to build a light rail system and other downtown improvements suddenly appeared threatened.

## THE CITY ACTS

It was the downtown association, the Central Dallas Association (CDA), became the catalyst for action. CDA came to believe that something had to be done about the shantytown in order for downtown progress to continue. They agreed to support the community groups in Deep Ellum, and add their voice to the pressure on the city.

It worked. The steady and increasing pressure from residents of Deep Ellum and the CDA, combined with the growth of the shantytown, finally got the attention of the City Hall. Led by Councilmember Chris Luna (whose district included Deep Ellum and downtown), the City Council voted to remove the shantytown. At the same time, Dallas County offered shelter and social services to anyone residing underneath the freeway. The City Attorney cited a city ordinance prohibiting public sleeping and a state criminal trespass law as the statutory justification for the plan.

In Dallas, there was reportedly a shelter bed and offer of social services to anyone who needed it. In other words, no one needed to be on the streets, or in the under-the-freeway shantytown unless they wanted to. Yet, over 200 people were residing there every night, or occasionally.

It appears that the shantytown was popular because it became something of a law-free

zone. It was a place where people could remain, unencumbered by rules, regulations, restrictions, or responsibility. One could drink, keep their addictions intact, and not be bothered or nagged. Privately run shelters, such as the Salvation Army, offered a warm bed, food, and a helping hand — but required sobriety. Furthermore, they were all faith-based, and thus presented the possibility about moralizing about one's conduct and lifestyle. Many simply made the choice that living outdoors, in the shantytown, was preferable.[1]

Once the shantytown was established, it then became a magnet for people who had access to housing, but who came to the shantytown to hang out with friends, drink, use drugs, or avoid contact with family members.

When the City Council voted to remove the shantytown, some of the people living there left on their own volition. Some sought help. Most, however, stayed put, waiting to see whether the city would really act.

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[1] Our discussions for other case studies with those who have studied the nature and causes of homelessness reveal that the strong desire to avoid rules, instruction, and accountability for one's conduct is common with alcoholics and drug addicts, and frequently lead to, and perpetrate, homelessness.

## LITIGATION SABER-RATTLING

The local chapter of the American Civil Liberties Union (ACLU) had other plans. It announced publically that it would sue the city, seeking an injunction preventing the city from taking any action to remove the shantytown. In the media, the ACLU charged that the city's proposed action was unconstitutional, cruel to the homeless, and motivated by a class-based desire to protect wealthy property owners.

The ACLU's saber-rattling prompted the CDA to decide to openly defend the city. This was rare. Although many downtown associations favor efforts to improve street order maintenance and the quality of urban life, few of them are willing to do so in an open and public manner. The CDA, however, voted to file an amicus brief in support of the city in the event of litigation.[2]

The litigation came. One week before the city's scheduled date to begin dismantling the shantytown, the ACLU sued in federal court, on behalf of Prince Johnson and other homeless people in the city.

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[2] The CDA's actions and openness, bold and innovative as it was, created a precedent, prompting other downtown associations to take a more active role in legislation and litigation controversies. Since then, downtown groups, including those in Phoenix, Philadelphia, New York, and Atlanta have brought legislative suggestions to the attention of City Council members, supported useful street order maintenance legislation, helped refute opposing arguments, and supported the city in urban quality of life litigation.

## THE LAWSUIT

The ACLU's lawsuit was comprehensive. It alleged that that the city's plan with regard to the shantytown violated a host of constitutional rights. And, while they were suing anyway, the ACLU added constitutional challenges to a host of city ordinances, and one state statute.

In its lawsuit, the ACLU alleged that it was cruel and unusual punishment, in violation of the Eighth Amendment to the U.S. Constitution, to prohibit public sleeping. Its argument was that humans, by necessity, need to sleep, and those without access to private property must sleep somewhere. By criminalizing public sleeping, the city was, the ACLU argued, criminalizing homelessness.

The same argument was used against the state criminal trespass law, at least when the law was used to prohibit trespass against state-owned property. The trespass law was cited because the shantytown was located on land owned by the state highway department. The city declared the shantytown residents to be trespassing on the land.

The ACLU did not stop there in its effort to prevent the removal of the shantytown. In its lawsuit, it also argued that the city's ordinance against aggressive begging was a violation of the First Amendment, and that the city's ordinance preventing the removal of the contents of public trashcans was also an infringement upon the rights of the homeless. The lawsuit also contended that a curfew at the city's Main Library-City Hall Plaza was also an Eighth Amendment

violation.

The lawsuit asked for an injunction that would keep the shantytown in place, an injunction against enforcement of the other city ordinances, damages, and attorneys' fees.

## THE RESPONSE

In many cities, the threat of a lawsuit, or the filing of a lawsuit over anti-crime or street order maintenance ordinances prompts a full-scale retreat. Many cities are tempted to back down, out of fear of bad publicity, the time consuming demands of litigation, or out of a desire to avoid the risk of an attorneys fees award.

Not so in Dallas. Both the City Attorney's Office and CDA responded to the threat of a lawsuit by coalition building, preparing, and with a resolve to defend the city and the community's interest in attractive, safe, and welcoming public spaces.

The City Attorney stated publicly that he believed that all of the challenged laws were constitutional, and that there was no constitutional right to turn green space near the city's downtown into one's bedroom, bathroom, or kitchen. He sought advice from other cities that had been sued over similar issues, and spoke extensively with experts in the field.

The CDA voted to participate in the lawsuit as a "friend of the court." It recruited the

neighborhood group from Deep Ellum to join it. Also joining the brief was the local Framers Market, which had also been plagued by panhandling and other anti-social conduct from residents of the shantytown that came to the Farmers Market every morning.

The brief was also joined by the local historical society, which was concerned about public elimination, public drinking, and other behaviors at Dallas' Old City Park, the location of nineteenth century houses.

The CDA recruited a major Dallas law firm, Hughes & Luce to work with it. The Hughes & Luce attorneys working on the brief were Darrell Jordan, later a candidate for Mayor of Dallas, and David Godsbey, later elected a state judge. Hughes & Luce drafted the brief on a pro bono basis.

The CDA's efforts were successful on all fronts. The coalition it formed demonstrated to the press and the public that there was a broad community interest in removing the shantytown and bringing those living there to needed sources for help. It also demonstrated to the City Attorney and the City Council that the business community stood by it.

The CDA also brought to Dallas Dr. George Kelling, a Professor at Northeastern University and the originator of the "broken windows" theory of fighting crime. Dr. Kelling toured the shantytown, Deep Ellum, and downtown, and met with social service providers in the City. He then appeared as an expert witness in the litigation.

## THE PRELIMINARY INJUNCTION HEARING

The ACLU had asked for a preliminary injunction to stop the city from taking any action to remove the shantytown. Before the hearing on the injunction request, the CDA and its coalition had filed a Motion seeking to intervene in the lawsuit. At the injunction hearing, that Motion was denied, and the coalition participated in the lawsuit solely as a friend of the court. The City Attorney, however, quickly agreed to introduce Dr. Kelling as the city's witness. If CDA and its partners had been allowed to intervene, they would have brought Dr. Kelling to the stand.

The injunction hearing began well for the ACLU. It introduced evidence concerning the alleged number of homeless people in Dallas, the problems homeless people confront (such as bad health, exposure, and crime). It also argued that it was innocuous to sleep in public, and that the city should be prevented from trying to sweep its homeless out of sight.

The city did not back down. It brought Dr. Kelling to the witness stand. Dr. Kelling explained the connection between disorder and crime, namely that disorder keeps people away from public spaces, making them more inviting ground for violent criminals.[3]

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[3] The theory is set forth in detail in the 1981 article "Broken Windows" in Atlantic Monthly (co-authored by James Q. Wilson), and in Dr. Kelling's 1996 book, Fixing Broken Windows (co-authored by Katherine Coles).

During his testimony, Dr. Kelling and the judge got into a dialogue about whether disorder was really much of a problem. For instance, the judge asked Dr. Kelling what the big deal was if someone urinated in public. Dr. Kelling responded that it depended where and how such activity took place, and that there was a big difference in terms of the effect on the community between ducking behind a bush or an alley, and eliminating on the sidewalk in front of customers and stores.

The city also introduced the testimony of Councilmember Luna. Mr. Luna testified about the numerous and persistent complaints he had received from area residents, as well as his vision for the area as an avant-guard, integrated, areas attracting all segments of the Dallas community. Police testimony was also offered, showing a higher crime rate in the area surrounding the encampment.

The city and its amicus curiae pointed out that, if there was a constitutional right to sleep in the public place of one's choosing, then even the judge would not be able to lock the door of his chambers at night.

In the courtroom, were numerous city residents, particularly those from Deep Ellum, the press, and city officials.

The judge declined to enjoin the city. The plaintiffs had failed in their primary goal — to stop the shantytown's removal. In a subsequent written decision, the court ruled that it appeared

that all of the challenged laws except the city's public sleeping ordinance were constitutional. The court also ruled that the removal of the shantytown was justified by the state criminal trespass statute. The court's decision gave short shrift to the city's arguments that the shantytown's cooking fires presented a danger to the structural integrity of the freeway overpass.

More importantly, it declared the city's public sleeping ordinance--which forbade sleeping in any public space--to be unconstitutional. This decision was remarkable, because it was unnecessary to resolve the central issue in the case: whether the city could prevent people from living in an encampment on public (state) property. Federal judges usually seek to avoid unnecessary constitutional adjudications. This judge went out of his way to do so.

## AFTER THE TRIAL COURT DECISION

With the federal trial court decision, the city was presented with a green light to remove the shantytown, but with a declaration that one of its ordinances was unconstitutional. For the ACLU, this was a hollow victory, given that the other five laws it attacked were upheld. Most importantly, the shantytown would be removed.

It was, two weeks later. The decision of the court prompted several additional persons who were living in the encampment to seek help or move away. The county moved in with a small army of social workers, who tried to convince people living in the shantytown to seek help. By the time the deadline approached, only about two dozen people remained. These remaining

individuals were escorted to social help by the police, or, if they preferred, were escorted outside of the space where the shantytown was located. A fence was erected on the site.

Today, grass grows on the spot. Meanwhile, development in Deep Ellum resumed, giving Dallas a touch of Greenwich Village. The Deep Ellum streets now include brew pubs, tatoo parlors, discos, stores catering to teenagers, punk rockers, and various alternative lifestyles. Panhandling was drastically reduced, as was public elimination, public intoxication, loitering, and sidewalk interference.

Meanwhile, the pressure and threats to the downtown and Farmers Market were alleviated. Development resumed with a vengeance, providing jobs, and providing residents and visitors to Dallas with a downtown of which they can be proud.

The trial court's ruling was also a success for many of those living underneath the freeway. A wide range of social services were made available, including housing placements, drug rehabilitation, job counseling, etc. The offer (and provision) of help came from both the county and numerous private charities.

Over half of those who were living in the shantytown took advantage of the offers of help. Today, a remarkable rate of over 40% of those seeking help are now living independent

and productive lives.[4]

Although the litigation brought a positive ending both for those who sought help and for the affected neighborhoods, the city was not satisfied. It decided to appeal the trial judge's ruling that its public sleeping ordinance was unconstitutional.

The authors of this report find that decision surprising. The city had achieved what it set out to do it in the litigation. It demonstrated the usefulness, fairness, and legality of its plan to remove the shantytown. The shantytown was gone, help was being provided to those who were living there, and the residents of the affected areas were happy.

Moreover, the ordinances the city needed to maintain its urban viability were upheld. The ordinance that was struck down, prohibiting all public sleeping in the city, was rare and, we think, unnecessary. While many cities have ordinances prohibiting "urban camping" (usually defined as sleeping with accouterments of camping), or prohibiting where public sleeping can occur (such as curfews in downtown parks), Dallas is unique in prohibiting all public sleeping.

The Dallas ordinance presented two problems. First, the ordinance appeared extreme, reaching as it did even a two year old who falls asleep in her crib. Second, the ordinance

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[4] Sadly, Prince Johnson, the named plaintiff in the ACLU lawsuit, declined offers of help and chose to remain on the streets of Dallas. Months later, he was killed in a dispute over a drug transaction.

presented the court with the stark question of what the city can do about someone who biologically needed to sleep and who lacked access to any private property in which to do so. Camping ordinances, on the other hand, avoid the latter question. People must sleep, it is true, but no one is required to camp, or to colonize a park intended for the use of the general community.

Nonetheless, the city decided to appeal and to defend its ordinance. The CDA again filed a "friend of the court" brief with the U.S. Court of Appeals for the Fifth Circuit. The amicus brief did not argue that the Dallas ordinance was (or was not) constitutional. Rather, it called for the appeals court to take into account the numerous urban camping ordinances in the country, and to not issue a decision that places those measures at risk. The amicus brief did, though, express skepticism about the claim that people had to sleep in public, and called for further proof on that point before any court assumes a homeless person is in such a state.[5]

The city, however, defended its ordinance as constitutional. Primarily, it argued that, since the Eighth Amendment prohibited cruel and unusual punishment, no one may raise an Eighth Amendment argument until they have been sentenced (that is, punished). Because the plaintiffs in this lawsuit sought a declaration that the Dallas ordinance was unconstitutional, and because no plaintiff had yet been punished, the city argued, that the plaintiffs lacked standing to

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[5] Its amicus brief was drafted by a new law firm, Gardere & Wynne. As with its predecessor, Gardere & Wynne (Barry Drees and Cynthia Hollingsworth) drafted the brief on a pro bono basis, with the active assistance of the CCI.

bring the lawsuit.

The city also argued that its ordinance was justified by the community's interest in the protection of its parks and other public spaces.

The Fifth Circuit agreed, ruling that there was no standing to challenge the sleeping ordinance on Eighth Amendment grounds, because no punishment had taken place, and no criminal sentence had been issued.

## AFTER THE APPEALS COURT RULING

The ruling gave the city a victory, but kept it in a dilemma. The city had prevailed, and its ordinance remained on the books. However, if the city enforced the ordinance with an arrest, conviction, and sentence, it could easily find itself back in court. Specifically, a sentenced person who really did have no place to go to sleep, could still raise an Eighth Amendment objection. If that occurred, the constitutionality of the city's public sleeping ordinance would have to be litigated anew.

Dallas, thus far, has taken the chance. It has chosen not to adopt an anti-camping ordinance, such as those enacted in Austin, Atlanta, Santa Ana, West Hollywood, and other communities. Yet, it does enforce the anti-public sleeping ordinance when someone tries to make one of the city's parks their home.

The litigation, three years later, still continues. The plaintiffs continue to assert that the other challenged ordinances are unconstitutional. Because the trial judge's ruling was limited to the plaintiff's request for a preliminary injunction, the plaintiffs were free to press on with their claim. Surprisingly, they chose to do so. The city had reason to believe they would not do so, because the trial court did not given much credence to their arguments that these measures were unconstitutional.[6]

In the meantime, CDA and others have retained their active interest in urban quality of life measures. CDA, with help from the CCI and another law firm, have proposed a new anti-parking lot trespassing ordinance, to allow the police to act when they see someone trespassing on parking lots, peering into car windows. The City Council is also considering a bill that would strengthen the city's anti-aggressive panhandling ordinance, to prohibit direct solicitations for money at automated teller machines, at freeway exists and traffic lights, and at public transportation stops. The city's success at defending its action and ordinance emboldens many in the city, and the City Council, to take action. The City Attorney, however, remains cautious about any action, particularly because the original shantytown litigation is continuing.

## CONCLUSION

The experience in Dallas demonstrates the value of tenacious defense of street order

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[6] Some of the plaintiff's claims have gotten weaker since the lawsuit was filed, particularly the allegation that Dallas' anti-aggressive panhandling ordinance is unconstitutional. Similar, and stronger, measures in Ft. Lauderdale, Atlanta, and Santa Monica have since been upheld by federal courts.

maintenance initiatives. No one in Dallas — not the City Council, the City Attorney, the business community, nor affected residents and store owners — yielded the moral high ground to those who sought to create a constitutional right to sleep in public. Rather, the city and a large coalition of residents rallied behind a move to return its green space to its original purpose, to bring people living in the shantytown to help, and to defend the community interest in safe and welcoming public spaces.

Although the federal court litigation has not yet concluded, few cities have fared as well as Dallas in these disputes. The shantytown is gone. An unprecedented high percentage of people who had been living there sought help, got it, and are on the road to independence and recovery. The Deep Ellum area is developing well, and is very popular as a place to live, dine, and recreate. Meanwhile, the city's downtown avoided the scourge of a large population of panhandlers and others that deters development in many other cities.

Finally, the county's study of what happened to those who sought help seem to support the notion that cities that allow people to live in parks are enabling addictive and destructive lifestyles, while those that vigorously enforce street order measures are both providing vitality to its public spaces, and providing useful encouragement for people to seek the help they need.

The parks and other public spaces in Dallas are noticeably cleaner and safer than those in many other large cities. While other street order maintenance initiatives would be beneficial, Dallas has come along well. The growth it is seeing - in employment, population, tax revenues,

and social services — are all a testament to the city's successful, tenacious defense of a useful, companionate, balanced effort.

# LAS VEGAS CASE STUDY

## INTRODUCTION

Faced with a downtown core in decline, the city of Las Vegas and eight downtown business owners launched a project to revitalize their main downtown thoroughfare. There were two central components to the "Freemont Street Experience." The first was construction of a huge light canopy and pedestrian walkway on historic Freemont Street. The second key component was a complete ban on panhandling and solicitation within the boundaries of the project.

Prior to the construction of the Freemont Street Experience downtown Las Vegas had become a seedy combination of failing businesses, pawnshops, and souvenir vendors. Visitors to downtown hotel casinos faced a wall of individuals panhandling or distributing hand bills--often of an explicit sexual nature. It was a hostile environment. There also was a sense in the community that things were not going to get any better downtown. There was no sign of any private dollars be reinvested in the downtown business core--no hint of a turnaround, while many businesses were on the verge of economic collapse.

The Freemont Street Experience was designed to turn things around for downtown Las Vegas. The hope was that this innovative project would attract both local residents and tourists back to the spot where Las Vegas got its start. Both the city, through bond offerings, and the

local businesses, were betting that this gamble would pay off.

## BACKGROUND ON HISTORIC DOWNTOWN LAS VEGAS

Downtown Las Vegas is located in a separate jurisdiction than the one governing the booming 3.5 mile "strip" (also known as Las Vegas Boulevard). The latter is in Clark County. Virtually all of the newer, bigger, casinos and hotels are actually located south of downtown, most along the Strip and most in Clark County. The City of Las Vegas, which has 300,000 residents, is dependent on tax revenues from downtown hotels, casinos, and businesses. With the decline of downtown, county tax revenue was dropping, even though the city's population was growing.

The Strip wasn't always the economic engine of the Las Vegas area. Downtown Las Vegas is the historic gaming and commercial business district of the city. Freemont Street, also known as "Glitter Gulch," was the main street of downtown Las Vegas, starting around 1905. Freemont Street was the site for Las Vegas' first traffic light, first Nevada gambling license, first high-rise building, and first paved street. The nearby downtown department stores, including Sears, Pennys, and Zales, were where residents came to do their shopping. However, in the 1970s newer branches of these and other stores opened in nearby regional malls. When the malls first opened, companies did not close their downtown stores. But it did not take much time for the downtown business climate to begin to disintegrate. The gaming industry also began to decline. As one city official put it, "before you knew it we had businesses closing and economic stagnation."

By the early 1990s, there had been no growth in almost fifteen years in the hotel/casino business on Freemont Street. The percentage of Las Vegas tourists that visited downtown during their stay in town dropped from 80% to 20% between 1985 to 1995. A police official said, "a lot of that was because downtown looked older. It was also perceived to be unsafe, largely do to the activities of street people."

## DOWNTOWN DISORDER

Prior to the construction of the Freemont Street Experience, downtown Las Vegas had become so seedy that most people avoided the area. In 1990, there were a number of closed businesses on Freemont Street, and others were headed towards failure. The buildings looked rundown, their paint was peeling, light bulbs were burned out, and facades were deteriorating. Additionally, in front of every hotel casino or restaurant, there was a wall of individuals panhandling or distributing advertising fliers for sexual services (handbilling). People would walk in the street to avoid the panhandlers and handbillers. The handbilling also left a trail of discarded paper all over the street. As one local businessman said, "It was a hostile environment." The police would get regular complaints and arrests were a daily occurrence.

Consistent with the "broken windows theory," panhandlers tended to operate downtown, rather than on the Strip. According to the police, downtown was where the soup kitchens were located and where there were alleys and shops where panhandlers can gather. On The Strip the casinos' security guards "just push em-off," one officer explained. In addition, the Strip is a long way from the inexpensive housing and shelters located in downtown.

Police officials and local businessmen suggested that the panhandling problem was primarily due to the high number of transients in the area and was not necessarily related to homelessness. In fact, city officials said that Las Vegas' homelessness rate was below the national average. The increase in transients was apparently due to people coming to the Las Vegas region to find work and not always being successful. A police official explained, "when you have sustained for six or seven years the highest economic growth rate among cities in the country people listen. They read articles about how great Las Vegas is doing and they become convinced that this is the land of opportunity. So more and more people are always coming here." Once people get to town, they can suffer the consequence of all the free alcohol and gambling.

There are 5,000 new residents moving into Vegas in each month. The public infrastructure cannot keep up. The main roads now have heavy rush hour traffic starting at 4:00 p.m. each afternoon. The city has doubled in size every 10 years since 1906. Las Vegas, fueled by the explosive growth in hotel/casino construction, has been the fastest growing city in America since 1988.

Freemont Street was not the only area of downtown that was suffering from disorder and decline. The area around Bonanza street, a few blocks away, also had problems. The street borders a relatively impoverished African American neighborhood in North Las Vegas. During the days of Jim Crow Laws, black entertainers like Sammy Davis Jr. would perform on the Strip and then stay here in North Las Vegas. But this area has developed a considerable problem with

loitering, panhandling, and even violence.

## HANDBILLING/DISTRIBUTION OF SEXUALLY-ORIENTED MATERIALS

The distribution of sexually-oriented materials, or handbilling, has been a longstanding problem in all parts of Las Vegas, not just downtown. On some streets there are ten men standing shoulder to shoulder, passing out explicit marketing materials. The handbillers are generally paid by the number of brochures they distribute, providing a motivation to press their hand bills into the hands of any and all passers-by, including children. Pedestrians have to walk through this gauntlet, or walk in the street to get around them.

Although many people feel distaste for the materials being distributed, the problem is pedestrian interference, as one senior police official explained. "My opinion is that they could be passing out bibles, when they create a public safety issue by forcing people into the street, it is a police concern." Although many people do not know it, prostitution is unlawful in Las Vegas. Police say that there remains a very large and active prostitution market in Las Vegas.

Prostitution rings attempt to get around the law by advertising their service as "escorts." They even advertise their services in the city's yellow pages. Las Vegas addressed the problem by enacting an ordinance banning escort services. However, the prostitution rings switched to promoting themselves as dancers and entertainers, which, as "expressive art," may qualify for First Amendment protection.

The police official explained, "it's not so much that the handbillers are aggressive, it is that we have lost 41 people in pedestrian auto accidents." The official said that these accidents are not neccessarily all linked to handbilling, but it certainly adds to the dangers pedestrians face. Furthermore, police say they have investigations into the handbill peddlers which lead directly to prostitution organizations.

The Police Department regularly receives complaints from tourists upset that their wife or kids are given these sexually oriented materials. These complaints are also heard by business owners and politicians. The handbilling makes it more challenging for some hotel/casinos trying to promote Las Vegas as a family destination. Nonetheless, according to police officials, some in the business community still want prostitutes available to their customers, they just do not want anyone to see it. The police official said, "They want every customer to be happy. They don't want families to receive the handbills, but they also do not want single guys attending conventions to be denied their pleasures either."

## IF YOU BUILD IT, THEY WILL COME

The specific idea for the "light canopy," which serves as the central attraction of the Freemont Street Experience, was developed by an architect that had designed the Treasure Island Casino for Steve Wynn. Wynn, concerned about the decline of downtown, sent his private jet to bring this architect to Las Vegas to discuss the problem with him. The architect came up with the idea for the light canopy off the top of his head. The concept was discussed and approved of by the owner of the eight major downtown hotel casinos. They, in turn, approached the city

government.

According to city officials, this was a time (1993) when the buzzword was public-private partnerships. The eight business leaders got together and said to the city officials that they would be willing to work with each other, if the city would turn over as much control of this project to them as possible. Although, it was somewhat unusual for the city to cede so much control of the project to the private sector, city officials were impressed that the businesses were willing to put $18 million of their own money behind the project. The businesses established a limited liability company to plan, build, and manage the project. The City of Las Vegas issued $21 million in bonds based upon anticipated downtown room tax revenues, the Redevelopment Agency issued $22.1 million in bonds based on future anticipated tax revenue, and $5.6 million of General Obligation bonds have been issued to fund construction.

The city also got the Nevada state legislature to enact legislation authorizing the creation of the Freemont Street Experience. The state legislation included a pedestrian mall ordinance, which by law refers to the grounds of the Freemont Street Experience not as a street or sidewalk, but as a "recreational facility." Under the arrangement, the city holds title to the ground underneath the facility, while the businesses own what's above ground. Both the business owners and the city officials liken the ownership and management of the facility to a ball park or convention center.

Five city blocks, including Freemont Street, were closed to traffic for over a year while

the project was built. The arched light canopy, 90 feet high in the center, covers the 1,400 feet long mall (the equivalent length of 4.6 football fields). The street, with vehicular traffic banned, has been re-paved with decorative winding walkways. During the day the canopy provides shade from the often scorching Las Vegas sun. At night over two million light bulbs and 208 speakers come to life every hour in a computer-generated animated light and sound show.

The hourly light and sound show, presented on the hour from 6 p.m. to 11 p.m. nightly, is impressive, lively, and fun. A development team of animators, designers, and audio engineers are continually creating new performances. Eventually, a full library of programs will be developed which can be tailored to holidays and special events. Currently, one of the most popular presentations is "Country Western Nights" which features a mix of traditional western images and country music. Another popular show is "Odyssey: An Illuminating Journey," which takes viewers on a seven minute trip through space and back to earth.

In addition to the canopy, a 45,000 square feet retail shopping and entertainment complex is currently under development. Further, a 1,400 space five-level parking plaza has already been constructed on the eastern side of Freemont Street.

Nonetheless, there still is some confusion about the arrangement. One police official noted that "because the word 'street' is still in the title, people have a hard time accepting that they are not permitted to park their car on the street. Well it's not a street. It's a privately run commercial entertainment complex," he said. The county has recently assessed the Freemont

Street Experience for property taxes, implicitly declaring the area to be private property. The outcome of the taxation attempt is unclear.

## THE ORDINANCES

There were two key ordinances enacted in Las Vegas, one that limited panhandling and another one that limited handbilling. There was very little public opposition to the solicitation legislation. A public meeting was held and everyone who spoke favored the measures. Naturally, the business community and the Chamber of Commerce were highly supportive. Local homeless advocates, arguing that panhandling reinforces addictive and debilitative lifestyles, testified in support of the panhandling ordinance.

Nevada Legal Services attorneys in Las Vegas believe that it was unconstitutional to ban peaceful panhandling and solicitation, at least by charitable organizations. One Legal Services attorney said that the Salvation Army's bell-ringers have a right to "point to the needs of the unfortunate and homeless." The Legal Services attorney specifically rejected the argument that Freemont Street had been transformed into something like a mall. "You can't get any more public than a public street," she said. The Legal Services attorneys predicted that eventually the law would be tested in court.

This appears to be saber-rattling. Federally-funded legal service lawyers are restricted in constitutional litigation they can bring. Also, similar lawsuits have failed in Ft. Lauderdale and Santa Monica. No litigation, to date, has ben filed challenging the solicitation ordinance.

The city spent a lot of time researching the solicitation ordinance before drafting it. The city attorney's office said that they reviewed the various ordinances in place in other cities, including the aggressive solicitation provision in Seattle and other cities. Las Vegas decided to add to their panhandling ordinance citywide limitations of solicitation in front of Automated Teller Machines (ATMs), bus, taxi, limousine, trolley or train stops, at any enclosed parking structure, and within 10 feet of a point of entry to or exit from any building open to the public, including commercial establishments. As the representative from the City Attorney's office explained that, "panhandling, in a nonaggressive manner, is allowable in most places outside Freemont Street Experience."

The panhandling ordinance was enacted in January 1995. A representative from the City Attorney's office, noting that their panhandling legislation varied somewhat from the aggressive panhandling ban approach in other cities, acknowledged that they may eventually face a lawsuit. However, he speculated that the challenge is more likely to come from a charitable organization or a vendor than legal advocates for the homeless. If there is a challenge, both the City Council and City Attorney are committed to defending the ordinance and avoiding pressures to change it.

The City Attorney's office believes that the panhandling ban will survive a challenge. "Our facts are strong," he said. The area where the Freemont Street Experience is located "is no longer a street or sidewalk. It is a privately run commercial enterprise, like a convention center or a stadium. People don't have the same First Amendment right in these facilities as they do in a public park," he said.

The text of the ordinance, in a section describing the need for the solicitation limitation, states that:

> ***Visitors to Las Vegas have increasingly chosen not to patronize the downtown area. In determining whether or not to pursue the commercial and entertainment opportunities of downtown Las Vegas, potential visitors consider the prospect of being targeted by solicitors in environments where freedom of movement is restricted. It is therefore in the interests of the City of Las Vegas to restrict solicitation activities in the commercial and entertainment area known as the Pedestrian Mall, where freedom of movement is restricted.***

The ordinance defines "solicitation" to mean "to ask, beg, solicit or plead, whether orally, or in a written or printed matter, for the purpose of obtaining money, charity, business or patronage, or gifts or items of value for oneself or another person or organization."

Violation of the solicitation limits constitute a misdemeanor offense punishable by a maximum fine of $1000 or by imprisonment up to six months, or by any combination of both.

## ENFORCING THE ORDINANCE

The Las Vegas Metro Police Department, which polices both downtown and Clark County (where the Strip is located), is responsible for enforcing the solicitation. However, they do receive assistance from the security guards hired by the Freemont Street Experience.

The police officials say that the panhandling law had a strong deterrent effect making very few arrests necessary. Panhandlers get at least one or two warnings from police before a citation is issued or an arrest is made. No one is arrested if they are just loitering in one area, only if they seek to solicit or distribute handbills. The decision to make an arrest is left to the discretion of the officer.

Police say they learned from Seattle's experience about the need to slowly and deliberately implement the new law. Las Vegas police and city attorney officials said they gave judges and courts time to adjust to the solicitation ordinance. A senior police official said that the department's ordinance enforcement effort "is not a tremendous all out effort, but it is one of the strategies we employ in policing." Although, he explained, the department prioritizes violent crime, misdemeanor offenses are "not a forgotten issue."

The Las Vegas Metro Police Department is opening a substation a few blocks away from the Freemont Street. The Department also has bike and street patrols that cover the area. The senior police official said, "we are all comfortable that Freemont Street, as it is now, is not a public forum."

**PRIVATE SECURITY EFFORTS**

Freemont Street Experience Limited Liability Company is by contract the "mall managers." They are a private operating entity comprised of eight of the downtown hotel/casinos that came together to form the company. The project is run like a business, with officers and

managers. They not only arrange special events; they are also responsible for operation and maintenance of the mall, contracting with people to program the light show, scheduling, and security arrangements. The private security officers, hired to police the grounds of the Freemont Street Experience, have uniforms and radios.

There are nine security officers and four metro police officers assigned to cover the Freemont Street Experience. Police say that they have been able to work effectively with the private security officers. Because, there are more private security officers in the Freemont Street area than police officers, cooperation is particularly important. All the security officers have the beepers and cellular phone number of the bike cops. If the security officers witness a crime, they would hold the suspects and contact the police officers.

Police also say that since the completion of the Freemont Street Experience the hotel security people have been more aggressive in coming out of their hotels and discouraging solicitation.

The senior police official explained that, "hotels are like small city police departments. Big hotels have great training for the officers, but small hotels have no training. A lot of the security officers from the hotels are poorly trained, poorly motivated, and poorly paid." He added that many of the security officers are retired from previous jobs, so they may be old and out of shape. In order to improve the training of security guards, the Metro police have started an integrated training program. There is also a "chiefs of security" association, including all the

heads of hotel security cooperating in an information sharing program.

When there is crime information of interest to the hotels, metro police sends a fax to the 40 hotel chiefs of security. For example, when an individual turned in six fraudulent $25 chips at a Freemont Street hotel and later showed up at a second hotel and did same thing, "within ten minutes we send out our fax to every hotel in Las Vegas. Half an hour later the man was arrested," the police official said.

Downtown Freemont Street has created a much more secure environment, but there are still some people in the surrounding area that are panhandling. The City Council and other officials are considering new legislation to address panhandling in other parts of the city, in part to ensure against a "spillover" effect from Freemont Street.

**HOMELESS SERVICES**

The city of Las Vegas has developed a number of programs to help the homeless. Recently, a new shelter has been built to serve women and children. Both job training and alcohol counseling are available at no charge. Said one police official, "This is not a cold-hearted council member in this city. We want to break the cycle of poverty, if there is a problem that can be addressed." He added that it was "because the city does so much to help homeless" there was so little opposition to the anti-panhandling legislation. Meanwhile, the Police Department reports that it is spending a million dollars a year responding to panhandling related problems.

The Police Department has a two officer team called the Homeless Enforcement Evaluation Liaison Team, modeled after a program in Santa Monica, California. When the team was first established, the two officers brought together the leading homeless service providers for a discussion of the city's homelessness issues. According to one senior police official:

> ***When we met the homeless service providers at our first meeting we discovered that they do not talk to each other. They all were competing for the same public dollar. We finally got them all together and we all agreed that we would work together.***

As a result of the meetings, police say they have developed a cooperative spirit with the homeless advocates. Homeless advocates, although critical of the city's approach to the problem prior to the development of the two officer team, agree that Las Vegas police now have a humane and fair policy towards the homeless.

Police, in cooperation with homeless service providers, developed a pocket card which helps officers diagnose and categorize the street people they confront, enabling the officers (and security guards who also carry the cards) to know where to send the people they encounter. Just because there are overnight shelters and social services available, that does not mean that people on the street will avail themselves of them. Many of the shelters have rules and conditions as to what type of client they will accept and what kind of services they will provide. One shelter will only take people that are sober and able to work, and only for 120 days. Another only deals with

the mentally ill homeless. A third said that they only deal with drying people out who are inebriated. A fourth said that it does not house anybody overnight, but can provide people with a place to receive mail and phone calls. Police say that, sometimes, they physically take the homeless to shelters, but usually the locations are downtown and easily accessible on foot.

## OPENING OF FREEMONT STREET

According to the city, the local media, and the facility's owners, there has been an overwhelming positive response from the opening of the Freemont Street Experience. The public is apparently coming back to the city's central business district.

An official of the Freemont Street Experience explained that the project has served as "a catalyst for redevelopment in the surrounding area, and we've already seen that in room renovations, redecorations, and expansion projects." Every downtown hotel casino that is on Freemont Street is investing in expanding or improving their facilities. An estimated $200 million is being spent on the new projects. Thousands of rooms and tens of thousands of jobs will be created, giving a much needed boost to the city's tax base.

City officials and hotel owners agree that there are no plans to further expand the canopy, nor to seek complete panhandling bans in other areas of the city. There has been a Clark County ordinance prohibiting handbilling along the Strip. That ordinance, thus far, has been upheld in the courts. "We are not going to put a canopy and mall on every street," said a representative from the City Attorney's Office. The goal of the Freemont Street Experience project was to

reverse the decline of downtown. From the perspective of those involved in the project, this goal has already been met. One Freemont Street hotel owner said that success of the project is contingent upon controlling sources of disorder:

> ***The environment is safe and clean—people can go outside and not be harassed. When the light show runs, people move out in the middle of the street and everything stops. Imagine that environment if there were not controls on panhandling? Nobody could participate in the entertainment without the ordinances.***

## NEW YEAR'S EVE ON THE NEW FREEMONT STREET

Three years ago, before the opening of the Freemont Street Experience, New Year's Eve celebrations in downtown led to bottle throwing, fighting and slam dancing. "From a public safety point of view, it was a nightmare," said one downtown Las Vegas hotel owner. The first New Years Eve celebrated at the new Freemont Street was completely different.

The Freemont Street Experience operating company decided to close off free access to the mall on New Years Eve and charge an admission fee for a party. The sealing of the area allowed for the control of the environment so that those who participated, according to a Freemont Street Experience representative, "had a very unique experience. Participants knew they would enjoy themselves in a safe environment, without minors drinking and doing reckless

things."

Although there were some complaints by people who asked, "how can you charge $10 to go on a street," people are adjusting to the street's new status. A Freemont Street Experience representative said the New Year's Eve party helped Las Vegas residents get the idea that the Freemont Street Experience is something much different than a typical public street. The representative acknowledged that New York's Times Square does not charge admission, but asked "how many arrests do they make, how much does that cost the city of New York? This event doesn't cost the city of Las Vegas anything." The New Year's Eve party at Freemont Street was covered both by all the local television news station, and by the national cable channel, MTV.

## CONCLUSION

Las Vegas' downtown gamble has been paying off. No lawsuits have been filed challenging the solicitation ban. Police, with the support and assistance of security guards in the area, are enforcing the solicitation ordinances. Confrontations and arrests have been rare. The public once again feels safe in and around Freemont Street. Existing local businesses are investing in their own properties and new retail businesses now see the area as attractive. Tourists are returning to the area to patronize the businesses there and to enjoy the canopy light show. Plus, the downtown businesses have supported the shelters and services for the homeless.

To date no other city has attempted to ban solicitation in an outdoor "mall" or street.

Indeed, the precedent set at Freemont Street has been most directly followed in Las Vegas, which enacted a county ordinance prohibiting direct handbilling on the Strip. Other cities have prohibited panhandling on beaches, boardwalks, airports, and bus stops. With the success of the Freemont Street Experience, you can bet that other communities will soon attempt to enact similar ordinances.

## APPENDIX A: T-SHIRT ISSUE

Another street disorder issue that has been a concern, and a subject of litigation, is the sale of T-shirts by street vendors. The vendors set up in busy intersections and force people to walk into the street. An ordinance banning t-shirt sales along the strip was enacted by Clark County. In addition, federal agencies, including the Immigration and Naturalization Service (INS) and the Internal Revenue Service (IRS) investigated the T-shirt sellers.

The ordinance prohibits erection of structures on the sidewalk and bans obstructive conduct in specific areas. A private group called Higher Taste, angered by the T-shirt sales, filed a civil suit to enjoin the t-shirt sellers from blocking the sidewalk.

One police official said bluntly, "we pursued this guys because we know they are scam artists. We pursued the money. We asked who are they supporting with their proceeds." He also said that these guys change corporate forms all the time. The police have sought to systematically identify who the principals are and who the salesmen on the street are. They have identified 136 distributors, mostly Mexican nationals.

Las Vegas Metro police also report that if you follow the proceeds from the T-shirt sales far enough it leads to some kind of organization claiming to be a religious faith. Thus a similar

religious order provides a very convenient cover for someone who is in the business of selling T-shirts. As a religious group, their business is non-profit and tax-exempt. The group of T-shirt sellers in Las Vegas has been linked to groups in Honolulu, San Diego, and Washington D.C. There have been 12 to 14 civil suits to enjoin them blocking sidewalk.

The ordinance regulating T-shirt sales has resulted in a major change. Before the ordinance there were T-shirt sales tables in front of every major hotel and casino, including Harrahs, the Mirage, Circus Circus, and Excalibar. Currently they are operating only in front of a casino that is not yet open. Businesses said they did 30% better when the T-shirt sales people were gone after the ordinance was enforced. People were avoiding the stores in an effort to get away from the T-shirt sellers.

The T-shirt vendors have challenged the ordinance. They say they are standing up for first amendment protected speech and that T-shirts are expressive speech. In order to justify this argument they have printed in black ink on a black T-shirt some type of simple, "political" message (e.g., protect the environment). However, these messages arguable do not meet the legible and readable standard.

# NEW YORK CITY CASE STUDY

**INDEX:**

## INTRODUCTION

New York City has had sharper crime reductions over the past three years than any other large city in the country, and, according to officials there, the city's approach to street order maintenance has a lot to do with this decline. Under the leadership of a Mayor [Rudolph Giuliani] who campaigned successfully on quality of life issues, and a Police Commissioner [William Bratton] committed to changing the City's entire approach to combating crime, New York has achieved remarkable results.

Unlike other cities, New York did not begin its assault against street disorder and other minor crimes by enacting any new laws. In fact, the city's effort to employ a panhandling law was blocked by a lawsuit and a new, more narrow ordinance, has just recently been adopted.[1] However, by working with laws already in place, the Police Department, along with its partners in the city's Parks Department and the business community, have been able to transform both New York City's image and reality. The Big Apple is now known as one of the safest big cities in the United States. Its approach has been followed by cities, large and small, in the United States and beyond.

## NEW YORK CITY'S STREET DISORDER PROBLEM

According to senior New York Police Department (NYPD) officials, street disorder issues had become an increasing problem by the 1990s. While in many U.S. cities, a person could not get away with urinating or drinking in public, New York had developed a high level of

[1] The development of this new ordinance is discussed later in this case study.

tolerance for such behavior, including begging, camping in parks, and sitting and lying on sidewalks or other public places. Police policies had contributed to the problem.

Police officials explained that the problem in New York was that, if citizens reported such violations, a police officer would respond, "I am sorry, I can't leave my post, we are looking for major criminals. We are too busy." The police official said, "realistically, when there were petty offenses, the police force looked the other way because they were told to stay on their posts." If the officer grabbed a minor offender he or she would be gone for the rest of his tour, processing the arrest and filling out paperwork, and there was no one else to put in his place.

New York has had a significant panhandling problem in all areas of the city, including in retail shopping areas, in the subway (both at stops and on the trains), at traffic lights, and at other places. One problem which resulted in a lot of citizen complaints was panhandling near public parking lots. Panhandlers intimidated citizens to pay them to "watch" their cars. "It was a racket, a form of panhandling," a police official said.

Police have also received many complaints from store owners on the Upper West Side and on Broadway. Panhandlers would ask for money in front of the stores, discouraging shoppers from going in to shop. There was also a problem with panhandlers blocking intersections. One chronic offender, who used a wheelchair, displayed a sign which indicated that he was a disabled Vietnam Veteran. According to police reports, he would wheel himself in the middle of traffic, blocking traffic, while he asked for money. It later turned out that he was

not injured, in the war or otherwise.

There have also been problems near ATM machines. In one case, a Citibank manager in Brooklyn reported to police that panhandlers were hanging out in the lobby or holding doors open near ATMs. They would pressure those leaving the bank to give them money. The new panhandling legislation (see below) specifically addressed panhandling near ATMs.

There were also considerable problems with sleeping, public elimination, and drug use and sales in the city's park. Many of the city's parks, throughout the five boroughs had serious problems coping with the homeless population that slept in the public parks. Thompkins Square Park (in the Lower East Side of Manhattan) and Bryant park (the park behind the 5th Ave library in midtown Manhattan) had particularly troublesome problems, raising health and safety concerns.

**SUPPORT FOR DISORDER CONTROL**

City officials believe that, instrumental to the ultimate success of their new quality of life approach, was the strong support of politicians, the police, and the public.

Street disorder became a major political issue in the mayoral race of 1993. Earlier efforts to address disorder in New York City were successfully blocked by vigorous American Civil Liberties Union objections. According to an official in the Criminal Justice Coordinator's office,[1] "the Mayor [Rudolph Giuliani] ran on a platform of improving the quality of urban life. Once elected, he brought in a Police Commissioner [William Bratton] who shared these views."

This political commitment to an aggressive approach to street disorder made it easier to change policies in the nation's largest police department.

The police, the City Council, and those inclined to oppose such efforts saw that the Mayor's quality of life initiative enjoyed tremendous popular support with most citizens. New Yorkers seemed to have reached a consensus that the time had come to try to reclaim some degree of order on the streets. According to a police official,

> ***Most New Yorkers welcome the idea that the daily affronts to their dignity have decreased. Most people are not victims of violent crime, but are bothered by panhandling, public urination, and littering. Such things make you question who is in charge. Citizens don't want to be harassed on the street, they don't want to be confronted on the subway, they don't want to see people flagrantly violate misdemeanor statutes with no effect.***

The Police Department's cooperation (and even enthusiasm) could not have been taken for granted. Traditionally some police departments, as well as many individual officers, are reluctant to focus on lower level offenses, refusing to see crime prevention as part of their job. The leadership of the NYPD, however, made it clear that qualify of life offenses were a high priority. Said a senior NYPD official: "We told officers to do it. Precinct captains are held accountable. It was part of the plan."[2]

## A NEW APPROACH TO FIGHTING DISORDER IN NEW YORK CITY

A police official explained that one could look at New York City's approach to enforcing street disorder as similar to motor vehicle enforcement. If you step up enforcement, you gain compliance, albeit grudging compliance in some cases. Quality-of-life offenses work in the same way. Now that the NYPD has begun to aggressively enforce disorder laws, there are many people who are grudgingly not drinking, smoking marijuana, or urinating in public at all. New York City thus appears to be a prime example of our conclusion that cities have about as much street disorder as they choose to tolerate.

The ability of the police department to enforce these laws was greatly aided by the additional police officers that were added to the force in response to the crack epidemic.[3] An official from the Criminal Justice Coordinator's office explained that the extra officers allowed the department to be more aggressive. He said:

> ***'The Mayor believes the police department should not be a completely reactive agency, it can be proactive. Traditionally the police come when called. It is very different to say let's study crime patterns occurring in the city and proactively attack it."***

The officers continue to do a better job because the nature of the community policing learning curve: success breeds success. Precinct Commanders have gone from the general guidance to be "responsive to the community" to attending a full calender of meetings with individuals and community organizations. In the previous Mayoral administration, a police

official explained, not much more than ten selected officers at each precinct were supposed to be "user friendly" to the community. "Now every officer walking a beat is trained to be, and is expected to be, responsive to community issues. It is no longer acceptable to just respond to 911 calls or to randomly walk a beat looking for crime," the official said.

According to another senior police official, one of the first efforts to address disorder problems was in response to increases in petty crime in Manhattan's Greenwich Village neighborhood. Pot smoking, public drinking, urination (often by college kids) had undermined the quality of life of community residents and was becoming a threat to public safety. A growing number of potentially violent criminals were drawn to the disorderly carnival atmosphere which had developed in the neighborhood, particularly in and around Washington Square Park.

In response police developed and implemented a broad "quality of life" campaign. Police increased patrols in the neighborhood, closed the park at night, and adopted a zero tolerance policy towards minor offenses. The result was a dramatically cleaned up neighborhood and a park which is now safely enjoyed by large numbers of citizens. The Greenwich Village experience emboldened police officials by showing not only that success was possible, but that it not take that long. Police and city officials were convinced that this type of effort would work in addressing disorder problems in other parts of the city.

## FIGHTING DISORDER ON THE STREETS OF NEW YORK CITY

Another early target of the NYPD were the "squeegee men." The squeegee men

pressured motorists for money in return for wiping their automobile windshields with a rag. This type of panhandling had enraged New Yorkers and visitors to the city for decades. Mayor Giuliani repeatedly promised to address this problem during his campaign. Once elected, he tasked the police to figure out a way to end this chronic harassment of New York City's motorists.

Police stepped up enforcement, using existing traffic laws, and communicated to the offenders in no uncertain terms that there was now a new policy, and that they would be arrested for blocking intersections while asking for money. In a matter of weeks, the squeegee men got the message that the police would not let them operate profitably. Remarkably, the problem that had frustrated residents and visitors to New York for years had been solved.

Police learned a great deal from their crack down on the squeegee men. They discovered that a significant proportion of those committing this relatively minor offense often had a serious record of violent crime. Essentially, disorder enforcement became a very efficient method for apprehending wanted felons. When police would stop someone committing a quality of life offense (ranging from squeegee men, disorderly conduct, public drunkenness, and drug selling), the officer would request identification and run a warrant check. These checks, according to a senior NYPD official, "yielded dramatic returns of people on warrants for serious crimes."

The police philosophy became, "if we can't catch them selling drugs we can catch them pissing in the streets or drinking a can of beer." The police official explained that when a police

officer caught someone violating a disorder offense, such as drinking in public, they would say to the offender, "Excuse me sir, you can't drink here. Can I see some identification?" With the identification in hand, the officer would conduct a warrant check. New York City issues 38,000 felony warrants a year, 100,000 misdemeanor warrants a year, and more than 11,000 felony drug warrants a month.[4] According to the Police official, their experience was that "those that have the greatest propensity to use drugs or violence also drink in public."

The police officials said that even those quality of life offenders who are themselves not guilty of more serious crimes often have very useful information about those who do. "Most murders and robbers are not caught in the act. If the department is not talking to quality of life offenders, it is losing an important opportunity to get information," a police official said. Thus the crackdown on disorder yielded both real urban quality of life benefits and a reduction in violent crime.

## FIGHTING DISORDER ON THE SUBWAYS OF NEW YORK CITY

There were three primary disorder problems on the subway: panhandling, farebeating, (also known as turnstile jumping), and people sleeping in subway tunnels.

Panhandling is illegal in the subway system; however, people were still asking for and receiving handouts in various parts of the subway system. This problem was addressed largely by a public relations efforts. Canned announcements were recorded and played over the subway station's public address system announcing that, "Panhandling is against the law--give to your

favorite charity." Signs were also put up asking subway riders not to give it to charities. Law enforcement efforts were also stepped up.

According to the Criminal Justice Coordinator's office, these efforts to control subway panhandling seem to be working. Not only is there less begging, city officials told us that the New York Subway system had experienced a 75% decrease in robberies in 1994 and 1995.

A crackdown on farebeaters also brought tremendous results. A police official said, "by spending resources to crack down on subway fare-beaters, we ended up making thousands of arrests for gun crimes, possession of knives, and narcotics." He suggested that those weapons would have been used for robberies or other crimes on the subway or elsewhere in town. He stated that the crackdown on farebeaters provided an opportunity to apprehend people who should be in prison. The police official said, "the volume of the seized weapons adds up. Every gun off the street is one less opportunity to use guns."

He further explained that, even though a very small percentage of guns are taken out of circulation, the criminal element is still altering its behavior. "We have had incidents where two guys may want to draw their guns, but they were worried about carrying them so they hide them. They may run back to get their guns and then try to find each other. Maybe they can't find each other, and there is no shooting." If people are not carrying their guns when they go on the subway or walk on the streets, they are less likely to get into a violent altercation.

The problems posed by the homeless population[5] differed from those created by panhandling and farebeating. Although there were exceptions, most of the homeless did not have serious criminal records. There are miles of underground tunnels that are no longer or rarely used. In 1989, between 10,000 to 11,000 people were living in the city's subway system. There was, according to the police official, a whole culture developing in the subway system which was viewed as very dangerous. These problems included starting fires and blocking emergency exits.

A homeless outreach unit[6] went into the subway tunnels to aggressively address this problem, "but not just to roust them out," a staff member of the Criminal Justice Coordinator's Office explained. When the homeless exited the tunnels, there was a van waiting with food. The van would take those interested to a shelter of their choice. If they did not want to go to a shelter, they were told firmly that they could not go back into the subway tunnels. Once most of the homeless were removed from the subway tunnels, police would regularly check the areas where they previously slept. Police told them "we'll take you to a shelter, or somewhere else, but you are not going to get five minutes sleep down here."

According to an official of the Criminal Justice Coordinator's Office, the effort was a "good example of using police effectively. Only two people were arrested, and that was due to them physically attacking the officers." Because there are some extremely remote sections of the subway system, the population living there has not been completely removed. However, the homeless population living in the subways is now estimated at less than 500 people, mostly congregated in lower Manhattan, where a large number of social services and soup kitchens are

located.

## FIGHTING DISORDER IN NEW YORK CITY'S PUBLIC PARKS

New York City's parks must cope with a variety of disorder concerns, including public drinking, public urination, graffiti, illegal drug sales, to camping or sleeping in the park. People sleeping in the park creates particularly serious health and sanitation problems, a Parks Department official explained. "They defecate, urinate in the public place and create conditions for exposure to diseases. Encampments unquestionably attract vermin," he said. In addition, needles have been found in the park, which are assumed to be from the homeless heroin users sleeping in the park. Further, the homeless themselves can become victims of crime. In July, 1994 a homeless man and woman who were living in a tent were killed.

Park Police officials explained that a variety of people sleep in public. Some people come out at lunch on Wall Street and take a nap on a park bench. Others come out of a bar at 4:00 a.m., sleep for a couple hours, and then go home. And then, one park police official said, "there are the hard-core people who tend to set up some kind of shelter, such as a bedroll or a cardboard box and sleep for longer periods of time, either during the day or night."

Ordinances and park regulations have prevented people from sleeping overnight in the city's parks since the 1890s. Furthermore, the city has the authority to close parks if it can

demonstrate a reason for it. Most parks are closed after dusk and presence in these parks at night is trespassing. Periodically, zero tolerance zones, which feature a much higher level of police presence, are established to clean up high crime areas. Police found that they only have to enforce these policies for a few weeks before the message gets out. Once the community sees that they have a nice park again, they resume their use of it and thus further discourage illegal activities.

The Park Police[7] official explained, "we enforce the rules and regulation. We know those areas where people sleep and we check them regularly. We have a checklist and do inspections. Public sleeping is an issue which always comes up. "Previously," he explained, "a lot of people slept in parks. There has always been a curfew, but it was not enforced." In June, 1994, when the city began to aggressively enforce the curfew in the park, there were 100-200 people regularly sleeping in Central Park. However, today, there are none, "because we have been so consistent in enforcing the curfew," he said.

The effort to enforce the sleeping curfew was reinforced by efforts to refurbish and repair Central Park, which began in 1981 and is nearing completion. As part of this effort, concession areas were built up. "All of these things generate greater usage and a better feel for the parks. It looks nice. The curbs are nicely done, the roadways are paved," the Parks Department official said.[8]

The park police report that they regularly conduct warrant checks for those committing

minor offenses, such as selling beer or driving illegally into the park. In about 5% of the case the violator of the minor offense is wanted for something else.

In Central Park, the Park Police officer reported, they did have a problem with marijuana. The police issued summons to the drug buyers. Prior to the current police administration, the officer explained, warrants would be ignored (i.e., people would not show up for their scheduled court appearance, fearing no consequences). In order to alter that perception, warrant officers began to show up at 6:00 a.m. at the offender's residence if someone missed a scheduled appearance. As the officer said, "When you knock on forty doors first thing in the morning, it makes an impression. Word gets out that you cannot just ignore the summons any more."

The official explained that when a Park Police officer finds a homeless person, they typically offer transportation to homeless shelter. However, he explained, "just 13% of people who are asked actually request homeless services. The rest of them just move on." The Park Police officers who interact with the homeless have been briefed not just on the techniques of outreach, but also on what facilities, services, and programs are available.[9]

The result of the enforcement of the curfew in Central Park, as well as the other order-maintenance initiatives was dramatic. Use of the park is up substantially (in non-curfew hours). Central Park went from about 14 million visitors in 1993, to 16 million. Because Central Park is now perceived to be safer, more groups are scheduling activities and events in the park. Foreign tourists, especially those from Europe and Japan, have added Central Park to the list of New

York tourist attractions they visit. According to New York City statistics, after the Statue of Liberty and the World Trade Center, Central Park is the city's most popular tourist attraction. The senior official noted that, "the single best way to make a park safer is to attract more users. We have gone at it from a whole bunch of angles."

A senior official of the Parks Department strongly endorsed an anti-crime strategy of aggressive street order maintenance.

> ***Order maintenance and crime fighting are not discrete items, they are sequential items. If you don't take care of the order maintenance first, you will end up doing crime fighting. It's not just the homeless in the park, its others guilty of public drinking and public urination. The challenge is to address these order maintenance problems before they require a crime fighting function.***

In addition to the improvements in Central Park, there has also been a reduction in public sleeping and petty crimes in some of New York City's other major parks:

**Bryant Park** is vastly improved, the park police official said. Businesses and residents surrounding the park have formed a Business Improvement District and hired private security, which has had a dramatic impact.

**Thompkins Square Park**, which has had a long-standing problem with public sleeping, is also much improved. Park police as well as Ninth Precinct police officers have cleaned up the park,

through consistent application of the curfew and periodic checks. The cleaning up of Thompkins Square Park was greatly facilitated by its refurbishment.[10]

**Union Square Park** was also physically redesigned. During the redesign, physical barriers, fences, and walls which prevented visibility through the park were removed. Now there is excellent visibility and the park feels much safer to the public. Usage of the park is also up, contributing to increased safety.

In spite of the vigorous effort to prevent sleeping in the parks, the park official said that there are still parks in the system that have a tendency to attract homeless people. However, he said, "absolutely none of them have encampments. There are some where people show up, with a box or structure, and manage to spend the night. But they are not there for long." This occurs mostly in Queens and Brooklyn.

The senior Park's Department official said that the evidence to date suggests that the enforcement of the park curfew has not resulted in displacement of criminal activities to any neighboring precincts. The data indicates that the crime rate in all the areas surrounding the parks went down at the same rate as park crime did. The Parks Department officials suggest that this is due to the fact that the worse offenders living among the homeless population have been arrested and incarcerated.

According to the senior Parks Department Official, "clean, safe, quiet crime-free

neighborhoods and parks is what citizens want from community policing. That's true for the rich and the poor-- white, black, Hispanic. That's the constant."

## ROLE OF BUSINESS IMPROVEMENT DISTRICTS IN NEW YORK CITY

Business improvement Districts in New York City (and elsewhere) help police fight disorder by: 1) hiring private security; 2) keeping their areas clean; and, 3) providing "ambassadors," who provide free and friendly assistance to tourists in the area. According to the senior police official, the city's Business Improvement Districts have helped to promote a sense of order and reduced the fear of crime. Places like Union Square Park, Bryant Park, and the area around Times Square are much safer and attractive today because the BIDS invested in the areas and spruced them up, a senior police official said.

One of the city's most active BIDs operates in one of the most famous pieces of real estate in the world--Times Square. Times Square has not been a violent neighborhood, but it had maintained a fairly threatening atmosphere, due to petty crime, three card monte, illegal peddlers, and low-level drug dealers.

The Times Square Business Improvement District (BID) is an independent not-for-profit organization of area businesses from 40$^{th}$ to 53$^{rd}$ Streets, between Sixth Avenue and Eighth Avenue in Manhattan. Among the groups members are large and small property owners, theaters, hotels, restaurants, community groups, social service providers, and government agencies. Its primary goals are to improve the cleanliness, reduce crime, and promote tourism

within the BID area.

An official from the Times Square BID explained that organizations like hers "get an awful big bang for the buck on sanitation." She also said that one cannot necessarily draw a sharp dividing line between security and sanitation because cleaner streets generally lead to safer streets. "Sanitation is so tangible, a clean district seems like a safe district and tends to bring better behavior," she said.

The Times Square BID also has forty private security officers hired to patrol the area. They are linked by radio to the two local precincts by a dispatcher. There are two shifts of security officers each day. The force is on the street from 9:30 a.m. until midnight seven days a week. Each shift has a supervisor and the security force is lead by a director and a deputy director. The security officers are trained to be "goodwill ambassadors" and to serve as the eyes and ears of the police department. If someone has their purse stolen, BID security officers are trained to see if the person who was robbed needs help and to call the police, not to chase the perpetrator.

The Times Square BID helped to create the Midtown Community Court[11] by donating $625,000. The Court also receives some support from New York City. The President of the Times Square BID sits on two advisory committees of the court. The Times Square Partnership also helped to equip the "mail room" that is used for misdemeanor offenders to serve their community service sentences. Those working in the mailroom also provide free mailing services

to non-profit organizations and learn some useful skills.

The BID official reports that the Times Square Partnership has helped to dramatically reduce crime in the region. According to the BID's figures, overall crime in Times Square is down by 43.7% over three years, which greatly outstrips the city's overall reduction in crime (about 25%) during the same time period. Along with the overall reduction in crime, Three Card Monte (a card game scam) is down by 80% and illegal peddling down by 77% (again, over three years). Prostitution is also down in the Times Square region.

The best proof that order has returned to Times Square, according to the BID official, is that the only recent complaints from citizens are about street musicians and street preachers. "Although those are issues we may not be able to address, it is kind of sweet that are biggest problem is someone paying the bongo drums too loud," the BID official said. She also noted that the Grand Central Partnership has also begun the process of measuring decibel levels to determine if the musicians are violating city regulations.

From the BID's perspective, the clearest sign of their success at helping to clean up the neighborhood is the improved business climate. More than 20 percent of all the hotel rooms in New York City are in Times Square. According to the BID official, due to the improved environment around Times Square, occupancy rates and overall business is "off the map. The area is hot." She explains that this improved business climate is not solely the result of the BID. It is also due to the city's long-term effort to clean up and rehabilitate 42nd Street and to the

revival of Broadway. "The perception of Times Square have changed. Times Square has turned the corner," she said.

## IMPACT OF CRIME REDUCTIONS

The result of the reduction in crime is more people coming into New York City for cultural and social events. There is more investment, higher office occupancy, and a steady tax base. A staff member of the Criminal Justice Coordinator's office said: "There is truly a sense in the city when people see things happening, they expect a police officer to close in on it. It is not just statistics. It is the spirit of policing that is affecting the behavior of the criminal element of the city.

The greatest number of tourists to ever visit New York was in 1995. The city's hotels had their highest rate of occupancy in years. Those are statistics of a vibrant city, the staff person from the Criminal Justice Coordinator's office explained. "It's hard to be vibrant when you are in the grip of violent crime." The number of conventions that New York was getting was dropping before the crime reduction, as were number of foreign tourists. Now, both are rising. Also, ridership on subways has increased and fear of crime has been reduced.

The ACLU says that crime may be down, but you have to weigh that against the increase in complaints about police brutality or misbehavior. The Coordinator's staff responded that the increased complaints may be due to greater reporting. "People may be thinking there will be a better response. But if you tell your officers to be aggressive, there are going to be more

consistent with the newly developing community policing efforts that were being implemented.

"I personally think that the NYCLU [New York Civil Liberties Union] brought the lawsuit because they lost the subway suit and they weren't going to give up the issue," the attorney said. He added that, from a legal standpoint it is tougher to defend a flat-out ban on panhandling in the streets which probably prompted the NYCLU to hope for a different result than with the subway case.

According to the attorney, the named plaintiff in the panhandling case, Jennifer Loper, came from a divorced, but well-to-do family. Her father was senior partner in a fairly large law firm. Her mother lived out in Great Neck. Ms. Loper admitted in sworn testimony to at least some drug use. She actually sought help from an organization which offered drug treatment. However, she decided that the six month length of the program was too long to be away from her friends, so she opted out. Ms. Loper herself was married and divorced, (Loper was her married name).

The attorney for the city explained, "Jennifer was absolutely *not* the prototypical panhandler. That was the point we were trying to make." Another named plaintiff, Bill Kaye, also came from an atypical background. Kaye grew up in a middle class community on the South Shore of Long Island. He was living with his mother who was divorced. He was about eighteen years old when he was arrested.

## NEW YORK CITY'S DEFENSE IN LOPER CASE

The city had a difficult challenge in defending Loper. The statute banned both passive and aggressive panhandling--anywhere, making it broader than most city's panhandling control ordinances. The New York City attorney said, "the problem is, if you accept panhandling as speech, it (the new law) is unconstitutional."

Because panhandling controls are consistent both with community policing and the broken windows theory, there was strong support in the police department to defending the statute.

Even though the city of New York lost the case, the attorney for the city who worked on it does not believe there was much the city could have done differently to win the case. "We put together an excellent record. In large measure, it was disregarded by the judges. It is the luck of the draw; it is part of litigating," the attorney explained.

Although the decision went against the city, the presiding judge listed in his opinion a variety of locations where panhandling could be banned, thus helping to guide the city in drafting a new law that restricts both where and how begging can occur.

The attorney for the city also observed that the New York State Attorney General was not interested in defending the panhandling statute. "They were not involved from the get go. The city was involved in defending NYPD enforcement of the statute within the city. The state played

no role. We notified them, and kept them appraised," he explained.

The attorney for New York City said that he believes that, if the Supreme Court hears a challenge to a Seattle-type anti-aggressive panhandling ordinance it would be upheld. There is, "no question in my mind that its a very reasonable approach," he said. (That approach eventually prevailed in New York as well).

However, the attorney did note that, "one of the things that disturbed me about the *Loper decision* of the Second Circuit is that it assumed that panhandling was unconstitutional without any discussion whatsoever." The attorney for the city further noted that, in many respects, the lawsuit was a purely academic exercise.

There was not any evidence of police department abuse of the statute. There was no evidence that police had asked people who were peacefully panhandling to move on. On the other hand, he added, "what's the harm of just having an aggressive panhandling law. You don't really need an all-encompassing statute where the potential for abuse exists."

An attorney with New York City's Law Department explained that the Second Circuit decision was better researched than the trial court decision. "There was more thought put into it, more logical." She said that, "If you look at it from strictly a legal perspective, they were segregating the conduct component from the speech component in the solicitation case that went to the Supreme Court. Soliciting people for money is the conduct." She also suggested that:

***The judge had an unrealistic view as to what panhandling was really like because he did not confront it every day. He didn't have a situation where their wives or children were approached late at night, or coming out of banks. When a man six feet tall ask for money --there is an implicit threat."***

## NEW YORK LITIGATION SUMMARY

### Young v. New York Transit Authority, The Federal District Court

The saga of New York's legal battles in defense of urban quality of life initiatives began with a short-lived Federal District Court decision that declared unconstitutional both a New York Transit Authority's regulation prohibiting panhandling in the subway system and a New York State law that prohibited loitering for the purpose of begging statewide.[2]

The plaintiffs in the case brought a class action suit against the New York Transit Authority and various others alleging that a Transit Authority regulation banning panhandling in the New York City subway system was a violation of the First Amendment rights of beggars. At the District Court's insistence, the plaintiffs later added a claim that New York Penal Law Section 240.35(1), which prohibited loitering for the purpose of begging throughout the state of New York, was unconstitutional.[3]

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[2]Young v. New York City Transit Authority, 729 F. Supp. 341 (S.D.N.Y. 1990).

[3]This instruction came after the New York Attorney General declined the Court's sua sponte invitation to intervene in the case on the grounds that the case, as it then existed, might bear on the constitutionality of Section 240.35(1). When the Attorney General declined this kind invitation to challenge the constitutionality of one of the statutes he was charged with enforcing and defending, the District Court Judge ordered that the plaintiffs amend their complaint and name the Attorney General as an additional defendant. *Id.* at 346

The District Court proceeded to evaluate the regulation, finding it to be a violation of the First Amendment to the United States Constitution.[4] The Court found the subways of New York City to be a public forum.[5] Apparently, the thought that people may be at subway stops or on trains to get from one place to another, as opposed to being there to hear the messages of others, did not occur to the trial judge.

The District Court eventually found that begging was communicative speech protected under the First Amendment and that the regulation was not sufficiently narrowly tailored to pass constitutional muster.[6]

Finally the Court also struck down the Section 240.35 (1) prohibition on prohibition on loitering for the purpose of begging as a violation of the Due Process Clause of the New York State Constitution.[7]

**YOUNG, The Second Circuit**

The New York Transit Authority appealed the District Court's ruling that the subway begging ban violated the First Amendment to the Second Circuit Court of Appeals.[8] The Transit Authority argued that begging is not protected expression under the First Amendment, and that

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[4]*Id.* at 360.

[5]*Id.* at 356-357.

[6]*Id.* at 360.

[7]*Id.* at 358.

[8]Young v. New York Transit Authority, 903 F.2d 146 (2nd Cir. 1990).

even if it was, the subway was not a public forum and the regulation was a reasonable time, place, and manner restriction.[9]

The Second Circuit looked to the record to find the Transit Authorities rationale for imposing the panhandling restriction. In doing so, it saw Transit Authority studies and surveys showing that two-thirds of the subway ridership had been intimidated into giving to panhandlers, that riders believed that panhandlers pervaded the subway system, and that panhandlers were a serious problem.[10] In addition, many passengers complained that demands for money by beggars and panhandlers included "unwanted touching, detaining, impeding, and intimidating."[11] The Court also took note of the fact that subway riders lacked control of their own fate because the subway is a narrow and confined space which did not allow passengers to take as much action to avoid panhandlers as they might be able to do on the public street.[12]

The plaintiffs reiterated their argument, accepted by the district court, that "begging is pure speech fully protected by the First Amendment."[13] The Court quickly set about demolishing this premise. They heeded a Supreme Court admonishment against the "view that an apparently limitless variety of conduct can be labeled 'speech' whenever the person engaging in the conduct

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[9] *Id.* at 147.

[10] *Id.* at 149.

[11] *Id.*

[12] *Id.*

[13] *Id.* at 152.

intends thereby to express an idea."[14] Furthermore, the "[government] generally has a freer hand in expressive conduct than it has in restricting the written or spoken word."[15]

The Court observed that "[c]ommon sense tells us that begging is much more 'conduct' than it is speech."[16]The test employed by the Court to determine whether a particular conduct possessed sufficient communicative elements to trigger First Amendment protections was whether there is an intent to convey a particularized message and whether there was a great likelihood that the message would be understood by those who viewed it.[17]

The Court concluded that begging is not intertwined with a "particularized" message, noting that "[it seems fair to say that most individuals who beg are not doing so to convey any social or political message. Rather, they beg to collect money."[18] Furthermore, even if a particular panhandler had a particularized message, it is unlikely that an observer would be able to discern what that message was.[19]

"The only message [the Court was] able to espy as common to all acts of begging is that beggars want to exact money from those whom they accost. While [the Court acknowledged]

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[14]*Id.* (quoting Texas v. Johnson, 109 S. Ct. 2533, 2539 (1989)).

[15]*Id.* (quoting *Johnson*, at 2540).

[16]*Id.* at 153.

[17]*Id.* at 153.

[18]*Id.*

[19]*Id.* at 154.

that passengers generally understand this generic message...it falls far outside the scope of protected speech under the First Amendment."[20]

The plaintiffs argued that there was no meaningful distinction between begging and other forms of charitable solicitation, which the Supreme Court has recognized as entitled to First Amendment protections.[21]

The Court of Appeals examined Supreme Court precedent and concluded that begging could be distinguished from charitable solicitation by organized charities, and therefore denied First Amendment protections because "organized charities serve community interests by enhancing communication and disseminating ideas, [while] the conduct of begging and panhandling in the subway amounts to nothing less than a menace to the common good."[22]

The Court then proceeded to analyze whether the Transit Authority regulation violated the First Amendment, assuming *arguendo*, that panhandling had some modicum of expressive or communicative nature.[23] The Court analyzed this using the *O'Brien* test which holds a regulation is sufficiently justified when "(1) it is within the constitutional power of the Government; (2) it furthers an important or substantial governmental interest; (3) the governmental interest is

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[20] *Id.*

[21] *Id.* at 154-155.

[22] *Id.* at 155 (citing, *generally*, City of Los Angeles v. Taxpayers for Vincent, 466 U.S. 789, 805 (1984)).

[23] *Id.* at 155.

unrelated to the suppression of free expression; and (4) the incidental restriction on alleged First Amendment freedom is no greater than is essential to the furtherance of that interest."[24]

Applying that test to the facts before it, the Court readily found that it was within the Transit Authority's power to promulgate the regulation. More significantly, the Court found the prohibition on panhandling to advance a substantial governmental interest, declaring that begging was "inherently aggressive" and that it amounted to "nothing less than assault, creating in the passengers the apprehension of imminent danger.[25] The Court also recognized serious public safety concerns inherent to operating a subway system that is used by millions of passengers daily, passengers who, because they are neither rich nor powerful, have little choice but to rely on the subway as their means of transportation.[26] The Court further found that the regulation was content neutral because the regulation was "not directed at any expressive aspect of the prohibited conduct."[27] The Court therefore concluded that the ordinance serves both a legitimate state interest and is unrelated to the suppression of free expression, thus satisfying the second and third prongs of the *O'Brien* test.

Finally, the Court looked at the question of whether the regulation was sufficiently narrowly tailored to protect First Amendment interests to the greatest extent possible. The Court noted that this does not mean that there "is some imaginable alternative that might be less

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[24]*Id.* at 157 (citing United States v. O'Brien, 391 U.S. 367, 377 (1968).

[25]*Id.* at 158.

[26]*Id.*

[27]*Id.* at 159.

burdensome on speech."[28] The Court quickly concluded that the regulation was not unduly burdensome and chided the District Court for "substitut[ing] its judgment for the [Transit Authority's] experience and expertise in operating the subway system."[29]

The Court then determined that the subway did not constitute a public forum for First Amendment purposes. This was not necessary to its holding, however the Court believed that the District Court had misread precedent in this area and corrected it.[30]

Finally, the Court of Appeals turned its attention to the District Court's conclusion that New York Penal Law Section 240.35(1) was unconstitutional under the New York State Constitution. The Court was sharply critical of the District Court for its de facto order that the plaintiffs add this claim to their case, add additional defendants, and claim a right to hear this cause under its pendant jurisdiction. The Court therefore vacated the District Court's finding that this provision was unconstitutional.[31]

In conclusion, the Court of Appeals reversed the District Court, upholding the constitutionality of the Transit Authority's regulation prohibiting panhandling in the subway system, and vacated the District Court's finding that Section 240.35 (1) was a violation of the

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[28]*Id.* (quoting U.S. v. Albertini, 472 U.S. 675, 689 (1985)).

[29]*Id.* at 160.

[30]*Id.* at 161.

[31]*Id.* at 163-164.

New York State Constitution because it lacked subject matter jurisdiction.[32]

**LOPER, The District Court**

While the Second Circuit vacated the District Court's holding that Section 240.35 (1), which prohibited loitering in a public place for the purpose of begging, that statute soon came under attack again. A plaintiff class consisting of those "needy persons who live in the State of New York, who beg on the public streets, or in the public parks of New York City[33]" challenged Section 240.35(1) as a violation of the First, Eighth, and Fourteenth Amendments to the United States Constitution.[34]

The Court began by criticizing the Young Court's dictum that beggars were distinguishable from organized charities.[35] As an example, the Court asserted that the difference between giving to a panhandler and giving to the Coalition for the Homeless "is largely semantic." The message is the same, while "the beggar just saves on administrative expenses."[36] The Court gave short shrift to arguments that the possibility that giving to beggars is simply a person to person transfer, while charitable giving is a political statement. The Court also did not

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[32]*Id.* at 164.

[33]Loper v. New York City Police Department, 802 F. Supp. 1029, 1033 (1992).

[34]*Id.* at 1032. Because the plaintiffs were only seeking a declaratory judgment that the statute was unconstitutional, and because the Court found the statute to be unconstitutional under the First Amendment, it did not reach the other claims. In passing, however, the Court stated that the Eighth Amendment claim had "little merit." *Id.* at 1048.

[35]*Id.* at 1036-1037.

[36]*Id.* at 1036.

consider the fact that beggars are more likely than charities to use panhandled money to feed drug and alcohol habits.

The City also introduced the expert testimony of Dr. George Kelling. Dr. Kelling testified about the "broken windows" effect, that is, that disorder scares people away from public spaces, making those spaces susceptible to violent crime. The Court saw some merit in these points, but did not agree that the "broken windows" theory justified a ban on all loitering for the purpose of begging.[37]

The Court proceeded by stating that a distinction between conduct and expression was of no use in resolving the issue at hand because the two were completely intertwined, with the statute targeting both.[38]

The Court analyzed the statute under a hybrid standard for evaluating expressive conduct and time, place, and manner restrictions. The Court found for the statute to be constitutional, it must be neutral, support a substantial governmental interest, and not completely ban the speech at issue.[39]

The Court quickly found that the statute was not neutral. The Court based this conclusion

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[37]*Id.* at 1034-1035.

[38]*Id.* at 1036.

[39]*Id.* at 1039.

on the fact that in Times Square, a pedestrian is subject to any number of solicitations, from billboards, from the Salvation Army Band, street vendors, street preachers, and beggars to name a few, however only the beggar is singled out by the statute, therefore it is not content neutral.[40] The Court thus made a constitutional issue out of policy preferences and legislative priorities.

The court then moved to the issue of alternate means of communication. The statute provided none, because it effectively prohibited begging across the state. It is this defect that the Court found to be fatal, ignoring the fact that beggars were left free to speak on any issue.[41]

The Court, however, did note that it could "readily imagine" prohibitions on aggressive begging, panhandling at ATM machines, and possibly a complete ban on all begging within a ten block radius of Grand Central Station at rush hour, however the complete prohibition, statewide, was impermissible.[42] This opened the door for limitations on where and how panhandling could occur, which New York City later took advantage of.

In sum, the Court found the scope of the statute to be impermissibly broad. The law under review eliminated all begging, everywhere. The Court found this to be in conflict with the First Amendment, while explicitly inviting more discrete prohibitions of either the manner of begging (aggressive, for example) or the area of prohibition (near ATMs or within ten blocks of

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[40] *Id.* at 1039-1040.

[41] *Id.* at 1040. The statute actually allowed begging, so long as the beggar did not loiter.

[42] *Id.*

Grand Central Station during rush hour).

The District Court issued an injunction prohibiting its enforcement.[43] The City appealed the decision to the Second Circuit.

## SECOND CIRCUIT IN LOPER

In its appeal to the Second Circuit, the city argued that begging was not expression protected by the First Amendment. In the alternative, the city argued that even if begging constituted constitutionally protected expression, the plaintiffs' interests were outweighed by the government's interest in maintaining public order.[44]

The Second Circuit concluded as a threshold matter that "begging constitutes communicative activity of some sort" and that the New York statute applied to traditional public forums.[45] The Court then turned its attention to whether the statute was 1) narrowly tailored to serve a compelling government interest and 2) whether the statute could be classified as a content neutral, time, place and manner restriction.

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[43] *Id.* at 1048.

[44] Loper II at 701.

[45] Loper, 999 F.2d 699, 704. The Court relied on the fact that the statute at issue in *Loper* applied to public forums as its principal rationale for distinguishing its holding in *Young*. 903 F.2d 146.

On the first question, the Court quickly determined that the statute, which prohibited nearly all public begging throughout the state, was not narrowly tailored.[46] The Court further found that the state had no compelling interest in prohibiting peaceful begging, and therefore the complete prohibition of any and all begging was not permissible under the First Amendment.[47]

The City argued that beggars have a tendency to congregate, that they become more aggressive when they do so, and that this has deleterious effects on businesses and intimidates residents. The City also told the Court of how panhandlers station themselves in front of ATMs, banks, bus stops, parking lots, they follow people down the sidewalk and become intimidating and coercive. That panhandlers also make fraudulent solicitations was also put before the Court.[48]

The Court did not endorse any of the activities by panhandlers, in fact it suggested other statutory provisions that may be used to target a number of them.[49] The Court's difficulty with the statute was that it saw the law as going beyond addressing these problems and banning all solicitation, regardless of whether it was peaceful begging or aggressive begging.[50] The distinction between a begging ban and a ban on loitering for the purpose of begging was of no concern to the Court. Therefore, the Second Circuit agreed that the Penal Law Section 240.25(1)

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[46] *Id.*

[47] *Id.*

[48] *Id.*

[49] *Id.* at 701-702.

[50] *Id.* at 706.

was unconstitutional, and affirmed the decision of the District Court.[51]

## DRAFTING NEW YORK CITY'S NEW PANHANDLING LAW

According to the police, New York City lacked several laws that would facilitate and improve the enforcement of street order maintenance, including limits on panhandling and public drunkenness. In the absence of an enforceable panhandling law, police must use other statutes to go after the worst offenders. Generally, police say, people who panhandle also engage in criminal trespass near ATMs, or they engage in accosting, which is covered under the state's broad harassment statute. The city's quality of life initiatives, city officials say, has already led to a significant improvement in the panhandling problem. An official from the city's Law Department noted (as mentioned above) that it is already illegal, under *Young*, to panhandle on the subways.

However, a lawyer for the city explained that New York would benefit from new legislation to help combat panhandling. The need for a new panhandling ordinance was particularly great in certain areas, such as the ninth police precinct, where a lot of social service providers are located.

After the *Loper* case was decided in 1994, lawyers for the city started work on drafting a new law. The reason it took until 1996 for a draft to be ready to present to the City Council was that they wanted to be able to address with confidence all the constitutional issues that might be

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[51] *Id.* at 706.

raised. Thus, the city did a tremendous about of background research. They looked at what many other jurisdictions had done, and they also worked with the Police Department. Once a rough draft of a bill was ready it had to be approved throughout city channels. Some of the issues of concern include the size of the buffer zone outside the ATM--a 10 feet buffer zone was agreed upon.

Eventually, over three years, Mayor Giuliani and Assistant Corporation Counsel Andrea Berger, and City Council Member John Sabini shepherded through a new panhandling law to replace the state statute overturned in the Loper decision. New York's new panhandling bill ended up being similar to ordinances adopted in Seattle and Washington, D.C. Although New York's police was able, using other laws, to address the squeegee men problem, the new panhandling law would affect the squeegee men as well. The attorney for the city predicted that the law new law will eventually be challenged in court. However, to date, no suit has been filed.

The attorney for the city's Law Department added that panhandling controls, such as the new panhandling law (enacted after this interview), are not controversial with the general public. "If the aggressive panhandling law were seen as an anti-begging law it would be a big deal," but people don't see it that way. "Police are not running around harassing beggars; there has been considerable effort to educate the police to be sensitive," she explained. In her opinion, New York is getting more conservative as liberals grow up and have children. "You get tired of certain things. Why do we have to put with stuff?"

## LESSONS LEARNED FROM NEW YORK'S EXPERIENCE

New York's approach to quality of life, an official from the Criminal Justice Coordinator's Office explained, may be different from other cities in that New York's plan is a well-thought out, legally researched plan. "We are not extending beyond constitutional protections. We are just being very creative and intelligent. It makes it difficult for the ACLU and folks similarly minded to attack," the staff member said.

He added that the Coordinator's office welcomes criticism. They hold out the hope that the ACLU could become the Police Department's partner. "We have spent very little of our resources fighting political fights over crime policy and thus all of our resources are spent fighting the real fight." The real fight, he explained, is getting order back on the street, getting housing for people, getting people taken care of. The reason why these changes are here to stay is that, he said, is "nobody is going to legally undo the initiatives we have started. Hopefully the will and the money will continue to be there to pursue this fight."

The officials from the Coordinator's office offered some advice to cities who want to learn from New York, "you need baseline data on what are the issues are. You need to survey community groups, find out what community policing officers say. Not just crime statistics, but what is the perception. You need to hear from the people on what bothers them."

Cities, one official said, should also look at improving their arraignment process. An inefficient arraignment system costs the Policy Department millions of dollars in overtime

costs--and keeps officers off the street. In the past, if an officer made an arrest, he or she was gone processing the arrest for the rest of their shift, and more. However, a more efficient arraignment process, which New York developed, allows officers to make needed arrests and to get back on the street quickly.

Additionally, the Police Department in New York City must determine what the community wants and what are they willing to pay for. The Coordinator's office staff person repeated what has been said by criminologist Lawrence Sherman, "An arrest is an investment." Any city wants to make their investment's wisely. New York made the decision that the $1,000 it costs to arrest and process a squeegee man is a good investment. "We made that investment because it sets a tone, alters behavior and restores the confidence of the community," the official said.

The Coordinator's office is now focusing on maintaining the reductions in crime. "Everyone would like to drive down crime 10% a year, indefinitely. But, given the number of drug addicts, desperate people, and sociopaths, there is a limit to how far crime rates can drop," one staff member said. However, he added that the more law-abiding your population, the more time there is for officers to do detailed investigations looking for the hardcore criminals. When officers are "running around dealing with crises" there are not enough officers working specialized investigations that bring important results over the long term.

## CONCLUSION

New York's successful campaign to control street disorder has become a model for the nation. Major crime is down 39% in New York City since 1993--a remarkable achievement. By looking after the little things, New York has accomplished grand results. City officials are optimistic that even greater results could occur in the future.

According to a staff member in the Criminal Justice Coordinator's Office, the Police Department and the city government:

> ***Now has the moral authority to stand up and say, we have done a lot to make it better, now others have to chip in. People have to not give to panhandlers. Give that dollar to a local charity. Five years ago, nobody would listen. But today citizens have developed an intolerance for disorder.***

1. The Criminal Justice Coordinator's Office has been required by the city charter since 1977. Under Mayor David Dinkins, the office was headed by a Deputy Mayor for Public Safety (a retired judge served in this role). Mayor Giuliani decided that a Coordinator would better serve his needs than a Deputy Mayor for Public Safety. Among the tasks given to the Coordinator's Office in the new administration was the merger of the separate transit and housing police forces into the city's main police force. The Coordinator's Office also handled the merger of the fire department and Emergency Medical Services. The Coordinator has 38 staff people working for her, some of whom are responsible for oversight of the city's alternative incarceration program. The Criminal Justice Coordinator's Office is primarily an advisory group to the Mayor helping to coordinate interagency issues.

2. Precinct captains were expected to use computer mapping software to chart the occurrences of crimes in their precinct, focus enforcement on the areas with the greatest problems, and show measurable reductions in crime. Meetings of all the commanders of different areas every four

weeks were held to discuss the mapped criminal activity, borough by borough. Precinct commanders and other police officials were told to direct their officers by: 1) good intelligence; 2) rapid focus and coordinated deployment; 3) effective tactics; and, 4) relentless follow-up.

3. Over the last five years, the New York Police Department has grown by 7,000 officers, to a total of 38,000 officers. The increase in officers was a response to a very significant increase in crime, not an increase in the city's population. In the 1970s and early 1980s, the crime rate was slowly increasing. The need for more police, prosecutors, judges, and jails was going up at a gradual pace allowing the system to adjust accordingly. However, starting in 1984, with the rise of the crack cocaine trade, there was huge spike in the crime rate which and carried on until the early 1990s. "It caught New York City and everybody else off guard. It took a while for the system to adjust," the staff member said.

4. Warrants are often for failure to appear in court for previous arrests.

5. Police official say that they do not believe that New York's homeless were involved in serious crime. However, the police did say that sometimes criminals take cover among the homeless population.

6.New York City has a variety of homeless outreach units and a health department which has psychiatric services. The city deploys teams of police officers, doctors, and social workers that travel around, particularly in cold weather. Police have the authority to take someone who appears to be at risk when the temperature drops below 30 degrees. Officers, in this situation, usually take someone to a shelter or psychiatric evaluation center

7. The Park Police are mostly deployed during daylight hours. The Park Police have 90% of the force working during the day, just 10% at night. However, when there are specific problems occurring at night, like in Thompkins Square, the park police will put more of its people on night shifts.

8. He also explained that everyone in their department is trained to report the presence of any graffiti. "People call the graffiti hotline and within hours it will be cleaned up. Graffiti artists say that the whole point of graffiti is to see it. If it's immediately repainted, people give up and paint it somewhere else."

9. Most of the time the first encounter between a park police officer and a homeless person is a peaceful one. The officer explains that sleeping in the park is against the law and provides the individual with some options of where they could go to sleep, as well as an offer of free transportation. The park police "have to be both the carrot and the stick" the official explained.

10. Prior to the refurbishment of the park some of the homeless held rallies to protest the efforts to get them to leave. Eventually the homeless were removed. The park was sealed for nearly a year while the work was done and reopened in 1991. The shutdown helped break patterns of illicit use of the park.

11. The Midtown Community Court in Manhattan is an experimental court designed to handle misdemeanor cases only, such as disorder offenses. It also utilizes referrals to social service agencies and relies on advanced computer technology to track the offender's history and provide comprehensive information to judges, prosecutors, and defense attorneys. For more information see the National Institute of Justice report "In New York City, a Community Court and a New Legal Culture," February, 1996.

# SAN FRANCISCO CASE STUDY

## INTRODUCTION:

San Franciscans began to notice an increase in the numbers of homeless people and panhandlers in their streets around 1982-83. At first, the problem was thought to be a temporary phenomenon connected to the national economic recession. City leaders believed that, if short term housing was provided, the crisis would pass in a few years. However, it soon became clear that homelessness in San Francisco would turn out to be a long term problem.

During the Mayoral election campaign of 1992 homelessness and the behavior of "street people" became a prominent political issue. The then Mayor, Art Agnos, was criticized for tolerating a homeless encampment at the Civic Center--what became to be called "Camp Agnos." Although Mayor Agnos eventually tore the encampment down, he lost his re-election bid anyway. The new Mayor, Frank Jordan, a former police chief, had campaigned on quality-of-life issues and promised to address citizens' concerns about the homeless. The program he initiated, which included the enforcement of an array of quality-of-life laws and a variety of social services, became known as "Matrix."

## SAN FRANCISCO'S STREET DISORDER PROBLEM

San Francisco's homeless population and other "street people" were contributing to the city's appearance of disorder by sitting or sleeping on public streets and panhandling--sometimes

quite aggressively. Particularly upsetting to San Francisco citizens were the high profile homeless encampments set up right in prominent places, including City Hall and Golden Gate Park. In the heavily trafficked retail, hotel, and tourist area of the city around Market Street, there was a large concentration of panhandlers and other people sitting, lying, standing around or sleeping in the parks. Many neighborhood parks in the city were overrun with sleepers, litter, condoms, needles and human waste. The first of the month, when those on public assistance receive their monthly check, is particularly difficult because of the number of intoxicated individuals who spent their day on the street recovering from an alcohol or drug binge.

Many of the worse offenders and most aggressive panhandlers were repeatedly cited and arrested for a variety of offenses. However, the offenders faced no real penalty for violations. One SFPD officer said, "I had one guy who had been arrested for 230 felonies and, 90 misdemeanors, mostly drug related," yet did not serve any significant time in prison.

The panhandlers either use signs asking for money or verbally accost walkers by. One trend is for the panhandlers to keep animals, such as cats and dogs with them, in the hope that it will encourage pedestrians to be more generous with their spare change. For a while, several panhandlers were using children as props. There was one incident where a woman had taken children out of a daycare center to have them at her side while she was panhandling. After the father of one of these children walked by and saw his child sitting there as a prop for begging there was a lot of attention focused on this part of the problem. The result was the police targeted panhandlers use of children and largely resolved the problem.

For those homeless or street people who are addicted to alcohol or drugs, some type of treatment is generally available, but often they would not use it. According to police and others working for the city, homeless people usually do not want to go to shelters. "Unless it's very cold outside, they will walk around all night, sneak into a hotel, or lie down in an alcove somewhere," reports one community policing officer.

Another petty crime committed by the same people that are panhandling on the streets of San Francisco is fraud relating to street car or bus tickets. Some people were selling used or fake cable car tickets to tourists. Others were promising people change for their five or ten dollar bills, only then to walk away with bills in hand.

Businesses, including hotels, retail stores, and restaurants, regularly complain to police, politicians, and their own business association about panhandling. A representative of the business group explained that hotels are particularly concerned about the long-term threat posed by street disorder in front of their property. "They are in the convention business and convention organizers are coming and doing site inspections and saying I am not going to bring my people here," she said. The problem is not as serious with smaller convention groups because their conferences are usually self-contained--meaning that attendees do not have to travel from one hotel to another, or to the Convention Center.

Retail stores are generally doing well in San Francisco now. Disney and Borders opened up new stores in 1996. A Niketown store and a Virgin records and video store are scheduled to

open in 1997. However, local businesses believe tourists are minimizing their time spent walking around the retail areas. The clothing store AnnTaylor has a store in the San Francisco Center (a shopping mall) and a store several blocks away in the POLK/Union Square area. The Ann Taylor sales staff report that customers will not walk from one store to another for an item. Customers would rather have the item shipped to their home then walk the four blocks.

The primary concern of the retail industry pertaining to street people scaring off shoppers. The business group representative said:

> ***Shoppers feel guilty seeing panhandlers on the street. This is one of the largest shopping districts in the world. People come here for shopping. They feel incredibly guilty about going into a store and spending thousand dollars when there is a guy sitting on the sidewalk who wants money for a hamburger.***

Many restaurants in San Francisco not only have a street people/panhandling problem outside their store, but inside as well. The manager of a fast food restaurant in one of San Francisco's popular shopping districts explained, "I don't see us having a homeless problem, we have a panhandling problem. I don't know whether people are homeless or not, my guess is they're not." According to his observations, about half panhandlers are sober, half are drunk. He said that when the same panhandlers come into his store repeatedly, he threatens to have them arrested for trespassing. If the threat doesn't work, he would call the San Francisco Police Department (SFPD). "Problem is this guys get back on the street before the officers are done

with the paperwork," he said.

The manager said that "the bathroom is my worst nightmare." In the restaurant business, he explained, its well known that many people judge restaurants by how clean the restroom is. When he became manager, he was committed to making those bathrooms clean, but doing so is a battle which, he says he is losing. Street people use the bathroom to "shower," or to take drugs. The restaurant is currently being sued by a pregnant woman who says she was exposed to crack cocaine smoke while using the bathroom and got sick.

He like others in San Francisco with regular encounters with street people, expressed frustration with the problem. "What really burns me up," he said, is that: "These people just don't want help. They like their lifestyle."

## THE CITY'S RESPONSE: THE MATRIX PROGRAM

San Francisco's new approach to quality-of-life issues relied largely on existing laws enforced more rigorously by the police department. These newly enforced laws targeted drinking in public, urinating, littering, drunk and disorderly behavior. The city also adopted, by referendum, new ordinances aimed at aggressive panhandling and loitering near ATM machines.

One person involved in supporting the referendum observed that the mayor placed the proposed ordinances on the ballot because there was not sufficient support from the city's Board of Supervisors to get them enacted.

Within the San Francisco Police Department what is now known as the Matrix program developed as part of a broad new "systems approach" to community crime concerns. This approach called for the use of different levels of an organization to combat a specific problem. For instance, if the Mission District had a problem with people breaking into cars, instead of just having the usual patrols, the police would take extra resources, extra officers, and develop a specific plan to focus on addressing this problem.

The Matrix methodology was used by the police department to address several different crime problems, before it was focused on homelessness and street disorder. The decision by the police department to become more involved in combating quality-of-life issues was partly based on findings from surveys of the public. The police surveys found that people were concerned with panhandling, urinating in public, and garbage on the streets and similar disorder problems. The police, in response to the public's concern, focused the Matrix methodology on quality-of-life issues in particular districts. The effort, which began in the summer of 1993, was designed to employ not only components of the police department, but also the departments of public health, parking and traffic, street sweepers, and other public agencies to attack the problem and all of its components.

The Matrix quality-of-life crackdown was subsequently turned into a citywide initiative. Shortly thereafter, the term "Matrix" became identified with the city's approach to these issues and everyone used the term merely to describe the program. However, in the course of applying Matrix to quality-of-life issues, the expression "matrix enforcement" became a pejorative way for

opponents of the program to describe the city's approach.

Before the SFPD initiated enforcement in a neighborhood, the police department would flood the area with brochures in order to let everyone know what was going to happen. "Unless it is a dangerous situation we always warn first, get public health people out to talk to the street people," a police commander explained. Police often took pictures of an area prior to starting enforcement.

The officer explained that some of the places they went into were filthy. "These guys trash an area and then go on to the next place because it gets so filthy. It is true on the streets as well. If you don't go after them for staying in one specific place for four or five days, that place turns into a toilet," the commander said. He also noted that most of the street people that police officers encountered were on drugs or alcohol. "We don't run into too many that are not," he said.

Once the Matrix program began, some of the homeless advocates complained that the police could not arrest someone who is sleeping on the streets unless there is a place for that person to go. In response to this argument, the SFPD officers began carrying lists of available shelters and to arrange to take street people directly to overnight facilities. A SFPD Commander described how the conversation would go with a homeless individual:

**We would say 'you can't sleep here, but you can go to this shelter.' If they say they don't want to, we'd come back and arrest them. It was mandatory**

**for us to tell them that they would be arrested and that we had an alternative place for them to go to. We went over and above the requirements because our Chief wanted to make sure we tried everything.**

Sometimes the police would call the city's Mobile Assistance Program (MAP) to provide transportation directly to the shelters. If the person was intoxicated and wanted help with substance abuse, they would be taken to a detoxification facility. If they did not want such help, the MAP staff would take them to a shelter where they can "sleep it off." A community policing officer described the attitude of the substance abusing homeless toward treatment services as follows: "You have those who don't want it. You have those who start it and don't finish. Then you have those that go through the whole program and then turn sour, then there's a very few who go through the whole program and are cured."

One of the problems with the Matrix program that the police mentioned was the inability to get some of the city's prosecutors to aggressively go after repeat violators. "A lot of the ADAs (Assistant District Attorneys) look at some of these low level things as insignificant," one officer explained. He noted that of a suspect gets representation and decides to challenge the arrest the cost of the trial to the city is likely to be around $20,000.

Most of the police officers were not resistant to focusing on quality-of-life issues. "Our officers did it because the community was on to them for it, and the Captain would be on their as... to clean that stuff up," the SFPD commander said.

The police Commander also said that he knew that a lawsuit was likely and that the Chief had us "crossing the T's and dotting the I's." The police also knew, he said, that some of the homeless advocates were "trying to set us up. They'd have people dressed like a homeless person, and a couple of witnesses hoping we would come a long kick him in the a.. and tell 'em to get out of here." Once the lawsuit commenced, however, the Commander said it did not affect enforcement. "The problem wasn't going away. We weren't going to stop enforcing the law."

## IMPACT OF MATRIX PROGRAM

Representatives of the City Attorney's Office, the business community, and the San Francisco Police Department all believe that the Matrix program did improve quality-of-life for San Francisco residents and visitors. A lawyer with the City Attorney's Office said, "Yes, it got better, but it is a never ending battle." He warned that it is important to maintain real penalties for violators. "You don't have to give them a jail sentence, you can give them community service to clean up some of these areas, but there have to be penalties," she said.

According to most observers, there was a palpable difference in places like Market Street and Union Square due to the Matrix program. After Matrix began, encampments were removed from Golden Gate Park and the plaza outside of City Hall. The tone of the panhandlers was different. "Somehow it is gotten across that you shouldn't be aggressive. Panhandlers have adopted the 'have a nice day' approach--they are polite," a lawyer from the City Attorney's Office said.

However, observers agreed that results were more noticeable when the program first got underway. Initially, panhandlers became much less aggressive, careful to stay within the boundaries of the law. But once the panhandlers were advised by their legal advocates on precisely what they could and could not do, they started coming back in to panhandle again and to re-inhabit the same areas where they were before.

Under Matrix, violators of disorder offenses received tickets and were supposed to go to court. The citations are similar to traffic tickets. According to the City Attorney's Office, most people were not paying the $76 ticket because they were intimidated by participating in the system or because they lived so far outside the system they could not conceive of going down to the Hall of Justice and participating in a hearing, or because they could not afford pay. However, the fines were still having an impact. Many of those who received tickets got the message and did not return to areas where Matrix was enforced. If someone accumulated enough warrants and a police officer encountered them doing something wrong, they would be arrested. The offender would then sometimes be released immediately, or they would spend the night in jail and be released the next day for time served. At the time of release, the warrants were cleared.

The criticism of the entire program was that it was a revolving system; but, according to the City Attorney's Office, the same is true for prostitution enforcement. At least under Matrix, something was being done, some penalties imposed. Both city officials and local businessmen believed that Matrix was improving the city's quality-of-life.

The Manager of the fast food restaurant said that his particular restaurant's revenues were up 30% in the two yours after the Matrix program was initiated. The restaurant manager counted himself as a strong supporter of the effort. He explained, "what I really like about Mayor Jordan's Matrix program is it dealt with the behavior problem and offers help to those who want it."

During the period when Matrix was being enforced, the city (in 1994), eliminated the cable car ticket machines that were being abused by the street people. This dramatically reduced ticket fraud, but did not eliminate panhandling and loitering near the cable car stops.

The street disorder problem on and around Market Street was also improved under Matrix. According to police and local businesses, there were fewer people camping out overnight, but, still many people panhandling or selling the "homeless newspaper" during the day in the area between Union Square and Powell Street.

Although the quality-of-life of most residents of San Francisco was enhanced by Matrix, some argued that the SFPD practiced selective enforcement. The Matrix rules, argued a staff person with San Francisco's Coalition for the Homeless, were only enforced against the homeless. "There was only one case where a non-homeless person was cited for violating a Matrix ordinance. Even though by law, Union Square Park is closed at night, tourists regularly walk through undisturbed, coming from the theater, or dinner. They call that police officer's discretion."

The staffer for the Coalition for the Homeless also argued that the city's policies affecting the homeless were "politically motivated" and denied that most homeless have an alcohol or drug problem. "When tourism and shopping is your financial base, homeless people are going to be a problem," he explained.

## HOMELESS SERVICES IN SAN FRANCISCO

The city of San Francisco offers a generous array of services to the homeless. According to a business group representative who had worked in other urban communities around the country, "no other place in the U.S. has more homeless services than San Francisco."

San Francisco is required by law to provide the homeless with a cash stipend referred to as "general assistance." The state of California provides a share of the funds and the county adds to these funds. In San Francisco, the combined financial package is $345 a month, all of which is provided in cash. According to several interviewees, many of San Francisco's homeless choose to live on the street and use this money for alcohol or drugs.

To get this financial assistance a homeless individual has to declare themselves indigent and must have an income below a fixed amount set by the county. The general assistance stipend is either sent to the post office by "general delivery" or directly to a check cashing facility. Once a homeless person declares themself indigent, they receive a voucher for a free hotel stay for one week. After the regular checks begin the following week, the city encourages indigents to get a room at an SRO (single room occupancy) hotel, which costs $200 a month. About 2,000 people

use their cash assistance for SROs in San Francisco. There are approximately 15,000 on general assistance.

There was an initiative to require the general assistance payments to go directly to the landlords--which would essentially force homeless to use their stipend for housing. Such a program received majority support from the city's residents in a referendum vote. However, the city's Department of Social Services delayed implementation of the vote until extra funding could be provided for outreach and social services. To this day, the mandatory direct payment program has not gone into effect. Currently, there is a voluntary program where some general assistance recipients have a portion of their assistance go directly to pay their rent at an SRO hotel. For now, most observers assume these funds go to sustaining addictions.

Cash assistance is just one component of the city's efforts to help the homeless. San Francisco sponsors a homeless outreach program that is regarded as one of the most effective in the country, according to two experts on homelessness who served as expert witnesses for the city during the lawsuit. The homeless outreach counselors, who work closely with community policing officers, each have a portable telephone and had the authority to ascertain the availability of treatment beds and to provide transportation to the treatment centers. According to the expert witnesses, the outreach workers were dealing with 300 to 400 people on a regular basis. About 60% were in some kind of facility. The remaining 150 were living on the street somewhere and were thus the hardest for the outreach effort to help.

## OPPOSITION TO THE MATRIX PROGRAM

Although the ACLU led the law suit against the ordinance, one of their attorneys explained that they generally attempted to "focus on non-litigation approaches" such as police practices and to avoid lawsuits whenever possible." As evidence of this he described the cooperative relationship between the ACLU and Mayor Frank Jordan when Jordan was the Chief of Police. Back in 1988, the ACLU even provided some training to police on how to enforce existing laws without violating civil liberties.

The cooperative relationship between the ACLU and Frank Jordan dissolved after Chief Jordan become Mayor. "Frank Jordan was no longer a law enforcement professional, he was a politician who ran on a campaign that got elected on a theme of getting tough on the homeless," said the ACLU attorney. The natural result was the aggressive panhandling ordinance, then the ATM measure, then Matrix, then the sitting and lying on the sidewalk ordinance (which was rejected by the public), and then the closing of Golden Gate Park at night.

The ACLU strongly opposes the use of the police to manage the city's homeless problem. According to the ACLU lawyer:

> ***The idea that police is the primary institution for dealing with homelessness is another example of using the police as a dumping ground. Politicians and merchants and the public place unreasonable expectations on police. You may not like that homeless person on the sidewalk, but unless that person is***

***committing an infraction, the police officer does not have the legal power to move him along.***

The ACLU attorney states that "we were not looking to sue. In fact we had a demonstrated history of not using lawsuits to try to address these issues. It's not just a question of impact, but also of cost effectiveness." However they were reportedly angered by what they perceived as selective enforcement of the obstructing the sidewalk policy, which they believed was not being applied to all those obstructing the sidewalk. The ACLU representative explained that the extent to which the Matrix laws were enforced varied both by location and by ordinance.

The sitting ordinance, unlike the others, was from the ACLU perspective, enforced selectively against those who appeared to be homeless. "There are many people who will go to Starbucks and sit on the curb talking to friends and drinking coffee. The fact that these people are left alone shows that the police are not punishing behavior, they are punishing people because of who they are." The ACLU made a similar argument concerning the ordinance which barred panhandling near ATMs, but allegedly because the ordinance was not widely enforced, the advocacy group did not sue over it.

The ACLU also objected to police enforcement of a regulation barring camping in public. The SFPD, according to the ACLU attorney, expanded the historical definition for constructing or maintaining a structure for human habitation. Police officers, complained the attorney, were authorized to write citations for people that had nothing more than blankets out on the street. "If

they had not unilaterally expanded the definition of that section, we would not have complained about it," explained the ACLU representative. He added, "when I talk about this issue I always say that there is no doubt, poverty, visible poverty in particular, is bad for business. But none of this means we should dump this problem on police and expect them to be able to solve it."

The ACLU also objected to police enforcement of San Francisco's aggressive panhandling law. "Panhandlers," he said, "are told by the police that they cannot sit on the street silently with a sign. There is no better example of passive panhandling." Thus, the ACLU argued, even a narrowly drafted law "creates a situation for cops on the street to say, 'get out of here,' regardless of what the lawyers say." For this reason, the ACLU filed a lawsuit to overturn the law, or at least this was the reason provided to us.

Critics of the Matrix program were the homeless advocacy community and the ACLU and some charitable religious groups. The City Council also became increasingly hostile to the Matrix program and eventually passed a resolution condemning the program as unconstitutional. From the City Attorney's Office perspective, the City Council members were posturing politically, as they took no action to repeal the ordinance.

## THE LAWSUITS

The City Attorney's Office in San Francisco was responsible for defending the state panhandling law which was challenged by the ACLU. The charter of the City Attorney's Office says that, if the city is sued, or city officials are sued in their official capacity, the office has an

obligation to defend the city. In addition, the plaintiffs, even though they were not asking for damages, were asking for attorneys fees equivalent to the standard fees charged by private law firms. Thus the lawsuit had serious financial, as well as policy implications, for the city of San Francisco.

They had a very sympathetic client in Mr. Celestius Blair. Mr. Blair is an African-American who now works for the city as a bus driver. Blair is a college graduate and actually attended Hastings law school for a year or so. According to the police officers that interacted with him, Mr. Blair's behavior, once he was arrested, was perfectly polite. The fact question of whether Blair accosted someone in violation of the state law was, according to the City Attorney's Office, a tough call. A lawyer for the city suggested that the city should have had the Blair case dismissed to get a better test case. "If you are going to be prosecuting someone, you should pick a person who is worst than the standard offender, not better. It is a little time consuming, but it's worth it," the attorney for the city said.

The city's defense was initiated because Mr. Blair was arrested and filed suit challenging the state law. The city defended the constitutionality of the statute. There were two key questions to be answered by the lawsuit: 1) A question of fact: did Mr. Blair accost someone in violation of the state panhandling law; 2) A question of law: assuming that Mr. Blair committed the offense he was charged with, is the underlying law constitutional.

The plaintiffs case, from the City Attorney's Office perspective, was essentially a

"canned case." Except, explained one attorney for the city, that "because San Francisco offers so much assistance and services to street people, they had to work hard to try to show that the city doesn't care about the homeless."

The plaintiffs argued that homelessness is the result of the fact that there are more people than housing units. The City Attorney's office deposed all the plaintiffs and their experts. From the city's perspective, the plaintiffs were "not dealing with reality, they pitched their battle on their own slogans."

The plaintiffs criticized the city for not spending more on homeless services (the city says they spend $80 million a year, the plaintiffs argued that it was really only $40 million). The plaintiffs attorneys looked through city documents for statements that could be construed as anti-homeless and tried to build a case out of it. "When they looked at documents from other cities, such as Santa Ana, they may have found some genuine anti-homeless statements. But, in San Francisco, they had to comb through thousands of documents to try to paint a negative picture of the city's view of homelessness," a lawyer for the City Attorney's Office said.

**THE CITY'S ARGUMENT**

Most cities, when they are sued over street order maintenance initiatives respond by defending the community interest in safe and welcoming public spaces, and by refuting the notion that all of the street people's behavior is constitutionally protected. Most cities, though, are not like San Francisco. In the Matrix litigation the city accepted the terms of debate put forth

by the "homeless advocates." The City Attorney's Office, however, sought to refute claims that the city treated the homeless unfairly and attempted to explain that the city's Matrix program actually helped the homeless by encouraging them to seek needed and available services. According to the city, and to expert consultants they hired for the case, most of the homeless were alcoholics, drug addicts, or the mentally ill in need of treatment. Matrix, by requiring the homeless to conform to society's norms, or to accept the shelter and treatment offered by the city, was in the best interests of the homeless as well as the general public.

The city, with the help of two expert witnesses, attempted to punch a hole in the plaintiffs argument that homelessness was involuntary. The city was concerned that the public believed that anyone who was homeless would automatically accept shelter and help if it were available. The city argued that the homeless, especially in San Francisco, have options, options which they choose to reject.

A lawyer for the city said that, at first, even the City Attorney's staff thought the homeless were poor pathetic people and: "we wondered how can you possibly give them a ticket. But as we learned more about what was going on, we realized that all of those assumptions were based on a lack of knowledge." As they learned more about the real situation on the street, they became genuinely convinced that Matrix had some salutary effects for the street people themselves. Another attorney explained, "as a liberal minded person, I went through a whole cycle of learning and understanding and then starting to appreciate the program and its beneficial qualities." The conclusion they reached were the same as those reached by the downtown retail

leaders, and by the city's experts.

The city, again, with the assistance of their expert witnesses, argued that one of the positive effects of the Matrix program was motivating some of those at risk to becoming homeless to spend their meager income for housing. The expert witnesses also determined, after studying the city's neighborhoods, that the plaintiffs vastly overstated the real number of homeless in the city. The consultants concluded that the "kind of numbers used by the homeless advocates were simply outrageous." Their experiences in Chicago, Philadelphia, and elsewhere indicate that the homeless count is often exaggerated because homeless people checking in to shelters often register under different names, different spellings, and different social security numbers. This results in multiple counts of the same people.

The expert witnesses also sought to explain during the trial that, although there are some real genetic tendencies affecting alcoholism...

> **the behavior of taking a drink is voluntary. If it were involuntary, nobody would ever stop. Members of AA make that choice every day. People can stop drinking and using drugs, they may need help, but they can stop. Once they do, you can interrupt the cycle of homelessness.**

They also strongly supported pressuring street people, through Matrix, to accept alcohol

or drug treatment. They noted, "people who are forced into treatment actually have at least as good a success rate than those who go in voluntarily. It is a mistake to assume that you have to be highly motivated at the start of your treatment." They noted that the nature of substance abusers who are living on the street is such that intervention will often be necessary to get people to change their behavior:

> **It's amazing the length to which alcoholics or drug addicts will travel, on the limited resources they have, to go find drink or drugs. If you arrest someone, they may have an awakening. These are debilitated people. If they have to go very far on there own to access treatment they may not get there.**

In addition, during the trial, the experts warned about the dangers inherent in providing free food to substance abusers and the mentally ill. "Free feeding is enabling." they testified. However, they said that food could be used as an incentive to encourage the homeless to accept other needed services.[1]

Concentrated social services, they say, could have accomplished some of the goals of the Matrix Program, but law enforcement remained an important element by encouraging street substance abusers to get help. The good street cops always know the drunks in the neighborhood. "This notion that it is horrendous that police should talk to drunks or drug addicts

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[1] A social service provider in Seattle uses its meal service as a bridge to intervention. See our Seattle case study for more information.

doesn't make sense. The police/street drug relationship is as old as alcohol and police and can be very useful."

If a police officer is present when a homeless outreach worker has a conversation with a street person, there is a positive change in the nature of the interaction. The expert witnesses explained that street people understand that there is a cop standing there and therefore "act differently than they would if they were only dealing with a good-hearted social worker." Homeless people, in short, respond to authority, "even drug addicts, alcoholics and the mentally ill. If the cop is there they know they are doing bad and part of them wants to stop," they told us.

## SAN FRANCISCO LITIGATION SUMMARY

San Francisco has been involved in substantial litigation over its efforts to address urban quality-of-life measures. This litigation has surrounded both city ordinances and state laws that addresses a wide array of urban quality-of-life problems ranging from aggressive begging to urban camping to public defecation. These cases have generally been long and drawn out, and, in the end, resulted in decisions of almost no precedential value.

Early urban quality-of-life litigation in San Francisco was largely centered around the application of section 647(c ) of the California Penal Code. This provision prohibits "accost[ing] other persons in any public place or in any place open to the public for the purpose of begging or

soliciting alms."[2]

This ordinance was attacked, unsuccessfully, in *Ulmer v. Municipal Court for Oakland-Piedmont Judicial District.*[3] In *Ulmer*, a California Court of Appeal considered the state statute[4] and held that it did not impinge on First Amendment freedom because it forbids the "approach" by the beggar rather than any particularized message that the beggar may have. This distinction between speech and conduct was rejected fifteen years later when the same statute came before the Federal District Court for the Northern District of California in *Blair v. Shanahan.*[5] The federal court in *Blair* ignored the California court's ruling on the states own law.

**BLAIR v. SHANAHAN**

In *Blair*, the plaintiff was a former panhandler who alleged that section 647(c ) violated the First Amendment as it is incorporated against the states in the Fourteenth Amendment. He argued that begging was akin to charitable solicitations, which are protected by the First

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[2]Cal. Penal Code § 647(c).

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

[4]Cal. Penal Code § 647(c ).

[5]Blair v. Shanahan, 775 F. Supp. 1315 (N.D. Cal. 1991), *mot. denied* 795 F. Supp. 309 (N.D. Cal. 1992), *aff'd in part, dismissed in part, remanded* 38 F.3d 1514 (9th Cir. 1994), *cert. denied* California v. Blair 115 S. Ct. 1698 (1995), and *on remand, vacated* Blair v. Shanahan, 919 F. Supp. 1361 (N.D. Cal. 1996).

Amendment.[6]

The District Court agreed, holding that panhandling is speech protected under the First Amendment.[7] The Court criticized arguments differentiating between solicitation by organizations and by individuals on their own behalf, noting that "[n]o distinction of constitutional dimension exists between soliciting funds for oneself and for charities."[8] In a stunning confrontation with the realities of modern day street panhandling, the Court held that "[b]egging gives the speaker an opportunity to spread his views and ideas on, among other things, the way our society treats its poor and disenfranchised," and that the communication of these additional messages qualified begging as protected speech.[9]

Having held that § 647(c ) was a content-based restriction "aimed specifically at protected speech in a public forum," the Court ruled that the state statute must be "necessary to serve a compelling state interest and ...[be] narrowly drawn to achieve that end."[10] The Court accepted the *Ulmer* Court's interpretation that the purpose of the statute was "to avoid 'annoyance' to the

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[6]775 F. Supp. at 1322.

[7]*Id.* at 1324.

[8]*Id.* at 1322.

[9]*Id.* at 1322-23. It is unclear whether the trial judge would have seen the same "opportunity" in theft, assault, or publix sex.

[10]*Id.* at 1324 (*citing* Boos v. Barry, 485 U.S. 312, 321 (1988)).

public," an interest that the District Court found "hardly compelling."[11]

Not only did the *Blair* court give little or no value to the avoiding harassment or intimidation, the Court also saw a vivid expressive message in the act of begging. However, such a message was never heard by anyone who testified at trial. More importantly, no explanation was provided as to why anyone, poor or not, was in any way prohibited from conversing on the plight of the poor, the adequacy of government poverty programs, or any other subject. The California statute only prohibited a peculiarly intrusive and antisocial method of expression, one which diminishes rather than enhances any kernel of sociopolitical commentary, even if such commentary was intended.

The Court also mistakenly merged charity with begging. Because the Supreme Court rulings protecting charitable solicitations rely on the underlying policy issues inherent in such solicitation, and the charity's resulting contribution to the polity, the validity of the comparison rises or falls depending on whether there is truly a message that is being conveyed or obstructed other than "I want money." A panel of the Second Circuit Court of Appeals ruled that there was no such communications in these efforts to acost.[12]

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[11]*Id.* (*citing Ulmer*, 55 Cal.App.3d at 265, 127 Cal.Rptr. at 447). Finally, the *Blair* court held that § 647(c ) also violated the Equal Protection Clause of the Fourteenth Amendment, as the statute allowed one to accost a person for the purpose of requesting something other than money for oneself. The Court conceded that such a distinction could be valid if narrowly tailored to the achievement of a compelling end, but that in this case the state had not met its burden of proving that.

[12]Young v. New York City Transit Authority, 903 F.2d 146 (2nd Cir. 1990).

The Court issued a declaratory judgment that the state statute was unconstitutional and set a number of collateral issues for trial. A number of procedural problems, collateral to the constitutional merits of the plaintiff's claims, arose to complicate matters, including the fact that the State of California was not a party to the lawsuit and did not have an opportunity to defend the constitutionality of its own statute.[13] After numerous appeals on these collateral issues, the District Court decided that the state should be able to intervene to defend its own statute and therefore vacated its 1991 decision, thereby eliminating it as a source of legal precedent.[14]

## JOYCE v. CITY AND COUNTY OF SAN FRANCISCO

In the midst of the *Blair* litigation, San Francisco found itself in federal court again, this time to defend its "Matrix program." The Matrix program combined a wide array of city services to the homeless with a vigorous enforcement of state and local laws dealing with street order maintenance including public drinking and inebriation, obstruction of sidewalks, lodging, camping or sleeping in public parks, littering, public urination and defecation, aggressive

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[13]First, while it was a state statute under challenged, no one joined the State of California as a party and therefore it had no opportunity to defend the constitutionality of its statute, something it subsequently sought to intervene to do. Secondly, San Francisco wished to appeal the declaratory judgment, while entering into a settlement agreement with the plaintiff on the remaining issues. It then became an issue as to whether an appeal by the City was foreclosed by its settlement agreement. It took a five year journey through the federal courts to resolve these procedural matters. Blair v. Shanahan, 775 F. Supp. 1315 (N.D. Cal. 1991), *mot. denied* 795 F. Supp. 309 (N.D. Cal. 1992), *aff'd in part, dismissed in part, remanded* 38 F.3d 1514 (9th Cir. 1994), *cert. denied* California v. Blair 115 S. Ct. 1698 (1995), and *on remand, vacated* Blair v. Shanahan, 919 F. Supp. 1361 (N.D. Cal. 1996).

[14]Blair v. Shanahan, 919 F. Supp. 1361 (N.D. Cal. 1996).

components were unconstitutionally vague.[31]

The plaintiffs' affidavits also alleged that the police enforced the city's anti-camping ordinance against homeless individuals who were not actually camping as that term is defined in the ordinance. The Court noted that, if these affidavits were true, the ordinance may have been unconstitutionally enforced. However, the Court found that the city was educating its officers on the proper enforcement of the law and that the alleged violations occurred before the education had begun. Therefore, there was insufficient reason to believe that such practices would continue. As a result, granting injunctive relief would be inappropriate.[32]

The Court quickly dismissed the plaintiffs claims that several of the measures were unconstitutionally overbroad, because this doctrine only applies in cases where the First Amendment is implicated, which the court found was not the case. Similarly, the Court rejected claims of vagueness, stating that challenged provisions appeared "sufficiently specific."[33]

The plaintiffs also alleged Fourth Amendment violations by the city, alleging that city officials confiscated and destroyed the unattended personal property of homeless individuals. The Court noted that this may constitute a Fourth Amendment violation, however injunctive

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[31] *Id.* at 861.

[32] *Id.*

[33] *Id.* at 862-863.

relief was inappropriate because the city implemented new procedures whereby unattended property would be retained for ninety days to allow the owner to subsequently claim the property.[34]

As a result, the Court denied all claims for injunctive relief.[35] In a subsequent decision, the Court certified the suit against the city as a class action.[36]

## B. FINAL ORDER AND APPEAL

Later, the District Court granted the City summary judgment. The Court again reviewed the constitutional issues raised by the plaintiffs.[37] With respect to the Eighth Amendment claims, the Court refused to rule whether homelessness constituted a status for Eighth Amendment purposes because the Matrix ordinances do not punish status. Rather, the ordinances punish conduct, conduct that "even people who have no residence can control."[38]

The Court rejected the plaintiffs' equal protection challenge because homelessness is not

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[34]*Id.* at 863.

[35]*Id.* at 864.

[36]Joyce v. City and County of San Francisco, 846 F. Supp. 843, 846 (N.D. Cal. 1994)

[37]Joyce v. City and County of San Francisco, No. C-93-4149-DLJ, (N.D. Cal. Aug. 18, 1995).

[38]*Id.* at 8.

a suspect class entitled to strict scrutiny. As a result, the challenged ordinances must only survive a rational basis review.[39] The Court agreed with the city that protecting public safety and health as well as preservation of the parks for their intended purposes were all rational basises for the Matrix program. Therefore, the Equal Protection challenge failed.[40]

As to the plaintiffs' "right to travel" challenge, the Court found no differential in treatment between residents and non-residents of San Francisco and therefore rejected this claim as well.[41]

The Court also rejected the plaintiffs' due process challenges that the ordinances were unconstitutionally vague, discriminatorily enforced, or overbroad.[42] While the court agreed that not all the terms of the ordinances and regulations were "model[s] of precision," the Court found that the terms gave a sufficient degree of specificity to put people on notice as to what constituted prohibited conduct.[43] Similarly, as the First Amendment was not involved, the Court rejected the overbreadth challenge.[44]

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[39] *Id.* at 12.

[40] *Id.* at 13.

[41] *Id.* at 16.

[42] *Id.*

[43] *Id.* at 16-17.

[44] *Id.*

The plaintiffs appealed the District Court's grant of summary judgment to the Ninth Circuit. However, before the appeal could be resolved, a change of Mayoral administrations occurred in San Francisco. The new Mayor, Willie Brown, announced the discontinuation of the Matrix program and ordered the Chief of Police to discontinue its systematic enforcement.[45] As a result, the Ninth Circuit declared the case to be moot and dismissed it, vacating the decision of the District Court.[46]

## CONCLUSION

San Francisco's involvement in urban quality-of-life litigation has been long, costly, and largely irrelevant, at least in the law. Two federal district courts, *Blair* and *Joyce*, reached contrary initial decisions on urban quality-of-life issues. Both of these decisions were subsequently vacated on procedural grounds. These cases took the city years to litigate, at great expense, however procedure and politics in the end left the City with no legal precedent to show for its efforts, beyond the state court ruling in *Ulmer*, which upheld California's ban on accosting for the purpose of begging.

The lessons taken away from this litigation are not legal lessons. However, as this study makes clear, the effect of enforcement on urban commercial vitality is real. The lack of

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[45]Joyce v. City and County of San Francisco, 87 F.3d 1320 (9th Cir. 1996).

[46]*Id.*

precedent allows future city leaders to try again.

## LEGAL LESSONS LEARNED

When drafting disorder laws, the attorney advised, it's important to talk to people who have worked on legislation in other cities. "Every piece of legislation on the books was subject to some political compromise, so attorneys drafting new laws should not just look at what the legislative body passed, they should talk to those who drafted the original statute," he said.

The attorney for the city said that the City Attorney's Office should have been involved from the start of the Matrix program. "Our office knew about creation of the program, but was not really involved in giving any legal advice until the program was underway." Once Matrix was implemented, there was an immediate criticism of the program from the civil liberties community. At that point, the City Attorney's Office knew that a lawsuit was likely.

The lawyers from the City Attorney's Office who worked on the Matrix litigation said that there were several reasons why they were successful in court. One key was being aggressive in discovery to make sure they had concrete facts on which to build a case. Another was litigating the case like it was any other case, and not getting intimidated by accusations made by the advocacy community.

## POST MATRIX

Willie Brown defeated Frank Jordan in the 1996 Mayoral election. Mr. Brown had

campaigned against the Matrix program and promised to end it. When the new mayor was inaugurated there seemed to be, according to several observers, an immediate negative change on the behavior of the city's street people.

The fast food restaurant manager reported that, since the new Mayor took office, there has been "a huge increase in the number of panhandlers in the area. It almost doubled overnight. The street people were no longer intimidated by the police." He believes that the panhandlers saw the news reports and realized that they could get away with more aggressive behavior. The manager said he and his fellow businessmen do not care if Matrix gets a new name, but they are very anxious for a continued police role in controlling panhandling.

Other business leaders shared the same observation. Another business representative said that after the new mayor announced he was abandoning the Matrix program, businesses all around the area found that:

> ***People are sleeping everywhere. They are coming out of shelters. They are figuring they can get away with it now. In the shelters they have to be sober. This is their opportunity not to have to play by the rules. They know they can get back on the street and nobody is going to bug them.***

# SEATTLE CASE STUDY

## INTRODUCTION

Over the past two decades Seattle, like many other large U.S. cities, effectively decriminalized a cluster of anti-social behaviors, such as public drunkenness, sleeping or lying on the street, aggressive begging, and public urination. Although police could ticket those who committed these offenses, the city's criminal justice system was focused solely on rising violent crime. Little effort was made to create an effective punishment, or an effective deterrent, for these quality of life offenses.

However, for a variety of reasons, Seattle's street disorder began to increase around 1990. The increasing problems on the streets of Seattle's commercial districts, including areas around the city's downtown, waterfront, and University districts, attracted the attention of city officials, local politicians, business groups and community organizations. They feared that if the activities of street people were not contained, Seattle could fall prey to the inner-city blight found in many large cities. Seattle decided to fight back with new laws and a new approach to street disorder.

This case study focuses on the process of developing and enacting an ordinance to limit the use of public sidewalks for lying or sitting (referred to henceforth as the sidewalk use ordinance). The impact of the ordinance, from the perspective of the proponents and opponents

of the legislation is also discussed. However the scope of this study did not include a systematic analysis of the effect or efficiency of the ordinances. Rather, it examines the process by which Seattle managed to craft a partial solution to a controversial and difficult problem and the court's response. Other cities which attempted to address disorder problems have been derailed by poor planning, legal opposition, an unsympathetic judiciary or an impatient business community. Seattle avoided these obstacles and, as a city, reached sufficient consensus [1] to begin to solve a problem other cities have allowed to fester indefinitely.

## SEATTLE'S WORSENING STREET PEOPLE PROBLEM

Seattle is widely known as a liberal, tolerant, friendly city. Seattle each year spends around $7 million for emergency shelter and transitional housing, emergency food service, and housing-related social services. The city has been increasing its spending on services for the homeless every year. However the number of street people continued to increase, and the manner in which they conducted themselves seemed to continually deteriorate. It was more than most citizens were willing to accept.

According to staff in the city attorney's office, "By 1993 there was a perceptible increase in sheer numbers as well as increases in apparent misbehavior. More citizens were reporting unpleasant experiences in streets and parks." At the same time, the business community was

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[1] Seattle officials and community activists agreed that there is wide support for the sidewalk use ordinance. An attempt at repeal of the ordinance was rejected by referendum with 70% opposed.

experiencing an apparent decline in the economic vitality in the downtown core. The closing of a major department store signaled to other business owners the acceleration of a downtown decline and a lack of commitment to business development by the city government. Although the perceived increase in street people was obviously not the sole cause of the deteriorating business environment, local business leaders saw a connection.

Seattle residents had hopes that their city, proud home of Boeing, Microsoft, a growing trade with the Far East and the world's best coffee, could be considered among the first rank of the world's cities. However, residents feared that their city was becoming like other deteriorating cities, with, as one resident put it, "good restaurants and bad schools."

It was not just the growing numbers of homeless people which worried Seattle residents, but their changing behavior. Most Seattle citizens, up to the mid-1980s, viewed homeless people as largely harmless mentally ill people. This image was reflected by a Seattle woman who became known as the "Eddie Bauer bag lady" after appearing on the cover of *Time* magazine with several of the Department store bags. By various accounts, there were a couple score of people downtown that people saw every day. Seattle citizens did not feel threatened by "bag ladies." However, by the late 1980s, early 1990s, the bag ladies were joined on the street by a new group of street people.

Why the profile and behavior of Seattle's homeless changed is not clear. Some interviewees think the problem was aggravated by the recession in both California and Seattle in

the early 1990s, the explosion of crack cocaine use in the late 1980s, the loss of low income housing through gentrification of neighborhoods like Pioneer Square and the increased popularity of Seattle-based "grunge" music in the last few years. Others believe that the streets of Seattle became an attractive place to "hang out" and spend time on the streets. For whatever reason, according to Seattle officials, local businesses, and social service providers, Seattle's street population had become larger and more difficult for city residents and government agencies to cope with by 1993.

According to both police and the city attorney's office, court decisions had effectively decriminalized public drunkenness. Police officers could give tickets and a fine for public drunkenness, but they believed that if they arrested anyone the arrest would be dismissed by the courts. During a six-month study in 1992, Seattle's City Attorney's office discovered that 800 people had received two or more citations for drinking in public, and 89 had received six or more, but none had paid their fines. Without any credible punishment to curb their public drinking, a small group of people continually broke the law. The drinking led to other problems. According to the city attorney's office:

> ***Absolutely nothing happens. Give a guy a ticket he wads it up and throws it away. There was no accountability and no consequences for doing the things you are not supposed to do. We started thinking about street disorder issues and the need to change our laws.***

An important component of the support for the sidewalk use ordinance came from

community anti-crime groups that had earlier organized to combat open-air drug markets. These neighborhood groups had also become concerned with the number of people hanging out on the street begging for money. This concern was particularly intense in and around the University District. The University District houses Seattle Community College as well as Seattle University, and several private high schools. One community organizer observed,

> ***We've had some very aggressive panhandlers. It was frightening. Also quite a few people who were intoxicated. Lot of people walking around. Feeling on the street was a lack of civility, or any type of social control. We are very much liberal democrats here, but we also respect each others space and these people were infringing on everyone.***

In the course of getting a food voucher program up and running, neighborhood groups learned who the people panhandling on the streets were and why many of them were there. The community learned that a significant number of the panhandlers were neither homeless nor destitute and that many used their panhandling proceeds for drugs and alcohol. This firsthand knowledge helped make the imposition of limitations on the street people acceptable to the community leaders.

## CONSTRUCTIVE CONFLICT: RALLYING SUPPORT FOR A NEW APPROACH

When city officials, including the Mayor and the City Attorney, began to speak up about the disorder problems and the need to make changes, many of the homeless advocates reacted

angrily and with organized protests. Supporters of the homeless advocates marched down to University Way ("The Ave"--which is the center of the city's eclectic and lively University District) and in the process broke a few windows. The advocates increased public awareness of the problems which the legislation was designed to begin to address and, according to the city attorney's office, "gave the media exactly what they most craved--open warfare." The conflict between government officials and their supporters in the public, and the homeless advocates and their supporters made disorder a much more visible issue in Seattle's media. The public rallied in favor of legislative changes once the issue was more widely discussed, because so many Seattle residents had personal experiences with aggressive street people. People would come up to city attorney and say, I am a liberal, but...."

## DRAFTING THE ORDINANCE

Realizing that there would likely be a legal challenge to any new ordinance, the City Attorney's Office began its preparation by asking "if you were at the Supreme Court of the United States, what would you want in your record." The city would need to show what the problem was and why the remedy taken by the city council is feasible and constitutional in relationship to the problem the city was trying to solve.

The Seattle sidewalk ordinance, as drafted by the City Attorney's office, was also drafted to address the loopholes in the pedestrian interference ordinance, which required a specific intent to block people's progress down a sidewalk. The newer ordinance dropped the intent requirement and instead focused on behavior—lying or sitting down on commercial sidewalks

during business hours. Such behavior particularly affected elderly, those in wheelchairs and the blind.

Furthermore, many of those who were sitting on the sidewalk were also panhandling (and many were intoxicated), so the ordinance was also designed to limit this problem. Thus the ordinance was drafted to directly address real concerns relating to public safety and the use of city sidewalks for their intended purpose. At the same time, the ordinance was intended to alleviate a behavior that drove people with options away from these public spaces.

The ordinance was drafted in a tailored fashion, dealing with specific behaviors at specific times at specific places. From the perspective of the authors, reasonable exceptions were written in. People who want to sit in public could still do so legally in city parks or in residential districts (but not in the downtown or commercial streets).

Even in the area where the law is in effect, it is only enforceable between 7:00 a.m. and 9:00 p.m. Consequences for violating the law are relatively minor. Violators are given $20 citations like parking tickets. Only repeat offenders can be arrested.

**CITY COUNCIL SUPPORT FOR ORDINANCE:**

After drafting the ordinance the City Attorney's Office and the Chair of the City Council's Public Safety Committee agreed to hold extensive public hearings in order to build a record which fairly and in a sophisticated manner sets forth the problem and why the city's

proposed solution was both reasonable and compassionate. Ordinance proponents presumed that the judge who gets the case was going to be a liberal whose inclination would be to reject laws that are perceived as unfair to society's downtrodden.

The Chair of the Public Safety Committee had very close ties to the homeless advocates, but she had begun to believe that Seattle's citizens were ready to accept reasonable limitations on the excesses of street people.

In order to gain a better understanding of the homeless problem in Seattle, she sent out one of her assistants to do a sidewalk survey around Broadway and the University District. The limited survey found that many of the people on the street were not homeless and that many had other sources of income. Many were clearly under the influence of drugs or alcohol. The Council Member, after an analysis of the survey, was convinced that the people on the street were taking advantage of the city's generosity and that the sidewalk use ordinance was a reasonable response.

The same Council Member had previously been involved in working with community groups to enact legislation aimed at closing down crack houses. Following that success, neighborhood groups and the Council Member worked to create drug free zones near schools. The council member said:

***These were citizen activists who said we need legislative solutions not only to***

*crime issues but also quality of life/safety on the street type issues. That set up a political framework in which we could look at panhandling and aggressive street behavior with a group of citizens that are organized and had already seen that legislative solutions really make a difference.*

Seattle's city officials who were seeking allies to support their sidewalk use ordinance were quite fortunate--they were able to turn to an experienced group of community activists who already had a record of supporting legislative solutions to urban quality of life problems.

## HEARING PROCESS

All-day hearings on the proposed sidewalk use ordinance were scheduled by the city council. Those opposed to the ordinances were the organized homeless advocates, the leaders of African- American organizations concerned about police brutality, as well as a number of self-styled groups. Among the latter were one of the few active revolutionary youth communist parties in the nation.

The hearing, widely attended by local news media, was dominated by extremely loud, rude and angry demonstrators. The strategy of ordinance proponents was to "get in the record the counter-point from the thoughtful liberal or moderate position articulating the balance of interests."[2]

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[2] This reflects the view of the supporters of the ordinances, including the city attorney's office, the chair of the City Council Public Safety Committee, and the business community.

Among those testifying were senior citizens who said "we like downtown, but we don't go there anymore because of the people on the street and sidewalk." They described their actual experience of having to walk around those sitting or lying on the street. To help illustrate the problems many elderly residents had in getting around people sitting on the street, a brief amateur video was made. The six minute tapes is essentially a walking tour narrated by an 82-year-old woman. The video was made part of the record of the city council hearing and was also watched during the Ninth Circuit hearing on the ordinance.

Most of the homeless service providers were privately supportive of the sidewalk use proposal and stayed out of the debate. One, the Seattle Indian Center, was openly in favor of the ordinances (see page xx for more on their perspective). Their view was that leaving drunks in the park was "enabling behavior." Even agencies designed to address the social and treatment needs of substance abusers, they argued, have rules about minimum standards of conduct for those they serve.

Ordinance proponents also made sure that a survey of Section Eight housing residents in one development, which showed that 95% supported the ordinance, was submitted in the hearings records. The tenants that were surveyed, many of whom were formerly homeless, were upset about the noise on the street at night created by gatherings of street people.

A key to the city's success, according to ordinance proponents, was making it clear in the record that homelessness is a very complicated issue. "What usually happens," said the City

Attorney, "is a record is not made and the simple distortions of the advocates become the record which judges examine. The Council built a record of the complexity of the problem."

A variety of business people supported the sidewalk use ordinance and testified at the hearing. Many were small "mom and pop" shopkeepers who talked about having to wash off the human waste in front of their store each morning. They told the city council that disorder problems of downtown were resulting in their laying off employees. The business community was careful to explain that they were not against homeless people, just disorderly and anti-social conduct and cited their support of charities which feed and aid the homeless.

**PERSPECTIVE OF THE ACLU**

The ACLU in Seattle, which opposed the sidewalk use ordinance, told project staff that their "primary concern is that the ordinance is not attached to any wrongdoing on the individual, but affects the individual by just being in public in certain way, even if they are not blocking entrance." That is why, the ACLU suggests, the plaintiffs in the lawsuit include a political organization, a street musician, a voter register, as well as street people.

The ACLU maintained that: "these folks are engaged in activity clearly protected by the First Amendment." At the same time, they said that they "are not advocating sitting as a first amendment issue, its a due process question. They have a right to be in public and not be hassled by the government if they are not acting in a wrongful fashion." Further, the government, they argue, does not have the right to circumscribe mere being in public "because it might look bad."

The ACLU in Seattle also directly took issue with the "broken windows," approach to disorder and crime. "The broken windows metaphor dehumanizes the individual. This is what a totalitarian does when he wants to disenfranchise the individual, not on the basis of wrongful conduct, be he jew, gypsy, black."

The ACLU representative also said that generally Seattle police enforce laws fairly. However, he said that the police's argument that they need these street order maintenance laws to keep the sidewalk safe "is largely bullshit."

The ACLU also credits Seattle's city attorney's office for achieving their goals. "They did a marvelous political job building a record. They are very adroit politicians."

**PERSPECTIVE OF SEATTLE'S BUSINESS COMMUNITY:**

Seattle's business community, represented by the Downtown Improvement District, was a strong supporter of the campaign for the sidewalk use ordinance. Businesses in the commercial and tourists areas were worried about a host of disorder concerns, including people lying or sitting on the sidewalk, aggressive begging, public elimination, public drunkenness, and graffiti.

Seattle is the national headquarters of Nordstrom Department stores, which was established in Seattle in 1901. The company is currently building a new flagship store downtown. Seattle's downtown has recently opened an FAO Schwartz. Also in development is Nike Town, a Virgin records superstore, a Cineplex Odeon with 15 theaters, and a Planet

Hollywood. Nonetheless, the business community was worried about street disorder scaring customers away and putting their investment at risk.

One particular concern is the high profile Pike Street, which hosts a needle exchange program. The Downtown Improvement District reports that most of their complaints come from this block. The business people said they did not oppose the needle exchange program, but argued that it should be a housed in a facility large enough so that people do not have to wait outside on the street.

The Downtown Improvement District is involved in several initiatives to improve the appearance of their area. It provides financial support to pay for street sweepers who keep the street cleans and finance painting crews to cover up graffiti. The District also finances a "power wash" of the areas sidewalks four times a year.

They also maintain a staff of private security personnel who patrol on bicycles. The security officers encourage panhandlers to stand up or move on (as required by the ordinance). They also seek to get those people sleeping in alleyways to go to a shelter. According to District staff, their security efforts have been so successful that it has displaced some of the street people to outside the borders of the Downtown Improvement District, where street disorder is less concentrated. Local businesses are considering extending their district to address this problem.

The Downtown Improvement District Staff say that local businesses are supportive of

local hygiene centers for the homeless, with showers, bathrooms, and washing machines, as well as feeding stations which provide meals. However, as in the case with the needle exchange program, they want these sites placed and maintained in a way they would not impact upon their businesses. They argue that, if a thorough analysis is not made prior to siting these programs, the impact on the business community could be quite serious. A Downtown Improvement District staffer expressing concern over the new hygiene center, "We think they are creating a magnet for problems that lead to another Pioneer Square type situation." Although the Pioneer Square neighborhood has experienced some development of high-end housing, it still cannot shake its image as the nation's original "skid row." Its continuing problems are aggravated by the presence of fifteen public and private social-service agencies, many of them homeless shelters, in the area.

## SEATTLE INDIAN CENTER

The Seattle Indian Center is the only social service provider which has gone on record in support of the sidewalk use ordinance. It is the only social service provider to join on a brief in support of any street order maintenance ordinance.

The Center provides a host of educational and assistance programs for the homeless. They attempt to use their standing offer of free meals as a means to get street people to use their other services, and start down the road to recovery.

The program has a structured intake for any first time visitors who want a free meal. The

free meals, in turn, serve as a link to other services. The Center can serve up to 150 meals an hour. Standards of behavior and conduct are upheld. They do not take anyone who is visibly intoxicated. "We tell them to sober up and come back." says a program staff member. "For a street person to get through the intake process it requires a modicum of cooperation, knowledge, and functioning. Not everybody, regrettably, has that," he said.

The staff and board of Seattle Treatment Center was sharply criticized by some homeless advocates for their support of the sidewalk use ordinance. The executive director and Board of the Seattle Indian Center, according to a staff member, took a stand which said they, "believe in standards of decency for all people, even people in need. People should be treated with decency and return in kind. We believe in the ordinances and we believe in helping people."

**JUDICIAL DECISION**

The local chapter of the American Civil Liberties Union (ACLU) and the taxpayer-funded legal aid provider sued the city alleging that the sidewalk use ordinance was unconstitutional. The advocacy groups' clients included a self-described homeless person, a voter register, a street musician and political agitator.

The plaintiffs alleged that the sidewalk use ordinance was a violation of their free expression rights, and was an unwarranted burden on their liberty (in contravention of their "substantive due process rights." They added to their lawsuit a First Amendment challenge to the city's anti-aggressive panhandling ordinance.

The lawsuit was not successful. Although the federal district court modified the panhandling ordinance, the ordinance was upheld. The sidewalk use ordinance was also upheld. In its decision, the court cited the important community interest in safe and obstacle free sidewalks, as well as in preserving the vitality of the affected areas. These interests prevailed over whatever "communication" there was in lying or sitting down on busy sidewalks.

The plaintiffs appealed, but limited their appeal to the sidewalk use issue. A panel of the Ninth Circuit Court of Appeals affirmed. That decision begins by observing that sometimes the English language gets it right—sidewalk are for walking, not lying. The appeals court decision was openly skeptical that mere lying or sitting communicated anything, or received much First Amendment protection.

The plaintiffs did not quit. They sought an "en banc" review of the decision. The en banc panel denied that request, but did make minor changes in the underlying decision (which did not affect the constitutionality of the ordinance).

The City Attorney believed that there was a significant chance that the plaintiffs would take their case to the U.S. Supreme Court. They did not. Instead, they sued in state court, making the same constitutional rights assertions under the Washington (state) Constitution.

In the interim, Congress has curtailed the authority of federally funded legal aid programs to bring these types of lawsuits. The Seattle-based Evergreen Legal Services decided to forgo

such funding and substantially reduced its staff. As of this writing, the state courts have not invalidated the ordinance.

## LITIGATION OVERVIEW

*Roulette v. City of Seattle*

The plaintiffs in the litigation were a collection of homeless individuals, advocates for the homeless, and political and social organizations. The coalition was represented by the local legal aid chapter, Evergreen Legal Aid, and the local ACLU chapter. The coalition filed suit in federal court challenging both Seattle's ordinance against sitting or lying on sidewalks in the commercial district during the day, and the ordinance challenging Seattle's anti-aggressive panhandling statute.[3] Plaintiffs challenged the sidewalk use ordinance arguing that it violated both the substantive and procedural due process protections of the Fourteenth Amendment, as a violation of the right to travel, a violation of the First Amendment, and as a violation of the Equal Protection Clause of the Fourteenth Amendment.[4]

The Court first examined the procedural due process issue. Procedural due process requires that an ordinance sets forth clear legal standards so that citizens know how to conform with the law, and police can enforce the ordinance in a consistent and non-discriminatory manner.[5] Plaintiffs argued that the sidewalk ordinance met neither of these requirements and was

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[3]Roulette v. City of Seattle, 850 F.Supp.1442, 1444 (1994) (Hereinafter Roulette I).
[4]*Id.* at 1445.
[5]*Id.* (Citing Kolender v. Lawson, 461 U.S. 352, 357-358 (1983)).

therefore unconstitutionally vague.[6]

With respect to police enforcement, the plaintiffs argued that the ordinance gave police unfettered discretion to issue "move along" orders and that lawful activity only became a violation when police decide that there is a violation.[7] The Court rejected this argument, noting that the ordinance proscribes specific activity (i.e. lying or sitting in designated places, within a specific time frame) and delineates specific exceptions. The Court accepted the city's argument that the exceptions to the ordinance's prohibitions were sufficiently clear and understandable. Furthermore, the ordinance's requirement that police warn individuals before issuing a citation was deemed by the court (at the city's urging) to further restrict police authority rather than enhanced it.[8]

The plaintiffs also argued that citizens were not on sufficient notice because, by reading the ordinance, it is unclear whether a particular place is one where sitting or lying is prohibited.[9] The Court rejected this argument because the police were required to warn individuals that they were in violation of the ordinance before enforcing it. Furthermore, the city promised to put up signs in the affected areas.[10]

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[6]Vagueness is a standard argument used by critics of urban quality of life measures. They try to defeat these measures by insisting upon near scientific precision in the language of the legislation.

[7]*Id.* at 1445.

[8]*Id.* at 1446.

[9]*Id.*

[10]*Id.* at 1447.

Finally, plaintiffs argued that the Seattle ordinance was unconstitutionally vague because it did not delineate the amount of time between when a warning could be given and when a citation could be issued. The Court brushed this aside, noting that few laws, if any, would meet such a high specificity standard.[11]

Next, the District Court turned to the substantive due process challenge. The plaintiffs argued that the statute violated the principles of substantive due process because sitting on a sidewalk is an innocent activity that the state has no rationale basis for prohibiting. There is nothing in the text of the Constitution that gives anyone a right to lie or sit on the sidewalk. Thus, here, the plaintiffs asked the Court to recognize a new right. The Court declined, quickly dismissing this claim, citing Seattle's interests in ensuring a smooth and safe flow of pedestrian traffic, as well as its interest in the commercial vitality of the city, to be legitimate legislative ends.[12]

The Court then examined plaintiffs' argument most likely to confuse a non-lawyer. Plaintiffs argued that being sprawled out on commercial sidewalks was protected as a part of their right to travel.[13] The Court found "no merit" to the right to travel claim, pointing out that the right to travel had been traditionally used to invalidated legislation that sought to erect barriers to interstate travel or impose residency requirements to receive state benefits.[14] The

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[11] *Id.*
[12] *Id.*
[13] *Id.*
[14] *Id.*

Court determined that the Seattle ordinance did neither. Furthermore, to the extent there may be a constitutional right *not* to travel, the plaintiffs were found to be free to chose whether to stay in downtown Seattle, because the ordinance applied only to sidewalks, not to alleys or parks, both of which were available to those who wished to sit.[15]

Next, the court turned to the plaintiffs' contention that the ordinance violated the First Amendment. Here, plaintiffs argued that the ordinance violated First Amendment rights because sitting on the sidewalk can be expressive conduct and the Seattle ordinance chills and restricts their ability to engage in such conduct.[16] More specifically, the plaintiffs argued that the mere presence of a disheveled person lying on the sidewalk sends a message about the person's needs and society's failures to meet those needs.[17]

The court rejected this, finding that the ordinance addressed nothing more than physical conduct, not speech. The Court agreed with the city's observation that "it is possible to find some kernel of expression in almost every activity a person undertakes...such a kernel is not sufficient to bring the activity within the protection of the First Amendment."[18] To accept the plaintiffs' arguments, the court concluded, would be to deem every activity of a homeless person to be expressive conduct.[19]

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[15] *Id.* at 1448.
[16] *Id.*
[17] *Id.* at 1449.
[18] *Id.* (Citing City of Dallas v. Stanglin, 490 U.S. 19, 25 (1989)).
[19] *Id.* at 1449.

The plaintiffs' last argument challenging the sidewalk use ordinance was that it violated the equal protection clause of the Fourteenth Amendment by discriminating against homeless people. Plaintiffs recognized that the homeless are not recognized as "a suspect class."[20] However, they argued that no such classification is required.[21] The court rejected this claim as well, noting first that no fundamental rights were abridged by the ordinance and, furthermore, the ordinance targets conduct, not individuals.[22] The Seattle ordinance, of course, does not discriminate at all. It applies to everyone.

In addition, the Court rejected Plaintiffs challenge to Seattle's ordinance against aggressive panhandling.[23] The Court construed the statute so as to eliminate any serious possibility of either over breadth or vagueness.[24]

NINTH CIRCUIT

The Plaintiffs appealed to the Ninth Circuit. Plaintiffs only appealed the substantive due process and First Amendment aspects of the sidewalk use ordinance.[25]

The Court's conclusion was clear from the first sentence of the opinion, when Judge

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[20]A suspect class is a group of people, such as a racial minority, that has historically suffered discrimination. United States v. Carolene Products, 304 U.S. 144, n.4 (1938); Korematsu v. United States v. United States, 323 U.S. 214 (1944).

[21]*Id.* The court declined Plaintiffs' invitation to declare the homeless to be a suspect class. *Id.* at n. 9.

[22]*Id.* at 1449-1450. The Court also rejected Plaintiffs' claim that the ordinance was unfair because sidewalk cafes were not prohibited as well. *Id.*

[23]SEATTLE MUN. CODE §12A.12.015(A) (1987).

[24]*Id.* at 1451.

[25]Roulette v. City of Seattle, 97 F.3d 300, 302 (1996) (hereinafter *Roulette II*).

Kozinski stated "[t]he first step to wisdom is calling a thing by its right name. Whoever named 'parkways' and 'driveways' never got to step two; whoever named 'sidewalks' did."[26]

The plaintiffs reasserted their First Amendment argument that the ordinance was unconstitutional on its face because sitting can have expressive value, such as standing when someone enters the room, or giving a standing ovation.[27] The Court acknowledged that posture may have some expressive element, but held that it was insufficient to sustain a First Amendment challenge.[28] The court held that, in order for a facial attack on First Amendment grounds to be successful, the statute in question must be "directed narrowly and specifically at expression or conduct commonly associated with expression."[29] Because sitting on a sidewalk does not have an integral association with expression, the ordinance does not violate the First Amendment.[30]

The plaintiffs' also renewed their substantive due process claim and the argument that the ordinance was merely cover for the city's efforts to get unsightly homeless people off of the streets.[31] The Court did not reach the merits of this contention. The Court noted that a facial challenge based upon substantive due process grounds could not be successful if the ordinance would produce a constitutional result in "a large fraction of cases."[32] Given that plaintiffs

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[26]*Id.*

[27]*Id.* at 303.

[28]*Id.*

[29]*Id.* at 305 (citing City of Lakewood v. Plain Dealer Publishing Co, 486 U.S. 750, 760 (1988)).

[30]*Roulette II* 97 F.3d. at 305.

[31]*Id.*

[32]*Id.* at 306.

themselves agreed that the city could use the ordinance to prevent people from blocking passage of another, the Court had no difficulty concluding that the ordinance would be constitutional in at least a large fraction of cases and therefore a facial challenge must fail.[33]

Having rejected both of the plaintiffs' contentions, the Court upheld the Seattle ordinance as constitutional.

**EN BANC REVIEW**

Plaintiffs requested that the entire Ninth Circuit reverse the panel's decision which upheld the ordinance. The Ninth Circuit refused to reverse the holding. However, it did order some modifications to the substantive due process analysis, perhaps to temper Judge Kozinski's hostile view of such challenges. These corrections have already been incorporated in the foregoing discussion.

**ENFORCEMENT OF THE SIDEWALK USE ORDINANCE**

The city attorney's office was exceedingly cautious in initiating enforcement of the sidewalk use ordinance. It wanted to ensure that police officers would be properly trained on how they could use the law. In addition, prior to initiating enforcement, a public education program was conducted. Flyers describing the ordinance were distributed to residents, and street signs which said "No sitting zones 7 a.m-.5 p.m. or violation of law" were put up in areas where street people often congregated.

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[33] *Id.*

The city attorney's office knew that there would be an immediate facial challenge to the law and that as soon as police started citing people "as applied" challenges would be filed. The facts surrounding the first test cases were seen as directly relevant to a subsequent decision on the constitutionality of the law. As one official from the city attorney's office said, "we wanted to control our test case facts so we kept a very tight rein on the early enforcement of the ordinances." Consequently, police were instructed not to issue any tickets under the ordinance unless they received an explicit go ahead from the City Attorney's Office.

Normally, the way a citation works is a cop would observe a violation, write up a ticket, hand it to the offender, and file a copy with the court. The prosecutor does not know about the incident until he receives the court copy of the ticket. Further, the only report on the facts of the incident is what the officer writes on the back of the citation. For the crucial test cases, the prosecutors wanted to make sure the cops had used the law in a completely correct fashion. The City Attorney's Office limited the use of the ordinance by authorizing only a few officers to issue citations. This elaborate procedure was perceived to be necessary because of the near-certainty of litigation. To influence the media and reviewing courts, the city proceeded with extreme caution.

After the Ninth Circuit Court decision upholding the law, the city believed that it was on firm ground and enforcement efforts broadened. Although only around fifty $20 citations have been issued by police officers (as of 9/96), those in a position to know, including the police, the city attorney's office, local businesses, and community activists agree that enforcement of the

ordinance has significantly reduced, but not eliminated, people sitting or lying on the sidewalk during business hours.

The impact of the ordinance is due to three reasons. First, by issuing citations to the worse violators, police can administer real penalties to the repeat violators. Secondly, the ordinance has given police officers greater motivation and authority to ask those violating the ordinance to move on. Third, all the publicity about the ordinance has filtered down to street people so that they have learned how to avoid violating it. The result has been less panhandling, and fewer people sitting around in one place all day long. In short, the ordinance announced a new level of intolerance towards aggressive begging, and word got out to the panhandlers.

According to a staff member of the Downtown Improvement District, Seattle police are...

> ***...doing a pretty good job with it. We're happy with the progress. What's the goal of the ordinance? The goal of the ordinance is to reduce the activity and the impact on the quality of life of people downtown. I think they have done that. I want to give them credit. I don't measure success by number of arrests.***

The waterfront areas, downtown, the University District, and other Seattle locations that are popular with residents and tourists, have benefitted significantly from enforcement of the sidewalk use ordinance. As the Downtown Improvement Staffer indicated, "Two aggressive panhandlers can ruin a good day in a vibrant neighborhood."

## CONCLUSION

The Seattle sidewalk use ordinance could have been, and still could be, more vigorously enforced. However, the city was dealing with a new ordinance in a touchy political environment and a very litigious advocacy community. Although the police and the City Attorney's Office proceeded with slowness and caution, they did not back down. Instead, they planned out an enforcement, political, and legal strategy. The result was success in court, and success in the commercial centers of Seattle.

# CASE STUDY CONCLUSION

## CASE STUDY CONCLUSIONS

While the patterns of decided cases are reasonably clear, judges in each jurisdiction have near-total discretion to go their own way until the issues work their way up to the U.S. Supreme Court and state supreme courts. Unlike other more settled areas of the law, cities that face lawsuits must be prepared to educate and persuade judges on the reasons for disorder enforcement.

In order to better understand how communities should proceed to minimize the chances of adverse court rulings, the research team visited six cities which had either faced legal challenges, or were fashioning innovative laws and strategies in response to recent court decisions. Each visit included interviews with public officials and a wide variety of non-governmental leaders, including both supporters and critics of disorder enforcement.

*The experience of these cities offers seven lessons for those who want to be effective, within constitutional boundaries, and successful in any court challenge:*

***IMPORTANT CASES & CITES (BOX)***

***CASE STUDY MATRIX***

| *CITY* | *ISSUES* | *OUTCOME OF LITIGATION* |
|---|---|---|
| New York | Panhandling | Total begging ban rejected, prohibition on panhandling in subways upheld, new "aggressive" panhandling legislation enacted--no challenge thus far |
| Seattle | Sidewalk obstruction | City prevailed in U.S. Court of Appeals |
| Atlanta | Loitering and theft in parking lots | Judge refused preliminary injunction; case pending |
| Las Vegas | Panhandling | No panhandling litigation, hand billing limitations and t-shirt sales limitations upheld at Federal District Court. |
| Dallas | Urban Camping | City lost in District Court on sleeping; prevailed in Court of Appeals. Other city ordinances, including panhandling control, upheld. |
| San Francisco | Comprehensive Approach | City won in 9th District Court; Federal appeals court dismissed lawsuit and vacated trial court decision |

**Collaborative problem solving works — in practice and in court.** The problem solving processes that have emerged from Community Oriented Policing — gathering data, conducting a thorough analysis, identifying and consulting with all stakeholders, making decisions in a collaborative fashion — often lead to lasting solutions that do not involve controversies and court cases. *It is important to go through the steps and also to document the process*, in order to reassure a judge in the unlikely event of litigation.

**Laws Enforcement must focus on behavior, not status.** It is what people on the street do, not who they are, or what they represent, that can be regulated by cities. For example, in San Francisco, the Matrix program focused on public sleeping, public urination, prostitution, and low level drug dealing, all of which, the reviewing judge concluded, are behaviors which it is reasonable for the community to regulate. If judges perceive that a city's effort is aimed at "getting the homeless off the street," he or she may block otherwise legitimate law enforcement.

Careful analysis which focuses on problem behavior will help public officials avoid the most common political and legal pitfall: equating quality of life crimes with homelessness. In all of the case studies, police agreed that many of the disorderly persons are not homeless, and conversely, most homeless people do not engage in the behaviors that trouble their fellow citizens. To conflate the problems of homelessness and public disorder invites disapproval from the courts, and also may diminish public support for both law enforcement and the programs needed to address the many serious problems of homeless and destitute people.

**Be Prepared.** Although the odds of being sued are not great, there is nothing cities can do to eliminate the risk. If local legal advocates for the homeless vigorously oppose order maintenance, the community will end up in court. However, the chances of a city winning in court are much greater if an initiative is carefully thought through, tailored to the problem at hand and based on legal precedent. A strong factual record demonstrating the problem, careful consultation with concerned parties, and public hearings has a significant impact on the judge, especially considering the lack of controlling precedent from appellate courts. Preparing to be sued also means that older ordinances need to be updated to reflect the latest decisions. Cities that, in haste, use ordinances that overreach or are outdated, may pay a price in court.

**Offer Assistance to Disorder Offenders who *are* homeless.** Communities can obtain and hold the moral high ground by doing something extremely simple — making sure that, in the process of developing solutions, the plight of destitute people, alcoholics, drug addicts, and the untreated mentally ill is included in the definition of the "problem" to be solved. While the court decisions do not suggest that such community-wide efforts are constitutionally required, but the participants felt that it helped them maintain public support and to persuade the judges to uphold the ordinances.

**Disorder Enforcement Requires Fine Tuning to be Effective.** New standards of public conduct often take hold quickly. One city reported that the day after an aggressive panhandling ordinance was adopted, panhandlers appeared with signs announcing "Non-Aggressive Panhandler." Often a modest level of enforcement by police was sufficient to modify the behavior of street people with a minimum of arrests. Nonetheless, architects of an effective approach to street disorder must pay attention to the "back end" of the system, educating prosecutors and judges on the need for appropriate penalties for repeat offenders. Where police and offenders discover that the judiciary will not provide an effective "or else," police will eventually give up on enforcement -- formal or informal. There is a need for real penalties for violators of disorder laws, both for deterrence and to maintain police support. In this area,

community courts, such as the one in mid-town Manhattan hold tremendous promise.[1]

**Do Not Overlook the Possibilities for Partnerships With Social Service Providers.** We observed (particularly in Seattle and Dallas) that city leaders who did not stereotype the service providers and instead engaged them in the problem solving process obtained important benefits. Many of those who work with the homeless and destitute recognize the difference between homelessness and street disorder, and also fully appreciate the difference between enabling self-destructive behavior and providing real help. Those cities, like Seattle, that reach out to service providers, may find that they have an important ally when they go to court.

**Law enforcement officials are likely to face sustained demands for dealing with disorder and quality of life issues.** A common theme in conversations with residents, small business persons and civic leaders in the six cities we visited was a sense of urgency. Active, high-level efforts were under way to renew older business districts and prevent a further withdrawal of people and resources. The people involved in these efforts were convinced that effectively combating urban street disorder was essential to their success. Where new disorder enforcement had been successful, the local leaders were convinced that improved safety and security in their urban public spaces was serving as a catalyst for economic development. Word of their successes can only spur demand for similar efforts elsewhere.

## ENDNOTES

1.These courts ensure that some real penalty is applied. Although the penalties, such as a few days worth of community service, may not seem like much, it is more than what most offenders actually face (e.g., no consequences at all or unpaid citations). Conveniently, some of the community service sentences can be served in the mail room set up in the basement of the court. Another promising non-incarceration penalty is the disclosure of disorder convictions to social service providers. The providers can then deny services to those putting a burden on their communities. Such policies ensure that charitable resources go to the most deserving, and provide a deterrent to anti-social conduct.

# MODEL AGGRESSIVE PANHANDLING ORDINANCE :

Prohibition against certain forms of aggressive solicitation.

Section 1. **Definitions**

For purpose of this section:

A. "Aggressive manner" shall mean:

1. Approaching or speaking to a person, or following a person before, during or after soliciting if that conduct is intended or is likely to cause a reasonable person to fear bodily harm to oneself or to another, or damage to or loss of property or otherwise be intimidated into giving money or other thing of value;
2. Continuing to solicit from a person after the person has given a negative response to such soliciting;
3. Intentionally touching or causing physical contact with another person without that person's consent in the course of soliciting;
4. Intentionally blocking or interfering with the safe or free passage of a pedestrian or vehicle by any means, including unreasonably causing a pedestrian or vehicle operator to take evasive action to avoid physical contact;
5. Using violent or threatening gestures toward a person solicited;
6. Following the person being solicited, with the intent of asking that person for money or other things of value;
7. Speaking in a volume unreasonably loud under the circumstances;
8. Soliciting money from anyone who is waiting in line for entry to a building or for another purpose.

B. "Soliciting" shall mean asking for money or objects of value, with the intention that the money or object be transferred at that time, and at that place. Soliciting shall include using the spoken, written, or printed word, bodily gestures, signs, or other means with the purpose of obtaining an immediate donation of money or other thing of value or soliciting the sale of goods or services.

C. "Public place" shall mean a place where a governmental entity has title, to which the public or a substantial group of persons has access, including but not limited to any street, highway, parking lot, plaza, transportation facility, school, place of amusement, park, or playground.

D. "Financial Institution" shall mean any banking corporation, credit union, or foreign exchange office as defined in Section _____ of the state code.

E. "Check cashing business" shall mean any person duly licensed by the superintendent of banks to engage in the business of cashing checks, drafts or money orders for consideration pursuant to Section _____ of the {state banking law}.

F. "Automated teller machine" shall mean a device, linked to a financial institution's account records, which is able to carry out transactions, including, but not limited to: account transfers, deposits, cash withdrawals, balance inquiries, and mortgage and loan payments.

G. "Automated teller machine facility" shall mean the area comprised of one or more automatic teller machines, and any adjacent space which is made available to banking customers after regular banking hours.

Section 2. **Prohibited acts**

A. No person shall solicit in an aggressive manner in any public place.

B. No person shall solicit on private or residential property without permission from the owner or other person lawfully in possession of such property.

C. No person shall solicit within twenty feet of public toilets.

D. No person shall solicit within twenty feet of any entrance or exit of any financial institution or check cashing business or within twenty feet of any automated teller machine without the consent of the owner of the property or another person legally in possession of such facilities. Provided, however, that when an automated teller machine is located within an automated teller machine facility, such distance shall be measured from the entrance or exit of the facility.

E. No person shall solicit an operator or other occupant of a motor vehicle while such vehicle is located on any street, for the purpose of performing or offering to perform a service in connection with such vehicle or otherwise soliciting the sale of goods or services. Provided, however, that this paragraph shall not apply to services rendered in connection with emergency repairs requested by the operator or passenger of such vehicle.

F. No person shall solicit from any operator or occupant of a motor vehicle on a public street in exchange for blocking, occupying, or reserving a public parking space, or directing the operator or occupant to a public parking space.

G. No person shall solicit while under the influence of alcohol or a controlled substance.

H. No person shall solicit by stating that funds are needed to meet a specific need, when the solicitor has the funds to meet that need, does not intend to use funds to meet that need, or does not have that need.

I. No person shall solicit in any public transportation vehicle; or at any bus, train, or subway station or stop or in any public parking lot or structure.

J. No person shall solicit in a group of two or more persons.

K. No person shall solicit within six feet of an entrance to a building.

L. No person shall solicit within twenty feet of any valid vendor location [as defined in Section XYZ of the city code].

M. No person shall solicit within twenty feet of any pay telephone, provided that when a pay telephone is located within a telephone booth or other facility, such distance shall be measured from the entrance or exit of the telephone booth or facility.

Section 3. **Penalties**

Any violation of the provisions of this ordinance constitutes a misdemeanor punishable by imprisonment for not more than thirty days or by a fine not to exceed five hundred dollars, or by both.

Section 4. **Severance**

If any section, sentence, clause, or phrase of this Ordinance is held invalid or unconstitutional by any court of competent jurisdiction, it shall in no way affect the validity of any remaining portions of this ordinance.

# MODEL "URBAN CAMPING" ORDINANCE:

Section 1. **Encampment**

A. No person shall camp in any public park, street, or place; except in areas specifically designated for such use, or specifically authorized by permit.

B. Definitions

For purposes of this ordinance

1. "Camp" shall mean residing in or using a public park, street, or place for living accommodation purposes: including, but not limited to, activities such as erecting tents (unless specifically designated for such use) or any structure providing shelter, making preparations to sleep, storing person belongings, starting a fire, regularly cooking or preparing meals, or living in a parked vehicle.
2. "Making preparations to sleep" shall include, but is not limited to, laying down bedding for the purpose of sleeping.
3. "Personal belongings" shall include, but are not limited to, clothing, sleeping bags, bedrolls, luggage, backpacks, kitchen utensils, cookware, and similar materials.
4. "Public park" includes all municipal parks, playgrounds, and beaches.
5. "Public street" includes all public streets and highways, public sidewalks, public benches, and public parking lots.
6. "Public place" includes public plazas, transportation facilities, schools, attractions, monuments, and any improved or unimproved public area.

Section 2. **Penalties**

A. Except as provided in Subsection B, any person who violates Section 1 shall be guilty of a civil violation.

B. Any person who violates Section 1 and has previously violated that Section within the past two years, or has failed to appear as directed when served with a citation and notice to appear for a violation of Section 1, is guilty of a misdemeanor.

Section 3. **Severability**

If any section, sentence, clause, or phrase of this Ordinance is held invalid or unconstitutional by any court of competent jurisdiction, it shall in no way affect the validity of any remaining portions of this Ordinance.

# MODEL JUVENILE CURFEW ORDINANCE:

Section 1. **Definitions.**

For purpose of this section:

A. "Curfew hours" shall mean: 11:00 p.m. on any Sunday, Monday, Tuesday, Wednesday, or Thursday, until 5:00 a.m. on the following day, and from 12:01 a.m. until 5:00 a.m. on any Friday, Saturday or Sunday.

B. "Emergency" means an unforseen combination of circumstances or the resulting state that calls for immediate action. The term "emergency' includes, but is not limited to, a fire, a natural disaster, an automobile accident, or any situation that requires immediate action to prevent serious bodily injury or loss of life.

C. "Establishment" means any privately-owned place of business to which the public is invited, including, but not limited to, any place of amusement or entertainment.

D. "Guardian" means a person who, under court order, is the guardian of the person of a minor or a public or private agency with whom a minor has been placed by a court.

E. "Minor" means any person under the age of 17 years, but does not include a judicially emancipated minor or a married minor.

F. "Narcotic trafficking" means the act of engaging in any prohibited activity related to narcotic drugs or controlled substances.

G. "Parent" means a natural parent, adoptive parent or step-parent, or any person who has legal custody by court order or marriage, or any person who is authorized by the natural parent or guardian to be a caretaker for the child.

H. "Public place" means any place to which the public, or a substantial group of the public, has access, and including, but is not limited to, streets, buildings, transport facilities, and shops.

I. "Remain" means to linger or stay or fail to leave the premises when requested to do so by a police officer or the owner, operator, or other person in control of the premises.

Section 2. **Purpose.**

A. Due to the fact that persons under the age of 17 years are particularly susceptible,

because of their lack of maturity, judgment, and experience, to participate in unlawful and gang-related activities and to be the victims of older perpetrators of crime; and

B. Because the city has an obligation to provide for the protection of minors from each other and from other persons, for the enforcement of parental control over, and responsibility for, children, for the protection of the general public, and for the reduction of the incidence of juvenile criminal activities; and

C. Because a curfew for those under the age of 17 years will be in the interest of the public health, safety, and general welfare and will help to attain these objectives and to diminish the undesirable impact of criminal conduct on the citizens of _____;

D. The city of _____ determines that passage of a curfew law will protect the welfare of minors by:

1. Reducing the likelihood that minors will be the victims of criminal acts during the curfew hours;
2 Reducing the likelihood that minors will become involved in criminal acts or exposed to narcotics trafficking during the curfew hours; and
3 Aiding parents or guardians in carrying out their responsibility to exercise reasonable supervision of minors entrusted to their care.

Section 3. **Curfew authority; defenses; enforcement and penalties.**

A. A minor commits an offense if he or she remains in any public place or on the premises of any establishment within the designated curfew hours.

B. A parent or guardian of a minor commits an offense if he or she knowingly permits, or by insufficient control allows, the minor to remain in any public place or on the premises of any establishment within _____during the curfew hours.

C. It is a defense to prosecution under this chapter that the minor was:

1. Accompanied by the minor's parent or guardian, or another adult supervising the minor with the parent guardian's knowledge and consent;
2. On an errand at the direction of the minor's parent or guardian, without any detour or stop;
3. In a motor vehicle, train, or bus involved in lawful interstate or intrastate travel;

4. Engaged in an employment activity or going to, or returning home from,

an employment activity, without any detour or stop;

5. Involved in an emergency;
6. On the sidewalk that abuts the minor's residence or that abuts the residence of a next-door neighbor if the neighbor did not complain to the Police Department about the minor's presence.
7. In attendance at an official school, religious, or other recreational activity sponsored by the city, a civic organization, or another similar entity that takes responsibility for the minor, or going to, or returning home from, without any detour or stop, an official school, religious, or other recreational activity supervised by adults and sponsored by the city, a civic organization, or another similar entity that takes responsibility for the minor.
8. Exercising First Amendment rights protected by the United States Constitution, including free exercise of religion, freedom of speech, and the right of assembly.

D. Before taking any enforcement action under this section, a police officer shall ask the apparent offender's age and reason for being in the public place. The officer shall not issue a citation or make an arrest under this section unless the officer reasonably believes that an offense has occurred and that, based on any response and other circumstances, no recognized defense is proferred or is present.

E. If a police officer determines that a minor is committing a curfew offense, the police officer shall take the minor to the nearest available police headquarters or substation or other area designated by the police department.

F. A minor who violates this section shall be detained by the police department at the nearest available police headquarters, substation, or other area designated by the police department and released into the custody of the minor's parent, guardian, or an adult person acting in loco parentis with respect to the minor. A minor who is released to a person acting in loco parentis with respect to the minor shall not be taken into custody for violation of this chapter while returning home with the custodian. If no one claims responsibility for the minor, the minor may be taken to the minor's residence or placed in the custody of the appropriate official at the Family Services Administration of the Department of Human Services and, subsequently, released at 5:00 a.m. the following morning.

G. Any adult who violates a provision of this chapter is guilty of a separate offense for each day, or part of a day, during which the violation is committed, continued, or permitted. Each offense, upon conviction, is punishable by a fine not to exceed $500 or community service.

H. Parents or persons in loco parentis of the minor may, upon each conviction for violating this chapter, be required to complete parenting classes.

I. A minor adjudicated of a violation of this chapter may be ordered by the court to perform community service of up to 50 hours for each violation.

Section 4. **Severance**

If any section, sentence, clause, or phrase of this Ordinance is held invalid or unconstitutional by any court of competent jurisdiction, it shall in no way affect the validity of any remaining portions of this ordinance.

# MODEL ANTI-EXCESSIVE NOISE ORDINANCE:

Section 1. It shall be unlawful for any person to willfully disturb any neighborhood or business in the City by making or continuing noise that is unreasonably loud under the circumstances.

Section 2. It shall further be unlawful for any person to willfully disturb any neighborhood or business within the City by causing noise that is unreasonably loud under the circumstances to emanate from either a moving or a stationary vehicle.

Section 3. Law enforcement officials shall issue at least one warning prior to the enforcement of Sections 1 or 2 of this Ordinance.

Section 4. Violation of this ordinance is punishable by a $75 fine. Violators of this ordinance are subject to a fine not to exceed $300 and up to ten days in jail if the violation is within 30 days of prior infraction of this ordinance.

# MODEL SIDEWALK USE ORDINANCE:

Section 1. **Statement of Legislative Intent.**

A. Public sidewalks in business districts are created and maintained for the primary purposes of enabling pedestrians to safely and efficiently move about from place to place, facilitating deliveries of goods and services, and providing potential customers with convenient access to goods and services.

B. During normal business hours, the public sidewalks in downtown and neighborhood commercial areas are prone to congestion, and should be kept available to serve these primary purposes.

C. Except in places provided therefor or where reasonably necessary, sitting or lying on the public sidewalks in downtown and neighborhood commercial areas during the hours of greatest congestion interferes with the primary purposes of the public sidewalks, threatens public safety, and damages the public welfare.

D. Pedestrians, particularly the elderly, disabled, or vision-impaired, are put at increased risk when they must see and navigate around individuals sitting or lying upon the public sidewalk.

E. The public welfare is promoted by economically healthy downtown and neighborhood commercial areas which attract people to shop, work, and recreate. These areas provide easily-accessible goods and services, employment opportunities, and tax revenues necessary to support essential public services, and the economic productivity necessary to maintain and improve property within these areas.

F. The accessibility of public sidewalks is a vital component needed to keep commercial areas as the community meeting place, fostering community life, interaction, and integration.

G. In some circumstances people sitting or lying on the sidewalks deter many members of the public from frequenting those areas, which contributes to undermining the essential economic viability of those areas. Business failures and relocations can cause vacant storefronts which contribute to a spiral of deterioration and blight which harms the public health, safety, and welfare and can lead to crimes against persons and property. An important factor in protecting public safety is attracting people to the streets and sidewalks of the City's business districts, because the presence of many law abiding citizens serves as a deterrent to crime and increases the public's sense of security and the safety of all.

H. There are numerous other places within the downtown and neighborhood

commercial areas where sitting or lying down can be accommodated without unduly interfering with the safe flow of pedestrian traffic, impairing commercial activity, threatening public safety or harming the public welfare. These other places include city parks and plazas, alleyways, private plazas, arcades, and common areas open to the public, and generally on private property with the permission of the property owner. In addition, public sidewalks outside the designated hours and designated areas are available for sitting or lying down. Therefore, the limited regulation of sitting or lying down on sidewalks is both reasonably necessary and appropriately balances the public interest and individual rights.

Section 2. **Sitting or lying on public sidewalks in downtown and neighborhood commercial zones.**

A. **Prohibition.** No person shall sit or lie down upon a public sidewalk, or upon a blanket, chair, stool, or any other object placed upon a public sidewalk, during the hours between 7:00 a.m. and 9:00 p.m. in the following zones:

1. The Downtown Zone, defined as the area bounded by . . . [to be set by City Council]
2. Neighborhood Commercial Zones, defined as areas zoned as . . . [to be set by City Council]

B. **Exceptions.** The prohibition in Subsection A shall not apply to any person, or persons:

1. Sitting or lying down on a public sidewalk due to a medical emergency;
2. Who, as the result of a disability, utilizes a wheelchair, walker, or similar device to move about the public sidewalk.
3. Operating or patronizing a commercial establishment conducted on the public sidewalk pursuant to a street use permit; or a person participating in or attending a parade, festival, performance, rally, demonstration, meeting, or similar event conducted on public sidewalk pursuant to a street use or other applicable permit.
4. Sitting on a chair or bench located on the public sidewalk which is supplied by a public agency or by the abutting private property owner; or
5. Sitting on a public sidewalk within a bus stop zone while waiting for public or private transportation.

Nothing in any of these exceptions shall be construed to permit any conduct which is prohibited by any other unmentioned city ordinances.

C. No person shall be cited under this section unless the person engages in conduct prohibited by this section after having been notified by a law enforcement officer

that the conduct violates this section.

Section 3. **Penalties**

Any violation of the provisions of this ordinance constitutes a civil infraction and subjects the offender to a fifty dollar fine or an equivalent amount of community service to be determined by a court of competent jurisdiction.

Section 4. **Severance.**

If any section, sentence, clause, or phrase of this Ordinance and/or its application to any person or circumstance is held invalid or unconstitutional by any court of competent jurisdiction, it shall in no way affect the validity of any remaining portions of this Ordinance.