Enforcement of Aggressive Panhandling and Local Camping and Sleeping Ordinances

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ENFORCEMENT OF AGGRESSIVE PANHANDLING AND CAMPING AND SLEEPING ORDINANCES

I. Introduction

Homelessness and transiency are complex problem faced by many cities in California. Managing both the needs of homeless individuals and the secondary effects associated with homelessness and transiency can involve navigating a variety of legal issues. This paper aims to identify and evaluate some of the legal tools available to cities to address some of the nuisance conditions and conduct often associated with transient or homeless individuals.

A. Homeless Statistics

Federal law defines the term "homeless individual" to include:

1. An individual who lacks a fixed, regular and adequate nighttime residence; and

2. An individual who has a primary nighttime residence that is:

(A) a supervised publicly or privately operated shelter designed to provide temporary living accommodations (including welfare hotels, congregate shelters, and transitional housing for the mentally ill);

(B) an institution that provides a temporary residence for individuals intended to be institutionalized; or

(C) a public or private place not designed for, or ordinarily used as, a regular sleeping accommodation for human beings.[1]

On any given night in the United States, approximately 633,782 persons are considered homeless individuals.[2] One third of these are unsheltered and staying in places not meant for human habitation. Many of these are families.

The statistics below come from the 2012 update of the United States Interagency Council on Homelessness:

> Just under half of all persons experiencing homelessness at a single point in time (46 percent) reside in four States: California, Florida, Texas, and New York (see Table 4). Together these four States

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[1] 42 U.S.C. §11302(a).

[2] Source: "The 2012 Point in Time Estimates of Homelessness," U.S. Department of Housing & Community Development, Office of Community Planning & Development, 2012.

represent just 33 percent of the overall U.S. population.[6] In three of these States (CA, FL, and TX), the percentage of home less persons who were unsheltered is significantly higher than the national average of 38 percent.

The Concentration of Homelessness in the United States (2012)

State	Sheltered		Unsheltered		Total
California	45,890	(35%)	85,008	(65%)	130,898
Florida	19,832	(36%)	35,338	(64%)	55,170
New York*	65,482	(94%)	4,084	(6%)	69,566
Texas	17,501	(51%)	16,551	(49%)	34,052
					289,686

Source: U.S. Department of Housing and Urban Development, 2012 Point In Time Count, http://www.hudhre.info/index.cfm?do=viewHomelessRpts

Note:
New York City accounts for 81 percent of the homeless population in the State of New York.

Unlike other States, New York's Legal Right to Shelter (based on a 1979 class action lawsuit against New York City and State) ensures greater availability of local and State resources; consequently there is a low proportion of unsheltered versus sheltered persons

Recent trends have seen a decrease in the number of homeless individuals and families. Since 2007, homelessness on any given night has decreased 5.7%. The percentage of persons who are unsheltered has also declined by 13.1%. More importantly, the number of homeless families has declined by 8%, such that 6,778 family households are considered homeless on any given night.

Despite recent decreases in homeless individuals and families, cities continue to grapple with the secondary impacts, both real and perceived, of homelessness and transiency. Much of the literature regarding secondary effects cite to a U.S Department of Justice, Office of Community Oriented Policing Services (2003) publication, which concludes that

> " Contrary to common belief, panhandlers and homeless people are not necessarily one and the same. Many studies have found that only a small percentage of homeless people panhandle, and only a small percentage of panhandlers are homeless."

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> Most panhandlers are not interested in regular employment, particularly not minimum-wage labor, which many believe would scarcely be more profitable than panhandling. Some panhandlers' refusal to look for regular employment is better explained by their unwillingness or inability to commit to regular work hours, often because of substance abuse problems. Some panhandlers buy food with the money they receive, because they dislike the food served in shelters and soup kitchens.[3]

While the report cited is now a decade old, and the data on which it relies even more dated, the perception of accuracy and the sentiment reflected are often repeated, in literature on the issue , as a matter of public perception, and among law enforcement personnel called on to address secondary effects of transiency, such as aggressive panhandling, public intoxication and public urination and defecation and agrressive or assaultive behaviors. These concerns about health, sanitation, aesthetics and access to parks and other public property, and antisocial behavior have led many cities to adopt laws that criminalize typical homeless or transient activities such as panhandling and sleeping and storing personal belongings in public places. Those actions have, in turn, generated legal challenges to the regulatory approaches that require careful attention by cities attempting to navigate this difficult terrain.

B. Brief Discussion of the Homeless and Transiency Problem

Homelessness is a broad social problem, with myriad root causes, generating widely divergent perspectives on the best means by which to address the problems that cause individuals and families to experience homelessness, as well as the impacts of homelessness on communities and their residents, businesses and economies. Congress passed and the President signed legislation, the Helping Families Save Their Homes Act of 2009, which requires the United States Interagency Council on Homelessness to devise resources and a comprehensive strategic plan to end homelessness that can be used by cities around the country to begin to address homelessness and its impacts on individuals, families and communities in the most effective manner. In the meantime, it is clear that California cities are disproportionately impacted by homelessness and the needs and impacts of homeless residents and those cities are at an extreme resource

[3] Scott, Michael S, U.S. Department of Justice, Office of Community Oriented Policing Services: Problem-Oriented Guides for Police –Panhandling, Problem-Specific Guides Series No. 13 (2003), citing to: Ellickson, R. (1996). "Controlling Chronic Misconduct in City Spaces: Of Panhandlers, Skid Rows and Public-Space Zoning." Yale Law Journal 105(5):1165–1248; Teir, R. (1998). "Restoring Order in Urban Public Spaces." Texas Review of Law & Politics 2:256–291; Goldstein, B. (1993). "Panhandlers at Yale: A Case Study in the Limits of Law." Indiana Law Review 27(2):295–359; Manning, N. (2000). "The Make-It-Count Scheme: A Partnership Response to Begging in Stoke-on-Trent City Centre." Problem-Solving Quarterly 13(3):5–8.

disadvantage in addressing the problems in any comprehensive way.

C. Manifestation as Aggressive Panhandling & Camping

From the perspective of many local agency elected officials, and their city attorneys, the issues of panhandling and anti- camping, whether in vehicles on the public streets or outdoors in other public places, often present themselves in the form of complaints about adverse impacts and demands that the city "do something". Because cities, especially smaller cities, generally are not social service providers and lack resources to provide broader services to address the root causes of homelessness, cities are often called upon to exercise their police power in the form of enforcement against adverse impacts associated with camping and panhandling. The list of complaints come from residents, business owners and tourists who complain of uncivil, aggressive and even assaultive and criminal behavior exhibited by some panhandlers and/or homeless individuals occupying public and private spaces.

D. Discussion of Paper

This paper does not attempt to summarize, compile or provide commentary on the desirability, implementation or effectiveness of multidisciplinary policy and social approaches to address homelessness, although links to useful resources that do are provided at the end of this paper. Rather, this paper focuses on the tools most often used to address the impacts often associated with transient or homeless individuals, including panhandling and camping in public spaces and the potential legal pitfalls that have been associated with such approaches. The effectiveness of those tools in isolation from other broader-ranging social and economic policy considerations is an expansive topic beyond the reach of this presentation.

II. Anti-Camping Ordinances

Anti-camping ordinances typically proscribe sitting, sleeping, lying or camping on public property. Some also prohibit the storage of personal property on public property. In California, such ordinances have been upheld as constitutional under both the United States and California Constitutions.

A. State of the Law

Tobe v. City of Santa Ana, 9 Cal.4th 1069 (1995)

Perhaps the most recognized California case regarding the constitutionality of "anti-camping" ordinances is *Tobe v. City of Santa Ana*. In that case, various homeless persons and taxpayers sought to prohibit enforcement of a Santa Ana ordinance banning "camping" and storage of personal property in designated public areas (such as streets, public parking lots, parks, etc.) Plaintiffs presented evidence that the ordinance was the culmination of a four year "campaign" by the City to expel homeless

persons and contended that the ordinance was unconstitutional both facially and as applied to the specific plaintiffs. The California Supreme Court refused to entertain an "as applied" challenge to the ordinance because none of the plaintiffs showed an impermissible means of enforcement as against any of them. Therefore, the Court's review was limited to the ordinance's facial constitutionality.

The Court found that the ordinance did not violate Federal and State constitutional rights of interstate or intrastate travel because "[a]n ordinance that bans camping and storing personal possessions on public property does not directly impede the right to travel . . . . The right to travel does not. . . endow citizens with a 'right to live or stay where one will.'" *Tobe,* at 1103.[4]

The Court further found the ordinance did not constitute "cruel and unusual punishment because the ordinance punished prescribed acts, not the status of being homeless. The Court analogized to *Robinson v. California,* a case decided by the United States Supreme Court which stated that while one cannot be punished for the status of being a drug addict, one can be punished for possessing or using drugs. The *Tobe* Court also held that the ordinance was not unconstitutionally vague since the terms "camping" and "storage" had clearly understandable meanings. Finally, the Court held that the ordinance was not overbroad or discriminatory because: (1) adoption of the ordinance was within the City's police power; (2) there is no fundamental right to camp on public property; (3) the ordinance was rationally related to the City's stated purpose of maintaining clean streets and public property; (4) the homeless are not a "suspect class;" and (5) there was no evidence that the ordinance was invidiously discriminatory on its face.

In re Eichorn, 69 Cal.App.4th 382 (1998)

Subsequent to *Tobe* a California appellate court did review the Santa Ana ordinance in light of an "as applied" challenge. Recall that the *Tobe* Court refused to consider an "as applied" challenge to the Santa Ana "anti-camping" ordinance. In *In re Eichorn*, Mr. Eichorn was cited for violating the same Santa Ana ordinance addressed in *Tobe*. While acknowledging the ordinance's facial constitutionality, the Court held that it may be unconstitutionally applied as to certain homeless persons if they are not allowed to assert a "necessity" defense to a criminal prosecution. The Court reasoned that if a homeless person truly has nowhere to go, it would violate constitutional rights

[4] The Court further noted that an "as applied" challenge on the right to travel may not succeed either because "the creation or recognition of a constitutional right does not impose on a state or governmental subdivision the obligation to provide its citizens with the means to enjoy that right. Santa Ana has no constitutional obligation to make accommodations on or in public property available to the transient homeless to facilitate their exercise of the right to travel." *Id.*

to punish that person for merely trying to sleep, eat and survive.[5] Therefore, the Court ruled that the ordinance will only survive an "as applied" constitutional challenge if a homeless defendant is allowed to present a "necessity" defense. The end result of this case is that if a homeless person truly has nowhere to go, and is forced to sleep, camp, eat, or carry out other life functions outdoors in violation of ordinance, the City cannot convict that person of a violation. Either the homeless person will be found not guilty by necessity or, if a local court refuses to allow a necessity defense to be presented, the ordinance will be considered unconstitutional as applied to that homeless defendant. This is the only case of its kind in California and could have a significant impact on the ability of cities to enforce "anti-camping" and "anti-sleeping" ordinances where there is truly a shortage of available shelter space for homeless persons.

Jones v. City of Los Angeles, 444 F.3d 1118 (9th Cir. 2006)

A more recent example of an "as applied" challenge to an anti-camping ordinance is *Jones v. City of Los Angeles,* 444 F.3d 1118 (9th Cir. 2006), which, although vacated by *Jones v. City of Los Angeles,* 505 F.3d 1006 (9th Cir. 2007), still offers significant guidance on the issue of necessity defenses. In *Jones*, the court held that "the Eighth Amendment prohibits [a city] from punishing involuntary sitting, lying, or sleeping on public sidewalks that is an unavoidable consequence of being human and homeless without shelter in [that city]." (*Jones*, *supra*, 505 F.3d at 1138.) Some courts have subsequently found *Jones* to be "highly persuasive", thereby ensuring its continuing relevance to the issue of anti-camping ordinances today. (See *Lehr v. City of Sacramento,* 624 F. Supp. 2d 1218, 1226 (E.D. Cal. 2009), Following the holding in *Jones*, and holding it would be improper for a city to punish an individual for camping in public where there is no local shelter available.)

More recently, the specter of *Jones* was raised again in a decision regarding an anti-camping ordinance in Boise, Idaho. In *Bell v. City of Boise*, the Ninth Circuit found that several homeless individuals had standing to sue the City of Boise and that their claims under the Eighth Amendment were not moot as a matter of law. (*Bell v. City of Boise* 709 F.3d 890, 897 (9th Cir. 2013) .) The trial court in that case had recognized that a legal basis existed for the claims of the homeless plaintiffs but dismissed their claims as moot as a result of the adoption of a "special order" by the Chief of Police. That "special order" was intended to guide officers in the enforcement of the ordinance and generally provided that no enforcement would take place when shelters were full. (*Id.* at 895.) The Ninth Circuit seemed to accept the reasoning of *Jones* by focusing on whether the homelessness was unavoidable. (*Id.*) It concluded that the claims of the homeless persons were not moot because a special order by the Chief of Police did not foreclose any reasonable expectations of recurrence of the allegedly unconstitutional

[5] In *Tobe*, the Santa Ana City Attorney assured the Supreme Court that "a necessity defense might be available to 'truly homeless' persons and that prosecutorial discretion would be exercised." *Eichorn*, at 388. The *Eichorn* Court appears to be holding the City Attorney to this promise.

enforcement of the Ordinances. (*Id.* at 901.) *Bell* also suggests that non-binding administrative orders may be insufficient to save an ordinance from an "as applied" challenge. . (*Id.* at 901.)

B. Summary of the Current State of Anti-Camping Ordinances

Taken together, these and other anti-camping cases provide a concise summary of the status of the law when it comes to enforcement of anti-camping ordinances.

1. Eighth Amendment Challenges

The United States Supreme Court has made it fairly clear that, under the Eighth Amendment, one may not be punished solely for status or a chronic condition. (*Robinson v. California,* 370 U.S. 660, 666 (1962).) As such, one may not be punished simply for being homeless. However, a city may impose a criminal sanction for public behavior which may create substantial health and safety hazards, both for the actor and for members of the general public, and which offends the moral and esthetic sensibilities of a large segment of the community. (*Powell v. Texas,* 392 U.S. 514, 532 (1968).) Therefore, as noted in *Tobe*, public camping is subject to regulation.

However, some courts will consider "necessity" under the Eighth Amendment as a defense to an as-applied challenge. (*In re Eichorn*, 69 Cal.App.4th 382 (1998).) As noted above, the *Jones* decision continues to be "highly persuasive" and influential. (*Lehr v. City of Sacramento,* 624 F. Supp. 2d 1218, 1226 (E.D. Cal. 2009).) Thus, it may be prudent for cities that have anti-camping ordinances to understand their shelter inventory and enforce carefully based on those facts.

2. Equal Protection

Because homelessness and poverty are not suspect classifications and there is no fundamental right to camp on public property, anti-camping ordinances are subject to the rational basis test. (*Maher v. Roe,* 432 U.S. 464, 470-71 (1977); *Kreimer v. Bureau of Police,* 958 F.2d 1242, 1269, n. 36 (3d. Cir. 1992); *Tobe*, *supra*, 9 Cal. 4th at 1108-09.) Under the rational basis test, any rational basis for the ordinance may be considered by the courts, and those attacking the rationality of the legislative classification have the burden to show otherwise. (*Walgreen Co. v. City and County of San Francisco,* 185 Cal. App. 4th 424, 435-436 (Cal. App. 1st Dist. 2010).) As a result of this low bar, almost all anti-camping ordinances will likely survive an Equal Protection challenge.

3. Vagueness

Anti-camping ordinances have been upheld against claims that they are unconstitutionally vague. (*Tobe*, *supra*, 9 Cal. 4th at 1108; *Joyce*, *supra*, 846 F. Supp. at 862-63.) To avoid being invalidated as vague, a statute must "be sufficiently definite to provide adequate notice of the conduct proscribed" and "provide sufficiently definite

guidelines for the police in order to prevent arbitrary and discriminatory enforcement." (*Tobe*, *supra*, 9 Cal. 4th at 1106-07.) In *Tobe*, the court noted that the term 'camp' is not ambiguous where it is defined as "occupation of camp facilities, living temporarily in a camp facility or outdoors, or using camp paraphernalia." (*Id.* at 1107.) Thus, so long as public agencies model their anti-camping ordinances on ones that have been upheld, such as the one in *Tobe*, they should be safe from a challenge on vagueness grounds.

4. Unattended Property

Many anti-camping ordinances include components that prohibit persons from storing unattended belongings on public property. Commonly, these types of ordinances are typically enforced through "sweeps" in which unattended homeless belongings are removed and taken in order to clear public property and improve access and appearance.

The Ninth Circuit Court of Appeals recently held that the Fourth and Fourteenth Amendment rights of nine homeless people living in Los Angeles were violated by City employees who seized and immediately destroyed their briefly unattended personal possessions. (*Lavan v. City of Los Angeles,* 693 F.3d 1022 (9th Cir. 2012), cert. denied in *City of Los Angeles v. Lavan,* 2013 U.S. LEXIS 4893 (U.S., June 24, 2013).) The City had seized and immediately destroyed the homeless persons' personal possessions, temporarily left on public sidewalks while they attended to necessary tasks such as eating, showering, and using restrooms. (*Id.* at 1024.) Los Angeles had argued that its seizure and disposal of items were authorized pursuant to its enforcement of a municipal code provision that forbids any merchandise, baggage or article of personal property to be left unattended upon any parkway or sidewalk. (*Id.* at 1026.) The Ninth Circuit rejected this argument, concluding that "[b]ecause homeless persons' unabandoned possessions are 'property' within the meaning of the Fourteenth Amendment, the City must comport with the requirements of the Fourteenth Amendment's due process clause if it wishes to take and destroy them." (*Id.* at 1032.)

Under *Lavan*, if a city believes that property left in a public place is merely unattended, steps should be taken prior to any seizure and before any destruction. At a minimum, a city must provide the homeless with notice and a reasonable period of time in which to retrieve the property. While there is no "bright-line" rule for how long persons should be given to retrieve their belongings, it should be noted that in cases where cities have entered into settlement agreements to change these practices, the time provided has ranged from 30 to 90 days. Public agencies may elect to be governed by the provisions of California Civil Code Section 2080 et seq., under which it must hold property for at least three months prior to selling the property at a public auction. (Civ. Code, §§ 2080.4, 2080.6.) However, these Civil Code provisions have no application to intentionally abandoned property. (Civ. Code, § 2080.7.) Nor do these provisions prohibit a city from determining a time at which property may be considered abandoned.

In a recent case from the District Court in Hawaii, a city's removal of property was upheld where the ordinance provided twenty-four or seventy-two hours written notice before items are seized, provided post-seizure notice describing the items that have been taken and the location where they may be retrieved, and provided for the holding of seized items for at least thirty days before destruction. (*De-Occupy Honolulu v. City & County of Honolulu* 2013 U.S. Dist. LEXIS 71968, 16-17 (D. Haw. May 21, 2013).)

Where city staff has a good faith belief that the property has been intentionally abandoned, summary seizure and destruction is likely permissible. However, it is difficult for city staff to know whether property is truly abandoned or merely unattended. Notice periods of as little as 24-hours, after which it is reasonable to conclude that the property has been abandoned and may be destroyed, probably suffice under most circumstances. If a city wishes to utilize such an approach, it ought to establish a policy and provide adequate training to its staff. Where a city has existing procedures for dealing with found property, which typically involve storage for a period of 30 to 90 days, it may need to establish a rationale for using a shorter 24-hour period in certain cases. Such rationale may involve public health concerns where the unattended/abandoned property is unsanitary, for example.

III. Aggressive Panhandling

A. State of the law

As both panhandling and complaints about panhandling from cities' residents, business owners, and tourists have increased, aggressive panhandling ordinances have become very common in cities across the country. Perhaps predictably, such ordinances have also been the subject of legal challenges at the state and federal court levels across the country. The ordinances have been challenged, both successfully and unsuccessfully, on constitutional grounds including due process, equal protection, vagueness and overbreadth, under the First Amendment of the United States Constitution and the California Constitution's Liberty of Speech clause.

In response to lawsuits, several cities have adopted or amended ordinances, either as the direct result of rulings in cases brought against them, in response to the analyses of courts in suits against other cities, or consistent with settlements of cases with groups like the ACLU and various homeless and First Amendment advocacy groups. As a result, most ordinances currently enforced share several common features, which should continue to be defensible against facial constitutional challenges, including: 1) prohibitions on "aggressive solicitation," which is generally defined to include an immediate request for funds accompanied by verbal or physical threats or coercion, or persisting in requests following a negative response from the individual being solicited; 2) regulation of activity on public property and/or privately owned

property open to the public or large groups of the public; and 3) prohibitions on solicitation of any kind in specified locations, most often including within specified distances of banks, check cashing businesses, automated teller machines, public transportation facilities, in traffic or locations that interfere with or impede traffic and, sometimes, within specified distances of business entrances.

It should be noted, however, that there are cases that have invalidated or called into question the viability of restrictions of solicitation premised on interference with vehicular traffic. In *Comite de Jornaleros de Redondo Beach v. City of Redondo Beach,* 657 F.3d 936 (9th Cir. 2011), cert. denied, (U.S. 2012) 132 S.Ct. 1566, the Ninth Circuit held that a city ordinance, prohibiting solicitation of business, employment, and contributions on streets and highways was not narrowly tailored to achieve city's interest in promoting traffic flow and safety, and thus violated free speech guarantees. The Court also found that the ordinance was overinclusive in that it would apply to such things as children selling lemonade on sidewalks, it was geographically overinclusive in that it applied citywide, despite small number of problem areas identified by city. Finally, the court concluded the city could have employed various less restrictive alternatives, such as enforcement of existing traffic laws and regulations. Thus, any restrictions based on traffic flow should be narrowly tailored and supported by findings that support the need for the regulation to address identified traffic and safety concerns in specified areas. Otherwise, the safest course is to utilize existing state law tools to address traffic interference issues that may be associated with panhandling.

Examples of representative ordinances that have been adopted or amended, which reflect the reasoning or compromises achieved via legal challenges are:

- **Section 120-2 of the San Francisco Police Code**

- **Berkeley Municipal Code Chapter 13.37**
(See *Berkeley Community Health Project v. City of Berkeley* 966 F.Supp. 941(N.D. Cal. 1997))

- **Los Angeles Municipal Code Section 41.59**
(See *Los Angeles Alliance For Survival v. City of Los Angeles,* 22 Cal.4th 352 (2000))

1. Speech Considerations

Under both state and federal law, in person solicitation regulations are viewed as content neutral and subject to intermediate, rather than strict scrutiny, so long as the regulation is justified without reference to the content of the regulated speech and is viewpoint neutral.

Solicitation is protected speech under both the California Constitution and the

First Amendment of the United States Constitution. (*International Soc. for Krishna Consciousness of California, Inc. v. City of Los Angeles 966 F.Supp. 956* at 962*(C.D. Cal. 1997)*, *citing People v. Fogelson*, 21 Cal.3d 158, 165 (1978)); *Hillman v. Britton*, 111 Cal.App.3d 810, 816(1980); and *International Society for Krishna Consciousness, Inc. v. Lee*, 505 U.S. 672, 677 (1992).) Article I, section 2, subdivision (a) of the California Constitution (liberty of speech clause) is more protective of speech than the First Amendment. However, the California Supreme Court's "…decisions dating back more than 80 years have recognized that requests for the immediate donation or payment of money — while often encompassed within and protected by the liberty of speech clause — may create distinct problems and risks that warrant different treatment and regulation. (*Los Angeles Alliance For Survival, supra,* 22 Cal.4th at pp. 356-57 (*Alliance*).)

The level of scrutiny under which courts review a restriction of free speech activity depends upon whether it is a content-neutral regulation of the time, place, or manner of speech or restricts speech based upon its content. A content-neutral regulation of the time, place, or manner of speech is subjected to intermediate scrutiny to determine if it is "(i) narrowly tailored, (ii) serves a significant government interest, and (iii) leaves open ample alternative avenues of communication. [Citation]" (*Los Angeles Alliance for Survival, supra,* 22 Cal.4th at p. 364.) A content-based restriction is subjected to strict scrutiny. "[D]ecisions applying the liberty of speech clause [of the California Constitution], like those applying the First Amendment, long have recognized that in order to qualify for intermediate scrutiny (i.e., time, place, and manner) review, a regulation must be 'content neutral' [citation], and that if a regulation is content based, it is subject to the more stringent strict scrutiny standard. [Citation.]" (*Id.* at pp. 364–365, fn. omitted.) The government bears the burden of justifying the regulation of expressive activity in a public forum. (*See Perry Educ. Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37, 45*(1983).)

In that context, both the Ninth Circuit Court of Appeals and the California Supreme Court have directly addressed a challenge to the City of Los Angeles's aggressive panhandling ordinance under the liberty of speech clause. In *Alliance*, plaintiffs (including the ACLU) argued that LA's ordinance was overbroad and violated the First Amendment to the United States Constitution and the liberty of speech clause of the California Constitution. The federal district court issued a preliminary injunction, holding that plaintiff homeless organizations had standing to challenge the ordinance as overbroad and the ordinance was most likely invalid on its face under the liberty of speech clause because it discriminated on the basis of content between categories of speech (speech soliciting the donation of funds versus speech with no solicitation component). The City appealed, and the Ninth Circuit certified a question to the California Supreme Court of whether regulation of solicitation was content-based for purposes of the California Constitution, thus requiring such regulations to withstand strict scrutiny analysis by the courts.

Ultimately, the California Supreme Court concluded "…that an ordinance (such

as the Los Angeles ordinance at issue in the underlying action) that is directed at activity involving public solicitation for the immediate donation or payment of funds should not be considered content based or constitutionally suspect under the California Constitution, and should be evaluated under the intermediate scrutiny standard applicable to time, place, and manner regulations, rather than under the strict scrutiny standard." *Los Angeles Alliance For Survival, supra,* 22 Cal.4th at p. 357.

The Ninth Circuit accepted the California Supreme court's answer to the certified question, but nonetheless affirmed the District Court's decision that granted a preliminary injunction barring enforcement of the Los Angeles Ordinance. The Court ruled that even though, as the California Supreme Court certified, regulation of solicitation is content-neutral,

> "…whether the ordinance in certain aspects and applications infringes upon the right to free speech raises other serious questions. Because the balance of hardships tips sharply in the appellees' favor and the appellees would be irreparably injured absent the preliminary injunction, we affirm the preliminary injunction and remand for further proceedings."

The case ultimately settled, resulting in the removal of ordinance language that had permitted persons to order panhandlers off property surrounding restaurants, bus stops and other places. The prohibition on aggressive solicitation and solicitation within a specified distance of an ATM remains in the ordinance.

While *Alliance* was decided under the state constitution, federal constitutional law similarly treats regulations of solicitation as content-neutral restraints of speech, subject to intermediate review. (*See, e.g.*, *United States v. Kokinda*, 497 U.S. 720, 730 (1990) (Kokinda).), legislation will be upheld as a reasonable time, place, and manner regulation so long as it is (i) narrowly tailored, (ii) serves a significant government interest, and (iii) leaves open ample alternative avenues of communication. (*Savage v. Trammell Crow Co.,* 223 Cal. App. 3d 1562, 1572–1574 (1990)). The burden is on the government to demonstrate that the regulation passes the test.

In *Roulette v. City of Seattle*, 97 F.3d 300 (9th Cir. 1996), the Ninth Circuit Court of Appeals considered a facial constitutional challenge on First Amendment grounds brought by homeless persons to a city ordinance prohibiting sitting or lying on sidewalks in commercial areas between 7:00 a.m. and 9 p.m. Petitioners claimed the ordinance violated their right to free speech pursuant to the First Amendment by preventing the expressive conduct of soliciting, and that the ordinance further violated their right to substantive due process under the Fourteenth Amendment. In rejecting the First Amendment challenge, the Court held that "[b]y its terms, the ordinance here prohibits only sitting or lying on the sidewalk. As we explained above, [which] are not forms of conduct integral to, or commonly associated with, expression. (*Id*. at 305). The Court similarly rejected the facial due process challenge, rejecting petitioners claim that

the ordinance was a "thinly veiled attempt to drive [out] unsightly homeless…" and accepted the ordinance on its face as a neutral measure to protect and preserve sidewalks for their intended purpose.

Similarly, in *Doucette v. City of Santa Monica*, 955 F. Supp. 1192, 1209 (C.D. Cal. 1997), the Court upheld a Santa Monica ordinance prohibiting solicitation from: "a) Bus stops; (b) Public transportation vehicles or facilities; (c) A vehicle on public streets or alleyways; (d) Public parking lots or structures; (e) Outdoor dining areas of restaurants (f) Within fifty feet of an automated teller machine…" In rejecting the plaintiffs' Section 1983 First Amendment claims, the Court found that the city's interests in preventing harassment and intimidation in areas where people experience particular vulnerability justified the regulation imposed.

2. <u>On Private Property</u>

Cities are often called upon to enact ordinances extending aggressive solicitation provisions to private properties where large sections of the public gather or to enforce trespassing laws against individuals engaging in panhandling, solicitation or other expressive conduct on private property. Such enforcement on private properties presents an often difficult quandary for responding officers as to whether the nature of the particular property involved affords the solicitor speech protections that would not otherwise be at issue on private property.

The controlling case on solicitation or expressive conduct on private/quasi-public property is *Robins v. Pruneyard Shopping Center* (1979) 23 Cal.3d 899, 902 *aff'd sub nom. Pruneyard Shopping Center v. Robins* (1980) 447 U.S. 74. Pruneyard analyzed the question of whether California's Constitution creates broader speech rights with respect to private property than does the federal Constitution. *Id.* After noting the importance of free speech and the right to petition the government, and observing that "central business districts apparently have continued to yield their functions more and more to suburban centers" Id. at 907, the court held that "sections 2 and 3 of article I of the California Constitution protect speech and petitioning, reasonably exercised, in shopping centers even when the centers are privately owned." Id. at 910. In particular, the *Pruneyard* holding is premised upon its finding that large retail shopping centers now serve as the functional equivalent of the traditional town center business district, where historically the public's free speech activity is exercised. *Id.* at pp. 907–910.

Subsequent cases have established that a location will be considered a quasi-public forum only when it is the functional equivalent of a traditional public forum with attributes that invite or encourage social gathering, rather than mere patronage for a specified purpose. *Pruneyard, supra*, 23 Cal.3d at 907; *Trader Joe's Co. v. Progressive Campaigns, Inc.* 73 Cal.App.4th 425, 434 (1999); *Albertson's, Inc. v. Young* 107 Cal.App.4th 106, 118 (2003). Appellate decisions applying *Pruneyard* focus on whether the property owner has so opened up his or her property for public use as to make it the functional

equivalent of a traditional public forum. *Trader Joe's Co. v. Progressive Campaigns, Inc.,* supra 73 Cal.App.4th at 433–434; *Planned Parenthood v. Wilson* (1991) 234 Cal.App.3d 1662, 1671. Cases indicate that, in considering whether a particular business or business area is impressed with a public character for purposes of expressive activity, no single factor is determinative. *Albertson's, Inc. v. Young* 107 Cal.App.4th at 118-20. Taken as a whole, *Pruneyard* implies that smaller privately owned commercial establishments that do not assume the societal role of a town center may prohibit expressive activity unrelated to the business enterprise. *Planned Parenthood v. Wilson* 234 Cal.App.3d 1662, 1670 (1991). Moreover, it is clear that private property owners may enforce reasonable time, place and manner restrictions on solicitation on their properties, subject to the same requirements applicable to governmental regulation discussed above.

In general, aggressive panhandling ordinances that extend to private properties endowed with a public character should be enforceable to the same extent as provisions applicable to public property. However, due to the fact and location intensive nature of the analysis with regard to activities on private properties, it is generally advisable for City enforcement personnel to intervene only where necessary to prevent or stop imminent or actual harm to individuals involved. Many police departments will provide the alternative to an onsite business manager or operator to file a citizen's arrest form, but will not other than to keep the peace.

IV. Conclusion

Although anti-camping ordinances have been upheld as constitutional, cities should be cautious when enforcing anti-camping ordinances where homelessness is unavoidable, especially in situations where there is a shortage of available shelter space for homeless persons in the jurisdiction. In addition, when cities are conducting sweeps to clear public property of the unattended personal belongings of homeless persons, cities must be careful to comply with due process requirements. At a minimum, cities should not summarily dispose of belongings that are not genuinely believed to have been abandoned.

Finally, aggressive panhandling ordinances are generally subject to intermediate scrutiny. Accordingly, such ordinances will be upheld if they are: (i) narrowly tailored, (ii) serve a significant government interest, and (iii) leave open ample alternative avenues of communication. Most literature on the subject concludes that enforcement of panhandling laws does not adequately or completely address the issues. Rather, Public education to discourage people from giving money to panhandlers and the availability of adequate social services (especially alcohol and drug treatment) for panhandlers are necessary components of any effective response likely to have a significant impact.

As always, we recommend that city staff consult with their city attorney's office prior to enacting policies or ordinances regulating the activity of homeless persons.

V. Resources

United States Interagency Council on Homelessness 2012 Update
http://www.usich.gov/resources/uploads/asset_library/Update2012_FINALweb.pdf

American Bar Association Commission on Homelessness and Poverty
http://www.americanbar.org/groups/public_services/homelessness_poverty/resources/homeless_courts.html
http://www.courts.ca.gov/documents/AOCLitReview-Mental_Health_Courts--Web_Version.pdf

U.S. Department of Justice, Office of Community Oriented Policing Services
Problem-Oriented Guides for Police -Panhandling
By Michael S. Scott
Problem-Specific Guides Series No. 13
http://cops.usdoj.gov/files/ric/CDROMs/POP1_60/Problem-Specific/Panhandling.pdf

National Alliance to End Homelessness
http://www.endhomelessness.org/

Homes Not Handcuffs: The Criminalization of Homelessness in U.S. Cities
A Report by The National Law Center on Homelessness & Poverty and
The National Coalition for the Homeless
http://www.nationalhomeless.org/publications/crimreport/CrimzReport_2009.pdf

U.S. Conference of Mayors, Hunger and Homelessness Survey: A Status Report on Hunger and Homelessness in America's Cities, A 25-City Survey, (December 2012)
http://usmayors.org/pressreleases/uploads/2012/1219-report-HH.pdf