First Draft of Report #56 – Panhandling

SUBMITTED FOR ADVISORY GROUP REVIEW
May 18, 2020

DISTRICT OF COLUMBIA CRIMINAL CODE REFORM COMMISSION
441 FOURTH STREET, NW, SUITE 1C001 SOUTH
WASHINGTON, DC 20001
PHONE: (202) 442-8715
www.ccrc.dc.gov

This Draft Report contains recommended reforms to District of Columbia criminal statutes for review by the D.C. Criminal Code Reform Commission's statutorily designated Advisory Group. A copy of this document and a list of the current Advisory Group members may be viewed on the website of the D.C. Criminal Code Reform Commission at www.ccrc.dc.gov.

Any Advisory Group member may submit written comments on any aspect of this Draft Report to the D.C. Criminal Code Reform Commission. The Commission will consider all written comments that are timely received from Advisory Group members. Additional versions of this Draft Report may be issued for Advisory Group review, depending on the nature and extent of the Advisory Group's written comments. The D.C. Criminal Code Reform Commission's final recommendations to the Council and Mayor for comprehensive criminal code reform will be based on the Advisory Group's timely written comments and approved by a majority of the Advisory Group's voting members.

The deadline for the Advisory Group's written comments on this First Draft of Report #54 – Panhandling is June 19, 2020. Oral comments and written comments received after this date may not be reflected in the next draft or final recommendations. All written comments received from Advisory Group members will be made publicly available and provided to the Council on an annual basis.

The Commission recommends repealing in their entirety D.C. Code §§ 22-2301 – 22-2306 concerning the offense of panhandling.[1] Most panhandling statutory provisions appear to be facially unconstitutional under recent Supreme Court case law, and the most severe forms of behavior addressed by the provisions involve conduct that is already criminalized in the RCC and current D.C. Code. For those provisions of the panhandling statute that may be constitutional and not otherwise criminalized, a criminal sanction does not appear to be proportionate. Panhandling may be regarded as a status offense that criminalizes conduct associated with poverty and homelessness. Repealing the panhandling statutes avoids constitutional challenges, eliminates unnecessary overlap, and improves the proportionality in the revised statutes.

COMMENTARY

Explanatory Note and Relation to Current District Law.

The statutory sections recommended for repeal constitute the sections in D.C. Code Title 22 Chapter 32, entitled "Panhandling." The primary statute describing the offense is D.C. Code § 22-2302, which provides:

> (a) No person may ask, beg, or solicit alms, including money and other things of value, in an aggressive manner in any place open to the general public, including sidewalks, streets, alleys, driveways, parking lots, parks, plazas, buildings, doorways and entrances to buildings, and gasoline service stations, and the grounds enclosing buildings.
> (b) No person may ask, beg, or solicit alms in any public transportation vehicle; or at any bus, train, or subway station or stop.
> (c) No person may ask, beg, or solicit alms within 10 feet of any automatic teller machine (ATM).
> (d) No person may ask, beg, or solicit alms from any operator or occupant of a motor vehicle that is in traffic on a public street.
> (e) No person may ask, beg, or solicit alms 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.
> (f) No person may ask, beg, or solicit alms in exchange for cleaning motor vehicle windows while the vehicle is in traffic on a public street.
> (g) No person may ask, beg, or solicit alms in exchange for protecting, watching, washing, cleaning, repairing, or painting a motor vehicle or bicycle while it is parked on a public street.
> (h) No person may ask, beg, or solicit alms on private property or residential property, without permission from the owner or occupant.

[1] D.C. Code § 22-2301. Definitions; D.C. Code § 22-2303. Prohibited Acts; § 22-2303. Permitted activity; § 22-2304. Penalties; § 22-2305. Conduct of prosecutions; and § 22-2306. Disclosures.

Other statutes in Chapter 23 concern: definitions;[2] a statement that exercise of a constitutional right to "picket, protest, or speak, and acts authorized by a permit" issued by D.C. government are all lawful;[3] that punishment for the offense is up to 90 days imprisonment, a fine, or both;[4] and that panhandling is to be prosecuted by the Attorney General.[5]

The panhandling statute criminalizes two broad categories of speech that involve use of "ask[ing], beg[ging], or solicit[ing] alms," defined as the "the spoken, written, or printed word or such other act conducted for the purpose of obtaining an immediate donation of money or thing of value."[6] The first category involves asking for donations in any public place in conjunction with some additional conduct—e.g. making a person fear bodily harm, touching a person without consent, repeating requests after being told no, or blocking someone's passage.[7] The second category involves asking for donations in one of several narrowly-specified public locations[8] (e.g. at a bus stop) or any private location.[9]

It has long been established that under the First Amendment, laws that target speech based on its communicative content are presumptively unconstitutional and can survive legal challenge only if they are narrowly-tailored to serve compelling state interests (under a strict-scrutiny test).[10] When the District's panhandling statute was enacted in 1993, however, Supreme Court precedent suggested that the speech involved in asking for a donation of money would not constitute a content-based law subject to strict scrutiny unless the government was signaling disagreement with the content of the speech.[11] Since adoption of the panhandling statute, in the 2015 case of *Reed v. Gilbert*, the Supreme Court clarified that "strict scrutiny applies either when

---

[2] D.C. Code § 22-2301 ("For the purposes of this chapter, the term: (1) 'Aggressive manner' means: (A) Approaching, speaking to, or following a person in a manner as would cause a reasonable person to fear bodily harm or the commission of a criminal act upon the person, or upon property in the person's immediate possession; (B) Touching another person without that person's consent in the course of asking for alms; (C) Continuously asking, begging, or soliciting alms from a person after the person has made a negative response; or (D) Intentionally blocking or interfering with the safe or free passage of a person by any means, including unreasonably causing a person to take evasive action to avoid physical contact. (2) 'Ask, beg, or solicit alms' includes the spoken, written, or printed word or such other act conducted for the purpose of obtaining an immediate donation of money or thing of value.").

[3] D.C. Code § 22-2303 ("Acts authorized as an exercise of a person's constitutional right to picket, protest, or speak, and acts authorized by a permit issued by the District of Columbia government shall not constitute unlawful activity under this chapter.").

[4] D.C. Code § 22-2304 ("(a) Any person convicted of violating any provision of § 22-2302 shall be fined not more than the amount set forth in § 22-3571.01 or be imprisoned not more than 90 days or both. (b) In lieu of or in addition to the penalty provided in subsection (a) of this section, a person convicted of violating any provision of § 22-2302 may be required to perform community service as provided in § 16-712.").

[5] D.C. Code § 22-2305 ("Prosecutions for violations of this chapter shall be conducted in the name of the District of Columbia by the Corporation Counsel.").

[6] D.C. Code § 22-2301(2) ("'Ask, beg, or solicit alms' includes the spoken, written, or printed word or such other act conducted for the purpose of obtaining an immediate donation of money or thing of value.").

[7] D.C. Code §22-2302(a); D.C. Code § 22-2301(1) ("'Aggressive manner' means: (A) Approaching, speaking to, or following a person in a manner as would cause a reasonable person to fear bodily harm or the commission of a criminal act upon the person, or upon property in the person's immediate possession; (B) Touching another person without that person's consent in the course of asking for alms; (C) Continuously asking, begging, or soliciting alms from a person after the person has made a negative response; or (D) Intentionally blocking or interfering with the safe or free passage of a person by any means, including unreasonably causing a person to take evasive action to avoid physical contact.").

[8] D.C. Code §22-2302(b)-(g).

[9] D.C. Code §22-2302(h).

[10] R.A.V. v. St. Paul, 505 U.S. 377, 395, 112 S.Ct. 2538 (1992).

[11] *See, e.g. Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989).

a law is content based on its face or when the purpose and justification for the law are content based."[12]

The plain language of the District's panhandling statute suggests that it is, in large part, facially unconstitutional under the standard in *Reed v. Gilbert*.[13] Because §22-2302 only prohibits the solicitation of alms, versus other types of speech, it is a content-based statute subject to strict scrutiny and a claim as to this has been upheld by the United States District Court for the District of Columbia.[14] The most severe forms of the offense involve both a content-based regulation of speech and, through the panhandling definition of "aggressive manner,"[15] an additional act that is already criminal under the D.C. Code and RCC.[16] The very

---

[12] *Reed v. Town of Gilbert, Ariz.*, 135 S.Ct. 2218, 2228 (2015).

[13] The evolution of Supreme Court First Amendment case law is not the only grounds for questioning the constitutionality of the District's panhandling statute. Even at the time of enactment of the panhandling statute, there appears to have been confusion in the legal analysis. Most notably, the legislative history asserts that the initial bill for the District's statute "was modeled after the Portland, Oregon ordinance on aggressive panhandling," but also states that there was a final Amendment in the Nature of a Substitute that added other provisions. *See Committee on the Judiciary Report on Bill 10-72, the "Panhandling Control Act of 1993"* at 3. The legal analysis and testimony regarding the initial bill by then Corporation Counsel John Payton specifically recommended alignment of the panhandling statute with the Portland, Oregon municipal ordinances which had been upheld by courts. However, the Portland, Oregon ordinances that Payton referenced and included with his testimony were 10 day, content-neutral "offensive physical contact" and pedestrian blocking statutes that do not criminalize or regulate speech at all. *See Committee on the Judiciary Report on Bill 10-72, the "Panhandling Control Act of 1993"* at 34-35. The Portland, Oregon "offensive physical contact" statute remains in effect today. Portland, Or., Mun. Code § 14A.40.020. The legislative history for the District statute does not explain whether or how the legal analysis provided by John Payton (representing the Executive) for the original bill was updated along with the final statutory text in the Amendment in the Nature of a Substitute.

[14] *See Brown v. Gov't of D.C.*, 390 F. Supp. 3d 114, 125 (D.D.C. 2019) ("As for the nature of the government's statutory prohibitions and its justifications for limiting speech in this manner, Plaintiffs allege that strict scrutiny applies, because the Panhandling Control Act is a content-based regulation insofar as it prohibits certain speech—i.e., immediate requests for money or things of value—in public areas, based on the message communicated. (See 5AC at ¶¶ 153–156.) Plaintiffs further allege that the Act cannot survive strict scrutiny, because the statutory restrictions are not narrowly tailored to promote a compelling governmental interest. (See id. at ¶¶ 158–62.) Specifically, the complaint contends that there are less restrictive alternatives available to the government, such as "enforcing existing generic criminal laws already on the books in this jurisdiction or enacting new criminal laws that directly target conduct that threatens the District's asserted interests rather than employing regulations that indirectly support those interests by directly burdening protected speech." (Id. at ¶ 161; see also id. at ¶¶ 160–62.) It is by now well established that government regulations are content-based if they "appl[y] to particular speech because of the topic discussed or the idea or message expressed[,]" Reed, 135 S. Ct. at 2227, and that content-based laws that restrict protected speech are subject to strict scrutiny, id. Furthermore, strict scrutiny " 'requires the Government to prove that the restriction furthers a compelling interest and is narrowly tailored to achieve that interest[.]' " Id. at 2231 (quoting Ariz. Free Ent. Club's Freedom Club PAC v. Bennett, 564 U.S. 721, 734, 131 S.Ct. 2806, 180 L.Ed.2d 664 (2011)). Thus, the complaint's First Amendment claims are plainly plausible, insofar as Plaintiffs assert that the Panhandling Control Act is both subject to strict scrutiny (because it prohibits requests for immediate donations of money in various public areas and not any other speech—i.e., it is a content-based restriction), and does not satisfy strict scrutiny (because other less restrictive alternatives are available).").

[15] D.C. Code § 22-2301(1).

[16] For example, D.C. Code § 22-2301(1)(A) ("Approaching, speaking to, or following a person in a manner as would cause a reasonable person to fear bodily harm or the commission of a criminal act upon the person, or upon property in the person's immediate possession") corresponds closely with disorderly conduct under D.C. Code § 22-1321(a) and RCC § 22E-4201. D.C. Code § 22-2301(1)(B) ("Touching another person without that person's consent in the course of asking for alms") arguably corresponds with assault under D.C. Code § 22-404 and offensive physical contact under RCC § 22E-1205. D.C. Code § 22-2301(1)(D) ("Intentionally blocking or interfering with the safe or free passage of a person by any means, including unreasonably causing a person to take evasive action to avoid physical contact") tracks Crowding, obstructing, or incommoding under D.C. Code § 22–1307.

fact that other criminal laws that aren't content-based regulation of speech already address the conduct described in the panhandling statute demonstrates that the statute is not "narrowly tailored." Additionally, since *Reed*, panhandling restrictions based on geographic areas that involve sidewalks, roads, parks, and other traditional or recognized public forums[17] have routinely been struck down by courts.[18] Specific evidence is needed as to the government's interest and, a general "public safety" justification does not constitute a compelling interest.[19] Such evidence is not part of the current legislative history, which is summary in its justification.[20]

Notably, two aspects of the current panhandling statute that may be facially *constitutional* are the D.C. Code § 22-2302(b) prohibition on panhandling "in any public transportation vehicle; or at any bus, train, or subway station or stop",[21] and the D.C. Code § 22-2302(h) prohibition "on private property or residential property, without permission from the owner or occupant." Unlike the other provisions of the panhandling statute which apply over-broadly to "any place open to the general public"[22] and involve otherwise criminal conduct (and so are not narrowly tailored), or occur in traditional public forums like public streets or sidewalks,[23] government has more leeway to regulate more in non-public forums such as these. Supreme Court precedent has upheld "reasonable" speech regulations in non-public forums where the government is not opposing the content of the speech.[24] Unfortunately, the current panhandling statute does not

---

[17] *See Minnesota Voters All. v. Mansky*, 138 S. Ct. 1876, 1885 (2018) ("Generally speaking, our cases recognize three types of government-controlled spaces: traditional public forums, designated public forums, and nonpublic forums. In a traditional public forum—parks, streets, sidewalks, and the like—the government may impose reasonable time, place, and manner restrictions on private speech, but restrictions based on content must satisfy strict scrutiny, and those based on viewpoint are prohibited. See *Pleasant Grove City v. Summum*, 555 U.S. 460, 469, 129 S.Ct. 1125, 172 L.Ed.2d 853 (2009). The same standards apply in designated public forums—spaces that have 'not traditionally been regarded as a public forum' but which the government has 'intentionally opened up for that purpose.' Id., at 469–470, 129 S.Ct. 1125. In a nonpublic forum, on the other hand—a space that 'is not by tradition or designation a forum for public communication'—the government has much more flexibility to craft rules limiting speech. *Perry Ed. Assn. v. Perry Local Educators' Assn.*, 460 U.S. 37, 46, 103 S.Ct. 948, 74 L.Ed.2d 794 (1983). The government may reserve such a forum 'for its intended purposes, communicative or otherwise, as long as the regulation on speech is reasonable and not an effort to suppress expression merely because public officials oppose the speaker's view.'").

[18] See, e.g., *Norton v. City of Springfield*, 806 F.3d 411, 413 (7th Cir. 2015); *Cutting v. City of Portland, Maine*, 802 F.3d 79 (1st Cir. 2015); *Comite de Jornaleros de Redondo Beach v. City of Redondo Beach*, 657 F.3d 936, 949 (9th Cir. 2011) (en banc); *Thayer v. City of Worcester*, 144 F. Supp. 3d 218, 237 (D. Mass. 2015) ("[M]unicipalities must go back to the drafting board and craft solutions which recognize an individuals… rights under the First Amendment…); *McLaughlin v. City of Lowell*, 140 F. Supp. 3d 177, 189 (D. Mass. 2015); *Browne v. City of Grand Junction, Colorado*, 2015 WL 5728755, at *13 (D. Colo. Sept. 30, 2015).

[19] *Thayer v. City of Worcester*, 144 F. Supp. 3d 218, 233 (D. Mass. 2015) (striking down provisions against blocking path and following a person after they gave a negative response)

[20] *See Committee on the Judiciary Report on Bill 10-72, the "Panhandling Control Act of 1993"* at 5 ("The Amendment in the Nature of a Substitute creates place restrictions on panhandling in these situations because persons engage in certain activity, whether it is parking their vehicle, sitting in traffic, waiting at a bus or subway stop, or conducting banking business at an ATM machine, that prevents them from 1eaving immediately after saying no to the panhandler's request for money. It is because of these situations that the Committee finds it necessary to establish place restrictions on the activities of panhandlers.").

[21] *McFarlin v. D.C.*, 681 A.2d 440, 448 (D.C. 1996) (upholding a First Amendment challenge to D.C. Code § 22-2302(b) where, under doctrine of constitutional avoidance "subway station or stop" under the statute was construed to not include traditional public fora, so strict scrutiny was not required standard of review).

[22] D.C. Code § 22-2302(a).

[23] D.C. Code § 22-2302(c)-(g).

[24] *Lehman v. City of Shaker Heights*, 418 U.S. 298, 303–04 (1974).

define language in D.C. Code § 22-2302(b)[25] and D.C. Code § 22-2302(h)[26] that may be key to determining the breadth (and facial constitutionality) of these provisions. Moreover, D.C. Code § 22-2302(b) and D.C. Code § 22-2302(h) may be susceptible to arguments that the laws are not reasonable given the government's interests at stake.[27] Consequently, while D.C. Code § 22-2302(b) and D.C. Code § 22-2302(h) may withstand a facial challenge under the First Amendment, this is not clear and does not preclude the possibility that many cases would raise as-applied challenges.

To the extent that the District wishes to regulate panhandling-type speech in public transportation, public transportation stations, or in door-to-door knocking on private residences,[28] such conduct is better addressed through civil sanctions or other regulatory mechanisms. Soliciting a donation on public transportation or in a public transportation station appears to comparable to other undesirable conduct (e.g. spitting, smoking, playing loud music, etc.) in such locations that is currently punishable by a $50 civil fine.[29] Charitable solicitations done without meeting regulatory requirements are also subject to criminal fines and penalties under other provisions concerning charitable solicitations per Title 44, Chapter 17 of the D.C. Code.[30]

In addition, the current panhandling statute's assignment of prosecutorial authority to the Attorney General for the District of Columbia (instead of the United States Attorney for the District of Columbia) may run afoul of Home Rule Act limitations on the Council's power to assign prosecutorial authority. The panhandling offense is punishable by a fine or imprisonment or both, which under D.C. Code 23-101 (as construed by the DCCA) means that the statute

---

[25] For example, the boundaries of a "subway station or stop" are undefined. The matter is the subject of litigation (see *McFarlin v. D.C.*, 681 A.2d 440, 447–48 (D.C. 1996)) and *Brown v. Gov't of D.C.*, 390 F. Supp. 3d 114, 125 (D.D.C. 2019).

[26] For example, it is unclear if "residential property" is intended to include government-owned (public) housing.

[27] *See Watchtower Bible & Tract Soc'y of New York, Inc. v. Vill. of Stratton*, 536 U.S. 150, 162–63 (2002) ("Despite the emphasis on the important role that door-to-door canvassing and pamphleteering has played in our constitutional tradition of free and open discussion, these early cases also recognized the interests a town may have in some form of regulation, particularly when the solicitation of money is involved. In *Cantwell v. Connecticut*, 310 U.S. 296, 60 S.Ct. 900, 84 L.Ed. 1213 (1940), the Court held that an ordinance requiring Jehovah's Witnesses to obtain a license before soliciting door to door was invalid because the issuance of the license depended on the exercise of discretion by a city official. Our opinion recognized that "a State may protect its citizens from fraudulent solicitation by requiring a stranger in the community, before permitting him publicly to solicit funds for any purpose, to establish his identity and his authority to act for the cause which he purports to represent." Id., at 306, 60 S.Ct. 900. Similarly, in Martin v. City of Struthers, the Court recognized crime prevention as a legitimate interest served by these ordinances and noted that "burglars frequently pose as canvassers, either in order that they may have a pretense to discover whether a house is empty and hence ripe for burglary, or for the purpose of spying out the premises in order that they may return later." 319 U.S., at 144, 63 S.Ct. 862. Despite recognition of these interests as legitimate, our precedent is clear that there must be a balance between these interests and the effect of the regulations on First Amendment rights. We "must 'be astute to examine the effect of the challenged legislation' and must 'weigh the circumstances and ... appraise the substantiality of the reasons advanced in support of the regulation.' " Ibid. (quoting Schneider, 308 U.S., at 161, 60 S.Ct. 146).").

[28] Notably, a person soliciting donations who remains on another person's property without the owner's permission would likely be subject to liability under D.C. Code § 22–3302, Unlawful entry on property, and RCC § 22E-2601, trespass.

[29] D.C. Code § 35–251.

[30] D.C. Code § 44-1712 ("Any person violating any provision of this chapter, or regulation made pursuant thereto, or filing, or causing to be filed, an application or report pursuant to this chapter, or regulation made pursuant thereto, containing any false or fraudulent statement, shall be punished by a fine of not more than $500, or by imprisonment of not more than 60 days, or by both such fine and imprisonment.").

cannot be prosecuted by the Attorney General for the District of Columbia unless it is deemed a "police or municipal ordinance" under subsection (a) or there is pre-Home Rule Act Congressional law specifying local prosecution per subsection (c).[31]

Case law determining prosecutorial authority in the District is complex and evolving, but the most recent DCCA opinion suggests a multi-factor analysis be used which includes consideration of: 1) the statute's nature as a "Local Regulation or General Prohibition;" 2) "History of Regulation and Enforcement;" 3) "Placement in D.C. Code;" 4) "Legislative History;" 5) "Dual Prosecution;" and 6) "Penalties."[32]

This analysis renders a mixed result for the panhandling statute. The statute is arguably a "local regulation" insofar does not absolutely bar solicitation of alms but does so in specified circumstances. Historically, the Office of the Attorney General (OAG) has prosecuted the offense since its creation in 1993.[33] Moreover, there is a link between the current panhandling statute and a prior vagrancy statute that broadly criminalized begging and was Congressionally-designated as an offense prosecuted by Corporation Counsel.[34] However, this link to the vagrancy statute is tenuous as the panhandling statute is quite different in scope. Panhandling includes conduct that would constitute "simple assault" (current D.C. Code 22-404),[35] an offense prosecuted by the United States Attorney for the District of Columbia—heightening concerns that the Council's designation of OAG as prosecutor affects prosecutorial powers that Congress intended to be exercised by the United States Attorney for the District of Columbia. The panhandling offense is codified in Title 22, with other criminal offenses that are generally not regulatory in nature. The legislative history of the panhandling statute does not include any Committee on the Judiciary statement as to the propriety of jurisdiction by the Attorney General for the District of Columbia (or the predecessor Corporation Counsel), and goes out of its way to note that the conduct covered by the panhandling statute from the vagrancy statute.[36] Moreover,

---

[31] *See generally In re Settles*, 218 A.3d 235, 239 (D.C. 2019) ("Otherwise, § 23-101 divides criminal offenses into three general categories: violations of "police or municipal ordinances or regulations," which are prosecuted by the District of Columbia, § 23-101(a); violations of "penal statutes in the nature of police or municipal regulations," which are prosecuted by the District of Columbia as long as the "maximum punishment is a fine only, or imprisonment not exceeding one year," but not both, id.; *District of Columbia v. Moody*, 304 F.2d 943 (D.C. Cir. 1962) (per curiam); and all others, which (subject to specific statutory exceptions) are prosecuted by the United States, D.C. Code § 23-101(c).").

[32] *In re Settles*, 218 A.3d 235 (D.C. 2019).

[33] *See, e.g. McFarlin v. D.C., 681 A.2d 440, 442 (D.C. 1996); Brown v. Gov't of D.C.*, 390 F. Supp. 3d 114, 125 (D.D.C. 2019).

[34] *See* D.C. Code § 22–3302 (1940). ("The following classes of persons shall be deemed vagrants in the District of Columbia: …(7) Any person wandering abroad and begging, or who goes about from door to door or places himself in or on any highway, passage, or other public place to beg or receive alms."). D.C. Code § 22–3305 (1940). ("All prosecutions under sections 22-3302 to 22-3306 shall be in the police court of the District of Columbia, in the name of the District of Columbia, by the corporation counsel or any of his assistants.").

[35] *See* Testimony of John Payton, Corporation Counsel, July 10, 1991 in *Committee on the Judiciary Report on Bill 10-72, the "Panhandling Control Act of 1993"* at 30 ("Much of the conduct which would constitute "offensive physical contact" would constitute the offense of simple assault under D.C. Code section 22-504 (1989)"). Corporation Counsel Payton also recommended raising the penalty to 90 days to better align with the contemporary assault penalty. *Id. See, also*, Testimony of Jacqueline A. Baillargeon, Public Defender Service, July 24, 1991 in *Id*. at 89.

[36] *Committee on the Judiciary Report on Bill 10-72, the "Panhandling Control Act of 1993"* at 3 ("The current vagrancy law (D.C. Code§ 22-3302 et seq.) does not address the issue of aggressive panhandling or offensive physical contact, but it does make begging a criminal offense. Bill 10-72 repeals a provision of this law that was found to be too vague and thus unenforceable constitutionally. The bill is not intended to prevent the needy from begging peaceably, it is intended to rid the street of those who use the plight of the homeless as a means to achieve

it is notable that the final legislation assigning prosecutorial responsibility contradicts without explanation hearing testimony by the Corporation Counsel John Payton noting that a penalty of a fine and imprisonment under D.C. Code § 23-101 would generally entails prosecution by the United States Attorney for the District of Columbia.[37] Lastly, while the penalty for the offense is within the realm of penalties for other offenses that Congress has designated as prosecutable by OAG, it is higher than most regulatory penalties and exceeds the Congressional limitation on penalties for regulations (not otherwise subject to a Congressional grant of authority) to 10 days imprisonment.[38]

While the question is unsettled, on balance these considerations suggest that the panhandling statute is not a police regulation for purposes of D.C. Code 23-101(a), and, for purposes of D.C. Code 23-101(c), is more than a mere amendment of the vagrancy statute that was Congressionally-granted to OAG for prosecution. Were the voyeurism statute to be retained in the D.C. Code, continued prosecution by OAG would be subject to challenge.

The Metropolitan Police Department in 2017 reported just 19 arrests for panhandling.[39] In contrast, Metro Transit Police over the course of just January 2019 recorded 20 arrests or citations issued for "PANHANDLING/BEG/VAGRANCY" or similar offense codes that include "panhandling".[40] This suggests that a large proportion of the enforcement of the panhandling statutes in recent years is being conducted by Metro Transit Police.

However, according to a CCRC analysis of data received from the Superior Court of the District of Columbia, over the entire 10-year span of 2009-2018, there were fewer than 104 charges and fewer than 40 convictions of adults for panhandling—exact numbers cannot be provided due to limitations on the court data.[41] Panhandling is a crime eligible for post and forfeit procedures,[42] however, which may partly account for the low number of prosecutions.

In a recent CCRC survey, District voters were asked to assign a ranking to the seriousness of "begging for money at a bus stop or on public transportation" when "[t]he begging

---

personal monetary gain through panhandling aggressively as well as those whose behavior presents a danger to citizens in public areas.").

[37] *See* Testimony of John Payton, Corporation Counsel, July 10, 1991 in *Committee on the Judiciary Report on Bill 10-72, the "Panhandling Control Act of 1993"* at 31 ("The bill should make clear who would prosecute a person for committing the offense of offensive physical contact (or the offenses of obstructing a sidewalk or an entrance). Under D.C. Code section 23-101 (1989), the general rule is that where both a fine and imprisonment may be imposed, the prosecution is conducted in the name of the United States by the United States Attorney for the District of Columbia. Therefore, if the Council intends that these offenses be prosecuted by the Corporation Counsel in the name of the district of columbia, it should expressly so state in the bill.").

[38] See D.C. Code § 1-303.05 ("The Council of the District of Columbia is hereby authorized to prescribe reasonable penalties of a fine not to exceed $300 or imprisonment not to exceed 10 days, in lieu of or in addition to any fine, or to prescribe civil fines or other civil sanctions for the violation of any building regulation promulgated under authority of § 1-303.04, and any regulation promulgated under authority of § 1-303.01, and any regulation promulgated under authority of § 1-303.03.").

[39] *See* MPD Adult Arrests by Year 2017 (available at https://mpdc.dc.gov/sites/default/files/dc/sites/mpdc/publication/attachments/Arrests%202017%20Public.csv).

[40] https://www.wmata.com/about/transit-police/upload/January-2019-Monthly-Blotter-Report.pdf

[41] See CCRC Advisory Group Memorandum #28 - Statistics on District Adult Criminal Charges and Convictions (October 10, 2019) and Appendix D to Advisory Group Memorandum #28 - DC Superior Court Criminal Division Adult Charges and Convictions Disposed (October 10, 2019) (available at https://ccrc.dc.gov/page/ccrc-documents).

[42] *See* Superior Court Bond and Collateral List: Non-Traffic Offenses – Collateral (July 5, 2019) (available at https://www.dccourts.gov/sites/default/files/Bond%20Collateral_Non-Traffic%20Offenses-Collateral)_07052019.pdf).

is not threatening to anyone."[43] The most frequent (modal) response, selected by 48.3% of recipients, was "0," a rating that was equivalent on the chart provided to respondents to: "Not a crime (e.g. a speeding ticket)." The median response was a "1," a low rating less serious than "non-painful physical contact (e.g. pushing someone around)." The mean response was a "2.4," a rating that is one class lower than a "4" which was equivalent on the chart provided to respondents to the harm of causing a "minor injury treatable at home (e.g. a black eye)."[44] More aggressive behavior revealed nearly identical results. Where District voters were asked to rank the seriousness of "continuing to beg for money in a public place from a person who already has said no. The begging is not threatening to anyone," the most frequent response, selected by 27.3% of recipients, was "0." The median response was a "2," and the mean response was a "2.8."

Relation to National Legal Trends.

Many states do not codify panhandling or begging statutes, leaving the matter to local ordinance, if there is any criminal law.[45] Some jurisdictions, like Chicago, have repealed their panhandling statute and have moved to alternative methods of addressing homelessness without burdening citizens in need.[46] Other cities have either repealed their statutes or no longer enforce their panhandling bans.[47] For those state and local jurisdictions that continue to have a panhandling of begging statute, the penalties are typically lower than 90 days.[48]

Since the 2015 Supreme Court decision in *Reed*, there has been a growing trend of challenges to panhandling statutes based on First Amendment grounds.[49] These challenges have

[43] For more information on the survey results and methodology, see CCRC Advisory Group Memo #27, Public Opinion Surveys on Ordinal Rankings of Offenses (October 10, 2019) (available at https://ccrc.dc.gov/page/ccrc-documents).

[44] This conduct is roughly equivalent to simple assault under current District law, punishable by up to 180 days imprisonment. *See* D.C. Code § 22-404; RCC §§ 22E-1202 and 22E-1205.

[45] For example, Michigan allows municipalities to draft their own panhandling statutes. "ACLU Puts Municipalities on Notice: Laws Banning Peaceful Panhandling Are Unconstitutional." American Civil Liberties Union of Michigan. October 29, 2013. https://www.aclu.org/press-releases/aclu-puts-municipalities-notice-laws-banning-peaceful-panhandling-are (ACLU of Michigan sent letters to 84 municipalities across the state of Michigan notifying them that their panhandling ordinances were unconstitutional and should be appealed). Arizona and Indiana, both have state panhandling statutes. *But see* Ariz. Rev. Stat. § 13-2914 (2019); Ind. Code § 35-45-17-1 (2019).

[46] "Chicago Repeals Unconstitutional Prohibition on Panhandling." American Civil Liberties Union Illinois. December 6, 2018. https://www.aclu-il.org/en/press-releases/chicago-repeals-unconstitutional-prohibition-panhandling.

[47] *See, e.g.*, Clift, Theresa. "Sacramento ordinance banned 'aggressive panhandling.' Now the law will be erased." The Sacramento Bee. May 14, 2019. https://www.sacbee.com/news/local/article230365514.html; Kiron, Andrew. "Superior Repeals Panhandling Ordinance." September 19, 2018; https://www.fox21online.com/2018/09/19/superior-repeals-panhandling-ordinance; "Rio Rancho Repeals Ordinance Making Panhandling Illegal." KRQE News. January 13, 2019. https://www.krqe.com/news/new-mexico/rio-rancho-repeals-ordinance-making-panhandling-illegal.

[48] In Ind. Code Ann. § 35-45-17-2, panhandling is classified as a Class C misdemeanor, punishable by up to 60 days in jail and a fine of up to $500. In Ariz. Rev. Stat. § 13-2914, panhandling is classified as a "petty offense," punishable by a maximum fine of $300 (and no incarceration). petty offense. Ariz. Rev. Stat. § 13-802.

[49] In the wake of *Reed*, the American Civil Liberties Union and the National Law Center on Homelessness & Poverty launched the #IAskForHelpBecause campaign aimed at challenging unconstitutional panhandling ordinances and promoting constructive alternative approaches to addressing homelessness and hunger. In

led to the repeal of panhandling statutes in many jurisdictions as federal courts are increasingly finding panhandling ordinances constitutionally deficient.[50] Many of these ordinances have language similar to the District's statute.[51]

collaboration with local partner organizations, letters were sent to 37 cities throughout the countries. *See* https://nlchp.org/panhandling/.

[50] *See, e.g. Norton v. City of Springfield, Ill*., 806 F.3d 411 (7th Cir. 2015); *Thayer v. City of Worcester*, 755 F.3d 60 (1st Cir. 2014), vacated, 135 S. Ct. 2887 (2015), declaring ordinance unconstitutional on remand, 2015 WL 6872450, at *15 (D. Mass. Nov. 9, 2015)).

[51] For example, the City of Champaign's aggressive panhandling statute was repealed where it defined panhandling as "any act by which one person asks, begs, or solicits...by requesting an immediate donation of money or other thing of value," and placed restrictions on where one may engage in panhandling. Champaign, Ill. Code § 23-95.