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**Entertaining free expression on public sidewalks:
Are city ordinances kicking musical muses to the curb?**

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Abstract

Freedom of expression, provided by the First Amendment, is a core part of the foundation of our democracy. Yet those who use public places for artistic expression, such as music, are still fighting to benefit from this right, a right vital to their ability to earn a living from musical performances. Historically, both in the United States and elsewhere, buskers, those who perform on the streets for tips, have been subjected to unreasonable restrictions on the time, place, and manner of their speech, and, at times, outright banishment from constitutionally protected public fora. This article demonstrates why current restrictions on street performers constitute clear violations of free speech through an examination of historical restrictions, case law, and the current rules and regulations of four U.S. cities. Obtaining an ostensibly permanent decision from the Supreme Court is not the solution for ensuring the free-speech rights of street performers. Rather, we present an example of model regulations that, if embraced by individual localities, can ensure proper protection for the First Amendment rights of musicians in public spaces.

Entertaining free expression on public sidewalks:

Are city ordinances kicking musical muses to the curb?

In a poll conducted by Americans for the Arts in 2016, 68% of the 3,020 online respondents reported attending an organized arts event in the previous year while 77% “say they experienced the arts in a ‘non-arts’ venue such as a park, hospital, shopping mall, or airport.”¹ The non-arts venues are home to, among others, street musicians. These artists are known as buskers—performers, often musicians, who play for tips on the sidewalks and in the subway stations of medium-to-large-sized cities around the world.

Whether it is considered entertainment or nuisance, in the United States busking is a type of speech undeniably protected by the First Amendment. However, depending on the city, lawmakers may be putting limitations on the “voice” of the busker... restricting it or just plain forbidding it. City administrators and city councils strive to maintain public spaces in a way that pleases citizenry, encourages economic investment along their streets, and assures public safety and order.² Regrettably, buskers are frequently seen as impediments to these goals, and, as will be shown in these pages, numerous U.S. city regulations unconstitutionally infringe on their rights to the extent of near total prohibition through vague and broad restrictions and through untenable limits on the time, place, and manner of busker performances.³ We will argue that the artistic output of street musicians should be as minimally constrained as possible while still allowing government to fulfill other obligations.

What is the best way to protect the rights of buskers? It would be impractical to simply wait for a definitive ruling from the Supreme Court. Indeed, to date, none of the legal challenges brought to the courts by performers expressing artistic speech on city sidewalks has reached the level of even a state supreme court. Instead, after reviewing the relevant case law, this article

offers easily amendable model guidelines for city administrators, which lay out the rights of and restrictions on buskers along with appropriate limitations on government. This proactive approach addresses the current piecemeal legislation and litigation issues.

From Broadway in Nashville to Bourbon in New Orleans and from Riverfront Park in Spokane, WA to Michigan Avenue in Chicago, buskers individuate public space with tenor and bass, helping to make it a distinctly identifiable environment. Street musicians contribute a part of the auditory component to the space-place construct of a city's sensory environment, or as Thibaud calls it, the "urban ambiance."⁴ But, then again, some people call it noise.⁵ Buskers use music as an important form of artistic communication in the streets and subways, whether to try out new compositions, earn a living, or engage with their audience. It is "a theater experience reduced to its minimum essentials—a performer and an audience."⁶ These public spaces are intended for free speech; if those entertaining us cannot be heard, what of the right of all of us to deliver our messages on the street corners of the United States? If laws are violating the rights of those who have been singing and playing on the street over the course of several thousand years, then we must worry about the democratic right of every person whose voice needs to be heard, a fundamental mechanism on which our forefathers built our country. Are city regulations on the time, place, and manner of street performance legal or do they violate the First Amendment? In some cases, they are legal, such as when speech takes place during a busy rush hour or has dangerously high levels of sound—these are issues of public safety, not a subjective judgment of the performers or performance.⁷ But in other cases, such schemes clearly infringe on the First Amendment rights of street musicians. Legally, the crux of the predicament for buskers, who are frequently prevented from performing on city sidewalks in the U.S. is our court system's "inevitable tension between individual rights and the interests of society," according to Judge

Sweet in *Loper v. New York City Police Dept.*⁸ And, perhaps, the treatment of street performers is also a determinative test of the health of all types of free speech in public spaces.

In this essay, we present a brief history of restrictions on street musicians, explain the rights of those musicians according to common-law interpretations of the First Amendment, analyze the current busking regulations in several cities to evaluate First Amendment protections and violations, and propose a solution to the never-ending attack on the constitutional rights of buskers.

Buskers: Historically Restricted

From the Beginning: Celebrated but Restricted

The position of performers in society has always been dubious; they are people who choose to defy class structure yet are vital to urban life.⁹ Campbell writes: “The history of busking is the history of urban civilization. There have been street performers at least as long as there have been streets.”¹⁰ Nick of the Busking Project, who prefers a one-name moniker, describes the busking tradition:

Mostly it is a story of struggle, for society’s attitude towards the itinerant performer has always been ambivalent... They have been repressed by institutions as diverse as the Roman Catholic Church and Puritan parliaments, but prohibition has only increased the ingenuity of their efforts to bring enjoyment into the streets.¹¹

Evidence points to the origins of the street musician in Roman agricultural and religious festivals, where workers found entertainment in insulting one another in verse. Later, such songs were sung outside the houses of individuals or public assemblies. In urban Rome, crossroads in residential areas became places for common people to meet and celebrate, including enjoying music, poetry, and drama. Eventually, such entertainment was used

politically as a means of keeping the idle, poor masses occupied and happy: “Entertainment, along with free food, was a means of political control, and no regime attempted to ban street performances.”¹²

Once Rome fell, the fate of street musicians rested for centuries on the whims of the upper class who could sponsor and protect buskers despite laws and edicts from church and state. Kings, queens and lords enjoyed hearing themselves immortalized in verse as well as the bawdy entertainment or turn of phrase provided by singing poets. Many of these nobles, along with their entertainers, suffered under church inquisitions. There were no free speech protections in these times. Although the Church wanted people to believe that all entertainers were lewd and immoral, much of the church’s opposition was actually political. After all, “wandering minstrels were not only entertainers and newscasters, they also spread ideas, different ideas from those traditionally disseminated from the pulpit.”¹³ Interestingly, it was some of the men of the church who helped keep street performance alive. Lower clergymen scholars produced and sang poetry inspired by classic texts. They also sang about immorality within the church, not sparing their superiors. The church’s reaction to this way of distributing news and ideas establishes the wandering performer as a source we would now protect as free speech.

Times were hard for street musicians, but the tradition survived in small pockets throughout Europe. For example, the Moors had a strong tradition of music and sung poetry, unlike their Christian neighbors. In addition, the Crusades also brought musical culture back to Europe. In England, minstrels eventually formed guilds for protection and regulation, but membership required a fee, and some could not afford this luxury.¹⁴ Monarchs recognized some guilds, and dues-paying members enjoyed employment and protection not available to non-members (similar to the situation of busking permits in some U.S. cities today).

By the 1600s, Puritan attitudes against frivolous entertainment put an end to most music and theater for several dozen years. In addition, laws about vagrancy and the poor did not consider street performers to be legitimate, honest workers, and thus many wound up in poorhouses or jails. Despite this, in large cities the urban poor often made money performing street music. These included whole families, the disabled, veterans of war, and recent immigrants. Some used music to draw attention to their poverty (again, something that today would be protected free speech), or even purposely annoyed the wealthy by playing outside homes and workplaces until they were either paid to go away or invited inside to give a concert.

Despite attempts through time to regulate or eliminate the music of the streets, it was “spared because enough people had liked it to make a sufficient opposition.”¹⁵ Buskers brought entertainment, ideas, and messages for which there was a considerable demand.

Historical Restrictions in the United States

Street performance was no stranger to the new Americans. The street music tradition was imported by immigrants, whether singing to sell or singing as a part of celebrations.¹⁶ Busking also took on new forms; a revolutionary spirit inspired political songs in printed form called “broadsides,” and street singers, including Ben Franklin, sold them.¹⁷ Campbell explains, “As the nation expanded westward, buskers followed in the form of the Mississippi showboat, the minstrel show, the small travelling circuses with their torchlight parades and calliopes, and the fast-talking medicine show huckster.”¹⁸

The Bill of Rights included the provisions of the First Amendment because “Sam Adams, Patrick Henry, Thomas Jefferson and the general population wanted the right to protest governmental policy through public demonstration, *songs* and printed pamphlets on the street and public parks.”¹⁹ Street musicians also added color to street life. In 1869, a folio written by an

Effie Bailey stated: “The extent which street music attains in Boston excites the wonders of visitors, and it is often remarked that its ‘wandering minstrels’ would alone prove the musical superiority of the Hub!”²⁰ However, as early as 1858, municipalities such as Boston began to curb the free-speaking buskers:

A law has recently been passed by the City Government forbidding street musicians to perform after ten o’clock, P.M. or more than ten minutes in one place, and they must always be prepared to show their license. Upwards of seventy-five men, women and children were licensed per day during the spring months.²¹

Despite regulations, German bands and Italian hurdy-gurdies were commonplace in early 1900s New York. In 1923, the license department reported 800 organ grinders and an equal number of other street musicians.²² Well-known performers such as George Burns and Irving Berlin (whose younger days included stints as a street performer and even a singing waiter),²³ and many African Americans including Louis Armstrong honed their talents in the streets.²⁴

In the early 1900s, community life still took place in the streets, but this was about to change as Hollywood churned out movies and nightclubs replaced attendance at music halls in the cities. Radio, television, and other mass media began to take over people’s entertainment time. Soon performers began to be cited for obstruction, incurring heavy fines, and cities were reconfigured for automobile, rather than foot traffic. In 1936, New York’s mayor, Fiorello LaGuardia, cancelled the license structure “explaining that the city should no longer go into partnership ‘in this concession of mendicancy.’”²⁵ This ban stood, despite protest, until 1970.²⁶

In the late 1950s and 1960s, young people began to congregate in the streets for social protest. Many of the “hippies,” the youth subculture that replaced the beat generation, were homeless, penniless, and jobless, but had guitars and inspired a folk song revival that spawned

new amateur street musicians. The street became a place to polish acts, develop talents, and try out original compositions. Mass media might have completely replaced street performance if not for the hippies' revival of the art.²⁷

Despite this small revival, and the existence of the First Amendment in the United States, there was no "Campaign to Save Busking" or "Busking Festivals."²⁸ The only promotion had been by journalists "genuinely concerned about the disappearance of street musicians from the streets, for reasons such as, among others, police harassment."²⁹

Legal Precedent for Buskers' Rights

Several areas of legal precedent by lower courts, under the First Amendment, support the right of street performers to play in public spaces. First, we review the general determination that what buskers do qualifies as free expression. Second, we show that governmental permitting schemes imposed on buskers are often unconstitutional. Finally, we explain how the practice of soliciting for tips has also been upheld as free expressive activity.

Busking is Free Expression

The free speech and assembly rights of town criers, street preachers, barkers, buskers, political orators, vendors, and others who take to the public forums to express themselves have been embodied in U.S. law since the First Amendment of the Bill of Rights was adopted as a part of the Constitution in 1791. The First Amendment was specifically and overtly recognized as applying to the individual states through the doctrine of incorporation in the 1925 *Gitlow v. New York* decision.³⁰ However, U.S. judges did not start defending the rights of buskers specifically until the late 20th century, and to date, not in the U.S. Supreme Court or even in state supreme courts.

The Supreme Court has decided that a wide array of expression is protected by the First Amendment, including parades, protests, street performances, political speeches, distribution of literature, and more.³¹ In particular, the entertainment or performance conduct of street musicians and other entertainers is clearly recognized as art and expression.³² Although cities have historically heavily *regulated* buskers, the performers cannot be singled out for total prohibition, particularly in places where other forms of free speech are not prohibited.³³

Since 1970, when Allen Ginsberg, “poet laureate of the “Beat Generation”³⁴ challenged Mayor LaGuardia’s ban on performing on the sidewalks of New York, oppressed street musicians have taken to local courts with litigation on behalf of buskers.³⁵ Three key cases will be discussed in the next few paragraphs.

In one of the earliest and most important legal cases involving street musicians, street performers in Nantucket, MA were covered by a new Transient Vendor Bylaw.³⁶ Busker Robert Goldstein, the “Troubadour of Nantucket,” sued the city, claiming that the law infringed improperly on his freedom of expression.³⁷ He would have to apply for a permit, and the decision as to whether he would obtain a permit would be based on the following three criteria: “Financial responsibility of the applicant, effect on neighboring properties, and the opinion of town merchants.”³⁸ The judge determined that these criteria “are neither narrow, objective nor definite standards, and because those criteria exceed in their scope constitutionally permissible grounds for regulating free expression, the bylaw does not pass constitutional muster.”³⁹ At issue as well in this case was the underlying requirement of a license. This case, *Goldstein v. Town of Nantucket*, used *Shuttlesworth v. Birmingham* as a precedent (discussed later in Permitting Schemes).

In 1983, a ban on busking and other business-related activities in Alexandria, Virginia was overturned as unconstitutional (*Davenport v. City of Alexandria, VA*).⁴⁰ The city had adopted an ordinance with the express intent of banning all street performers from a 61-block public area in the center of the city, a much wider area than the mere two blocks of commercial entities purportedly affected by the “intrusions” of the buskers. It should be noted that the 61-block section was not exclusively retail, containing dining establishments and “many residences, historic landmarks, churches, and public buildings, themselves tourist attractions.”⁴¹

As an alternative, the city fathers offered specified places for street performers to engage in their busking activities. These approved parks and plazas would be designated as such, rendering all remaining public spaces no-busker zones.⁴² In effect, instead of cordoning off only a few public areas from which street musicians’ expressions were *prohibited*, the city identified and isolated only a few public areas in which buskers’ artistic expressions were *allowed*. This would be a case of overbreadth and governmental overreach. The city had alleged that such activity in this area of the city posed public safety issues (requiring a time, place, or manner restriction), but the court did not find this claim legitimate.

Prior to 1985, the city of Chicago had restricted busking in some areas and at some times. Then, the US District Court for the Northern District of Illinois ruled in favor of buskers, lifting the enforcement of the ban in some areas as well as overturning a permit plan restricting the use of amplifiers (*Friedrich v. Chicago*).⁴³ The court found the restrictions singled out only the free speech of performers and not, for example, religious groups, and thus found discrimination on the basis of both the content of speech and the type of speaker, violations of both the First Amendment freedom of expression and the Fourteenth Amendment rights to equal protection

under the law. In addition, it held that the buskers did not pose a problem in some of the places and times.

Friedrich v. City of Chicago is a case involving grievances related to some aspects of the Chicago Street Performance Ordinance but not to others. The court found that some but not all aspects of the ordinance were in violation of a street performer's First Amendment rights. Judge Aspen's finding that buskers' preferred venue, public sidewalks, are public forums, meant that the city's regulatory options were limited. He reminded us that "time, place and manner regulations may be enforced if they are (1) reasonable, (2) content-neutral, (narrowly tailored to a serve a significant government interest), and (4) leave open ample alternative channels of communication."⁴⁴ Chicago's regulation was not neutral, however, since it singled out buskers and did not cover "other classes of speakers and 'performers', such as leafletters [*sic*], picketers or preachers."⁴⁵

The city would therefore need to have a compelling interest in regulating the buskers' conduct. Judge Aspen found such an interest in the fear that when street performers draw such large crowds that stepping off of the sidewalk into the street becomes necessary, "both pedestrians and drivers are endangered."⁴⁶ But the city must use a constitutionally sound means of addressing this compelling interest in public safety. This is where the city failed. Its regulation banned buskers, especially break dancers, on certain streets at particular times. These areas, where busking was prohibited, were found to be more geographically extensive than is necessary to achieve the city's interest in protecting pedestrians and drivers.

In addition, the plaintiffs challenged the permitting scheme involving performing artists who use amplification. Performers who use sound amplification equipment were required to purchase a special license, the cost of which supposedly applied to the payment of police officers

assigned to determine whether the buskers are violating any of the amplification restrictions. Judge Aspen had no problem with the city wanting to limit decibel levels, but the specific regulation it used was too vague, and gave too much discretion to administrators deciding who would get a license.⁴⁷

Additional Cases

In *Turley v. Police Department of City of New York*, a street musician was prohibited from playing his “TrebleBass,” a combination electric bass and guitar that could not be heard without connection to an amplifier.⁴⁸ The court found that, although the city was only charging a \$45 per day permit fee, even this was unreasonable, especially since the city failed to provide sufficient evidence to justify the charge. Also, the city’s maximum volume level of 75 decibels was found to be unreasonably low for the performer to be heard above the ambient sound in Times Square.

Street performers continue to litigate. For example, in 2011 in Las Vegas, a local actress and her female friend, both dressed in costumes as sexy police officers, were arrested for posing for a tip without a license. In *Santopietro v. Howell*, the actual police officers and the actresses/performers differed regarding the manner in which the gratuity was requested; one considered them to be polite requests and the other as “demands,” albeit “non-coercive” demands.⁴⁹ The officers had undergone special training prior to the arrest. As a result of frequent similar erroneous arrests of street performers, the special training had been developed for all officers in the county, and this had arisen out of an Interim Stipulated Memorandum of Understanding (MOU). The MOU set out clarifications regarding the rights of street performers, including their right to perform on sidewalks and pedestrian bridges, and their right to accept unsolicited tips and to non-coercively solicit tips. An MOU might solve the problem of sounds

unnecessary arrests of or infringements upon buskers' rights, but it would have to be required for all U.S. police departments, and it would need to be much more detailed than the one developed for the Las Vegas strip.

This case eventually wound up in the United States Court of Appeals, 9th Circuit in 2017, where the court established a major point in regard to necessitating the purchase of a license by street performers, stating,

...any such requirement would run squarely afoul of *Berger's* [*Berger v. City of Seattle*, 569 F. 3d 1029] central holding, that a permitting scheme that “requires single individuals to inform the government of their intent to engage in expressive activity in a public forum, a requirement that neither we nor the Supreme Court has *ever* [*Emphasis original.*] countenanced,” is not permissible.⁵⁰

In another recent case from Providence, Rhode Island, litigation resulted in a settlement that required the city to permit Pombo, a lone saxophonist, to play music on the sidewalks and streets of public property, and to solicit or accept donations. Moreover, the city could no longer require him to obtain a busking permit.⁵¹

Licensing/Permitting Schemes Inhibit Performers' Free Speech

Permitting and licensing schemes for street performers did not originate in the United States, but they have been extremely common here. As early reports of the number of “licensed” buskers in New York City indicate, municipalities have used licensing for many years to regulate public spaces. Writing in a specialized law review published by Harvard University, attorney John Juricich pointed out:

A permitting regulation is one that requires a busker or street performer (or anyone wishing to engage in free speech activities) to obtain a permit before legally exercising

his or her guaranteed rights under the First Amendment. Although permitting schemes are rampant, one bedrock principle remains true of them: they are a prior restraint and carry a presumption of unconstitutionality that is egregious in the mind of the Court.⁵²

Prior restraint, according to the Supreme Court in *Nebraska Press Association v. Stuart*, is “the most serious and the least tolerable infringement on First Amendment rights.”⁵³

Several court cases established the allowable types of permit schemes. First, in *Freedman v. Maryland*, the practice of government rating of films was ended and rating boards could approve but not ban a film.⁵⁴ The decision was a precedent for removing government entities from decisions about the type of speech that enters the public sphere.

In *Shuttlesworth v. City of Birmingham*, the City of Birmingham had arrested one man, Shuttlesworth, out of about 10 African-American men who had been boycotting some downtown stores without a permit.⁵⁵ The arresting officer originally claimed that the men were blocking pedestrian traffic on the sidewalk, but then admitted that only half of the sidewalk was blocked. By the time Shuttlesworth was arrested, he was the only member of the group still present, so he alone could not have been blocking pedestrian traffic nor vehicular traffic, which was the purpose of the ordinance cited. Justice Potter Stewart asserted,

This ordinance as it was written, therefore, fell squarely within the ambit of the many decisions of this Court over the last 30 years, holding that a law subjecting the exercise of First Amendment freedoms to the prior restraint of a license, without narrow, objective, and definite standards to guide the licensing authority, is unconstitutional.⁵⁶

Thus, the Court for the first time required future permit schemes to use objective and narrow standards for granting or denying permit applications. The standards set in the *Shuttlesworth* case were then used to evaluate permit fees in *Forsyth County, Ga. v. Nationalist Movement*, decided

in 1992. Until this case, Supreme Court decisions had upheld the right of the government to charge reasonable fees as a requisite for groups to assemble or march in public spaces. Such fees were intended to recover estimated municipal costs of police protection, clean-up, and any other administrative expenses incurred by the city as a result of the assemblies. Some cities were charging as much as millions of dollars. In 1987, a group of 90 demonstrators conducted a “March Against Fear and Intimidation.” When word got out about the upcoming event, about 300 people from the Nationalist Movement appeared to oppose the march. Eight arrests were made for trespassing and carrying concealed weapons. The following weekend, 20,000 integrationists marched. Once again, counter-protesters joined the opposing forces at the scene. Many were arrested for protesting without a permit. In the end, the Nationalist Movement was charged \$8,000 to cover the outlay by the city. The court ruled for the Nationalist Movement, concluding that administrators, in order to estimate how many police officers would be needed to provide security—and thus how much the city would need to be reimbursed— “must examine the content of the message conveyed [and] the public response to that content.”⁵⁷

According to attorney John Juricich, these decisions fall short of the “precedential certainty” that is needed to fully protect the rights of buskers. He points out that the Supreme Court explained as much in 2002 when it held: “[I]t is offensive—not only to the values protected by the First Amendment, but to the very notion of a free society—that in the context of everyday public discourse a citizen must first inform the government of her desire to speak . . . then obtain a permit to do so.”⁵⁸

Limitations on Time, Place and Manner Constrain Buskers’ Speech

It is a bedrock free speech principle that a government entity is given the most leeway in regulating speech activities when it uses a valid time, place, or manner restriction, and that

regulations based on speech content are almost certainly unconstitutional. As far as street musicians are concerned, restrictions are intended to promote order by: (a) maintaining safe traffic flow; (b) protecting people, property, and the environment from damage; and (c) ensuring the administration of justice. Restrictions on buskers are often found within “permitting schemes.”

The “time, place, and manner” concept of speech rights was first articulated in 1938 in *Lovell v. City of Griffin*,⁵⁹ a case involving the distribution of religious literature in a city where the people were required by ordinance to obtain permission from the city administration before passing out the pamphlets.⁶⁰ The decision of the Court described the law this way: “The ordinance prohibits the distribution of literature of any kind *at any time, at any place, and in any manner* without a permit from the City Manager,” and then concluded “that it strikes at the very foundation of the freedom of the press by *subjecting it to license and censorship* [Emphasis added].⁶¹

The legal concept allowing municipalities to place certain reasonable restrictions on the rights of individuals to express themselves in public places, for the purpose of protecting the well-being and safety of the citizens, finally took its abbreviated form of “time, place, and manner” in 1940, in *Cantwell v. Connecticut*, affirming,

A State constitutionally may, by general and nondiscriminatory legislation, regulate the time, place and manner of soliciting upon its streets, and of holding meetings thereon, and may in other respects safeguard the peace, good order and comfort of the community.⁶²

The long history of busking is replete with all kinds of time-place-and-manner policies. These restrictions are “the most common regulation conflicting with buskers’ First Amendment

interests.”⁶³ Such restrictions can be so onerous as to make street musicians and other sidewalk performers almost invisible if not completely absent from the downtown sections of urban centers. Ideally, city administrations that appreciate the benefit of “hosting” a flourishing environment of musical buskers manage the activity to a moderate degree, regulating it only as much as is necessary.

One of the very few cases decided by the Supreme Court that has even a tenuous relationship to sidewalk performers is *Frisby v. Schultz*.⁶⁴ This was a Wisconsin case about several protesters who situated their anti-abortion protest on the sidewalk in front of the residence of a physician who performed abortions. The city enacted a new ordinance banning all picketing in residential areas of the town. Writing for a 6-member majority, Justice O’Connor found that the city ordinance did not violate the protesters’ First Amendment rights, that it was a reasonably crafted means of protecting residential privacy. We can extrapolate from the decision for guidance as to what would constitute constitutional regulations of buskers’ expression. First, such regulations must not restrict speech on the basis of its content. Second, limitations must be narrowly tailored to achieve a specific government interest (safety, property damage, traffic flow, etc.) lest they be found overbroad. Third, the restrictions must leave ample alternative channels for the desired expression or communication. Furthermore, any restriction must treat all forms of protected speech the same, and not be applied, for example, only to street performers or only to street performers who solicit tips.

Time-related ordinances and policies

Time restrictions regulate when buskers can perform. Reasons may include the avoidance of traffic rush hour, ensuring residents and tourists in their hotel rooms enjoy restful nights, and avoiding conflicts with other activities and events scheduled in the city. Regulations might also

defer to times when a school is in session, or when government functions, such as court proceedings, are going on.

Place-related ordinances and policies

Allowing busking in certain areas and forbidding it in others is a common “place” restriction in U.S. cities. The courts have established several types of areas.⁶⁵ So-called traditional public forums have historically been reserved for the communication of ideas and include parks, sidewalks, and streets. Restrictions in such areas are typically not allowed. Limited or designated public forums are places the government has set aside and where free expression is at least compatible with other functions. These include public university assembly halls, city-owned theatres, and perhaps capitol grounds. Generally, more restrictions are allowed here. Places such as private property, jails, airports and military bases are considered non-public forums and therefore speech is usually legally restricted. And expression targeting a specific private residence may also be restricted, although passing through residential areas on public sidewalks is allowed.

For example, in 2016 the City of New York was ordered to pay \$100,000 to a group of musicians in settlement of a case of wrongful arrest of the buskers for playing in a subway station. Busking in the subway system has been legal in New York since 1985.⁶⁶ In Washington D.C., the transit authority legally restricts free speech activity within 15 feet of a station entrance, escalator or stairway to ensure the safe flow of pedestrians.⁶⁷

Manner-related ordinances and policies

Many manner-related restrictions apply to noise. As early as the 1930s, city administrators in New York viewed the sounds of music from the sidewalks as little more than a public nuisance. Of course, the noise was not coming only from the singers and instrumentalists,

but also from the crowds they attracted. Strategies embraced by cities have included: (a) the prohibition of certain instruments;⁶⁸ (b) the regulation of the decibel level of the sound from a specified distance;⁶⁹ (c) the proscription of “pitches” or set-ups near hospitals, police departments, and other already noisy areas; (d) the prohibition of amplifiers or the requirement of a special license for the use of an amplifier; and (e) the requirement of passing an audition to spare tourists and residents the unpleasant sounds, i.e., noise, of amateur musicians in what is called an “acoustic protection zone.”⁷⁰ The City of Wilmington, Delaware precisely yet undiplomatically presents its noise regulation on “itinerant performers” this way:

No performer or group of performers may generate *noise* (emphasis added), which exceeds the ambient noise level by ten dBA... If the sound level exceeds a median sound level of 50 decibels, and exceeds the background noise by at least ten dBA, the performer or group of performers causing the excessive sound level shall either turn down the music or move to a distance from the origin of the complaint so as to reduce the sound level within these limitations. Background noise for this purpose shall mean L90.⁷¹

An interesting manner restriction is that, as innocuous as it seems, buskers in some cities are not allowed to sit. In one northeastern city, it appears that buskers are literally being kicked to the curb, but only where the brick pavers are located. The City of Northampton, Massachusetts is quite clear on this point, stating,

The permittee will not play musical instruments on any public sidewalk that is less than six (6) feet in width including pavers. The permittee shall locate at the edge of the sidewalk, opposite the building, on the brick pavers. No chairs or city benches will be utilized. Sitting on the brick pavers will not be allowed.⁷²

This ordinance can be extremely burdensome. Just think about how long you might be able to stand in a small space while strumming a guitar or playing the saxophone, knowing there is no place to rest for a few minutes on a chair or stool. What would this policy mean for an elderly or disabled musician? Such an ordinance appears to be too restrictive to be constitutional.

Soliciting of Tips Is Free Expression

One essential aspect of busking, the passive solicitation of voluntary monetary contributions, should be examined. Specifically, street performers have been prevented from plying their trade just because they put an open guitar case nearby. Performing on the sidewalks is usually a pleasurable experience for both player and listener, but it is difficult to maintain one's energy, enthusiasm, and body for hours at a time simply for the love of making music. Some street musicians actually support themselves on the donations made by passersby. One of the most frequent ways that buskers "solicit" donations is by leaving an open instrument case nearby for use as a receptacle for bystanders' tossed coins or dollars as signs of their appreciation of the show.

There are several cases in New York, for example, which deal with the request for contributions by people who practice artistic expression on city sidewalks. We will discuss two of these. *Loper v. New York* is one of those cases that pertains particularly to street entertainers.⁷³ A city ordinance had banned begging and concomitantly determined that busking musicians or other street performers soliciting contributions were, in fact, beggars. In his opinion, US District Judge Sweet ruled that begging is protected speech under the First Amendment and that to prohibit begging was unconstitutional, content-based regulation.

The next case discussed is pertinent to musical buskers' "sale" of their performance and sale of CDs and other material related to their performances, per *Bery v. City of New York*.⁷⁴

Here a New York statute, the General Vendors Law, was challenged by street artists, who were arrested for selling their artwork on the city's public sidewalks without a license. Some plaintiffs asserted that their work had been confiscated and even damaged at times.

The Second Circuit ruled for the plaintiffs, stating that "If the First Amendment reached only 'expressions conveying a "particularized message,'" its 'protection would never reach the unquestionably shielded painting of Jackson Pollock, music of Arnold Schonberg, or Jabberwocky verse of Lewis Carroll.'" ⁷⁵ The court concluded also that visual art is as wide ranging in its depiction of ideas, concepts and emotions as any book, treatise, pamphlet or other writing, and is similarly entitled to full First Amendment protection. ⁷⁶

A Comparison of Four Cities' Busking Ordinances

Today, each city fosters its own style of performance, audience reaction, and police presence. Looking at the right of free expression among those whose livelihood is made in public spaces, particularly buskers, is one important way to evaluate the health of free expression in general in U.S. society. Typically, the places buskers congregate in each city is very specific; these "places reflect not only density and receptivity of audience, but also places of truce with civic authorities." ⁷⁷ In some cities, popular locations hold auditions and "book" buskers months ahead. Those who schedule buskers in popular locations say they are "here to protect middle-class sensibilities" and "keep the winos from playing" in these spaces. ⁷⁸ They keep the shopkeepers happy at a time when businesspeople can become hostile, fearing that buskers will drain away customers and dollars from their shops.

Serious problems, including arrests and imprisonment, can arise when street musicians and other buskers move from city to city. The city ordinances and state laws change from one metropolis to the next, and art truly becomes the perception that lies in the eye of each city's

beholder. It does not take long for buskers to realize that a particular limitation of concern in another jurisdiction was ultimately determined in court to be unconstitutional and that the same unfair regulation is facing them once again in another city. Stephen Baird, director of Community Arts Advocates, Inc., manages a Web site, which currently lists the regulations for several cities in the U.S. His site offers the most complete listing of legal citations since the 1970s.⁷⁹

What are some of the time, place, and manner restrictions specific to a few U.S. cities? Which regulations foster and which impede the growth of busking? Which ordinances appear on their face to impose prior restraint on a form of artistic expression that some courts have already decided should be protected? We now present some answers to these questions. Doumpa and Broad collected and reviewed the busking policies of 46 cities around the world and focused their ranking of cities' propensity to encourage (Melbourne and Sydney, Australia) or discourage (Mexico City) busking on 34 of those.⁸⁰ To our knowledge, this is the only such research. We, of course, are concentrating on U.S. cities, and only six urban centers in their sample are in the United States. On the basis of the authors' rankings, we first chose the most favorable U.S. city, Spokane, Washington, and the least favorable city, New Orleans, Louisiana. We then selected a city which, according to their review, is only mildly unfavorable, Chicago, Illinois. For our fourth city, we selected a city not in their sample, but a city that prides itself on its thriving music industry and its lively musical street scene—and even calls itself the Music City—Nashville, Tennessee.

Spokane, WA

Doumpa and Broad (2014) rated this small city, population about 216,000⁸¹ as the top-ranked municipality in the United States for its encouragement of busking although Spokane

ranks behind seven cities outside the U.S. In Spokane, busking is managed as noise pollution and is restricted as such along with other sources of noise. Prior to the Doumpa and Broad analysis, which was conducted in 2014, the period between 2008 and 2012 was one of numerous squabbles between Spokane city fathers and buskers. In 2008, the attempt to curtail the musical activity on the sidewalks took the form of a call for buskers to purchase licenses. The ordinance proposed was never enacted. Noise-level restrictions were the argument du jour during 2009. The ordinance enacted counted ambient noise towards the maximum decibel level permitted. This was difficult to enforce because it required decibel readings several times daily, the meters are quite expensive, and the task is time-consuming for officers.

City Hall began to look at other possibilities for regulating noise levels. Someone suggested that a violation would occur if an individual or group's sound could be heard from 100 feet away, or if it rattled windows, or if it included heavy bass parts. Between the hours of 10 p.m. and 7 a.m., sounds must not be audible from adjacent private property. Julie Schaffer, an attorney for Spokane's Center for Justice, complained about the vagueness of the ordinances, which would inevitably lead to arbitrary enforcement.⁸² "The effect of this confusion," she argued, would be "to chill constitutionally protected expression and speech."⁸³

As far as we have been able to determine, Spokane is still searching for appropriate measures to enact in the regulation of street musicians. Simply on the basis of sound regulations, we find Spokane's environment for busking to be neither particularly amicable nor hostile. It is simply vague. The city has been working on regulating buskers, but the city code offers no new narrow or specific regulations. Its current code, enacted in August of 2014, states, "A person who engages in constitutionally protected expressive activities in the public right-of-way must

still comply with all other regulations regarding conduct in the public right-of-way.”⁸⁴ No other regulations regarding conduct in the public right-of-way are listed.

New Orleans, LA

New Orleans has always been recognized as a “city favored by citizens and tourists alike for a culture grounded in live music and outdoor celebration.”⁸⁵ It is one of the most well-known cities on the Gulf Coast, boasting a population of 392,000 even after recovering from the Hurricane Katrina losses.⁸⁶ Doumpa and Broad, however, report New Orleans to be a city that manifests an unfavorable setting for street performers.⁸⁷ In fact, for the past few years, administrators have been working to tighten noise pollution and other restrictions. The two researchers suggest, “This seems to mean lower sound levels, limitations on time and duration, and more enforced policing with the possibility of imprisonment for contravening the regulations.”⁸⁸ This would certainly predict a much less welcoming environment for those plying their trade on the sidewalks.

According to the findings of the 2014 report, buskers must purchase a low-cost annual license, and for those who use amplification, there is another license to buy and a prohibition on sound above 85 db.⁸⁹ Doumpa and Broad found that certain whole areas of the city were off limits to street performers. New Orleans’s licensing scheme appeared to serve the purpose of filling the city coffers with no obvious accounting for how this revenue will be spent on behalf of the citizens. More recently, New Orleans has done away with permitting altogether. However, for those street musicians who want to perform in the French Market area, a free registration badge is required. The maximum sound level has been reduced to 80 dB from a distance of 50 feet. Amplifiers are allowed, but, again, not so as to raise the volume above the 80 decibels. Except for the lowering of the volume restriction, New Orleans has loosened all other

restrictions, but does not allow the selling of CDs. Exact regulation for New Orleans can be found at the site for the Guide to New Orleans Street performance.⁹⁰

Chicago, IL

Chicago, a metropolis of 2.7 million residents, has mixed feelings about buskers—or so one would think by looking at the city’s ordinances.⁹¹ According to Lindsay Friedman, a *Chicago Tribune* reporter, in the early 1980s, the “Second City” placed a ban on all street performers unless they had a special permit.⁹² This specific ban was lifted in 1983, although buskers still had to be able to show a “standardized” permit. The city currently requires a license to busk on the sidewalks (a two-year license costing \$100). Senior citizens, veterans, and the disabled are afforded a discount. Permits must be worn on the busker’s person and be visible to all passersby. In 2014, a separate license to busk in the subway stations was required (\$10 a year). Today, performing in the subway stations is not permitted.⁹³

Busking is not permitted in some of Chicago’s busiest pedestrian areas, the Magnificent Mile being one of those places where funny or musical muses could actually draw large enough crowds to make a living.⁹⁴ In September 2017, Alderman Brendan Reilly introduced a noise-abatement ordinance that would limit the volume of downtown buskers to “near-library levels — not audible to a person standing 20 feet away.”⁹⁵ Chicago’s treatment of buskers is incontrovertibly moving in a more unfavorable direction for the profession.

Nashville, TN

Now, we take a look at the potential for a welcoming approach to buskers in a metropolitan area of 1.8 million people, a city that takes great pride in its nickname—Nashville, Music City USA.⁹⁶ Nashville gets into *Bery v. City of New York* territory with its permitting arrangement that distinguishes between street musicians who want to sell their CDs and those

who do not. Those who have recorded music or have T-shirts to vend must pay \$57 for a permit.⁹⁷ Nashville buskers are not allowed to *ask* for donations but are permitted to *accept* them.⁹⁸

Since 2013, street musicians in Nashville have had to work within the constraints of a comprehensive sound ordinance, which “banned street performers’ use of drums, amplifiers, saxophones and stools.”⁹⁹ Peak shopping hours, when the pedestrian traffic is greatest, present other obstacles for buskers. Finding just the right pitch, or spot, on the sidewalk where one can be heard over the automobile traffic and other ambient sound without setting up too close to another street musician per the regulations, adds a whole new dimension of competition for the ears of willing donors. Buskers find themselves battling the sounds emanating from stores, restaurants, and bars lining the very sidewalks on which they position themselves. Abby Roach—known as “Abby the Spoon Lady” on the street—is the president of the Asheville Buskers Collective. She offers this response to an article on the Freedom Forum Institute Web site: “Why is it okay to forget about the First Amendment? First Amendment covers time, place, and manner...meaning they can’t say no saxophones or drums and still have guitars. It’s unequal then, which is the purpose of the 1st...equality.”¹⁰⁰ With no ordinances speaking specifically to street performers, buskers take to the sidewalks wondering whether a police citation and a \$100 fine is just a block up the street. A situation with no rules is almost worse than unconstitutional rules, and the Nashville scene appears to be tone deaf.

Conclusion

Doumpa and Broad conducted their survey of busking ordinances and regulations in cities around the world with the purpose of finding those urban centers creating atmospheres most and least favorable to street performers. Their intent was to determine which of these city

policies had significant effects on the quality of the experience in public spaces. The authors elaborate: “There is growing recognition that in order to revitalize the urban space and to entice people to come to town, we need to fill these spaces with life, with culture, with art—in short, to make people want to be there, and not just to shop.”¹⁰¹

Buskers have dealt with being an unwelcome presence for hundreds of years. In the U.S., the right to free expression in public places was established from the beginning of our nation. And yet even today, buskers in the U.S. are still fighting for their right to share their art and perform their music, facing forcible removal and arrest; when possible, they challenge municipalities in court. Permitting schemes and restrictions on the time, place, and manner are found in the four cities we examined and are common across the country. Some are overly restrictive, and some are overly broad and vague; both kinds can be unconstitutional and neither is welcoming to those who try to bring sound, color, and vibrancy to our city streets. Despite numerous court decisions upholding the rights of street performers, cities still create unconstitutional restrictions. Few other groups have had to endure such a long-lasting battle to have their voices heard in the milieu in which it belongs. Yet street performers provide a unique contribution to our society:

The busker is important, not merely because he brings us music on our way to work, but also because he represents the unpredictability and freedom that have been lost in most people’s regimented lives. The footloose musician has always been around and his different perspective on life can give a fresh point of view to that coming from masses of people all trained to think the same way.¹⁰²

Buskers are important not only for the culture they represent, but for the litmus test of the state of free speech they provide. In most cities, wherever buskers can be found and no matter

the type of main act on display, they have all learned one more skill to add to their performances—jumping through hoops. Buskers must come together nationally and more purposefully to deliver to city administrations model guidelines that emerge from common law and decisions ranging from local courts to the Supreme Court. Stephen Baird has already developed three separate sets of such model regulation guidelines: one for small towns, one for medium-sized towns, one for large cities (see Appendix A).

Baird's recommended "regulations" deal with the definitions that municipalities struggle with, leaving the cities to determine only the appropriate time, place, and manner restrictions. Basically, this guideline is a fill-in-the-blanks document.¹⁰³ The national adoption of these sample regulations has the potential for bringing most cities into general compliance with each another, while allowing for individual cities to tailor certain time, place, and manner restrictions to the needs of the particular community. Volume regulations could be standardized, making at least one restriction consistent throughout the country. Except for the monies collected to cover actual municipal services, all collected fees and fines could be earmarked for the arts or some other related services. This could turn the perception of a licensing fee from a barrier to free speech to a contribution to the city's culture—only if the monies are truly not given to the general fund. Adapting the guidelines to cover the specific needs of a city's neighborhoods would be a rather simple task. The administrations would be able to expeditiously incorporate the new busker policies into their city codes and post them to the Internet, where other city councils and buskers would have easy access to them. In the end, until consistency rules the day, street corner singers, musicians—and speakers—will continue to be restricted by a myriad of local regulations.

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"The sample for this study was randomly drawn from Ipsos's online panel, partner online panel sources, and "river" sampling and does not rely on a population frame in the traditional sense. Ipsos uses fixed sample targets, unique to each study, in drawing sample. After a sample has been obtained from the Ipsos panel, Ipsos calibrates respondent characteristics to be representative of the U.S. Population using standard procedures such as raking-ratio adjustments. The source of these population targets is U.S. Census 2016 American Community Survey data. The sample drawn for this study reflects fixed sample targets on demographics. Post-hoc weights were made to the population characteristics on gender, age, region, race/ethnicity and income."

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Running head: ENTERTAINING FREE EXPRESSION

Appendix A

MODEL REGULATION OF STREET PERFORMERS (Large City)¹⁰⁴

The following are suggestions for model regulations in the areas of definitions, permits, fines, places for performance, noise levels, impeding traffic, and tips.

A. It is vital to include clear definitions of both the busker/performer and public space. For example, Baird suggests:

The following terms are defined for the purpose of this regulation as follows:

"Perform" includes, but is not limited to, the following activities: acting, singing, playing musical instruments, pantomime, juggling, magic, dancing and reciting.

"Performer" means an individual who owns a permit pursuant to the provisions of this Regulation.

"Public Areas" includes sidewalks, parks, playgrounds, and all other public ways located in the City of _____.

B. A permit should be easily available for a reasonable fee. Baird suggests:

A permit shall be issued by the Arts Council to each applicant therefor in exchange for a completed application and a fee of \$10, subject to the provisions of Section 8 of this Regulation.

C. Fines, and the use of the fees collected, should be a reasonable amount (compared to the income of the street performer) and clearly stated. Baird suggests:

Any person who performs in a public area without a permit issued under Section 3 of this Regulation shall be fined not more than \$25. The proceeds of any such fine shall be directed to the General Fund and appropriated to the budget of the Arts Council.

D. The places and spaces where and when performers are allowed should be clearly articulated, and, not unreasonably restricted. Any special restrictions should be clearly spelled out, including the justification for the restriction. For example, Baird suggests:

Performances may take place in the following locations:

1. In public areas, except those excluded by the City Council, Chief of Police, the Traffic Director or Public Works Commissioner, pursuant to Section 7 of this Regulation
2. On private property, if the performer has obtained the written permission of the owner of such property or other person with authority to grant such permission with respect to such property;
3. In a public area where an authorized fair or public festival is being conducted, if the performer has obtained the written permission of the sponsor of such fair or festival.
4. Performances may take place between 7:00 a.m. and 11:00 p.m. Sunday - Thursday, 7:00 a.m. and 12:00 midnight Friday and Saturday unless otherwise allowed by the Arts Council.

No public area shall be excluded from performances except: by majority decision of City Council or its designated committee pursuant to paragraph (a) hereof; or by decision of the Chief of Police in the case of an emergency; provided that no public area may be excluded from performances by the Chief of Police under this subparagraph for more than 7 days.

E. Clear information about noise levels should be included, such as the following suggested by Baird:

A performer may use electric or electronic amplification up to a level of 80 decibels measured 50 feet from the source of the sound. The conduct and behavior of all street performers will be in compliance with the existing Noise ordinances and codes.

- F. In the case that traffic becomes impeded, a clear manner of resolving the situation should be stated, as suggested by Baird:

A performer may not block the passage of the public through a public area except as permitted by the sponsor of an event under paragraph (a) of this Section or otherwise allowed by the Director of Traffic and Parking or Public Works Commissioner. If a sufficient crowd gathers to see or hear a performer such that the passage of the public through a public area is blocked, a police officer may disperse the portion of the crowd that is blocking the passage of the public, but said police officer shall not cause the performer to leave the location.

No performer or group of performers shall perform at a distance of less than 50 feet from another performer or group of performers that already is performing.

- G. Because the collection of tips is often a disputed part of busking, clear specifications should be provided for all. In addition, a clear understanding of what is, and is not, disorderly and thus prohibited, should be laid out.

A performer may accept contributions of money or property at a performance. Contributions may be received in any receptacle.

A performer who performs and accepts contributions under the provisions of this Regulation shall not be committing disorderly conduct by virtue of those acts.

A performer who performs under the provisions of this Regulation shall be presumed not to constitute a disturbance of the peace or quiet, unless it is determined by a police officer that such a performance is not in the spirit of entertainment but rather is gross and disorderly conduct.

¹⁰⁴ Stephen Baird, “Model Regulations,” 2017. Accessed May 10, 2018
<http://www.busersadvocates.org/saaregulations.html>