Transit Passengers and Civil Rights

DETAILS

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TRANSIT PASSENGERS AND CIVIL RIGHTS

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INTRODUCTION

The overall objectives of this study are to research what rights transit authorities have in ejecting or excluding persons who constitute a danger or annoyance to other passengers and the due process rights that members of the traveling public have in the use of transit. Important issues are whether a transit authority may eject or exclude a passenger based on his or her present or past conduct; what elements of behavior must a transit operator observe to justify the removal or exclusion of a passenger who is loud or disruptive, violates the law, or who is a known sex offender; what procedures must be afforded to a passenger who is ejected from a transit system or who is barred from using the transit system for a prolonged period of time; and whether a transit authority may reject a service animal accompanying a transit passenger.

The above issues and others discussed herein present numerous constitutional and other issues. Depending on the issue, the transit authority's actions or restrictions may implicate the First Amendment, the Due Process Clause of the Fifth and Fourteenth Amendments, the Equal Protection and/or the Privileges and Immunities Clauses of the Fourteenth Amendment[1] of the U.S. Constitution, and federal and state civil rights statutes, as well as rights under a state constitution or state law.

This Report discusses, *inter alia*, (1) what the transit authority's obligations are to serve the public; (2) whether there is a constitutional right to travel via transit; (3) when restrictions on the use of transit facilities may implicate the First Amendment's rights of free speech and assembly; (4) what the transit authority's lawful responses are when there is suspicious activity or security threats; (5) what the transit authority's lawful responses are when there is unruly behavior or the presence of sex offenders in the transit system; (6) what the transit authority's obligations are regarding a transit user's service animal; (7) what the transit authority's potential liability is under the civil rights laws for a violation by the transit authority of a user's constitutional rights; (8) the standard of judicial review, i.e., level of scrutiny, that the courts would apply to transit regulations or policies that provide for the temporary or permanent suspension of transit users from the system; (9) whether the transit authority should have specific and clearly defined procedures in place concerning the barring of transit users; and (10) if a transit user is refused service or suspended or barred from using transit facilities, what procedures would satisfy due process.

I. RESPONSES BY TRANSIT AGENCIES TO SURVEY ON POLICIES AND PROCEDURES

In April and May 2004, 60 transit agencies representing 29 states responded to a questionnaire regarding their experiences, practices, and procedures relating to the subject of the Report. The agencies' responses will be discussed in various sections of this Report.[2]

The following tables provide some information on the nature of the agencies that responded to the survey, such as the population of the agencies' service areas, the number of buses and train cars, and the average number of daily riders. Please note that not every agency responded to all requests for information or questions in the survey. Table 1.A shows the range of responses by the size of the population of the transit agency's service area; most responses were from agencies with service area populations ranging from 100,000 to 1,000,000.

[1] Hutchins v. District of Columbia, 338 U.S. App. D.C. 11, 188 F.3d 531 (D.C. Cir. 1999) (Upholding D.C. curfew law applicable only to juveniles).

[2] Responses of the transit agencies are on file with the Transportation Research Board, Washington, DC, and are hereinafter referred to as "Confidential Survey Response."

TABLE 1.A—NUMBER OF TRANSIT AGENCIES RESPONDING BY SIZE OF POPULATION SERVICE AREA

Less than 49,999	50,000 to 99,999	100,000 to 199,999	200,000 to 499,999	500,000 to 999,999	1 Million to 1,999,999	2 Million to 2,999,999	3 Million to 4,999,999	5 Million or More
1	4	10	9	9	7	3	2	1

Table 1.B illustrates the range of the agencies' fleets in number of buses. Over 60 percent of the agencies responding had fleets of less than 200 buses.

TABLE 1.B—AGENCY'S FLEET (BUS ONLY)

0 to 99	100 to 199	200 to 299	300 to 399	400 to 499	500 to 599	600 to 699	700 to 799	800 to 899	900 to 999	1000 or more
28	8	2	3	2	3	3	0	0	1	2

Table 1.C illustrates the range of agencies' fleets in the number of rail cars for those also having rail operations. About 15 percent of the agencies responding to the survey furnish both bus and rail service.

TABLE 1.C—AGENCY'S FLEET (RAIL CAR ONLY)

0 to 99	100 to 199	200 to 299	300 to 399	400 to 499	500 to 599	600 to 699	700 to 799	800 or More
3	1	1	1	0	0	1	0	1

Table 1.D illustrates the wide range in numbers of daily riders on the transit systems responding to the survey. About half of the agencies responding had more than 20,000 riders per day.

TABLE 1.D—AGENCY'S AVERAGE NUMBER OF DAILY RIDERS

Less than 4,999	5,000 to 9,999	10,000 to 19,999	20,000 to 49,999	50,000 to 99,999	100,000 to 199,999	200,000 to 299,999	300,000 to 499,999	500,000 to 999,999	1 million or more
12	4	8	6	3	6	6	1	0	1

In the survey, transit agencies were asked whether in the past 3 years the agency had excluded a transit user from the system because of being a security threat; for threatening another user; for engaging in political, religious, or other expression or protest; for being a registered sex offender; or for engaging in begging or other unacceptable behavior.

TABLE 1.1—PERCENTAGE OF TRANSIT AGENCIES REPORTING BARRING TRANSIT USERS IN PAST 3 YEARS

Agencies that had Excluded Users	Agencies that had Not Excluded Users	No Response or Referred to Police
62% (37 of 60)	30% (18 of 60)	8% (5 of 60)

As to the nature of the incidents in the past 3 years, only four agencies responded that the incidents were too numerous to describe or that they numbered in the hundreds. Fourteen agencies (23 percent) reported that they had had approximately one to three incidents the last 3 years.

The agencies reporting incidents described them variously as involving trespassing; assaults on the operator or transit users; abusive or disorderly conduct; destruction of property (e.g., cutting seats); panhandling; drinking, being drunk in public or having open containers of alcoholic beverages; thefts; fighting; unacceptable verbal behavior; refusals to leave the vehicle; and indecent exposure. Transit agencies did not report any incidents involving political, religious or other expression or protest or involving registered sex offenders.

In the survey, transit agencies also were asked whether they had procedures for responding to problems or incidents.

TABLE 1.2—PERCENTAGE OF TRANSIT AGENCIES HAVING PROCEDURES FOR RESPONDING TO INCIDENTS

Agencies Reporting Procedures	Agencies Reporting No Procedures	Response Not Clear
53% (32 of 60)	45% (27 of 60)	2% (1 of 60)

Thirty-two agencies (53 percent) reported having some procedures, whereas 27 agencies (45 percent) reported having no procedures. Based on the responses, it appears that only 13 agencies (22 percent) have some form of *written procedures*. Seventeen agencies (28 percent) responded that their policy was to report any incident to the police and rely on the police and the courts to deal with such incidents. One agency reported that the municipality had added a new section to its municipal code describing various forms of prohibited bus conduct.

As stated, some agencies had unwritten procedures. A few of the responses from agencies with no written procedures:

- "Bus supervisors always respond at the scene of the incident[;] depending on the nature of the incident, quite often [the] police are called. Both the supervisor and bus operator are asked to document [the] details of the incident."[3]
- "Operators contact Dispatch through radio or emergency switch where street supervisors and police are dispatched to intercept [the] bus."[4]
- In situations where a user was barred from the system, one agency stated that, "[i]n most cases [the] person who is barred will come in and talk to management about their situation, and we make a decision."[5]

Transit agencies were also asked whether, in the past 3 years, transit users had made claims for being denied service or for being barred or suspended from using the transit system.

[3] Confidential Survey Response.

[4] *Id*.

[5] *Id*.

TABLE 1.3—PERCENTAGE OF TRANSIT AGENCIES REPORTING CLAIMS IN PAST 3 YEARS BASED ON USER'S EXCLUSION

Transit Agencies Reporting No Complaints or Claims	Transit Agencies Reporting Some Form of Complaint	Transit Agencies Reporting the Filing of a Claim	No Response or Response Not Clear
70% (42 of 60)	10% (6 of 60)	10% (6 of 60)	10% (6 of 60)

Forty-two agencies (70 percent) answered that they had not had such claims. Another six agencies (10 percent) reported that there had been complaints occasionally that had resulted in a follow-up inquiry, but that these complaints had not resulted in formal cases or proceedings. Only six transit agencies (10 percent) responded that they had had an actual claim for having denied service or for having barred or suspended a user from the transit system.

Few claims appear to have involved actual court proceedings. One agency advised that it had had claims relating to "harsh treatment," but that the suspension had been upheld.[6] Another agency reported that more than 3 years ago one suspended passenger had taken legal action (outcome not disclosed). One agency reported that one suspended passenger had contacted the local office on civil rights, but no legal or other action had resulted. One agency advised that there had been one or more instances in which there was an appeal to the transit commission (no other details provided). One agency reported that there had been some complaints by passengers that were resolved after an informal hearing. Only one agency advised that there had been a complaint that had been "denied" in court, but no other details were provided.[7]

One transit agency, serving a population of more than 3.5 million with both buses and trains, reported:

> Neither the [agency's] Transit Police nor Research and Planning is aware of any successful attempts to exclude a person from the transit system. Certainly, no one would be excluded for engaging in political, religious, or other expression of protest. Many years ago, a woman kept faking seizures in the system, causing disruptions and delays. [The agency] was unsuccessful in getting her excluded from the system. There are some other anecdotal incidents, but no one can say for sure that anyone was banned from the system in the past 3 years. Records of this would not be easily retrievable.[8]

As discussed in Part II. below, although the transit agency is under an obligation to serve the public, the agency may respond to a security threat or disorderly, abusive, or other conduct that impairs the safety or comfort of others using the transit agency's facilities.

II. OBLIGATIONS OF THE COMMON CARRIER IN SERVING THE PUBLIC

A common carrier may be liable for the unexcused refusal to transport persons who pay or are ready to pay the fare. However, where a common carrier has reasonable cause to believe that the safety of its passengers will be endangered by a prospective traveler, the carrier may refuse service. Persons whose conduct is riotous, disorderly, or potentially dangerous may be refused service; thus, for example, a bus driver has an affirmative duty to protect passengers and may exclude persons because of their disruptive behavior.

In *Martin v. Central Ohio Transit Authority*,[9] the plaintiffs, an injured youth and mother, appealed the trial court's decision that granted summary judgment to the defendant transit bus driver. The youth and his companions caused a disturbance on a transit bus, were told to leave, and upon refusing the driver produced a handgun. A struggle ensued and the youth was shot. The lower court's ruling was affirmed that the bus driver was acting within his scope of employment and that he had a duty, as the driver of a common carrier, to protect his passengers. As such, he had qualified immunity under Ohio Rev. Code Ann. § 2744.03(A)(6)(a) and his actions or omissions were not with malicious purpose, in bad faith, or in a wanton or reckless manner under § 2744.03(A)(6)(b).

No authority has been found holding that a transit authority's refusal to serve a passenger or its suspension or bar of a user from service implicates any constitutional right of the patron to use transit. In fact, it is reasonable for a transit agency, as a common carrier, to exclude a patron who poses a threat to the safety and security of himself or other passengers or the operator.[10] Depending on the circumstances, if a transit agency must take action to suspend temporarily or perma-

[6] *Id*.

[7] *Id*.

[8] *Id*.

[9] 70 Ohio App. 3d 83, 590 N.E.2d 411 (1990).

[10] *See generally* 14 AM. JUR. 2D *Carriers* § 82, at 219–20; Schaeffer v. Cavallero, 54 F. Supp. 2d 350, 351–52 (S.D. N.Y. 1999) (No claim for damages for removal of a passenger unless carrier's decision was arbitrary and capricious).

nently a user from the system, as discussed in later sections of this Report, the transit user possibly would be entitled to notice and some form of rudimentary hearing, but not necessarily before being barred from using the system in whole or in part. No cases were located, however, in which a court has recognized or imposed any due process requirements on an agency when excluding or barring transit users.

III. THE QUESTION OF WHETHER THERE IS A CONSTITUTIONAL RIGHT TO TRAVEL ON TRANSIT

As stated, no authority has been located holding that access to or use of the transit system is a constitutional right. Even assuming *arguendo* that access to or use were held to be a constitutional right, the prevailing judicial view appears to be that such a right would not be a "fundamental" right. The distinction between a right and a fundamental right is an important one. Where a constitutional right is not a fundamental one, courts are likely to use a lower level of judicial scrutiny when they are reviewing the legality of restrictions on the user's right to use the system or the transit agency's procedures for barring a patron from the system.

The U.S. Supreme Court and lower courts have recognized in some situations a "fundamental" right to travel *interstate* or across borders.[11] For example, in *Saenz v. Roe*,[12] the Court held that a California statute imposing a durational residency requirement by limiting Temporary Assistance to Needy Families (TANF) benefits through the recipient's first year of residency violated the Fourteenth Amendment's "right to travel."[13] According to Justice Stevens, the right to travel is an outgrowth of a number of Constitutional provisions. However, the *Saenz* case did not rule on intrastate travel.[14] The *Saenz* decision and other cases suggest that the Court's "right to travel interstate" decisions have more to do with the structure ("architecture")[15] of the federal union and the equality of the states than with the existence of a personal, fundamental right to travel.[16]

The courts appear to be divided on whether there is a constitutional right to travel intrastate.[17] Some federal circuits refuse to recognize a constitutional right to travel intrastate.[18] Other courts have held that travel is

[11] *See* Memorial Hosp. v. Maricopa County, 415 U.S. 250, 94 S. Ct. 1016, 39 L. Ed. 2d 306 (1974) (One-year residency requirement for non-emergency medical care at the county's expense violated right to travel). The issue has come up a number of times in other cases dealing with residency requirements in which the Court has reached divergent results. *Compare, e.g.,* Sosna v. Iowa, 419 U.S. 393, 95 S. Ct. 553, 42 L. Ed. 2d 532 (1975) (Upheld a 1-year residency requirement for initiating divorce proceedings); Dunn v. Blumstein, 405 U.S. 330, 92 S. Ct. 995, 31 L. Ed. 2d 274 (1972) (Court struck down Tennessee's 1-year residency requirement for voting in state elections). However, the Court approved a government ban on travel to Cuba in Zemel v. Rusk, 381 U.S. 1, 85 S. Ct. 1271, 14 L. Ed. 2d 179, *reh'g denied*, 382 U.S. 873 (1965).

[12] 526 U.S. 489, 119 S. Ct. 1518, 143 L. Ed. 2d 689 (1999).

[13] The majority opinion did not rely on the Equal Protection Clause as the Court had in Shapiro v. Thompson, 394 U.S. 618, 89 S. Ct. 1322, 22 L. Ed. 2d 600 (1969). For the first time since the *Slaughterhouse Cases*, the Court relied on the Privileges and Immunities Clause of Article IV of the 14th Amendment and the Citizenship Clause of the 14th Amendment. *See* Comment, Laurence H. Tribe, *Saenz Sans Prophecy: Does the Privileges or Immunities Revival Portend the Future—or Reveal the Structure of the Present?*, hereinafter cited as "Tribe," 113 HARV. L. REV. 110, 126 (1999).

[14] Saenz v. Roe, 526 U.S. 489, 500, 119 S. Ct. 1518, 20 L. Ed. 2d 138 (1968).

[15] In part the argument is that "to be accorded constitutional recognition, the right must be inferred from the structures of self-government that underlie our Constitution's architecture and its animating premises." Tribe, 113 HARV. L. REV. 154.

[16] Thus, it has been argued that "the holding of *Saenz* reflected the Court's vision of [a] governmental design in a federal union of equal states, and not primarily the Court's perception of a personal right ineluctably flowing from constitutional text or deeply rooted tradition despite the majority's ostensible reliance on the language of several clauses." Tribe, 113 HARV. L. REV. 154. The Court's welfare and other cases striking down durational residency requirements arguably are not so much based on an individual constitutional right as on the absolute necessity of an equality of treatment of the states for the preservation of the Union. "[I]ndividuals who travel to states other than their state of residence are entitled to expect that they will be treated no less favorably by the states through which they travel or in which they stay temporarily than such states treat their own residents…." Tribe, 113 HARV. L. REV. 141. "Purely as a matter of the Court's own jurisprudence, it is not at all unusual for rights that are considered fundamental and peculiarly American to be derived from the structural features of the Constitution." Tribe, 113 HARV. L. REV. 168.

[17] King v. New Rochelle Mun. Hous. Auth., 442 F.2d 646, 647 (2d Cir. 1971), *cert. denied*, 404 U.S. 863 (1971) (Five-year durational residency requirement for admission to public housing violated Equal Protection Clause); Wellford v. Battaglia, 343 F. Supp. 143, 150 (D. Del. 1972*), aff'd per curium*, 485 F.2d 1151 (3d Cir. 1973) (Law imposing 5-year residency requirement for one seeking election as mayor did not meet "compelling interest" test, thus violating 14th Amendment); Bykofsky v. Borough of Middletown, 401 F. Supp. 1242 (M.D. Pa. 1975), *aff'd without opinion*, 535 F.2d 1245 (3d Cir.), *cert. denied*, 429 U.S. 964 (1976) (Although right to travel was "implicit in the concept of ordered liberty," a juvenile curfew ordinance did not unconstitutionally infringe on right of minors to travel, 401 F. Supp. 1254).

[18] Wright v. City of Jackson, 506 F.2d 900, 901–02 (5th Cir. 1975) (In upholding city residency requirement for firemen, the court stated "that nothing in *Shapiro* or any of its progeny stands for the proposition that there is a fundamental constitutional 'right to commute' which would cause the compelling governmental purpose test enunciated in *Shapiro* to apply," *Id.* at 902); Wardwell v. Bd. of Educ., 529 F.2d 625 (6th Cir. 1976)

not a fundamental right.[19] Importantly, most courts have held that the right to travel intrastate is not a *fundamental* right that is subject to *strict scrutiny* by the courts.[20] As noted in this Report, the difference between a right and a fundamental right is important because the applicable level of scrutiny used by the courts differs when deciding whether to uphold a government restriction.[21]

Although cases were not located involving transit operations and any constitutional right to intrastate travel, there are analogous cases, for instance, involving juvenile curfew laws and "anti-cruising laws" in which the courts have upheld restrictions on the right to travel. The cases also illustrate the test the courts are likely to use in reviewing restrictions on travel by transit or on procedures used to exclude a patron from the use of transit facilities.

The cases involving juvenile curfews present some issues that are analogous to transit.[22] Even if some users have a fundamental right to travel, not all users (e.g., minors) necessarily have a fundamental right to do so. Although the holdings in the juvenile curfew cases are not uniform, the majority view seems to be that the laws do not impair a fundamental right.[23] It appears that the courts would be inclined to apply either the lowest standard of review (i.e., the rational basis test) or possibly an intermediate standard of review to issues such as an agency's restrictions on riders' use of the system or procedures on barring or suspending them from the system.[24]

Another analogous area is the anti-cruising ordinances, which the courts have upheld as an appropriate time, place, and manner restriction on the "right" to intrastate travel.[25] In *Lutz v. City of York, Pa.*,[26] although the court held that there was a constitutionally protected right to intrastate travel, the city's anti-cruising ordinance was an allowable restriction of that right. The cruising ordinance was subjected to intermediate scrutiny and upheld because it was "narrowly tailored to meet significant city objectives."[27] Most courts have supported limitations on the right when there is a compelling governmental interest and the law or regulation is narrowly tailored to fit that interest. A few cases have supported the general principle in *Lutz* that intrastate travel deserves a certain level of constitutional protection.[28]

In sum, no authority has been located holding that there is a connection between any constitutional right and the exclusion of someone from the transit system. In any case, the standard of review a court would apply to regulations that permit the agency to bar patrons from using an intrastate public transportation system on the ground of security or on other reasonable

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(Court held that requirement for public school teachers to establish residence in city school district within 90 days of employment met rational basis requirement; "the right to intrastate travel has [not] been afforded federal constitutional protection," the court distinguishing those cases dealing with durational residency requirements affecting interstate travel, *Id.* at 627); Andre v. Board of Trustees, 561 F.2d 48 (7th Cir. 1977), *cert. denied*, 434 U.S. 1013 (Held that only the right to travel interstate is a recognized fundamental right). *See also* Detroit Police Officers Ass'n v. City of Detroit, 190 N.W.2d 97 (Mich. 1971), *appeal dismissed for want of substantial federal question*, 405 U.S. 950 (1972).

[19] Scheunemann v. City of West Bend, 179 Wis. 2d 469, 507 N.W.2d 163, 167 (Ct. App. 1993) (Court applied intermediate, not strict, scrutiny in upholding an "anti-cruising" law said to violate the right to travel).

[20] *See, e.g.,* Johnson v. City of Cincinnati*,* 310 F.3d 484, 509 (6th Cir. 2002), *cert. denied*, 539 U.S. 915, 123 S. Ct. 2276 (Mem), 156 L. Ed. 2d 130 (2003). In a case in which the Sixth Circuit held that a city ordinance excluding individuals convicted of a drug offense from certain drug-free zones, including areas in front of schools, was an unconstitutional infringement of their right to intrastate travel, the court observed that "[i]f the right to *intrastate* travel [were] a *fundamental liberty interest*, [the] court would have been required to apply *strict scrutiny*, rather than the rational-basis standard of review…to evaluate constitutionality" of the restriction imposed on travel at issue in that case (emphasis supplied). *See also* Doe v. Miller, 298 F. Supp. 2d 844 (S.D. Iowa 2004) (Iowa district court struck down a state statute that prohibited convicted sex offenders from establishing a residence within 2000 feet of a school or child care facility on the basis that a broad definition of "residence" as defined by the statute would preclude sex offenders from residing or even traveling in large portions of the state, thus infringing on the fundamental right to travel.).

[21] The Court in *Wellford* stated: "The right to travel…is a right to intrastate as well as interstate migration…. Moreover, the motive behind a challenged law and its actual effect on the right to travel are not relevant considerations in determining the appropriate standard of review." Wellford, 343 F. Supp. 143, at 147–48. There is a difference between a residency requirement and a *durational* residency requirement; durational residency requirements are subject to greater scrutiny. Wellford, 343 F. Supp. at 147–48, note 9.

[22] Douglas G. Smith, *A Return to First Principles? Saenz v. Roe and the Privileges or Immunities Clause*, UTAH L. REV. 305, 349 (2000), hereinafter cited as "Smith."

[23] Smith, UTAH L. REV. 351–52.

[24] Hutchins v. District of Columbia, 338 U.S. App. D.C. 11, 18–19, 188 F.3d 531, 538 (D.C. Cir. 1999) (D.C. Circuit held that "*juveniles* do not have a fundamental right to be on the streets at night without adult supervision" (emphasis supplied)).

[25] *See* Comment, Gregory J. Mode, *Wisconsin, A Constitutional Right to Intrastate Travel, and Anti-Cruising Ordinances*, 78 MARQ. L. REV. 735, 736–49 (1995).

[26] 899 F.2d 255 (3d Cir. 1990).

[27] *Id*. at 270.

[28] Snowden v. State, 677 A.2d 33 (Del. 1996) (Upholding the constitutionality of an anti-stalking statute, although it implicated the stalker's right to travel freely); Townes v. City of St. Louis, 949 F. Supp. 731 (E.D. Mo. 1996) (Applying the *Lutz* intermediate scrutiny test to uphold a city ordinance placing traffic barriers in residential areas resulting in less convenient access to some residents' homes).

grounds is not conclusive given a lack of case law specifically on point.[29] However, based on the cases relied upon in this Report, a court will most likely apply a standard of judicial review no higher than that of intermediate scrutiny.

IV. RESTRICTIONS ON THE USE OF TRANSIT FACILITIES AND THE FIRST AMENDMENT

Restrictions in transit areas on speech or expressive conduct may implicate the First Amendment.[30] In the survey for this Report, the transit agencies were asked whether there were state or transit agency laws, regulations, or policies applicable to the agency regarding when, how, and under what circumstances transit facilities may be used for political expression or protest.

[29] Townes, 949 F. Supp. at 734.

[30] In Hague v. Committee for Indus. Org. (CIO), 307 U.S. 496, 59 S. Ct. 954, 83 L. Ed. 1423 (1939), the Court extended First Amendment protection in matters involving "speech-plus-conduct" by developing the public forum doctrine in recognition of the importance of the discussion of public affairs in public streets, parks, and facilities. *See also* David M. O'Brien, 2 CONSTITUTIONAL LAW AND POLITICS: CIVIL RIGHTS AND CIVIL LIBERTIES 636 (5th ed. 2002). The concept of a public forum has been expanded to include municipal auditoriums, sidewalks, shopping centers, criminal trials, and the public areas surrounding schools, courthouses, embassies, and state capital buildings. *Id.* at 637. However, in Board of Airport Comm'rs of Los Angeles v. Jews for Jesus, Inc., 482 U.S. 569, 107 S. Ct. 2568, 96 L. Ed. 2d 500 (1987), the Court struck down a "First Amendment free zone," which banned all First Amendment opinion, solicitations, and canvassing in a central airport terminal as being overly broad. Three years later, the Court, however, in United States v. Kokinda, 497 U.S. 720, 110 S. Ct. 3115, 111 L. Ed. 2d 571 (1990), held in a plurality opinion that post offices may ban all solicitations on their property.

TABLE 4.1—PERCENTAGE OF TRANSIT AGENCIES REPORTING LAWS, REGULATIONS, OR POLICIES APPLICABLE TO USE OF TRANSIT FACILITIES FOR POLITICAL EXPRESSION OR PROTEST

Agencies Having Laws, Regulations, or Policies	Agencies Not Having Laws, Regulations, or Policies	Response Not Clear
30% (18 of 60)	50% (30 of 60)	20% (12 of 60)

Eighteen agencies (30 percent) reported that there were such state or transit agency laws, regulations, or policies. Virtually all transit agencies responding to the survey stated that their facilities are not to be used for political expression or protest. Moreover, 30 agencies (50 percent) responded there were no laws, regulations, or policies applicable to them. Some of the agencies responded that their actions had to comply with federal and state constitutional law on political expression or protest.

A publication entitled, *Restrictions on Speech and Expressive Activities in Transit Terminals and Facilities*, TCRP Digest No. 10 (1998), provides a more detailed discussion of free speech and the public forum doctrine. However, the limited public forum doctrine applies when the government opens a nonpublic forum to the public but limits expressive activity to certain kinds of speakers or to the discussion of certain subjects. Although a subway platform has been cited as an example of a limited public forum,[31] several cases hold that transit facilities are not public *fora*.[32] In a limited public forum, the "'government is free to impose a blanket exclusion on certain types of speech, but once it allows expressive activities of a certain genre, it may not selectively deny access for other activities of that genre."[33] Once opened as a public forum, a government is not obligated to retain its public forum characteristics, but while serving as a public forum, it retains the same constitutional privileges as any other public forum.[34] The government has no obligation to allow access to all persons who wish to exercise their right to free speech on every type of government property.[35]

Insofar as reasonable time, place, and manner restrictions on the exercise of speech, the courts apply the *intermediate* test of scrutiny pursuant to which the courts have upheld a wide range of legislative restrictions.[36] The restrictions need not be the least restrictive or the least intrusive means of achieving the government's end.[37] Restrictions are constitutional "so long as the distinctions drawn are reasonable in light of the purpose served by the forum and are view-point neutral."[38] Government "restrictions on the volume of speech do not necessarily violate the First Amendment, even when that speech occurs in an area traditionally set aside for public debate."[39]

The transit authority may allow limited access to its subway stations, such as for public speaking; the distribution of written noncommercial materials; and the solicitation for religious, political, and charitable purposes, and, at the same time, fine a member of a political organization for selling the organization's newspaper on a subway platform in violation of the authority's policy.[40] A transit system may also restrict political advertisement; however, it must do so in a viewpoint-neutral manner.[41] As discussed in Part VI.A of the Report, it is constitutional for a transit system to prohibit begging based on reasons of public safety as a reasonable limitation on speech in a nonpublic forum.[42]

In addition, users of public transportation are a captive audience and have the right to be left alone—i.e., not to have to endure loud or obtrusive speech or noise.[43] On the other hand, the "First Amendment [does

[31] Hotel & Rest. Employees Union v. City of N.Y. Dep't of Parks & Recreation, 311 F.3d 534, 547 (2d Cir. 2002); *see also* A.C.L.U. v. Mineta, 319 F. Supp. 2d 69 (D.D.C. 2004).

[32] People of the State of N.Y. v. Schrader, 162 Misc. 2d 789, 617 N.Y.S.2d 429 (N.Y. Crim. Ct., N.Y. County 1994); Young v. N.Y. City Transit Auth., 903 F.2d 146, 154 (2d Cir. 1990) (Begging as First Amendment speech).

[33] Hotel & Rest. Employees Union, 311 F.3d 534, 545–46 (2d Cir. 2002), quoting from Travis v. Owego-Apalachin Sch. Dist., 927 F.2d 688, 692 (2d Cir. 1991).

[34] Perry Educ. Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37, 45-6, 103 S. Ct. 948, 74 L. Ed. 2d 794 (1983).

[35] Kevin Francis O'Neill, *Disentangling the Law of Public Protest*, 45 LOY. L. REV. 411, 419 (1999), hereinafter cited to as "O'Neill."

[36] *Id*. at 475–76.

[37] *Id*. at 438–39.

[38] Cornelius v. NAACP Legal Defense and Educational Fund, Inc., 473 U.S. 788, 807, 105 S. Ct. 3439, 87 L. Ed. 2d 567 (1985).

[39] City of Seattle v. Eze, 111 Wash. 2d 22, 759 P.2d 366, 371 (1988).

[40] Rogers v. New York City Transit Auth., 89 N.Y.2d 692, 680 N.E.2d 142, 657 N.Y.S.2d 871 (N.Y. 1997).

[41] ACLU v. Mineta, 319 F. Supp. 2d 69, 78 (D.D.C. 2004). (Determining that a subway's restriction on pro-marijuana legalization advertisements would have been constitutional but for the fact that the regulation was not viewpoint-neutral and could not survive heightened scrutiny analysis).

[42] People of the State of N.Y. v. Schrader, 162 Misc. 2d 789, 617 N.Y.S.2d 429 (N.Y. Crim. Ct., N.Y. County 1994).

[43] Note, James J. Zych, *Hill v. Colorado and the Evolving Rights of the Unwilling Listener*, 45 ST. LOUIS U. L.J. 1281,

not secure] to each passenger on a public vehicle…a right of privacy substantially equal to [the] privacy to which [one] is entitled in his own home."[44] When speech is forced upon a captive audience or when the speech constitutes a nuisance, "the law will operate to protect the 'unwilling listener.'"[45] In *Lehman v. Shaker Heights*,[46] the Court held that the city, through a management agreement with its public transportation contractor, could prohibit political advertising on public buses. The Court noted that the public forum analysis was not appropriate because "[t]he streetcar audience is a captive audience. [The audience] is there as a matter of necessity, not of choice."[47]

Although restrictions must be viewpoint neutral,[48] the issue of the reasonableness of the restrictions is not at issue if the transit agency has not opened any facility for the purpose of political or other speech or expressive conduct. The transit agencies' responses indicate that in general they prohibit political expression or protest on or in transit property or facilities. Hence, their property has not been opened for expressive activity by members of the public.[49] Transit agencies may want to be careful whenever creating or designating a limited public forum. As noted, in a limited public forum the government may impose a blanket-exclusion on certain types of speech, "but once it allows expressive activities of a certain genre, it may not selectively deny access for other activities of that genre…."[50]

In sum, the transit authority is a nonpublic forum unless the transit authority designates some part of the facilities as a public forum, i.e., creates a limited public forum. The transit authority may place reasonable time, place, and manner restrictions on the exercise of speech in a limited public forum and may forbid certain exercises of speech as long as the transit authority treats all genres of speech equally. Any attempt by the transit authority to limit the content of speech would be subject to strict scrutiny by the courts. Content-neutral restrictions are subject to intermediate scrutiny.[51] Finally, the transit authority may act reasonably to protect its captive audience from excessive noise and even from certain forms of speech (e.g., begging, certain offensive advertising).

V. TRANSIT AGENCY'S RESPONSE TO SECURITY THREATS OR SUSPICIOUS ACTIVITY

There is an important issue regarding the right of transit authorities to eject or exclude persons who constitute a danger to other passengers, even more so since the terrorist attacks of September 11, 2001. Transit security, however, has been a concern and the subject of extensive research both prior to and after the 9/11 attacks.[52]

1305 (2001), hereinafter cited as "Zych." *See* Public Utilities Com. of D.C. v. Pollak, 343 U.S. 451, 468, 72 S. Ct. 813, 96 L. Ed. 1068 (1952) (Speaker's rights more limited when traveling on a public thoroughfare); Kovacs v. Cooper, 336 U.S. 77, 89, 69 S. Ct. 448, 93 L. Ed. 513 (1949) (Government can impose restrictions on sound amplification trucks).

[44] Pollak, 343 U.S. at 463 (Transit radio program in streetcars and buses did not violate First and Fifth Amendments).

[45] Zych, 45 St. LOUIS U. L.J. 1307.

[46] 418 U.S. 298, 94 S. Ct. 2714, 41 L. Ed. 2d 770 (1974).

[47] Lehman, 418 U.S. at 302, quoting from Public Utilities Comm'n v. Pollak, 343 U.S. 451, 468. *See also* Hill v. Colorado, 530 U.S. 703, 718, 120 S. Ct. 2480, 147 L. Ed. 2d 597 (2000) ("[O]ur cases have repeatedly recognized the interests of unwilling listeners in situations where 'the degree of captivity makes it impractical for the unwilling viewer or listener to avoid exposure.'"); United States v. Hicks, 980 F.2d 963, 965 (5th Cir. 1992) (Freedom of speech defense rejected in a case where the defendants refused to turn off a boom-box that could interfere with the airline's navigational system).

[48] *See* New York Magazine v. Metropolitan Transp. Auth., 136 F.3d 123, 134 (2d Cir. 1998). Furthermore, as one commentator has written, "restrictions must serve a compelling government interest and be narrowly tailored to achieve that interest. The government may, however, impose content-neutral time, place and manner restrictions…so long as those restrictions are 'narrowly tailored to serve a significant government interest,' and must 'leave open ample alternative channels of communicati(ng) the message.'" O'Neill, 45 LOY. L. REV. 475, quoting from Ward v. Rock Against Racism, 491 U.S. 781, 791 (1989), quoting from Clark v. Community for Creative Non-Violence, 468 U.S. 288, 293 (1984). A speech restriction does not leave open ample alternative channels if the speaker is left unable to reach his intended audience. O'Neill, 45 LOY. L. REV. 443.

[49] *See* People of the State of N.Y. v. Schrader, 162 Misc. 2d 789, 617 N.Y.S.2d 429, 437 (N.Y. Crim. Ct., N.Y. County 1994); Young v. N.Y. City Transit Authority, 903 F.2d 146, 154 (2d Cir. 1990).

[50] Hotel & Rest. Employees Union, 311 F.3d at 545–46, quoting from Travis v. Owego-Apalachin Sch. Dist., 927 F.2d 688, 692.

[51] *See* Los Angeles Alliance for Survival v. City of L.A., 22 Cal. 4th 352, 93 Cal. Rptr. 2d 1, 993 P.2d 334 (Calif. 2000), and authorities discussed therein.

[52] *See, e.g.,* ANNABELLE BOYD & JOHN P. SULLIVAN, EMERGENCY PREPAREDNESS FOR TRANSIT TERRORISM (TCRP Synthesis 27, 1997); JEROME A. NEEDLE & RENEE M. COBB, IMPROVING TRANSIT SECURITY (TCRP Synthesis of Transit Practice 21, 1997), available at http://nationalacademies.org/trb/publications/tcrp/tsyn21.pdf; BRIAN MICHAEL JENKINS, PROTECTING PUBLIC SURFACE TRANSPORTATION AGAINST TERRORISM AND SERIOUS CRIME: AN EXECUTIVE OVERVIEW (Mineta Transportation Institute College of Business, Report 01-14, 2001) (Discussing, *inter alia*, intelligence and threat analysis, physical barriers, access control and intrusion detection, chemical and biological defense, public communications, and training); FEDERAL TRANSIT ADMINISTRATION, TRANSIT WATCH TOOLKIT (2004), available at http://transit-safety.volpe.volpe.dot.gov/Security/TransitWatch/Toolkit.asp; FEDERAL TRANSIT ADMINISTRATION, PUBLIC TRANSPORTATION SYSTEM SECURITY AND EMERGENCY PREPAREDNESS PLANNING GUIDE (2003), available at http://transit-safety.volpe.dot.gov/

As the General Accounting Office (GAO) observed in 2002, "[a]bout one-third of terrorist attacks worldwide target transportation systems, and transit systems are the mode most commonly attacked."[53] According to a study published in April 2004 by the American Public Transportation Association (APTA), the association found that "[n]ew security measures have been adopted since [September 11, 2001] by 88.3 percent" of transit agencies responding to [APTA's] survey, and "74.2 percent have increased security measures that were already in place."[54] APTA states that some of transit's important security needs are radio communications systems, including operational control redundancy; security cameras on board vehicles; controlled access to facilities and secure areas; security cameras in stations; and automated vehicle locator systems.[55] Based on its survey responses, APTA estimates that a total of $6 billion is needed for transit security—$5.2 billion in capital needs and $800 million in annual operating needs.[56]

At the federal level, the Department of Homeland Security (DHS),[57] formerly the Office of Homeland Security (OHS), Department of Transportation (DOT), Federal Transit Administration (FTA), and the Transportation Security Administration (TSA) have responded to transit security needs and issues.[58] One of the "primary missions of the DHS is to secure and protect the United States' transportation system, including aviation, mass transit, maritime and port security, pipelines, and surface transportation."[59] Although TSA's focus initially was on aviation security, the agency is now focusing on mass transit as well.[60] After 9/11, FTA developed a National Transit Response Model that provided "guidance to the U.S. transit industry in responding to the various [DHS] threat level designations."[61]

In September 2002, the GAO also reported on the challenges in securing mass transit systems, on the steps that transit agencies had taken to enhance security, and on the federal role in transit security.[62] DHS and DOT have taken "significant steps" to enhance rail and transit security in the last 2 years in cooperation with public and private entities that own transit and rail systems.[63] Their efforts include a mass transit K-9 rapid deployment program, transit inspection, education and awareness, and several uses of technology, including biological, chemical, and high explosive countermeasures.[64] In May 2004, DHS and TSA announced new initiatives on passenger rail and transit security, "which is the first time in the history of mass transit that the federal government has taken the leadership

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Publications/security/PlanningGuide.pdf; FEDERAL TRANSIT ADMINISTRATION, STANDARD PROTOCOLS FOR MANAGING SECURITY INCIDENTS INVOLVING SURFACE TRANSIT VEHICLES (2002), available at http://transit-safety.volpe.dot.gov/Publications/security/FTASTandards.pdf; FEDERAL TRANSIT ADMINISTRATION, HANDBOOK FOR TRANSIT SAFETY AND SECURITY CERTIFICATION (2002), available at http://transit-safety.volpe.dot.gov/…/Additional/Safety_and_Security_Certification_Guidelines.pdf. *See* BOYD MAIER & ASSOCIATES, TRANSIT SECURITY HANDBOOK (Volpe National Transportation Systems Center, 1998) (Specifically addressing terrorism prevention activities).

[53] *See* U.S. GENERAL ACCOUNTING OFFICE, REPORT TO CONGRESSIONAL REQUESTERS, MASS TRANSIT, FEDERAL ACTION COULD HELP TRANSIT AGENCIES ADDRESS SECURITY CHALLENGES 2 (Dec. 2002) hereinafter "GAO Report," available at http://www.gao.gov/cgi-bin/getrpt?GAO-03-263.

[54] American Public Transportation Association, "Survey of United States Transit System Security Needs and Funding Priorities" (Washington, DC, April 2004), at 11, available at http://www.apta.com/services/security/security_survey.cfm, hereinafter cited as "APTA Study."

[55] APTA Study, *supra* note 54, at 5.

[56] *Id*. at 11.

[57] With the passage of the Homeland Security Act on November 25, 2002, TSA was transferred to the new DHS, which assumed overall responsibility for transportation security.

[58] *See* Statement of Gerald L. Dillingham [Director of Civil Aviation Issues for the U.S. General Accounting Office, Washington, DC], National Commission on Terrorist Attacks Upon the United States (April 1, 2003), available at http://www.9-11commission.gov/hearings/hearing1/witness_dillingham.htm. After 9/11, the Agency found that by December 2002, when it visited 10 transit agencies, the agencies had implemented new security initiatives or increased the frequency of existing activities:

> agencies had assessed vulnerabilities, provided additional training on emergency preparedness, revised emergency plans, and conducted multiple emergency drills. Several agencies…had also implemented innovative practices to enhance safety and security, such as training police officers to drive buses and implementing an employee suggestion program to solicit ideas for improving security.

Id.

[59] Note, Owen Bishop, *A 'Secure' Package? Maritime Cargo Container Security After 9/11*, 29 U. DENV. TRANSP. L. J. 313–14 (2002).

[60] *See* Transportation Security Administration, TSA Mass Transit Group, available at http://www.tsa.gov/public/display?theme=154.

[61] Federal Transit Administration, "Federal Transit Administration Transit Threat Level Response Recommendation," available at http://transit-safety.volpe.dot.gov/security/SecurityInitiatives/ThreatLevel/default.asp.

[62] "Mass Transit, Challenges in Securing Transit Systems," U.S. Senate, Subcomm. on Housing and Transportation, Committee on Banking, Housing and Urban Affairs (Sept. 18, 2002) (Statement of Peter Guerrero, Director, Physical Infrastructure Issues); *see also* FBI LAW ENFORCEMENT BULLETIN (Jan. 1, 1999) (Reporting that mass transit was a terrorist target).

[63] *See* Department of Homeland Security, available at http://www.dhs.gov/dhspublic/display?content=3377 (Rail and transit security initiatives).

[64] *Id*.

role in setting a federal security standard for passenger rail and mass transit systems."[65]

The FTA notes that "[t]ransit systems must continue to enhance their security systems, facilities and vehicle designs to ensure the safety and security of the riding public."[66] The FTA states that it will "[c]onsistent with the recommendations of the President's Commission on Critical Infrastructure Protection…identify possible key terrorist targets in transit and evaluate the economic consequences of disruption to transit service in those markets. Core systems that may be vulnerable to terrorist acts will need to develop fail-safe interventions."[67]

Some of the means of enhancing transit security are "accessing transit vulnerabilities, examining current transit systems terrorism prevention programs, [and] identifying technologies…."[68] FTA's activities include the development of an advanced multi-sensor system that incorporates full data fusion.[69] The FTA's goal is to "tie together ten or fewer Urban Chemical Release Detector (UCRD) multi-sensor detector instruments that will be installed in a variety of locations within a subway station."[70] In addition, the agency will develop a detailed "validation of the Subway Environmental Simulation Chemical and Biological (SESCB) numerical modeling code."[71] According to the agency, a "fully validated code can be used to confidently predict the possibility of identifying and quantifying the threat created from the release of a variety of chemical and biological agents."[72] A third goal is the expansion of background/interferant measurements "to acquire and analyze background data using the UCRD system hardware in a variety of subway stations in wide ranging environmental conditions."[73] The FTA will collect and analyze data on safety and security concerns to provide the agency with a basis for identifying key safety and security issues. Legislation was proposed in Congress in both 2004 and 2005 aimed at increasing rail and public transportation security at the state and local level.[74]

There are numerous initiatives and programs at the state and local level dealing with transit security and counterterrorism.[75] Among the measures implemented or considered for implementation include greater elec-

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[65] Transportation Security Administration (Transcript of DHS Under Secretary Asa Hutchinson on Rail Security, May 20, 2004), available at http://www.tsa.gov/public/display?theme=47&content=09000519800a64d8.

[66] *See* Federal Transit Administration, "Crime Prevention and Anti-Terrorism," available at http://www.fta.dot.gov/11227_11229_ENG_HTML.htm.

> By designing the physical environment in a way that deters criminal behavior, transit agencies improve the quality of life on their systems by reducing both the fear and incidence of crime, including the vulnerability of the system to an act of terrorism. Through this program, the Federal Transit Administration (FTA) will demonstrate innovative security technologies, system design, and rail and bus vehicle security enhancements…."

Id.

[67] *Id*.

[68] *Id*.

> …Of particular importance will be a risk assessment of the range of transportation services at airports served by rapid transit lines. The FTA will also develop a computer model for application in field operations that simulates the transit environment, including medical triage, contingency transit, emergency evacuation routes, and vulnerable locations points, which will aid security personnel in responding to catastrophic transit events. Id.

[69] *Id*.

[70] *Id*.

[71] *Id*.

[72] *Id*.

[73] *Id*.

[74] For the latest legislative information, *see* American Public Transportation Association, legislative update, available at http://www.apta.com/government_affairs/positions/washrep/2004september17.cfm. *See, e.g.,* H.R. 153, Rail and Public Transportation Security Act of 2005 (January 4, 2005), available at http://thomas.loc.gov/cgi-bin/bdquery/z?d107:HR00153:@@@X; *see also* H.R. 4476, Rail Transit Security and Safety Act of 2004 (June 1, 2004), 108th Cong., 2d Sess., available at http://www.theorator.com/bills108/hr4476.html; CONF. REP. S. 2854, Intelligence Reform and Terrorism Prevention Act of 2004 (Dec. 7, 2004) (Re: S. 2854 and H. REP. 796; H.R. Rep. 5082, Public Transportation Terrorism Prevention and Response Act of 2004, 108th Cong., 2d Sess., October 6, 2004 (Proposing to authorize the Secretary of Transportation "to award grants to public transportation agencies and over-the-road bus operators to improve security, and for other purposes…."); and *see* Hearing, Public Transportation Security, H.R. Committee on Transportation and Infrastructure, Subcomm. on Highways, Transit & Pipelines (June 24, 2004), available at http://www.house.gov/transportation/highway/06-22-04/06-22-04memo.html (Including Statement of Robert Jamison, Deputy Administrator, Federal Transit Administration, available at http://www.house.gov/transportation/highway/06-22-04/Jamison.pdf, noting that FTA has "undertaken an aggressive nationwide security program with the full cooperation and support of every transit agency involved," concentrating on funding for training, emergency preparedness, and public awareness).

[75] See Florida Public Transportation Anti-Terrorism Resource Guide, (National Center for Transit Research (www.nctr.usf.edu/pdf/Transit%20Terrorism%20Resource%20Guide.pdf), Tampa, Florida) (Outlining a variety of law enforcement initiatives, including the creation of seven regional domestic security task forces, more law enforcement and other "first responder" training, establishment of a statewide anti-terrorism database, and the undertaking of certain chemical and biological attack initiatives); "Eyes and Ears" Campaign, Bay Area Rapid Transit (May 2004), available at http://www.bart.gov/news/features/features20040526.asp; Maine Homeland Security, available at http://www.mainesecurity.com/Homeland_Security.htm; "Preparing Your System for Terrorism," Maryland Rural Transit Assistance Program, RTAP Update (Baltimore, Md., Sept. 2003); Massachusetts Bay Transportation Authority, "Security Initiatives," available at http://www.mbta.com/traveling_t/safety_index.asp.

tronic surveillance,[76] and protection against chemical and biological attacks.[77] In May 2004, New York City proposed a ban on photography on New York City's subways and buses to deter surveillance by terrorists of the nation's largest mass transit system.[78] No cases were located challenging any of the foregoing laws or initiatives for infringing personal liberty.

VI. TRANSIT AGENCY'S RESPONSE TO CRIMINAL ACTIVITY, PANHANDLING, AND SEX OFFENDERS

A. Criminal Activity

Although the importance of the above mentioned initiatives regarding security threats and suspicious activity can not be understated, transit agencies' general response to crime is also important. The FTA notes that "at transit agencies where the 'no tolerance' [policy] has been in effect…crime is considerably lower than on those systems where minor infractions are tolerated."[79] As for law enforcement and transit, APTA found that of 120 transit agencies responding to its survey, 16.7 percent have their own dedicated transit police. "[M]ost transit agencies with their own law enforcement organization are larger systems, primarily rail or multimodal systems and a few very large bus systems. Dedicated security personnel in addition to transit police are employed by 25.8 percent of respondents."[80] APTA also found elsewhere that

> Law enforcement service is provided by state and local governments under paid contracts for 35.8 percent of responding transit systems and provided without payment for an additional 34.2 percent of respondents. The remaining responding systems did not specify the arrangement through which the local law enforcement function is provided to their agency. Dedicated security personnel are contracted for by 56.7 percent of responding agencies and 10 percent make other arrangements for security personnel. In all cases municipal, county, and state law enforcement officers would also provide a security function consistent with local law whether or not a formal contractual arrangement exists.[81]

As for responding to security threats, criminal activity, or disruptive conduct, transit agencies for this Report were asked whether there were state or transit agency laws, regulations, or policies applicable to the agency on when, how, and under what circumstances transit personnel could refuse service to or eject a transit user from the facilities. It should be noted that 17 of 60 respondents, or about 28 percent, reported that they rely also or exclusively on the police and the judicial system concerning problems on transit vehicles; thus, the success of such an approach depends upon rapid action by the police and the courts and not on written transit procedures.

[76] *See* Joey Campbell, *Security Concerns Attract Operators to Advances in Video Surveillance*, METRO MAGAZINE, Feb.–Mar. 2002, at 48, available at http://www.metro-magazine.com/t_featpick.cfm?id=90503364. *See also* PATRICIA MAIER & JUD MALONE, ELECTRONIC SURVEILLANCE TECHNOLOGY ON TRANSIT VEHICLES (TCRP Synthesis of Transit Practice 38, Transportation Research Board, 2001), available at http://nationalacademies.org/trb/publications/tcrp/tsyn21.pdf.

[77] *See* ANTHONY J. POLICASTRO & SUSANNA P. GORDON, THE USE OF TECHNOLOGY IN PREPARING SUBWAY SYSTEMS FOR CHEMICAL/BIOLOGICAL TERRORISM (American Public Transportation Association, May 1999).

[78] *See* http://news.boston.herald.com/localRegional/view.bg?articleid=29028.

[79] *See* Federal Transit Administration, "Crime Prevention and Anti-Terrorism," available at http://www.fta.dot.gov/11227_11229_ENG_HTML.htm.

[80] APTA Study, *supra* note 54.

[81] APTA Study, *supra* note 54, at 7.

TABLE 6.1—PERCENTAGE OF AGENCIES WITH LAWS, REGULATIONS, OR POLICIES ON EJECTION OF USER AS SECURITY THREAT OR FOR DISRUPTIVE CONDUCT

Agencies Reporting Laws, Regulations, or Policies	Agencies Reporting No Known Laws, Regulations, or Policies	Response Not Clear
52% (31 of 60)	35% (21 of 60)	13% (8 of 60)

Thirty-one agencies (52 percent) stated that there were such laws, regulations, or policies applicable to the agencies. Twenty-one agencies (35 percent) responded that there were none, or that they were not aware of any. One agency from California noted that the California Public Utilities Code Section 99170(a)(1) and the California Penal Code Section 640(b)(6) address this boisterous behavior issue. For example, Section 99170(a)(1) of the Public Utilities Code provides in part that:

> (a) No person shall do any of the following with respect to the property, facilities, or vehicles of a transit district:
>
> Operate, interfere with, enter into, or climb on or in, the property, facilities, or vehicles owned or operated by the transit district without the permission or approval of the transit district.
>
> Interfere with the operators or operation of a transit vehicle, or impede the safe boarding or alighting of passengers….

As for a specific transit policy applicable to security threats or disruptive conduct, 15 agencies (25 percent) appeared to have a policy, but only seven agencies (about 12 percent) indicated that it was a written policy. The remaining responses were unclear on whether, regardless of the existence of any state laws or regulations, there was a specific transit agency policy. Several agencies responded that any security threat or disruptive conduct would be referred to a supervisor.

An important aspect of a transit agency's response to threats to public safety is the need to react to possible acts of terrorism or suspicious activity, including the detention of suspicious persons or the removal of suspicious articles from transit facilities. When trying to protect facilities and users from suspicious activity and the like, a transit agency, of course, must be concerned with possible violations of the Fourth Amendment's prohibition against unreasonable searches and seizures and with a transit user's other rights to due process or privacy. Judicial precedents illustrate the circumstances in which agencies may detain or search individuals or property in, on, or near transit facilities.[82]

The transit agency may need to identify and detain suspicious persons, as well as react to suspicious or abandoned packages or other items. To be reasonable, "an arrest or search must be based on probable cause and executed pursuant to a warrant."[83] There are exceptions to the probable cause and warrant requirements in cases of "investigatory detentions, warrantless arrests, searches incident to a valid arrest, seizure of items in plain view, exigent circumstances, consent searches…and searches in which the special needs of law enforcement make the probable cause requirement impracticable."[84] If reasonable suspicion exists, the police may detain a person to ascertain his or her identity.[85] Reasonable cause for a stop and frisk (conducted without the necessity of having a warrant) may be based on information supplied by another person and does not have to be based on the officer's personal observation.[86] Proper investigatory detentions, however, must be supported by an objective, credible reason, but not one necessarily indicative of criminality.[87]

The detention of personal effects is governed by the same standards as in *Terry v. Ohio*,[88] i.e., the officer may in appropriate circumstances, and in an appropri-

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[82] *See* United States v. Rivera, 247 F. Supp. 2d 108 (D. P.R. 2003) (Court denied motion to suppress search conducted in shopping mall based on the authority of custom agents to conduct an extended search.); United States v. 12,200 Ft. Reels of Super 8mm Film, 413 U.S. 123, 125, 93 S. Ct. 2665, 37 L. Ed. 2d, 500 (1973) ("[S]earches of persons or package at the national borders rest on different considerations and different rules of constitutional law from domestic regulation….").

[83] Jeremy J. Calysn et al., *Investigation and Police Practice: Warrantless Searches and Seizures*, 86 GEO. L. J. 1214 (1998), hereinafter cited as "Calysn et al."

[84] *Id*. at 1214.

[85] *Id*. at 1220–21, *citing* Terry v. Ohio, 392 U.S. 1, 6–7, 22–23 (Brief seizure by police based on reasonable suspicion of criminal activity is "narrowly drawn" exception to the Fourth Amendment's probable cause requirement).

[86] Adams v. Williams, 407 U.S. 143, 147–8, 92 S. Ct. 1921, 32 L. Ed. 2d 612 (1972).

[87] People v. McIntosh, 96 N.Y.2d 521, 755 N.E.2d 329, 730 N.Y.S.2d 265 (N.Y. 2001) (Police officer lacked objective, credible reason to request everyone on a bus, including defendant, to produce tickets and identification). *Compare* with People v. McIntosh, 274 A.D.2d 740, 711 N.Y.S.2d 547 (A.D., 3d Dept. 2000) (Intermediate appellate court held that the officer had a reasonable basis for belief that criminal activity was afoot, warranting further inquiry of bus passenger and his companion where the officer observed them trying to conceal something as the officer approached when bus was traveling in area known for drug activity).

[88] Terry v. Ohio, 392 U.S. 1, 6–7, 22–23, 885 S. Ct. 1868, 20 L. Ed. 2d 889 (1968).

ate manner, approach a person for purposes of investigating possibly criminal behavior, even though as yet not enough for probable cause to make an arrest.[89] "[S]earches conducted as part of a general regulatory scheme, done in furtherance of administrative goals rather than to secure evidence of a crime, may be permissible under the Fourth Amendment without a particularized showing of probable cause,"[90] but it must be shown that the decision to search a particular person is not "subject to the discretion of the official in the field."[91] The police may detain property without probable cause but not search it without probable cause,[92] but a warrant may not be necessary to search an abandoned container.[93]

As a general matter, the authorities have the power to arrest or disperse demonstrators who engage in obtrusive, unruly, or violent behavior but judicial deference to the government authorities' response may disappear if, for example, the police "overreact."[94]

B. Panhandling or Begging

As for panhandling or begging on transit facilities, transit agencies were asked whether there were applicable state or transit agency laws, regulations, or policies on the regulation or expulsion of persons engaged in panhandling or begging in or on transit facilities.

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[89] United States v. Place, 462 U.S. 696, 703–4, 103 S. Ct. 2637, 77 L. Ed. 2d 110 (1983).

[90] United States v. Bulacan, 156 F.3d 963, 967 (9th Cir. 1998).

[91] Camara v. Municipal Court, 387 U.S. 523, 532–33, 87 S. Ct. 1727, 18 L. Ed. 2d 930 (1967).

[92] Smith v. Ohio, 494 U.S. 541, 543–44, 110 S. Ct. 1288, 108 L. Ed. 2d 464 (1990).

[93] United States v. Procopio, 88 F.3d 21, 26-7 (1st Cir. 1996), *cert. denied*, 519 U.S. 1138 (1997) (After property left openly in public place, its examination by government agents was not unreasonable under the Fourth Amendment); United States v. Scott, 975 F.2d 927, 930 (1st Cir. 1992).

[94] Washington Mobilization Comm. v. Cullinane, 566 F.2d 107, 128 (D.C. Cir. 1977) (Upheld "failure-to-move-on provision" in D.C. Code as a reasonable regulation and recognized expansive police powers, for example, to enforce "police line"); Lamb v. City of Decatur, 947 F. Supp. 1261 (C.D. Ill. 1966) (Police officers who sprayed pepper spray on a group of peaceful demonstrators did not qualify for immunity from civil rights action); *see* Kevin Francis O'Neill, *Detangling the Ideas of Public Protest*, 45 LOY. L. REV. 411, 519 (1999).

TABLE 6.2—PERCENTAGE OF TRANSIT AGENCIES HAVING STATE OR TRANSIT AGENCY LAWS, REGULATIONS, OR POLICIES CONCERNING PANHANDLING OR BEGGING

Transit Agencies Having Laws, Regulations, or Policies	Transit Agencies Not Having Laws, Regulations, or Policies	Transit Agencies with Specific Agency Policy
37% (22 of 60)	53% (32 of 60)	10% (6 of 60)

Thirty-two agencies (53 percent) responded that there were no state or transit agency laws, regulations, or policies of which they were aware that applied to panhandling or begging. Twenty-two agencies (37 percent) said that there were such state or transit agency laws, regulations, or policies. Six transit agencies or 10 percent noted that the agency had a specific policy that applied to panhandling or begging. One agency advised that it was aware of a provision of the Santa Monica Municipal Code, Section 4.54.020, that defines "solicitation" as

> any request made in person seeking an immediate donation of money or other item of value. A person shall not be deemed to be in the act of solicitation when he or she passively displays a sign or gives any other indication that he or she is seeking donations without addressing his or her solicitation to any specific person, other than in response to an inquiry by that person.

Under Section 4.54.030 of the municipal code, soliciting is prohibited at "(a) [b]us stops;" and on "(b) [p]ublic transportation vehicles or facilities."

Indeed, there are a number of cases upholding ordinances that prohibit begging on transit facilities. Although in *Young v. N.Y. City Transit Authority*,[95] the Second Circuit held that begging on the subway "falls far outside the scope of protected speech under the First Amendment," the same court in *Loper v. N.Y. City Police Dept*.[96] held that there is no significant distinction between begging for charity for oneself and asking for charity for persons other than oneself, with both being protected under the First Amendment. However, in the *Young* case, even assuming *arguendo* that begging was protected speech, the court held that 21 NYCRR Section 105.6 did not violate the First Amendment and vacated the district court's judgment enjoining various defendants from enforcing a prohibition against begging in their public transit facilities.[97] Although not essential to its decision, the court in the *Young* case noted that a subway is not a public forum in which begging and panhandling must be permitted. The transit authority

> [n]ever intended to designate sections of the subway system, including platforms and mezzanines, as a place for begging and panhandling. Nor does the amended regulation abrogate our holding in [*Gannett Satellite Information Network, Inc. v. Metropolitan Transportation Authority*, 745 F.2d 767, 773 (2nd Cir. 1984)] that the subway system is not a traditional or designated public forum….[98]

In *People v. Schrader*,[99] the court upheld a ban on begging under 21 NYCRR 1050.6[b][2]. First, the court agreed that "begging constitutes protected speech under the First Amendment and should be analyzed under the same standards as have been applied to other forms of solicitation."[100] Second, however, begging could be lawfully banned in the subway. The court held that "[t]he New York City transit system is a nonpublic forum, containing at most, a limited forum open only to some speech activities, but expressly not extended to begging."[101] Second, the ban on begging "while allowing other forms of solicitation is a reasonable distinction in light of the [transit authority's] concerns with public safety and the avoidance of congestion in providing its transportation services."[102] Because the transit system is a nonpublic forum, the transit authority "is not required to choose the least restrictive means of regulating begging."[103]

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[95] 903 F.2d 146, 154 (2d Cir. 1990).

[96] Loper v. N.Y. City Police Dep't, 999 F.2d 699 (2d Cir. 1993). In *Loper*, the Second Circuit struck down N.Y. Penal Law § 240.35(1) (McKinney 1989), which prohibited begging in public places throughout New York. The court held that no compelling state interest was served by "excluding those who beg in a peaceful manner from communicating with their fellow citizens." *Id*. at 705. Furthermore, the total ban was "neither content neutral nor narrowly tailored, [and thus could not] be justified as a proper time, place or manner restriction on protected speech, regardless of whether or not alternate channels are available." *Id*. Of interest is Thompson v. City of Chicago, 2002 U.S. Dist. LEXIS 4813 (E.D. Ill. 2002), involving the city's enforcement of its anti-panhandling ordinance. Apparently on the basis of the *Loper* decision, the City directed that the police were not to enforce the ordinance. The evidence, however, was that the police had continued to do so. Thus, a motion for an injunction was not moot because the City had not established that there is "'no reasonable expectation that the putatively illegal conduct will be repeated, and that there are no remaining effects of the alleged violation,'" quoting Ragsdale v. Turnock, 841 F.2d 1358, 1365 (7th Cir. 1988).

[97] Young, 903 F.2d 146, 161.

[98] *Id*. at 162.

[99] 162 Misc. 2d 789, 617 N.Y.S.2d 429 (N.Y. Crim. Ct., N.Y. County 1994).

[100] 617 N.Y.S.2d at 435.

[101] *Id*. at 437.

[102] *Id*.

[103] *Id*. at 438.

As in the *Schrader* case, challenges to laws prohibiting begging may be challenged also on state constitutional grounds, because a state constitutional provision may "provide[] greater speech protection than the First Amendment…."[104] In *Los Angeles Alliance for Survival v. Los Angeles*,[105] groups and individuals sought to enjoin the enforcement of a county ordinance prohibiting certain forms of aggressive solicitation. The California Supreme Court granted the request of the U.S. Court of Appeals for the Ninth Circuit to address what the proper standard was under the California Constitution's liberty of speech clause for analyzing the constitutionality of ordinances governing the public solicitation of funds. The California Supreme Court noted that requests for the immediate payment of money—"while often encompassed within and protected by the liberty of speech clause—may create distinct problems and risks that warrant different treatment and regulation."[106] In ruling that the ordinance in question, which in part banned "all solicitation…in public transportation vehicles and within 10 feet of such vehicle stops,"[107] was content-neutral, the court held that the ordinance was subject to intermediate scrutiny rather than strict scrutiny. The court wrote, moreover, that the United States Supreme Court reviews regulations of solicitation as content-neutral restraints of speech,[108] and that "a restriction is content-neutral if it is 'justified without reference to the content of the regulated speech.'"[109] Although the California Supreme Court agreed that the California liberty of speech clause is broader and more protective than the First Amendment's freedom of speech clause in all applications,[110] the regulation in question was both content-neutral and well within the government's police power.[111]

C. Sex Offenders

Special problems arise in connection with the transit authority's interest in protecting passengers from sex offenders. Transit agencies were asked whether with respect to a known sex offender (such as someone identified in a registry required by state law) there were applicable state or transit agency laws, regulations, or policies on when, how, and under what circumstances the agency could refuse service to or eject the person from the facilities.

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[104] *Id*. at 434.

[105] 22 Cal. 4th 352, 93 Cal. Rptr. 2d 1, 993 P.2d 334 (Calif. 2000).

[106] 993 P.2d at 335.

[107] *Id*. at 340, quoting from Clark v. Community for Non-Violence, 468 U.S. 288, 293, 104 S. Ct. 3065, 3069, 82 L. Ed. 2d 2211 (1984).

[108] *Id*. at 336, *citing, e.g.,* United States v. Kokinda*,* 497 U.S. 720, 730, 110 S. Ct. 3115, 111 L. Ed. 2d 571 (1990).

[109] 993 P.2d at 343.

[110] *Id*. at 342.

[111] *Id*. at 348.

TABLE 6.3—PERCENTAGE OF TRANSIT AGENCIES REPORTING STATE OR TRANSIT AGENCY LAWS, REGULATIONS, OR POLICIES APPLICABLE TO REFUSAL OF SERVICE OR EJECTION OF KNOWN SEX OFFENDERS

Transit Agencies Having Such Laws, Regulations, or Policies	Transit Agencies Not Having Such Laws, Regulations, or Policies	Response Not Clear/ No Response
8% (5 of 60)	80% (48 of 60)	12% (7 of 60)

Forty-eight agencies (80 percent) responded that there were no applicable state or transit agency laws, regulations, or policies in these situations, whereas only five agencies (8 percent) indicated that there were.

One agency responded that because it was a small agency, "we identify such known offenders to our drivers. They are closely monitored and followed when on the premises." Two other agencies reported that they worked closely with the Department of Corrections or the police department; one agency said that "[w]e receive photographs of Level 3 offenders. [The Department of Corrections] will inform us if their restrictions include…buses or transit facilities." Another agency responded that as part of the plea agreement for persons convicted of sex offenses that occur on transit property, the offender may be permanently banned from transit facilities.

By 1995, at least 44 states required sex offenders to register with authorities when they move into a community. In addition, at least 27 states now have community notification statutes.[112] The Supreme Court recently upheld laws requiring the registration of sex offenders.[113] Previously, the courts had held that New Jersey's analogous "Megan's Law," N.J.S.A. 2C:7-1 to -5 (Registration) and N.J.S.A. 2C:7-6-11 (Community Notification), did not violate the constitutional rights of sex offenders, notwithstanding "our country's fundamental belief that criminals, convicted and punished, have paid their debt to society and are not to be punished further."[114]

Without a nexus to the rider's behavior on transit, it may be risky for a transit authority to exclude someone on mere suspicion or even if the agency knew that the individual was a previously convicted sex offender. One court rejected the claim that even a psychiatrist would be able to identify a sex offender: "A review of the cases in other jurisdictions does not persuade us that it is generally accepted in the medical or legal communities that psychiatrists possess such knowledge or capabilities."[115] No authority has been located indicating that it would be a sufficient reason to bar a transit user from the system simply because he or she is a registered sex offender.[116] The Supreme Court of Illinois has held that a statute providing for the revocation of driver's licenses of those convicted of enumerated sex offenses was unconstitutional because the law had no relation to the legislative goal of highway safety.[117]

Without the sanction of state law or a court order, a transit agency's decision or action in barring a known (or suspected) sex offender from the transit system possibly would trigger at the very least the requirements of due process in the form of reasonable notice and an opportunity for a pre-suspension hearing. As seen, however, less than 10 percent of the agencies responding to the survey indicated that the agencies have any laws, regulations, or policies upon which they would be able to rely to bar a registered or otherwise known sex offender from transit facilities.

In sum, the transit authority may refuse service to unruly or apparently dangerous or threatening patrons in the interest of protecting other passengers or the operator. The transit authority may question a person to ascertain his or her identity if there is a reasonable

[112] Lynn A. Baker, *Conditional Federal Spending After Lopez*, 95 COLUM. L. REV. 1911, 1989 (1995), hereinafter cited as "Baker," *quoting* Lawrence Wright, *A Rapist's Homecoming*, THE NEW YORKER, Sept. 4, 1995, at 56, 68.

[113] Smith v. Doe, 538 U.S. 84, 123 S. Ct. 1140, 155 L. Ed. 164 (2003) (Court upheld a "Megan's Law" in Alaska—the Alaska Sex Offender Registration Act).

[114] Doe v. Poritz, 662 A.2d 367, 372 (N.J. 1995). However, "[p]ublic notification implicates a privacy interest in nondisclosure, and therefore triggers due process." *Id*. at 417. *Compare* E.B. v. Verniero, 119 F.3d 1077 (3d Cir. 1997) (Holding that a sex offender registration law inflicting additional punishment and placing the burden of persuasion on the offender violated the due process requirements of the registrant).

[115] State v. Cavello, 88 N.J. 508, 443 A.2d 1020, 1027 (1982). *See* United States v. St. Pierre, 812 F.2d 417, 420 (8th Cir. 1987) ("[N]o showing that the scientific community recognized the existence of identifiable traits common to rapists"). No cases were located that address the question of whether a sex offender should be considered disabled or otherwise be protected from alleged discrimination under the Americans with Disabilities Act or state mental health legislation.

[116] For example, *see* V*alidity and Application of Statute or Regulation Authorizing Revocation or Suspension of Driver's License for Reason Unrelated to Use of, or Ability to Operate, Motor Vehicle*, 18 A.L.R. 5th 542.

[117] People v. Lindner, 127 Ill. 2d 174, 535 N.E.2d 829, 129 Ill. Dec. 64 (Ill. 1989); People v. Priola, 203 Ill. App. 3d 401, 561 N.E.2d 82, *app. denied*, 567 N.E.2d 339.

suspicion of possible criminal activity, even though there is as yet an insufficient basis for an arrest based on probable cause. The same rule applies to detaining a suspicious package. Although convicted sex offenders may be identified and/or registered in accordance with state law, the transit authority may be unable to bar them from the transit facilities unless the state law or possibly a court order or judgment requires or authorizes the agency to bar the registered offender.

VII. TRANSIT AUTHORITIES AND PATRONS' USE OF SERVICE ANIMALS

It is unlawful to discriminate against a person using or seeking to use a place of public accommodation solely because that person has a disability and is accompanied by a guide dog, hearing dog, or other service animal.[118] Access to transportation facilities is specifically covered by the Americans with Disabilities Act (ADA).[119] Under 42 U.S.C. § 12132, "no qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity."

Section 12148(a) of the ADA makes it clear that a "designated public transportation program or activity" must be conducted such that "when viewed in the entirety the program or activity is readily accessible to and useable by individuals with disabilities."[120] Under § 12141, the phrase "designated public transportation" includes bus, rail, intercity, or commuter rail transportation "that provides the general public with general or special service (including charter service) on a regular and continuing basis." Section 12181 *et seq*. of the ADA covers public accommodations and services operated by private entities, including, for example, terminals, depots, and stations used for specified public transportation. Section 12184(a) states that "[n]o individual shall be discriminated against on the basis of disability in the full and equal enjoyment of specified public transportation services provided by a private entity that is primarily engaged in the business of transporting people and whose operations affect commerce." The term "specified public transportation" means transportation by bus, rail, or any other conveyance that provides the general public with general or special service on a regular and continuing basis.[121] Under § 12205, for litigation or administrative proceeding ensuing because of violations of the ADA, attorney's fees are recoverable by the prevailing party (other than by the United States).

Title 28, Part 35, of the Code of Federal Regulations (C.F.R.), applies to nondiscrimination on the basis of disability in state and local services. Part 36 of the regulations covers nondiscrimination on the basis of disability by public accommodations and in commercial facilities. Title 49, Part 37, of the C.F.R. applies to service animals in the context of transportation services. The section applies to public and private entities.[122] The entity "shall permit service animals to accompany individuals with disabilities in vehicles and facilities."[123]

In *Americans Disabled for Accessible Public Transp. v. Skinner*,[124] the U.S. Court of Appeals for the Third Circuit construed a number of provisions establishing the obligations of recipients of federal financial assistance to provide accessible public transportation for the disabled and held in general that "the statutes delegate broad powers to the Secretary to promulgate regulations, detailing minimum criteria," which in the court's view had to be upheld "if the balance they strike represents a permissible reading of the statutes…."[125]

In response to "Commonly Asked Questions About Service Animals in Places of Business," the Department of Justice advises that a service animal is

> *any* guide dog, signal dog, or other animal individually trained to provide assistance to an individual with a disability. If they meet this definition, animals are considered service animals under the ADA regardless of whether they have been licensed or certified by a state or local government….
>
> If you are not certain that an animal is a service animal, you may ask the person who has the animal if it is a service animal required because of a disability. However, an individual who is going to a restaurant or theater is not likely to be carrying documentation of his or her medical condition or disability. Therefore, such documentation generally may not be required as a condition for providing service to an individual accompanied by a service animal. Although a number of states have programs to certify service animals, you may not insist on proof of state certification before permitting the service animal to accompany the person with a disability….[126]

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[118] Americans with Disabilities Act, 42 U.S.C. § 12101 *et seq*.; 28 C.F.R. pt. 35 and pt. 36, § 36.302(c)(1); 49 U.S.C. § 41705; N.Y. CIV. RIGHTS LAW § 47; N.Y. TRANSP. LAW § 147; and N.Y. City Admin. Code (Human Rights) § 8-102 (4) and (18), and § 8-107.4 and § 8-107 (15); 56 Regulations of the City of New York (RCNY) (Department of Parks and Recreation) § 1-04 (i).

[119] 42 U.S.C. § 12101(a)(5). *See also* 14 AM. JUR. 2d *Carriers* § 829, at 222 ("A carrier's duty to not discriminate against disabled passengers is now governed also by the Americans with Disabilities Act.").

[120] *See, however,* Melton v. Dallas Area Rapid Transit, 391 F.3d 669 (5th Cir. 2004) (Public transit authority not required by ADA or Rehabilitation Act to make reasonable modification to its para-transit service; Kiernan v. Utah Transit Auth., 339 F.3d 1217 (10th Cir. 2003) (para-transit rider not entitled to preliminary injunction where agency terminated para-transit eligibility to riders with mobility devices exceeding the dimensions of a common wheelchair).

[121] 42 U.S.C. §12181, § 301.42(10).

[122] 49 C.F.R. § 37.167(a).

[123] 49 C.F.R. § 37.167(d). Other requirements are set forth in § 37.167(b) and (e) to (j).

[124] 881 F.2d 1184 (3d Cir. 1989).

[125] *American Disabled for Accessible Public Transp*., 881 F.2d at 1198.

[126] *See* http://www.usdoj.gov/crt/ada/qasrvc.htm.

The Justice Department advises that "[t]he service animal must be permitted to accompany the individual with a disability to all areas of the facility where customers are normally allowed to go. An individual with a service animal may not be segregated from other customers."[127] Also, as provided under the N.Y. Civil Rights Law Section 47-b(2), a person with a disability who is accompanied by a service animal may keep the service animal in his or her immediate custody.

There are other provisions in the ADA that are of interest. The ADA has specific provisions governing complaints, administrative and legal action, and enforcement. Although federal circuit courts of appeals have held that a state is not immune under the 11th Amendment from an action in federal or state court for a violation of the ADA,[128] the Supreme Court in 2001, reversing an 11th Circuit decision, held in *Board of Trustees of the University of Alabama v. Garrett*[129] that suits in federal court by state employees to recover damages by reason of the state's failure to comply with Title I of the ADA are barred by the 11th Amendment.

The 14th Amendment does not require states to make special accommodations for the disabled, as long as their actions are rational. The ADA's legislative record fails to show that Congress identified a history and pattern of irrational employment discrimination by the States against the disabled. Congress targeted the ADA at employment discrimination in the private sector only.[130] However, 11th Amendment immunity does not extend to local governmental units such as cities and counties.[131]

Thus far, no cases have been located regarding issues transit operators may have encountered under federal and state laws with respect to the handling of service animals and what action is appropriate under the circumstances. However, in *Johnson v. Gambrinus Company/Spetzl Brewery*,[132] the court held that under the ADA the brewery had to change its policy to allow a service animal (guide dog) to accompany a blind person on a tour of the facility. "[T]he legislative history of Title III makes clear that Congress concluded that it is a reasonable modification for places of public accommodation with animal restriction policies to allow individuals with disabilities full use of service animals."[133] It is discriminatory to refuse to alter a "no pets" rule for a person with a disability who uses a guide or service dog.[134] The owner of the brewery, who relied on the Food, Drug, and Cosmetic Act, 21 U.S.C. § 342, was concerned about physical contamination (dog hair in the beer), but failed to show that ADA modifications would alter fundamentally the nature of or jeopardize the safety of the public accommodation.[135]

The transit authority would have the burden of showing why a service animal would jeopardize the operation. The transit authority must be aware that various animals for a variety of reasons may qualify as service animals and that the agency may not be able to determine readily whether a passenger has a disability requiring the use of a service animal.

VIII. LIABILITY OF TRANSIT AUTHORITIES AND OTHERS FOR VIOLATIONS OF CONSTITUTIONAL RIGHTS

A. Federal Law: 42 U.S.C. § 1983

The elements of a § 1983 claim are that (a) the plaintiff was deprived of a right secured by the U.S. Constitution or the laws of the United States and that (b) the plaintiff was subjected to this deprivation by a person acting "under color of state law."[136] Although there are also state laws allowing damage claims for violation of constitutional rights, there are important differences in the laws. State constitutional rights are often more expansive than federal constitutional rights; however, a violation of a right conferred by a state constitution or state law will not support a federal § 1983 claim.[137] State governments are immune from suit under 42 U.S.C. § 1983 because of the 11th Amendment and considerations of federalism.[138] Thus, individual states, their departments and agencies, and their officials acting in their official capacities are not deemed "persons" subject to suit under § 1983.[139] However, the Supreme Court in *Monell v. Department of Social Services*[140] held that municipalities and local governments are "persons" within the meaning of § 1983, stating:

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[127] *See* http://www.usdoj.gov/crt/ada/qasrvc.htm.

[128] *See, e.g.,* Muller v. Costello, 187 F.3d 298, 308 (2d Cir. 1999) (Congress abrogated 11th Amendment immunity from suit under the ADA; "[t]he evil that Congress sought to combat by passing the ADA was irrational discrimination against persons with disabilities.").

[129] 531 U.S. 356 (2001).

[130] The Court explained that discrimination by states justifying the abrogation of 11th Amendment immunity is distinguishable from the Voting Rights Act of 1965, where Congress was reacting to a marked pattern of unconstitutional action by the states. 531 U.S. at 373.

[131] *Id*. at 357.

[132] 116 F.3d 1052 (5th Cir. 1997).

[133] Johnson, 116 F.3d at 1061.

[134] *Id*. at 1061, n.6 *citing* H.R. REP. NO. 485 (III), 101st Cong., 2d Sess. 59 (1990).

[135] Johnson, 116 F.3d at 1061–62.

[136] McGuire v. Ameritech Services, Inc., 253 F. Supp. 2d 988, 997 (S.D. Ohio 2003) (State, however, had 11th Amendment immunity in this case).

[137] Gail Donohue & Jonathan I. Edelstein, *Life After Brown: The Future of State Constitutional Tort Actions in New York*, 42 N.Y.L. SCH. L. REV. 447, 491 (1998), hereinafter "Donohue & Edelstein."

[138] Donohue & Edelstein, 42 N.Y.L. SCH. L. REV. at 491.

[139] Hockaday v. Texas Dep't of Criminal Justice, 914 F. Supp. 1439, 1444–45 (S.D. Tex. 1996).

[140] Monell v. Department of Social Services, 436 U.S. 658, 690–91, 98 S. Ct. 2018, 56 L. Ed. 2d 611 (1978), *discussed in* Reed v. City and County of Honolulu, Hawaii, 76 Haw. 219, 873 P.2d 98, 106 (Haw. 1994).

> Congress intended municipalities and other local government units to be included among those persons to whom § 1983 applies. Local governing bodies, therefore, can be sued directly under § 1983 for monetary, declaratory, or injunctive relief where, as here, the action that is alleged to be unconstitutional, implements or executes a policy statement, ordinance, regulation, or decision officially adopted and promulgated by that body's officers.

However, the Court went on to explain that

> a local government may not be sued under § 1983 for an injury inflicted solely by its employees or agents. Instead, it is when execution of a government's policy or custom, whether made by its lawmakers or by those whose edicts or acts may fairly be said to represent official policy, inflicts the injury that the government as an entity is responsible under § 1983.[141]

A federally regulated private company may be a "state actor" for the purpose of a § 1983 action.[142] In *Elam Const., Inc. v. Regional Transp. Dist.*,[143] in which it was alleged that the actions of the district's board of directors violated the plaintiffs' First Amendment rights, the court held that the Regional Transportation District was a "person" and could be sued under § 1983 since the RTC was not an arm of the state for 11th Amendment purposes. Although transit authorities may be subject to § 1983 claims, a plaintiff must assert that the existence of a governmental policy or custom was the cause of his or her claim.[144]

B. State Law

Many states permit recovery of damages for violations of constitutional rights; for example, "[a] direct action against the State for its violations of free speech is essential to the preservation of free speech."[145] Transit agencies were asked whether in their state the agency could be held liable in tort for a violation of a provision of the state constitution.

[141] Monell, 436 U.S. at 694.

[142] United States v. Davis, 482 F.2d 893, 904 (9th Cir. 1973) (Search by an airline employee pursuant to governmental regulations was one performed under color of state law because the "search was part of the overall, nationwide anti-hijacking effort…." *Id*.).

[143] 980 F. Supp. 1418, 1421–22 (D. Colo. 1977), *aff'd*, 129 F.3d 1343, *cert. denied*, 523 U.S. 1047, 118 S. Ct. 1363, 140 L. Ed. 2d 513 (1998).

[144] Torries v. Knapich, 966 F. Supp. 194 (S.D. N.Y. 1997). *See* Monell v. Department of Social Services of City of N.Y., 436 U.S. 658, 694, 98 S. Ct. 2018, 56 L. Ed. 2d 611 (1978) ("[I]t is when execution of a government's policy or custom, whether made by its lawmakers or by those whose edicts or acts may fairly be said to represent official policy, inflicts the injury that the government as an entity is responsible under § 1983."). *See*, however, Covington v. City of N.Y., 916 F. Supp. 282, 288 (S.D. N.Y. 1995) (Action may be based on the government's "deliberate indifference" in training and supervising of its employees regarding persons' constitutional rights); and Walker v. City of N.Y., 974 F.2d 293, 297 (2d Cir. 1992) (Three pronged test for establishing state actor's "deliberate indifference").

[145] Corum v. University of N.C., 330 N.C. 761, 413 S.E.2d 276, 289 (N.C. 1992) (Professor had cause of action under 42 U.S.C.A. § 1983 and direct cause of action under state constitution against university vice-chancellor in his official capacity).

TABLE 8.1—PERCENTAGE OF TRANSIT AGENCIES ADVISING THEY MAY BE HELD LIABLE IN TORT FOR A VIOLATION OF THE STATE CONSTITUTION

Percentage of Transit Agencies Reporting They May be Held Liable	Percentage of Transit Agencies Reporting "No" or "Not Known"
48% (29 of 60)	52% (31 of 60)

The respondents were about evenly divided, with 29 transit agencies (48 percent) responding that their agency could be held liable in tort for a violation of an individual's rights under the state constitution. Thirty-one transit agencies (52 percent) reported that their transit agency could not be held liable or did not know whether their transit agency could be held liable for such a violation.

In *Brown v. State of New York*,[146] the court held that the violation in question was a constitutional tort, which was defined to be "any action for damages for violation of a constitutional right against a government or individual defendants."[147] Under the holding in *Brown*, "almost any civil wrong could be classified as a [constitutional] tort."[148] Under *Brown*, there must be a threshold determination of whether the right sought to be enforced is self-executing, followed by an analysis of whether a damage remedy is a necessary and appropriate means of enforcing the right.[149] Some courts have held that the entire state constitution or the state's Bill of Rights is self-executing. One authority notes that it has not yet been determined whether local governments, for example, in New York could be held liable for state constitutional torts, although dicta suggests that such lawsuits may be maintained.[150] However, according to judicial authority, government employees may not be sued in their individual capacities for constitutional torts in New York.[151] Another important issue is whether the state and/or its instrumentalities or subdivisions have waived sovereign immunity in respect to claims for constitutional torts.[152]

In responding to the survey, several transit agencies advised that they could be held liable under federal law for violating an individual's constitutional rights. On a related matter, some courts have held that, because damage remedies are available under federal law, 42 U.S.C. § 1983, against state officials in their individual capacities, there is no need to imply a state constitutional cause of action against state officials in their individual capacity.[153] Courts in Alaska, New Hampshire, North Carolina, and Ohio have held that no right of action exists under the state constitution if alternative remedies are available.[154] Finally, it has been suggested that the standard of care in a constitutional tort case is more than mere negligence.

> In traditional tort law, causes of action are divided into those which require intent and those which may be established by mere negligence. In civil rights jurisprudence, however, mere negligence is not sufficient, although a number of intermediate standards such as deliberate indifference, reckless disregard and unnecessary and wanton conduct will support liability under 42 U.S.C. 1983 in certain circumstances.[155]

Transit authorities may not be immune from actions for constitutional torts and will need to be careful in the adoption of transit policies governing the refusal of service or the suspension or barring of transit users, as well as in the training and supervision of employees. Transit authorities may have an even wider range of exposure under a state constitution or state law that provides more protection than the federal constitution. Both federal and state constitutions must be considered in the adoption of a transit policy that allegedly restricts the rights of transit users.

IX. LEVEL OF JUDICIAL SCRUTINY APPLICABLE TO TRANSIT AGENCIES' POLICIES OR PROCEDURES ON BARRING TRANSIT USERS

As discussed in the next sections, some transit agencies have policies regarding the temporary suspension or permanent expulsion of transit users. This section of the Report discusses the legal tests that the courts may choose to apply in determining the constitutionality of such policies or procedures. The distinction between a right and a fundamental right is quite important in the courts' determination of the level of judicial scrutiny to

[146] 89 N.Y.2d 172, 674 N.E.2d 1129, 652 N.Y.S.2d 223 (1996).

[147] Donohue & Edelstein, 42 N.Y.L. SCH. L. REV. 459, quoting from *Brown,* at 674 N.E.2d at 1132.

[148] *Id*. at 460.

[149] *Id*. at 471.

[150] *Id*. at 528; *but compare* Martinez v. Saunders, 2004 U.S. Dist. LEXIS 10060 (S.D. N.Y. June 2, 2004) at 24.

[151] Martinez v. Sanders, 2004 U.S. Dist. LEXIS 10060 at 24 (S.D. N.Y. 2004).

[152] *See* Board of County Comm'rs v. Sundheim, 926 P.2d 545, 549–50 (Colo. 1996) (An implied cause of action did not exist for violation of state constitutional rights, and the Colorado Government Immunity Act, waiving Colorado's sovereign immunity in certain situations, does not specifically include the violation of a citizen's state constitutional rights.).

[153] *See* Donohue & Edelstein, 42 N.Y.L. SCH. L. REV. at 529.

[154] *Id*. at 493.

[155] *Id*. at 532.

apply when deciding whether a burden or restriction on travel is constitutional.[156]

Although there is considerable confusion and disagreement among the courts regarding which test to apply,[157] the courts may apply one of three tests—rational basis, intermediate scrutiny, or strict scrutiny.

The first approach is the rational basis test, which is the minimal standard of review that the courts apply in reviewing the constitutionality of legislation or regulations. Where the democratic process (e.g., elections) adequately protects conflicting interests, the courts apply minimal or rational basis scrutiny.[158] The challenged legislation is upheld if it "'bear[s] some rational relationship to legitimate state purposes.'"[159]

A second approach that requires or allows a somewhat higher level of scrutiny than the rational basis test is the test of intermediate scrutiny, which the courts apply to "important rights that should be subject to more searching judicial review…."[160] The courts have applied intermediate scrutiny to cases arising under the Due Process and Equal Protection Clauses involving restrictions on commercial speech and on travel.[161]

The third and highest level of scrutiny is the most searching kind of review—strict scrutiny. Legislation allegedly infringing civil rights, including certain fundamental rights, is subject to a standard of review based on strict scrutiny. The courts use a higher level of scrutiny where those affected by legislative action cannot defend their interests effectively in the political arena.[162] For example, if a law is a disadvantage to a "suspect-class" or impinges on a fundamental right protected by the Constitution, the law is subject to strict scrutiny. To survive such intensified review, the classification must promote a compelling governmental interest and be narrowly tailored to serve that interest.[163] As soon as the Court deems a right to be fundamental, the courts must apply strict or an intensified level of scrutiny, a test that requires the government to show a "compelling justification" for the law.[164]

The nature of the right to travel determines the level of scrutiny that a court will apply (e.g., strict scrutiny, intermediate scrutiny, minimal scrutiny) in reviewing government action that affects the right. As discussed, it does not appear that there is any authority holding that there is a constitutional right to travel aboard transit. Unless there is some basis for applying strict scrutiny (e.g., racial discrimination), it appears that the courts at most would apply a standard of intermediate scrutiny, and, if the restriction satisfied the test, would uphold reasonable time, place, or manner restrictions on a patron's use of transit facilities.

X. DUE PROCESS STANDARDS APPLICABLE TO TRANSIT AGENCIES' PROCEDURES FOR REFUSAL OF SERVICE

In general, the 14th Amendment's guarantee of due process is fully applicable to proceedings conducted by state and local government agencies.[165]

When a statute expressly or impliedly allows a transit authority to expel a user or suspend a user from the system, there is a possibility the law will be attacked on the ground of lack of due process for being vague or overbroad.

A. Vague or Overbroad Laws

To determine whether a penal law is unconstitutionally vague, first, the statute must provide adequate notice of what conduct is prohibited, and, second, the statute must not be drafted in a manner that fosters arbitrary or discriminatory enforcement.[166] Legislation is vague "when a legislature states its proscriptions in terms so indefinite that the line between innocent and condemned conduct becomes a matter of guesswork."[167] Legislation is not unconstitutionally vague if the law's prohibitions are ones that an ordinary person exercising common sense would be able to understand and with

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[156] A more exacting standard of review is required of legislation that impairs constitutional rights that are held to be fundamental rights, such as those enumerated in the Bill of Rights. United States. v. Carolene Products Co., 304 U.S. 144, 153, 58 S. Ct. 788, 82 L. Ed. 1234 (1938) (Harlan Fiske Stone, J.). *See* 2 CONSTITUTIONAL LAW AND POLITICS: CIVIL RIGHTS AND CIVIL LIBERTIES 1279 (5th ed. 2000).

[157] Douglas A. Smith, *A Return to First Principles? Saenz v. Roe and the Privileges or Immunities Clause*, UTAH L. REV. 305, 345–46 (2000), hereinafter "Smith."

[158] United States v. Carolene Products, 304 U.S. at 152–53, n. 4 (1938).

[159] *See* Smith, UTAH L. REV. 342–43 (2000).

[160] *Id*. at 347.

[161] *See id*. at 345.

[162] United States v. Carolene Products, 304 U.S. at 153 (1938).

[163] Smith, UTAH L. REV. 343 (2000).

[164] Attorney General of N.Y. v. Soto-Lopez, 476 U.S. 898, 904, 106 S. Ct. 2317, 2321, 90 L. Ed. 2d 899 (1986) ("A…law implicates the right to travel when it actually deters such travel, [or] when impeding travel is its primary objective." *Id*. at 903); Smith, UTAH L. REV. 347 (2000); *see also* William Mann, *All the (Air) Rage: Legal Implications Surrounding Airline and Government Bans on Unruly Passengers in the Sky*, 65 J. AIR. L. & COM. 857, 866 (2000) ("A law that does implicate the right to travel is subject to strict scrutiny by the courts.").

[165] New York State National Organization for Women v. Pataki, 261 F.3d 156, 163 (2d Cir. 2001), *cert. denied*, 534 U.S. 1128, 122 S. Ct. 1066, 151 L. Ed. 2d 969 (2002).

[166] People v. Webb, 184 Misc. 2d 508, 709 N.Y.S.2d 369 (Crim. Ct., New York County, 2000) (Portion of a rule that prohibited "authorizing access to or use of" subway was unconstitutionally vague where it was alleged that the defendant had unlawfully "allowed" certain persons to enter subway station. *Id.* at 709 N.Y.S.2d 371).

[167] LAURENCE H. TRIBE, CONSTITUTIONAL LAW § 12-31, at 1033 (2d ed. 1988), *quoting* Richmond Med. Ctr. for Women v. Gilmore, 11 F. Supp. 2d 795, 812 (E.D. Va. 1998).

which he or she can comply.[168] Moreover, a regulation must be sufficiently clear to warn a party regarding what is expected of him or her.[169] Before an agency can sanction someone for a failure to comply with regulatory requirements, the agency must either put appropriate language into the regulation itself or at least refer to it in the regulation. General references to a regulation's policy or underlying purpose will not provide fair notice as required by procedural due process.[170] Vague regulations may cause individuals to avoid constitutionally protected behavior in which they would otherwise engage if the boundary of legal behavior was clearly established.[171]

Where there are clear regulatory guidelines for transit officials and others, the courts tend "to give great leeway to predictive judgments based on a matter within the agency's sphere of expertise."[172] Due process issues arise whenever a transit authority relies on general or vague laws proscribing certain conduct or if the authority acts without specific statutory or regulatory guidance. However, when determining whether a regulation or law is vague, a court must recognize that words are inherently imprecise, and therefore "'mathematical certainty' is unattainable."[173] In *City of Seattle v. Eze,*[174] the court ruled that an ordinance barring "loud or raucous behavior" that "unreasonably disturbs others" was not unconstitutionally vague: "A person of ordinary understanding would be capable of determining that conduct such as Eze's was prohibited under the ordinance."[175] In *Lewis v. Searles*, the court held that although there was no specific quantifiable area demarcating every single right of way, a statute restricting political advertisement signs from public right of ways was not vague.[176] Additionally, a statute allowing an official to cancel a driver's license of one whom the official believes would be "inimical to public safety or welfare" on the highways has been upheld.[177]

One sees the term "overbroad" used most often with respect to laws claimed to violate the First Amendment.[178] The court in *American Civil Liberties Union v. Mineta*[179] explained the difference between vague and overbroad:

> A vague law "denies due process by imposing standards of conduct so indeterminate that it is impossible to ascertain just what will result in sanctions…."
>
> "[A] law that is overbroad may be perfectly clear but impermissibly purport to penalize protected First Amendment activity." Even a "clear and precise enactment may nevertheless be 'overbroad' if in its reach it prohibits constitutionally protected conduct." A statute is overly broad "only if 'it reaches a substantial number of impermissible applications,'" sweeping within its reach both protected and unprotected expression and conduct." "The mere fact that one can conceive of some impermissible applications of a statute is not sufficient to render it susceptible to an overbreadth challenge."[180] (Citations omitted).

A breach of the peace statute may be constitutionally insufficient to restrict free speech[181] or assembly.[182] In

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[168] M & Z Cab Corp. v. City of Chicago, 18 F. Supp. 2d 941, 948 (N.D. Ill. 1998) (Procedural due process analysis requires the court to undertake a two-step process: court must determine whether plaintiffs were deprived of a protected interest in life, liberty, or property, and, if the plaintiffs were deprived of such an interest, the court must then determine what process was due with respect to that deprivation. *Id*. at 946).

[169] General Elec. Co. v. United States EPA, 53 F.3d 1324, 1328–29 (D.C. Cir. 1995).

[170] Trinity Broadcasting of Fla., Inc. v. FCC, 211 F.3d 618, 630 (D.C. Cir. 2000).

[171] Grayned v. City of Rockford, 408 U.S. 104, 109, 92 S. Ct. 2294, 33 L. Ed. 2d 222 (1972).

[172] Hutchins v. District of Columbia, 338 U.S. App. D.C. 11, 30, 188 F.3d 531, 542 (D.C. Cir. 1999).

[173] Lewis v. Searles, No. 2:02-CV-259, 2002 U.S. Dist. LEXIS 20673, at *9-10 (D. Vt., Oct. 23, 2002) *quoting* Grayned, 408 U.S. at 110.

[174] 111 Wash. 2d 22, 759 P.2d 366, 367 (Wash. 1988).

[175] The *Eze* case was followed in State v. Glas, 147 Wash. 2d 410, 54 P.3d 147, 154 (Wash. 2002) (Constitutionality presumed "where the statute's purpose is to promote safety and welfare, and the statute bears a reasonable and substantial relationship to that purpose"); State v. Baldwin, 111 Wash. App. 631, 45 P.3d 1093, 1102 (Wash. App. Div. 1, 2002) ("Impossible standards of specificity not required"); and City of Spokane v. White, 102 Wash. App. 955, 10 P.3d 1095, 1097 (Wash. App., Div. 3, 2000).

[176] Lewis v. Searles, No. 2:02-CV-259, 2002 U.S. Dist. LEXIS 20673, at *9 (D. Vt., Oct. 23, 2002).

[177] Askildson v. Commissioner of Public Safety, 403 N.W.2d 674, 676 (Minn. App. 1987).

[178] *See* Parks v. Finan, 385 F.3d 694, 702-3 (6th Cir. 2004); Ridley v. Mass. Bay Transp. Auth., 390 F.3d 65 (1st Cir. 2004) (Certain MBTA regulatory guidelines regarding rejection of advertising held not unreasonably vague or overbroad), *but see* State v. Ausmus, 336 Ore. 493, 85 P.3d 864 (Ore. 2003) (An Oregon statute proscribing disorderly conduct was held to be overbroad because

> a person ordered to disperse violates [the law] regardless of whether or not any harm results from the refusal to disperse, the continued congregation with others, or the proscribed mental state. Thus, the statute applies to an individual who, in response to an order to disperse, abandons whatever activity in which they were engaged that made the order lawful in the first place, but continues peaceably to congregate with others, with the intent to cause public inconvenience, annoyance, or alarm or recklessly creates the risk of causing public inconvenience, annoyance or alarm.

Id. at 871).

[179] 319 F. Supp. 2d 69 (D. D.C. 2004).

[180] *Id*. at 76–77.

[181] Cantwell v. Connecticut, 310 U.S. 296, 304, 91 S. Ct. 1686, 84 L. Ed. 1213 (1940); *see* O'Neill, 45 LOY. L. REV. at 485–87 ("[I]ndirect regulation of expressive conduct is usually accomplished by enforcing general prohibitions against undesirable *conduct*—statutes proscribing breach of the peace, [disorderly] conduct, disturbing a lawful meeting, or 'annoying pedestrians'—[as a means of] punishing controversial speech.").

[182] Coates v. City of Cincinnati, 402 U.S. 611, 615, 91 S. Ct. 1686, 29 L. Ed. 2d 214 (1971) (Court struck down an ordinance

Wisconsin v. Antonicci,[183] the court held that a state statute proscribing disorderly conduct was not overbroad. The court stated that the law was not so broad that its sanctions may apply to conduct protected by a "constitutional right to travel," which the court held was not absolute in any case.[184] It is not only potentially disorderly motorists and transit patrons who may be entitled to travel: "victims also have a constitutional right to travel and that right includes the right to move freely about the sidewalks and streets of the community."[185]

B. Notice and Hearing

Generally, due process requires that an individual be given notice and an opportunity for a hearing before the state may permanently deprive someone of life, liberty, or property.[186] Moreover, it has been held that an agency may not impose even a temporary suspension without providing the core requirements of due process: adequate notice and a meaningful hearing.[187] Nonetheless, the concept of due process is flexible and varies with the particular situation.[188] Thus, the procedural protections required by the Due Process Clause must be determined with reference to the rights and interests at stake in the particular case.[189] Although there are cases involving constitutional rights in which the courts have held that a pre-deprivation notice and hearing is required before the termination of a right or benefit, it appears that in many situations only a notice and some form of hearing are required.[190] In deciding whether agency procedures comport with the requirements of due process, the courts do not defer to the agency's judgment or discretion.[191] What process is due necessarily depends on the right that is under consideration, the exigency of the situation, and what alternate means are available.[192] Although the standard appears to leave room for the agency to decide that administrative factors favor using one means rather than another,[193] whatever rules the agency chooses to adopt, even if it adopts some rules gratuitously, the agency must follow them.[194]

C. Whether Barring a Transit User Implicates a Constitutional Right to Travel

As stated, the threshold issue is what constitutional, statutory, or other right is affected by the transit agency's action. Although restrictions on intrastate travel may be subject to less scrutiny by the courts (i.e., rational basis or intermediate level of scrutiny rather than strict scrutiny), the U.S. Supreme Court has held that *"[t]he right to travel is a part of the 'liberty' of which the citizen cannot be deprived without due process of law under the Fifth Amendment."* (Emphasis supplied.)[195] One appellate court has held, however, that a State's denial of a driver's license for an applicant's refusal to provide his social security number did not violate the applicant's right to interstate travel, because there is no fundamental right to drive.[196]

In the intrastate travel cases, the courts have rejected the application of a test of strict scrutiny in favor

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that prohibited sidewalk meetings by three or more people conducted "in a manner annoying to persons passing by" and held that "public intolerance or animosity" cannot be the basis for abridging the rights of free assembly and association. *Id*. at 614–15).

[183] 2004 Wis. App. 186, 687 N.W.2d 549, 2004 Wisc. App. LEXIS 682 (2004).

[184] Wisconsin, 2004 Wis. App. LEXIS 682, at **13. The court further stated that

> [t]he mere "passive following" of another vehicle will not qualify for conviction. The statute does not proscribe activities intertwined with protected freedoms unless carried out in a manner which is violent, abusive, indecent, profane, boisterous or unreasonably loud, or conduct similar thereto, and under circumstances in which such conduct tends to cause or provoke a disturbance. Prohibition of conduct which has this effect does not abridge constitutional liberty.

Id. (citations omitted).

[185] *Id*. at 14.

[186] M & Z Cab Corp. v. City of Chicago, 18 F. Supp. 2d 941 (N.D. Ill. 1998) (Court upheld post-deprivation hearing). *Id*. at 946–7.

[187] Sloan v. Department of Housing & Urban Dev., 343 U.S. App. D.C. 376, 231 F.3d 10, 18 (D.C. Cir. 2000). Assuming due process is required, generally the following elements must be satisfied: "(1) Adequate notice of the charges; (2) Reasonable opportunity to prepare for and meet them; (3) An orderly hearing adopted to the nature of the case; and (4) A fair and impartial decision." *See* Note: *The Silent Treatment: Perpetual In-School Suspension and the Education Rights of Students*, 81 TEX. L. REV. 1637, 1644, 1658–59 (hereinafter cited as "In-School Suspension"), *citing* Buttny v. Smiley, 281 F. Supp. 280, 288 (D.C. Colo. 1968); Whitfield v. Simpson, 312 F. Supp. 889, 894 (E.D. Ill. 1970); and Ector County Indep. Sch. Dist. v. Hopkins, 518 S.W.2d 576, 581 (Tex. Civ. App., El Paso 1975) (Calling for an evaluation of fundamental fairness in light of the totality of the circumstances.).

[188] In-School Suspension, *supra* note 1877, 81 TEX. L. REV. 1658–59.

[189] *Id*. at 1644 *(*Discussing Goss v. Lopez, 419 U.S. 565, 574 (1975)).

[190] M & Z Cab Corp., 18 F. Supp. 2d at 946.

[191] Ramirez-Alejandre v. Ashcroft, 320 F.3d 858, 869 (9th Cir. 2003).

[192] Ricketts v. City of N.Y., 181 Misc. 2d 838, 688 N.Y.S.2d 418, 424 (Sup. Ct., New York County, 1999). *See* M & Z Cab Corp. v. City of Chicago, M & Z Cab Corp. v. City of Chicago, 18 F. Supp. 2d 941 at 946.

[193] Reno v. Flores, 507 U.S. 292, 305, 113 S. Ct. 1439, 123 L. Ed. 2d 1 (1993).

[194] Wilkinson v. Legal Services Corp., 27 F. Supp. 2d 32, 47–48 (D. D.C. 1998).

[195] Kent v. Dulles, 357 U.S. 116, 125, 78 S. Ct. 1113, 2 L. Ed. 2d 1204 (1958), [overruled as stated in Regan v. Wald, 468 U.S. 222, 82 L. Ed. 2d 171, 104 S. Ct. 3026, 1984 U.S. LEXIS 134, 52 U.S.L.W. 4966 (1984)].

[196] Miller v. Reed, 176 F.3d 1202, 1206 (9th Cir. 1999).

of one of rational basis or at most intermediate scrutiny.[197] According to the courts, governments must enjoy some degree of flexibility to regulate travel.[198] In the *Hutchins* case, where the court was urged to reject the D.C. curfew law, the court refused to apply a test of strict scrutiny and settled instead on one of intermediate scrutiny in deciding that the law restricting after-hours movement of juveniles was constitutional.[199] In its effort to clarify the law, the D.C. Circuit held that it was necessary to examine the factual premises upon which the legislature based its decision, the logical connection the remedy has to those premises, and the scope of the remedy employed.[200] It appears that these same considerations would be relevant to the transit authority's decision on how to regulate conduct in or on its facilities. Significantly, "[m]inor restrictions on travel simply do not amount to the denial of a fundamental right…."[201]

D. Whether Removing or Barring a Transit User Implicates a Property Right

It has been held that "[p]rocedural due process is only implicated where there has been a taking or deprivation of a legally protected liberty or property interest."[202] No precedent has been located, however, holding or even implying that transit patrons have a property interest in the use of transit facilities. One claiming that a city ordinance creates a public right must "show more than a 'unilateral expectation' of the property interest; they must prove a 'legitimate entitlement' to that interest."[203] Assuming a transit rider relied on a state law or local ordinance for a claim that there was a right to ride by virtue of a property interest in public transit, it would have to be shown that the law or ordinance "expressly created" a property right. The creation of such a property right is unlikely because it "would interfere with the [agency's] ability to maintain public transportation and safety" in or on its facilities.[204] Thus, no authority has been found holding that a transit user has either a right to travel aboard transit or a property right in the use of transit.

Nevertheless, "there has been general, although not uniform agreement that" whenever the government is involved in the ownership and operation of property used by the public, such as housing, the government's ownership is a sufficient basis on which to invoke federal constitutional due process protection for those affected by the government's actions.[205] Although no cases have been located specifically involving a passenger's due process rights if temporarily barred or suspended from using transit facilities, what kind of due process is necessary has been addressed in a wide variety of analogous situations.[206] "[N]ormally, when an…administrative agency is about to take action ad-

[197] Lutz v. City of York, 899 F.2d 255, 269 (3d Cir. 1990).

[198] According to the court in Hutchins v. District of Columbia, 338 U.S. App. D.C. 11, 28–29, 188 F.3d 531, 541, the law restricting travel involved in that case only had to be "'substantially related' (rather than narrowly tailored) to the achievement of 'important' (rather than compelling) government interests," a somewhat different and more relaxed definition of the intermediate standard. Court opinions have been remiss, however, in clearly explaining the applicable doctrines. In contrast to the *Hutchins* case, according to the court in the *Lutz* case, to survive the intermediate scrutiny test a law must be fashioned or "narrowly tailored" to meet significant government interests—not necessarily compelling ones. Lutz, 899 F.2d at 269. The *Lutz* opinion is very helpful in that it reviews the prior relevant case law. However, in contrast to the Supreme Court's decision in Saenz v. Roe, 526 U.S. 489, 119 S. Ct. 1518, 143 L. Ed. 2d 689 (1999), the Third Circuit in Roe v. Anderson, C.A. 9, 134 F.3d 1400 (Cal. 1998), upholding an anti-cruising ordinance, held that there was a constitutional right of intra-state travel growing out of the doctrine of substantive due process and that the 14th Amendment's Privileges or Immunities Clause was *not* a source of an implied fundamental right of intrastate travel.

[199] *Hutchins*, 188 F.3d at 540–41. As the D.C. Circuit held in *Hutchins*, "[n]either the Supreme Court nor the lower federal courts have expounded upon—explained in doctrinal terms—the phrase 'substantial relationship.'" *Id.* at 542.

[200] *Id*. at 542; "[T]he cruising ordinance passes muster as a reasonable time, place and manner restriction on the *right of localized intrastate travel*." *Lutz*, 899 F.2d at 270 (emphasis added).

[201] Cramer v. Skinner, 931 F.2d 1020, 1031 (5th Cir. 1991).

[202] Fortuna's Cab Service, Inc. v. City of Camden, 269 F. Supp. 2d 562, 564 (D. N.J. 2003) (Taxi operators had no property interest in taxi-stands relocated by the city).

[203] *Id*.

[204] *Id*.

[205] *Tenant's Right to Hearing*, 28 A.L.R. FED. 742; *see also* Rodriquez v. Towers Apartments, Inc., 416 F. Supp. 304 (D. P.R. 1976).

[206] *Tenant's Rights, Under Due Process Clause of Federal Constitution, to Notice and Hearing Prior to Imposition of Higher Rent or Additional Service Charges for Government-Owned or Government-Financed Housing*, 28 A.L.R. FED. 739; *Validity and Application of Statute or Regulation Authorizing Revocation or Suspension of Driver's License for Reason Unrelated to Use of, or Ability to Operate, Motor Vehicle*, 18 A.L.R. 5th 542; *Right of Student to Hearing on Charges before Suspension or Expulsion from Educational Institution*, 58 A.L.R. 2d 903; *Right to Notice and Hearing Prior to Termination of Medicaid Payments to Nursing Home under Medicaid Provisions of Social Security Act*, 37 A.L.R. FED. 682; *Actions by State Official Involving Defendant as Constituting "Outrageous" Conduct Violating Due Process Guaranties*, 18 A.L.R. 5th 1; *Violation of Due Process Clause by Municipal Ordinance Prohibiting House to House Soliciting and Peddling Without Invitation*, 35 A.L.R. 2d 365; *Vagueness as Invalidating Statutes or Ordinances Dealing with Disorderly Persons or Conduct*, 12 A.L.R. 3d 1448; *Sufficiency of Notice and Hearing before Revocation or Suspension of Motor Vehicle Driver's License*, 60 A.L.R. 3d 427, § 3[A]; *Validity, Construction, and Application of Loitering Statutes and Ordinances*, 72 A.L.R. 5th 1; *"State-Created Danger," or Similar Theory, as Basis for Civil Rights Action under 42 U.S.C.A. § 1983*, 159 A.L.R. FED. 37.

verse to a citizen, on the basis of 'adjudicative facts,' due process entitles the citizen at some stage to have notice, to be informed of the facts on which the agency relies, and to have an opportunity to rebut them."[207]

When limitations exist on agency discretion to terminate or extend benefits, procedural due process must be afforded.[208] The threshold issue triggering this analysis is whether the agency's action affects either a liberty interest or a property interest.[209] In *Goldberg v. Kelly*, [210] the Court held that welfare benefits are a matter of statutory entitlement for persons qualified to receive them and procedural due process is applicable to their termination. Consequently, a pre-determination evidentiary hearing was necessary to provide the welfare recipient with procedural due process.[211]

However, in *Mathews v. Eldridge*,[212] the Court held that an evidentiary hearing was *not* required prior to the termination of Social Security disability payments. After reviewing the agency's procedures, the Court held that the situation was distinguishable from *Goldberg v. Kelly*. According to the *Mathews* Court, requiring an evidentiary hearing in all cases prior to the termination of disability benefits would entail fiscal and administrative burdens out of proportion to any countervailing benefit. The Court further held that the administrative procedures prescribed under the Social Security Act fully comported with due process, because the claimant was given an opportunity to submit additional arguments and evidence to the agency before termination of the benefit.

As held in *Mathews,* "'[D]ue process is flexible and calls for such procedural protections as the particular situation demands.'"[213] Three factors to consider are (1) the private interest that will be affected by the official action; (2) the risk of an erroneous deprivation of the interest by the use of the procedures and the possible value, if any, of additional procedural safeguards; and (3) the government's interest, including the fiscal and administrative burdens that the additional or substitute procedures would entail.[214]

The *Mathews* test remains today as a key test applied by federal courts when assessing whether actions taken by the government meet procedural due process requirements. In *Gilbert v. Homar*,[215] the Supreme Court applied the *Mathews* balancing test to determine that a state university could delay a pre-termination hearing for an employee arrested on drug charges while suspending the employee without pay. The court found that only slight harm would befall the employee by missing a paycheck. The delay would be brief and the university had a strong interest in quickly removing an employee arrested on drug charges.[216] The determinative factor was the third *Mathews* prong: that no additional procedures such as a pre-suspension hearing would alleviate the problem of the suspension. The court held that a pre-suspension hearing would only encourage the employer to make a rash decision, most likely against the employee.[217]

The *Mathews* test was applied again in June 2004 by the Supreme Court in a review of the process that was due to enemy combatants in U.S. custody from the war on terror when raising habeas corpus. In *Hamdi v. Rumsfeld*,[218] the Supreme Court applied the *Mathews* test and held that civilians detained by the U.S. as alleged enemy combatants must be granted "notice of the factual basis for his classification, and a fair opportunity to rebut the Government's factual assertions before a neutral decision-maker."[219] The Supreme Court determined that the government had a strong interest in detaining these individuals and continuing to detain enemy combatants. However, the petitioners were entitled to some form of hearing when challenging the enemy combatant classification because the question of habeas corpus bears directly on the legitimacy of the continued internment of the alleged combatants.[220] The Supreme Court held that the alleged combatants must have a hearing because of the strong private interests that the combatants have in such a hearing. To allay concerns of the government, the hearing itself may be specially tailored to address the uncommon burden that the hearings could place on the executive branch while the nation was still in a state of conflict.[221]

To determine whether agency procedures accord with the constitutional guarantee of due process, the courts, thus, examine the context of each case. Different levels of process are required in different situations.[222] In de-

[207] Thomas v. City of N.Y., 143 F.3d 31, 36, n.7 (2d Cir. 1998), *quoting* Langevin v. Chenango Court, Inc., 447 F.2d 296, 300 (2d Cir. 1971) *citing*, *inter alia*, Londoner v. Denver, 210 U.S. 373, 52 L. Ed. 1103, 28 S. Ct. 708 (1908).

[208] Occean v. Kearney, 123 F. Supp. 2d 618, 623–24 (S.D. Fla. 2000).

[209] Am. Mfrs. Mut. Ins. Co. v. Sullivan, 526 U.S. 40, 59, 119 S. Ct. 977, 143 L. Ed. 2d 130 (1999) ("Only after finding the deprivation of a protected interest do we look to see if the State's procedures comport with due process." *Id*.).

[210] Goldberg v. Kelly, 397 U.S. 254, 90 S. Ct. 1011, 25 L. Ed. 2d 287 (1970) [*overruled as stated in* State ex rel. K.M. v. W. Va. Dep't of Health & Human Res., 212 W. Va. 783, 575 S.E.2d 393, 2002 W. Va. LEXIS 241 (2002)].

[211] *Id*. at 262.

[212] 424 U.S. 319, 340, 96 S. Ct. 893, 47 L. Ed. 2d 18 (1976).

[213] Mathews v. Eldridge, 424 U.S. 319, 334, 96 S. Ct. 893, 47 L. Ed. 2d 18 (1976), *quoting* Morrissey v. Brewer, 408 U.S. 471, 481 (1972).

[214] *Id*. at 335.

[215] 520 U.S. 924, 117 S. Ct. 1807, 138 L. Ed. 2d 120 (1997).

[216] *Id*. at 933–34.

[217] *Id*. at 934–35.

[218] Hamdi v. Rumsfeld, 124 S. Ct. 2633, 159 L. Ed. 2d 578, 2004 U.S. LEXIS 4761 (S. Ct. June 28, 2004).

[219] *Id*. 124 S. Ct. at 2648.

[220] *Id*.

[221] *Id*.

[222] AT&T Communications of the Southwest, Inc. v. Southwestern Bell Tel. Co., 86 F. Supp. 2d 932, 951 (W.D. Mo. 1999),

termining whether an agency's denial of a formal hearing violated due process, the court considers the private interest affected by the government's action, the risk of erroneous deprivation without the required safeguard, and the government's interest in avoiding additional procedures.[223] Cases analogous to the transit agency's right to bar users have arisen in a variety of contexts, including, for example, public housing, public schools, revocation of driver's licenses, and others.[224]

Although it may be necessary to provide a notice to the affected person, not every situation requires that a full evidentiary hearing be provided before or after the government's action.[225] For example, although the due process clause extends limited protection to public housing tenants, it has been held that such tenants do not have a right to a full adversary hearing before a rent or service charge increase is proposed or implemented.[226] There is in this context a right to a notice but not a right to a hearing.[227]

In contrast to transit users, public school students facing temporary suspension or expulsion may have liberty and property interests that qualify for protection under the Due Process Clause of the 14th Amendment.[228] Similar to intrastate travel, the Court "has never declared that the right to an education is a fundamental right under the United States Constitution;"[229] thus, class attendance is a privilege and not a right. In *Goss v. Lopez*,[230] however, the Court held that Ohio, having chosen to extend the right to an education to people of appellees' class generally, could not withdraw that right on grounds of misconduct, absent fundamentally fair procedures to determine whether the misconduct had occurred, and must recognize a student's legitimate entitlement to a public education as a property right protected by the Due Process Clause.

Thus, "[e]ven though education is not a fundamental right or liberty, the Court has granted students a property right to the education that is provided by the government."[231] In *Plyler v. Doe*,[232] the Court held "If the State is to deny a discrete group of innocent children the free public education that it offers to other children residing within its borders, that denial must be justified by a showing that it furthers some substantial state interest. No such showing was made here."

Based on *Plyler* and other cases, the right to transit may be more than a mere governmental benefit.[233] In contrast, the courts have applied more stringent due process protection in cases involving the suspension or revocation of driver's licenses.[234]

As stated, however, no precedents have been located imposing any requirements of due process on transit agencies when barring transit users. Assuming *arguendo* that a suspended rider is entitled to due process, it is unclear what measure of due process would actually be due under the circumstances.[235] Nevertheless, due process does not necessarily require that notice and a hearing occur before there is some depriva-

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rev'd in part, vacated in part, 236 F.3d 922 (2001), *cert. granted, judgment vacated*, 535 U.S. 1075, 122 S. Ct. 1958 (2002).

[223] Commercial Drapery Contractors, Inc. v. United States, 133 F.3d 1, 6-7 (D.C. Cir. 1998).

[224] Francis v. Barnes, 69 F. Supp. 2d 801 (E.D. Va. 1999), *aff'd*, 208 F.3d 208.

[225] Shelton v. Consumer Products Safety Comm'n, 277 F.3d 998, 1007 (8th Cir. 2002), *cert. denied*, 537 U.S. 1000, 123 S. Ct. 514, 154 L. Ed. 2d 395 (2002).

[226] *Tenant's Right to Housing*, 28 A.L.R. FED. at 742.

[227] *Id*. at 750. *See also Tenants' Procedural Rights Prior to Eviction or Termination of Benefits Under § 8 of the Housing Act of 1937*, 81 A.L.R. FED. 844.

[228] Goss v. Lopez, 419 U.S. 565, 574, 95 S. Ct. 729, 42 L. Ed. 2d 725 (1975).

[229] In-School Suspension, *supra* note 188, 81 TEX. L. REV. 1643, *citing* San Antonio Independent Sch. Dist. v. Rodriquez, 411 U.S. 1, 35, 93 S. Ct. 1278, 36 L. Ed. 2d 16 (1973) (Texas's school finance system passed the rational basis test.).

[230] Goss v. Lopez, 419 U.S. 565, 574, 95 S. Ct. 729, 42 L. Ed. 2d 725 (1975).

[231] In-School Suspension, *supra* note 187, 81 TEX. L. REV. 1644.

[232] 457 U.S. 202, 230, 102 S. Ct. 2382, 72 L. Ed. 2d 786 (1982) (Plaintiffs were illegal immigrant school-age children who challenged Texas educational laws that required undocumented children to pay a tuition fee to enroll in classes. The Court rejected the claim that illegal aliens were a suspect class but affirmed the lower court's rulings that it was unnecessary to decide whether the statute would survive a "strict scrutiny" analysis because the discrimination embodied in the statute was not supported by a rational basis. 457 U.S. at 208.

[233] The *Plyler* decision "implies an 'intermediate' level of scrutiny for state regulation of education." In-School Suspension, *supra* note 187, 81 TEX. L. REV. 1646. As the article notes, "[o]stensibly applying the rational basis test," the Court in *Plyler* did state that education is more than "some governmental 'benefit' indistinguishable from other forms of social welfare legislation." *See id*. Although there is a split of authority at the state level, "[s]everal state courts have declared that their constitutions provide a fundamental right to education and that any state practice attacked as an alleged violation of that right requires justification under strict scrutiny." *See id*. at 1650, *citing* authorities from California, Connecticut, Kentucky, and Pennsylvania.

[234] In Bell v. Burson, 402 U.S. 535, 541–42, 91 S. Ct. 1586, 29 L. Ed. 2d 90 (1971), the Court held that except in emergency situations, due process requires that when a state seeks to terminate a driver's license, it must afford notice and opportunity for a hearing appropriate to the nature of the case before the hearing becomes effective. The driver generally has the right to cross-examine witnesses and to confront his accusers at the hearing. *Id*. *See Sufficiency of Notice and Hearing before Revocation or Suspension of Motor Vehicle Driver's License*, 60 A.L.R. 3d 427.

[235] JOHN E. NOWAK & RONALD D. ROTUNDAL, CONSTITUTIONAL LAW 8 § 13.1–13.2, 13.7–13.9 (3d ed. 1986 & Supp. 1988) (Unless a plaintiff can show that he or she has been deprived of a "property" or "liberty" interest, then there is no right to due process.).

tion of the affected person's right.[236] Notice and a right to a post-deprivation hearing accompanied by the right to petition the courts for redress may adequately protect an affected person's due process rights.[237] The model of a full evidentiary hearing is not required in every circumstance, and, as long as the affected person is given a full and fair opportunity to present his case, confrontation and cross-examination of witnesses may not be necessary.[238]

Furthermore, in informal administrative hearings, the concept of due process generally demands fewer procedural safeguards.[239] For example, due process does not invariably require the administrative decision-maker to hear or view the witness's testimony.[240] Due process does not require oral argument and live witness testimony for all agency determinations.[241] A telephonic hearing in regard to the revocation of a driver's license has been upheld.[242] Although administrative burden is a factor to consider under the Supreme Court's *Mathews* test, mere administrative burden alone cannot ordinarily serve as a rationale for slighting serious due process rights.[243] The fact that the same agency serves both as the prosecutor and as the judge in an administrative adjudication is not, in and of itself, enough to make out a due process violation.[244]

As discussed in the public school suspension and other cases, the notice and the hearing may be simultaneous in some situations or the hearing may occur after the government has acted to suspend the privilege or benefit at issue.[245] "By and large, school authorities have the power to define the offenses for which a student may be expelled from school; that power can be exercised with wide discretion, so long as it is reasonably exercised."[246] It should be noted that "school board regulations that describe behavior calling for expulsion are usually very specific."[247]

Thus, in a wide variety of situations, the courts have held that the minimal due process afforded by the government was satisfactory.[248] Based on cases in somewhat analogous contexts, it appears that the transit authority would be acting reasonably if, pursuant to its established procedures, it first barred the transit user immediately for being a security or other risk and thereafter provided notice and a "rudimentary" opportunity to be heard "as soon as practicable."[249] The "rudimentary" hearing required in connection with "short suspensions" in the public school context does not necessarily mean that there has to be an "opportunity for the one suspended to secure counsel, to confront and cross-examine witnesses supporting the charge, or to call his own witnesses to verify his version of the incident."[250] However, in an "unusual situation," even a short suspension could require "something more than rudimentary procedures…."[251] A longer suspension or permanent bar expulsion could require "more formal procedures."[252]

As stated, no cases were found holding that a transit agency's act of barring or suspending a transit user from the system is a deprivation of a right or otherwise triggers some requirements of due process. For agencies already having written procedures for barring a rider, it appears that the courts would apply no more than intermediate scrutiny in reviewing laws or procedures applicable to a suspension or bar. In any case, if some due process were required, at most a notice and an opportunity for a post-suspension or -bar hearing with a right of redress to the courts probably would be sufficient. As for sex offenders, although notification and registration laws may help to identify them to the transit authority, the transit authority may have to provide

[236] M & Z Cab Corp. v. City of Chicago, 18 F. Supp. 2d 941, 946–47 (N.D. Ill. 1998) (Defendants not constitutionally entitled to provide taxicab companies a hearing before placing a hold on taxicab medallions pending revocation hearing).

[237] Towers v. City of Chicago, 979 F. Supp. 708, 714–16 (N.D. Ill. 1997).

[238] Ricketts v. City of N.Y., 181 Misc. 2d 838, 688 N.Y.S.2d 418, 424 (Sup. Ct., New York County, 1999), *citing* Taddonio v. Heckler, 609 F. Supp. 689, 694 (E.D. Pa. 1985).

[239] Cooper v. Salazar, 196 F.3d 809, 814 (7th Cir. 1999).

[240] Allston v. Gaines, 158 F. Supp. 2d 76, 80 (D. D.C. 2001).

[241] Southern Utah Wilderness Alliance v. Bureau of Land Management, 147 F. Supp. 2d 1130, 1146–47 (D. Utah 2001).

[242] Muir v. Nebraska Dep't of Motor Vehicles, 260 Neb. 450, 618 N.W.2d 444, 449 (2000).

[243] Penobscot Air Services, Ltd. v. FAA, 164 F.3d 713, 724 (1st Cir. 1999).

[244] Cobb v. Yeutter, 889 F.2d 724, 731 (6th Cir. 1989).

[245] In People v. Giacopelli, 171 Misc. 2d 844, 655 N.Y.S.2d 835, 841 (Justice Ct., N.Y. Rockland County 1997), the court upheld a hearing conducted concurrently with the summary suspension of a drunk-driving defendant's driver's license at the time of the arraignment.

[246] In-School Suspension, *supra* note 187, at 1637, 1641 (2003).

[247] *Id*. at 1641.

[248] Metro County Title, Inc. v. FDIC, 13 F.3d 883, 887–88 (5th Cir. 1994) (Upholding informal FDIC procedures); Luckett v. Jelt, 966 F.2d 209 (7th Cir. 1992), *cert. denied,* 507 U.S. 922, 113 S. Ct. 1287 (Upholding Illinois Human Rights Act procedures even though certain adversarial-type processes were not available); Johnson v. Rodriquez, 943 F.2d 104*,* 110 (1st Cir. 1991), *cert. denied*, 502 U.S. 1063, 112 S. Ct. 948 (Upholding proceedings before the Massachusetts Commission Against Discrimination (MCAD) where the plaintiff had an opportunity to present his case before the MCAD and proceedings were conducted in full accordance with state law); Stuart v. Department of the Interior, 109 F.3d 1380, 1385 (9th Cir. 1997) (No violation of due process where the Bureau of Indian Affairs cancelled an installment contract for a land purchase without a pre-cancellation hearing).

[249] Goss, 419 U.S. at 582–83. *See* LAWRENCE F. ROSSOW & JERRY R. PARKINGSON, THE LAW OF STUDENT EXPULSIONS AND SUSPENSIONS 3 (1989) (Due process considerations are the same for expulsions and suspensions).

[250] *Id*. at 583.

[251] *Id*. at 584.

[252] *Id*.

some level of due process before excluding known offenders from the transit system.

As seen in this part of the Report, a transit agency may need specific laws, regulations, or policies before deciding to bar a user from the transit system on a temporary or permanent basis. Before barring a transit user, a notice may be required, but there seems to be no reason that the notice could not be issued immediately or "on the spot" to the user. In the public school situation, it has been held that on the basis of a property right or otherwise the student has a right to an education. Nevertheless, it is permissible for school officials to bar students for misconduct without providing a full due process hearing. To some extent, the transit agency has the discretion to decide in its policies or procedures the kind of hearing and right to appeal that are to be provided to users who engage in illegal or inappropriate conduct. Based on current law, the transit policies and procedures discussed in the next part of this Report would seem to satisfy the requirements of due process.

XI. TRANSIT AGENCY PROCEDURES FOR BARRING OR EXCLUDING TRANSIT USERS

As noted, many transit agencies reported that they have laws, regulations, or policies permitting them to bar users temporarily from transit facilities for various kinds of conduct and in some cases even permanently. Some transit agencies have procedures that require the giving of a notice to the user (e.g., a "notice of exclusion" or "banning notice"), and provide for some type of hearing and appeal. Other transit agencies reported having no such laws, regulations, or policies and advised that they rely on the attorney responsible for the agency to obtain a judicial restraining order. Where the agency has its own policy, it is possible that a user barred from service would challenge the procedures for being vague or unreasonable or failing to provide the user with adequate notice or a sufficient hearing. Thus, as seen from the previous part of this Report, the level of scrutiny that the courts would apply in reviewing the agency's policies or actions is quite important.

Transit agencies were asked whether their state or transit agency have any laws, regulations, or policies that set forth procedures (e.g., notice and/or hearing) regarding the temporary or permanent suspension of transit users from the system.

TABLE 11.1—PERCENTAGE OF AGENCIES REPORTING STATE OR TRANSIT AGENCY LAWS, REGULATIONS, OR POLICIES ON SUSPENSION OF USERS

Agencies Reporting Laws, Regulations, and Policies	Agencies Relying on General Statutory Authority	Agencies Reporting No Laws, Regulations, or Policies	Not Known
28% (17 of 60)	15% (9 of 60)	50% (30 of 60)	7% (4 of 60)

Seventeen transit agencies (28 percent) reported that the state or agency had such laws, regulations, and policies regarding suspension of users. Another nine agencies (15 percent) reported that they relied on general statutory authority, such as laws against trespassing, to suspend users. Thirty agencies (50 percent), however, reported that they had no state or transit agency laws, regulations, or policies authorizing suspension of users.

As discussed in this section, the kinds of policies and procedures that transit agencies have are important. Some transit agencies provided copies of applicable regulations, policies, or procedures, some of which are summarized briefly below. The Appendix contains selections of the more extensive policies provided by several transit agencies. Several agencies have policies governing what kind of conduct is prohibited, the process the agency uses in barring a user on a temporary or permanent basis from the system, the appeals process available to the user, and the offenses and periods of time for which a user may be suspended or barred.

First, as to the kinds of prohibited conduct and enforcement procedures, one agency has 30 pages of "Rules of Conduct" and 17 pages of detailed "Procedures and Enforcement Guidelines" relating to its rules.[253] Of interest also is that the agency's guidelines have a "Three Strikes Policy":

> For conduct not amounting to a violation of another applicable state or local law bearing a greater penalty or criminal sanction than is provided, a person who commits a civil infraction in a [transit agency] vehicle or while on [transit agency] property may receive up to three (3) verbal or written warnings before an exclusion of service is issued.[254]

[253] Confidential Survey Response.

[254] *Id*.

In addition, the agency also has a "Zero Tolerance Policy:"

> All criminal activity, including misdemeanor criminal activity which takes place on board [transit agency] vehicles or while on any [transit agency] facility or property, regardless of the situation, shall be handled with Zero Tolerance. When an arrest citation is warranted, law enforcement support will be requested if not already present, and the arrest citation shall be issued.[255]

The agency's guidelines provide detailed procedures on the refusal of service and ejection of transit users. For example, the guidelines provide in part that "passengers who have three documented incidents of refusal of service and/or ejection for failure to comply will be formally issued a letter of exclusion of service."[256] The guidelines provide for a formal tracking system and the creation of a "passenger file" for the reporting and documentation of incidents, as well as for correspondence between the agency and the user.[257] Furthermore, the agency has a "security alert folder:"

> Passengers who are currently excluded from service will have a Security Alert Form filled out, with picture attached, and placed in the Security Alert Folder. The purpose of this folder is for operator information only. Files and photographs will not be posted on any bulletin board. This information is provided on a "need to know basis." Folders will be maintained in the file cabinet at [the transit agency's] main office drivers' room. Each supervisor will maintain an updated copy of the folder for use in Dispatch and on the road….[258]

The Guidelines provide for "Exclusion of Service Letters" and set forth the criteria for the issuance of the same:

> A letter of exclusion will be issued for:
>
> 1. Any violation resulting in arrest, citation, or ejection by a law enforcement officer;
>
> 2. Any violation of [a specific provision of the Rules of Conduct];
>
> 3. An accumulation of three or more denials of service/ejections under the Three Strikes Policy.
>
> Letters of Exclusion will be for a minimum of seven (7) days.[259]

The guidelines, which set forth the required information, including the period of the exclusion and the reason therefore, state that such a letter "may be issued on the spot by a supervisor."[260] The duration of the exclusion "may be shorter or longer depending on the circumstances of each case," but the guidelines provide for periods of exclusions for each offense.[261] Under the guidelines, a person violating a letter of exclusion is subject to arrest, apparently for trespass. The foregoing requirements and conditions are noted also in the agency's Rules of Conduct, which set forth a procedure for a suspension and an appeal from an exclusion order.

Two agencies reported having definite periods of time, based on the offense, for which the user may be suspended or barred from the system. Table 11.2 illustrates one agency's policy concerning the period of time that a user may be excluded from the system.

[255] *Id*.
[256] *Id*.
[257] *Id*.
[258] *Id*.
[259] *Id*.
[260] *Id*.
[261] *Id*.

TABLE 11.2—ONE AGENCY'S PERIODS OF EXCLUSION OF A USER FROM TRANSIT SYSTEM FOR OFFENSES

First Offense	Up to 90 days
Second Offense	91–180 days
Third Offense	181–365 days
Each Subsequent Offense	Up to 365 days

As seen in Table 11.3 below, another agency has five categories of temporary and permanent suspensions. Although the response did not identify the grounds for each category of suspension, the categories themselves are of interest:

TABLE 11.3—ONE AGENCY'S PERIODS OF SUSPENSION OF A USER FROM THE TRANSIT SYSTEM

1 to 2 months	The user may ride the buses but may not come to the terminal
3 to 6 months	Where no crime committed; category applies to anyone barred by the police or agency supervisors for misbehaving in the terminal or on the bus
1 full year	Anyone arrested on the charge of the commission of a misdemeanor (user threatens a transit employee but does not actually touch the employee)
2 years	Anyone arrested in the terminal or on the bus on the charge of commission of a felony
2 years to life	Anyone who actually touches a transit agency employee and/or all weapon charges while at the terminal or on the buses

Another agency provided a copy of its procedures on "Passenger Conduct" that proscribe certain kinds of conduct, including a prohibition of engaging in illegal activity or "[a]cting in a manner threatening to the safety of drivers or passengers or engaging in seriously disruptive or objectionable behavior that interferes with and/or disturbs the operation of the vehicle."[262]

The memorandum continues:

> Violators of the above prohibitions may have their riding privileges suspended by [the agency's] Operations Manager. Before such a suspension is issued, the passenger will be given a chance to provide his/her version of the situation. After such a suspension is issued, the passenger may pursue his right to appeal the suspension as provided herein. The decision to suspend, as well as the length of suspensions, depends on the severity and disruptiveness of the prohibited action. If riding privileges are suspended, the individual will be placed on a one (1) year probation. An additional violation during the probation period may result in permanent suspension of riding privileges.[263]

Although there are no cases on the degree of due process required of transit agencies, several transit agencies responding to the survey appear to have clear policies and procedures that comport with or even exceed the level of due process required by the courts in other situations as discussed earlier in this Report. Several of the agencies responding to the survey have policies and procedures that cover the kinds of prohibited conduct, the form of notice and circumstances under which the agency may suspend a user, the duration of suspensions, and some form of hearing and appeal. Transit authorities lacking such guidelines may want to have policies and procedures on which they may rely

[262] *Id.*

[263] *Id.*

when having to bar a transit user for security or other reasons.[264]

CONCLUSIONS

As seen from the survey of 60 transit agencies, about 62 percent of the agencies responding advised that they had had instances in the past 3 years when they had to bar transit users on the basis of being a security threat, for threatening another user, or for engaging in begging or other unacceptable behavior. As seen, when the categories are separated by specific types of behavior, there are some categories for which transit agencies have not had many, if any, incidents. As for having procedures governing how to respond to problems or incidents, 53 percent of the agencies reported having some procedures, but it appears that only about 22 percent had any form of written procedures.

In general, a common carrier may refuse service to a passenger if the carrier has a reasonable cause to believe that the safety or convenience of its passengers will be endangered by another user. No authority was located holding that a patron's use of transit implicates a constitutional right to travel. Assuming *arguendo* that a user has a right to use the transit system, the prevailing view among the courts appears to be that any such right is not a fundamental right. Because use of the transit system is not a fundamental, constitutional right, the courts are likely to use a lower level of judicial scrutiny when reviewing the legality of an agency's restrictions on the user's right to use the system or the agency's policies or procedures for suspending a user's right to use the system.

Restrictions in transit areas on speech or expressive conduct may implicate the First Amendment. About 30 percent of the agencies responding reported having state or transit agency laws, regulations, or policies on when, how, and under what circumstances transit facilities could be used for political or other expression or expressive conduct. However, virtually all transit agencies that responded stated that their facilities were not to be used for political expression or protest. The issue of the reasonableness of the transit agency's restrictions is not an issue if the agency has not opened any facility for the purpose of the exercise of free speech or expressive conduct.

Even if there is limited permission granted for the exercise of First Amendment rights, access to a nonpublic forum can be restricted as long as the restrictions are reasonable, content-neutral, and not an effort to suppress expression merely because public officials oppose the speaker's view. As for other limitations on loud behavior, government restrictions on the volume of speech do not necessarily violate the First Amendment, even when that speech occurs in an area traditionally set aside for public debate. In the instances when the transit agency has opened an area for public expression, it appears that the agency may impose reasonable time, place, and manner restrictions.

About 52 percent of the agencies reported having laws, regulations, or policies applicable to the agency regarding when, how, and under what circumstances transit personnel could refuse service or eject transit users or others from the facilities. As for a specific transit policy applicable to security threats or disruptive conduct, 15 agencies (25 percent) appeared to have a policy, but only seven agencies (12 percent) clearly indicated that it was a written policy.

As for panhandling or begging, about 37 percent of the agencies said that there were state laws or transit agency laws, regulations, or policies applicable to the agency regarding the regulation or expulsion of persons engaged in panhandling or begging in or on transit facilities.

At least 44 states require sex offenders to register with authorities when they move into a community. In addition, at least 27 states now have community notification statutes. The Supreme Court recently upheld laws requiring the registration of sex offenders. However, only about 8 percent of the agencies responding to the survey indicated there were any applicable state or transit agency laws, regulations, or policies on when, how, and under what circumstances the agency could refuse service to or eject a known sex offender (such as someone identified in a registry required by state law) from transit facilities. Without the sanction of state law or a court order, the transit agency's action in barring a known sex offender from the transit system likely would trigger due process requirements in the form of reasonable notice and an opportunity for a pre-or post-suspension hearing. However, it does not appear that many transit agencies have laws, regulations, or policies in place on which they would be able to rely.

As for service animals, thus far no cases have been located regarding issues transit systems may have encountered under federal and state laws with respect to the handling of service animals and what action is appropriate under the circumstances. However, transit agencies should be aware that various animals for a number of reasons may qualify as service animals and that the agency may not be able to determine readily whether a passenger has a disability requiring the use of a service animal.

Suspension or expulsion of a transit user, depending on the circumstances, could give rise to a claim for damages, for example, under 42 U.S.C. § 1983, that a person has been deprived of a federal constitutional right by a person acting "under color of state law." It has been held that individual states, their departments and agencies, and their officials acting in their official capacities are not deemed "persons" subject to suit under § 1983. Although municipalities and local govern-

[264] Phillip T.K. Daniel et al., *Suspension and Expulsion in America's Public Schools: Has Unfairness Resulted from a Narrowing of Due Process?,* 13 HAMLINE J. PUB. L. & POL'Y 1, at 14. As the article notes, many states have passed legislation detailing extensive procedures that must be followed by school districts when a student is punished with suspension or expulsion.

ments are deemed to be "persons" subject to suit under § 1983, even if a transit agency were subject to a § 1983 claim, a plaintiff must establish that the existence of a governmental policy or custom was the cause of his or her injuries. As noted in the Report, many states permit recovery of damages for violations of constitutional rights. In responding to the survey, about 48 percent of transit agencies stated that their agency could be held liable in tort for a violation of an individual's rights under the state constitution.

Transit agencies are interested in the extent of due process that must be afforded to users when the agency must bar them from the facilities for violating the law, being a security threat, being loud or threatening other passengers or the operator, or engaging in numerous other activities that the transit agencies have identified as unacceptable. As discussed in the Report, a regulation or policy must be sufficiently clear to warn a party regarding what is expected of him or her. Before an agency can sanction someone for a failure to comply with regulatory requirements, the agency must have appropriate language in the applicable regulation or policy. Where there are clear regulatory guidelines for transit officials and others, the courts tend to give great leeway to judgments based on a matter within the agency's sphere of expertise. Due process issues arise whenever a transit authority relies on general or vague laws proscribing certain conduct or if the authority acts without specific statutory or regulatory guidance. Although some agencies reported having specific policies and procedures on which to rely when barring a user from transit facilities, many agencies responding to the survey either had no policies or were relying on policies that apparently are not in writing.

Despite the absence of cases addressing the issue of whether transit agencies must afford due process to a rider who is barred or suspended, it could be argued that an agency may not impose even a temporary suspension without providing some level of due process. Several of the agencies responding to the survey provided copies of their reasonably explicit and detailed policies and procedures. What process is due necessarily depends on the right that is under consideration, the exigency of the situation, and what alternate means are available. The standard appears to leave ample room for the agency to decide that administrative factors favor using one means rather than another. The courts have held in numerous situations that a notice and only a rudimentary hearing are constitutionally sufficient. As the U.S. Supreme Court held in *Mathews v. Eldridge*, due process is flexible and calls for such procedural protections as the particular situation demands.[265]

Although it may be necessary to provide a notice to the affected person, not every situation requires that a full evidentiary hearing be provided before or after the government's action. Assuming due process requirements were held to apply, the agency may be able to bar or exclude transit users subject only to some rudimentary due process. Notice and a right to a post-deprivation hearing accompanied by the right to petition the court for redress may adequately protect an affected person's due process rights. The model of a full evidentiary hearing is not required in every circumstance. At informal administrative hearings, the concept of due process generally demands fewer procedural safeguards.

As discussed in the public school suspension and other cases, the notice and the hearing may be simultaneous in some situations or the hearing may occur after the government has acted to suspend the privilege or benefit at issue. Based on cases in analogous contexts, it appears that the transit authority would be acting reasonably if, pursuant to its established procedures, it first gave notice and barred the transit user immediately for being a security or other risk and thereafter provided an opportunity to be heard as soon as practicable. A longer suspension or permanent bar expulsion could require "more formal procedures."[266]

The transit policies and procedures discussed in the Report or included in the Appendix seem to satisfy the requirements of due process. However, as seen, only about 30 percent of transit agencies responding to the survey indicated there were state or transit agency laws, regulations, or policies that set forth procedures (e.g., notice and/or hearing) regarding the temporary or permanent suspension of transit users from the system. Thus, some agencies do have policies governing what kind of conduct is prohibited, the process the agency uses in barring a user on a temporary or permanent basis from the system, the appeals process available to the user, and the offenses and periods of time for which a user may be suspended or barred.

It should be noted that a few recent cases suggest that the courts could be moving in the direction of holding that there is a fundamental right to travel intrastate. If so, the courts could move also in the direction of applying a higher level of scrutiny when reviewing laws, regulations, or policies that permit transit agencies to suspend or bar users from the system. Transit agencies may want to promulgate policies and procedures if they do not now have them or review the ones they do have to ascertain whether they are sufficiently specific and afford adequate protection both to the user and the agency in situations where they may have to refuse service on a temporary or permanent basis.

[265] 424 U.S. 319, 335, 96 S. Ct. 893, 47 L. Ed. 2d 18 (1976).

[266] Goss, 419 U.S. at 584.

APPENDIX

Attachment No. 1

(One Agency's Procedures Regarding Suspension and Appeals)

Vehicle Safety

Our goal is to provide each customer with a safe, reliable trip. If something goes wrong, we want to hear from you. All vehicle operators must be professional and courteous with customers. Above all, the customer's safety is the vehicle operator's primary responsibility.

Any customer who observes unprofessional conduct by a vehicle operator is encouraged to report the incident. It should be reported directly to the transportation provider or the customer's sponsoring agency.

When reporting an incident, include the following information:

- time and date incident occurred
- location
- vehicle number
- a description or name of the vehicle operator.

For [AGENCY] incidents, call [NAME, NUMBER]

Customers are expected to conduct themselves in a way that insures safe transportation for themselves and others. For their safety and the safety of others, customers are responsible for their own behavior while on the vehicle. Attendants are responsible for the behavior of those in their charge.

The vehicle operator may assign customers to particular seats if necessary.

Customers who do not demonstrate appropriate behavior while on the vehicle, such as being excessively noisy or getting up from their seats, will be subject to the following consequences for inappropriate behavior occurring within a 30-day period:

- First time: Verbal warning from vehicle operator
- Second time: Written warning from the para-transit provider
- Third time: Two-week suspension of riding privileges

Appeals Process

Customers who have been notified in writing that their right to transportation has been suspended may appeal the suspension to the Manager of Accessible Transit Services.

Customers should first attempt to resolve the grievance with the transportation provider. Appeals are made to the [AGENCY].

Attachment No. 2

(Policy and SOP Re: Service Animals)

Service animals, such as guide dogs, may accompany persons with disabilities in the vehicles operated by or for the [AGENCY] if the animal is on a lead that does not interfere with other passengers on the bus and the animal is under the constant supervision and control of the person with disabilities.

A service animal is any guide dog, signal dog or other animal individually trained to work or perform tasks for an individual with a disability including, but not limited to, guiding individuals with impaired vision, alerting individuals with impaired hearing to sounds, providing minimal protection or rescue work, pulling a wheelchair or fetching dropped items.

While riding in a vehicle, the animal is required to sit or stand on the floor of the vehicle and may not block the aisle.

If the animal misbehaves, the customer will be asked to remove the animal from the vehicle.

If there are multiple occurrences of misbehavior, the animal's riding or entry privileges may be revoked.

Examples of misbehavior include unprovoked growling or attacking passengers, the bus driver, other [AGENCY] employees or other service animals.

Customers are required to notify the reservationists that an animal will be accompanying them when they reserve their ride.

STANDARD OPERATING PROCEDURE – AMERICANS WITH DISABILITIES ACT

[NAME OF] BUS TRANSPORTATION

To establish procedures for Bus Operators to follow in providing service to customers with disabilities in compliance with the Americans with Disabilities Act.

Department of Transportation Final Rule (Federal Register, September 6, 1991)
District "Service Animal Policy" revised May 1996.

SUPERSEDES: S.O.P. D-32 dated 12-03-97

Service Animals – "Any guide dog, signal dog, or other animal individually trained to work or perform tasks for an individual with a disability, including, but not limited to, guiding individuals with impaired vision, alerting individuals with impaired hearing to

sounds, providing minimal protection or rescue, pulling a wheelchair, or fetching dropped items."

Common Wheelchair - Three or four-wheeled device which does not exceed 30 inches in width and 48 inches in length and does not, with operator, exceed 600 lbs.

RESPONSIBILITIES: Operators shall follow the appropriate procedures in this S.O.P. at all times. Operators shall report immediately to Radio Control any failure of a lift, ramp, kneeler, or public address either in the yard during the required daily pre-trip inspection or in service. Operators must immediately inform Radio Control of any inability to accommodate a disabled customer desiring access to a bus.

Radio Controllers shall discuss given situations with the Operators when called on the radio. If an Operator reports an inability to pick up a disabled customer, Radio Controllers will monitor the situation to ensure that, as required, alternative transportation is available. Radio Controllers will advise the Operator of the service to be provided so the Operator can inform the customer.

A. General - A.D.A. Service

1. [AGENCY] must be made available and accessible to customers with disabilities.

2. [AGENCY] must "...properly assist and treat customers in a respectful and courteous way, with appropriate attention to the differences among customers with disabilities."

3. Disabled customers who have in their possession a respirator or portable oxygen tank **are** allowed to ride in an [AGENCY] vehicle.

4. [AGENCY] shall ensure that adequate time is given to customers with disabilities to complete boarding or disembarking from vehicle

5. Service animals, such as dog guides, may accompany persons with disabilities if the animal is on a lead, and is under the constant supervision and control of the person with disabilities. The animal does not have to be muzzled, but is required to sit or stand on the floor of the bus and must not block the aisle. If a service animal misbehaves, operators should consult Dispatch. Operators have the right to request that the owner and offending animal disembark.

6. It is District policy, as provided by the Americans with Disabilities Act, that mobility devices be secured using the securement system available. If the customer will not allow the Operator to attempt securement, the Operator shall refuse service. If the customer will not de-board, the Operator shall call Radio Control.

7. Operators may not deny service on the grounds that the mobility device cannot be secured satisfactorily by the vehicle's securement system.

8. Operators must leave the decision about whether to transfer to a seat to the customer. They may inform the customer about risks and make a suggestion, but must respect the customer's decision.

9. Operators are to lower the kneeler for disabled and senior customers when it is apparent the lowered bus would be safer and/or convenient for the customer; or, when requested by the customer.

10. Customers with disabilities who cannot climb steps must be permitted to use lifts and ramps.

11. Customers requiring a ramp or lift shall board first after on-board passengers have exited. Walk-in passengers will then be allowed to board. Customers needing the ramp or lift should exit last after on-board customers have exited.

Attachment No. 3

(One Agency's Rules of Conduct And Exclusion of Service Policy)

ORDINANCE [NUMBER]

2003 REVISION

Regulations Governing Conduct on District Property

The Board of Directors of [AGENCY] hereby ordain and decree the following Ordinance:

1.05. To facilitate the purposes set forth in Chapter [NUMBER] and for the safety, convenience, and comfort of District Passengers and for the protection and preservation of District property, it is necessary to establish the following rules and regulations governing use of District facilities and providing remedies for violations thereof.

1.10. Definitions. As used in this Ordinance, unless the context requires otherwise:

(1) "District" means the [NAME].

(2) "District Station" includes the District Administrative Facility, the [AGENCY] transit Station, any other District transit station, any bus Passenger shelter, the customer Service Center, any District-operated parking lot or park-and-ride lot, and covered areas of any bus stop.

(3) "District Transit System" means the property, equipment and improvements of whatever nature owned, leased or controlled by the District to provide public transportation for Passengers or to provide for movement of people, and includes any District Vehicle and any District Station.

(4) The "Boarding Platform Areas" of the station *are* designated on the attached Map. Boarding Platform Areas at bus stops within public rights-of-way are limited to eight feet from bus doors while buses are unloading. Boarding Platform Areas at other locations owned/controlled by [AGENCY] District shall be eight feet from the curb where buses load/unload Passengers.

(5) A "shelter" is the area within the drip line of any structure located at a District stop or station that is designed or used to protect customers from adverse weather conditions.

(6) "District Vehicle" includes a bus, van or other vehicle used to transport Passengers and owned or operated by or on behalf of the District.

(7) "Emergency" includes, but is not limited to, a fire on a District Vehicle or Station, or serious physical injury to persons, or threat thereof, or any apparently urgent medical need.

(8) "Downtown Guide" means a person who is employed by Downtown [NAME] to enforce certain City regulations and to assist downtown visitors, and who provides services to the District through contract with [NAME] including enforcement of these regulations.

(9) "Operator" means a District employee responsible for operating any District Vehicle.

(10) "Passenger" means a person who holds a valid fare and is en-route on a District Vehicle, or waiting for the next available District Vehicle, to such person's destination, or a person who enters a District Station with the intent to purchase a valid fare for transportation on the next available District Vehicle to such person's destination.

(11) "Peace Officer" includes [NAME]'s security officers, [AGENCY] supervisors, and others duly appointed by the District General Manager. [NAME] Peace Officers are designated as such for the purposes [LAW NUMBER]. Peace Officer also includes sheriff deputies, state and local police officers, and all such other persons as may be designated by law, including Downtown Guides, if so designated.

(12) "Service Animal" means any animal used by a person who requires the assistance of such animal to facilitate that person's life functions, including but not limited to seeing and hearing.

1.15 Regulations:

(1) Elderly and Disabled Seating. The aisle-facing benches at the front of buses are reserved for the use of disabled and senior Passengers. Non-qualifying Passengers must vacate such seating upon request of any District Vehicle operator or employee.

(2) Smoking Prohibited. No person shall smoke tobacco or any other substance, or carry any burning or smoldering substance, in any form, aboard a District vehicle or within the boundaries of any District station; except smoking may be permitted at a District station within any posted area designated as a 'SMOKING AREA." The General Manager or her/his designee may designate appropriate areas where smoking is permitted.

(3) Alcohol and Drugs. No person shall use or possess alcohol or illegal drugs on a District Vehicle or in a District Station, except for lawfully possessed and unopened alcoholic beverages.

(4) Criminal Activity. No person shall engage in any activity prohibited by State, County or Municipal Law of [NAME] while on a District Vehicle, or within any District Station or the District Transit System.

(5) Disorderly Conduct. No person shall intentionally or recklessly cause inconvenience, annoyance or alarm to another by:

(a) Engaging in fighting, or violent, tumultuous or threatening behavior (physical or verbal), within any District Vehicle or District station;

(b) Making unreasonable noise within any District Vehicle or in any District Station;

(c) Obstructing the free movement of Passengers within any District Vehicle or district station;

(d) Creating a hazardous or physically offensive condition within a District Vehicle or District Station; or

e) Otherwise violate [LAW NUMBER] as now in effect or hereafter amended.

(6) Harassment. No person shall intentionally or recklessly harass or annoy another person by:

(a) Subjecting such other person to offensive physical contact;

(b) Publicly insulting such other person by abusive words or gestures in a manner intended and likely to provoke a violent response; or

(c) Otherwise violate [LAW NUMBER] as now in effect or hereafter amended.

(7) Threatening or Offensive Language. No person shall intentionally or recklessly disturb, harass, or intimidate another person by means of threatening or offensive language, or obscenities in a District Vehicle or in a District Station in such a manner as to interfere with a Passenger's use and enjoyment of the transit system.

(8) Food and Beverages. For the protection of public safety, no person shall bring aboard a District Vehicle any food or beverage in open containers. No person shall consume food or alcohol on any District Vehicle. Passengers on District vehicles may consume non-alcoholic beverages only from LTD-approved containers with snap-on or screw-on lids.

(9) Littering, Spitting. No person shall discard or deposit, other than into a trash receptacle provided for that purpose, any rubbish, trash, debris, cigarette butts or offensive substance in or upon a District Vehicle or District Station. No person shall spit, defecate, or urinate in or upon any District Vehicle or District Station except in a toilet.

(10) Safety.

(a) All Passengers (except infants who are held) must wear shoes, pants/shorts and shirt, a dress, or comparable clothing on District Vehicles and in District Stations. In addition, all Passengers must cover any exposed skin that may transmit communicable disease.

(b) No person shall in any manner hang onto, or attach himself or herself onto any exterior part of a District Vehicle at any time. In addition, no person shall extend any portion of his or her body through any door or window of a District Vehicle.

(c) No person shall ride a skateboard, roller skates or in-line skates in a District Vehicle or District Station. Passengers with in-line skates will be allowed in a District Vehicle or District Station so long as the wheels are rendered inoperable by a device ("skate guard") designed to provide stability and traction to the user and to permit the user to walk while wearing the skates.

(d) No person shall discharge any weapon or throw, or cause to be thrown or projected, any object at or within a District Vehicle or District Station, or at any person on a District Vehicle or in any part of a District Station.

(e) No person shall interfere, in any manner, with the safe operation or movement of any District Vehicle.

(f) No person shall impede or block the free movement of Passengers, or otherwise disrupt the functions of the District in any District Station, Boarding Platform Area, or in any District Vehicle.

(11) District Property.

(a) Use of the Transit System. The Transit System is intended for the use of the District's Passengers. To ensure the safety, comfort, and convenience of such Passengers, no person shall impede or block the free movement of Passengers, interfere with ingress and egress from District facilities and vehicles, intimidate or harass other Passengers, or in any manner interfere with the principal transportation purpose to which the Transit System is dedicated.

(b) Limited Access Areas. To ensure the safety, comfort, and convenience of District Passengers and the safe and efficient operation of the Transit System, only Passengers, District personnel, and those transacting District business shall be permitted within any District administrative facility, customer service center, shelter, District Vehicle, and on any District Boarding Platform area.

(c) Off-Hours Closure. All District Stations shall be closed during the non-operating hours of 12:00 a.m. through 4:30 a.m. The General Manager or designee shall have the discretion to extend or contract these non-operating hours. No person other than Peace Officers or District personnel shall be in or about any District Station during these hours.

(d) District's Right of Closure. The District expressly reserves the right to close any District Station or Stations and exclude all access at a time and for a duration to be determined by the District Board or General Manager. Such closure may be necessary for

reasons that include, but are not limited to, an emergency, natural disaster, cleaning and repairs.

(e) Damaging District Property. No person shall damage, destroy, interfere with, or obstruct in any manner the property, services, or facilities of the District, including Passengers' property located upon District property.

(f) Exclusion of Non-District Vehicles. Unless otherwise allowed by posted sign, all non-District vehicles are excluded from District Stations. Emergency vehicles and other vehicles authorized by the District are exempt from this exclusion.

(g) Free Movement of District Vehicles. No person or vehicle shall obstruct the free movement of District Vehicles while loading or unloading Passengers, or while entering or exiting a District Station.

(h) Skateboards. In-line Skates, Bicycles. No person shall ride a bicycle, skateboard or in-line skates at a District Station. Bicycles shall only be parked at a District Station at designated areas.

(i) Animals. No person shall bring or carry aboard a District Vehicle, or take into a District Station, any animal not housed in an enclosed carrying container, except for a person who requires a service animal, or a person training a service animal. In no event, however, shall any animal be allowed on a District Vehicle or at a District Station if such animal creates a hazard or nuisance to any Passenger or District employee.

(j) Carriages and Strollers. No person shall bring or carry aboard a District Vehicle a carriage or stroller unless such item is folded and unoccupied. Carriages and strollers must remain folded while aboard the District Vehicle.

(12) Packages. Any packages or parcels brought aboard a District Vehicle must be able to be stored on and/or below one seat (if available), and must be secured so as to prevent their displacement should the Vehicle be required to make a sudden stop or sharp turn, In no event shall any package or parcel be allowed to block access to any aisle or stairway.

(13) Radios. No person shall play radios, tape recorders, or other audio devices or musical instruments on a District Vehicle or in a District Station, unless the sound produced thereby is only audible through earphones to the person carrying the device.

(14) Repulsive Odors. No person shall board or remain on a District Vehicle or enter or remain in a District Station if the person, the person's clothing, or anything in the person's possession, emits a grossly repulsive odor that is unavoidable by other District Passengers on the Vehicle or in the Station and which causes a nuisance or extreme discomfort to District Passengers or employees.

(15) Emergency Exit. No person shall activate the "Emergency Exit" or alarm device of a District Vehicle or Station in the absence of an emergency.

(16) District Seats. No person shall place his or her feet on seat cushions on any District Vehicle or in any District Station.

(17) Posting Notices. Except as otherwise allowed by District regulation, no person shall place, permit or cause to be placed any notice or advertisement upon any District Vehicle, or on any District Station or upon any vehicle without the owner's consent while the vehicle is parked therein.

(18) Flammable Substances. No person shall bring aboard a District Vehicle, or take into a District Station any flammable substance, except for matches and cigarette lighters.

(19) Weapons. No person, except a Peace Officer, shall bring into or carry aboard a District Vehicle, or bring into a District Station, any knife, (except a folding knife with a blade less than 3 1/2 inches in length), ice pick, bow, arrow, crossbow, any explosive device or material, any instrument or weapon commonly known as a blackjack, sling shot, sand-club, sandbag, sap glove or metal knuckles, etc., or any other illegal or unlawfully possessed weapon of any kind.

(20) Non-payment of Fare; Misuse of Bus Pass or Group Pass.

(a) Non-Payment of Fare. No person shall occupy, ride in or use, any Transit Vehicle unless the person has paid the applicable fare or has a valid and lawfully acquired transfer, bus pass or group pass.

(b) Misuse of Bus Pass. No person shall use or attempt to use a District bus pass to board or ride in a District Vehicle unless the bus pass was lawfully acquired at an authorized District outlet by or on behalf of the person. Unless otherwise transferable by the express terms of the bus pass only the person identified on the bus pass may use such pass.

(c) Misuse of Group Pass. No person shall use or attempt to use a District group pass to board or ride in a District Vehicle unless:

(i) The group pass was lawfully acquired at an authorized District outlet by or on behalf of the person; and

(ii) The group pass is used according to the terms of the applicable group pass agreement; and

(iii) The person is a current member of the group to whom group pass was issued pursuant to the applicable group pass agreement.

(d) Confiscation of Misused Bus Pass or Group Bus Pass. Any District Vehicle operator or any Peace Officer may confiscate a bus pass or group bus pass used or presented for use in violation of subsections (b) or (c) of this section.

(e) Nonpayment of Fare. Misuse of Bus Pass or Group Pass is Theft. Any person who violates subsections (a), (b) or (c) above, in addition to any penalties described herein, may be subject to criminal prosecution for theft of services.

1.20 Exclusion.

(1) In addition to any penalties provided herein for the violation of s Ordinance, and to any penalties for the violation of the laws of the State of [NAME], any Peace Officer, and other persons as may be designated by the District's General Manager, may issue a Notice of Exclusion from the District Transit System to any person who violates this Ordinance, or who commits any offense as defined by the criminal laws of the State of [NAME] or any other city, county or municipal rule having concurrent jurisdiction over District property, when such offense is committed upon any District Vehicle or at any District station.

(a) Except as provided in (b) below, written Notice signed by the issuing authority shall be given to a person who has been excluded from all or part of the District Transit System. The written Notice shall specify the particular violation or reason for exclusion, places and duration of exclusion, and the consequences for failure to comply with the notice.

(b) In order to ensure the safety, convenience, and comfort of all Passengers, a District Vehicle operator may, without giving written Notice of Exclusion, direct a Passenger to leave a District Vehicle, or direct a prospective Passenger not to board a District Vehicle, if the operator has probable cause to conclude that such Passenger is in violation of any provision of this Ordinance. Without written Notice of Exclusion, such exclusion shall be effective only for the route in progress at the time of the exclusion.

(2) A Notice of Exclusion shall be effective immediately upon issuance and shall remain in effect until the exclusion expires, or is terminated by [AGENCY], or is rendered ineffective upon appeal. Any person receiving Notice of Exclusion may appeal in writing to the District's General Manager, or designee, under procedures provided by [AGENCY'S] Contested Case Hearing Procedure as now in place or amended hereafter. Such appeal must be delivered to the District General Manager or designee within ten days of receipt of the Notice of Exclusion. The Exclusion shall remain in effect during the pendency of the appeal. If the decision on appeal is in favor of the excluded person, the period of exclusion set forth in the Notice shall be terminated immediately.

(3) At any time during the period of exclusion, a person who has received a Notice of Exclusion may apply to the District General Manager or designee for a variance to allow the person to enter upon the District [Transit System]. The District General Manager or designee may, at its sole discretion, grant a variance if the person establishes

a need to enter upon the District Transit System for reasons of employment, medical treatment or similar good cause. The General Manager or designee may terminate an exclusion or grant a variance if the excluded person shows that he or she was wrongly or unfairly excluded from the District Transit System. A variance may include such conditions as the District General Manager or designee determines will prevent future offenses.

(4) A person excluded under this section may not enter or remain upon any part of the District Transit System from which the person is excluded during the stated period of exclusion. In addition to penalties imposed by this Ordinance, an excluded person who enters or remains upon any District Vehicle or part of the District Transit System from which the person has been excluded, may be charged with Criminal Trespass in the Second Degree, [LAW NUMBER] or as amended hereafter, and subjected to the penalties thereto.

Attachment No. 4

(One Agency's Refusal of Service and Tracking Policy)

REFUSAL OF SERVICE, EJECTION

A. GENERAL:

Our first two lines of defense against prohibited conducted are:

1. Good customer relations skills and;

2. "Strategies" Training

A supervisor may authorize an operator to refuse transportation or eject a passenger without the presence of a supervisor, [AGENCY] officer, or other law enforcement officer. The operator should attempt to get the name of the offender for future *reference* and documentation. If unable to obtain a name, a detailed description of the individual must be put on the Incident Report.

Any time an operator refuses transportation or ejects a passenger, an Incident Report must be completed and turned in at the end of that shift. The report must specify the Rule of Conduct that was violated, date/time of occurrence(s), and the name of the supervisor authorizing the action.

Anyone who is refused service or ejected from the bus will be denied transportation for the remainder of the day, unless otherwise stated.

B. FAILURE TO COMPLY:

Passengers who repeatedly test the system or habitually violate the Rules will not be tolerated. The following procedures will be used in refusing transportation or ejecting:

1. Three Strikes Policy. A passenger will be warned twice before [he/she is] ejected from the bus on the third violation, normally on the same trip. That same passenger will not be continually allowed Three Strikes for each one way trip.

2. If this passenger is warned twice of a violation on an outbound trip and then boards the bus two hours later on the inbound trip; the first time that passenger violates a Rule of Conduct, [he/she] will be ejected. The operator will write one incident report documenting all three violations.

3. This holds true for passengers whose violations are committed three or more times over a period of one day, one week, or several months.

4. Under these circumstances, passengers who have three documented incidents of refusal of service and/or ejection for failure to comply will be formally issued a letter of exclusion of service.

FORMS AND TRACKING SYSTEM

A. INCIDENT REPORTS:

Two copies of all incident reports will be made. The original will be maintained by Human Resources. One copy will be maintained in an Incident Book in Dispatch. The second copy will be sent FYI to the operator's supervisor then to the Operations Administrative Assistant to be placed in the Operator's file.

B. PROBLEM PASSENGER PROFILE:

The Operations Administrative Assistant will track all individuals who violate the Rules of Conduct and are written up on an Incident Report on a Problem Passenger Profile form. Individuals will be tracked by either name, [or] nickname or physical description. The Problem Passenger Profile form will be used to identify multiple violations, patterns and habitual offenders.

C. PROBLEM PASSENGER FILE:

A Problem Passenger file will be started on passengers for which [AGENCY] has three or more documented cases of misconduct, passenger-passenger altercations, or violations of the Rules of Conduct. Problem Passenger Files will contain:

1. Copies of all incident reports,

2. Customer Comment Forms,

3. Supervisor notes from any contact with the passenger,

4. Any written correspondence between and the passenger,

5. Copies of active letters of exclusion; and

6. Original inactive letters of exclusion.

Files are to be maintained confidential and will be classified as Current, No Action 1-2 Years, and No Action 2 (+) Years.

D. SECURITY ALERT FOLDER:

Passengers who are currently excluded from service will have a Security Alert Form filled out, with picture attached, and placed in the Security Alert Folder. The purpose of

this folder is for operator information only. Files and photographs will not be posted on any bulletin board. This information is provided on a "need to know basis". Folders will be maintained in the file cabinet in the main driver’s room....

Attachment No. 5

(One Agency's Exclusion of Service Letters and Policy)

EXCLUSION OF SERVICE LETTERS

A. CRITERIA:

A letter of exclusion will be issued for:

I. Any violation resulting in arrest, citation, or ejection by a law enforcement officer;

2. Any violation of Article [NUMBER], or;

3. An accumulation of three or more denials of service/ejections under the Three Strikes Policy

Letters of exclusion will be for a minimum of seven (7) days.

B. DOCUMENTATION:

In order to support the issuance of a letter of exclusion, one of the following documents must be on file in Dispatch:

1. Copy of police reports or citations or;
2. Incident report(s) documenting violation and;
3. Any supporting documents to include:
   a) Radio or Dispatch Daily Logs
   b) Supervisor Supplemental or Daily Report forms
   c) Customer Comment Forms, Verified and as appropriate
   d) Witness cards, as appropriate

C. ISSUANCE OF LETTER:

A letter of exclusion may be issued on the spot by a supervisor. Dispatch will assist in making a quick check of the records to determine whether this passenger is currently excluded from service or has any past violations or exclusions. Letters issued on the spot are much less time consuming....

A letter of exclusion will be issued when any one of the above-mentioned criteria has been met. The supervisor issuing the letter will first check the Problem Passenger Profile and the Incident Book for any additional supporting documents and will also check any past history of exclusions in the Problem Passenger File....

***

E. VIOLATIONS OF AN EXCLUSION ORDER:

An individual who violates an exclusion order may be arrested for Criminal Trespass under [LAW NUMBER].

Law enforcement will be called and arrests requested if the individual violating an exclusion order is or potentially:

1. Threatens the safe operation of [AGENCY] buses or facilities;

2. Threatens the security of passengers or employees; or

3. Harasses a passenger or an employee.

If there is an immediate threat to safety and security, the bus will hold and wait for the arrival of law enforcement.

Avoid all unnecessary confrontations. Again, choose your battles wisely. Do not start an incident that gets you or on the front page of the newspaper. Also weigh the impact on service and schedule and how your plan of action will affect all passengers on board. Have an alternate plan and consider law enforcement meeting a bus at a transfer center if possible.

If an arrest is made, citation issued, to avoid confrontations or as an alternate plan, any documented violation of an exclusion order is a subsequent violation of the Rules of Conduct and another letter of exclusion will be issued. This extension will be added to the end of the original letter.

F. ARRESTS:

Law enforcement officers will make an arrest if called for criminal trespassing under an exclusion order. The arresting officer must have the following documents:

1. Copy of the Exclusion Order, with signatures and dates and

2. Copy of the Incident Report(s) for which the exclusion was based.

Without these documents no arrest will be made. Because it may not always be possible or practical to deliver these documents to the scene of the arrest, all supervisors will carry an updated copy, of the Exclusion of Service Folder while on the road. [AGENCY] will also have an updated copy of the Exclusion of Service Folder on hand. [AGENCY] will verify to the arresting officer that the appropriate documents are on file at their office to make the arrest.

EXCLUSION ORDER FORM

DATE:

TO:

SUBJECT: Notice of Exclusion from [AGENCY] Vehicles and Properties

This letter serves as notice of exclusion of service for a period of _____. This exclusion notice is effective immediately. Privileges will be reinstated on _____ unless this exclusion order is violated. Throughout the duration of this exclusion you are prohibited from entering in or onto any [AGENCY] vehicles, facilities, and properties.

This exclusion of service is for the following reason(s): On (date/time), _____ [describe].

This is in violation of Article [number], Section [number], sub-paragraph [number] of the [AGENCY] Rules of Conduct as adopted by the Board of Directors on [DATE].

Should you choose to appeal this order, it must be submitted in writing to the attention of the Director of Operations within fifteen (15) calendar days of receipt of this order. You may request a hearing or may request review without a hearing based on a written statement setting forth the reasons why you believe this exclusion order is invalid or improper. This exclusion order will remain in effect during any appeal process.

Refusal to immediately comply with written or verbal exclusion notice shall be grounds for criminal prosecution for Trespass.... The areas and properties involved on which you are not allowed, are as follows: All vehicles, marked bus stops, bus stop shelters, park and ride lots, transfer centers, or any other property.

If you have any questions regarding this exclusion order, call during regular business hours.

Signed _____

Title

_____

Method of notification (check one)

U.S. Mail, return receipt requested.

Personal delivery

I have read and/or have been read and understand this exclusion notice. I fully understand that failure to immediately comply with this notice will result in a criminal prosecution for Trespass....

Signed

_____

Date

_____

Witness
Date

CONDITIONAL EXCLUSION ORDERS

DATE:

TO:

SUBJECT: Notice of Conditional Restriction of Service

This letter serves as notice of conditional restriction of service for a period of _____. This restriction is restriction is effective immediately. Full privileges will be reinstated on _____.

This restriction of service is for the following reason(s): On (date/time), _____.
This is in violation of Article [number], Section [number], sub-paragraph [number] of [AGENCY] Rules of Conduct as adopted by the Board of Directors on [DATE].

Throughout the duration of this restriction you are prohibited from entering in or onto [AGENCY] vehicles, facilities, and properties except as follows:

1. Transportation to and from medical, legal or social service appointments and;

2. Transportation for the purpose of shopping, these trips are limited to two round trips per week. A week is defined from Sunday through Saturday. Unused trips may be carried over to another week. Shopping trips are limited to your immediate local area only.

3. You are required to notify [NUMBER OF] hours in advance of any planned travel. Routed passengers will contact [NAME]. [AGENCY] passengers will contact a [NAME]. Failure to provide advance notice will result in refusal of service.

Any violation of this agreement may result in an Exclusion of Service order. Refusal to immediately comply with [a] written or verbal exclusion notice shall be grounds for criminal prosecution for Trespass [LAW NUMBER], GROSS MISDEMEANOR

OFFENSE. The areas and properties involved on which you are not allowed are as follows: All [AGENCY] vehicles, marked bus stops, bus stop shelters, park and ride lots, transfer centers, or any other property.

Signed

_____

Title

I have read and/or have been read and understand these restrictions. I fully understand that failure to immediately comply with this notice may result in an Exclusion of Service order.

Signed _____

Date _____

Witness

Date _____

REINSTATEMENT CONTRACTS,

TRANSIT REINSTATEMENT OF PRIVILEGES CONTRACT

I _____ agree in return for my privileges, to abide by the "Rules of Conduct for [AGENCY] Vehicles, facilities and Properties. I also agree to abide by the laws of the State of [NAME] which include [LAW NUMBER], unlawful bus conduct.

I understand that, if I violate any of the Rules of Conduct, the Bus Operator, Supervisor, or any employee may order me off the bus and out of a facility.

I understand that if I refuse to immediately comply with this order that I will be in violation of Criminal Trespass, [LAW NUMBER] which may result in my arrest.

Signed

_____

Title
Date

I have read and/or have been read and understand these restrictions. I fully understand that failure to immediately comply with this notice may result in an Exclusion of Service order.

Signed _____
Date _____

Witness
Date _____

Attachment No. 6

(One Agency's Rider Suspension Policy)

Rider Suspension Policy

[THE AGENCY] has a commitment to provide quality public transportation within the [AGENCY] Service Area. There are occasions, however, when customer behavior seriously disrupts or endangers the health and safety of our employees and other members of the public who use our services. When this occurs, it may be necessary to deny [AGENCY] service and/or access to [AGENCY] facilities to those customers.

Section A

CRITERIA for DENIAL of SERVICE and/or REMOVAL from COACH or TRANSIT CENTERS

The following conduct will subject a [AGENCY] customer to immediate removal from a coach and/or transit center:

1. Verbal or physical abuse of [AGENCY] employees, customers, or damage to equipment.

2. Behavior which presents a danger to the health or safety of the offending customer, other customers, or an [AGENCY] employee. Such behavior includes conduct which is violent, seriously disruptive, or illegal as defined in [LAW NUMBER].

3. Urinating, defecating, vomiting, or inappropriately discharging of bodily fluids on transit property.

4. Eating, drinking, and carrying open food or beverage containers.

5. Soliciting, advertising, selling or distributing goods or services, except as authorized by [AGENCY] or its agents.

6. Sexually harassing any {AGENCY] employee or customer.

7. Demonstrated pattern of no-shows on the [AGENCY] system. The "No Show Policy under the Americans with Disabilities Ac of 1990" outlines separate procedures undertaken in that instance.

8. Customers temporarily unable to care for themselves due to illness or intoxication (alcohol, drugs, or other intoxicating substances), resulting in single instances of disruptive behavior which interfere with the safe and smooth operation of the system. Such customers may be reseated, refused service, or removed from [AGENCY] vehicles or facilities at the discretion of [AGENCY].

9. Any conduct that is prohibited on all [AGENCY] vehicles, in accordance with [IDENTIFY] and Ordinance [NUMBER] including the following:

a. Smoking or carrying a lighted or smoldering pipe, cigar, cigarette, or using any tobacco products on [AGENCY] properties not designated as tobacco use areas.

b. Discarding litter other than in designated receptacles.

c. Playing any radio, recorder, or other sound-producing equipment that does not limit sound to individual listeners, or interferes with communication devices by [AGENCY] employees or public safety officers in the line of duty, or the use of private communication devices, such as pagers or portable telephones.

d. Spitting or expectorating.

e. Carrying any flammable liquid, explosive, acid or other article or material likely to cause harm to others. Persons may, however, carry cigarette lighters or firearms and ammunition in a way that is not otherwise prohibited by law.

f. Intentionally obstructing or impeding the flow of transit vehicles, passenger traffic, hindering or preventing access to transit vehicles or stations, or unlawfully interfering with the provision or use of public transportation services.

g. Intentionally disturbing others by engaging in loud, raucous, unruly, or harassing behavior that is harmful and intimidating to others.

h. Destroying, defacing, or otherwise damaging property of [AGENCY].

i. Carrying any alcohol, controlled substances, guns, knives, or other devices that are weapons or apparently capable of use as weapons unless authorized by law.

j. Violation of any federal, state, county or local criminal law.

Section B

GENERAL INCIDENT PROTOCOL

The following is the general procedures and protocol that [AGENCY] will follow in enforcing these rules:

1. [AGENCY] representatives or its agents will encourage respect and good behavior from customers on all [AGENCY] vehicles and facilities. Customers who undertake or participate in any conduct set out in Section A will be requested to cease the misbehavior, and warned that if the behavior continues, he/she will be asked to leave the bus, transit center or other [AGENCY] facility. This will be done politely, discretely, and quickly.

2. If the customer refuses, a Supervisor and/or law enforcement officer may be contacted immediately to evict him/her from the coach transit center or other [AGENCY] facility. No customer shall be removed forcibly from [AGENCY] vehicles or facilities without the assistance of law enforcement or a Supervisor, except in self-defense.

3. When a customer is removed, he/she will be discharged at a bus stop, or at a location where the customer is unlikely to be injured or endangered, unless the operator or other passengers are in imminent danger, in which case immediate discharge is appropriate. Operators are expected to exercise best judgment in these circumstances.

4. [AGENCY] personnel will carefully and completely document all suspensions, and provide such written reports to his/her immediate Supervisor, and the Director of Operations.

5. If the customer has a cognitive or physical disability, as defined by the Americans with Disabilities Act of 1990 (ADA), every effort will be made to evaluate if the incident was caused by his/her disability, and if accommodations can be made to allow that customer continued access to [AGENCY] services. The will take the customer's disability into consideration when determining the actions to be taken. Ongoing service may be provided conditionally if an attendant accompanies the customer and such will prevent further conduct that violates these rules.

6. [AGENCY] reserves the right to immediately refuse all [AGENCY] services to a customer when necessary to protect the health and safety of other customers or employees, regardless of the progressive steps of suspension reflected in policies when the actions involve violent, illegal, or seriously disruptive behavior. In such cases, a suspension notice may be issued immediately by a law enforcement officer or [AGENCY] Supervisor.

7. Only Supervisors and/or law enforcement are empowered to suspend a customer from [AGENCY] service.

Section C

PROCEDURES FOR SERVICE DENIAL AND/OR SUSPENSION

There are two "tracks" of procedures for denying or suspending service:

1. Minor Infraction: defined as behavior which is prohibited by Section A, but minor in nature, and for which there is every reason to believe that it can or will be corrected. A single day service denial should be the general suspension.

a. Operators needing to remove a customer for unlawful bus conduct as defined in Section A shall notify dispatch immediately of a minor infraction. No Operator

will, without prior approval from a Supervisor, refuse service to a customer past the day of the problem for which he/she was removed from the bus or facility.

b. A customer will not be denied access to other parts of the system on the day of the incident unless there are extenuating circumstances. A decision to limit service on that day to other parts of the system will be made only by a Supervisor.

c. Operators shall report single incidents when service has been denied on Operator's Notes Form. As documented, patterns of minor infractions may be evaluated for further action, including warning of suspension or outright suspension from [AGENCY] service, under the procedures of Section 2 herein.

2. Serious Infraction: defined as violent, illegal, or seriously disruptive behavior, or pattern of minor infractions leading up to or requiring ongoing suspension of service.

a. Upon the occurrence of a Serious Infraction, whenever possible, Supervisors shall fill out a Service Suspension Notice and give it to the offending customer when he/she is removed from the bus or facility. The Supervisor will indicate on the notice if the customer is

- Warned of future suspension, or
- Suspended from service, and the end date

b. Depending on the severity of the incident, suspensions will be, at a minimum, for a period of one week, and may last up to one year. Severe incidents, such as assaulting an operator or customer, may warrant a suspension for an indefinite period of time. The length of the suspension is solely at the discretion of [AGENCY] Supervisors.

c. If law enforcement has removed the customer from the system, [AGENCY] Supervisors will make a reasonable effort to formally notify the customer of the terms of the suspension and right to appeal.

d. If the customer has been issued a written warning of future suspension and the behavior reoccurs, Supervisors will officially notify the customer that [AGENCY] will not provide transportation for a specified period of time.

e. Staff will inform operators and dispatch regarding service suspension.

3. Appeal:

a. The Service Suspension Notice submitted to a customer shall notify the customer of his/her right to appeal the decision to the Director of Operations or his/her designee. The customer may file a Notice of Appeal within six (6) working days after receiving the Service Suspension Notice at [DESCRIBE].

b. The customer may request a hearing or may request a review without a hearing based on a written statement or interview outlining the reasons why the

suspension should be revoked. If requested, the hearing shall be held by the Director of Operations or his/her designee, within thirty (30) days.

c. Following the hearing, or if a hearing is not requested, the Director of Operations or his/her designee shall render a decision within 10 days after receipt of the Notice of Appeal or the completion of the hearing. The decision may be conveyed to the customer in writing.

d. [AGENCY] will not provide service to the customer pending resolution of the Appeal.

4. Resumption of Service:

a. Upon expiration of the suspension period, or revocation of the suspension, the customer may be required to enter into a contract (see "Transit Use Agreement") with [AGENCY] outlining appropriate behaviors prior to resumption of service. It is the customer's responsibility, or someone acting on his/her behalf, to contact the Director of Operations to request a meeting at least three (3) weeks prior to resumption of service, The Agreement will be completed at that time.

b. Customers who receive an-until-further notice suspension shall be entitled to request a review prior to reinstatement. The customer and [AGENCY] must agree to terms and conditions regarding resumption of service, then service shall begin within three (3) weeks following the date of the agreement.

c. A decision to grant resumption of service may be contingent on:

- Completion of the Transit Use Agreement, and
- Demonstrated corrective behavior or an ability to act in conformity with these rules.

d. After resumption of service, a probationary period not to exceed thirty (30) days will be imposed. If the customer exhibits behavior that is prohibited by Section A, the original suspension shall be immediately reinstated and a new suspension period imposed.

e. The Director of Operations will notify [AGENCY] Supervisors who will notify [AGENCY] operators and dispatch regarding the resumption of service.

f. A reinstated suspension may be appealed under the provisions of Section [NUMBER].

Attachment No. 7

One Agency's Enforcement Policy Concerning Exclusion from Service and Procedure for Appeal and Hearing

A. [DELETED]

B. ENFORCEMENT

1. Removal from [AGENCY] Vehicles, Facilities, and Properties.

Any person engaging in prohibited conduct under the provisions of Article [NUMBER] may be refused entrance upon or ordered to leave [AGENCY] vehicles facilities and properties by a commissioned law enforcement official, [AGENCY] personnel as authorized by the Executive, or Director of [AGENCY] or authorized personnel of a contracted service provider in accordance with the terms of the applicable service contract. Failure to immediately comply with such a removal order may be grounds for prosecution for criminal trespass and/or unlawful bus conduct.

2. Exclusion from Service.

(a) *Basis for Exclusion.* Engaging in prohibited conduct under Article III shall be cause for excluding or restricting a person from entering and using all or any part of [AGENCY] vehicles, facilities, and properties for a period of time not to exceed one year, unless otherwise authorized by law (SIP69.50.435).

(b) *Notice Procedure.* [AGENCY] shall give a person to be excluded from 1W vehicles, facilities, and properties written notice, by personal delivery or by mailing a copy, by U.S. Mail, return receipt requested, addressed to the person's last known address. The notice shall specify the reason for exclusion, identify the scope, duration, and effective date of the exclusion, and explain the appeal process.

(c) *Constructive Notice.* Receipt of a notice is construed to have occurred if the person knew or reasonably should have known from the circumstances that he/she is excluded from [AGENCY] vehicles, facilities and properties. Receipt of a notice is also presumed to have been accomplished three (3) calendar days after the notice has been placed in the U.S. mail to the person's last known mailing address.

(d) *Immediate Refusal or Removal. A* person may be immediately re-seated, refused transportation, or removed from [AGENCY] vehicles, facilities, and properties without prior written notice if the person has engaged in prohibited conduct under Article [NUMBER] which, in [AGENCY] discretion, poses a safety or security risk, interferes with or impinges on the rights of others, impedes the free flow of the general public, or impedes the orderly and efficient use of [AGENCY] vehicles, facilities, and properties.

(e) *Length of Exclusion.* The following guidelines shall be used in determining

the duration of a particular exclusion for engaging in prohibited conduct under the provisions of Article [NUMBER]. The actual exclusion period imposed may be shorter or longer depending on the circumstances of each case.

First Offense:	up to 90 days
Second Offense:	up to 180 days
Third Offense:	up to 365 days
Each Subsequent Offense:	up to 365 days

(f) *Appeal Procedure*. Not later than fifteen (15) calendar days after commencement of the exclusion, an excluded person may appeal in writing to the [AGENCY] Director of Operations, or his/her designee, for de novo review of the exclusion. The appellant may request a hearing or may request review without a hearing based on a written statement setting forth the reasons why the appellant believes exclusion is invalid or improper. If the appellant is unable to respond in written format, [ ] will make reasonable accommodations.

(g) Hearing. If the appellant does not request a hearing, the Director of Operations, or his/her designee, shall render a written decision within five (5) business days after receipt of the appeal. If a hearing is requested, the hearing shall be held within thirty (30) calendar days after receipt of the appeal, and a written decision shall be rendered within ten (10) calendar days after the hearing. The exclusion shall remain in effect during the appeal process. If an appellant requires ublic transportation services to attend the hearing, appellant shall contact [NAME] five (5) business days prior to the hearing date and [AGENCY] shall make arrangements to provide the necessary public transportation services for the appellant.

*(h) Missed Trips on [*AGENCY] *Vehicles*. The appeal and hearing provisions in subsection (f) and (g) above shall not apply to exclusion based on a violation of Article [NUMBER] concerning [DESCRIBE]. The written notice of such violation provided in Article [NUMBER] shall provide the appellant an opportunity to appeal within thirty (30) days after notice of exclusion is received. The appeal process shall include an opportunity to be heard and to present information and arguments. The exclusion is stayed pending the outcome of the appeal.

(i) Refusal to Comply. The refusal to immediately comply with written or verbal notice excluding or restricting a person from [AGENCY] vehicles, facilities, and properties shall be grounds for prosecution for criminal trespass [LAW NUMBER].

3. Other Laws not Limited

The enforcement of Article [NUMBER] herein is not intended to limit, in any manner, the enforcement of any applicable federal, state or municipal laws.

C. LIABILITY

Nothing in Article [NUMBER] herein shall create a duty to any person on the part of [AGENCY] form any basis for liability on the part of [AGENCY], its officers, agents or employees. The obligation to comply with Article [NUMBER] is solely that of any person entering and using [AGENCY] vehicles, facilities, and properties and [AGENCY] enforcement of Article [NUMBER] is discretionary not mandatory.

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