

RESPONSES

“Homeless and Hungry, Please Help!”: A Constitutional Right to Communicate Messages of Need

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There are people who can never forgive a beggar for their not having given him anything.

— Karl Kraus¹

The most stunning thing about Anneke Meerkotter’s article, “Litigating to Protect the Rights of Poor and Marginalized Groups in Urban Spaces,” is its universality.² Professor Meerkotter holds the

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¹ KARL KRAUS, *HALF-TRUTHS AND ONE-AND-A-HALF TRUTHS: SELECTED APHORISMS* 114 (Harry Zohn ed. & trans., Univ. of Chi. Press 1990) (1976).

² Anneke Meerkotter, *Litigating to Protect the Rights of Poor and Marginalized Groups in Urban Spaces*, 74 U. MIA. L. REV. CAVEAT 1, 1 (2020),

same position I do—Litigation Director at a non-profit law firm. Additionally, we both bring public interest litigation to challenge the enforcement of laws used to criminalize poor and marginalized groups that our governments have deemed unfit to occupy public spaces. Although we work on two different continents, the colonial legacy of criminal “vagrancy laws” that Professor Meerkotter describes in Africa is the same one I confront every day in my work in the United States, specifically in the state of Florida.

Our work’s commonality allows me to confirm that a central premise of Professor Meerkotter’s article holds true in the United States. The litigation necessary to overturn these vagrancy laws, “even when successful, has often failed to significantly change policing practices and prevent the creation of new offenses with similar effects.”³ The Supreme Court of the United States has clearly established that vagrancy laws, nearly identical to the ones with which Professor Meerkotter grapples within Africa, are unconstitutional.⁴ As such, it is rare to find a historical vagrancy law in state statutes or local ordinances anymore. Nevertheless, in 2020, my colleagues and I still face a continuous assault of “new offenses with similar effects.”⁵

A variety of new offenses targeted at persons experiencing homelessness were enacted to take the place of vagrancy laws by criminalizing basic activities of survival such as sleeping, resting, storing personal property, and asking for help.⁶ Scholars and activists have termed these anti-homeless ordinances “the new vagrancy

https://lawreview.law.miami.edu/wp-content/uploads/2020/01/Litigating-to-Protect_Anneke-Meerkotter.pdf.

³ *Id.*; see also RISA GOLUBOFF, VAGRANT NATION: POLICE POWER, CONSTITUTIONAL CHANGE, AND THE MAKING OF THE 1960s 339–344 (2016).

⁴ *Papachristou v. City of Jacksonville*, 405 U.S. 156, 171 (1972).

⁵ Meerkotter, *supra* note 2, at 1; see also NAT’L L. CTR. ON HOMELESSNESS & POVERTY, HOUSING NOT HANDCUFFS 2019: ENDING THE CRIMINALIZATION OF HOMELESSNESS IN U.S. CITIES 37–49 (Dec. 2019) [hereinafter NAT’L L. CTR. ON HOMELESSNESS & POVERTY (Dec. 2019)], <http://nlchp.org/wp-content/uploads/2019/12/HOUSING-NOT-HANDCUFFS-2019-FINAL.pdf>.

⁶ NAT’L L. CTR. ON HOMELESSNESS & POVERTY (Dec. 2019), *supra* note 5, at 37–49; JAVIER ORTIZ & MATTHEW DICK, THE WRONG SIDE OF HISTORY: A COMPARISON OF MODERN AND HISTORICAL CRIMINALIZATION LAWS 20–21 (Sara Rankin ed., 2015), <https://ssrn.com/abstract=2602533>.

laws”⁷ to reflect the fact that they differ in name only from the vagrancy laws the Supreme Court has deemed unconstitutional.⁸ The purpose of the new vagrancy laws is the same: to cast a wide net to allow cities and counties to round up and remove homeless persons from public space through fines, jail, and trespass exclusion orders.⁹

One particular subset of the new vagrancy laws widespread throughout the United States are laws that punish people who ask for help in the form of money, food, or other charitable assistance.¹⁰ It is rare to find a city or county in Florida that does not restrict or prohibit individuals from speaking or holding signs to communicate messages of need.¹¹ The ubiquity of such restrictions is rooted in the “broken windows” theory,¹² which is premised on the hypothesis that “serious [street] crime flourishes in areas where disorderly behavior goes unchecked.”¹³

⁷ See, e.g., Carrie Leonetti, *The Wild Wild West: The Right of the Unhoused to Privacy in Their Encampments*, 56 AM. CRIM. L. REV. 399, 404 (2019); MARINA FISHER ET AL., CALIFORNIA’S NEW VAGRANCY LAWS: THE GROWING ENACTMENT AND ENFORCEMENT OF ANTI-HOMELESS LAWS IN THE GOLDEN STATE 5–6 (Feb. 2015), <https://ssrn.com/abstract=2558944>; SASHA FELDSTEIN ET AL., CALIFORNIA’S NEW VAGRANCY LAWS: THE GROWING ENACTMENT AND ENFORCEMENT OF ANTI-HOMELESS LAWS IN THE GOLDEN STATE 1 (June 2016), <https://ssrn.com/abstract=2794386>.

⁸ See *Papachristou*, 405 U.S. at 171.

⁹ NAT’L L. CTR. ON HOMELESSNESS & POVERTY (Dec. 2019), *supra* note 5, at 37–49; see also S. LEGAL COUNS., JAILBIRDS IN THE SUNSHINE STATE: DEFENDING CRIMES OF HOMELESSNESS (May 2016), <http://fshc.org/docs5/Defending%20Crimes%20of%20Homelessness.pdf> (training manual for public defenders and criminal defense lawyers on ordinances and statutes typically used to criminalize homelessness in Florida).

¹⁰ NAT’L L. CTR. ON HOMELESSNESS & POVERTY (Dec. 2019), *supra* note 5, at 44–45 (finding that, of 187 cities surveyed for report nationwide in 2019, 83% of cities have at least one law restricting begging or panhandling).

¹¹ S. LEGAL COUNS., *supra* note 9, at 7.

¹² Meerkotter, *supra* note 2, at 11; see also GOLUBUFF, *supra* note 3 at 341 (“[W]ith new forms of ‘broken windows’ and ‘order maintenance’ policing, officials adapted the centuries-old idea that vagrancy law’s challengers had largely rejected: because petty crime would lead to more serious crime, law enforcement should take aim at the former to prevent the latter. These neo-vagrancy-type justifications for the regulation of incipient crime mimicked, though fell short of replicating, the old.”).

¹³ DON MITCHELL, THE RIGHT TO THE CITY: SOCIAL JUSTICE AND THE FIGHT FOR PUBLIC SPACE 200 (2003) (quoting George L. Kelling & James Q. Wilson,

Commonly targeting behavior labeled as “begging,” “panhandling,” or “solicitation,” these types of statutes and ordinances are considered necessary to address the “first broken window” of “broken windows policing”: the “unchecked panhandler.”¹⁴ As originally conceived, proponents of the broken window theory posited that, “[i]f the neighborhood cannot keep a bothersome panhandler from annoying the passers-by, the thief may reason, it is even less likely to call the police and identify a potential mugger or to interfere if a mugging takes place.”¹⁵ What are, however, the major legal impediments to implementing this theory to full effect? The Supreme Court and federal courts of appeals decisions that have long-recognized “charitable solicitation” (including speech asking for charity to meet one’s own needs) as protected speech under the First Amendment of the Constitution.¹⁶

As the United States Court of Appeals for the Seventh Circuit recognized:

Beggars at times may communicate important political or social messages in their appeals for money, explaining their conditions related to veteran status, homelessness, unemployment and disability, to name a few. Like the organized charities, their messages cannot always be easily separated from their need for money. While some communities might wish all solicitors, beggars and advocates of various causes be vanished from the streets, the First Amendment guarantees their right to be there, deliver their pitch and ask for support.¹⁷

Broken Windows: The Police and Neighborhood Safety, ATLANTIC, Mar. 1982, at 29).

¹⁴ *Id.* at 200, 203.

¹⁵ *Id.* at 200 (quoting Kelling & Wilson, *supra* note 13).

¹⁶ *E.g.*, Vill. of Schaumburg v. Citizens for a Better Env’t, 444 U.S. 620, 632 (1980) (recognizing charitable appeals for funds implicates a variety of speech interests protected by First Amendment); Smith v. City of Fort Lauderdale, 177 F.3d 954, 956 (11th Cir. 1999) (“Like other charitable solicitation, begging is speech entitled to First Amendment protection.”).

¹⁷ Gresham v. Peterson, 225 F.3d 899, 904 (7th Cir. 2000).

Yet, these ordinances and statutes proliferate. They are regularly used to arrest, fine, and jail individuals experiencing homelessness.¹⁸ They include patently unconstitutional provisions despite numerous court rulings that dictate that such provisions, if ever analyzed by courts, would never survive judicial review.¹⁹

My first federal court case representing an individual experiencing homelessness involved such a situation. We represented David Booher, an individual who had spent more than 200 days in jail for six arrests for holding a sign stating “Hungry Vet, God Bless” or “Anything Helps” on public roadways in Marion County, Florida.²⁰ The Marion County ordinance we challenged prohibited begging, panhandling, soliciting, or obtaining alms, food, money, or gifts “directly or indirectly for the personal use of the solicitor or beggar without a panhandler’s license.”²¹ Once an individual paid the \$100 fee and all other requirements were met to obtain a permit, the individual was required to wear a badge to identify that individual as a “beggar or panhandler.”²²

The United States District Court for the Middle District of Florida granted our motion for preliminary injunction and enjoined the Sheriff of Marion County from enforcing the ordinance throughout the pendency of the litigation.²³ The court found that we had established a substantial likelihood of success on the merits, in part because the ordinance was plainly unconstitutional.²⁴ The court could not find any legitimate government interest in requiring an individual to wear a beggar’s badge and found that “the underlying purpose is to preclude homeless and indigent individuals from freely engaging in protected speech activity, because it is deemed undesirable.”²⁵

¹⁸ NAT’L L. CTR. ON HOMELESSNESS & POVERTY, *supra* note 5, at 50.

¹⁹ S. LEGAL COUNS., *supra* note 9, at 7–22.

²⁰ Appendix in Support of Plaintiff’s Motion for Preliminary Injunction at 9, 13, *Booher v. Marion Cnty.*, Case No. 5:07-cv-00282 (M.D. Fla. July 11, 2007), ECF 2-2; *see also* *Booher v. Marion Cnty.*, No. 5:07-cv-00282, 2007 WL 9684182, at *2 (M.D. Fla. Sept. 21, 2007).

²¹ *Booher*, 2007 WL 9684182, at *1 (citing MARION, FLA., CODE art. XIV, § 10-403 (2007)).

²² *Id.* (citing §§ 10-404 to -405).

²³ *Id.* at *5.

²⁴ *Id.* at *4.

²⁵ *Id.* at *3.

Ultimately, we reached a settlement after the County repealed the ordinance, but why was litigation necessary in the first place?

The answer lies, in part, in a gamble taken by cities and counties across the country that the individuals targeted by such ordinances would never have access to legal counsel who could raise constitutional claims (either defensively in the context of a prosecution or affirmatively in the context of federal court litigation). The individuals targeted by such ordinances likely do not have access to lobbyists or politicians to prevent such regulations from being enacted into law. Further, it is unlikely the individuals targeted by such ordinances know that they have a right that is being infringed upon in the first place.²⁶

These weaknesses are exploited by powerful forces of government to great effect, ensuring that judicial orders have limited impact in changing laws and police practices beyond the facts of that case. Some governments take their cue from court rulings and move to revise or repeal similar ordinances or statutes that may contain similar constitutional deficiencies.²⁷ But too many other governments simply play the odds, betting that satisfying the demands of

²⁶ William L.F. Felstiner, Richard L. Abel & Austin Sarat, *The Emergence and Transformation of Disputes: Naming, Blaming, Claiming . . .*, 15 L. & SOC'Y REV. 631, 633–36 (1980) (describing three stages in emergence and transformation of a legal dispute: naming, blaming and claiming). Even if persons experiencing homelessness recognize their problems as legal, they face additional barriers accessing traditional legal services such as lack of transportation and means of communication. See Kimberly Sanchez, Kirsten Anderson & Amy Petkovsek, "Local Lawyering": *Strategies for Closing the Justice Gap in Underserved Communities*, MGMT. INFO. EXCH. J., Summer 2017, at 38–39; see also U.S. INTERAGENCY COUNCIL ON HOMELESSNESS, ENGAGING LEGAL SERVICES IN COMMUNITY EFFORTS TO PREVENT AND END HOMELESSNESS 1 (2017), https://www.usich.gov/resources/uploads/asset_library/Engaging_Legal_Services.pdf ("People at risk of or experiencing homelessness often face legal issues that can create roadblocks to accessing or maintaining safe and stable housing, employment and income supports, health care services, and other opportunities that can help them stabilize and achieve their goals. Oftentimes, people in these circumstances do not recognize when they have legal needs, and even when they do, they frequently do not seek legal assistance.").

²⁷ For example, a national campaign "#IAskForHelpBecause" was launched by the National Homelessness Law Center in 2018, along with a broad coalition of partners, including Sothern Legal Counsel, to target the numerous panhandling ordinances still in effect across the country and advocate for constructive solutions of housing, not handcuffs. As a result of the initial campaign, more than 70 cities

their constituents by silencing such messages of need will never be scrutinized by a court of law.²⁸

The popularity of such ordinances continues unabated despite a string of recent court rulings declaring ordinances regulating “pan-handling” or “begging” to be unconstitutional content-based restrictions on speech.²⁹ Despite the near-certainty that they will lose if their ordinances are challenged, governments continue to censor messages of need to hide the fact that there are people in need in our

and counties took steps to cease enforcement or repeal their ordinances. #Ask-ForHelpBecauseCampaign, NAT’L HOMELESSNESS L. CTR. <https://nlchp.org/pan-handling/> (last visited Sept. 27, 2020).

²⁸ The growth in laws criminalizing homelessness since 2016 suggests the fact that cities feel more comfortable passing laws criminalizing homelessness than following the spirit of the animating precedents protecting the rights to which persons experiencing homelessness are entitled. See NAT’L L. CTR. ON HOMELESSNESS & POVERTY (Dec. 2019), *supra* note 5, at 11–16. In another case litigated by Southern Legal Counsel with the National Homelessness Law Center, we obtained a permanent injunction on behalf of a client experiencing homelessness who had been repeatedly arrested for holding a sign on the side of the roadway asking for help. *Vigue v. Shoar*, Case No. 3:19-cv-186-J-32JBT, 2020 WL 6020484, at *19–20 (M.D. Fla. Oct. 12, 2020) (order granting permanent injunction against state statutes used to prohibit roadside solicitation and obstruction of traffic). Litigation was necessary despite the facts that two prior district court decisions dating back to 2003 had already declared one of the statutes unconstitutional, see *Bischoff v. Florida*, 242 F. Supp. 2d 1226, 1235–36 (M.D. Fla. 2003); *Chase v. City of Gainesville*, No. 1:06 cv 44 SPM-AK, 2006 WL 3826983, at *2 (N.D. Fla. Dec. 28, 2006), and a Florida Attorney General opinion from 2007 questioned constitutional infirmities in the statute that persisted after amendments subsequent to prior court decisions, 2007-50 Fla. Op. Att’y Gen. 4 (2007) (then-Florida Attorney General McCollum’s advisory legal opinion regarding statutory amendment on local ordinance prohibiting solicitation on public roadways).

²⁹ See NAT’L L. CTR. ON HOMELESSNESS & POVERTY (Dec. 2019), *supra* note 5, at 80. The U.S. Supreme Court’s decision in *Reed v. Town of Gilbert*, 576 U.S. 155 (2015), changed how courts evaluate the constitutionality of panhandling ordinances, evoking a sea change in First Amendment jurisprudence. See, e.g., *Vigue v. Shoar*, Case No. 3:19-cv-186-J-32JBT, 2020 WL 6020484, at *12–14 (M.D. Fla. Oct. 12, 2020); *Norton v. City of Springfield*, 806 F.3d 411, 412–13 (7th Cir. 2015); *Thayer v. City of Worcester*, 755 F.3d 60 (1st Cir. 2014), *vacated*, 576 U.S. 1048, *remanded to* 144 F. Supp. 3d 218, 238 (D. Mass. 2015) (declaring ordinance unconstitutional on basis that it restricts speech); see also *Homeless Helping Homeless, Inc. v. City of Tampa*, CASE NO. 8:15-CV-1219-T-23AAS, 2016 WL 4162882, at *6 (M.D. Fla. Aug. 5, 2016) (finding that city’s ordinance was unconstitutional because it infringed upon First Amendment right to free speech).

communities.³⁰ Cities use justifications like public safety or aesthetics, but the purpose or effect is the same: to punish homeless people for their pleas instead of answering their request for help.³¹ The risks are too low and the rewards are too high for cities to resist the opportunity to pretend homelessness and poverty do not exist.

To address perceived dangers flowing from speech, Supreme Court Justice Louis Brandeis famously called for “more speech, not enforced silence.”³² What if, instead of silencing such messages, we engaged in dialogues and learned why people are in need and what we could do to ensure no one must beg for help on a street corner? Based on more than a decade of doing this work, I have learned that solutions to address homelessness are often developed without ever including persons with lived experiences in those conversations.³³ If

³⁰ Southern Legal Counsel’s work in collaboration with the ACLU of Florida to stop enforcement of panhandling restrictions by the City of Miami Beach illustrates this proposition. The City of Miami Beach added a panhandling ban as a purported public health measure into its COVID-19 emergency order adopted in May 2020. Martin Vassolo, *Panhandling within 50 Feet of a Store Now a Crime in Miami Beach, COVID-19 Order Says*, MIA. HERALD (May 16, 2020, 06:40 PM), <https://www.miamiherald.com/article242787201.html>. One day after a letter demanding repeal by a coalition of civil rights groups, including Southern Legal Counsel, the City removed the prohibition from its weekly renewal of the emergency order. Alex Deluca, *Attorneys Say Miami Beach’s Panhandling Ban Was Unconstitutional*, MIA. NEW TIMES (July 16, 2020, 8:00 AM), <https://www.miaminewtimes.com/news/aclu-miami-beach-covid-19-panhandling-ban-was-unconstitutional-11666087>. The fact that the City of Miami Beach attempted to do this illustrates the challenges of achieving lasting change in the fight against criminalization because the same city had previously ceased enforcement of its panhandling ordinance in response to a letter during the #IAskForHelpBecause campaign, *see supra* text accompanying note 27, by a similar coalition of groups in 2018, <https://www.miamiherald.com/news/local/community/miami-dade/miami-beach/article217672810.html>.

³¹ *McLaughlin v. City of Lowell*, 140 F. Supp. 3d 177, 184 (D. Mass. 2015) (“Panhandling is not merely a minor, instrumental act of expression. . . . at stake is ‘the right to engage fellow human beings with the hope of receiving aid and compassion.’”).

³² *Whitney v. California*, 274 U.S. 357, 377 (1927) (Brandeis, J., concurring), *overruled in part by* *Brandenburg v. Ohio*, 395 U.S. 444, 449 (1969).

³³ *See, e.g.*, Amy Sawyer, *People with Lived Experience Must be Meaningful Partners in Ending Homelessness*, U.S. INTERAGENCY COUNCIL ON HOMELESSNESS (July 12, 2016), <https://www.usich.gov/news/people-with-lived-experience-must-be-meaningful-partners-in-ending-homelessness/> [<https://web.archive.org/web/20191028215617/https://www.usich.gov/news/>

we are to truly address homelessness and poverty, we need more speech from those with lived experience, not silence. That is why “Litigating to Protect the Rights of Poor and Marginalized Groups in Urban Spaces” will continue to be necessary to protect the right to free speech for those who have the least political power in our society. Otherwise, we simply accept, without dissent, that the rule of law does not apply equally to all of us. That, I cannot do.

people-with-lived-experience-must-be-meaningful-partners-in-ending-homelessness].