

ACLU Kansas
Hot Topics Series

Criminalizing Poverty



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Laws that criminalize poverty are a significant issue in Kansas and across the country. Law enforcement routinely targets houseless and impoverished communities for municipal ordinance violations that criminalize basic acts of human existence – like sleeping or asking for food. These ordinances take the form of anti-camping and anti-panhandling laws that create barriers for these communities in the name of public health, law and order, or protecting business and political interests. These laws turn basic human functions, such as eating, hydrating, securing temporary/permanent housing, and protecting oneself from the elements, into criminal acts.

As explained below, anti-panhandling and anti-camping ordinances push people into the criminal legal system where they face arrest, fines, and criminal records that may make it harder for them to find permanent housing or employment. These ordinances are not only unconstitutional—they are bad public policy.

Criminalizing poverty is unconstitutional

Anti-panhandling and anti-camping ordinances frequently run afoul of the First and Eighth Amendments to the U.S. Constitution.

Anti-panhandling ordinances

Panhandling, commonly understood as the act of soliciting or requesting donations (oftentimes in order to meet basic needs), is a form of speech that is protected by the First Amendment.¹ The United States Supreme Court has also recognized that “solicitation of charitable contributions is protected speech.”²

Courts evaluating the constitutionality of anti-panhandling ordinances will look to three things: whether the speech/conduct is protected; whether the areas impacted constitute “traditional public fora”; and whether the ordinance regulates speech without regard for its conduct.³ Sidewalks and public ways are unquestionably considered public fora,⁴ and regulations targeting requests for donations unquestionably target the content of a person’s speech.

Kansas laws targeting the solicitation of donations may violate the First Amendment under the test described above. In *Brewer v. City*

of Albuquerque, the Tenth Circuit Court of Appeals concluded that Albuquerque’s ordinance, which regulated “pedestrian presence in and around roadways,” violates the First Amendment.⁵ In another case challenging a panhandling ordinance in Oklahoma City, the Tenth Circuit likewise allowed a case to go forward on the theory that the ordinance violated the First Amendment.⁶ In *Evans v. Sandy City*, though the Tenth Circuit court did not find the specific ordinance unconstitutional, the case did assume that “panhandling is protected under the First Amendment” and noted other circuits that have determined panhandling is protected speech.⁷ Cases from other jurisdictions

¹ See *Messina v. City of Fort Lauderdale*, 2021 U.S. Dist. LEXIS 116963 at *15 (S.D. Fla. 2021) (“[p]anhandling is protected speech under the First Amendment.”) (citations omitted);

² See *Riley v. Nat’l Fed’n of Blind*, 487 U.S. 789 (1988) (footnote omitted) (“[o]ur prior cases teach that the solicitation of charitable contributions is protected speech.”). Although the court does not speak directly to panhandling, lower courts have interpreted this language to encompass the practice.

³ See *Brewer* at *23 (10th Cir. 2021).

⁴ *McCullen v. Coakley*, 573 U.S. 464, 476 (2014) (citations omitted) (sidewalks and public ways are public fora because they “have immemorially been held in trust for the use of the public and, time out of mind, have been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions.”).

⁵ *Brewer, et al. v. City of Albuquerque*, No. 19-2140, at *3 (10th Cir. 2021).

⁶ *McCraw v. City of Okla. City*, 973 F.3d 1057, 1061 (10th Cir. 2020).

⁷ *Evans v. Sandy City*, 2019 U.S. App. LEXIS 35930 at *3 (10th Cir. 2019); See *Evans* at *3, 24.

also suggest that ordinances criminalizing panhandling will not pass constitutional muster. In *Messina v. City of Fort Lauderdale*, for example, the court recognized that restrictions on speech—including panhandling—must be a) narrowly tailored to serve a government interest and b) “leave open ample alternative channels for communication of the information.”⁸

Anti-camping ordinances

Like anti-panhandling ordinances, laws that punish sleeping in public raise serious constitutional concerns. Courts have routinely held that laws criminalizing the act of sleeping in public when there is no shelter space available violate the Eighth Amendment. In *Martin v. City of Boise*, the Ninth Circuit held that “so long as there is a greater number of homeless individuals in [a jurisdiction] than the number of available beds [in shelters],” the jurisdiction cannot prosecute homeless individuals for “involuntarily

sitting, lying, and sleeping in public.”⁹ The court concluded “that a municipality cannot criminalize such behavior consistently with the Eighth Amendment when no sleeping space is practically available in any shelter.”¹⁰ In 2020, the Supreme Court declined to review the Ninth Circuit’s decision in *Martin*, thereby rendering that decision the law of the land.

Kansas courts have adopted the Ninth Circuit’s reasoning in *Martin*. In *Cochran v. City of Wichita*, the court found that Wichita’s camping ordinance “does not criminalize involuntary behavior as an individual cannot be charged with a violation of the camping ordinance when there are no open beds in a shelter. Therefore, the camping ordinance specifically targets voluntary conduct and does not violate Plaintiff’s Eighth Amendment rights.”¹¹ Anti-camping ordinances in Kansas communities that allow for enforcement when shelter space is unavailable are unconstitutional.

Criminalizing poverty is harmful

In addition to being unconstitutional, laws targeting those living in poverty are also bad public policy. Anti-panhandling laws can deter community members from choosing to panhandle out of fear that they will be prosecuted under such a law. This has an unconstitutional chilling effect and may discourage vulnerable people from seeking help and resources when they need it most.¹² When anti-camping ordinances are passed, it is a clear signal to the houseless community that they are not welcome in that community, that their basic human functions will be met with punishment, and/or that their property will be destroyed when the ordinance is enforced.

The penalty provisions of anti-panhandling and anti-camping ordinances also further exacerbate poverty. Further, “[b]ecause people

⁸ *Messina v. City of Fort Lauderdale*, 2021 U.S. Dist. LEXIS 116963 at *61-62 (S.D. Fla. 2021); *Messina* at *16 (citing to *McCullen v. Coakley*, 573 U.S. 464, 477, 134 S. Ct. 2518, 189 L. ed. 2d 502 (2014)) (additional citation omitted).

⁹ *Martin* at 617.

¹⁰ *Martin* at 618.

¹¹ *Cochran v. City of Wichita*, 2018 U.S. Dist. LEXIS 165285 at *23 (D. Kan. 2018) (citation omitted).

¹² *Messina* at 6; *Cross v. City of Sarasota*, 2016 U.S. Dist. LEXIS 80772 at *11 (M.D. Fla. 2016) (citation omitted) (dismissed in part by *Cross v. City of Sarasota*, 2016 U.S. Dist. LEXIS 152615 (M.D. Fla. 2016)).

¹³ National Law Center on Homelessness & Poverty, Housing Not Handcuffs Fact Sheet, <https://housingnothandcuffs.org/wp-content/uploads/2016/07/HNH-Crim-One-Pager.pdf>

¹⁴ Peter B. Edelman, Criminalization of Poverty: Much More To Do, *Duke Law Journal*, April 2020, <https://dlj.law.duke.edu/2020/04/criminalizationofpoverty/> (citation omitted).

¹⁵ Homes Not Handcuffs: How Austin Criminalizes Homelessness, grassroots leadership, <https://grassrootsleadership.org/reports/homes-not-handcuffs-how-austin-criminalizes-homelessness>.

¹⁶ Peter B. Edelman, Criminalization of Poverty: Much More To Do, *Duke Law Journal*, April 2020, <https://dlj.law.duke.edu/2020/04/criminalizationofpoverty/> (citation omitted).

experiencing homelessness are not on the street by choice but because they lack choices, criminal and civil punishment serves no constructive purpose.”¹³ First, a fine could create a significant burden for someone that is panhandling or sleeping on the street who is already unable to pay for basic life necessities. Second, imprisonment even for short periods of time can have significant impacts on a person’s health and well-being. For those who are employed and working hard to improve their financial situation, citations and arrests can cause them to miss work, which will further drive them into poverty. As such, penalties under these ordinances further compound the problems faced by houseless communities. Specifically, “collateral consequences further the cycle of the criminalization of poverty.”¹⁴

Criminalizing poverty is also expensive for local governments: the money spent on policing, arresting, citing, adjudicating, and jailing a person for anti-panhandling or anti-camping ordinance violations would be much better spent providing the houseless community with resources and a safe

place to sleep.¹⁵ As one legal academic notes, “cities short on revenue have enacted even more ordinances in recent years designed to get homeless individuals to leave the city or otherwise suffer repeated stints in jail.”¹⁶ This is fiscally unsound policy. “Instead of wasting significant amounts of money on criminalization,” cities should consider investing their limited resources on providing supports and services to houseless communities.¹⁷

Criminalizing poverty serves no member of the community. Anti-poverty ordinances harm the houseless community: “[i]nstead of helping people escape life on the streets, criminalization creates a costly revolving door that circulates individuals experiencing homelessness from the street to the criminal justice system and back, wasting resources that could otherwise go to solving the problem.”¹⁸ These communities do not need their survival actions to be criminalized; they need support, as “homeless individuals often face intersectional challenges relating to income, housing, and mental health needs.”¹⁹ And support is a feasible

option that cities can invest in: “[i]n city after city, where laws and policies are changed to reduce the city’s reliance on law enforcement and instead invest in affordable, supportive housing, it gets homeless people off the streets far more effectively and far more cheaply than endlessly cycling people through courts, jails, and back onto the streets.”²⁰

Laws targeting houseless communities in Kansas

Multiple cities in Kansas have passed, or attempted to pass, laws that criminalize poverty. Topeka has an anti-camping ordinance that bars any sort of camping or storage of personal property within a specified area.²¹ And while the ordinance provides a notice requirement for the seizure of personal property, it also gives law enforcement significant leeway to seize personal property without notice if they subjectively believe there is an “immediate threat.”²² Topeka’s ordinance carries a potential fine of \$499 and 30 days in jail. In Lawrence, an ordinance bars camping on private property and public property or a public

¹⁷ ACLU-WA & HRAP Ltr. Re. DOJ Statement of Interest in *Bell v. Boise*, ACLU Washington August 19, 2015, <https://www.aclu-wa.org/docs/aclu-wa-hrap-ltr-re-doj-statement-interest-bell-v-boise> (citation omitted) (cite provides access to link to download). ¹⁸ National Law Center on Homelessness & Poverty, *Housing Not Handcuffs Fact Sheet*, <https://housingnothandcuffs.org/wp-content/uploads/2016/07/HNH-Crim-One-Pager.pdf>. ¹⁹ Peter B. Edelman, *Criminalization of Poverty: Much More To Do*, *Duke Law Journal*, April 2020, <https://dlj.law.duke.edu/2020/04/criminalizationofpoverty/>. ²⁰ National Law Center on Homelessness & Poverty, *Housing Not Handcuffs Fact Sheet*, <https://housingnothandcuffs.org/wp-content/uploads/2016/07/HNH-Crim-One-Pager.pdf>. ²¹ Topeka Municipal Code § 9.45.360.

right of way.²⁴ It carries a potential fine of \$1000 and 6 months in jail.²⁵ In a December 2019 letter, the ACLU of Kansas highlighted problems with the original ordinance, which did not provide a carve out for when no shelter space was available.²⁶ In June 2020, the city revised the ordinance to ensure it would not be enforced when the city's shelter is full.

Wichita's ordinance bars camping on any public property.²⁷ However, this ordinance does have a carve out for temporary permits to allow camping "or storage of personal property on public property."²⁸ And, recently, Leavenworth passed an anti-camping ordinance that bars "camping," defined as: "specified activities" when it "reasonably appears" that the individual is using the area as a "living accommodation."²⁹ The ordinance bars individuals from residing outside anywhere in Leavenworth, and in this way, seems specifically tailored to push houseless people out of Leavenworth.

In 2021, the National Homelessness Law Center and the ACLU of Kansas sent a letter to the Leavenworth mayor,

mayor pro-tem, and commissioners raising the concern that Leavenworth's proposed ordinance falls afoul of the ruling in *Martin v. Boise*, urging them to vote against the proposed ordinance and work on more constructive solutions. Thereafter, Leavenworth made a change to the ordinance by adding an affirmative defense that "if all the local homeless shelters defendant would qualify to attend were full on the date of the offense" prior to passing the ordinance.³⁰

However, this affirmative defense is not sufficient because it places the onus on individuals to assert a legal right not to be prosecuted, rather than preventing unconstitutional enforcement of the law in the first place.

Kansas towns have also adopted anti-panhandling ordinances, despite the constitutional implications described above. In February 2021, the City of Merriam passed an anti-panhandling ordinance.³¹ Under the ordinance, "[i]t shall be unlawful for any person to stand, sit, or otherwise go upon any median or roadway or remain upon or alongside any median or roadway

at any of the [specified] intersections" noted in the ordinance.³² Further, upon conviction, (as previously referenced) a person guilty of violating this section shall be sentenced to a fine not to exceed \$499.00 and/or imprisonment not to exceed thirty (30) days."³³

Criminalizing poverty needs to end

Laws criminalizing poverty are often justified by claims of safety, order, and health. But many of these laws are unconstitutional, either as written or as applied. These laws cause deep harm for houseless communities, driving them further into poverty or unnecessarily ensnaring them in the criminal legal system. It is imperative that we take action to repeal these types of laws and defend and support houseless communities in Kansas. Policy solutions should focus on providing homes and services, rather than handcuffs and exorbitant fines, so we can move away from criminalization and towards building better futures for all Kansans.

²² § 9.45.380. ²³ § 9.45.400. ²⁴ Code of the City of Lawrence, § 14-417(B),(C). ²⁵ § 14-417(D). ²⁶ <https://www.aclukansas.org/en/letter-city-lawrence-re-anti-camping-ordinance> ²⁷ Wichita, Kansas – Code of Ordinances, § 5.20.020 ²⁸ §§ 5.20.020, 5.20.040. ²⁹ Ordinance No. 8170. ³⁰ Ordinance No. 8170. ³¹ The ordinance can be found in the Code of Ordinances at Chapter 68, Article II, Division 2, Sec. 68-50. ³² Code of Ordinances – Merriam, Kansas § 68-50(b). ³³ § 68-50(e).