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From Jail, a Panhandler Fights New York's Loitering Law as a Violation of Free Speech

By [FERNANDA SANTOS](#)

NEW ROCHELLE, N.Y., May 29 — A homeless panhandler arrested here six months ago on loitering charges is contending in court that a state law banning begging violates his right to free speech. The man, Eric Hoffstead, started living on the streets about a year ago and was arrested after asking a police officer for a dollar; he urged his court-appointed lawyer to challenge the arrest after reading a newspaper article about a similar case.

"I've never been the type of person to let things get the best of me," Mr. Hoffstead, 36, said in an interview at the Westchester County jail. "I'm a fighter, and I'm going to fight this loitering charge until the end."

The state penal code holds that a person is loitering if he "remains or wanders about in a public place for the purpose of begging," but in a ruling that applied specifically to New York City enforcement, the provision was ruled unconstitutional in 1992 by a federal District Court.

Despite that ruling, more than 2,300 people have been arrested statewide for violating it over the last decade, including 442 in 2006.

Constitutional law experts say the decision, in a lawsuit filed on behalf of a group of panhandlers arrested for loitering by the New York Police Department, is not binding on state courts but should serve as a persuasive precedent to state judges considering similar challenges.

David Bookstaver, a spokesman for the state's Office of Court Administration, said that Mr. Hoffstead's arrest "appears to have been an error," and that the judge in the case was reviewing the arrest and would rule perhaps as early as Wednesday.

Even as Mr. Hoffstead tries to overturn his arrest here, another lawyer is pursuing a contempt of court motion on behalf of New York City panhandlers, citing 791 summonses issued by city police officers between June 23, 2005, when a federal judge in Manhattan ordered city authorities to "cease enforcement" of the provision, and Feb. 21, 2007.

The lawyer, Matthew D. Brinckerhoff, has applied to have the case turned into a class-action lawsuit, which would allow him to challenge the constitutionality of the loitering law in courts statewide.

“What’s clear to me is that given the nature of the people who are being harmed here, given the fact that they’re disenfranchised and homeless, nobody cares enough or has the will to take meaningful action to correct this situation,” Mr. Brinckerhoff said.

The United States Supreme Court has struck down several loitering statutes, but it has never considered the particular issue of loitering for the purpose of begging, and whether prohibiting it constitutes a violation of the First Amendment, said Michael C. Dorf, professor of constitutional law at the [Columbia University](#) School of Law.

In upholding the 1992 New York City case, the United States Court of Appeals for the Second Circuit said begging constituted “protected communicative conduct, and city streets and parks were classified as a traditional public forum.”

“A lawyer is certainly entitled to make the argument that the lower federal courts have ruled the law unconstitutional and tell the state it should be persuaded by this ruling,” Professor Dorf said. “The state, however, is free to issue a decision based on its own interpretation of the Constitution.”

Markus D. Dubber, a professor at the School of Law at the State University of New York at Buffalo, said it was “very unusual” for state judges to rule in opposition to prior federal court decisions, even if those decisions were not binding.

Mr. Hoffstead’s lawyer, Carl D. Birman, summed up his argument in an interview on May 17: “If the federal courts rule that a law is unconstitutional in New York City,” he said, “it ought to be deemed unconstitutional across New York State.”

John M. Caher, a spokesman for the New York State Division of Criminal Justice Services, said most of the 2,338 arrests statewide on a charge of loitering for begging — a violation, a lower-level crime than a misdemeanor — accompanied other, more serious charges.

Mr. Hoffstead, for example, also faces a charge of possession of a controlled substance, since an officer found a pipe with crack cocaine residue tucked inside one of his jacket cuffs when he was arrested. Mr. Birman contends that the drug charge should be dismissed because it stems from an unlawful arrest.

In the jailhouse interview on May 17, Mr. Hoffstead said he worked for about 12 years as a barber but lost his job and, eventually, his home after he started using drugs. Since 1994, he has amassed more than a dozen misdemeanor arrests, on charged including trespassing, petty larceny and drug possession.

Since he lost his home, he has roamed the streets here, sleeping at the train station, in boarded-up homes or on friends' couches, he said.

On Nov. 29, the day he was arrested, Mr. Hoffstead said, he had quarreled with a friend he was staying with and decided to take a walk to "blow off some steam." According to a police report of the incident, Mr. Hoffstead approached a few people on the sidewalk near the corner of Washington and Webster Avenues, as officers watched.

At one point, one of the officers approached Mr. Hoffstead, who, in turn, asked: "Do you have a dollar you can spare?" The officer, Timothy Adrian, arrested Mr. Hoffstead "for violating Penal Law Section 240.35 (loitering/begging)," according to the police report.

Mr. Hoffstead was released on his own recognizance on Dec. 5, but was arrested again in February, after the court issued a warrant for his arrest because he had missed a court appearance in the loitering case. He remained behind bars until May 18, when a friend posted the \$250 bail. He was returned to the county jail last Wednesday, after the police here picked him up again on charges of trespassing at a public housing project.

Mr. Birman, his lawyer, credits Mr. Hoffstead with spotting a newspaper article's mention of the federal court case against the New York Police Department, thus providing him with ammunition to petition for the dismissal of the case.

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