

Winter 1995

## Begging and the First Amendment

Jonathan Mallamud  
*Rutgers*

Follow this and additional works at: <https://scholarcommons.sc.edu/sclr>



Part of the [Law Commons](#)

---

### Recommended Citation

Jonathan Mallamud, Begging and the First Amendment, 46 S. C. L. Rev. 215 (1995).

This Article is brought to you by the Law Reviews and Journals at Scholar Commons. It has been accepted for inclusion in South Carolina Law Review by an authorized editor of Scholar Commons. For more information, please contact [digres@mailbox.sc.edu](mailto:digres@mailbox.sc.edu).

# SOUTH CAROLINA LAW REVIEW

VOLUME 46

WINTER 1995

NUMBER 2

## Begging and the First Amendment

JONATHAN MALLAMUD\*

I.	INTRODUCTION . . . . .	215
II.	BEGGING UNDER PRESENT DOCTRINE . . . . .	216
	<i>A. Introduction</i> . . . . .	216
	<i>B. Commercial Speech</i> . . . . .	219
	<i>C. Public Forum Doctrine</i> . . . . .	220
	<i>D. Charitable Solicitation</i> . . . . .	222
	<i>E. The O'Brien Test</i> . . . . .	225
	<i>F. Time, Place, and Manner</i> . . . . .	228
	<i>G. Conclusion</i> . . . . .	229
III.	BEGGING AS UNPROTECTED CONDUCT UNDER "FREEDOM OF SPEECH" ANALYSIS . . . . .	230
IV.	CONCLUSION . . . . .	234

### I. INTRODUCTION

Whether begging is speech protected by the First Amendment to the United States Constitution presents important questions about the rights of less fortunate citizens and the ability of government officials to control the public environment. The question also raises provocative doctrinal issues.

Although the Supreme Court has not decided whether begging is protected by the Free Speech Clause of the First Amendment, the Court has held that solicitation is protected speech.<sup>1</sup> Restrictions of commercial solicitation "need only be tailored in a reasonable manner to serve a substantial state interest in order to survive First Amendment scrutiny."<sup>2</sup> Thus, if begging is characterized as commercial solicitation, it certainly is possible, although not clear, that state and local governments will be able to justify regulating begging. Given the state of First Amendment law, any analysis of begging under the First

---

\* Professor of Law, Rutgers-The State University-School of Law-Camden. A.B. 1958, Oberlin College; J.D. 1961, Harvard University.

1. See *Edenfield v. Fane*, 113 S. Ct. 1792, 1797 (1993).

2. *Id.* at 1798.

Amendment also must consider the cases about charitable solicitation<sup>3</sup> and the application of the test set forth by the Supreme Court in *United States v. O'Brien*<sup>4</sup> for laws that regulate conduct and have an incidental effect on speech.

In 1990 the Second Circuit Court of Appeals held in *Young v. New York City Transit Authority*<sup>5</sup> that begging could be prohibited in the New York City subways.<sup>6</sup> In July 1993 another panel of the Second Circuit held in *Loper v. New York City Police Department*<sup>7</sup> that a generally applicable prohibition of begging violated the First Amendment.<sup>8</sup> Although it might seem fairly easy to explain the difference in results by reference to the public forum doctrine,<sup>9</sup> whether begging is protected raises issues that go beyond the public forum doctrine. The opinions in these cases show a sharp contrast in approach. Unlike the panel in *Loper*, the *Young* court found that the goal of the beggar, to obtain money, renders the activity conduct rather than speech.<sup>10</sup> There is substantial merit in that approach, and Part II of this Article will argue for its use by the Supreme Court. First, though, Part I will discuss the question of protecting begging under present First Amendment doctrine.

## II. BEGGING UNDER PRESENT DOCTRINE

### A. Introduction

Begging, as used here, refers to requests for money as well as the receipt of money under circumstances in which the giver expects nothing in return. Usually, the giver assumes, either because of the appearance of, or representations made by, the one requesting money, that the recipient needs the money to obtain the basic necessities of life. One writer used the term “personal

3. Two recent Supreme Court cases are *International Soc’y for Krishna Consciousness, Inc. v. Lee*, 112 S. Ct. 2701 (1992) [hereinafter ISKCON I] and *Lee v. International Soc’y for Krishna Consciousness, Inc.*, 112 S. Ct. 2709 (1992) [hereinafter ISKCON II]. Note that the concurring and dissenting opinions in both cases are printed following the Court’s opinion in ISKCON II.

4. 391 U.S. 367, 377 (1968).

5. 903 F.2d 146 (2d Cir.), *cert. denied*, 498 U.S. 984 (1990) (mem).

6. *Id.* at 148.

7. 999 F.2d 699 (2d Cir. 1993).

8. *Id.* at 706; *accord* Blair v. Shanahan, 775 F. Supp. 1315 (N.D. Cal. 1991); C.C.B. v. Florida, 458 So. 2d 47 (Fla. Dist. Ct. App. 1984). *Contra* People v. Zimmerman, 19 Cal. Rptr. 2d 486 (Cal. App. Dep’t. Super. Ct. 1993).

9. The generally applicable prohibition extended to the streets and sidewalks of New York, areas that constitute public fora, *see, e.g.*, *Hague v. Committee for Indus. Org.*, 307 U.S. 496, 515 (1939), whereas the subways arguably do not constitute public fora. *See Young*, 903 F.2d at 162.

10. 903 F.2d at 154. The court did not rest its decision on that distinction. *Id.*

begging” to describe the activity.<sup>11</sup> Because most people have sympathy for the plight of the homeless and other needy people, there is a tendency for that sympathy to drive the discussion of whether begging constitutes protected speech. For example, Helen Hershkoff and Adam S. Cohen, in arguing that prohibitions on begging violate the First Amendment, begin their article by focusing on the plight of an individual beggar, “a poor woman with serious medical problems . . . [who] was telling passersby that she was hungry . . . .”<sup>12</sup> The authors seem to take the position that to allow begging will result in a wider awareness of the problems of the homeless, an awareness that presumably might apply political pressure to remedy the underlying conditions that give rise to begging. As they see it, begging serves the underlying purposes of the First Amendment precisely because of its “engagement value.”<sup>13</sup> They describe engagement value in the following terms:

Mainstream listeners find begging profoundly disturbing in part because it violates the rule of phantom normalcy. The presence of beggars makes it impossible for them to be oblivious to the poverty in their midst. A simple walk down the street becomes a grim confrontation with a poor person telling her story. The interruption may annoy the listener; he may have no interest in being drawn into contact with a person society tells him to regard as strange and unstable.<sup>14</sup>

That the intrusion may annoy or even threaten passersby suggests to some people that it may constitute an invasion of one’s personal space. After all, while someone may have the freedom to speak, others do not have an obligation to listen. Begging presents a conflict precisely because of its intrusive nature.

Engagement value implicates personal privacy concerns that presumably the government may act to protect. Undoubtedly the presence of beggars may highlight the existence of serious problems that warrant public concern. Similarly, certain kinds of criminal activity highlight social problems. For instance, blocking access to abortion clinics or killing doctors who perform abortions may have the intended effect of communicating opposition to abortion. But the question of whether the First Amendment insulates begging from regulation is decided by addressing the conflict, not by avoiding its existence. Thus, one cannot help but wonder whether some peoples’ desire to treat begging as protected speech reflects less a concern with speech and

---

11. Paul G. Chevigny, *Begging and the First Amendment: Young v. New York City Transit Authority*, 57 BROOK. L. REV. 525, 526 (1991).

12. Helen Hershkoff & Adam S. Cohen, Commentary, *Begging to Differ: The First Amendment and the Right to Beg*, 104 HARV. L. REV. 896, 896 (1991).

13. *Id.* at 910-16.

14. *Id.* at 912.

debate than a concern with the underlying social problem. As Hershkoff and Cohen see it:

[laws that prohibit begging] are also troubling because they silence debate about social policies toward the poor. Large numbers of Americans are homeless, destitute, and hungry. Our society has chosen not to alleviate their plight. Prohibiting begging tells the poor not only that they must suffer, but also that they will be punished by making direct requests for help.<sup>15</sup>

On the other hand, begging itself probably will not solve the problems of the poor and the homeless,<sup>16</sup> and its protection may seriously undermine the ability of the police to protect the urban environment.<sup>17</sup> While the cause of the poor may be meritorious, the question of whether the First Amendment protects begging should not hinge on whether the poor deserve protection.<sup>18</sup> Rather, courts must apply First Amendment doctrine to determine whether governmental regulation or suppression of begging protects legitimate interests or suppresses protected communication. Although the Supreme Court has not spoken on the issue, two Justices have made comments that reflect the conflict inherent in the issue. In *United States v. Kokinda*<sup>19</sup> Justice O'Connor observed (for herself, Chief Justice Rehnquist, and Justices White and Scalia) that "residents of metropolitan areas know from daily experience, confronta-

15. *Id.* at 896-97.

16. *See* Chevigny, *supra* note 11, at 527.

17. In *Loper v. New York City Police Dep't*, 999 F.2d 699 (2d Cir. 1993), the police

assert[ed] that beggars tend to congregate in certain areas and become more aggressive as they do so. Residents are intimidated and local businesses suffer accordingly. Panhandlers are said to station themselves in front of banks, bus stops, automated teller machines and parking lots and frequently engage in conduct described as "intimidating" and "coercive." Panhandlers have been known to block the sidewalk, follow people down the street and threaten those who do not give them money. It is said that they often make false and fraudulent representations to induce passers-by to part with their money.

*Id.* at 701. The court held that the general ban on begging nevertheless violated the First Amendment. *Id.* at 706.

18. In light of *Brown v. Board of Education*, 347 U.S. 483 (1954), one certainly can argue that courts should protect the politically powerless. *See, e.g.*, *United States v. Carolene Prods. Co.*, 304 U.S. 144, 152-53 n.4 (1938); JOHN H. ELY, *DEMOCRACY AND DISTRUST* 103 (1980). But that argument relates more to equal protection rather than to what constitutes protected expression. In any event, such an argument has not led the courts to reorder political priorities in the distribution of resources. *See Weinburger v. Salfi*, 422 U.S. 749 (1975); *Lindsey v. Normet*, 405 U.S. 56 (1972); *Dandridge v. Williams*, 397 U.S. 471 (1970).

19. 497 U.S. 720 (1990) (plurality opinion).

tion by a person asking for money disrupts passage and is more intrusive and intimidating than an encounter with a person giving out information.”<sup>20</sup> She subsequently repeated the statement in *ISKCON I* when she concurred in upholding a ban on solicitation in an airport.<sup>21</sup> However, Justice O’Connor joined the Court in striking down a ban on leafletting in *ISKCON II*.<sup>22</sup> Justice Souter, dissenting in *ISKCON I* (he would have held that a ban on solicitation also violated the First Amendment), commented, “While a solicitor can be insistent, a pedestrian on the street or airport concourse can simply walk away or walk on.”<sup>23</sup>

### B. Commercial Speech

Arguably, begging constitutes commercial solicitation because it involves the transfer of money to a person who uses it for his own purposes. As such, it would enjoy First Amendment protection but to a lesser degree than other forms of protected speech.<sup>24</sup> One advocate for full First Amendment protection of begging argued that begging cannot be commercial speech because the one who gives money to a beggar receives nothing in return.<sup>25</sup> That reasoning fails to consider that money goes to the beggar for the beggar’s personal use. Thus, since begging is for personal gain and lacks an eleemosynary motive, it more closely resembles commercial solicitation than charitable solicitation.

In *Edenfield v. Fane*<sup>26</sup> the Supreme Court struck down a ban on client solicitation by certified public accountants “in the business context.”<sup>27</sup> The Court found that the solicitation was “commercial expression to which the protections of the First Amendment apply.”<sup>28</sup> Because the regulated speech was commercial solicitation, the Court held that the regulation at issue “need

20. *Id.* at 734.

21. *ISKCON II*, 112 S. Ct. at 2713.

22. *Id.* 2713-15.

23. *Id.* at 2725 (concurring and dissenting opinion).

24. See *Central Hudson Gas & Elec. Corp. v. Public Serv. Comm’n*, 447 U.S. 557 (1980); *Bates v. State Bar*, 433 U.S. 350 (1977); *Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748 (1976).

25. Charles F. Knapp, Note, *Statutory Restriction of Panhandling in Light of Young v. New York City Transit: Are States Begging Out of First Amendment Proscriptions?*, 76 IOWA L. REV. 405, 419-20 (1991).

26. 113 S. Ct. 1792 (1993).

27. *Id.* at 1796. Given the context of the discussion, the Supreme Court might be more inclined to uphold such a ban outside of the commercial context. The Court found that solicitation posed none of the dangers that in-person solicitation by lawyers could pose because “Fane’s prospective clients are sophisticated and experienced business executives . . . .” *Id.* at 1802-03.

28. *Id.* at 1797.

only be tailored in a reasonable manner to serve a substantial state interest in order to survive First Amendment scrutiny.<sup>29</sup> The Court distinguished *Ohralik v. Ohio State Bar Ass'n*,<sup>30</sup> a case that upheld the regulation of in-person solicitation by lawyers. In doing so, Justice Kennedy, writing for the Court, explained that “the constitutionality of a ban on personal solicitation will depend upon the identity of the parties and the precise circumstances of the solicitation.”<sup>31</sup> Justice Kennedy also pointed out, “Even solicitation that is neither fraudulent nor deceptive may be pressed with such frequency or vehemence as to intimidate, vex, or harass the recipient. In *Ohralik*, we made explicit that ‘protection of the public from these aspects of solicitation is a legitimate and important state interest.’”<sup>32</sup> This standard would not be hard for a government to meet in trying to justify the prohibition of begging.

In *Fane* the State sought to prohibit accountants from soliciting clients of other accountants. The Court characterized the targets of the solicitation as “sophisticated and experienced business executives who understand well the services that a CPA offers.”<sup>33</sup> To uphold a regulation of speech, the government must “demonstrate that it is regulating speech in order to address what is in fact a serious problem and that the preventative measure it proposes will contribute in a material way to solving that problem.”<sup>34</sup> In *Fane* the State simply failed to show that the speech restriction advanced a substantial governmental interest.<sup>35</sup> Thus, assuming that a state or local government could show that beggars on the street have adverse effects on the environment and are intimidating to many pedestrians, there is a substantial likelihood that begging could be circumscribed or prohibited if the courts find that begging constitutes commercial speech.

### C. Public Forum Doctrine

Government regulation of speech “on government property that has traditionally been available for public expression is subject to the highest scrutiny.”<sup>36</sup> In a general statement joined only by Justice Black, Justice

---

29. *Id.* at 1798 (citations omitted).

30. 436 U.S. 447 (1978).

31. *Fane*, 113 S. Ct. at 1802.

32. *Id.* at 1799 (quoting *Ohralik*, 436 U.S. at 462).

33. *Id.* at 1803.

34. *Id.*

35. *Id.* at 1804.

36. *ISKON I*, 112 S. Ct. 2701, 2705 (1992). For a recent extensive discussion of the public forum doctrine see David S. Day, *The End of the Public Forum Doctrine*, 78 *IOWA L. REV.* 143 (1992). Day finds that the doctrine as presently applied by the Court no longer serves to protect free speech. *Id.* at 202-03. However, a critical discussion of public forum doctrine is beyond the scope of this article and therefore this is not the place to deal with his criticism of the Court's

Roberts wrote, “[Parks and streets] 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.”<sup>37</sup> To take that statement and elevate it to a requirement that government may only regulate expression in the streets by regulations that are narrowly tailored to serve compelling government interests could seriously interfere with the government’s ability to keep order. As the Ninth Circuit Court of Appeals put it, “To conclude that streets may generally be categorized as traditional public fora may not require us to also conclude that the streets at all times and under all circumstances are susceptible to characterization as a perpetual public forum uniquely available for free expression.”<sup>38</sup> That court upheld a ban against solicitation of occupants of vehicles temporarily stopped on city streets.<sup>39</sup> Another court made a similar point in upholding a ban on solicitation of employment from a vehicle or by a pedestrian on a street.<sup>40</sup> It is too simplistic to deem streets free and open to communication without taking into account the multiple uses to which streets traditionally have been put.

Whether begging is protected does not necessarily turn on the public forum doctrine. Begging is solicitation and arguably differs from using streets for meetings and parades or simply standing on the sidewalk holding a sign. Although in *ISKCON I* the Supreme Court upheld a ban on solicitation in airports on the grounds that an airport is not a public forum,<sup>41</sup> Justice Kennedy agreed that the ban survived First Amendment scrutiny even though he thought that the airport was a public forum.<sup>42</sup> As he put it:

[T]he Port Authority’s ban on the “solicitation and receipt of funds” within its airport terminals should be upheld under the standards applicable to speech regulations in public forums. The regulation may be upheld as either a reasonable time, place, and manner restriction, or as a regulation directed at the nonspeech element of expressive conduct.<sup>43</sup>

---

current version of the doctrine.

37. *Hague v. Committee for Indus. Org.*, 307 U.S. 496, 515 (1939). Justice Roberts also stated in the same paragraph that such use was “not absolute, but relative, and must be exercised in subordination to the general comfort and convenience, and in consonance with peace and good order; but it must not, in the guise of regulation, be abridged or denied.” *Id.* at 516.

38. *Acorn v. City of Phoenix*, 798 F.2d 1260, 1266 (9th Cir. 1986).

39. *Id.* at 1273; *see also* *International Soc’y for Krishna Consciousness of New Orleans, Inc. v. City of Baton Rouge*, 876 F.2d 494 (5th Cir. 1989); *Illinois v. Tosch*, 501 N.E.2d 1253 (Ill. 1986).

40. *Central Am. Refugee Ctr. v. City of Glen Cove*, 753 F. Supp. 437, 440 (E.D.N.Y. 1990).

41. *See* *ISKCON I*, 112 S. Ct. at 2705-06.

42. *See id.* at 2715 (concurring opinion).

43. *Id.* at 2720 (Kennedy, J., concurring).



Under a regime that generally protected begging as pure speech, the public forum doctrine would enable the government to proscribe begging in confined environments such as subways.<sup>44</sup> It also is true that government has far more power to limit speech-related activity in a nonpublic forum than it does in a public one under current doctrine.<sup>45</sup> But the issue with which this Article is concerned goes not to an evaluation of the public forum doctrine but rather to the question of the nature of begging under the First Amendment. While government regulation of begging in a nonpublic forum stands a far better chance of surviving judicial scrutiny, regulation of begging in a public forum might also be upheld. The nature of the forum affects the level of scrutiny but does not necessarily determine the result.<sup>46</sup>

#### D. Charitable Solicitation

Charitable solicitation, in the view taken by the Supreme Court, is so intertwined with the exercise of free speech rights that it must be treated as protected speech.<sup>47</sup> It has been argued that this intertwining arises because soliciting money conveys a message of “the socio-economic and political realities of our economically-stratified system.”<sup>48</sup> *Village of Schaumburg v. Citizens for a Better Environment*<sup>49</sup> is best read as finding action intertwined with speech when advocacy groups utilized solicited funds to exercise free speech. The organizations thereby violated a regulation requiring that seventy-five percent of the money collected be paid out rather than used for administration.<sup>50</sup> In *Schaumburg* the Supreme Court said:

Soliciting financial support is undoubtedly subject to reasonable regulation but the latter must be undertaken with due regard for the reality that solicitation is characteristically intertwined with informative and perhaps persuasive speech seeking support for particular causes or for particular views on economic, political, or social issues, and for the reality that

---

44. See *Young v. New York City Transit Auth.*, 903 F.2d 146 (2d Cir.), cert. denied, 498 U.S. 984 (1990).

45. See, e.g., ISKCON I, 112 S. Ct. at 2708 (applying reasonableness standard to a ban on solicitation in a nonpublic forum). Justice O'Connor, the fifth vote, emphasized that “airports are not public fora thus only begins our inquiry.” *Id.* at 2712 (concurring opinion).

46. Cf. *Clark v. Community for Creative Non-Violence*, 468 U.S. 288 (1984) (upholding a ban on sleeping overnight in the context of a demonstration in government-owned parks). In *Clark*, the government did not question the right of the organizers to demonstrate in those parks.

47. *Riley v. National Fed'n of the Blind of North Carolina, Inc.*, 487 U.S. 781 (1988); *Secretary of State v. Joseph H. Munson Co.*, 467 U.S. 947 (1984); *Village of Schaumburg v. Citizens for a Better Environment*, 444 U.S. 620 (1980).

48. Knapp, *supra* note 25, at 416-17.

49. 444 U.S. 620 (1980).

50. See *Schaumburg*, 444 U.S. at 635-37.

without solicitation the flow of such information and advocacy would likely cease.<sup>51</sup>

In the advocacy-group context, there are two aspects of solicitation that give rise to First Amendment protection; the use of the money collected for advocacy and the advocacy that takes place when the solicitor engages in conversation with the prospective donor. While *Schaumburg* addressed a problem regarding the use of the proceeds of solicitation, the act of solicitation itself discussed in *Schaumburg* also involved “informative and perhaps persuasive” speech. One cannot conclude that because a beggar asks for money for personal use, the beggar’s conduct amounts to advocacy in the sense that the charitable solicitor’s explanation of a charitable cause’s merits or of a political issue amounts to advocacy.<sup>52</sup>

In *Young v. New York City Transit Authority* the Second Circuit distinguished begging from charitable solicitation in these harsh terms: “While organized charities serve community interests by enhancing communication and disseminating ideas, the conduct of begging and panhandling in the subway amounts to nothing less than a menace to the common good.”<sup>53</sup> One need not take such an extreme view of begging to disagree with Judge Meskill, who in *Young* said, “[B]egging is indistinguishable from charitable solicitation for First Amendment purposes. To hold otherwise would mean that an individual’s plight is worthy of less protection in the eyes of the law than the interests addressed by an organized group.”<sup>54</sup>

The distinction does not go to the value placed on the particular cause at issue, but rather to the fact that beggars solicit money for themselves, not to advocate a cause or to use the money to engage in advocacy. Judge Meskill seems to substitute his sympathy for the beggars’ plight for First Amendment analysis. Nothing in the restriction on begging prevents the beggar from engaging in advocacy by discussion or by holding a sign describing the problems of the homeless or the poor. But that point seems to have eluded Judge Meskill, who says, “To suggest that these individuals, who are obviously struggling to survive, are free to engage in First Amendment activity in their spare time ignores the harsh reality of the life of the urban poor.”<sup>55</sup>

51. *Id.* at 632.

52. See *Young v. New York City Transit Auth.*, 903 F.2d 146, 154-58 (2d Cir.), *cert. denied*, 498 U.S. 984 (1990). The court said, “[N]either *Schaumburg* nor its progeny stand for the proposition that begging and panhandling are protected speech under the First Amendment. Rather, these cases hold that there is a sufficient nexus between solicitation by organized charities and a ‘variety of speech interests’ to invoke protection under the First Amendment.” *Id.* at 155.

53. *Id.* at 156.

54. *Id.* at 167 (Meskill, J., concurring and dissenting).

55. *Id.* at 166 (Meskill, J., concurring and dissenting).

Judge Meskill fails to appreciate that the First Amendment protects one's right to be free from a government restriction on communication. If one's personal circumstances do not allow communication, that does not implicate the First Amendment. Beyond that, Judge Meskill's comment seems more concerned with urban poverty, a substantive concern beyond help from an amendment that serves to protect communication from government regulation. As the majority in *Young* said, "[I]t is not the role of this court to resolve all the problems of the homeless, as sympathetic as we may be."<sup>56</sup>

The beggar solicits money for personal support, not for eleemosynary purposes or to engage in political activity. Without financial support, advocacy becomes difficult. That does not mean that we all have a right to financial support. Nor does it mean that seeking money for personal gain, as worthy as we might think the solicitors are, amounts to charitable solicitation.

Nevertheless, in *Loper v. New York City Police Department*<sup>57</sup> a different panel of the Second Circuit found that begging constituted charitable solicitation. That court said:

Begging frequently is accompanied by speech indicating the need for food, shelter, clothing, medical care or transportation. Even without particularized speech, however, the presence of an unkempt and disheveled person holding out his or her hand or a cup to receive a donation itself conveys a message of need for support and assistance. We see little difference between those who solicit for organized charities and those who solicit for themselves in regard to the message conveyed. The former are communicating the needs of others while the latter are communicating their personal needs. Both solicit the charity of others. The distinction is not a significant one for First Amendment purposes.<sup>58</sup>

In light of that statement, little more can be said that would not be repetitious. The distinction lies in soliciting for personal gain as opposed to soliciting for those organized to serve the needs of others or to engage in political advocacy on behalf of others. Beggars, like charitable solicitors, seek something for nothing. Whether seeking something for nothing, by itself, renders one a charity under present doctrine remains open.

---

56. *Young*, 903 F.2d at 156-57.

57. 999 F.2d 699 (2d Cir. 1993).

58. *Id.* at 704.

*E. The O'Brien Test*

Although a request for, and the possible receipt of, money constitutes activity rather than expression, that activity arguably also conveys "a message of need for support and assistance."<sup>59</sup> Thus, arguably the regulation of begging requires application of the test enunciated by the Supreme Court in *United States v. O'Brien*<sup>60</sup> to govern the regulation of conduct that also communicates ideas.<sup>61</sup> Under that test:

[A] government regulation is sufficiently justified if it is within the constitutional power of the Government; if it furthers an important or substantial governmental interest; if the governmental interest is unrelated to the suppression of free expression; and if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest.<sup>62</sup>

Perhaps the most difficult problem here is whether the test applies at all. Regulation of begging is not within the constitutional power of government if begging itself is considered speech. It is on this question that the major controversy rests. Thus, the *O'Brien* test aids little in solving this controversy. Consequently, one must first assume that begging constitutes conduct for the purposes of discussion, then go on to apply the other elements of the test.

In *Loper* the police argued that the ban on begging served the purpose of allowing the police to control many deleterious effects of begging that were within the government's regulatory power.<sup>63</sup> According to the police, some beggars make false or fraudulent representations and others station themselves in front of banks and automatic teller machines; moreover, beggars generally become more aggressive when they are allowed to congregate.<sup>64</sup> Although few arrests were made under the statute, the police still found the prohibition useful in enabling them to control begging and to limit the tendency toward greater aggressiveness and the commission of more serious crimes.<sup>65</sup> The *Loper* court suggested that the police could control the aggressive elements of

---

59. *Id.* at 704.

60. 391 U.S. 367 (1968).

61. *Id.* at 376.

62. *Id.* at 377.

63. *Loper*, 999 F.2d at 701.

64. *Id.*

65. *Id.*

begging by using other statutes<sup>66</sup> and found that the statute in question “in no way advances substantial and important governmental interests.”<sup>67</sup>

The court’s conclusion is difficult to understand. It seems that maintaining public order constitutes an important or at least substantial governmental interest. The *Loper* court took the position that because charitable solicitation was permitted, begging had to be permitted even though the statute permitted soliciting only by those organizations registered with the Secretary of State or falling within a specific exemption in the statute.<sup>68</sup> Presumably this argument asks whether the authorities have a problem with soliciting in general as opposed to soliciting only by beggars. However, the government’s argument is that begging presents a problem, based on the effects of such conduct, that charitable solicitation does not present. This point of view suggests that the government does, in fact, have a substantial interest.

In *United States v. O’Brien*<sup>69</sup> the Supreme Court upheld a conviction for burning a draft card despite the expressive element involved in that act, which took place as part of an antiwar demonstration.<sup>70</sup> The Court did not question the government’s interest in requiring the preservation of the draft card by prohibiting its burning, even though the draft system could have been managed by using other forms of identification. Certainly, begging falls far short of draft card burning as expressive conduct. *O’Brien* enables the courts to separate legitimate regulation from content-based regulation. *O’Brien* does not license the courts to weigh the importance of the government’s interest against the effect of the regulation on speech; rather, it allows the courts to see whether the government acts to further a legitimate interest rather than preventing communication. Thus, under *O’Brien*, when a legitimate government interest exists, as long as it is not trivial, the courts must accept it and proceed to consider the final factor in *O’Brien*, whether “the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest.”<sup>71</sup>

Before turning to that factor, one point needs to be analyzed. In *Loper* the court maintained its argument that the government could not treat beggars differently from organized charities because, in theory, a group of beggars could organize as a charity, solicit money, and pay that money to themselves.<sup>72</sup> However, that problem does not appear to have presented itself as

66. *Id.* at 701-02.

67. *Id.* at 705.

68. 999 F.2d 699, 705 (citing N.Y. EXEC. LAW §§ 172, 172-a (McKinney 1993)).

69. 391 U.S. 367 (1968).

70. *Id.* at 377.

71. *Id.*

72. *Loper*, 999 F.2d 699, 705 (“Certainly, a member of a charitable, religious or other organization who seeks alms for the organization and is also, as a member, a beneficiary of those alms should be treated no differently from one who begs for his or her own account.”).

a substantial, practical concern.<sup>73</sup> Additionally, if a group of beggars organized and registered as required or met the statutory exemptions, it might call into question the ability of the government to police charities to ensure that such organizations do not use solicited funds for their own purposes. On the other hand, the court simply may be eliminating the eleemosynary motivation necessary for an organization to be deemed a charity. If an eleemosynary motivation is not necessary, then perhaps the Court's decision shows that any distinction becomes blurred and difficult to administer at the fringes. Potential manipulation of the term "charity" does not undercut the idea that the government might have a legitimate interest in prohibiting unlicensed begging because of its tendency to lead to substantial harm.

The appropriate question is whether the regulation of all begging satisfies the final factor of the *O'Brien* test, whether the restriction is "essential" to the furtherance of a legitimate interest. The court in *Loper* thought that the prohibition on all begging went too far because peaceful begging "carries no harms of the type enumerated by the [police]."<sup>74</sup> The court appears to be correct if the final prong of the test is read literally; it certainly is possible to read the test to suggest that if any other means could serve the same function and impinge less upon speech, then the regulation fails the test. But such a literal interpretation neglects the holding of *O'Brien* itself, where the government could have used alternate means of identification to identify registrants even if they had burned their draft cards. Indeed, it is inconceivable to think that the government lacked a means to cope with those who negligently or inadvertently lost their draft cards. Yet in *O'Brien* the Supreme Court upheld the prohibition on draft card burning.

More recently, the Supreme Court has made clear that *O'Brien* does not require strict scrutiny of the fit between the statute and the legitimate governmental purpose it serves. In *Ward v. Rock Against Racism*<sup>75</sup> the Court stated that the final prong of the *O'Brien* test is satisfied if the regulation is "narrowly tailored to serve the government's legitimate, content-neutral interests" even though the regulation is not "the least restrictive or least intrusive means of doing so."<sup>76</sup> This reformulation gives the government

---

73. A group of poor and homeless people sell a newspaper called the *Street News* in New York City. Presumably, this activity is protected under the First Amendment, although some might consider it a circumvention of the restrictions on begging. But beggars still abound in far greater numbers than those people selling *Street News*. At this point, the issue has not been presented by the existence of widespread circumvention, which, if it were a problem, would have occurred in the New York City subways. Unless the regulation were shown to be ineffective because of circumvention, the validity of the regulation remains an important issue.

74. 999 F.2d at 706.

75. 491 U.S. 781 (1989).

76. *Id.* at 798. Although the Court was referring to the time, place, and manner standard, the statement follows the Court's criticism of the Court of Appeals' use of *O'Brien*'s least

more leeway in pursuing legitimate objectives but provides little guidance as to when the government's action should survive the test. In the case of begging, the prohibition applies to peaceful as well as aggressive begging and to honest as well as fraudulent requests for money. Consequently, the test leaves courts with the responsibility of weighing the need for the broad regulation in accomplishing the government's purpose. Unfortunately, putting courts in this position encourages them to resort to their personal opinions on begging when rendering their decisions. State or local governments likely regulate or prohibit begging because of the difficulty of attempting to prevent only the aggressive or threatening instances of begging. Rarely will the police be present to witness those specific instances, although they can be prevented by prohibiting begging altogether.

The application of *O'Brien* depends on how one weighs the government's interest against the importance of begging to the communication of the messages about poverty and the plight of the homeless. Thus, while *O'Brien* might serve to raise the issues, the test gives little guidance about how to resolve these issues in the context of begging.

#### *F. Time, Place, and Manner*

In some settings time, place, and manner analysis will not differ from the application of the *O'Brien* test.<sup>77</sup> To the extent that time, place, and manner might differ from *O'Brien*, one could argue that the limitation on begging does not deprive beggars of the ability to communicate their message. Justice Kennedy, concurring in upholding the ban on solicitation in airports in *ISKCON II*,<sup>78</sup> took a slightly different route and distinguished between a ban on in-person solicitation and other kinds of solicitation.<sup>79</sup> Prohibitions on begging are aimed at in-person solicitation and to that extent Justice Kennedy's treatment of solicitation is relevant. In *ISKCON II* he voted to uphold a ban on the immediate solicitation of money because such conduct intensifies the risk of fraud and duress.<sup>80</sup> At the same time, Kennedy suggested that the prohibition survived in part because under the regulation the person soliciting could "continue to disseminate his message," provided he did not accept immediate payment; "for example [the person could] distribut[e] preaddressed envelopes in which potential contributors may mail their donations."<sup>81</sup>

---

intrusive means test and its conclusion that the *O'Brien* test is "little, if any, different from the standard applied to time, place, or manner restrictions." *Id.* (quoting *Clark v. Community for Creative Non-Violence*, 468 U.S. 288, 299 (1984)).

77. *Ward*, 491 U.S. at 798.

78. 112 S. Ct. 2709 (1992) (per curiam).

79. *Id.* at 2723.

80. *Id.* at 2722.

81. *Id.* at 2723.

Viewed in these terms, a ban on begging might be construed as allowing the distribution of preaddressed envelopes, in which case the ban could be viewed as a permissible time, place, and manner regulation.<sup>82</sup>

Nevertheless, the issue really turns on whether one regards the begging itself as speech. It strains logic to analyze the begging prohibition as one that prohibits only one form of soliciting money. It is seriously doubtful that the preaddressed envelope alternative has much meaning in this context. While begging certainly involves in-person solicitation, and evils attach to it, little is gained by trying to uphold the regulation of begging under time, place, and manner analysis. If streets are an inappropriate place for begging, it is not because of time, place, and manner considerations, but rather because of the nature of begging itself.

### G. Conclusion

Current doctrine does not mandate a particular result with respect to the protection of begging under the First Amendment. Since the Supreme Court continues to protect solicitation under the Free Speech Clause of the First Amendment, the various doctrines designed to guide the application of the First Amendment might govern. Those doctrines, as applied to begging, are sufficiently flexible to enable courts to uphold or strike down prohibitions of begging. Lack of precedent coupled with the consequent difficulty of justifying decisions in terms of already enunciated doctrine can create problems in any area of the law. In this context, in which the question of whether the First Amendment should protect begging evokes emotional responses, courts deciding cases under the applicable doctrines retain so much flexibility that their personal opinions about beggars often appear to drive their legal conclusions.

Of course, one would not expect that personal views on begging could be totally eliminated from the analysis. Rather, the problem is that personal views can be expressed in ways that hide them under the guise of the application of the doctrines. When courts address emotive issues in situations that require them to make value judgments, those value judgments should be made apparent. Given the state of the law, courts can apply the various multipart tests established by the Supreme Court to reach whatever conclusion they deem advisable without exposing their own personal values. For a test to have utility it should at least channel the analysis so that the factors that drive the decision become apparent on the face of the opinion even when the test falls short of directing the ultimate conclusion.

---

82. In *ISKCON II*, Justice Kennedy stated that “[t]he regulation may be upheld as either a reasonable time, place, and manner restriction, or as a regulation directed at the nonspeech element of expressive conduct.” *Id.* at 2720.



Another problem arises because begging does not fit neatly within any particular form of doctrinal analysis. Begging is not really charitable solicitation, and whether it fits under *O'Brien* depends upon whether one thinks that begging is primarily a communication of ideas or conduct that incidentally communicates. In *Young v. New York City Transit Authority*<sup>83</sup> the Second Circuit Court of Appeals analyzed begging under the charitable solicitation cases,<sup>84</sup> *O'Brien*,<sup>85</sup> and the public forum analysis,<sup>86</sup> although the court also thought the speech-versus-conduct analysis played an important role in the decision.<sup>87</sup> As stated by the court:

Whether with or without words, the object of begging and panhandling is the transfer of money. Speech simply is not inherent to the act; it is not of the essence of the conduct. Although our holding today does not ultimately rest on an ontological distinction between speech and conduct, we think this case presents a particularly poignant example of how the distinction subsists in right reason and coincides with common sense. To be sure, these qualities ought not to be forsaken in our legal analysis.<sup>88</sup>

To use this analysis for begging when deciding whether begging regulations suppress communication or serve legitimate ends seems more sensible than trying to fit the regulations within one of the present doctrines discussed above.<sup>89</sup> Under current law one first must determine which doctrine applies, a difficult problem in the case of begging. Then, regardless of which doctrine controls, it usually will fail to mandate a result or even provide a useful guide for the decision.

### III. BEGGING AS UNPROTECTED CONDUCT UNDER

#### “FREEDOM OF SPEECH” ANALYSIS

---

83. 903 F.2d 146 (2d Cir. 1990).

84. *Id.* at 154-57.

85. *Id.* at 157-61.

86. *Id.* at 161-62.

87. *Id.* at 152-54.

88. *Young*, 903 F.2d 146, 154.

89. In this context, Professor William Van Alstyne's discussion of “the formal complexity in subsets of First Amendment law” is pertinent. W. VAN ALSTYNE, *FIRST AMENDMENT: CASES AND MATERIALS* 290 n.9 (1991). As Van Alstyne stated,

In the natural life of these systems, however, it is also true that the complexity of ‘the rules’ thus laid down tends inevitably to engender its own uncertainties . . . . There is, moreover, a serious first amendment hazard at risk in these complex approaches. The risk is that one may lose sight of some organizing philosophy common to all first amendment cases in trying too hard to figure out which is the ‘right’ set of rules that technically appear to govern one’s immediate case, and thereby be misled into foregoing access to a far more powerful set of more general observations that might well be important to set matters right.

Supreme Court doctrines often structure analysis and thereby guide the decisions of lower courts. In addition, good doctrines provide useful tools for attorneys and make their task easier. The use of doctrines minimizes the possibility that the values of individual judges will skew their application of the law. By establishing a particular doctrine the Supreme Court weighs competing values and directs the lower courts in their analysis of those values in particular situations. Although the various doctrines described in Part I may be useful in other contexts, they do not provide much guidance when applied to begging regulations.<sup>90</sup> In addition, the very existence of so many doctrines may increase the difficulties for the lower courts due to the necessity of applying multiple doctrines in begging cases.

When doctrines fail to direct conclusions, courts must resort to the use of the relevant values in deciding cases. In the case of begging, courts should decide first whether begging constitutes speech protected by the First Amendment. If the begging is not speech, application of First Amendment doctrine is unnecessary. Although such an analysis is relatively simple, it involves value judgments. To some extent, courts must make value judgments under the various First Amendment doctrines in dealing with begging; however, the courts' use of these settled doctrines tends to obfuscate their own biases. Furthermore, since courts must resort to basic values anyway, there would be less confusion if courts were allowed to rely exclusively on these values rather than having to fit their results, when possible, into a number of different doctrines. The ultimate question turns on whether begging is protected speech.

In ordinary usage, we equate speech with written or oral communication. As a result, a tendency exists to consider the use of words as protected by the First Amendment. But closer analysis reveals that "freedom of speech" covers much less than the word "speech" as ordinarily used.<sup>91</sup> When we recognize

---

90. Justice John Paul Stevens recently noted the difficulties posed by the attempted application of doctrines to particular situations without a consideration of the significance of the facts at issue. He said,

In sum, it seems to me that the attempt to craft black-letter or bright-line rules of First Amendment law often produces unworkable and unsatisfactory results, especially when an exclusive focus on rules of general application obfuscates the specific facts at issue and interests at stake in a given case. . . . Indeed, a litigant's misplaced reliance on propositions of law instead of the special facts of the case may snatch defeat from the jaws of victory.

Justice John Paul Stevens, *The Freedom of Speech*, Address in inaugural Ralph Gregory Elliot First Amendment Lecture at Yale Law School (Oct. 27, 1992), in 102 *YALE L.J.* 1293, 1307 (1993).

91. See Frederick Schauer, *Categories and the First Amendment: A Play in Three Acts*, 34 *VAND. L. REV.* 265, 272-73 (1981).

that people use speech to make contracts, commit perjury, engage in discrimination, extort money, and threaten other's bodily security,<sup>92</sup> it appears more sensible to create a special meaning for the term "freedom of speech."<sup>93</sup> In addition, some communication that we accept as protected, such as flag burning,<sup>94</sup> would strike most people as conduct rather than speech. Nevertheless, flag burning receives constitutional protection, as do other forms of symbolic expression that do not involve the use of words.<sup>95</sup> Thus, "freedom of speech" includes expression that does not normally fit within the ordinary use of the term "speech." Consequently, the idea of protected expression probably fits more closely with "freedom of speech" than with any concept stemming from the ordinary meaning of speech.

Even when doctrines clearly apply to a given case, courts still have to resort to the basic First Amendment values. In the case of subversive speech, for example, courts must distinguish between "advocacy of the use of force" and actual incitement to "imminent lawless action."<sup>96</sup> Consider this famous statement by Justice Oliver Wendell Holmes:

Every idea is an incitement. It offers itself for belief and if believed it is acted on unless some other belief outweighs it or some failure of energy stifles the movement at its birth. The only difference between the expression of an opinion and an incitement in the narrower sense is the speaker's enthusiasm for the result. Eloquence may set fire to reason.<sup>97</sup>

Of course, the fact that every idea is an incitement only means that ideas must not be suppressed (unless imminent unlawful action clearly would follow). As Justice Holmes stated, "[T]he only meaning of free speech is that they should be given their chance and have their way."<sup>98</sup> Even when the Supreme Court

92. *Id.* at 270.

93. *Id.* at 273.

94. *United States v. Eichman*, 496 U.S. 310 (1990); *Texas v. Johnson*, 491 U.S. 397 (1989).

95. *See, e.g.*, *Spence v. Washington*, 418 U.S. 405 (1974) (*per curiam*) (displaying United States flag upside down with a peace symbol taped on it); *Tinker v. Des Moines Indep. Community Sch. Dist.*, 393 U.S. 503 (1969) (wearing black armband to protest United States' policy in Vietnam).

96. *Brandenburg v. Ohio*, 395 U.S. 444, 447-48 (1969) (*per curiam*).

97. *Gitlow v. New York*, 268 U.S. 652, 673 (1925) (dissenting opinion).

98. *Id.* The basic values behind freedom of speech drive this conclusion, but the language of the statement does not lead to a conclusion unless one takes those values into account. The difficulty with many legal doctrines is that words cannot perform the desired task. When a plurality of the Supreme Court adopted Judge Learned Hand's famous modification of the clear and present danger test to discount the "gravity of the evil" by its improbability, they said that Hand's formulation "takes into consideration those factors which we deem relevant, and relates their significances. *More we cannot expect from words.*" *Dennis v. United States*, 341 U.S. 494, 510 (1951) (plurality opinion) (emphasis added).

has formulated useful doctrines, application of the First Amendment's protection of "freedom of speech" often involves a fact-sensitive analysis that is guided primarily by the underlying values of the First Amendment. Thus, when a court must decide whether an activity constitutes protected speech, it does not have to get involved in a novel task.

Whether begging involves protected expression seems relatively easy to decide. A beggar typically wants money and consequently asks passersby for money. The beggar has no intention to communicate his views about the problems of poverty or homelessness. Communication on these issues remains unimpeded by statutes prohibiting begging. The beggar is free to state his views either orally or by means of a picket sign. The prohibition only prevents the request for, and receipt of, money. This simple analysis appears to answer the question. The basic values of the First Amendment are not implicated, and it should not be hard to conclude that begging is not expression protected by the "freedom of speech." In short, the analysis simply involves determining whether the speech, or communicative act, is used to convey thoughts or ideas, to entertain, to provide aesthetic enjoyment, or, conversely, whether the speech constitutes part of a transaction or conduct that is not protected.<sup>99</sup> Where doctrines do not fit because speech does not constitute protected expression under the concept of "freedom of speech," a court should be able to say so and decide the case in accordance with that judgment.

Applying the freedom of speech protections of the First Amendment by distinguishing speech from action is a venerable idea<sup>100</sup> that has not gained wide acceptance.<sup>101</sup> Part of the problem may stem from trying to do too much with First Amendment theories. It is always easy to demolish theories proposed by others in this area because words fail to capture the basic principle of the First Amendment when they are used to try to mandate results in unforeseen cases. At the same time, it seems clear that the First Amendment does not protect the mere use of words. Consider perjury, bribery, and

---

99. Professor Cass Sunstein recently suggested a tiered approach to the First Amendment in which political speech would receive the highest degree of protection. Cass R. Sunstein, *Free Speech Now*, 59 U. CHI. L. REV. 255, 304-07 (1992). Sunstein's definition of political speech requires a kind of analysis that does not seem to differ materially from the approach suggested in the text. Sunstein explained,

For present purposes I will treat speech as political *when it is both intended and received as a contribution to public deliberation about some issue*. It seems implausible to think that words warrant the highest form of protection if the speaker does not even intend to communicate a message; the First Amendment does not put gibberish at the core even if it is taken, by some in the audience, to mean something.

*Id.* at 304.

100. See, e.g., THOMAS I. EMERSON, *THE SYSTEM OF FREEDOM OF EXPRESSION* 19 (1970).

101. See JOHN RAWLS, *POLITICAL LIBERALISM* 345 n.56 (1993); Schauer, *supra* note 91, at 275.

false advertising: all involve the use of words, but none enjoys First Amendment protection.<sup>102</sup> The notion of applying the First Amendment to bribery and perjury is illogical, and presumably the absence of decisions on this point reveals that people do not litigate it. Justice Douglas once explained that falsely shouting fire in a theater is not protected speech because such “speech is brigaded with action.”<sup>103</sup> It is an apt way of making the point.

#### IV. CONCLUSION

I recognize that many people find the regulation of begging morally wrong because they see no harm posed by a simple request for money. Thus, it is easier to defend the prohibition of “aggressive” begging than of begging generally. I have chosen to address begging in general because my argument is that begging does not constitute protected expression under the First Amendment. Sympathy for the plight of the beggar, coupled with a perception that beggars cause annoyance but not harm, probably leads many to conclude that the First Amendment should protect begging. Such a conclusion confuses personal views with the concept of freedom of expression. It certainly would seem heartless to prevent a poverty-stricken homeless person from asking for and receiving help from a sympathetic passerby. However, this line of reasoning does not ask whether expression is being proscribed but whether there exists a legitimate governmental purpose for the prohibition of begging. Arguably, if no such purpose exists, the prohibition would be unconstitutional because it would violate the right to due process under the Fifth or Fourteenth Amendments. The failure of courts to engage in rigorous substantive due process analysis, outside of very limited areas involving fundamental rights,

---

102. See Sunstein, *supra* note 99, at 305 (stating that these and other categories of speech clearly “are not entitled to the highest degree of constitutional protection”); Schauer, *supra* note 91, at 274 (“[C]ontract law, antitrust law, and the like are excluded [from First Amendment protection] for reasons having little if anything to do with the extent or the imminence of the danger. They are excluded, and properly so, because they have nothing to do with what the concept of free speech is all about.”).

103. *Brandenburg v. Ohio*, 395 U.S. 444, 456 (1969) (Douglas, J., concurring). Justice Douglas continued by pointing out that the statement and the action were “inseparable and a prosecution can be launched for the overt acts actually caused.” *Id.* at 456-57. In the case of begging, a verbal or nonverbal request for money is the means by which the transaction is initiated, and the request forms part of the “action” that we call begging or panhandling.

There is some reason to think that the present Supreme Court recognizes the distinction between speech and action as material for decision-making, even if the concept does not find its way into the Court’s doctrine. In *R.A.V. v. City of St. Paul*, 112 S. Ct. 2538 (1992), the Court held that an ordinance prohibiting the burning of a cross violated the freedom of speech protections of the First Amendment. Then, the following Term, the Court held a statute constitutional that provided that a penalty for a crime could be enhanced where a victim was selected because of his race, because the statute was aimed at conduct unprotected by the First Amendment. *Wisconsin v. Mitchell*, 113 S. Ct. 2194, 2201 (1993).

should not justify the misuse of the First Amendment to strike down silly laws.<sup>104</sup>

Begging constitutes a part of a transaction involving the transfer of money. It does not constitute protected expression under the First Amendment. A prohibition on begging prevents the transfer of funds, but it does not prevent the expression of views about the plight of the needy or the homeless. Under present First Amendment doctrines, courts must labor through marginally relevant analyses to decide cases involving prohibitions on begging. The cause of the First Amendment would be better served if, before having to apply First Amendment doctrines, courts could decide whether the regulated activity constituted protected speech. Begging is not protected speech. The reason for this conclusion is better articulated in terms of basic First Amendment values than the variety of arguably applicable Supreme Court doctrines courts currently use.

---

104. Substantive due process is outside the scope of this article; however, substantive due process seems the proper issue if one finds the prohibition of begging unjustified.

