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Picketing and Privacy: Can I Patrol on the Street Where You Live?, 7 S. Ill. U. L.J. 463 (1982)

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Picketing and Privacy: Can I Patrol on the Street Where You Live?

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> I believe that the homes of men . . . can be protected by government from noisy, marching, threatening picketers and demonstrators . . . .
>
> Justice Black concurring in *Gregory v. City of Chicago*†
>
> [The Illinois Residential Picketing Statute's] broad prohibition represents the judgment of the Illinois legislature that any residential picketing—quiet, or raucous, by one picket or 300, for one hour or one day—intrudes upon [the fundamental right of residential privacy].
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> Brief of Defendant Carey in *Brown v. Scott*††
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> The Court today suggests that some picketing activities would have but a "negligible impact on privacy interests," intimating that Illinois could satisfy its interests through more limited restrictions on picketing, such as regulating the hours and numbers of pickets.
>
> Justice Rehnquist dissenting in *Carey v. Brown*†††

I. *CAREY V. BROWN*: THE SUPREME COURT AVOIDS THE ISSUE

On September 6, 1977, at approximately 6:15 p.m., about twenty persons, most of them members of the Committee Against Racism, picketed the home of Michael A. Bilandic, who was then Mayor of the City of Chicago.[1] The picketers were protesting the Mayor's failure to espouse busing to achieve racially integrated public schools.[2] Most of the picketers were arrested and charged with residential picketing[3] and

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† 394 U.S. 111, 125-26 (1969).

†† Brief for Defendant-Appellee at 12, Brown v. Scott, 602 F.2d 791 (7th Cir. 1979), *aff'd sub nom.* Carey v. Brown, 447 U.S. 455 (1980).

††† 447 U.S. 455, 478 (1980).

1. Brown v. Scott, 462 F. Supp. 518, 519 (N.D. Ill. 1978), *rev'd*, 602 F.2d 791 (7th Cir. 1979), *aff'd sub nom.* Carey v. Brown, 447 U.S. 455 (1980). The authors represented the Committee Against Racism and its members in the ensuing litigation, including the state criminal action and the above cited federal proceedings.

2. *Id.*

3. The Illinois Residential Picketing Statute provided:

It is unlawful to picket before or about the residence or dwelling of any person, except

disorderly conduct.[4] Pursuant to a plea agreement, they pled guilty to the charge of residential picketing and were variously sentenced to six months' to one year's supervision.[5] Approximately six months later, they filed a civil rights action[6] in the United States District Court for the Northern District of Illinois. Alleging the facts stated above, they claimed that they wished to engage in residential picketing again but were deterred from doing so by the threat of prosecution under the Illinois Residential Picketing Statute, and that the Statute violated the first and fourteenth amendments to the United States Constitution.[7] On cross-motions for summary judgment, the district court found in favor of the defendants on the merits, holding that the Statute was neither vague, overbroad, nor violative of equal protection.[8] The plaintiffs appealed and the United States Court of Appeals for the Seventh Circuit reversed on the equal protection ground.[9]

The defendants appealed and in a six to three decision the United States Supreme Court affirmed *sub nom Carey v. Brown*.[10] In doing so, the Court considered only the equal protection issue, holding that the Statute violated the equal protection clause because it discriminated among pickets based on the subject matter of their expression, since the Statute excepted from its prohibition the picketing of a residence that was also a place of employment involved in a labor dispute.[11] The Court thus left open the question of whether a statute barring all residential picketing, regardless of subject matter, would be an overbroad restriction of activity protected by the first amendment.[12] That is the question this Article will consider.

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when the residence or dwelling is used as a place of business. However, this Article does not apply to a person peacefully picketing his own residence or dwelling and does not prohibit the peaceful picketing of a place of employment involved in a labor dispute or the place of holding a meeting or assembly on premises commonly used to discuss subjects of general public interest.

ILL. REV. STAT. ch. 38, ¶ 21.1-2 (1979) (declared unconstitutional in Brown v. Scott, 602 F.2d 791 (7th Cir. 1979), *aff'd sub nom.* Carey v. Brown, 447 U.S. 455 (1980) (amended 1980)). There is no officially recorded legislative history. For an unofficial account, see Heinz, Gettleman & Seeskin, *Legislative Politics and the Criminal Law*, 64 NW. U.L. REV. 277, 293-96 (1969).

4. *Brown*, 462 F. Supp. at 519.

5. *Id.*

6. The suit was brought under 42 U.S.C. § 1983 (1976); it sought declaratory and injunctive relief. *Brown*, 426 F. Supp. at 519, 521.

7. *Brown*, 462 F. Supp. at 519, 534.

8. *Id.* at 518.

9. Brown v. Scott, 602 F.2d 791 (7th Cir. 1979), *aff'd sub nom.* Carey v. Brown, 447 U.S. 455 (1980).

10. 447 U.S. 455 (1980). The Chief Justice and Justices Blackmun and Rehnquist dissented.

11. *Id.* at 459 & n.2.

12. Although the majority did not face the issue directly, Justice Rehnquist noted in dissent that the majority implicitly decided the issue. Rehnquist noted, "The Court today suggests that some picketing activities would have but a 'negligible impact on privacy interests,' intimating that

The question is not purely theoretical. Subsequent to *Carey v. Brown*, the Illinois Legislature deleted the labor exception; the amended Statute prohibits all picketing of purely private residences, except one's own residence.[13] Other states and some municipalities have similar laws.[14]

II. Posing the Issue: Privacy Interests Versus Free Speech Interests

The Court in *Carey v. Brown* was not faced with the issue of the constitutionality of banning even "the classic expressive gesture of the solitary picket"[15] from the public streets and sidewalks in front of private residences. However, Justice Rehnquist noted in his dissent the implication in the majority's opinion that such a ban would be unconstitutional since the State's interest in protecting residential privacy could be satisfactorily protected by more limited restrictions such as regulating the hour and number of pickets.[16] Justice Rehnquist himself disagreed with that sentiment. He would have permitted the State to conclude that the presence of even a solitary unwelcome picketer on the street in front of one's home was an intolerable intrusion on residential privacy because "few of us . . . would feel comfortable knowing that a stranger lurks outside our home."[17]

Even Justice Rehnquist admitted, however, that residential picketing by one such as a domestic employee, who has no alternative forum for effectively airing his grievance, would arguably be protected by the

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Illinois could satisfy its interests through more limited restrictions on picketing, such as regulating the hours and numbers of pickets." *Id.* at 478 (Rehnquist, J., dissenting).

13. The Illinois Residential Picketing Statute, as amended, provides:

> It is unlawful to picket before or about the residence or dwelling of any person, except when the residence or dwelling is used as a place of business. However, this Article does not apply to a person peacefully picketing his own residence or dwelling and does not prohibit the peaceful picketing of the place of holding a meeting or assembly on premises commonly used to discuss subjects of general public interest.

ILL. REV. STAT. ch. 38, ¶ 21.1-2 (1981).

The new Statute has been enforced against protesters who picketed the residence of Mayor Byrne of Chicago to protest her appointments to the Chicago Housing Authority. The Mayor lived in a high-rise on Chicago's near north side. *See* Chicago Tribune, July 28, 1982, § 1, at 13, col. 2.

14. *See, e.g.*, ARIZ. REV. STAT. ANN. § 13-2909 (1978); ARK. STAT. ANN. §§ 41-2966, 41-2968 (1977); CONN. GEN. STAT. § 31-120 (1962); HAWAII REV. STAT. § 379A-1 (1976); MD. ANN. CODE art. 27, § 580A (1982); VA. CODE §§ 18.2-418, 18.2-419 (1982).

15. Grayned v. City of Rockford, 408 U.S. 104, 119 (1972).

16. 447 U.S. 455, 478 (1980) (Rehnquist, J., dissenting).

17. *Id.* at 478-79. Equating picketing with loitering, of course, ignores that the picket is engaged in expressive activity. However, even loitering may be protected by the first amendment. *See* Kolender v. Lawson, 103 S. Ct. 1855 (1983); Papachristou v. City of Jacksonville, 405 U.S. 156 (1972).

first amendment.[18] But an exception for the domestic employee from an otherwise absolute ban on residential picketing would clearly violate the rule in *Carey v. Brown* against subject matter discrimination among pickets.[19] After *Carey v. Brown*, therefore, the question of whether a peaceful picket creates an intolerable intrusion on residential privacy must be asked without reference to the subject matter of the picket's message. Put another way, under *Carey v. Brown*, if the domestic employee has a constitutionally protected right peacefully to picket the home of his employer, that is, if his presence on the street where the employer lives is not an intolerable invasion of the resident's privacy, then every other peaceful picket has the same right. Thus, the question is posed: Is an absolute ban on residential picketing consistent with the free speech guarantee of the first amendment as applied to the states by the fourteenth amendment?

A. *The Cases*

Surprisingly few cases have discussed the question of a first amendment right to picket residences, and those courts that have ruled on the issue have reached divergent results.[20] Courts have generally not accorded first amendment protection in cases that involve large numbers of pickets,[21] or where the pickets have been disorderly,[22] or

18. *Carey*, 447 U.S. at 479 (Rehnquist, J., dissenting). The majority noted that although many state and federal laws provide special protection for labor protests, an argument that the National Labor Relations Act preempts states from enacting laws prohibiting the picketing of residences involved in labor disputes would have dubious merit. *Id.* at 466 & n.10.

19. *See id.* at 466; *see also* People Acting Through Community Effort v. Doorey, 468 F.2d 1143 (1st Cir. 1972); *cf.* DeGregory v. Giesing, 427 F. Supp. 910 (D. Conn. 1977) (labor picketing less protected than public issue picketing). It is not clear, however, whether a statute allowing residential picketing, regardless of subject matter, for all persons who did not have adequate alternative forum would violate the rule of *Carey v. Brown*. For a discussion of the alternative forum question, see *infra* text accompanying notes 107-11.

20. Where the issue has been reached, it is often difficult to determine to what extent the court's ruling was influenced by the nature and objective of the picketing, and, indeed, to what extent the court's description of the nature and objective of the picketing was colored by the court's own view of the propriety of residential picketing. Annot., 42 A.L.R.3d 1353, 1356 (1972). *See* Kamin, *Residential Picketing and the First Amendment*, 61 NW. U.L. REV. 177 (1967); Comment, *Picketers at the Doorstep*, 9 HARV. C.R.-C.L. L. REV. 95 (1974); Comment, *Residential Picketing of a Slum Landlord*, 1971 URB. L.J. 223 (1971); Comment, *Picketing the Homes of Public Officials*, 34 U. CHI. L. REV. 106 (1966); Annot., 42 A.L.R.3d 1353 (1972).

21. *E.g.*, Garcia v. Gray, 507 F.2d 539 (10th Cir. 1974), *cert. denied*, 421 U.S. 971 (1975) (300 pickets); Hebrew Home & Hosp. for Chronic Sick, Inc. v. Davis, 38 Misc. 2d 173, 235 N.Y.S.2d 318 (Sup. Ct. 1962) (40 pickets whose conduct interfered with the normal operation of the home and hospital); People v. Levner, 30 N.Y.S.2d 487 (Magis. Ct. 1941) ("hundreds of pickets"); City of Wauwatosa v. King, 49 Wis. 2d 398, 182 N.W.2d 530 (1971) (25-35 pickets).

22. *E.g.*, State v. Perry, 196 Minn. 491, 265 N.W. 302 (1936) (small number of pickets carrying banners and cards); Walinsky v. Kennedy, 94 Misc. 2d 121, 404 N.Y.S.2d 491 (Sup. Ct. 1977)

have trespassed upon private property,[23] or have been guilty of illegal coercion.[24] Courts have also refused to protect picketing that constitutes an unfair labor practice[25] or has an otherwise illegal object.[26] In a few cases, courts have refused to extend first amendment protection even to peaceful residential picketing on the theory that a reasonable alternative forum was available.[27] For example, the district court in *Brown v. Scott* upheld, as applied, a statutory ban against even peaceful picketing, reasoning that the right to picket on public sidewalks in residential areas was not absolute and that on balance the homeowner/public official's privacy interest outweighed the picketer's free speech interest when an alternative forum—city hall—was available.

Other courts have found that on the balance the free speech interest outweighed the privacy interest and have held that residential picketing is protected by the first amendment. Thus, picketing the home of their employer by domestic employees[28] and picketing the residence of an absentee slum landlord by his tenants[29] have been held proper under circumstances where the courts found no reasonable alternative

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(chanting crowd of 40 carrying baseball bats, whistles and bullhorns); People v. Kaye, 165 Misc. 663, 1 N.Y.S.2d 354 (Magis. Ct. 1937) (small number of pickets carrying inciting banners).

23. Garcia v. Gray, 507 F.2d 539 (10th Cir. 1974), *cert. denied*, 421 U.S. 971 (1975) ("some 300 pickets" chanting "down with the mayor"); City of Wauwatosa v. King, 49 Wis. 2d 398, 182 N.W.2d 530 (1971) (25-35 pickets marching in front of residence).

24. *E.g.*, Zeeman v. Amalgamated Retail & Dep't Store Employees Local 55, 17 Lab. Cas. (CCH) ¶ 65,572 (Cal. Super. 1950); Jacobs v. United Furniture Workers Local 576, 16 Lab. Cas. (CCH) ¶ 65,065 (Cal. Super. 1949); State v. Cooper, 205 Minn. 333, 285 N.W. 903 (1939) (chauffeur not allowed to picket employer's residence where his conduct was likely to arouse anger, disturbance or violence); State v. Zanker, 179 Minn. 355, 229 N.W. 311 (1930) (pickets produced banner calling resident a "strikebreaker"); Walinsky v. Kennedy, 94 Misc. 2d 121, 404 N.Y.S.2d 491 (Sup. Ct. 1977) (chanting crowd of 40 carrying baseball bats, whistles and bullhorns); Fawick Airflex Co. v. United Elec. Radio & Mach. Workers Local 735, 56 Ohio L. Abs. 426, 92 N.E.2d 446 (Ct. App.), *appeal dismissed*, 154 Ohio St. 205, 93 N.E.2d 769 (1950) (intent to influence a judge in a pending matter by picketing his home is contempt of court); Pipe Mach. Co. v. DeMore, 36 Ohio Ops. 342, 76 N.E.2d 725 (Ct. App. 1947), *appeal dismissed*, 149 Ohio St. 582, 79 N.E.2d 910 (1948) (pickets made threats, distributed cards calling residents "scabs").

25. Allen-Bradley Local No. 1111 v. Wisconsin Employment Relations Bd., 315 U.S. 740 (1942); *see* Carpenters & Joiners Union, Local No. 213 v. Ritter's Cafe, 315 U.S. 722 (1942). *In re* United Mech. Union Local 150-F, 151 N.L.R.B. 386 (1965).

26. Walinsky v. Kennedy, 94 Misc. 2d 191, 404 N.Y.S.2d 491 (Sup. Ct. 1977) (office is proper alternative forum to picket); Petrucci v. Hogan, 5 Misc. 2d 480, 27 N.Y.S.2d 718 (Sup. Ct. 1941) (ultimate objective was to accomplish an unlawful purpose involving malicious intent to annoy and intimidate the plaintiffs and their families).

27. Brown v. Scott, 462 F. Supp. 518 (N.D. Ill. 1978), *rev'd*, 602 F.2d 791 (7th Cir. 1979), *aff'd sub nom.* Carey v. Brown, 447 U.S. 455 (1980).

28. Annenberg v. Southern Cal. Dist. Council of Laborers, 38 Cal. App. 3d 637, 113 Cal. Rptr. 519 (1974). *But see* Hate v. Cooper, 205 Minn. 233, 285 N.W. 903 (1939) (chauffeur not allowed to picket employer's residence).

29. Hibbs v. Neighborhood Org. to Rejuvenate Tenant Hous., 433 Pa. 578, 252 A.2d 622 (1969).

forum. Similarly, picketing the private home of a state governor[30] and picketing the private residence of a state agency head[31] have been held to be proper exercises of the right of assembly and petition.

In *State v. Schuller*,[32] which involved peaceful picketing on the public sidewalk in front of the home of the Secretary of Defense, the Maryland Court of Appeals refused to place any significance on the fact that the home of a public official was involved and ignored the alternative forum question. The court held that the statutory ban on all residential picketing was overbroad on its face because less restrictive alternatives could have satisfactorily safeguarded the State's interest in protecting residential privacy. The court noted that

> [i]n the present case, the defendants' picketing was peaceful and on the public street; they neither obstructed traffic nor became disorderly. It was stipulated that they did not disturb the neighbors other than by engaging in the picketing itself. Moreover [the statute] provides that "[i]t shall be unlawful for any person to engage in picketing before or about the residence or dwelling place of any individual." Rather than prohibiting certain specific conduct associated with picketing and within the purview of the state's power to control, the Maryland act provides for a blanket ban on residential picketing itself. The statute proscribes picketing even if it is peaceful and orderly, it is quiet and non-threatening, is on public property, and does not obstruct persons or traffic. The ban applies regardless of the time of day the picketing takes place. While picketing and parading and the use of the streets for such purpose is subject to reasonable time, manner and place regulation, such activity may not be wholly denied . . . .[33]

In the authors' opinion, the *Schuller* court decided the question rightly and in accord with the relevant precedents of the United States Supreme Court.

B. *Method of Determining the Rights of Residential Pickets Vis-A-Vis Homeowners*

Most of the courts that have examined the issue whether the first amendment prohibits an absolute ban on the picketing of private residences have simply balanced the privacy interest of the homeowner against the free speech interests of the pickets. The argument against such an approach is that it provides for ad hoc decision making,[34] so

30. Flores v. City & County of Denver, 122 Colo. 71, 220 P.2d 373 (1950).
31. State v. Anonymous, 6 Conn. Cir. Ct. 372, 274 A.2d 897 (1971-72).
32. 280 Md. 305, 372 A.2d 1076 (1977).
33. *Id.* at 315-16, 372 A.2d at 1081 (citation omitted).
34. Ad hoc balancing has been the subject of much lively debate. Professor Emerson has

that ultimately the judge is forced to decide based on his own feelings about picketing and privacy.[35] However, since the United States Supreme Court has generally rejected the view that first amendment rights are absolute,[36] ultimately some form of balancing is inevitable. Nonetheless, a systematic methodology is needed to help the courts to balance the values that residential privacy and free speech are meant to protect so that the conclusion reached is not merely the result of the personal predisposition of the judge and the opinion a mere rationalization of that preformed conclusion.

The methodology employed by the Supreme Court in *United States v. O'Brien*[37] appears to provide a systematic means to resolve the conflict between the rights of pickets and the rights of persons who desire peace and quiet in their homes. The Supreme Court noted in *O'Brien* that

> when "speech" and "non-speech" elements are combined in the same course of conduct, a sufficiently important governmental interest in regulating the nonspeech element can justify incidental limitations on First Amendment freedoms. To characterize the quality of the governmental interest which must appear, the Court has employed a variety of descriptive terms: compelling; substantial; subordinating; paramount; cogent; strong. . . . [W]e think it clear that a government regulation is sufficiently justified if it is within the constitutional power of the Government; if it furthers an important or substantial government interest; if the government interest is unre-

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persuasively criticized the ad hoc balancing approach by noting that it is "so unstructured that it can hardly be described as a rule of law at all." T. EMERSON, THE SYSTEM OF FREEDOM OF EXPRESSION 16 (1970). On the other hand, Professor Shiffrin has cautioned that a "judiciary aware that it is balancing protected speech out of the first amendment is far more likely to give speech the protection it deserves." Shiffrin, *Defamatory Non-Media Speech and the First Amendment Methodology*, in CONSTITUTIONAL GOVERNMENT IN AMERICA 26 (R. Collins ed. 1980). Professor Shiffrin notes that regardless of the test utilized "a court may not escape the task of assessing the First Amendment interest at stake and *weighing* it against the public interest allegedly served by the regulation." *Id.* (emphasis by Professor Shiffrin) (quoting Bigelow v. Virginia, 421 U.S. 809, 826 (1975)).

35. For instance, for Justice Rehnquist the privacy interest would prevail based upon his general feeling that "few of us . . . would feel comfortable knowing that a stranger lurks outside our home." Carey v. Brown, 447 U.S. 455, 478-79 (Rehnquist, J., dissenting).

Professor Emerson has noted that all too often balancing seems to be a way of rationalizing preformed conclusions. T. EMERSON, *supra* note 34, at 718.

36. Even Justice Black, the foremost opponent on the Supreme Court of ad hoc balancing, was unwilling to absolutely protect expression when it was done in a manner that he found to be offensive. *See, e.g.*, Adderley v. Florida, 385 U.S. 39 (1966); Tinker v. Des Moines Indep. Community School Dist., 393 U.S. 503, 515 (1969) (Black, J., dissenting); Brown v. Louisiana, 383 U.S. 131, 151 (1966) (Black, J., dissenting).

37. 391 U.S. 367 (1968). *O'Brien* involved the constitutionality of 50 U.S.C. app. § 462(b)(3) (Supp. V 1965-1969) (now appearing at 50 U.S.C. app. § 462(b)(3) (1976)), which made it a crime for anyone to knowingly destroy or mutilate a draft card. *See also* Young v. American Mini Theaters, Inc., 427 U.S. 50, 79-80 (1976) (Powell, J., concurring).

> lated 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.[38]

Although the *O'Brien* test provides no guarantee that a court will reach the correct result,[39] it does provide a framework to analyze systematically the interests involved.

III. The Free Speech and Assembly Interest in Residential Picketing

O'Brien requires, first, a consideration of the speech interest in residential picketing. Peaceful picketing—despite the fact that the picket is engaged in conduct by walking back and forth on a public sidewalk with a printed sign or placard—is "an exercise of [the] basic constitutional rights [of speech, assembly and petition] in their most pristine and classic form."[40] Because of the conduct aspect of peaceful picketing, courts have had considerable difficulty in defining the precise extent to which it is protected by the first amendment.[41] Nonetheless, the Supreme Court in *Carey v. Brown* recognized that "there can be no doubt that in prohibiting picketing on the public streets and sidewalks in residential neighborhoods, the Illinois statute regulates expressive conduct that falls within the First Amendment's preserve."[42] The Court also accepted as established that

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38. 391 U.S. at 376-77 (footnotes omitted).

39. Indeed one can persuasively argue that the Supreme Court reached the wrong result in *O'Brien*. T. Emerson, *supra* note 34, at 83-87.

40. Edwards v. South Carolina, 372 U.S. 229, 235 (1963); *accord* Thornhill v. Alabama, 310 U.S. 88 (1940).

41. *See, e.g.*, International Bhd. of Teamsters, Local 695 v. Vogt, Inc., 354 U.S. 284 (1957). Professor Emerson has attempted to draw a distinction between labor and nonlabor picketing based on the fact that the latter is aimed at the general public and is less likely to be economically coercive. T. Emerson, *supra* note 34, at 455. *See also* DeGregory v. Giesing, 427 F. Supp. 910 (D. Conn. 1977). *But see* NAACP v. Claiborne Hardware Co., 102 S. Ct. 3409 (1982). However, to the extent that the difference between labor and nonlabor picketing is content related, this distinction cannot be used to determine who can properly engage in residential picketing. Carey v. Brown, 447 U.S. 455 (1980). *But cf.* Hudgens v. NLRB, 424 U.S. 507 (1976); NLRB v. Fruit & Vegetable Packers, Local 760, 377 U.S. 58 (1964).

It is well established that the first amendment does not protect picketing that is accompanied by violence or the threat of violence. Edwards v. South Carolina, 372 U.S. 229, 236 (1963); Milk Wagon Drivers Union, Local 753 v. Meadowmoor Dairies, Inc., 312 U.S. 287 (1941); *cf.* NAACP v. Claiborne Hardware Co., 102 S. Ct. 3409 (1982). Nor does it protect picketing that seeks to coerce an illegal objective. NLRB v. Retail Store Employees Union, Local 1001, 447 U.S. 607 (1980); International Bhd. of Teamsters, Local 695 v. Vogt, Inc., 354 U.S. 284 (1957); Hughes v. Superior Court, 339 U.S. 460 (1950); Giboney v. Empire Storage & Ice Co., 336 U.S. 490 (1949). *But cf.* NAACP v. Claiborne Hardware Co., 102 S. Ct. 3409 (1982). It also does not protect pickets who trespass upon private property. Hudgens v. NLRB, 424 U.S. 507 (1976); Adderley v. Florida, 385 U.S. 39 (1966).

42. Carey v. Brown, 447 U.S. at 460.

> "[w]herever the title of streets and parks may rest, 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." . . . " '[S]treets, sidewalks, parks, and other similar public places are so historically associated with the exercise of First Amendment rights that access to them for the purpose of exercising such rights cannot constitutionally be denied broadly and absolutely.' "[43]

It is beyond dispute today that picketing is a form of protected conduct and that public streets and sidewalks are public forums.

Assuming that residential picketing does not have an illegal objective or is not accompanied with violence or by trespasses on private property,[44] it cannot be abridged merely because some persons, or even a majority, find it to be offensive. In a pluralistic society, the burden normally falls on the viewer to avert his eyes from matters that offend him.[45] Thus in *Cohen v. California*,[46] the Supreme Court reversed the conviction of a young man for "willfully disturb[ing] the peace or quiet of any neighborhood or person . . . by . . . offensive conduct."[47] The defendant had been observed in the Los Angeles County Courthouse "wearing a jacket bearing the words 'Fuck the Draft.' "[48] Women and children had been present when the defendant wore the jacket as a means of informing the public of his feelings against the Vietnam War and the draft.[49] Speaking for the Court, Justice Harlan emphasized the importance of allowing the defendant to express his emotions in his chosen manner:

> [M]uch linguistic expression serves a dual communicative function: it conveys not only ideas capable of relatively precise, detached explication, but otherwise inexpressible emotions as well. In fact, words are often chosen as much for their emotive as their cognitive

43. *Id.* (quoting first Hague v. CIO, 307 U.S. 496, 515 (1939) and second Hudgens v. NLRB, 424 U.S. 507, 515 (1976)); *see also* United States v. Grace, 103 S. Ct. 1702, 1706-07 (1983); Kalven, *The Concept of the Public Forum: Cox v. Louisiana*, 1965 SUP. CT. REV. 1. The grounds of a county jail, Adderley v. Florida, 385 U.S. 39 (1966), public buses, Lehman v. City of Shaker Heights, 418 U.S. 298 (1974), and military bases, Greer v. Spock, 424 U.S. 828 (1976), unlike public streets and sidewalks, are public places that are not proper forums for first amendment expression. However, once a state opens a forum to some it may not deny the use of that forum to others based solely on the content of the speaker's message. *See* Widmar v. Vincent, 454 U.S. 263 (1981). *Cf.* Perry Educ. Ass'n v. Perry Local Educators' Ass'n, 103 S. Ct. 948 (1983).

44. *See supra* note 41.

45. Erznoznik v. City of Jacksonville, 422 U.S. 205, 210-11 (1975); Spence v. Washington, 418 U.S. 405, 412 (1974); Cohen v. California, 403 U.S. 15, 21 (1971).

46. 403 U.S. 15 (1971).

47. *Id.* at 16 (quoting California penal statute) (ellipses by the Court).

48. *Id.* (quoting the California Court of Appeal at 1 Cal. App. 3d 94, 97-98, 81 Cal. Rptr. 503, 505 (1969)).

49. *Id.*

> force. We cannot sanction the view that the Constitution, while solicitous of the cognitive content of individual speech, has little or no regard for that emotive function which, practically speaking, may often be the more important element of the overall message sought to be communicated.[50]

Similarly, in *Erznoznik v. City of Jacksonville*,[51] the Supreme Court struck down an ordinance that prohibited the showing of films containing nudity by a drive-in theatre when its screen was visible from a public street or place. The Court rejected the City's argument that the ordinance was necessary to protect its citizens, and especially minors, against unwilling exposure to materials that may be considered offensive.

Nor may residential picketing be abridged simply because it intimidates someone. In *Organization for a Better Austin v. Keefe*,[52] the Supreme Court reversed an injunction issued by the Illinois courts enjoining a racially integrated community organization from distributing in a Chicago suburb literature that was critical of a real estate broker's alleged "blockbusting" and "panic peddling" activities. The Court, in rejecting the broker's argument that the organization's activities invaded his right to privacy and were coercive and intimidating rather than informative, noted:

> The claim that the expressions were intended to exercise a coercive impact on respondent does not remove them from the reach of the First Amendment. Petitioners plainly intended to influence respondent's conduct by their activities; that is not fundamentally different from the function of a newspaper. . . . Petitioners were engaged openly and vigorously in making the public aware of respondent's real estate practices. Those practices were offensive to them, as the views and practices of petitioners are no doubt offensive to others. But so long as the means are peaceful, the communication need not meet standards of acceptability.[53]

Concerted action to protest racial discrimination by local merchants was found to be protected by the first amendment in *NAACP v. Claiborne Hardware Co.*[54] The Supreme Court reversed a

50. *Id.* at 26. *See also* Watts v. United States, 394 U.S. 705 (1969). Political hyperbole is protected by the first amendment. " '[D]ebate on public issues should be uninhibited, robust, and wide-open, and . . . may well include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials.' " *Id.* at 708 (quoting from New York Times Co. v. Sullivan, 376 U.S. 254, 270 (1964)); Terminiello v. Chicago, 337 U.S. 1 (1949) ("[A] function of free speech under our system of government is to invite dispute." *Id.* at 4).

51. 422 U.S. 205 (1975).

52. 402 U.S. 415 (1971).

53. *Id.* at 419 (citations omitted).

54. 102 S. Ct. 3409 (1982).

$1,250,699 judgment against the NAACP for conducting a boycott, and for picketing and marching against merchants in Port Gibson, Mississippi, on the ground that the practice of banding together to express views is deeply embedded in our American political process.[55] The Court noted that the fact that some of the activities of the boycotters may have caused apprehension in others did not by itself remove those activities from the protection of the first amendment.[56] The Court found the emotionally charged rhetoric of Charles Evers, one of the leaders of the boycott, to be protected because "strong and effective extemporaneous rhetoric cannot be nicely channeled in purely dulcet phrase."[57] The Court also ruled that the NAACP could not be held responsible for random acts of violence that occurred during the boycott, because the NAACP itself had never advocated nor condoned the violence.

Nor may residential picketing be banned because the audience may react violently against it. Although the Supreme Court has held that so-called "fighting words," or speech that is likely to promote violence, may not be protected by the Constitution,[58] the Court has narrowly restricted this exception so that fighting words must be directly addressed to the person of the hearer[59] and directly incite "imminent lawless action."[60] That the audience may be hostile to the views expressed is insufficient to remove the speech from the protection of the first amendment.[61] In *Gregory v. City of Chicago*,[62] the Supreme Court reversed the convictions of persons who had marched in a peaceful and orderly procession to the Mayor's residence to press their claims for the desegregation of Chicago's public schools. The Chicago police had told the protesters to disperse when the crowd of bystanders became larger and more unruly and, when the marchers refused, had arrested them for disorderly conduct. The Court found the record to be devoid of any evidence that the marchers themselves had been disorderly.

The values served by extending first amendment protection to residential picketing are twofold.[63] First, an effective marketplace in a democratic society depends upon free and open discussion that is

55. *Id.* at 3423.
56. *Id.* at 3424.
57. *Id.* at 3434.
58. Chaplinsky v. New Hampshire, 315 U.S. 568 (1942).
59. Cohen v. California, 403 U.S. 15, 20 (1971).
60. Brandenburg v. Ohio, 395 U.S. 444, 447 (1969); *see* NAACP v. Claiborne Hardware Co., 102 S. Ct. 3409 (1982); Watts v. United States, 394 U.S. 705 (1969).
61. *But cf.* Feiner v. New York, 340 U.S. 315 (1951).
62. 394 U.S. 111 (1969).
63. *See generally* G. GUNTHER, CASES AND MATERIALS ON CONSTITUTIONAL LAW 1108-11 (10th ed. 1980); T. EMERSON, *supra* note 34, at 6-9.

aimed at finding truth.[64] As Justice Holmes recognized in his dissent in *Abrams v. United States*, "the best test of truth is the power of the thought to get itself accepted in the competition of the market."[65] Additionally, if persons are inhibited from airing their grievances freely and openly, they will often resort to clandestine measures or to violence to express their dissatisfaction with the status quo.[66] While peacefully airing their grievance in the forum of their choosing, residential pickets disseminate information and promote discussion of public issues in residential neighborhoods.

Second, the right to freedom of expression and assembly is a basic human right. Thus as Justice Brandeis recognized, the forefathers "who won our independence believed that the final end of the State was to make men free to develop their faculties. . . . They valued liberty both as an end and as a means. They believed liberty to be the secret of happiness and courage to be the secret of liberty."[67]

The liberty justification focuses more on the rights of the individual than does the marketplace justification.[68] The marketplace model is primarily concerned with the contribution of ideas to the working of a free society. However, the liberty model goes further and recognizes that unless there is some intervening substantial governmental interest unrelated to the suppression of the message, the individual in a free society ought to be able to determine how, when, where, and to whom he wants to disseminate his idea or message. When the free speech rights of one person appear to conflict with the privacy rights of another, both the marketplace model and the liberty model must be considered.

IV. The Interest in Residential Privacy

O'Brien requires, secondly, a consideration of whether there is a substantial governmental interest, unrelated to the suppression of free expression, in protecting residential privacy. The justification offered

64. T. Emerson, *supra* note 34, at 6-7; NAACP v. Claiborne Hardware Co., 102 S. Ct. 3409 (1982).

65. 250 U.S. 616, 630 (1919) (Holmes, J., dissenting).

66. *See* Seng, *The Cairo Experience: Civil Rights Litigation in a Racial Powderkeg*, 61 Or. L.J. 285 (1982); *cf.* Dennis v. United States, 341 U.S. 494 (1951) ("Whatever theoretical merit there may be to the argument that there is a 'right' to rebellion against dictatorial governments is without force where the existing structure of the government provides for peaceful and orderly change." *Id.* at 501).

67. Whitney v. California, 274 U.S. 357, 375 (1927) (Brandeis, J., concurring). *See also* Kolender v. Lawson, 103 S. Ct. 1855 (1983) ("Our Constitution is designed to maximize individual freedoms within a framework of ordered liberty." *Id.* at 1858).

68. *See* Baker, *Scope of the First Amendment Freedom of Speech*, in Constitutional Government in America 45 (R. Collins ed. 1980).

by the State of Illinois for the Residential Picketing Statute invalidated by the Supreme Court in *Carey v. Brown*,[69] as well as the justification offered in virtually all cases involving residential picketing, was that the Statute protected the right to privacy. However, the word "privacy" is virtually without meaning unless it is placed in a specific context. Warren and Brandeis in their classic work on the right of privacy identified four different interests under the common name of privacy.[70] Of these four interests, the right to be free from intrusions upon one's physical solitude or seclusion appears to be the interest protected by residential picketing restrictions.[71] Simply put, residential picketing restrictions protect the right "to be let alone" in one's home.[72]

This right to be let alone as it is protected through residential picketing restrictions is not a federally protected constitutional right.[73] The

69. 447 U.S. 455 (1980).

The preamble to the Illinois Residential Picketing Statute provided that

> [t]he Legislature finds and declares that men in a free society have the right to enjoyment of their homes; that the stability of community and family life cannot be maintained unless the right to privacy and a sense of security and peace in the home are respected and encouraged; that residential picketing, however just the cause inspiring it, disrupts home, family and communal life; that residential picketing is inappropriate in our society, where the jealously guarded rights of free speech and assembly have always been associated with respect for the rights of others. For these reasons the Legislature finds and declares this Article to be necessary.

ILL. REV. STAT. ch. 38, ¶ 21.1-1 (1979). The Illinois Legislature did not amend the language of the preamble to its current Residential Picketing Statute. *See* ILL. REV. STAT. ch. 38, ¶ 21.1-1 (1981).

70. Warren & Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193 (1890). Dean Prosser has categorized those interests as: 1) the right to be free from intrusions upon one's physical solitude or seclusion, as by invasions of one's home or other quarters, or an illegal search of one's shopping bag in a store; 2) the right to be free from publicity, of a highly objective kind, given to private information about oneself, even though it is true and no action would lie for defamation; 3) the right to be free from publicity that places oneself in a false light in the public eye; 4) the right not to have one's name or likeness appropriated by another for his benefit. *See* W. PROSSER, HANDBOOK OF THE LAW OF TORTS 804-14 (4th ed. 1971).

71. *See* T. EMERSON, *supra* note 34, at 548.

72. *See* Rowan v. United States Post Office Dep't, 397 U.S. 728, 736-38 (1970); Warren & Brandeis, *supra* note 70, at 195.

73. The Constitution protects the right of privacy from governmental instrusions in a number of ways. The first amendment protects the freedom to associate and the right to privacy in one's associations. *See* Griswold v. Connecticut, 381 U.S. 479 (1965); NAACP v. Alabama, 357 U.S. 449 (1958). The third amendment prevents the peacetime quartering of soldiers in private residences; the fourth amendment affirms the right to be secure in one's person, home, papers and effects from unreasonable searches and seizures. *See* Payton v. New York, 445 U.S. 573 (1980). The fifth amendment's privilege against self-incrimination reflects a concern for privacy. Tehan v. United States *ex rel* Shott, 382 U.S. 406, 416 (1966). Also, the ninth amendment's reservation of rights may protect the right to privacy. Roe v. Wade, 410 U.S. 113 (1973). In Whalen v. Roe, 429 U.S. 589 (1977), the Supreme Court identified two general interests that are protected from governmental intrusions by the constitutional right of privacy—"[o]ne is the individual interest in avoiding disclosure of personal matters, and another is the interest in independence in making certain kinds of important decisions." *Id.* at 599-600 (citations omitted).

In a dissenting opinion in Public Util. Comm'n v. Pollak, 343 U.S. 451 (1952), where the majority upheld an opinion of the Public Utilities Commission for the District of Columbia al-

intrusion caused by a residential picket is not the result of governmental action; rather it is the result of action by private individuals.[74] As Justice Stewart stated in *Katz v. United States*: "[T]he protection of a person's *general* right to privacy—his right to be let alone by other people—is, like the protection of his property and of his very life, left largely to the law of the individual States."[75]

Even though it is not a federally protected constitutional right, the interest one has to peace and quiet in his home is an important interest that states can protect against encroachments by other persons. The United States Supreme Court first recognized the power of state and local governments to protect the peace and quiet of residential areas against persons claiming the right of free speech in *Kovacs v. Cooper*.[76] The Court upheld a city ordinance that forbade the use or operation on the public streets of sound trucks or other amplification devices that emitted "loud and raucous" noises.[77] The ordinance was challenged by a man who used an amplifier on his truck to broadcast comments about a local labor dispute. The Court in upholding the ordinance com-

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lowing sound amplification devices to broadcast radio programs on city streetcars and buses, Justice Douglas noted:

> The case comes down to the meaning of "liberty" as used in the Fifth Amendment. Liberty in the constitutional sense must mean more than freedom from unlawful governmental restraint; it must include privacy as well, if it is to be a repository of freedom. The right to be let alone is indeed the beginning of all freedom. Part of our claim to privacy is in the prohibition of the Fourth Amendment against unreasonable searches and seizures. It gives the guarantee that a man's home is his castle beyond invasion either by inquisitive or by officious people. A man loses that privacy of course when he goes upon the streets or enters public places. But even in his activities outside the home he has immunities from controls bearing on privacy. He may not be compelled against his will to attend a religious service; he may not be forced to make an affirmation or observe a ritual that violates his scruples; he may not be made to accept one religious, political, or philosophical creed as against another. Freedom of religion and freedom of speech guaranteed by the First Amendment give more than the privilege to worship, to write, to speak as one chooses; they give freedom not to do nor to act as the government chooses. The First Amendment in its respect for the conscience of the individual honors the sanctity of thought and belief. To think as one chooses, to believe what one wishes are important aspects of the constitutional right to be let alone.

Id. at 467-68 (Douglas, J., dissenting). Justice Douglas's dissent was cited with approval by the Supreme Court in *Lehman v. City of Shaker Heights*, 418 U.S. 298, 302 (1974), which upheld a ban on political advertising in city buses.

74. *Cf.* Blum v. Yaretsky, 102 S. Ct. 2777 (1982); Pruneyard Shopping Center v. Robins, 447 U.S. 74 (1980); Flagg Bros., Inc. v. Brooks, 436 U.S. 149 (1978); Hudgens v. NLRB, 424 U.S. 507 (1976).

75. 389 U.S. 347, 350-51 (1967) (emphasis by the Court) (footnotes omitted).

76. 336 U.S. 77 (1949).

77. *Id.* at 79. In Saia v. New York, 334 U.S. 558 (1948), the Supreme Court had struck down an ordinance that forbade the use of sound amplification devices except with permission of the police on the ground that "[a]ny abuses which loud-speakers create can be controlled by narrowly drawn statutes." *Id.* at 562. The *Kovacs* Court distinguished *Saia* on the ground that the *Saia* ordinance prescribed no standards for the exercise of discretion by the police chief and because the *Kovacs* ordinance barred only "loud and raucous" noises from the streets. *Kovacs*, 336 U.S. at 82-83.

mented that sound trucks would be dangerous to traffic in heavily congested cities and that "in the residential thoroughfares the quiet and tranquility so desirable for city dwellers would . . . be at the mercy of advocates of particular religious, social or political persuasions."[78] This substantial governmental interest justified prohibiting the use of sound trucks in residential areas.

Two years later, in *Breard v. Alexandria*,[79] the Supreme Court upheld an ordinance that prohibited solicitors and peddlers from going door to door to private residences if they had not been previously requested or invited to do so by the owners or occupants. The ordinance was challenged as a violation of the first amendment by a man who was arrested for going from door to door soliciting subscriptions for magazines. The Court noted that the City had the power to protect its citizens against "practices deemed subversive of privacy and of quiet."[80]

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78. 336 U.S. at 87.

In his concurring opinion in Gregory v. City of Chicago, 394 U.S. 111 (1969), Justice Black commented:

> Were the authority of government so trifling as to permit anyone with a complaint to have the vast power to do anything he pleased, wherever he pleased, and whenever he pleased, our customs and our habits of conduct, social, political, economic, ethical, and religious, would all be wiped out, and become no more than relics of a gone but not forgotten past. . . . And perhaps worse than all other changes, homes, the sacred retreat to which families repair for their privacy and their daily way of living, would have to have their doors thrown open to all who desired to convert the occupants to new ideas, new morals, and a new way of life. Men and women who hold public office would be compelled, simply because they did hold public office, to lose the comforts and privacy of an unpicketed home. I believe that our Constitution, written for the ages, to endure except as changed in the manner it provides, did not create a government with such monumental weaknesses. Speech and press are, of course, to be free, so that public matters can be discussed with impunity. But picketing and demonstrating can be regulated like other conduct of men. I believe that the homes of men, sometimes the last citadel of the tired, the weary, and the sick, can be protected by government from noisy, marching, tramping, threatening picketers and demonstrators bent on filling the minds of men, women, and children with fears of the unknown.

Id. at 125 (Black, J., concurring).

In Village of Belle Terre v. Boraas, 416 U.S. 1 (1974), the Supreme Court upheld an ordinance restricting land use in a village to one-family dwellings and preventing not more than two unrelated persons to live together in a single housekeeping unit in part on the legitimate objective to keep residential areas free of "disturbing noises" and "increased traffic." *Id.* at 5.

79. 341 U.S. 622 (1951).

80. *Id.* at 640. The Court quoted Professor Chafee:

> Of all the methods of spreading unpopular ideas, [house-to-house canvassing] seems the least entitled to extensive protection. The possibilities of persuasion are slight compared with the certainties of annoyance. Great as is the value of exposing citizens to novel views, home is one place where a man ought to be able to shut himself up in his own ideas if he desires. There he should be free not only from unreasonable searches and seizures but also from hearing uninvited strangers expound distasteful doctrines. A doorbell cannot be disregarded like a handbill. It takes several minutes to ascertain the purpose of a propagandist and at least several more to get rid of him. . . . Moreover, hospitable housewives dislike to leave a visitor on a windy doorstep while he explains his errand, yet once he is inside the house robbery or worse may happen. So peddlers of ideas and salesmen of salvation in odd brands seem to call for regulation as much as the

The Supreme Court also relied upon the right to be let alone to reach its decision in *Rowan v. United States Post Office Department*.[81] In that case, the Court upheld the constitutionality of a federal statute that allowed persons who had received uninvited advertisements for sexually provocative materials to request the Postmaster General to issue an order "directing the sender and his agents or assigns to refrain from further mailings to the named addressees."[82] Vendors of materials covered by the statute had contended that their rights of free speech and due process had been violated. The Court noted that "[i]n today's complex society we are inescapably captive audiences for many purposes, but a sufficient measure of individual autonomy must survive to permit every householder to exercise control over unwanted mail."[83] Therefore, the Court categorically rejected the argument that a vendor has a first amendment right to send unwanted material into the home of another.[84]

However, in *Organization for a Better Austin v. Keefe*,[85] the Supreme Court refused to extend any privacy protection to a real estate broker who claimed that persons were distributing leaflets to his neighbors. As noted earlier, the leaflets called the broker a "blockbuster" and a "panic peddler" and urged recipients of the leaflets to telephone the broker at his home and to urge him to sign an agreement to cease these practices.[86] The Court noted that

> [n]o prior decisions support the claim that the interest of an individual in being free from public criticism of his business practices in pamphlets or leaflets warrants use of the injunctive power of a court. Designating the conduct as an invasion of privacy, the apparent basis for the injunction here, is not sufficient to support an injunction against peaceful distribution of informational literature. . . . [R]espondent is not attempting to stop the flow of information into his own household, but to the public.[87]

Regulations restricting first amendment freedoms, even when residential privacy is the object of the protection, must be narrowly drafted and must be no more restrictive than is necessary to achieve the gov-

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regular run of commercial canvassers. . . . Freedom of the home is as important as freedom of speech.

341 U.S. at 639 n.27 (quoting Z. CHAFEE, FREE SPEECH IN THE UNITED STATES 406 (1941)) (ellipses by the Court).

81. 397 U.S. 728 (1970).

82. 39 U.S.C. § 4009(b) (Supp. IV 1964) (currently at 39 U.S.C. § 3008(b) (1976)).

83. 397 U.S. at 736.

84. *Id.* at 738.

85. 402 U.S. 415 (1971).

86. *Id.* at 416.

87. *Id.* at 419-20 (citations omitted).

ernment's objective. Thus, in *Martin v. City of Struthers*,[88] the Supreme Court struck down an ordinance that forbade any person to knock on doors, ring doorbells, or otherwise summon to the door the occupants of residences to distribute handbills or circulars. The Court noted that door-to-door campaigning is a commonly accepted and effective technique to disseminate opinions and that the ordinance "substitute[d] the judgment of the community for the judgment of the individual householder."[89] The Court held that the decision whether to allow persons to call at a home belonged to the homeowner and that the City could punish only those who call at a home in defiance of the previously expressed will of the occupant.[90]

Similarly, in *Village of Schaumburg v. Citizens for a Better Environment*,[91] the Supreme Court struck down an ordinance that prohibited door-to-door solicitation by charitable organizations that did not use at least seventy-five percent of their receipts for charitable purposes, excluding administrative expenses. After recognizing that charitable solicitation in residential neighborhoods was within the protection of the first amendment,[92] the Court considered whether the restriction was necessary to protect the citizens from fraud or from "undue annoyance."[93] The Court concluded that the Village could protect these interests "by measures less destructive of First Amendment interests."[94]

V. Less Restrictive Means to Protect Residential Property

Assuming then, as we must, that peaceful residential picketing is protected by the first amendment and that states have a substantial interest, unrelated to the suppression of first amendment freedoms, in protecting residential privacy, under the *O'Brien* test the next consideration must be whether an absolute ban on residential picketing is the

88. 319 U.S. 141 (1943).

89. *Id.* at 144.

90. *Id.* at 148. The Court also noted that a city could institute identification procedures to protect its citizens against criminals who pose as canvassers. *But cf.* Breard v. Alexandria, 341 U.S. 622 (1951) (ordinance forbidding door-to-door soliciting by commercial magazine vendors upheld). In Hynes v. Mayor of Oradell, 425 U.S. 610 (1976), a city ordinance required an identification permit to canvass or solicit from door to door for charitable or political purposes. The Court invalidated the ordinance as unacceptably vague. The Court recognized, however, that prior cases indicated that door-to-door canvassing and soliciting was subject to reasonable regulations to protect citizens from crime and undue annoyance. *Id.* at 620.

91. 444 U.S. 620 (1980).

92. *Id.* at 633.

93. *Id.* at 636.

94. *Id.* The Court noted that fraudulent misrepresentations could be prohibited and the penal laws used to punish such conduct directly. *Id.* at 637. It also noted that a provision permitting homeowners to bar solicitors from their property by posting "No Solicitors" signs would be a less intrusive and more effective measure to protect privacy. *Id.* at 639.

least restrictive means of protecting the peace and quiet of persons in their homes.[95] The Supreme Court has consistently held that a state or local government may protect individual privacy and regulate the right to protest by enacting reasonable time, place and manner restrictions.[96] We therefore will consider, first, whether a ban on residential picketing is merely a reasonable manner restriction because the demonstrators have alternative means other than picketing to disseminate their ideas, and second, whether a ban on residential picketing is merely a reasonable place restriction because alternative forums are available to the demonstrators. Finally, we will consider whether residential peace and quiet can be protected by means other than an absolute ban on residential picketing.

A. *Alternative Methods of Disseminating Information*

A possible justification for a ban on residential picketing is that the prohibition does not unduly restrict first amendment rights because alternative channels for communication are still available. The ban merely restricts the speaker from patrolling with a placard on the streets and sidewalks in residential areas. It does not forbid disseminating information in the neighborhood by alternative methods such as handing out leaflets, giving speeches from a soapbox, going door to door, sending letters, using the news, broadcasting media, or the telephone.

Nonetheless, the Supreme Court has never sustained a ban on peaceful picketing solely because other channels of communication were available.[97] An argument that first amendment rights are not abridged if the information can be made available in another way was soundly rejected by the Supreme Court in *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.*:

> We are aware of no general principle that freedom of speech may be abridged when the speaker's listeners could come by his message by some other means, such as seeking him out and asking him what it is. Nor have we recognized any such limitation on the independent right of the listener to receive the information sought to be communicated. Certainly, the recipients of the political publications in *Lamont*[98] could have gone abroad and thereafter disseminated them them-

95. *See supra* text accompanying note 38.

96. *See, e.g.*, Erznoznik v. City of Jacksonville, 422 U.S. 205, 209 (1975); Cox v. Louisiana, 379 U.S. 536, 554 (1965); Cox v. New Hampshire, 312 U.S. 569, 576 (1941).

97. *See supra* notes 40-62 and accompanying text.

98. Lamont v. Postmaster Gen. of the United States, 381 U.S. 301 (1965) (Court struck down law that interfered with rights of citizens to receive political publications sent from abroad).

> selves. Those in *Kleindienst*[99] who organized the lecture tour by a foreign Marxist could have done the same. And the addressees of the inmate correspondence in *Procunier*[100] could have visited the prison themselves. [Footnotes supplied.][101]

Practically, it is doubtful if other methods of disseminating information are equally as effective as a picket.[102] A picket may attract attention and get coverage by local newspapers and media that leafletting or door-to-door solicitations will not. That some persons will find residential picketing to be offensive and coercive may also be a reason why demonstrators may decide to utilize that form of communication to "wake-up" a neighborhood.[103] Furthermore, other channels of communication may be more costly and thus not be available to those whose causes are poorly financed.[104] In *Linmark Associates, Inc. v. Township of Willingboro*,[105] the Supreme Court, in striking down a township ordinance forbidding the posting of "For Sale" signs in residential areas, noted:

> Although in theory sellers remain free to employ a number of different alternatives, in practice realty is not marketed through leaflets, sound trucks, demonstrations, or the like. The options to which sell-

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99. Kleindienst v. Mandel, 408 U.S. 753 (1972) (Court sustained Attorney General's denial of visa to alien who wanted to come to the United States to participate in a conference).

100. Procunier v. Martinez, 416 U.S. 396 (1974) (Court sustained prison mail censorship regulations).

101. 425 U.S. 748, 757 n.15 (1976). *See also* Citizens for a Better Env't v. Village of Schaumburg, 590 F.2d 220, 224 (7th Cir. 1978), *aff'd*, 444 U.S. 620 (1980). *But see* Breard v. Alexandria, 341 U.S. 622 (1951), where the Court noted that subscriptions to magazines could still be made by anyone who was interested without the annoyance of house-to-house canvassing. *Id.* at 644. In MetroMedia, Inc. v. City of San Diego, 453 U.S. 490 (1981), without discussing the availability of alternative channels of communication, the Court held that a city could properly ban billboards. However, in his concurring opinion, Justice Brennan stated:

> Although there are alternative channels for communication of messages appearing on billboards, such as newspapers, television, and radio, these alternatives . . . appear to be less satisfactory. . . . Indeed the parties expressly stipulated that "[m]any businesses and politicians and other persons rely upon outdoor advertising because other forms of advertising are insufficient, inappropriate and prohibitively expensive. . . ." Justice Black said it well when he stated the First Amendment's presumption that "all present instruments of communication, as well as others that inventive genius may bring into being, shall be free from governmental censorship or prohibition."

Id. at 525 (Brennan, J., concurring) (citation omitted) (quoting first the joint Stipulation of Facts in *MetroMedia* and second Kovacs v. Cooper, 336 U.S. 77, 102 (1949) (Black, J., dissenting)).

102. In Thornhill v. Alabama, 310 U.S. 88 (1940), the Court noted that by proscribing picketing or loitering about a business the State had proscribed "nearly every practicable, effective means whereby those interested—including the employees directly affected—may enlighten the public on the nature and causes of a labor dispute." *Id.* at 104.

103. *See supra* text accompanying notes 52-68. Actually picketing may be less intrusive than door-to-door canvassing. *Cf.* Village of Schaumburg v. Citizens for a Better Env't, 444 U.S. 620, 644 (1980) (Rehnquist, J., dissenting).

104. *See* Martin v. City of Struthers, 319 U.S. 141, 146 (1943).

105. 431 U.S. 85 (1977).

> ers realistically are relegated—primarily newspaper advertising and listing with real estate agents—involve more cost and less autonomy than "For Sale" signs . . . . [They] are less likely to reach persons not deliberately seeking sales information, . . . and may be less effective media for communicating the message that is conveyed by a "For Sale" sign in front of the house to be sold . . . . The alternatives, then, are far from satisfactory.[106]

B. *Alternative Forums*

Another possible justification for a ban on residential picketing is that the prohibition does not unduly restrict first amendment rights because alternative forums are available. Demonstrators are still free to picket in the public parks and on the streets and sidewalks in nonresidential areas. For instance, the district court in sustaining the Illinois Residential Picketing Statute noted that the Mayor of Chicago could have been picketed at city hall rather than in front of his home.[107]

The alternative forum argument was soundly rejected in *Schneider v. State*, where the Supreme Court stated that "one is not to have the exercise of his liberty of expression in appropriate places abridged on the plea that it may be exercised in some other place."[108] In fact, some

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106. *Id.* at 93 (citations omitted).

107. Brown v. Scott, 462 F. Supp. 518, 531 (N.D. Ill. 1978), *rev'd*, 602 F.2d 791 (7th Cir. 1979), *aff'd sub nom.* Carey v. Brown, 447 U.S. 455 (1980).

108. 308 U.S. 147, 163 (1939). See also Tinker v. Des Moines Indep. Community School Dist., 393 U.S. 503 (1969), where the Court noted that "[f]reedom of expression would not truly exist if the right could be exercised only in an area that a benevolent government has [designated] as a safe haven for crackpots." *Id.* at 513.

This argument assumes that the picketing will take place on the public streets and sidewalks, which are traditional public forums and not on private property or on public property that is traditionally closed to the public for first amendment purposes. *See supra* note 43. However, the Supreme Court has on occasion considered the existence of alternative forums. In Heffron v. International Soc'y for Krishna Consciousness, Inc., 452 U.S. 640 (1981), the Court sustained a state rule that required religious and other groups to sell their literature from fixed booths at the Minnesota State Fair. The Court explained that "[f]or [the Rule] to be valid as a place and manner restriction, it must also be sufficiently clear that alternative forums for the expression of respondents' protected speech exist despite the effects of the Rule." *Id.* at 654. The Court noted that the rule did not prevent the organization from engaging in its activities outside the fairgrounds. Also, the rule did not deny the organization the right to conduct its activities at some point within the fairground, and its members were free to mingle with the crowd and orally propagate their views. The Court characterized the fairgrounds, unlike public streets and sidewalks, as a "limited public forum in that it exists to provide a means for a great number of exhibitors temporarily to present their products or views, be they commercial, religious, or political, to a large number of people in an efficient fashion." *Id.* at 655.

In Young v. American Mini Theaters, Inc., 427 U.S. 50 (1976), the Court sustained a city zoning regulation that prevented the concentration of adult movie theaters in limited areas. The Court noted that the restrictions did not affect the number of adult movie theaters that could operate in the city or unduly deny the viewing public access to them. *Id.* at 62. But, in Schad v. Borough of Mount Ephraim, 452 U.S. 61 (1981), the Court struck down a zoning ordinance that

persons, and arguably all persons, who may want to demonstrate in residential areas will have no effective alternative forum. A maid who is employed by a retired tycoon and who wants to protest her wages and working conditions has no forum equal to the sidewalk in front of her employer's residence.[109] Jews who want to publicize that a semirecluse was formerly a commander in a Nazi concentration camp may also find their most effective forum to be the street in front of his house.

Even in the case of a mayor, it is far from clear that an adequate alternative forum exists at city hall. Assuming, for the sake of argument, that a picket at city hall would gain the attention of the mayor, the argument ignores the right of pickets to address the audience of their choice. If the demonstrators want to reach the neighbors of the local official, and not just his political or business associates, then an alternative forum outside the neighborhood will be inadequate.[110] The protesters may also decide that the residential forum is a better alternative because the picket will receive better news coverage than one conducted in front of city hall or on a commercial thoroughfare.[111]

C. *Less Restrictive Alternatives*

There are numerous ways that state and local governments can regulate picketing short of an absolute ban so as to preserve the peace and quiet of residential neighborhoods. The pickets can be prevented from being loud and boisterous and from using sound trucks and blowing horns.[112] They can be prevented from trespassing onto private

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prohibited live entertainment, including nude dancing, from the Borough. The Court emphasized that "[t]o be reasonable, time, place, and manner restrictions not only must serve significant state interests but also must leave open adequate alternative channels of communication." *Id.* at 75-76. Similarly, in Kovacs v. Cooper, 336 U.S. 77 (1949), the Court sustained an ordinance that prohibited sound trucks from the public streets, noting that the trucks "may be utilized in places such as parks or other open spaces off the streets." *Id.* at 85. However, in United States v. Grace, 103 S. Ct. 1702 (1983), the Court struck down 40 U.S.C. 13k (1976), which prohibited displaying any banner on the sidewalks in front of the Supreme Court Building. The Court rejected the Government's argument that this was a reasonable "place" restriction having only a minimal impact on expressive activity because the prohibition had insufficient nexus with any of the public interests that may be thought to undergird § 13k. *Grace*, 103 S. Ct. at 1708-10.

109. *See* Carey v. Brown, 447 U.S. at 479-80 (Rehnquist, J., dissenting); Hibbs v. Neighborhood Org. to Rejuvenate Tenant Hous., 433 Pa. 578, 252 A.2d 622 (1969).

110. *Cf.* Organization for a Better Austin v. Keefe, 402 U.S. 415 (1971); Martin v. City of Struthers, 319 U.S. 141, 145 (1943).

The neighbors also have a constitutional right to receive the message and the demonstrators have standing to raise the first amendment rights of their audience. *See* Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc., 425 U.S. 748, 756-57 (1979).

111. *Cf.* Brown v. Scott, 462 F. Supp. 518, 531 (N.D. Ill. 1978), *rev'd*, 602 F.2d 791 (7th Cir. 1979), *aff'd sub nom.* Carey v. Brown, 447 U.S. 455 (1980).

112. Grayned v. City of Rockford, 408 U.S. 104 (1972); Kovacs v. Cooper, 336 U.S. 77 (1949).

property.[113] The number of pickets can be limited,[114] and the spaces between them regulated so that the streets and sidewalks are not obstructed.[115] Also, the time during which the picket is conducted is subject to reasonable regulation.[116] A narrowly drafted statute or ordinance containing reasonable restrictions to protect the peace and quiet of residential areas is thus possible.[117]

Such restrictions may not totally eliminate the discomfort that some persons will feel in knowing that even one solitary picket is patrolling the sidewalk in front of his home.[118] Nonetheless, the first amendment right of the peaceful picket to disseminate his message effectively to the desired neighborhood audience cannot be thwarted. Ultimately, "[t]he plain, if at times disquieting, truth is that in our pluralistic society, constantly proliferating new and ingenious forms of expression, 'we are inescapably captive audiences for many purposes.' "[119]

VI. CONCLUSION

To be sure, a state can constitutionally impose reasonable time, place and manner regulations on the use of residential streets and sidewalks for picketing.[120] It can regulate the number of pickets, and the hours during which they may picket; it can prohibit loud and raucous picketing and the use of offensive sound amplifying devices; it can prohibit pickets from interfering with traffic on the public streets and sidewalks and from trespassing on private property. But legislation regulating the right to use public streets must be narrowly drawn,[121] and the right to use the streets for communication of views "must not,

113. *See* Hudgens v. NLRB, 424 U.S. 507 (1976); Adderley v. Florida, 385 U.S. 39 (1966).

114. *See* United States v. Pyle, 518 F. Supp. 139, 160 (E.D. Pa. 1981). *But see* Davis v. Francois, 395 F.2d 730, 735 (5th Cir. 1968) (ordinance that limited the number of pickets to two, regardless of the time, place or circumstances, held unconstitutional).

115. *See* Cox v. Louisiana, 379 U.S. 536, 554-55 (1965); Cox v. New Hampshire, 312 U.S. 569, 573 (1941).

116. *See* Grayned v. City of Rockford, 408 U.S. 104 (1972); Carpenters & Joiners Union, Local No. 213 v. Ritter's Cafe, 315 U.S. 722, 738 (1942) (Reed, J., dissenting).

117. *See* T. EMERSON, *supra* note 34, at 559; Gregory v. City of Chicago, 394 U.S. 111, 124 (1969) (Black, J., concurring).

118. Carey v. Brown, 447 U.S. 455, 478 (1980) (Rehnquist, J., dissenting). Presumably, the state has power to proscribe deliberate, scurrilous verbal or visual assaults upon the householder. *See* Erznoznik v. City of Jacksonville, 422 U.S. 205, 210 n.6 (1975) (quoting Rosenfeld v. New Jersey, 408 U.S. 901, 905-06 (1972) (Powell, J., dissenting)).

119. Erznoznik v. City of Jacksonville, 422 U.S. 205, 210 (1975) (quoting Rowan v. United States Post Office Dep't, 397 U.S. 728, 736 (1970)).

120. *See* United States v. Grace, 103 S. Ct. 1702, 1706-07 (1983); Poulos v. New Hampshire, 345 U.S. 395 (1953); Cox v. New Hampshire, 312 U.S. 569 (1941).

121. Lovell v. City of Griffin, 303 U.S. 444 (1938).

in the guise of regulation, be abridged or denied."[122] As the Supreme Court has repeatedly stressed:

> "[E]ven though the governmental purpose be legitimate and substantial, that purpose cannot be pursued by means that broadly stifle fundamental personal liberties when the end can be more narrowly achieved. The breadth of legislative abridgement must be viewed in the light of less drastic means for achieving the same basic purpose."[123]

If such is the law, it is doubtful that a total ban on residential picketing is constitutional. As Justice Black stated in his concurring opinion in *Gregory v. City of Chicago*, "[n]arrowly drawn statutes regulating the conduct of demonstrators and picketers are not impossible to draft."[124]

122. Hague v. CIO, 307 U.S. 496, 516 (1939).

123. Buckley v. Valeo, 424 U.S. 1, 238-39 (1975) (Burger, C.J., concurring in part, dissenting in part) (quoting Shelton v. Tucker, 364 U.S. 479, 488 (1960)).

124. 394 U.S. 111, 124 (1969).