University of Baltimore Law Review

Volume 7
Issue 1 *Fall 1977*

Article 6

1977

Casenotes: Constitutional Law — Freedom of Speech — Maryland Court of Appeals Holds Unconstitutional Maryland's Anti-Residential Picketing Statute. State v. Schuller, 280 Md. 305, 372 A.2d 1076 (1977)

Alan Cohen
University of Baltimore School of Law

CASENOTES

CONSTITUTIONAL LAW — FREEDOM OF SPEECH — MARYLAND COURT OF APPEALS HOLDS UNCONSTITUTIONAL MARYLAND'S ANTI-RESIDENTIAL PICKETING STATUTE. *STATE v. SCHULLER,* 280 Md. 305, 372 A.2d 1076 (1977).

I. INTRODUCTION

Residential picketing presents a conflict between the picketer's constitutional right of free speech and the householder's rights of privacy and freedom from coercion. In the recent case of *State v. Schuller,*[1] the Court of Appeals of Maryland, by declaring unconstitutional Maryland's statute banning residential picketing, held in favor of freedom of speech.

Defendants Schuller and Simpkins were among a group of eight individuals who, on April 14, 1976, picketed the home of then-Secretary of Defense Donald Rumsfeld in Montgomery County, Maryland. At no time did any of the picketers obstruct traffic, trespass on private property, or engage in any sort of disorderly conduct.[2] Police arrived on the scene in response to a complaint telephoned by one of Rumsfeld's neighbors. Three times police officers warned the picketers that their activity violated Maryland law. Four of the picketers, including Schuller and Simpkins, refused to leave and were charged with violating MD. ANN. CODE art. 27, § 580A 2 (1976), which provided: "It shall be unlawful for any person to engage in picketing before or about the residence or dwelling place of any individual."[3]

Following their arrests, Schuller and Simpkins were tried in district court and convicted of unlawful picketing. Upon appeal, the convictions were reversed by the Circuit Court for Montgomery County, which held that subsection 2 of article 27, § 580A violated the defendants' constitutional rights of freedom of speech and assembly. Moreover, the court held that subsection 4(1) of article 27, § 580A, which exempted from the general prohibition "any picketing or assembly in connection with a labor dispute," violated the defendants' fourteenth amendment right to equal protection of the laws.[4]

The court of appeals, unanimously affirming the decision of the circuit court, held that peaceful residential picketing was protected

1. 280 Md. 305, 372 A.2d 1076 (1977).
2. *Id.* at 307, 372 A.2d at 1077.
3. Violation of the statute was punishable by a fine of not more than one hundred dollars or by imprisonment for not more than 90 days, or both. Each day of violation of the statute constituted a separate offense. MD. ANN. CODE art. 27, § 580A 5 (1976).
4. 280 Md. at 308, 372 A.2d at 1077-78; Joint Record Extract at 19-20.

by the first amendment.[5] As the case was one of first impression before the court of appeals,[6] the court chose to rely on decisions of courts of other jurisdictions, particularly the United States Supreme Court. Judge Eldridge, writing for the court, noted that although the Supreme Court had not specifically considered the constitutionality of a statute prohibiting residential picketing,[7] the Court had dealt extensively with the relationship between picketing and the right of free speech.[8]

The court of appeals began its discussion by examining *Thornhill v. Alabama*,[9] in which the Supreme Court first held that picketing was a mode of expression entitled to constitutional protection.[10] The *Thornhill* court indicated, however, that a state may "preserve the peace and . . . protect the privacy, the lives, and the property of its residents" by enacting "a statute narrowly drawn to cover the precise situation giving rise to the danger."[11]

The court of appeals noted that because picketing was an activity including both speech and conduct, it was subject to some

5. 280 Md. at 316, 372 A.2d at 1082. The court declined sub silentio defendant's invitation to declare the statute also in violation of articles 2, 23, and 40 of the Declaration of Rights of the Maryland Constitution. *See* Brief for Appellee at 1-2. Article 2 declares that the United States Constitution is the supreme law of the state; article 23 guarantees due process of law; and article 40 protects freedom of speech and of the press.

6. The Supreme Bench of Baltimore City considered the problem in the 1966 case of Molofsky v. Bundy, 34 U.S.L.W. 2582, in which Judge Harris enjoined the defendants from picketing the home of an individual who desired to transfer her liquor license to defendants' neighborhood. In his opinion, the judge declared, "When the right to free speech . . . is weighed against the right to privacy, the balance favors the privacy of the home." Neither the briefs nor the court of appeals' opinion in *Schuller* cited *Molofsky*.

7. The Court, in Allen-Bradley Local No. 1111 v. Wisconsin Employment Relations Board, 315 U.S. 740 (1942), held that a Wisconsin statute banning residential picketing by parties to a labor dispute was not superseded by federal legislation. In its decision the Court declined to review any constitutional question on the ground that such questions had not been "properly presented." *Id.* at 751; *accord,* Auto Workers v. Wisconsin Employment Relations Board, 351 U.S. 266 (1956). *See* DeGregory v. Giesing, 427 F. Supp. 910, 912 n.1 (D. Conn. 1977).

8. 280 Md. at 310, 372 A.2d at 1078.

9. 310 U.S. 88 (1940).

10. *Id.*; *accord,* Carlson v. California, 310 U.S. 106 (1940). *Thornhill* was presaged by Schneider v. State, 308 U.S. 147 (1939), and Lovell v. Griffin, 303 U.S. 444 (1938), in which the Court struck down ordinances prohibiting distribution of leaflets and circulars, and by Senn v. Tile Layers Union, 301 U.S. 468 (1937), in which the Court upheld a Wisconsin statute forbidding courts from enjoining peaceful picketing.

    For an early view of picketing, see American Steel Foundries v. Tri-City Trades Council, 257 U.S. 184 (1921), in which the Court stated that the word "picket" indicated a militant purpose inconsistent with peaceful persuasion. *Id.* at 205. The Court, however, did permit the union to post one "representative" at the entrance of a plant being struck, for the purpose of communication and persuasion. *Id.* at 206-07.

11. 310 U.S. at 105, *quoted in* 280 Md. at 311, 372 A.2d at 1079.

regulation.[12] Such regulation, however, had to be narrowly drawn to reach specific conduct which impinged on "valid state interests."[13] The state argued that the protection of the privacy of the home was a valid state interest which could be protected only by a total proscription of residential picketing.[14] The court rejected this contention sub silentio, holding that the Maryland statute's prohibition of all residential picketing, regardless of time or manner, was too broad. Therefore, the residential picketing statute violated the constitutional right of freedom of speech.[15]

In the second part of its opinion, the court of appeals considered the constitutionality of subsection 4(1) of article 27, § 580A, which exempted from the statutory ban any picketing in connection with a labor dispute.[16] The court of appeals found that this exemption created an impermissible distinction between labor picketing and other peaceful picketing, depriving non-labor picketers of equal protection of the laws under the fourteenth amendment.[17] The court reached its conclusion in reliance on *Police Department of Chicago v. Mosley*,[18] in which the Supreme Court struck down an anti-picketing ordinance with a similar exemption for labor picketing.

II. PICKETING AND THE SUPREME COURT

The Supreme Court first declared picketing a form of speech protected by the first amendment in the 1940 case of *Thornhill v. Alabama*.[19] In *Thornhill*, the Court declared unconstitutional an Alabama statute making all labor picketing a criminal offense. The Court, in an opinion written by Justice Murphy, equated freedom to picket with freedom of the press — a freedom, it noted, dear to the hearts of the founding fathers.[20] Free dissemination of ideas, the Court continued, could not constitutionally be suppressed on any issue.[21] Because wages and working conditions in industry had an

12. 280 Md. at 312, 372 A.2d at 1080. The court of appeals relied on Shuttlesworth v. Birmingham, 394 U.S. 147, 152-53 (1969).
13. 280 Md. at 312, 372 A.2d at 1080.
14. *Id.* at 309, 372 A.2d at 1078; Brief for Appellant at 11-15, 18.
15. 280 Md. at 316, 372 A.2d at 1081-82.
16. The court quoted but did not discuss subsection 4(2), which exempted "the picketing in any lawful manner [of] a person's home when it is also his sole place of business."
17. 280 Md. at 318, 372 A.2d at 1083. The court, declining to presume that the legislature would have banned residential picketing without exempting labor picketing, refused to sever the offensive exemption from the statute. *Id.* at 319-21, 372 A.2d at 1083-84.
18. 408 U.S. 92 (1972).
19. 310 U.S. 88 (1940). *See generally* Kamin, *Residential Picketing and the First Amendment*, 61 Nw. U. L. REV. 177, 194-97 (1966).
20. 310 U.S. 88, 101-02 (1940).
21. *Id.* at 102-03.

importance which transcended the concerns of the parties to a particular labor dispute,[22] members of a labor union had the right to inform the public about labor disputes through the use of picketers.[23] The fact that some members of the public may have responded to such picketing by boycotting the business which was a party to the labor dispute did not justify a statutory ban on all picketing, for "[e]very expression of opinion . . . has the potentiality of inducing action in the interests of one rather than another group in society."[24] Summarizing its thesis in the companion case of *Carlson v. California,*[25] the Court concluded:

> The carrying of signs and banners, no less than the raising of a flag, is a natural and appropriate means of conveying information on matters of public concern. . . . [P]ublicizing the facts of a labor dispute in a peaceful way through appropriate means, whether by pamphlet, by word of mouth or by banner, must now be regarded as within that liberty of communication which is secured to every person by the Fourteenth Amendment against abridgment by a State.[26]

Although the Court in *Thornhill* noted in dictum that picketing was subject to regulation,[27] it was not until 1965, in *Cox v. Louisiana (Cox I),*[28] that the Supreme Court provided a clear statement as to how a state could constitutionally regulate non-labor, or "public issue," picketing.[29] In *Cox I* the Court, *inter alia,*[30] upheld the constitutionality of a statute prohibiting persons from obstructing

22. *Id.* at 103.
23. 310 U.S. at 103; *accord,* Carlson v. California, 310 U.S. 106, 112-13 (1940).
24. 310 U.S. at 104.
25. 310 U.S. 106 (1940).
26. *Id.* at 112-13.
27. 310 U.S. at 105.
28. 379 U.S. 536 (1965).
29. In the field of labor law, the Supreme Court soon retreated from "the broad pronouncements, but not the specific holding, of *Thornhill.*" International Brotherhood of Teamsters, Local 695 v. Vogt, Inc., 354 U.S. 284, 289 (1957). In International Brotherhood of Electrical Workers v. NLRB, 341 U.S. 694 (1951), the Court held that the National Labor Relations Board's statutory authority to enjoin picketing staged in conjunction with secondary boycotts did not abridge the right of free speech of those desiring to picket, because such picketing would further an unlawful objective. *Id.* at 705. This statutory authority presently is contained in 29 U.S.C. § 158(b)(4)(A) (1970). In United Mechanics Local 150-F, 151 N.L.R.B. 386 (1965), the NLRB held that picketing in front of the homes of non-striking employees constituted an unfair labor practice within the meaning of 29 U.S.C. § 158(b)(1). *Id.* at 393-95. Because that statutory provision prohibits coercion only of employees, however, the NLRB lacks authority to enjoin picketing in front of the residences of employers. Teamsters Local 695, 204 N.L.R.B. 866, 870 (1973). *See generally* T. EMERSON, THE SYSTEM OF FREEDOM OF EXPRESSION 445 (1970).
30. The *Cox* Court also declared a breach of the peace statute unconstitutionally vague. 379 U.S. at 551-52.

sidewalks, streets, and corridors and entrances of public buildings.[31] Stating that the first and fourteenth amendments did not afford the same kind of freedom to persons who wished to communicate ideas by marching or picketing as they did to persons who communicated ideas by pure speech,[32] the Court concluded that the exercise of the rights of free speech and assembly could not be permitted to threaten public order by, for instance, interfering with the free flow of traffic.[33] For example, one could not "insist upon a street meeting in the middle of Times Square at the rush hour as a form of freedom of speech and assembly."[34] Accordingly, a narrowly drawn non-discriminatory statute constitutionally could be enacted to regulate the use of the streets for assemblies and parades according to time, place, duration, and the manner of use of the streets.[35]

III. REGULATION OF PICKETING

Any exercise of free speech entails some costs to society. "If it is oral, it is noise and may interrupt someone else; if it is written, it may be litter."[36] A valid restriction on picketing or demonstrating, however, cannot be justified merely by legislative preferences or beliefs concerning public convenience.[37] In order to be constitutional, the regulation must be necessary to preserve an important interest of society[38] having no relation to the first amendment activity proscribed.[39] Furthermore, the regulation must employ the least restrictive means available to safeguard the societal interest requiring protection.[40] Therefore, courts review statutes regulating picketing and demonstrating without the presumption of constitutionality accorded legislative judgments in other areas.[41]

31. Justice Black, in a separate opinion, stated that the statute's exemption of labor picketing deprived the defendants of equal protection. *Id.* at 580–81. The Court later adopted this view in Police Department of Chicago v. Mosley, 408 U.S. 92, 97–98 (1972).
32. 379 U.S. at 555.
33. *Id.* at 554.
34. *Id.*
35. *Id.* at 558.
36. Kalven, *The Concept of a Public Forum*, 1965 SUP. CT. REV. 1, 23.
37. Schneider v. State, 308 U.S. 147, 161 (1939).
38. Grayned v. City of Rockford, 408 U.S. 104, 116–17 (1972); Cameron v. Johnson, 390 U.S. 611, 617 (1968); Cox v. Louisiana, 379 U.S. 559, 564 (1965).
39. United States v. O'Brien, 391 U.S. 367, 377 (1968); Reilly v. Noel, 384 F. Supp. 741, 748 (D.R.I. 1974).
40. Thomas v. Collins, 323 U.S. 516, 530 (1945); Blasecki v. City of Durham, 456 F.2d 87, 91 (4th Cir.), *cert. denied*, 409 U.S. 912 (1972); Reilly v. Noel, 384 F. Supp. 741, 748 (D.R.I. 1974).
41. Blasecki v. City of Durham, 456 F.2d 87, 91 (4th Cir.), *cert. denied*, 409 U.S. 912 (1972). In *Schuller*, the state conceded that Maryland's residential picketing statute required "strict judicial scrutiny." Brief for Appellant at 21.

Societal interests which courts have held sufficient to justify restrictions on demonstrations include free flow of traffic,[42] preservation of government property for the use to which it is lawfully dedicated,[43] and protection of government operations from substantial interference.[44] On the other hand, a possibility that demonstrations at a particular location will trigger violent reactions from spectators is an insufficient justification for banning demonstrations at that location.[45] While some courts consider the presence of an alternative time, place, or manner a factor in determining the constitutionality of a restriction,[46] other courts have declared that this factor is immaterial.[47] Recent Supreme Court decisions, moreover, have cast a shadow on the constitutionality of the alternative situs doctrine.[48]

The constitutional validity of particular restrictions on picketing and demonstrating must be determined on a case by case basis. For example, a statute banning demonstrations in legislative chambers while the legislature is in session may be necessary to protect the legislature from substantial disturbance and interference;[49] however, a total ban on demonstrations in legislative chambers, encompassing periods when the legislature is not in session, may be overbroad.[50]

42. Cox v. Louisiana, 379 U.S. 536, 554-55 (1965); Blasecki v. City of Durham, 456 F.2d 87, 92 (4th Cir.), *cert. denied,* 409 U.S. 912 (1972).
43. Adderley v. Florida, 385 U.S. 39, 47 (1966); *see* Kirstel v. State, 13 Md. App. 482, 490, 284 A.2d 12, 17 (1971), *cert. denied,* 264 Md. 749, *appeal dismissed,* 409 U.S. 943 (1972).
44. Unemployed Workers Union v. Hackett, 332 F. Supp. 1372, 1379 (D.R.I. 1972); *see* State v. McNair, 178 Neb. 763, 768-69, 135 N.W.2d 463, 466-67 (1965).
45. National Socialist White People's Party v. Ringers, 473 F.2d 1010, 1014 (4th Cir. 1973); Collin v. Chicago Park Dist., 460 F.2d 746, 754 (7th Cir. 1972), *citing* Gregory v. City of Chicago, 394 U.S. 111 (1969); Dr. Martin Luther King, Jr. Movement, Inc. v. City of Chicago, 419 F. Supp. 667, 674-75 (N.D. Ill. 1976); Village of Skokie v. National Socialist Party of America, 51 Ill. App. 3d 279, 287, 366 N.E.2d 347, 353 (1977). *But see* Blasecki v. City of Durham, 456 F.2d 87, 91-92 (4th Cir.), *cert. denied,* 409 U.S. 912 (1972).
46. *See, e.g.,* Bakery Drivers Local v. Wohl, 315 U.S. 769, 775 (1942); People Acting Through Community Effort v. Doorley, 338 F. Supp. 574, 580 (D.R.I.), *rev'd on other grounds,* 468 F.2d 1143 (1st Cir. 1972); Annenberg v. S. Cal. Dist. Council of Labor, 38 Cal. App. 3d 637, 647, 113 Cal. Rptr. 519, 525-26 (1974); *cf.* Lloyd Corp. v. Tanner, 407 U.S. 551, 566-67 (1972) (upholding right of shopping center owner to exclude pamphleteers from his property).
47. Chicago Area Military Project v. City of Chicago, 508 F.2d 921, 926 (7th Cir.), *cert. denied,* 421 U.S. 992 (1975); Collin v. Chicago Park Dist., 460 F.2d 746, 752 (7th Cir. 1972); Wolin v. Port of New York Authority, 392 F.2d 83, 91-92 (2d Cir.), *cert. denied,* 393 U.S. 940 (1968); Dr. Martin Luther King, Jr. Movement, Inc. v. City of Chicago, 419 F. Supp. 667, 674 (N.D. Ill. 1976); *see* Schneider v. State, 308 U.S. 147, 163 (1939).
48. *See* Hudgens v. NLRB, 424 U.S. 507, 520-21 (1976); Police Department of Chicago v. Mosley, 408 U.S. 92 (1972). For a discussion of the constitutionality of the alternative situs doctrine, see text accompanying notes 118-29 *infra.*
49. *See* State v. McNair, 178 Neb. 763, 768-69, 135 N.W.2d 463, 466-67 (1965).
50. *Cf.* Reilly v. Noel, 384 F. Supp. 741 (D.R.I. 1974) (upholding right to demonstrate in the rotunda of a state capitol).

An example of a valid restriction according to time, place, and manner was an ordinance upheld by the Supreme Court in *Grayned v. City of Rockford.*[51] In *Grayned,* the Court affirmed the conviction of a defendant who had engaged in a demonstration outside a school building, thus violating an ordinance forbidding persons while adjacent to a school building from "making . . . any noise or diversion which disturbs or tends to disturb the peace or good order of [a] school session or class."[52] The Court indicated that while a total ban on demonstrations outside school buildings would have been overbroad,[53] a noise restriction on demonstrations held during school hours was a valid regulation of time, place, and manner.[54] The regulation was justified by the substantial governmental interest in having "an undisrupted school session conducive to the students' learning."[55]

IV. RESIDENTIAL PICKETING

While the Supreme Court has yet to consider the constitutional validity of a statute banning residential picketing, it has indicated that marching or picketing in residential neighborhoods is an activity given some degree of constitutional protection.[56] In the 1969 decision of *Gregory v. City of Chicago,*[57] the Court effectively declared that, at least in the absence of a specific and narrowly drawn statutory prohibition, the streets and sidewalks of residential neighborhoods were a public forum.

Comedian and civil rights activist Dick Gregory had led a group of about 85 persons to the home of Mayor Richard Daley. For an hour they circled the block on which the mayor's home was located as over one thousand spectators, increasingly hostile and violent toward the demonstrators, gathered. The police, on the theory that they could no longer protect the safety of the marchers, ordered Gregory and his group to leave the area. The marchers refused to leave and were arrested for disorderly conduct.[58]

The Court, in a brief opinion authored by Chief Justice Warren, reversed the convictions. Because there was no evidence that the defendants' conduct had been disorderly, their convictions violated

51. 408 U.S. 104 (1972).
52. *Id.* at 107-08.
53. *Id.* at 118.
54. *Id.*
55. *Id.*
56. *See* National Socialist Party of America v. Village of Skokie, 97 S. Ct. 2215 (1977) (reversing injunction); Organization for a Better Austin v. Keefe, 402 U.S. 415 (1971) (reversing injunction); Gregory v. City of Chicago, 394 U.S. 111 (1969) (reversing disorderly conduct conviction).
57. 394 U.S. 111 (1969).
58. For a full discussion of Gregory's march, see *id.* at 126-30 (appendix to concurring opinion of Black, J); Kamin, *supra* note 19, at 177-82, 231-36.

due process.[59] Before *Gregory,* a number of state courts had upheld disorderly conduct convictions of peaceful residential picketers on the ground that residential picketing, by its very nature, was likely to irritate onlookers and catalyze violent reactions against picketers.[60] That reasoning was totally repudiated by *Gregory.* The Court came closest to sanctioning peaceful demonstrations before private homes as a constitutionally protected activity when it stated, "Petitioners' march, if peaceful and orderly, falls well within the sphere of conduct protected by the First Amendment."[61]

Justice Black, joined by Justice Douglas, issued a concurring opinion in which he agreed with the majority that the convictions violated due process. He reached this conclusion because of the absence of a statute banning demonstrations in residential neighborhoods. He believed, however, that such a statute would be constitutional:

> [N]o mandate in our Constitution leaves States and governmental units powerless to pass laws to protect the public from the kind of boisterous and threatening conduct that disturbs the tranquility of spots selected by the people . . . for homes, wherein they can escape the hurly-burly of the outside business and political world . . . .
>
> . . . .
>
> 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, . . . 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 views, new morals, and a new way of life. Men and women who hold public office would be

59. The Supreme Court had previously overturned disorderly conduct convictions of peaceful non-residential demonstrators. *See* Brown v. Louisiana, 383 U.S. 131 (1966); Cox v. Louisiana, 379 U.S. 536 (1965); Henry v. City of Rock Hall, 376 U.S. 776 (1964); and Edwards v. South Carolina, 372 U.S. 229 (1963).

60. "Conduct is disorderly . . . when it is of such nature as to affect the peace and quiet of persons who may witness the same and who may be disturbed or provoked to resentment thereby." State v. Zanker, 179 Minn. 355, 357, 229 N.W. 311, 312 (1930).

In State v. Cooper, 205 Minn. 333, 285 N.W. 903 (1939), disorderly conduct convictions of peaceful residential picketers were affirmed despite a total absence of onlookers at the scene of the picketing. The court labeled the picketing as "likely to arouse anger, disturbance, or violence." *Id.* at 337, 285 N.W. at 905; *accord,* State v. Perry, 196 Minn. 481, 265 N.W. 302 (1936); People v. Levner, 30 N.Y.S.2d 487 (1941). *Contra,* Flores v. City and County of Denver, 122 Colo. 71, 220 P.2d 373 (1950). For a defense of disorderly conduct arrests in situations comparable to *Gregory,* see Kamin, *supra* note 19, at 219–25.

61. 394 U.S. at 112. Although arguably dictum, *see* Tassin v. Local 832, Nat'l Union of Police Officers, 311 So. 2d 591, 592–93 (La. App. 1975) (Samuel, J., dissenting), the statement was authoritatively adopted by the Court in Police Department of Chicago v. Mosley, 408 U.S. 92, 99 (1972).

> compelled, simply because they did hold public office, to lose the comforts and privacy of an unpicketed home. I believe that our Constitution . . . did not create a government with such monumental weaknesses. Speech and press are, of course, to be free, . . . [b]ut picketing and demonstrating can be regulated like other conduct of men. I believe 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.[62]

Although this was only a concurring opinion, courts have relied upon it to uphold statutes banning residential picketing, while completely ignoring the opinion of the *Gregory* majority.[63] Only in the Connecticut case of *State v. Anonymous*[64] has a court decided that the majority opinion in *Gregory* required it to hold unconstitutional a statute banning residential picketing.[65] In *Schuller,* the Court of Appeals of Maryland discussed only the concurring opinion in *Gregory* and interpreted it merely to authorize a statute to prohibit "noisy, marching, tramping, threatening picketers and demonstrators" in residential neighborhoods.[66] Such a limited interpretation of Justice Black's concurring opinion appears to be unique.

Even if the streets and sidewalks of residential neighborhoods are a public forum, a narrowly drawn non-discriminatory statute constitutionally may be enacted to regulate their use as a public forum according to time, place, duration, or manner of use.[67] The issue is whether a statutory ban on all residential picketing is a valid regulation of place.

A. Residential Picketing and The Right of Privacy

To date, courts have considered constitutional challenges to five statutes banning residential picketing. Three of these statutes were

---

62. 394 U.S. at 118, 125-26.
63. Garcia v. Gray, 507 F.2d 539, 544-45 (10th Cir. 1974); People Acting Through Community Effort v. Doorley, 338 F. Supp. 574, 578 (D.R.I.), *rev'd on other grounds,* 468 F.2d 1143 (1st Cir. 1972); City of Wauwatosa v. King, 49 Wis. 2d 398, 182 N.W.2d 530 (1971). References to Justice Black's concurrence are found throughout the *Wauwatosa* opinion. *See* Tassin v. Local 832, Nat'l Union of Police Officers, 311 So. 2d 591, 592-93 (La. App. 1975) (Samuel, J., dissenting); Brief for Appellant at 10-12, State v. Schuller, 280 Md. 305, 372 A.2d 1076 (1977).
64. 6 Conn. Cir. Ct. 372, 274 A.2d 897 (1971).
65. The court in *Anonymous* construed the statute under consideration as prohibiting only picketing of the homes of strikebreaking employees. This statute is presently found in CONN. GEN. STAT. ANN. § 31-120 (1972). *See* DeGregory v. Giesing, 427 F. Supp. 910 (D. Conn. 1977).
66. 280 Md. at 315, 372 A.2d at 1081.
67. Cox v. Louisiana, 379 U.S. 536, 558 (1965).

upheld on the ground that the protection of the privacy of the individual householder was a substantial societal interest justifying a total proscription of residential picketing.[68] Despite these opinions, the right of privacy was scarcely mentioned by the *Schuller* court.[69] Those opposed to residential picketing view the householder as a helpless captive of persons wishing to force him to receive their communications. The proposition that the right of privacy constitutes a societal interest of sufficient magnitude to justify constitutionally a statutory ban on residential picketing received forceful support in the Wisconsin Supreme Court's decision in *City of Wauwatosa v. King*:[70]

> Tranquility and privacy are fragile enough flowers, particularly in a home setting. . . . Home is many things, most of them intangibles, not just a house and shelter, but an opportunity to rest, relax and recharge batteries for the morrow. Of such ingredients is tranquility made up, and privacy derived. Can it be seriously contended that the 25 to 35 picketers parading up and down in front of the homes here involved did not adversely affect the well-being, tranquility and privacy of the folks at home in their homes? To those inside and to the neighbors, the home becomes something less than a home when and while the picketing, demonstrating and parading continue. . . . [T]he very fact of the physical patrolling and marching by the group of uninvited and unwelcome paraders creates pressure. The newsworthiness of the situation stems in part from the tensions created and pressures focused on the home. Such tensions and pressures may be psychological, not physical, but they are not, for that reason, less inimical to family privacy and truly domestic tranquility. If, as we have said, it is a proper public purpose to protect both privacy and tranquility, then the prohibiting of picketing before or about the home is a clearly related and entirely reasonable means to such end.[71]

---

68. *Compare* Garcia v. Gray, 507 F.2d 539 (10th Cir. 1974), People Acting Through Community Effort v. Doorley, 338 F. Supp. 574 (D.R.I.), *rev'd on other grounds,* 468 F.2d 1143 (1st Cir. 1972), *and* City of Wauwatosa v. King, 49 Wis. 2d 398, 182 N.W.2d 530 (1971); *with* State v. Anonymous, 6 Conn. Cir. Ct. 372, 274 A.2d 897 (1971) *and* State v. Schuller, 280 Md. 305, 372 A.2d 1076 (1977). *See* DeGregory v. Giesing, 427 F. Supp. 910 (D. Conn. 1977).
69. The court of appeals was content simply to quote a portion of Justice Black's concurring opinion in Gregory v. City of Chicago, 394 U.S. 111 (1969), dealing with privacy and contend that it did not authorize a complete statutory ban on residential picketing. For a general discussion by the court of appeals of the constitutional right of privacy, see Montgomery County v. Walsh, 274 Md. 489, 511-13, 336 A.2d 97, 104-05 (1975), *appeal dismissed,* 424 U.S. 901 (1976); Doe v. Commander, Wheaton Police Dep't., 273 Md. 262, 272-73, 329 A.2d 35, 41-42 (1974).
70. 49 Wis. 2d 398, 182 N.W.2d 530 (1971), *reprinted in* 42 A.L.R.3d 1341 (1972).
71. *Id.* at 411-12, 182 N.W.2d at 537; *accord,* City of Brookfield v. Groppi, 50 Wis. 2d 166, 184 N.W.2d 96 (1971); *see* Gregory v. City of Chicago, 394 U.S. 111, 118,

Several cases have reached the Supreme Court which dealt with the question of a homeowner's right to exclude from his home unwanted communications in forms other than picketing. In *Martin v. Struthers,*[72] the Court, in an opinion authored by Justice Black, declared unconstitutional an ordinance prohibiting door to door solicitation. Although noting that the ordinance may have been "aimed at the protection of the householder from annoyance,"[73] the Court held that the right of free speech outweighed the privacy interests at stake:

> [D]oor to door campaigning is one of the most accepted techniques of seeking popular support. . . . Door to door distribution of circulars is essential to the poorly financed causes of little people.
>
> Freedom to distribute information to every citizen wherever he desires to receive it is so clearly vital to the preservation of a free society that, putting aside reasonable police and health regulations of time and manner of distribution, it must be fully preserved. The dangers of distribution can so easily be controlled by traditional legal methods, leaving to each householder the full right to decide whether he will receive strangers as visitors, that stringent prohibition can serve no purpose but that forbidden by the Constitution, the naked restriction of the dissemination of ideas.[74]

Six years after the *Martin* decision, the Court, in *Kovacs v. Cooper,*[75] upheld the constitutionality of an ordinance banning sound trucks in public streets. The Court stated that while a homeowner was free to bar a door to door solicitor from entering his home, "he [was] practically helpless to escape the interference with his privacy by loud speakers except through the protection of

---

124-26 (1969) (Black, J., concurring); Garcia v. Gray, 507 F.2d 539, 544-45 (10th Cir. 1974); Annenberg v. S. Cal. Dist. Council of Labor, 38 Cal. App. 3d 637, 645-46, 113 Cal. Rptr. 519, 524-25 (1974); Keefe v. Organization for a Better Austin, 115 Ill. App. 2d 236, 252, 253 N.E.2d 76, 84 (1969), *rev'd*, 402 U.S. 415 (1971); Molofsky v. Bundy, 34 U.S.L.W. 2582 (Supreme Bench Balt. City 1966); State v. Cooper, 205 Minn. 333, 336, 285 N.W. 903, 905 (1939); State v. Perry, 196 Minn. 481, 482, 265 N.W. 302 (1936); State v. Zanker, 179 Minn. 355, 356, 229 N.W. 311 (1930); People v. Levner, 30 N.Y.S.2d 487, 493 (1941); Pipe Machinery Co. v. DeMore, 36 Ohio Op. 342, 343-44, 76 N.E.2d 725, 727 (1947), *appeal dismissed,* 149 Ohio St. 582, 79 N.E.2d 910 (1948).

72. 319 U.S. 141 (1943).

73. *Id.* at 144.

74. *Id.* at 146-47. The Supreme Court's recent decision in Hynes v. Mayor of Oradell, 425 U.S. 610 (1976), may have narrowed the holding in *Martin.* The Court, while declaring unconstitutionally vague an ordinance which required door to door solicitors to notify police before soliciting, indicated in dicta that a proper notification statute could be drawn. Protection either of public safety or of peacful enjoyment of the home would be substantial societal interests justifying such a statute. *Id.* at 619-20.

75. 336 U.S. 77 (1949).

the municipality."[76] The Court rejected the proposition that the use of sound trucks was "essential to the poorly financed causes of little people,"[77] and declined "to call forth constitutional protection for what those charged with public welfare reasonably think is a nuisance when easy means of publicity are open."[78]

More recently, in *Rowan v. United States Post Office,*[79] the Supreme Court upheld the constitutionality of a federal statute under which a householder could require a mailer to remove the householder's name from his mailing lists and stop all further mailings to him.[80] After comparing this statutory right to the right of a homeowner to exclude unwanted door to door solicitors of literature from his home,[81] the Court concluded:

> [N]o one has a right to press even 'good' ideas on an unwilling recipient. That we are often 'captives' outside the sanctuary of the home and subject to objectionable speech and other sound does not mean we must be captives everywhere.[82]

On the other hand, in *Erznoznik v. City of Jacksonville,*[83] the Court declared that an ordinance prohibiting the showing of nudity at any drive-in theater where the film was visible "from any public street or public place" violated the first amendment. The Court found that the intrusion into the privacy of the home that was present in *Rowan* was absent in *Erznoznik,*[84] despite the fact that defendant theater owner's screen was visible from nearby residences.[85] Absent a showing that substantial privacy interests were being invaded in an intolerable manner, the burden fell upon the offended viewer simply to avert his eyes.[86]

By analogy, the rationales of *Kovacs v. Cooper* and *Grayned v. City of Rockford*[87] appear to permit a state to prohibit picketers in

---

76. *Id.* at 87.
77. The quotation is from Martin v. Struthers, 319 U.S. 141, 146 (1943).
78. Kovacs v. Cooper, 336 U.S. 77, 88-89 (1949). Justice Black attacked this reasoning in a dissenting opinion, *id.* at 102-03. If statutes of the *Martin* and *Kovacs* variety were held constitutional, he argued, the right of free speech would soon be enjoyed only by those wealthy enough to own news media or to purchase advertisements therein. While stating that, because of the nuisance potential inherent in the use of sound trucks, a city could impose on such use reasonable regulations according to time, place, and manner, he stated that a ban on their use anywhere in a city violated the first amendment. *Id.* at 104.
79. 397 U.S. 728 (1970).
80. 39 U.S.C. § 4009 (Supp. IV 1964) (current version at 39 U.S.C. § 3008 (1970)).
81. *See* Martin v. Struthers, 319 U.S. 141, 148 (1943).
82. 397 U.S. at 738.
83. 422 U.S. 205 (1975).
84. *Id.* at 209, 211-12.
85. *Id.* at 221 (Burger, C.J., dissenting).
86. *Id.* at 211; *accord,* Cohen v. California, 403 U.S. 15, 21 (1971).
87. 408 U.S. 104 (1972). *See* text accompanying notes 51-55 *supra.*

front of private residences from chanting or otherwise making noises loud enough to be heard inside the picketed homes.[88] Moreover, a statute which requires residential picketers first to notify police would likely be upheld, provided that the statute was designed to protect against possible disorder.[89] The holding of *Organization for a Better Austin v. Keefe,*[90] however, seems to refute the argument that the constitutional right of privacy would justify a statutory ban on residential picketing.

The Organization for a Better Austin distributed leaflets describing Keefe, a real estate broker, as a "blockbuster" and a "panic peddler." Two of the leaflets urged recipients to telephone Keefe at his home; another threatened a boycott of Westchester, Illinois, stores. The leaflets were distributed at a Westchester shopping center, outside Keefe's church, and under the doors of Keefe's neighbors. Keefe sought an injunction. At trial an OBA official admitted that the primary purpose of the organization's activities was to pressure Keefe into signing a no-solicitation agreement prepared by OBA.[91] The injunction was granted; it included a ban on picketing, although no picketing had occurred.[92]

The Appellate Court of Illinois held that "the protection of the privacy of home and family" outweighed any interest in free speech.[93] The Supreme Court, in an opinion written by Chief Justice Burger, rejected this contention:

> Designating the conduct as an invasion of privacy . . . is not sufficient to support an injunction against peaceful distribution of informational literature of the nature revealed by this record. *Rowan v. United States Post Office* . . . is not in point; the right of privacy involved in that case is not shown here. Among other important distinctions, respondent is not attempting to stop the flow of information into his own household, but to the public.[94]

Residential picketing, like the distribution of leaflets involved in *Keefe,* necessarily entails some communication to neighbors and passers-by, although in most cases informing or coercing the target

88. The *Schuller* court implied that a statute constitutionally may prohibit noisy residential picketers. 280 Md. at 315, 316, 372 A.2d at 1081. Arresting quiet picketers because they attract noisy spectators would, of course, be the equivalent of arresting peaceful picketers because they attract disorderly spectators, a practice condemned by the Supreme Court in Gregory v. City of Chicago, 394 U.S. 111 (1969).
89. *Cf.* Hynes v. Mayor of Oradell, 425 U.S. 610, 619-20 (1976).
90. 402 U.S. 415 (1971).
91. Keefe v. Organization for a Better Austin, 115 Ill. App. 2d 236, 238-39, 253 N.E.2d 76, 77-78 (1969), *rev'd,* 402 U.S. 415 (1971).
92. Organization for a Better Austin v. Keefe, 402 U.S. 415, 417 (1971).
93. 115 Ill. App. 2d at 252, 253 N.E.2d at 84.
94. 402 U.S. at 419-20.

of the picketing may be the dominant motive. Requiring picketers in front of private homes to walk quietly reduces, but does not entirely eliminate, the status of the picketed householder as a captive audience. The Court in *Keefe* nonetheless appeared to weigh this conflict between the right of privacy and the right of free speech in favor of the latter. Under this reasoning, a homeowner offended by picketing is thus under the burden of averting his eyes by drawing the shades or by simply not looking through the window. Admittedly, the homeowner may avoid the unwanted communication only by becoming a prisoner in his own home; however, his constitutional right of privacy is considerably reduced when he leaves the sanctuary of his home for his lawn or for places outside his property.[95] By proscribing peaceful residential picketing, the Maryland statute had in effect extended the protected zone of the homeowner from his lawn to a point outside his neighborhood. The ability of government constitutionally to provide such an extended zone seems to have been denied by the Court in *Keefe*.[96]

B. Residential Picketing and Coercion

In *Cox v. Louisiana (Cox II)*,[97] the Supreme Court, upholding a statute prohibiting picketing near a courthouse, stated:

> [J]udges are human; and the legislature has the right to recognize the danger that some judges, jurors, and other court officials, will be consciously or unconsciously influenced by demonstrations in or near their courtrooms both prior to and at the time of the trial. . . . Suppose demonstrators paraded and picketed for weeks with signs asking that indictments be dismissed, and that a judge, completely uninfluenced by these demonstrations, dismissed the indictments. A State may protect against the possibility of a conclusion by the public under these circumstances that the judge's action was in part a product of intimidation and did not flow only from the fair and orderly working of the judicial process.[98]

---

95. *See* Public Utilities Comm'n v. Pollak, 343 U.S. 451, 464 (1952); *cf.* Air Pollution Variance Bd. v. Western Alfalfa, 416 U.S. 861, 865 (1974); Hester v. United States, 265 U.S. 57, 59 (1924) (evidence seized without a warrant, on private property, but in open fields, admissible against property owner at trial). *But see* Lehman v. City of Shaker Heights, 418 U.S. 298, 307 (1974) (Douglas, J., concurring).

96. The United States Court of Appeals for the Tenth Circuit, in upholding a statutory ban on residential picketing, apparently rejected this interpretation of *Keefe*. Garcia v. Gray, 507 F.2d 539, 544-45 (10th Cir. 1974) (citing only the decision of the Illinois court). *See* People Acting Through Community Effort v. Doorley, 338 F. Supp. 574, 580 (D.R.I.), *rev'd on other grounds*, 468 F.2d 1143 (1st Cir. 1972); Annenberg v. S. Cal. Dist. Council of Labor, 38 Cal. App. 3d 637, 113 Cal. Rptr. 519 (1974).

97. 379 U.S. 559 (1965).

98. *Id.* at 565.

Professor Kamin, in an article written a decade ago, argued that the protection afforded to judges and jurors in courthouses should be extended to public officials in their homes. Public officials, he contended, should be free to make decisions free from the "physical intimidation and coercion" of residential picketing:

> If public decisions are to be made in this way, the group which can bring the greatest amount of physical power to bear upon public officials will see its views prevail. A government somewhere might function in this way — but it would not be a democracy.[99]

Historically, most courts which have enjoined residential picketing have done so on the ground that such activity is motivated primarily by a desire to coerce and intimidate the individual being picketed and thus is not entitled to constitutional protection.[100] The value of these cases as precedent, however, must be questioned in light of *Organization for a Better Austin v. Keefe.*

Keefe presented a very strong case of coercion.[101] In upholding an injunction against leafleting, the Appellate Court of Illinois stated, "Coercion, not speech, was the purpose and object of defendants' activities."[102] The Supreme Court reversed:

> 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 . . . . 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.[103]

---

99. Kamin, *supra* note 19, at 231.
100. *See* Hall v. Hawaiian Pineapple Co., 72 F. Supp. 533, 537 (D. Haw. 1947); S. Cal. Iron and Steel Co. v. Ass'n of Iron Workers, 186 Cal. 604, 619, 621, 200 P. 1, 7, 8 (1921); Jacobs v. United Furniture Workers, 16 C.C.H. LAB. CAS. ¶65,065, at 75,372, 75,379 (L.A. County Super. Ct. Cal. 1949); Tassin v. Local 832, Nat'l Union of Police Officers, 311 So. 2d 591, 592-93 (La. App. 1975) (dissenting opinions); State v. Zanker, 179 Minn. 355, 229 N.W. 311 (1930); Evening Times Printing & Publishing Co. v. American Newspaper Guild, 124 N.J. Eq. 71, 81, 199 A. 598, 604 (1938); Hebrew Home and Hosp. for Chronic Sick, Inc. v. Davis, 38 Misc. 2d 173, 177-78, 235 N.Y.S.2d 318, 323-24 (1962); Petrucci v. Hogan, 5 Misc. 2d 480, 490, 27 N.Y.S.2d 718, 728 (1941); Fawick Airflex Co. v. United Electrical & Machine Workers, 56 Ohio Abs. 426, 92 N.E.2d 446 (1950); Pipe Machinery Co. v. DeMore, 36 Ohio Op. 342, 343, 76 N.E.2d 725, 726 (1947). The *Schuller* court did not discuss coercion as a possible ground for upholding the statute.
101. *See* text accompanying note 91 *supra.*
102. Keefe v. Organization for a Better Austin, 115 Ill. App. 2d 236, 252, 253 N.E.2d 76, 84 (1969).
103. 402 U.S. at 419; *see* Thornhill v. Alabama, 310 U.S. 88, 104 (1940).

Nonetheless, *Cox II* makes clear that, in certain limited situations, picketing may be barred on the ground of coercion. The rationale of *Cox II,* which upheld a ban on demonstrations near a courthouse, logically encompasses a ban on picketing in front of a judge's home.[104] The holding of *Keefe*, however, would indicate that in most other situations, residential picketing would not be barred merely because it necessarily includes elements of coercion.

V. EQUAL PROTECTION AND THE ALTERNATIVE SITUS

An equal protection issue arises when the legislature exempts labor pickets from an anti-picketing statute. In the area of residential picketing, such an exemption is usually limited to the situation in which a home sought to be picketed is the place of employment involved in the labor dispute.[105] The statute invalidated by the court of appeals in *Schuller,* however, contained a broader exemption for "any picketing in connection with a labor dispute."[106] Courts have justified a statutory exemption for domestic employees on the grounds that it is necessary to preserve an employee's right to picket at the site of the subject matter of his dispute, and that the homeowner, by becoming an employer, impliedly consents to the possibility that his home may become the site of labor picketing should a dispute arise.[107] One court indicated that, without an

104. *See* Hebrew Home and Hosp. for Chronic Sick, Inc. v. Davis, 38 Misc. 2d 173, 235 N.Y.S.2d 318 (1962); Fawick Airflex Co. v. United Electrical & Machine Workers, 56 Ohio Abs. 426, 92 N.E.2d 446 (1950), *appeal dismissed,* 154 Ohio St. 205, 93 N.E.2d 769 (1950). *See generally* Annot., 58 A.L.R.3d 1297 (1974).

In the field of labor law, the National Labor Relations Board has authority under 29 U.S.C. § 158(b)(1)(A) (1970) to enjoin picketing by unions at the homes of strikebreaking employees. *See* Teamsters Local 695, 204 N.L.R.B. 866, 870 (1973); United Mechanics Local 150-F, 151 N.L.R.B. 386 (1965). Although the constitutionality of this authority has yet to be tested, the time would appear to be ripe for such a test in view of Hudgens v. NLRB, 424 U.S. 507 (1976), and Police Dep't of Chicago v. Mosley, 408 U.S. 92 (1972), which indicated that distinctions may not be drawn between different communications on the basis of their content. *See* text accompanying notes 125-29. Under 29 U.S.C. § 158(b)(1)(A) (1970), a person's right to picket a private home in Maryland now depends on the message on the picket sign. Justice Black, in his concurring opinion in NLRB v. Fruit & Vegetable Packers, Local 760, 377 U.S. 58, 76-80 (1964), stated his belief that the NLRB's authority to enjoin picketing is unconstitutional in so far as it is based solely on the message sought to be conveyed. Justice Black's concurrence was cited favorably by the *Mosley* Court. Police Dep't of Chicago v. Mosley, 408 U.S. 92, 98 (1972). *But see* DeGregory v. Giesing, 427 F. Supp. 910 (D. Conn. 1977) (upholding Connecticut statute interpreted to prohibit labor picketing in residential areas, but to permit other picketing).

105. *See, e.g.,* ARK. STAT. ANN. § 41-1443 (Supp. 1975); HAW. REV. STAT. § 379 A-1 (Supp. 1975); ILL. ANN. STAT. ch. 38, § 21.1-2 (Supp. 1977).

106. MD. ANN. CODE art. 27, § 580A 4(1) (1976).

107. People Acting Through Community Effort v. Doorley, 338 F. Supp. 574, 580-81 (D.R.I.), *rev'd on other grounds,* 468 F.2d 1143 (1st Cir. 1972); City of Wauwatosa v. King, 49 Wis. 2d 398, 413-14, 182 N.W.2d 530, 537-38 (1971); *see* Annenberg v. S. Cal. Dist. Council of Labor, 38 Cal. App. 3d 637, 647-48, 113 Cal. Rptr. 519, 526 (1974).

exemption for domestic workers, a statute prohibiting residential picketing would deprive these workers of equal protection by eliminating the only site at which they may picket.[108]

In *Police Department of Chicago v. Mosley*,[109] the Supreme Court held that an ordinance which barred picketers within 150 feet of a school building during school hours, unless the school was involved in a labor dispute, violated the equal protection clause of the fourteenth amendment:

> The operative distinction is the message on a picket sign. But, above all else, the First Amendment means that the government has no power to restrict expression because of its message, its ideas, its subject matter, or its content. . . .
>
> . . . [G]overnment may not grant the use of a forum to people whose views it finds acceptable, but deny use to those wishing to express less favored or more controversial views. . . . Once a forum is opened up to assembly or speaking by some groups, government may not prohibit others from assembling or speaking on the basis of what they intend to say.[110]

The broad exemption of all labor picketing in subsection 4(1) of Maryland's residential picketing statute clearly violated the equal protection clause of the fourteenth amendment as interpreted by the *Mosley* Court.[111] It is uncertain whether an exemption limited to domestic employees would likewise be deemed unconstitutional. The United States Court of Appeals for the First Circuit has held[112] that an anti-residential picketing ordinance which exempted "picketing in any lawful manner during a labor dispute of the place of employment, involved in such labor dispute" violated the equal protection clause of the fourteenth amendment. On the other hand, a

---

108. City of Wauwatosa v. King, 49 Wis. 2d 398, 414, 182 N.W.2d 530, 538 (1971). Although a state may limit labor picketing to the situs of the dispute, *see* Carpenters & Joiners Union, Local 213 v. Ritter's Cafe, 315 U.S. 722, 727-28 (1942); DeGregory v. Giesing, 427 F. Supp. 910, 915 (D. Conn. 1977), Maryland courts are forbidden by statute from enjoining labor picketing in "any public street or any place where any person or persons may lawfully be." MD. ANN. CODE art. 100, § 65(e) (1964).

109. 408 U.S. 92 (1972).

110. *Id.* at 95-96. Although the United States Court of Appeals for the Seventh Circuit had declared the ordinance unconstitutional as a violation of freedom of speech, Mosley v. Police Dep't of Chicago, 432 F.2d 1256 (7th Cir. 1970), the Supreme Court found it unnecessary to address this aspect, resting its decision on the equal protection clause. An ordinance identical to that in *Mosley* was likewise struck down on equal protection grounds in Grayned v. City of Rockford, 408 U.S. 104, 107 (1972), decided the same day as *Mosley*.

111. The state had argued that this clause merely permitted picketers at an employer's place of business. Brief for Appellant at 23, State v. Schuller, 280 Md. 305, 372 A.2d 1076 (1977).

112. People Acting Through Community Effort v. Doorley, 468 F.2d 1143 (1st Cir. 1972).

California appellate court, in an opinion which did not cite *Mosley,* indicated that domestic employees were permitted to picket their employer's home only in instances in which the picketing resulted in minimal invasion of the employer's privacy; in that case, for example, hundreds of acres of privately owned land separated the picketers from the home.[113] More recently, a three judge federal court, in *DeGregory v. Giesing,*[114] rejected an equal protection challenge to a statute construed to prohibit residential picketing in connection with a labor dispute except in the case of a home which was the place of employment involved in a dispute.[115] The *DeGregory* court stated that, notwithstanding *Mosley,* subject matter distinctions were permissible if they were precisely tailored to serve a substantial governmental interest.[116] The subject matter distinctions drawn by the statute were justified, in the court's view, by the state's substantial interest in limiting the scope of a labor dispute to the situs of the dispute.[117]

The *Mosley* decision also makes doubtful one of the grounds on which residential picketing has been enjoined — the availability of alternative sites for the picketing. Courts utilizing the alternative situs doctrine permit picketing of homes only if no alternative site for the picketing exists,[118] or at least, view the possibility of alternative sites as a factor to be weighed against such picketing.[119] Except in cases of picketing by domestic employees, residential picketers usually have alternative sites for their picketing; in *Schuller,* the alternative sites were the public areas adjacent to the Pentagon.[120]

113. Annenberg v. S. Cal. Dist. Council of Labor, 38 Cal. App. 3d 637, 648, 113 Cal. Rptr. 519, 526 (1974). No anti-picketing statute was involved in this case. *See* Jewish Defense League v. Washington, 347 F. Supp. 1300 (D.D.C. 1972) (upholding labor exemption contained in statute banning picketing within 500 feet of an embassy).
114. 427 F. Supp. 910 (D. Conn. 1977).
115. CONN. GEN. STAT. ANN. § 31-120 (1972). *See* State v. Anonymous, 6 Conn. Cir. Ct. 372, 274 A.2d 897 (1971).
116. 427 F. Supp. at 913-14. *DeGregory* relied on Young v. American Mini Theatres, 427 U.S. 50, 63-71, 82-83 n.6 (1976).
117. 427 F. Supp. at 915.
118. *See* Hibbs v. Neighborhood Organization to Rejuvenate Tenant Housing, 433 Pa. 578, 253 A.2d 622 (1969); City of Wauwatosa v. King, 49 Wis. 2d at 413-14, 182 N.W.2d at 537-38 (1971).
119. *See* Bakery Drivers Local 802 v. Wohl, 315 U.S. 769, 775 (1942); Annenberg v. S. Cal. Dist. Council of Labor, 38 Cal. App. 3d 637, 647, 113 Cal. Rptr. 519, 525-26 (1974); Tassin v. Local 832, Nat'l Union of Police Officers, 311 So. 2d 591, 593-94 (La. App. 1975) (Lemmon, J., dissenting). *See also* State v. Perry, 196 Minn. 481, 265 N.W. 302 (1936); Evening Times Printing & Publishing Co. v. American Newspaper Guild, 124 N.J. Eq. 71, 83, 199 A. 598, 605 (1938); Note, *Picketing the Homes of Public Officials,* 34 U. CHI. L. REV. 106, 121-23 (1966).
120. On the right to demonstrate in the concourse of the Pentagon, see United States v. Crowthers, 456 F.2d 1074 (4th Cir. 1972).

The alternative situs doctrine appeared to have reached its zenith in the case of *Lloyd Corp. v. Tanner,*[121] in which the Supreme Court held that the owner of a shopping center was free to bar persons desiring to distribute leaflets when the activity was not "directly related in its purpose to the use to which the shopping center property was being put."[122] Thus, the Court apparently held that striking employees of individual stores, with no alternative sites at which to picket, could not be barred from shopping center property; however, persons desiring to exercise first amendment rights on issues unrelated to the shopping center could be excluded.[123] In the latter instance the Court noted:

> It would be an unwarranted infringement of property rights to require them to yield to the exercise of First Amendment rights under circumstances where alternative avenues of communication exist.[124]

The Court's subsequent decision in *Mosley* casts a shadow on the constitutional validity of the alternative situs test apparently used in *Lloyd.* Whether alternative sites exist depends upon the message on the picket sign.[125] *Mosley* seems to indicate that drawing a distinction between communications based on the messages sought to be conveyed is unconstitutional.[126] Applying this principle, the Court, in *Hudgens v. NLRB,*[127] overruled its apparent holding in *Lloyd* and held that the owner of a shopping center may in all cases bar picketers from the property. The Court decided that a privately owned shopping center is not dedicated to public use to the extent that persons are entitled to exercise first amendment rights therein. By way of dictum, the Court noted that if a shopping center were deemed to be the functional equivalent of a municipality, then any

121. 407 U.S. 551 (1972).
122. *Id.* at 563, *quoting* Food Employees Local 590 v. Logan Valley Plaza, Inc., 391 U.S. 308, 320 n.9 (1968).
123. The Supreme Court later denied that this had been the holding of *Lloyd. See* Hudgens v. NLRB, 424 U.S. 507, 518-20 (1976). Before *Hudgens,* however, commentators has unanimously interpreted *Lloyd* in the manner stated in the text. *See, e.g.,* Lewis, *Free Speech and Property Rights Re-Equated: The Supreme Court Ascends from* Logan Valley, 24 LAB. L. J. 195, 199-200 (1973); Note, Lloyd v. Tanner: *The Demise of* Logan Valley *and the Disguise of* Marsh, 61 GEO. L. J. 1187, 1190, 1209, 1212 (1973); 57 MINN. L. REV. 603, 607 (1973); 27 U. MIAMI L. REV. 219, 222, 224 (1972); 1973 WASH. U.L.Q. 427, 432. *See also* 28 U. FLA. L. REV. 1032, 1038-39 (1976).
124. 407 U.S. at 567. One commentator has stated that the alternative situs rationale used to bar picketers from private property in *Lloyd* should not be extended to bar residential picketers from public streets and sidewalks. *See* Note, *Picketers at the Doorstep,* 9 HARV. CIV. RIGHTS — CIV. LIB. L. REV. 95, 105-06 (1974) [hereinafter cited as *Doorstep*].
125. *See* NLRB v. Fruit & Vegetable Packers, Local 760, 377 U.S. 58, 79 (1964) (Black, J., concurring).
126. *See* text accompanying notes 109-10.
127. 424 U.S. 507 (1976).

exclusion of picketers based on the criteria which seemed to have been enunciated in *Lloyd* would constitute discrimination in the regulation of expression on the basis of the content of the expression.[128] "[I]f the respondents in the *Lloyd* case did not have a first amendment right to enter that shopping center to distribute handbills concerning Vietnam, then the pickets in the present case did not have a first amendment right to enter this shopping center for the purpose of advertising their strike."[129] *Mosley,* as interpreted by this dictum in *Hudgens,* may thus spell the end of the alternative situs doctrine in so far as the doctrine is used as a criterion for determining whether specific persons may picket at a particular site.

VI. PICKETING THE HOMES OF PRIVATE PERSONS

Some commentators would attach importance to whether an individual whose home is picketed is a public or private person.[130] Those who advocate a distinction on this basis find support in the Supreme Court's decisions in the field of defamation.[131] Although the target of the leafleting in *Organization for a Better Austin v. Keefe* could have been characterized as a private person active in a matter of public interest,[132] the Court did not discuss whether private persons were entitled to a greater protection of privacy than persons involved in public affairs.

Aside from labor dispute cases and *Keefe,* the only reported appellate case involving picketing of a private person's home is *Hibbs v. Neighborhood Organization to Rejuvenate Tenant Housing.*[133] In *Hibbs,* the Supreme Court of Pennsylvania permitted tenants to picket their landlord's home, on the ground of lack of alternative situs.[134] In a larger number of cases, dissatisfied consumers, home purchasers, and tenants have sought to picket the office of parties with whom they entered contractual relations.[135]

---

128. *Id.* at 520.
129. *Id.* at 520-21.
130. *See generally Doorstep, supra* note 124, at 114-16, 121-22.
131. *See* Time, Inc. v. Firestone, 424 U.S. 448 (1976); Gertz v. Robert Welch, Inc., 418 U.S. 323 (1974); N.Y. Times Co. v. Sullivan, 376 U.S. 254 (1964); *accord,* General Motors Corp. v. Piskor, 277 Md. 165, 352 A.2d 810 (1976); Jacron Sales Co. v. Sindorf, 276 Md. 580, 350 A.2d 688 (1976).
132. *See* text accompanying note 91.
133. 433 Pa. 578, 252 A.2d 622 (1969).
134. *See generally* Note, *Residential Picketing of Slum Landlords,* 1971 URB. L. ANN. 223.
135. *Compare* Carter v. Knapp Motor Co., 243 Ala. 600, 11 So. 2d 383 (1943); Menard v. Houle, 298 Mass. 546, 11 N.E.2d 436 (1937), Roberts v. Ryan Homes, Inc., 70 Misc. 2d 198, 333 N.Y.S.2d 564 (1972); Springfield, Bayside Corp. v. Hochman, 44 Misc. 2d 882, 255 N.Y.S.2d 140 (1964), West Willow Realty Corp. v. Taylor, 23 Misc. 2d 867, 198 N.Y.S.2d 196 (1960), Saxon Motor Sales, Inc. v. Torino, 166 Misc. 863, 2 N.Y.S.2d 885 (1938), *and* Mazzocone v. Willing, 369 A.2d 829 (Pa. Super. Ct. 1976) *with* Singer v. Romerrick Realty Corp., 255 App. Div. 715, 5 N.Y.S.2d 607 (1938), Dicta Realty Assoc. v. Shaw, 50 Misc. 2d 267, 270 N.Y.S.2d

These cases typically have reached courts on motions to enjoin the publication of defamatory material. In *Prucha v. Weiss,*[136] the Court of Appeals of Maryland held that a court of equity lacked power to issue an injunction restraining publication of defamatory matter.[137] A possible exception to the *Prucha* rule may be a situation in which restraint of defamatory publication becomes essential to the preservation of a business.[138] Authority is split as to whether a court may enjoin picketing of a business by consumers on the basis of this exception.[139] Since *Organization for a Better Austin v. Keefe,* however, peaceful consumer picketing may be an activity which is constitutionally protected regardless of the truth of the message displayed on the signs. Courts adopting this view limit businesses to a remedy at law.[140] If the exception to the *Prucha* rule remains constitutionally valid, however, then a businessman whose home is the target of defamatory picketing may be able to enjoin the picketing when the home serves as his place of business, or when the picketing triggers significant adverse publicity in the news media and the resulting consumer reaction threatens the preservation of his business. The residential picketing statute struck down by the *Schuller* court contained a subsection which authorized a court of equity to enjoin residential picketers and to award damages against the picketers.[141] As this subsection was among the ones invalidated by the court, there appear to be no other grounds upon which a court may enjoin the picketing of homes of private persons.

VII. A PROPOSED RESIDENTIAL PICKETING STATUTE

The court of appeals in *Schuller* implied that a statute could be enacted providing constitutionally reasonable regulations according

342 (1966), Julie Baking Co. v. Graymond, 152 Misc. 846, 274 N.Y.S. 250 (1934), Schmoldt v. Oakley, 390 P.2d 882 (Okla. 1964), Stansbury v. Beckstrom, 491 S.W.2d 947 (Tex. Civ. App. 1973), *and* McMorries v. Hudson Sales Corp., 233 S.W.2d 938 (Tex. Civ. App. 1950). *See generally* Annot., 62 A.L.R.3d 227 (1975). There are no reported appellate cases in Maryland involving consumer picketing.

136. 233 Md. 479, 197 A.2d 253, *cert. denied,* 377 U.S. 992 (1964).

137. *Id.* at 484, 197 A.2d at 256.

138. Nann v. Raimist, 255 N.Y. 307, 317, 174 N.E. 690, 694 (1931); *see* Warren House Co. v. Handwerger, 240 Md. 177, 179, 213 A.2d 574, 575 (1965).

139. *Compare* Carter v. Knapp Motor Co., 243 Ala. 600, 604, 11 So. 2d 383, 385 (1943); Menard v. Houle, 298 Mass. 546, 11 N.E.2d 436 (1937), Roberts v. Ryan Homes, Inc., 70 Misc. 2d 198, 203, 333 N.Y.S.2d 564, 569 (1972), *and* Mazzocone v. Willing, 369 A.2d 829 (Pa. Super. Ct. 1976) *with* Schmoldt v. Oakley, 390 P.2d 882 (Okla. 1964) *and* Stansbury v. Beckstrom, 491 S.W.2d 947 (Tex. Civ. App. 1973).

140. *See* Mazzocone v. Willing, 369 A.2d 829, 836-38 (Pa. Super. Ct. 1976) (dissenting opinion); Stansbury v. Beckstrom, 491 S.W.2d 947 (Tex. Civ. App. 1973).

141. MD. ANN. CODE art. 27, § 580A 6 (1976), which provides as follows:

> Notwithstanding the penalties herein provided, any court of general equity jurisdiction may enjoin conduct proscribed by this article, and may in any such proceeding award damages, including punitive damages, against the persons found guilty of actions made unlawful by this section.

to time, place, and manner.[142] Presumably, such a statute properly could limit residential picketing to daylight hours in order to minimize its disruptive effects upon picketed neighborhoods. The time limitations should not be so broad, however, that picketers could conduct their activity only during the hours in which the target of the picketing would probably be at work. Residential picketing, accordingly, should be permitted on weekends, or alternatively, during evening hours.

The Supreme Court has indicated that a statute may require that door to door solicitors first notify police, provided the notice requirement serves a valid state interest.[143] A similar requirement for persons desiring to picket a private home is justified by the historic propensity of residential picketing to escalate into violence.[144] *Kovacs v. Cooper*[145] and *Grayned v. City of Rockford*[146] would seem to indicate that a state may require residential picketers to parade quietly. The ordinance approved by the Supreme Court in *Grayned* presents a model for enacting a noise restriction on residential picketing.[147]

The following statute is one that would protect the interests of privacy and public safety to the extent constitutionally permissible in Maryland:

> (a) No person shall engage in picketing before or about the residence of any individual unless the person engaging in such picketing shall have notified the police department of the municipality or county in which the picketing is to occur at least 24 hours before the commencement of the picketing;
> (b) No person shall engage in picketing before or about the residence of any individual between the hours of 6 P.M. and 9 A.M;
> (c) No person, while engaging in picketing before or about the residence of any individual, shall willfully make or

142. 280 Md. at 316, 372 A.2d at 1081; *see* Cox v. Louisiana, 379 U.S. 536, 558 (1965).
143. *See* Hynes v. Mayor of Oradell, 425 U.S. 610, 616-17, 619-20 (1976) (ordinance requiring door to door solicitors to notify police before beginning activity declared unconstitutionally vague; dicta indicating properly drawn statute would be upheld).
144. *See, e.g.*, Gregory v. City of Chicago, 394 U.S. 111, 126-30 (1969) (appendix to concurring opinion of Black, J.); Village of Skokie v. Nat'l Socialist Party of America, 51 Ill. App. 3d 279, 366 N.E.2d 347 (1977); State v. Perry, 196 Minn. 481, 265 N.W. 302 (1936).
145. *See* text accompanying notes 75-78 *supra*.
146. *See* text accompanying notes 51-55 *supra*.
147. The ordinance reads:

> No person, while on public or private grounds adjacent to any building in which a school or any class thereof is in session, shall willfully make or assist in the making of any noise or diversion which disturbs or tends to disturb the peace or good order of such school session or class thereof.

408 U.S. 104, 107-08 (1972).

> assist in the making of any noise or diversion which can be heard within any residence, and which is of such a nature as to disturb the occupants of that residence.

IX. CONCLUSION

Although the Supreme Court has not yet dealt with a constitutional challenge to a statute prohibiting residential picketing, various decisions of the Court seem to indicate that such picketing is, at least to some extent, a constitutionally protected activity. While other decisions of the Court establish a right of privacy in the home, they do not appear to go so far as to justify constitutionally a total ban on picketing of private dwellings. The view that residential picketing may be barred because of its coercive impact or because alternative sites are available at which to picket appears no longer to be tenable following recent decisions of the Court. While the constitutionality of a limited exemption for domestic workers in a residential picketing statute is uncertain, a broad exemption for all labor picketing constitutes a violation of the equal protection clause of the fourteenth amendment. The Court of Appeals of Maryland appears, therefore, to have been correct in declaring the state's residential picketing statute unconstitutional on grounds of both freedom of speech and equal protection.

The common citizen has little if any access to public officials, especially on the national and state level. Correspondence is answered by form letter; telephone calls seldom pass through the barrier of secretaries. By contrast, the rich and the powerful, together with the special interest lobbyist, have easy access to public officials. In an era when access to the courts has passed largely beyond the financial reach of millions of Americans, residential picketing may be a last, albeit highly imperfect, method by which a citizen consumer, or tenant can confront effectively a public official, businessman, or landlord. Residential picketing may be, in the words of Justice Black, "essential to the poorly financed causes of little people."[148] A dictum of a federal judge written thirty years ago is equally true today:

> To ban such activity because it is unpleasant to have such publicity at home is to admit the effectiveness of this kind of free expression. Picketing of this type brings home the fact that a man may leave his tools at his work but not his conscience or his relations with his fellow man.[149]

Alan Cohen

148. Martin v. Struthers, 319 U.S. 141, 146 (1943).
149. United Electrical, Radio & Machine Workers v. Baldwin, 67 F. Supp. 235, 242 (D. Conn. 1946).