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ASSAULT UPON SOLITUDE—A REMEDY?

Privacy is an exciting legal concept which is often subject to national controversy. A recent multitude of books,¹ articles,² and studies³ describe the alarming specter of computerized collection and storage of personal information as yet another, albeit sophisticated, "invasion of privacy." However disquieting this "Big Brother" development may appear, personal data banks are at least an arguably foreseeable, and in most cases beneficial, result of the computer age. At least this transgression of privacy is passive. By contrast, this comment will explore a neglected but no less important threat to privacy, the interest of maintaining control over the physical seclusion, tranquillity, and solitude of the private residence. Privacy in this sense is the householder's control over desired or unwanted communications with outsiders in a limited, private property environment.⁴

Mail is one of the three methods by which outsiders can intrude into the home; but, because of mail's intrinsically passive nature, it can be readily ignored and will not be discussed herein.⁵ However, physical and sonic intrusions, primarily caused by unwanted door-to-door and telephone solicitations, result in unavoidable disturbances. This interference on the "home front" can effectively destroy the individual's solitude, a quality of life which is an absolutely necessary, as well as highly desirable, human experience.⁶

Most states provide stiff criminal sanctions against telephone harassment and eavesdropping.⁷ However, no parallel remedy is presently available for the incessant daily interruptions by charitable⁸ and commercial solicitors,⁹ front porch missionaries,¹⁰ and pollsters.

¹ See, e.g., J. ROSENBERG, *THE DEATH OF PRIVACY* (1969); A. WESTIN, *PRIVACY AND FREEDOM* (1967) [hereinafter cited as WESTIN].

² See, e.g., *NEWSWEEK*, July 27, 1970, at 15.

³ See, e.g., *THE PROBLEMS OF PRIVACY IN THE COMPUTER AGE* (A. HARRISON ed. 1967).

⁴ For an interesting philosophical examination of privacy, see Fried, *Privacy*, 77 *YALE L. J.* 475 (1968).

⁵ For an analysis of the problem posed by hate mail, see Ezer, *Intrusion of Solitude: Herein of Civil Rights and Civil Wrongs*, 21 *LAW IN TRANS.* 63, 67-75 (1961).

⁶ See note 16, *infra*.

⁷ See CAL. PEN. CODE §§ 630-637.2, 653m (West 1970). For a complete summary of currently enacted legislation dealing with telephone abuse, see Note, *Unwanted Telephone Calls—A Legal Remedy?*, 1967 *UTAH L. REV.* 379, 404-407.

⁸ A sizable portion of charitable contributions are solicited in the home. Charities raised \$9.2 billion in 1962. M. BRENTON, *THE PRIVACY INVADERS* 199 (1964) [hereinafter cited as BRENTON].

⁹ One encyclopedia publisher alone employs over 80,000 door-to-door solicitors. *BUSINESS WEEK*, July 29, 1967, at 57.

¹⁰ The Jehovah's Witnesses is one such missionary sect. This group made in ex-

Although public policy may soon demand protection of domestic solitude because of increasing intrusions on the home, the following discussion will reveal that no tort theory or constitutional scheme yields a feasible defense. However, a carefully constructed ordinance enacted and enforced by the local government authority is one means by which an effective protection against the growing challenge to domestic solitude can be realized.¹¹

Hopefully, this comment will afford adequate guidance to individuals and communities that have decided that the time to act is at hand.

PRIVACY—A HUMANISTIC CONCEPT IN NEED OF PROTECTION

The vigorous arguments of innumerable commentators and dissatisfied plaintiffs are, as of yet, insufficient to expand any existing theory of privacy to adequately afford protection from unwanted household intrusions. Nevertheless, the pressing social need for protection of the home environment is cause for grave concern. Before analyzing this need, a short examination of the "right to privacy" concept is warranted.

The legal right to privacy has been exhaustively discussed, analyzed, and criticized during its short life span.¹² If anything is absolute with respect to this "most comprehensive right," it is that confusion permeates all of its theories. Few concepts are more vague, or less amenable to definition or application.¹³ This difficulty stems from two dichotomous concepts of privacy, one tort or "private law" theory, and the other constitutional or "public law" in nature. Difficulties arise when determining which theory, if either, is applicable in a given circumstance. More often there are congeries of interest, some interrelated, some unrelated, and some clearly inconsistent.¹⁴

Despite—perhaps even because of—the problems of articulat-

cess of 29.5 million visits to homes in the United States during the twelve months ending September 30, 1969. 1970 YEARBOOK OF JEHOVAH'S WITNESSES 27 (1969).

¹¹ In areas where communities are more or less contiguous, regional or state wide legislation may be required to achieve the desired local result.

¹² "[N]o other tort has received such an outpouring of comment in advocacy of its bare existence." W. PROSSER, THE LAW OF TORTS 830 (3rd ed. 1964).

¹³ Dixon, *The Griswold Penumbra: Constitutional Charter for an Expanded Law of Privacy*, 64 MICH. L. REV. 197 (1965) [hereinafter cited as Dixon].

¹⁴ *Id.* at 199. Authors, attorneys, and jurists alike have found it difficult and sometimes impossible to compartmentalize privacy into mutually exclusive concepts in which tort law and constitutional protection operate independently. This result is not surprising considering the source of the two privacy concepts. Brandeis, a co-author of the tort concept, was later to propound the constitutional theory from the bench of the Supreme Court. See note 25, *infra*.

ing a precise definition of privacy and the inherent limitations of any tort concept, vast segments of society value privacy as the most cherished "right" of civilized man. For many privacy is a major component of the "American Dream."¹⁵ Complementing this socio-political phenomenon is a conclusively demonstrated psychological human need for privacy in the form of seclusion and solitude.¹⁶ Individuals must be afforded occasional opportunities to shed their highly developed psychic armor which protects the human spirit from the pressures of modern society. Being always "on stage" would destroy the human organism.¹⁷

The American political and social systems indirectly encourage a recluse by maintaining strong commitments to the family, a social unit which can adequately provide physical and mental solitude.¹⁸ A complementary and historically stronger Anglo-Saxon commitment has been the preservation of the home.¹⁹ Today the mainstream of lay sentiment clearly expects protection of domestic solitude under the law. However incorrect the statement may be as a legal conclusion, a common spontaneous reaction to unwanted intrusions is: "They're invading my privacy!"

The most difficult legalistic hurdle along the path to a remedy is recognizing that privacy is more akin to a spiritual interest than any interrelationship of property and people.²⁰ This viewpoint leads many commentators to disregard privacy as a legal concept worthy of protection. For example, the late Dean Magruder suggested that the mental hide be toughened rather than develop a legal remedy for irritations incident to modern society.²¹ The opposite, more humanistic, viewpoint contends that an increasing callousness and tolerance of intrusions on solitude is cause for serious concern. This

¹⁵ Dixon, *supra* note 13.

¹⁶ The physical and psychological tensions incident to life in modern society demand periods of privacy for emotional release, reflection, and rejuvenation. Studies have also linked a human need for autonomy with the concept of individuality, a keystone upon which all democratic political systems rest. WESTIN, *supra* note 1, at 32-37. See generally, K. HORNEY, OUR INNER CONFLICTS 73 (1945); A. MASLOW, MOTIVATION AND PERSONALITY 212-213, 227, 237 (1954); H. MURRAY, EXPLORATIONS IN PERSONALITY 144-145, 151, 156-158 (1938).

¹⁷ WESTIN, *supra* note 1, at 35. Studies of other mammals have revealed a similar requirement for temporary seclusion between normal "social" encounters. *Id.* at 10.

¹⁸ *Id.* at 24.

¹⁹ "The poorest man may, in his cottage, bid defiance to all the forces of the Crown. It may be frail; its roof may shake; the wind may blow through it; the storms may enter; the rains may enter; but the King of England may not enter; all his force dares not cross the threshold of the ruined tenement." William Pitt, 1776, as quoted in BRENTON, *supra* note 8 at 237.

²⁰ Recall that in *simplistic* terms traditional law concepts deal with the interrelationships of people to property, property to property, and people to people.

²¹ Magruder, *Mental and Emotional Disturbances in the Law of Torts*, 49 HARV. L. REV. 1033, 1035 (1936).

concern is founded on a belief that future deterioration of individuality and the opportunity for solitude will cause harmful, if not disastrous, effects on the American way of life. Population growth and complex societal interdependence will accentuate this problem. Similarly, this growth and commutuality are precisely why privacy should be zealously safeguarded.²² If left unchecked, the erosion of domestic solitude will inevitably destroy a critical element of individuality.²³

Unfortunately, the natural growth of societal complexity is not likely to foster a suitably protective concept of privacy.²⁴ While a growing judicial awareness of an expanding civil right to privacy from governmental intrusions is apparent, no parallel legal concept is developing to counter non-governmental interests.²⁵ A crucial question to be answered herein is whether such protection can be found in the law, and if not, whether a reasonably effective defense can be legislated. A logical starting point in the search for a remedy is a brief examination of tort law.

TORT LAW LIMITATIONS

The first legal barricades for protection against unwanted intrusions of the home were structured from two tort concepts, invasion of privacy and nuisance. Although neither concept has proven to be, by itself, a satisfactory remedy, a brief analysis of these concepts reveals how a protective device should be structured.

²² BRENTON, *supra* note 8, at 13. This comment endorses Mr. Brenton's thesis that the encroachments on privacy ". . . are fast becoming unreasonable and irresponsible full-scale invasions, denigrating our privacy to an alarming degree and tending to make intrusions a way of everyday life." *Id.*

²³ See WESTIN, *supra* note 1, at 368.

²⁴ In addition to population growth in absolute terms, massive population migration to urban areas has accentuated our "beehive-like" life style. At the same time technological sophistication presents some difficult challenges to solitude, including randomly dialed, computerized telephone solicitations and personal information data banks.

²⁵ Thirty-seven years after co-authoring the "birth" of the tort privacy concept, Mr. Justice Brandeis announced his now famous advocacy of privacy from governmental intrusion. "The makers of our Constitution undertook to secure conditions favorable to the pursuit of happiness. They recognized the significance of man's spiritual nature, of his feelings and his intellect. They knew that only a part of the pain, pleasure and satisfactions of life are to be found in material things. They sought to protect Americans in their beliefs, their thoughts, their emotions and their sensations. They conferred, as against the Government, the right to be let alone—the most comprehensive of rights and the right most valued by civilized man." *Olmstead v. United States*, 277 U.S. 438, 478 (1927) (dissenting). See *Griswold v. Connecticut*, 381 U.S. 479 (1965). *But see* Rogers, *A New Era for Privacy*, 43 N.D. L. Rev. 253, 269 (1967), where the author observes: "For all these years the Court has mouthed platitudes about man's home being his castle. Yet all the Court has been willing to protect is the castle door."

Invasion of Privacy

The tort concept of privacy grew out of a now famous law review article which was written by Samuel Warren and Louis Brandeis in protest of the "yellow press" of Boston.²⁶ Although they failed to specifically articulate a right to domestic solitude, they did mention personal solitude as part of the privacy concept warranting protection. A right to solitude had been first announced two years earlier.²⁷

No precise definition of this tort exists even today. However, the conceptual thrust of modern privacy tort law is towards the protection of man's sensations, emotions, and spiritual nature. This theory is in contrast with most traditional tort theories which provide protection of physical persons and tangible property.

Dean Prosser has categorized the right to be let alone as one of four distinct areas included in the invasion of privacy tort.²⁸ However, to obtain damages for interference with this right, the intrusion must be something which is decisively offensive or objectionable to a reasonable man.²⁹ Case law indicates that "run of the mill" intrusions by door-to-door or telephone solicitors are annoyances that must be endured *ad nauseam*.³⁰

In contrast, plaintiffs who seek damages against those using listening devices to invade their privacy have generally been successful.³¹ However, absent this furtive technique of spying, traditional tort remedies have been almost uniformly frustrated. No matter how personally humiliating or irritating the intrusion may seem to the victim, courts unanimously refuse to extend the scope of protection without the demonstration of an overwhelming quantum of malicious harassment.³²

²⁶ Warren & Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193 (1890).

²⁷ T. COOLEY, LAW OF TORTS 29 (2nd ed. 1888).

²⁸ Prosser, *Privacy*, 48 CAL. L. REV. 383 (1960). Dean Prosser identifies four separate torts under the general heading of privacy: 1). intrusion upon the plaintiff's seclusion or solitude, or his private affairs; 2). public disclosures of embarrassing facts about the plaintiff; 3). publicity which places the plaintiff in a "false light" in the public eye; and 4). appropriation, for the defendant's advantage, of the plaintiff's name or likeness. *Id.* at 389. However, this categorization has not gone without severe criticism. Cf. Bloustein, *Privacy as an Aspect of Human Dignity: An Answer to Dean Prosser*, 39 N.Y.U.L. REV. 962, 1000-1007 (1964). For a review of the right of privacy tort concepts that are recognized in California, see Comment, *The Right of Privacy in California*, 7 SANTA CLARA LAW. 242 (1967).

²⁹ W. PROSSER, THE LAW OF TORTS 833 (3rd ed. 1964).

³⁰ The scant number of reported cases in this area probably indicates that few plaintiffs can afford time consuming, expensive litigation with the hope of receiving minimal damages at best.

³¹ See, e.g., *Roach v. Harper*, 143 W.Va. 869, 105 S.E.2d 564 (1958).

³² See notes 33 & 34 and accompanying text, *infra*.

Typical of the decisions which allow relief is *Housh v. Peth*.³³ In that case the Ohio Supreme Court held that a continuous barrage of telephone calls directed at the plaintiff was so outrageously unreasonable and malicious that damages were appropriate. Plaintiff was awarded \$2000. However, plaintiffs in a qualitatively similar legal position, but not experiencing the "required" quantum of harassment, are not likely to succeed.³⁴

Clearly the invasion of privacy tort does not provide an effective remedy for unwanted intrusions in everyday life. An obvious alternative is the tort of nuisance.

Nuisance

All jurisdictions within the United States have enacted broad criminal statutes concerning nuisances;³⁵ and public nuisance actions are tried by the state. The victims of such nuisances are spared most of the expensive and time consuming burden of litigation and therefore, should be less inhibited from bringing complaints against alleged offenders. However, few prosecutions of solicitors under a nuisance theory have proved successful.³⁶ The activity must be conclusively offensive, inconvenient, or annoying to the average person in the community.³⁷ The reasonableness, the duration or recurrence, and the severity of the alleged nuisance are determinative factors for finding a fact situation which will result in a successful prosecution.³⁸ Both public and private nuisance actions require some substantial interference with the interest involved; the law does not concern itself with all of the annoyances and disturbances of everyday life.³⁹

A solid line of decisions precludes protection of domestic solitude by means of the nuisance theory without *carefully* drafted legislation. For example, unwanted door-to-door visitations by missionaries are not actionable nuisances.⁴⁰ Although in the social sense a householder might find having to answer the doorbell in response to unwanted solicitations of products or ideas a nuisance, this is not a nuisance in the legal sense.⁴¹

³³ 165 Ohio St. 35, 133 N.E.2d 340 (1956).

³⁴ See generally, *Tollefson v. Safeway Stores, Inc.*, 142 Colo. 442, 351 P.2d 274 (1960); *Household Finance Corp. v. Bridge*, 252 Md. 531, 250 A.2d 878 (1969); *Nader v. General Motors Corp.*, 25 N.Y.2d 560, 255 N.E.2d 765 (1970); *Lewis v. Physicians and Dentists Credit Bureau*, 27 Wash. 2d 267, 177 P.2d 896 (1947).

³⁵ W. PROSSER, *THE LAW OF TORTS*, 607 (3rd ed. 1964).

³⁶ See, e.g., *People v. Northum*, 41 Cal. App. 2d 284, 106 P.2d 433 (1940).

³⁷ W. PROSSER, *THE LAW OF TORTS*, 599 (3rd ed. 1964).

³⁸ *Id.* at 599-602.

³⁹ *Id.* at 598-99.

⁴⁰ See *People v. Northum*, 41 Cal. App. 2d 284, 106 P.2d 433 (1940).

⁴¹ *Id.* at 289, 106 P.2d at 436.

In actions brought under a private nuisance theory, an actual interference with the use and enjoyment of the land must be shown. Without such proof, the interference with some personal right is insufficient for obtaining a judgment.⁴² However, at least two cases involving extended telephone harassment have resulted in private nuisance judgments.⁴³ Nevertheless, absent any malice or harassment, the nuisance theory will offer no protection to the individual seeking guarantees of domestic solitude.

A seemingly reasonable administrative solution to telephone intrusions has recently been proposed by an enterprising law student.⁴⁴ In his petition to the California Public Utilities Commission, he requested that the local telephone authority be directed to place an asterisk (*) beside the telephone listing of anyone making such a request. The asterisk, accompanied by suitable warnings placed in the telephone directory, would inform telephone solicitors that the party so indicated does not desire commercial, charitable, polling, or religious solicitations of any kind. In dismissing this suggestion, the California Public Utilities Commission held that telephone regulation of this nature is the business of the legislature.⁴⁵

Realizing that there is no civil right to privacy from non-governmental agents and that no common law concept will protect solitude adequately, a statutory solution must be found. Threat of a trespass violation is presently impossible in California as residential property cannot legally be posted.⁴⁶ However, many states and municipalities have trespass-after-warning statutes, and appellate courts will uphold a conviction when the statute has constitutionally classified which activities are prohibited. A typical case is *Village of West Jefferson v. Robinson*,⁴⁷ in which the Ohio Supreme Court held that an ordinance which prohibited uninvited commercial door-to-door solicitation was a valid exercise of the police power. The ordinance defined such activities as a public nuisance and provided a misdemeanor conviction for violators.⁴⁸ Statutory "warning" such as given in the *West Jefferson* case is sufficient when the legislative intent and effect is to prohibit only commercial intrusions.⁴⁹ How-

⁴² W. PROSSER, *THE LAW OF TORTS*, 611 & n.91 (3rd ed. 1964).

⁴³ *Brillhardt v. Ben Tripp, Inc.*, 48 Wash. 2d 722, 297 P.2d 232 (1956); *Wiggins v. Moskins Credit Clothing Store*, 137 F. Supp. 764 (E.D. S.C. 1956).

⁴⁴ This interesting but economically infeasible solution is discussed in detail within the opinion of *McDaniel v. Pacific Tel. & Tel. Co.*, 60 P.U.R.3d 47 (Cal. Pub. Util. Comm'n 1965).

⁴⁵ *Id.* at 50.

⁴⁶ See CAL. PEN. CODE § 554 (West 1970).

⁴⁷ 1 Ohio St. 2d 113, 205 N.E.2d 382 (1965).

⁴⁸ *Id.* at 115, 205 N.E.2d at 384.

⁴⁹ In 1942 the Supreme Court made its first decision bearing directly upon a community's right to regulate commercial solicitation. The Court upheld a city ordi-

ever, when first amendment considerations are present, severe limitations are placed upon state legislative action.⁵⁰

THE CONSTITUTIONAL ISSUE

That segment of the American public which regards unwanted intrusions into the home to be unlawful, generally rests its argument on some ethereal constitutional scheme. However, the Federal Constitution protects citizens only from certain governmental intrusions on privacy.⁵¹ Therefore, the scope of constitutional considerations herein will be necessarily limited to passing on the validity of legislation designed to regulate intrusions by non-governmental sources.

The so called *Green River* ordinance was first constitutionally tested in 1933.⁵² That ordinance was primarily aimed at prohibiting itinerant merchants from making uninvited door-to-door solicitations. In *Town of Green River v. Fuller Brush Co.*,⁵³ the defendant argued that the ordinance was an unreasonable and discriminatory burden on interstate commerce which denied him a property right without due process of law. The court disagreed and upheld the ordinance as a valid exercise of the community's police power, reasoning that the ordinance regulated only the location and method by which commerce could be transacted.⁵⁴ Ever since the *Town of Green River* decision, similar legislation has been challenged in both state and federal courts on grounds of violation of the interstate commerce clause, the due process clause of the fourteenth amendment, and the first admendment guarantees of free speech and press.⁵⁵

nance which prohibited the distribution of commercial advertising in the streets and announced that the Constitution clearly imposes no restraint on reasonable governmental regulation of commerce. *Valentine v. Chrestensen*, 316 U.S. 52 (1942).

⁵⁰ See note 62 and accompanying text, *infra*.

⁵¹ Simplistically speaking, the Constitution grants certain powers to the states and the federal government while at the same time imposing restraints on both to protect individual freedoms. The Constitution does not expressly restrain non-governmental interests. See J. BURNS, *GOVERNMENT BY THE PEOPLE* 83-85 (5th ed. 1963).

⁵² *Town of Green River v. Fuller Brush Co.*, 65 F.2d 112 (10th Cir. 1933). "Green River" is a label traditionally used in referring to antisolicitation ordinances. See text accompanying note 53, *infra*. Protection of privacy, crime prevention, and avoidance of generally agreed upon annoyances have been frequently offered by local governments as reasons for enacting antisolicitation legislation.

⁵³ 65 F.2d 112 (10th Cir. 1933).

⁵⁴ *Id.* at 115. "The act of strangers in going upon private property uninvited and ringing doorbells is not in our judgment a property right." *Id.* at 116.

⁵⁵ See, e.g., *Donley v. City of Colorado Springs*, 40 F. Supp. 15 (D. Colo. 1941); *Zimmerman v. Village of London*, 38 F. Supp. 582 (S.D. Ohio 1941); *McCormick v. City of Montrose*, 105 Colo. 493, 99 P.2d 969 (1939); *Jewel Tea Co. v. City of Geneva*, 137 Neb. 768, 291 N.W. 664 (1940); *Green v. Town of Gallup*, 46 N.M. 71, 120 P.2d 619 (1941); *People v. Bohnke*, 287 N.Y. 154, 38 N.E.2d 478 (1941); *City of Orangeburg v. Farmer*, 181 S.C. 143, 186 S.E. 783 (1936).

The landmark case of *Breard v. City of Alexandria*,⁵⁶ established the present guidelines for the construction of antisolicitation statutes. Defendant Breard was arrested for going from house to house obtaining subscriptions to nationally known magazines in violation of the city's antisolicitation ordinance.⁵⁷ He unsuccessfully argued that the ordinance in question violated the interstate commerce clause and his rights under the first and fourteenth amendments. The Court⁵⁸ determined that the constitutionality of the ordinance turned upon a balancing of conveniences: the householder's desire for privacy and the publisher's right to distribute his information in a certain way. In upholding the validity of the ordinance, the Court emphasized the inherent limitations of a solicitor's property right rather than strongly advocating any right to privacy in the home.⁵⁹

Whereas certain species of commercial activities can be regulated to the point of extinction,⁶⁰ the Supreme Court has announced that similarly stringent regulation of religious and political activities is unconstitutional. Likewise, charities have been afforded constitutional protection.⁶¹ The landmark case in this area is *Martin v. City of Struthers*,⁶² in which the defendant was arrested while going from door-to-door distributing religious handbills. The City argued that the defendant was not prohibited from distributing her

⁵⁶ 341 U.S. 622 (1951). The Court took notice that up to this time in only five instances had similar ordinances withstood appellate review. *Id.* at 628 n.6.

⁵⁷ A portion of the ordinance follows. "Section 1. Be it Ordained by the Council of the City of Alexandria, Louisiana, in legal session convened that the practice of going in and upon the private residences in the City of Alexandria, Louisiana by solicitors, peddlers, hawkers, itinerant merchants or transient vendors of merchandise not having been requested or invited so to do by the owner or owners, occupant or occupants of said private residences for the purpose of soliciting orders for the sale of goods, wares and merchandise and/or disposing of and/or peddling or hawking the same is declared to be a nuisance and punishable as such nuisance as a misdemeanor." *Id.* at 624-625.

⁵⁸ Justice Reed, author of the vigorous dissent in the *Martin* case, note 61 *infra*, gave the opinion of the Court. (5-4 decision).

⁵⁹ "[T]he exigencies of trade are not ordinarily expected to have a higher rating constitutionally than the tranquillity of the fireside. . . ." *Breard v. City of Alexandria*, 341 U.S. 622, 627 (1951). The Court also reasoned that to force a community to admit the solicitors of publications into the home would be a gross misapplication of the first and fourteenth amendment guarantees. *Id.* at 645.

⁶⁰ See note 49, *supra*.

⁶¹ *Adams v. City of Park Ridge*, 293 F.2d 585 (7th Cir. 1961). The Chicago Heart Fund successfully challenged an ordinance which required city council approval of all solicitations by charitable organizations except for the Community Chest. Although the ordinance was a clear denial of equal protection, the court rested its decision primarily on the denial of first amendment guarantees. Although not clearly articulated by the court, at least some charitable organizations may have an informational as well as a collecting function in society. This educational aspect of charities is constitutionally protected. See 75 HARV. L. REV. 1649 (1962).

⁶² 319 U.S. 141 (1943).

literature, but only from summoning the householder to his door.⁶³ However, the Court's 5-4 decision regarded the ordinance as analogous to a trespass-without-warning statute which violated first amendment rights of both the defendant and the potential recipient of her literature.⁶⁴ The Court's decision turned on its belief that every citizen has the right to decide whether or not to listen or otherwise receive information in his home.⁶⁵ The Struthers ordinance clearly denied this right.⁶⁶

In comparison, courts have experienced a more difficult task in accommodating those who exercise their freedom of expression in a public place, when such activity seriously affects the peace and tranquillity of neighboring homes. The typical fact situation involves the use of sound amplification equipment located on streets or parking lots but heard, either by design or unavoidably, in private residences.⁶⁷ Although the courts have not uniformly upheld ordinances which regulate disturbances of this nature, courts will usually allow reasonable restraint of this type of "aural aggression."⁶⁸

The California Constitution grants adequate power to its subordinate county and municipal governments to safeguard the tranquillity of the home.⁶⁹ Consequently, California ordinances which regulate various types of commercial solicitation have been uniformly upheld.⁷⁰ In the recent case of *Di Lorenzo v. City of Pacific*

⁶³ "It is unlawful for any person distributing handbills, circulars or other advertisements to ring the door bell, sound the door knocker, or otherwise summon the inmate or inmates of any residence to the door for the purpose of receiving such handbills, circulars or other advertisements they or any person with them may be distributing." *Id.* at 142.

⁶⁴ *Id.* at 148. By comparison, no unconstitutionality is found when no state action is present. See *Watchtower Bible & Tract Society v. Metropolitan Life Ins. Co.*, 297 N.Y. 339, 79 N.E.2d 433 (1948), *cert. denied* 335 U.S. 886 (1948).

⁶⁵ The Court has frequently reiterated its holding that the first amendment protects an individual's right to receive information of his choosing. See *Stanley v. Georgia*, 394 U.S. 557, 564 (1969) (obscene material); *Griswold v. Connecticut*, 381 U.S. 479, 482 (1965) (birth control information); *Lamont v. Postmaster General*, 381 U.S. 301, 308 (1965) (political literature) (Brennan, J., concurring).

⁶⁶ The *Martin* case disapproved a holding made one year and one justice change earlier which declared a considerably more restrictive ordinance valid. *Cf. Jones v. Opelika*, 316 U.S. 584 (1942), *rev'd*, 319 U.S. 103 (1943).

⁶⁷ See *Kovacs v. Cooper*, 336 U.S. 77 (1949) (ordinance upheld); *Saia v. New York*, 334 U.S. 558 (1948) (ordinance held invalid); *Haggerty v. Associated Farmers of California*, 44 Cal. 2d 60, 279 P.2d 734 (1955) (ordinance upheld).

⁶⁸ *Id.*

⁶⁹ Despite sharp curtailment of the police power in many areas by the state government, local government has not been pre-empted in the solicitation area. See generally, D. MANDELKER, *MANAGING OUR URBAN ENVIRONMENT*. 171-172 (1966). "Any county, city, town, or township may make and enforce within its limits all such local, police, sanitary and other regulations as are not in conflict with general laws." CAL. CONST. art. XI, § 11.

⁷⁰ See, e.g., *People v. Mobin*, 237 Cal. App. 2d 115, 46 Cal. Rptr. 605 (1965); *Pittsford v. City of Los Angeles*, 50 Cal. App. 2d 25, 122 P.2d 535 (1942); *In re Hartmann*, 25 Cal. App. 2d 55, 76 P.2d 709 (1938).

Grove,⁷¹ an ordinance which prohibited solicitation for profit or the placement of information on private property without the consent of the owner or occupant, withstood constitutional challenge. Agreeing with the plaintiff that the *Martin* case was controlling, the court held that limited regulation of the time, place, and manner of distribution of literature is valid and constitutional if the peace, good order, and comfort of the community require it.⁷² Exacting attention should be given to this uncharted area of limited regulation when constructing truly effective and comprehensive antisolicitation legislation.

LEGISLATIVE SOLUTIONS

Pragmatically speaking, the problem of enacting effective legislation centers more on political realities than constitutional considerations. Antisolicitation ordinances are by their very nature highly controversial and exceedingly unpopular with certain factions of the community.⁷³ The twenty-eight day life span of one such antisolicitation ordinance suggests that adoption of effective measures to protect residential solitude will be made only through compromise and the insistence of an intensely persistent body politic.⁷⁴

Telephone Solicitation

The inability of the individual to give telephone solicitors notice that he does not want to be disturbed, necessitates a different legislative solution than the door-to-door situation.⁷⁵ The Supreme Court has held on numerous occasions that it is within the police power to reasonably regulate business and commerce where they conflict with the health, comfort, and convenience of the community.⁷⁶ Outright prohibition of business and commercial telephone solicitations will be constitutionally valid as long as some other rea-

⁷¹ 260 Cal. App. 2d 68, 67 Cal. Rptr. 3 (1968).

⁷² *Id.* at 74, 67 Cal. Rptr. at 7. See also, *Martin v. City of Struthers*, 319 U.S. 141, 143 (1943).

⁷³ Strong opposition to antisolicitation regulation has traditionally come from telephone companies, polling organizations and insurance companies. See generally, *McDaniel v. Pacific Tel. & Tel. Co.*, 60 P.U.R.3d 47, 49 (Cal. Pub. Util. Comm'n 1965).

⁷⁴ Tampa, Florida's telephone anti-solicitation ordinance (3612-A) was passed on September 22, 1964 and repealed on October 20, 1964.

⁷⁵ Perhaps the most prominent reason why notice beside telephone listings was rejected in *McDaniel* was the extreme cost of implementing the plan. *McDaniel v. Pacific Tel. & Tel. Co.*, 60 P.U.R.3d 47, 55 (Cal. Pub. Util. Comm'n 1965).

⁷⁶ However, control of activities which are constitutionally subject to regulation may not be achieved by means which sweep unnecessarily broadly and thus invade areas of protected freedom. See *Zwickler v. Koota*, 389 U.S. 241, 250 (1967); *NAACP v. Alabama*, 377 U.S. 288, 307 (1964).

sonable means of pursuing the commercial enterprise is available.⁷⁷ One such ordinance has already withstood constitutional challenge.⁷⁸

However, where the desire for domestic solitude interferes with first amendment rights, accommodation must result.⁷⁹ The *Martin* case held that the peace, good order, and comfort of the community may require some degree of regulation of the time, place, and manner of exercising those rights.⁸⁰ Therefore, while some regulation is constitutionally valid, reasonable access to householders must be guaranteed to those who desire to express themselves by means of the telephone. The author's proposed telephone ordinance allows for such accommodation.

PROPOSED TELEPHONE SOLICITATION ORDINANCE

a). The use of any telephone in the City of —⁸¹ by any solicitor, peddler, promoter, vendor, or any other person for the purpose of contacting another person in the City to offer for sale or sell products or services, or to promote by any scheme, device, or other means, any commercial or business plan, project, or venture, without having been requested or invited so to do by the person called, or without the present existence of a current business or commercial relationship between the person called and the person making such a call, is hereby declared to be a nuisance and punishable as a misdemeanor.⁸²

b). Furthermore, the use of any telephone in the City by any solicitor, promoter, pollster, missionary, campaigner, or any other person for the purpose of contacting another person in the City concerning solicitations or information about any charity, opinion, religion, political belief, or non-profit organization, without having been requested so to do by the person called is hereby declared to be a nuisance and punishable as a misdemeanor.⁸³ The provisions of this subsection (b) do not apply to any calls concerning solicitations or information about any charity, opinion, religion,

⁷⁷ See *Breard v. City of Alexandria*, 341 U.S. 622, 632-33 (1951); *Valentine v. Chrestensen*, 316 U.S. 52, 54 (1942).

⁷⁸ See *Alabama Law Enforcement Officers v. City of Anniston*, 272 Ala. 319, 131 So. 2d 897 (1961).

⁷⁹ "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." *Martin v. City of Struthers*, 319 U.S. 141, 146-47 (1943). "The right of freedom of speech and press includes not only the right to utter or to print, but the right to distribute, the right to receive. . . ." *Griswold v. Connecticut*, 381 U.S. 479, 482 (1965).

⁸⁰ *Martin v. City of Struthers*, 319 U.S. 141, 143 (1943). *Accord*, *Cantwell v. Connecticut*, 310 U.S. 296, 304 (1939).

⁸¹ In areas where communities are more or less contiguous, regional or statewide legislation may be required to achieve any measure of success.

⁸² Depending upon the existing legislation within the jurisdiction, provisions for penalties may have to be set forth within the ordinance.

⁸³ *Id.*

political belief or non-profit organization placed between the hours of 9:00 A.M. and 7:00 P.M., Sundays excepted.

As is readily apparent, the proposed ordinance classifies telephone "solicitations" into two broad categories: commercial and non-commercial. This division is necessitated by both constitutional and political considerations. Perhaps the most important are the latter. Unless the ordinance insures a workable compromise between the individual's desire to be left alone and those interests that will be regulated, the ordinance is not likely to be enacted.

The proposed ordinance prohibits all commercial solicitations unless they have been requested or a current business relationship exists between the caller and the recipient of the call. Practically speaking, few established merchants use a solicitation marketing technique and those that do have a myriad of alternative advertising and sales methods at their disposal. The clause allowing calls by current business associates will allow creditors and their agents to remind clientele of their obligations without fear of prosecution. This exception clause is clearly justifiable. The individual has at some previous time chosen to initiate business relations with the caller, and in many cases has been extended credit. In a sense, prior conduct of the individual has impliedly authorized telephone communications to maintain, clarify, or arbitrate existing relations.

The absolute prohibition of all other commercial telephone solicitation is constitutionally valid. In both *Valentine v. Chrestensen*⁸⁴ and *Breard v. City of Alexandria*,⁸⁵ the Supreme Court announced that certain forms of commercial solicitation could be prohibited by a municipality if such action was deemed necessary. In the *Valentine* case, the owner of a submarine on display was arrested for violating a city ordinance which prohibited the distribution of commercial handbills in the streets. Although a second printing of the handbills contained a protest of the ordinance on the reverse side, the Supreme Court held that this addition to the circular did not warrant the extension of first amendment protection to the defendant's distribution. The defendant's motive was still commercial in nature and thereby was not afforded constitutional protection. Likewise in *Breard*, commercial door-to-door solicitation was prohibited. Clearly, the denial of the telephone for commercial solicitation stands on identical constitutional ground.

As discussed earlier, accommodation of solicitors is constitutionally required when first amendment rights are concerned. As was so clearly stated in the *Martin* case, both the solicitor and the po-

⁸⁴ 316 U.S. 52, 54-55 (1942).

⁸⁵ 341 U.S. 622, 632-33 (1951).

tential recipient have a right to disseminate and receive information.⁸⁶ However, the *Martin* case likewise holds that the *time*, manner, and place of information dissemination can be regulated.⁸⁷ Thus, while no reported case has verified the constitutionality of an ordinance limiting the hours in which solicitation can be made, the constitutional question is narrowed considerably. Do the time limitations included in the ordinance constitute reasonable regulation?

The proposed ordinance provides sixty hours each week in which non-commercial solicitations or informational calls can be placed. Assuming that eight hours of each day are spent sleeping, over one-half of the remaining waking hours are available for the exercise of first amendment rights by telephone. Thus, a strong argument can be made that the limitations included in the proposed ordinance are reasonable and therefore constitutionally valid.

Opinion surveys and non-profit organizations serve valuable functions in society. Although some individuals may find solicitations by these institutions the most aggravating of all, constitutional considerations would in some instances preclude absolute prohibition. For example, an atheist society would certainly have a constitutional right to distribute information. Consequently, to avoid any constitutional problem under either the first amendment free speech guarantee or the equal protection clause of the fourteenth amendment, these institutions' solicitation capability has been protected.

Thus, the proposed telephone ordinance has been constructed not only to satisfy constitutional requirements, but to facilitate a workable accommodation with important civic interests. This compromise will help in obtaining passage of the ordinance and result in a reasonable degree of domestic solitude not previously experienced.

Door-to-Door Solicitation

An ordinance to regulate door-to-door solicitations is simple in comparison to the telephone problem. The notice requirement is easily satisfied. Likewise, no difficulty with communications across local jurisdictional limits has to be dealt with. Conveniently, the Supreme Court has come close to suggesting how to construct an effective and constitutionally valid ordinance. In the *Martin* case the Court referred to a proposed regulation which would make it

⁸⁶ *Martin v. City of Struthers*, 319 U.S. 141, 146-47 (1943).

⁸⁷ *Id.* at 143.

an offense to summon a householder who has appropriately indicated that this was against his wishes.⁸⁸ In a subsequent case, the Court inferred that an appropriate sign coupled with valid legislation would adequately protect the householder.⁸⁹ Therefore, the decision as to whether a physical intrusion into the home will be allowed can be left with whom it belongs—with the individual householder.

PROPOSED DOOR-TO-DOOR SOLICITATION ORDINANCE

a). The practice of going in or on a private residence in the City of —, and ringing the doorbell or otherwise summoning the inmate of that residence, by solicitors, peddlers, pollsters, missionaries, campaigners, distributors, or any other person for the purpose of offering for sale or selling products or services, or to promote by any plan, scheme, device, or other means any commercial or business enterprise, charity, religion, opinion, political belief or organization is hereby declared to be a nuisance and punishable as a misdemeanor⁹⁰ if a sign, no smaller than two (2) inches by ten (10) inches which reads "no solicitors" or words to that effect, is within reasonable view and proximity of the door to the residence.

b). This ordinance shall in no way serve to interfere with any of the above mentioned activities at residences not displaying a sign as described in subsection (a), nor at residences where the occupant has expressly requested or invited the visitation.

Constitutional accommodation with respect to first amendment guarantees presents no serious difficulty in the door-to-door situation. The proposed ordinance does not prohibit an activity by itself; rather, a penalty is provided for those who violate the announced wishes of the individual householder. In simplistic terms, the ordinance is nothing more than a trespass-after-warning statute.

Nor are there any major faults in the ordinance from a community interest standpoint. No organization is likely to risk public scorn and condemnation by expressing a belief that the individual does not have a right to deny public access to his home.

Although no reported case indicates that any similar ordinance has undergone appellate review, the proposed ordinance is clearly both constitutionally sound and politically realistic. Thus, the householder can totally safeguard his domestic solitude from physical intrusion by simply placing a sign near his door.⁹¹

⁸⁸ "We do not, by this reference, mean to express any opinion on the wisdom or validity of the particular proposal . . ." *Id.* at 148 & n.13.

⁸⁹ *Kovacs v. Cooper*, 336 U.S. 77, 86 (1949).

⁹⁰ See note 82, *supra*.

⁹¹ A common practice of door-to-door solicitors is to concentrate their activities on homes which display "no solicitation" signs. Experience has proven that individuals who recognize their personal weakness to the front porch sales pitch are most likely

CONCLUSION

Generally speaking, intrusions by telephone and door-to-door solicitations are still regarded by most courts and governmental authorities as *de minimis*.⁹² However, the validity of this position will certainly face increasingly stronger challenges in the future.

Fortunately, protective legislation is both politically and constitutionally feasible. California courts will unquestionably uphold reasonable legislation which is enacted to protect domestic security and tranquillity from unwanted commercial solicitors. Although no court has affirmed this author's contention, limitations can most probably be placed upon those who wish to expound their ideas and beliefs by telephone and home visitation. However, access to the home for these activities cannot be totally denied by state action. The proposed legislation herein provides a workable compromise between constitutionally protected activities and a desirable degree of solitude.

As society becomes more complex, the necessity for the protection of domestic solitude becomes imperative. To assume that this quality of privacy will survive simply because man has a need for seclusion is sheer folly. The time has arrived when legislative action must be taken to safeguard the personal freedom which is inherent in being let alone.

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to "post" their door. Thus, a warning sign without legislative teeth for violators has oftentimes been more harmful than helpful.

⁹² See text accompanying notes 34 & 37, *supra*.