GIVE ME A HOME WHERE NO SALESMEN PHONE: TELEPHONE SOLICITATION AND THE FIRST AMENDMENT

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Introduction

The telephone is an instrument with a unique capacity to intrude. Unlike no other medium of communication, the telephone reaches into virtually every home and workspace in the nation. Until very recently, unsolicited calls, including wrong numbers, crank calls and solicitations, were regarded as a necessary annoyance. Wrong numbers and crank calls are perhaps inherent hazards of the system, but technology has caught up with telephone solicitation, and for some, annoyance has given way to outrage.[1] A 1978 California survey commissioned by the Pacific Telephone Company revealed that only .1% of the population "likes" to receive unsolicited calls.[2] Yet residential telephone subscribers continue to receive them in increasingly annoying numbers.[3]

The convenience of the telephone and the efficiency of the computer have created the Automatic Dialing and Recorded Message Player ("ADRMP"). For less than $1,200 one can purchase a computer-recorder capable of calling sixty households per hour, complete with a recorded solicitation and blank tape on which the telephone subscriber may records his response.[4] Should the subscriber hang up, the computer is unable to disconnect the line. Depending upon the service

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1. *See Congressional Record*, H.R. 9505-06, 95th Cong., 1st Sess., 123 CONG. REC. E6213 (1977) (Introductory Remarks by Congressman Les Aspin of Wisconsin).

2. Field Research Corp., The California Public's Experience With and Attitude Toward Unsolicited Telephone Calls at 9 (Mar. 1978) (survey conducted for Pacific Telephone Co., on file in Cal. Pub. Util. Comm'n File No. OII12).

3. U.S. NEWS AND WORLD REP., Mar. 27, 1978 at 67. The number of calls placed is staggering: "Every day telephone solicitors place 7 million calls, selling $28,000,000 in products . . . ." BUSINESS WEEK, Feb. 20, 1978 at 26.

4. For example, Dictaphone Corporation offers the Dictaphone 1650 ($1,195 retail). The maximum recordable message is 150 seconds, with an unlimited response tape. The estimate of 60 calls per hour is based on a one-minute call. "The most sophisticated gear can ask a series of questions, record the responses, and tabulate the results itself. Some new equipment can even detect a 'no' answer, and then begin a revised line of questions." BUSINESS WEEK, Feb. 20, 1978, at 27.

area, the phone may be inoperative for the duration of the message.[5] In addition, virtually every model can be easily modified by the user to dial at random every number in a given sequence, so that even individuals with unlisted telephone numbers will not be missed.[6] Operating over several time zones with the use of a WATS[7] line, ADRMPs are capable of making from 1,000 calls per day[8] to 130,000 calls per month.[9] This can be accomplished at a cost of six cents per call if a human operator is used to begin each message, or less that one cent for a fully automated call.[10] Indeed, the low cost of such calls indicate that

5. Some telephone companies do provide a disconnect feature which automatically clears the line within 10 to 42 seconds after the subscriber hangs up. Cal. Pub. Util. Comm'n, Decision No. 88770, Investigation on the Commission's Own Motion Into the Use of the Public Utility Telephone System for Telephone Solicitations, Advertising, by Automatic Dialing-announcing Devices for Solicitation or Announcements to Residential Telephones, Interim Opinion 10 (May 2, 1978) (filed Feb. 22, 1978, Cal. Pub. Util. Comm'n File No. OII11) [Hereinafter cited as Interim Opinion].

Not all subscribers receive this feature, however. For example, while 85% of Pacific Telephone customers are provided this service, only 20% of General Telephone subscribers have the disconnect feature. The remaining General Telephone customers could be provided the disconnect feature at an estimated cost of $5,800,000. This cost would be passed along to the consuming public. *Id.* at 8-10.

The disconnect feature works as follows: if a telephone without it is called by an ADRMP and the subscriber hangs up, the line will be inoperative until the message is completed. If a telephone with the disconnect feature is called by an ADRMP, however, and the subscriber hangs up, the line will clear when the 10 to 42 seconds elapse. If the subscriber picks up the receiver during the 10 to 42 second disconnect period, however, the disconnect feature terminates, and the elapsed time must begin to accumulate again when the receiver is hung up.

The effect of having an inoperative phone for even a short period of time can be catastrophic. A Minneapolis woman whose mother had suffered a heart attack was about to call an ambulance when the phone rang and a computerized sales pitch began. Her phone was not equipped with a disconnect feature and she was unable to clear the line to make her emergency call. Her mother finally received medical aid—but only after the daughter used a neighbor's phone. U.S. NEWS AND WORLD REP., Mar. 27, 1978 at 67.

6. Interim Opinion, *supra* note 5, at 4-5, 7. Representatives from Telesystems and Kosco, manufacturers of electronic telephone solicitation equipment, pointed out that such use by solicitors, while technically possible, would be counterproductive, since it angers the public and ties up the lines of large businesses, governmental agencies, and police and fire stations.

7. Wide Area Telephone Service.

8. The Dycan 1000 has a capacity of 1,000 calls per day through the simultaneous use of four telephone lines. Interim Opinion, *supra* note 5, at 4.

9. The Dycan 25000 has a capacity of 130,000 calls per month. *Id.* "[I]f you had 193 of them, they would be able to call every home in the U.S. once a week." Congressman Les Aspin, *quoted in* U.S. NEWS AND WORLD REP., Sept. 11, 1978 at 44.

10. U.S. NEWS AND WORLD REP., Mar. 27, 1978 at 67. Sellers and users of ADRMPs generally support the use of operators to initiate calls and ascertain the subscriber's interest before beginning the recorded message. But six calls may be made without supervision for each call with supervision, suggesting significant financial incentive to use fully automated machines. Interim Opinion, *supra* note 5 at 4, 5-6, 7. Some companies lease time on ADRMPs and sell a complete service package which may increase the price per completed

they can easily replace solicitations made by mail.[11]

The implications of this technology are far-reaching in terms of the potential for unwarranted intrusions upon individual privacy.[12] One result is that isolated facts concerning an individual can be gathered and coordinated in a vast computer data network for use by commercial businesses. The same sophistication and techniques employed in the development of mailing lists[13] can be applied to the compiling of telephone number lists, which in turn can be stored in computers linked to ADRMP systems.[14] Such telephone lists may contain much more information about an individual than merely his or her name and address.[15] They may, for instance, contain data on one's socioeconomic status, political party registration, place of employment and occupation, type of car, past purchases and credit rating. With such information instantaneously retrievable from a computer databank, businessmen, political organizations and charities have the capacity to compile computer files about each American buyer and tailor their solicitation to increase the liklihood of achieving the desired result.[16] In

call to $1.50. Services may include script writers to prepare the message, professional announcers to record it, development of market research areas and operation of the ADRMP itself. Under this service, approximately 50 calls may be completed each hour. *Id.* at 5-6.

11. "As postal rates increase, these sophisticated, automated talking and listening machines will surely replace solicitations via mail." "Junk Calls," *Parade*, Feb. 5, 1978, at 19 (Sunday newspaper supplement).

12. The implications of the use of electronic telephone solicitations may go far beyond unwanted telephone calls: "[M]any people have voiced concern that the computer, with its insatiable appetite for information, its image of infallibility, and its inability to forget anything that has been stored in it, may become the heart of a surveillance system that will turn society into a transparent world in which our homes, our finances, and our associations will be bared to a wide range of casual observers, including the morbidly curious and the maliciously or commercially intrusive." A. MILLER, THE ASSAULT ON PRIVACY 3 (1971).

13. Note, *Subscription List Sales and the Elusive Right of Privacy*, 62 IOWA L. REV. 591 (1976). *See* note 15 *infra*.

14. Indeed, computer interaction is already a reality: "Computers can be linked together so that data on an individual can be gathered from across the nation and from a variety of sources to give a comprehensive picture of his finances, employment, schooling, and reputation over a lifetime." Bazelon, *Probing Privacy*, 12 GONZAGA L.REV. 587, 598 (1977).

15. Subscription lists are so specialized that brokers sell catalogues with the names of other brokers who compile lists from hospital records of births and professional directories. Such a catalogue can include over 1,800 separate list brokers. *Subscription List Sales and the Elusive Right of Privacy*, *supra* note 13 at 598-99.

16. The sophistication of information-profiling of individuals is extraordinary. Personal data contained in data banks "can be cross-indexed with other relevant elements to form a context of interpretation. Random facts about an individual may appear meaningless or innocuous when considered in isolation. When aggregated and interrelated with other facts, they form a composite 'data profile' from which one can draw conclusions and make decisions." Bouvard & Bouvard, *Computers and Individual Rights*, in THE RIGHT TO PRIVACY 26 (G. McClellan, ed. 1976). The use of computer data banks has already been adapted to the mail solicitation industry where "mass consumer mailings have become in-

some areas where ADRMPs have been used, for example, the machines have obtained sales in half the calls placed.[17] The unavoidable by-product of any such system is increased disruption of the home by the unsolicited call.[18] Any solicitor with a computer-selected sales pitch and method of delivery is virtually certain to have at least some impact on the subscriber; even if the listener hangs up, the contact has been made. Indeed, public reaction from those who have rceived calls from ADRMPs has been consistently negative. Not one favorable letter was sent to the California Public Utilities Commission during its recent six-month investigation of telephone solicitation. One person, writing in protest of ADRMPs, suggested that one be programmed to call legislators, telephone company executives, ADRMP sellers and users—perhaps fifty times a day—as a lobbying effort to restrict their use.

The psychological impact of this contact, coupled with the technological efficiency and low cost involved in making the contact, suggests that the telephone subscribers are in need of some type of legislative protection. Not surprisingly, ADRMPs are the subject of five congressional bills[19] and proposed regulations or legislation in twenty-four states.[20] The Federal Trade Commission[21] has undertaken a six-month investigation of direct telephone solicitation. Any regulations restricting the free use of the telephone would, however, undoubtedly evoke First Amendment challenges on the ground that the regulations restrict the caller's freedom of speech.

A message delivered by means of a telephone is quite clearly speech, and therefore merits First Amendment protection. But even speech which is thus protected is still subject to regulation through time, place and manner restrictions. Regulation of the telephone as a means of delivering a message, such that the message is in certain circumstances prohibited from being delivered, may at first glance by viewed as a restriction of the speech itself, subject to challenge on First Amendment grounds. Alternatively, such regulations may be recog-

creasingly selective under the watchful eye of electronic hardware. Computers have made it feasible carefully to match up product profiles with consumer profiles to increase mailing efficiency." MEDIA/SCOPE, Nov. 1968 at 86.

17. Barringer, *Automated Phone-Dialing Ban Approved by Maryland House*, Wash. Post, Mar. 1, 1978, § C, at 1.

18. At a hearing in early 1978 in Annapolis, Maryland on the subject of legislation to ban ADRMPs, State House Delegate Marilyn Goldwater observed: "You could be swamped with 10, 20 or even 30 recorded calls in a day. You could lose control of your own telephone in your own home." *Id.* at col. 2.

19. *See* note 157 *infra*.

20. *See* note 159 *infra*.

21. Since state legislation may not prevent the use of ADRMPs or traditional solicitations across state lines, the Federal Trade Commission has completed the six-month investigation and is considering national regulation. U.S. NEWS AND WORLD REP., Mar. 27, 1978 at 67. *See also* BUSINESS WEEK, Feb. 20, 1978 at 26.

nized as mere limitations on the manner of delivery. The message prohibited from delivery by telephone may still be communicated through other means, such as by printed or electronic media or through the mails. Another constitutional challenge to such regulations could be based upon the theory that a willing listener has a right to receive information and hence cannot be prohibited from receiving certain messages because of their content. This challenge can be met by enacting carefully drawn legislation which allows a willing listener to receive the desired message.

The regulation of telephone solicitation is a problem of first impression, but an argument in support of restrictive legislation can be supported by an analysis of analogous questions which have reached the United States Supreme Court. This note will examine time, place and manner regulations as they have been developed in light of the First Amendment. It will then discuss the limitations on the protection of commercial speech and will seek to develop a doctrine of residential privacy. Various types of legislative proposals will be analyzed in light of these principles. Finally, it will propose a statutory model for the restriction of telephone solicitation.

I. First Amendment Considerations in Limiting Telephone Solicitation

The First Amendment does not protect speech in all contexts and at all times.[22] Chief Justice Holmes provided the now classic example when he noted that even "[t]he most stringent protection of free speech would not protect a man in falsely shouting fire in a theater and causing a panic."[23] Thus, despite the absolute language of the First Amendment,[24] the Constitution will tolerate time, place and manner restrictions as a method of regulating otherwise protected speech.[25]

A. Time, Place and Manner Restrictions

A draft protester was arrested for burning his draft card on the

22. For example, obscenity, fighting words, defamation and incitement are not protected. *See* Gertz v. Robert Welch, Inc., 418 U.S. 323 (1974) (defamation); Miller v. California, 413 U.S. 15 (1973) (obscenity); Brandenberg v. Ohio, 395 U.S. 444 (1969) (incitement); New York Times Co. v. Sullivan, 376 U.S. 254 (1964) (defamation); Chaplinski v. New Hampshire, 315 U.S. 568 (1942) (fighting words).

23. Schenck v. United States, 249 U.S. 47, 52 (1919). *Schenck* involved the first application of the "clear and present danger test" to the restriction of speech otherwise entitled to protection under the First Amendment. *Id.*

24. "Congress shall make *no law* . . . abridging the freedom of speech . . . ." U.S. CONST. amend. I (emphasis added).

25. Grayned v. City of Rockford, 408 U.S. 104, 115 (1972); Cox v. New Hampshire, 312 U.S. 569, 575-76 (1941).

courthouse steps in *United States v. O'Brien*.[26] He claimed that the law prohibiting the burning of draft cards abridged his freedom of expression. Writing for a majority of the Supreme Court, Chief Justice Warren outlined the prerequisites to limiting First Amendment rights:

> This Court has held that when 'speech' and 'nonspeech' elements are combined in the same course of conduct, a sufficiently important governmental interest in regulating the nonspeech element can justify incidental limitations on First Amendment freedoms. . . . [A] government regulation is sufficiently justified if it is within the constitutional power of the Government; if it furthers an important or substantial governmental interest; if the governmental interest is unrelated to the suppression of free expression; and if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest.[27]

The Court examined the governmental interest in prohibiting the burning of draft cards and found it sufficient to affirm O'Brien's conviction.[28]

The appellant in *Grayned v. City of Rockford*[29] was arrested during a demonstration in front of a school yard and convicted of violating municipal antipicketing and antinoise ordinances. Grayned challenged the constitutionality of both ordinances. The antipicketing ordinance was invalidated as violative of equal protection, and the conviction on this charge was reversed.[30] In examining the overbreadth challenge to the antinoise ordinance, however, the Supreme Court reiterated that "reasonable 'time, place and manner,' regulations may be necessary to further significant governmental interests, and are permitted."[31] The Court considered "the question of how to accomodate First Amendment rights with the 'special characteristics of the school environment.' "[32] Schools are a particular source of conflict since they "are often the focus of significant grievances"[33] and yet also require "an undisrupted school session conducive to the students' learning . . . ."[34] The Court concluded that, given these conflicting interests, "Rockford's modest restriction on some peaceful picketing represents a considered

26. 391 U.S. 367 (1968).

27. *Id.* at 376-77.

28. The Court concluded that the prohibition against burning draft cards served to preserve proof of registration for the draft, facilitate communication between individuals and their draft boards, remind the holder of his obligations, and complete a regulatory scheme to prevent abuse of draft cards. *Id.* at 378-80.

29. 408 U.S. 104 (1972).

30. *Id.* at 107.

31. *Id.* at 115.

32. *Id.* at 117, citing Tinker v. Des Moines Independent Community School Dist., 393 U.S. 503, 506 (1969).

33. 408 U.S. at 118.

34. *Id.* at 119.

and specific legislative judgment that some kinds of expressive activity should be restricted at a particular time and place, here in order to protect the schools."[35] Thus, Grayned's challenge to the antinoise ordinance failed. The *Grayned* Court left open the question of whether other areas also constitute "special environments" entitled to greater degrees of protection. In a later section, this note will examine the trend of recent cases dealing with the home as a special environment requiring greater protection from disruptive intrusion.

One question not addressed by the majority opinions in *O'Brien* and *Grayned* was what the result in those cases would have been had the speakers been completely foreclosed from delivering their messages. Justice Harlan's concurring opinion in *O'Brien* emphasized his understanding that the majority opinion "does not foreclose consideration of First Amendment claims on those rare instances when an 'incidental' restriction upon expression . . . in practice has the effect of entirely preventing a 'speaker' from reaching a significant audience with whom he could not otherwise lawfully communicate."[36] Since O'Brien could have reached his audience in other ways, such a claim was not appropriate, and the demonstration in *Grayned* similarly could have been staged elsewhere. Yet Justice Harlan's concurrence made it clear that a time, place and manner restriction on speech may in fact operate as an absolute prohibition.

A speaker who can reach an audience through various media cannot claim that a prohibition which eliminates one medium abridges his right of free speech. On the other hand, one who is effectively prohibited from delivering his message could claim an abridgement of his First Amendment rights. Users of ADRMPs might claim that legislation restricting telephone solicitation would force them to use other, perhaps more expensive, means of delivering their message. As they would be able nonetheless to communicate through the use of other media, such a claim should fail.[37]

Characterizing such regulation of telephone solicitation as mere time, place and manner restrictions would not answer all of the potential constitutional challenges, however. Regulations of telephone solicitation may purport to restrict only commercial calls, thereby raising the issue of constitutional protection for commercial speech. The next section will explore the validity of those challenges based on the recent case law extending First Amendment protection to commercial speech.

35. *Id.* at 121 (footnote omitted).

36. 391 U.S. at 388-89 (Harlan, J., concurring).

37. The only context in which this claim might succeed would be a situation in which a message could only be communicated by telephone. Such a situation seems very remote, however, given the wide variety of alternative media for communication.

B. First Amendment Protection for Commercial Speech

Supporters of telephone solicitation invariably claim that restrictions on commercial calls would be unconstitutional under recent Supreme Court decisions extending First Amendment protection to commercial speech.[38] This claim is misleading because the extension of First Amendment protection to commercial speech does not exempt it from restrictions, such as those based on time, place and manner, which may be constitutionally applied to all speech. The claim is inaccurate because it implies that the extent of the protection has been clearly defined by the Court, when in fact the cases merely suggest the minimum standards for protecting commercial speech. As the following analysis demonstrates, the recognition of First Amendment protection for commercial speech does not preclude its restriction or limitation.

Commercial speech until recently was considered outside the protection of the First Amendment, in the same category as fighting words, obscenity and incitement.[39] This view was based on the Supreme Court's decision in *Valentine v. Chrestensen*,[40] where the Court stated that a solicitation which was commercial in nature was not afforded constitutional protection.[41] Three recent cases have severely narrowed, if not overruled *Chrestensen*.[42] In *Bigelow v. Virginia*,[43] a managing editor of a New York newspaper which printed an informational advertisement for an abortion referral service was convicted of violating a Virginia law making it a misdemeanor to encourage procurement of an abortion. The Virginia Supreme Court had upheld the conviction based on *Chrestensen*,[44] but the Supreme Court reversed, ruling that '[t]he fact that the particular advertisement in appellant's newspaper had commercial aspects . . . did not negate all First Amendment guar-

38. In a magazine interview, for example, one proponent stated that "[t]he Supreme Court has ruled in many cases that companies have a right to freedom of commercial speech", implying an absolute protection of commercial speech. Murray Roman, Chairman, Campaign Communications Institute of America, *quoted in* U.S. NEWS AND WORLD REP., Sept. 11, 1978 at 43.

39. *See* cases cited at note 19 *supra*.

40. 316 U.S. 52 (1942).

41. *Id.* at 54-55.

42. In a 1975 decision, the Court distinguished *Valentine* and drastically limited its scope: "[T]he holding is distinctly a limited one: the ordinance was upheld as a reasonable regulation of manner in which commercial advertising could be distributed. The fact that it had the effect of banning a particular handbill does not mean that *Chrestensen* is authority for the proposition that all statutes regulating commercial advertising are immune from constitutional challenge. The case obviously does not support any sweeping proposition that advertising is unprotected; *per se*." Bigelow v. Virginia, 421 U.S. 809, 819-20 (1975) (footnote omitted).

43. 421 U.S. 809 (1975).

44. *Id.* at 819.

antees."[45] Fighting words, obscenity and incitement were distinguished as clearly beyond constitutional protection,[46] but, particularly due to the informational character of the advertisement at issue it was clear that such speech merited some degree of First Amendment protection. Exactly how much protection it deserved, however, was not explicitly defined in *Bigelow*.

In a subsequent case, *Virginia Board of Pharmacy v. Virginia Consumer Council*,[47] the Court examined a Virginia law which declared a pharmacist guilty of unprofessional conduct if he advertised prescription drug prices. The Court held that "[w]hatever may be the proper bounds of time, place, and manner restrictions on commercial speech, they are plainly exceeded by this Virginia statute, which singles out speech of a particular content and seeks to prevent its dissemination completely."[48] The Court held that such commercial speech was entitled to protection under the First Amendment, due to its function of "serv[ing] individual and societal interests in assuring informed and reliable decisionmaking."[49] The Court thus once again emphasized the importance of preserving the free flow of information directed to the consumer.

The Court's decision in *Bates v. State Bar of Arizona*[50] arose from disciplinary action brought by the State Bar of Arizona against two attorneys who, in order to maintain high volume in a low-cost legal clinic, advertised their services in a local newspaper. Such advertising violated a state bar rule, and the Special Local Administrative Committee recommended suspension for six months. Upon review, the Board of Governors of the State Bar recommended a one-week suspension. The attorneys sought review by the Supreme Court of Arizona on the ground that their First Amendment rights had been infringed. The state Supreme Court rejected this claim.[51] The Supreme Court reversed. Citing, *inter alia*, *Bigelow* and *Virginia Board of Pharmacy*, and evaluating the public policy in favor of informed consumerism, the Court ruled "simply that the flow of such information may not be restrained."[52] These three cases read together affirm the existence of First Amendment protection for commercial speech, although the extent of the protection is not yet clear.[53]

45. *Id.* at 818.
46. *Id.* at 819.
47. 425 U.S. 748 (1976).
48. *Id.* at 771.
49. Bates v. State Bar of Arizona, 433 U.S. 350, 364 (1977) (citation omitted).
50. 433 U.S. 350 (1977).
51. *In re* Bates, 113 Ariz. 394, 555 P.2d 640 (1976).
52. 433 U.S. at 384.
53. "In concluding that commercial speech enjoys First Amendment protection, we have not held that it is wholly undifferentiated from other forms . . . . Even if the differ-

The fact patterns of these three cases reflect situations in which the speech at issue was subject to complete suppression, rather than mere regulation or limitation. From the perspective of this note, however, commercial speech would not be completely suppressed by telephone solicitation regulation; only the method of telephone communication would be limited. If other areas of protected speech are subject to time, place and manner restrictions, there is no reason why commercial telephone solicitations should not be subjected to similar restrictions. The Court in *Bates* made clear that

> [i]n holding that advertising by attorneys may not be subjected to blanket suppression, and that the advertisement at issue is protected, we, of course, do not hold that advertising by attorneys may not be regulated in any way . . . .
>
> As with other varieties of speech, it follows as well that there may be reasonable restrictions on the time, place, and manner of advertising.[54]

While commercial speech may thus be afforded First Amendment protection, it is still subject to traditional limitations.

It is thus clear that *all* speech, including commercial speech, is subject to time, place and manner restrictions, so long as these restrictions are applied in a constitutionally prescribed manner. The following analysis of Supreme Court cases dealing with the area of residential privacy will provide the basis for applying such restrictions specifically to telephone solicitations in the home.

II. Towards a Doctrine of Residential Privacy

One commentator has noted that "[p]rivacy is unique in that it derives little independent protection by precedent and none from the text of the Constitution while, paradoxically, it is recognized as a fundamental social value."[55] It is not surprising, therefore, that two distinct bodies of privacy law have developed[56]—one in tort to remedy a breach of the social order, and the other as a result of constitutional

ences do not justify the conclusion that commercial speech is valueless, and thus subject to complete suppression by the State, they nonetheless suggest that a different degree of protection is necessary to insure that the flow of truthful and legitimate commercial information is unimpaired." Virginia Bd. of Pharmacy v. Virginia Consumer Council, 425 U.S. 748, 771 n.24 (1976).

54. 433 U.S. at 383-84.

55. Silver, *The Future of Constitutional Privacy*, 21 ST. LOUIS U.L.J. 211, 223-24 (1977) (footnote omitted).

56. There are "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." Comment, *Assault Upon Solitude—A Remedy?*, 11 SANTA CLARA LAWYER 109, 110 (1970) (footnote omitted).

construction not necessary in an earlier day.[57]

The theoretical basis for a right to privacy in tort was provided by an influential law review article[58] written by Samuel Warren and Louis Brandeis.[59] The authors there attempted to prove that the exploitation of private facts afforded a basis for recovery in tort. Following the Warren and Brandeis article, several courts adopted their analysis and applied it in tort cases,[60] and the results were exhaustively analyzed by Dean Prosser seventy years after the article appeared.[61] He described four areas where invasion of privacy justify the award of damages: intrusion upon solitude,[62] publication of private facts,[63] placing one in a false light[64] and appropriation of one's name or likeness.[65] In broad terms, the last three areas denote specific rights to be free from public scrutiny—a right not to be spoken *about*. Only the first, intrusion upon

57. "[T]he fourth amendment was drafted to cover the technological realities of 18th century America. In 1787, the eyes and ears were the only instruments for surveillance; by keeping officials bodily out of certain places like the home and office, privacy could be assured." Bazelon, *supra* note 14 at 605 (footnote omitted).

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

59. The authors were influenced by the embarrassingly detailed press coverage of the prominent Warren family's social season. The objections to the reporters' behavior were apparently limited to the publication itself, rather than the intrusion, since the article does not describe unwanted intrusions as invasions of the right to privacy. Prosser, *Privacy*, 48 CAL. L. REV. 383, 389 (1960). Warren and Brandeis had harsh words for journalists: "The press is overstepping in every direction the obvious bounds of propriety and of decency. Gossip is no longer the resource of the idle and of the vicious, but had become a trade, which is pursued with industry as well as effrontery." Warren and Brandeis, *supra* note 58, at 196.

60. *See* Prosser, *supra* note 59, at 384-89 (1960). Two early cases illustrate the ensuing split in the courts. In Roberson v. Rochester Folding Box Co., 171 N.Y. 538, 64 N.E. 442 (1902), a photograph of a young woman was used without her permission to advertise flour. In a four to three decision, the court rejected the Warren-Brandeis theory and declared that the right to privacy did not exist. Three years later, in a case where an insurance company had used a man's name and photograph with a fictitious testimonial in its advertising, a court permitted a cause of action for invasion of privacy and granted relief in the form of damages. Pavesich v. New England Life Ins. Co., 122 Ga. 190, 50 S.E. 68 (1905).

The RESTATEMENT (SECOND) OF TORTS § 867 (1939) recognized a right to privacy, and the vast majority of states elected to follow this view: "A person who unreasonably and seriously interferes with another's interest in not having his affairs known to others or his likeness exhibited to the public is liable to the other."

It has been noted that "[t]he major contribution of Warren and Brandeis was in showing through rigorous critical analysis that doctrines of trespass, nuisance, and property were inadequate for the occasion, and that a new concept of protectible privacy could and should be evolved, both as a basis for an intelligible rationale for the handful of existing cases and for future development." Dixon, *The Griswold Penumbra: Constitutional Charter for an Expanded Law of Privacy?*, 64 MICH. L. REV. 197, 199 (1965).

61. Prosser, *supra* note 59, at 383.

62. *Id.* at 389-92.

63. *Id.* at 392-98.

64. *Id.* at 398-401.

65. *Id.* at 401-07.

solitude, suggests a right not to be spoken *to*.[66] Intrusion upon solitude is the only cause of action in tort with a potential for prohibiting some forms of telephone solicitation.[67]

While Warren and Brandeis firmly established a basis for tort recovery for invasions of privacy, the Supreme Court's decision in *Griswold v. Connecticut*[68] first established a constitutional right of privacy. The *Griswold* Court was confronted with an 1897 Connecticut law prohibiting the use of contraceptives.[69] A Planned Parenthood executive director and its chief medical officer had provided contraceptive materials to a married couple. They were fined as accessories under the aiding and abetting statute. The appellants claimed that a law which made it a crime to use contraceptives violated the due process clause of the Fourteenth Amendment. Justice Douglas, writing the majority

66. For a thorough discussion of the right not to be spoken *to*, *see* Haiman, *Speech v. Privacy: Is There a Right Not To Be Spoken To?*, 67 NW. U.L. REV. 153 (1972).

67. According to Prosser, "the gist of the wrong is clearly the intentional infliction of mental distress." Prosser, *supra* note 59, at 422 n.24. However, the degree of harm may be less than that required for recovery for intentional infliction of mental distress. If the offensive conduct occurs because of an intrusion, the required seriousness of the harm is lessened: "Where such mental disturbance stands on its own feet, the courts have insisted upon extreme outrage, rejecting all liability for trivialities, and upon genuine and serious mental harm, attested by physical illness, or by the circumstances of the case. But once 'privacy' gets into the picture, and the fact of intrusion is added, such guarantees apparently are no longer required." *Id.* at 422.

At present, only telephone calls of a quantity and quality sufficient to be considered harassment have supported recovery in tort. *See* Housh v. Peth, 165 Ohio St. 35, 133 N.E.2d 340 (1956) (tort recovery allowed when creditor made numerous and frequent threatening calls to plaintiff and her employer). *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); Lewis v. Physicians and Dentists Credit Bureau, Inc., 27 Wash. 2d 267, 177 P.2d 896 (1947).

The courts have treated intrusions by telephone as less than offensive or objectionable to a reasonable person unless the harm suffered was serious enough to warrant a claim for mental distress. Given the reactions of the public, however, it is conceivable that any calls by an ADRMP could reasonably be considered offensive or objectionable, and the degree of harm necessary may be correspondingly lessened for an actionable claim. The actual harm may not suffice for a claim of intentional infliction of mental distress, but based on the element of intrusion upon solitude, the courts may accept proof of harm considerably less than that required for mental distress. This approach demonstrates the possibility that the problem of solicitation by ADRMPs can be addressed through existing tort law, but it does not affect other, more traditional methods of telephone solicitation. Apart from this rationale, tort law does not provide a basis for dealing with the problem of telephone solicitation.

68. 381 U.S. 479 (1965).

69. Because of the political climate within Connecticut, it appeared that the only hope for eliminating the law was through Supreme Court action. The source of a constitutional right of privacy generated substantial debate within the Court, since there were four opinions comprising a seven-justice majoritv. Concurring opinions found a right of privacy in the Ninth Amendment, *id.* at 486 (Goldberg, J., concurring), the Fourteenth Amendment, *id.* at 499 (Harlan, J., concurring), and based on a general interpretation of liberty rather than a specific right, *id* at 502 (White, J., concurring).

opinion which recognized a right of privacy, stated that "specific guarantees in the Bill of Rights have penumbras, formed by emanations from those guarantees that help give them life and substance. . . . Various guarantees create zones of privacy."[70] Having recognized a right of privacy, the majority opinion concluded that the governmental interest in controlling the use of contraceptives invaded the area of constitutionally guaranteed freedoms.

This "bold innovation"[71] established the constitutional right of privacy, however ill-defined. A "zone of privacy"[72] was found implicit in almost every amendment,[73] but like a penumbra, it was not a tangible body with clearly discernible limits. Without more definition, "[t]he inescapable implication is that a right without description is a right without protection."[74] *Griswold* thus failed to establish a comprehensive right of privacy but it did serve to place the *concept* of privacy within the constitutional framework.

Under current law, no well-defined sanctuary exists for the individual wherever the right of privacy is afforded complete protection. As the following cases illustrate, the constitutional zone of privacy has been extended to include protection against intrusions via the door and the mailbox. While no cases have focused on the extent of protection against intrusions by the telephone, the door and mailbox, cases certainly provide a basis for analogous restrictions on home telephone solicitation. As will be seen, a balancing test is involved: if the "right of every person 'to be let alone' must be placed on the scales with the right of others to communicate,"[75] the right of every telephone subscriber similarly must be weighed against the right of every solicitor to communicate.

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70. 381 U.S. at 484.

71. Emerson, *Nine Justices in Search of a Doctrine*, 64 MICH. L. REV. 219, 229 (1965).

72. 381 U.S. at 484.

73. "The right of association contained in the penumbra of the first amendment is [a zone of privacy], as we have seen. The Third Amendment in its prohibition against the quartering of soldiers 'in any house' in time of peace without the consent of the owner is another facet of that privacy. The Fourth Amendment explicitly affirms the 'right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures.' The Fifth Amendment in its Self-Incrimination Clause enables the citizen to create a zone of privacy which government may not force him to surrender to his detriment. The Ninth Amendment provides: 'The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people.'

"The Fourth and Fifth Amendments were described in *Boyd v. United States*, 116 U.S. 616, 630, as protection against all governmental invasions 'of the sanctity of a man's home and the privacies of life.' We recently referred in *Mapp v. Ohio*, 367 U.S. 643, 656, to the Fourth Amendment as creating a 'right to privacy, no less important than any other right carefully and particularly reserved to the people.'" *Id.* at 484-85 (footnote omitted).

74. Comment, *A Taxonomy of Privacy: Repose, Sanctuary, and Intimate Decision*, 64 CALIF. L. REV. 1447, 1448 (1976).

75. Rowan v. Post Office Dep't, 397 U.S. 728, 736 (1969).

A. Protecting A Captive Audience

A first and obvious step toward protecting residential privacy would be to limit auditory intrusions from sources outside the home. The propriety of such a limitation has been recognized by the Supreme Court. In *Kovacs v. Cooper*,[76] the operator of a sound truck was convicted of violating a city ordinance which prohibited the use of any instrument which emitted "loud and raucous noises"[77] while attached to any vehicle. His conviction was affirmed by the New Jersey Supreme Court,[78] and by an equally divided court in the New Jersey Court of Errors and Appeals.[79] The Supreme Court upheld the ordinance. Without relying upon a theory of residential privacy under the Constitution, the Court nevertheless acknowledged a legitimate governmental interest in prohibiting "acts or things reasonably thought to bring evil or harm to its people,"[80] and in "protect[ing] the well being and tranquility of a community."[81] Noting that the unwilling listener "[i]n his home or on the street . . . is . . . practically helpless to escape the interference with his privacy by loudspeakers except through the protection of the municipality,"[82] the Court concluded that the "need for reasonable protection in the homes or business houses . . . justifies the ordinance."[83] The ordinance was thus treated as a regulation of the *manner* in which a message is communicated to its audience, rather than as a regulation of the message content itself.

Four years later, in *PUC v. Pollak*,[84] one member of the Court went so far as to describe unwilling listeners as a "captive audience."[85] In that case, two passengers of a District of Columbia transit company under exclusive congressional franchise brought suit against the public utilities commission,[86] complaining that radio broadcasts in the buses abridged their right of privacy. Their complaint was dismissed by the public utilities commission, and they appealed to the federal district court, where it was again dismissed. On further appeal, the court of appeals held that the broadcast of commercials and announcements deprived passengers of liberty without due process of law.[87] Reversing

76. 336 U.S. 77 (1948).
77. *Id.* at 78.
78. 135 N.J.L. 64, 50 A.2d 451 (1946).
79. 135 N.J.L. 584, 52 A.2d 806 (1947).
80. 336 U.S. at 83.
81. *Id.*
82. *Id.* at 86-87.
83. *Id.* at 89.
84. 343 U.S. 451 (1952).
85. "The streetcar audience is a captive audience." *Id.* at 468 (Douglas, J., dissenting).
86. PUC v. Pollak, 89 U.S. App. D.C. 94, 191 F.2d 450 (D.C. Cir. 1951).
87. *Id.* at 102, 191 F.2d at 458. The court's analysis focused on the captive audience argument, which it also referred to as "forced listening." *Id.* at 99, 191 F.2d at 455.

the court of appeals, the Supreme Court held that the broadcasts did not invade the privacy of a passenger on a bus: "However complete his right of privacy may be at home, it is substantially limited by the rights of others when its possessor travels on a public thoroughfare or rides in a public conveyance."[88] The majority opinion, written by Justice Burton, observed that an affirmance of the court of appeals decision would secure to the passenger "a right of privacy substantially equal to the privacy to which he is entitled in his own home."[89] The home, was cited by the dissent as the paramount example of protected privacy, implying that a resident could prohibit any unwanted message from entering his own home.[90]

The ordinance which was ultimately upheld in *Kovacs*[91] had prohibited all aural intrusions upon unwilling listeners, primarily residents. In reaching this result the Court found it unnecessary to recognize the home as a special zone of privacy. Yet in *Pollak*, the Court dealt with an issue unrelated to the home—radio broadcasts on transit buses—but used the standards applicable to residential privacy as the yardstick by which to measure other zones requiring protection.[92] The Court in *Pollak* thus suggested that the home is a zone of privacy requiring protection, but was unwilling to define the limits of that protection.

In *Cohen v. California*,[93] the Supreme Court later clarified the interests involved in restricting speech. There, a war protester was arrested for wearing a jacket with the phrase "Fuck the Draft" printed on its back as he entered a local courthouse. The Court reversed his conviction on several grounds,[94] one of which focused on the captive audience issue. It identified two prerequisites to a valid restriction of speech where the listener is a captive audience: first, there must be "substantial privacy interests"[95] at stake; and second, this privacy interest must have been invaded in "an essentially intolerable manner."[96] The Court observed that while one may have a greater privacy interest in the courthouse than in, for example, Central Park, such an interest could not compare to "the interest in being free from unwanted expression in

88. 343 U.S. at 464.

89. *Id.*

90. Justice Douglas, in his dissent, characterized the resident and the passenger alike as a "captive audience . . . [that] is there as a matter of necessity not of choice." *Id.* at 468.

91. Kovaks v. Cooper, 336 U.S. 77 (1948).

92. *Id.* at 464-65. *See also id.* at 467 (Douglas, J., dissenting): "[A] man's home is his castle beyond invasion either by inquisitive or by officious people. A man loses that privacy of course when he goes upon the streets or enters public places."

93. 403 U.S. 15 (1971).

94. *Id.* at 19-20. The Court characterized the activity at issue as the "fact of communication," rather than obscenity or fighting words. *Id.*

95. *Id.* at 21.

96. *Id.*

the confines of one's home."[97] Moreover, the audience in the courthouse could have avoided "further bombardment of their sensibilities simply by averting their eyes."[98]

Applying the *Cohen* analysis to the validity of telephone solicitation regulation, it appears that certain restrictions could withstand scrutiny. The first requirement, that the regulation protect substantial privacy interests, is supported by the opinions in *Kovacs* and *Pollak*, where the Court emphasized the value of tranquility in the home, and the necessity of governmental action to protect it. The second requirement is that the prohibited manner of intrusion be "essentially intolerable." In *Cohen*, the Court stressed the face that Cohen's protest did not involve "raucous omissions of sound trucks," nor was the audience powerless to avoid his message. In contrast, both *Kovacs* and *Pollak* involved situations in which the individual was not capable of avoiding the message. The residential listener's inability to avoid receiving the message is thus critical to a determination that the intrusion is "intolerable" and subject to regulation under *Cohen*.

The Supreme Court's opinions in *Kovacs*, *Pollak* and *Cohen* approached the problem of intrusion in terms of a captive audience, the resident being only an illustrative example. Cases involving door-to-door solicitation, however, come closer to applying discernible privacy interests to solicitation in the home.

B. Protecting the Door

Where door-to-door solicitation is at issue, the content of the message is the critical factor in examining the constitutionality of regulations, rather than their characterization as time, place and manner restrictions. *PUC v. Pollak*[99] seems to suggest that the home is entitled to constitutional protection guaranteeing complete privacy,[100] but the Supreme Court's decision in *Martin v. Struthers*,[101] dealing with door-to-door solicitation, significantly narrows this conclusion.

In *Struthers*, a door-to-door solicitor of handbills for a free religious meeting was arrested for violating a city ordinance banning door-to-door distribution of handbills and circulars. The Ohio Supreme Court dismissed her appeal,[102] but the Supreme Court invalidated the ordinance as a violation of both the solicitor's right to address a willing listener,[103] and the resident's right to receive a welcome message.[104]

97. *Id.* at 21-22.
98. *Id.* at 21.
99. 343 U.S. 451.
100. *See* notes 73-76 and accompanying text *supra*.
101. 319 U.S. 141 (1942).
102. 139 Ohio St. 372, 40 N.E.2d 154 (1942).
103. In *Struthers*, the Court recognized the need for a balance between the rights of the

The Court held that only the householder, as opposed to the community at large, had the right to determine whether or not he would receive noncommercial solicitors: "Whether such visiting shall be permitted has in general been deemed to depend upon the will of the individual master of each household, and not upon the determination of the community."[105] Since a resident could provide or withhold consent by posting a sign or notice,[106] it was deemed unnecessary for the municipality to restrict such solicitation. The opinion left open, however, the question of the existence of similar protection for commercial solicitations made door-to-door.[107]

In contrast to *Struthers*, where the Court focused on the rights of both solicitors and householders, the Court in *Breard v. Alexandria*[108] focused almost exclusively on the rights of the former group. There, a door-to-door solicitor of magazines was arrested for violating what is commonly referred to as a *Green River*[109] ordinance, which prohibited all door-to-door commercial solicitation. Earlier, in *Struthers*, the Court had noted that the homeowner could best protect his privacy by posting signs, so that the prohibitory ordinance in that case was impractical and unnecessary and therefore an inappropriate restriction on freedom of speech. The Court in *Breard* catalogued the frequency and seriousness of abuse by door-to-door solicitors and noted that the posting of signs by individual residents, while still possible, was now impractical.[110] It then proceeded to uphold the ordinance as a valid limitation on the solicitor's rights, rather than focusing on the privacy

speaker and the audience: "In any case, the problem must be worked out by each community for itself with due respect for the constitutional rights of those desiring to distribute literature and those who choose to exclude such distributors from the home . . . . The Struthers ordinance does not safeguard these constitutional rights." 319 U.S. at 148-49.

104. *Id.* The individual's right to receive information has been frequently emphasized by the Court. *See* notes 43-53 and accompanying text *supra*. *See also* 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 Gen., 381 U.S. 301, 308 (1965) (political literature) (Brennan, J., concurring).

105. *Id.* at 141.

106. *Id.* at 147.

107. The decision applied to "[f]reedom to distribute information." *Id.* at 146-47.

108. 341 U.S. 622 (1950).

109. *Green River* ordinances are named after Town of Green River v. Fuller Brush Co., 65 F.2d 112 (10th Cir. 1933), a decision upholding an ordinance banning commercial door-to-door solicitation.

110. The majority opinion emphasized that the impracticality was a function of the increase in the number of solicitations: "Door-to-door canvassing has flourished increasingly in recent years with the ready market furnished by the rapid concentration of housing. The infrequent and still welcome solicitor to the rural home became to some a recurring nuisance in towns when the visits were multiplied. Unwanted knocks on the door by day or night are a nuisance, or worse, to peace and quiet. The local retail merchant, too, has not been unmindful of the effective competition furnished by house-to-house selling in many lines . . . . The idea of barring classified salesmen from homes by means of notices posted by individ-

rights of householders.[111]

The Court's decision in *Breard* is important for two reasons. First, the ordinance was analyzed as a regulation of the *manner* of communication, rather than as a complete prohibition as in *Struthers*, even though the ordinances in both cases had the practical effect of prohibiting all solicitation. The Court in *Breard* stated: "Subscriptions may be made . . . without the annoyances of house-to-house canvassing. We think those communities that have found these methods of sale obnoxious may control them by ordinance."[112] In response to the argument that such ordinances violate the right of free speech, the Court characterized it as "a misuse of the great guarantees of free speech and free press to use those guarantees to force a community to admit solicitors of publications to the home premises of its residents. We see no abridgement of the principles of the first amendment in this ordinance."[113]

Breard is also important for a second, less obvious reason. It illustrates that the validity of time, place and manner restrictions may depend upon the circumstances under which they are imposed. What may be unreasonably restrictive in one setting might be a reasonable regulation in another. Earlier, in *Struthers*, the Court held that door-to-door solicitation could be controlled by action of the individual householder,[114] but seven years later, the *Breard* opinion cited the abuse and concurrent social change which supported the need for the legislative action at issue. The *Breard* Court emphasized the necessity of balancing the First Amendment rights of the solicitors against the governmental interest in protecting the privacy interests of its citizens; striking such a balance necessitated "an adjustment of constitutional rights in the light of the particular living conditions of the time and place."[115]

The sole distinction between *Struthers* and *Breard* appears to be the characterization of the content of the intended message. *Struthers* based its protection of solicitors on the noncommercial nature of the solicitation, the dissemination of information about a religious meeting.

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ual householders was rejected early as less practical than an ordinance regulating solicitors." 343 U.S. at 626-27 (footnotes omitted).

111. In recognizing the constitutional right of privacy, the *Griswold* majority cited *Breard* as an example of a legitimate privacy interest. Griswold v. Connecticut, 381 U.S. 479, 485 (1965).

112. 341 U.S. at 644-45.

113. *Id.* at 645.

114. "For centuries it has been a common practice in this and other countries for persons not specifically invited to go from home to home and knock on doors . . . to communicate ideas . . . . Whether such visiting shall be permitted has in general been deemed to depend upon the will of the individual master of each household, and not upon the determination of the community." 319 U.S. at 141.

115. 341 U.S. at 626.

Breard based its limitation on solicitors on the commercial nature of the solicitation, the canvassing for magazine subscriptions. If solicitors can be called "the press or oral advocates of ideas,"[116] then their speech cannot be prohibited without abridging their First Amendment rights. According to *Struthers*, householders must be free to receive noncommercial solicitations. But after *Breard*, such protection is "not open to the solicitors for gadgets or brushes."[117] The two cases, when read together, suggest that where the intrusion is made by door-to-door solicitation, noncommercial speech is protected to the extent that the householder wishes to receive it, while commercial speech may be effectively prohibited by regulation,[118] whether the householder wishes to receive it or not.

Struthers and *Breard* may be seen as decisions strictly limited to the problem of door-to-door solicitation. Combined with *Kovacs* and *Pollak*, they demonstrate the Court's increasing concern with external intrusions upon the home. Without more, telephone solitication could be interpreted as lying outside the scope of the Court's concern, because the intrusion is an inherent problem of telephone subscription. In its approach to solicitation by mail, however, the Court has indicated a broader concern for residential privacy.

C. Protecting the Mailbox

The mailbox is the third avenue by which a potentially unwanted message can be brought into the home. Unlike the first two areas of analysis, this problem has been addressed by federal statute. Title III of the Postal Revenue and Federal Salary Act of 1967[119] was enacted to protect the addressee's right *not* to receive certain messages. Under the Act, if an addressee has received advertisements for matter which he in his "sole discretion believes to be erotically arousing or sexually provocative,"[120] the addressee can request the postmaster to issue an order that his name be removed from a sender's mailing list and thereby prohibit future mailings from that sender. The constitutionality of this statute was upheld soon after its enactment.

In *Rowan v. Post Office Department*,[121] a declaratory ruling was sought by publishers, distributors, mailing list brokers, and owners and

116. *Id.* at 641.

117. *Id.*

118. Examples of decisions which have upheld restrictions or prohibitions of door-to-door solicitations include: People v. Mobin, 237 Cal. App. 2d 115, 46 Cal. Rptr. 605 (1965); City of Clifton v. Weber, 84 N.J. Super. 333, 202 A.2d 186 (App. Div. 1964), *aff'd*, 44 N.J. Super. 266, 208 A.2d 401 (1965); Village of West Jefferson v. Robinson, 1 Ohio St. 2d 113, 205 N.E.2d 382 (1965).

119. 39 U.S.C. § 4009(a)(Supp. IV 1964).

120. *Id.*

121. 397 U.S. 728 (1969).

operators of mailing services and mail order houses that the statute violated the First and Fifth Amendment rights to free speech and due process. They claimed that while the goal of the statute to curb objectionable sexually-oriented material was legitimate, it had been improperly interpreted by the Postmaster to include *all* materials. The United States District Court for the Central District of California concluded that the act was constitutional when interpreted to encompass advertisements similar to those initially mailed to the addressee.[122]

The Supreme Court affirmed, concluding that "Congress did not intend so restrictive a scope to those provisions."[123] In upholding the statute, it stated that "[t]he section was intended to allow the addressee complete and unfettered discretion in electing whether or not he desired to receive further materials from a particular sender . . . . The interpretation . . . that most completely effectuates that intent is one that prohibits any further mailings."[124] For the first time the Court specifically recognized that the privacy of the home is part of "the right of every person 'to be let alone' [which] must be placed in the scales with the right of others to communicate."[125] Just as the Court in *Breard* noted the growing annoyance of door-to-door solicitation requiring protective legislation, the Court in *Rowan* recognized the growing annoyance of junk mail.[126] It viewed the statute as a response to that problem: "In effect, Congress had erected a wall—or more accurately permits a citizen to erect a wall—that no advertiser may penetrate without his acquiescence."[127] The mails, as a *manner* of communication, can therefore be regulated to restrict speech.

Rowan is critical to an analysis of residential privacy because it sets forth an absolute limit upon the solicitor's right to communicate to a recipient. This right "is circumscribed only by an affirmative act of

122. 300 F. Supp. 1036, 1040.

123. 397 U.S. at 731.

124. *Id.* at 734-35.

125. *Id.* at 736.

126. The Court emphasized the voluminous amount of unsolicited mail received by the ordinary American household: "In today's complex society we are inescapably captive audiences for many purposes, but a sufficient measure of individual autonomy must survive to permit every householder to exercise control over unwanted mail. To make the householder the exclusive and final judge of what will cross his threshold undoubtedly has the effect of impeding the flow of ideas, information, and arguments that, ideally, he should receive and consider. Today's merchandising methods, the plethora of mass mailings subsidized by low postal rates, and the growth of the sale of large mailing lists as an industry in itself have changed the mailman from a carrier of primarily private communications, as he was in a more leisurely day, and have made him an adjunct of the mass mailer who sends unsolicited and often unwanted mail into every home. It places no strain on the doctrine of judicial notice to observe that whether measured by pieces or pounds, Everyman's mail today is made up overwhelmingly of material he did not seek from persons he does not know. And all too often it is matter he finds offensive." *Id.* at 736.

127. *Id.* at 738.

the addressee giving notice that he wishes no further mailings from that mailer."[128] *Rowan* thus permits complete restriction of any unwanted intrusion into the mailbox upon the sole discretion and initiative of the addressee, regardless of the content of the solicitation.

In the foregoing residential privacy cases, the Court dealt with regulations which limit the accessibility of an audience to the speaker, as distinguished from total prohibition. In each case, the Court balanced the First Amendment rights of the speaker against the privacy interests of the resident. In *Struthers*, the privacy interests of some residents were deemed secondary to the right of other residents to receive noncommercial messages; the speaker could not be prohibited from addressing a willing audience. *Breard* held that the privacy interests of the resident outweighed the First Amendment rights of the speaker with a commercial message. In *Rowan*, the Court summarized the balancing of interests:

> Weighing the highly important right to communicate, but without trying to determine where it fits into constitutional imperatives, against the very basic right to be free from sights, sounds, and tangible matter we do not want, it seems to us that a mailer's right to communicate must stop at the mailbox of an unreceptive addressee.[129]

The right of privacy of the resident in the home is thus greater than the First Amendment right of a speaker who delivers an unwanted message by visual, auditory or tangible means.

Once this interest in residential privacy is established, it is possible to apply standards for restricting speech which is the source of the intrusion. In each of the areas of communications explored above, the governmental interest involved was the protection of a captive audience—the listener who is unable to escape a given message. Applying the *Cohen* test discussed above,[130] it must be shown that "substantial privacy interests are being invaded in an essentially intolerable manner"[131] before government may restrict speech. *Kovacs*, *Pollak* and *Breard* recognized the resident as an audience with substantial privacy interests. *Kovacs* and *Pollak* demonstrated that the inability to avoid a message renders the intrusion "intolerable." Moreover, *Rowan* itself has been cited for the proposition that "in the privacy of the home, . . . the individual's right to be let alone plainly outweighs the First Amendment rights of an intruder."[132]

128. *Id.* at 737.

129. *Id.* at 736-37.

130. *See* notes 93-98 and accompanying text *supra*.

131. Cohen v. California, 403 U.S. 15, 21 (1971).

132. FCC v. Pacifica, 438 U.S. 726, 749-50 (1978) (affirming action taken by the Federal Communications Commission against a local radio broadcaster upon complaint by a listener that objectionable material had been broadcast). In *Pacifica*, the Court recognized the elec-

D. The Telephone Analogy

Telephone solicitation may have seemed, until very recently, a trivial problem which each subscriber could handle in his own way. But technological advances, including ADRMPs, WATS lines and computer data files,[133] suggest a change in the industry which justifies legislative action.

By analogy to door-to-door solicitation and solicitation by mail, several observations can be made about the nature of solicitation by telephone. Most importantly, the telephone is in general a more active method of communication than either mail or door-to-door solicitation. All door-to-door solicitation and delivery of objectionable mail can be prohibited by order of the householder. The resident can determine whether or not he desires to admit a door-to-door solicitor without opening the door. In contrast, a telephone subscriber must answer the phone to determine whether or not he wishes to receive the message. Similarly, unsolicited mail is picked up at one's convenience. Once picked up, it is often easily distinguished from personal correspondence and can be discarded without reading the contents. By its ring, however, the telephone gives no indication of the nature or source of the call and requires answering if only to restore peace to the home.

Each of the cases discussed above, with the exception of *Struthers*, recognized that the individual by himself is incapable of protecting his privacy. In *Struthers*, the Court felt that the individual was in fact capable of enforcing his wishes and could avoid an unwanted message; thus the ordinance was ruled invalid. *Kovacs*, *Breard* and *Pollak*, on the other hand, all involved situations in which the individual was not capable of avoiding the message; legislative efforts to protect the listener were therefore upheld.

In pinpointing the precise balance between rights of privacy and speech, the main objective is to protect the individual resident in situations where he is incapable of protecting himself. The First Amendment rights of the speaker in those situations are outweighed by the privacy interests of the listener. The speech may be relegated to another medium, or to another forum, where the individual may exercise discretion. Thus, by use of time, place and manner restrictions, unsolicited speech may be effectively excluded from the home. The only qualification remaining is that found in *Struthers*: the resident must be free to receive noncommercial solicitations if he so desires.

Regulations that result in prohibiting telephone solicitations to the home are of two basic types: those that allow the resident to indicate

tronic media as "a uniquely pervasive presence in the lives of all Americans." *Id.* Offensive material broadcast to listeners in public and in private constitutes a harm of an intrusive nature that the FCC has an obligation to proscribe.

133. *See* notes 4-16 and accompanying text *supra*.

his unwillingness to receive calls and those that prohibit only commercial calls. By allowing the individual to decide whether he will receive solicitations, the requirements meet the test of *Struthers*. By contrast, legislation that prohibits only commercial solicitations in an effort to satisfy the requirements of *Struthers*, by allowing noncommercial calls to be made unrestricted, still faces serious challenge on First Amendment grounds. A brief examination of the content-neutrality doctrine, as it applies to a prohibition of commercial speech on the basis of content, will illustrate that legislation of this type will not survive constitutional challenge.

E. Content-Neutrality *versus* the Right of Privacy

Both commercial and noncommercial speech are protected by the First Amendment, and both are subject to time, place and manner regulation, as has been shown above. What remains to be determined is whether regulations may distinguish the two types of speech, restricting only commercial speech. The issue is particularly pressing because the trend of the Supreme Court, as has been described above, is to afford commercial speech the fullest protection of the First Amendment. The rule that time, place and manner regulation of protected speech must be content-neutral was expressly adopted by the Supreme Court in the landmark case of *Police Department v. Mosley*.[134] A single picket daily walked the sidewalk adjacent to a Chicago school, his signs accusing the school of racial discrimination. The day before a city ordinance that allowed picketing only in the event of a labor dispute went into effect, he ceased picketing and brought an action for declaratory and injunctive relief. The District Court for the Northern District of Illinois dismissed the complaint, and the Seventh Circuit reversed, invalidating the ordinance.[135]

The Supreme Court affirmed,[136] ruling that "the First Amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter, or its content."[137] The majority stated that the only acceptable qualification of this rule would be "to protect public order. But these justifications for selective exclusions from a public forum must be carefully scrutinized."[138] *Mosley* therefore embodies the rule that content-based regulations face a conclusive presumption of invalidity, save perhaps for situations bearing on "the public order." In these situations the regulation is still presumptively invalid and is subject to strict scrutiny.

134. 408 U.S. 92 (1972).
135. Mosley v. Police Dep't of Chicago, 432 F.2d 1256 (7th Cir. 1970).
136. 408 U.S. 92 (1972).
137. *Id.* at 95.
138. *Id.* at 98-99.

In two more recent cases the issue of content-neutrality arose in the context of movie theaters which screened sexually oriented but nonobscene "adult" films. In *Erznoznik v. City of Jacksonville*[139] the Court held, *inter alia*, that the showing of the films at a drive-in theater adjacent to a residential neighborhood could not be regulated because the films were not obscene, and were thus protected by the First Amendment. The Court stated that such a regulation "must satisfy the rigorous constitutional standards that apply when government attempts to regulate expression."[140] The heavy burden of the strict presumption in *Mosley* was thus affirmed in *Erznoznik*, although the language of the opinion suggests that that presumption is less than conclusive.[141]

Young v. American Mini Theatres, Inc.[142] posed a different problem concerning movie theaters. In an effort to disperse adult theaters, Detroit adopted an ordinance which specifically defined sexually oriented films and required that theaters screening such films be licensed and not operate within 1000 feet of each other or of other similar "adult" establishments. Operators of two theaters challenged the constitutionality of the ordinance in an action for injunctive relief.[143] The trial court, however, upheld the ordinance as a rational attempt to preserve the city's neighborhoods.[144] The court of appeals reversed,[145] observing that although the city's interest in protecting neighborhoods from crime incident to "adult" businesses was legitimate, the city had failed to provide evidence to prove that the regulation was necessary in achieving its goal.[146]

The Supreme Court upheld the ordinance.[147] In a plurality opinion four justices[148] held that, notwithstanding the nonobscene and therefore protected character of the film, the regulation of the movie theaters on the basis of film content was valid to achieve the city's goal of preserving neighborhoods and the quality of life for residents. The opinion declined to disturb the "wisdom"[149] of the city in framing a regulation that would achieve its objective. Thus the plurality appar-

139. 422 U.S. 205 (1975).

140. *Id.* at 217.

141. *Id.*

142. 427 U.S. 50 (1976).

143. Nortown Theatre Inc. v. Gribbs, 373 F. Supp. 363 (E.D. Mich. 1974).

144. *Id.*

145. American Mini Theatres, Inc. v. Gribbs, 518 F.2d 1014 (6th Cir. 1975).

146. "The City did not discharge its heavy burden of justifying the prior restraint which these ordinances undoubtedly impose by merely establishing that they were designed to serve a compelling public interest. Since fundamental rights are involved, the City had the further burden of showing that the method which it chose to deal with the problem at hand was necessary and that its effect on protected rights was only incidental." *Id.* at 1019-20.

147. Young v. American Mini Theatres, Inc. v. Gribbs, 427 U.S. 50 (1976).

148. Burger, C.J., White, Rehnquist and Stevens, JJ.

149. 427 U.S. at 71.

ently abandoned the strict *Mosley* presumption and used a balancing approach in its stead. The governmental interest in protecting neighborhoods from decline and crime outweighed the citizen's interest in screening adult films with a particular content.[150]

Justice Powell joined with the plurality in the result, but his concurrence did not accept their new approach. Rather, he relied on a zoning theory, declaring that First Amendment rights were affected "only incidentally and to a limited extent."[151] In his opinion Powell dismissed the classification of adult films as unnecessary in reaching the result.

Because of the inherent weaknesses in the plurality opinion in *Young*, the present application of the content-neutrality doctrine is uncertain. In the context of legislation which distinguishes between commercial and noncommercial speech for the purpose of restricting telephone solicitations, for example, the strict *Mosley* rule may still apply, invalidating the legislation. The *Erznoznik* qualification would not save such legislation since "the public order" is not at issue. If the *Young* approach were utilized, the Court would balance the right to residential privacy against the right to make a particular type of telephone solicitation. In light of the protection of residential privacy as a fundamental right, such legislation would be in conflict with the state goal. The state interest in protecting privacy is compelling, but the distinction between protected noncommercial and commercial telephone calls does not facilitate achieving that objective. If the governmental purpose in regulating telephone solicitation is to protect privacy, there is no logical or rational reason to suggest that limiting only commercial calls will achieve that goal to any greater degree than limiting all calls. If a call is intrusive, it is no less intrusive if it is noncommercial than if it is commercial. Legislation which distinguishes the two types of speech in the context of telephone solicitation is therefore extremely vulnerable to constitutional challenge under the content-neutrality doctrine.

Each of the residential privacy cases discussed limits the solicitor's contact with the home—from sound-truck broadcasts to door-to-door solicitors to the mails. The discernible trend is to extend protection to the home from unwanted solicitations of all types. But the privacy of the home is not fully protected until *all* solicitation—including that by telephone—can be prohibited by the householder. Several methods of limiting telephone solicitation have been developed. The next section of this note will examine these plans and a legislative model which

150. "[F]ew of us would march our sons and daughters off to war to preserve the citizen's right to see "Specified Sexual Activities" exhibited in the theaters of our choice." *Id.* at 70.

151. *Id.* at 73.

would permit prohibition of telephone solicitation by the subscriber will be proposed.

III. The Legislative Model

The doctrine of residential privacy, as shown by the foregoing discussion, provides a persuasive rationale for legislative action to restrict telephone solicitation. Each of the four methods of intrusion into the home has been the result of technological change.[152] This trend was noted by one commentator who observed that "concomitantly with increasing legal recognition of privacy, there has developed a technicological ability to invade it by a number of means heretofore not known."[153] By the very nature of the judicial system,[154] the means to invade privacy are developed and put into use long before the courts are afforded the opportunity to consider their constitutional implications and establish guidelines to protect individual rights.

Legislative bodies, on the other hand, can anticipate and respond to changing social needs. They are able to investigate problems, predict areas of potential conflict, and act to prevent the compromise of freedoms and rights.[155] Legislatures can also anticipate likely areas of disagreement, giving the courts language reflecting their intentions as to further interpretation.[156] Since the telephone solicitation industry has been quick to make use of technological and commercial advances, legislative action is the best approach for solving the proliferating problems. Moreover, the Supreme Court cases dealing with residential

152. Indeed, the very basis for the Warren-Brandeis article was the muckraking journalism then in vogue. To introduce their analysis of the right to privacy, they noted that "[r]ecent inventions and business methods call attention to the next step which must be taken for the protection of the person, and for securing to the individual . . . the right 'to be let alone.'" Warren & Brandeis, *supra* note 58, at 195. *See also* note 59 *supra*.

153. Miller, *Do Americans Value Privacy?*, in THE RIGHT TO PRIVACY 41 (G. McClellan ed. 1976). Regulation of telephone solicitation is not new. At least one community, Tampa, Florida, passed an anti-solicitation ordinance in September, 1964. It was repealed in October, 1964. But the development of ADRMPs, which were first marketed during the summer of 1977, has created a storm of protest resulting in numerous attempts to enact restrictive measures. *See* notes 19-21 and accompanying text *supra*.

154. The jurisdiction of the judiciary extends only to review of actions of the legislative and executive branches and decisions of lower courts. It is beyond the scope of the judiciary to act *sui generis* or to undertake to establish policies or procedures.

155. *See, e.g.*, 5 U.S.C. § 552(a). The act established limitations on the permissible use by the federal government of individually-identifiable information.

156. *See, e.g.*, notes 123-27 and accompanying text *supra*. In Rowan v. Post Office Dep't, 397 U.S. 728 (1969), the Court analyzed at length the legislative history of Title III of the Postal Revenue and Federal Salary Act of 1967. The Act was claimed to apply only to sexually oriented material, but the Court concluded from the language of the Act, together with records of the legislative hearings, that the underlying legislative intent required a broader interpretation. The Act was construed in *Rowan* to apply to *all* objectionable material.

privacy provide adequate guidelines for appropriate legislation. The first issue to be addressed is a determination of the scope of prospective restrictions.

A. Restricting Telephone Solicitation

It can be argued that the regulation of residential telephone solicitation, regardless of the commercial or noncommercial nature of the intended message, is constitutionally valid. The proposed model discussed below reflects this perspective.

The five aforementioned congressional bills[157] and apparently all of the state proposals,[158] except those which purport to ban ADRMP use rather than telephone solicitation *per se*, are narrower in scope and refer only to limitations on commercial solicitation.[159] One reason for

157. *See* text accompanying note 19 *supra*. Those bills include the following: H.R. 9506, 96th Cong., 1st Sess. (1979); H.R. 10033, 95th Cong., 2d Sess., 123 CONG. REC. H 12,282 (1978); H.R. 10032, 95th Cong. 2d Sess., 123 CONG. REC. H 12,282 (1978); H.R. 9506, 95th Cong., 1st Sess. (1977); H.R. 9505, 95th Cong., 1st Sess. (1977).

158. *See* text accompanying notes 19 & 20 *supra*.

159. The following discussion of legislative proposals is based on a survey made in 1978. While it is not an exhaustive list, it does indicate the typical forms that such legislation has taken and the general number of states considering actions to limit telephone solicitation. It should be noted that many states have several bills embodying the same approach and some bills contain more than one approach. The bills, which differ in numerous ways, have been categorized for purposes of this discussion.

The asterisk approach was proposed in two states, Indiana, H.B. 1045 (1978), and Wisconsin, A.B. 857 (1978), S.B. 436 (1978). Neither state enacted the bills into law. The rationale of this approach and its disadvantages are discussed in the text accompanying notes 167-70 *infra*.

The congressional approach has been enacted in Alaska, ALASKA STAT. § 45.50.472 (1978), and proposed in additional states—Arizona, H.B. 2162, 33d Leg., 2d Sess. (1978); Florida, H.B. 1029 (1978), S.B. 205 (1978); Hawaii, H.B. 2823, 9th Leg. (1978); Illinois, H.B. 2637 (1978); Iowa, H.F. 428, 67th Gen. Assembly, 1977 Sess.; Missouri, H.B. 1578, 79th Gen. Assembly, 2d Sess. (1978); New Jersey, A.B. 1308 (1978); New York, A.B. 9096 (1978); Rhode Island, H.B. 7613, Jan. Sess. (1978); Virginia, H.B. 1136 (1978) and Wisconsin, A.B. 857 (1978), S.B. 436 (1978). The disadvantages of this approach are discussed in the text accompanying note 177 *infra*.

The only state to propose a complete ban on telephone solicitation has been Iowa. S.F. 2099, 67th Gen. Assembly, 1978 Sess. The remaining proposals limit telephone solicitation to a much lesser extent.

Six states, for example, enacted legislation which would ban calls made by ADRMPs: Alaska, ALASKA STAT. § 45.50.472 (1978); California, CAL. PUB. UTIL. CODE § 2821 (West Supp. 1979); Florida, FLA. STAT. ANN. § 365.165 (West Supp. 1979); Maryland, MD. ANN. CODE art. 78, § 55c (Supp. 1979); Texas, PUB. UTIL. COMM'N R. 052.02(h) (1978); and Wisconsin, WIS. STAT. ANN. § 134.72 (West Supp. 1979-80). Legislation which would ban ADRMPs has been proposed in nine states: Florida, H.B. 1029 (1978), H.B. 439 (1978); Hawaii, H.B. 2823, 9th Leg. (1978); Illinois, S.B. 1382, 80th Gen. Assembly (1978); Michigan, H.B. 5944 (1978); Minnesota, H.F. 1747 (1978), S.F. 1620 (1978); New York, A.B. 10536 (1978), A.B. 9096 (1978); Pennsylvania, S.B. 1363 (1978); Rhode Island, H.B. 7613 (1978); and Tennessee, H.B. 2336 (1978), S.B. 2078 (1978). This approach is effective only insofar as

this may be that politicians are understandably reluctant to ban political and charitable solicitations. There is perhaps no remedy for this reluctance except for an overwhelming mandate from their constituencies.[160] Another reason for the less comprehensive reach of existing proposals may stem from the mistaken assumption that the Supreme Court's recent extension of First Amendment protection to commercial speech would preclude *all* restrictions. But as demonstrated earlier, this is not a valid concern;[161] both commercial and noncommercial speech may still be regulated by appropriate time, place and manner restrictions.

Both commercial and noncommercial telephone solicitation should be prohibited for three reasons. First, since time, place and manner restrictions can constitutionally be applied to noncommercial speech,[162] traditionally an area of greater First Amendment protection, they can logically be applied to commercial speech as well. Second, the distinction between a commercial and a noncommercial solicitation is not always easily drawn.[163] If noncommercial calls are permitted while commercial calls are not, economic pressure may cause an essentially

it eliminates intrastate use of ADRMPs. The subscriber may not be benefited, since it is both relatively easy to make calls across state lines and inexpensive due to the availability of low-cost long-distance telephone services (e.g., WATS lines). The ultimate result may not even be perceptible to the subscriber. A ban on the use of ADRMPs, furthermore, would only operate to eliminate one method of delivering telephone solicitations. The privacy of the subscriber would not be protected from intrusion by unwanted calls.

Three states have proposed legislation which would eliminate ADRMP calls to one minute. Florida, S.B. 205 (1978); Missouri, H.B. 1578, 79th Gen. Assembly, 2d Sess. (1978); and New York, A.B. 9096 (1978). This method has the added disadvantage over the ADRMP ban of allowing ADRMP calls intrastate. The calls may be shorter in duration but more in number, since a possible result of the time limitation is to encourage solicitors to make multiple calls to deliver the same message currently delivered in only one. The subscriber's privacy interest is not served by such an approach.

Maryland, H.B. 537 (1978) and Missouri, H.B. 930, 79th Gen. Assembly, 2d Sess. (1978), S.B. 724, 79th Gen. Assembly, 2d Sess. (1978), proposed that calls by ADRMPs be permitted only when the solicitors obtained written consent from the subscriber in advance. This approach is less effective in eliminating calls than a complete ban on ADRMPs and, again, will not affect those calls originating outside state boundaries.

160. *See, e.g.*, Tampa, Florida ordinance 3612-A, passed September 22, 1964 and repealed October 20, 1964. There, the community acted—however ambivalently—to eliminate telephone solicitation: "The twenty-eight day life span of one such anti-solicitation ordinance suggests that adoption of effective measures to protect residential solitude will be made only through compromise and insistence of an intensely persistent body politic." Note, 11 SANTA CLARA LAWYER 109, 119 (1970).

161. *See* notes 38-54 and accompanying text *supra*.

162. *See* notes 22-27 and accompanying text *supra*.

163. Consider, for example, the commercial and noncommercial elements in the following: telephone campaign by the Boy Scouts to sell magazines; a survey testing brand-name recognition of pickles; a call by a local automobile salesman soliciting charitable donations to be delivered to his dealership.

commercial message to be framed to avoid the prohibition.[164] Third, and perhaps most importantly, if telephone solicitations are to be restricted because they invade a right of residential privacy, the message is no less an invasion if it is noncommercial than if it is commercial. Thus, as has been discussed above, any legislation which undertakes on its face to classify commercial and noncommercial calls and prohibit only commercial calls would very likely not survive a challenge on First Amendment content-neutrality grounds.

At present, a residential telephone subscriber may protect his privacy from telephone solicitors by either not answering the telephone or by hanging up on each unwanted caller. Neither is an entirely satisfactory solution. Earlier sections of this note have examined the precedents which provide constitutional guidelines for limiting telephone solicitation. The following section will explore a variety of proposals for restricting telephone solicitation consistent with those guidelines.

B. Proposals

The cases dealing with residential privacy provide sufficient guidelines for the formulation of constitutionally valid restrictions on telephone solicitation. *Struthers*, for example, indicated that in order for such a regulation to be valid, each householder must be capable of *receiving* noncommercial information; the posting of a sign is sufficient to prohibit undesirable solicitation of a noncommercial nature.[165] *Rowan* held that regulations permitting addressees to prohibit delivery of mail from certain senders are permissible methods of protecting privacy.[166] The restriction of telephone solicitation, then, requires legislation that permits the user to demonstrate his desire to remain undisturbed. It must also include sanctions to enforce the wishes of the subscriber. But while the principle is clear, the mechanics of such a regulatory scheme have yet to be established. Various approaches have been suggested by the proponents of telephone solicitation regulation.

1. The Asterisk Approach

In 1965 a telephone subscriber appeared before the California Public Utilities Commission (CPUC) demanding that an asterisk be placed before his name in the telephone book to signify his unwilling-

164. Since a completed noncommercial call costs from one to six cents and has 20 times the effectiveness of mass mailings costing many times more, the economic pressure may cause solicitors to devise methods to bring calls with a commercial purpose within the letter of the law permitting non-commercial solicitation. Interim Opinion, *supra* note 5, at 20.

165. *See* note 106 and accompanying text *supra*.

166. 397 U.S. at 736.

ness to receive solicitations.[167] The CPUC also heard testimony opposing this request. The telephone company estimated an initial cost of $4.2 million to effect the asterisk program (based on an estimate that twenty-five percent of its subscribers would wish to participate), with an annual recurring cost of approximately $2.3 million.[168] The cost would be passed along to subscribers. The Commission dismissed the request and held that such regulation was appropriately left to the legislature.

This approach was more recently embodied in Indiana House Bill 1045.[169] The bill proposed that the telephone company be allowed to charge the consumer for the service of inserting the identifying mark in the telephone book. In addition to the arguments, which were made in the 1965 California case,[170] that the procedure itself is too expensive for practical implementations, it can also be argued that this approach effectively charges the consumer for not receiving calls. The fee, no matter how small, may discourage those who wish to protect their privacy. This result makes the asterisk approach undesirable.

2. The Street Address Directory Approach

The CPUC also considered an alternative proposal.[171] The telephone company publishes quarterly a telephone book wherein subscribers are listed by street address rather than by name. An individual may have his name removed from the directory at any time free of charge. The telephone company suggested regulations to require solicitors to use the Street Address Directory; individuals wishing to have their names deleted could do so without additional cost to the consumer public.

This approach remains popular with the telephone company, but critics have pointed out a major flaw—that these directories are used for other legitimate purposes. Police representatives indicated at the hearings that such deletions would limit the effective use of the directory by fire and police services.[172] Also, legitimate neighborhood serv-

167. McDaniel v. Pacific Tel. & Tel. Co., 60 PUB. U. REP. 3d 47 (Cal. Pub. Util. Comm'n 1965).

168. *Id.* at 49, 55. These figures apply only to the Pacific Telephone and Telegraph service area. Pacific Telephone and Telegraph representatives also indicated that additional equipment and operators would be needed to supply directory information services related to the use of the asterisk system, but gave no additional figure for these costs. *Id.*

169. Indiana H.B. 1045, 1978 Gen. Assembly. Similar bills are Wisc. H.B. 857 and S.B. 436 (1978).

170. *See* note 167 and accompanying text *supra*.

171. *Id.* at 49. McDaniel also requested an order requiring Pacific Telephone and Telegraph to secure subscriber permission for publication of names in the street address directory.

172. The sheriff of Alameda County testified in opposition to the Street Address Directory proposal. He listed instances when the directory was used by police personnel: location

ices[173] would be denied access to a perhaps interested and willing resident whose name was deleted only because he wished to avoid telephone solicitations. The significant governmental interest in maintaining community services might negate any potential benefit gained. Indeed, these arguments have thus far prevented the adoption of this approach.

3. The Congressional Approach

The Congressional proposals[174] require the solicitor to pay for a list of residential subscribers who are unwilling to receive telephone solicitations. This system would require the telephone company to provide an alternative listing, giving a subscriber the opportunity to signify annually his lack of willingness to be solicited by telephone. The solicitors would pay for the listing so no additional cost would be borne by the subscribing public. Solicitors would be required to comply with this list, and penalties would be assessed where violations occurred. In effect, as Congressman Aspin said, "subscribers [will have] hung 'No Solicitors' signs on their phones . . . ."[175] As with the others, however, this proposed restriction on solicitation would apply only to commercial calls. Where subscribers do not express their unwillingness to receive calls, solicitations made by automatic equipment must be limited to one minute or less.

This plan has much to recommend it. It provides the necessary opportunity for subscribers to receive noncommercial solicitations, as required by *Struthers*. It also allows the individual resident to indicate, by his own initiative and discretion, his unwillingness to receive all messages, as required by *Rowan*. A major criticism of the congressional plan focuses on the cost to solicitors. Any plan to restrict telephone solicitation will involve significant cost, however, and this plan requires the solicitors, rather than the consumer, to subsidize the cost of the solicitations.[176]

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of a missing child, investigation of crimes, notification of next-of-kin, service of warrants, communications with patrols in the field, and pinpointing locations of fires. *Id.* at 58-60.

173. Other legitimate uses of the Street Address Directory were mentioned at the hearings, such as its use by school districts for determining whether students are properly registered, by county planners for determining property locations in connection with rights-of-way, and by assessors, tax collectors and other officials. *Id.* at 58.

174. *See* note 19 *supra*.

175. Congressional Record, H.R. 9505-06, 95th Cong., 1st Sess., 123 CONG. REC. E6213 (1977) (Introductory remarks by Congressman Les Aspin).

176. It should be noted, however, in the words of Murray Roman, Chairman of the Campaign Communications Institute of America, that "[i]n one way or another, that cost is ultimately going to be passed on to the consumer." U.S. NEWS AND WORLD REP., Sept. 11, 1978 at 44.

Proponents of telephone solicitation also contend that the increased cost will result in lost jobs. Appellants in *Breard* also presented this argument, claiming " 'the right to engage

There are two major drawbacks to the congressional approach. The first is the classification of calls into commercial and noncommercial and the subsequent limitation of the ban to commercial calls. Because the legislation itself classifies calls on the basis of content, it would be vulnerable to challenge on First Amendment content-neutrality grounds. The author himself has made it clear that the objective of the bill is to protect the privacy of the subscriber.[177] To distinguish commercial calls and subject them to prohibition without the same treatment for noncommercial calls is not necessary to effectuate the goal and, in fact, works to frustrate it. Such legislation in its present form, therefore, cannot survive challenge.

The second major drawback is the relatively slight limitation on the use of ADRMPs, such as automatic calls being limited to less than one minute. The threat from such calls is only partially that their length may deprive subscribers without a disconnect feature from using their telephones during automatic calls. The remaining problems include sequential dialing machines that call numbers on a given frequency, including unlisted numbers; development of computerized data files on subscribers to enable solicitors to make effective calls; and the general proliferation of solicitations delivered to the home.

C. The Proposed Model

Of the three proposals discussed above, the congressional plan appears to be the most complete. But even that plan would restrict only commercial solicitations. As the preceding discussion has indicated,[178] there is ample support for allowing the restriction of *all* telephone solicitations, both commercial and noncommercial, of those residents who indicate an unwillingness to receive them. Indeed, the doctrine of content-neutrality requires such a result. The proposed model which follows is based upon those considerations.

A BILL

> To amend the Communications Act of 1934 to prohibit making unsolicited telephone calls to persons who have indicated they do not wish to receive such calls.
>
> *Be it enacted by the Senate and House of Representatives*

in one of the common occupations of life,' " 341 U.S. 622, 629 (1951) (citations omitted), which the Court characterized as "an assertion by a door-to-door solicitor that the Due Process Clause of the Fourteenth Amendment does not permit a state or its subdivisions to deprive a specialist in door-to-door selling of his means of livelihood." *Id.* at 632. The Court was clear in distinguishing between the "commerce, *i.e.*, sales of periodicals" and the "methods" which were subject to regulation, concluding that "even a legitimate occupation may be restricted or prohibited in the public interest." *Id.* at 632-33.

177. *See* text accompanying note 175 *supra*.

178. *See* notes 157-64 and accompanying text *supra*.

of the United States of America in Congress assembled, That this Act may be cited as the "Telephone Privacy Act".

Sec. 2 Title II of the Communications Act of 1934 is amended by adding at the end thereof the following new section:

PROHIBITION OF UNSOLICITED TELEPHONE CALLS

Sec. 224. (a)(1)(A) No person may make or cause to be made any unsolicited telephone call to any telephone if the person who is the subscriber for such telephone has given notice, in accordance with subsection (b), that he does not wish to receive unsolicited telephone calls.

(B) No person shall cause to be made any unsolicited telephone call to any telephone if such call is made entirely by automatic equipment or if such call is placed by automatic equipment.

(2) No person may employ, or contract for, any other person to make any telephone call in violation of paragraph (1).

(b)(1) Any person who is a telephone subscriber and who wishes not to receive unsolicited telephone calls may notify the telephone company which provides telephone exchange service for such telephone that he does not wish to receive such calls. The Commission shall prescribe regulations—

(A) specifying the manner in which notification shall be given,

(B) specifying the manner in which telephone companies shall make available to persons making unsolicited telephone calls the names and telephone numbers of persons who do not wish to receive such calls, and

(C) specifying the times at which and manner in which a subscriber may give or revoke such notification.

Regulations under subparagraph (C) shall require that a subscriber be given the opportunity to give such notification whenever a telephone is installed, and not less frequently than annually thereafter.

(2) No telephone company may make any charge to a subscriber for the service of listing him or her as not wishing to receive unsolicited telephone calls, and the costs incurred by any telephone company to administer the provisions of this section shall be borne by those persons or institutions obtaining the names and telephone numbers of those subscribers who do not wish to receive unsolicited telephone calls under a

fee structure to be prescribed by regulation of the Commission.[179]

Under the proposed model, telephone companies would initially be required to provide a listing of subscribers unwilling to receive telephone solicitations *of any kind*. This feature would allow each subscriber to determine whether or not he wished to receive solicitations, just as the homeowner in *Struthers*, rather than the government, had to be allowed to choose whether or not to admit solicitors. Second, the solicitors would be required to use the lists compiled by the telephone company, just as mail solicitors must use the lists compiled by the Postmaster under *Rowan*. This would ensure that subscribers' wishes were heeded by solicitors. Third, as in the congressional proposal, the solicitor would pay for the use of the list, in effect reimbursing the telephone company for its service. This aspect of the Model would prevent the subscribing public from subsidizing the cost of exercising its prerogative not to be disturbed. Fourth, because the legislation does not make a classification for commercial speech, it is not vulnerable to constitutional challenge on First Amendment content-neutrality grounds. It may be argued that there may be individuals who wish to receive noncommercial calls, but not commercial calls, who will be forced to choose between all calls or none. Statistics compiled in the survey for the Pacific Telephone Company,[180] however, indicate that this is unlikely: only .2% of subscribers polled stated that they liked calls soliciting charitable donations,[181] and 1.1% stated that they liked receiving calls of a religious nature.[182] For purposes of comparison, .1% liked receiving wrong numbers,[183] and .4% liked receiving crank calls.[184]

A legislative model that would restrict all residential telephone solicitations of those who have indicated their unwillingness to be disturbed, as set out above, fulfills the four requirements established in *O'Brien* for the regulation of speech through time, place and manner restrictions.[185] First, restriction of telephone solicitation is within the constitutional power of the government.[186] Second, it furthers the strong governmental interest in protecting the right of residential privacy. The strength of this interest emerges from an analysis of legisla-

179. The bill might also include guidelines for enforcement. *See, e.g.*, H.R. 9506, 96th Cong., 1st Sess. (1979).

180. Field Research Corp., The California Public's Experience with and Attitude Toward Unsolicited Telephone Calls at 9 (Mar. 1978) (survey conducted for the Pacific Telephone Co., on file in Cal. Pub. Util. Comm'n File No. OII12).

181. *Id.*

182. *Id.*

183. *Id.*

184. *Id.*

185. *See* text accompanying note 27 *supra*.

186. The telephone, as an instrumentality of interstate commerce, falls under the regulatory power of the federal government.

tion enacted, and subsequently upheld by the Supreme Court, to restrict other media from penetrating the home.[187] Third, the interest in restricting telephone solicitation is not related to suppressing free expression. It centers instead on the need to protect the home from specific, unwanted intrusions.[188] Finally, there is at present no other effective means by which to restrict such calls.[189] The proposed model therefore does not limit freedom of speech more than is necessary to achieve its legitimate goal. Thus, the proposed model meets the standards set out in *O'Brien* for restricting unwanted residential telephone solicitation.

The proposed model has the advantages of complying with all the established constitutional requirements and of effectively eliminating telephone solicitations from the homes of those unwilling to receive them. Telephone solicitations are restricted only as a *manner* of communication under the proposed model, while the speech itself is not. The speaker may deliver his message via any other media (e.g., television, radio, newspapers, or magazines). The calls are also restricted only as to *place*. Although the calls cannot be made to a residence, the speaker may deliver his message in any other setting (e.g., businesses, clubs, agencies and associations).[190] Calls to residences are not precluded altogether. Those who do not wish to receive solicitations may so indicate, thus meeting the requirements established by the Court in analogous residential privacy cases.[191] The willing recipient is free to receive whatever solicitation he desires, and the unwilling recipient may, by his own initiative and discretion, indicate his unwillingness to receive solicitations. The proposed model does not distinguish commercial and noncommercial speech, in conformity with the content-neutrality doctrine, and, therefore, is not vulnerable to constitutional challenge. Finally, the model would eliminate the use of ADRMPs from the telephone solicitation industry. Thus, the proposed model appears to be the best, if not the only, viable solution to the problem of the intrusion of telephone solicitation into the home.

187. *See, e.g.*, Kovacs v. Cooper, 336 U.S. 77 (1948), notes 76-83 and accompanying text *supra*.

188. *See, e.g.*, Breard v. Alexandria, 341 U.S. 622 (1951), notes 108-13 and accompanying text *supra*.

189. *See* note 133 and accompanying text *supra*.

190. Calls are not subject to *time* regulations under the proposed model in addition to *place* and *manner* regulations, because such restriction would not fully serve the governmental interest of protecting residential privacy.

191. Rowan v. Post Office Dep't, 397 U.S. 728 (1969); *see* text accompanying notes 121-28 *supra*. PUC v. Pollak, 343 U.S. 451 (1952); *see* text accompanying notes 84-92 *supra*. Breard v. Alexandria, 341 U.S. 622 (1951); *see* text accompanying notes 108-18 *supra*. Kovacs v. Cooper, 336 U.S. 77 (1948); *see* text accompanying notes 60-67 *supra*. Martin v. Struthers, 319 U.S. 141 (1942), *see* text accompanying notes 101-07 *supra*.

Conclusion

The constitutional rights of free speech and privacy are involved in regulating telephone solicitation. The cases examined above have emphasized that the two rights frequently conflict, and that neither can be permitted to eclipse the other. No one has a right to speak anywhere, at any time and in any manner he chooses. Similarly, no one can claim a right of privacy which encompasses wherever, whenever and however he chooses to move through society. Both rights must be tempered to achieve compatibility with respect to interests that are ultimately countervailing. The tempering factor is a time, place and manner regulation, one that establishes one right as preeminent only in a given context. It is the thesis of this note that in the context of the home, the privacy interest of the resident should prevail over the countervailing right of a speaker to deliver an unwanted message over the telephone. While the speaker has the right of free expression, he may not use it to disturb the solitude of a resident who has expressed his desire not to be disturbed. The message may nonetheless be delivered by other means, in other settings.

The constitutional doctrine of residential privacy protects against unwanted intrusions when specific criteria are met. Just as he must indicate to the Postmaster his unwillingness to receive mail solicitations under *Rowan*, the resident must indicate to the telephone company his unwillingness to receive solicitations by telephone. The proposed model would establish a means by which the subscriber may limit access to his telephone, consistent with constitutional requirements, since both commercial and noncommercial speech are subject to time, place and manner restrictions.

The argument that a limitation on the right of free speech is an impermissible "encroachment" on constitutional rights fails to recognize that the Court has consistently recognized time, place and manner regulations as a legitimate device to mold the parameters of that right to its surroundings. Moreover, from the perspective of this note, the impermissible "encroachment" is that which affects the privacy interests of the resident rather than the First Amendment interests of solicitors.

The privacy of the individual, particularly in his home, is a right only recently recognized and not easily defined. As technology advances, "encroachments" become more evident. Regulation of telephone solicitation is necessary to protect the resident from such intrusions and to counteract technology's most recent method of communication by which an unwanted message may enter the home.