

1980

Scapegoat Picketing: Beyond the Pale of Constitutional Protection

Robert J. Mongeluzzi

Follow this and additional works at: <https://ir.lawnet.fordham.edu/flr>



Part of the [Law Commons](#)

Recommended Citation

Robert J. Mongeluzzi, *Scapegoat Picketing: Beyond the Pale of Constitutional Protection*, 48 Fordham L. Rev. 794 (1980).

Available at: <https://ir.lawnet.fordham.edu/flr/vol48/iss5/6>

This Article is brought to you for free and open access by FLASH: The Fordham Law Archive of Scholarship and History. It has been accepted for inclusion in Fordham Law Review by an authorized editor of FLASH: The Fordham Law Archive of Scholarship and History. For more information, please contact tmelnick@law.fordham.edu.

SCAPEGOAT PICKETING: BEYOND THE PALE OF CONSTITUTIONAL PROTECTION

INTRODUCTION

Scapegoat picketing¹ is the picketing of a private business or private individual² with whom the picketers have no dispute.³ Its sole purpose is to

1. *Rouse Phila. Inc. v. Ad Hoc* '78, No. 4145 (C.P. Phila. Co. Jan. 31, 1979), *aff'd*, Nos. 380, 390, 444 (Pa. Super. Ct. Dec. 28, 1979), *appeal docketed*, No. 99 (E.D. Pa. Jan. 25, 1980). "Scapegoat boycotting urges concerted refusal to have business relationships with a 'target' consisting of a limited number of persons, for the purpose of protesting against and symbolizing protest against the actions and conduct of third parties As to the 'target' the sole purpose of the boycott is to cause damage, injury and destruction for symbolic purposes. In a true scapegoat boycott the 'target' has no power or authority to force concessions from the third parties. In a true scapegoat boycott there is no real or bona fide dispute, primary or secondary, between the 'target' and the boycotters." *Id.*, slip op. at 24 (emphasis omitted). It is apparent that this definition of scapegoat boycotting pertains only to picketing. This was implied in the Superior Court's affirmance by its statement that the injunction was limited to the area of the picketing. Nos. 380, 390, 444, slip op. at 2. Other methods of protest, such as handbilling and leafletting, cannot be enjoined. *See Organization For A Better Austin v. Keefe*, 402 U.S. 415 (1971); *Martin v. City of Struthers*, 319 U.S. 141 (1943); *Schneider v. State*, 308 U.S. 147 (1939); *Lovell v. Griffin*, 303 U.S. 444 (1938). *Compare Missouri v. National Org. for Women, Inc.*, 467 F. Supp. 289 (W.D. Mo. 1979) (leafletting urging boycott of unrelated third parties held unenjoinable) *with West Willow Realty Corp. v. Taylor*, 23 Misc. 2d 867, 198 N.Y.S.2d 196 (Sup. Ct. 1960) (picketing of uninvolved third party held enjoinable).

"A picketer may: (1) Merely observe workers or customers. (2) Communicate information, e.g., that a strike is in progress, making either true, untrue or libelous statements. (3) Persuade employees or customers not to engage in relations with the employer: (a) through the use of banners, without speaking, carrying, true, untrue or libelous legends; (b) by speaking, (i) in a calm, dispassionate manner, (ii) in a heated, hostile manner, (iii) using abusive epithets and profanity, (iv) yelling loudly, (v) by persisting in making arguments when employees or customers refuse to listen; (c) by offering money or similar inducements to strike breakers. (4) Threaten employees or customers: (a) by the mere presence of the picketer; the presence may be a threat of, (i) physical violence, (ii) social ostracism, being branded in the community as a 'scab,' (iii) a trade or employees' boycott, *i.e.*, preventing workers from securing employment and refusing to trade with customers, (iv) threatening injury to property; (b) by verbal threats. (5) Assaults and use of violence. (6) Destruction of property. (7) Blocking of entrances and interference with traffic." Hellerstein, *Picketing Legislation and the Courts*, 10 N.C. L. Rev. 158, 186 n.135 (1931). *See also* M. Forkosch, *A Treatise on Labor Law* § 262 (2d ed. 1965); C. Gregory & H. Katz, *Labor and the Law* 141 (3d ed. 1979); B. Zepke, *Labor Law* 100 (1977); Hersbergen, *Picketing By Aggrieved Consumers—A Case Law Analysis*, 59 Iowa L. Rev. 1097, 1099 (1974).

2. The picketing of public officials is beyond the scope of this Note. The public person has sacrificed, at least partially, his right to privacy. Furthermore, the rights of public protest and criticism would be significantly diminished if public officials were immune from picketing. *See Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974); *Rosenbloom v. Metromedia, Inc.*, 403 U.S. 29 (1971); *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964). *See generally* Comment, *Picketers at the Doorstep*, 9 Harv. C.R.-C.L. L. Rev. 95, 121-22 (1974); Note, *Picketing The Homes of Public Officials*, 34 U. Chi. L. Rev. 106, 119-23 (1966).

3. The key factor distinguishing scapegoat picketing from other forms of picketing is that there is no dispute, specifically or generally, between the scapegoat picketers and their target. A comparison of *Rouse Phila. Inc. v. Ad Hoc* '78, No. 4145 (C.P. Phila. Co. Jan. 31, 1979), *aff'd*, Nos. 380, 390, 444 (Pa. Super. Ct. Dec. 28, 1979), *appeal docketed*, No. 99 (E.D. Pa. Jan. 25,

cause economic damage and destruction to the "target" to symbolize a protest against the actions of unrelated third parties.⁴ Unlike labor relations⁵ or consumer picketing,⁶ scapegoat picketing is directed at a target that has no "involvement in or any control over or power to affect the primary disputes between the protestors and the third parties."⁷

In general, because picketing is viewed as a form of communication protected by the first amendment,⁸ there is some question whether scapegoat

1980), and *Claiborne Hardware, Inc. v. NAACP*, No. 78,353 (Miss. Ch. Ct. Aug. 9, 1978), will illustrate this distinction. In *Rouse*, the picketers conceded that their dispute was not with the shopping center; rather, they were urging others to boycott the stores to symbolize criticism of government policies. No. 4145, slip op. at 21. In *Claiborne*, the picketing and boycotting of white merchants was in response to systematic racial discrimination against blacks. No. 78,353, slip op. at 11. Thus, although there was no dispute between the picketers and their target in *Rouse*, there were general allegations of discrimination charged against the target merchants in *Claiborne*, and hence, a dispute between the protestors and their target. No. 78,353, slip op. at 16. The scapegoat picketing may be on the private property of the target, or on the public property adjacent to it. In the latter case, the protest must be directed at the private property with whom there is no dispute to be classified as scapegoat picketing. See No. 4145, slip op. at 21-23.

4. *Rouse Phila. Inc. v. Ad Hoc '78*, No. 4145, slip op. at 24. A scapegoat is "an animal or person to whom sins, ill luck, or other evils are ceremonially attached and who symbolically bears them away by being sacrificed," or "a person or thing bearing the blame for others," or "a person, group, race, or institution against whom is directed the irrational hostility and unrelieved aggression of others." Webster's Third New International Dictionary 2025 (1976).

5. Picketing is often used by employees and labor organizations to establish collective bargaining relationships, to publicize unfair labor practices or substandard working conditions, and to exert economic pressure upon employers to exact concessions during contract negotiations. See generally R. Gorman, *Labor Law* 211-39 (1976). These forms of picketing are protected to a certain extent by the National Labor Relations Act §§ 7-8, 29 U.S.C. §§ 157-58 (1976), but remain subject to constitutional limitations. E.g., *Hudgens v. NLRB*, 424 U.S. 507 (1976); *American Radio Ass'n v. Mobile S.S. Ass'n*, 419 U.S. 215 (1974); *International Bhd. of Teamsters, Local 695 v. Vogt, Inc.*, 354 U.S. 284 (1957). In several instances, picketing by employees and labor organizations may be regulated by the states, for example: when a valid state public policy is violated, *Sears, Roebuck & Co. v. San Diego Co. Dist. Council of Carpenters*, 436 U.S. 180 (1978) (trespass); *Farmer v. United Bhd. of Carpenters & Joiners*, 430 U.S. 290 (1977) (intentional infliction of emotional distress), or when the state's regulation does not unduly interfere with the scheme of federal labor relations authority. See *Amalgamated Ass'n of St., Elec. Ry. & Motor Coach Employees v. Lockridge*, 403 U.S. 274 (1971); *San Diego Bldg. Trades Council v. Garmon*, 359 U.S. 236 (1959). A full analysis of picketing in the labor relations context is beyond the scope of this Note and is discussed only insofar as it is relevant to scapegoat picketing.

6. Consumer picketing is an exception to federal labor law prohibition of secondary boycotts. Labor Management Relations (Taft-Hartley) Act § 8(b)(4), 29 U.S.C. § 158(b)(4) (1976). The consumer picketing exception, first enunciated in *NLRB v. Fruit & Vegetable Packers & Warehousemen*, 377 U.S. 58 (1964), permits peaceful secondary picketing of retail stores directed solely at appealing to consumers to refrain from buying the primary employer's product. *Id.* at 63-73. See generally R. Dereshinsky, *The NLRB and Secondary Boycotts* 5-49 (1972); R. Gorman, *supra* note 5, at 257-61.

7. *Rouse Phila. Inc. v. Ad Hoc '78*, No. 4145, slip op. at 24.

8. E.g., *Shuttlesworth v. City of Birmingham*, 394 U.S. 147, 152 (1969); *Carlson v. California*, 310 U.S. 106, 113 (1940); *Thornhill v. Alabama*, 310 U.S. 88, 101-02 (1940); *Hague v. CIO*, 307 U.S. 496, 508 (1939). The first amendment provides that: "Congress shall make no law

picketing may be constitutionally enjoined.⁹ For example, recently in *Rouse Philadelphia, Inc. v. Ad Hoc '78*,¹⁰ members of Ad Hoc '78 picketed the Gallery shopping mall in Philadelphia to urge others to boycott those stores, even though the picketers had no economic or other dispute with the Gallery. The picketers conceded that their activity was an attempt to publicize their disputes with the government, over which the Gallery had no power or authority.¹¹ The Gallery was granted a temporary injunction¹² because the court deemed both the defendant's purpose and method¹³ of picketing improper. In an analogous case, *Missouri v. National Organization for Women*,

respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or of the right of the people peaceably to assemble, and to petition the Government for a redress of grievances." U.S. Const. amend. I.

9. See Comment, *The Consumer Boycott*, 42 Miss. L.J. 226, 228-33 (1971); Note, *The Invisible Hand and the Clenched Fist: Is There a Safe Way to Picket Under the First Amendment?*, 26 Hastings L.J. 167 (1974). See generally Hersbergen, *supra* note 1.

10. No. 4145, (C.P. Phila. Co. Jan. 31, 1979), *aff'd*, Nos. 380, 390, 444 (Pa. Super. Ct. Dec. 28, 1979), *appeal docketed*, No. 99 (E.D. Pa. Jan. 25, 1980).

11. "The demonstrators also protested against police brutality, the treatment of the Move group, the policies of the City government and in opposition to a proposed change in the City Charter with regard to mayoral succession. They also protested about problems of black unemployment and problems relating to schools. The plaintiffs have no relationship to any of these issues whatsoever." *Id.*, slip op. at 23. In testifying as to his group's purpose, the acknowledged leader of the picketing stated that "[t]he merchants [of the Gallery] wouldn't have to particularly do anything for me to end the boycott. . . . [W]e are after the city administration, the Redevelopment Authority, the Rizzo administration" *Id.* at 21.

12. *Id.* at 6-9, 48-51. There are numerous factors that the court must weigh in determining whether a preliminary injunction is to be issued. See *Blackwelder Furniture Co. v. Seilig Mfg. Co.*, 550 F.2d 189, 195 (4th Cir. 1977); *New York Pathological & X-Ray Lab. v. Immigration & Nat. Serv.*, 523 F.2d 79, 81 (2d Cir. 1975); *Allison v. Froehlike*, 470 F.2d 1123, 1126 (5th Cir. 1972). The first factor is that its issuance is necessary to prevent immediate and irreparable harm. See *Brown v. Chote*, 411 U.S. 452, 456 (1973); *Lewis v. Baune*, 534 F.2d 1115, 1123-24 (5th Cir. 1976); *Flood v. Kuhn*, 309 F. Supp. 793, 799 (S.D.N.Y. 1970). The second requirement is that greater injury would result by refusing the injunction, than by granting it. See *Friends of the Earth, Inc. v. Coleman*, 518 F.2d 323, 330 (9th Cir. 1975); *Sierra Club v. Hickel*, 433 F.2d 24, 33 (9th Cir. 1970), *aff'd sub nom. Sierra Club v. Morton*, 405 U.S. 727 (1972). See generally Leubsdorf, *The Standard for Preliminary Injunctions*, 91 Harv. L. Rev. 525 (1978). Some courts also require the plaintiff to show a reasonable likelihood of success on the merits. See *Brown v. Chote*, 411 U.S. 452, 456 (1973); *Walco Prods., Inc. v. Kittay & Blitz, Inc.*, 354 F. Supp. 121, 124 (S.D.N.Y. 1972). Another requirement is that until a final determination is made, the decree properly restores the parties to the status existing immediately prior to the allegedly wrongful conduct. See *Hollon v. Mathis Ind. School Dist.*, 491 F.2d 92, 93 (5th Cir. 1974); *United States v. Feature Sports, Inc.*, 349 F. Supp. 966, 967-68 (S.D.N.Y. 1969). The public interest should also be taken into account. See *Yakus v. United States*, 321 U.S. 414, 440 (1944). See generally Farmer & Williamson, *Picketing and the Injunctive Power of State Courts—From Thornhill to Vogt*, 35 U. Det. L.J. 431 (1958); Work, *Injunctive Relief for Economically-Directed Civil Rights Picketing*, 38 U. Colo. L. Rev. 516 (1966).

13. See *Allen-Bradley Local 1111 v. Wisconsin Employment Relations Bd.*, 315 U.S. 740 (1942); *Milk Wagon Drivers Union, Local 753 v. Meadowmoor Dairies, Inc.*, 312 U.S. 287 (1941); *Wortex Mills Inc. v. Textile Workers Union*, 369 Pa. 359, 85 A.2d 851 (1952). The Constitution does not protect picketing which is "violent, threatening, menacing, insulting, or clearly calculated to provoke a breach of the peace by others." *Smith v. Grady*, 411 F.2d 181, 189 (5th Cir. 1969) (citation omitted).

Inc.,¹⁴ a feminist organization sponsored a boycott of any convention in a state that had not ratified the Equal Rights Amendment.¹⁵ This boycott, however, was held to be neither an antitrust violation¹⁶ nor an unjustified interference with prospective economic relations.¹⁷ The court concluded that the purpose of the boycott and the constitutional interests in protecting the exercise of the rights of assembly and petition outweighed the state's interest in protecting a business expectancy.¹⁸ These cases illustrate the crucial distinction between protest directed at the primary disputant, which may incidentally harm unrelated third parties, and scapegoat protests that are specifically directed at unrelated third parties to symbolize a dispute with the primary party.

Scapegoat picketing brings into focus a clash between the rights to communicate, assemble, and petition,¹⁹ and the rights to engage in business and to own and enjoy property.²⁰ When these rights conflict,²¹ the judiciary

14. 467 F. Supp. 289 (W.D. Mo. 1979).

15. *Id.* at 291. The National Organization for Women (NOW) organized a boycott to "persuade and urge those organizations that support [the Equal Rights Amendment (ERA)] to refrain from holding conferences, conventions, and meetings in unratified states." *Id.* The court determined that NOW's boycott was both "symbolic" and "to attract attention and bring public visibility to the issue of ratification [of the ERA]." *Id.* at 295. The State of Missouri estimated that the boycott resulted in \$19 million in revenue losses. *Id.* at 297.

16. *Id.* at 305. The State argued that the boycott violated the Clayton Act § 16, 15 U.S.C. § 26 (1976), and constituted a restraint of trade in violation of the Sherman Act § 1, 15 U.S.C. § 1 (1976). The court determined, however, that the boycott was essentially political, 467 F. Supp. at 304, and was a legitimate attempt to influence the government, *id.*, thus, falling outside the proscriptions of the antitrust laws. *Id.* at 305. There has been a great deal of controversy regarding the applicability of antitrust laws to non-commercial picketing and boycotts. While earlier commentators suggested that antitrust laws might be applicable in the political context, *see* Coons, *Non-Commercial Purposes as a Sherman Act Defense*, 56 Nw. U. L. Rev. 705, 748-50 (1962); Comment, *The Consumer Boycott*, 42 Miss. L.J. 226, 238-44 (1971), this argument has recently been contested. *See* Sandifer & Smith, *The Tort Suit for Damages: The New Threat to Civil Rights Organizations*, 41 Brooklyn L. Rev. 559, 573-75 (1975); Note, *Political Boycott Activity and the First Amendment*, 91 Harv. L. Rev. 659, 678-97 (1978). Furthermore, *Eastern R.R. Presidents Conf. v. Noerr Motor Freight, Inc.*, 365 U.S. 127 (1961), precludes the application of the Sherman Act to most non-commercial boycotts. In *Noerr*, the Court held that "the Sherman Act does not apply to the [boycott] activities . . . at least insofar as those activities comprised mere solicitation of governmental action with respect to the passage and enforcement of laws." *Id.* at 138. There are numerous exceptions to this doctrine, however, and state regulation of anticompetitive behavior is not completely preempted by federal law. *See generally* L. Sullivan, *Handbook of the Law of Antitrust* § 238 (1977).

17. 467 F. Supp. at 305-06; *see* notes 110-18 *infra* and accompanying text.

18. 467 F. Supp. at 305-06.

19. *Police Dep't of Chicago v. Mosley*, 408 U.S. 92, 99 (1972); *Carlson v. California*, 310 U.S. 106, 113 (1940); *Thornhill v. Alabama*, 310 U.S. 88, 102 (1940); *Hague v. CIO*, 307 U.S. 496, 517 (1939). The first amendment guarantees apply to the states through the fourteenth amendment. *Bridges v. California*, 314 U.S. 252, 267-68 (1941) (petition); *De Jonge v. Oregon*, 299 U.S. 353, 364 (1937) (assembly); *Gitlow v. New York*, 268 U.S. 652, 666 (1925) (speech).

20. *See Truax v. Corrigan*, 257 U.S. 312, 327 (1921); *Carter v. Knapp Motor Co.*, 243 Ala. 600, 603, 11 So. 2d 383, 384 (1943); *NAACP v. Overstreet*, 221 Ga. 16, 21, 142 S.E.2d 816, 823 (1965), *cert. dismissed*, 384 U.S. 118 (1966) (per curiam); *Schmoldt v. Oakley*, 390 P.2d 882, 885 (Okla. 1964); *cf. Dorchy v. Kansas*, 272 U.S. 306, 311 (1926) ("The right to carry on business—be it called liberty or property—has value."); *Exchange Bakery & Restaurant, Inc. v.*

endeavors to balance and accommodate them.²² Although the courts have not until recently addressed the particular issue, their decisions regarding other forms of picketing may conclusively end the use of scapegoat picketing as a form of protest.²³ First, any picketing that violates a valid public policy or law may be enjoined.²⁴ Second, scapegoat picketing may constitute malicious²⁵ or coercive²⁶ conduct and thus be subject to enjoinder pursuant to a tortious injury theory. Finally, a proper balancing of all competing values may result in a finding that society is benefited when scapegoat picketing is enjoined.²⁷ It is submitted, therefore, that scapegoat picketing may be enjoined without violating constitutional safeguards.

Rifkin, 245 N.Y. 260, 265, 157 N.E. 130, 133 (1927) ("Freedom to conduct a business . . . is like a property right.").

21. This conflict has been intensified by the development and use of awesome economic power by picketers and boycotters. For example, the boycott of table-grapes led by Cesar Chavez resulted in a reduction in national sales of 12%. *Time Magazine*, July 4, 1969, at 18. The retailers of Birmingham, Alabama estimated that they were losing almost \$750,000 per week because of a boycott of stores allegedly engaging in racial discrimination. *Time Magazine*, June 7, 1963, at 95. See also Hersbergen, *supra* note 1, at 1147-51; Comment, *The Consumer Boycott*, 42 *Miss. L.J.* 226, 226-27 (1971).

22. *Pickering v. Board of Educ.*, 391 U.S. 563, 568 (1968); *Carpenters & Joiners Union, Local 213 v. Ritter's Cafe*, 315 U.S. 722, 726-27 (1942); *Schneider v. State*, 308 U.S. 147, 160 (1939). "[T]he dichotomy between personal liberties and property rights is a false one. . . . In fact, a fundamental interdependence exists between the personal right to liberty and the personal right in property. Neither could have meaning without the other." *Lynch v. Household Fin. Corp.*, 405 U.S. 538, 552 (1972). Freedom of speech and press are not absolutes. They do "not mean that one can talk or distribute where, when and how one chooses. Rights other than those of the advocates are involved. By adjustment of rights, we can have both full liberty of expression and an orderly life." *Breard v. Alexandria*, 341 U.S. 622, 642 (1951); accord, *NLRB v. Babcock & Wilcox Co.*, 351 U.S. 105, 112 (1956); see Emerson, *Toward a General Theory of the First Amendment*, 72 *Yale L. J.* 877 (1963); Frantz, *The First Amendment in the Balance*, 71 *Yale L. J.* 1424 (1962). Yet, some commentators regard the first amendment as absolute. See Meiklejohn, *The First Amendment Is an Absolute*, 1961 *Sup. Ct. Rev.* 245; Powe, *Evolution to Absolutism: Justice Douglas and the First Amendment*, 74 *Colum. L. Rev.* 371 (1974).

23. See *Rouse Phila. Inc. v. Ad Hoc '78*, No. 4145 (C.P. Phila. Co. Jan. 31, 1979), *aff'd*, Nos. 380, 390, 444 (Pa. Super. Ct. Dec. 28, 1979), *appeal docketed*, No. 99 (E.D. Pa. Jan. 25, 1980). See also *Segal v. Wood*, 42 A.D.2d 548, 345 N.Y.S.2d 27 (1st Dep't 1973); *Plainview Realty, Inc. v. Board of Managers of Vill. on Artist Lake Condo.*, 86 Misc. 2d 515, 383 N.Y.S.2d 194 (Sup. Ct. 1976).

24. See *American Radio Ass'n v. Mobile S. S. Ass'n*, 419 U.S. 215, 230 (1974); *Building Serv. Employees, Local 262 v. Gazzam*, 339 U.S. 532, 540-41 (1950); *International Bhd. of Teamsters Local 309 v. Hanke*, 339 U.S. 470, 477-79 (1950); *Hughes v. Superior Ct. of Cal.*, 339 U.S. 460, 464 (1950); *Giboney v. Empire Storage & Ice Co.*, 336 U.S. 490, 498 (1949); *Carpenters & Joiners Union, Local 213 v. Ritter's Cafe*, 315 U.S. 722, 725 (1942); *Fair Share Org., Inc. v. Mitnick*, 134 *Ind. App.* 675, 678-79, 188 N.E.2d 840, 843-45 (1963); *Pappas v. Stacey*, 151 *Me.* 36, 47-48, 116 A.2d 497, 503 (1955); *A.S. Beck Shoe Corp. v. Johnson*, 153 *Misc.* 363, 369, 274 N.Y.S. 946, 954 (Sup. Ct. 1934); 1621, *Inc. v. Wilson*, 402 Pa. 94, 104-05, 106 A.2d 271, 276 (1960); pt. I(B) *infra*.

25. E.g., *Menard v. Houle*, 298 *Mass.* 546, 11 N.E.2d 436 (1937); see pt. II(A) *infra*. Compare *Saxon Motor Sales, Inc. v. Torino*, 166 *Misc.* 863, 2 N.Y.S.2d 885 (Sup. Ct. 1938) with *Schmoldt v. Oakley*, 390 P.2d 882 (Okla. 1964).

26. See notes 80-109 *infra* and accompanying text. Compare *Dicta Realty Assocs. v. Shaw*, 50 *Misc.* 2d 267, 270 N.Y.S.2d 342 (Sup. Ct. 1966) with *West Willow Realty Corp. v. Taylor*, 23 *Misc.* 2d 867, 198 N.Y.S.2d 196 (Sup. Ct. 1960).

27. See pt. III *infra*.

I. PICKETING AND THE FIRST AMENDMENT

A. *Constitutional Guarantees*

Freedom of speech, assembly, and petition are fundamental rights protected by the first amendment against the government's unreasonable abridgment.²⁸ These liberties are zealously guarded because "[t]he right of an individual . . . to protest in a peaceable manner against injustice or oppression, actual or merely fancied, is one to be cherished and not to be proscribed in any well-ordered society. It is an essential prerogative of free men living under democratic institutions."²⁹ Generally, picketing is regarded as a form of communication protected to a certain extent by this broad interpretation of the first amendment guarantees.³⁰

However vital first amendment freedoms are, their existence must be compatible with the preservation of other essential rights such as the right to privacy³¹ and the right to property.³² The prohibition on encroachment of first amendment rights is not an absolute. Restraints are permitted for various reasons.³³ Accordingly, "pure speech," because of its lofty importance, may be restrained only upon a showing that a "clear and present danger" of some substantive evil that the government has a right to protect against is likely to result from that speech.³⁴ Conversely, "symbolic speech" may be limited only if the restriction is justified by a "sufficiently important governmental interest."³⁵ Furthermore, the government is prohibited from

28. *E.g.*, *Buckley v. Valeo*, 424 U.S. 1, 25 (1976) (per curiam), *Kusper v. Pontikes*, 414 U.S. 51, 56-57 (1973); *United States Civ. Serv. Comm. v. National Ass'n of Letter Carriers*, 413 U.S. 548, 567 (1973); *Shelton v. Tucker*, 364 U.S. 479, 486 (1960); *Gitlow v. New York*, 268 U.S. 652, 666 (1925).

29. *Julie Baking Co. v. Graymond*, 152 Misc. 846, 847, 274 N.Y.S. 250, 251-52 (Sup. Ct. 1934). For further statements concerning the vital importance of free speech and the open dissemination of ideas, see *New York Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964); *Bridges v. California*, 314 U.S. 252, 263 (1941); *Abrams v. United States*, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting).

30. See cases cited note 8 *supra*. See also *Tanenhaus, Picketing as Free Speech: Early Stages in the Growth of the New Law of Picketing*, 14 U. Pitt. L. Rev. 397 (1953).

31. *E.g.*, *Gregory v. Chicago*, 394 U.S. 111, 125 (1969) (Black, J., concurring), *Allen-Bradley Local No. 1111 v. Wisconsin Employment Relations Bd.*, 315 U.S. 740, 748-49 (1942), *Garcia v. Gray*, 507 F.2d 539, 544-45 (10th Cir. 1974), *cert. denied*, 421 U.S. 971 (1975), *Hall v. Hawaiian Pineapple Co.*, 72 F. Supp. 533, 537 (D. Hawaii 1947); see *Griswold v. Connecticut*, 381 U.S. 479, 495 (1965) (Goldberg, J., concurring).

32. See *Linmark Assocs., Inc. v. Willingboro*, 431 U.S. 85, 93-94 (1977), *Hudgens v. NLRB*, 424 U.S. 507, 520-21 (1976); *Lloyd Corp. v. Tanner*, 407 U.S. 551, 567-68 (1972). See also *Amalgamated Food Employees Union Local 590 v. Logan Valley Plaza, Inc.*, 391 U.S. 308, 320 (1968), *Marsh v. Alabama*, 326 U.S. 501, 506-07 (1946).

33. *Elrod v. Burns*, 427 U.S. 347, 360 (1976); *e.g.*, *Schenck v. United States*, 249 U.S. 47, 52 (1919) (the power of the government to abridge the right to a person to shout "fire" falsely in a crowded theatre).

34. *Schenck v. United States*, 249 U.S. 47, 52 (1919). In each case, the courts determine "whether the gravity of the 'evil,' discounted by its improbability, justifies such invasion of free speech as is necessary to avoid the danger." *Dennis v. United States*, 341 U.S. 494, 510 (1951); see *Nebraska Press Ass'n v. Stuart*, 427 U.S. 539 (1976).

35. *E.g.*, *Tinker v. Des Moines Indep. School Dist.*, 393 U.S. 503, 509 (1969) (arm bands), *United States v. O'Brien*, 391 U.S. 367, 376 (1968) (burning draft card); *Blanton v. State Univ.*, 489 F.2d 377, 386 (2d Cir. 1973) (student sleep-in); *New Rider v. Board of Educ.*, 480 F.2d 693, 698 (10th Cir.), *cert. denied*, 414 U.S. 1097 (1973) (hair length); see *Note, Symbolic Speech*, 43 *Fordham*

regulating the content, subject matter, or message of any speech.³⁶

No longer classified as pure speech,³⁷ picketing is deemed to be "more than free speech."³⁸ Indeed, it is established "that picketing, not being the equivalent of speech as a matter of fact, is not its inevitable legal equivalent."³⁹ Recognizing the confrontation and coercion inherent in picketing,⁴⁰ the Court

L. Rev. 590 (1975). Symbolic speech "has been defined as the communication of opinion by conduct rather than by the spoken word. Use of symbolic conduct largely has been a result of the participant's lack of access to the government and the media." *Id.* at 590 (footnote omitted).

36. See *Linmark Assocs., Inc. v. Willingboro*, 431 U.S. 85, 93-94 (1977); *Police Dep't of Chicago v. Mosley*, 408 U.S. 92, 95 (1972); *Cohen v. California*, 403 U.S. 15, 24 (1971); *New York Times Co. v. Sullivan*, 376 U.S. 254, 269-70 (1964); *Wood v. Georgia*, 370 U.S. 375, 388-89 (1962); *Terminiello v. Chicago*, 337 U.S. 1, 4 (1949); *Kovacs v. Cooper*, 336 U.S. 77, 87 (1949); *De Jonge v. Oregon*, 299 U.S. 353, 365 (1937). "[G]overnment may not grant the use of a forum to people whose views it finds acceptable, but deny use to those wishing to express less favored or more controversial views. And it may not select which issues are worth discussing or debating in public facilities. . . . Selective exclusions from a public forum may not be based on content alone, and may not be justified by reference to content alone." *Police Dep't of Chicago v. Mosley*, 408 U.S. 92, 96 (1972).

37. See *Shuttlesworth v. City of Birmingham*, 394 U.S. 147, 152 (1969); *Cox v. Louisiana*, 379 U.S. 536, 555 (1965). Early judicial sentiment was hostile to any picketing whatsoever. For example, in *Atchison, T. & S. F. Ry. Co. v. Gee*, 139 F. 582 (S.D. Iowa 1905), the court stated that "[t]here is and can be no such thing as peaceful picketing, any more than there can be chaste vulgarity, or peaceful mobbing, or lawful lynching. When men want to converse or persuade, they do not organize a picket line." *Id.* at 584. Thus, picketing was regarded as either unlawful per se, *Sherry v. Perkins*, 147 Mass. 212, 214, 17 N.E. 307, 309 (1888), a private nuisance, *Hughes v. Kansas City Motion Picture Mach. Operators, Local 170*, 282 Mo. 304, 319, 221 S.W. 95, 99 (1920), an unlawful conspiracy, *Thomas v. Cincinnati, N. O. & T. P. Ry.*, 62 F. 803, 817-18 (S.D. Ohio 1894), unlawful intimidation, *Kolley v. Robinson*, 187 F. 415, 416-17 (8th Cir. 1911), or an unjustified tortious injury to prospective or existing contractual relations. *Beck v. Railway Teamsters' Protective Union*, 118 Mich. 497, 517-18, 77 N.W. 13, 21 (1898). Several New York decisions recognized that picketing, in and of itself, "connotes no evil." *Exchange Bakery & Restaurant, Inc. v. Rifkin*, 245 N.Y. 260, 263, 157 N.E. 130, 133 (1927); *Julie Baking Co. v. Graymond*, 152 Misc. 846, 847, 274 N.Y.S. 250, 251 (Sup. Ct. 1934). Finally, in *Senn v. Tile Layers Protective Union, Local 15*, 301 U.S. 468 (1937), the Supreme Court indicated for the first time that picketing might be considered within the protection of the first amendment. Justice Brandeis noted that "[m]embers of a [labor] union might, without special statutory authorization by a State, make known the facts of a labor dispute, for freedom of speech is guaranteed by the Federal Constitution." *Id.* at 478. Later, in *Thornhill v. Alabama*, 310 U.S. 88 (1940), the Court left no doubt that picketing was protected expression within the ambit of free speech when it stated that "the dissemination of information concerning the facts of a labor dispute must be regarded as within an area of free discussion that is guaranteed by the Constitution." *Id.* at 102. This protection has also been extended to nonlabor picketing. See, e.g., *Edwards v. South Carolina*, 372 U.S. 229 (1963); *Hughes v. Superior Ct. of Cal.*, 339 U.S. 460 (1950); *New Negro Alliance v. Sanitary Grocery Co.*, 303 U.S. 552 (1938); *United States v. Aarons*, 310 F.2d 341 (2d Cir. 1962); *Brewer v. Hoxie School Dist.*, 238 F.2d 91 (8th Cir. 1956); *Green v. Samuelson*, 168 Md. 421, 178 A. 109 (1935); *People v. Carcel*, 3 N.Y.2d 327, 165 N.Y.S.2d 113, 144 N.E.2d 81 (1957); *People v. Nahman*, 298 N.Y. 95, 81 N.E.2d 36 (1948); *Anora Amusement Corp. v. Doe*, 171 Misc. 279, 12 N.Y.S.2d 400 (Sup. Ct. 1939); 1621, *Inc. v. Wilson*, 402 Pa. 94, 166 A.2d 271 (1960).

38. *Bakery & Pastry Drivers Local 802 v. Wohl*, 315 U.S. 769, 776 (1942) (Douglas, J., concurring).

39. *Hughes v. Superior Ct. of Cal.*, 339 U.S. 460, 465 (1950); accord, *Shuttlesworth v. City of Birmingham*, 394 U.S. 147, 152 (1969).

40. The picket line "is . . . not so much a rational appeal to persuasion as a signal for the

began to regard picketing as a variant of "speech-plus."⁴¹ The Court limited the protection of picketing because "the very presence of a picket line may induce action of one kind or another, quite irrespective of the nature of the ideas which are being disseminated."⁴² Accordingly, to sustain enjoinder of picketing, the government must assert that the picketing violates "public policy, whether of its criminal or its civil law, and whether announced by its legislature or its courts."⁴³ There is no requirement, however, that the government allege an important, substantial,⁴⁴ or compelling interest.⁴⁵

application of immediate and enormous economic leverage, based on an already prepared position. As such, it must, under ordinary circumstances, be classified as action rather than expression." T. Emerson, *The System Of Freedom Of Expression* 445 (1970). "Patrolling, even peacefully conducted, contains compulsive features since the presence of the picket line, alone, irrespective of the ideas being communicated, tends to determine responsive behavior." *Waldbaum, Inc. v. United Farm Workers*, 87 Misc. 2d 267, 279, 383 N.Y.S.2d 957 (Sup. Ct. 1976) (footnote omitted); see pt. II(B) *infra*.

41. The term "speech plus" was first applied to picketing in Justice Douglas' concurring opinion in *Food Employees Local 590 v. Logan Valley Plaza, Inc.*, 391 U.S. 308, 326 (1968) (Douglas, J., concurring); *accord*, *Building Employees Union Local 262 v. Gazzam*, 339 U.S. 532, 537 (1950). It describes activity that combines within the same course of conduct both speech and non-speech elements. See generally B. Schwartz, *Constitutional Law* 319 (2d ed. 1979); L. Tribe, *American Constitutional Law* 598 (1978).

42. *Bakery & Pastry Drivers Local 802 v. Wohl*, 315 U.S. 769, 776-77 (1942) (Douglas, J., concurring); *accord*, *Building Employees Union Local 262 v. Gazzam*, 339 U.S. 532, 537, (1960). "The loyalties and responses evoked and exacted by picket lines are unlike those flowing from appeals by printed word." *Hughes v. Superior Ct. of Cal.*, 339 U.S. 460, 465 (1950), see C. Gregory & H. Katz, *supra* note 1, at 307-09; Tanenhaus, *supra* note 30, at 413-18; Teller, *Picketing and Free Speech*, 56 Harv. L. Rev. 180 (1942). Furthermore, picketing is confrontation "laden with emotion, full of suggestions of acute economic conflict and even unspoken possibilities of a violent physical encounter." Kamin, *Residential Picketing and the First Amendment*, 61 Nw. U. L. Rev. 177, 211 (1966). The picket line illustrates one author's observation that "the medium is the message." M. McLuhan, *Understanding Media* 7 (1964).

43. *International Bhd. of Teamsters, Local 695 v. Vogt, Inc.*, 354 U.S. 284, 293 (1956); e.g., *Local Union No. 10, United Ass'n of Journeymen Plumbers v. Graham*, 345 U.S. 192 (1953) (state "right-to-work" law); *Giboney v. Empire Storage & Ice Co.*, 336 U.S. 490 (1949) (state anti-trade restraint statute); *Harper v. Brennan*, 311 Mich. 489, 18 N.W.2d 905 (1945) (state anti-trust statute); *Construction & Gen. Labor Union, Local 688 v. Stephenson*, 221 S.W.2d 375 (Tex. Civ. App. 1949) (state prohibition of secondary picketing in absence of labor dispute); see *Sears, Roebuck & Co. v. San Diego Co. Dist. Council of Carpenters*, 436 U.S. 180 (1977) (trespass); *American Radio Ass'n v. Mobile S.S. Ass'n*, 419 U.S. 215 (1974) (prevention of wrongful interference); *Building Employees Union Local 262 v. Gazzam*, 339 U.S. 532 (1950) (prohibition of closed shop); *International Bhd. of Teamsters, Local 309 v. Hanke*, 339 U.S. 470 (1950) (encouragement of self-employer units); *Hughes v. Superior Ct. of Cal.*, 339 U.S. 460 (1950) (prohibition of involuntary employment according to race); *Carpenters & Joiners Union, Local 213 v. Ritter's Cafe*, 315 U.S. 722 (1942) (prohibition of secondary picketing); *Fair Share Org., Inc. v. Mitnick*, 134 Ind. App. 675, 188 N.E.2d 840 (1963) (equal employment).

44. See *United States v. O'Brien*, 391 U.S. 367, 377 (1968).

45. See *International Bhd. of Teamsters, Local 695 v. Vogt, Inc.*, 354 U.S. 284 (1957). In *American Radio Ass'n v. Mobile S.S. Ass'n*, 419 U.S. 215 (1974), the respondents challenged the constitutionality of a state decree enjoining the picketing of a foreign-flag ship in protest over allegedly substandard wages. This picketing was deemed to violate a state public policy against

Therefore, although abridgment of pure speech must satisfy the "clear and present danger" test, and regulation of symbolic speech must serve an important governmental interest, restriction of picketing is constitutionally valid if it interferes with a valid governmental interest.⁴⁶

*B. Confinement of Picketing to a Situs Directly Related to the Dispute:
A Valid State Policy*

It is now recognized that government has an interest in controlling picketing "if the manner in which picketing is conducted or the purpose which it seeks to effectuate gives ground for its disallowance."⁴⁷ Furthermore, the judgment of the government as to whether the picketing interferes with public policy is weighed with a considerable degree of respect.⁴⁸ Thus, state policies, whether enacted by the legislature or recognized by the judiciary,⁴⁹ that prohibit or limit picketing at situses unrelated to the dispute have been upheld by the courts⁵⁰ and support the enjoinder of scapegoat picketing.

As early as 1942, the Supreme Court recognized the validity of a state policy that restricts picketing to a situs directly related to the dispute. In

wrongful interference by third persons with the conduct of business. *Id.* at 230. Relying on its decision in *Vogt*, the Supreme Court rejected the challenge, concluding that Alabama's policy against "wrongful interference" was within the "broad field in which a State, in enforcing some public policy, . . . could constitutionally enjoin peaceful picketing aimed at preventing effectuation of that policy." *Id.* at 230 (citations omitted). Thus, the Court's determination rested not on a compelling or important state interest, but on a valid state public policy. *Id.* at 231. For cases requiring a compelling state interest to justify restriction on fundamental rights, see *Zablocki v. Redhall*, 434 U.S. 374 (1978) (right to marry); *Shapiro v. Thompson*, 394 U.S. 618 (1969) (right to travel); *Skinner v. Oklahoma*, 316 U.S. 535 (1942) (right to procreate).

46. *E.g.*, *American Radio Ass'n v. Mobile S.S. Ass'n*, 419 U.S. 215 (1974); *International Bhd. of Teamsters, Local 695 v. Vogt, Inc.*, 354 U.S. 284 (1957); *Hughes v. Superior Ct. of Cal.*, 339 U.S. 460 (1950). *But see* *National Treas. Employees Union v. Fasser*, 428 F. Supp. 295 (D.D.C. 1976), in which the court stated "[w]hen speech and nonspeech elements are combined in the same act, Government regulation is permitted where the following conditions are met: (1) the regulation furthers an important government interest, (2) the Government interest is unrelated to the suppression of expression, and (3) the incidental restriction on First Amendment freedoms is 'no greater than is essential to the furtherance of that interest.'" *Id.* at 298. The *Fasser* court apparently confused the test for abridgment of picketing with the test for abridgment of "symbolic speech" as evidenced by its reliance on "symbolic speech" cases. *Id.* The court in *Rouse* accurately described the hierarchy of first amendment protection of communication: "as a person's activities move away from *pure speech* and into the area of expressive *conduct* they require less constitutional protection. As the mode of expression moves from the *printed page* or from *pure speech* to the commission of public *acts*, the scope of permissible regulation of such expression increases." *Rouse Phila. Inc. v. Ad Hoc '78*, Nos. 380, 390, 444, slip op. at 7 (Pa. Super. Ct. Dec. 28, 1979) (emphasis in original).

47. *Hughes v. Superior Ct. of Cal.*, 339 U.S. 460, 465-66 (1950).

48. *See* *Dennis v. United States*, 341 U.S. 494, 539-40 (1951); *International Bhd. of Teamsters, Local 309 v. Hanke*, 339 U.S. 470 (1950). Because a state's judgment embraces "social and economic policies, which in turn depend on knowledge and appraisal of local social and economic factors, such judgment on these matters comes to this Court bearing a weighty title of respect." *Id.* at 475.

49. *Hughes v. Superior Ct. of Cal.*, 339 U.S. 460, 466 (1950).

50. *See, e.g.*, *Carpenters & Joiners Union, Local 213 v. Ritter's Cafe*, 315 U.S. 722 (1942); *Pipe Mach. Co. v. DeMore*, 36 Ohio Op. 342, 76 N.E.2d 725 (Ct. App. 1947); *Evening Times Printing & Publishing Co. v. American Newspaper Guild*, 124 N.J. Eq. 71, 199 A. 598 (1938).

Carpenters & Joiners Local 213 v. Ritter's Cafe,⁵¹ a builder used non-union employees to construct a building for Ritter, causing members of a union to picket at Ritter's restaurant located one and a half miles from the site of the construction. In addition, the restaurant union engaged in a sympathy strike and union truck drivers refused to cross the picket lines to make deliveries to Ritter's restaurant.⁵² The Texas Court of Civil Appeals enjoined the picketing, finding that it constituted a violation of state antitrust laws.⁵³ On appeal, acknowledging the necessity to insulate uninvolved parties from industrial conflict, the Supreme Court held that the states must have the power "to confine the sphere of communication to that directly related to the dispute."⁵⁴ Thus, it was constitutionally valid for Texas to protect the general welfare by prohibiting the exertion of concerted pressures aimed at a business "wholly outside the economic context of the real dispute."⁵⁵

The enjoinder of picketing at a situs that is unrelated to the particular grievance or dispute has also been held to be justified by a valid public policy in the context of residential picketing.⁵⁶ Recently, in *DeGregory v. Giesing*,⁵⁷ a federal district court upheld the constitutionality of a state statute prohibiting the picketing of homes or residences. The court noted that the statutory classification which was based on location, not subject matter,⁵⁸ was similar

51. 315 U.S. 722 (1942).

52. *Id.* at 722-24.

53. *Id.* at 724.

54. *Id.* at 727-28. It is "[t]he right of the state to determine whether the common interest is best served by imposing some restrictions upon the use of weapons for inflicting economic injury in the struggle of conflicting industrial forces . . ." *Id.* at 725. See also *Senn v. Tile Layers Protective Union*, 301 U.S. 468, 481 (1937); *Dorchy v. Kansas*, 272 U.S. 306, 311 (1926); *Truax v. Corrigan*, 257 U.S. 312, 363 (1921) (Brandeis, J., dissenting); *Aikens v. Wisconsin*, 195 U.S. 194, 205 (1904).

55. 315 U.S. at 726. Such prohibitions are analogous to federal prohibition of secondary boycotts in labor disputes. Labor Management Relations (Taft-Hartley) Act § 8(b)(4), 29 U.S.C. § 158(b)(4) (1976). "The gravamen of a secondary boycott is that its sanctions bear, not upon the employer who alone is a party to the dispute, but upon some third party who has no concern in it." *International Bhd. of Elec. Workers, Local 501 v. NLRB*, 181 F.2d 34, 37 (2d Cir. 1950), *cert. denied*, 341 U.S. 694 (1951); see R. Dereshinsky, *supra* note 6, at 5-49; R. Gorman, *supra* note 5, at 251-54.

56. See notes 131-43 *infra* and accompanying text. In *Pipe Mach. Co. v. DeMore*, 36 Ohio Op. 342, 76 N.E.2d 725 (Ct. App. 1947), for example, a union began to picket the residences of employees who had crossed a union picket line to denounce those employees as "scabs." In affirming an order enjoining the picketing in the vicinity of private residences, the court reasoned that "[i]f there is to be . . . 'restriction of picketing to the area within which a . . . dispute arises' any picketing of residences in a labor dispute should be enjoined." *Id.* at 344, 76 N.E.2d at 727. It is important to note that "[t]he fact that [the] policy is expressed by the judicial organ of the State rather than by the legislature [is] immaterial." *Hughes v. Superior Ct. of Cal.*, 339 U.S. 460, 466 (1950).

57. 427 F. Supp. 910 (D. Conn. 1977).

58. *Id.* at 915. Similarly, in *Police Dep't of Chicago v. Mosley*, 408 U.S. 92 (1972), the Court considered whether exemption of peaceful labor picketing from its general prohibition on picketing next to a public school is permissible. The Court decided it was not, because the ordinance at issue described peaceful picketing in terms of its subject matter. *Id.* at 94-95. Any discrimination in the content of picketing must serve a substantial government interest. *Id.* at 99. An abridgment of scapegoat picketing would not be based on a distinction between content of picketers' messages, since such an abridgment is based on location; the content of the message is irrelevant. See *Rouse Phila. Inc. v. Ad Hoc '78*, No. 4145 (C.P. Phila. Co. Jan. 31,

to traditionally permissible time, place and manner restrictions on public communication.⁵⁹ Furthermore, proscription of picketing, demonstrating, and parading in residential areas⁶⁰ is consistent with the Supreme Court's repeated assertion that "people who want to propagandize protests or views [do not] have a constitutional right to do so whenever and however and wherever they please."⁶¹ The regulation of scapegoat picketing would also be legitimate as a valid area-based restriction of first amendment rights because the scapegoat picketers would not be precluded from communicating their messages in a more appropriate locale.

Regulations on the location of picketing are valid if they do not distinguish between permissible and impermissible picketing on the basis of the content of the message that the picketers are attempting to convey.⁶² For example, a state cannot permit labor picketing in a designated area, if it prohibits political or consumer picketing in that area.⁶³ It might be argued that a restriction of scapegoat picketing is similarly a content based distinction, because it is premised on the absence of a dispute between the picketers and their target. Upon closer examination, however, the basis of a restriction on

1979), *aff'd*, Nos. 380, 390, 444 (Pa. Super. Ct. Dec. 28, 1979), *appeal docketed*, No. 99 (E.D. Pa. Jan. 25, 1980); *City of Wauwatosa v. King*, 49 Wis. 2d 398, 412-14, 182 N.W.2d 530, 537-38 (1971).

59. 427 F. Supp. at 915. The permissibility of picketing in residential areas is governed by certain special circumstances. *See* *Lehman v. City of Shaker Heights*, 418 U.S. 298, 304 (1974). For example, when there is no showing that sidewalks in residential areas have been made a public forum by the state for the purpose of "assembly, communicating thoughts between citizens, and discussing public questions," *id.* at 313 (Brennan, J., dissenting) (quoting *Hague v. CIO*, 307 U.S. 496, 515-16 (1939)), the state may properly restrict the picketing in that area. Persons in their homes cannot avoid pickets on their sidewalks. Thus, the "very basic right to be free from sights, sounds, and tangible matter [they] do not want," must be protected. *Rowan v. United States Post Office Dep't*, 397 U.S. 728, 736 (1970); *accord*, *Hynes v. Mayor & Council of Oradell*, 425 U.S. 610, 619-20 (1976).

60. The courts have upheld the prohibition of picketing in certain other designated areas in order to promote the public peace. *See* *United States v. Aarons*, 310 F.2d 341 (2d Cir. 1962) (area contiguous to submarine); *Frend v. United States*, 100 F.2d 691 (D.C. Cir. 1938), *cert. denied*, 306 U.S. 640 (1939) (embassy); *Scott v. District of Columbia*, 184 A.2d 849 (Ct. App. D.C. 1962) (White House gate). In *Cox v. Louisiana*, 379 U.S. 559 (1965), the Court upheld a Louisiana location-based statute, stating that "[i]t prohibits a particular type of conduct, namely, picketing and parading, in a few specified locations, in or near courthouses." *Id.* at 562. In *Adderley v. Florida*, 385 U.S. 39 (1966), although not a picketing case, the Court upheld the trespass convictions of petitioners who claimed they were exercising their first amendment rights by parading near a jail. The Court noted that "there is no merit to the petitioners' argument that they had a constitutional right to stay on the property, over the jail custodian's objections, because this 'area chosen for the peaceful civil rights demonstration was not only "reasonable" but also particularly appropriate.'" *Id.* at 47-48; *accord*, *Cameron v. Johnson*, 390 U.S. 611, 617 (1968) (upholding prohibition of picketing at a courthouse).

61. *Adderley v. Florida*, 385 U.S. 39, 48 (1966); *see* *Cox v. Louisiana*, 379 U.S. 536, 555-64 (1965).

62. *E.g.*, *Grayned v. City of Rockford*, 408 U.S. 104, 119-20 (1972); *Police Dep't of Chicago v. Mosley*, 408 U.S. 92, 102 (1972); *see* *Cohen v. California*, 403 U.S. 15, 24 (1971); *Street v. New York*, 394 U.S. 576, 592 (1969); *New York Times Co. v. Sullivan*, 376 U.S. 254, 269-70 (1964).

63. *E.g.*, *Police Dep't of Chicago v. Mosley*, 408 U.S. 92, 94-98 (1972).

scapegoat picketing would be the unrelatedness of the situs to the dispute,⁶⁴ the political or philosophical message itself is irrelevant. Furthermore, even if the restriction on scapegoat picketing is considered to be based on the content of the picketers' message, it is nevertheless valid if enjoinder furthers a substantial state interest,⁶⁵ such as the limitation of picketing to the situs of that dispute.⁶⁶

In sum, it is evident that a prohibition of scapegoat picketing would effectuate the government's interests in the preservation of the economy against the disruption of businesses that are unrelated to the picketers' disputes,⁶⁷ and in the elimination of conduct that "unlawfully prejudices the rights and privileges of those [not disputants]."⁶⁸ Thus, it is within the public policy of a state to confine picketing exclusively to those situses with which the picketers' dispute is directly related.

II. SCAPEGOAT PICKETING: MALICIOUS, COERCIVE, OR INTENTIONALLY TORTIOUS?

Picketing and other first amendment activity that is maliciously motivated,⁶⁹ or coercive,⁷⁰ or intentionally interferes with prospective contractual relations⁷¹ may justifiably be enjoined. Such conduct is deemed to violate valid public policy.⁷²

A. *Malicious Picketing*

Numerous courts have held that picketing and other first amendment expression conducted for the sole purpose of inflicting injury on another, has a

64. See *Lloyd Corp. v. Tanner*, 407 U.S. 551, 568 (1972); *Garcia v. Gray*, 507 F.2d 539, 544 (10th Cir. 1974), *cert. denied*, 421 U.S. 971 (1975); *City of Wauwatosa v. King*, 49 Wis. 2d 398, 407-08, 182 N.W.2d 530, 535 (1971).

65. E.g., *Police Dep't of Chicago v. Mosley*, 408 U.S. 92, 99 (1972); *DeGregory v. Giesing*, 427 F. Supp. 910, 914 (D. Conn. 1977).

66. See *id.* at 915; cf. *Carpenters & Joiners Union, Local 213 v. Ritter's Cafe*, 315 U.S. 722, 727 (1942) (sphere of communication should be confined "to that directly related to the dispute"); *Gomez v. United Office & Professional Workers, Local 16*, 73 F. Supp. 679, 683 (D.D.C. 1947) (picketing should be restricted "to a point within a reasonable radius of the area" of the labor dispute).

67. See *American Radio Ass'n v. Mobile S.S. Ass'n*, 419 U.S. 215, 231 (1974).

68. *Evening Times Printing & Publishing Co. v. American Newspaper Guild*, 124 N.J. Eq. 71, 83, 199 A. 598, 605 (1938); see *State v. Perry*, 196 Minn. 481, 481-82, 265 N.W. 302, 302 (1936); *Springfield, Bayside Corp. v. Hochman*, 44 Misc. 2d 882, 886, 255 N.Y.S.2d 140, 145-46 (Sup. Ct. 1964); *Hebrew Home & Hosp. for Chronic Sick, Inc. v. Davis*, 38 Misc. 2d 173, 177-78, 235 N.Y.S.2d 318, 323-24 (Sup. Ct. 1962).

69. See, e.g., *NAACP v. Overstreet*, 221 Ga. 16, 142 S.E.2d 816 (1965), *cert. dismissed*, 384 U.S. 118 (1966) (per curiam); *Menard v. Houle*, 298 Mass. 546, 11 N.E.2d 436 (1937), *Saxon Motor Sales, Inc. v. Torino*, 166 Misc. 863, 2 N.Y.S.2d 885 (Sup. Ct. 1938).

70. See, e.g., *Roosevelt Hosp. v. Orlansky*, 92 Misc. 2d 525, 400 N.Y.S.2d 663 (Sup. Ct. 1977); *Springfield, Bayside Corp. v. Hochman*, 44 Misc. 2d 882, 255 N.Y.S.2d 140 (Sup. Ct. 1964); *West Willow Realty Corp. v. Taylor*, 23 Misc. 2d 867, 198 N.Y.S.2d 196 (Sup. Ct. 1960).

71. See, e.g., *NAACP v. Overstreet*, 221 Ga. 16, 21, 142 S.E.2d 816, 823 (1965), *cert. dismissed*, 384 U.S. 118 (1966) (per curiam).

72. See *American Radio Ass'n v. Mobile S.S. Ass'n*, 419 U.S. 215, 230-31 (1974); *Hughes v. Superior Ct. of Cal.*, 339 U.S. 460, 463-64 (1950).

malicious purpose and therefore, is enjoined.⁷³ In *Menard v. Houle*,⁷⁴ for example, the defendant, an automobile purchaser dissatisfied with the dealer's refusal to replace an allegedly defective steering system, tied lemons to the car and covered it with disparaging writing directed at the dealer.⁷⁵ The defendant then parked the car near the dealership. The Massachusetts Supreme Court affirmed the lower court's issuance of an injunction, stating that conduct is enjoined "where there is a continuing course of unjustified and wrongful attack upon the plaintiff."⁷⁶ Similarly, in *Saxon Motor Sales, Inc. v. Torino*,⁷⁷ a New York Supreme Court determined that if the evidence demonstrates that the defendant's sole purpose is to injure the plaintiff, it is sufficient to support an injunction of the defendant's demonstration.⁷⁸ These cases are based on the rationale that although articulate consumer protests should be permitted, "[a]cts . . . tending to injure the plaintiffs' business are not in the realm of the permissible."⁷⁹

It would appear that scapegoat picketing which causes others to refrain from or to discontinue business relationships with the target, is conducted solely to injure and destroy the target for symbolic purposes.⁸⁰ Although the necessity for public communication is great, the arbitrary selection of an innocent party as the focus of the picketers' activity, rather than the exertion of pressure against those who could more effectively deal with their protests, offends the norms of civil responsibility.⁸¹ Therefore, scapegoat picketing is arguably motivated by a malicious purpose and is constitutionally enjoined.

B. *Coercive Picketing*

The courts have also enjoined picketing that has a coercive effect on the target.⁸² Although the meaning of "coercion" in this context is clouded, the picketing of a target unrelated to the dispute may be coercive and enjoined

73. See *American Bank & Trust Co. v. Federal Reserve Bank*, 256 U.S. 350, 358 (1921); *NAACP v. Overstreet*, 221 Ga. 16, 22-24, 142 S.E.2d 816, 822-24 (1965), *cert. dismissed*, 384 U.S. 118 (1966) (per curiam); *Hornsby v. Smith*, 141 Ga. 491, 497-98, 13 S.E.2d 20, 23-24 (1941).

74. 298 Mass. 546, 11 N.E.2d 436 (1937).

75. *Id.* at 547, 11 N.E.2d at 436-37. The writing stated: "'Don't believe what they say, this car is no good; I tried to have it fixed but they can't fix it and they will do nothing about it . . . this car was no good when I got it; don't be a sucker, this car is no good but it looks all right.'" *Id.*, 11 N.E.2d at 437.

76. *Id.* at 548, 11 N.E.2d at 437.

77. 166 Misc. 863, 2 N.Y.S.2d 885 (Sup. Ct. 1938). In *Saxon*, the defendant placed large signs disparaging the quality of the automobile on the sides and rear of the vehicle. The defendant then parked the car in close proximity to the plaintiff dealer's place of business. *Id.* at 863, 2 N.Y.S.2d at 885.

78. *Id.* at 863-64, 2 N.Y.S.2d at 885-86.

79. *Julie Baking Co. v. Graymond*, 152 Misc. 846, 847, 274 N.Y.S. 250, 252 (Sup. Ct. 1934).

80. See notes 1-7 *supra* and accompanying text.

81. See *Shuttlesworth v. City of Birmingham*, 394 U.S. 147, 152-54 (1969); *Hughes v. Superior Ct. of Cal.*, 339 U.S. 460, 464-66 (1950); *Hague v. CIO*, 307 U.S. 496, 515-16 (1939). See generally T. Emerson, *The Right To Protest*, in *The Rights of Americans* 208 (N. Dorsen ed. 1971).

82. E.g., *Streamwood Home Builders, Inc. v. Brolin*, 25 Ill. App. 2d 39, 46-48, 165 N.E.2d 531, 535-36 (1960); *Springfield, Bayside Corp. v. Hochman*, 44 Misc. 2d 882, 885-86, 255

despite first amendment considerations. In *Organization For A Better Austin v. Keefe*,⁸³ the Supreme Court discussed the relationship between coercive activity and first amendment freedoms. In that case, a community group distributed throughout the neighborhood of a local real estate agent leaflets accusing him of racially discriminatory "blockbusting."⁸⁴ In reversing and vacating the injunctive decree of a state court, the Supreme Court stated that "[t]he claim that the [pamphleteering was] intended to exercise a coercive impact on respondent does not remove them from the reach of the First Amendment. [The pamphleteers] plainly intended to influence respondents' conduct by their activities; this is not fundamentally different from the function of a newspaper."⁸⁵ Thus, under a broad reading of *Keefe*, it may be argued that any coercive picketing should be protected by the first amendment.⁸⁶

Prior decisions of the Supreme Court, however, indicate that there is a distinction between coercion that is effectuated by force of public sentiment, and coercion resulting from malicious injury or intimidation.⁸⁷ In *Senn v. Tile Layers Protective Union*,⁸⁸ for example, the Supreme Court stated that picketing is within the protection of the first amendment when "[t]he sole purpose of the picketing was to acquaint the public with the facts and . . . to induce [the target] to unionize his shop."⁸⁹ In such a case, there is no coercion but only "persuasion incident to publicity."⁹⁰ Thus, *Senn* implies that picketing is coercive when it does not merely publicize a group's views or protests, but intentionally damages or destroys the property rights of others.⁹¹ This interpretation is bolstered by the Court's statement in *Cafeteria Employees*

N.Y.S.2d 140, 145-46 (Sup. Ct. 1964); *West Willow Realty Corp. v. Taylor*, 23 Misc. 2d 867, 869-71, 198 N.Y.S.2d 196, 199-200 (Sup. Ct. 1960).

83. 402 U.S. 415 (1971).

84. *Id.* at 416. "Blockbusting" or "panic peddling" involves a realtor who arouses fears of white residents by asserting that blacks are moving into their neighborhood, and exploits these racial fears by obtaining listings of houses which he can then sell to blacks. *Id.*

85. *Id.* at 419.

86. "Petitioners were engaged openly and vigorously in making the public aware of respondent's real estate practices. Those practices were offensive to them, as the views and practices of petitioners are no doubt offensive to others. But so long as the means are peaceful, the communication need not meet standards of acceptability. . . . No prior decisions support the claim that the interest of an individual in being free from public criticism of his business practices in pamphlets or leaflets warrants use of the injunctive power of a court." *Id.* at 419. This analysis, however, dealt only with pamphleteering and thus, may not be directly applicable to picketing. This suggestion is buttressed by the fact that the Court specifically noted that there "was no evidence of picketing." *Id.* at 417; see *Walinsky v. Kennedy*, 94 Misc. 2d 121, 132, 404 N.Y.S.2d 491, 498 (Sup. Ct. 1977); cf. *Hersbergen*, *supra* note 2, at 1118-31 (uncertain effect of *Keefe*).

87. See *Organization For A Better Austin v. Keefe*, 402 U.S. 415 (1971), *Moore v. Newell*, 548 F.2d 671 (6th Cir.), *cert. denied*, 431 U.S. 971 (1977).

88. 301 U.S. 468 (1937).

89. *Id.* at 480.

90. *Id.* at 481.

91. *Id.* at 480; see *Rouse Phila. Inc. v. Ad Hoc '78*, No. 4145, slip op. at 27 (C. P. Phila. Co. Jan. 31, 1979), *aff'd*, Nos. 380, 390, 444 (Pa. Super. Ct. Dec. 28, 1979), *appeal docketed*, No. 99 (E.D. Pa. Jan. 25, 1980).

Local 302 v. Angelos,⁹² that "acts of coercion going beyond the mere influence exerted by the fact of picketing, are of course, not constitutional prerogatives."⁹³

It becomes apparent, therefore, that in the context of organized protests, the Court has distinguished between two types of coercive expressions. Coercion that is merely "incident to publicity" will be protected;⁹⁴ coercion that attempts to intimidate the target by intentionally causing economic harm goes beyond normal persuasion and will not be protected.⁹⁵ For example, in the recent case *Moore v. Newell*,⁹⁶ the Sixth Circuit affirmed the extortion conviction of a representative of the Black Panthers who, upon being refused a charitable contribution by a merchant, began picketing the merchant's store.⁹⁷ Although noting that picketing may be protected first amendment activity if it incidentally discourages customers from patronizing a store or business,⁹⁸ the court classified the defendant's picketing as coercive because it was intimidating,⁹⁹ and thus, beyond the pale of constitutional protection.

Once the two forms of coercive picketing are distinguished, the remaining issue is to determine the particular factual circumstances that will render coercive picketing enjoined. It appears that the lack of a grievance or contractual relationship between picketers and their target causes picketing to exceed normal persuasion and constitute unlawful duress and coercion.¹⁰⁰ For example, in *Streamwood Home Builders, Inc. v. Brolin*,¹⁰¹ homeowners in a housing development picketed the plaintiff developer's office, demanding that more schools be built in the area.¹⁰² The court enjoined the picketing because the plaintiff had no legal obligation to build schools.¹⁰³ Thus, the picketing could not be justified as a lawful expression of community interest, but as an attempt to alter government policy by intimidating a totally unrelated individual.

Similarly, picketing a corporation with which the picketers have no grievance is deemed coercive. In *West Willow Realty Corp. v. Taylor*,¹⁰⁴ for

92. 320 U.S. 293 (1943).

93. *Id.* at 295.

94. *See, e.g.,* *Organization For A Better Austin v. Keefe*, 402 U.S. 415, 419 (1971); *Senn v. Tile Layers Protective Union*, 301 U.S. 468, 480-81 (1937).

95. *See, e.g.,* *Moore v. Newell*, 548 F.2d 671, 673 (6th Cir.), *cert. denied*, 431 U.S. 971 (1977); *Roosevelt Hosp. v. Orlansky*, 92 Misc. 2d 525, 526-27, 400 N.Y.S.2d 663, 664-65 (Sup. Ct. 1977); *West Willow Realty Corp. v. Taylor*, 23 Misc. 2d 867, 869-70, 198 N.Y.S.2d 196, 198-99 (Sup. Ct. 1960). These cases comport with Professor Gregory's definition of coercion as "pressure—the creation of a situation which will cause the picketed person serious economic harm if he does not comply with the picketers' demands." Gregory, *Picketing and Coercion: A Defense*, 39 Va. L. Rev. 1053, 1058 (1953).

96. 548 F.2d 671 (6th Cir.), *cert. denied*, 431 U.S. 971 (1977).

97. *Id.* at 672.

98. *Id.* (citing *Thornhill v. Alabama*, 310 U.S. 88, 104 (1940)).

99. 548 F.2d at 673.

100. *Compare* *Dicta Realty Assocs. v. Shaw*, 50 Misc. 2d 267, 270 N.Y.S.2d 342 (Sup. Ct. 1966) with *West Willow Realty Corp. v. Taylor*, 23 Misc. 2d 867, 198 N.Y.S.2d 196 (Sup. Ct. 1960).

101. 24 Ill. App. 2d 39, 165 N.E.2d 531 (1960).

102. *Id.* at 41, 165 N.E.2d at 532.

103. *Id.* at 42, 48, 165 N.E.2d at 533, 536.

104. 23 Misc. 2d 867, 198 N.Y.S.2d 196 (Sup. Ct. 1960).

example, the defendant, a dissatisfied home purchaser, picketed the plaintiff's housing development even though he had bought his home from an entirely different corporation.¹⁰⁵ The only connection between the defendant's dispute and the target of the picketing was that both corporations shared a common major shareholder.¹⁰⁶ The court enjoined the picketing, interpreting it as a malicious effort to intimidate and coerce the plaintiff for the purpose of forcing the settlement of an unrelated dispute.¹⁰⁷ The court noted that "the course of conduct of the defendant is directed against third persons . . . and not against the corporation which allegedly sold a home to defendant and against which defendant has an alleged claim for defects in construction and misrepresentations."¹⁰⁸ Thus, picketing a target that owes no contractual duty to the picketer, and picketing a target with which the picketer has no dispute, are both coercive conduct, and wrongful to such an extent that such first amendment expression may be restrained.¹⁰⁹ Under this analysis, scapegoat picketing which necessarily entails a lack of a dispute between the protest and the target, is conducted to exert malicious coercion and may be enjoined by the courts.

C. *Tortious Interference*

The theory of tortious intentional interference with prospective economic relations has also justified enjoinder of picketing and supported liability for damages.¹¹⁰ Thus, even if the ultimate motive for the picketing is to alter or

105. *Id.* at 868, 198 N.Y.S.2d at 197.

106. *Id.*

107. *Id.* at 869-71, 198 N.Y.S.2d at 199-200.

108. *Id.* at 870, 198 N.Y.S.2d at 199.

109. The importance of the existence of a dispute in determining the constitutionality of enjoining picketing is further illustrated by *Dicta Realty Assocs. v. Shaw*, 50 Misc. 2d 267, 270 N.Y.S.2d 342 (Sup. Ct. 1966), in which a tenant picketed his apartment complex, complaining of poor maintenance. The court refused to enjoin the picketing, because it was directed primarily at the party with which he had the dispute. *Id.* at 270-71, 270 N.Y.S.2d at 345-46. Similarly, in *Schmoldt v. Oakley*, 390 P.2d 882 (Okla. 1964), and *McMorries v. Hudson Sales Corp.*, 233 S.W.2d 938 (Tex. Civ. App. 1950), the courts did not enjoin picketing directed against the party with whom the protest was concerned. In *Schmoldt*, the defendant, a disgruntled automobile purchaser, upon rejection of his claim by plaintiff-dealer, placed upon his vehicle a seven by two and one-half foot sign, covered with writing disparaging the dealer. Upon the sign, the defendant suspended lemons. He then drove the vehicle in the vicinity of the dealership and parked it there. 390 P.2d at 883. The court refused to enjoin the acts of the defendant. *Id.* at 886-87. In *McMorries*, the defendant placed signs on his automobile which disparaged the plaintiff. He subsequently drove the vehicle in the proximity of Hudson dealerships in principal cities and towns in Texas. 233 S.W.2d at 939. The plaintiff was the wholesale distributor of Hudson autos in Texas, and a representative of the company with which the defendant had his dispute. *Id.* at 938-39. There was, then, a dispute nexus in this case. The way in which the court distinguished *Menard v. Houle*, 298 Mass. 546, 11 N.E.2d 436 (1937), is also significant. While noting the factual similarity of the cases, 233 S.W.2d at 941, the court noted that in *Menard*, the defendant's claims were knowingly false and therefore, no dispute existed between the picketer and his target. *Id.* The only way in which the above cases can be reconciled is to recognize that the lack of a dispute between the picketers and their target demonstrates the picketers' coercive intent and subjects the picketing to enjoinder.

110. See, e.g., *American Radio Ass'n v. Mobile S.S. Ass'n*, 419 U.S. 215, 230-31 (1974); *Rouse Phila. Inc. v. Ad Hoc '78*, No. 4145, slip op. at 31-33 (C.P. Phila. Co. Jan. 31, 1979).

influence government policy,¹¹¹ if it "causes other damages while acting under the guise of attempting to persuade the government [liability will be] imposed."¹¹² Under this theory, the actor must have "the purpose of causing this specific type of harm to the plaintiff."¹¹³ Second, the harm must actually result.¹¹⁴ Finally, the court must determine whether the alleged interference is

aff'd, Nos. 380, 390, 444 (Pa. Super. Ct. Dec. 28, 1979), *appeal docketed*, No. 99 (E.D. Pa. Jan. 25, 1980). For example, in *NAACP v. Overstreet*, 221 Ga. 16, 142 S.E.2d 816 (1965), *cert. dismissed*, 384 U.S. 118 (1966) (per curiam), the plaintiff store-owner was picketed and boycotted by the NAACP for allegedly beating a black youth whom he had discharged because of alleged theft. *Id.* at 19, 142 S.E.2d at 825. In reversing an award of damages against the Georgia State Conference of the NAACP, but affirming it as to all other defendants, the court noted that the right to operate a business is to be protected and that defendants' activities, being malicious, were actionable. *Id.* at 21, 142 S.E.2d at 824. It is important to recognize that the court specifically noted that there were no allegations of racial discrimination, *Id.* at 22, 142 S.E.2d at 823, hence it can be inferred that the court based liability upon the fact that there was no dispute between the picketers and the target. Similarly, in *Southern Christian Leadership Conference, Inc. v. A.G. Corp.*, 241 S.E.2d 619 (Miss. 1970), in response to an alleged beating of blacks by police officers, the defendants organized a boycott of all white businesses, including the plaintiff's. *Id.* at 621-23. The Mississippi Supreme Court, in affirming liability for maliciously conspiring to injure the plaintiff's business, stated that "[t]he whole trouble in this case was that these defendants had no complaint or grievance or even a gripe against the [picketed target]." *Id.* at 624. The court noted that the right to boycott in protest of racially discriminatory treatment may be protected by the first amendment, but that no such allegations were made to the plaintiff in this case. *Id.* at 624; see *New Negro Alliance v. Sanitary Grocery Co.*, 303 U.S. 552 (1938); Note, *Prior Restraint of Racial Picketing*, 17 U. Fla. L. Rev. 453 (1964).

111. See *Missouri v. National Org. for Women, Inc.*, 467 F. Supp. 289, 305 (W.D. Mo. 1979); *Sierra Club v. Butz*, 349 F. Supp. 934, 938 (N.D. Cal. 1972). It can be argued that certain conduct in furtherance of the right to petition the government for redress of grievances is privileged and not actionable in tort. In *Sierra Club*, for example, a lumber company counterclaimed for tort damages because the Sierra Club, by oral and written representations, assertions of administrative appeals, and filing of complaints, had sought to persuade the government to preserve forests as a natural resource and not to permit their use for manufacturing lumber. *Id.* at 935-36. The court rejected the counterclaim, noting that "when a suit based on interference with an advantageous relationship is brought against a party whose 'interference' consisted of petitioning a governmental body to alter its previous policy a privilege is created by the guarantee of the First Amendment." *Id.* at 938.

112. *Sierra Club v. Butz*, 349 F. Supp. 934, 939 (N.D. Cal. 1972). The imposition of tort damages upon civil rights organizations has been criticized. See Sandifer & Smith, *supra* note 16 at 559; Note, *The Invisible Hand and the Clenched Fist: Is There A Safe Way to Picket Under the First Amendment?*, 26 Hastings L.J. 167 (1974); Note, *Mississippi's Secondary Boycott Statutes: Unconstitutional Deprivations of the Right to Engage in Peaceful Picketing and Boycotting*, 18 How. L.J. 583 (1975).

113. *Birl v. Philadelphia Elec. Co.*, 402 Pa. 297, 301, 167 A.2d 472, 474 (1960); e.g., Restatement (Second) of Torts § 766B (1977). "One who intentionally and improperly interferes with another's prospective contractual relation . . . is subject to liability to the other for the pecuniary harm resulting from loss of the benefits of the relation, whether the interference consists of (a) inducing or otherwise causing a third person not to enter into or continue the prospective relation or (b) preventing the other from acquiring or continuing the prospective relation." *Id.*

114. E.g., *Birl v. Philadelphia Elec. Co.*, 402 Pa. 297, 301, 167 A.2d 472, 474 (1960); see *Bruce Lincoln-Mercury, Inc. v. Universal C.I.T. Credit Corp.*, 325 F.2d 2, 14 (3d Cir. 1963) (requiring a "reasonable assurance" that prospective economic benefit would have been achieved).

"improper,"¹¹⁵ in the sense that it was "both injurious and transgressive of generally accepted standards of common morality or of law."¹¹⁶

It is submitted that when all these factors are considered, scapegoat picketing would be found improper and therefore, enjoined and actionable in tort. First, the scapegoat picketer's motive is to interfere intentionally with the target's prospective economic relations.¹¹⁷ Moreover, the social interests advanced by the scapegoat picketers—to injure and destroy the economic well-being of the target, merely as a form of symbolic protest against some unrelated third party—do not justify the interference with economic and contractual relationships.¹¹⁸

III. SCAPEGOAT PICKETING AND THE BALANCING PROCESS

In the absence of a statute or a clearly articulated public policy, some courts have utilized a balancing test to determine the validity of restrictions on picketing.¹¹⁹ In all picketing cases, the individual's freedom of expression is

115. See Restatement (Second) of Torts § 767, Comment c, at 31 (1977). See also *Adler, Barish, Daniels, Levin & Creskoff v. Epstein*, 482 Pa. 416, 431, 393 A.2d 1175, 1183 (1978), *appeal dismissed and cert. denied*, 99 S. Ct. 2817 (1979).

116. *Di Cristofaro v. Laurel Grove Mem. Park*, 43 N.J. Super. 244, 255, 128 A.2d 281, 287 (App. Div. 1957). See also *In Re Kearney Chems., Inc.*, 468 F. Supp. 1107, 1112 (D. Del. 1979); 1 F. Harper & F. James, *The Law of Torts* § 6.11, at 510 (1956); Carpenter, *Interference With Contract Relations*, 41 Harv. L. Rev. 728, 745 (1927-1928).

117. *E.g.*, *Rouse Phila. Inc. v. Ad Hoc '78*, No. 4145, (C.P. Phila. Co. Jan 31, 1979), *aff'd*, Nos. 380, 390, 444 (Pa. Super. Ct. Dec. 28 1979), *appeal docketed*, No. 99 (E.D. Pa. Jan. 25, 1980). The picketing in *Rouse* caused an estimated loss of \$225,000 in sales revenue in five days to Gimbels Inc., one of the ninety-four businesses leasing space in the Gallery. Other stores in the Gallery suffered losses up to 74% in sales revenue. *Id.* at 88-89.

118. See Restatement (Second) of Torts § 767 (1977). The Restatement lists the following factors to determine whether conduct interfering with contractual or economic relations should be privileged: "(a) the nature of the actor's conduct, (b) the actor's motive, (c) the interests of the other with which the actor's conduct interferes, (d) the interests sought to be advanced by the actor, (e) the social interests in protecting the freedom of action of the actor and the contractual interests of the other, (f) the proximity or remoteness of the actor's conduct to the interference, and (g) the relations between the parties." *Id.* The more directly the actor's conduct causes the interference, the greater that factor will be weighed against him. *Id.* § 767, Comment h.

119. *E.g.*, *International Bhd. of Teamsters, Local 695 v. Vogt, Inc.*, 354 U.S. 284 (1957). "[T]he [courts'] strong reliance on the particular facts in each [picketing] case demonstrated a growing awareness that these cases involved not so much questions of free speech as review of the balance . . . between picketing that involved more than 'publicity' and competing interests of state policy." *Id.* at 290. "Thus, when there develops a dispute or controversy between conflicting claims to certain rights and freedoms, it is the function of the Court to attempt to so balance and distribute these rights as between the contending parties as to do the greatest good for the greatest number of people." *Clemmons v. Congress of Racial Equality*, 201 F. Supp. 737, 748 (E.D. La. 1962), *rev'd on other grounds*, 323 F.2d 54 (5th Cir. 1963), *cert. denied*, 375 U.S. 992 (1964). Picketing will certainly cause some damage to the picketed target, and "if it is to be permitted by the courts, [it] requires justification in a balancing of advantages and disadvantages to the interests of all . . . parties." *A.S. Beck Shoe Corp. v. Johnson*, 153 Misc. 363, 366, 274 N.Y.S. 946, 950 (Sup. Ct. 1934). See generally *Emerson, supra* note 22; *Frantz, supra* note 22; *Mendelson, On the Meaning of the First Amendment: Absolutes in the Balance*, 50 Calif. L. Rev. 821 (1962).

the most significant factor in opposition to enjoinder.¹²⁰ However, such rights "must be accommodated with . . . property rights with as little destruction of one as is consistent with the maintenance of the other. . . . The locus of that accommodation may fall at different points along the spectrum depending on the nature and strength of the rights asserted in a particular context."¹²¹

There are several important considerations to be weighed in determining whether protesters have "the right to conduct picketing on or in direct relation to private property."¹²² One is whether the conduct assertedly protected by the first amendment is "directly related in its purpose" to the use of the subject property.¹²³ Another consideration is whether there exist reasonable alternative means of communication to reach the intended audience.¹²⁴ It is submitted that application of these factors to scapegoat picketing will result in a finding that compels enjoinder.

In *Lloyd Corp. v. Tanner*,¹²⁵ the Supreme Court balanced these consid-

120. See, e.g., *American Radio Ass'n v. Mobile S.S. Ass'n*, 419 U.S. 215, 228-29 (1974); *Police Dep't of Chicago v. Mosley*, 408 U.S. 92, 95 (1972); *Hughes v. Superior Ct. of Cal.*, 339 U.S. 460, 464 (1950); *Carpenters & Joiners Union, Local 213 v. Ritter's Cafe*, 315 U.S. 722, 725-26 (1942); *Thornhill v. Alabama*, 310 U.S. 88, 95-96 (1940).

121. *Advance Indus. Div.-Overhead Door Corp. v. NLRB*, 540 F.2d 878, 883 (7th Cir. 1976) (citation omitted).

122. *Garcia v. Gray*, 507 F.2d 539, 543 (10th Cir. 1974), *cert. denied*, 421 U.S. 971 (1975).

123. *Lloyd Corp. v. Tanner*, 407 U.S. 551, 563 (1972); *Garcia v. Gray*, 507 F.2d 539, 543 (10th Cir. 1974), *cert. denied*, 421 U.S. 971 (1975); see *City of Wauwatosa v. King*, 49 Wis. 2d 398, 182 N.W.2d 530 (1971).

124. *Lloyd Corp. v. Tanner*, 407 U.S. 551, 566 (1972).

125. 407 U.S. 551 (1972). *Lloyd* was the second of a trilogy of cases involving protests at shopping centers. In *Amalgamated Food Employees Local 590 v. Logan Valley Plaza, Inc.*, 391 U.S. 308 (1968), the Court held that a union has a first amendment right to picket a primary employer in a large private shopping center complex. *Id.* at 319. Thus, the Court expanded the "public function" doctrine first applied in *Marsh v. Alabama*, 326 U.S. 501, 507 (1946) to a "company town." "Wherever the title of streets and parks may rest, they have immemorially been held in trust for the use of the public and, time out of mind, have been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions. Such use of the streets and public places has, from ancient times, been a part of the privileges, immunities, rights, and liberties of citizens. The privilege of a citizen of the United States to use the streets and parks for communication of views on national questions may be regulated in the interest of all; it is not absolute, but relative, and must be exercised in subordination to the general comfort and convenience, and in consonance with peace and good order; but it must not, in the guise of regulation, be abridged or denied." *Hague v. C.I.O.*, 307 U.S. 494, 515-16 (1939). The *Logan Valley* Court concluded that since the shopping center was the "functional equivalent" of the business district in *Marsh*, the center should be treated like public property. 391 U.S. at 325. Thus, the private property owner in *Logan Valley* could not limit first amendment rights by prohibiting picketing of a primary employer although it was located in a large shopping center. *Id.* at 319-20. The union's picketing was consonant with the use to which the property was being put, because the picketing was directed at the manner in which the targeted store was operated and the union directed its message only to the patrons of the store. *Id.* at 321-22. The Court in *Logan Valley*, however, specifically reserved the issue of whether a first amendment right exists if the purpose of picketing is not directly related to the use to which the picketed property is actually put. *Id.* at 320 n.9. The final case of the trilogy was *Hudgens v. NLRB*, 424 U.S. 507 (1976), in which picketers supporting an economic strike filed an unfair labor practice charge with the NLRB after they were threatened with arrest if picketing did not cease. The Court held that a

erations to determine whether a privately owned shopping center may prohibit the distribution of handbills protesting the Vietnam War when the handbilling is unrelated to the shopping center's operations.¹²⁶ A closely divided Court held that a private property owner may limit the exercise of free speech that is unrelated to the use of his property when alternative means are available to communicate the dispute to the intended audience.¹²⁷ Although it is uncertain whether both prongs of this test must be satisfied,¹²⁸ it is arguable that scapegoat picketing satisfies neither test. Because the dispute is not related to the private property at which the protest is directed, the purpose of the picketing is not related to the use of that property.¹²⁹ Furthermore, because the picketing is totally unrelated to the situs, there are innumerable alternative means of communication available to the protesters.¹³⁰ Thus, scapegoat picketers have no protected first amendment right to picket on or in direct relation to property unrelated to their dispute.

union has no first amendment right to picket at a shopping center and that such protection should be controlled by labor legislation. *Id.* at 523. Thus, the status of non-labor shopping center picketing must be determined in light of *Lloyd* and *Logan Valley*. A majority of the Supreme Court believed that *Lloyd* distinguished, rather than overruled, *Logan Valley*. *Id.* at 523 (Powell, J. concurring) (Burger, C. J., joins); *id.* at 524 (White, J., concurring), *id.* at 535 (Marshall, J., dissenting) (Brennan, J., joins). See generally Note, *Shopping Center Picketing: The Impact of Hudgens v. National Labor Relations Board*, 45 Geo. Wash. L. Rev. 812 (1977).

126. 407 U.S. at 552.

127. *Id.* at 563. The Court concluded that the respondents had failed to meet this test because their anti-war message was not related to the use to which the property was being put, and since the intended audience was the public at large, the protestors had alternative means of communication available to them. *Id.* at 564.

128. The picketing that was protected by the Court in *Logan Valley* satisfied both tests, 391 U.S. at 321, while the expression left unprotected, in *Lloyd* satisfied neither. 407 U.S. at 563-64.

129. See *Carpenters & Joiners Union, Local 213 v. Ritter's Cafe*, 315 U.S. 722 (1942). "[N]o . . . First Amendment protection is afforded to defendants where their activities are directed toward those plaintiffs with no interest in the premises. . . ." *Segal v. Wood*, 42 A.D.2d 548, 549, 345 N.Y.S.2d 27, 28 (1st Dep't 1973). Although perhaps overstating the necessity for a relationship between the picketers and the target, in *People v. Sinclair*, 86 Misc. 426, 149 N.Y.S. 54 (1914), *aff'd*, 167 A.D. 899, 151 N.Y.S. 1136 (1st Dep't 1915), the court stated that "peaceful picketing is allowed because those who picket have a special interest as distinguished from that of the public in doing what they do for the welfare of those in the occupation to which such pickets belong. They are not allowed to picket because as members of the public they have a grievance, but because they have a special right or interest to protect." *Id.* at 438, 149 N.Y.S. at 61. Similarly, in *New Negro Alliance v. Sanitary Grocery Co.*, 303 U.S. 552 (1938), the Court stated that "those having a direct or indirect interest in such terms and conditions of employment should be at liberty to advertise and disseminate facts and information." *Id.* at 563. Thus, some sort of interest is required. There is no such interest in the scapegoat picketing context. In *City of Wauwatosa v. King*, 49 Wis. 2d 398, 182 N.W.2d 530 (1971), the court sustained the validity of a state anti-residential picketing statute. The ordinance in *Wauwatosa* exempted residential picketing at employment sites and therefore was challenged as a denial of equal protection. The court rejected this challenge noting that "it is the relatedness of the dispute to the fact of use of the home as a place of employment that is controlling." *Id.* at 412, 182 N.W.2d at 538. But see *State v. Schuller*, 280 Md. 305, 316, 372 A.2d 1076, 1082 (1977).

130. See Note, *Shopping Center Picketing: The Impact of Hudgens v. National Labor Relations Board*, 45 Geo. Wash. L. Rev. 812, 817 n.37 (1977).

In residential picketing cases courts have also upheld the enjoinder of picketing,¹³¹ basing their decisions not only upon state policies of confining the sphere of communication to that directly related to the dispute, but also upon a balancing of the right to picket and the right to privacy.¹³² The majority of cases that have addressed this conflict have protected privacy, not picketing.¹³³ The rationale is that a ban on residential picketing protests the public peace¹³⁴ and the sanctity of the home.¹³⁵ Indicative of this balancing process is the recent New York case of *Walinsky v. Kennedy*,¹³⁶ in which an association of homosexuals picketed the residence of the plaintiff in response to an editorial he had authored opposing the enactment of a "gay-rights" bill. Stating that the request for an injunction "involves a balancing of competing social interests,"¹³⁷ the court held that plaintiff's right to privacy when considered against the defendants' choice of a residential situs rather than a more appropriate business office, tipped the balance in favor of enjoinder.¹³⁸

Although the balancing of competing rights generally has resulted in a determination that the privacy of the individual homeowner was entitled to protection, a contrary result has been reached under the particular circumstances of some cases. Thus, the picketing of the private home of a state governor has been held a proper exercise of the right of assembly and petition,¹³⁹ as has the peaceful picketing of the residence of the head of a United States agency.¹⁴⁰ The residential picketing of an otherwise inaccessible landlord has also been upheld.¹⁴¹ In those cases in which the right to picket overcame the right to privacy, special circumstances existed. The first category is the picketing of public persons or government officials who certainly

131. See Kamin, *supra* note 42; Note, *Picketers at the Doorstep*, 9 Harv. C.R.-C.L. L. Rev. 95 (1974); Note, *Picketing the Homes of Public Officials*, 34 U. Chi. L. Rev. 106 (1966); 7 U. Balt. L. Rev. 107 (1977).

132. See, e.g., *Walinsky v. Kennedy*, 94 Misc. 2d 121, 127-29, 404 N.Y.S.2d 491, 495-96 (Sup. Ct. 1977); Blasi, *Prior Restraints on Demonstrations*, 68 Mich. L. Rev. 1482 (1970); Fried, *Two Concepts of Interests: Some Reflections on the Supreme Court's Balancing Test*, 76 Harv. L. Rev. 755 (1963); Kalven, *The Concept of the Public Forum: Cox v. Louisiana*, 1965 Sup. Ct. Rev. 1.

133. See, e.g., *Garcia v. Gray*, 507 F.2d 539 (10th Cir. 1974), *cert. denied*, 421 U.S. 971 (1975); *State v. Cooper*, 205 Minn. 333, 285 N.W. 903 (1939); *State v. Perry*, 196 Minn. 481, 265 N.W. 302 (1936); *Walinsky v. Kennedy*, 94 Misc. 2d 121, 404 N.Y.S.2d 491 (Sup. Ct. 1977); *City of Wauwatosa v. King*, 49 Wis. 2d 398, 182 N.W.2d 530 (1971).

134. See *State v. Zanker*, 179 Minn. 355, 229 N.W. 311 (1930); *Walinsky v. Kennedy*, 94 Misc. 2d 121, 404 N.Y.S.2d 491 (Sup. Ct. 1977); *People v. Levner*, 30 N.Y.S.2d 487 (Magis. Ct. 1941).

135. *Garcia v. Gray*, 507 F.2d 539, 543 (10th Cir. 1974), *cert. denied*, 421 U.S. 971 (1975); *State v. Cooper*, 205 Minn. 333, 336, 285 N.W. 903, 905 (1939); *State v. Perry*, 196 Minn. 481, 482, 265 N.W. 302, 302, (1936); *Pipe Mach. Co. v. DeMore*, 36 Ohio Op. 342, 344, 76 N.E.2d 725, 727 (Ohio App. 1947).

136. 94 Misc. 2d 121, 404 N.Y.S.2d 491 (Sup. Ct. 1977).

137. *Id.* at 125, 404 N.Y.S.2d at 494.

138. *Id.* at 131-32, 404 N.Y.S.2d at 498.

139. *Flores v. City of Denver*, 122 Colo. 71, 220 P.2d 373 (1950).

140. *State v. Anonymous*, 6 Conn. Cir. 372, 274 A.2d 897 (1971).

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

cannot be insulated from public criticism.¹⁴² The second category allows picketing if the residence is the only feasible situs to communicate effectively.¹⁴³ Scapegoat picketing involves none of these exigencies. It does not involve the picketing of government officials, and because the target situs is unrelated to the dispute, it cannot be the only situs at which effective communication to the intended audience may be achieved.

Another factor considered by the courts in their balancing process to determine the permissibility of picketing, is the availability of reasonable alternatives to ameliorate the protested conditions. In *Springfield, Bayside Corp. v. Hochman*,¹⁴⁴ for example, the court stressed that, in the interest of maintaining a peaceful, orderly society, alternative administrative remedies should be exhausted before any picketing should be condoned.¹⁴⁵ Similarly, in *People v. Kopezak*,¹⁴⁶ in upholding the disorderly conduct convictions of picketers protesting housing conditions, the court stated that even if the picketers' grievances were justified, "the conditions of the premises in question should be remedied if possible and if not the same should be condemned by the proper authorities. . . . [T]he lawful and orderly manner of the tenants was to file their complaints with one of these departments."¹⁴⁷

Therefore, under the rationale of these cases, if the grievances or disputes can be remedied administratively, these alternatives should be exhausted before picketing is permissible. For example, in *Rouse Philadelphia Inc. v. Ad Hoc '78*,¹⁴⁸ Ad Hoc's grievances were with the government¹⁴⁹ and not with the department stores at which they conducted the picketing. Thus, the scapegoat picketers should have been required to exhaust municipal and federal grievance procedures before their picketing at unrelated sites would be deemed permissible. Common sense would appear to dictate that the picket-

142. See *Gregory v. City of Chicago*, 394 U.S. 111, 112 (1969), *State v. Anonymous*, 6 Conn Cir. 372, 377, 274 A.2d 897, 900 (1971-1972); *Flores v. City of Denver*, 122 Colo 71, 74, 220 P.2d 373, 376 (1950).

143. E.g., *Hibbs v. Neighborhood Org. to Rejuvenate Tenant Hous.*, 433 Pa 578, 252 A.2d 622 (1969). In *Hibbs*, the respondent rented houses in low income areas under a fictitious name and conducted all transactions with tenants by mail through the use of a post office box. All tenant complaints had to be sent through the mail and consequently, were frequently lost or delayed. *Id.* at 579-80, 252 A.2d at 623. To publicize Hibbs's deplorable activities, tenants conducted informational picketing in front of his home. The Pennsylvania Supreme Court reversed a lower court decree that granted a temporary restraining order, stating that "[b]ecause of the secretive manner in which Hibbs was conducting his real estate business there was no other place to effectively communicate his activities." *Id.* at 580, 252 A.2d at 623-24, see *Lloyd Corp. v. Tanner*, 407 U.S. 551, 563 (1972); *Garcia v. Gray*, 507 F.2d 539, 543 (10th Cir 1974), *cert. denied*, 421 U.S. 971 (1975); *Walinsky v. Kennedy*, 94 Misc. 2d 121, 131, 404 N.Y.S.2d 491, 497-98 (Sup. Ct. 1977).

144. 44 Misc. 2d 882, 255 N.Y.S.2d 140 (Sup. Ct. 1964)

145. *Id.* at 886, 255 N.Y.S.2d at 145.

146. 153 Misc. 187, 274 N.Y.S. 629 (Ct. Spec. Sess. 1934), *aff'd mem.*, 266 N.Y. 565, 195 N.E. 202 (1935).

147. *Id.* at 189-90, 274 N.Y.S. at 632.

148. *Rouse Phila. Inc. v. Ad Hoc '78*, No. 4145 (C.P. Phila. Co Jan 31, 1979), *aff'd*, Nos. 380, 390, 444 (Pa. Super. Ct. Dec. 28, 1979), *appeal docketed*, No. 99 (E.D. Pa. Jan 25, 1980)

149. See note 11 *supra*.

ing of an unassociated, unrelated target without resort to administrative remedies would be attributed even less protection by the courts.

CONCLUSION

It cannot be denied that the American public has the right to protest and to communicate criticisms of government policies. Yet these rights do not immunize from regulation and restriction the scapegoat picketers' arbitrary infliction of economic damage upon uninvolved third parties. Thus, scapegoat picketing is beyond the pale of constitutional protection.

Robert J. Mongeluzzi