

Picketing and Prayer: Restricting Freedom of Expression outside Churches

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NOTE

PICKETING AND PRAYER: RESTRICTING FREEDOM OF EXPRESSION OUTSIDE CHURCHES

Alan Phelps

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INTRODUCTION

Simple yet powerful, picketing is a key form of free speech that must be both protected and protected against. In recent years, anti-abortion protestors have become some of the most vocal and well-organized picketers. The latest battlefields of their continuing crusade spread beyond the well-trod territory surrounding abortion clinics. Picketing, protesters have learned, attracts attention. Picketing in areas not known for protests—residential streets, nonmedical businesses, and schools—can attract even more attention. Doctors' homes bear the brunt of this new wave of picket lines, but a few communities must deal with harassing and coercive protests on less-familiar constitutional ground, such as the sidewalks surrounding churches.¹ When protesters target a church the questions that arise implicate not only where to draw new lines in the sandy dominion between privacy and speech, but also between speech and constitutional rights such as the freedom of religion. Courts already institute limits on the First Amendment when it interferes with the enjoyment of one's physical home;² some argue similar restrictions should protect one's spiritual home as well.

Part I of this Note examines reasons why anti-abortion protestors and other activists target institutions such as churches, and different communities' attempts to stop this focused picketing. Part II discusses the Supreme Court's free speech doctrine, focusing on cases involving targeted picketing outside non-commercial sites, such as doctors' residences. Parts III and IV discuss the inconclusive state of the current case law as to the question of whether restrictions on church picketing are constitutional. These sections conclude that, based on indications from lower courts and an extrapolation of related Supreme Court cases, such ordinances indeed may pass First Amendment muster as long as they are narrowly tailored. Finally, Part V cautions that several of the possible doctrines that potentially justify the expansion of picketing restrictions away from residences could compromise important free speech values, and presents an alternative.

¹ See *infra* notes 6-9 and accompanying text.

² See *infra* Part II.

I BACKGROUND

A. Anti-Abortion Protests Move to New Targets

Protesting outside abortion clinics is more difficult today than a few years ago. Tough federal legislation spurred in part by reports of violence outside abortion clinics³ and unfavorable court rulings⁴ stymies the aggressive picketing of the past. Reluctant to risk stiff punishments, such as ten years in prison and a \$250,000 fine,⁵ potential participants in large anti-abortion protests now either stay home or look for less risky options.⁶ Rather than discontinue their mission, the most ardent protestors increasingly turn their attention away from clinics to what some call the abortion rights movement's weak link: the individual doctors who perform such procedures.⁷ Protestors now routinely picket doctors' residences⁸ and increasingly focus on aspects of doctors' lives unrelated to their practice.⁹

³ President Clinton signed the Freedom of Access to Clinic Entrances Act (FACE), Pub. L. No. 103-259, § 3, 108 Stat. 694 (codified at 18 U.S.C. § 248 (1994)), into law in 1994. See Ruth Marcus, *President Signs Clinic Access Law, Foes File Lawsuit*, WASH. POST, May 27, 1994, at A10. The Act provides for criminal sanctions against anyone who:

[B]y force or threat of force or by physical obstruction, intentionally injures, intimidates or interferes with or attempts to injure, intimidate or interfere with any person because that person is or has been, or in order to intimidate such person or any other person or any class of persons from, obtaining or providing reproductive health services.

18 U.S.C. § 248(a)(1) (1994); see also Alan E. Brownstein, *Rules of Engagement for Cultural Wars: Regulating Conduct, Unprotected Speech, and Protected Expression in Anti-Abortion Protests* (pt. 1), 29 U.C. DAVIS L. REV. 553, 556 (1996) (discussing the constitutionality of FACE).

⁴ See, e.g., *Madsen v. Women's Health Center, Inc.*, 512 U.S. 753, 757 (1994) (upholding a court-imposed buffer zone around an abortion clinic).

⁵ See 18 U.S.C. § 248(b). The statute provides for jail terms up to 10 years if the restricted conduct results in bodily injury; for noninjurious conduct the statute provides terms of up to one year for the first offense and up to three years for subsequent offenses.

⁶ See Richard A. Serrano, *Law Protecting Abortion Clinics Thwarts Protests*, L.A. TIMES, Dec. 8, 1996, at A1 (describing how anti-abortion protest leaders today "find it increasingly difficult to recruit volunteers willing to risk violating federal law"). One Florida anti-abortion activist told a newspaper reporter that it was "futile to go with a handful of people to sit down in front of an abortion clinic because you'll be in jail in 20 minutes." Andrew Conte, *Shifting Tactics*, STUART NEWS/PORT ST. LUCIE NEWS (Stuart, Fla.), Oct. 11, 1998, at A1, available in LEXIS, News Library (quoting statement of Cliff Beckett). The situation led that particular protestor to open a traveling counseling service with his wife rather than continue picketing. See *id.*

⁷ See T. Trent Gegax & Lynette Clemetson, *The Abortion Wars Come Home*, NEWSWEEK, Nov. 9, 1998, at 34.

⁸ See, e.g., Steven A. Berger, *Anti-Abortion Activists Picket Bedford Home of Dr. Goldner*, UNION LEADER (Manchester, N.H.), Jan. 5, 1998, at A1; Gegax & Clemetson, *supra* note 7, at 34; *Foes of Abortion Picket Doc's Home*, BOSTON HERALD, Jan. 5, 1998, at 18.

⁹ See Mareva Brown, *Number of Doctors Doing Abortions Has Fallen Sharply*, SACRAMENTO BEE, Jan. 18, 1998, at A11. For example, Troy Newman, an Operation Rescue coordinator in California, stated: "[Our group] target[s] abortionists to expose them We follow them everywhere and tell everyone who cares to listen that they kill children for a living." *Id.*

A widespread strategy in this new battlefield is the exposure campaign designed to make life uncomfortable for abortion-providing doctors and their families.¹⁰ Such tactics range from the relatively peaceful to outright harassment. Protestors in different communities have printed wanted posters labeling doctors as child killers, followed these doctors around town, picketed their homes, disturbed their neighbors, and in some cases even threatened their children and spouses.¹¹ An infamous book by Chicago anti-abortion activist Joseph Scheidler entitled *Closed: 99 Ways to Stop Abortion*¹² endorses picketing doctors' homes as a way to warn other abortion-performing doctors of the risks in providing this service.¹³ Many anti-abortion groups take Scheidler's advice to heart. In California, protestors blocked the path of one doctor's car, slashed his tires, picketed his house, held up signs comparing the doctor to serial killer Jeffrey Dahmer, and harassed his wife at a shopping mall.¹⁴ A group of Dallas anti-abortion activists organized daily demonstrations in front of a doctor's home, his workplace, his wife's workplace, and the couple's church.¹⁵ The application of these extreme measures has not escaped the eye of local legislators.

B. Cities React to Picketing

As anti-abortion protests began to increase in residential areas, cities quickly started to use existing laws or enact new ones to restrict such picketing.¹⁶ Courts usually uphold these residential picketing bans unless they appear to restrict protests more than necessary.¹⁷

¹⁰ See, e.g., David G. Savage, *Abortion Foes Target Doctors for Harassment*, L.A. TIMES, Mar. 14, 1993, at A1 (discussing tactics used by anti-abortion protestors).

¹¹ See *id.*

¹² JOSEPH M. SCHEIDLER, *CLOSED: 99 WAYS TO STOP ABORTION* (1985).

¹³ See *Roe Versus Wade Plus 25* (CNN television broadcast, Jan. 22, 1998), available in LEXIS, Transcripts Library, Transcript No. 98012100V34. Scheidler says he has "shut down a lot of abortion clinics through persuasion." *Id.*

¹⁴ See Benjamin Pimentel, *Operation Rescue Loses in Court*, S.F. CHRON., Jan. 9, 1997, at A19.

¹⁵ See *Tompkins v. Cyr*, 995 F. Supp. 664, 671-73 (N.D. Tex. 1998). The protestors used a telephone hotline to let members of the group know where and when to meet each day. See *id.* One protestor rushed at the doctor's wife as she went to get her mail and said, "Stop the killing now. Aren't you afraid, Mrs. Tompkins, I'm going to shoot you now?" *Id.* (quoting statement of Tomanek).

¹⁶ See, e.g., Dan Luzadder, *Panel Backs Limits on Pickets: Measure Aims to Keep Protesters from Homes*, ROCKY MTN. NEWS (Denver, Colo.), Feb. 6, 1997, at 8A; Scott Wade, *Law That Would Ban Picketing at Homes Follows National Lead*, COURIER-JOURNAL (Louisville, Ky.), Mar. 20, 1997, at 2B.

¹⁷ See Abdon M. Pallasch & David Mendell, *Protesters on Fine Line When Target Is a Home: Policy Shift Pushing City into Rights Debate*, CHI. TRIB., July 26, 1998, § 4, at 1 ("Illinois law bans pickets outside homes unless those homes double as businesses, and the U.S. Supreme Court has upheld such bans."). Courts find some such ordinances too broad, however. See, e.g., *Judge Rules Against Bangor Picketing Law*, PORTLAND PRESS HERALD, Dec. 13, 1996, at 5B ("Bangor's ordinance against targeted residential picketing is unconstitu-

However, protestors can harass and picket doctors anywhere. Just as laws protecting abortion clinics merely move the location of the picketing, ordinances creating buffer zones around residences likely will encourage protestors to find new ground for getting out their message. These residential ordinances will drive dedicated picketers to sidewalks of the areas previously thought immune to such tactics.¹⁸

1. *Prairie Village, Kansas*

While many states prohibit physical disruption of church services,¹⁹ the Kansas town of Prairie Village enacted what appears to be the first challenged ordinance that facially prohibits all picketing outside both residences and churches.²⁰ The Kansas Supreme Court visited the matter in *City of Prairie Village v. Hogan*.²¹ In *Hogan*, police arrested Theodore T. Hogan on Sunday morning, March 15, 1992 for picketing "before or about a church."²² Officials observed Hogan walking a route that twice took him several blocks north and south of a church on the opposite side of the street.²³ Hogan carried with him a sign expressing anti-abortion text and photographs.²⁴ He testified that he chose that particular area for his protest "because it would up my ante of Christians on their way to and from church," but he also hoped nonchurchgoers driving along the street would see his message.²⁵ The prosecution presented no evidence that Hogan stopped near the church for any length of time or bothered anyone in particular, although police said a few people may have crossed the street to avoid Hogan when the police were questioning him.²⁶

tional, a judge ruled this week in the case of two anti-abortion protesters who said they broke the new law in order to test it in court."); Editorial, *Protest, Harassment Two Different Things*, OMAHA WORLD HERALD, Feb. 3, 1997, at 14 ("Nebraskans lost some of their legal protection against harassment when U.S. District Judge Warren Urbom ruled that it's unconstitutional for the state to prohibit protesters from picketing at a person's residence.").

¹⁸ See *Morning Edition* (NPR radio broadcast, Aug. 11, 1994), available in 1994 WL 8690168 (discussing one anti-abortion protest group's tactic of picketing doctors wherever the doctors go). Roy McMillan, a member of the Mississippi group, said he and the others "want everyone in the state to know the face and the name of the abortionist." *Id.* In at least a few communities, protestors have decided to target churches where abortion doctors worship. See *Tompkins*, 995 F. Supp. at 671-73.

¹⁹ See *infra* Part III.A.

²⁰ See PRAIRIE VILLAGE, KAN., MUN. CODE, tit. 10, ch. 10.04.010 (1992), quoted in *City of Prairie Village v. Hogan*, 855 P.2d 949, 950 (Kan. 1993). The ordinance makes it unlawful for "any person to engage in picketing before or about the residence of any individual in the city, or before or about any church in the city." *City of Prairie Village v. Hogan*, 855 P.2d 949, 950 (Kan. 1993) (internal quotation marks omitted).

²¹ 855 P.2d 949 (Kan. 1993).

²² *Id.* at 950.

²³ See *id.* at 951.

²⁴ See *id.*

²⁵ *Id.*

²⁶ See *id.*

Both a municipal court and state district court found Hogan guilty and fined him \$300.²⁷ Hogan appealed to the Kansas Supreme Court,²⁸ which ruled that any statute must be construed narrowly when it appears "facially overbroad" and could reach conduct protected by the First Amendment.²⁹ The court then limited the statute accordingly, holding that the Prairie Village ordinance banned only focused picketing in front of a particular residence or church and, citing the United States Supreme Court's decision in *Frisby v. Shultz*,³⁰ held that merely marching *through* a neighborhood did not constitute focused picketing in front of a particular building.³¹ Disagreeing with a lower court, the Kansas Supreme Court found that Hogan's picket route did not constitute picketing in front of a particular place under the ordinance.³² Because Hogan was not found in violation of the ordinance, the court declined to rule on the constitutionality of the law.³³

2. *Lincoln, Nebraska*

A federal district court in Nebraska, however, found itself facing the question of the constitutionality of such church picketing ordinances. For twenty-two months, a group of Omaha abortion protesters, known as "Rescue the Heartland," targeted a Presbyterian church in Lincoln where a doctor who performed abortions served as a church elder.³⁴ Every Sunday between February 1997 and January 1999, a group of six to twelve protestors gathered outside the church entrances displaying graphic signs and enlarged photographs of aborted fetuses.³⁵ As in *Hogan*, the local police saw "nothing that [they] felt rose to the level of something for instance like terroristic threats or disturbing the peace."³⁶ The city's police chief later told the city council that officers did not personally see anyone being

²⁷ See *id.* at 950.

²⁸ See *id.*

²⁹ See *id.* at 952.

³⁰ 487 U.S. 474 (1988); see also discussion *infra* Part II.B.

³¹ See *Hogan*, 855 P.2d at 953.

³² See *id.* at 954.

³³ See *id.*

³⁴ See Aaron Sanderford, *In Church's War with Protesters, Both Sides Aim to Protect Children*, LINCOLN J. STAR, June 29, 1998, at 1A. Soon after the court battle described *infra* notes 52-55 and accompanying text, the protestors stated they would discontinue the weekly protests because the doctor no longer performed abortions in Omaha. See Susan Szalewski, *Abortion Protests End Outside Church*, OMAHA WORLD-HERALD, Jan. 4, 1999, at 11.

³⁵ See Joe Duggan, *Church Asking City for Help with Anti-Abortion Protestors*, LINCOLN J. STAR, June 20, 1998, at A1; Szalewski, *supra* note 34.

³⁶ *Olmer v. City of Lincoln*, 23 F. Supp. 2d 1091, 1097 (D. Neb. 1998) (quoting *Minutes of the Regular Lincoln City Council Meeting: Comments During Public Hearing on Amending Chapter 9.20 of the LMC [Lincoln Municipal Code] by Adding a New Section Numbered 9.20.090*, at 36 (Sept. 8, 1998) (comments of Chief of Police Tom Casady)), *aff'd*, No. 98-4112NE, 1999 U.S. App. LEXIS 25528 (8th Cir. Oct. 17, 1999).

chased, blocked, or impeded even during plainclothes patrols of the neighborhood during the weekly demonstrations.³⁷

Church members, however, charged that the protestors directed verbal and visual attacks at children as they entered the church with their families. One couple said that a protestor walked into the street while their van stopped for a traffic light, and placed a graphic poster near the back window of the van where the children sat³⁸ with their heads down in an attempt to avoid the sight.³⁹ Another church member said the protestors regularly would videotape cars driving into the church parking lot.⁴⁰ When the member asked a protestor about this practice, she was told the tapes would be used to look up addresses from license plate numbers.⁴¹ Although the protestors agreed to stay away from one of the church's entrances, their presence at the entrance to the parking lot continued to create a gauntlet that all the congregation's children had to pass through.⁴² One nine-year-old child said that a protestor "stuck a bloody baby picture" in front of his face.⁴³ "I have had some bad times in my life, but that was the worst," he said.⁴⁴ At least fifteen families, most with children, eventually left the church because of the picketing.⁴⁵

Ultimately, members of the congregation felt forced to hire an attorney to lobby the city council for an antipicketing ordinance designed to protect churches.⁴⁶ In particular, the churchgoers resented that many of their children were now afraid to attend services.⁴⁷ Church members collected some 3000 signatures supporting the proposed restriction.⁴⁸ The local city council eventually passed the measure over a mayoral veto and opposition from the city attorney, who stated publicly that in his opinion the ordinance would be found unconstitutional after an expensive court battle.⁴⁹ The new ordinance forced picketers carrying signs, banners, and placards to remain across the street from any house of worship in the city "at any

³⁷ See *Olmer*, 23 F. Supp. 2d at 1097.

³⁸ See Sanderford, *supra* note 34. The couple said their daughter asked them why the family could not go to a different church, one without picketers. See *id.*

³⁹ See *id.*; see also *Olmer*, 23 F. Supp. 2d at 1097 (discussing the Sunday routine of "asking . . . children to remove their seat belts and sit on the floor . . . to avoid having them see the large graphic signs" (internal quotation marks omitted)).

⁴⁰ See Sanderford, *supra* note 34.

⁴¹ See *id.*

⁴² See *id.*

⁴³ Fred Knapp, *Several Testify at Hearing on Picketing Proposal*, LINCOLN J. STAR, Sept. 9, 1998, at 1A.

⁴⁴ *Id.*

⁴⁵ See *Olmer*, 23 F. Supp. 2d at 1097.

⁴⁶ See Sanderford, *supra* note 34.

⁴⁷ See Duggan, *supra* note 35.

⁴⁸ See *id.*

⁴⁹ See Ed Russo, *Council Overrides Johanns' Veto*, LINCOLN J. STAR, Sept. 22, 1998, at 1A.

time within the period a half hour before to a half hour" after services.⁵⁰ Drafters of the ordinance believed that protestors still could stand on the sidewalks in front of the church at any time for activities such as handing out leaflets or conducting direct, one-on-one conversations.⁵¹

⁵⁰ LINCOLN, NEB., MUN. CODE § 9.20.090 (1998) (quoted in *Olmer*, 23 F. Supp. 2d at 1095). This statute provides:

9.20.090 Disturbing the Peace by Focused Picketing at Religious Premises

(a) Definitions. As used in this ordinance, the following terms shall have the meanings here set forth:

(1) The term "religious premises" shall mean "the property on which is situated any synagogue, mosque, temple, shrine, church or other structure regularly used for the exercise of religious beliefs, whether or not those religious beliefs include recognition of a God or other supreme being";

(2) The term "scheduled religious activity" shall mean "an assembly of five or more persons for religious worship, wedding, funeral, memorial service, other sacramental ceremony, religious schooling or religious pageant at a religious organization's premises, when the time, duration and place of the assembly is made known to the public, either by a notice published at least once within 30 days but not less than 3 days before the day of the scheduled activity in a legal newspaper of general circulation in the city or in the alternative by posting the information in a reasonably conspicuous manner on the exterior premises for at least 3 days prior to and on the day of the scheduled activity."

(3) The term "focused picketing" shall mean "the act of one or more persons stationing herself, himself or themselves outside religious premises on the exterior grounds, or on the sidewalks, streets or other part of the right of way in the immediate vicinity of religious premises, or moving in a repeated manner past or around religious premises, while displaying a banner, placard, sign or other demonstrative material as a part of their expressive conduct." The term "focused picketing" shall not include distribution of leaflets or literature.

(b) It shall be deemed an unlawful disturbance of the peace for any person intentionally or knowingly to engage in focused picketing of a scheduled religious activity at any time within the period from one-half hour before to one-half hour after the scheduled activity, at any place (1) on the religious organization's exterior premises, including its parking lots; or (2) on the portion of the right of way including any sidewalk on the same side of the street and adjoining the boundary of the religious premises, including its parking lots; or (3) on the portion of the right of way adjoining the boundary of the religious premises which is a street or roadway including any median within such street or roadway; or (4) on any public property within 50 feet of a property boundary line of the religious premises, if an entrance to the religious organization's building or an entrance to its parking lot is located on the side of the property bounded by that property line. Notwithstanding the foregoing description of areas where focused picketing is restricted, it is hereby provided that no restriction in this ordinance shall be deemed to apply to focused picketing on the right of way beyond the curb line completely across the street from any such religious premises.

Id. (typeface altered).

⁵¹ See Russo, *supra* note 49. The author of the proposal based it on a similar ordinance upheld by a lower court in Topeka, Kansas. See J. Christopher Hain, *Hearing Set on Picket Ordinance*, LINCOLN J. STAR, Aug. 18, 1998, at 1A. Apparently the attorney was referring to the Prairie Village, Kansas ordinance, see *supra* note 20 and accompanying text, that a lower court upheld and the Kansas State Supreme Court declined to review for constitutionality.

Four "Rescue the Heartland" protestors immediately filed a suit in a federal district court seeking to halt enforcement of the ordinance before it took effect.⁵² United States District Judge Richard Kopf issued a temporary restraining order prohibiting enforcement of the ordinance.⁵³ On November 4, 1998, Judge Kopf found the ordinance overbroad and granted a preliminary injunction against its enforcement.⁵⁴ The Lincoln City Council voted to appeal the injunction to the United States Court of Appeals for the Eighth Circuit.⁵⁵

3. Topeka, Kansas

In *St. David's Episcopal Church v. Westboro Baptist Church, Inc.*,⁵⁶ the plaintiff church sued members of the Westboro Baptist Church under a nuisance theory, requesting a temporary injunction to enjoin them from engaging in focused picketing⁵⁷ outside St. David's during scheduled worship sessions, weddings, funerals, and other services.⁵⁸ A lower court granted a temporary restraining order ("TRO") largely adopting the language of St. David's petition. This order restricted Westboro members from focused picketing within thirty-six feet of the church property to the east, west, and north, and within 215 feet of church property on the south, starting one half hour before and ending one half hour after a "religious event."⁵⁹ The Westboro members continued picketing without their customary signs,⁶⁰ and the lower court amended the TRO to cover focused picketing "with or without banner[s], placard[s], or sign[s]."⁶¹ The Kansas Court of Appeals

⁵² See *Olmer*, 23 F. Supp. 2d at 1094. Three of the protestors testified that they never knowingly harassed or intimidated anyone. See *id.* at 1096. With the city attorney unavailable to defend the ordinance because of his public statements, the city hired a local firm and accepted an offer of pro bono assistance from the Washington, D.C. office of Wilmer, Cutler & Pickering. See Ed Russo, *2 Firms to Defend City in Picket Suit*, LINCOLN J. STAR, Sept. 29, 1998, at 1A.

⁵³ See *Olmer*, 23 F. Supp. 2d at 1096.

⁵⁴ See *id.* at 1094.

⁵⁵ See Mark Andersen, *Council to Appeal Picketing Ruling*, LINCOLN J. STAR, Nov. 17, 1998, at 1A. Whether the city will continue the legal battle now that the protest has stopped remains to be seen. The Eighth Circuit affirmed, 2-1, Judge Kopf's injunction just as this Note was going to press. See *Olmer v. City of Lincoln*, No. 98-4112NE, 1999 U.S. App. LEXIS 25528 (8th Cir. Oct. 17, 1999). Time constraints do not permit a full analysis of the circuit court's decision here, but the majority opinion and the dissent provide interesting, real-world examples of some of the arguments discussed more fully in Part IV.

⁵⁶ 921 P.2d 821 (Kan. Ct. App.), *review denied*, 260 Kan. 995 (1996), *cert. denied*, 519 U.S. 1090 (1997).

⁵⁷ In their petition, St. David's defined "focused picketing as 'standing, sitting or walking at a deliberately slow speed or walking repeatedly around Plaintiff's house of worship by any person governed by the order, while carrying a banner, placard or sign.'" *Id.* at 824.

⁵⁸ See *id.*

⁵⁹ *Id.* at 825.

⁶⁰ See *id.* at 825-26.

⁶¹ *Id.* at 826.

later ruled that this TRO "ripened into a temporary injunction,"⁶² which Westboro appealed.

The *St. David's* court viewed the evidence in a light most favorable to the plaintiff to decide if the church would have a substantial likelihood of prevailing on the merits.⁶³ The court deliberately refused to reach the issue of whether Westboro's speech was constitutionally protected⁶⁴ and ruled in favor of *St. David's* to affirm the buffer zone.⁶⁵ Both the Kansas Supreme Court and the United States Supreme Court declined to review the decision.⁶⁶

These three cases—*Hogan*, *Olmer*, and *St. David's*—provide an idea of how a ban on picketing outside churches might fare if a court were to examine it fully. In *Hogan*, the court avoided the constitutional issue, but stressed narrow construction of the restrictive ordinance. The *Olmer* court held that challenges to a similar ordinance would have a substantial likelihood of success, while the court in *St. David's* upheld a judge-instituted ban targeting a specific group of picketers. To understand these interpretations and to predict what other courts might do in similar situations, it is best to begin with the basic tenets of free speech law.

II

COURT METHODOLOGY FOR REVIEW OF RESTRICTIONS ON EXPRESSION

The emphasis placed on freedom of speech in this country makes the First Amendment a hotly debated topic in many contexts. The First Amendment provides, in part, that "Congress shall make no law . . . abridging the freedom of speech."⁶⁷ But, as with any general rule, courts recognize exceptions. For instance, the proverbial prankster who enjoys yelling about fires in theaters lacks constitutional protection,⁶⁸ as does the ruffian who threatens others with violence.⁶⁹

In the case of relatively peaceful picketing, courts first pay attention to the location protestors choose to deliver their message rather than the message itself. "There is no doubt that as a general matter peaceful picketing . . . [is] expressive activity involving 'speech' pro-

⁶² *Id.* at 827.

⁶³ *See id.*

⁶⁴ *See id.* at 832.

⁶⁵ *See id.*

⁶⁶ *See St. David's Episcopal Church v. Westboro Baptist Church, Inc.*, 260 Kan. 995 (1996), *cert. denied*, 519 U.S. 1090 (1997).

⁶⁷ U.S. CONST. amend. I.

⁶⁸ *See New York Times v. United States*, 403 U.S. 713, 749 (1971) (Burger, C.J., dissenting) (referring to Justice Holmes's famous hypothetical).

⁶⁹ *See Watts v. United States*, 394 U.S. 705, 707 (1969) (dictum) (stating that a statute making a threat against the President a crime is constitutional as long as it is interpreted with an eye to the limitations of the First Amendment).

tected by the First Amendment,"⁷⁰ but not all speech is protected in all places.

A. Standard Public Forum Analysis

The doctrine surrounding First Amendment challenges to speech restrictions is well-established, though sometimes difficult to apply in practice.⁷¹ As an initial matter, courts ask whether the site of the speech is a public forum where speech receives the most deference, a "limited" public forum open only to certain types of speech, or a non-public forum where speech may be restricted.⁷² The Supreme Court considers streets, parks, and sidewalks—whether near a church or not—to be "quintessential public forums."⁷³ From "'[T]ime out of mind' public streets and sidewalks have been used for public assembly and debate, the hallmarks of a traditional public forum."⁷⁴ In such paradigmatic public forums, government regulations impacting expression must meet several requirements. First, the restriction must be content-neutral to avoid facing nearly always-fatal strict scrutiny.⁷⁵ Second, the regulation must be a reasonable time, place, or manner restriction that serves an important governmental interest without closing alternative channels for the expression.⁷⁶ Third, the regulation must be narrowly tailored to serve the governmental interest.⁷⁷

1. Content Neutrality

To demonstrate content neutrality, the government must show that its restriction can be "justified without reference to the content of the regulated speech."⁷⁸ The relevant test is whether the government "adopted a regulation of speech because of disagreement with the message it conveys. The government's *purpose* is the controlling con-

⁷⁰ *United States v. Grace*, 461 U.S. 171, 176 (1983).

⁷¹ See generally Steven G. Gey, *Reopening the Public Forum—From Sidewalks to Cyberspace*, 58 OHIO ST. L.J. 1535, 1535-55 (1998) (reviewing the history of the public forum doctrine).

⁷² See *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 45-48 (1983). For a critical analysis of whether these distinctions provide the best way to address First Amendment questions, see C. Thomas Dienes, *The Trashing of the Public Forum: Problems in First Amendment Analysis*, 55 GEO. WASH. L. REV. 109, 110 (1986) (arguing that the pigeonholing of cases into specific, outcome determinative fora unnecessarily undermines the careful weighing of competing speech and public interests).

⁷³ *Perry Educ. Ass'n*, 460 U.S. at 45.

⁷⁴ *Frisby v. Schultz*, 487 U.S. 474, 480 (1988) (quoting *Perry Educ. Ass'n*, 460 U.S. at 45).

⁷⁵ See *Perry Educ. Ass'n*, 460 U.S. at 45.

⁷⁶ See *Heffron v. International Soc'y for Krishna Consciousness, Inc.*, 452 U.S. 640, 648 (1981).

⁷⁷ See *Ward v. Rock Against Racism*, 491 U.S. 781, 798 (1989).

⁷⁸ *Ward*, 491 U.S. at 791 (quoting *Clark v. Community for Creative Non-Violence*, 468 U.S. 288, 293 (1984)) (internal quotation marks omitted).

sideration."⁷⁹ Even if a restriction tends to affect some speakers more than others, the Constitution requires nothing more than a content-neutral governmental purpose.⁸⁰

2. *Reasonable Time, Place, or Manner Restriction*

Once restriction on expression passes the content neutrality test, the government must show that it serves a significant governmental interest while leaving open ample alternative channels for speech.⁸¹ Reasonable time, place, or manner restrictions give government the power to control disruption in public areas so long as this control does not tread heavily on speech rights.

Courts recognize a variety of significant governmental interests as constitutionally permissible bases of time, place, or manner restrictions. For example, the Supreme Court considers the orderly movement of large crowds about a fairground,⁸² the maintenance of attractive city parks,⁸³ the smooth flow of traffic on busy streets,⁸⁴ and the freedom of neighborhoods from over-amplified noises⁸⁵ as substantial governmental interests to justify the restriction of speech. While the analysis is heavily fact-specific, a general theme of protecting "the safety and convenience" of citizens in public places emerges from these holdings.⁸⁶

The government also must show that ample alternative channels of expression remain in spite of the restriction. An alternative channel for expression could entail moving the speech to a nearby, less obtrusive location or allowing the speaker to stay in the area, but to communicate in other ways. If the speaker still can reach the selected target audience through the alternative channel, a court will usually find that ample channels exist.⁸⁷

3. *Narrow Tailoring*

Although a regulation "must be narrowly tailored to serve the government's legitimate, content-neutral interests[,] . . . it need not be the least restrictive or least intrusive means of doing so."⁸⁸ As long as the means chosen by the government "are not substantially broader than necessary to achieve the government's interest, . . . the regula-

⁷⁹ *Id.* (citation omitted) (emphasis added).

⁸⁰ *See id.*

⁸¹ *See Heffron*, 452 U.S. at 647-48.

⁸² *See id.* at 651.

⁸³ *See Clark v. Community for Creative Non-Violence*, 468 U.S. 288, 296 (1984).

⁸⁴ *See Cox v. Louisiana*, 379 U.S. 536, 554 (1965).

⁸⁵ *See Kovacs v. Cooper*, 336 U.S. 77, 87 (1949).

⁸⁶ *Heffron*, 452 U.S. at 650 (internal quotation marks omitted).

⁸⁷ *See id.* at 654-55.

⁸⁸ *Ward v. Rock Against Racism*, 491 U.S. 781, 798-99 (1989).

tion will not be invalid simply because a court concludes that the government's interest could be adequately served by some less-speech-restrictive alternative."⁸⁹ In practice, predicting whether a restriction will be found substantially broader than necessary is difficult because of the fact-specific nature of the inquiry. Courts examining such ordinances consider a variety of issues, such as the types of communication banned, and the times of day and geographical areas in which speech is restricted.

B. Free Speech in the Context of Residential Picketing

In *Frisby v. Schultz*,⁹⁰ the Supreme Court upheld an ordinance designed to stop anti-abortion harassment by prohibiting picketing outside private residences.⁹¹ Controversial picketing outside the Brookfield, Wisconsin home of a doctor who performed abortions prompted the ordinance. Over the course of one month, groups of eleven to forty protestors picketed six times outside the doctor's home.⁹² Although the picketers did not violate local rules prohibiting disorderly conduct and loud noises, neighborhood's complaints led the town board to take action.⁹³ Aware that any exceptions might doom the ordinance for lack of content neutrality, the town leaders passed a relatively broad restriction outlawing any "picketing before or about the residence or dwelling of any individual in the Town of Brookfield."⁹⁴ The ordinance stated that Brookfield residents "enjoy in their homes and dwellings a feeling of well-being, tranquility, and privacy" that ought to be protected and preserved from picketing that "causes emotional disturbance and distress to the occupants . . . [and] has as its object the harassing of such occupants."⁹⁵

Demonstrators filed suit in federal district court under 42 U.S.C. § 1983 after officials notified them that further protests would lead to enforcement of the new ordinance.⁹⁶ Subsequently, the district court held that the ordinance did not meet the narrow tailoring require-

⁸⁹ *Id.* at 800. When reviewing injunctions, a more rigorous standard applies, as the Supreme Court explained in *Madsen v. Women's Health Center, Inc.*, 512 U.S. 753, 765 (1994). Concerned that injunctions might have a more discriminatory potential than statutes, the Court moved beyond mere intermediate scrutiny and declared an injunction must "burden no more speech than necessary to serve a significant government interest." *Madsen*, 512 U.S. at 765.

⁹⁰ 487 U.S. 474 (1988).

⁹¹ *See id.* at 488.

⁹² *See id.* at 476.

⁹³ *See id.*

⁹⁴ *Id.* at 477 (internal quotation marks omitted)

⁹⁵ *Id.* (alteration and omission in original) (internal quotation marks omitted).

⁹⁶ *See id.*

ments for public forum restrictions.⁹⁷ This decision was eventually affirmed by a divided panel of the United States Court of Appeals for the Seventh Circuit,⁹⁸ and then was appealed to the Supreme Court,⁹⁹ which granted certiorari.

The Supreme Court's analysis of the issue¹⁰⁰ began by noting that any picketing restriction must be subjected to "careful scrutiny," but that "[e]ven protected speech is not equally permissible in all places and at all times."¹⁰¹ The Court quickly dispatched the Town of Brookfield's argument that its narrow, residential streets could not be characterized within the standard definition of a public forum.¹⁰² Justice O'Connor wrote, "No particularized inquiry into the precise nature of a specific street is necessary . . . [for streets] held in the public trust [to be] properly considered traditional public fora."¹⁰³ Thus, any picketing ordinance must meet the Court's "stringent standards"¹⁰⁴ for speech restrictions outlined in cases such as *Perry*.¹⁰⁵

As the Brookfield town leaders anticipated, the Court held the broad language of the ordinance content-neutral.¹⁰⁶ The Court then considered whether the ordinance met the *Perry* test under which it must be (1) narrowly tailored to (2) serve a significant governmental interest and (3) leave open ample alternative channels of communication. The Court's response to each of these factors deserves mention.

Starting with the alternative channels requirement, the Court distinguished its analysis from those of the lower courts by insisting on a narrow view of the ordinance's scope. Rather than characterizing the ordinance as banning all picketing in residential areas, the Court focused on the ordinance's language and use of the singular forms of "residence" and "dwelling."¹⁰⁷ According to the Court, this choice of words suggested "that the ordinance is intended to prohibit only picketing focused on, and taking place in front of, a particular residence."¹⁰⁸ Thus, protestors remained able to communicate their message with "[g]eneral marching through residential neighbor-

⁹⁷ See *Schultz v. Frisby*, 619 F. Supp. 792 (E.D. Wis. 1985), *aff'd en banc*, 822 F.2d 642 (7th Cir. 1987), *rev'd*, 487 U.S. 474 (1988).

⁹⁸ See *Schultz v. Frisby*, 822 F.2d 642 (1987), *rev'd*, 487 U.S. 474 (1988).

⁹⁹ See *Frisby v. Schultz*, 484 U.S. 1003 (1988) (postponing the further consideration of jurisdictional question until "the hearing of the case on the merits").

¹⁰⁰ See *Frisby v. Schultz*, 487 U.S. 474 (1988). Justice O'Connor wrote the majority opinion.

¹⁰¹ *Id.* at 479 (alterations in original) (quoting *Cornelius v. NAACP Legal Defense & Educ. Fund, Inc.*, 473 U.S. 788, 799 (1985)).

¹⁰² See *id.* at 480.

¹⁰³ *Id.* at 481

¹⁰⁴ *Id.*

¹⁰⁵ See *supra* notes 72-89 and accompanying text.

¹⁰⁶ See *Frisby*, 487 U.S. at 482.

¹⁰⁷ See *id.*

¹⁰⁸ *Id.*

hoods, or even walking a route in front of an entire block of houses.”¹⁰⁹ The Court determined that ample channels of protest remained open, because the ordinance only foreclosed focused picketing.¹¹⁰

Next, the Court agreed that governments have an interest in protecting the tranquillity and privacy of the home—the unique “last citadel of the tired, the weary, and the sick.”¹¹¹ The Court relied on a line of cases that held that the government can protect unwilling recipients of a message while inside of their homes.¹¹²

Lastly, the Court considered whether the ordinance actually targeted more activity than what it sought to eliminate and thus violated narrow tailoring principles. A complete ban of a particular expressive activity may be permissible, the Court wrote, if the “‘medium of expression itself’” rather than a byproduct of that communication offends the governmental interest.¹¹³ Applying this to Brookfield, the Court contended that the focused picketing did not “seek to disseminate a message to the general public, but to intrude upon the targeted resident, and to do so in an especially offensive way.”¹¹⁴ Furthermore, the Court wrote, the target of such an “offensive and disturbing . . . form of . . . communication . . . is figuratively, and perhaps literally, trapped within the home, and because of the unique and subtle impact of such picketing is left with no ready means of avoiding the unwanted speech” as might be possible away from the home.¹¹⁵ The

¹⁰⁹ *Id.* at 483.

¹¹⁰ *See id.* at 484. The Court agreed with the Town that the ordinance would permit protestors to enter neighborhoods in groups, to go door-to-door explaining their views, to distribute literature through the mail, and to call residents on the telephone. *See id.*

¹¹¹ *Id.* (quoting *Gregory v. Chicago*, 394 U.S. 111, 125 (1969) (Black, J., concurring)).

¹¹² According to the Court, there “is no right to force speech into the home of an unwilling listener.” *Id.* at 485. The Court cited *FCC v. Pacifica Foundation*, 438 U.S. 726 (1978) (holding that offensive radio broadcasts are not protected speech), *Kovacs v. Cooper*, 336 U.S. 77 (1949) (holding that soundtrucks broadcasting at unreasonably loud volumes in residential neighborhoods are not protected speech), *Martin v. Struthers*, 319 U.S. 141 (1943) (holding a complete ban on door-to-door solicitation invalid, but noting that homeowners who indicate an unwillingness to be disturbed could still be protected from intrusion), and *Schneider v. State*, 308 U.S. 147 (1939) (holding that a municipality’s duty to maintain the smooth flow of traffic through its streets permitted it to restrict the distribution of handbills on the streets and sidewalks in support of this decision). In all of these cases, however, messages enter the home more invasively than the apparently peaceful Brookfield picketing. Handbilling involves someone actually entering the homeowner’s property. Radio broadcasts go directly into the unwilling listener’s living room. Obnoxious sound trucks spitting advertisements at high volume could be nearly impossible to ignore. While potentially as harassing as any of these other examples, picketing also can be easy to shut out as long as the protestors remain relatively quiet.

¹¹³ *Frisby*, 487 U.S. at 486 (quoting *City Council v. Taxpayers for Vincent*, 466 U.S. 789, 810 (1984) (upholding a local ordinance banning all signs on public property in order to reduce visual clutter and blight)).

¹¹⁴ *Frisby*, 487 U.S. at 486.

¹¹⁵ *Id.* at 487.

Court thus held that the First Amendment allowed Brookfield to protect this "captive audience" by completely banning this intrusive speech.¹¹⁶

By denying certiorari in *Lawson v. Murray*,¹¹⁷ the Supreme Court recently rejected a challenge to an even broader injunction issued to protect the home of a New Jersey doctor who performs abortions. The Court let stand a restriction that prohibited protestors from demonstrating on the street along Murray's property line, about eighty feet from the house, and limited protesting *beyond* that point to fifteen persons for one hour every two weeks, provided that the protestors give police twenty-four-hour advance notice.¹¹⁸ Although Justice Scalia concurred in the denial of certiorari on separate grounds, he condemned the injunction as "a mockery of First Amendment law."¹¹⁹ Justice Scalia wrote that the lower court's reliance on the "captive audience" exception "may make it difficult to reach the most significant question the case presents: whether prior restraint of speech may be imposed in absence of actual or threatened illegality."¹²⁰

In the case of the residential castle, it appears that even the relatively peaceful picket is too much of an imposition for captive home-dwellers to bear. The question that remains open is whether this strong protective impulse translates to protections of other facets of life farther from home.

III

CURRENT FIRST AMENDMENT CASE LAW APPEARS ONLY PARTIALLY APPLICABLE TO CHURCH PICKETING ORDINANCES

A. Statutes Prohibiting Disruption of Religious Services

Although only a few ordinances restrict picketing outside churches to the degree seen in *Olmer* or *Hogan*, many states have laws banning the disruption of funerals¹²¹ or the disturbance of religious services.¹²² Most of these ordinances are broad and could be read to

¹¹⁶ *Id.* at 487-88.

¹¹⁷ 119 S. Ct. 387 (1998).

¹¹⁸ *See id.* at 387 (Scalia, J., concurring).

¹¹⁹ *Id.*

¹²⁰ *Id.*

¹²¹ *See, e.g.*, MASS. ANN. LAWS ch. 272, § 42 (Law. Co-op. 1998) ("Whoever wilfully interrupts or . . . in any way disturbs a funeral assembly or procession shall be punished."); OKLA. STAT. tit. 21, § 1166 (1997) (stating that anyone who "disturbs, interrupts or disquiets" a funeral assemblage is guilty of a misdemeanor).

¹²² *See, e.g.*, CAL. PENAL CODE § 302(a) (West 1997) (providing for a fine up to \$1000 for anyone who "intentionally disturbs or disquiets any assemblage of people met for religious worship at a tax-exempt place of worship"); N.Y. PENAL LAW § 240.21 (Consol. 1998) (providing that anyone "who makes unreasonable noise or disturbance" within 100 feet of a religious service is guilty of aggravated disorderly conduct); N.C. GEN. STAT. § 14-

encompass picketing outside churches, even when such picketing is relatively peaceful. For instance, the commonly used term *disturb* means “[t]o throw into disorder; to move from a state of rest or regular order; to interrupt a settled state of; to throw out of course or order.”¹²³ “Disturbance of public or religious worship” has been defined as “[a]ny acts or conduct which interfere with the peace and good order of an assembly of persons lawfully met together for religious exercises.”¹²⁴ In *Riley v. District of Columbia*,¹²⁵ the District of Columbia Court of Appeals upheld a statute that outlawed the disturbance of congregations engaged in religious exercise against a charge of vagueness. The court held that “‘disturb’ is a word in common use and has an ordinary meaning which is easily understood by persons of reasonable intelligence.”¹²⁶ Churchgoers in Lincoln likely would contend that the *Olmer* picket at the very least interrupted the settled state of their congregation and interfered with the good order of their assembly, even if much of the disturbance occurred outside the church itself.

The few court cases dealing with religious service and funeral disruption ordinances focus on protestors who actually entered a church during or shortly after services.¹²⁷ However, some of these holdings also include broad language that may apply to pre- or post-service disturbance. For example, in *Hill v. State*¹²⁸ an Alabama court held that a law forbidding disturbance of religious worship applied even when services had concluded and members were leaving:¹²⁹ “[T]here is generally an assemblage of the worshippers before the services commence, and the assemblage continues for a reasonable time after the . . . services terminate. . . .”¹³⁰

Although this language offers supporters of an *Olmer*-style ordinance some ground to argue that freedom of expression around a church may be subject to special limits, police guarding the church in *Hill* did not arrest the defendant until he actually entered the building, placard in hand.¹³¹ In contrast, nowhere in *Olmer* is it alleged

288.4(a)(7) (1997) (stating that anyone who “engages in conduct which disturbs the peace or order at any religious service” commits unlawful disorderly conduct); .

¹²³ BLACK’S LAW DICTIONARY 476 (6th ed. 1990).

¹²⁴ *Id.* at 477.

¹²⁵ 283 A.2d 819 (D.C. 1971).

¹²⁶ *Id.* at 822.

¹²⁷ *See, e.g., State v. Olson*, 178 N.W.2d 230, 231 (Minn. 1970) (upholding conviction of the defendant for disrupting a church service under a statute proscribing the disturbance of another’s “peace and quiet” (interual quotation marks omitted)).

¹²⁸ 381 So. 2d 206 (Ala. Crim. App. 1979).

¹²⁹ *See id.* at 212.

¹³⁰ *Id.*

¹³¹ *See id.* at 209.

that picketers entered the church or even that the picketing could be heard or seen from within the church walls.

B. Cases Dealing with Protests Outside Churches

Many of the cases dealing with church protests are distinguishable from *Olmer* and *St. David's*. In *Olivieri v. Ward*,¹³² the Second Circuit upheld a police order preventing gay rights protestors from demonstrating directly in front of St. Patrick's Cathedral in New York City during the annual Gay Pride March, but allowing the demonstrators to picket on an adjacent street.¹³³ The court held that the temporary clearing of the church sidewalk was a reasonable time, place, or manner restriction,¹³⁴ given the size of the demonstration, the potential for violence due to the event's history, and the nearby counter-demonstration planned by anti-gay protestors.¹³⁵ Furthermore, the court concluded that the side street option gave the demonstrators ample alternative channels for their communication.¹³⁶ Because this case dealt with a large demonstration and only a temporary speech restriction, it is easily distinguishable from the *Olmer* statute, which involved a permanent restriction applied to small groups without a local history of violence.

In another church picketing case, *Action v. Gannon*,¹³⁷ the Eighth Circuit held that protestors could not demonstrate inside a cathedral, but that they had the right "to engage in peaceful pamphleteering and picketing on public property . . . provided, of course, that they do not interfere with those entering or leaving the church."¹³⁸ Arguably dicta, it is difficult to know what the *Action* court meant by *interfere*. This case involved protestors who, on numerous occasions, entered a church with the intention and effect of disrupting and actually halting services.¹³⁹

In *Tompkins v. Cyr*,¹⁴⁰ a federal district court in Texas examined a request for an injunction prohibiting protests outside the home of a beleaguered doctor and his wife who had been the focus of protests at several locations, including their church. In restricting the protestors, the court criticized their activity outside the church:

The Court is troubled by the notion that a person may be subjected to focused picketing at their place of worship. Indeed, the

¹³² 766 F.2d 690 (2d Cir. 1985)

¹³³ See *id.* at 691.

¹³⁴ See *id.* at 694.

¹³⁵ See *id.*

¹³⁶ See *id.*

¹³⁷ 450 F.2d 1227 (8th Cir. 1971).

¹³⁸ *Id.* at 1232-33.

¹³⁹ See *id.* at 1229-31.

¹⁴⁰ 995 F. Supp. 664, 671-73 (N.D. Tex. 1998)

right to engage in quiet and reflective prayer without being subjected to unwarranted intrusion is an essential component of freedom of religion. The government certainly has a significant interest in protecting this important First Amendment right. However, neither party has briefed or argued this constitutional issue.¹⁴¹

Although this language provides support for the proposition that the government has a legitimate interest in protecting areas surrounding churches,¹⁴² it is only dicta.

In *Edwards v. City of Santa Barbara*,¹⁴³ two "sidewalk counselors" opposed to abortion challenged a city ordinance that barred demonstrations within eight feet of entrances to medical clinics and houses of worship (the "driveway" provisions) or within a moving eight-foot "bubble" surrounding approaching and departing patients or worshipers within 100 feet of such entrances.¹⁴⁴ While the district court enjoined enforcement of the ordinance except for the "bubble zone," the Ninth Circuit reversed and upheld only the "driveway" provision for both clinics and churches.¹⁴⁵ In that case, however, the governmental interest focused on parishioners' physical access to churches.¹⁴⁶ A small eight-foot buffer zone allows both access to a doorway as well as nearly every form of communication, including conversation. The *Edwards* ordinance did not prohibit signs or any gatherings outside the narrow eight-foot zone, differentiating itself from the more wide-sweeping ban seen in *Olmer*.¹⁴⁷

IV

THE CONSTITUTIONALITY OF CHURCH PICKETING BANS: COMBINING THE LOWER COURT DECISIONS WITH FREE SPEECH METHODOLOGY

In the absence of case law dealing directly with the question of whether ordinances or injunctions banning picketing outside a church are constitutional, the best guides are *Olmer*, *St. David's*, and Supreme Court cases such as *Frisby*. The next section gives an analysis of picketing restrictions in light of these cases and the First Amendment doctrine described above.

¹⁴¹ *Id.* at 681 n.10.

¹⁴² See discussion *infra* Part IV.B.

¹⁴³ 150 F.3d 1213 (9th Cir. 1998) (per curiam), *cert. denied*, 119 S. Ct. 1142 (1999).

¹⁴⁴ *Id.* at 1215 (internal quotation marks omitted).

¹⁴⁵ *Id.* (internal quotation marks omitted).

¹⁴⁶ See *id.* at 1216-17.

¹⁴⁷ In an older New York state court decision, *Abyssinian Baptist Church of New York v. African Nationalist Movement*, 71 N.Y.S.2d 93 (N.Y. Sup. Ct. 1947), the court granted a preliminary injunction against Sunday church picketing on the grounds that it "tends to a breach of the peace and the sanctity of the day and holy places of assembly and worship." *Id.* at 93. However, the court's reliance on the Book of Exodus as its sole authority for this proposition, see *id.*, limits the precedential value of the holding.

A. The Requirement of Content Neutrality

Like the broad ordinance passed by Brookfield and upheld in *Frisby*,¹⁴⁸ total restrictions on church picketing appear to pass the content-neutrality gauntlet. On its face, such a measure simply bans all types of focused protests regardless of the message conveyed, perhaps subject to specific time periods.

For example, the *St. David's* court quickly decided the injunction before it met the test of content neutrality. Quoting the command from *Madsen* that "the government's purpose [is] the threshold consideration," the *St. David's* court held that the express purpose of the injunction was to prevent potential violence between Westboro and *St. David's* members as occurred during previous encounters.¹⁴⁹ This consideration, the court said, was not viewpoint based.¹⁵⁰

The *Olmer* opinion notes that content neutrality can be determined by evidence showing that officials passed an ordinance in response to specific protestors outside a particular church.¹⁵¹ Such concerns are beyond the scope of this Note which discusses such ordinances in a more general sense and assumes no content-based motives on the part of the legislative decision maker. Given no ulterior motives, an outright ban on all types of picketing in front of any place of worship appears to be content neutral. Such a ban requires no inquiry into the nature or substance of the restricted speech.

B. The Requirement of an Important Governmental Interest

The promulgation of a reasonable time, place, or manner restriction also requires a constitutionally important governmental interest. Both the Lincoln ordinance and the Kansas injunction cite two poten-

¹⁴⁸ See *supra* notes 90-115 and accompanying text.

¹⁴⁹ *St. David's Episcopal Church v. Westboro Baptist Church, Inc.*, 921 P.2d 821, 829 (Kan. Ct. App. 1996) (quoting *Madsen v. Women's Health Ctr., Inc.*, 512 U.S. 753, 763 (1994)).

¹⁵⁰ See *St. David's*, 921 P.2d at 829.

¹⁵¹ While finding the ordinance content-neutral for the purposes of the preliminary injunction, the *Olmer* court noted:

There is evidence in the record that the ordinance at issue was written by the attorney for the Westminster Presbyterian Church; that the attorney, on the church's behalf, was attempting to target and regulate demonstrators who carry anti-abortion signs outside of that particular church; and that the ordinance was drafted broadly for strategic purposes in order to avoid perceived constitutional difficulties. . . . [A] plausible argument can be made that the ordinance's facial content-neutrality is but a pretext for siding with a large and influential church to the detriment of a few protestors. . . .

Olmer v. City of Lincoln, 23 F. Supp. 2d 1091, 1099 (D. Neb. 1988) (footnotes omitted), *aff'd*, No. 98-4112NE, 1999 U.S. App. LEXIS 25528 (8th Cir. Oct. 17, 1999). The court's reasoning presents an interesting problem for other legislative bodies in similar situations. How can legislators assure courts that their facially neutral regulations are in fact neutral even when passed entirely at the insistence of the targets of a specific protest?

tially legitimate governmental interests: protecting children and protecting the right to worship.

1. *Protecting Children*

The district court in *Olmer* held that the main governmental interest at stake was “protecting very young children from being forced to view extremely graphic and quite disturbing images upon their entrance to, or exit from, church.”¹⁵² The court found this interest in protecting children from gruesome signs to be significant,¹⁵³ a point the plaintiff protestors conceded.¹⁵⁴

Like the *Olmer* court, the *St. David's* court wrestled with the issue of whether the protestors' verbal and visual speech barrage deserved less constitutional protection because children were routinely a part of the target audience.¹⁵⁵ The court noted the Supreme Court's holding in *FCC v. Pacifica Foundation*¹⁵⁶ that speech delivered to homes through radio broadcasts was “uniquely accessible to children” in contrast to forms of expression that can be withheld from children without restricting access to adults.¹⁵⁷ Comparing the audience in the case before it to that in *Pacifica*, the *St. David's* court explained that adding children to the mix changed the language that Westboro picketers lawfully could use.¹⁵⁸ “Importantly, as in [*Pacifica*], the audience cannot be otherwise separated out so that the children are not subject to the objectionable speech, absent requiring the children to remain home, which would be an obvious assault upon their free exercise of religion.”¹⁵⁹ The *St. David's* court also reasoned that, as with messages transmitted via broadcast media, church picketing confronts citizens in both a public and private sphere—public space must be traversed to get to the church, and actually engaging in worship is a private activity.¹⁶⁰

Although both the *Olmer* and *St. David's* courts came to the conclusion that protecting children from gruesome language could be an important governmental interest, the interest is a problematic one. While the urge to protect children is strong and understandable, complete protection of a group nearly ubiquitous in society requires simi-

¹⁵² *Id.*

¹⁵³ *See id.* at 1100. The court cited, among other cases, *Sable Communications, Inc. v. FCC*, 492 U.S. 115, 126 (1989) (“[T]here is a compelling interest in protecting the physical and psychological well-being of minors.”).

¹⁵⁴ *See Olmer*, 23 F. Supp. 2d at 1100.

¹⁵⁵ *See St. David's*, 921 P.2d at 830-31.

¹⁵⁶ 438 U.S. 726 (1978) (upholding an FCC order condemning radio station that broadcast comedian's monologue entitled “Filthy Words”).

¹⁵⁷ *St. David's*, 921 P.2d at 831 (quoting *Pacifica*, 438 U.S. at 749).

¹⁵⁸ *See id.*

¹⁵⁹ *Id.*

¹⁶⁰ *See id.*

larly ubiquitous restrictions that sanitize language everywhere. The Supreme Court recognized this concern in *Bolger v. Youngs Drug Products Corp.*¹⁶¹ In *Bolger*, the court struck down a federal statute outlawing the mailing of unsolicited contraceptive advertisements.¹⁶² Noting that *Pacifica's* special governmental interest in regulating broadcast media "does not readily translate into a justification for regulation of other means of communication,"¹⁶³ the Court declared that "[t]he level of discourse reaching a mailbox simply cannot be limited to that which would be suitable for a sandbox."¹⁶⁴ Most recently, the Supreme Court in *Reno v. ACLU*¹⁶⁵ applied strict scrutiny to an Internet anti-pornography measure designed to protect children. The Court found that the medium featured neither the invasive nature nor the spectrum scarcity attributed to broadcasting in *Pacifica*.¹⁶⁶

One could argue with the *St. David's* court by saying that gruesome pictures outside a church that children must attend constitute a medium just as invasive as broadcasting. However, it is important to remember that *Pacifica* and *Reno* involved protecting children from obscene speech, not the political protest speech in question as in *St. David's*.¹⁶⁷ In *Ginsberg v. New York*,¹⁶⁸ the Supreme Court held that material not obscene for adults could still be obscene and restricted as to minors. The *Ginsberg* Court, however, made clear that such material could not be kept from adults, even noting that the challenged statute allowed parents to acquire the material for their children.¹⁶⁹ Therefore, an ordinance simply banning all gruesome speech outside a church would impermissibly restrict both children's and adults' access to the material.

2. *Protecting the Right to Worship or "Religious Privacy"*

Another potential governmental interest involves protecting the right of citizens to worship without undue interference. For example, the Lincoln ordinance provides that it "is intended only to prohibit a certain specified form of disturbance of the peace which arises when

¹⁶¹ 463 U.S. 60 (1983).

¹⁶² *See id.* at 75.

¹⁶³ *Id.* at 74.

¹⁶⁴ *Id.*

¹⁶⁵ 521 U.S. 844 (1997).

¹⁶⁶ *See id.* at 868-70.

¹⁶⁷ Obscene material is generally held to appeal to the prurient interest in nudity, sex, or excretion. *See* MODEL PENAL CODE § 251.4(1) (1980). Although they may be distasteful or perhaps even shocking, the sort of images described in *Olmer* and *St. David's* do not meet the legal definition of obscenity.

¹⁶⁸ 390 U.S. 629 (1968).

¹⁶⁹ *See id.* at 639. For a discussion of various attempts to protect children from obscenity, see Note, *The Cyberworld Cannot Be Confined to Speech That Would Be Suitable for a Sandbox*, 29 SETON HALL L. REV. 286 (1998).

one form of expressive conduct, focused picketing, tends to override another form of expressive conduct, namely the free exercise of religion.¹⁷⁰ The *St. David's* decision also mentioned other governmental interests such as “ensuring the public safety and order,” “promoting the free flow of traffic on public streets and sidewalks,” protecting “property rights” and the “right to worship one’s religion without infringement.”¹⁷¹

The same First Amendment that keeps expression free from governmental interference also protects citizens from any abridgment of the free exercise of their religion.¹⁷² Although there is no state action prohibiting free exercise of religion in the case of a private group picketing a church, in some contexts government *inaction* has the effect of subordinating one right to another. As the Supreme Court wrote in *Kovacs v. Cooper*,¹⁷³ “[t]o enforce freedom of speech in disregard of the rights of others would be harsh and arbitrary.”¹⁷⁴ If the government did nothing to stop private interference with the exercise of constitutional rights, those rights would be worthless.¹⁷⁵ For example, courts have held that the free exercise of religion does not include the freedom to destroy the religious activities of another.¹⁷⁶ Free speech is also subjugated to a defendant’s right to a fair trial by limiting pretrial prejudicial statements.¹⁷⁷ As seen in *Frisby*, the government has a further interest in protecting privacy in that “last citadel of the tired, the weary, and the sick”—the home.¹⁷⁸ These same words could easily apply as well to churches, long sanctuaries for those weary, tired, and sick both physically and spiritually. In fact, these words were originally found in Justice Black’s concurrence in *Gregory v. City of Chicago*,¹⁷⁹ which notes that buildings besides homes, such as schools, courthouses, libraries, and hospitals, require peace and quiet.¹⁸⁰ Similarly, one can argue that churches carry an inherent

¹⁷⁰ *Olmer v. City of Lincoln*, 23 F. Supp. 2d 1091, 1096 (D. Neb. 1998) (quoting Lincoln, Neb., Ordinance 17413 § ICC) (Sept. 21, 1998)) (internal quotation marks omitted), *aff'd*, No. 98-4112NE, 1999 U.S. App. LEXIS 25528 (8th Cir. Oct. 17, 1999).

¹⁷¹ *St. David's Episcopal Church v. Westboro Baptist Church, Inc.*, 921 P.2d 821, 829-30 (Kan. Ct. App. 1996).

¹⁷² “Congress shall make no law . . . prohibiting the free exercise [of religion].” U.S. CONST. amend. I.

¹⁷³ 336 U.S. 77 (1949).

¹⁷⁴ *Id.* at 88.

¹⁷⁵ See Alan E. Brownstein, *Rules of Engagement for Cultural Wars: Regulating Conduct, Unprotected Speech, and Protected Expression in Anti-Abortion Protests—Section II*, 29 U.C. DAVIS L. REV. 1163, 1203-1213 (1996) (arguing that speech may be limited to protect other constitutional rights).

¹⁷⁶ See *Hill v. State*, 381 So. 2d 206 (Ala. Crim. App. 1979).

¹⁷⁷ See *Sheppard v. Maxwell*, 384 U.S. 333, 361-63 (1966).

¹⁷⁸ *Frisby v. Schultz*, 487 U.S. 474, 484 (1988) (quoting *Gregory v. City of Chicago*, 394 U.S. 111, 125 (1969) (Black, J., concurring)).

¹⁷⁹ 394 U.S. 111 (1969).

¹⁸⁰ See *id.* at 118 (Black, J., concurring).

sanctity that approaches close to that of the home, perhaps even surpassing it in the minds of many churchgoers.

While examining the governmental interest in protecting churches from undue disturbances, the *St. David's* court noted the concern in *Frisby* and *Madsen* for residential privacy.¹⁸¹ The court also reflected on the holding of the *Madsen* Court that the government has a significant interest in protecting a clinic's property from focused picketing because it "threaten[ed] both the psychological and physical well-being of a [reproductive] clinic's patients."¹⁸² The *St. David's* court then agreed with the Kansas trial court that one has the right to worship in a peaceful environment, be it one's home or one's house of worship.¹⁸³ Based on this reasoning, the *St. David's* court found that "in addition to the government interest in protecting residential and clinical privacy, the government has a legitimate interest in protecting the privacy of one's place of worship."¹⁸⁴ This right, the court said, does not flow from the free exercise clauses of either the federal or Kansas state constitutions, since both prohibit government action interfering with religious conduct. Rather, "the right of free exercise would be a hollow one if the government could not step in to safeguard that right from unreasonable interference from another private party."¹⁸⁵

Defending this conclusion, the *St. David's* court wrote that the Supreme Court has held that "'religious worship may not be disturbed by those anxious to preach a doctrine of atheism.'"¹⁸⁶ The court then took the leap necessary to apply such cases to the situation before it: "More broadly stated[,] . . . one's religious worship may not be unduly *disturbed* by another anxious to preach a different religious or social philosophy."¹⁸⁷ As this Note points out,¹⁸⁸ one person's disturbance might be another's minor inconvenience. However, demonstrations that actually drive families away from a particular church, as in *Olmer*, are arguably undue disturbances.

The other religion-based mandate in the First Amendment, the Establishment Clause, creates another hurdle that a court must clear before it could declare religious privacy a significant governmental interest.¹⁸⁹ Special restrictions on public areas near churches might

¹⁸¹ See *St. David's Episcopal Church v. Westboro Baptist Church, Inc.*, 921 P.2d 821, 830 (Kan. Ct. App. 1996).

¹⁸² *Id.*

¹⁸³ See *id.*

¹⁸⁴ *Id.*

¹⁸⁵ *Id.*

¹⁸⁶ *Id.* (quoting *Kovacs v. Cooper*, 336 U.S. 77, 86 (1949)).

¹⁸⁷ *Id.* (emphasis added)

¹⁸⁸ See *supra* notes 122-26 and accompanying text.

¹⁸⁹ "Congress shall make no law respecting an establishment of religion . . ." U.S. CONST. amend. I. The Supreme Court found the Establishment Clause applicable to the

suggest the imprimatur of a government favoring religious worship, a chink in the so-called "wall"¹⁹⁰ between church and state.

*Lemon v. Kurtzman*¹⁹¹ articulates the Supreme Court's three-part methodology for determining whether a governmental action violates the Establishment Clause: "First, the statute must have a secular legislative purpose; second, its principal or primary effect must be one that neither advances nor inhibits religion; finally, the statute must not foster 'an excessive government entanglement with religion.'"¹⁹² In a series of later decisions the Court modified the secular-effect prong into an endorsement test,¹⁹³ which held unconstitutional governmental actions that, considering the totality of the circumstances, create in a reasonable person the perception that the state endorses or disapproves of religion.¹⁹⁴ Although its precise contours became uncertain after the Court's splintered decision in *Capitol Square Review & Advisory Board v. Pinette*,¹⁹⁵ the endorsement test still remains a part of the Establishment Clause doctrine. *Lemon* and its progeny thus present an obvious and confusing conflict between the Establishment Clause and the Free Exercise Clause, because any governmental act that protects the free exercise of religion necessarily advances religion in some way.¹⁹⁶

A picketing ban that seeks to minimize harassment around churches seems to meet the first part of the *Lemon* test. Protecting a constitutional right is a secular purpose, even if that right involves religion. This case differs from those in which the Court has found no secular purpose, such as those involving state laws mandating that all classrooms post a copy of the Ten Commandments,¹⁹⁷ requiring

states through the Fourteenth Amendment in *Everson v. Board of Education*, 330 U.S. 1 (1947).

¹⁹⁰ *Everson v. Board of Educ.*, 330 U.S. 1, 18 (1947).

¹⁹¹ 403 U.S. 602 (1971).

¹⁹² *Id.* at 612-13 (quoting *Walz v. Tax Comm'n*, 397 U.S. 664, 674 (1970)) (citation omitted). Although Justice Scalia likened the *Lemon* test to a horror-movie "ghoul," invoked or ignored at the whim of the Court, see *Lamb's Chapel v. Center Moriches Union Free Sch. Dist.*, 508 U.S. 384, 398-99 (1993) (Scalia, J., concurring), the Court has never overruled it.

¹⁹³ See *County of Allegheny v. ACLU*, 492 U.S. 573, 592-93 (1989); *Lynch v. Donnelly*, 465 U.S. 669, 688-92 (1984) (O'Connor, J., concurring).

¹⁹⁴ See *County of Allegheny v. ACLU*, 492 U.S. at 597 (Blackmun, J.).

¹⁹⁵ 515 U.S. 753 (1995). A plurality opinion by Justice Scalia instituted a per se rule, holding that privately funded religious speech in a state-owned but genuinely public forum does not violate the Establishment Clause. See *id.* at 770 (Scalia, J.); see also David Goldberg, *Capitol Square Review and Advisory Board v. Pinette: Beware of Justice Scalia's Per Se Rule*, 6 GEO. MASON L. REV. 1 (1997) (reviewing Establishment Clause jurisprudence and arguing against Justice Scalia's position in *Pinette*).

¹⁹⁶ See *Walz v. Tax Comm'n*, 397 U.S. 664, 668-69 (1970) (noting that either of religion clauses, "if expanded to a logical extreme, would tend to clash with the other").

¹⁹⁷ See *Stone v. Graham*, 449 U.S. 39, 41 (1980) (per curiam).

schools to teach "creation science,"¹⁹⁸ or authorizing teachers to hold one-minute voluntary prayer sessions.¹⁹⁹ The government imposes no subtle requirement to go to church by merely protecting the right of citizens to worship.

Though the question is closer, bans on picketing outside church also appear to pass the second *Lemon* prong, the current endorsement test. In *Corporation of the Presiding Bishop v. Amos*,²⁰⁰ the Court wrote: "A law is not unconstitutional simply because it *allows* churches to advance religion, which is their very purpose. For a law to have forbidden 'effects' under *Lemon*, it must be fair to say that the *government itself* has advanced religion through its own activities and influence."²⁰¹ In the case of an *Olmer*-style ordinance, it is not fair to say that the city government itself is advancing religion because the ordinance only makes it easier for churches to do so. A prohibition on the picketing of churches has less effect on their ability to advance religion than the favorable tax treatment that churches already receive.²⁰² Forcing a protestor to put down a placard as he passes in front of a church, though arguably an infringement on free speech, seems no more of an imposition than forcing that same protestor to fund the church indirectly through higher taxes.²⁰³

Even so, one might assert that a ban on picketing outside churches endorses religion when similar bans do not protect other properties. The plaintiffs in *Olmer* presented a similar argument comparing the Lincoln ban to a town ordinance granting churches free snow removal, which *Barense v. Town of Barrington*²⁰⁴ ruled unconstitutional. If a city cannot push snow away from a church, the plaintiffs argued, it should not have the ability to push citizens away either.²⁰⁵ The difference between snow and people, of course, is that the church

¹⁹⁸ See *Edwards v. Aguillard*, 482 U.S. 578, 596-97 (1987).

¹⁹⁹ See *Wallace v. Jaffree*, 472 U.S. 38, 40, 61 (1985).

²⁰⁰ 483 U.S. 327 (1987).

²⁰¹ *Id.* at 337.

²⁰² See I.R.C. § 170 (1994 & Supp. III 1997) (allowing tax deductions to certain taxpayers for donations to religious organizations); § 501(c)(3) (1994) (exempting from federal income taxation certain organizations, including those "operated exclusively for religious . . . purposes").

²⁰³ For a good example of the argument that tax benefits for churches violate the Constitution, see E.C. Lashbrooke, Jr., *An Economic and Constitutional Case for Repeal of the I.R.C. Section 170 Deduction for Charitable Contributions to Religious Organizations*, 27 DUQ. L. REV. 695, 715-20 (1989) (advocating the repeal of I.R.C. § 170 on constitutional grounds).

²⁰⁴ 955 F. Supp. 151 (D.N.H. 1996).

²⁰⁵ The protestor plaintiffs in *Olmer* also argued that the Lincoln ordinance violated the second *Lemon* prong because it granted governmental power to a church, thereby advancing religion. The plaintiffs compared the situation to that in *Larkin v. Grendell's Den, Inc.*, 459 U.S. 116 (1982), which struck down a Massachusetts statute giving religious institutions the power to veto certain liquor licenses. See *Larkin*, 459 U.S. at 127. The Lincoln ordinance, however, does not give churches power to halt specific demonstrations that they choose to halt; the broad ban covers all picketing.

easily could get rid of snow on its own. Only the government, however, can remove people from public property. Therefore, the government has a responsibility to prevent uses of public property that interfere with the constitutional rights of others. Furthermore, legislators have targeted other sites where focused picketing might impinge on private lives and constitutional rights, such as abortion clinics and residential areas.²⁰⁶ A reasonable person more likely will view these regulations as responses to harassing picket lines rather than endorsement of a particular way of life.

The third prong of the *Lemon* test, which proscribes “excessive entanglements,” involves “examining the character and purposes of the institutions that are benefitted, the nature of the aid that the State provides, and the resulting relationship between the government and the religious authority.”²⁰⁷ In *Agostini v. Felton*,²⁰⁸ the Court treated this prong as simply another aspect of the effect of a governmental action.²⁰⁹ Either way, the test does not disrupt a church picketing ordinance. This test appears primarily to prohibit laws that would require the government to undertake “continuing state surveillance”²¹⁰ or “entangle the state in details of administration.”²¹¹ These picketing bans require no state monitoring to determine whether certain conduct appears religious. The state would act only to remove focused picketing from outside places of worship, a relatively simple task that does not interfere with religious activity.²¹²

Representing further evidence that the *Lemon* test likely would not stop a government from protecting the right to worship, the case law does not appear to cite the Establishment Clause as a bar to the various antifuneral picketing and worship-disturbance statutes in place around the country.²¹³

3. *Protecting a Captive Audience*

Closely related to the idea of “religious privacy,” or privacy in general, is another potential governmental objective: the protection of a captive audience who, like the home dwellers in *Frisby*, cannot retreat from unwanted speech. In *Olmer*, the city argued that the state ought

206 See *supra* note 3; *infra* text accompanying notes 215-38.

207 *Lemon v. Kurtzman*, 403 U.S. 602, 615 (1971).

208 521 U.S. 203 (1997).

209 See *id.* at 223.

210 *Lemon*, 403 U.S. at 619.

211 *Id.* at 615 (quoting *Walz v. Tax Comm'n*, 397 U.S. 664, 695 (1970) (Harlan, J.)) (internal quotation marks omitted).

212 Of course, this action moves the state into the messy landscape of defining *church*, but such territory is not new to the government.

213 See *supra* notes 121-30 and accompanying text.

to be able to protect both a citizen's "religious home" and residential home.²¹⁴

Generally, "[t]he ability of government, consonant with the Constitution, to shut off discourse solely to protect others from hearing it is, in other words, dependent upon a showing that substantial privacy interests are being invaded in an essentially intolerable manner."²¹⁵ In an open, public location, the listener bears the burden of avoiding offensive speech.²¹⁶ As the Supreme Court recognized in *Frisby*, however, listeners cannot always avoid speech.²¹⁷ The private residence in *Frisby* is the prime example of a location where listeners can expect their privacy to defeat an outsider's desire to communicate. The case law is less clear, however, when addressing areas that lie beyond the inherent sanctity of the home.

The Supreme Court first developed the captive audience idea to protect residential areas from sound trucks blasting amplified advertisements.²¹⁸ Generally, a "captive audience" is one that cannot avoid the objectionable speech.²¹⁹ Although the home is perhaps the best example of an environment in which a captive audience may exist, the Court has recognized that "[i]n today's complex society we are inescapably captive audiences for many purposes"²²⁰ and that the captive audience doctrine may apply to locations outside the home.

Although that may be true, the Court has been reluctant to identify other specific places where the captive audience doctrine might operate.²²¹ Besides people in their own homes, the Court has pointed to school children as potential captives, especially in the context of school prayer.²²² In *Madsen v. Women's Health Center, Inc.*,²²³ the Court also noted that "while targeted picketing of the home threatens the psychological well-being of the 'captive' resident, targeted picketing of a hospital or clinic threatens not only the psychological, but also the physical, well-being of the patient held 'captive' by medical circum-

²¹⁴ *Olmer v. City of Lincoln*, 23 F. Supp. 2d 1091, 1102 (D. Neb. 1998) (internal quotation marks omitted), *aff'd*, No. 98-4112NE, 1999 U.S. App. LEXIS 25528 (8th Cir. Oct. 17, 1999).

²¹⁵ *Cohen v. California*, 403 U.S. 15, 21 (1971).

²¹⁶ *See id.* at 21-22.

²¹⁷ *See Frisby v. Schultz*, 487 U.S. 474, 484 (1988).

²¹⁸ *See Kovacs v. Cooper*, 336 U.S. 77, 87 (1949). In banishing obnoxious sound trucks from neighborhoods, the Court reasoned that people in the surrounding homes were "practically helpless" to avoid the cacophonous din. *Id.*

²¹⁹ *Consolidated Edison Co. v. Public Serv. Comm'n*, 447 U.S. 530, 542 (1980) (holding that advertising inserts in customer bill envelopes do not implicate a captive audience because the customers easily could dispose of the objectionable speech).

²²⁰ *Rowan v. United States Post Office Dep't*, 397 U.S. 728, 736 (1970).

²²¹ *See* Jessica M. Karner, Comment, *Political Speech, Sexual Harassment, and a Captive Workforce*, 83 CAL. L. REV. 637, 669 (1995).

²²² *See Bethel Sch. Dist. No. 403 v. Fraser*, 478 U.S. 675, 684 (1986).

²²³ 512 U.S. 753 (1994).

stance."²²⁴ The Court seems to establish a tough test for captivity in *Cohen v. California*,²²⁵ which held that the government may "prohibit intrusion into the privacy of the home," but only when "substantial privacy interests are being invaded in an essentially intolerable manner."²²⁶ However, a few years later in *Erznoznik v. City of Jacksonville*,²²⁷ the Court generalized that "each case ultimately must depend on its own specific facts" and that speech restrictions may be permissible "when the speaker intrudes on the privacy of the home or the degree of captivity makes it impractical for the unwilling viewer or auditor to avoid exposure."²²⁸

The most prominent case that expands the captive audience doctrine outside the home is *Lehman v. City of Shaker Heights*.²²⁹ The *Lehman* Court plurality decided that commuters in a city-owned and -operated streetcar present a captive audience whom the government can protect from certain types of advertising.²³⁰ The plurality held that the commuters rode the streetcar "as a matter of necessity, not of choice"²³¹ and could not avoid viewing advertising placards. The plurality cited "the risk of imposing upon a captive audience."²³² Justice Douglas, the fifth vote, stressed that "the right of the commuters to be free from forced intrusions on their privacy precludes the city from transforming its vehicles of public transportation into forums for the dissemination of ideas upon this captive audience."²³³ Dissenting Justice Brennan, however, contended that riders easily could avert their eyes to avoid the ads.²³⁴ Only a plurality of the Justices joined the lead opinion.²³⁵

Although some courts still refer to *Lehman* for the proposition that captive audiences exist outside the home,²³⁶ the Supreme Court itself has noted that *Lehman* involves merely "the special interests of a government in overseeing the use of its property"²³⁷ and has limited

²²⁴ *Id.* at 768.

²²⁵ 403 U.S. 15 (1971).

²²⁶ *Id.* at 21.

²²⁷ 422 U.S. 205 (1975).

²²⁸ *Id.* at 209 (citation and footnote omitted) (emphasis added).

²²⁹ 418 U.S. 298 (1974).

²³⁰ *See id.* at 304 (Blackmun, J.).

²³¹ *Id.* at 302 (Blackmun, J.) (quoting *Public Utils. Comm'n v. Pollack*, 343 U.S. 451, 468 (1952) (Douglas, J., dissenting)) (internal quotation marks omitted).

²³² *Id.* at 304 (Blackmun, J.).

²³³ *Id.* at 307. (Douglas, J., concurring).

²³⁴ *See id.* at 320 (Brennan, J., dissenting).

²³⁵ *See id.* at 299.

²³⁶ *See, e.g.,* *New York City Unemployed & Welfare Council v. Brezenoff*, 742 F.2d 718, 722 (2d Cir. 1984) (holding that welfare recipients waiting in a welfare office constitute a captive audience); *Resident Advisory Bd. v. Rizzo*, 503 F. Supp. 383, 402 (E.D. Pa. 1980) (deciding that workers on a jobsite constitute a captive audience).

²³⁷ *Consolidated Edison Co. v. Public Serv. Comm'n*, 447 U.S. 530, 540 (1980).

its application. In fact, the Court seems outright reluctant to apply the doctrine to many areas that appear to involve genuine captivity. For instance, the Supreme Court has not ruled that employees at their worksite form a captive audience.²³⁸ It makes little sense to reason that commuters on a streetcar escape captivity once they arrive at work, which necessitated the streetcar ride in the first place. Perhaps the Supreme Court would rather forget about *Lehman*, and read the language of *Frisby* as hinting that the doctrine may not apply outside the home.²³⁹

Where this stance leaves the application of the captive audience doctrine to protests outside churches is uncertain. If the current Supreme Court were to expand the captive audience doctrine beyond the four walls of the home, churches present one of the strongest cases.

First, churches potentially present a high degree of real captivity. Many religions require or strongly encourage in-church worship on specified days and at specified times.²⁴⁰ The congregation and spiritual leader not only might look upon one's absence from church with disfavor, but may even regard it as a punishable sin.²⁴¹ For the true believers of many religions, whether and where to attend church are matters of less flexibility than virtually any other activity. When protestors surround a house of worship, the faithful do not have the option of avoidance. The unwilling listener simply must endure the offensive speech.

Second, churches and homes share many similar characteristics. As with homes, people go to churches voluntarily to exercise their constitutional rights. Like homes, churches traditionally possess sanctity as a place of refuge where the weary might come for solace and guidance. One Lincoln reverend stated in an *Olmer* defense affidavit that "[p]art of our religion teaches our members that the Church is their spiritual home, a sacred place, and a place to which they can retreat to escape from the trials and tribulations of their daily pur-

²³⁸ See Karner, *supra* note 221, at 669.

²³⁹ See *id.* at 670. As the *Frisby* Court noted, "that we are often captives outside the sanctuary of the home and subject to objectionable speech . . . does not mean we must be captives everywhere." *Frisby v. Schultz*, 487 U.S. 474, 484 (1988) (omission in original) (quoting *Rowan v. United States Post Office Dep't*, 397 U.S. 728, 738 (1970)) (internal quotation marks omitted).

²⁴⁰ See 3 THE ENCYCLOPEDIA OF RELIGION 488 (Mircea Eliade ed., 1987).

²⁴¹ The *Catechism of the Catholic Church*, for instance, makes it clear that Sunday worship is integral to the dictates of the Third Commandment, see *Exodus* 20:8-10, and quotes from the *Codex Iuris Canonici*: "On Sundays and other holy days of obligation the faithful are bound to participate in the Mass." CATECHISM OF THE CATHOLIC CHURCH 526 (1994) (quoting 1983 CODE c.1247) (internal quotation marks omitted).

suits.²⁴² Many commentators agree that worship is a uniquely private activity.²⁴³

Nevertheless, the *Olmer* court refused to extend the *Frisby* captive audience doctrine to churches, declaring that “[i]t is at best an imperfect analogy to suggest that adults and children attending church are similar to the residents of a home.”²⁴⁴ Courts may avoid this extension, because a liberal application of the doctrine potentially could lead to overly excessive speech regulation. As the Supreme Court often notes, people in modern society are captives in some way almost every minute of the day, forced into certain places by the demands of time, age, health, and socioeconomic status.²⁴⁵ Besides the aforementioned schoolhouse, workplace, and doctor’s office, several other modern “prisons” may require one’s presence despite the existence of a picket—the welfare office, courthouse, drivers’ license renewal office, and city hall. Depending on one’s line of work or other factors, one even might have to visit these places regularly. Yet, extending the captive audience doctrine to each of these sites and many others we might contemplate would intolerably limit free expression.

Of course, the application of the captive audience doctrine to churches does not necessitate its extension everywhere. “Church” is no easier to define than religion itself, but this conceptual ambiguity does not prevent the government from giving churches special tax treatment.²⁴⁶ The analogy between churches and homes may be imperfect, as the *Olmer* court suggested, but it is conceivable that a different court could use this analogy as the basis for extending the captive audience doctrine to church picketing.

C. The Requirement of Ample Alternative Channels

Whether a particular ordinance restricting expression outside a church leaves ample speech alternatives is a highly fact-specific question. In *City of Ladue v. Gilleo*,²⁴⁷ the Supreme Court held that even regulations merely shifting the time, place, or manner of expression must leave ample alternative channels of communications.²⁴⁸ The fact that a speaker simply could communicate somewhere else is not

²⁴² Defendants’ Brief in Opposition to Plaintiffs’ Motion for a Preliminary Injunction at 11, *Olmer v. City of Lincoln*, 23 F. Supp. 2d 1091 (D. Neb. 1998) (No. 4:CV98-3311) (alteration in original) (quoting affidavit of Rev. Lauren D. Ekdahl).

²⁴³ See, e.g., ROBERT N. BELLAH ET AL., *HABITS OF THE HEART: INDIVIDUALISM AND COMMITMENT IN AMERICAN LIFE* 219-49 (updated ed. 1996) (describing how many aspects of religion in America are private).

²⁴⁴ *Olmer*, 23 F. Supp. 2d at 1102.

²⁴⁵ See *supra* note 220 and accompanying text.

²⁴⁶ See I.R.C. § 501(c)(3) (1994).

²⁴⁷ 512 U.S. 43 (1994).

²⁴⁸ See *id.* at 56.

enough to satisfy the ample alternatives element.²⁴⁹ The requirement seeks to ensure that speech restrictions do not “ha[ve] the effect of entirely preventing a ‘speaker’ from reaching a significant audience with whom he could not otherwise lawfully communicate.”²⁵⁰ In other words, a speaker’s right to convey a message to certain groups must receive protection along with the message itself.

While cases such as *United States v. Grace*²⁵¹ address the constitutional protection of signs and banners on public sidewalks,²⁵² the Court considers a wide range of leaflets, actual speech, and more individualized methods of communication to be “ample alternatives.”²⁵³ For example, the *St. David’s* court touched only briefly on the alternative channels requirement, noting that Westboro made no showing that alternative avenues left untouched by the injunction, such as handing out leaflets, engaging in limited picketing, picketing elsewhere, or using mailings, would give the defendant “insufficient other means to communicate its message.”²⁵⁴

The Lincoln ordinance forced protestors to move their placards across the street, but allowed them to distribute leaflets on the sidewalk directly in front of the church.²⁵⁵ Protestors also could speak to churchgoers from the sidewalk, as long as this speech did not trigger disturbance-of-the-peace laws.²⁵⁶ The *Olmer* court’s opinion granting a preliminary injunction against the Lincoln ordinance does not reach the issue of ample alternative channels.²⁵⁷ The court indicated, however, that because the church adjoins a busy, four-lane roadway, a prohibition on signs removes any reasonable means for demonstrators

²⁴⁹ See *Schneider v. State*, 308 U.S. 147, 163 (1939) (“[O]ne is not to have the exercise of his liberty of expression in appropriate places abridged on the plea that it may be exercised in some other place.”).

²⁵⁰ *United States v. O’Brien*, 391 U.S. 367, 388-89 (1968) (Harlan, J., concurring). The Court seems to go even further in cases such as *Gilleo*, in which it found a restriction unconstitutional because, among other reasons, alternative channels of communication would not reach the intended audience “nearly as well.” *Gilleo*, 512 U.S. at 57.

²⁵¹ 461 U.S. 171 (1983).

²⁵² See *id.* at 183-84 (striking down a statute prohibiting the display of flags or banners on the grounds of the Supreme Court building).

²⁵³ See, e.g., *Clark v. Community for Creative Non-Violence*, 468 U.S. 288, 295 (1984) (upholding a ban on sleeping in a park against protestors seeking to bring attention to homelessness because the protestors still could communicate their message in ways such as what the dissent calls “feigned sleeping”); *Heffron v. International Soc’y for Krishna Consciousness, Inc.*, 452 U.S. 640, 654-55 (1981) (upholding a state rule mandating that the sale or distribution of merchandise on a fairground take place in specific, fixed locations).

²⁵⁴ *St. David’s Episcopal Church v. Westboro Baptist Church, Inc.*, 921 P.2d 821, 832 (Kan. Ct. App. 1996).

²⁵⁵ See *Olmer v. City of Lincoln*, 23 F. Supp. 2d 1091, 1095 (D. Neb. 1998), *aff’d*, No. 98-4112NE, 1999 U.S. App. LEXIS 25528 (8th Cir. Oct. 17, 1999).

²⁵⁶ See *id.*

²⁵⁷ The court found that the ordinance was not narrowly tailored to achieve the governmental interest in question and thus declined to examine this issue in detail. See *id.* at 1103.

to communicate from the sidewalks around the church to passing motorists.²⁵⁸ Furthermore, according to the court the application of the same rule to a church such as St. Patrick's Cathedral in New York City would bar protest from a large area during fifty-three masses each week.²⁵⁹

Although demonstrators certainly could not distribute leaflets to motorists speeding past the church, nothing in the Lincoln ordinance prevents pickets just outside the specified church area. Presumably, drivers would see signs on an adjacent block as easily as they would see those in front of the church. So long as churches were dispersed within the community, there would be plenty of sidewalk space for protestors to picket under the potential observation of motorists. As for the target audience itself, the *Olmer* ordinance gives demonstrators ample alternative methods of communicating their message either from across the street with placards or on the church sidewalk with leaflets and conversation.

D. The Requirement of Narrow Tailoring

As stated above, courts prohibit restrictions on speech that are "substantially broader than necessary to achieve the government's interest";²⁶⁰ in the case of injunctions, restrictions must "burden no more speech than necessary to serve a significant government interest."²⁶¹ The *St. David's* court failed to reach this issue in depth, considering the facts insufficient to judge whether the buffer zone in question was overbroad.²⁶² Articulating the need for an evidentiary hearing, it concluded that buffer zone injunction cases involve too many unique facts simply to rely on holdings from other courts regarding the appropriate size and shape of the buffer zone.²⁶³

The ordinance at issue in *Olmer* prohibited all signs on public property within fifty feet of religious premises during specified times before, during, and after services.²⁶⁴ As the *Olmer* court pointed out, this language not only prohibits disruptive protests, but also bans a person "from passively holding a sign or banner that does not frighten children in any way";²⁶⁵ it would outlaw "a Catholic priest . . . displaying to his willing flock on the cathedral sidewalk shortly before mass a

²⁵⁸ See *id.*

²⁵⁹ See *id.*

²⁶⁰ *Ward v. Rock Against Racism*, 491 U.S. 781, 800 (1989).

²⁶¹ *Madsen v. Women's Health Ctr., Inc.*, 512 U.S. 753, 765 (1994).

²⁶² See *St. David's Episcopal Church v. Westboro Baptist Church, Inc.*, 921 P.2d 821, 832 (Kan. Ct. App. 1996).

²⁶³ See *id.*

²⁶⁴ See *Olmer*, 23 F. Supp. 2d at 1095.

²⁶⁵ *Id.* at 1101.

sign that states: 'Abortion is Wrong.'²⁶⁶ Yet, the ordinance would not stop protestors from handing children graphic pictures of aborted fetuses.²⁶⁷ The *Olmer* court concluded that the ordinance therefore failed in two respects: it "bans speech that is harmless to very young children, yet potentially significant to adults, while failing to prohibit other speech . . . that may terrorize a child."²⁶⁸

Although one might argue that parents can keep their children away more easily from offensive leaflets than from large placards, it is indisputable that the *Olmer* ordinance burdens a substantial amount of harmless and even desirable speech. The situation highlights a problem that many city councils have to face when trying to grapple with this issue: an attempt to pass an all-inclusive ordinance to avoid being labeled a content-based restriction will run headlong into the narrow-tailoring requirement. City leaders in *Olmer* contended that they simply did the best they could,²⁶⁹ but the court countered with two arguments of its own.

First, according to the court, the goal of protecting children may excuse a content-based restriction.²⁷⁰ Thus, a city may have the power to ban only gruesome signs and communication that might scare children without burdening other speech. Secondly, the *Olmer* court reasoned that a more limited buffer zone, such as that upheld in *Edwards*,²⁷¹ could shield children from the pictures while allowing demonstrations on most of the sidewalk outside the church.²⁷² As this Note discussed earlier,²⁷³ however, *Edwards* involves only an eight-foot buffer zone around church entrances. Such a narrow picket-free space likely would not protect children from offensive signs. Although this small buffer zone does not serve a governmental interest, the reference to *Edwards* shows that some type of buffer zone might be found constitutional, so long as it meets the court's objections regarding overbreadth.

The extension of *Frisby's* narrow tailoring rationale likely would not assuage court's concerns with broad ordinances. The *Frisby* Court noted that complete bans still might be narrowly tailored "if each activity within the proscription's scope is an appropriately targeted

²⁶⁶ *Id.*

²⁶⁷ *See id.*

²⁶⁸ *Id.*

²⁶⁹ *See id.* at 1102.

²⁷⁰ *See id.* at 1100 (citing *Reno v. ACLU*, 521 U.S. 844, 875 (1997) ("[W]e have repeatedly recognized the governmental interest in protecting children from harmful materials.")).

²⁷¹ *See Edwards v. City of Santa Barbara*, 150 F.3d 1213, 1215-16 (9th Cir. 1998) (per curiam).

²⁷² *See Olmer*, 23 F. Supp. 2d at 1102-03.

²⁷³ *See supra* text accompanying notes 143-47.

evil.”²⁷⁴ In other words, such a complete prohibition may be necessary when “the medium of expression itself” creates the evil.²⁷⁵ In the case of residential picketing, the *Frisby* Court held that targeting a captive audience in a home is such an “offensive and disturbing . . . form of . . . communication” that it becomes an evil worthy of a complete yet narrowly tailored ban.²⁷⁶

Although the captive audience doctrine speaks to the issue of the government’s permissible interest in protecting residential (or church) privacy, in this context the doctrine seems to work more like the secondary effects doctrine;²⁷⁷ the secondary effects doctrine allows the banishment of some evil to save an otherwise content-specific or overbroad ordinance from unconstitutionality. The question becomes whether focused picketing around a church is so offensive and disturbing as to constitute an evil that must be rooted out even if desirable communication is destroyed along the way.

The *Olmer* court apparently thought not, and ample reasons exist to support that conclusion. The language of *Frisby* specifically addresses residential listeners and seems to tap directly into the home-as-castle idea, stating that even a solitary picketer could “invade residential privacy” like a “stranger” who “lurks outside.”²⁷⁸ A change in facts, the Court says, might prompt a different outcome—for instance, when someone’s home provides the forum for a public meeting.²⁷⁹ Even if the *Frisby* opinion does encompass a wider variety of venues, it does not seem prudent to allow the government to label so easily entire classes of speech evil and thus eliminate the good speech with the bad.

Although one can argue for its application, the secondary effects doctrine itself also fails to save church picketing bans for similar reasons. In *City of Renton v. Playtime Theatres, Inc.*,²⁸⁰ the Supreme Court announced the idea of secondary effects in upholding a zoning ordinance that prohibited adult movie theaters from locating within 1000 feet of a church, park, school, or residential zone.²⁸¹ Although the ordinance appeared content-based on its face, the Court concluded instead that it was content-neutral because the government’s “‘predominate concerns’ were with the secondary effects of adult thea-

²⁷⁴ *Frisby v. Schultz*, 487 U.S. 474, 485 (1988).

²⁷⁵ *Id.* at 486 (quoting *Members of the City Council v. Taxpayers for Vincent*, 466 U.S. 789, 810 (1984)) (internal quotation marks omitted).

²⁷⁶ *Id.* at 487.

²⁷⁷ See *supra* text accompanying notes 263-68.

²⁷⁸ *Frisby*, 487 U.S. at 487 (quoting *Carey v. Brown*, 447 U.S. 455, 478-79 (1980) (Rehnquist, J., dissenting)).

²⁷⁹ See *id.* at 488.

²⁸⁰ 475 U.S. 41 (1986).

²⁸¹ See *id.* at 47.

ters," such as increased crime and lower property values, rather than with the theaters themselves.²⁸² Even though the ban eliminated adult establishments from ninety-five percent of the city,²⁸³ the Court held that reasonable alternative channels for the communication remained.²⁸⁴

Although the Court has never addressed *Renton's* applicability to non-sexually explicit communication, a plurality in *Boos v. Barry*²⁸⁵ appeared to extend the secondary effects doctrine to political speech.²⁸⁶ *Boos* deals with a restriction on speech critical of foreign governments outside their embassies.²⁸⁷ While a majority of the Court found the restriction unconstitutional,²⁸⁸ at least six Justices may have thought that analysis under the secondary effects doctrine was relevant.²⁸⁹

Some lower courts have shown greater reluctance to apply the secondary effects doctrine to political speech,²⁹⁰ and the landscape remains hazy. The Third Circuit wrote in *Rappa v. New Castle County*²⁹¹ that it had "some doubts" about extending the doctrine and struck down a Delaware law that exempted advertisements for local cities, industries, and meetings from regulations banning all signs within twenty-five feet of state highways.²⁹² The *Rappa* court noted in its decision that a Supreme Court majority "has never explicitly applied the analysis to political speech."²⁹³ However, in a case regarding a Maine statute that prevented door-to-door solicitation by police officers, the First Circuit mentioned that the law might be content-neutral because it sought to prevent secondary effects such as implied coercion.²⁹⁴

In the context of residential picketing, at least a few courts have combined *Frisby* and *Renton* to devise a rationale that allows some pickets but not others. The Rhode Island Supreme Court cited *Frisby* and *Renton* in upholding an antipicketing ordinance that had been passed in reaction to abortion protests and excepted from prohibition pro-

282 *Id.*

283 *See id.* at 64 (Brennan, J., dissenting).

284 *See id.* at 50.

285 485 U.S. 312 (1988).

286 *See id.* at 321 (O'Connor, J.).

287 *See id.* at 315.

288 *See id.* at 329.

289 *See* Susan H. Williams, *Content Discrimination and the First Amendment*, 139 U. PA. L. REV. 615, 633 (1991).

290 *See* David L. Hudson, Jr., *The Secondary Effects Doctrine: "The Evisceration of First Amendment Freedoms,"* 37 WASHBURN L.J. 55, 93 (1997).

291 18 F.3d 1043 (3d Cir. 1994).

292 *See id.* at 1069.

293 *Id.*

294 *See* *Auburn Police Union v. Carpenter*, 8 F.3d 886, 893 n.9 (1st Cir. 1993). The court mentioned this idea only in a footnote, because neither litigant raised the argument.

tests related to activities inside a residence.²⁹⁵ Mentioning *Renton*, a New Jersey court in *Murray v. Lawson*²⁹⁶ allowed an injunction to stand, even though it had the effect of prohibiting a particular group of anti-abortion demonstrators from picketing in front of a doctor's residence.²⁹⁷ Similarly, in *Valenzuela v. Aquino*,²⁹⁸ a Texas court found that an injunction dealing with the secondary effects of picketing did not violate the content-neutrality requirement.²⁹⁹

Courts are less likely to embrace *Renton* as a rationale outside the context of focused residential picketing. For example, the District of Columbia Circuit did not accept as a constitutional secondary effect "the threat of listeners' violent reaction" to a Ku Klux Klan march.³⁰⁰ The court pointed to *Forsyth County v. Nationalist Movement*,³⁰¹ which held that "[l]isteners' reaction to speech is not a content-neutral basis for regulation."³⁰² Secondary effects of the type discussed in *Renton*, the court said, do not relate to the expressive activity itself.³⁰³

Although some precedent exists to support a secondary effects defense for picketing regulations, the generally lukewarm court reaction indicates that this doctrine might not justify a restriction like the Lincoln ordinance in *Olmer*. After all, judges have good reason to limit any new applications of the doctrine. Would-be censors are quick to invoke the secondary effects doctrine in their attempt to secure for their cause the far less rigorous scrutiny of content-neutrality.³⁰⁴ Without a bright-line limitation, such as the original *Renton* zoning control of adult businesses, this expansive doctrine could subsume virtually every form of expression.

295 See *Town of Barrington v. Blake*, 568 A.2d 1015, 1019-20 (R.I. 1990).

296 624 A.2d 3 (N.J. Super. Ct. App. Div. 1993), *aff'd as modified*, 649 A.2d 1253 (N.J. 1994).

297 See *id.* at 13.

298 800 S.W.2d 301 (Tex. Ct. App. 1990), *aff'd in part and rev'd in part*, 853 S.W.2d 512 (Tex. 1993).

299 See *id.* at 305.

300 *Christian Knights v. District of Columbia*, 972 F.2d 365, 374 (D.C. Cir. 1992).

301 505 U.S. 123 (1992).

302 *Id.* at 134.

303 See *Christian Knights*, 972 F.2d at 373.

304 See, e.g., Christopher M. Kelly, Note, "The Spectre of a 'Wired' Nation": Denver Area Educational Telecommunications Consortium v. FCC and First Amendment Analysis in Cyberspace, 10 HARV. J.L. & TECH. 559, 637 (1997) (suggesting that the so-called "V-chip" television device could be constitutional because it would prevent the secondary effects); William L. Mitchell, II, Comment, "Secondary Effects" Analysis: A Balanced Approach to the Problem of Prohibitions on Aggressive Panhandling, 24 U. BALT. L. REV. 291, 322-23 (1995) (arguing that the secondary effects doctrine could apply to the battle against "aggressive panhandling").

V

CONSTRUCTING A CONSTITUTIONAL BAN ON
CHURCH PICKETING

Preceding sections of this Note discussed the inadequacies of specific case law surrounding bans on communication outside churches, but reasoned that standard time, place, and manner analysis generally could apply. Part IV.A demonstrated that the requirement of content neutrality presents no problems for such broad ordinances. Part IV.B argued that the protection of children (as in the *Olmer* decision) and the protection of "religious privacy"—if it does not violate the Establishment Clause—represent the most credible governmental interests at stake in these ordinances. As Part IV.C showed, the requirement of ample alternative channels for communication presents no barrier to these ordinances, depending on the specific language in question. Perhaps the most difficult requirement for local governments to meet in drafting such an ordinance is that of narrow tailoring, as Part IV.D pointed out.

A. Traditional Narrowly Tailored Schemes Appear Either
Ineffective or Undesirable

With the demise of the Lincoln restriction in *Olmer*, the question remains whether any such ban can be written to meet the concerns outlined by the *Olmer* court, and if so, whether the result would be constitutionally desirable. The answer is probably *no* on both counts.

Before deciding whether a restriction is narrowly tailored to serve a significant governmental interest, one must first specify that interest. In *Olmer*, the court and the authors of the ordinance appeared to focus on the protection of children, as discussed above. After making this determination, the *Olmer* court easily refuted the city's rationale by stating obvious ways in which the ordinance was both over- and underinclusive.³⁰⁵ Attacking the problem from either of these angles only exacerbates the deficiencies on the other side of the equation. An ordinance that makes communication restrictions within the buffer zone more absolute risks violating the ample-alternatives requirement. Changing the restriction so that it covers less speech or a smaller geographical area erodes any protection of children the government may have hoped to create.

As the *Olmer* court suggested, it may be possible to abandon the goal of content neutrality and ban only those images that would offend children. However, the ubiquity of children presents a problem. The tactic of "protecting children" plays to adults' sympathies, but po-

³⁰⁵ See *Olmer v. City of Lincoln*, 23 F. Supp. 2d 1091, 1101 (D. Neb. 1998), *aff'd*, No. 98-4112NE, 1999 U.S. App. LEXIS 25528 (8th Cir. Oct. 17, 1999).

tentially leaves everyone else with fewer opportunities to contribute to the marketplace of ideas. Even narrowly tailored restrictions, if applicable to all the environments in which one is likely to encounter children, quickly could result in a narrowing of speech everywhere. The *Olmer* court cited *Reno v. ACLU*³⁰⁶ for the proposition that the government has an interest in protecting children from harmful materials,³⁰⁷ but that case addresses communication delivered to private homes, not communication encountered on a public sidewalk.³⁰⁸

Other governmental interests mentioned earlier in this Note hold several advantages over the protection of children. Protecting religious privacy or captive audiences entering churches allow restrictions through the use of content-neutral language. However, problems remain. If protecting religious privacy or the right of individuals to worship as they please constitutes the government's primary interest, practicality requires one eventually to revisit the issue of protecting children. Nothing about the relatively peaceful picketing in *Olmer* deters adults from attending a church except for the protest's potentially detrimental effect on their children.

The language of the captive audience doctrine, on the other hand, is more expansive, focusing on the psychological effect that even a solitary, peaceful picketer can create.³⁰⁹ Although this expansiveness apparently fits the bill for banning picketing outside churches, that same characteristic makes extending the doctrine undesirable. One could argue that churches fundamentally differ from other places that hold captive audiences, but enough similarities exist that the recognition of nonresidential captivity could allow unwanted camel noses under the free speech tent.

B. An Alternative? Preventing Coercion

A better way to protect both churchgoers and First Amendment values focuses on the true heart of the matter: coercion. Targeted protesting can cause audience members to adopt outwardly a different viewpoint on some public issue, not because of the idea's merit, but because of the coercive pressure the protest itself creates.³¹⁰ In

³⁰⁶ 521 U.S. 844 (1997).

³⁰⁷ See *Olmer*, 23 F. Supp. 2d at 1101.

³⁰⁸ See *Reno*, 521 U.S. at 849-53. It is also worth noting that the Court struck down the legislation in question despite concerns about protecting children. See *id.* at 875.

³⁰⁹ See *supra* Part IV.B.3.

³¹⁰ See Anne D. Lederman, Comment, *Free Choice and the First Amendment or Would You Read This If I Held It in Your Face and Refused to Leave?*, 45 CASE W. RES. L. REV. 1287, 1299 (1995). Lederman examined Supreme Court cases involving targeted protests in the labor relations, abortion clinic, schoolhouse, and courthouse settings. See *id.* at 1299-1321. She concluded that while regulating speech according to its coercive value seems to violate the First Amendment, the Court seemed willing to accept coerciveness as a valid factor when it

the case of focused picketing around a church, coercion obviously exists when members of the congregation must alter or abandon the way in which they treat their constitutional rights.

In his *Frisby* dissent, Justice Brennan argued that certain activities related in the record of the case, such as the large number of protesters, the shouting and name calling, the trespassing, and the blocking of exits, seemed coercive.³¹¹ Brennan termed these examples "intrusive and coercive abuses"³¹² of free speech rights and stated that the government can neutralize such abuses through restrictions. "It is the intrusion of speech into the home or the unduly coercive nature of a particular manner of speech around the home that is subject to more exacting regulation."³¹³ Justice Brennan argued that a regulation is not narrowly tailored under *Vincent*, if it could be written to eliminate coercive elements of the expression without completely banning the picketing.³¹⁴ His dissent contended that a government can constitutionally regulate the number of picketers, the hours of picketing, and the noise level, thereby "neutraliz[ing] the intrusive or unduly coercive aspects of picketing around the home,"³¹⁵ yet leaving room for free speech.

The captive audience theory accepts the idea of protecting the targets of protests from the coercive speech. For Justice Brennan, however, the *Frisby* majority went too far by allowing the notion that a solitary demonstrator—the lurking stranger—induces a psychological and thus coercive reaction.³¹⁶ This weakness of the captive audience doctrine—the blind notion that any home-bound captive audience faces coercion regardless of a protest's characteristics—is perhaps why courts refuse to extend it beyond homes. The standard captive audience theory simply encompasses too much behavior, concentrating on the *status* of the audience and assuming the *effect*.

Whether coercion actually occurs logically depends on the nature of both the protest and the audience. In many environments, it would seem to take more than the solitary picketer to produce any sort of undue coercion. For example, it is doubtful that the hapless defendant in *Hogan* looking to "up [his] ante" of Christians coerced anyone, even if his conduct had fallen under the court's definition of "focused picketing."³¹⁷ On the other hand, the various affidavits and

invades "the target's privacy interests in retaining free choice in matters related to the protesters' activity." *Id.* at 1322.

³¹¹ See *Frisby v. Schultz*, 487 U.S. 474, 494 (1998) (Brennan, J., dissenting).

³¹² *Id.* (Brennan, J., dissenting).

³¹³ *Id.* at 492-93 (Brennan, J., dissenting).

³¹⁴ See *id.* at 493-94 (Brennan, J., dissenting).

³¹⁵ *Id.* at 494 (Brennan, J., dissenting).

³¹⁶ See *id.* at 495-96 (Brennan, J., dissenting).

³¹⁷ *City of Prairie Village v. Hogan*, 855 P.2d 949, 951 (Kan. 1993).

public statements of parents in the *Olmer* case demonstrate that larger groups are better at coercing children and thereby parents. According to Justice Brennan, a “carefully crafted ordinance” should eliminate the coercive aspects of such pickets without eliminating free speech altogether.³¹⁸

It is probably true that a permissible restriction designed to stop such coercion may look like the regulation that the *Olmer* court envisioned when imagining a more narrowly tailored ordinance. Given the fact that children succumb to coercion much more easily than adults, in the end a ban with the stated goal of stopping coercion may look like a ban with the goal of “protecting children,” but with one important difference: the basis of the restriction would not rest upon the problematic justification of protecting children everywhere, protecting all captive audiences, or eliminating all-pervasive secondary effects. Most importantly, this shift in focus at least would require plaintiffs to make a showing that someone faces coercion from demonstrators. This probably would not be possible, for instance, if the protestors in *Olmer* merely handed graphic leaflets to adults and did not communicate with children.

A coercion doctrine could run into expansiveness problems of its own. For example, parading demonstrators could be said to coerce pedestrians from crossing the street at a particular corner. Abortion protestors carrying graphic signs outside a doctor’s favorite barber shop could frighten children, requiring parents to find another hairstylist. These cases are distinguishable, however, because they do not involve the same type of constitutional rights as *Olmer*. There is a difference between conduct that forces others to abandon or to significantly alter the way in which they exercise constitutional religious rights and the unavoidable aspects of living in a community alongside people with whom you may disagree.³¹⁹ Any potential balancing test would have to measure the constitutional importance of the implicated rights.

The coercion doctrine that Justice Brennan described in his *Frisby* dissent therefore provides an alternative rationale for banning exactly what the city in *Olmer* wanted to restrict without overburdening protestors’ free speech rights. The resulting ordinance still must be narrowly tailored to meet the goal of reducing coercion and further protecting constitutional expression. In a time when demonstrators mount often-harassing pickets in attempts to persuade others to

³¹⁸ *Frisby*, 487 U.S. at 496 (Brennan, J., dissenting).

³¹⁹ Another idea is to restrict picketing to the site of the activity under protest, but this argument does not resolve the issue. Protestors could claim that they are not picketing a doctor in a church, but rather they are protesting that the church allows such a person within its walls. Thus, any site could become the site of an activity under protest.

change their viewpoint, focusing on the true evil—coercion—would provide effective protection for the rights of citizens on either side of the picket line. Curtailing coercion would serve society better than either governmental inaction when the speech fails to fall within existing categories, or governmental overstepping should a court broaden existing doctrines.

CONCLUSION

The effectiveness of focused protesting wherever a doctor who performs abortions travels in the community is great enough that the tactic is not likely to disappear. Even if such protests cause no social change, they generate publicity as witnessed in both *Olmer* and *St. David's*.³²⁰ As legislatures attempt to solve the problems that arise when one form of expression, such as picketing, infringes on other forms of expression, courts must balance carefully the opposing First Amendment freedoms. This wariness is apparent in the *Olmer* decision, where the court discussed problems with the city ordinance under the current doctrine. The court in *St. David's*, on the other hand, was perhaps too quick to agree that the injunction under review could constitute a reasonable time, place, and manner restriction. However, neither solution is satisfactory. Rather than an outcome-determinative forum analysis, a more flexible analysis based on the ideas of coercion, as expressed by Justice Brennan in *Frisby*, would lend itself to a careful weighing of the constitutional interests involved in these questions while continuing to protect vigorously the freedom of speech.

³²⁰ On a regular basis Fred Phelps (no relation to the author), the leader of the Westboro Baptist Church, captures the national media spotlight with his protests outside of churches. A search in LEXIS's News Group File, Most Recent Two Years for the names *Fred Phelps* and *Westboro* generates more than 100 hits from newspapers and magazines across the country. All too often, the press focuses on the sensational activities of fringe groups that express extreme points of view, potentially misleading the public in their perceptions of what constitutes acceptable behavior. Groups such as the Westboro Baptist Church thrive on publicity, good or bad, and cameras that turn toward their expressions of hatred only fuel their conduct. As one weary newspaper in Phelps's home state of Kansas put it: "Over the years, we have grown tired of editorializing against the nauseating, hateful tirades of Fred Phelps. Criticism does not deter Phelps; in fact, it seems to invigorate him." Perry Young, *A Tale of Two Phelps*, ASHEVILLE CITIZEN-TIMES (Asheville, N.C.), Dec. 11, 1998, at A10 (quoting *Ottawa Herald* of Ottawa, Kansas).