University of Arkansas at Little Rock Law Review

Volume 23
Issue 1 *The Ben J. Altheimer Symposium: Media Law and Ethics Enter The 21st Century*

Article 16

2000

Constitutional Law—First Amendment—Does the Right to Free Speech Trump the Right to Worship? Olmer v. City of Lincoln, 192 F.3d 1176 (8th Cir. 1999).

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CONSTITUTIONAL LAW—FIRST AMENDMENT—DOES THE RIGHT TO FREE SPEECH TRUMP THE RIGHT TO WORSHIP? *Olmer v. City of Lincoln*, 192 F.3d 1176 (8th Cir. 1999).

I. INTRODUCTION

How far may men go in persuasion and communication and still not violate the right of those whom they would influence? [1]

The First Amendment guarantees the right of freedom of speech,[2] but answering "why" determines the extent of the guarantee.[3] Free speech rights to further self-governance, educate the public via a "marketplace of ideas," and promote autonomy have been broadly granted.[4] Yet, no matter how strong the right of speech appears, it has never been absolute.[5] Within this expansive range, defining to what degree speech should be protected is not always clear. In some cases, the potential harm to society justifies restrictions on speech.[6] However, fashioning rules that adequately balance the worth of free speech with the state's interest in protecting other rights can be a difficult task.[7] The outcome may depend on the value the court places on free speech rights over other interests. This note explores whether free speech is "part of the mix" of rights to be balanced or if it is at the "top of the heap" of protected rights.

Anti-abortion protests targeted at specific churches, or their members, place before the courts a potential conflict of rights between freedom of speech and the freedom to worship. When free speech concerns are raised within the backdrop of abortion rights, the issues become even more emotionally charged. Both pro-choice activists and anti-abortion groups use expressive conduct, or picketing, as an effective way to raise public awareness of contrasting viewpoints.

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1. Hill v. Colorado, 120 S. Ct. 2480, 2490 (2000) (quoting American Steel Foundries v. Tri-City Cent. Trades Council, 257 U.S. 184, 204 (1921)).

2. *See* U.S. CONST. amend I. "Congress shall make no law . . . abridging the freedom of speech." *Id.*

3. *See* RODNEY A. SMOLLA, SMOLLA AND NIMMER ON FREEDOM OF SPEECH: A TREATISE ON THE FIRST AMENDMENT § 2.01[2], at 2-4 (1994).

4. *See* ERWIN CHEMERINSKY, CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES § 11.1.2, at 751-56 (1997).

5. *See* Cornelius v. NAACP Legal Defense & Educ. Fund, Inc., 473 U.S. 788, 799 (1985). "Even protected speech is not equally permissible in all places and at all times." *Id.*

6. *See* Alan Brownstein, *How Rights Are Infringed: The Role of Undue Burden Analysis in Constitutional Doctrine*, 45 HASTINGS L.J. 867, 943 (1994).

7. *See* LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW § 12-19, at 950-51 (2d ed. 1988).

However, this form of expressive activity often creates a tension between picketers' free speech rights and other constitutionally recognized rights. During the past ten years anti-abortion protests in front of health clinics have become more regulated.[8] Residential picketing, focused on individual physicians who perform abortions, became subject to regulation based on the Supreme Court's decision in *Frisby v. Schultz*.[9] Anti-abortion protestors, continuing to focus on individual physicians, have chosen houses of worship as their newest location.[10]

This note examines a recent United States Court of Appeals for the Eighth Circuit decision that weighed the First Amendment freedom to worship against First Amendment free speech rights and tipped the scales in favor of free speech. In *Olmer v. City of Lincoln*,[11] the court struck down a city ordinance designed to protect worshipers by limiting "focused picketing" on sidewalks in front of churches.[12] This note reviews the facts in the *Olmer* case. It then examines the test for regulating expressive conduct and the rights and interests to be balanced against free speech. It concludes with an analysis of the court's reasoning and a discussion of the significance of the *Olmer* decision.

II. FACTS

In February 1997, a group of anti-abortion protesters picketed Westminster Presbyterian Church in Lincoln, Nebraska, objecting to the appointment of Dr. Winston Crabb as an elder and deacon in the church.[13] Dr. Crabb was a member of the congregation, and a medical

8. *See, e.g.*, Freedom of Access to Clinic Entrances Act, 18 U.S.C. § 248 (1994); Madsen v. Women's Health Ctr. Inc., 512 U.S. 753, 757 (1994).

9. 487 U.S. 474 (1988).

10. *See* Alan Phelps, Note, *Picketing and Prayer: Restricting Freedom of Expression Outside Churches*, 85 CORNELL L. REV. 271, 286-89 (1999).

11. 192 F.3d 1176 (8th Cir. 1999) (2-1 decision) (rehearing and rehearing en banc denied (Dec. 9, 1999)).

12. *See id.* at 1178.

13. *See* Julia McCord, *Pickets at the Door; Anti-Abortion Demonstrations at Westminster Presbyterian Church in Lincoln Present a Dilemma for Members*, OMAHA WORLD-HERALD, July 19, 1997, at 59SF, *available in* 1997 WL 6313878. Protesters were primarily members of an anti-abortion group named Rescue the Heartland, organized by Larry Donlan and located in nearby Omaha. *See id.* Rescue the Heartland had written to the church's governing council to request Dr. Crabb's removal from office and began picketing when the church refused. *See id.*

doctor who, as part of his medical practice, performed abortions.[14] Anti-abortion demonstrators, carrying signs reading "Winston Crabb, Abortionist and Elder" and shouting protests, gathered at the entrances, exits, and parking lots surrounding the church.[15] In addition to the verbal protests, members of the group held signs depicting detailed photographic images of bloody, aborted fetuses.[16] A number of the protesters also carried video cameras and filmed parishioners as they entered and left the church.[17]

The picketing continued in this fashion for a year and a half.[18] Church members found the picketing outside their church disruptive and complained that it prevented them from peaceably attending church.[19] Members' children showed signs of emotional distress such as nightmares and frequent crying, and became anxious when approaching the church.[20] Fifteen families, many of whom had small children, left Westminster Presbyterian Church because of the picketing.[21]

The Lincoln City Council ("Council") held a public hearing to examine whether an ordinance prohibiting picketing at religious services should be adopted.[22] At the hearing, church members

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14. *See Olmer*, 192 F.3d at 1178.

15. *See id.* at 1178, 1182. Slogans also included "Dr. Crabb is Unfit to be an Elder," "Life," and "1 Corinthians 5:13," among others. *See id.*

16. *See id.* at 1183 (Bright, J., dissenting). Group members carried six to eight foot tall signs showing enlarged photographs of bloody fetuses and unborn babies, which church members said were being thrust into their path and into their children's faces as they attended worship service. *See* Paul Hammel, *Abortion Picketing Under Fire: A Lincoln Religious Coalition Lines up in Support of Limits on Protests Outside a Presbyterian Church*, OMAHA WORLD-HERALD, Sept. 3, 1998, at 17, *available in* 1998 WL 5518567. In a leaflet Donlan's group distributed to members of the congregation on February 16, 1997, Donlan wrote, "'[W]e will gather regularly along the sidewalk surrounding the church . . . . I must warn you that many of our signs graphically represent the reality of abortion.'" McCord, *supra* note 13.

17. *See* McCord, *supra* note 13. One church member, a young mother and a lawyer, called the signs "'horrifying'" but stated that she was more worried about what "'this group will do to make a point.'" McCord, *supra* note 13.

18. *See Olmer*, 192 F.3d at 1182 (Bright, J., dissenting).

19. *See* Brief for Appellants at 3-7, Olmer v. City of Lincoln, 192 F.3d 1176 (8th Cir. 1999) (No. 98-4112) (referring to statements made by church members at the Lincoln City Council Meeting on September 8, 1988).

20. *See Olmer*, 192 F.3d at 1182-83 (Bright, J., dissenting). A nine-year-old testified that "[t]his lady stuck a bloody baby picture right in my face . . . . My tummy was queasy and it was horrifying. . . . that time was the worst ever." *Id.* at 1183 (Bright, J., dissenting) (alteration in original).

21. *See* Olmer v. City of Lincoln, 23 F. Supp. 2d 1091, 1097 (D. Neb. 1998), *aff'd*, 192 F.3d 1176 (8th Cir. 1999).

22. *See Olmer*, 192 F.3d at 1182 (Bright, J., dissenting).

complained of verbal assaults on themselves and their children.[23] Police officers had been patrolling during the protests and confirmed verbal exchanges.[24] The police, however, in contrast with the church members, did not believe the picketers' actions rose to the level of "threatening."[25]

In September 1998, the Council passed an ordinance seeking to restrict "focused picketing"[26] of churches and other religious establishment's premises.[27] The Mayor of Lincoln vetoed the ordinance, the council overrode the veto, and the ordinance was enacted as law.[28]

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23. *See id.* at 1183 (Bright, J., dissenting). Members reported comments directed at children, such as "[y]ou're lucky Dr. Crabb didn't murder you." Paul Hammel, *Picket Limit Proposal Gets Hearing: The Lincoln City Council Will Consider an Ordinance That Would Restrict Anti-Abortion Protests Near Churches*, OMAHA WORLD-HERALD, Aug. 18, 1998, at 13SF, *available in* 1998 WL 5516345.

24. *See Olmer*, 23 F. Supp. 2d at 1099.

25. *See id.* Members of the congregation attending the City Council hearing asserted that the picketing was intimidating and that protestors behaved differently when police were present. *See* Appellants' Brief at 6, *Olmer* (No. 98-4112).

26. *See Olmer*, 192 F.3d at 1179. Section 9.20.090(a)(3) of the Lincoln, Nebraska Municipal Code defined "focused picketing" as follows:

> [T]he 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.

Id.

27. *See Olmer*, 192 F.3d at 1178. Section 9.20.090(b) of the Lincoln, Nebraska Municipal Code provides as follows:

> 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.

Olmer, 23 F. Supp. 2d at 1095.

28. *See Olmer*, 192 F.3d at 1178.

Two days later, the plaintiffs filed a complaint in federal district court[29] seeking a preliminary injunction prohibiting enforcement of the ordinance, claiming that the ordinance violated the Free Speech Clause of the First Amendment by denying them the right to engage in peaceful picketing.[30]

On September 30, 1998, the United States District Court for the District of Nebraska issued a temporary restraining order prohibiting enforcement of the ordinance.[31] A preliminary injunction followed on November 4, 1998, on the basis that the ordinance was not narrowly tailored to serve the government's motivating interest.[32] The City of Lincoln ("City") appealed to the United States Court of Appeals for the Eighth Circuit, claiming that the ordinance met constitutional requirements by imposing only content-neutral limitations on the time, place, and manner of speech and thus was narrowly tailored to protect the government's significant interests in (1) protecting young children from frightening images; (2) preserving citizens' rights to exercise religion freely; and (3) maintaining public order.[33] The court of appeals affirmed the district court's decision, holding that although the city had an interest in protecting children, the ordinance was not narrowly tailored enough to serve this interest without abridging too much speech.[34]

III. BACKGROUND

Low costs combined with high publicity value make expressive conduct, such as picketing, an effective way for people on both sides of an issue to make their voices heard. Because of this, picketing is often viewed as a constructive method of bringing about social change.[35] The United States Supreme Court has long considered this type of expressive conduct protected as free speech.[36] However, as picketing becomes more focused or targeted, the coercive aspects of

29. *See id.* at 1184 (Bright, J., dissenting).
30. *See Olmer*, 23 F. Supp. 2d at 1094.
31. *See id.* at 1096.
32. *See id.* at 1094.
33. *See Olmer*, 192 F.3d at 1180.
34. *See id.* at 1182.
35. *See* Sylvia Arizmendi, *Residential Picketing: Will the Public Forum Follow Us Home?*, 37 HOW. L.J. 495, 506 (1994).
36. *See id.* at 503. Peaceful picketing was first held entitled to First Amendment protection in *Thornhill v. Alabama*, 310 U.S. 88 (1940), a labor case in which an employee was convicted under a loitering and picketing statute for picketing his workplace. *See id.* at 502.

this form of expressive activity create a tension between picketers' right to free speech and the privacy rights of those they are trying to influence.[37] This section describes the test used to regulate expressive conduct such as picketing. It then reviews the history of residential picketing cases. Finally, it looks at the privacy concerns that need to be balanced against free speech rights in focused picketing decisions.

A. The Test for Regulating Expressive Conduct

Expressive conduct, although regarded as an important facet of free speech, is not protected to the same extent as pure speech.[38] Nevertheless, a state's ability to enact restrictions is limited by certain factors.[39] A court initially looks at whether the conduct takes place in a public forum, limited public forum, or non-public forum.[40] Streets and sidewalks, where most picketing activity normally takes place, are traditionally considered places open for public discussion and therefore fall within public forum guidelines for restrictions.[41] The government can set reasonable time, place, and manner restrictions on speech in public areas but the regulation must (1) be content-neutral; (2) be narrowly tailored to serve a legitimate government interest; and (3) allow ample alternative channels of communication.[42]

1. *Content-Neutral v. Content-Based Regulations*

The proper level of scrutiny is determined by whether the statute regulates based on the content of speech.[43] As an initial matter, the regulation must be content-neutral.[44] Content-based restrictions are

37. *See id.* at 500.

38. *See* Cox v. Louisiana, 379 U.S. 536, 555 (1965). "[T]he First and Fourteenth Amendments [do not] afford the same kind of freedom to those who would communicate ideas by conduct such as patrolling, marching, and picketing on streets and highways, as these amendments afford to those who communicate ideas by pure speech." *Id.*

39. *See* Perry Educ. Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37, 45 (1983).

40. *See id.* at 45-46.

41. *See* Hague v. Committee for Indus. Org., 307 U.S. 496, 515 (1939). Justice Roberts stated in *Hague* that sidewalks for "time out of mind, have been used for purposes of assembly, . . . and discussing public questions." *Id.*

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

43. *See id.*

44. *See* SMOLLA, *supra* note 3, § 3.02 [3], at 3-33. Smolla points out that "[g]enuine time, place, or manner regulations are *by definition* content-neutral" or the court could not apply the standard of review for this type of ordinance. *Id.* § 3.02[3], at 3-33 (emphasis in original).

presumptively unconstitutional and are subjected to strict scrutiny due to concern that the government may be suppressing speech because it disagrees with the speaker's view.[45] A content-neutral regulation limits expression based on when, where, or how a communication is delivered, rather than the substance of the message.[46] Content-neutral regulations are subject to an "intermediate" level of scrutiny because they are less likely to censor specific viewpoints.[47] Therefore, time, place, and manner restrictions can be enacted when an ordinance is content-neutral.[48] Regulations having an incidental effect on some speakers, but not others, may still be considered content-neutral if they serve governmental purposes not related to the content of the message.[49]

2. *Narrowly Tailored to Serve a Significant Government Interest*

Even if the regulation is content-neutral, however, the government must not use broader means than necessary to achieve its aims.[50] The second element of analysis requires restrictions on speech to be "narrowly tailored" to serve a "significant government interest."[51] This is the most fact-sensitive section of the test, and the two considerations are balanced against each other.[52] The government's interest may be extremely important, but if the means chosen to limit speech are substantially broader than necessary, the regulation will fail.[53]

The Court has considered a wide range of governmental interests significant enough to require regulation, including

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45. *See* R.A.V. v. City of St. Paul, 505 U.S. 377, 382 (1992) (stating that regulation based on content is "presumptively invalid"); Turner Broad. Sys., Inc. v. FCC, 512 U.S. 622, 641-42 (1994). "Our precedents thus apply the most exacting scrutiny to regulations that suppress, disadvantage, or impose differential burdens upon speech because of its content." *Id.* at 642.

46. *See* SMOLLA, *supra* note 3, § 3.02[3], at 3-32.

47. *See id.* at 2-10.

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

49. *See* Ward v. Rock Against Racism, 491 U.S. 781, 791 (1989). For example, an ordinance banning residential picketing can be upheld even if anti-abortion protestors are the only group affected because the ordinance can apply to other groups as well. *See* Martha A. Field, *Abortion and the First Amendment*, 29 U.C. DAVIS L. REV. 545, 549 (1996).

50. *See Ward*, 491 U.S. at 789.

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

52. *See* ALLAN IDES & CHRISTOPHER N. MAY, CONSTITUTIONAL LAW: INDIVIDUAL RIGHTS § 8.4.2, at 325 (1998).

53. *See Ward*, 491 U.S. at 800.

preserving privacy interests, protecting public safety, and maintaining the normal activity of a school.[54] Whether the interest is significant will often relate to the normal activity of the location where the message is disseminated.[55] If the conduct or expression disrupts the flow of the activities usually undertaken in the location, then the government has more freedom to regulate.[56] However, the interest in allowing free speech is strong and the magnitude of the government's countervailing interest makes a difference when allowing regulation.[57]

To be narrowly tailored, a restriction must serve the government's legitimate interest without unnecessarily interfering with freedom of speech.[58] Generally, a regulation is considered narrowly tailored if it restricts only the particular source of "evil" it is designed to eliminate.[59] Courts are not required, however, to determine whether the government has an alternative method that might be less intrusive.[60]

3. *Ample Alternative Channels for Communication*

Finally, in addition to being content-neutral and narrowly tailored, the regulation must leave open "alternative channels for communication."[61] This requirement can be met if there are other methods of communication[62] or other locations where the message

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54. *See* Luke T. Cadigan, Note, *Balancing the Interests: A Practical Approach to Restrictions on Expressive Conduct in the Anti-Abortion Protest Context*, 32 B.C. L. REV. 835, 853 & n.117 (1991). *See also* Frisby v. Schultz, 487 U.S. 474, 486 (1988) (preserving residential privacy); Heffron v. International Soc'y for Krishna Consciousness, Inc., 452 U.S. 640, 654 (1981) (protecting visitor's safety at local fairgrounds); Grayned v. City of Rockford, 408 U.S. 104, 112 (1972) (maintaining normal activity of school).

55. *See Grayned*, 408 U.S. at 116. The Court in *Grayned* indicated that "[t]he crucial question is whether the manner of expression is basically incompatible with the normal activity of a particular place at a particular time." *Id.*

56. *See id.*

57. *See* Cadigan, *supra* note 54, at 889.

58. *See Grayned*, 408 U.S. at 114.

59. *See Frisby*, 487 U.S. at 485.

60. *See* SMOLLA, *supra* note 3, § 3.02[3], at 3-37 to -38. The court in *Ward* stated that although a regulation must be narrowly tailored to serve the government's interests it "need not be the least restrictive or least intrusive means of doing so." *Ward*, 491 U.S. at 798.

61. *See* IDES & MAY, *supra* note 52, § 8.4.3, at 327-28.

62. *See* Kovacs v. Cooper, 336 U.S. 77, 89 (1949). In *Kovacs*, the Court upheld an ordinance limiting loudspeakers on trucks in public streets. *See id.* Restricting the way the message was conveyed was appropriate because the message could still be communicated by pamphlets or other methods. *See id.*

can be communicated.[63] Courts have not set defined guidelines for what places or methods constitute "alternative channels," but as long as all means of communication are not totally eliminated an ordinance will not usually fail this section of the test.[64]

B. Residential Picketing

In a residential area, focused picketing intrudes on privacy more than other forms of expressive conduct, such as handbills or door-to-door solicitation, because it is aimed directly at a particular residence or person.[65] When picketing focuses on a specific place or individual, it involves harassment and coercion of the resident or captive audience.[66] As a factual matter, such focused picketing usually continues over a longer period of time than other expression, often occurring for weeks, months, or even years.[67] These factors may lead even those who are champions of free speech to let their concern for privacy outweigh their interest in free speech.[68]

In 1969, the Supreme Court considered the issue of residential picketing in *Gregory v. City of Chicago*.[69] In *Gregory*, a group of marchers, led by comedian and activist Dick Gregory, picketed the house of Chicago Mayor Richard Daley.[70] The group wanted to pressure the mayor to oust a school superintendent who they believed to have hampered the school desegregation process.[71] The crowd surrounding the house increased to over 1000 bystanders.[72] The police asked the demonstrators to stop.[73] When they refused,

63. *See* Heffron v. International Soc'y for Krishna Consciousness, Inc., 452 U.S. 640, 655 (1981). In *Heffron*, the Court upheld a regulation prohibiting the distribution of materials on the fairgrounds at places other than registered booths. *See id.* The Court noted that the Krishna could reach the audience at locations other than the fairgrounds or by renting a booth at the fairgrounds. *See id.*

64. *See* SMOLLA, *supra* note 3, § 3.02[3], at 3-39.

65. *See* Arizmendi, *supra* note 35, at 534.

66. *See* Frisby v. Schultz, 487 U.S. 474, 486 (1988).

67. *See* Arizmendi, *supra* note 35, at 534.

68. *See id.* at 534-35; Franklyn S. Haiman, *Speech v. Privacy: Is There a Right Not to Be Spoken to?*, 67 NW. U. L. REV. 153, 161 (1972) (noting that even Justices Black and Douglas were "willing to subordinate their interest in the primacy of the First Amendment to their concerns for privacy" in the context of residential picketing).

69. 394 U.S. 111 (1969).

70. *See id.* at 115 (Black, J., concurring).

71. *See id.* (Black, J., concurring).

72. *See* Arizmendi, *supra* note 35, at 535.

73. *See Gregory*, 394 U.S. at 116 (Black, J., concurring).

the police arrested many of the marchers.[74] The Court reversed Gregory's conviction for breaching the peace, but the majority opinion did not discuss harassment, an issue Justice Black felt the majority had overlooked.[75] Justice Black observed that if a government is "powerless" to regulate conduct, then people's homes would be subject to picketing by anyone attempting to convert the residents to "new views, new morals, and a new way of life."[76]

Not until 1988, in *Frisby v. Schultz*,[77] did the Court specifically consider whether residential picketing could be banned.[78] A group ranging in size from eleven to forty picketed a doctor's home in Brookfield, Wisconsin on at least six occasions during a one-month period in 1985.[79] Due to numerous complaints from citizens, the town passed an ordinance flatly banning all residential picketing.[80] The *Frisby* Court upheld the ordinance, stating that it was narrowly tailored to serve the significant governmental interest of residential privacy.[81] The Court voiced concerns about the coercive effects of the speech, noting that this kind of picketing was intrusive rather than informative.[82] The court upheld the ordinance, agreeing that the state had a substantial interest in banning picketing directed at unwilling listeners.[83] The Court pointed out that the residents had no ready means of avoiding the unwanted speech.[84]

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74. *See id.* (Black, J., concurring).

75. *See id.* at 113 (Black, J., concurring).

76. *Id.* at 125 (Black, J., concurring). Justice Black also stated that if regulation were not permissible "public buildings would cease to be available for the purposes for which they were constructed and dedicated whenever demonstrators and picketers wanted to use them for their own purposes." *Id.* (Black, J., concurring).

77. 487 U.S. 474 (1988).

78. *See id.* at 476. The Court had previously reviewed a residential picketing ordinance in *Carey v. Brown*, 447 U.S. 455 (1980). *See* Arizmendi, *supra* note 35, at 537-38. The *Carey* case involved a statute that banned all picketing in residential areas with the exception of labor picketing. *See id.* While the court discussed First Amendment concerns, the case was eventually decided on equal protection grounds. *See id.*

79. *See Frisby*, 487 U.S. at 476.

80. *See id.*

81. *See id.* at 488. The Court relied on the singular form of the words "residence" and "dwelling" to determine that the ordinance was intended to limit only picketing focused on, and in front of, a particular residence. *See id.* at 482.

82. *See id.* at 486. "The type of picketers banned . . . do 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." *Id.*

83. *See id.* at 488.

84. *See id.* at 487. In free speech cases, the burden generally falls on the unwilling listener in public places to avoid the speech. *See* TRIBE, *supra* note 7, § 12-19, at 948.

Justices Brennan and Stevens, dissenting separately, read the ordinance as restricting all picketing in a residential neighborhood, but were troubled by the protestors' methods.[85] Brennan agreed that intrusive or unduly coercive speech is subject to more exacting regulation and that the facts in this case illustrated why this is true.[86] Justice Brennan referred to sign-carrying, slogan-shouting protestors who regularly converged on the doctor's home and, in addition to demonstrating, told young children in the neighborhood that the doctor was a baby killer.[87] Indicating that substantial regulation is permitted to neutralize the intrusive or unduly coercive aspects of residential picketing, Justice Brennan explained that government regulation of the number of picketers, the hours when picketing could take place, or the noise level would be constitutionally permissible.[88] Justice Stevens acknowledged that the form with which a speaker communicates might be offensive, independent of the intended message, and he stated that "picketing for the sole purpose of imposing psychological harm . . . is [not] constitutionally protected."[89]

C. Balancing Free Speech Rights with Privacy Rights

Privacy rights have emerged from the "penumbra" of several constitutional amendments.[90] The First, Third, Fourth, and Fifth Amendments are all implicated.[91] Justice Louis Brandeis first defined the right to privacy as "the right 'to be let alone.'"[92] While this right has been used to great effect in deciding constitutional

85. *See Frisby*, 487 U.S. at 494 (Brennan, J., dissenting), 497 (Stevens, J., dissenting).

86. *See id.* at 494 (Brennan, J., dissenting).

87. *See id.* (Brennan, J., dissenting)

88. *See id.* (Brennan, J., dissenting).

89. *Id.* at 498 (Stevens, J., dissenting). "Picketing is a form of speech that, by virtue of its repetition of message and often hostile presentation, may be disruptive of an environment irrespective of the substantive message conveyed." *Id.* (Stevens, J., dissenting).

90. *See* TRIBE, *supra* note 7, § 15-3, at 1309.

91. *See* Griswold v. Connecticut, 381 U.S. 479, 484 (1965).

92. Samuel D. Warren & Louis D. Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193, 195 (1890) (quoting Judge Cooley).

issues,[93] there is no well-defined standard for what the right to privacy entails.[94]

Courts are wary when asked to limit free speech in public areas, but justices have acknowledged a listener's interest in the quality of the surrounding environment.[95] When balancing a listener's autonomy interest against government regulation of free speech in the context of residential picketing, the special "sanctity of the home" tips the scales.[96] But the *Frisby* Court's concern about the coercive effects of focused picketing and the privacy rights of captive audiences can be applied in other contexts.[97] Commentators have argued that a flat geographical line protecting unwilling listeners in their homes but not when they venture out in public does not necessarily serve free speech interests.[98]

1. *Protecting the Unwilling Listener*

Free speech has great protection in public places, and unwilling listeners are protected from offensive messages only when "substantial privacy interests are being invaded in an essentially intolerable manner."[99] Based on this standard, a listener must

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93. *See* Griswold v. Connecticut, 381 U.S. 479 (1965) (concluding that the Constitution protects a fundamental right to privacy which includes the right to make intimate decision on use of contraceptives); Roe v. Wade, 410 U.S. 113 (1973) (upholding the right to an abortion); Planned Parenthood v. Casey, 505 U.S. 833 (1992) (reaffirming *Roe* and establishing "undue burden" standard).

94. *See* Marcy Strauss, *Redefining the Captive Audience Doctrine*, 19 HASTINGS CONST. L.Q. 85, 107 (1991). Strauss quotes Professor Thompson: "Perhaps the most striking thing about the right to privacy is that nobody seems to have any very clear idea what it is." *Id.* at 107-08 (quoting Judith Jarvis Thompson, *The Right to Privacy*, 4 PHIL. & PUB. AFF. 295, 295 (1975)).

95. *See* TRIBE, *supra* note 7, § 12-19, at 948. *See also* Bolger v. Youngs Drug Prod. Corp., 463 U.S. 60, 84 (1983) (Stevens, J., concurring). Justice Stevens stated that "regulations of form and context may strike a constitutionally appropriate balance between the advocate's right to convey a message and the recipient's interest in the quality of his environment." *Id.* (Stevens, J., concurring).

96. Frisby v. Schultz, 487 U.S. 474, 484 (1988).

97. *See id.* at 484-87. *See also* Leslie Gielow Jacobs, *Is There an Obligation to Listen?*, 32 U. MICH. J.L. REFORM 489, 520-21 (1999) (advocating that the government should protect unwilling listeners no matter what the location).

98. *See* Jacobs, *supra* note 97, at 490-91. Jacobs argues that the "significance of the listener's physical location becomes important only when it correctly signals the balance between competing constitutional interests of free speech and privacy." *Id.* at 491.

99. Cohen v. California, 403 U.S. 15, 21 (1971). *See also* Strauss, *supra* note 94, at 108. Professor Strauss describes the principal privacy interests in the captive audience context as the right to make individual choices, the right to repose, and the

simply turn away from an offensive message in the absence of an interest strong enough to justify regulation.[100] Only if a person is considered "captive" does the required showing lessen.[101] When people are in a location where they cannot freely leave or where they have a right to remain and the speech is not easily avoided, the invasion of their privacy rights creates a greater justification for regulation.[102]

In a global society, there are willing and unwilling listeners at most locations, and people are seldom totally captive. Accordingly, protection from unwanted speech is limited in most public places.[103] Protection as a member of a "captive audience" is more likely accorded for the home.[104] Outside the home, it is less clear that being forced to hear unwanted speech permits the government to regulate. The question becomes: When does the responsibility to turn away become too much of a burden for the listener and outweigh the right to free speech?[105]

2. *Picketing as Harassment/Coercion*

The coercive element or psychological harm identified in residential picketing concerned the *Frisby* Court.[106] Under this theory, regulating focused picketing is appropriate when it is being used to intrude or coerce, rather than communicate.[107] Generally, speech in a public place does not lose its protected character

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right to be free from offense. *See* Strauss, *supra* note 94, at 108.

100. *See* TRIBE, *supra* note 7, § 12-19, at 948.

101. *See Frisby*, 487 U.S. at 484. When courts refer to captive audiences they often consider the ease with which the audience can avoid unwanted speech. *See Frisby*, 487 U.S. at 485-86 (difficult for homeowner to avoid speech); Bolger v. Youngs Drug Prod. Corp., 463 U.S. 60, 72 (1983) (easy to dispose of materials); *Cohen*, 403 U.S. at 21 (audience can avert eyes).

102. *See* TRIBE, *supra* note 7, § 12-19, at 949 n.24.

103. *See Cohen*, 403 U.S. at 21 (presence of unwilling listeners in a public courtroom does not justify regulating offensive speech); Erznoznik v. City of Jacksonville, 422 U.S. 205, 212 (1975) (drive-in theatre screen not obtrusive enough that privacy interests are invaded).

104. *See Frisby*, 487 U.S. at 484.

105. *See* Strauss, *supra* note 94, at 89. "The descriptive statement that people are subjected to unwanted stimuli is not the same as saying that normatively they *should be* forced to endure them." *Id.* at 95 (emphasis in original).

106. *See Frisby*, 487 U.S. at 486. Commentators have noted that theoretically the right to picket may seem fundamental but that "an actual protest may be a form of coercion and intimidation resembling . . . abuse rather than . . . a right." Arizmendi, *supra* note 35, at 497.

107. *See* Jacobs, *supra* note 97, at 510.

"simply because it may embarrass others or attempt to coerce them into action."[108] Nevertheless, *Frisby* indicates that coercion and harassment can play a factor in regulating the time, place, and manner of speech.[109]

Defining "harassment" in any context is difficult for courts and legislatures, but could be especially difficult in free speech cases.[110] Individuals usually engage in expressive conduct or picketing to communicate a message. Principles underlying free speech theory are based on informing people about issues and seeking to persuade others of the value of a certain viewpoint.[111] There is a difference, however, between persuasive public speech and targeted expression.[112] Free speech rights give picketers the opportunity to deliver their message, but endless repetition to the same unwilling listeners lessens the communicative value of the speech and makes it more like coercion.[113]

Focused picketing can also interfere with an individual's autonomy interest in making independent decisions on the issues being protested.[114] The United States Court of Appeals for the Second Circuit distinguished protected speech from unprotected harassment as the difference between attempting to persuade people to the merits of what is being said and coercively pressuring them to change their behavior.[115] The "nature, location, and context" of

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108. NAACP v. Claiborn, 458 U.S. 886, 910 (1982).

109. *See Frisby*, 487 U.S. at 487.

110. *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, 1165 (1996).

111. *See* CHEMERINSKY, *supra* note 4, § 11.1.2, at 750-56.

112. *See* Brownstein, *supra* note 110, at 1166. Professor Brownstein distinguishes the following three types of speech: persuasive speech aimed at the public at large; targeted private speech expressed between individuals on private concerns; and targeted public speech that is relevant to matters of public concern, but is purposefully directed at individuals. *See id.* at 1166-68.

113. *See* Brownstein, *supra* note 110, at 1172.

114. *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, 1323 (1995).

115. *See* Pro-Choice Network v. Schenck, 67 F.3d 377, 395 (2d Cir. 1995) (en banc) (Winter, J., concurring). Judge Winter concluded that picketers have the right to criticize but stated:

> [C]oercion or obstruction does not gain First Amendment protection simply because no one is physically injured, traffic moves, and private property is not invaded. A placid scene that is the result of citizens not going where they wish to be in order to avoid bullying is hardly consistent with a marketplace of ideas.

some targeted speech makes the harm caused to people who have difficulty avoiding the message outweigh the persuasive impact.[116] Because of the effects felt by both their nuclear and spiritual families, doctors whose homes and churches become targets for focused picketing campaigns are prime examples of those who feel coercive pressure.[117] The method of forcing people into "new views" is not compatible with either the "autonomy interest" or "marketplace of ideas" theory of free expression.[118]

3. *Extending* Frisby*'s Premise to the Freedom to Worship*

Our democracy is built on the right to question authorities, practices, and beliefs, whether political or religious. Therefore, the opportunity to convey a thought-provoking message to a religious organization is firmly within the bounds of First Amendment protection.[119] However, in locations where the quality of the environment is a key concern, should a person have the right to deliver that message in an offensive, disturbing manner?[120]

Focused picketing outside religious sites raises many of the same concerns illustrated by picketing at residences or abortion

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Id. at 397 (Winter, J., concurring). Originally in *Schenck*, a panel for the Second Circuit invalidated a cease-and-desist order based on First Amendment protection for sidewalk counselors outside an abortion clinic. *See* Pro-Choice Network v. Schenck, 67 F.3d 359 (2d Cir. 1995) (2-1 decision), *vacated in part*, 67 F.3d 377 (2d Cir. 1995) (en banc), *aff'd in part, rev'd in part*, 519 U.S. 357 (1997). The dissent's position that the order was not designed to suppress the anti-abortion protestors' message but to prevent people from being badgered at close range was vindicated when the en banc decision vacated the panel decision. *See* Brownstein, *supra* note 110, at 1188.

116. *See* Brownstein, *supra* note 110, at 1170.

117. In 1995, a jury in Texas awarded Dr. Norman Tompkins $8,600,000 in damages in a tort case for privacy invasion and intentional infliction of emotional distress. *See Plaintiffs' Attorney Stresses Theme of Psychological Terrorism*, INSIDE LITIG., Dec. 1995, at 4. Protestors picketed Dr. Tompkins's office, home, and church from October 1992 to July 1993. *See* Tompkins v. Cyr, 995 F. Supp. 664, 672 (N.D. Tex. 1998). Dr. Tompkins's children were afraid to visit his home, his daughter's wedding had to be held at a secret location outside town, and he eventually closed his Dallas practice of 26 years. *See id.* at 673. Reviewing a motion for judgment as a matter of law, the district court judge determined that the protestors' First Amendment rights did not bar the jury verdict although it lowered the damages to $5,048,000. *See id.* at 675, 689.

118. *See* Lederman, *supra* note 114, at 1323.

119. *See* Brownstein, *supra* note 110, at 1204.

120. *See id.* Brownstein states that participants at events of religious significance "deserve an opportunity to experience without unreasonable interference the feelings of reverence, awe, solemnity, joy, or sorrow commonly associated with religious observances." *Id.*

clinics. On one hand, picketers wish to address the particular people who are at these locations and might not have such a concentrated opportunity elsewhere.[121] On the other hand, someone attending a religious service is engaged in an intensely personal act much like actions in the home or medical services context.[122] In these instances, the offensive speech of strangers may be particularly intrusive.[123]

Few courts have dealt specifically with the issue of regulating focused picketing outside churches.[124] The only similar case in the Eighth Circuit involved demonstrators who actually entered the church and disrupted services.[125] However, the Supreme Court, and other courts following its lead, has held valid regulations on focused picketing, including buffer zones, time limitations, and sign restrictions.[126] The United States Court of Appeals for the Ninth Circuit recently upheld a city ordinance prohibiting all demonstration activity within a certain distance of health care facilities and places of worship.[127] The Ninth Circuit held the ordinance to be narrowly tailored and relied on the government's strong interest in protecting worshipers from intimidation and harassment and ensuring their access to places of worship to sustain the ordinance.[128] When rights like freedom of speech and freedom to worship come into direct conflict, careful evaluation of the degree of burden on

121. *See id.* at 1174-76.

122. *See id.* at 1204.

123. *See* Frisby v. Schultz, 487 U.S. 474, 486 (1988) (stating that focused picketing intrudes on targeted resident in an especially offensive way).

124. *See* Phelps, *supra* note 10, at 287.

125. *See* Action v. Gannon, 450 F.2d 1227 (8th Cir. 1971) (holding demonstrators did not have a right to enter a cathedral and disrupt services). In *Action*, the case involved protests by members of the black community against the actions of a predominately white church. *See id.* at 1229. The court affirmed an injunction protecting the rights of churchgoers because the picketers actually entered the church and disrupted services. *See id.* at 1238. The injunction, however, was remanded to the district court to revise the ordinance to permit peaceful picketing to protect plaintiff's First Amendment rights. *See id.*

126. *See Frisby*, 487 U.S. at 488 (upholding ordinance banning focused picketing in front of residences); Edwards v. City of Santa Barbara, 150 F.3d 1213 (9th Cir. 1998), *cert. denied*, 119 S. Ct. 1142 (1999) (upholding buffer zone around houses of worship); St. David's Episcopal Church v. Westboro Baptist Church, Inc., 921 P.2d 821 (Kan. Ct. App. 1996), *review denied*, 260 Kan. 995 (1996), *cert. denied*, 519 U.S. 1090 (1997) (upholding 214-foot buffer zone, time restrictions, and sign regulations).

127. *See Edwards*, 150 F.3d at 1215.

128. *See id.* at 1215-16.

each party could lead to reasonable accommodation of the conflicting rights.[129]

IV. REASONING OF THE COURT

In *Olmer v. City of Lincoln*,[130] the United States Court of Appeals for the Eighth Circuit struck down a city ordinance designed to limit "focused picketing" on the sidewalks and right-of-ways in front of churches and religious premises as unconstitutional.[131] The majority held that the ordinance restricted more speech than necessary to serve the government's significant interest in protecting children from harmful materials.[132] The dissent, however, was primarily concerned with protecting an individual's freedom to worship and the privacy rights affected when church members receive unwanted and coercive messages.[133] This section reviews the majority and dissenting opinions in an effort to show how the choice of interest and the weight given to that interest led to the court's decision. In *Olmer*, as in many cases dealing with the constitutionality of a government regulation, the interest on which the court focuses is outcome-determinative.[134]

A. The Majority Opinion

Initially, the court noted that peaceful picketing is expressive conduct protected by the First Amendment, that sidewalks are places of public assembly, and that the government's ability to regulate speech in such public areas is limited.[135] The court then applied the test for time, place, and manner regulations in a public forum.[136]

The court of appeals, like the district court, assumed that the ordinance was content-neutral because, on its face, the ordinance

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129. *See* Brownstein, *supra* note 110, at 1205-06.

130. 192 F.3d 1176 (8th Cir. 1999) (2-1 decision).

131. *See id.* at 1182. Judge Richard Arnold wrote the two-to-one majority opinion. *See id.* at 1178. Judge Bright wrote a dissenting opinion. *See id.* at 1182.

132. *See id.*

133. *See id.* at 1188 (Bright, J., dissenting).

134. *See* Cadigan, *supra* note 54, at 889.

135. *See Olmer*, 192 F.3d at 1179.

136. *See id.* at 1180. This standard for restrictions on speech in public was established by the Supreme Court in *Perry Education Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37 (1983). *See* discussion *supra* section III A.

did not attempt to regulate speech based on viewpoint.[137] Both courts agreed that the City's interest in protecting young children from "frightening images" was constitutionally significant.[138] The court of appeals, however, declined to extend the City's legitimate interest beyond that point.[139] Both courts agreed that a gruesome picture, such as a dead body, would affect young children.[140] Absent such pictures, however, both courts held that the City does not have a legitimate interest in shielding young children from the presence of an anti-abortion protestor.[141]

The Eighth Circuit reviewed whether the ordinance was "narrowly tailored" to serve the legitimate interest of protecting children.[142] Reasoning that the ordinance banned not only speech that would be psychologically damaging to children, but also speech that was directed toward adults, the court held the ordinance overbroad.[143] As the court explained, the ordinance made the carrying of any sign unlawful, no matter what the sign said or depicted.[144] The court stated that while parishioners might not like the signs or agree with them, disagreement over content was not a

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137. *See Olmer*, 192 F.3d at 1180. The district court assumed the ordinance was content-neutral because "(1) the ordinance facially bans all 'focused picketing' regardless of the apparent message sought to be conveyed; and (2) the Lincoln City Council's purpose in passing the ordinance and overriding the mayor's veto was . . . unrelated to the content of the expression conveyed by those engaging in focused picketing." Olmer v. City of Lincoln, 23 F. Supp. 2d 1091, 1098-99 (D. Neb. 1998), *aff'd*, 192 F.3d 1176 (8th Cir. 1999).

138. *See Olmer*, 192 F.3d at 1180. Protection of children has been acknowledged as an important interest. *See* Reno v. ACLU, 521 U.S. 844, 875 (1997) (recognizing a governmental interest in protecting children from harmful materials); Sable Communications, Inc. v. FCC, 492 U.S. 115, 126 (1989) (recognizing compelling interest in the well-being of minors). In obscenity cases this protection is based on the premise that freedom of speech "presupposes" some degree of maturity, intelligence, and discipline on the audience's part, and government intervention is appropriate if the audience lacks these qualifications. *See* HARRY KALVEN, JR., A WORTHY TRADITION: FREEDOM OF SPEECH IN AMERICA 54 (Jamie Kalven ed., 1988). However, the Supreme Court has also declared that speech cannot be limited to what would be "suitable for a sandbox." Bolger v. Youngs Drug Prod. Corp., 463 U.S. 60, 74 (1983).

139. *See Olmer*, 192 F.3d at 1180.

140. *See id.* The district court stated that, absent the picture of a dead body, there was no "credible and unbiased" evidence that a sign-carrying protestor harmed a young child. *Id.* The court of appeals noted that the City offered evidence contradicting this finding but held that the district court's resolution of this issue of fact was not clearly erroneous. *See id.*

141. *See id.*

142. *See id.*

143. *See id.*

144. *See id.*

sufficient basis under the First Amendment to justify the ordinance that the City sought.[145]

The court then turned to the City's interest in preserving the right of its citizens to freely exercise their religion.[146] The court recognized that in theory the free exercise of religion is a substantial interest, but did not think it applied in this instance.[147] The court compared this case with its previous decision in *Action v. Gannon*[148] stating that freedom of religion interests would apply when protestors enter the church without permission and interrupt church services with their own speech.[149] The court also disagreed with the City's contention that the ordinance should be upheld based on the Supreme Court's decision in *Frisby v. Schultz*.[150] Fearing that granting churches the same privacy protection as the home would proscribe too much speech, the court limited *Frisby* to its facts.[151]

Finally, the court addressed the City's interest in public order.[152] The court recognized that in some circumstances, such as keeping streets free of obstructions or preventing distractions for traffic safety, the City has a sufficient interest in regulation.[153] The court, however, contended that these purposes could probably be achieved by current ordinances regulating traffic and public safety, and that this ordinance was not necessary to achieve those aims.[154]

B. The Dissent

In his dissent, Judge Bright did not find freedom of religion as abstract a concept as did the majority.[155] He observed that the

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145. *See Olmer*, 192 F.3d at 1180. The court appears to assume that church members' concerns were based solely on disagreement with the signs. However, even church members who were "pro-life" were "offended by the picketing" and concerned about their children. McCord, *supra* note 13.

146. *See Olmer*, 192 F.3d at 1180.

147. *See id.*

148. *See id.* at 1181-82 (discussing Action v. Gannon, 450 F.2d 1227 (8th Cir. 1971)). *See also supra* note 124 and accompanying text.

149. *See Olmer*, 192 F.3d at 1181-82. Picketers in the *Olmer* case had confronted Dr. Crabb in the parking lot and entered the church offices, but not during religious services. *See* McCord, *supra* note 13.

150. *See Olmer*, 192 F.3d at 1182-83 (discussing Frisby v. Schultz, 487 U.S. 474 (1988) (upholding ordinance prohibiting focused picketing in front of a residence)).

151. *See id.* at 1182.

152. *See id.*

153. *See id.*

154. *See id.*

155. *See id.* at 1182 (Bright, J., dissenting).

specific issue in this case—whether the government has a significant interest in protecting those who attend religious services from unwanted messages—is one of first impression in the Eighth Circuit.[156] The foundation for Judge Bright's dissent was the Supreme Court's ruling in *Frisby*, which recognized a significant government interest in protecting unwilling listeners' privacy rights.[157] To Judge Bright, the same principle that protected residential privacy in *Frisby* should protect churchgoers' rights to attend services free from interference.[158]

Judge Bright noted that the First Amendment does not deprive communities of the power to enact legislation that limits speech.[159] Emphasizing the Supreme Court's concern with protecting the "unwilling listener" or "captive audience" in his home, Judge Bright pointed out that members of Westminster are captives of unwanted speech when attending their spiritual home.[160] He stressed the City's strong interest in ensuring a right to exercise religious beliefs free from intrusive and unduly coercive messages.[161] Judge Bright further observed that the Ninth Circuit had recently upheld a similar ordinance in *Edwards v. City of Santa Barbara*[162] based on this premise.[163]

Judge Bright explained that the City's interest is significant for three reasons.[164] First, the fundamental right to worship is as

156. *See Olmer*, 192 F.3d at 1184 (Bright, J., dissenting).

157. *See id.* at 1182 (Bright, J., dissenting).

158. *See id.* at 1184-85 (Bright, J., dissenting).

159. *See id.* at 1184 (Bright, J., dissenting). Judge Bright quoted from *Gregory v. City of Chicago* in which Justice Black stated that localities could legislate "'to protect the public from the kind of boisterous and threatening conduct that disturbs the tranquility of spots selected by the people either for homes, . . . or [other public] buildings that require peace and quiet to carry out their functions. . . . .'" *Id.* (Bright, J., dissenting) (quoting Gregory v. City of Chicago, 394 U.S. 111, 125 (1969) (Black, J., concurring)).

160. *See id.* at 1185-86 (Bright, J., dissenting). The *Frisby* Court's primary concern was the sanctity of the home, but the Court also stated: "The First Amendment permits the government to prohibit offensive speech as intrusive when the 'captive' audience cannot avoid the objectionable speech." *Frisby*, 487 U.S. at 487.

161. *See Olmer*, 192 F.3d at 1186 (Bright, J., dissenting). Judge Bright mentioned the dissent in *Frisby* in which Justice Brennan noted that protestors warned young children away from the abortion doctor's house because he was a "baby killer." *See id.* at 1186 n.5 (Bright, J., dissenting). Justice Brennan stated in *Frisby* that "[s]urely it is within the government's power to enact regulations as necessary to prevent such intrusive and coercive abuses." *Id.* (Bright, J., dissenting) (quoting *Frisby*, 487 U.S. at 494 (Brennan, J., dissenting)).

162. 150 F.3d 1213 (9th Cir. 1998), *cert. denied*, 119 S. Ct. 1142 (1999).

163. *See Olmer*, 192 F.3d at 1185 & n.3 (Bright, J., dissenting).

164. *See id.* at 1185 (Bright, J., dissenting).

important as the right to privacy within one's home because it is a long-recognized freedom in our society and is protected by the First Amendment.[165] Second, houses of worship, no matter what religion, are sacred places where people seek spiritual replenishment, and the government has a strong interest in protecting tranquility at these sites.[166] Judge Bright noted that attending church at Westminster was anything but tranquil, and members were being forced to choose between attending church and enduring the demonstrations or forfeiting their fundamental right to worship.[167] Third, churchgoers assaulted with gory pictures and verbal abuse present the paradigm of the "unwilling listener" or "captive audience."[168]

Judge Bright also concluded that the ordinance was narrowly tailored because it restricted "focused picketing" in a limited way by only restricting activities within a certain time period and in a limited area.[169] Picketers were able to use the sidewalk and entryways to the church at any time and were only constrained from carrying large materials, such as signs or banners, for a short period of time before and after religious services.[170] Picketers could pass out leaflets at any time.[171] Judge Bright challenged the majority's characterization of the adult churchgoer's opposition as being based on dislike or disagreement with the signs.[172] He pointed out that objecting to jeering shouts, graphic images, and psychological distress amounts to more than mere disapproval of the content of a message.[173] Judge Bright also maintained that the plaintiffs had

165. *See id.* (Bright, J., dissenting). Judge Bright's historical argument comes from the Constitution's protection of freedom of religion in the First Amendment and the Declaration of Independence permitting individuals certain unalienable rights in order to pursue happiness. *See id.* (Bright, J., dissenting). *See also* U.S. CONST. amend I; THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776).

166. *See Olmer*, 192 F.3d at 1185 (Bright, J., dissenting). Judge Bright referred to Justice Black's description of the home as "the last citadel of the tired, the weary, and the sick" in *Gregory v. City of Chicago*, 394 U.S. 111, 125 (1969) (Black, J., concurring). *Olmer*, 192 F.3d at 1185 (Bright, J., dissenting). Judge Bright remarked that "[t]his description applies with equal force to houses of worship." *Id.* (Bright, J., dissenting).

167. *See Olmer*, 192 F.3d at 1185 (Bright, J., dissenting).

168. *See id.* (Bright, J., dissenting).

169. *See id.* (Bright, J., dissenting). Judge Bright based his opinion on the same test used in *Frisby*. *See id.* (Bright, J., dissenting). If an ordinance "[does] no more than eliminate the exact source of the evil it [seeks] to remedy[,]" it is sufficiently narrow. City Council of Los Angeles v. Taxpayers for Vincent, 466 U.S. 789, 808 (1984).

170. *See Olmer*, 192 F.3d at 1186 (Bright, J., dissenting).

171. *See id.* (Bright, J., dissenting).

172. *See Olmer*, 192 F.3d at 1187 (Bright, J., dissenting).

173. *See id.* (Bright, J., dissenting). Even pro-life members were distressed about the picketing. *See* McCord, *supra* note 13.

more than ample alternative channels of communication.[174] They could continue to protest across the street from the church or at any other location except the sidewalks and entryways bordering the church's property during the restricted time periods.[175]

Finally, Judge Bright questioned the court's use of *Action v. Gannon*[176] as precedent for declaring the Lincoln ordinance unconstitutional.[177] The specific issue in *Action* was whether individuals could be enjoined from entering a cathedral and disrupting services.[178] This case, however, was about the government's power to enforce restrictions on picketers near religious premises.[179] He interpreted *Action* to stand for the broad proposition that protestors should not be allowed to interfere with an individual's right to worship.[180]

V. SIGNIFICANCE

The Eighth Circuit's decision in *Olmer* gives weight to the premise that free speech is at the top of a hierarchy of constitutional rights. This decision, and the later denial of an en banc hearing, seem to indicate that the Eighth Circuit will continue to follow an extremely strict approach when faced with ordinances restricting focused picketing outside houses of worship. However, precedent would allow regulation controlling the when, where, and how of expressive conduct based on a balance between a person's right to protest and another's right to unobstructed access to her place of worship.

The Constitution provides an assortment of rights. Free speech is clearly one of them; privacy is another. The Supreme Court has not automatically advanced free speech rights over other constitutionally protected interests, but has engaged in a balancing act.[181]

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174. *See Olmer*, 192 F.3d at 1187 (Bright, J., dissenting).

175. *See id.* at 1187 (Bright, J., dissenting). Judge Bright compared this ordinance to the ordinance upheld in *Frisby* as similarly prohibiting only a discrete type of expression. *See id.* (Bright, J., dissenting).

176. 450 F.2d 1227 (8th Cir. 1971).

177. *See Olmer*, 192 F.3d at 1187 (Bright, J., dissenting).

178. *See id.* at 1188 (Bright, J., dissenting).

179. *See id.* (Bright, J., dissenting).

180. *See id.* (Bright, J., dissenting).

181. *See generally* KALVEN, *supra* note 138 (examining the development of free speech doctrine). *See also* Erznoznik v. City of Jacksonville, 422 U.S. 205, 208 (1975) ("This Court has . . . pitt[ed] the First Amendment rights of speakers against the privacy rights of those who may be unwilling viewers or auditors—in a variety of contexts.

Recognizing that "enforc[ing] freedom of speech in disregard of the rights of others [is] harsh and arbitrary in itself,"[182] the Supreme Court has upheld restrictions intended to protect those who cannot escape from the psychological impact of focused picketing.[183] The Supreme Court's ruling in *Frisby* balanced free speech rights and the privacy interests inherent in protecting listeners from unwanted communication in important settings, such as the home.

However, the Eighth Circuit chose a limited interpretation of *Frisby*. Instead of allowing time, place, and manner restrictions based on the picketers' intent to harass and coerce, the court narrowed *Frisby*'s application to personal residences.[184] In the context of exposing vulnerable families with small children and other worshipers to unwanted assaults of graphic depictions of abortions from which they could not escape if they chose to attend church, the Eighth Circuit's ruling is particularly harsh. In *Olmer*, the Eighth Circuit seems to choose a very narrow view of what rights are worthy of protection.

The privacy of churchgoers is as constitutionally important as the privacy of homeowners. People should not be forced to endure a "gauntlet" to attend the church of their choice. The "special nature of the place" plays an important role in deciding whether

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Such cases demand delicate balancing . . . .) (internal citations omitted).

182. Kovacs v. Cooper, 336 U.S. 77, 88 (1949).

183. *See* Madsen v. Women's Health Ctr., 512 U.S. 753, 768 (1994) (acknowledging states' strong interest in medical privacy because targeted picketing of a clinic threatens the psychological well-being of "captive" audience); Frisby v. Schultz, 487 U.S. 474, 486 (1988) (recognizing the psychological effects of targeted picketing on an individual's family life).

184. During the time this note was going through the publication process the Supreme Court decided *Hill v. Colorado*, 120 S. Ct. 2480 (2000). In *Hill*, the Court held constitutional a state statute prohibiting demonstrators from knowingly approaching within eight feet of individuals who were within 100 feet of health care facility entrances. *Id.* at 2499. Discussing the confrontational aspect of the protests, the Court quoted testimony from legislative hearings indicating that protesters were "'flashing bloody fetus signs,'" yelling, and thrusting signs in people's faces. *Id.* at 2486 n.7 (quoting from Hill v. Thomas, 973 P.2d 1246, 1250-51 (Colo. 1999)). The Court noted when conducting its analysis "the significant difference between state restrictions on a speaker's right to address a willing audience and those that protect listeners from unwanted communication." *Id.* at 2489. The Court further stated that "[t]he right to avoid unwelcome speech has special force in the privacy of the home, and its immediate surroundings, but can also be protected in confrontational settings." *Id.* at 2490. During an examination of the Colorado statutes' interpretation of picketing, the Court commented that its previous holdings had recognized "that statutes can equally restrict all 'picketing.'" *Id.* at 2492 n.30. However, cities enacting legislation similar to the Lincoln, Nebraska ordinance may achieve better results by defining a floating buffer zone area similar to one used in *Hill*.

speech can be regulated.[185] Houses of worship are traditionally regarded as special places for many reasons. In addition to being "spiritual homes," churches often serve as focal points for community outreach and activities. Cities have an significant interest in controlling conduct at these places even when they are located in what are traditionally public locations.

By understating the significance of the government's interest in protecting religious worshipers from confrontational and harassing messages, the Eighth Circuit established a rigid standard for communities attempting to regulate this type of expressive conduct. Protestors, prevented from engaging in harassing focused picketing at homes and medical offices can, after *Olmer*, continue to picket churches. Cities are left without guidelines for limiting the time, place, and manner of focused picketing near religious sites. Ordinances modeled on *Frisby* are now of questionable validity in light of the *Olmer* decision.

Learning to live in our society calls for acquiring some level of tolerance for the viewpoints of others. The First Amendment's free speech clause may require that people occasionally be subjected to speech they find disturbing or insulting.[186] However, there is a difference between being subjected to another viewpoint and being subjected to expressive conduct that infringes on an individual's exercise of a constitutional right.[187] Balancing these rights is not an easy task. Reviewing state restrictions attempting to protect one right at the expense of another unquestionably provides courts with a challenge.[188] In this case, the ability of unwilling listeners to attend church peaceably took a back seat to protestors' speech rights.

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185. Grayned v. City of Rockford, 408 U.S. 104, 120 (1972).

186. *See* Terminiello v. City of Chicago, 337 U.S. 1, 4 (1949). "[Speech] may indeed best serve its high purpose when it induces a condition of unrest, creates dissatisfaction with conditions as they are, or even stirs people to anger." *Id.*

187. *See* Phelps, *supra* note 10, at 284.

188. *See* Brownstein, *supra* note 110, at 1199.

* J.D. expected May 2002. The author gratefully acknowledges Professor Erica Beecher-Monas for her thoughtful comments on earlier drafts of this note.