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RESIDENTIAL PICKETING: BALANCING FREEDOM OF EXPRESSION AND THE RIGHT TO PRIVACY

*Frisby v. Schultz*¹

“GET WELL CHARLIE—OUR TEAM NEEDS YOU.” Such a sign, complains Justice Stevens in his dissent to *Frisby v. Schultz*, could not be carried in front of a residence in Brookfield, Wisconsin, long enough to communicate its intended message.² *Frisby v. Schultz* involved a facial first amendment challenge to a city ordinance which prohibited picketing “before or about any residence” The *Frisby* Court upheld the validity of the ordinance.³ This Note will discuss the tension between freedom of expression and the right to privacy as balanced in *Frisby* and the central role which the Court’s narrow construction of the ordinance played.

Appellees Schultz and Braun, opponents of abortion, sought to express their views by picketing on a public street in front of a doctor’s house who performs abortions.⁴ The appellees and others gathered at least six times to picket the doctor’s home for periods of an hour to an hour and a half. The group ranged in size from eleven to more than forty persons.⁵ The police had no occasion to enforce various ordinances involving obstruction of streets, loud noises or disorderly conduct.⁶

1. 108 S. Ct. 2495 (1988).

2. *Id.* at 2508 (Stevens, J., dissenting).

3. *Id.* at 2497. The underlying action had attacked the ordinance both on its face and as applied. Verified Complaint for Injunctive, Declaratory, and other Relief at 4, *Schultz v. Frisby*, 619 F. Supp. 792 (E.D. Wis. 1985), *aff’d*, 807 F.2d 1339 (7th Cir. 1986), *vacated*, 818 F.2d 1284 (7th Cir. 1987), *aff’d en banc*, 822 F.2d. 642 (7th Cir. 1987), *rev’d*, 108 S. Ct. 2495 (1988). The Supreme Court only addressed (and rejected) appellees’ facial first amendment challenge. 108 S. Ct. at 2497, 2504. Appellees are currently attempting to litigate the remaining issues in the lower federal courts. See *Schultz v. Frisby*, No. 85-C-1018 (E.D. Wis. Dec. 13, 1988) (granting the town’s motion for judgment on the pleadings), *appeal pending*, No. 89-1098 (7th Cir. docketed Jan. 17, 1989).

4. *Id.*

5. *Id.* at 2498.

6. *Id.* The majority opinion, written by Justice O’Connor, was joined by Rehnquist, C.J., and Blackmun, Scalia, Kennedy, JJ. Their description of the protests as “peaceful and orderly” is not in complete accord with the account given by dissenters, Brennan and Marshall, JJ. The dissent related allegations including trespassing, blocking entrances, shouting and frightening young children with accusations that the doctor was a “baby killer.” *Id.* at 2507.

The town board, moved by the resulting complaints, enacted an ordinance which stated: "It is unlawful for any person to engage in picketing before or about the residence or dwelling of any individual in the town of Brookfield."⁷ Appellees halted their picketing when confronted with the threat of arrest and prosecution and filed suit in district court naming city officials and the Town of Brookfield as defendants.⁸ Appellees contended that the ordinance violated the first amendment and brought their complaint under 42 U.S.C. § 1983⁹ seeking declaratory as well as preliminary and permanent injunctive relief.¹⁰

The district court concluded that the ordinance was not narrowly tailored to advance the city's legitimate interests.¹¹ It found the ordinance, which "completely bans all picketing in residential neighborhoods," to be an improper restraint of protected speech within the context of a public forum.¹² The district court granted a preliminary injunction and ordered that it become permanent within sixty days unless defendants appealed or either party requested a trial on the merits.¹³ The city appealed the court's entry of the preliminary injunction and requested a trial on the merits.¹⁴ A Seventh Circuit panel affirmed the district court's order.¹⁵ The court of appeals then vacated that decision¹⁶ and reheard the case en banc, affirming the district court's judgment in an equally divided vote.¹⁷ The city again appealed, this time to the United States Supreme Court, which disregarded the lack of finality in the district court's order and granted certiorari due to the substantial importance of the question.¹⁸ The *Frisby* Court held that

7. *Id.* at 2498. The language of the ordinance specifically declared that "the practice of picketing before or about residences or dwellings causes emotional disturbance and distress to the occupants . . . [and] has as its objective the harassing of such occupants." *Id.* While the ordinance also expresses concern for public safety due to the obstruction of streets and sidewalks, the Court mentions this only in passing.

8. *Schultz*, 619 F. Supp. 792.

9. 42 U.S.C. § 1983 (1982) provides, in part, that "[e]very person who, under color of any statute, ordinance . . . of any state . . . subjects or causes to be subjected, any citizen . . . to the deprivation of any rights . . . secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proceeding for redress."

10. *Schultz*, 619 F. Supp. at 793.

11. *Id.* at 797.

12. *Id.*

13. *Frisby v. Schultz*, 108 S. Ct. 2495, 2498 (1988).

14. *Id.*

15. 807 F.2d 1339 (7th Cir. 1986), *vacated*, 818 F.2d 1284 (7th Cir. 1987), *aff'd en banc*, 822 F.2d 642 (7th Cir. 1987), *rev'd*, 108 S. Ct. 2495 (1988).

16. 818 F.2d 1284 (7th Cir. 1987), *aff'd en banc*, 822 F.2d 642 (7th Cir. 1987), *rev'd*, 108 S. Ct. 2495 (1988).

17. 822 F.2d 642 (7th Cir. 1987), *rev'd*, 108 S. Ct. 2495 (1988).

18. *Frisby v. Schultz*, 108 S. Ct. 2495, 2498-99 (1988).

an ordinance which prohibited picketing "before or about" any residence¹⁹ was not (as narrowly construed) unconstitutional on its face.²⁰

PICKETING AS SPEECH

The acceptance of picketing as a means of expression came late in our history. Only since the 1940 decision of *Thornhill v. Alabama*²¹ has the Supreme Court recognized that freedom of expression must include the right to picket.²² The "safeguarding" of that right, said the Court, "is essential to the securing of an informed and educated public opinion with respect to a matter which is of public concern."²³

While picketing is *protected* today, it is only in this century that picketing was even considered *lawful*. In 1905 a federal court proclaimed:

There is and can be no such thing as peaceful picketing, any more than there can be chaste vulgarity, or peaceful mobbing, or lawful lynching. When men want to converse or persuade, they do not organize a picket line. . . .

. . . .

. . . No self-respecting man will submit to it. Nor is he compelled to submit to it. . . . He need only apply to the courts . . . and he will be given an order to end it.²⁴

The violence and militancy of labor picketers caused the Supreme Court in *American Steel Foundries v. Tri-City Central Trades Council* to conclude that picketing was inherently unlawful.²⁵ But despite *American Steel's* grim assessment of picketers, the 1921 decision seemed to signal acceptance of peaceful picketing, even if the Court was not prepared to recognize it by name.²⁶ The same year, in *Truax v. Corrigan*, Justice Taft declared that in *American Steel Foundries* "we held . . . that peaceful picketing was a contradiction in terms. . . ."²⁷ At the same time, however, the Court in *Truax* held it lawful for the union to maintain a representative at each plant entrance "to announce the strike and peaceably to persuade the

19. *Id.* at 2497.

20. *Id.* at 2504.

21. 310 U.S. 88 (1940).

22. *Id.* at 104.

23. *Id.*

24. *Atchison, T. & S.F. Ry. v. Gee*, 139 F. 582, 584-86 (C.C.S.D. Iowa 1905).

25. *American Steel Foundries v. Tri-City Central Trades Council*, 257 U.S. 184, 205 (1921).

26. *Id.* The Court indicated that the word "picket" itself symbolized a militant purpose. See also *Jones v. E. Van Winkle Gin & Mach. Works*, 131 Ga. 336, 340, 62 S.E. 236, 238 (1908).

27. *Truax v. Corrigan*, 257 U.S. 312, 340 (1921).

employees and would-be employees to join them in it."²⁸ It took a few more years to remove the militant stigma that clung to the term *picket*.

By 1937, the Court, in *Senn v. Tile Layers Protective Union, Local No. 5*,²⁹ no longer perceived a problem with the concept of peaceful picketing and even implied that picketing was a form of speech which, as such, would be protected by the Constitution.³⁰ Three years later, in *Thornhill v. Alabama*,³¹ the Court invalidated a state statute³² prohibiting loitering or picketing near any establishment with the intent of influencing others from transacting business there.³³ In holding the statute unconstitutional, the *Thornhill* Court rejected the notion that any business should have an absolute freedom from speech merely because that speech may be detrimental to its interests:

Every expression of opinion on matters that are important has the potentiality of inducing action in the interests of one rather than another group in society. But the group in power at any moment may not impose penal sanctions on peaceful and truthful discussion of matters of public interest merely on a showing that others may thereby be persuaded to take action inconsistent with its interests.³⁴

Since *Thornhill*, the right to picket has remained firmly tied to first amendment freedoms. It is this first amendment freedom which the Court in *Frisby* counterbalanced against the privacy interest of the picketed resident.

THE PRIVACY INTEREST

An individual's privacy finds constitutional protection in more than one source. First, the Supreme Court has culled the right to privacy from

28. *Id.* In his dissent to *Truax*, Justice Brandeis had a different view of the Court's opinion in *American Steel Foundries*, saying that the Court had "recently held that peaceful picketing is not unlawful." *Id.* at 371 (Brandeis, J., dissenting). For a discussion of the law of picketing in this period, see Tanenhaus, *Picketing as a Tort: The Development of the Law of Picketing from 1880 to 1940*, 14 U. PITT. L. REV. 170 (1953).

29. 301 U.S. 468 (1937).

30. *Id.* at 478. "Members of a union might, without special statutory authorization by a state, make known the facts of a labor dispute, for freedom of speech is guaranteed by the Federal Constitution." *Id.* The court in *Senn* upheld a Wisconsin law authorizing peaceful picketing. *Senn*, who was not a union member, operated a small tile contracting business from his home. Union members picketed his home, followed him to his jobs and picketed at his job sites. *Id.* at 473-75. The Court did not find it significant that the picketing had occurred at *Senn's* home.

31. 310 U.S. 88 (1940).

32. *Id.* at 106.

33. *Id.* at 91.

the Constitution itself, particularly as it relates to one's home and family life.³⁵ The other source of the privacy interest, and the source upon which the *Frisby* Court bases its decision, stems from the exercise of state police power. Courts have held that the police power reaches "beyond health, morals and safety, . . . comprehend[ing] the duty, within constitutional limitations, to protect the well-being and tranquility of the community."³⁶ In *Frisby*, the Court asserted that the "state's interest in protecting the well-being, tranquility, and privacy of the home is certainly of the highest order in a free and civilized society."³⁷ It characterized one's home as unique; the last "retreat to which men and women can repair to escape the tribulations of their daily pursuits"³⁸ It is this view of one's home, as the individual's last refuge, which changes the balance between freedom of speech and the resident's privacy. Within his home the "unwilling listener" truly becomes a "captive" audience.³⁹ "That we are often 'captives' outside the sanctuary of the home," said the *Frisby* Court, "and subject to objectionable speech . . . does not mean we must be captives everywhere."⁴⁰ In the conflict between speech and residential privacy, speech has often been limited. The *Frisby* Court echoed earlier decisions that individuals need not submit to unwanted speech in their homes and that government may protect that privacy.⁴¹ *Rowan v. Post Office Department*⁴² involved a federal statute which allowed an individual to halt offensive mailings to the home. The *Rowan* Court remarked, "it seems to us that

35. See generally *Roe v. Wade*, 410 U.S. 113 (1973) (right to obtain an abortion); *Eisenstadt v. Baird*, 405 U.S. 438 (1972) (unmarried woman's right to use contraceptives); *Stanley v. Georgia*, 394 U.S. 557 (1969) (right to view pornography in the home); *Loving v. Virginia*, 388 U.S. 1 (1967) (right to marry is a basic civil right).

Assuming that the Court recognized a privacy right in this context, it would be difficult to show state action where the resident's privacy interest has been invaded by other private citizens and where the state's only involvement is a failure to enforce that privacy interest. For a discussion of state action and the constitutional right to privacy see Comment, *Picketers at the Doorstep*, 104 HARV. C.R.-C.L. L. REV. 95, 110 (1974).

Even if such a constitutional right to privacy were established and the necessary state action were found, the outcome would still be in doubt. Any constitutional right to privacy might well be subordinated to first amendment expression. In *Carey v. Brown*, 447 U.S. 455 (1980), the Court declared that "[p]ublic issue picketing, 'an exercise of . . . basic constitutional rights in their most pristine and classic form,' has always rested on the highest rung of the hierarchy of First Amendment values" *Id.* at 466-67.

36. *Kovacs v. Cooper*, 336 U.S. 77, 83 (1949).

37. *Frisby v. Schultz*, 108 S. Ct. 2495, 2502 (1988) (quoting *Carey*, 447 U.S. at 471).

38. *Id.*

39. *Id.*

40. *Id.* (quoting *Rowan v. Post Office Dep't*, 397 U.S. 728, 738 (1970)).

41. *Id.*

42. *Rowan v. Post Office Dep't*, 397 U.S. 728, 738 (1970).

a mailer's right to communicate must stop at the mailbox of an unreceptive addressee."⁴³ In *Kovacs v. Cooper*,⁴⁴ the Court in upholding a city ordinance prohibiting the use of sounds trucks which emitted "loud and raucous noises,"⁴⁵ described the resident as "helpless to escape this interference with his privacy."⁴⁶ *FCC v. Pacifica Foundation*⁴⁷ upheld FCC regulations prohibiting offensive radio broadcasts.⁴⁸ The privacy interest in the home is clearly settled as a significant state interest and one historically capable of resisting intrusion under the guise of expression.⁴⁹

THE FRISBY COURT'S FIRST AMENDMENT ANALYSIS

The *Frisby* Court began its constitutional analysis by asserting that the city's anti-picketing ordinance "operates at the core of the First Amendment by prohibiting appellees from engaging in picketing on an issue of public concern."⁵⁰ While "careful scrutiny" is the standard traditionally applied to public issue picketing, the *Frisby* Court looked to the place of the picketing to establish what restrictions it would permit.⁵¹

The relevant fora in *Frisby* were the streets of Brookfield, Wisconsin. Despite the residential character of the streets, the *Frisby* Court found them to be traditional public fora: "A public street does not lose its status as a traditional public forum simply because it runs through a residential neighborhood. . . . The residential character of those streets may well inform the application of the relevant test, but it does not lead to a different test."⁵² The anti-picketing ordinance was to be measured against the stringent standards for limiting restrictions on speech in a traditional public forum.⁵³

In keeping with its decision in *Perry Education Association v. Perry Local Educators' Association*,⁵⁴ the *Frisby* Court first sought to determine

43. *Id.* at 736-37.

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

45. *Id.* at 78.

46. *Id.* at 87.

47. *FCC v. Pacifica Found.*, 438 U.S. 726 (1978).

48. *Id.* at 748-49.

49. *Frisby v. Schultz*, 108 S. Ct. 2495, 2503 (1988).

50. *Id.* at 2499.

51. *Id.*

52. *Id.* at 2500. See also *Hague v. CIO*, 307 U.S. 496 (1939). The *Hague* court declared:

Wherever the title of streets and parks may rest, they have immemorially been held in trust for the use of the public and, time out of mind, have been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions. Such use of the streets and public places has, from ancient times, been a part of the privileges, immunities, rights, and liberties of citizens.

Id. at 515.

53. *Frisby*, 108 S. Ct. at 2500.

54. *Perry Education Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37 (1983).

whether the ordinance was content-neutral. Appellees argued that the ordinance, while neutral on its face, contained an implied exception for labor picketing. While a state law⁵⁵ expressly protecting peaceful labor picketing supported the contention, the Court declined to accept it.⁵⁶ The Court observed that the district court had rejected this interpretation and the court of appeals had affirmed that rejection.⁵⁷ Following its usual practice, the *Frisby* Court deferred to the lower federal court's construction of the state statute recounting its "belief that district courts and courts of appeal are better schooled in and more able to interpret the laws of their respective states."⁵⁸ Having accepted the trial court's statement that the ordinance was content-neutral,⁵⁹ the Court applied the applicable test as set out in *Perry*.⁶⁰

Perry held that a state may enforce "time, place, and manner of expression" regulations which are content-neutral if those regulations "are narrowly tailored to serve a significant government interest, and leave open ample alternative channels of communication."⁶¹ *Frisby* found the significant government interest within the language of the ordinance itself: "the protection of residential privacy."⁶² In so doing (as noted above), the Court focused on the uniqueness of the home as a sanctuary of last resort and Brookfield's goal of protecting this sanctuary.⁶³

The examination then turned to whether the ordinance was narrowly tailored to serve the government interest. The test for such tailoring is whether the ordinance "targets and eliminates no more than the exact source of the 'evil' it seeks to remedy."⁶⁴ If not narrowly tailored, the statute is overbroad and must be struck as invalid on its face.⁶⁵ *Broadrick v. Oklahoma*⁶⁶ described the overbreadth doctrine as "strong medicine" and held that a finding of facial overbreadth is inappropriate whenever a

55. WIS. STAT. § 103.53(1) (1986).

56. *Frisby v. Schultz*, 108 S. Ct. 2495, 2500-01 (1988).

57. *Id.* at 2501.

58. *Id.* at 2500 (quoting *Brockett v. Spokane Arcades, Inc.*, 472 U.S. 491, 499-500 (1985)).

59. While the *Frisby* Court noted that the district court had rejected appellee's interpretation of the state law, *id.*, the trial court did not actually address the construction of the statute. The finding of content-neutrality was based upon the trial court's reading of the ordinance's legislative history. Further, the finding of content-neutrality was unessential to the court's opinion and therefore dicta. *Schultz*, 619 F. Supp. at 796-97.

60. *Id.* at 2501.

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

62. *Frisby v. Schultz*, 108 S. Ct. 2495, 2502 (1988).

63. See *supra* notes 37-40 and accompanying text.

64. *Frisby v. Schultz*, 108 S. Ct. at 2502.

65. *Broadrick v. Oklahoma*, 413 U.S. 601, 613 (1973).

66. *Broadrick v. Oklahoma*, 413 U.S. 601 (1973).

"limiting construction has been or could be placed on the challenged statute."⁶⁷

Broadrick also limited the application of the overbreadth doctrine in situations involving speech plus conduct. Where conduct, and not pure speech is involved, the overbreadth must not only be real but must go substantially beyond the sweep of the statute's permissible scope.⁶⁸ *Erznoznik v. City of Jacksonville*⁶⁹ emphasized the need for caution when appraising a facial challenge because invalidation of an ordinance may be an "unnecessary interference with a state regulatory program."⁷⁰

Overbreadth need not necessarily be invoked, however, even where certain speech has been totally prohibited. A complete ban could be narrowly tailored as long as every act within the statute's scope is part of the "targeted evil."⁷¹ For example, *Frisby* cited *City Council of Los Angeles v. Taxpayers for Vincent*,⁷² in which the Court upheld an ordinance banning all signs on public property because the evil to be targeted was the "visual clutter and blight" which the signs created. Each sign was a part of that clutter and therefore appropriately restricted by a total ban.⁷³ The *Frisby* Court applied this same principle, except that the Court viewed the ordinance as a total ban on "focused" picketing, rather than residential picketing in general.⁷⁴ It characterized the picketing which the ordinance prohibited as directed at a home rather than toward the public: a message intended as an offensive intrusion upon a particular resident.⁷⁵ As such, the Court viewed every instance of focused picketing as a part of the targeted evil.⁷⁶

In so holding, the Supreme Court in *Frisby* disagreed with the lower courts which had read the ordinance as a complete ban on picketing in a residential neighborhood.⁷⁷ The district court had, in effect, applied the overbreadth doctrine when it found the ordinance "likely to fail the test of a constitutional time, place, and manner regulation of speech."⁷⁸ Ad-

67. *Id.* at 613.

68. *Id.* at 616.

69. *Erznoznik v. City of Jacksonville*, 422 U.S. 205 (1973).

70. *Id.* at 216. *See* *Brockett v. Spokane Arcades, Inc.*, 472 U.S. 491, 499-500 (1985) (while normally the lower federal courts are better situated to construe the laws in their states, "we surely have authority to differ with the lower federal courts as to the meaning of a state statute."). *See also* *Virginia v. American Booksellers Ass'n*, 108 S. Ct. 636 (1988).

71. *Frisby v. Schultz*, 108 S. Ct. 2495, 2502-03 (1988).

72. *City Council of Los Angeles v. Taxpayers for Vincent*, 466 U.S. 789 (1984).

73. *Id.* at 808-10.

74. *Frisby*, 108 S. Ct. at 2503-04.

75. *Id.* at 2503.

76. *Id.*

77. *Id.* at 2503-04.

78. *Schultz v. Frisby*, 619 F. Supp. 792, 797-98 (E.D. Wis. 1985), *aff'd*, 807 F.2d 1339 (7th Cir. 1986), *vacated*, 818 F.2d 1284 (7th Cir. 1987), *aff'd en banc*, 822 F.2d 642 (7th Cir. 1987), *rev'd*, 108 S. Ct. 2495 (1988).

dressing its refusal to defer to the lower court's construction of the ordinance, the Supreme Court said, "[w]e are particularly reluctant to defer when the lower courts have fallen into plain error . . . which is precisely the situation here."⁷⁹ The error consisted in reading the language "unlawful . . . to engage in picketing before or about the residence or dwelling of any individual"⁸⁰ as a ban on all picketing in a residential area. The *Frisby* Court instead proclaimed a narrow reading of the ordinance in keeping with a "well established principle that statutes will be interpreted to avoid constitutional difficulties."⁸¹ The *Frisby* Court reasoned that the use of the singular words "residence" and "dwelling" suggested a ban only of picketing which was "focused" upon a particular residence.⁸² The Court was further persuaded by Brookfield's Counsel's representations that the town viewed the ordinance as only prohibiting focused picketing.⁸³ The ordinance's reach, as the *Frisby* Court ultimately construed it, was that it banned "picketing taking place solely in front of a particular residence."⁸⁴

This limiting construction aided the Court in two areas. First, it allowed the Court to find the ordinance "narrowly tailored."⁸⁵ The ordinance would prohibit only focused, targeted picketing; i.e., only the evil which it might legitimately prevent.⁸⁶ Second, this narrow construction permitted the Court to find that the ordinance "preserves ample alternative channels of communication."⁸⁷ The Court indicated that the ordinance would not prohibit numerous other forms of expression such as "[g]eneral marching through residential neighborhoods, or even walking a route in front of an entire block of houses"⁸⁸ It would not prohibit the distribution of literature, door-to-door or by the mails.⁸⁹ Contacts by telephone would be permissible,

79. *Frisby*, 108 S. Ct. at 2501.

80. *Id.* at 2498, 2501.

81. *Id.* at 2501.

82. *Id.*

83. *Id.* In his concurrence Justice White accepted the representations of counsel as sufficient to avoid application of the overbreadth doctrine, but expressed reservations in relying on those statements. He pointed out that only in the oral argument did the town's counsel restrict the scope of the ordinance's enforcement. The appellant's briefs claimed that the ordinance banned all picketing in a residential area. Further, counsel had not argued this restricted construction in the courts below. *Id.* at 2505.

According to Walter M. Weber, attorney for the appellees, the Town of Brookfield has subsequently enforced the ordinance against seven demonstrators (including one of the original plaintiffs) who marched up and down the street and around the block. He said that notwithstanding the town counsel's assurances to the Supreme Court, the town had never intended to abide by the narrower interpretation (telephone interview with Walter M. Weber, January 12, 1988).

84. *Id.* at 2501.

85. *Id.* at 2504.

86. *Id.*

87. *Id.* at 2501-02.

88. *Id.* at 2501.

short of harassment.⁹⁰ The ordinance, having been found content-neutral, narrowly tailored to meet only the significant government interest, and preserving of alternative channels of communication, was accordingly upheld and the facial challenge to its constitutionality failed.⁹¹

DISSENT: THE COSTS OF FRISBY

The dissent by Justices Brennan and Marshall criticized the majority for approving an ordinance which prohibits more speech than required to protect the legitimate state interest. "[T]his test requires that the government demonstrate that the offending aspects of the prohibited manner of speech cannot be separate[d], and less intrusively, controlled."⁹² It pointed out that the government could constitutionally regulate the most troublesome aspects of picketing: shouting, trespassing, blocking exits.⁹³ The government might regulate the number of picketers, the hours of picketing or the noise level so that the intrusiveness of the picket is controlled.⁹⁴

The dissent also rejected the argument that picketers wish to communicate only with the "targeted resident."⁹⁵ The speech in this case was directed at *both* the doctor and the public; even the site itself serves to identify the object of the protest.⁹⁶ Finally, the dissent objected to the majority's depiction of even a lone picketer as a sinister presence; a "lurking stranger."⁹⁷ The solitary picketer, at midafternoon, is not objectionable because the picketer lurks surreptitiously but because she is open and notorious.⁹⁸ If picketing were regulated so as to be non-coercive and non-intrusive, then the only remaining discomfort to the resident would be that of "knowing there is a person outside who disagrees with someone inside."⁹⁹

Justice Stevens, whose comment began this Note, criticized the majority for finding the ordinance "narrowly tailored" to protect "only unwilling recipients of the communications."¹⁰⁰ He wrote that the ordinance's plain language prohibited all picketing without regard to its intrusiveness: the same prohibitions applied whether the picketing was directed at willing, indifferent or unwilling recipients.¹⁰¹ He also emphasized that speech may

90. *Id.* at 2501-02.

91. *Id.* at 2504.

92. *Id.* at 2507 (Brennan J., dissenting).

93. *Id.*

94. *Id.*

95. *Id.* at 2508.

96. *Id.*

97. *Id.*

98. *Id.*

99. *Id.*

100. *Frisby v. Schultz*, 108 S. Ct. 2495, 2509 (1988) (Stevens, J., dissenting) (quoting the majority opinion).

101. *Id.*

be offensive in one of two ways. It may give offense independently of its message, simply by being inappropriately loud or ugly.¹⁰² Justice Stevens did not believe such speech is constitutionally protected.¹⁰³ At the opposite pole, however, speech may be offensive solely because the listener disagrees with the message, however gently delivered.¹⁰⁴ Justice Stevens agreed with the majority that the overbreadth of the ordinance, while unquestionably real, may or may not be substantial. It is unlikely that town will enforce the ordinance in the event that friendly message carriers gather. Perhaps the town might tolerate even unfriendly pickets briefly.¹⁰⁵ Nonetheless the ordinance gives the town too much latitude, "while potential picketers must act at their peril. . . . It is a simple matter for the town to amend its ordinance and to limit the ban to conduct that unreasonably interferes with the privacy of the home and does not serve a reasonable communicative purpose."¹⁰⁶

THE EFFECT OF *FRISBY V. SCHULTZ*

The Supreme Court in *Frisby v. Schultz* makes it clear that the government may enforce content-neutral restrictions prohibiting picketers (in groups or even a single individual) from gathering in front of a residence and "focusing" their protest upon the occupants of that residence.¹⁰⁷ By contrast, the Court indicated that "walking a route in front of an entire block of houses" would be protected.¹⁰⁸ The Court construed the challenged ordinance, however, to prohibit only "focused" picketing which occurred "solely" in front of a particular residence.¹⁰⁹ The *Frisby* Court specifically left undecided situations involving picketing of a home used as a business or meeting place or where the resident invites picketers.¹¹⁰

Regarding picketing of a residence used as a business, the Supreme Court case of *Senn v. Tile Layers Protective Union, Local No. 5*¹¹¹ was the first to suggest the link between the right to picket and freedom of speech. *Senn* upheld a state law authorizing peaceful picketing.¹¹² Apparently the Court considered the fact that *Senn's* home was also a workplace unimportant.¹¹³

102. *Id.* (citation omitted).

103. *Id.*

104. *Id.* at 2508.

105. *Id.* at 2510.

106. *Id.*

107. *Frisby v. Schultz*, 108 S. Ct. 2495, 2501 (1988).

108. *Id.*

109. *Id.*

110. *Id.* at 2504.

111. 301 U.S. 468 (1937).

112. Ironically, this is the same law that the appellees' in *Frisby* argued would require a labor picketing exception to the Brookfield ordinance.

113. 301 U.S. at 473-75.

In the 1980 case of *Carey v. Brown*,¹¹⁴ the Court dealt with an Illinois statute¹¹⁵ which banned the picketing of residences or private dwellings, but exempted from the ban "the peaceful picketing of a place of employment involved in a labor dispute."¹¹⁶ The Court struck the statute on equal protection grounds, holding that the state may protect "individual privacy by enacting reasonable time, place, and manner regulations applicable to all speech *irrespective of content*."¹¹⁷

The difference between regulation of the *place* of expression and restrictions based on *content*, while not necessarily important in practice, is certainly important from a constitutional standpoint.¹¹⁸ The statute in *Carey* was subsequently amended to remove the offending language but still contained an exception for the picketing of a residence used as a business or place of meeting for the discussion of public issues.¹¹⁹ Such an exception respects the Court's holding in *Grayned v. City of Rockford*,¹²⁰ which involved protesters outside a high school. The *Grayned* Court stated: "The nature of a place, [and] 'the pattern of its normal activities, dictate the kinds of regulations of time, place, and manner that are reasonable.' . . . The crucial question is whether the manner of expression is basically incompatible with the normal activity of a particular place at a particular time."¹²¹ This standard, which looks to the appropriateness of the location, would seemingly leave some room for the type of "focused" picketing found in *Frisby* in those situations where the residence is the relevant and fitting location for such protest. The home may be most appropriate where no alternative location for expression exists. The *Frisby* Court, however, did not mention and did not appear to be affected by the obvious alternative that the doctor could have been picketed at his place of business,¹²² nor

114. 447 U.S. 455 (1980).

115. ILL. REV. STAT. ch. 38, para. 21.1-2 (1977).

116. Additionally, the statute made exceptions for picketing a residence or dwelling used either as a business or as a meeting place "commonly used to discuss subjects of general public interest." *Id.*

117. *Carey*, 447 U.S. at 470.

118. The distinction often might be of no practical effect. The result of allowing an exception for the picketing of a *place* of business would be no different than if the exception were for picketing *related to the conduct of that business*. Few individuals would have any other reason to picket the location in any event. The same practical effect also occurs when analyzing restrictions rather than exceptions to restrictions. If a city were to enact *place* regulations that effectively limited the picketing of an abortion clinic, the result would be the same as if it had enacted content-specific regulations. No one would be restrained except anti-abortion protesters because it is unlikely that anyone else would wish to picket there anyway.

119. ILL. REV. STAT. ch. 38, para. 21.1-2 (1987).

120. 408 U.S. 104 (1972).

121. *Id.* at 116.

122. *Schultz v. Frisby*, 619 F. Supp. 792, 795 (E.D. Wis. 1985).

is there any indication regarding the outcome had that option not been available.¹²³

Further *Carey v. Brown*¹²⁴ was potentially an important precedent in that it involved the picketing of a public official's residence.¹²⁵ In *Carey*, the Supreme Court gave no indication that merely because the resident was the mayor of Chicago his home should be placed into any category other than that of a residence used solely for residential purposes.¹²⁶ Presumably, city hall would be available for picketing, thus leaving no basis for classifying the mayor's home any differently from those of his neighbors.¹²⁷

Aside from the *Frisby* Court's balancing of the competing interests of privacy and expression, the Court's treatment of the overbreadth issue gives rise to another question. The ordinance, while challenged as facially overbroad,¹²⁸ was not assailed as vague. Yet before the Supreme Court's treatment of *Frisby*, every party and court read Brookfield's ordinance as prohibiting *all picketing in residential areas*.¹²⁹ Nonetheless, the *Frisby* Court found the ordinance susceptible to a narrowing interpretation so as to respect the policy of avoiding constitutional difficulties wherever possible.¹³⁰

The vagueness issue surfaces because it seems unlikely that anyone who was to merely read the ordinance would similarly interpret it.¹³¹ The language: "it is unlawful for any person to engage in picketing before or about the residence or dwelling of any individual in the town of Brookfield,"¹³² while not vague *before* the *Frisby* Court reconstructed it, may well be vague now that the Court has interpreted it. The Court enhanced the meaning of the ordinance in a way which many lawyers, not to mention ordinary people, might never understand.

A vague law is not unconstitutional only because it is a snare for the innocent or subject to arbitrary enforcement.¹³³ It may also offend wherever

123. In his dissent to *Carey v. Brown*, 447 U.S. 455 (1980), Justice Rehnquist disparaged the Court's foggy directions to legislatures attempting to formulate reasonable picketing statutes. He lamented that the Court's "hymns of praise in prior opinions celebrating carefully drawn statutes are no more than sympathetic clucking, and in fact the State is damned if it does and damned if it doesn't." *Id.* at 475-76.

124. 447 U.S. 455 (1980).

125. *Id.* at 457.

126. *Id.* at 477 (Rehnquist, J., dissenting).

127. *Id.*

128. *Frisby v. Schultz*, 108 S. Ct. 2495, 2497 (1988).

129. *Id.* at 2505 (White, J., concurring).

130. *Id.* at 2501.

131. *Grayned v. City of Rockford*, 408 U.S. 104 (1972). The Court in *Grayned* held that "[i]t is a basic principle of due process that an enactment is void for vagueness if its prohibitions are not clearly defined. . . . [W]e insist that laws give the person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly." *Id.* at 108.

132. *Frisby*, 108 S. Ct. at 2498.

133. *Grayned v. City of Rockford*, 408 U.S. 104, 110 (1972).

it tends to inhibit the exercise of first amendment freedoms.¹³⁴ Whenever citizens subject to such a law wish to exercise their freedom of expression through picketing, they steer a course between getting arrested on one hand and foregoing the exercise of constitutional rights on the other.

The Supreme Court in *Grayned v. City of Rockford*,¹³⁵ held: "Uncertain meanings inevitably lead citizens to 'steer far wider of the unlawful zone' . . . than if the boundaries of the forbidden areas were clearly marked."¹³⁶ Unless citizens are aware of the *Frisby* Court's narrow interpretation of the ordinance, those wishing to avoid arrest will be encouraged to forego the exercise of their rights. Laws such as the Brookfield ordinance may cause potential picketers to steer so wide and clear in exercising their first amendment freedoms so as to devalue the *Frisby* Court's narrow construction of the ordinance and its attempt to avoid conflict with local lawmakers.

In defense of the majority opinion in *Frisby v. Schultz*, however, the narrowing interpretation of the ordinance was not necessarily adverse to the interests of the picketers in question. Their activities allegedly fell within the area which the city might have constitutionally prohibited.¹³⁷ Also, while the statute as interpreted requires clarification for the ordinary person to understand it, the need to interpret statutes is a common feature of our legal system. Nor is it especially notable that a court interpreted an ordinance differently from its most common meaning. The narrowed interpretation presents no special danger that the unwary citizen will accidentally cross into the forbidden zone.

Although the dangers of vagueness are most obvious where an individual is innocently entangled in the violation of a vague law, he at least retains substantive defenses to prosecution. If the violated law is shown to be vague, the courts will not enforce it.¹³⁸

The Brookfield ordinance, however, presents a completely different problem. The ordinance appears to prohibit all picketing in residential neighborhoods.¹³⁹ An ordinary person—or that person's attorney—would probably understand it in its plain sense. Lacking the urgent situation where

134. *Id.* at 109.

135. 408 U.S. 104 (1972).

136. *Id.* at 109.

137. *Frisby v. Schultz*, 108 S. Ct. 2495, 2498 (1988). In fact, the record indicates that the one picket that induced neighbors to complain followed an extended route in front of a number of different residences. See Plaintiffs' Brief in Opposition to Defendants' Motion for Judgment on the Pleadings at 4 (citing record material), *Schultz v. Frisby*, No. 85-C-1018 (E.D. Wisc. Dec. 13, 1988), *appeal pending*, No. 89-1098 (7th Cir. docketed Jan. 17, 1989).

138. See *Papachristou v. City of Jacksonville*, 405 U.S. 156, 162 (1972) (municipal vagrancy ordinance held void for vagueness because it failed "to give a person of ordinary intelligence fair notice that his contemplated conduct is forbidden. . .").

139. *Frisby*, 108 S. Ct. at 2501.

an individual stands accused of violating the law, it is far less likely that he (or his attorney) would go to the lengths necessary to learn that the statute did not prohibit all such picketing. Most likely, the ordinary person would simply forego his constitutional rights. The question is whether the effective loss of those rights is an acceptable price to pay to avoid interfering with the legislative province of local government. More to the point: How much restraint has the court actually shown in leaving the law on the books? Once the Court purported to change the meaning of the ordinance's words, the amendment of the words themselves would seem a lesser interference than the interference already imposed. As Justice Stevens concluded in his dissent, "it is a simple matter for the town to amend its ordinance and to limit the ban"¹⁴⁰ Notwithstanding the Court's proper reluctance to invoke the overbreadth doctrine, overall fairness and clarity would be better served if Brookfield amended the ordinance to say what the Supreme Court has decided it now means.¹⁴¹

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140. *Frisby v. Schultz*, 108 S. Ct. 2495, 2510 (1988) (Stevens, J., dissenting).

141. Since the United States Supreme Court is not the ultimate authority in construing state law, it is possible that the Wisconsin Supreme Court may yet decide that the ordinance *does* mean what it says.

