

# **A Time to Mourn: Balancing the Right of Free Speech Against the Right of Privacy in Funeral Picketing**

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## Table of Contents

<b>I. Abstract/Introduction.....</b>	<b>- 1 -</b>
<b>II. Funeral Picketing and Westboro.....</b>	<b>- 5 -</b>
<b>III. The Right to Mourn as a Governmental Interest .....</b>	<b>- 8 -</b>
<b>A. The Right to Mourn and Privacy.....</b>	<b>- 8 -</b>
<b>B. Mourning as an Important Value.....</b>	<b>- 11 -</b>
<b>C. The Right to Mourn and the Right to Worship.....</b>	<b>- 13 -</b>
<b>D. Other Significant Interests .....</b>	<b>- 15 -</b>
<b>IV. The Legislative Response to Funeral Picketing .....</b>	<b>- 16 -</b>
<b>A. Federal Legislation.....</b>	<b>- 16 -</b>
<b>B. State Legislation .....</b>	<b>- 17 -</b>
<b>V. Constitutional Scrutiny of Funeral Picketing Legislation.....</b>	<b>- 19 -</b>
<b>A. Scrutiny of Speech in a Public Forum.....</b>	<b>- 19 -</b>
<b>B. Targeted Legislation &amp; Content Neutrality.....</b>	<b>- 22 -</b>
<b>C. Application of Legislation to Counter-Demonstrations .....</b>	<b>- 25 -</b>
<b>D. Recent Constitutional Challenges.....</b>	<b>- 25 -</b>
<b>VI. Surviving Constitutional Challenges.....</b>	<b>- 30 -</b>
<b>A. Ample Alternative Means of Communication.....</b>	<b>- 30 -</b>
<b>B. Captive Audience Rationale .....</b>	<b>- 32 -</b>
<b>C. Narrowly Tailored Requirement.....</b>	<b>- 40 -</b>
<b>1. Time Provisions .....</b>	<b>- 40 -</b>
<b>2. Distance Requirements .....</b>	<b>- 42 -</b>
<b>D. Nature of Punishment and Injunctive Relief.....</b>	<b>- 46 -</b>
<b>VII. Conclusion .....</b>	<b>- 48 -</b>
<b>Appendix.....</b>	<b>- 49 -</b>

# A Time to Mourn: Balancing the Right of Free Speech Against the Right of Privacy in Funeral Picketing

## Abstract

The issue of funeral picketing has received national media coverage and has resulted in a frenzy of legislation in a short amount of time. The group responsible for the funeral picketing, Westboro Baptist Church, has targeted soldiers killed in Iraq and Afghanistan, homosexuals, political figures and even children. Some may want to dismiss Westboro as a fringe group that should not be taken seriously, but they have been taken seriously by at least twenty-seven states, the federal government, and mourners who have been eyewitnesses to the group's tactics.

Funeral picketing raises crucial First Amendment issues including whether the Supreme Court's interest in protecting unwilling listeners and captive audiences is broad enough to cover mourners. This article is a reflection on whether the state should recognize mourning as a legitimate interest and whether that interest should be properly balanced against the right of Free Speech. In an attempt to respond to this issue, the majority of the state legislatures have produced laws that are unconstitutional because of their geographic overbreadth. This article examines the legislative response to funeral picketing and proposes ways the statutes can be constitutionally defensible. This article also argues for expansion of the captive audience doctrine and illustrates why privacy in mourning is as important as privacy in one's home. The issue of funeral picketing and the privacy interest in mourning has generated very little, if any, legal scholarship. I intend for this article to fill a void in the literature and provide guidance to legislatures and courts who will undoubtedly be wrestling with this issue in years to come.

## I. Introduction

The idea of paying respect to the dead is a concept as old as civilization.<sup>1</sup> In fact, respecting the dead and a time of mourning is revered by religious and non-religious alike. Some would view respecting the dead and a time of mourning as a simple matter of human decency.<sup>2</sup> The existence of a religious group, specifically a Christian church, choosing to spread

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<sup>1</sup> Archaeologists identified evidence of funerary behavior "within the last 100,000 years, in the Middle and Upper Paleolithic." MIKE PARKER PEARSON, *THE ARCHAEOLOGY OF DEATH AND BURIAL* 147-149 (2000). Early Neanderthal remains "provide evidence of mortuary practices in the form of body positioning, grave construction, placing of artifacts and animal parts in the grave, the arrangement of stones around the grave, and even the placing of flowers in the grave." *Id.* There is also evidence of formal burial behavior occurring before Neanderthals. *Id.*; see also, Paul Pettitt, *When Burial Begins*, *BRITISH ARCHAEOLOGY*, Aug. 2002, at 66 available at <http://www.britarch.ac.uk/BA/ba66/feat1.shtml>.

<sup>2</sup> See Anita Bernstein, *Treating Sexual Harassment with Respect*, 111 HARV. L. REV. 445, 516-17 (Dec. 1997)(noting how the law has enforced respect for corpses including decent burials). The American legal system demonstrates its respect for the dead in tort and criminal law. It is an offense in many jurisdictions to desecrate a dead body. For example, possible tort actions related to corpses include intentional mishandling of a dead body and negligent or wrongful interference with a dead body. See Remigius N. Nwabueze, *Biotechnology & the New Property Regime in Human Bodies & Body Parts* 24 LOY. L.A. INT'L & COMP. L. REV. 19, 29 (Jan. 2002); see generally RESTATEMENT (SECOND) OF TORTS § 868 (1979 & Supp. 2006).

its message through picketing at funerals is astonishing. The Christian Bible states that there is a time for everything under the sun, including a time to mourn.<sup>3</sup> It also instructs Christians<sup>4</sup> to weep with those who weep and rejoice with those who rejoice.<sup>5</sup>

The very concept of funeral picketing is a strange paradox.<sup>6</sup> Death of a friend, acquaintance or loved one is a universal experience that crosses social class, economic ability, religious beliefs, political status, or ethnic background. Funerals, including military funerals, raise unique privacy concerns. Arguably, attending a funeral can be one of the most private and painful common human experiences one can go through. Specific emotions may vary from one funeral to the next; however, the emotional impact of death raises the need for privacy. In a Freedom of Information Act case, the Supreme Court noted that “[f]amily members have a personal stake in honoring and mourning their dead and objecting to unwarranted public exploitation that, by intruding upon their own grief, tends to degrade the rites and respect they seek to accord to the deceased person who was once their own.”<sup>7</sup>

How one handles death varies by culture; however, it typically includes “a core of understandings, spiritual beliefs, rituals, expectations and etiquette.”<sup>8</sup> Today in the United States activities surrounding death typically involve signs of respect, grief and reflection.

Unlike most civilian funerals, military funerals include a public dimension. Funerals involving the death of soldiers killed in war generate greater publicity. Veteran funerals are also

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<sup>3</sup> *Ecclesiastes* 3:4.

<sup>4</sup> The term Christian is employed by a variety of individuals to mean different things. The most common definition is a believer in and follower of Jesus Christ. As one scholar explained, a Christian “is one who has received the gift of eternal life; he is not one who depends upon a hopelessly imperfect state but rather one who has reached a perfect standing before God as being in Christ.” MERRILL F. UNGER, *THE NEW UNGER’S BIBLE DICTIONARY* 226 (1988).

<sup>5</sup> *Romans* 12:15.

<sup>6</sup> Although the term funeral is used throughout this article, it is meant to encompass all services to honor the dead, including memorial services, graveside services, and wakes, no matter where they are held.

<sup>7</sup> *Nat’l Archives & Records Admin. v. Favish*, 541 U.S. 157, 167-68 (2004). If the Supreme Court can state this with respect to a request for documents, surely a case can be made for protecting mourners from physical and emotional intrusions.

<sup>8</sup> PAUL C. ROSENBLATT, *Grief in Small Scale Societies*, in *DEATH & BEREAVEMENT ACROSS CULTURES* 27, 30 (Colin Murray Parkes et al. eds., 1997).

entitled to certain military funeral honors,<sup>9</sup> including the presentation of a United States flag and the playing of Taps.<sup>10</sup> What the United States must answer as a society is whether a funeral is an appropriate time or place for protesting and whether the right to free speech should have limits, even if done in a traditional public forum.<sup>11</sup> Should there be a legally recognized time to mourn?

Funeral picketing is a novel concept pioneered by a group identified as Westboro Baptist Church (“Westboro”).<sup>12</sup> Westboro has led protests and demonstrations for over fifteen years, but

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<sup>9</sup> 10 U.S.C. § 1491(c) (West Supp. 2006); *see also* Major Samuel W. Morris, *A Survey of Military Retirement Benefits*, 177 MILITARY L. REV. 133, 152 (Fall 2003). Individuals who join the military have an assurance that their surviving family members will feel support from the tradition the military offers through a military honors funeral. The playing of taps, the display of the flag and a gun salute can have an important meaning to military families. The symbols used in military funerals are meant to show honor towards deceased soldiers and their families.

Unfortunately, the very symbols used to honor deceased soldiers may trigger funeral picketers to action. Westboro, in a typical blame-the-victim type argument, claims it does not picket private funerals, only public ones. *See* Westboro, <http://www.godhatesfags.com> (last visited February 7, 2007). Consequently, family members can have a private funeral if they acquiesce to Westboro’s definition of private and relinquish their right to a military burial. *Id.*

<sup>10</sup> Taps is a bugle call traditionally played at military funerals and memorial services in the United States. It was written during the Civil War by Major General Daniel Butterfield and Oliver Norton in 1862. *See generally* Jari A. Villanueva, Twenty-four Notes That Tap Deep Emotions, [www.arlingtoncemetery.net/taps.htm](http://www.arlingtoncemetery.net/taps.htm) (last visited February 7, 2007)(providing historical background on Taps).

<sup>11</sup> The right of free speech under the First Amendment is esteemed, but it is not absolute. *See generally*, Note, *Hate is Not Speech: A Constitutional Defense of Penalty Enhancement for Hate Crimes*, 106 HARV. L. REV. 1314, 1317 (April 1993)(“The First Amendment does not give absolute protection to every act that has communicative content”); Patti Stanley, Note, *Constitutional Law—First Amendment—Does the Right to Free Speech Trump the Right to Worship? Olmer v. City of Lincoln*, 192 F.3d 1176 (8<sup>th</sup> Cir. 1999), 23 U. ARK. LITTLE ROCK L. REV. 273, 273 (Fall 2000).

<sup>12</sup> Westboro has no known affiliation with mainstream Baptist conventions like the Southern or National Baptist Convention. Westboro’s pastor and founder, Fred Phelps is a former civil rights attorney. The picketing activities of the group are unique to Westboro and have not been practiced by any Baptist, Christian or other religious groups. Although Westboro has not made racist statements, it has been compared to the Ku Klux Klan (another organization that claims ties to Christianity), and has been described by some as a hate group. Westboro clearly does not see itself as a hate group, and denounces racism and physical violence; rather it has expressed intolerance for what it sees as sin. Two of the sins identified by Westboro which has impacted its activities are homosexuality and idolatry. Westboro believes America has embraced homosexuality and is consequently being punished. In Westboro’s eyes, examples of God’s disgust towards America would include the terrorist attacks on September 11, 2001 and the death of American soldiers killed in Iraq and Afghanistan. Idolatry would include worshiping the dead instead of God by elevating them to the status of heroes. Westboro believes God’s wrath has turned against America. *See* Westboro, [http://www.godhatesfags.com/writings/20051212\\_legislation-message.pdf](http://www.godhatesfags.com/writings/20051212_legislation-message.pdf) and <http://www.godhatesfags.com> (last visited February 7, 2007). Westboro is the only group so far that views funerals as an appropriate forum to spread its message. This fact raises the question of why this is a significant issue if Westboro is just a fringe group that may eventually go away. The issue is significant because their efforts have been relatively successful, which may lead to other groups picketing at funerals as well.

recently gained substantial media and legislative attention when it began to protest at military funerals.<sup>13</sup>

This article will propose a balance between the right to mourn and the right to free speech. Part two will provide background on Westboro's First Amendment activities, including the nature of its speech and motivations.

Part three argues that the right to privacy, which includes a right to mourn, is a substantial interest worthy of protection from intrusive speech. Funeral protests can cause additional emotional distress for mourners and can disrupt the peaceful nature of the funeral. The court should recognize the right to mourn as a significant interest.

Part four will examine the legislative response by the federal and numerous state governments. In less than two years, over twenty states have enacted legislation to address the issue of funeral picketing. Part four examines the common themes in the legislation and some of the legislative histories.

Part five addresses whether the legislation will be viewed as content-based or content-neutral. The statutes that have been enacted thus far do not attempt to restrict Westboro's message, but impose time, place and manner restrictions. The legislation will likely be viewed as content-neutral by the courts.

Part six will propose ways the statutes can survive constitutional challenges either by making the statutes more narrowly tailored or expanding the current captive audience doctrine to funerals and memorial services.

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<sup>13</sup> See e.g., Lizette Alvarez, *Outrage at Funeral Protests Pushes Lawmakers to Act*, N.Y. TIMES, April 17, 2006, at A14.

## II. Funeral Picketing and Westboro

Funeral picketing raises important constitutional concerns that go beyond Westboro; however, understanding Westboro and its motivations is essential to understanding the speech interests at issue.<sup>14</sup> Westboro has inspired twenty-seven legislative bodies into action in less than two years.<sup>15</sup> Members of Westboro have been subjected to threats and abusive language during their protests, although they are cautious to abide by local laws.<sup>16</sup> The Southern Poverty Law Center identified Westboro as a hate group<sup>17</sup> while Westboro identifies itself as a religious group.<sup>18</sup> If Westboro is a hate group, a primary target of its hate has been homosexuality.<sup>19</sup>

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<sup>14</sup> Most information about Westboro and its beliefs are located on its various websites. Based on the website and the various press releases therein, Westboro's primary goal is to communicate its message. The message is not limited to homosexuality, rather the message appears to be about God's purported judgment towards America for its sin, which includes America's alleged support of homosexuality. God's wrath, they believe, is evident in natural disasters, terrorist attacks, and now soldier's dying in the wars in Afghanistan and Iraq. The group's message is also evident in the protest signs they hold up: "America is Doomed, God Blew up the Soldiers, Thank God for Dead Soldiers, Thank God for IED's, Too Late to Pray, God is Your Enemy." See *McQueary v. Stumbo*, 453 F.Supp.2d 975, 984 (E.D. Ky. 2006); see also Westboro, <http://thesignsofthetimes.net> and <http://www.godhatesfags.com> (last visited February 7, 2007). The acronym IED's, frequently used by Westboro, refers to Improvised Explosive Devices which are homemade devices designed to cause death or injury. Although Westboro's speech may implicate the fighting words doctrine that doctrine's application to funeral picketing is unlikely and outside the scope of this article. See generally *Chaplinsky v. New Hampshire*, 315 U.S. 568, 569-72 (1942); see also discussion *infra* note 77.

<sup>15</sup> David L. Hudson, First Amendment Center, *Assembly: Funeral Protests*, October 2006 <http://www.firstamendmentcenter.org> (last visited February 7, 2007).

<sup>16</sup> See Molly McDonough, *Picket Fencing*, 92 A.B.A. J. 16, 18 (July 2006) (describing Westboro as cautious, frequently notifying the media and local law enforcement, agreeing on a time and place for the demonstration, and abiding by law enforcement directives). On its website, Westboro explained its picketing activities. "We stand at a respectful distance, on lawfully accessed public right of ways and hold up some signs with words. . . . When they falsely claim the soldier is in heaven, we're going to speak words of truth, that the soldier is in hell. When the soldier's family members walk hundreds of feet, sometimes hundreds of yards, to stand squarely in front of us and cuss us, we're going to remind them that their loved one is going to cuss them eons in hell for lying to them on the important matters of eternity." Westboro, [http://www.godhatesfags.com/writings/20051212\\_legislation-message.pdf](http://www.godhatesfags.com/writings/20051212_legislation-message.pdf) (last visited February 7, 2007).

<sup>17</sup> The Southern Poverty Law Center published Westboro on its map of hate groups in Kansas. Southern Poverty Law Center, <http://www.splcenter.org/intel/map/hate.jsp?S=KS&m=4> (last visited November 4, 2006); see also Alvarez *supra* note 13.

<sup>18</sup> The group identifies itself as Baptist, a Christian denomination. According to its website, the group professes to follow the teachings of Sixteenth Century theologian John Calvin. See Westboro, <http://www.godhatesfags.com/main/aboutwbc.html> (last visited February 7, 2007). Calvin was a very well respected theologian who is most known for his work with the Protestant Reformation and his teachings on soteriology or Christian salvation. DUANE EDWARD SPENCER, *TULIP: THE FIVE POINTS OF CALVINISM IN LIGHT OF SCRIPTURE*, 7-9 (4<sup>th</sup> prtg. 2005). Followers of Calvin have summarized his teachings into five points: 1) the total depravity of man; 2) unconditional election; 3) limited atonement; 4) irresistible grace; and 5) perseverance of the saints. *Id.* at 14. Many Protestant churches subscribe anywhere from one to all five points of Calvinism. On the organization's

Westboro believes it is spreading religious messages, not political ones.<sup>20</sup> Picketing is clearly one of the primary avenues the group uses to spread its message.<sup>21</sup> Picketing is a relatively low cost form of expression and Westboro's picketing has generated tremendous publicity.

The picketing has targeted gatherings as diverse as gay pride parades, the Southern Baptist Convention, the American Civil Liberties Union and Billy Graham Crusades.<sup>22</sup> The group, however, first gained substantial media attention in 1998 when it picketed the funeral of Matthew Shepard, a young man who was murdered because of his sexual orientation.<sup>23</sup>

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manifesto, Westboro calls itself a five-point Calvinism church. Westboro, <http://www.godhatesfags.com/main/manifesto.html> (last visited February 7, 2007). Calvinism at its extreme results in hyper-Calvinism, which some scholars consider an aberration from true Calvinism. IAIN H. MURRAY, SPURGEON V. HYPER-CALVINISM: THE BATTLE FOR GOSPEL PREACHING 40 (1995). For example, while Christianity as a religion is characterized for its outreach to reconcile sinners to God through salvation, hyper-Calvinism essentially believes God will save only those he has predestined to save so outreach to others (i.e. "witnessing") is unnecessary. Westboro has not directly identified itself as embracing hyper-Calvinism, but evidence of hyper-Calvinism is present in the FAQ section of their web-page. Westboro, <http://www.godhatesfags.com/main/faq.html#Condemned> (last visited February 7, 2007).

<sup>19</sup> See Westboro, <http://www.godhatesfags.com> (last visited February 7, 2007). Although Westboro has been very vocal regarding homosexuality, it is not the group's sole concern. In addition to viewing homosexuality as sin, Westboro is critical of forms of idolatry, which they also identify as sin. The United States, they claim, has committed idolatry by worshiping the dead through extravagant memorial services instead of worshiping God. See Westboro, [www.godhatesamerica.com/ghfmin/writings/20051212\\_legislation-message.pdf](http://www.godhatesamerica.com/ghfmin/writings/20051212_legislation-message.pdf) (last visited February 7, 2007).

<sup>20</sup> In a press release, the group stated: "We aren't anti-war protesters; we aren't anti-don't-ask-don't-tell protesters; we're the prophets of God. We don't care who's in office; we don't care about your politics; we don't care about your policies on the war." Press Release, Westboro, *A Message from Westboro Baptist Church (WBC) to Lawmakers on Legislation Regarding Her Counter-Demonstrations at Funerals of Dead Soldiers*, (December 12, 2005) [www.godhatesamerica.com/ghfmin/writings/20051212\\_legislation-message.pdf](http://www.godhatesamerica.com/ghfmin/writings/20051212_legislation-message.pdf).

<sup>21</sup> The group explained on its web-page that other means of spreading its message include press releases, its web-page, faxes and television. See Westboro, <http://www.godhatesfags.com> (last visited February 7, 2007). Arguably, if limits were placed on funeral picketing the group would still have ample alternative means of communicating its message. See discussion *infra* Part VI-A.

<sup>22</sup> Brief for Plaintiff at 2, *Phelps-Roper v. Nixon*, No. 06-4156-cv-c-NKL (W.D. MO 2006); see also *St. David's Episcopal Church v. Westboro Baptist Church, Inc.*, 921 P.2d 821 (Kan. Ct. App. 1996)(granting a temporary injunction which prohibited Westboro from picketing during worship times, weddings, and funerals). Interestingly, the American Civil Liberties Union (ACLU), which has been criticized by Westboro as the "Anti-Christ Lawsuit Union" and the "Anal Copulators and Lesbians Union" is representing the group in its challenge against the Missouri funeral picketing statute. See Press Release, Westboro (Dec. 16, 2003) [http://www.godhatesamerica.com/ghfmir/fliers/dec2003/Aclu\\_12-16-2003.pdf](http://www.godhatesamerica.com/ghfmir/fliers/dec2003/Aclu_12-16-2003.pdf); Press Release, ACLU of Eastern Missouri, (July 21, 2006) <http://www.aclu-em.org/pressroom/2006pressreleases/72106funeralprotestchallen.htm>.

<sup>23</sup> Westboro proudly displays on its website the number of days it believes Matthew Shepard has been in hell on its "Gospel Memorial to Matthew Shepard." See Westboro, <http://www.godhatesfags.com/memorial.html> (last visited February 7, 2007). While the group claims that they do not support Shepard's murder they are quick to say that Shepard *got himself* killed looking for homosexual sex. *Id.* The site includes a photograph of Shepard with red flames surrounding his face.



The group has not limited its picketing activities to known homosexuals. Other notable funerals Westboro has picketed include Coretta Scott King, Ronald Reagan, Chief Justice William Rehnquist, and Fred Rogers of Mr. Rogers Neighborhood.<sup>24</sup> Westboro also appears at other tragic events that generate media coverage like the death of coal miners killed in Virginia or the death of children.<sup>25</sup> According to its website, the group believes funerals are the perfect time to spread its message because it is a time when people consider their own mortality.<sup>26</sup> While funerals do not appear to be “the perfect time” to spread political messages, individuals do tend to be more vulnerable at funerals:

[T]he idea of death, the fear of it, haunts the human animal like nothing else; it is a mainspring of human activity—activity designed largely to avoid the fatality of death, to overcome it by denying in some way that it is the final destiny for man . . . the fear of death is indeed a universal in the human condition.<sup>27</sup>

Although Westboro has been demonstrating for over fifteen years, it did not motivate the general public into action when its members picketed the funerals of targeted political figures or known homosexuals.<sup>28</sup> In fact, Westboro’s presence at the funerals of Matthew Shepard, Coretta Scott King, Ronald Reagan, and Chief Justice Rehnquist received miniscule media attention and legislative response.<sup>29</sup> It was not until Westboro’s funeral picketing activities hit a raw nerve—

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<sup>24</sup> See Press Release, Westboro, WBC to Picket the Funeral of Coretta Scott King (January 31, 2006) [http://www.godhatesfags.com/fliers/jan2006/20060131\\_coretta-scott-king-funeral.pdf](http://www.godhatesfags.com/fliers/jan2006/20060131_coretta-scott-king-funeral.pdf) (last visited February 7, 2007); Press Release, Westboro, Picketing of Ronald Reagan’s Funeral (June 7, 2004) [http://www.godhatesfags.com/fliers/jun2004/Reagan\\_Funeral\\_Schedule\\_6-7-2004.pdf](http://www.godhatesfags.com/fliers/jun2004/Reagan_Funeral_Schedule_6-7-2004.pdf) (last visited February 20, 2007); Press Release, Westboro, Westboro to Picket Funeral of Chief Justice William Rehnquist (Sept. 5, 2005) [http://www.godhatesfags.com/fliers/sep2005/20050905\\_rehnquist-funeral.pdf](http://www.godhatesfags.com/fliers/sep2005/20050905_rehnquist-funeral.pdf) (last visited February 20, 2007).

<sup>25</sup> See Press Release, Westboro (Jan. 25, 2006) [http://www.godhatesfags.com/fliers/jan2006/20060125\\_don-bragg-funeral.pdf](http://www.godhatesfags.com/fliers/jan2006/20060125_don-bragg-funeral.pdf) (coal miner killed in West Virginia); Press Release, Westboro (Oct. 4, 2006) [http://www.godhatesfags.com/fliers/oct2006/20061004\\_amish-picket-cancelled.pdf](http://www.godhatesfags.com/fliers/oct2006/20061004_amish-picket-cancelled.pdf) (Amish school children murdered; picket ultimately cancelled in exchange for media air time); Press Release, Westboro (Feb. 9, 2007) [http://www.godhatesfags.com/fliers/feb2007/20070209\\_nyia-page-funeral.pdf](http://www.godhatesfags.com/fliers/feb2007/20070209_nyia-page-funeral.pdf) (twenty-three month old died of abuse and hypothermia).

<sup>26</sup> See Westboro, <http://www.godhatesfags.com/main/faq.html#Funeral> (last visited February 7, 2007).

<sup>27</sup> PEARSON, *supra* note 1, at 142.

<sup>28</sup> McDonough, *supra* note 17, at 16.

<sup>29</sup> The first state to enact legislation in response to Westboro’s activities was Westboro’s home state of Kansas. See KAN. ST. ANN. 21-4015 (1992). Westboro successfully argued that the act was overly broad and it was amended.

the funerals of deceased soldiers killed in Iraq and Afghanistan—that the government and public took notice.<sup>30</sup>

Although Westboro is a relatively small organization,<sup>31</sup> it has had a large impact on several states in a short period of time. According to the National Conference of State Legislatures and the First Amendment Center between 2005-2006 thirty-four states introduced legislation geared towards funeral picketing and twenty-seven have passed.<sup>32</sup> Many of the states treated the issue as emergency legislation in reaction to the group threatening to picket a funeral in their state. The knee-jerk legislative response from the different states is similar in many aspects. Whether the legislation will be interpreted as content-neutral or content-based will be the key issue to its survival. Westboro's activities have raised an important issue that needs further clarification—how to balance the right to mourn and the right of free speech.

### **III. The Right to Mourn as a Governmental Interest**

#### **A. The Right to Mourn and Privacy**

An important issue in determining whether a statute is constitutional is the governmental interest involved. The governmental interest involved in the funeral picketing statutes is what I characterize as the right to mourn.<sup>33</sup> The distinct problem with balancing the right to mourn against the right of free speech is that free speech is a well-recognized fundamental right.<sup>34</sup> The right to mourn is not. The right to mourn is a concept based on the need for individuals to mourn

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*See Phelps v. Hamilton*, 840 F. Supp. 1442, 1462-63 (D. Kan. 1993) *aff'd in part & rev'd in part* 122 F.3d 1309, 1323 (10th Cir. 1997). Massachusetts and Oklahoma had similar laws that made it a crime to disrupt a funeral. MASS. ANN. LAWS ch. 272 § 42 (Law. Co-op. 1998); OKLA. STAT. tit. 21, §1166 (1997).

<sup>30</sup> McDonough, *supra* note 17, at 16.

<sup>31</sup> Interestingly, Westboro consist of roughly one hundred members, many of which are related to the pastor, Fred Phelps, by birth or marriage. *See*, Dan Lavoie, CHI. SUN TIMES, April 20, 2006, at 6; Denise Taylor, BOSTON GLOBE, October 20, 2005, at 11.

<sup>32</sup> Hudson, *supra* note 16.

<sup>33</sup> Another governmental interest is to protect unwilling listeners. *See* discussion *infra* Part VI-B.

<sup>34</sup> The Supreme Court has stated that “citizens must tolerate insulting, and even outrageous speech, in order to provide ‘adequate breathing space’ to freedoms protected by the First Amendment.” *Boos v. Barry*, 485 U.S. 312, 322 (1988).

in peace. It includes an interest in respecting privacy during the mourning process and a desire to protect individuals from additional emotional distress.

The Court has accepted most interests articulated by the government as legitimate,<sup>35</sup> including an interest in noise reduction,<sup>36</sup> esthetics,<sup>37</sup> public safety,<sup>38</sup> and emotional distress.<sup>39</sup> Although the Supreme Court has not specifically recognized the right to mourn, it might be considered an extension of the greater privacy right.<sup>40</sup> Justice Brandeis gave birth to the right of privacy in a dissenting opinion when he discussed the general “right to be let alone.”<sup>41</sup> Traditionally the right to privacy related to freedom of choice in marriage, sex and reproduction.<sup>42</sup> Although the right to mourn has not yet been established as a right or a governmental interest, courts have referred to the right to privacy to encompass other rights, including the rights of unwilling listeners and the right to worship.<sup>43</sup>

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<sup>35</sup> See generally, JOHN E. NOWAK & RONALD D. ROTUNDA, PRINCIPLES OF CONSTITUTIONAL LAW (2d ed. 2005)(“The Court has never yet found that any interest asserted by government to justify a time, place, or manner regulation of expressive activity was so insignificant that it did not qualify as an ‘important’ or ‘significant’ interest.”).

<sup>36</sup> *Ward v. Rock Against Racism*, 491 U.S. 781 (1989); see also *City Council of Los Angeles v. Taxpayers for Vincent*, 466 U.S. 789 (1984).

<sup>37</sup> *Taxpayers for Vincent*, 466 U.S. at 789.

<sup>38</sup> *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 475 (1996); *Renton v. Playtime Theatres, Inc.*, 475 U.S. 41 (1986).

<sup>39</sup> *Hill v. Colorado*, 530 U.S. 703, 710, 728 (2000)(recognizing evidence that “emotional confrontations may adversely affect a patient’s medical care” and noting the “emotional strain and worry” patients and relatives face when entering health care facilities).

<sup>40</sup> The right of privacy was formally developed in *Griswold v. Connecticut*, 381 U.S. 479 (1965). Justice Douglas, who wrote for the majority, concluded that the state infringed on the right of privacy. He explained that the right is found in the penumbras of guarantees of the Bill of Rights. *Id.* at 483; see also NOWAK & ROTUNDA, *supra* note 36, at 239 and 477.

<sup>41</sup> See *Olmstead v. United States*, 277 U.S. 438, 478 (1928)(Brandeis, J. dissenting); see also Samuel Warren & Louis Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193 (1890).; NOWAK & ROTUNDA, *supra* note 36, at 478 (stating that “Brandeis advocated a reading of the Fourth Amendment in order to insure that the government did not intrude the ‘privacy of the individual.’”).

<sup>42</sup> In *Roe v. Wade*, Justice Blackmun recognized the right of privacy whether based on the Fourteenth Amendment or the Ninth Amendment as broad enough to include a woman’s right to an abortion. *Roe v. Wade*, 410 U.S. 113, 153 (1973). Constitutional protection for privacy was asserted more recently in *Lawrence v. Texas* when the Supreme Court struck down a Texas law which prohibited homosexual activity. *Lawrence v. Texas*, 539 U.S. 558 (2003).

<sup>43</sup> See e.g., *Hill*, 530 U.S. at 703.

Justice Brandeis described the right to be “let alone” as “the most comprehensive of rights and the right most valued by civilized men.”<sup>44</sup> Justice Brandeis’ right to be “let alone” was asserted to support the privacy rights of the unwilling listener in *Hill v. Colorado*.<sup>45</sup> *Hill*, an abortion buffer-zone case, evaluated the constitutionality of a state statute that regulated speech within 100 feet of the entrance to any health care facility.<sup>46</sup> The statute created a bubble zone that prohibited individuals from approaching closer than eight feet without consent of the speaker. The Court held in a 6-3 decision that the statute was a valid content-neutral time, place and manner regulation.<sup>47</sup> One of the most significant aspects of *Hill* was the Court’s decision to balance the interests of unwilling listeners with the right of Free Speech outside the home.<sup>48</sup> Justice Stevens, who wrote for the majority explained that “[t]he right of every person ‘to be let alone’ must be placed in the scales with the right of others to communicate.”<sup>49</sup> There is no greater time when the right to be let alone would be more poignant than when one is grieving the loss of a loved one and attending rituals related to burial.

Burial customs help satisfy “basic psychological, spiritual and social needs.”<sup>50</sup> Funeral practices help the bereaved find comfort and accept the reality of death.<sup>51</sup> A funeral is the most

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<sup>44</sup> *Olmstead*, 277 U.S. at 478.

<sup>45</sup> 530 U.S. 703, 716-17 (2000).

<sup>46</sup> *Id.* *Hill* is an imperfect analogy since it involved the recognized right to abortion. *Hill* remains essential because of the Court’s discussion of the interests of unwilling listeners. In a footnote the majority clarified that the right to be let alone is “more accurately characterized as an interest that states can choose to protect in certain situations.” *Id.* at 716-17 n.24. One of the reasons *Hill* is so significant is that it attempted to balance an important interest against the fundamental First Amendment right of free speech.

<sup>47</sup> *Id.*

<sup>48</sup> *Id.* at 714-16. The Court addressed the right of unwilling listeners in the limited context of the privacy of one’s home in *Frisby v. Schultz*, 487 U.S. 474 (1988); see discussion *infra* Part VI-B.

<sup>49</sup> *Hill*, 530 U.S. at 718. The Court’s recognition of the right of unwilling listeners has received substantial criticism. *Id.* at 751 (Scalia, J. dissenting)(arguing that the right to be let alone “is not an interest that may be legitimately weighed against the speakers’ First Amendment rights.”); see also Jamin B. Raskin & Clark L. LeBlanc, *Disfavored Speech About Favored Rights: Hill v. Colorado, the Vanishing Public Forum and the Need for An Objective Speech Discrimination Test*, 51 AM. U. L. REV. 179, 199 (Dec. 2001)(“The Court’s surprising identification of the unwilling listener as a strong potential counterweight to traditional public forum free speech rights is a most troubling development, but also puzzling in its doctrinal ramifications.”); William E. Lee, *The Unwilling Listener: Hill v. Colorado’s Chilling Effect on Unorthodox Speech*, 35 U.C. DAVIS L. REV. 387, 390 (Jan. 2002).

<sup>50</sup> Rev. William A. Wendt, *Death Rituals*, AM. J. HOSPICE CARE 24, 25-26 (Winter 1984)

important time to be left alone. Westboro's picketing of funerals confronts mourners during a vulnerable period.<sup>52</sup> It is because of this vulnerability that the right to privacy should be respected.

## **B. Mourning as an Important Value**

The Supreme Court has recognized the emotional and physical impact of First Amendment activities on emotionally vulnerable individuals, such as medical patients and their families.<sup>53</sup> As the Court explained in *NLRB v. Baptist Hospital, Inc.*, “[h]ospitals, after all, are . . . where patients and relatives alike are under emotional strain and worry, where pleasing and comforting patients are principal facets of the day’s activity, and where the patient and his family . . . need a restful, uncluttered, relaxing and helpful atmosphere.”<sup>54</sup> Similarly, in *Hill v. Colorado*, the Court expressed concern over abortion protesters closely approaching patients who “are often in particularly vulnerable physical and emotional conditions.”<sup>55</sup> The emotional distress involved in bereavement is well documented, and a state’s interest in minimizing further distress should be protected as well.<sup>56</sup>

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<sup>51</sup> Susan Klein & David A. Alexander, *Good Grief: A Medical Challenge*, TRAUMA 261, 262 (2003); see also Judy Churchill, *Grief: A Normal Response to Loss*, HOME HEALTH CARE MGMT & PRAC., 1, 2 (Oct. 1999) (concluding that funerals gives griever an opportunity to “confront denial and pay communal tribute to their loved one”); see also Wendt, *supra* note 51, at 25 (defining death rituals as “specific behaviors and activities that enable humans to negotiate the oft-times treacherous corridor that stretches between the moment of separation from the familiar and that of entry into the world of the new, and to be transformed by what takes place in the passage. Such rituals can help people accept the experiences of death—before, during and after.”).

<sup>52</sup> On its website’s FAQ the group answered the question of why they picket funerals. Their response was: “To warn people who are still living that unless they repent, they will likewise perish. When people go to funerals, they have thoughts of mortality, heaven, hell, eternity, etc., on their minds. It’s the perfect time to warn them of things to come.” Westboro, <http://www.godhatesfags.org> (last visited February 7, 2007).

<sup>53</sup> *Hill*, 530 U.S. at 728-29 (“Persons who are attempting to enter health care facilities—for any purpose—are often in particularly vulnerable physical and emotional conditions.”); see also *Madsen v. Women’s Health Ctr.*, 512 U.S. 753, 772-73 (1994) (holding in part, noise restrictions included in the injunction burdened no more speech than necessary to protect the “health and well-being of the patients”).

<sup>54</sup> *NLRB v. Baptist Hosp. Inc.*, 442 U.S. 773, 783-84 n.12 (1979).

<sup>55</sup> 530 U.S. at 728-29.

<sup>56</sup> See generally Amicus Curiae Brief of American Center for Law & Justice Supporting Defendants at 9, *Phelps-Roper v. Nixon*, No. 06-4156-CV-C-FJG (W.D. Mo. Jan. 26, 2007) (noting “the emotional vulnerability of bereaved funeral mourners would in most cases exceed that of home residents as well as those who are entering health care facilities”).

The loss of a loved one can trigger the grieving process.<sup>57</sup> It is a time of great vulnerability when people question their lives, faith, and mortality. Although people grieve in different ways, feelings of grief are only exacerbated when special circumstances surround the death.<sup>58</sup> Regardless of whether death is viewed as a time of celebration or for mourning, it is a deeply private time. The support for the bereaved is even more evident when the death involves a life sacrificed because of the tragedy of violence or war. Some scholars have suggested that survivors are comforted by feelings that their loved one died for a noble cause.<sup>59</sup>

Military deaths can be especially painful because the deaths tend to be abrupt.<sup>60</sup> Although the ages of soldiers killed in Iraq and Afghanistan varies, a large number have been in their early twenties.<sup>61</sup> In addition to the tragedy of one dying young, some families must conduct services without a body or with a closed casket. For a loved one trying to come to grips with death, these issues make the emotional distress experienced even more pronounced.<sup>62</sup> The taunting by picketers towards mourners that their loved one is going to hell would reasonably result in additional emotional distress.

It has been noted:

Surely one of the most prominent aspects of death is its potential for intense emotional impact on the survivors. The reasons are as numerous as they are

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<sup>57</sup> “Grief is a wholly natural reaction to the loss of a cherished object or person. While there are cultural variations, particularly with regard to bereavement rituals, there are consistent themes of grieving and behavior.” Klein & Alexander, *supra* note 52, at 262. (internal citations omitted). Emotions expressed by bereaved individuals may include shock or denial.

<sup>58</sup> *See id.* (explaining that the nature of the death can implicate how people grieve).

<sup>59</sup> “Many family members appear to have less trouble adjusting to the death of a loved one when the loss is construed as serving a noble or ‘good cause’ such as defending one’s country or family as opposed to a senseless event like a car accident or natural disaster.” Eyal Ben-Ari, *Epilogue: A Good Military Death*, 31 *Armed Forces & Soc.*, 651, 656 (Summer 2005).

<sup>60</sup> *Id.* at 653.

<sup>61</sup> A soldier who is killed at a young age can intensify feelings of grief because it seems unnatural. *See id.* The U.S. Department of Defense web-page lists the names and ages of its “fallen warriors” to date. U.S. Dep’t Defense, <http://www.defendamerica.mil/fallen.html> (last visited February 7, 2007).

<sup>62</sup> Many individuals go through the bereavement process without counseling and without acute symptoms. Individuals who are grieving can experience increased rates of depression, anxiety, alcohol misuse, phobias, suicide and mania. *See* Klein & Alexander, *supra* note 52, at 268.

obvious. There is the simple but often searing fact of separation from a loved one; the realization that he or she will no longer enjoy the fruits of life; the suddenness with which death strikes. There can be fear for one's own life, and fear of the power of death in general. There may be anger, directed diffusely at the deceased, or at the persons or powers held responsible. Finally, there are various strong reactions to the corpse itself.<sup>63</sup>

The government has a valid interest in protecting families during their grieving process; consequently the right to mourn should be recognized by the courts as a legitimate and significant governmental interest.

### **C. The Right to Mourn and the Right to Worship**

The right to mourn is a novel interest that can be loosely analogized to the right to worship. Many burial services in the United States are religious in nature,<sup>64</sup> although military funerals are traditionally secular. Courts and scholars are slowly recognizing the right to worship (independent from the First Amendment's Free Exercise clause). Since most of the enacted legislation is not limited to military funerals,<sup>65</sup> examining the right to worship demonstrates the application of privacy rights outside the traditional reproductive context.

In *Olmer v. City of Lincoln*, the Eighth Circuit Court of Appeals declined to address the right to worship directly, but noted that the right "in the abstract, is undoubtedly substantial and important."<sup>66</sup> *Olmer* was an appeal from a preliminary injunction enjoining the enforcement of a local ordinance.<sup>67</sup> The ordinance restricted focused picketing of churches and other religious premises thirty-minutes before, during and after scheduled religious activities.<sup>68</sup> The respondents were abortion protesters who protested the appointment of an abortion doctor as

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<sup>63</sup> PETER METCALF & RICHARD HUNTINGTON, *CELEBRATIONS OF DEATH: THE ANTHROPOLOGY OF MORTUARY RITUAL* 43 (2d ed. 1991).

<sup>64</sup> See Tony Walter, *Secularization*, in *DEATH & BEREAVEMENT ACROSS CULTURES* 170 (Colin Murray Parkes et al. eds., 1997) (estimating between fifty to ninety-nine percent of funerals are religious and religious funerals are the norm even in places where baptisms and church weddings are declining).

<sup>65</sup> See appendix.

<sup>66</sup> *Olmer v. City of Lincoln*, 192 F.3d 1176, 1180 (8<sup>th</sup> Cir. 1999) (en banc).

<sup>67</sup> *Id.* at 1178.

<sup>68</sup> *Id.*

deacon and elder at Westminster Presbyterian Church. The Court held that the ordinance was unconstitutional because it was not narrowly tailored to protect a significant government interest.<sup>69</sup> Judge Bright, in his dissent, poignantly argued that the right of freedom of worship is as important as the right of privacy in the home.<sup>70</sup>

Unlike *Olmer*, the Kansas Court of Appeals concluded that the right of worship is an important government interest. In *St. David's Episcopal Church v. Westboro Baptist Church, Inc.*, Westboro appealed a temporary injunction which enjoined them from focused picketing on the public sidewalks surrounding St. David's church.<sup>71</sup> Unlike the current picketing of military funerals, the picketing in this case was conducted for over a year during normal worship times. St. David's argued that Westboro's activities infringed on their religious worship.<sup>72</sup> Applying the test articulated in *Madsen v. Women's Health Center*, the court examined the articulated government interest.<sup>73</sup> The court of appeals upheld the trial court's conclusion that "a place of worship would place a close second to one's residence when it comes to the right to worship and communicate with the maker of one's choice in a tranquil, private and serene environment."<sup>74</sup> Just as there is a value in being left alone during worship, there is equal value in being left alone during a funeral or burial service.

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<sup>69</sup> *Id.*

<sup>70</sup> *Id.* at 1185; see also Alan Phelps, *Picketing & Prayer: Restricting Freedom of Expression Outside Churches*, 85 CORNELL L. REV. 271, 301-05 (Nov. 1999); Stanley, *supra* note 11, at 290-95. Both the majority and dissent relied on the captive audience doctrine in *Frisby v. Schultz* to support its position. See discussion *infra* Part VI-B.

<sup>71</sup> *St. David's Episcopal Church v. Westboro Baptist Church, Inc.*, 921 P.2d 821, 830 (Kan. Ct. App. 1996).

<sup>72</sup> *Id.* at 828-29.

<sup>73</sup> *Id.* at 830; see also *Madsen*, 512 U.S. at 765 (explaining heightened scrutiny of content-neutral injunctions must burden no more speech than necessary to serve a significant interest).

<sup>74</sup> *Id.* at 830 (internal quotations omitted).



#### **D. Other Significant Interests**

There are other important governmental interests undermined by funeral picketing. Demonstrations and picketing can result in other negative secondary effects like noise, traffic and disorder.<sup>75</sup>

Another key interests articulated by some of the legislation is the state's concern for disruption. Funerals are traditionally peaceful, dignified, and solemn occasions. Dignity is a value that has also been recognized by the courts.<sup>76</sup> The state's significant interest in protecting the dignified nature of burial activities should be protected as well.

Funerals represent one of the few instances where the dignity and purpose of the occasion can be destroyed by protesters. In funeral picketing, the mourners' interest is in solemnizing the event compared to abortion patients who are interested in obtaining an abortion. Unlike abortions, funerals tend to be outdoors and can be automatically disrupted by noise, signs and chanting. An abortion protester may cause emotional distress to patients and unwilling listeners, but is unable to prevent or disrupt the abortion by expressive activity. In contrast, a funeral protester could effectively disrupt a service and interfere with the peaceful and solemn occasion of a funeral.

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<sup>75</sup> See e.g., *Renton*, 475 U.S. at 47-49 (upholding zoning ordinance of adult theatres as content-neutral where predominate concern was not with the content of the films but the secondary effects on the community). The state may also have an interest in curbing violence since some of the signs and charts may involve fighting words. The Supreme Court has explained, the "emotive impact of speech on its audience is not a secondary effect." *Boos*, 485 U.S. at 321. Application of the highly criticized fighting words doctrine to funeral picketing is unlikely. The Supreme Court has declined to uphold a fighting words conviction since 1942 when it decided *Chaplinsky v. New Hampshire*, 315 U.S. 568 (1942). See generally, ERWIN CHERMERINSKY, CONSTITUTIONAL LAW: PRINCIPLES & POLICIES 1002 (3<sup>rd</sup> ed. 2006) (noting the Supreme Court's failure to uphold a fighting words conviction without ever overruling *Chaplinsky*); Burton Caine, *The Trouble with "Fighting Words": Chaplinsky v. New Hampshire is a Threat to First Amendment Values and Should Be Overruled*, 88 MARQ. L. REV. 441, 451, 536-38, 556 (Winter 2004) (noting that *Chaplinsky* should not be interpreted to include addresses to crowds and the doctrine has been limited to punishing critical speech against authoritative bodies like police officers) Although fighting words is outside the scope of this article for a discussion on the improbability of a fighting words statute surviving particularly in the funeral picketing scenario see also David L. Hudson, Jr. *What's on the Horizon*, First Amendment Center, April 2006, [http://www.firstamendmentcenter.org/Assembly/horizon.aspx?topic=assembly\\_horizon](http://www.firstamendmentcenter.org/Assembly/horizon.aspx?topic=assembly_horizon).

<sup>76</sup> See Maxine D. Goodman, *Human Dignity in Supreme Court Constitutional Jurisprudence*, 84 NEB. L. REV. 740, 757 (2006) (arguing that the Supreme Court has recognized human dignity as a constitutional value and citing cases).

## **IV. The Legislative Response to Funeral Picketing**

### **A. Federal Legislation**

Legislators across the country have tried to balance the rights of mourners with the rights of protesters. On May 29, 2006, Congress enacted the Respect for America's Fallen Heroes Act ("RAFHA").<sup>77</sup> RAFHA prohibits demonstrations at funerals controlled by the National Cemetery Administration and Arlington National Cemetery.<sup>78</sup> The legislative history clearly indicates that Westboro's picketing activities were the primary motivation for the legislation. Senator Larry Craig explained, the Act "was conceived in response to hateful, intolerant demonstrations taking place at the funeral services of deceased service members of the global war on terror."<sup>79</sup> Congressman Dennis Moore expressed similar sentiments in his speech when RAFHA was being considered:

I find it abhorrent that individuals and groups feel a military funeral is an appropriate forum to display their beliefs on gay rights. . . . It is unfortunate that some individuals and groups add to the anguish and grief of those who have lost a loved one by protesting outside of the funerals of fallen soldiers.<sup>80</sup>

Although the legislation clearly targeted a particular group, it makes no reference to the specific content of the picketing activity; rather, the legislative history, and the text of the Act suggests the primary concern was the impact the activity was having on the place of the protest, the potential effects on the funeral goers, and the dignity of the funeral.

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<sup>77</sup> 38 U.S.C. § 2413 (2006). A second federal statute, The Dignity for Military Funerals Act, S 2452, 109<sup>th</sup> Cong. (2006) has been referred to the Committee on the Judiciary and is beyond the scope of this article.

<sup>78</sup> 38 U.S.C. § 2413. The federal legislation is distinct from the state legislation because the federal legislation is limited to cemeteries under the control of the National Cemetery Administration, like Arlington. Those cemeteries would probably be considered a non-public forum. The regulation of speech in a non-public forum only needs to be reasonably related to a legitimate interest. *See Perry*, 460 U.S. at 46. Arlington is not like a sidewalk or a place that has been open for expressive activity. In fact Arlington prohibits expressive activity like picketing, orations, solicitations or placards. *See Visitors' Rules for the Arlington National Cemetery*, 32 C.F.R. § 554.33(f)(1-5)(2006); *see also Warren v. Fairfax Cty.*, 196 F.3d 186, 192-93 (4th Cir. 1999)(Niemeyer, J. dissenting).

<sup>79</sup> 152 Cong. Rec. S5129 (daily ed. May 24, 2006) (statement of Sen. Craig). In some instances, Westboro was identified by name; *see also* 152 Cong. Rec. E 774 (May 10, 2006) (statement of Rep. Moore).

<sup>80</sup> 152 Cong. Rec. E 774 (May 10, 2006) (statement of Rep. Moore).

The Act prohibits demonstrations “beginning sixty minutes before and ending sixty minutes after a funeral, memorial service or ceremony” that take place “within 150 feet of a road, pathway or other route of ingress to or egress from” the property.<sup>81</sup> The 150 foot buffer zone applies to demonstrations that create noise or may disturb the peace.<sup>82</sup> RAFHA also prohibits demonstrations within 300-feet of the cemetery that “impedes access to or egress from” the cemetery.<sup>83</sup> In addition to expressing outrage towards Westboro for its activities, the Act includes a provision encouraging states to enact similar legislation.<sup>84</sup>

## **B. State Legislation**

The federal legislation focused on the negative effect the picketing could have on grieving families—not on the message. State legislative bodies have taken similar approaches—criticizing Westboro for its impact on families and disruption of services—but not criticizing its message or its right to communicate it.<sup>85</sup> Over twenty-seven states enacted separate anti-funeral picketing statutes or broadened preexisting disorderly conduct statutes.<sup>86</sup> Most of the statutes prohibit picketing funerals within a certain distance, and prohibits picketing during a certain time period before, during and after a funeral.<sup>87</sup>

One of the first known funeral picketing statutes was from Westboro’s home state of Kansas.<sup>88</sup> The Kansas funeral picketing statute was found unconstitutionally vague by a federal

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<sup>81</sup> 38 U.S.C. § 2413. Funerals on property controlled by the National Cemetery Administration are typically conducted at committal shelters. 152 Cong. Rec. S 5129 (May 24, 2006) (statement of Sen. Craig). Committal shelters tend to be at least 300 feet from property lines and obstructed by trees and shrubs. Consequently it would be difficult to actually disrupt a funeral on government property. *Id.*

<sup>82</sup> *Id.*

<sup>83</sup> 38 U.S.C. § 2413 (a)(2)(B).

<sup>84</sup> Specifically the provision reads that “[i]t is the sense of Congress that each State should enact legislation to restrict demonstrations near any military funeral.” Pub. L. No. 109-228, 120 Stat. 387 (2006).

<sup>85</sup> See appendix.

<sup>86</sup> See appendix. The Florida and Delaware statutes are limited to picketing military funerals, while the other states impose similar time, place and manner restrictions on picketing any funeral. DEL. CODE ANN. Tit. 11 § 1303 (2006); FLA. STAT. §§ 871.01 & 871.02 (2006).

<sup>87</sup> See discussion *infra* Part VI-C(2).

<sup>88</sup> Kansas Funeral Picketing Statute, Kan. St. Ann. 21-4015 (1992).

district court because it failed to define what was meant by “before or after” a funeral.<sup>89</sup> The statute has since been amended to prohibit funeral picketing during a definite time period of one hour before and two hours after a funeral.<sup>90</sup>

The statutes in Delaware, Nebraska, and Oklahoma mirror the time period of the Kansas Funeral Picketing Act of one hour before and two hours after a funeral.<sup>91</sup> Illinois and South Carolina impose restrictions of thirty minutes before and after a funeral,<sup>92</sup> while the majority of state statutes and the federal statute impose restrictions of one hour before and one hour after.<sup>93</sup> The majority of the state statutes impose distance restrictions from 500 to 1000 feet.<sup>94</sup> Only eight states enacted legislation with distance requirements of 300 feet or less.<sup>95</sup>

The consistent reference to reasonable time, place and manner restrictions in the text of the statutes shows that legislative bodies intended for the statutes to be content-neutral and subject to intermediate scrutiny. Whether or not the statutes actually will be considered content-neutral by the courts is an unresolved issue.<sup>96</sup>

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<sup>89</sup> *Phelps v. Hamilton*, 840 F.Supp. 1442, 1462-63 (D. Kan. 1995) *aff'd in part & rev'd in part* 122 F.3d 1309, 1323 (10<sup>th</sup> Cir. 1997).

<sup>90</sup> Kan. St. Ann. 21-4015 (2006). Kansas is currently considering adding additional provisions to its funeral picketing legislation. S.B. 244, 2007 Sess. (Ks. 2007).

<sup>91</sup> DEL. CODE ANN. tit. 11 §1303 (2006); NEB. REV. STAT. § 28-1320.01 (2006); OKLA. STAT. tit. 21, § 1380 (2006).  
<sup>92</sup> 720 ILL. COMP. STAT. 5/26-6 (2006); S.C. CODE ANN. § 16-17-525 (2006).

<sup>93</sup> 38 U.S.C. § 2413. States that impose restrictions on picketing from one hour before to one hour after a funeral include Georgia (GA. CODE ANN. § 16-11-34.2 (2006)), Iowa (IOWA CODE §723.5 (2006)), Minnesota (MINN. STAT. § 609.501 (2006)), Mississippi (MISS. CODE ANN. § 97-35-51 (2006)), Missouri (MO. REV. STAT. § 578.501 (2006)), New Jersey (NJ. STAT. ANN. § 2C:33-8.1 (2006)), North Carolina (N.C. GEN. STAT. § 14-288.4 (2006)), Ohio (OHIO REV. CODE ANN. § 3767.30 (2006)), Pennsylvania (18 PA. CONS. STAT. § 7517 (2006)), South Dakota (S.D. CODIFIED LAWS §§ 22-13-17, 22-13-18, 22-13-19, & 22-13-20 (2006)), Texas (TEX. PENAL CODE ANN. § 42.055 (2006)), and Wisconsin (WIS. STAT. § 947.011 (2005-06)).

<sup>94</sup> See *infra* note 210 and accompanying text.

<sup>95</sup> See *infra* note 212 and accompanying text.

<sup>96</sup> Two courts that have analyzed funeral picketing statutes have both concluded that the legislation is content-neutral. See discussion and accompanying notes *infra* Part V.

## V. Constitutional Scrutiny of Funeral Picketing Legislation

### A. Scrutiny of Speech in a Public Forum

Balancing the right of free speech against the right to mourn in funeral picketing cases is impacted by location and the application of public forum analysis. The funeral picketing has occurred in public areas, like sidewalks, across from funerals and not on the premises of cemeteries or other funeral locations.<sup>97</sup> Public sidewalks are considered the quintessential public forum according to the Supreme Court.<sup>98</sup> As one scholar explained,

[o]pen public spaces like parks, sidewalks, streets and other accessible government-owned properties have served as the most effective and reliable arena of communication for all citizens regardless of their political ideology, private wealth, property ownership status, or popularity. That is why the traditional public forum has been called the “poor man’s printing press.”<sup>99</sup>

The government’s ability to restrict speech in a public forum is limited.<sup>100</sup> The Supreme Court has stated that “the First Amendment protects the right of every citizen to reach the minds of willing listeners and to do so there must be opportunity to win their attention.”<sup>101</sup> The First Amendment has been an essential tool to protect the controversial, marginal, and politically weak.<sup>102</sup> Westboro is definitely controversial, but they have a right to broadcast their message. It is through exposure to the marketplace of ideas that thoughts, morals, and opinions develop and change.<sup>103</sup> Although picketing on a public sidewalk is constitutionally protected behavior,

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<sup>97</sup> One of the determining factors of a public forum is whether it has been open for expressive activity. The constitutional scrutiny is less when the location involves a non-public forum. *Perry*, 460 U.S. at 46. Cemeteries do not have the same historical relationship with speech like public streets, and would discourage expressive activity such as picketing or demonstrations. *See e.g.*, *Visitors’ Rules for the Arlington National Cemetery*, 32 C.F.R. § 553.22 (f) (2006).

<sup>98</sup> *See e.g.*, *Perry*, 460 U.S. at 45.

<sup>99</sup> *Raskin & LeBlanc*, *supra* note 50, 181.

<sup>100</sup> *Boos*, 485 U.S. at 318.

<sup>101</sup> *Kovacs v. Cooper*, 336 U.S. 77, 87 (1949) *quoted in* *Hill v. Colorado*, 530 U.S. 703, 728 (2000).

<sup>102</sup> *See generally*, Note, *The Impermeable Life: Unsolicited Communications in the Marketplace of Ideas*, 118 HARV. L. REV. 1314, 1316-22 (Feb. 2005) (discussing the right to be left alone and the importance of unsolicited communications to the marketplace); *see also* *Raskin & LeBlanc*, *supra* note 50, at 199.

<sup>103</sup> *See Abrams v. United States*, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting). It is not clear, however, that Westboro’s speech contributes to the marketplace. The speech of Westboro is not meant to inform and educate as

the idea of picketing a funeral is inherently offensive regardless of the message being communicated, but because of the disruption of a solemn event. The government should not try to silence Westboro's message, no matter how offensive, but it can impose reasonable time, place or manner restrictions in order to protect significant or important competing interests.<sup>104</sup>

When legislation is challenged in court, the threshold question for determining constitutionality is the level of judicial scrutiny to apply. Restrictions on speech based on the content of the message must be subjected to strict judicial scrutiny, and the regulation must serve a compelling government interest,<sup>105</sup> while restrictions based on the time, place and manner of the message are subjected to intermediate scrutiny and need only show a significant government interest.<sup>106</sup> Content-based restrictions are presumptively invalid,<sup>107</sup> so escaping the content-based label is essential for any of the funeral picketing statutes to survive.<sup>108</sup> To determine whether the laws are content-based or content-neutral a court would apply the standard articulated in *Ward v. Rock Against Racism*.<sup>109</sup>

As the Supreme Court stated in *Ward*, “[t]he principal inquiry in determining content-neutrality in speech cases generally and in time, place, or manner cases in particular, is whether the government has adopted a regulation of speech because of disagreement with the message it conveys.”<sup>110</sup> *Ward* involved a time, place, and manner regulation of sound amplification at a

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much as enrage and insult. There is very little that is informative about picketing a funeral. The message delivered during the funeral picketing is not intended as a statement on the war, politics, the president, the deceased, or the survivors. Rather it is a statement of condemnation of a country who Westboro believes is doomed. A funeral is not a venue where conflicting ideas and beliefs are exchanged. A funeral is a venue to mourn.

<sup>104</sup> See *Boos*, 485 U.S. at 322.

<sup>105</sup> See *Perry Ed. Ass'n. v. Perry Local Educators' Ass'n.*, 460 U.S. 37, 45 (1983).

<sup>106</sup> See generally, *CHEMERINSKY*, *supra* note 76 at 932-33.

<sup>107</sup> *Turner Broad. Sys. v. Fed. Comm'n. Comm'n.*, 512 U.S. 622, 640-41 (1994)

<sup>108</sup> A content-based restriction must be narrowly tailored to a compelling governmental interest. See e.g., *Boos*, 485 U.S. at 319; see generally *CHEMERINSKY* *supra* note 76, at 933; *NOWAK & ROTUNDA*, *supra* note 36, at 591. Very few statutes can survive this type of strict judicial scrutiny. See *Hill*, 530 U.S. at 735 (Souter, J. concurring).

<sup>109</sup> 491 U.S. 781 (1999).

<sup>110</sup> 491 U.S. at 791.

park bandshell.<sup>111</sup> A concert sponsor challenged the regulation as unconstitutional. The regulation required all concert sponsors to use city sound amplification equipment and technicians.<sup>112</sup> The court of appeals concluded the regulation was invalid because it was not the least intrusive means to regulate the sound.<sup>113</sup> The Supreme Court reversed and explained that the “less-restrictive-alternative analysis” is not part of the test to determine if a time, place and manner regulation is valid.<sup>114</sup> Under *Ward*, a regulation of the time, place, or manner of speech must be content-neutral, and narrowly tailored to serve a legitimate government interest.<sup>115</sup>

Determining whether a law is content-based or content-neutral may be challenging because some statutes are both.<sup>116</sup> To determine if legislation is content-based the court will focus on the government’s purpose by examining the face of the statute, the government’s stated interests, and legislative history.

The funeral picketing statutes will probably be considered content-neutral. In spite of targeted comments by legislators regarding Westboro, there is no mention of suppressing Westboro’s message in the legislative history, press releases or the actual statutes. Rather, states have expressed concern over the time, place and manner of the message. The federal and state governments’ articulated interests are unrelated to the content of Westboro’s speech. Indeed, the universal issue identified by the different statutes has been the effect of picketing on the bereaved. The state’s interest in protecting the privacy of grieving families and maintaining the peace and dignity of funerals is unrelated to the content of Westboro’s speech. Facially, the

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<sup>111</sup> *Id.* at 784.

<sup>112</sup> *Id.* at 787.

<sup>113</sup> *Id.* at 789.

<sup>114</sup> *Id.* at 797.

<sup>115</sup> *Id.* at 798.

<sup>116</sup> See Wilson Huhn, *Assessing the Constitutionality of Laws that are Both Content-Based & Content-Neutral: The Emerging Constitutional Calculus*, 79 IND. L.J. 801, 806 (Fall 2004). In fact, the federal district court in Kentucky concluded the Kentucky statute was both. Ultimately, that issue was decided for the Kentucky statute in favor of content-neutrality. See *McQueary v. Stumbo*, 453 F. Supp.2d 975 (E.D. Ky. 2006) (granting preliminary injunction) discussed *infra*.

federal and state legislations are content-neutral. The funeral picketing statutes focus on the location of Westboro's speech instead of the message.<sup>117</sup> The statutes attempt to regulate the places where speech may occur, not the speech itself. Similar to the abortion buffer zone cases, a court would probably conclude that the statutes were not enacted because of disagreement with Westboro's message, but the disruptive conduct.

## **B. Targeted Legislation & Content Neutrality**

Westboro could argue that the legislation is content-based because Westboro is the target of the legislation, and it was enacted to silence them or a particular form of expression.<sup>118</sup> The targeted nature of the legislation is evidenced by the comments by numerous legislators.<sup>119</sup>

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<sup>117</sup> The stated purpose of the regulations, to protect the grieving families and preserve the peace and dignity of funerals, has nothing to do with Westboro's message of Americans going to hell, or God's wrath because of homosexuality. Westboro's message can still be communicated, just not during stated periods before and after a funeral.

<sup>118</sup> If funeral picketing is seen as a unique form of expression, an argument could be made that the various forms of legislation are attempting to silence this specific form of communication; consequently, the legislation is really content-based. Picketing is considered an effective form of protest because of the low costs involved and the publicity it generates. See Stanley, *supra* note 11, at 277. The Court noted in *Frisby* that prohibiting a form of expression may be necessary in some instances. *Frisby*, 487 U.S. at 486 quoting *Taxpayers for Vincent*, 466 U.S. at 810. "As picketing becomes more focused or targeted, the coercive aspects of 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." Stanley, *supra* note 11, at 277-78. Funeral picketing should not be considered a special form of expression, but an offensive application of the well established form of expression of picketing. There is nothing unique about funerals that are truly central to Westboro's message. The picketing of clinics and health care facilities by abortion and anti-abortion protesters is reasonably related to the picketer's message. The picketing of funerals, however, is not reasonably related to a message against homosexuality or Americans going to hell, particularly when Westboro protests military funerals regardless of the sexual orientation or religious beliefs of the deceased. Westboro has exhibited a pattern of protesting at events that have an indirect, if any connection to its message. A prime example of this was Westboro's planned protest at the funeral of the tragically murdered Amish school children. Westboro ultimately cancelled the protest in exchange for media time. Westboro claimed that the children were murdered because God was punishing the governor for trying to stop their First Amendment rights. See Westboro, Press Release (Oct. 4, 2006) [http://www.godhatesfags.com/fliers/oct2006/20061004\\_amish-picket-cancelled.pdf](http://www.godhatesfags.com/fliers/oct2006/20061004_amish-picket-cancelled.pdf). Instead of planning the protest at the governor's mansion or the courthouse, the group chose an event that would receive the most media attention. Arguably, Westboro's rejoicing over the death of a soldier does not contribute to the marketplace of ideas that were meant to be protected by the First Amendment. Westboro has repeatedly stated it is not protesting the war; rather, it views fallen soldiers as evidence of God's wrath. Because of Westboro's broad message about America in general, its message could be effectively communicated at countless other venues aside from funerals.

<sup>119</sup> For example, Missouri Governor Matt Blunt stated "it is offensive that groups would attempt to spread a message of hate as families and friends grieve the loss of a loved one. No family should have to endure such hardship." Press Release, Missouri Governor Matt Blunt (July 5, 2006) <http://www.gov.mo.gov/press/HB1026070506.htm> (on file with author). Oklahoma Senator Mary Easley, and sponsor to the Oklahoma Funeral Picketing Act stated "I want these groups to know that there is a proper time and place for staging a protest, but during a funeral isn't one of



Legislatures, however, can target a group or activity without the legislation being content-based as long as the governmental purpose for enacting the legislation is unrelated to the content of the message.<sup>120</sup> The press releases and legislative comments suggest a clear disdain for the group's behavior. The disdain does not appear to be towards the group's viewpoint about the war, homosexuality, heaven or hell; rather, the disdain is based on the group's decision to antagonize individuals during the universally difficult human experience of mourning. One of the most critical descriptions of Westboro was drafted in the Preamble of Kentucky's legislation.<sup>121</sup> It states in part:

WHEREAS, certain despicable individuals have been disrupting the funerals of soldiers who died while serving in the United States Armed Forces; and WHEREAS, these disruptions have taken such forms as shouting insults at the parents of the fallen; and WHEREAS, the military dead and their families deserve respect and compassion; and WHEREAS, all mourners should be left in peace<sup>122</sup>

The Kentucky statute clearly reflects an animus towards Westboro.<sup>123</sup> Based on the Preamble, the Kentucky statute was enacted due to a concern for the impact of the picketing on mourning families. When the various state statutes identified a purpose, it was related to either the privacy and emotional disturbance of grieving families or the peace and dignity of the

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them.” Press Release, Oklahoma State Senate, Senator Mary Easley (Feb. 2, 2006) [http://www.oksenate.gov/news/press\\_releases/press\\_releases\\_2006/pr20060202a.html](http://www.oksenate.gov/news/press_releases/press_releases_2006/pr20060202a.html) (on file with author). In another press release Senator Easley stated “I hope this finally stops those protesters and lets families mourn their loved ones in peace. . . . These picketers need to realize what they have been doing at funerals is wrong. If they violate this law they can expect to face the legal consequences.” Press Release, Oklahoma State Senate, Senator Mary Easley (Mar. 3, 2006) [http://www.oksenate.gov/news/press\\_releases/press\\_releases\\_2006/pr20060303c.html](http://www.oksenate.gov/news/press_releases/press_releases_2006/pr20060303c.html) (on file with author).

<sup>120</sup> See e.g., *Madsen*, 512 U.S. at 763 (stating that an injunction limited to people “with a particular viewpoint does not itself render the injunction content or viewpoint based”); see generally *Stanley*, *supra* note 11, at 279.

<sup>121</sup> The Kentucky statute was found unconstitutionally broad by a federal district court that enjoined enforcement of the statute. *McQueary*, 453 F. Supp.2d at 975; See discussion *infra* Part V-D.

<sup>122</sup> KY. REV. STAT. ANN. §§ 525.055, 525.145 & 525.155 (2006).

<sup>123</sup> To date Kentucky is one of the two states that have been challenged in court over the funeral picketing legislation. See *McQueary*, 453 F. Supp.2d at 975; see also *Phelps-Roper v. Nixon*, No. 06-4156-CV-C-FJG (W.D. Mo. Jan. 26, 2007) (order denying preliminary injunction).

funeral.<sup>124</sup> The right to mourn and concern for the emotional distress of citizens burying their loved one should be viewed as a significant governmental interest.<sup>125</sup>

If the statutes are considered content-neutral, a court will analyze whether the statutes are “narrowly tailored to serve a significant governmental interest” and whether ample alternative means for communication exists.<sup>126</sup>

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<sup>124</sup> See e.g., RIGHT TO REST IN PEACE ACT, COLO. REV. STAT. § 18-9-125(a)-(c) (2006) (“it is necessary to enact this act in order to: (a) Protect the privacy of grieving families and others who are entering, attending, or leaving a funeral; (b) Preserve the peaceful character of funerals and funeral sites; and (c) Allow for a sufficient distance away from a funeral site so that mourners can be assured that the funeral is not disrupted by violent, abusive, indecent, profane, boisterous, unreasonable loud, or otherwise disorderly conduct.” GA. CODE ANN. § 16-11-34.2 (2006)(a) (“the interest of persons in planning, participating in, and attending a funeral or memorial service for a deceased relative or loved one without unwanted impediment, disruption, disturbance or interference is a substantial interest”); 720 Ill. Comp. Stat. 5/26-6 (2006) (“due to the unique nature of funeral and memorial services and the heightened opportunity for extreme emotional distress on such occasions, the purpose of this Section is to protect the privacy and ability to mourn of grieving families directly before, during, and after a funeral or memorial service.”); KAN. STAT. ANN. § 21-4015 (2)-(3) (West, Westlaw through 2005 Reg. Sess.) (“the interests of families in privately and peacefully mourning the loss of deceased relatives are violated when funerals are targeted for picketing . . . picketing of funerals causes emotional disturbance and distress to grieving families”); NEB. REV. STAT. § 28-1320.01 (2006) (“families have a legitimate and legally cognizable interest in organizing and attending funerals for deceased relatives and that the rights of families to peacefully and privately mourn the death of relatives are violated when funerals are targeted for picketing or protest activities. . . .the purposes . . . are to protect the privacy of grieving families and to preserve the peaceful character of cemeteries, mortuaries, churches and other places of worship during a funeral while still providing picketers and protesters the opportunity to communicate their message at a time and place that minimizes the interference with the rights of funeral participants.”); NJ. STAT. ANN. § 2C:33-8.1(a-d) (2006) (“Families have a substantial interest in attending funeral services for their loved ones; b. The interest of families in privately and peacefully mourning the loss of their relatives are violated when funerals are targeted for disruption, picketing and other demonstrations; c. such disruption causes emotional disturbance and distress to grieving families; and d. It is in the interest of the State of New Jersey to protect families’ privacy immediately prior to, during and after a funeral service.”); OKLA. STAT. tit. 21, § 1380 (2006) (“it is generally recognized that families have a substantial interest in organizing and attending funerals for deceased relatives, b. the interests of families in privately and peacefully mourning the loss of deceased relatives are violated when funerals are targeted for picketing and other public demonstrations, c. picketing of funerals causes emotional disturbance and distress to grieving families”); and 18 PA. CONS. STAT. § 7517 (2006) (“families have a substantial interest in organizing and attending commemorative services for deceased relatives. (2) the interests of families in privately and peacefully mourning the loss of deceased relatives is violated when commemorative services are targeted for picketing and other public demonstrations. (3) Picketing of commemorative services causes emotional disturbance and distress to grieving families who participate in commemorative services. (4) full opportunity exists under the terms and provisions of this section for the exercise of freedom of speech and other constitutional rights at times other than within one hour prior to, during and one hour following the commemorative services.”)

<sup>125</sup> Local governments are also justified in enacting anti-funeral picketing legislation based on concern for the negative effects of the picketing—like noise and traffic—to an event that is typically solemn. Cf., *Renton*, 475 U.S. at 47-48 (recognizing secondary effects as a content-neutral basis for upholding ordinance). Even if the statutes are facially content-based they may still be considered content-neutral if they were motivated by a content-neutral purpose, like the negative secondary effects of the picketing. See *id.*

<sup>126</sup> *Ward v. Rock Against Racism*, 491 U.S. 781, 796 (1989).

### **C. Application of Legislation to Counter-Demonstrations**

Westboro has argued that the statutes are content-based because if the picketing signs were in favor of the deceased, the legislation would never have been enacted. Facially, the funeral picketing statutes can be applied to all demonstrations. For legislation to survive constitutional scrutiny it must be content and viewpoint neutral both facially and as applied. This raises the special issue of the Patriot Guard Riders.

The Patriot Guard Riders are a group of motorcycle riders who have formed to produce counter-demonstrations in response to Westboro.<sup>127</sup> The application of the statutes to the Patriot Guard Riders is somewhat ironic since they are frequently welcomed by the families and attend most military funerals with the express purpose of drowning out Westboro's message with counter-chanting and motorcycles. The primary differences between the Patriot Guard Riders and Westboro are their messages and motives.

Legislation geared towards exempting the Patriot Guard Riders would be blatant viewpoint discrimination. The same concerns for disruption, noise, and traffic would apply to both Westboro and the Patriot Guard Riders. Although there have been many supporters of the Patriot Guard Riders for their efforts in shielding the families, there may be some unwilling listeners who do not wish to hear patriotic music, chants, or motorcycle sounds before entering a funeral.<sup>128</sup> Although family members may claim the Riders are invited guests, it would be very difficult to draft content-neutral legislation that would make an exception to their appearance.

### **D. Recent Constitutional Challenges**

Some states have already faced constitutional challenges to the funeral picketing legislation. In *Phelps-Roper v. Nixon*, the plaintiff, attorney and daughter of Westboro's

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<sup>127</sup> See Alvarez *supra* note 13; McDonough, *supra* note 17, at 18

<sup>128</sup> See e.g., Alvarez *supra* note 13 (describing a military family who asked the Riders not to attend their son's funeral).

founder, filed a preliminary injunction against Missouri’s anti-funeral picketing statute.<sup>129</sup>

Missouri’s statute criminalized picketing “in front of or about” a funeral.<sup>130</sup> In the event the first section is found unconstitutional, a separate statutory section criminalizes picketing within 300 feet of a funeral.<sup>131</sup>

The court denied the preliminary injunction and concluded that the plaintiff was not likely to succeed on the merits.<sup>132</sup> To determine the likelihood of success on the merits the court had to evaluate the constitutionality of Missouri’s funeral picketing statute.

First, the court rejected the plaintiff’s argument that the statute was content-based although the statute was motivated in response to Westboro’s activities.<sup>133</sup> The court concluded that the statute was content-neutral and recognized the government’s interest in “protecting the rights of Missouri citizens while they mourn the death of friends or family.”<sup>134</sup> Without further discussion, the court concluded the plaintiff failed to prove a likelihood of succeeding in her argument that the defendants did not have a significant government interest.

The court did not address the provision related to the specific 300-foot distance and instead focused on the provision that prohibited picketing “in front of or about” a funeral. The court concluded that the statute was narrowly tailored because the language was similar to the language upheld by the Supreme Court in *Frisby v. Schultz*.<sup>135</sup> The court also rejected the

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<sup>129</sup> Phelps-Roper v. Nixon, No. 06-4156-CV-C-FJG (W.D. Mo. Jan. 26, 2007) (order denying preliminary injunction).

<sup>130</sup> MO. REV. STAT. § 578.501 (2006).

<sup>131</sup> Mo. Rev. Stat. § 578.502

<sup>132</sup> Phelps-Roper v. Nixon, No. 06-4156-CV-C-FJG (W.D. Mo. Jan. 26, 2007).

<sup>133</sup> *Id.* at \*5.

<sup>134</sup> *Id.* The court also recognized defendant’s assertion of the captive audience doctrine and an argument in an amicus brief regarding funeral attendees’ first amendment right to exercise their religion *Id.* at \*5-6.

<sup>135</sup> *Id.* at \* 6; *see also Frisby*, 487 U.S. at 474. In *Frisby*, the Supreme Court construed the local ordinance as prohibiting picketing “focused on and taking place in front of a particular residence.” *Id.* at 482; *see discussion infra* Part VI-B.

plaintiff's argument that the statute was vague and overbroad.<sup>136</sup> The court concluded that although there were undefined terms in the statute, they all had "plain meanings that a person of ordinary intelligence could clearly understand."<sup>137</sup>

The holding in *Phelps-Roper* is troubling. The court correctly recognized the interests in mourning but wrongly decided the issue of vagueness and overbreadth. The disputed provision of "in front of or about" fails to give guidance on where protesters can exercise their rights of free speech.<sup>138</sup> Although the Missouri statute uses the "in front of" language that was utilized in *Frisby*, the "or about" provision is unique to the Missouri statute.<sup>139</sup> In *Frisby*, the Court was clearly concerned about targeted picketing "focused on and taking place in front of a particular residence."<sup>140</sup> The "in front of or about" language in the Missouri statute fails to give proper notice to protesters.

According to the plaintiff's brief, Westboro contacted local authorities for guidance on the "in front of or about" description.<sup>141</sup> Conflicting responses were given that included the parking lot of a funeral, 100 feet from the church entrance, "on the other side of town," and 400 feet.<sup>142</sup> The arbitrary and conflicting interpretations of the provision undermine the court's

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<sup>136</sup> *Phelps-Roper v. Nixon*, No. 06-4156-CV-C-FJG (W.D. Mo. Jan. 26, 2007) at \*7-8.

<sup>137</sup> The plaintiff also filed a motion to enjoin the prosecuting attorney from enforcing the statute in an overly broad manner. The prosecuting attorney informed the plaintiff that the statute applied to all picketing within one hour of a funeral and protests were allowed 400 feet away from the funeral. The prosecuting attorney did not respond to the motion for preliminary injunction and instead entered a stipulation where he essentially agreed not to enforce Missouri's funeral picketing statute. The plaintiff agreed to withdraw the motion for preliminary injunction once a consent judgment was entered. The court declined to rule on the preliminary injunction or the proposed consent judgment until a final judgment is entered. *Id.* at \*9-10.

<sup>138</sup> *See e.g.*, *Chicago v. Morales*, 527 U.S. 41 (1999) ("It is established that a law fails to meet the requirements of the Due Process Clause if it is so vague and standardless that it leaves the public uncertain as to the conduct it prohibits.")

<sup>139</sup> *See* MO. REV. STAT. § 578.501 (2006); *Frisby*, 487 U.S. at 482.

<sup>140</sup> *Frisby*, 487 U.S. at 482.

<sup>141</sup> Brief for Plaintiff in Support of Motion for Preliminary Injunction at 5-6, *Phelps-Roper v. Nixon* (W.D. Mo)(No. 06-4156-CV-C-NKL).

<sup>142</sup> *Id.*

conclusion that a person of reasonable intelligence would know the meaning of the terms.<sup>143</sup> The proper location where Westboro can picket in Missouri remains a mystery and will undoubtedly be revisited by an appellate court.

A different result was reached by the federal district court in Kentucky. In *McQueary v. Stumbo*, the plaintiff, a supporter of Westboro, filed a motion for preliminary injunction to challenge some of the provisions of the Kentucky statute.<sup>144</sup> The court concluded that the provisions were unconstitutionally overbroad and enjoined enforcement.<sup>145</sup> The challenged provisions prohibited picketing within 300 feet of a funeral and prohibited displaying observable images, sounds, chanting, or singing without authorization of the family members.<sup>146</sup> The court addressed the initial inquiry of the correct level of scrutiny to apply. The court concluded that the statute was content neutral in spite of the clear motivations to respond to Westboro's activities.<sup>147</sup> The court reasoned that the statute contained both content neutral and content based aspects, but the predominate purpose of the statute was the content neutral purpose of preventing interference with funerals and protecting unwilling listeners.<sup>148</sup> The court concluded that intermediate scrutiny applied, and it found the state has a significant interest in prohibiting interference with funerals.<sup>149</sup>

The court wrestled with the application of *Hill v. Colorado* and the interests of unwilling listeners in the context of funerals.<sup>150</sup> The 300-foot distance requirement was held not narrowly tailored and burdened substantially more speech than necessary since the 300-foot distance could

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<sup>143</sup> *Phelps-Roper v. Nixon*, No. 06-CV-C-FJG at \*7-8.

<sup>144</sup> 453 F. Supp.2d 975 (E.D. KY 2006).

<sup>145</sup> *Id.* at 997.

<sup>146</sup> KY. REV. STAT. ANN. §§ 525.055, 525.145, and 525.155 (2006).

<sup>147</sup> *McQueary*, 453 F. Supp.2d at 985.

<sup>148</sup> *Id.* at 985-86.

<sup>149</sup> *Id.* at 986-87.

<sup>150</sup> *Id.* at 992; *Hill*, 530 U.S. at 717; *See* discussion *infra* Part VI-B.

impact communication unrelated to the funeral and was substantially broader than distances the Supreme Court has upheld in abortion protest cases.<sup>151</sup>

The court's decision in Kentucky is well-supported by Supreme Court precedent. Although the court struggled with the application of *Hill* and the interests of unwilling listeners, it ultimately "assumed" that the state's interest was valid.<sup>152</sup> While the Preamble to the Kentucky statute probably received applause from constituents it was poorly drafted, and the gratuitous comments regarding "certain despicable individuals" ultimately was used against the state to argue that the statute was content-based.<sup>153</sup> Moreover, the 300-foot distance was excessive.

The legislatures in Kentucky (and other jurisdictions) do not protect their citizens by drafting clearly unconstitutional statutes and spending tax dollars on inevitable litigation. The 300-foot distance requirement is not reasonably related to Kentucky's stated interest.<sup>154</sup> Moreover, the Kentucky legislation was one of the few statutes that failed to include specific time provisions.<sup>155</sup> There is a huge delta between the distances upheld in prior Supreme Court decisions and the 300-1000 feet provisions that have been enacted in the majority of the funeral picketing statutes.<sup>156</sup>

States that have enacted funeral picketing legislation should be applauded for their efforts to protect mourners; however, most of the legislation is vulnerable to overbroad challenges.

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<sup>151</sup> *Id.* at 995-96. The court also determined that the provision regarding distributing literature that had no geographic restriction was overbroad as well. *Id.*

<sup>152</sup> McQueary, 453 F. Supp.2d at 992; *Hill*, 530 U.S. at 718.

<sup>153</sup> McQueary, 453 F. Supp.2d at 985 (concluding that the statute had both content neutral and content based aspects); *see also* KY. REV. STAT. ANN. §§525.055, 525.145 & 525.155. The Preamble is recited by the court in McQueary, 453 F. Supp.2d at 977; *see discussion supra* Part V-B

<sup>154</sup> Recently, Westboro attacked Ohio's 300-foot distance. The Ohio statute prohibits picketing "within 300 feet of a funeral . . . one hour before, during and one hour after." OHIO REV. CODE ANN. § 3767.30 (2006); *see also* Phelps-Roper v. Taft, No. 1:06-CV-02038 (N.D. Ohio filed Aug. 24, 2006).

<sup>155</sup> KY. REV. STAT. ANN. §§ 525.055, 525.145 & 525.155 (2006).

<sup>156</sup> *See discussion infra* Part VI(C)(2).

Funeral picketing is such an emotional issue that judges and legislatures may be tempted to effectively silence Westboro's message by trying to place the group as far as humanly possible from the mourners, hence some statutes have passed legislation as broad as 1000 feet.<sup>157</sup> The government can and should protect mourners, but it cannot insulate them for an indefinite period of time with geographically overbroad distances.

Criminalizing unpopular and even offensive speech does violence to the First Amendment. The First Amendment was meant to protect unpopular speech. Reasonable time, place and manner restrictions provide a balance between free speech and the interests in mourning.

## **VI. Surviving Constitutional Challenges**

As demonstrated, the government has a significant interest in honoring the right to mourn because it ultimately protects citizens from emotional disturbance, and maintains the dignity of funerals. Intermediate scrutiny requires that the legislation be deemed content-neutral, that it is narrowly tailored to serve a significant governmental interest and that there are ample alternative channels for communication.<sup>158</sup>

### **A. Ample Alternative Means of Communication**

For the funeral picketing statutes to survive constitutional scrutiny, Westboro must have other adequate ways to reach its audience.<sup>159</sup> Westboro's primary means of reaching its audience

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<sup>157</sup> See note 206 *infra* and accompanying text.

<sup>158</sup> Ward, 491 U.S. at 796.

<sup>159</sup> See Michael A. Mugmon, *Broad Sheet Bullies?: Designated Public Forum & Established Newspapers' Efforts to Rid Philadelphia's Public Transit System of a Government Sponsored Competition*, 150 U. PA. L. REV. 1961, 1991 (June 2002). Of course audience selection is up to the protester, not the government. Based on its message, Westboro's targeted audience is not mourners but the general public. Westboro does not limited its protests to mourners or military families.



has been through picketing on public sidewalks across from funerals. The group also publishes its message through numerous websites, fliers, press releases, faxes and television.<sup>160</sup>

Although public sidewalks have traditionally been viewed as public fora, a funeral does not become a public event merely because a flag is draping a coffin or someone is playing Taps in the background. A funeral is a private gathering of people who share the same goal: showing respect to the deceased and/or the survivors.<sup>161</sup> Whether Westboro is viewed as sincerely trying to share its message, or creating a publicity stunt at the expense of the bereaved, it is clear that Westboro's speech has very little to do with the decedents.<sup>162</sup> Westboro's message is about the perceived favoritism America has had towards homosexuality.

Families and friends of deceased soldiers cannot impact the United States perceived policies on homosexuality. Most of the deceased soldiers are not public figures but private individuals. Instead of targeting an audience that can reasonably respond to its speech, Westboro chooses occasions to subject unwilling listeners to ideas they can do nothing about. Because the funeral attendees have little to no relation to Westboro's message—other than the soldier died because God is angry with America—Westboro clearly has alternative means of communicating its message. The legislation will have no impact on Westboro communicating its message through its websites, press releases, fliers and television appearances. More importantly, Westboro may still participate in demonstrations and picketing during the time periods and distances not covered by the legislation. The greatest constitutional challenge the federal and state statutes face is the narrow tailoring requirement.

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<sup>160</sup> Some of the websites maintained by the group include: [www.godhatesamerica.com](http://www.godhatesamerica.com); [www.godhatesfags.com](http://www.godhatesfags.com); [www.priestsrpeboys.com](http://www.priestsrpeboys.com); [www.hatemonsters.com](http://www.hatemonsters.com); [www.yourpastorisawhore.com](http://www.yourpastorisawhore.com); [www.signsofthetimes.net](http://www.signsofthetimes.net); [www.godhatescanada.com](http://www.godhatescanada.com); [www.godhatesweed.com](http://www.godhatesweed.com); [www.smellthebrimstone.com](http://www.smellthebrimstone.com)

<sup>161</sup> Many individuals in Western culture announce burial details in obituaries and some funerals receive media attention when the decedent was particularly heroic. These facts, however, do not transform a private event into a public one. Total strangers that attend funerals share the same communal goal as the other attendees—to pay respect to the decedent. Funeral picketers do not try to join the gathering; they want to disrupt it.

<sup>162</sup> See discussion *supra* note 119.

Ensuring that the government enacts statutes that are content-neutral and narrowly tailored will balance the rights of Westboro's speech while balancing the rights of mourners. Many of the statutory provisions ban funeral picketing during a particular time and distance. This type of ban on funeral picketing is justified based on an expansion of the captive audience doctrine.

The Supreme Court previously upheld an ordinance that prohibited focused residential picketing under the captive audience doctrine.<sup>163</sup> Funeral picketing is at least as intrusive if not more so than focused picketing of a residence; consequently, the captive audience doctrine should be expanded to protect funeral attendees as well.<sup>164</sup>

### **B. Captive Audience Rationale**

To determine whether an ordinance is narrowly tailored, the Court will consider the extent to which the ordinance is protecting unwilling listeners who are a captive audience. The concept of individuals being held captive was articulated by the Supreme Court in the 1940s in *Kovacs v. Cooper*, a case involving an ordinance that prohibited sound trucks from emitting loud noises.<sup>165</sup> In a plurality decision, the Supreme Court upheld the ordinance as constitutional.<sup>166</sup> The Court explained “[t]he unwilling listener is not like the passer-by who may be offered a pamphlet in the street but cannot be made to take it. In his home or on the street he is practically

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<sup>163</sup> 487 U.S. 474 (1988).

<sup>164</sup> Expanding the captive audience doctrine is not without its critics. Constitutional Law scholar Eugene Volokh believes the principles of *Frisby* could apply to a funeral and recognizes that funeral picketing can be more intrusive than picketing hospitals or abortion clinics; however, he argues that expansion would lead to a slippery slope where additional exceptions “would eventually swallow the rule” and lead to restrictions on picketing in general. Eugene Volkh, *Burying Funeral Protests*, National Review Online (March 23, 2006) accessed at <http://www.nationalreview.com/comment/volokh200603230730.asp>; McDonough, *supra* note 17, at 18; *but c.f.* Phelps, *supra* note 71.

<sup>165</sup> *Kovacs v. Cooper*, 336 U.S. 77 (1949).

<sup>166</sup> *Id.*

helpless to escape this interference with his privacy by loud speakers except through the protection of the municipality.”<sup>167</sup>

Another important case involving the captive audience doctrine is *Cohen v. California*.<sup>168</sup> *Cohen* involved a criminal conviction of an individual who wore an offensive jacket inside a courthouse and was later arrested for disturbing the peace.<sup>169</sup> The jacket carried the slogan “Fuck the Draft.”<sup>170</sup> There was no other speech involved other than the jacket which was made visible to the public.<sup>171</sup> The Supreme Court reversed the conviction and stated that individuals who were offended could simply avert their eyes.<sup>172</sup> In this instance, the rights of speakers trumped the rights of unwilling listeners.

*Cohen* is distinguishable from the funeral picketing scenario. Most obviously, *Cohen*’s speech consisted of an article of clothing. The speech involved in funeral picketing is substantially more confrontational and offends more than the eyes. Funeral picketing is not limited to signs but includes chanting and other noise. Moreover, unlike a generic message regarding politics, funeral picketing often involves personal attacks rejoicing in the private pain of the bereaved. Over the last few years, in balancing the rights of privacy against the right of free speech, the Court has placed additional emphasis on the rights of unwilling listeners. This shift suggests that *Cohen* should not apply to funeral picketing cases.

Expansion of the captive audience doctrine depends in large part on the court’s treatment of *Frisby v. Schultz*.<sup>173</sup> In *Frisby*, a group of abortion protesters picketed on a public street

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<sup>167</sup> Kovacs, 336 U.S. 86-87.

<sup>168</sup> 403 U.S. 15 (1971).

<sup>169</sup> 403 U.S. at 16-19.

<sup>170</sup> 403 U.S. at 16.

<sup>171</sup> *Id.* at 17.

<sup>172</sup> *Cohen*, 403 U.S. at 21.

<sup>173</sup> *Frisby v. Schultz*, 487 U.S. 474 (1988).

outside the residence of a doctor who performed abortions.<sup>174</sup> In response to the picketing, a municipal ordinance was passed that prohibited picketing in residential neighborhoods.<sup>175</sup> The Town Board expressed concern that residential picketing “causes emotional disturbance and distress to the occupants.”<sup>176</sup> The lower courts enjoined enforcement of the ordinance but the Supreme Court reversed.<sup>177</sup> As a threshold matter, the Court deferred to the lower courts’ conclusion that the ordinance was content-neutral.<sup>178</sup> The Court held that the statute did not violate the First Amendment because it addressed the targeted evil of focused residential picketing.<sup>179</sup> Most of the Court’s opinion was devoted to discussing the significant government interest involved—the protection of residential privacy.<sup>180</sup>

There are many parallels that can be drawn between residential privacy and privacy in mourning. The essential question is whether the concept of residential privacy is based on the location of the home or the idea of what the home represents. The Supreme Court has described the home as a retreat, a place of escape, and a sanctuary.<sup>181</sup> Similarly, a funeral represents a moment of escape. It is a time when individuals can put aside “the tribulations of their daily pursuits” while they focus on thoughts of mortality and grief.<sup>182</sup> The Supreme Court has already exhibited a willingness to apply the captive audience doctrine outside of residential privacy, particularly when the interests of the unwilling listener are at stake.<sup>183</sup>

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<sup>174</sup> *Id.* at 476.

<sup>175</sup> *Id.* at 476-77.

<sup>176</sup> *Id.* at 477.

<sup>177</sup> *Id.* at 478.

<sup>178</sup> *Id.* at 482.

<sup>179</sup> 487 U.S. 486-87.

<sup>180</sup> *Id.* at 484.

<sup>181</sup> *Id.*

<sup>182</sup> *Carey v. Brown*, 447 U.S. 455, 471 (1980).

<sup>183</sup> *Hill*, 530 U.S. at 716-18; As the Court in *Frisby* explained, “[t]here is no right to force speech into the home of an unwilling listener.” *Frisby*, 487 U.S. at 485.

One of the reasons the Court decided in favor of the government in *Frisby* was the targeted nature of the picketing.<sup>184</sup> Justice O'Connor, writing for the majority explained that the focused picketing was "narrowly directed at the household, not the public. The type of picketers . . . 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."<sup>185</sup>

Targeted picketing of a funeral is analogous to the targeted picketing of a home. Both are coercive forms of harassment.<sup>186</sup> Funeral picketing is not an expression of ideas, but an attempt to force a message down the throat of an unwilling listener during an often tragic and vulnerable time of his or her life.<sup>187</sup> Just as "religious worship [should] not be disturbed by those anxious to preach a doctrine of atheism," a funeral should not be disturbed by those anxious to announce the deceased is burning in hell.<sup>188</sup> The presence of picketers at and during a funeral turns a private solemn setting into a confrontational one. If the states are prevented from protecting its citizens during a time of mourning in favor of harassment dressed up in the guise of the First Amendment, the states would be rendered impotent. Legislatures that have enacted funeral

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<sup>184</sup> *Frisby*, 487 U.S. at 486 (explaining that the picketers did not "seek to disseminate a message to the general public, but to intrude upon the targeted resident, and to do so in an especially offensive way"). The Court construed the ordinance as applying to targeted residential picketing as opposed to general residential picketing.

<sup>185</sup> 487 U.S. at 486.

<sup>186</sup> See Stanley, *supra* note 11, at 285. Stanley discusses the problem of focused picketing on privacy. "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." *Id.*

<sup>187</sup> Westboro has claimed it is exercising its religion in funeral picketing; consequently, they claim funeral picketing legislation also violates their rights under the Free Exercise Clause. In its brief, the ACLU presents Westboro as a group concerned with fulfilling its duty to "warn" survivors of things to come. Brief for Plaintiff in Support of Motion for Preliminary Injunction at 3, *Phelps-Roper v. Nixon* (W.D. Mo)(No. 06-4156-cv-c-NKL). The argument is perplexing since Westboro's signs do not tell mourners to pray or repent; rather, Westboro's signs indicate jubilation over tragedy and death by displaying signs like "Thank God for Dead Soldiers" and "God Hates Your Tears." See discussion *supra* Part II and accompanying notes. In fact, the ACLU's depiction of Westboro is contradicted by Westboro's statements on its web-pages. See Westboro, <http://godhatesfags.com> (last visited February 7, 2007). Westboro's Free Exercise argument is particularly ironic since it is content to ignore the beliefs of mourners and others who disagree with their message. See discussion *supra* Part III-C. Arguably, mourners and Westboro can both claim protection under the Free Exercise clause.

<sup>188</sup> See *Kovacs*, 336 U.S. at 86,

picketing statutes are justified in their interest to protect funeral attendees. The government's interest in protecting the "unwilling listener" was emphasized in both *Hill* and *Frisby*.<sup>189</sup>

In *Hill*, the Supreme Court continued to recognize the interests of unwilling listeners in captive situations.<sup>190</sup> *Hill* was so significant because it involved unwilling listeners in a public forum.<sup>191</sup> In *Hill* the Court explained that the "right to avoid unwelcome speech" can have special force in the privacy of the home, but can also be protected in confrontational settings."<sup>192</sup> The Court in *Frisby* explained, "[t]he First Amendment permits the government to prohibit offensive speech as intrusive when the 'captive' audience cannot avoid the objectionable speech. . . . The resident is figuratively, and perhaps literally, trapped within the home, and because of the unique and subtle impact of such picketing is left with no ready means of avoiding the unwanted speech."<sup>193</sup>

Similarly, funeral attendees are trapped and have no means of avoiding unwanted speech. Picketing at funerals is personally targeted towards the decedent and his or her loved ones. The unwilling listener is not subjected to the offensive speech by happenstance, but is a target during an emotionally charged time. The funeral attendee is not simply exposed to offensive speech, but chased in a corner and trapped with no means of escape other than denying him or herself attendance at the funeral. If unwilling listeners can be protected on sidewalks adjacent to medical facilities that same protection should apply to unwilling listeners on sidewalks adjacent to funerals.

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<sup>189</sup> *Hill*, 530 U.S. at 716-18; *Frisby*, 487 U.S. at 485.

<sup>190</sup> *Hill*, 530 U.S. at 718.

<sup>191</sup> See discussion *supra* and accompanying notes, Part III-A. See generally, Jennifer L. Maffett, Note, *Balancing Freedom of Speech Against the Rights of Unwilling Listeners: The Attack on the First Amendment in Hill v. Colorado*, 26 U. DAYTON L. REV. 327, 330 (Winter 2001)(describing *Hill* as the "first time the Supreme Court gave greater weight to the rights of unwilling listeners than the protection of free speech.")

<sup>192</sup> *Hill*, 530 U.S. at 717.

<sup>193</sup> *Frisby*, 487 U.S. at 487.

The Supreme Court has repeatedly stated that “we are often captives outside the sanctuary of the home and subject to objectionable speech.”<sup>194</sup> Consequently, in a courthouse, or on a public street we may encounter something offensive by happenstance and we must make the decision to pay attention or avert our eyes. A funeral is different. Funeral picketing represents the type of speech identified in *Hill* “that is so intrusive that the unwilling audience cannot avoid it.”<sup>195</sup> *Hill* acknowledged that the interests of the unwilling listener can be protected outside the home in confrontational settings.<sup>196</sup>

Judges and scholars have relied on *Frisby* to support application of the captive audience doctrine to houses of worship.<sup>197</sup> As Judge Bright explained in his dissent in *Olmer*, “houses of worship—whether church, synagogue or mosque—are sacred places where people seek rest and replenishment. Justice Black described the home as ‘the last citadel of the tired, the weary, and the sick.’ This description applies with equal force to houses of worship.”<sup>198</sup> The same arguments can be used to support application of the captive audience doctrine to funerals. Individuals attending funerals should not be forced to choose between attending a funeral and suffer the signs and sounds of protesters who are literally rejoicing over their pain or forfeiting their right to mourn in community with others. Just as the sanctity of the home is respected, a funeral is a sacred and private occasion that should be protected.

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<sup>194</sup> See e.g., *Cohen*, 403 U.S. at 21, *quoting* *Rowan v. United States Post Office Dept.*, 397 U.S. 728, 738 (1970).

<sup>195</sup> *Hill*, 530 U.S. at 716.

<sup>196</sup> *Id.* at 717.

<sup>197</sup> See e.g., *Phelps*, *supra* note 71, at 300. This article argues for the application of the captive audience doctrine to churches. “First, churches potentially present a high degree of real captivity. Many religions require or strongly encourage in-church worship on specified days and times. The congregation and spiritual leader not only might look upon one’s absence from church with disfavor, but may even regard it as punishable sin. For the true believers of many religions, whether and where to attend church are matters of less flexibility than virtually any other activity. When protesters surround a house of worship, the faithful do not have the option of avoidance. The unwilling listener simply must endure the offensive speech.” *Id.*

<sup>198</sup> *Olmer*, 192 F.3d at 1185 (J. Bright, dissenting).

In *Madsen*, the Supreme Court agreed with the lower court's conclusion that the "state's interest in residential privacy, acknowledged in *Frisby v. Schultz*, applied by analogy to medical privacy."<sup>199</sup> In *Madsen* the court noted "while targeted picketing of the home threatens the psychological well-being of the 'captive' resident, targeted picketing of a hospital or clinic threatens not only the psychological, but also the physical, well-being of the patient held 'captive' by medical circumstance."<sup>200</sup> Similarly, targeted picketing of a funeral could impact the psychological well-being of funeral attendees.<sup>201</sup> The process of mourning is a private time and a necessary time for emotional well-being. Just as there is no right to force speech into the home of an unwilling listener, there should be no right to force speech on a gathering of unwilling listeners who may be emotionally vulnerable.

Funeral attendees' status as unwilling listeners is elevated by the heightened emotions involved with grieving. The emotional distress of funeral attendees may exceed that of residents in their home or patients entering a medical facility.<sup>202</sup> Not only is the captive audience unable to avoid the speech, their sensitivity to the speech is greater which should trigger greater protection from the court.

There are inherent privacy issues involved with funerals and mourning. A funeral is an occasion where it would be "impractical for the unwilling viewer or auditor to avoid exposure."<sup>203</sup> The federal district court in Kentucky recognized the captive nature of funerals in *McQueary*:

A funeral is a deeply personal, emotional and solemn occasion. Its attendees have an interest in avoiding unwanted, obtrusive communications which is at least similar to a person's interest in avoiding such communications inside his home.

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<sup>199</sup> *Madsen*, 512 U.S. at 768 (internal citations omitted).

<sup>200</sup> *Id.*

<sup>201</sup> See discussion *supra* Part III-B.

<sup>202</sup> See *supra* note 57.

<sup>203</sup> *Hill*, 530 U.S. at 718.



Further, like medical patients entering a medical facility, funeral attendees are captive. If they want to take part in an event memorializing the deceased, they must go to the place designated for the memorial event. Whatever the meaning of *Hill*, for purposes of this Opinion, the Court will assume that the state has an interest in protecting funeral attendees from unwanted communications that are so obtrusive that they are impractical to avoid.<sup>204</sup>

Funeral homes would be a logical place to extend the captive audience doctrine. As in *Hill*, funeral attendees are presumably unwilling listeners that are in need of the Court's protection.<sup>205</sup> Funerals provide a stronger case for assuming the existence of unwilling listeners than *Hill*.<sup>206</sup> In *Cohen*, the courthouse was comprised of the public at large with different views regarding the war. Although the Court did not focus on the issue in its analysis, there would have been a mixture of both willing and unwilling listeners in a courthouse open to the public.<sup>207</sup> In the context of medical clinics, the Court expressed concern over the unwilling listener and the distress caused by the speakers exercising their First Amendment rights. The Court did not recognize the possibility of willing listeners being present.<sup>208</sup> The implicit assumption was that individuals seeking medical treatment or loved ones seeing patients in the hospital, or women who had made decisions to obtain abortions were unwilling to hear pro-life arguments. It would be a more credible argument that individuals attending a funeral are unwilling listeners to speakers who wish to picket the funeral. It is not the speech of the funeral picketers, but the very act of coming against the funeral to picket that is so intrusive. As the Supreme Court recognized

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<sup>204</sup> McQueary, 453 F. Supp.2d at 992.

<sup>205</sup> *Hill*, 530 U.S. at 718.

<sup>206</sup> *Id.*; see also Madsen, 523 U.S. at 768.

<sup>207</sup> See *Cohen* 403 U.S. 21-22 (noting that the presence of some unwilling listeners in a public building did not justify conviction, especially when there was no evidence that "persons powerless to avoid appellant's conduct did in fact object to it). For a discussion of the Supreme Court's general failure to consider the rights of willing listeners under the captive audience doctrine, see generally Marcy Strauss, *Redefining The Captive Audience Doctrine*, 19 HASTINGS CONST. L.Q. 85 (Fall 1991)(critiquing the ambiguity of the captive audience doctrine).

<sup>208</sup> In a footnote, the majority explained, "[t]he purpose of the Colorado statute is not to protect a potential listener from hearing a particular message. It is to protect those who seek medical treatment from the potential physical and emotional harm suffered when an unwelcome individual delivers a message (whatever its content) by physically approaching an individual at close range . . . ." *Hill*, 530 U.S. 718 n.25.

“[i]t may not be the content of the speech as much as the deliberate verbal or visual assault that justifies proscription.”<sup>209</sup>

The very presence of individuals protesting, regardless of their message, at a funeral is disruptive and harassing. As Justice Stevens explained, “[p]icketing 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.”<sup>210</sup> Similar to targeted residential picketing, the evil of targeted funeral picketing is “created by the medium of expression itself.”<sup>211</sup> Legislation drafted towards banning targeted funeral picketing should be considered narrowly tailored.

### **C. Narrowly Tailored Requirement**

#### ***1. Time Provisions***

The majority of the state statutes contain restrictions regulating the time of picketing activities near funerals. The temporal restrictions essentially ban speech during a particular period, before during and after a funeral. The time limits also reinforce that picketers have ample alternative means for picketing at anytime other than that prescribed by the statute. This total ban on funeral picketing during this time is justified by the state’s significant interest in regulating targeted picketing. In their rush to enact legislation, however, some of the state statutes are overbroad.

A time, place, or manner regulation may not burden substantially more speech than necessary to further the government’s interest.<sup>212</sup> The narrow tailoring requirement is satisfied if the legislation “promotes a substantial government interest that would be achieved less

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<sup>209</sup> Hill, 530 U.S. 703, 716 *quoting* *Erznoznik v. Jacksonville*, 422 U.S. 205, 210-11 n.6 (1975).

<sup>210</sup> *Frisby v. Schultz*, 487 U.S. 474, 498 (1988) (Stevens, J. dissenting).

<sup>211</sup> *Id.* at 485.

<sup>212</sup> *Ward v. Rock Against Racism*, 491 U.S. 781, 799 (1989).

effectively absent the regulation.”<sup>213</sup> In other words, the statute must target and eliminate “no more than the exact source of the ‘evil’ it seeks to remedy.” Legislation may be considered narrowly tailored, even if it is not the least restrictive or least intrusive means of satisfying the government’s stated interest.<sup>214</sup>

The federal and many of the state statutes impose a time regulation ranging from thirty minutes to two hours, with the majority of the legislation focusing on one hour time limits.<sup>215</sup> Arguably, speech related to abortion is time-sensitive. Many pro-life demonstrators desire not only to express their opinion, but influence individual decisions. Funeral picketing, in contrast, is not time-sensitive. The message being conveyed will not lose its force by the expiration of a few hours. Even assuming the goal behind funeral picketing is to influence ideas, the ideas expressed have nothing to do with the funeral that is being disrupted.<sup>216</sup>

The government’s interest in protecting those who mourn should be at its highest during and immediately following the funeral. Whether the significant governmental interest is to protect citizens who mourn from additional emotional distress, to protect the solemnity and dignity of funerals, or to control noise and traffic, a one hour time limitation is narrowly tailored to achieve those goals. The minority of states with provisions restricting picketing for two hours after a funeral are at greater risk for being found unconstitutional.<sup>217</sup> A two hour ban on funeral picketing following a funeral burdens more speech than necessary. The adoption of time ranges of a half-hour to one hour in other jurisdictions suggests that one hour is sufficient.

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<sup>213</sup> *Ward*, 491 U.S. at 798-99.

<sup>214</sup> *Hill v. Colorado*, 530 U.S. 703, 726 (2000).

<sup>215</sup> See *supra* note 93 and accompanying text; see also appendix.

<sup>216</sup> But see Brief for Plaintiff in Support of Motion for Preliminary Injunction at 3, *Phelps-Roper v. Nixon* (W.D. Mo)(No. 06-4156-cv-c-NKL)(opining that funerals are the “precise and only place” where Westboro could communicate its message and it is “imperative” to Westboro’s message that it be delivered when it is most timely and relevant; see also Plaintiff’s Comp at 4, *Phelps-Roper v. Nixon* (W.D. Mo)(No. 06-4156-cv-c-NKL).

<sup>217</sup> The statutes in Delaware, Kansas, Nebraska, and Oklahoma currently prohibit picketing from one hour before during and two hours after a funeral. DEL CODE ANN. TIT. 11 § 1303 (2006); KAN. STAT. ANN. § 21-4015 (West, Westlaw through 2005 Reg. Sess.); NEB. REV. STAT. § 28-1320.01 (2006); OKLA. STAT. tit. 21 § 1380 (2006).

Funeral attendees, especially family members are known to attend funerals early and remain. The issues of privacy in mourning, emotional distress, dignity, noise and traffic are just as ripe when attendees are arriving and leaving the service, but not two hours after the service is completed.

## **2. Distance Requirements**

The state statutes are most vulnerable to attack based on the various distance requirements.<sup>218</sup> Most of the funeral picketing statutes prohibit picketing anywhere from 500 to 1000 feet.<sup>219</sup> The Supreme Court has been reluctant to impose significant distance requirements in the past. When the Respect for Fallen Heroes Act was submitted to Congress it had an original distance of 500 feet, but was later amended to 300 feet.<sup>220</sup> Only eight states enacted legislation with distance requirements of 300 feet or less.<sup>221</sup> In *McQueary*, the federal district court held the 300-foot distance provision was unconstitutional.<sup>222</sup> Based on prior Supreme Court cases, the minority of states with distance requirements of 100 feet or less will likely be found to be narrowly tailored. Funeral attendees are presumably unwilling listeners; however,

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<sup>218</sup> The state of Missouri prohibited picketing “in front of or about” a funeral and had a separate provision regarding a 300-foot distance that would apply only in the event the former provision was found unconstitutional. In *Phelps-Roper*, the federal district court held that the “in front of or about” provision was narrowly tailored because it was similar to the ordinance upheld in *Frisby*. See *Phelps-Roper v. Nixon*, No. 06-4156-CV-C-FJG, at \*6 (W.D. Mo. Jan. 26, 2007) (order denying preliminary injunction); see discussion *supra* part V.

<sup>219</sup> State statutes with distances requiring 500 feet include Georgia (GA. CODE ANN. § 16-11-34.2 (2006)), Indiana (IND. CODE § 35-45-1-3 (2006)), Iowa (IOWA CODE § 723.5 (2006)), Minnesota (MINN. STAT. § 609.501 (2006)), New Jersey (NJ. STAT. ANN. § 2C:33-8.1 (2006)), Oklahoma (OKLA. STAT. tit. 21, § 1380 (2006)), Pennsylvania (18 PA. CONS. STAT. § 7517 (2006)), Tennessee (TENN. CODE ANN. § 39-17-317 (2006)), Texas (TEX. PENAL CODE ANN. § 42.055 (2006)) and Wisconsin (WIS. STAT. § 947.011 (2005-06)). Three states require a distance of 1000 feet. Those states are: Mississippi (MISS. CODE ANN. § 97-35-51 (2006)), South Carolina (S.C. CODE ANN. § 16-17-525 (2006)), and South Dakota (S.D. CODIFIED LAWS §§ 22-13-17, 22-13-18, 22-13-19, & 22-13-20 (2006)).

<sup>220</sup> 152 Cong. Rec. S 5129.

<sup>221</sup> State statutes requiring distances of 100 feet include Colorado (RIGHT TO REST IN PEACE ACT, COLO. REV. STAT. § 18-9-125 (2006)) and Maryland (MD. CODE ANN., CRIM. LAW § 10-205 (2006)). Illinois is the only state with a 200 foot distance. 720 ILL. COMP. STAT. 5/26-6 (2006). Three hundred feet distances were adopted by Delaware (DEL. CODE ANN. Tit. 11 §1303 (2006)), Kentucky (Act of March 27, 2006, SB 93, Reg. Sess. codified as amended at KY. REV. STAT. ANN. §§ 525.055, 525.145, and 525.155), Nebraska (NEB. REV. STAT. § 28-1320.01 (2006)), North Carolina (N.C. GEN. STAT. § 14-288.4 (2006)) and Ohio (OHIO REV. CODE ANN. § 3767.30 (2006)).

<sup>222</sup> See *McQueary*, 453 F.Supp.2d at 975 (holding 300-foot zone was overly broad because, “it would restrict communicating intended for the general public on matters unrelated to the funeral”).

there may be listeners in the surrounding areas beyond a 100-foot distance who may be willing listeners. There is no significant governmental interest in protecting listeners greater than 100 feet away, especially those who have no connection with the funeral. Time limitations provide better protection of mourners than overly broad distance requirements. The most analogous cases, in terms of distance requirements, would be the buffer zone distances in the abortion cases.

The Supreme Court declined to uphold a 300 foot buffer zone in *Madsen v. Women's Health Center, Inc.*<sup>223</sup> *Madsen* involved an injunction against anti-abortion protesters. The injunction established a thirty-six foot buffer zone around the clinic, a 300-foot no-approach zone around the clinic, and a buffer zone around staff residences. The Court considered the thirty-six foot buffer zone narrowly tailored because of the government's interest in protecting access to the clinic.<sup>224</sup> Moreover, it noted that the protesters were still able to communicate their message while being seen and heard from the clinic parking lots.<sup>225</sup> The Court found that the 300 foot zone was not narrowly tailored because it would "ban general marching through residential neighborhoods, or even walking a route in front of an entire block of houses."<sup>226</sup> The Court suggested in dicta that a "limitation on the time, duration of picketing, and number of pickets outside a smaller zone" would have been narrowly tailored.<sup>227</sup>

The statutes with distance requirements of five hundred feet and above pose similar problems. The geographic overbreadth of the statutes is problematic because other expressive activity wholly unrelated to the funeral would be impacted. A five hundred foot zone is roughly

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<sup>223</sup> 512 U.S. 753 (1994).

<sup>224</sup> *Madsen*, 512 U.S. at 769-770.

<sup>225</sup> *Id.* at 770.

<sup>226</sup> *Id.* at 775.

<sup>227</sup> *Id.*

one and a half football fields.<sup>228</sup> Forcing the picketers to demonstrate at this distance would essentially silence them from their targeted audience. Unlike the protesters in *Madsen* the funeral attendees would probably be unable to hear or see the picketers' message. Although effectively silencing a message that could be characterized as hateful and harassing seems appealing, it fails to balance the right of free speech with the right to mourn. The state regulations cannot prevent funeral picketers like Westboro from communicating their message, but they can find a balance between the protesters rights and the rights of the mourners. There are no reports of Westboro attempting to enter funeral homes or directly confront the mourners; rather they tend to picket on sidewalks directly across from the funeral.<sup>229</sup>

The Court has expressed its reluctance to completely ban generally disseminated communication in public places,<sup>230</sup> and sidewalks are well recognized public forums.<sup>231</sup> In *Hill v. Colorado*, the Supreme Court upheld an eight foot restriction within 100 feet of a health care facility.<sup>232</sup> The Court noted that the eight foot distance "should not have any adverse impact on the readers' ability to read signs displayed by demonstrators," and it would allow protesters to communicate at a "normal conversational distance."<sup>233</sup> The distance requirements suggested by the states would adversely impact the mourners' ability to read the signs or hear the protesters.

The courts have also been reluctant to impose significant distance restrictions in election polling cases. In *Burson v. Freeman*, the Supreme Court, in a plurality opinion, upheld a Tennessee statute that prohibited campaign speech within 100 feet of a polling place.<sup>234</sup> The Supreme Court was concerned about balancing free speech rights with voting rights and electoral

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<sup>228</sup> See Seth Ruzi, *Reviving Trespass-Based Search Analysis Under the Open View Doctrine*, 63 N.Y.U. L. REV. 191, 225 n.249 (April 1988)(noting that four football fields is 1200 feet).

<sup>229</sup> McDonough, *supra* note 17, at 18.

<sup>230</sup> *Madsen*, 512 U.S. at 769.

<sup>231</sup> See e.g., *Frisby*, 487 U.S. at 480.

<sup>232</sup> *Hill*, 530 U.S. at 726.

<sup>233</sup> *Id.*

<sup>234</sup> 504 U.S. 191 (1992).

integrity.<sup>235</sup> Although the Court found the statute was content-based it held that it served a compelling interest in preventing voter intimidation and election fraud.<sup>236</sup> The Court concluded that the 100-foot distance was reasonable.<sup>237</sup>

*Burson* was a pre-election case; consequently, the constitutional right to vote was implicated. Circuit courts have also limited distances in post-election cases.<sup>238</sup> The Ninth Circuit considered the constitutionality of a 300-foot distance in exit polling in *Daily Herald Co. v. Munro*.<sup>239</sup> *Munro* involved a Washington statute that prohibited exit or public opinion polls within 300 feet of polling places. The state argued that it wanted to prevent disruption at polling places.<sup>240</sup> The Court held that the statute was unconstitutional, explaining that the areas within the 300 feet were traditional public forums that encompass streets and sidewalks.<sup>241</sup>

State legislation banning picketing within 300 feet or more is significantly broader than what the Supreme Court has previously upheld.<sup>242</sup> The distance requirements are unreasonable and reflect more emotional dislike for Westboro's behavior rather than a careful balancing of Westboro's constitutional rights with the rights of the mourners. The States have a right to protect mourners. States do not have the right to silence Westboro or its message.

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<sup>235</sup> *Id.*

<sup>236</sup> *Id.* at 206.

<sup>237</sup> *Id.* at 210.

<sup>238</sup> See e.g., *Anderson v. Spear*, 356 F.3d 651 (6th Cir. 2004)(500-feet not narrowly tailored); but see *Schirmer v. Edwards*, 2 F.3d 117 (5th Cir. 1993)(600-feet narrowly tailored in a campaign free zone); see generally Blake D. Morant, *Electoral Integrity: Media, Democracy & the Value of Self-Restraint*, 55 ALA L. REV. 1, 32-35 (Fall 2003)(arguing for voluntary restraint by the media in election coverage and analyzing election polling cases).

<sup>239</sup> 838 F.2d 380 (9<sup>th</sup> Cir. 1988).

<sup>240</sup> *Id.* at 385.

<sup>241</sup> *Id.* at 384.

<sup>242</sup> But see *Boos*, 485 U.S. at 312. The Supreme Court upheld a 500-foot distance in *Boos*. The statute in *Boos* prohibited the display of any sign that brings a foreign government into "public disrepute" within 500 feet of a foreign embassy. *Id.* at 315. The statute also prohibited multiple persons from congregating from within 500 feet of the embassy. *Id.* The Court struck down the display clause of the statute because it was not narrowly tailored. *Id.* at 324. The congregation clause was upheld based on the Court's reading that it only applied to groups posing a security threat. *Id.* at 331. The limited nature of *Boos* makes it difficult to apply in the funeral picketing context. In fact, the closest analogy would be with the display clause that the Court found unconstitutional.

Legislatures should amend the distance requirements in a way that the demonstrator's speech can still be communicated while protecting the right of mourners. Mourners are presently protected by the time limits posed on picketing, and most mourners will never be exposed to the picketers' message because of such time limits.<sup>243</sup> Distances closer to 100 feet would provide additional protection to mourners while allowing picketers to exercise their First Amendment rights.

#### **D. Nature of Punishment and Injunctive Relief**

All of the statutory provisions provide some form of criminal punishment for violation.<sup>244</sup> The vast majority of the funeral picketing statutes provide for misdemeanor punishment for violation, while some of the statutes convert to felony punishment following a second or third conviction.<sup>245</sup> The misdemeanor penalty provisions would likely survive intermediate scrutiny because the imposition of a fine or misdemeanor jail time is narrowly tailored to advance the state's interest without placing an excessive burden on the protesters.

Thus far, Westboro has indicated reluctance to directly violate the laws and risk arrest.<sup>246</sup> Instead, Westboro has asserted facial challenges against the recent legislation, characterizing them as overly broad.<sup>247</sup> A few of the statutes have specific provisions for injunctive relief. For example, the Oklahoma, Kansas and Pennsylvania statutes provide for injunctive relief and

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<sup>243</sup> The limitation of this argument is that it effectively shields the targeted audience from the speech. The government cannot control who Westboro decides to target anymore than it can control Westboro's message.

<sup>244</sup> A few statutes are also seeking to provide civil remedies to surviving family members. See MISS. CODE ANN. § 97-35-51 (2006). The Kansas legislature is proposing similar legislation to allow defamation actions. S.B. 244, 2007 Sess. (Ks. 2007) ("if an act of libel or slander is committed at a funeral and the person defamed is the deceased at such funeral or any living relative of the deceased, then an action for libel or slander may be sustained").

<sup>245</sup> See e.g. COLO. REV. STAT. § 18-9-125 (2006); DEL. CODE ANN. tit. 11 § 1303(3)(a) (2006); 720 ILL. COMP. STAT. 5/26-6(d) (2006); FLA. STAT. § 871.01 (2). Indiana and Michigan are the minority jurisdictions that make funeral picketing a felony. See IND. CODE § 35-45-1-3 (2006); MICH. COMP. LAWS § 750.167d (2006).

<sup>246</sup> See *McQueary v. Stumbo*, 453 F. Supp.2d 975 (E.D. Ky. 2006); *Phelps-Roper v. Nixon*, No. 06-4156-CV-C-FJG (W.D. Mo. Jan. 26, 2007) (order denying preliminary injunction); See also discussion *supra* Part V; See Westboro, [http://www.godhatesfags.com/writings/20051212\\_legislation-message.pdf](http://www.godhatesfags.com/writings/20051212_legislation-message.pdf) (last visited February 7, 2007).

<sup>247</sup> See *McQueary v. Stumbo*, 453 F. Supp.2d 975 (E.D. Ky. 2006); *Phelps-Roper v. Nixon*, No. 06-4156-CV-C-FJG (W.D. Mo. Jan. 26, 2007) (order denying preliminary injunction); See also discussion *supra* Part V.



award for attorney's fees.<sup>248</sup> All three statutes provide a misdemeanor range of punishment for violations.<sup>249</sup> Presumably, if Westboro decided to announce an upcoming protest, a state could preempt Westboro by filing for injunctive relief which could ultimately result in contempt sanctions against Westboro.

While most statutes would be assessed under the standard in *Ward*, injunctions are evaluated under a higher level of scrutiny.<sup>250</sup> The Supreme Court addressed the proper scrutiny in *Madsen*.<sup>251</sup> In *Madsen*, the Court explained the reason injunctions are different, including the greater risks of censorship and discriminatory application.<sup>252</sup> The Court concluded that injunctions require "a somewhat more stringent application of general First Amendment principles."<sup>253</sup>

As a threshold matter, the court would have to determine if the injunction is content-neutral. A content-neutral injunction must "burden no more speech that necessary to serve a significant government interest."<sup>254</sup> Because of the heightened level of review, seeking an injunction against Westboro poses the additional risk of some provisions being found unconstitutional. For example, an injunction that imposes a felony range of punishment for contempt would be more burdensome than necessary to protect the government's interest. Moreover, overly broad distances of 500 feet, like the distance provisions in both Pennsylvania and Oklahoma, would fail under a heightened constitutional scrutiny.<sup>255</sup>

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<sup>248</sup> Okla. Stat. tit. 21, § 1380 (2006); 18 Pa. Cons. Stat. § 7517 (2006); Kan. Stat. Ann. § 21-4015 (West, Westlaw through 2005 Reg. Sess.)

<sup>249</sup> *Id.* The misdemeanor range of punishment, which is usually less than a year in jail and/or a fine, would probably survive the heightened review applied to injunctions.

<sup>250</sup> *Madsen*, 512 U.S. at 764; *see also Ward*, 491 U.S. 781.

<sup>251</sup> 512 U.S. at 764.

<sup>252</sup> *Id.*

<sup>253</sup> *Id.* at 765.

<sup>254</sup> *Id.*

<sup>255</sup> 18 Pa. Cons. Stat. § 7517 & Okla. Stat. tit. 21 § 1380.

## **Conclusion**

Speech should not be criminalized merely because it is upsetting or deeply offensive, but the government must protect the First Amendment and balance the interests of mourners. Mourners represent the epitome of unwilling listeners. Although citizens must tolerate offensive speech in public, a funeral is different. Mourners are vulnerable to increased emotional distress, so the government's interest in protecting mourners is significant. Protesters have a right to publish their message. They do not have the right to impose their message on an audience that is captive and unwilling to hear it. Expansion of the captive audience doctrine to targeted funeral picketing would provide better protection for mourners and balance the right of free speech with the right of privacy. Balancing the interests of mourners with the fundamental right of free speech can only be accomplished by reasonable time, place, and manner restrictions. Most of the recent legislation should be amended to comply with reasonable distances closer to 100 feet and time limits no broader than one hour.

## **APPENDIX**

This Appendix contains a portion of the statutes that address picketing funerals.

### **Alabama**

Act of April 17, 2006, H.B. 661, REG. SESS. (Al. 2006). "A person commits the crime of disrupting a funeral or memorial service if, during the 60 minutes immediately preceding a funeral or memorial service that has a scheduled starting time, during the funeral or memorial service, or immediately following the funeral or memorial service, the person does any of the following with the intention of disrupting the funeral or memorial service: (1) Engages in a protest, including, but not limited to protest with or without using an electric sound amplification device, that involves singing, chanting, whistling, yelling or honking a motor vehicle horn within 500 feet of the entrance to a facility being used for a funeral or memorial service."

### **Colorado**

RIGHT TO REST IN PEACE ACT, COLO. REV. STAT. § 18-9-125 (2006). "(4) It is unlawful for a person to knowingly engage in funeral picketing within one hundred feet of the funeral site or to engage in electronically amplified funeral picketing within one hundred fifty feet of the funeral site. . . . (5)(a) Each mourner shall be entitled to recover reasonable damages, but not less than one thousand dollars, together with reasonable attorney fees and costs from each person who violates subsection (4) of this section."

### **Delaware**

DEL. CODE ANN. tit. 11 §1303 (2006). "A person shall not do any of the following within three hundred feet of the building or other location where a military funeral or memorial service is being conducted, or within three hundred feet of a military funeral procession or burial: (a) Make loud and raucous noise which causes unreasonable distress to persons attending the funeral or memorial service . . . (b) Direct abusive epithets or make any threatening gesture which the person knows or reasonable should know is likely to provoke a violent reaction by another (c) Disturb or disrupt the funeral, memorial service, funeral procession, or burial by conduct intended to disturb or disrupt the funeral, memorial service, funeral procession or burial. (2) This section applies to conduct within one (1) hour preceding, during and within two (2) hours after a military funeral, memorial service, funeral procession or burial."

### **Florida**

Act of June 20, 2006, codified as amended at FLA. STAT. §§ 871.01 & 871.02 (2006). "Whoever willfully interrupts or disturbs any assembly of people met for the purpose of acknowledging the death of an individual with a military funeral honors detail pursuant to 10 U.S.C. s. 1491 commits a misdemeanor of the first degree"

### **Georgia**

GA. CODE ANN. § 16-11-34.2 (2006). "It shall be unlawful to engage in any disorderly or disruptive conduct with the intent to impede, disrupt, disturb, or interfere with the orderly conduct of any funeral or memorial service or with the normal activities and functions carried on in the facilities or buildings where such funeral or memorial service is taking place. Any or all of the following shall constitute disorderly or disruptive conduct: (1) Displaying any visual images that convey fighting words or actual or imminent threats of harm . . . (2) Uttering loud, threatening, or abusive language or singing, chanting, whistling, or yelling with or without noise amplification including, but not limited to, bullhorns, automobile horns, and microphones, such as would tend to impede, disrupt, disturb or interfere with a funeral or memorial service within 500 feet . . . (3) attempting to block or blocking pedestrian or vehicular access to the ceremonial site or location being used for a funeral or memorial service at any time on hour prior to, during, or one hour after the posted time for said funeral or memorial service; or (4) conducting a public assembly, parade, demonstration, or other like event, either fixed or processional . . ."

### **Illinois**

720 Ill. COMP. STAT. 5/26-6 (2006). "A person commits the offense of disorderly conduct at a funeral or memorial service when he or she: (1) engages, with knowledge of the existence of a funeral site, in any loud singing, playing of music, chanting, whistling, yelling, or noisemaking with, or without noise amplification . . . (2) displays . . . within 200 feet of any ingress or egress of that funeral site any visual images that convey fighting words or actual or veiled threats against any person . . . (3) obstructs, hinders, impedes, or blocks another person's entry to or exit from that funeral site . . . (4) knowingly engages in a march or picket at the funeral site at any public location located

within 200 feet of any ingress or egress of that funeral site. . . .(e) This section does not apply to the peaceful activity regulated by the National Labor Relations Act or the Illinois Public Labor Relations Act.”

#### **Indiana**

IND. CODE § 35-45-1-3 (2006). “(a) A person who recklessly, knowingly, or intentionally: . . . (3) disrupts a lawful assembly of persons; commits disorderly conduct, a Class B misdemeanor. . . .(c) The offense described in subsection (a) is a Class D felony if it: (1) is committed within five hundred (500) feet of: (A) the location where a burial is being performed; (B) a funeral procession, if the person described in subsection (a) knows that the funeral procession is taking place; or (C) a building in which: (i) a funeral or memorial service; or (ii) the viewing of a deceased person; is being conducted; and (2) adversely affects the funeral, burial, viewing, funeral procession or memorial service.”

#### **Iowa**

IOWA CODE §723.5 (2006). “A person shall not do any of the following within five hundred feet of the building or other location where a funeral or memorial service is being conducted, or within five hundred feet of a funeral procession or burial: a. Make loud and raucous noise which causes unreasonable distress . . . b. Direct abusive epithets or make any threatening gesture which the person knows or reasonable should know is likely to provoke a violent reaction by another. c. Disturb or disrupt the funeral, memorial service, funeral procession or burial by conduct intended to disturb or disrupt . . .(2) This section applies to conduct within sixty minutes preceding, during, and within sixty minutes after a funeral, memorial service, funeral procession or burial.”

#### **Kansas**

KAN. STAT. ANN. § 21-4015 (West, Westlaw through 2005 Reg. Sess.). “It is unlawful for any person to engage in picketing before or about any cemetery, church or mortuary within one hour prior to, during and two hours following the commencement of a funeral.”

#### **Kentucky**

Act of March 27, 2006, SB 93, Reg. Sess. codified as amended at KY. REV. STAT. ANN. §§ 525.055, 525.145, and 525.155. “A person is guilty of disorderly conduct in the first degree when he or she: . . .(b) Acts in a way described in paragraph (a) . . . within three hundred (300) feet of a: 1. Cemetery during a funeral or burial; 2. Funeral home during the viewing of a deceased person; 3. funeral procession; or 4. funeral or memorial service; and (c) knows that he or she is within three hundred (300) feet of an occasion described in paragraph (b) of this subsection. . . . “A person is guilty of disrupting meetings and processions in the first degree when, with intent to prevent or disrupt a funeral or burial, funeral home viewing of a deceased person, funeral procession, or funeral or memorial service for a deceased person, he or she does any act tending to obstruct or interfere with it physically or makes any utterance, gesture or display designed to outrage the sensibilities of the group attending the occasion. . . . A person is guilty of interference with a funeral when he or she at any time on any day: (a) Blocks, impedes, inhibits, or in any other manner obstructs or interferes with access into or from any building or parking lot of a building in which a funeral . . . is being conducted; (b) congregates, pickets, patrols, demonstrates or enters on that portion of a public right-of-way or private property within three hundred (300) feet of an event specified in paragraph (a) of this subsection; or (c) without authorization from the family of the deceased or person conducting the service, during a funeral, wake, memorial service, or burial: 1. sings, chants, whistles, shouts, yells or uses a bullhorn, auto horn, sound amplification equipment, or other sounds or images observable to or within earshot of participants in the funeral, wake, memorial service, or burial; or 2. Distributes literature or any other item.”

#### **Louisiana**

LA. REV. STAT. ANN. § 14:103(7)-(8) (2006). “Disturbing the peace is doing of any of the following in such manner as would foreseeable disturb or alarm the public: . . . (7)Intentionally engages in any act or any utterance, gesture, or display designed to disrupt a funeral, funeral home viewing, funeral procession, wake, memorial service, or burial of a deceased person; (8)Intentionally blocks, impedes, inhibits, or in any other manner obstructs or interferes with access into or from any building or parking lot of a building in which a funeral, wake, memorial service, or burial is being conducted, or any burial plot or the parking lot of the cemetery in which a funeral wake, memorial service or burial is being conducted.”

### **Maryland**

MD. CODE ANN., [CRIM. LAW] § 10-205 (2006). “(A)(2) A person may not knowingly obstruct, hinder, impede, or block another person’s entry to or exit from a funeral, burial, memorial service, or funeral procession. (B) A person may not address speech to a person attending a funeral, burial, memorial service, or funeral procession that is likely to incite or produce an imminent breach of the peace. (c) A person may not engage in picketing activity within 100 feet of a funeral, burial, memorial service, or funeral procession that is targeted at one or more persons attending the funeral, burial, memorial service, or funeral procession.”

### **Michigan**

MICH. COMP. LAWS § 750.167d (2006). “A person shall not do any of the following within 500 feet of a building or other location where a funeral, memorial service, or viewing of a deceased person is being conducted or within 500 feet of a funeral procession or burial: (a) Make loud and raucous noise and continue to do so after being asked to stop. (b) Make any statement or gesture that would make a reasonable person under the circumstances feel intimidated, threatened, or harassed. (c) Engage in any other conduct that the person knows or should reasonable know will disturb, disrupt, or adversely affect the funeral, memorial service, viewing of the deceased person, funeral procession, or burial.”

### **Minnesota**

MINN. STAT. § 609.501 (2006). “Whoever does any of the following is guilty of a misdemeanor . . . (1) with intent to disrupt a funeral ceremony, graveside service, or memorial service, protests or pickets within 500 feet of the burial site or the entrance to a facility or location being used for the service or ceremony, within one hour prior to, during, or one hour following the service or ceremony; (2) with intent to disrupt a funeral procession, impedes or attempts to impede a vehicle that is part of the procession; (3) intentionally blocks or attempts to block access to a funeral ceremony, graveside service, or memorial service; or (4) knowingly engages in targeted residential picketing at the home or domicile of any surviving member of the deceased person’s family or household on the date of the funeral ceremony, graveside service, or memorial service.”

### **Mississippi**

MISS. CODE ANN. § 97-35-51 (2006). “Whosoever does any of the following shall be guilty of a misdemeanor: (i) With intent to disrupt a funeral service, graveside service, memorial service, or funeral ceremony, protests or pickets within 1,000 feet of the location or locations at which the service or ceremony is being conducted within one (1) hour before, during, and one (1) hour following the service or ceremony; (ii) With intent to disrupt a funeral procession impedes vehicles that are part of the funeral procession; (iii) intentionally blocks access to a funeral service, funeral ceremony, graveside service or memorial service; or (iv) engages in targeted residential picketing at the home or domicile of any surviving member of the deceased person’s immediate family on the date of the service or ceremony . . .”

### **Missouri**

MO. REV. STAT. § 578.501 (2006). “It shall be unlawful for any person to engage in picketing or other protest activities in front of or about any church, cemetery, or funeral establishment . . . within one hour prior to the commencement of any funeral, and until one hour following the cessation of any funeral. . . . It shall be unlawful for any person to engage in picketing or other protest activities within three hundred feet of or about any location at which a funeral is held . . .”

### **Nebraska**

NEB. REV. STAT. § 28-1320.01 (2006). “Picketing of a funeral means protest activities engaged in by a person or persons located within three hundred feet of a cemetery, mortuary, church, or other place of worship during a funeral. . . . A person commits the offense of unlawful picketing at a funeral if he or she engages in picketing from one hour prior to through two hours following the commencement of a funeral.”

### **New Jersey**

NJ. STAT. ANN. § 2C:33-8.1 (2006). “A person is guilty of disrupting a funeral if, during the period beginning one hour prior to the scheduled commencement of a funeral, and until one hour following the actual completion of the funeral, with the purpose of causing inconvenience, annoyance or alarm to the funeral or its participants, or of recklessly creating the risk thereof, the person knowingly: (1) obstructs . . . another person’s entry to or exit from the funeral, the funeral procession, the funeral home, church, synagogue, temple or other place of public worship or

other location at which a funeral takes place as part of demonstration activities, or (2) engages in demonstration activities within 500 feet of the funeral . . . and makes or assists in the making of noise, diversions, or threatening gestures, or engages in any other disruptive conduct, that disrupts or tends to disrupt the peace or good order of the funeral.”

#### **North Carolina**

N.C. GEN. STAT. § 14-288.4 (2006). “(a) Disorderly conduct is a public disturbance intentionally caused by any person who does any of the following: . . . (8) Engages in conduct with the intent to impede, disrupt, disturb or interfere with the orderly administration of any funeral . . . including a military funeral . . . Any of the following conduct that occurs within one hour preceding, during, or within one hour after a funeral or memorial service shall constitute disorderly conduct under this subdivision: (a) Displaying, within 300 feet of the ceremonial site . . . any visual image that conveys fighting words or actual or imminent threats of harm . . . (b) Uttering, within 300 feet of the ceremonial site, . . . loud, threatening, or abusive language or singing, chanting, whistling, or yelling with or without noise amplification . . . (c) Attempting to block or blocking pedestrian or vehicular access to the ceremonial site or location used for a funeral or memorial.”

#### **Ohio**

OHIO REV. CODE ANN. § 3767.30 (2006). “Every citizen may freely speak, write, and publish the person’s sentiments on all subjects, . . . but no person shall picket or engage in other protest activities . . . within three hundred feet of any residence, cemetery, funeral home, church, synagogue, or other establishment during or within one hour before or one hour after the conducting of an actual funeral or burial service at that place. No person shall picket or engage in other protest activities, nor shall any association or corporation cause picketing or other protest activities to occur within three hundred feet of any funeral procession.”

#### **Oklahoma**

OKLA. STAT. tit. 21, § 1380 (2006). “It is unlawful for any person to engage in picketing within five hundred (500) feet of any cemetery, church or mortuary during the period from one hour before the scheduled commencement of funeral services until one hour after the actual completion of the funeral services.”

#### **Pennsylvania**

18 PA. CONS. STAT. § 7517 (2006). “A person commits a misdemeanor of the third degree if the person engages in demonstration activities within 500 feet of any cemetery, mortuary, church or other location being utilized for the purposes of commemorative service within one hour prior to, during and one hour following the commemorative service.”

#### **South Carolina**

S.C. CODE ANN. § 16-17-525 (2006). “It is unlawful for a person to willfully, knowingly, or maliciously disturb or interrupt a funeral service. . . . This subsection applies to a willful, knowing, or malicious disturbance or interruption within: (1) one thousand feet of the funeral service; and (2) a time period of one-half hour before the funeral service until one-half hour after the funeral service. (B) It is unlawful for a person to undertake an activity at a public or privately owned cemetery, other than the decorous participation in a funeral service or visitation of a burial space, without the prior written approval of the public or private owner.”

#### **South Dakota**

S.D. CODIFIED LAWS §§ 22-13-17, 22-13-18, 22-13-19, and 22-13-20 (2006). “No person may engage in any act of picketing at any funeral service during the period from one hour before the scheduled commencement of the funeral services until one hour after the actual completion of the funeral services. . . .the term picketing, means protest activities engaged in by any person stationed within one thousand feet of a funeral service within one hour prior to, during and one hour following the commencement of any funeral service.”

#### **Tennessee**

TENN. CODE ANN § 39-17-317 (2006). “A person commits the offense of interfering with a funeral or burial, funeral home viewing of a deceased person, funeral procession, or funeral or memorial service for a deceased person, if such person acts to obstruct or interfere with such commemorative service or makes any utterance, gesture, or display in a manner offensive to the sensibilities of an ordinary person. Picketing, protesting, or demonstrating at a

funeral or memorial service shall be deemed offensive to the sensibilities of an ordinary person. (b) The provisions of this section shall only apply to acts within five hundred (500) feet of a funeral or burial . . .”

#### **Texas**

TEX. [PENAL] CODE ANN. § 42.055 (2006). “A person commits an offense if, during the period beginning one hour before the service begins and ending one hour after the service is completed, the person engages in picketing within 500 feet of a facility or cemetery being used for a funeral service.”

#### **Vermont**

2006 Vt. Acts & Resolves page no. 167 (Westlaw listed VT legis 167). “No person shall disturb or attempt to disturb a funeral service by engaging in picketing within 100 feet of the service within one hour prior to and two hours following the publicly announced time of the commencement of the service.”

#### **Virginia**

VA. CODE ANN. § 18.2-415 (Supp. 2006). “A person is guilty of disorderly conduct if, with the intent to cause public inconvenience, annoyance or alarm, or recklessly creating a risk thereof, he: . . . (B) Willfully . . . disrupts any funeral, memorial service . . . or if the disruption (i) prevents or interferes with the orderly conduct of the funeral, memorial service or meeting or (ii) has a direct tendency to cause acts of violence by the person or persons at whom, individually, the disruption is directed.”

#### **Wisconsin**

WIS. STAT. § 947.011 (2005-06). “No person may do any of the following during a funeral or memorial service, during the 60 minutes immediately preceding the scheduled starting time of a funeral or memorial service if a starting time has been scheduled, or during the 60 minutes immediately following a funeral or memorial service: 1 Engage in conduct that is prohibited under s. 947.01 within 500 feet of any entrance to a facility being used for the service with the intent to disrupt the service. 2. Intentionally block access to a facility being used for the service.”