

The Incompatibility of Free Speech and Funerals: A *Grayned*-Based Approach for Funeral Protest Statutes

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*Since June 2005, one small Kansas church has provoked an important First Amendment debate by trumpeting anti-gay messages during American military funerals. Not surprisingly, jittery politicians have sought to thwart the church's protests with dozens of statutes limiting speech near funerals and funeral processions. Free speech advocates, in turn, have challenged three of these funeral protest statutes. Courts have upheld two—in Missouri and Ohio—while enjoining the third in Kentucky. In these cases, the legal debate has centered on the privacy interest articulated by the Supreme Court in *Frisby v. Schultz* and *Hill v. Colorado*. But that foundation may prove infirm. Relying on the privacy interest in the funeral protest context creates several significant legal inconsistencies and policy problems. This Note argues that, instead of relying on the privacy interest, courts should evaluate funeral protest statutes using the compatibility rationale that the Supreme Court set forth in *Grayned v. City of Rockford*. Although the Court has not formally adopted the compatibility rationale, the notion appears periodically in its opinions.*

The impending legal crisis over funeral protest statutes presents an ideal opportunity for the formal establishment of this compatibility rationale, which would guide courts when evaluating statutes that favor one speech activity over another on the basis of the first activity's time, place, and manner requirements. In short, the compatibility rationale would recognize the distinctive value of time, place, and manner restrictions insulating constitutionally protected activities that can occur in only one particular time, place, and manner from other protected activities which may occur just as effectively elsewhere. This rationale would help courts evaluate the statutes in a more coherent manner. It would also assist advocates of funeral protest statutes who, by emphasizing the incompatible nature of political speech and funerals, could obtain several strategic advantages that they could not achieve by solely relying on privacy. In the process, they might also reinstate the traditional solemnity of memorials honoring fallen American soldiers.

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I. INTRODUCTION

At first blush, the funeral for U.S. Army Specialist Jared Hartley resembled the traditional solemn memorial of a fallen soldier.¹ “Nearly half the town” of Newkirk, Oklahoma, joined grieving family, friends, and Hartley’s fiancé to pay their last respects to the twenty-two year-old who died in Iraq after an improvised explosive device (“IED”) detonated near his armored vehicle.² In keeping with tradition, an American flag covered Specialist Hartley’s coffin, and “[t]wenty-one gun shots rang across the Oklahoma fields” in his honor.³

But Specialist Hartley’s funeral proved distinctly untraditional. Across the street, protestors held signs proclaiming “Thank God for IEDs,” “America is Doomed,” and “God Hates Fags.”⁴ One person brandished an American flag, then stepped on it.⁵ And these protestors distributed fliers taunting those who read them: “They turned America / Over to fags; They’re coming home / In body bags.”⁶ The spectacle at Hartley’s funeral was, as one attendee observed, “not right.”⁷

Since June 2005, the small Kansas church that picketed Hartley’s memorial has wreaked similar havoc at hundreds of funerals across America.⁸ Much to grieving family members’ dismay, the Westboro Baptist Church (“WBC”) pairs aggressive tactics with a provocative message—that God punishes America for its tolerance of homosexuality by killing soldiers in Afghanistan and Iraq.⁹ While protests at funerals may seem patently

¹ Brent B. Wistrom, *Funeral Marred by Protesters*, WICHITA EAGLE, July 24, 2005, at B1.

² *Id.*

³ *Id.*

⁴ *Id.*

⁵ *Id.*

⁶ *Id.*

⁷ Wistrom, *supra* note 1.

⁸ For details about other Westboro Baptist Church (“WBC”) military funeral protests, see, for example, Fred Mann, *Road to Westboro*, WICHITA EAGLE, Apr. 2, 2006, at A1.

⁹ *Id.*

tasteless, they have triggered an important new battle¹⁰ in the long line of First Amendment public forum doctrine cases.¹¹

Not surprisingly, jittery politicians have sought to thwart the WBC's antics with dozens of statutes limiting speech near funerals and funeral processions.¹² Defenders of free speech, in turn, have challenged these statutes five times in court.¹³ On first impression, the resulting legal wrangling may smack of an attempt by the political majority to smother an unpopular minority viewpoint, implicating a chief evil against which the First Amendment protects.¹⁴ However, closer analysis of funeral protests and the statutes designed to limit them reveals that this situation actually presents a much more complex problem.

By describing what occurred when WBC members and their adversaries protested at scores of soldiers' funerals¹⁵ between 2005 and 2007, Part II of this Note illustrates that the trouble with speech at funerals stems not from its extreme content, but rather from its disruptive nature. Controversial and popular political speakers alike arguably have polluted the peaceful and quiet atmosphere that soldiers' funerals deserve.

Of course, funerals are not the first activity that legislators have tried to insulate from disruptive speech. Part III describes how courts have evaluated other time, place, and manner speech restrictions that—not coincidentally—parallel funeral protest statutes. These precedents, which establish a legally-protected privacy interest in avoiding unwanted speech, form the basis for current funeral protest litigation. But that foundation might prove infirm.

Part IV—which chronicles the spate of speech regulations enacted in the wake of the WBC's protests—demonstrates that governments have been

¹⁰ A search of Westlaw and Lexis databases revealed only one prosecution of a funeral protestor who did not belong to the WBC. See *Tennessee v. Ervin*, 40 S.W.3d 508 (Tenn. Crim. App. 2000) (upholding the prosecution for disorderly conduct of a protestor who yelled "Stop killer cops" at a memorial for police officers killed in the line of duty).

¹¹ Courts permit only "very limited" speech restrictions on public property. *United States v. Grace*, 461 U.S. 171, 177 (1983) (invalidating a federal statute prohibiting communicative displays outside of the Supreme Court). Speech in quintessential public forums like sidewalks and parks possesses great First Amendment value because it "effectively communicates an idea quickly and inexpensively" and, as such, it "is often the only means of mass communication available to minority groups" who need protection the most. Sylvia Arizmendi, *Residential Picketing: Will the Public Forum Follow Us Home?*, 37 *HOW. L.J.* 495, 497 (1994).

¹² See *infra* Part IV.

¹³ See *infra* Part V.

¹⁴ See Geoffrey R. Stone, *Content Regulation and the First Amendment*, 25 *WM. & MARY L. REV.* 189, 214–215 (1983).

¹⁵ This Note uses the term "funeral" broadly to include memorial services, calling hours, wakes, and other gatherings designed for grieving.

careful to limit funeral demonstrations without reference to their content. The statutes restrict speech with sundry rules generally governing the time, place, and manner when it may occur. Of particular controversy have been three aspects of these statutes: fixed zones that limit speech a set distance from protected activities; floating zones that prohibit speech in roving areas following mobile protected activities; and grace periods that extend fixed and floating zones to a time period before or after protected activities. WBC members have challenged each of these features of funeral protest statutes despite their acknowledgment that the statutes have stifled neither the church nor its counterparts.¹⁶

The first wave of funeral protest cases produced irreconcilable results. With privacy as their guiding interest, courts fumbled to explain vastly different outcomes. Part V examines these recent decisions and highlights how the reliance on the privacy interest caused legal inconsistencies and policy problems. It then suggests that, so long as privacy remains the government interest served by funeral protest statutes, these difficulties are inevitable.

Effective protests and solemn funerals simply cannot co-exist. They are, in other words, incompatible. A small but growing segment of case law recognizes such dissonance as a partial justification for time, place, and manner restrictions that prevent two clashing constitutionally protected rights from quashing each other.¹⁷ But the Supreme Court has never clearly established compatibility as a government interest sufficient to justify speech restrictions by itself.

Part VI of this Note argues that courts should use funeral protest litigation to establish such a compatibility rationale. It also suggests how the rationale might operate in practice. In short, courts should recognize the distinctive value of time, place, and manner restrictions safeguarding constitutionally protected activities that may occur only in one particular time, place, and manner from other protected activities which may occur just as effectively elsewhere.

By employing the compatibility rationale, courts could more effectively evaluate the myriad funeral protest statutes that states recently have enacted. And by emphasizing the incompatible nature of disruptive political speech and funerals, opponents of funeral protests could obtain several strategic advantages that relying on privacy alone would fail to achieve. This doctrinal shift might even help to ensure that fallen soldiers like Specialist Hartley receive the dignified memorials that they deserve.

¹⁶ See *infra* notes 130–59.

¹⁷ See *infra* Part V.

II. BACKGROUND

A. *The Virulent History of the Westboro Baptist Church*

Funeral protests took root in 1955 when Fred Phelps established the WBC, his small Baptist church in Topeka, Kansas.¹⁸ At the time, Phelps had not yet acquired pariah status—in fact, previously, he had earned an appointment to West Point,¹⁹ plaudits from civil rights leaders, and even a law degree.²⁰ But Phelps' early years provided hints of his colorful future: for instance, shortly before Phelps established the WBC, *Time* featured a photograph of him protesting “necking and petting” on a college campus.²¹ Over the years, his congregation never affiliated with the national Baptist organization.²² Still, Phelps enlarged the church's membership—largely by growing his own family through childbirth and marriage—to include nearly seventy-five members.²³ For more than fifty years, they have lived and worshipped together on a compound near Topeka.²⁴ But the church lacked national attention—that is, until recently.

The WBC entered the political fray almost by accident. Irritated by city leaders who did not respond to his letters, in 1991 Phelps demonstrated at a Kansas public park where he believed that homosexual activities frequently occurred.²⁵ To his apparent surprise, Phelps' placards (which stated, “Watch your kids. Gays in restrooms.”) provoked counter-protests.²⁶ The resulting attention excited Phelps and his small church.²⁷ Suddenly, Phelps seemed to have found his calling, and, likewise, his church seemed to have found a mission.²⁸

¹⁸ Mann, *supra* note 8.

¹⁹ *Id.* Phelps, however, chose not to attend the academy.

²⁰ Matt Sedensky, *A Ministry of Hate*, ASSOCIATED PRESS, June 10, 2006. Phelps later was disbarred for improper activities involving a lawsuit against a court reporter. Mann, *supra* note 8.

²¹ Mann, *supra* note 8.

²² *Id.*

²³ Sedensky, *supra* note 20.

²⁴ Justin Kendall, *The New Fred*, KANSAS CITY PITCH WEEKLY, Nov. 2, 2006, <http://www.pitch.com/2006-11-02/news/the-new-fred/>.

²⁵ Mann, *supra* note 8.

²⁶ *Id.*

²⁷ *Id.*

²⁸ *Id.*

Within several years, the WBC emerged on the national radar screen by protesting at the funeral of Matthew Shepard.²⁹ Several men had brutally murdered Shepard, a Wyoming college student, because he was gay.³⁰ Shepard's story gripped the nation and drew its sympathy.³¹ Bucking that sentiment, Phelps brought signs to Shepard's funeral exclaiming that "God Hates Fags."³² As with his protests in Kansas parks, Phelps' anti-gay messages sparked extreme outrage.³³

Since that notorious episode in Wyoming, the WBC also has demonstrated outside a variety of funerals including those for victims of the terrorist attacks on September 11, 2001; miners who died in the Sago, West Virginia tragedy; Frank Sinatra; Barry Goldwater; gay men who died after contracting AIDS; Mister Rogers; and Coretta Scott King.³⁴ Fueled by the financial support of family members,³⁵ Phelps claims to have protested more than 25,000 times.³⁶

But protests at soldiers' funerals have garnered the WBC more attention than anything else. During 2005 and 2006, church members protested at nearly 200 of these events³⁷ in dozens of states.³⁸ Each protest has followed a somewhat predictable pattern. The group typically notifies local authorities of its plans several days before the target funeral.³⁹ Then, on the day of that funeral, protestors line a street or sidewalk nearby.⁴⁰ On quieter days, church members display signs communicating incendiary anti-gay messages.⁴¹ Other times the protestors noisily chant and spout declarations that the

²⁹ Sedensky, *supra* note 20.

³⁰ *Id.*

³¹ *Id.*

³² *Id.*

³³ *Id.*

³⁴ *Id.* See also Mann, *supra* note 8.

³⁵ Mann, *supra* note 8.

³⁶ *Id.* Phelps also has taken his message to the political world, serving as a candidate for offices including mayor and governor. *Id.*

³⁷ Judy Keen, *Funeral Protestors Say Laws Can't Silence Them*, USA TODAY, Sept. 14, 2006, at 5A.

³⁸ *Id.*

³⁹ See, e.g., Alan Feuer, *Revvng Their Engines, Remembering a War's Toll: With a Chrome-Lined Cortege, the Patriot Guard Riders Pay Homage to Soldiers Killed in Iraq*, N.Y. TIMES, May 29, 2006, at B1.

⁴⁰ *Id.*

⁴¹ Adam Jadhav, *Anti-Gay Protestors Target Small-Town Soldier's Funeral*, ST. LOUIS POST-DISPATCH, Dec. 9, 2005, at A1.

memorialized soldiers will rot in hell.⁴² The WBC aims, with these tactics, to shock funeral attendees so that they will hear the church's provocative message.⁴³

B. *The Patriot Guard Bikers and Other Counter-Protestors*

The news-making opportunity that military funerals present attracts more than just anti-gay protestors. Since October 2005, a pro-military organization named the "Patriot Guard" has contributed significantly to the chaotic scene. This hardy group of bikers serves as a formidable adversary to the WBC, working "to shield families from protestors and to honor fallen soldiers."⁴⁴

From its first gathering with forty bikers who countered a WBC protest in Oklahoma, the Patriot Guard has grown to include more than 60,000 members hailing from all walks of life.⁴⁵ The bikers, following the WBC's lead, normally park or stand along the road leading to a funeral site, saluting or holding flags.⁴⁶ Wearing colorful vests adorned with military regalia, the bikers are hard to miss.⁴⁷ And also like the WBC, guard members sometimes act rambunctiously: they try to "overshadow the [WBC's] jeers with patriotic chants and a sea of red, white and blue flags."⁴⁸ During especially spirited standoffs, the Patriot Guard rev their motorcycle engines to "smother hateful slogans in a Harley engine's word-obscuring roar."⁴⁹

Other groups occasionally join the Patriot Guard in seeking to overpower the WBC's message. Members of the Veterans of Foreign Wars and the American Legion, for example, also have countered Phelps's group.⁵⁰ In Boston, a fourteen-man bagpipe band drowned out the protestors' chants, and

⁴² Lizette Alvarez, *Outrage at Funeral Protests Pushes Lawmakers to Act*, N.Y. TIMES, Apr. 17, 2006, at A14.

⁴³ Marjory Raymer, *Protestors Target Next Funeral*, FLINT J., Mar. 8, 2006, at A1.

⁴⁴ Jeff Seidel, *Group Drowns out Words of Hate at Soldiers' Funerals: Patriot Guard Shields Family in Grand Ledge*, DETROIT FREE PRESS, Mar. 28, 2006, at 1; see also Tim Carpenter, *Standing Guard*, TOPEKA CAP. J., Dec. 31, 2006, at 1B.

⁴⁵ Carpenter, *supra* note 44; see also Beccy Tanner, *Some Room to Grieve*, WICHITA EAGLE, Nov. 6, 2005, at 1B.

⁴⁶ Seidel, *supra* note 44.

⁴⁷ *Bikers Roll to Soldiers' Funerals to Counter Anti-Gay Protesters*, AP, Feb. 21, 2006, available at <http://www.foxnews.com/story/0,2933,185617,00.html>.

⁴⁸ *Id.*

⁴⁹ Feuer, *supra* note 39.

⁵⁰ Paul Janczewski, *Supporters Counter Church Group's Funeral Protest*, FLINT J., Mar. 12, 2006, at A2.

police officers backed their horses' rear ends into the group.⁵¹ Less diplomatic opposition also has met WBC protestors. The group claims that its members have been "beaten . . . and that one was punched in the face by a sheriff in Wisconsin."⁵² And vandals have targeted the WBC's facilities, firing bullets and placing a pipe bomb near the church headquarters.⁵³

Taken together, the pro-military speakers sometimes offset the disruptive effects of WBC protests.⁵⁴ More often, however, Patriot Guard members and their allies merely increase the sum of speech, detracting from the peace and quiet of a funeral.⁵⁵ Indeed, some local authorities fear that the tension between bikers and WBC members eventually may erupt into violence.⁵⁶ Rather than cleansing the funeral environment of disruptive speech, Patriot Guard members actually can aggravate the tainting effects created when the WBC converts a solemn funeral into a political event. Apparently, protestors' speech need not be unpopular to disrupt a funeral.

III. PROTEST LIMITS AND CONSTITUTIONAL LAW

A. *Focused Picketing and Frisby v. Schultz*

Long before the WBC hated gays, political groups tested the First Amendment with efforts to derive communicative value through disruptions of other groups' protected activities.⁵⁷ During the latter half of the twentieth

⁵¹ Commentary, *Voice of the Times: Demonstrators Drowned Out at Hero's Funeral*, ANCHORAGE DAILY NEWS, July 7, 2005, at B7.

⁵² Mann, *supra* note 8.

⁵³ *Id.*

⁵⁴ Jason George, *Bikers Come, Protestors Go: Members of Group 25,000 Strong Stand Guard at Funeral*, CHI. TRIB., Apr. 20, 2006, at 1; *see also* Feuer, *supra* note 39 (offering that sometimes the WBC has cancelled planned protests after learning that Patriot Guard representatives would attend).

⁵⁵ The Patriot Guard's disruptive effect occurs despite the general popularity of their message. *See, e.g.*, George, *supra* note 54 (explaining that the "Patriot Guard Riders' wholesome aim to protect grieving families from hate speech appears to be a cause with which few can disagree").

⁵⁶ *See, e.g.*, Jason Stein, *Biker Barrier Motorcyclists Shield Mourners from Protestors*, WISCONSIN STATE JOURNAL, Feb. 17, 2006, at B1.

⁵⁷ Courts historically have held that the right to free speech in the public forum applies to even the most unpopular speakers—speakers arguably more offensive than protestors outside funerals. *See, e.g.*, *Collin v. Smith*, 578 F.2d 1197 (7th Cir. 1978), *cert. denied*, 439 U.S. 916 (1978) (declaring unconstitutional a Skokie, Illinois ordinance prohibiting speech activities designed to promote hatred based upon the heritage of another). The Supreme Court has explained that public forum speech carries so much value that sometimes "citizens [in public spaces] must tolerate insulting, and even

century, federal courts evaluated government attempts to suppress similarly provocative protests near sites as varied as abortion clinics, embassies, voting locations, and churches. Such efforts generally fall into two categories: “fixed zones,” limits on speech within a set distance of a stationary protected activity; and “floating zones,” speech-free zones that follow a roving protected activity. Courts typically review these restrictions with the familiar intermediate scrutiny approach that evaluates a time, place, and manner restriction by testing whether it is “narrowly tailored to serve a significant government interest [while leaving] open ample alternative channels of communication.”⁵⁸

What distinguishes the funeral protest situation from cases that appear to be its doctrinal ancestors is the extreme proliferation of statutory responses and legal challenges that have occurred during a brief period of time, thanks to the WBC. As this Section explains, the privacy interest is not equipped to handle the impending crisis. The murky existing doctrine simply lacks the ability to distinguish the statutes and their varied approaches to limiting speech.

outrageous, speech in order to provide ‘adequate “breathing space” to the freedoms protected by the First Amendment.’” *Boos v. Barry*, 485 U.S. 312, 322 (1988) (quoting *Hustler Magazine, Inc. v. Falwell*, 485 U.S. 46, 56 (1988)).

⁵⁸ *McQueary v. Stumbo*, 453 F. Supp. 2d 975, 981 (E.D. Ky. 2006) (quoting *Frisby v. Schultz*, 487 U.S. 474, 481 (1988)); *Phelps-Roper v. Nixon*, No. 06-4156-CV-C-FJG, 2007 WL 273437, at * 2 (W.D. Mo. Jan. 26, 2007) (notice of appeal filed 2/1/07). Courts afford a more deferential, intermediate level of scrutiny to regulations that limit only the time, place, and manner of expression, without reference to what idea the expression communicates. *See, e.g.*, *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989). By contrast, only very exceptional important government interests can justify regulations directed at one particular message. *Compare* *Burson v. Freeman*, 504 U.S. 191 (1992) (upholding a 100-foot, content-specific limit around polling sites) *with* *Police Dep’t of Chi. v. Mosley*, 408 U.S. 92, 95 (1972) (invalidating a 150-foot, content-specific speech ban near schools because it singled out speech that was unrelated to labor disputes and explaining that “above all else, the First Amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter, or its content”).

Frisby v. Schultz stands as the landmark case in fixed-zone litigation.⁵⁹ In *Frisby*, the Supreme Court upheld a municipal ordinance prohibiting “focused picketing” near private residences.⁶⁰ *Frisby* established that the “protection of the unwilling listener,” especially at home,⁶¹ constitutes a significant government interest. The Court explained the special weight of this privacy interest at home, where speech literally may captivate unwilling listeners. In effect, those offended by speech there simply cannot avoid it.⁶²

After announcing the privacy interest, the *Frisby* Court proceeded with a routine intermediate scrutiny analysis that found narrow tailoring because the ordinance reached no more speech than necessary—only speech “narrowly directed at the household, not the public.”⁶³ The Court also declared, without significant discussion, that it was “virtually self-evident that ample alternatives remain” because the statute left available contact through telephone calls, literature distribution, and door-to-door communication.⁶⁴ Given this cursory analysis, the *Frisby* privacy interest apparently justifies a relaxed approach to the tailoring and ample alternative requirements of the intermediate scrutiny test.

Other recent cases mimic *Frisby*’s approach. The Court in *Boos v. Barry* upheld a ban on multi-person protests within 500 feet of foreign government buildings in Washington, D.C., without explaining what demanded that

⁵⁹ For litigants’ and courts’ reliance on the reasoning of *Frisby*, see, for example, *Nixon*, 2007 WL 273437, at *3, citing *Frisby* for the notion “that the state had an interest in protecting citizens in their residences from unwanted communications,” and *McQueary*, 453 F. Supp. 2d *passim*. For critical analysis of the *Frisby* decision, see Robert E. Rigby, Jr., Comment, *Balancing Free Speech in a Public Forum vs. Residential Privacy: Frisby v. Schultz*, 24 NEW ENG. L. REV. 889, 914 (1990), arguing that *Frisby* “seriously undermined the fundamental right to freely express an opinion in public”; see also *Leading Cases: Residential Picketing*, 102 HARV. L. REV. 261, 268 (1988) (explaining that the Court “sharply undercut the logic and force of its holding” by limiting its protections to private homes when “[t]he theory of residential privacy . . . applies with equal if not greater force to picketing of an entire block or neighborhood . . .”); Todd R. Seelman, Note, *The Illusion of Residential Privacy: The Doctrine of Time, Place, and Manner Regulation Revisited: Frisby v. Schultz*, 108 S. Ct. 2495 (1988), 12 HAMLINE L. REV. 447, 471–74 (1989) (arguing that the Court erred because the Brookfield statute was overbroad).

⁶⁰ *Frisby v. Schultz*, 487 U.S. 474 (1988). The challenged statute reads: “It is unlawful for any person to engage in picketing before or about the residence or dwelling of any individual in the Town of Brookfield.” *Id.* at 477. The *Frisby* Court employed intermediate scrutiny after accepting—without questioning—the lower court’s determination that the ordinance was content neutral. *Id.* at 481–82.

⁶¹ *Id.* at 484–85.

⁶² *Id.*

⁶³ *Id.* at 486.

⁶⁴ *Id.* at 483–84.

specific distance.⁶⁵ In *Burson v. Freeman*, several years later, the Court upheld a Tennessee fixed zone that prohibited speech within 100 feet of polling places, while similarly punting on the tailoring analysis.⁶⁶ And, in *Madsen v. Women's Health Center*, the Supreme Court upheld an injunction that imposed a thirty-six-foot fixed zone around the entrance of an abortion clinic as well as a prohibition on noisy protests outside the clinic.⁶⁷ In each of these cases, the Court analyzed tailoring and ample alternatives briefly and failed to clarify how to define precisely the legally permissible boundary of privacy-based speech restrictions.

Still, the privacy interest apparently has limits. It has failed to justify fixed zones in a handful of cases that are difficult to distinguish factually from the primary holdings in *Frisby*, *Boos*, *Burson*, and *Madsen*. For example, *Madsen* itself invalidated as overbroad portions of the injunction that protected homes of abortion clinic employees.⁶⁸ The Court in *Madsen* explained that the 300-foot fixed zone—200 feet smaller than the one that the Court upheld in *Boos*—would affect more protected speech than the ordinance in *Frisby* did.⁶⁹

⁶⁵ *Boos v. Barry*, 485 U.S. 312 (1988). The challenged provision protecting embassies and consulates made it illegal to “congregate within 500 feet of any such building or premises, and refuse to disperse after having been ordered so to do by the police authorities” of the District of Columbia. *Id.* at 316. The *Boos* Court upheld the law after finding that it “merely regulate[d] the place and manner of certain demonstrations” without “reach[ing] a substantial amount of constitutionally protected conduct.” *Id.* at 331–32. For an argument that *Boos* is inconsistent with *Frisby*, see generally Lee B. Madinger, Comment, *Free Speech in Public Places: Application of the Perry Analysis in Picketing Cases*, 11 WHITTIER L. REV. 267 (1989).

⁶⁶ 504 U.S. 191 (1992). The challenged statute in *Burson* prohibited “the display of campaign posters, signs, or other campaign materials, distribution of campaign materials, and solicitation of votes for or against any person or political party or position” within 100 feet of polling buildings and their entrances. *Id.* at 193–94.

⁶⁷ 512 U.S. 753 (1994). The Court treated the restrictions that it reviewed in *Madsen* “more stringent[ly]” than it does statutes in most public forum cases because of the chilling potential of an injunction, as opposed to that of a general regulation. *Id.* at 764–65. The *Madsen* injunction prohibited (1) “congregating, picketing, patrolling, demonstrating or entering . . . within [thirty-six] feet” of the clinic, unless on adjacent private property; (2) “singing, chanting, whistling, shouting, yelling, use of bullhorns, auto horns, sound amplification equipment or other sounds or images observable to or within earshot of the patients inside the Clinic”; (3) approaching patients within 300 feet of the clinic, unless invited; and (4) “approaching, congregating, picketing, patrolling” or demonstrating outside the homes of clinic employees. *Id.* at 759–60.

⁶⁸ *Id.* at 776.

⁶⁹ *Id.* at 775. The Court also invalidated aspects of the *Madsen* injunction that limited speech on private property. In addition, it determined that the section of the injunction limiting observable images unconstitutionally obliged patients’ discomfort

More recently, the Eighth Circuit invalidated a ban on focused pickets of religious premises in *Olmer v. City of Lincoln*.⁷⁰ Although the *Olmer* Court did not deny that the City of Lincoln's restrictions strongly resembled those upheld in *Frisby*, it expressly declined to extend *Frisby*—parroting the *Frisby* justification that “the home is different, and, in [the court’s] view, unique.”⁷¹ Rather than affirming the law with *Frisby*’s powerful privacy justification, the Eighth Circuit declared that the Lincoln ordinance impermissibly affected more speech than was necessary to serve its government interest: protecting children from frightening images.⁷²

Courts’ ability to find improper tailoring in *Madsen* and *Olmer* despite the similarities between the invalidated injunctions and those approved in other Supreme Court cases strengthens the argument that the strength of the *Frisby*-based government interest underlying a fixed zone—the main factual difference in these cases—might determine the constitutionality of a privacy-based restriction.⁷³ Regardless, *Frisby* and its progeny currently do not

with the content of images that they could easily avoid by closing the clinic’s curtains. *Id.* at 773. The *Madsen* Court also invalidated as overbroad—because they would reach more protected speech than necessary—the aspects of the injunction that limited personal approach within 300 feet. *Id.* at 776.

⁷⁰ 192 F.3d 1176, 1182 (8th Cir. 1999). The *Olmer* ordinance prohibited protestors from “intentionally or knowingly . . . engag[ing] in focused picketing of a scheduled religious activity at any time within the period from one-half hour before to one-half hour after the scheduled activity . . . in the immediate vicinity of religious premises, or moving in a repeated manner past or around religious premises.” *Id.* at 1179. The court assumed that the limit operated in a content-neutral fashion. *Id.* at 1180. It also accepted as important the interest cited in the case by the City of Lincoln, namely the protection of “very young children from frightening images.” *Id.* Even so, the Eighth Circuit invalidated the ordinance. *Id.* at 1182.

⁷¹ *Id.* at 1182 (citing *Frisby v. Schultz*, 487 U.S. 474, 484 (1988)) (internal quotation marks omitted). Courts’ reluctance to extend the captive audience doctrine to new contexts also arguably appeared in the *Hill* decision. See Kristen G. Cowan, Note, *The Tailoring of Statutory Bubble Zones: Balancing Free Speech and Patients’ Rights*, 91 J. CRIM. L. & CRIMINOLOGY 385, 421 (2001) (analyzing the Supreme Court’s decision to rely on “the government’s interests in ensuring clinic access and safeguarding patients’ emotional and physical health” rather than the privacy doctrine).

⁷² *Olmer*, 192 F.3d at 1180.

⁷³ Scholars have suggested that the Court’s kaleidoscopic approach to narrow tailoring actually depends on implicit valuations of the government interest involved. Rachel Entman, Note, *Picket Fences: Analyzing the Court’s Treatment of Restrictions of Polling, Abortion and Labor Picketers*, 90 GEO. L.J. 2581 (2002); see also Patti Stanley, *Does the Right to Free Speech Trump the Right to Worship?*, 23 U. ARK. LITTLE ROCK L. REV. 273, 289 (2000) (arguing that *Olmer* demonstrates how importantly “the choice of interest and the weight given to that interest” figure in determining whether a statute passes constitutional muster). For another explanation of the Court’s tailoring analysis in recent cases, see Alan K. Chen, *Statutory Speech Bubbles, First Amendment*

provide a precise rule about when fixed zone speech restrictions violate the First Amendment.

Only sparse precedent exists to indicate the Supreme Court's approach to floating zones.⁷⁴ But courts appear to scrutinize the tailoring of such zones. Two recent cases frame the law in this area. In the first, *Schenck v. Pro-Choice Network of Western New York*, the Court declared a law establishing fifteen-foot floating zones around visitors and cars near abortion clinics unconstitutionally overbroad.⁷⁵ *Schenck* left floating zones with questionable constitutional status until *Hill v. Colorado*.⁷⁶ In *Hill*, the Court upheld a Colorado statute establishing an eight-foot floating zone around patients within 100 feet of health care facilities.⁷⁷ The Court distinguished the

Overbreadth, and Improper Legislative Purpose, 38 HARV. C.R.-C.L. L. REV. 31, 67 (2003), arguing that "the Court may be moving toward an understanding of overbreadth that focuses not on precision, but on the challenged law's equal treatment (or mistreatment) of different types of speakers."

⁷⁴ See *Schenck v. Pro-Choice Network of W. N.Y.*, 519 U.S. 357, 377–80 (1997). For a discussion of how states regulate such zones in the funeral protest context, see *supra* Part III.

⁷⁵ *Id.* at 378. *Schenck*'s floating zone failed the tailoring test because it would make "attempts to stand 15 feet from someone entering or leaving a clinic and to communicate a message . . . hazardous." *Id.* at 378. The resulting chilling effect "burden[ed] more speech than necessary to serve the relevant governmental interests," and the Court declared the floating zones invalid. *Id.* at 379. The *Schenck* Court also upheld a fifteen-foot fixed zone outside clinics. *Id.* at 383.

⁷⁶ 530 U.S. 703, 712 (2000). However, the *Schenck* decision did not isolate floating zones for Court evaluation because, the Court found, fixed zones alone could adequately safeguard the government interest in protecting "a woman's freedom to seek pregnancy-related services." *Schenck*, 519 U.S. at 376–77. The *Schenck* Court did not address the government interest, similar to that affirmed in *Frisby*, in "protecting the medical privacy and well-being of patients held 'captive' by medical circumstance." *Id.* at 376 n.8. The interest in protecting patients' ability to enter the clinic justified fixed zones around its entrances but not floating zones that might affect more speech than necessary. *Id.* at 377.

⁷⁷ *Hill*, 530 U.S. at 725–26. The Colorado statute prohibited protestors from "knowingly approach[ing] another person within eight feet of such person" without consent and with the goal of "passing a leaflet or handbill to, displaying a sign to, or engaging in oral protest, education, or counseling" when "within a radius of one hundred feet from any entrance door to a health care facility." *Id.* at 708. The government interests at stake included ensuring "unimpeded access to health care facilities and the avoidance of potential trauma to patients associated with confrontational protests," as well as protecting "[t]he unwilling listener's interest in avoiding unwanted communication." *Id.* at 715–16. This interest justified intermediate scrutiny, under which the Court upheld the statute. *Id.* at 725–29. For criticism of the extension of the captive audience doctrine to *Hill*, see, for example, 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, 202 (2001), stating that "[t]he Court's surprising identification of the unwilling listener interest as a strong

Colorado floating zone from the one that it invalidated in *Schenck* by emphasizing its smaller size (eight feet, as opposed to fifteen in *Schenck*).⁷⁸ In justifying the set distance found in Colorado's floating zone—although not its specific size—the *Hill* Court explained that a “bright-line prophylactic rule may be the best way to provide protection, and, at the same time, by offering clear guidance and avoiding subjectivity, to protect speech itself.”⁷⁹

With only two cases demonstrating the Supreme Court's approach to floating zones, and especially because both of the cases involved restrictions in the same context—abortion clinics—floating zone law remains a nascent concept. If for no other reason, future funeral protest cases may prove interesting for their ability to clarify the law in this area.

B. *Uncertainty Following Frisby*

The law's current approach to fixed-zone and floating-zone restrictions produces at least four problems that might surprise courts and litigants attempting to rely on *Frisby* and its successors. First, although this Note argues that a court's estimation of a government interest ultimately determines the validity of a statute, courts sometimes fail to evaluate a *Frisby*-based interest carefully.⁸⁰ That could change. In other contexts, the

potential counterweight to traditional public forum free speech rights is a most troubling development, but also puzzling in its doctrinal ramifications.” See also Brian W. Oberst, Note, *Buffering Free Speech: An Examination of the Impact of Colorado's Buffer Zone Law on Protected Speech after Hill v. Colorado*, 120 S. Ct. 2480 (2000), 24 HAMLINE L. REV. 89 (2000).

⁷⁸ *Hill*, 530 U.S. at 726–27. For doubts about the Court's distinctions between *Hill*, *Schenck*, and *Madsen*, see Allison Lange, Note, *Statute Regulating Speech and Speech-Related Conduct Within 100-Feet of An Entrance to a Health Care Facility is a Narrowly-Tailored Content-Neutral Time, Place, and Manner Regulation*, 11 SETON HALL CONST. L.J. 429, 464–67 (2001), declaring that the statute in *Hill* creates “undefined prohibited conduct and unclear boundary lines [that] will undoubtedly curtail the freedom of speech.” For a critique of *Hill* as an anti-speech decision, see generally Raskin & LeBlanc, *supra* note 77.

⁷⁹ *Hill*, 530 U.S. at 729. The Colorado law also included a knowing mental state requirement that prevented accidental law violations by speakers and therefore minimized its chilling effect. *Id.* at 727.

⁸⁰ For example, the Supreme Court's discussion of the protection of the unwilling listener in *Hill* appears “in a single footnote . . . cavalierly . . . [And t]he Court neither explained what level of interest the protection of unwilling listeners rises to nor defined the acceptable parameters of its use by governments to restrict speech.” 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, 362 (2001).

Court has diligently evaluated the importance and applicability of an ostensible government interest before upholding a statute.⁸¹

A second problem with relying on privacy to evaluate funeral protest statutes stems from courts' recent habit of leniently determining whether focused picketing statutes operate in a content-neutral or content-specific fashion. For example, in *Hill*, the Supreme Court found that limits on speech directed at patients of abortion clinics were content-neutral.⁸² But legal scholars question whether these restrictions actually intended to limit—or had the effect of limiting—any kind of speech other than that which opposed abortion rights.⁸³

Third, focused picketing decisions almost dismissively have overlooked the requirement of alternative channels for speakers.⁸⁴ Persuasive arguments that speech derives symbolic or practical value from its context apparently have not convinced *Frisby*-focused courts that limiting where and when

⁸¹ See, e.g., *Burson v. Freeman*, 504 U.S. 191 (1992). In *Burson*, the Court held that the history of fraud and intimidation in elections justified establishing fixed zones even though they limited speech at a time when it might best reach a particular audience. The *Burson* Court acknowledged that “how large a restricted zone is permissible or sufficiently tailored” is a difficult question. *Id.* at 208 (emphasis removed). But it indicated that justifying the 100-foot span of the statute with particularity was unnecessary and impossible. *Id.* at 208–09. The Court also suggested that selecting a particular distance for a speech-free zone is unavoidably arbitrary and that the distance is not critical to the tailoring analysis; indeed, the Court found that the difference between the existing 100-foot zone and a twenty-five foot zone was insignificant because it “takes approximately 15 seconds to walk 75 feet.” *Id.* at 210 (quoting *Freeman v. Burson*, 802 S.W.2d 210, 215 (Tenn. 1990)).

⁸² *Hill*, 530 U.S. at 719–20.

⁸³ A debate currently rages about the content-neutrality of the statute in *Hill*. Compare *Hill*, 530 U.S. at 715 (“[T]he legislative history makes it clear that [the *Hill* statute’s] enactment was primarily motivated by activities in the vicinity of abortion clinics.”) and *Raskin & LeBlanc*, *supra* note 77, at 213 (proclaiming that the “statute’s operation strongly suggests a purpose to curb anti-abortion speech”) and *Chen*, *supra* note 73 at 56 (describing “powerful evidence that the legislature’s principal or only concern was anti-abortion protestors”) with *Cowan*, *supra* note 71, at 417–18 (arguing that the statute was content neutral because “[t]here is no evidence that . . . the Colorado legislature was specifically targeting the anti-abortion viewpoint” and “an abortion advocate approaching a patient within eight feet to educate about benefits of abortion also would violate this provision”).

⁸⁴ See, e.g., *Frisby v. Schultz*, 487 U.S. 474, 483 (1988) (“[T]he limited nature of the prohibition makes it virtually self-evident that ample alternatives remain.”); *Hill*, 530 U.S. at 780–81 (Kennedy, J., dissenting) (“[T]he law forecloses peaceful leafletting, a mode of speech with deep roots in our Nation’s history and traditions.”); *Olmer v. City of Lincoln*, 192 F.3d 1176, 1187 (8th Cir. 1999) (“The picketers may protest as much as they wish across the street, or anywhere else for that matter, except in the limited areas set forth in the ordinance.”).

speech may occur inevitably changes what a speaker can say.⁸⁵ For example, protestors outside embassies in Washington might argue that they could not reach their target audience without drawing nearer to embassies, and protestors outside abortion clinics might say that their message would lack value if they could not communicate it before abortion clinic patients crossed the threshold into the protected interior of the facilities.

Rather than government interests, content-neutrality, or alternative channels, the superficial action in recent focused picketing cases has centered on the tailoring requirement. Indeed, whenever courts have declared a focused picketing statute unconstitutional, they have done so because of overbreadth.⁸⁶ But even this analysis is consistently unpredictable. Tailoring requirements present the fourth problem with relying on *Frisby's* privacy interest. The permissible size of a fixed zone seems very unsteady: the Supreme Court found 500 feet from embassies⁸⁷ and 100 feet from polling locations⁸⁸ permissible, yet it also invalidated a 300-foot fixed zone around homes of abortion clinic employees.⁸⁹ And around similar abortion clinics,

⁸⁵ See, e.g., *City of Ladue v. Gilleo*, 512 U.S. 43, 56–58 (1994) (invalidating a city ordinance banning the use of yard signs because of the unique value of a message in that context); see also Geoffrey R. Stone, *Content-Neutral Restrictions*, 54 U. CHI. L. REV. 46, 68 (1987) (explaining that limiting speech at a particular location “may have a significant effect on those speakers whose messages are tied . . . to” the location. “By denying these speakers access to what are the most logical targets of their expression, such regulations deprive them of access to the most important audience and prevent them from utilizing especially dramatic and effective means of communication.”); Timothy Zick, *Speech and Spatial Tactics*, 84 TEX. L. REV. 581, 601 (2006) (describing how buffer zones “substantially burden rights of association and expression near clinics [and] . . . rob speakers of proximity and immediacy that is critical to their message”). But see *Ward v. Rock Against Racism*, 491 U.S. 781, 800 (1989) (explaining that a “regulation will not be invalid simply because a court concludes that the government’s interest could be adequately served by some less-speech-restrictive alternative”).

⁸⁶ See, e.g., *Schenck v. Pro-Choice Network of W. N.Y.*, 519 U.S. 357, 371 (1997); *Madsen v. Women’s Health Ctr., Inc.*, 512 U.S. 753, 775 (1994); *Olmer*, 192 F.3d at 1180. Such willingness to employ the overbreadth doctrine stands in stark contrast to a general trend wherein the Supreme Court does so sparingly and only after finding highly substantial overbreadth. ERWIN CHERMERINSKY, *CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES* 912–16 (2d ed. 2002).

⁸⁷ *Boos*, 485 U.S. at 331–32.

⁸⁸ *Burson v. Freeman*, 504 U.S. 191, 208 (1992).

⁸⁹ *Madsen*, 512 U.S. at 775. The *Madsen* Court simply said that the “record before us does not contain sufficient justification for this broad a ban on picketing; it appears that a limitation on the time, duration of picketing, and number of pickets outside a smaller zone could have accomplished the desired result.” *Id.*

the Supreme Court found an eight-foot floating zone constitutional in Colorado,⁹⁰ but not a fifteen-foot zone in New York.⁹¹

Constitutional limits of fixed and floating zones remain unclear. In recent cases, the Supreme Court has not scrutinized the requirements of sufficient government interests, content-neutrality, and availability of alternatives in focused picketing statutes. In addition, the Court's evaluation of such statutes' tailoring has proved very unpredictable. Although this Note argues that the use of *Frisby* as a governmental interest essentially overrides the other aspects of the intermediate scrutiny test, courts could change course. *Frisby* might fail to justify a particular limit, or courts might employ the neglected aspects more forcefully. Thus, although *Frisby* and the cases that followed it appear to permit some fixed zones and floating zones which protect substantial government interests, they also may conceal legal landmines that could surprise litigants in future cases.

IV. STATE RESPONSES TO THE CRISIS

A. Legislative Efforts to Protect Funerals

Fears of funeral protests have sparked legislative efforts throughout the United States. In 2006, for example, Congress enacted the "Respect for America's Fallen Heroes Act" to prohibit demonstrations near soldiers' funerals.⁹² Even municipal governments have waded into the funeral protests quagmire.⁹³ But the greatest amount and variety of responses to maneuvers by the WBC and its rivals—and the only type of response challenged thus far

⁹⁰ *Hill v. Colorado*, 530 U.S. 703, 730 (2000).

⁹¹ *Schenck*, 519 U.S. at 377–79; see also *Cowan*, *supra* note 71, at 423 (arguing that a fifteen-foot bubble zone would foreclose alternative means of communication while eight feet would not because within eight feet, "people still could communicate but harassment would be prevented").

⁹² 38 U.S.C.A. § 2413 (Supp. 2007). The "Respect for America's Fallen Heroes Act" bans demonstrations outside funerals for soldiers one hour before and after a funeral, memorial service, or ceremony, when such protests occur within 150 feet of any road or path leading into the property and when the protestor's intent is to disturb, as well as within 300 feet if it is not intended to disturb the funeral. *Id.* In addition to picketing, the federal law prohibits "oration, speech, use of sound amplification equipment or device, or similar conduct" as well as "the display of any placard, banner, flag or similar device" and the "distribution of any handbill, pamphlet, leaflet, or other written or printed matter" unless any of these behaviors or items is part of the funeral itself. *Id.*

⁹³ See, e.g., *Denny Boyles, Fresno City Council Bans Protests at Funerals*, FRESNO BEE, Dec. 13, 2006, at B1.

in court—has occurred at the state level. As of October 1, 2007, at least forty-three states had enacted funeral protest statutes.⁹⁴

The state statutes differ in several key respects.⁹⁵ Most litigation thus far has focused on the size of fixed zones, which prohibit speech within a certain distance of a protected activity.⁹⁶ Although all generally resemble fixed zones that the Court approved in *Boos*, *Burson*, and *Frisby*, zone sizes vary tremendously among the states. Most common are the 500-foot restrictions

⁹⁴ This Note focuses on the state statutes because of their varied approaches to the funeral protests problem and also because, to date, litigation has focused on these statutes—and not on their federal or municipal counterparts. The statutes include: ALA. CODE § 13-A-11-17 (LexisNexis Supp. 2006); ARK. CODE ANN. § 5-71-230 (Supp. 2006); COLO. REV. STAT. ANN. § 18-9-108 (West 2006); Act of June 6, 2007, Conn. Legis. Serv. P.A. 07-98 (West); DEL. CODE ANN. tit. 11, § 1303 (Supp. 2006); FLA. STAT. ANN. § 871.01 (West Supp. 2007); GA. CODE ANN. § 16-11-34.2 (Supp. 2006); IDAHO CODE ANN. § 18-6409 (Supp. 2007); 720 ILL. COMP. STAT. ANN. 5/26-6 (West Supp. 2007); IND. CODE ANN. § 35-45-1-3 (West 2006); IOWA CODE ANN. § 723.5 (West Supp. 2007); KAN. STAT. ANN. § 21-4015 (1995); Funeral Privacy Act, ch. 111, 2007 Kan. Sess. Laws S.B. 244 (amending KAN. STAT. ANN. § 21-4015); KY. REV. STAT. ANN. § 525.145 (LexisNexis Supp. 2006), *enjoined by* *McQueary v. Stumbo*, 453 F. Supp. 2d 975 (E.D. Ky. 2006); LA. REV. STAT. ANN. § 14:103 (Supp. 2007); ME. REV. STAT. ANN. tit. 17-A, § 501-A (2007); MD. CODE ANN., CRIM. LAW § 10-205 (LexisNexis Supp. 2006); MASS. ANN. LAWS ch. 272, § 42A (LexisNexis 1992); MICH. COMP. LAWS ANN. § 123.1113 (West 2006); MINN. STAT. ANN. § 609.501 (West Supp. 2007); MISS. CODE ANN. § 97-35-18 (West Supp. 2006); MO. ANN. STAT. §§ 578.501-03 (West Supp. 2007); Act of Mar. 16, 2007, ch. 10, 2007 Mont. Laws S.B. 15 (amending MONT. CODE ANN. § 45-8-1); NEB. REV. STAT. ANN. § 28-1320.01 (LexisNexis Supp. 2006); Act of July 17, 2007, ch. 370, § 2, 2007 N.H. Laws 560 (amending N.H. REV. STAT. ANN. § 644 by inserting § 644:2-b); N.J. STAT. ANN. § 2C:33-8.1 (West Supp. 2007); N.M. STAT. ANN. § 30-53-3 (West 2007); Assemb. B. 2385, 2007 Leg., 230th Sess. (N.Y. 2007) (amending N.Y. PENAL LAW § 240.21); N.C. GEN. STAT. ANN. § 14-288.4 (Supp. 1 2006); N.D. CENT. CODE § 12.1-31-01.1 (2007); OHIO REV. CODE ANN. § 3767.30 (West Supp. 2006); OKLA. STAT. ANN. tit. 21, § 1380 (West Supp. 2007); 18 PA. CONS. STAT. ANN. § 7517 (West Supp. 2007); R.I. GEN. LAWS § 11-11-1 (2007); S.C. CODE ANN. § 16-17-525 (2006); S.D. CODIFIED LAWS § 22-13-17 (2006); TENN. CODE ANN. § 39-17-317 (2006); TEX. PENAL CODE ANN. § 42.055 (Vernon Supp. 2006); UTAH CODE ANN. § 76-9-108 (Supp. 2007); VA. CODE ANN. § 18.2-415 (Supp. 2006); VT. STAT. ANN. tit. 13, § 3771 (2006); Act of Feb. 2, 2007, ch. 2, § 1, 2007 Wash. Legis. Serv. 6 (West) (amending WASH. REV. CODE ANN. § 9A.84.030); WIS. STAT. § 947.011 (West Supp. 2006); WYO. STAT. ANN. § 6-6-105 (2007).

⁹⁵ A typical statute, in Wisconsin, bans protests occurring one hour before or after a funeral and within 500 feet of the funeral site. WIS. STAT. ANN. § 947.011 (West Supp. 2006). Reflecting the popularity of such efforts, this statute passed the Wisconsin Senate by a thirty-three to zero vote and the Wisconsin House by a vote of ninety-two to three. Jason Stein, *Legislature Passes Bill Limiting Funeral Protests*, WIS. ST. J., Feb. 3, 2006, at A1.

⁹⁶ See *infra* Part V.A.

standing in fourteen states.⁹⁷ Towards the one extreme, four states—Mississippi, South Carolina, South Dakota, and Texas—prohibit speech within 1,000 feet of a funeral site.⁹⁸ Montana restricts speech within 1,500 feet.⁹⁹ Other states limit speech in smaller areas. For example, Ohio proscribes speech activities within 300 feet of a funeral site.¹⁰⁰ Illinois and Utah employ 200-foot fixed zones,¹⁰¹ and Arkansas, Connecticut, and New Hampshire restrict speech within 150 feet of funerals.¹⁰² Towards the other extreme, four states—Colorado, Maryland, New York, and Vermont—prohibit picketing only within 100 feet of a funeral service.¹⁰³ Like the ordinance at issue in *Frisby*, statutes in Florida, Idaho, Kansas, Louisiana, Maine, Missouri, Rhode Island, and Virginia provide no specific distance

⁹⁷ See ALA. CODE § 13-A-11-17 (LexisNexis Supp. 2006); GA. CODE ANN. § 16-11-34.2 (Supp. 2006); IND. CODE ANN. § 35-45-1-3 (West 2006); IOWA CODE ANN. § 723.5 (West Supp. 2007); MASS. ANN. LAWS ch. 272 § 42A (LexisNexis 1992); MICH. COMP. LAWS ANN. § 123.1113 (West 2006); MINN. STAT. ANN. § 609.501 (West Supp. 2007); N.J. STAT. ANN. § 2C.33-8.1 (West Supp. 2007); N.M. STAT. ANN. § 30-53-3 (West 2007); OKLA. STAT. ANN. tit. 21, § 1380 (West Supp. 2007); 18 PA. CONS. STAT. ANN. § 7517 (West Supp. 2007); TENN. CODE ANN. § 39-17-317 (2006); Act of Feb. 2, 2007, ch. 2, § 1, 2007 Wash. Legis. Serv. 6 (West) (amending WASH. REV. CODE ANN. § 9A.84.030); WIS. STAT. ANN. § 947.011 (West Supp. 2006).

⁹⁸ MISS. CODE ANN. § 97-35-18 (West Supp. 2006); S.D. CODIFIED LAWS § 22-13-19 (2006); TEX. PENAL CODE ANN. § 42.055 (Vernon Supp. 2006).

⁹⁹ Act of Mar. 16, 2007, ch. 10, 2007 Mont. Laws S.B. 15 (amending MONT. CODE ANN. § 45-8-1).

¹⁰⁰ OHIO REV. CODE ANN. § 3767.30 (West Supp. 2007); see also DEL. CODE ANN. tit. 11, § 1303 (Supp. 2006); MO. ANN. STAT. §§ 578.501–03 (West Supp. 2007); NEB. REV. STAT. ANN. § 28-1320.02 (LexisNexis Supp. 2006); N.C. GEN. STAT. § 14-288.4 (Supp. 1 2006); N.D. CENT. CODE § 12.1-31-01.1 (2007); WYO. STAT. ANN. § 6-6-105 (2007).

¹⁰¹ 720 ILL. COMP. STAT. ANN. 5/26-6 (West Supp. 2007); UTAH CODE ANN. § 76-9-108 (Supp. 2007).

¹⁰² ARK. CODE ANN. § 5-71-230 (Supp. 2006); Act of June 6, 2007, 2007 Conn. Legis. Serv. Pub. Acts 07-98 (West); Act of July 17, 2007, ch. 370, § 2, 2007 N.H. Laws 560 (amending N.H. REV. STAT. ANN. § 644 by inserting § 644:2-b). In addition to their 150-foot fixed zones, Connecticut and New Hampshire also limit speech within 300 feet of the entrance of a funeral location. Act of June 6, 2007, 2007 Conn. Legis. Serv. P.A. 07-98 (West); Act of July 17, 2007, ch. 370, § 2, 2007 N.H. Laws 560 (amending N.H. REV. STAT. ANN. § 644 by inserting § 644:2-b).

¹⁰³ COLO. REV. STAT. ANN. § 18-9-108 (West 2006); MD. CODE ANN., CRIM. LAW § 10-205 (LexisNexis Supp. 2006); N.Y. PENAL LAW § 240.21 (Gould 2007); VT. STAT. ANN. tit. 13, § 3771 (2006).

restrictions, instead “leaving it to courts and law enforcement” to determine what is appropriate.¹⁰⁴

A second litigated aspect of funeral protest statutes concerns limits that they impose on speech near processions to and from a funeral.¹⁰⁵ Such limits effectively create “floating zones” where protests may not occur through roving sections of a community—similar to the zone around visitors to abortion clinics that the Court upheld in *Hill*. Of the fourteen floating zone provisions that states have enacted, eleven prohibit speech the same distance away from processions as they do for funerals.¹⁰⁶ Unique among the states, Delaware’s floating zone spans larger than its fixed zone—1000 feet as opposed to 300 feet.¹⁰⁷ Two states—Indiana and Washington—include special mental state requirements for violations of floating zones, ensuring that protestors know about a nearby procession before they may be found guilty of illegally demonstrating near it.¹⁰⁸ And seven states prohibit speakers’ activities that impede—or attempt to impede—a procession.¹⁰⁹

¹⁰⁴ Jonathan Rivoli, *Lawmakers OK Ban on Protests at Funerals*, ST. LOUIS POST-DISPATCH, Feb. 22, 2006, at B4 (referring to Missouri). In an interesting tactic, Missouri’s legislature enacted two provisions that limit funeral protests. One bans speech “in front of or about any location at which a funeral is held.” MO. ANN. STAT. § 578.501 (West Supp. 2007). The second, a fixed zone, goes into effect only if a court deems the first unconstitutional. MO. REV. STAT. §§ 578.502–503 (West Supp. 2007). For additional statutes that do not specify a fixed zone distance, see FLA. STAT. ANN. § 871.01 (West Supp. 2007); IDAHO CODE ANN. § 18-6409 (Supp. 2007); KAN. STAT. ANN. § 21-4015 (2007); LA. REV. STAT. ANN. § 14:103 (Supp. 2007); ME. REV. STAT. ANN. tit. 17-A, § 501-A (2007); R.I. GEN. LAWS § 11-11-1 (2007); VA. CODE ANN. § 18.2-415 (Supp. 2006).

¹⁰⁵ See *infra* Part V.A.

¹⁰⁶ See IOWA CODE ANN. § 723.5 (West Supp. 2007); KAN. STAT. ANN. § 21-4015 (1995); Funeral Privacy Act, ch. 111, 2007 Kan. Sess. Laws S.B. 244 (amending KAN. STAT. ANN. § 21-4015); KY. REV. STAT. ANN. § 525.145 (LexisNexis Supp. 2006), *enjoined by* *McQueary v. Stumbo*, 453 F. Supp. 2d 975 (E.D. Ky. 2006); LA. REV. STAT. ANN. § 14:103 (Supp. 2007); MD. CODE ANN., CRIM. LAW § 10-205 (LexisNexis Supp. 2006); MICH. COMP. LAWS ANN. § 123.1113 (West 2006); MO. ANN. STAT. §§ 578.501–03 (West Supp. 2007); N.J. STAT. ANN. § 2C:33-8.1 (West Supp. 2007); N.C. GEN. STAT. ANN. § 14-288.4 (Supp. 1 2006); OHIO REV. CODE ANN. § 3767.30 (West Supp. 2007); TENN. CODE ANN. § 39-17-317 (2006). *But see* NEB. REV. STAT. ANN. § 28-1320.02 (LexisNexis Supp. 2006) (excepting processions from its prohibitions).

¹⁰⁷ DEL. CODE ANN. tit. 11, § 1303 (2007).

¹⁰⁸ IND. CODE ANN. § 35-45-1-3 (West 2006); Act of Feb. 2, 2007, ch. 2, § 1, 2007 Wash. Legis. Serv. 6 (West) (amending WASH. REV. CODE ANN. § 9A.84.030).

¹⁰⁹ ALA. CODE § 13-A-11-17 (LexisNexis Supp. 2006); GA. CODE ANN. § 16-11-34.2 (Supp. 2006); MINN. STAT. ANN. § 609.501 (West Supp. 2006); MISS. CODE ANN. § 97-35-18 (West Supp. 2006); N.J. STAT. ANN. § 2C:33-8.1 (West Supp. 2007); UTAH CODE ANN. § 76-9-108; WIS. STAT. ANN. § 947.011 (West Supp. 2006).

Finally, litigants have challenged “grace periods” that limit speech during certain time periods before and after funerals.¹¹⁰ Nineteen states provide one hour grace periods.¹¹¹ In Arkansas, Illinois, and South Carolina, a similar restriction exists for thirty minutes.¹¹² Delaware, Michigan, Nebraska, and Vermont limit speech one hour before and two hours after a service.¹¹³ Other states—those that do not specify similar grace periods—appear to limit speech only during a funeral itself.¹¹⁴

In addition to regulating the times and places in which protests may occur, some statutes prohibit specific modes of funeral protesting. Restrictions also vary as to which kinds of tactics they limit.¹¹⁵ Their mental

¹¹⁰ See *Phelps v. Hamilton*, 122 F.3d 1309, 1315, 1323 (10th Cir. 1997).

¹¹¹ Act of June 6, 2007, 2007 Conn. Legis. Serv. 07-98 (West); GA. CODE ANN. § 16-11-34.2 (Supp. 2006); IOWA CODE ANN. § 723.5 (West Supp. 2007); MINN. STAT. ANN. § 609.501 (West Supp. 2007); MISS. CODE ANN. § 97-35-18 (West Supp. 2006); MO. ANN. STAT. §§ 578.501–03 (West Supp. 2007); Act of Mar. 16, 2007, ch. 10, 2007 Mont. Laws 15 (amending MONT. CODE ANN. § 45-8-1); N.J. STAT. ANN. § 2C.33-8.1 (West Supp. 2007); Act of July 17, 2007, ch. 370, § 2, 2007 N.H. Laws 560 (amending N.H. REV. STAT. ANN. § 644 by inserting § 644:2-b); N.C. GEN. STAT. § 14-288.4 (Supp. 1 2006); N.D. CENT. CODE § 12.1-31-01.1 (2007); OHIO REV. CODE ANN. § 3767.30 (West Supp. 2007); OKLA. STAT. ANN. tit. 21, § 1380 (West Supp. 2007); 18 PA. CONS. STAT. ANN. § 7514 (West Supp. 2007); S.D. CODIFIED LAWS § 22-13-17 (2006); TEX. PENAL CODE ANN. § 42.055 (Vernon Supp. 2006); UTAH CODE ANN. § 76-9-108; WIS. STAT. ANN. § 947.011 (West Supp. 2006); WHO. STAT. ANN. § 6-6-105 (2007).

¹¹² ARK. CODE ANN. § 5-71-230 (Supp. 2006); 720 ILL. COMP. STAT. ANN. 5/26-6 (West Supp. 2007); S.C. CODE ANN. § 16-17-525 (2006).

¹¹³ DEL. CODE ANN. tit. 11, § 1303 (Supp. 2006); MICH. COMP. LAWS ANN. § 123.1113 (West 2006); NEB. REV. STAT. ANN. § 28-1320.03 (LexisNexis Supp. 2006); VT. STAT. ANN. tit. 13, § 3771 (2006).

¹¹⁴ See, e.g., FLA. STAT. ANN. § 871.01 (West Supp. 2007); IND. CODE ANN. § 35-45-1-3 (West 2006); ME. REV. STAT. ANN. tit. 17-A, § 501-A (2007); MD. CODE ANN., CRIM. LAW § 10-205 (LexisNexis 2006); N.M. STAT. ANN. § 30-53-3 (West 2007); N.Y. PENAL LAW § 240.21 (Gould 2007); R.I. GEN. LAWS § 11-11-1 (2007); Act of Feb. 2, 2007, ch. 2, § 1, 2007 Wash. Legis. Serv. 6 (West) (amending WASH. REV. CODE ANN. § 9A.84.030).

¹¹⁵ Alabama’s statute, for example, limits whistling and the “honking [of] a motor vehicle horn.” ALA. CODE § 13-A-11-17 (LexisNexis Supp. 2006). Pennsylvania prohibits the:

[U]se of sound amplification equipment or device or similar conduct that is not part of a commemorative service . . . display of any placard, sign, banner, flag or similar device, unless such display is part of a commemorative service [or the] distribution of any handbill, pamphlet, leaflet or other written or printed matter, other than a program distributed as part of a commemorative service.

18 PA. CONS. STAT. ANN. § 7517 (West Supp. 2007). Illinois specifies that protestors may not use fighting words or hate speech during a funeral. 720 ILL. COMP. STAT. 5/26-6

state requirements differ tremendously.¹¹⁶ And finally, the events receiving protection from statutes vary widely.¹¹⁷ Litigants have not yet challenged these features of funeral protest statutes.

(West Supp. 2007). The Illinois statute's focus on disruptive speech resulted from negotiations with the cemetery workers' union in that state, which demanded that the state legislature not eliminate the right to picket quietly and peacefully outside funerals. See John Patterson, *Senate Votes to Prohibit Protests at Funerals*, CHI. DAILY HERALD, Apr. 6, 2006, at 7. On the other hand, Colorado's statute enables prosecution of speech only when it constitutes *significant* interference with a funeral. COLO. REV. STAT. ANN. § 18-9-108 (West 2006).

¹¹⁶ Some funeral protest statutes allow prosecution only if a judge finds that a protestor possesses a particular mental state. A few require intentional, willful, or purposeful behavior. See ALA. CODE § 13-A-11-17 (LexisNexis Supp. 2006); ARK. CODE ANN. § 5-71-230 (Supp. 2006); Act of June 6, 2007, 2007 Conn. Legis. Serv. 07-98 (West); DEL. CODE ANN. tit. 11, § 1303 (Supp. 2006); GA. CODE ANN. § 16-11-34.2 (Supp. 2006); LA. REV. STAT. ANN. § 14:103 (Supp. 2007); MINN. STAT. § 609.501 (West Supp. 2007); MISS. CODE ANN. § 97-35-18 (West Supp. 2006); N.J. STAT. ANN. § 2C.33-8.1 (West Supp. 2007); N.C. GEN. STAT. ANN. § 14-288.4 (Supp. 1 2006); UTAH CODE ANN. § 76-9-108; Act of Feb. 2, 2007, ch. 2, § 1, 2007 Wash. Legis. Serv. 6 (West) (amending WASH. REV. CODE ANN. § 9A.84.030). Others require a knowing mental state by the actor. See 720 ILL. COMP. STAT. 5/26-6 (West Supp. 2007); MD. CODE ANN., CRIM. LAW § 10-205 (LexisNexis 2006); Act of Mar. 16, 2007, ch. 10, 2007 Mont. Laws S.B. 15 (amending MONT. CODE ANN. § 45-8-1). Still others require only recklessness. See IND. CODE ANN. § 35-45-1-3 (West 2006); Assemb. B. 2385, 2007 Leg., 230th Sess. (N.Y. 2007) (amending N.Y. PENAL LAW § 240.21). Idaho looks for malice and willfulness. IDAHO CODE ANN. § 18-6409 (Supp. 2007). Yet many state statutes specify no mental state requirement at all. See MASS. ANN. LAWS ch. 272 § 42A (LexisNexis 1992); MICH. COMP. LAWS ANN. § 123.1113 (West 2006); NEB. REV. STAT. ANN. § 28-1320.03 (LexisNexis Supp. 2006); OHIO REV. CODE ANN. § 3767.30 (West Supp. 2007); OKLA. STAT. ANN. tit. 21, § 1380 (West Supp. 2007) (*but see* S.B. 756, 51st Leg., 1st Reg. Sess. (Okla. 2007) (amending OKLA. STAT. ANN. tit. 21, § 1380)); 18 PA. CONS. STAT. ANN. § 7517 (West Supp. 2007); S.D. CODIFIED LAWS § 22-13-17 (2006); TENN. CODE ANN. § 39-17-317 (2006); TEX. PENAL CODE ANN. § 42.055 (Vernon Supp. 2006); VT. STAT. ANN. tit. 13, § 3771 (2006).

¹¹⁷ Most of the statutes specify that they apply to burials, funerals, and memorial services. See, e.g., MD. CODE ANN. CRIM. LAW § 10-205 (LexisNexis Supp. 2006). New Jersey extends protection even to places of worship and funeral homes. *N.J. Limits Protests at Funerals for Soldiers Killed in Combat*, N.J. REC., Aug. 22, 2006, at A4. Mississippi prohibits protests near the homes of immediate family members of the deceased on the day of a funeral. MISS. CODE ANN. § 97-35-18 (West Supp. 2006). Other states have narrower limits: for instance, whereas many states apply speech limits to all funerals, Florida protects only those of military veterans. FLA. STAT. ANN. § 871.01 (West Supp. 2006).

B. *Effect of Legislative Efforts*

The outpouring of legislative efforts restricting speech at funerals does not appear to have squelched the protestors' message. Far from fearing funeral protest statutes, the WBC seems to welcome the attention that they generate.¹¹⁸ In fact, before lawmakers acted to protect funerals, Fred Phelps asked them to try, saying, "I look forward to it. I want to see those jackasses up there wrestle with the First Amendment."¹¹⁹ And, after several laws took effect, Phelps' daughter Margie Phelps rejoiced, explaining that "[t]he press, the Patriot Guard and the president are delivering our message in spite of themselves."¹²⁰ Rather than silencing the WBC's unpopular message, funeral protest statutes amplified it—especially to those not present at funerals.

Moreover, the government restrictions have not curtailed the WBC's ability to reach funeral attendees themselves. Church members continue to protest within eyesight of mourners, making their point despite complying with distance requirements imposed by funeral protest statutes.¹²¹ For instance, soon after Congress passed the federal act, WBC members announced plans to protest at each of the 122 national cemeteries with only slight modifications to bring their tactics into compliance with the new funeral protest law.¹²² More expansive state laws, such as Iowa's 500-foot ban, also have failed to deter the WBC's protests.¹²³ And, generally, the church members have said that funeral protest laws prove ineffectual: "That legislation will not interfere one bit with us," according to Phelps' daughter, Shirley Phelps-Roper.¹²⁴ "We're never within 300 feet," one family member said. "We never were before they passed that goofy, worthless, impotent law."¹²⁵ In short, although funeral protest statutes place significant limits on

¹¹⁸ Mann, *supra* note 8.

¹¹⁹ *Id.*

¹²⁰ Alan Bjerga, *Funeral Protest Faces New Law*, PITTSBURGH POST-GAZETTE, June 6, 2006, at A6.

¹²¹ *Id.*

¹²² *Id.*

¹²³ *Westboro Protestors Keep Distance at Iowan's Funeral*, WICHITA EAGLE, Apr. 18, 2006.

¹²⁴ Tim Hoover, *Church Group to Continue Protests at Funerals of Soldiers: New Laws Are No Deterrent, Member Says*, KANSAS CITY STAR, Jan. 25, 2006, at B3. The WBC skipped one funeral in Wisconsin after alleging that authorities threatened to arrest church members, but government officials in that jurisdiction vehemently have denied that they ever contacted the church with such a message. Larry Oakes, *Wisconsin Law Deters Funeral Protesters*, MINNEAPOLIS STAR-TRIB., Mar. 7, 2006, at 2B.

¹²⁵ Thomas W. Krause, *Protest May Test State's Funeral Law*, TAMPA TRIB., July 6, 2006, at 1.

protestors, the protestors still convey their message to their intended audiences.

Notwithstanding their continued ability to protest at funerals, WBC protestors remain able to disseminate a strikingly similar message at alternative physical venues. For example, the church members “expanded their protests from services for dead soldiers to veterans hospitals [including] Walter Reed Army Medical Center . . . [with] signs that said, ‘Thank God for maimed soldiers.’”¹²⁶ They have protested hospitals in other areas as well.¹²⁷

Finally, the WBC continues to spread its message through the media. The church, for example, manages a slew of colorful Internet websites.¹²⁸ In recent years, church leaders also have appeared on several television programs, including shows as varied as “Hannity and Colmes” and “The Tyra Banks Show.”¹²⁹ Despite funeral protest statutes, the WBC’s message continues to draw plenty of attention through alternative channels.

V. THE INFIRMITY OF CURRENT FUNERAL PROTEST LITIGATION

A. *Phelps v. Hamilton*, *McQueary v. Stumbo*, *Phelps-Roper v. Nixon*, and *Phelps-Roper v. Taft*

The WBC has waged an intense battle over the constitutionality of funeral protest statutes.¹³⁰ Not surprisingly—given the Court’s confusing approach to privacy-based fixed and floating zones as well as the huge

¹²⁶ *Phelps and Family Say They’ll Picket Veterans Hospitals*, WICHITA EAGLE, Apr. 6, 2006, at B8.

¹²⁷ George, *supra* note 54.

¹²⁸ The WBC manages at least seven websites, including www.thesignsofthetimes.net, www.smellthebrimstone.com, www.godhatesamerica.com, www.priestsrapeboys.com, www.godhatessweden.com, www.godhatescanada.com, and www.godhatesfags.com. *Snyder v. Phelps*, No. RDB-06-1389, 2006 WL 3081106, at *1 n.1 (D. Md. Oct. 30, 2006).

¹²⁹ Kendall, *supra* note 24.

¹³⁰ Although no appellate court has reviewed a funeral protest law, such a contest seems imminent. In addition to instigating *McQueary*, *Nixon*, and *Taft*, the American Civil Liberties Union filed a complaint in the Eastern District of Missouri. In that case, the court denied without explanation the plaintiff’s request to enjoin the statute, and shortly thereafter granted the defendant’s motion to dismiss. *Phelps-Roper v. Humphreys*, 06-CV-130-SNL (E.D. Mo. filed Sept. 18, 2006). A defamation case, *Snyder v. Phelps*, is pending against WBC members in Maryland. The case survived a motion to dismiss on October 30, 2006. *Snyder v. Phelps*, No. RDB-06-1389, 2006 WL 3081106, at *1 (D. Md. Oct. 30, 2006). Finally, an appellate court previously upheld a temporary injunction enjoining the WBC from picketing near a Kansas church. *St. David’s Episcopal Church v. Westboro Baptist Church, Inc.*, 921 P.2d 821 (Kan. Ct. App. 1996).

variety of statutes enacted already—the cases thus far involving funeral protest statutes have produced a messy status quo.

The first court review of funeral protest law actually occurred more than a decade ago, when the WBC began to protest at funerals in Kansas.¹³¹ In that case, *Phelps v. Hamilton*, a Kansas federal district court reviewed the conviction of a WBC member under a Kansas statute prohibiting, among other things, “picketing before or about” any funeral service.¹³² The Tenth Circuit in *Hamilton* ruled that because the statute failed to provide speakers clear notice about when and where protests could occur, its vagueness created in protestors a genuine fear of prosecution and likely chilled their speech.¹³³

The recent flurry of court decisions began in September 2006 when a federal district judge granted a preliminary injunction preventing Kentucky from enforcing its 300-foot fixed zone around funerals.¹³⁴ The judge in *McQueary v. Stumbo* declared Kentucky’s statute content-neutral because its provisions applied “evenhandedly to all speakers, not simply the WBC” and prohibited picketing “no matter the content or the speaker” involved.¹³⁵ The statute served a significant, *Frisby*-based privacy interest, namely to:

protect citizens from unwelcome communications—including offensive communications—where the communications invade substantial privacy interests in an essentially intolerable manner, as where the communications are directed at citizens in their homes or where the communications are directed at a “captive” audience and are so obtrusive that individuals cannot avoid exposure to them.¹³⁶

However, the Kentucky statute failed to withstand intermediate scrutiny because it was overbroad: The *McQueary* court found that the fixed zone proscribed a substantial excess of speech, picketing, and leafleting.¹³⁷ It reached speech that was unrelated to a funeral regardless of whether that

¹³¹ See *Phelps v. Hamilton*, 122 F.3d 1309, 1315, 1323 (10th Cir. 1997).

¹³² *Id.*; KAN. STAT. ANN. § 21-4015 (1995).

¹³³ See *Hamilton*, 122 F.3d 1309, 1315, 1323 (10th Cir. 1997). For a discussion of *Phelps v. Hamilton* and its subsequent history, see Megan Dunn, Note, *The Right to Rest in Peace: Missouri Prohibits Protesting at Funerals*, 71 MO. L. REV. 1117, 1126–28 (2006). In response to Phelps’ 1993 lawsuit, the Kansas legislature amended its funeral protest statute to specify that it limited protests only one hour before, and two hours after, a funeral. *Hamilton*, 122 F.3d at 1323; see also KAN. STAT. ANN. § 21-4015(e) (1995).

¹³⁴ *McQueary v. Stumbo*, 453 F. Supp. 2d 975 (E.D. Ky. 2006).

¹³⁵ *Id.* at 985.

¹³⁶ *Id.* at 989.

¹³⁷ *Id.* at 996.

speech actually could disrupt the funeral.¹³⁸ Finally, the *McQueary* court noted that the 300-foot zone affected substantially more speech than did restrictions that the Supreme Court previously upheld in *Frisby*, *Hill*, and *Madsen*.¹³⁹ Even the *Frisby* privacy interest could not justify Kentucky's attempt to limit speech.

In contrast to the Kansas and Kentucky cases, the January 2007 ruling in *Phelps-Roper v. Nixon* resulted in defeat for the WBC.¹⁴⁰ In that case, a federal district judge denied a request by church members to enjoin Missouri's funeral protest statute.¹⁴¹ The statute prohibited "picketing or other protest activities in front of or about any location at which a funeral is held" within an hour of a funeral's beginning and end.¹⁴² Like the court in *McQueary*, the *Nixon* court found the statute content-neutral, located ample alternatives for the speech that it restricted,¹⁴³ and identified a sufficient government interest, in this case freedom "from interference by other citizens while they mourn the death of friends or family."¹⁴⁴ *Nixon* cited *Frisby* and acknowledged the State of Missouri's contention that "spectators to a funeral are more captive than citizens in their own homes," because, whereas people can leave their homes, "a funeral spectator cannot leave the funeral or procession without missing the opportunity to pay last respects to the deceased."¹⁴⁵

The *Nixon* court, however, parted ways with the *McQueary* court in its determination that the funeral protest statute carried sufficient tailoring to survive the preliminary injunction review.¹⁴⁶ Without much discussion, the *Nixon* court found that the tailoring of the Missouri statute sufficed because it approximated limits upheld by the Supreme Court in *Frisby*, *Madsen*, and *Hill*.¹⁴⁷ With that finding, the court upheld Missouri's statute.

¹³⁸ *Id.*

¹³⁹ *Id.*

¹⁴⁰ *Phelps-Roper v. Nixon*, No. 06-4156-CV-C-FJG, 2007 WL 273437, at *6 (W.D. Mo. Jan. 26, 2007) (notice of appeal filed Feb. 1, 2007); *see also* Dunn, *supra* note 133 at 1138-39 (arguing that federal courts are likely to uphold the Missouri statute).

¹⁴¹ *Nixon*, 2007 WL 273437, at *6.

¹⁴² MO. ANN. STAT. § 578.501(2) (West Supp. 2007).

¹⁴³ *Nixon*, 2007 WL 273437, at *4.

¹⁴⁴ *Id.* at *3.

¹⁴⁵ *Id.* (emphasis removed).

¹⁴⁶ *Id.* at *4.

¹⁴⁷ *Id.* This finding creates an interesting tension with *McQueary*, which used those cases for opposite effect. The court also denied a motion by the *Phelps* plaintiffs to declare that the Missouri statute was unduly vague. *Id.*

After *Nixon*, the next analysis of a funeral protest statute involved Ohio's 300-foot fixed zone—which resembled Kentucky's invalidated zone—as well as its 300-foot floating zone. In *Phelps-Roper v. Taft*, the Northern District of Ohio affirmed the Ohio statute's *Frisby*-based government interest as well as the ample alternatives that it left open to speakers.¹⁴⁸ And like *Nixon*, the Ohio decision differed with *McQueary*, approving the tailoring of Ohio's 300-foot fixed zone and finding that it “is not substantially broader than necessary.”¹⁴⁹ The decision did not explain this divergence from *McQueary*. The floating zone, by contrast, failed the Northern District's overbreadth analysis because it carried “substantial” overbreadth.¹⁵⁰ The *Taft* court also did not explain its conclusion regarding floating zones in any detail.

B. *The Rule of Hamilton, McQueary, Nixon, and Taft*

In general, courts in *Hamilton*, *McQueary*, *Nixon*, and *Taft* have approached speech restrictions in a consistent, *Frisby*-based manner. After determining that the statutes under review were content-neutral, each court searched for a significant government interest, narrow tailoring, and ample alternative channels.¹⁵¹ In each case, the adequacy of the statute's tailoring ostensibly determined its constitutionality. Still, the courts reached startlingly different outcomes in the four cases. Whereas the *McQueary* court found 300 feet too large for a fixed zone, the *Nixon* court found that distance appropriate.¹⁵² And whereas *Hamilton* found “before or about” unduly vague, *Nixon* found “in front of or about” permissibly clear. Indeed, the only definite area lacking inconsistency in the courts' holdings is the area with the

¹⁴⁸ The WBC apparently conceded that Ohio's statute operated in a content-neutral fashion. *Phelps-Roper v. Taft*, No. 1:06 CV 2038, 2007 U.S. Dist. LEXIS 20831, at *15–16, *21 (N.D. Ohio Mar. 23, 2007). Reliance on *Frisby* and *McQueary* appears in the Ohio decision at *13.

¹⁴⁹ *Id.* at *17–18.

¹⁵⁰ *Id.* at *18–19.

¹⁵¹ *Phelps-Roper v. Nixon*, 2007, No. 06-4156-CV-C-FJG, WL 273437, at *3–4 (W.D. Mo. Jan. 26, 2007) (notice of appeal filed Feb. 1, 2007); *McQueary v. Stumbo*, 453 F. Supp. 2d 975, 986 (E.D. Ky. 2006).

¹⁵² The Kentucky statute did not conform to the narrow tailoring requirement because it would prohibit speech that funeral participants could neither see nor hear. *McQueary*, 453 F. Supp. 2d at 996. By contrast, the *Nixon* court concluded that the Missouri statute's tailoring satisfied the requirement based on Supreme Court precedents on focused picketing—namely, *Frisby*, *Hill*, and *Madsen*. *Phelps-Roper v. Nixon*, No. 06-4156-CV-C-FJG, 2007 WL 273437, at *4 (W.D. Mo. Jan. 26, 2007).

least litigation—floating zones, which *Taft* invalidated but no other court has reviewed.¹⁵³

Appellate review of these four cases could affect numerous state statutes. If higher courts adopted *McQueary* instead of *Taft* and *Nixon*, they would require courts to invalidate twenty-three state statutes that include fixed zones of 300 feet or larger.¹⁵⁴ Moreover, if the *McQueary* overbreadth reasoning applies to all fixed zones, not just zones as large as 300 feet, courts also must invalidate smaller fixed zones in nine additional states.¹⁵⁵ As many as thirteen statutes (in addition to Ohio's) might be invalidated under *Taft*; it is unclear whether *Taft*'s disapproval of Ohio's floating zone tailoring might apply to all floating zones or merely floating zones as large as Ohio's (300 feet).¹⁵⁶ Finally, courts could employ the *Hamilton* decision's requirement for specific time limits on protests to invalidate the six statutes that do not specify when protests cannot occur.¹⁵⁷

¹⁵³ *Taft*, 2007 U.S. Dist. LEXIS 20831 at *22. Additionally, if *Hamilton* requires a definite time element to funeral protest statutes, the courts may also be consistent in that respect.

¹⁵⁴ These states are Delaware, Nebraska, North Carolina, North Dakota, Missouri, Ohio, and Wyoming (300 feet); Alabama, Georgia, Indiana, Massachusetts, Michigan, Minnesota, New Jersey, New Mexico, Oklahoma, Tennessee, and Wisconsin (all 500 feet); Mississippi, South Carolina, South Dakota, and Texas (1000 feet); and Montana (1500 feet). *See supra* notes 97–100 and accompanying text. Courts also could invalidate the federal statute on this basis. 38 U.S.C.A. § 2413 (2006).

¹⁵⁵ States with fixed zones smaller than 300 feet include Illinois and Utah (200 feet), Arkansas, Connecticut, and New Hampshire (150 feet), and Colorado, Maryland, New York, and Vermont (100 feet). *See supra* notes 101–103 and accompanying text.

¹⁵⁶ Floating zones appear to be unconstitutional because of their wide reach and their complete inconsistency with other Supreme Court precedents. *See, e.g.*, *Frisby v. Schultz*, 487 U.S. 474, 483 (1988) (avoiding unconstitutional overbreadth by narrowing the town ordinance so that it excluded parades); *see also* Rebecca Bland, Note, *The Respect for America's Fallen Heroes Act: Conflicting Interests Raise Hell with the First Amendment*, 75 UMKC L. REV. 523, 538 (2006) (analogizing funeral protest statute grace periods with those invalidated in *Frisby*, *Grayned*, and *Madsen*).

¹⁵⁷ Funeral protest statutes lacking time limits exist in Florida, Indiana, Maine, Maryland, New Mexico, New York, Rhode Island, and Washington. *See* FLA. STAT. ANN. § 871.01 (West 2006); IND. CODE ANN. § 35-45-1-3 (West 2006); ME. REV. STAT. ANN. tit. 17-A, § 501-A (2007); MD. CODE ANN., CRIM. LAW § 10-205 (West 2006); N.M. STAT. ANN. § 30-53-3 (West 2007); N.Y. PENAL LAW § 240.21 (Gould 2007); R.I. GEN. LAWS § 11-11-1 (2007); WASH. REV. CODE ANN. § 9A.84.030 (West 2007). The specified grace periods appear less likely to be invalidated. For a decision upholding a grace period after the conclusion of a protected event, *see Hill v. State*, 381 So. 2d 206, 212 (Ala. Crim. App. 1979).

C. Problems Highlighted by the Current Case Law

In addition to the clear contradiction between *McQueary*'s and *Taft*'s holdings regarding fixed zones, as well as the potential conflict between *Nixon* and *Hamilton*,¹⁵⁸ at least four other problems plague the status quo.¹⁵⁹ As this section explains, these problems underscore the difficult situation facing courts when they seek to evaluate fixed and floating zones using privacy doctrine as their guide.

First, courts' apparent preference for loosely defined fixed zone parameters, such as Missouri's "in front of or about" zone, leads to the overbreadth problems that rendered Kentucky's statute unconstitutional. Speech on private property, a major concern in *McQueary*, easily could be punishable under the Missouri "in front of or about" language. That language also might reach the kinds of non-offensive speech that concerned the *McQueary* court (e.g., an ice cream truck passing a funeral would be "in front of or about" it). Thus, the Missouri statute approved in *Nixon* likely would fail the demanding tailoring requirements of the *McQueary* court.

Second, if courts indeed prefer such vague language, the significant under-inclusivity of resulting provisions causes additional problems.¹⁶⁰ Missouri's "in front of or about" terminology easily could neglect much of the speech at the root of the harm. As dozens of statutes imply, some of the precise evils that funeral protest statutes aim to eradicate occur within a fixed zone, but not necessarily within the narrower "in front of or about" region.¹⁶¹

¹⁵⁸ Despite the numerous inconsistencies and undesirable policy outcomes that the most recent funeral protest cases produced, *Hamilton* does not appear to raise significant constitutional issues. Indeed, the Kansas legislature's subsequent compliance with the *Hamilton* decision; the existence of specific time elements in twenty-six of the current funeral protest statutes; and the absence of vague time elements in the remaining statutes, might indicate legislatures' acknowledgement that *Hamilton* stands on firm constitutional ground.

¹⁵⁹ *But see* Barry P. McDonald, *Speech and Distrust: Rethinking the Content Approach to Protecting the Freedom of Expression*, 81 NOTRE DAME L. REV. 1347, 1387 (2006) (arguing that courts should uphold all of the statutes because one cannot "seriously [argue] that such a limited restriction would have a substantially adverse impact on the marketplace of public debate, or on the church members' ability to feel fully self-realized" and because "the government should . . . have the right to enact such restrictions out of respect for the dead soldiers' sacrifices, regardless of its views about the message"); Dunn, *supra* note 133, at 1139 (predicting that federal courts will uphold the Missouri statute).

¹⁶⁰ The Supreme Court held in *R.A.V. v. City of St. Paul* that underbroad speech restrictions may be unconstitutional because by leaving part of their targeted evil unaddressed, they run the risk of discriminating based upon the content of the speech. *R.A.V. v. City of St. Paul*, 505 U.S. 377, 395–97 (1992).

¹⁶¹ *See supra* notes 97–103 and accompanying text.

For example, a person's speech may be very disruptive when it occurs 200 feet away from a funeral, yet it likely would remain beyond the reach of the Missouri statute. At the same time, some statutes enable prosecution of non-disruptive picketers who stand much closer to a funeral. Take, for example, a protestor yelling and screaming behind a wall, audible but not visible to funeral attendees. That protestor might not stand "in front of or about" the funeral, but she still would generate the disruptive evil against which the statute aims to protect. Therefore, the Missouri statute seems not to satisfy the stringent tailoring requirements of the Kentucky court. For this reason, *Nixon* and *McQueary* are difficult to reconcile.

Third, the status quo is problematically inconsistent with Supreme Court precedent. In particular, the tailoring specificity required by the *McQueary* court conflicts with the Supreme Court's approach to similar fixed zones in *Boos*, *Burson*, and *Madsen*. In the *Burson* decision, which evaluated a statute similar to the one enjoined in *McQueary*, the Court declared that it was impossible and unnecessary to justify a particular distance in a fixed zone.¹⁶² Given courts' current propensity to analogize funeral protest statutes to these other privacy-based protections, they should permit fixed zones in the funeral protest context for the sake of consistency with the law of focused protests generally.

Finally, favoring the vague "in front of or about" language over more specific fixed zone language may create an unconstitutional chilling effect. Whereas protestors objectively can determine whether they stand within a certain number of feet of a funeral, they will experience much more difficulty knowing when they are "in front of or about" the location. The approved Missouri language, therefore, does not provide helpful notice to protestors about how they can communicate lawfully. They understandably might fear prosecution. The resulting chilling effect essentially expands the no-speech zone far beyond the designated "in front of or about" region. In short, a fixed zone nominally might reach more speech than Missouri's zone does, but its impact could be far worse for free speech.

The status quo's overbreadth, underbreadth, tension with Supreme Court precedent, and problematic policy outcomes indicate that courts simply cannot establish a principled division between permissible and impermissible fixed zones. In other words, the specific permissible scope of a focused picketing restriction does not flow from the identification of a *Frisby*-based privacy interest. The recent funeral protest decisions demonstrate the difficulty in drafting and reviewing statutes aiming to protect privacy. It

¹⁶² *Burson v. Freeman*, 504 U.S. 191, 208–09 (1992).

appears nearly impossible to craft a provision that targets all of the evils that frustrate privacy without reaching any additional speech.¹⁶³

D. *The Need for a New Approach*

Even if courts can reconcile the outcomes in recent funeral protest cases, relying on privacy in this particular context remains risky for two additional reasons. First, advocates already have failed to persuade courts to extend the privacy justification to support protest restrictions in a context similar to funerals.¹⁶⁴ The church protest ordinance invalidated in *Olmer* roughly approximates Missouri's funeral protest statute.¹⁶⁵ Factually, the government interest in protecting children from offensive images at church services strongly resembles the goal of preserving the solemnity of a funeral.¹⁶⁶ And the means by which the laws in question attempted to limit speech are nearly identical. Yet the *Olmer* court declined to extend *Frisby* because of the Supreme Court's express statement that only the unique nature of the home

¹⁶³ See, e.g., Alan Phelps, *Picketing and Prayer: Restricting Freedom of Expression Outside Churches*, 85 CORNELL L. REV. 271, 297–304 (1999) (arguing that “an attempt to pass an all-inclusive ordinance [limiting speech near churches] to avoid being labeled a content-based restriction will run headlong into the narrow-tailoring requirement”).

¹⁶⁴ See *id.* at 297–301 (comparing *Frisby* and *Olmer* and arguing that “[i]f the current Supreme Court were to expand the captive audience doctrine beyond the four walls of the home, churches present one of the strongest cases”); Carrie L. Johnson, Note, *Unwanted Speech and the State's Interest in Protecting Religious Free Exercise: Drawing First Amendment Lines in Olmer v. City of Lincoln*, 34 CREIGHTON L. REV. 423, 469 (2001) (describing similarities between churchgoers and residents of private homes). The Supreme Court in 2004 recognized a privacy right for family members in control of the bodies and images of the recently-deceased. *National Archives and Records Admin. v. Favish*, 541 U.S. 157 (2004). Recently, however, the Tenth Circuit determined that this privacy right for the grieving does not extend to funeral attendance, finding against a family seeking to prevent photographers from attending a funeral on the basis of privacy. *Showler v. Harper's Magazine Foundation*, 222 F.App'x 755 (10th Cir. 2007).

¹⁶⁵ Compare *Phelps-Roper v. Nixon*, No. 06-4156-CV-C-FJG, 2007 WL 273437, at *2 (W.D. Mo. Jan. 26, 2007) (notice of appeal filed Feb. 1, 2007) and *supra* notes 151–52 and accompanying text with *Olmer v. City of Lincoln*, 192 F.3d 1176, 1182 (8th Cir. 1999).

¹⁶⁶ Funerals are similar to church services because both involve captive audiences seeking peace and quiet for a temporary event. While differences between these contexts certainly exist, they have more in common with each other than they do with the interests at issue in other Supreme Court picketing cases, such as those involving embassies, polling locations, and abortion clinics.

justifies such strong protection.¹⁶⁷ Courts similarly might reject funeral protest statutes justified solely by privacy. As in *Olmer*, a court reviewing such laws could withhold *Frisby*'s protection for fear that applying it would lead to a classic slippery slope problem.¹⁶⁸

Just as *Olmer*'s factual differences with *Frisby* warranted different outcomes, courts also might find that funerals and abortion clinics present incomparable factual contexts. In short, the protection that medical patients need differs significantly from the safeguards that grieving funeral attendees require.¹⁶⁹ The Supreme Court's primary concern in abortion cases has been enabling patients and employees to enter clinics without intimidation or physical confrontation.¹⁷⁰ To serve such an end, zones protecting patients within eight feet—as in *Hill*—may be satisfactory. By contrast, funeral protest statutes seek not only to prevent confrontation and to ensure peaceful entry, but also to preserve the solemnity of the funeral occasion itself.¹⁷¹ For

¹⁶⁷ *Olmer*, 192 F.3d at 1181–82; see also Stanley, *supra* note 73, at 295 (arguing that *Olmer* illustrates great reluctance within courts about extending *Frisby* to contexts other than the home).

¹⁶⁸ *Olmer*, 192 F.3d at 1182. But see Eugene Volokh, *Burying Funeral Protests*, National Review Online, March 23, 2006, <http://nationalreview.com/comment/volokh200603230730.asp> (predicting that “it’s a good bet that courts will find that the interest in protecting the privacy of the grieving at a funeral is at least as strong as the interest in protecting the privacy of people at their homes”).

¹⁶⁹ For a similar argument about the inadequacy of applying abortion clinic precedent to protests outside churches that offend children, see Phelps, *supra* note 163. But see Johnson, *supra* note 164, at 471 (calling for legislators to draw bubble zones—similar to those upheld in *Hill*—to protect children from offensive speech outside churches).

¹⁷⁰ *Hill v. Colorado*, 530 U.S. 703, 715 (2000).

¹⁷¹ As if guided by a national advisory group, several states enacted strikingly similar legislative intent language that cites the privacy interest as well as an inchoate interest in “peace” and avoiding “distress.” See, e.g., 18 PA. CONS. STAT. ANN. § 7517 (West Supp. 2007) (“The General Assembly finds and declares that . . . [interests include] privately and peacefully mourning,” and that “[p]icketing of commemorative services causes emotional disturbance and distress to grieving families.”); see also KAN. STAT. ANN. § 21-4015 (1995); N.J. STAT. ANN. § 2C:33-8.1 (West Supp. 2007); OKLA. STAT. ANN. tit. 21, § 1380 (West Supp. 2006). For slightly different approaches, see GA. CODE ANN. § 16-11-34.2 (Supp. 2006), citing the interest in grieving “without unwanted impediment, disruption, disturbance, or interference . . .”; see also 720 ILL. COMP. STAT. ANN. 5/26-6 (West Supp. 2007) (citing the protection of “the unique nature of funeral and memorial services and the heightened opportunity for extreme emotional distress . . . [as well as] privacy and ability to mourn” as legislative aims). For an alternative approach proposed for protecting church services from protests, see Phelps, *supra* note 163, at 309–12 (suggesting that speech be limited whenever it “can cause audience members to adopt outwardly a different viewpoint on some public issue, not because of the idea’s merit, but because of the coercive pressure the protest itself creates”).

some outdoor funerals—unlike indoor abortion clinics—there is no safe haven within which protestors cannot be seen or heard. Funeral protestors, therefore, spoil solemnity with speech activities designed to distract and inflame funeral attendees and to transform funerals into political events. Unlike abortion protests, these tactics can destroy another protected activity from eight feet away. The speech restrictions appropriate to ensure privacy and access at an abortion clinic thus cannot adequately serve the government interest that animates funeral protest limits.

If the inconsistencies between *McQueary* and *Nixon* suggest that appellate courts will review funeral protest statutes carefully, the factual differences between funerals and activities protected by previously-litigated statutes beg those courts and the litigants before them to adopt a different legal approach altogether. Privacy might ultimately provide courts with a basis for upholding funeral protest statutes. But there is no guarantee.¹⁷² Given such considerable uncertainty, supporters of these statutes should look to supplement their arguments with support from other legal doctrines. This Note proposes that the one Supreme Court decision and the framework that it establishes may provide a more certain, logical, and clear basis for future challenges to the constitutionality of funeral protest statutes.

VI. ESTABLISHING A COMPATIBILITY FRAMEWORK

A. Background

Rather than relying solely on the problematic privacy arguments, litigants and courts in future funeral protest cases should also emphasize the utter incompatibility of free speech and funerals. The essential basis for this compatibility rationale would be *Grayned v. City of Rockford*.¹⁷³ *Grayned* involved the prosecution of a picketer who violated Rockford, Illinois ordinances banning protests and noisy disruption of schools while they were

¹⁷² For additional criticism of the application of the privacy interest to funeral protests, see McDonald, *supra* note 159, at 1387 (arguing for strict scrutiny because “[u]nder an honest application of current doctrine, even though such [funeral protest] regulations are facially content-neutral, they would likely not withstand First Amendment scrutiny because they would be very difficult to justify as being unrelated to the content of the affected expression”).

¹⁷³ *Grayned v. City of Rockford*, 408 U.S. 104 (1972). *McQueary* cites *Grayned* only twice, for propositions related to the content of unwanted communications, at 987, and in explaining the *Madsen* decision’s dependence on the abortion clinic context of its regulations, at 994. *McQueary v. Stumbo*, 453 F. Supp. 2d 975, 987, 994 (2006). *Nixon* does not cite *Grayned* or its compatibility rationale. See *Phelps-Roper v. Nixon*, No. 06-4156-CV-C-FJG, 2007 WL 273437 (W.D. Mo. Jan. 26, 2007) (notice of appeal filed 2/1/07).

in session.¹⁷⁴ The Supreme Court found Rockford's anti-noise ordinance sufficiently tailored because it targeted only speech that was "actually incompatible with normal school activity."¹⁷⁵ In critical language, the Court explained that the "nature of a place [and] the pattern of its normal activities [will] dictate the kinds of regulations of time, place, and manner that are reasonable."¹⁷⁶ The *Grayned* decision then announced that "[t]he crucial question is whether the manner of expression is basically incompatible with the normal activity of a particular place at a particular time."¹⁷⁷

Since *Grayned*, the Supreme Court has utilized compatibility language in a variety of other contexts.¹⁷⁸ The concept appeared in *Schad v. Borough of Mount Ephraim*; the Court invalidated a time, place, and manner restriction because the speech that it limited—live adult entertainment—was not "incompatible with the uses presently permitted" by the municipality.¹⁷⁹ Similar language also appeared in the Court's debate about a rule against distributing pamphlets at a state fair.¹⁸⁰ In *Heffron v. International Society for Krishna Consciousness, Inc.*, the Court upheld the fair's regulation after explaining that "the significance of the governmental interest must be

¹⁷⁴ *Grayned*, 408 U.S. at 106. In addition to upholding the noise prohibitions of Rockford's ordinance, the Supreme Court overturned the picketing prohibitions because they included a content-based exception for labor picketers. *Id.* at 107.

¹⁷⁵ *Id.* at 113. The ordinance also permitted punishment only when a speaker acted with the intent to disrupt and when his actions caused actual disruption. *Id.*

¹⁷⁶ *Id.* at 116 (internal quotations omitted).

¹⁷⁷ *Id.* For criticism of the view that *Grayned* elevates the constitutional status of compatibility, see Michael S. Maurer, *Regulating Embassy Picketing in the Public Forum*, 55 GEO. WASH. L. REV. 908, 923-24 (1987) (arguing that "[a]lthough the site in *Grayned* was important to the Court's reasoning, the antinoise ordinance passed constitutional muster because it did not discriminate against points of view . . . *Grayned* [does] not stand for the proposition that the site alone dictates the restrictions").

¹⁷⁸ See *United States v. Grace*, 461 U.S. 171, 184-85 nn.1-8 (1983) (Marshall, J., concurring in part and dissenting in part) (providing examples of the principle that "[e]very citizen lawfully present in a public place has a right to engage in peaceable and orderly expression that is not incompatible with the primary activity of the place in question" regardless of whether the "place is a school, a library, a private lunch counter, the grounds of a statehouse, the grounds of the United States Capitol, a bus terminal, an airport, or a welfare center"). For an example of the compatibility rationale in lower courts, see Judge Bork's opinion in *Finzer v. Barry*, 798 F.2d 1450, 1462 (D.C. Cir. 1986).

¹⁷⁹ *Schad v. Borough of Mount Ephraim*, 452 U.S. 61, 75 (1981). The *Schad* Court declared that the compatibility analysis is "the initial question in determining the validity of the exclusion." *Id.*

¹⁸⁰ *Heffron v. Int'l Soc'y for Krishna Consciousness, Inc.*, 452 U.S. 640, 649-52 (1981).

assessed in light of the characteristic nature and function of the particular forum involved.”¹⁸¹

The compatibility rationale also found a voice in a 1965 case involving speech outside courthouses.¹⁸² In *Cox v. Louisiana*, the Supreme Court upheld a statute prohibiting “pickets or parades in or near a building housing a court of the State of Louisiana” with the intent of disrupting justice.¹⁸³ After identifying a legitimate state interest in “protecting [the] judicial system from the pressures which picketing near a courthouse might create,”¹⁸⁴ the *Cox* Court declared the statute “narrowly drawn to punish specific conduct that infringes a substantial state interest in protecting the judicial process.”¹⁸⁵ Even the First Amendment could not justify the tactics of the protestors in *Cox*, which proved incompatible with the important government interest of the administration of justice.¹⁸⁶

The *Boos* decision also involved some discussion of compatibility.¹⁸⁷ One clause that the Supreme Court approved in *Boos* prohibited protestors from congregating and refusing to disperse within 500 feet of an embassy.¹⁸⁸ In upholding this provision, the Supreme Court approvingly cited *Grayned* for the proposition that a statute “crafted for a particular context [will affect only speech that would disrupt] normal embassy activities.”¹⁸⁹ That reasoning supported the Court’s finding that the statute was not vague and buttressed the overall holding that the important government interest in the case necessitated extensive speech restrictions.¹⁹⁰

Individual justices also occasionally employ compatibility language. Several years after *Grayned*, the compatibility rationale appeared in Justice Powell’s concurrence in *Greer v. Spock*.¹⁹¹ In his opinion supporting speech restrictions at a military base, Justice Powell explained that his approach was

¹⁸¹ *Id.* at 650–51.

¹⁸² *Cox v. Louisiana*, 379 U.S. 559 (1965).

¹⁸³ *Id.* at 560.

¹⁸⁴ *Id.* at 562.

¹⁸⁵ *Id.* at 564.

¹⁸⁶ *Id.*

¹⁸⁷ See *supra* Part III.A.

¹⁸⁸ *Boos v. Barry*, 485 U.S. 312, 329 (1988). Before this case reached the Supreme Court, the appeals court narrowed the statute to prohibit speech that was “directed at an embassy” and that might create “a threat to the security or peace of the embassy.” *Id.* at 330 (quoting *Finzer v. Barry*, 798 F.2d 1450, 1471 (D.C. Cir. 1986)).

¹⁸⁹ *Id.* at 332.

¹⁹⁰ *Id.*

¹⁹¹ 424 U.S. 828, 842–49 (1976) (Powell, J., concurring in part and dissenting in part).

“analogous to that . . . described in *Grayned*.”¹⁹² Speech at military bases could be limited, according to Powell, because of the “basic incompatibility . . . between the communication and the primary activity of [the] area.”¹⁹³ In that light, “the public interest in insuring the political neutrality of the military” could “justif[y] the limited infringement” that the speech restriction poses.¹⁹⁴ Justice Brennan’s concurring opinion in *Heffron* also declared that “[i]n no way could I agree that respondents’ desired ‘manner of expression is basically incompatible with the normal activity’ of the fair.”¹⁹⁵ Additionally, Justice O’Connor’s concurrence in *International Society for Krishna Consciousness v. Lee*, a decision upholding speech restrictions in airport terminals, explained that “[f]ace-to-face solicitation is incompatible with the airport’s functioning in a way that the other, permitted activities are not.”¹⁹⁶

Courts and litigants seeking to adopt the compatibility rationale may also draw upon arguments made by courts at the state level. The highest court of at least one state—Connecticut—has adopted a *Grayned*-based compatibility test.¹⁹⁷ A California appellate court also announced that it would follow a similar test.¹⁹⁸ And the Montana Supreme Court has employed the compatibility test to invalidate at least one speech restriction.¹⁹⁹

Still, the compatibility language appears only sparingly in recent focused picketing cases. In *Madsen*, for example, the Supreme Court suggested briefly that it will “take account of the place to which the regulations apply” when evaluating the appropriate tailoring.²⁰⁰ The *Frisby* opinion did not cite

¹⁹² *Id.* at 843.

¹⁹³ *Id.*

¹⁹⁴ *Id.* at 848.

¹⁹⁵ *Heffron v. Int’l Soc’y for Krishna Consciousness, Inc.*, 452 U.S. 640, 658 n.2 (1981) (Brennan, J., concurring in part and dissenting in part) (quoting *Schad v. Borough of Mount Ephraim*, 452 U.S. 61, 75 (1981) (quoting *Grayned v. City of Rockford*, 408 U.S. 104, 116 (1972))).

¹⁹⁶ *Int’l Soc’y for Krishna Consciousness, Inc. v. Lee*, 505 U.S. 672, 689 (1992) (O’Connor, J., concurring in the opinion and concurring in the judgment).

¹⁹⁷ See *Connecticut v. Linares*, 655 A.2d 737, 753–54 (Conn. 1995) (announcing that Connecticut would “adopt the ‘compatibility’ test, as expressed in *Grayned* . . . for claims brought under the Connecticut constitution that involve restrictions on speech on public property”).

¹⁹⁸ *U.C. Nuclear Weapons Labs Conversion Project v. Lawrence Livermore Lab.*, 201 Cal. Rptr. 837, 843 (Cal. Ct. App. 1984) (announcing that the California court would adopt the basic incompatibility test).

¹⁹⁹ See *Dorn v. Bd. of Trs. of Billings Sch. Dist. #2*, 661 P.2d 426, 433 (Mont. 1983).

²⁰⁰ *Madsen v. Women’s Health Ctr., Inc.*, 512 U.S. 753, 772 (1994).

Grayned and discussed the role of context in speech restrictions only while evaluating whether the limits in that case affected a public forum.²⁰¹ *Hill* cited *Grayned* several times, but never for the notion of compatibility.²⁰² However, because of the differences between the facts of those cases and those in funeral protest litigation, recent focused picketing cases have not needed to rely on the compatibility rationale as much as funeral protest cases eventually might.

B. *The Compatibility Approach*

In addition to citing the government interest in privacy, courts and litigants seeking to preserve the dignity of funerals should turn to a different approach. A more relevant, effective, and constitutionally consistent argument for the statutes would borrow from the *Grayned* compatibility reasoning. Courts could find that the government interest in funeral protest statutes stems from the complete incompatibility of intentionally disruptive protests and funeral services. A compatibility rationale could proceed as follows:

When a protected activity can occur during only one particular time, place, and manner, the government may enact restrictions on speech activities lacking similar time, place, and manner requirements when such activities disrupt the effectiveness of the first activity, so long as any such restrictions isolate speech activities—defined by their time, manner, or place—that are totally incompatible with the first activity.

This rationale would help courts to determine which statutes pass constitutional muster. For example, in the funeral protest context, the compatibility rationale would permit speech restrictions only to the extent that they are necessary to prevent the protected activity lacking time, place, and manner requirements—protests—from destroying the protected activity carrying particular requirements in those respects—funerals.

Of course, statutes serving this government interest still would need to survive intermediate scrutiny review, so in some ways the evaluation would parallel the *Frisby* test. But realistically, if a court followed *Grayned*, it would weigh the government interest in funeral protest statutes more heavily than courts do when they rely upon the *Frisby* privacy reasoning.²⁰³ Courts

²⁰¹ *Frisby v. Schultz*, 487 U.S. 474, 481–82 (1988).

²⁰² *Hill v. Colorado*, 530 U.S. 703, 733 (2000); see also *id.* at 740 (Souter, J., joined by O'Connor, Ginsberg, and Breyer, J.J., concurring); *id.* at 748 n.2 (Scalia, J., joined by Thomas, J., dissenting).

²⁰³ As demonstrated, for example, by its failure in *Olmer*. *Olmer v. City of Lincoln*, 192 F.3d 1176, 1182 (8th Cir. 1999).

using compatibility also would benefit from a more relevant understanding of the purpose underlying a focused-picketing statute—the priority of a protected activity with particular time, place, and manner requirements over another lacking similar needs. Thus, although courts superficially would employ the same test, they could more easily evaluate the sufficiency of the tailoring.

A second advantage to evaluating funeral protest statutes in compatibility terms results from avoiding the politically-charged and impractical notion of privacy. Privacy generates exceptional vitriol among courts and litigants.²⁰⁴ By contrast, compatibility does not yet provoke controversy, and courts can explain in common-sense terms what it means: two protected government interests are incompatible when they cannot succeed simultaneously. In such situations, time, place, and manner restrictions ultimately provide the greatest protection to both activities by enabling each to occur.

Finally, a shift from privacy to compatibility might justify more appropriate tailoring. As described *supra*, the Supreme Court has found that privacy interests can be safeguarded by restrictions as small as eight feet—distances far too small to protect funerals.²⁰⁵ Establishing the compatibility rationale could enable courts and litigants to establish a new, broader tailoring requirement that justifies the current statutes and actually maintains the solemnity of funerals more than eight feet ever could.

Courts will not need to fabricate out of whole cloth this rationale for the statutes. Indeed, at least one funeral protest statute uses language similar to *Grayned*'s. North Carolina's prohibition refers to "conduct with the intent to impede, disrupt, disturb, or interfere . . . with the *normal activities and functions* occurring in the facilities or buildings where a funeral or memorial service . . . is taking place."²⁰⁶ Perhaps other states could adopt similar language, or courts could refer to North Carolina's language when evaluating other statutes' efforts to protect funerals. Focusing on this compatibility interest, rather than the privacy interest that animated courts in recent cases, might create additional hope for those seeking to preserve the solemnity of funerals.

²⁰⁴ See, e.g., *Hill*, 530 U.S. at 752 (Scalia, J., joined by Thomas, J., dissenting) (describing the privacy right to avoid undesired communication as nonexistent); William E. Lee, *The Unwilling Listener: Hill v. Colorado's Chilling Effect on Unorthodox Speech*, 35 U.C. DAVIS L. REV. 387, 390 (2002) (calling "the privacy interest in *Hill* . . . a house of cards that collapses upon close examination"). But see Robert D. Nauman, Note, *The Captive Audience Doctrine and Floating Buffer Zones: An Analysis of Hill v. Colorado*, 30 CAP. U. L. REV. 769, 820–21 (2002) (arguing that *Hill* "seems to stand, in part, for recognition that the right to privacy is important and is worth protecting, even in a public forum").

²⁰⁵ See generally *Hill*, 530 U.S. 703.

²⁰⁶ N.C. GEN. STAT. § 14-288.4(a)(8) (Supp. 1 2006) (emphasis added).

C. Remaining Challenges

The compatibility approach obviously is not a panacea. Even backed by a stronger government interest and under review by courts employing *Grayned's* approach, funeral protest statutes still would face at least four major challenges. First, formalizing the compatibility rationale would require courts to answer the difficult, slippery-slope question of what gives a person the right to assert the need for compatibility.²⁰⁷ Limiting compatibility's protection to important government interests provides only a partial answer to this question because courts have recognized innumerable interests as important.

The subjectivity of incompatibility might present a second concern—vagueness. Even finding the mutual exclusivity of two simultaneous government interests requires some degree of judgment.²⁰⁸

Third, whether courts use privacy or compatibility, an open question remains: what would happen if the WBC protested politically important funerals? For instance, most of the statutes ostensibly reach even protests outside official state funerals. The same is true of funerals occurring not in cemeteries or churches but on public property with unusual political significance—for example, a town square. Or, protestors might challenge the compatibility rationale by protesting at a funeral with a message directly related to the funeral, such as protests against war, funerals generally, or the person honored by the funeral. Courts seem unlikely to abide by limits on protests within such traditional and powerful political contexts.²⁰⁹

Finally, even if they employ the compatibility rationale, courts will struggle to define an upper limit for funeral protest statutes.²¹⁰ The compatibility rationale might justify upholding a fixed zone larger than what privacy warranted in *Frisby*, *Madsen*, or *Hill*, but courts may struggle to read

²⁰⁷ See Stone, *supra* note 85, at 69 (arguing that “courts should [not] be in the business of making such inquiries” because doing so inevitably will require judgments about the content of the speech being regulated).

²⁰⁸ But the *Grayned* opinion addressed a similar concern, holding that the anti-noise statute's compatibility test was not vague because “the measure [of] whether normal school activity has been or is about to be disrupted” though imprecise, “clearly ‘delineates its reach in words of common understanding.’” *Grayned v. City of Rockford*, 408 U.S. 104, 112 (1972) (quoting *Cameron v. Johnson*, 390 U.S. 611, 616 (1968)).

²⁰⁹ See, e.g., *United States v. Grace*, 461 U.S. 171, 183–84 (1983), (invalidating a federal statute prohibiting communicative displays near the Supreme Court).

²¹⁰ Volokh, *supra* note 168 (predicting that “[o]nce the supposedly narrow exception for residential picketing is broadened to cover funeral picketing, these two exceptions (one older and one new) could then be used as precedents in arguments for more exceptions (say, for churches or for medical facilities), which would eventually swallow the rule”).

Grayned as justifying statutes that restrict speech by as much as 1,000 feet.²¹¹ The Supreme Court has never validated a fixed zone larger than 500 feet,²¹² and even the most effective protestors realistically could not disrupt a quiet ceremony from such a great distance. The compatibility rationale also probably could not justify so vast a prohibition on speech as that created by floating zones near funeral processions, which deaden free speech through large, roving areas in an unpredictable fashion.²¹³

VII. CONCLUSION

The *Frisby* privacy-based rationale ultimately presents a risky legal basis for limits on protests at funerals. Relying upon cases supporting access to abortion clinics also creates problems. The Supreme Court's tailoring requirement in these cases remains unpredictable—at best. Courts' laissez-faire approach in evaluations of government interests, content-neutrality, and ample alternative channels underlying focused picketing restrictions could always change. Moreover, relying solely on the privacy approach unwisely binds the law governing funeral protest statutes to what courts have approved in highly unrelated contexts, such as abortion clinics. A better approach might be the *Grayned* compatibility rationale, which could justify temporary limits on funeral protests when they legitimately disrupt funerals.

Although the Supreme Court has applied this approach only a handful of times, it is difficult to imagine a more appealing case for its formal establishment than one involving protests at the funerals of Soldiers, Sailors, Airmen, and Marines who have lost their lives while serving the country in battle. Courts should give the rationale a try. Perhaps then families of Marines like Specialist Jared Hartley could grieve for their loved ones without fear of disruption—from anti-gay protestors or others—and with the solemnity that their occasion deserves.

²¹¹ See, e.g., Volokh, *supra* note 168 (predicting that 300 feet is the largest fixed zone that a Court might allow).

²¹² *Boos v. Barry*, 485 U.S. 312, 316 (1988).

²¹³ See *Phelps-Roper v. Taft*, No. 1:06 CV 2038, 2007 U.S. Dist. LEXIS 20831, at *18–19 (N.D. Ohio Mar. 23, 2007).