

September 2009

Not Your Mother's Remedy: A Civil Action Response to the Westboro Baptist Church's Military Funeral Demonstrations

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Recommended Citation

Chelsea Brown, *Not Your Mother's Remedy: A Civil Action Response to the Westboro Baptist Church's Military Funeral Demonstrations*, 112 W. Va. L. Rev. (2009).

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NOT YOUR MOTHER'S REMEDY: A CIVIL ACTION RESPONSE TO THE WESTBORO BAPTIST CHURCH'S MILITARY FUNERAL DEMONSTRATIONS

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I. INTRODUCTION

When the Westboro Baptist Church turned up to demonstrate at his son's military funeral carrying signs stating "Fag troops" and "You're Going to Hell," among others, Albert Snyder decided not to turn to the state legislature or Congress to plead for relief that may or may not ever materialize. Instead, he chose an approach unique to the victims of the Westboro Baptist Church's demonstrations — a civil action response. Mr. Snyder filed suit in the District Court of Maryland against the Church, its founder Fred W. Phelps, Sr., and members Shirley L. Phelps-Roper and Rebekah A. Phelps-Davis for intentional infliction of mental and emotional distress and invasion of privacy by intrusion upon seclusion. Fred Phelps, Shirley Phelps-Roper, and Rebekah Phelps-Davis are legal aficionados accustomed to maneuvering through the legal system and attempting to use it to their advantage to disseminate their message through publicity

and monetary judgments.¹ However, in an ironic twist, it is now the Westboro Baptist Church who faces the stiff penalty of a civil judgment rather than the other way around.

In March 2006, Lance Corporal Matthew A. Snyder's family attempted to lay their son to rest in a traditional Catholic burial service.² He died while serving his country in Iraq.³ Instead of the quiet, respectful services that the Snyder family envisioned for their son, they and fellow mourners were confronted at the cemetery with demonstrators carrying signs expressing, "God hates you," "You're going to hell," "Fag troops," and "Semper Fi, Semper Fags."⁴ The Snyder family is not the first to be confronted by the Westboro Baptist Church's demonstrations. This type of shocking conduct has become commonplace in the Westboro Baptist Church's attempt to raise publicity for its homophobic message. Many military families are confronted with this message in a time of grief and mourning as Fred Phelps and the congregation of the Westboro Baptist Church travel the country protesting at funerals of fallen soldiers. According to the Westboro Baptist Church members and its founder Fred Phelps, their purpose behind the demonstrations at military funerals is to "oppos[e] the homosexual lifestyle of soul-damning, nation-destroying filth."⁵ Their demonstrations take the form of "large, colorful signs containing Bible words and sentiments" similar to those used in protest of Lance Corporal Snyder's service.⁶ They believe that the soldiers against whom they demonstrate "voluntarily joined a fag-infested army to fight for a fag-run country" and that it is

¹ The Westboro Baptist Church and its leadership are accustomed to action in the courtroom. Founder Fred Phelps graduated from Washburn University School of Law in 1964, and subsequently practiced civil rights litigation. Fred Mann, *Westboro Baptist Church: Road to Westboro*, THE WICHITA EAGLE, Apr. 2, 2006, at A1. Phelps was even honored by the Bonner Springs Branch of the NAACP for his work in this area. *Id.* He was subsequently disbarred from the practice of law in Kansas in 1979 for bringing a suit against a court reporter which the Kansas Supreme Court found to be the result of a personal vendetta. *See generally* State v. Phelps, 598 P.2d 180 (Kan. 1979) (his proffers that individuals would testify as to the court reporter's reputation were false and designed to hold the party up to public ridicule). Phelps was additionally disbarred from the federal court system due to his false allegations against members of the federal judiciary in Kansas charging racial and religious bias. *See generally* Matter of Phelps, 771 P.2d 936 (Kan. 1989). Additionally, of Phelps' thirteen children, ten are attorneys and many operate out of the family law firm, Phelps-Chartered. Mann, *supra*, at 1A. The group maintains a number of websites including, <http://www.godhatesfags.com>, <http://www.thesignsofthetimes.net>, <http://www.godhatesamerica.com>, <http://www.priestsrapeboys.com>, <http://www.godhatessweden.com>, and <http://www.godhatescanada.com>.

² Complaint, Snyder v. Phelps, 533 F. Supp. 2d 567 (D. Md. 2008) (No. RDB-06-1389).

³ *Id.*

⁴ *Id.*

⁵ God Hates Fags, Westboro Baptist Church FAQ, <http://www.godhatesfags.com/faq.html> (last visited Sept. 4, 2009).

⁶ *Id.*

their duty to demonstrate at these funerals in order to inform the country that God has forsaken it and is punishing it through the carnage in Iraq.⁷

The disturbing demonstrations by the Westboro Baptist Church have sparked a wide range of responses from private citizens participating in counter-protest and from various levels of government. Citizen groups such as the Patriot Guard Riders have formed to follow the church's demonstrations and attempt to form a human shield for grieving families from the group's signs.⁸ Also, state legislatures have responded swiftly to Westboro Baptist Church demonstrations with passage of anti-picketing laws during funerals.⁹ Congress also passed legislation limiting the timing of demonstrations on or within 300 feet of a nationally controlled cemetery.¹⁰ These laws have in turn sparked criticism for what some see as the potential targeting of this specific group due solely to the content of their message.¹¹ Robert O'Neil, Founder and Director of the Thomas Jefferson Center for the Protection of Free Expression, notes that "[d]espite the apparent content neutrality [of the legislation enacted], these measures target a particular subject matter in ways that — and for reasons that — imply a concern with content."¹² The constitutionality of these laws attempting to protect mourning families from the message and conduct of the Westboro Baptist Church have been and will continue to be debated in courts across the country. However, Mr. Snyder's novel civil action against the Westboro Baptist Church and its members may give new hope to victims of this group's demonstrations.

This Note will examine the decision of the District Court of Maryland in *Snyder v. Phelps* through the lens of the First Amendment's protection of religious expression. Part II provides pertinent background information, including information about the operations of the Westboro Baptist Church and its members. Part II also explores the response by national and state legislatures as well as private citizens, like Mr. Snyder, to the activities of the church and its congregation. Part III outlines the analytical framework provided by previous jurisprudence on the subject. Part III then analyzes *Snyder v. Phelps* in light of this framework to determine that the District Court reached a decision in harmony with the First Amendment's protection of religious expression. The Note argues that the Westboro Baptist Church's victims should seek relief through state tort law actions rather than appeal to state and federal legislatures for regulatory statutes that may be found to be unconstitutional. Part III concludes by

⁷ *Id.* See also *infra* Section II.A.

⁸ See *infra* note 36.

⁹ See *infra* notes 39–40.

¹⁰ See *infra* note 40.

¹¹ See *infra* notes 46–47.

¹² Katherine A. Ritts, Note, *The Constitutionality of 'Let Them Rest in Peace' Bills: Can Governments Say 'Not Today, Fred' to Demonstrations at Funeral Ceremonies?*, 58 SYRACUSE L. REV. 137, 145 (2007) (quoting David L. Hudson, Jr., *Funeral Protests*, FIRST AMENDMENT CENTER, http://www.firstamendmentcenter.org/assembly/topic.aspx?topic=funeral_protests).

briefly exploring some of the future implications of this decision on religious institutions and their clergy.

II. BACKGROUND

This section begins by examining the origins of the Westboro Baptist Church and its homophobic beliefs as well as its operational activities in spreading that message to the world. Next, it looks at the response of both the national and state governments to these activities as well as the response of ordinary citizens. It concludes by providing the pertinent facts surrounding the funeral of Marine Lance Corporal Matthew A. Snyder and the demonstrations which spurred his father to file suit in the District Court of Maryland.

A. *History of the Westboro Baptist Church and its Methodology*

The Westboro Baptist Church (“WBC”) calls itself an “Old School (or Primitive) Baptist Church,” and is located in Topeka, Kansas.¹³ Fred W. Phelps, Sr. founded the church in 1955, and he has served as the Pastor of the church since that date.¹⁴ Of the church’s seventy-five members, eighty percent are related to Phelps by blood or marriage.¹⁵ Thus, the congregation is primarily composed of Phelps’ thirteen children, fifty-four grandchildren, and seven great-grandchildren.¹⁶ Of the congregation, Phelps’ daughter, Shirley Phelps-Roper, has become the unofficial spokesperson and is also its attorney operating out of the family’s law firm, Phelps-Chartered.¹⁷

The WBC claims to “adhere to the teachings of the Bible, [and] preaches against all form [sic] of sin” through its “daily peaceful sidewalk demonstrations opposing the homosexual lifestyle of soul-damning, nation-destroying filth.”¹⁸ WBC also claims that its fundamental beliefs are grounded in John Calvin’s five points of Calvinism: “Total Depravity, Unconditional Election, Limited Atonement, Irresistible Grace, and Perseverance of the Saints.”¹⁹ This self-styled Baptist Church is unaffiliated with any mainstream Baptist organiza-

¹³ God Hates Fags, *supra* note 5.

¹⁴ Mann, *supra* note 1, at A1.

¹⁵ *Id.*

¹⁶ *Id.*

¹⁷ Ritts, *supra* note 12, at 143.

¹⁸ God Hates Fags, *supra* note 5.

¹⁹ *Id.* In analogizing its beliefs to John Calvin’s theology, WBC states that it “adhere[s] to the teachings of the Bible, preach[es] against all form [sic] of sin (e.g., fornication, adultery [including divorce and remarriage], sodomy), and insist[s] that the sovereignty of God and the doctrines of grace be taught and expounded publicly to all men.” *Id.*

tion.²⁰ In practice, WBC goes much further in attempting to disseminate its message to the public than most typical religious organizations.

The WBC travels the country demonstrating at unlikely events, such as funerals, in order to garner publicity for its message. Since beginning this practice, the group has allegedly staged 33,000 demonstrations at various venues.²¹ The standard operating procedure is for WBC to notify local media and law enforcement of their intended demonstrations through press releases issued out of Phelps' office.²² The demonstrations typically involve WBC members standing within clear view of their chosen event, holding signs, and chanting the group's slogans such as "God Hates Fags," "Fags Burn in Hell," and "No Special Laws for Fags."²³ The group has used these demonstrations to attract publicity for its message on a nationwide level beginning with their demonstration at Matthew Shepard's funeral in 1998.²⁴ The group has also demonstrated at the funerals of other well-known individuals, most notably Mr. Rogers, Frank Sinatra, Barry Goldwater, Coretta Scott King, and the miners who died in the January 2, 2006, Sago Mine disaster.²⁵ Their intent in targeting individuals attending funerals is to reach them at a time when "they have thoughts of mortality, heaven, hell, eternity, etc., on their minds" and presumably are more sensitive to WBC's message of eternal damnation for sinners.²⁶ The WBC is not limited to funerals in choosing the venue for its demonstrations. In addition to picketing

²⁰ Terry Mattingly, *Baptists of all Stripes Shy Away from Phelps*, OAKLAND TRIBUNE, Nov. 10, 2007, available at http://findarticles.com/p/articles/mi_qn4176/is_20071110/ai_n21103776/print?tag=artBody;col1. According to Will Hall, head of the Southern Baptist Convention's official news agency, they are "a tiny church that's out there all by itself and that's the way they want it." *Id.*

²¹ God Hates Fags, *supra* note 5. According to Phelps, the family spends a quarter of a million dollars on airfare each year which comes from the family's own coffers; the family does not accept donations from outside sources. Mann, *supra* note 5. See *infra* note 30.

²² Press Release, Westboro Baptist Church, God Hates America, and God is killing our troops in His wrath (Oct. 18, 2008) (on file with author).

²³ God Hates Fags, *supra* note 5.

²⁴ Matt Sedensky, *Fred Phelps: Kansas Minister Preaches Doom and Hatred*, SEATTLE POST-INTELLIGENCER, June 3, 2006, available at <http://www.religionnewsblog.com/14867>. Matthew Shepard was the twenty-one year-old University of Wyoming student who was "lashed to a split-rail post, pistol-whipped, robbed, and left in near-freezing temperatures" to die because he was gay. *Id.* Phelps and his followers picketed the funeral with signs bearing the message "God Hates Fags" and chanted "Fags die, God laughs." *Id.*

²⁵ Mann, *supra* note 1.

²⁶ God Hates Fags, *supra* note 5.

funerals of notable people, the group has also picketed at high schools²⁷ and University of Nebraska football games.²⁸

The group thrives on the publicity that it receives as a result of its demonstrations, and the more negative the tone of the publicity, the better. One news reporter describes the group thusly: “Over the years, we have grown tired of editorializing against the nauseating, hateful tirades of Fred Phelps. Criticism does not deter Phelps; in fact, it seems to invigorate him.”²⁹ The WBC has not backed down despite vehement criticism and has only once agreed to cancel their protest — in exchange for an hour of radio time on a syndicated talk-show.³⁰

The WBC’s most notorious publicity tactic has been their targeting of military funerals with signs of “Thank God for Dead Soldiers” and “God Blew Up the Troops.”³¹ The central message of these demonstrations is to protest against what the WBC views as the support for homosexuality indoctrinated in the American military-complex.³² According to the WBC, God is punishing

²⁷ *Hate Group Plans Anti-Gay Protest at School*, MSNBC, Oct. 10, 2008, <http://www.msnbc.msn.com/id/27110704>. The WBC planned to protest Hamilton High School’s Gay Straight Alliance Club with signs saying “God Hates GSA.” *Id.* See Press Release, Westboro Baptist Church, God Hates the Hypocrites of Heartland High School, in Belton, Missouri, Who Claim to be Baptist, but Compromise with Fags (Oct. 17, 2008) (on file with author).

²⁸ Press Release, Westboro Baptist Church, God Hates Nebraska & the University of Nebraska (Aug. 15, 2008) (on file with author) (“God hates Nebraska and the University of Nebraska. WBC plans a series of pickets, in religious protest and caution to parents, lest they send their kids to a school that is heavily infested with fags.”).

²⁹ Alan Phelps, Note, *Picketing and Prayer: Restricting Freedom of Expression Outside Churches*, 85 CORNELL L. REV. 271, 312 n.320 (1999) (quoting Perry Young, *A Tale of Two Phelps*, ASHVILLE CITIZEN-TIMES, Dec. 11, 1998, at A10).

³⁰ Sara Bonisteel, *Anti-Gay Kansas Church Cancels Protests at Funerals for Slain Amish Girls*, FOX NEWS, Oct. 04, 2006, <http://www.foxnews.com/story/0,2933,217760,00.html>. The group agreed to cancel demonstrations at the slain Amish girls’ funeral services in exchange for an hour of radio time on Mike Gallagher’s talk show. *Id.* In defense of the church’s decision to protest the funerals, Phelps-Roger replied, “Those Amish people, everyone is sitting around and talking about those poor little girls — blah, blah, blah — they brought the wrath upon themselves . . . [the Amish] don’t serve God, they serve themselves.” *Id.* The WBC and its founder, Fred Phelps, especially, seem to feed off of the publicity that they receive as a result of their foul demonstrations; however, the publicity does not seem to directly translate into donations from sympathizers to their message. According to the group’s website, they do not accept donations because to do so would “make merchandise of the Gospel.” *God Hates Fags*, *supra* note 5. In its typically brusque manner, the website encourages those seeking t-shirts similar to those of the WBC demonstrators to “go to a local shirt-maker near you and custom-make your own.” *Id.* See also *supra* note 21.

³¹ The WBC does not refer to its demonstrations as anti-war protests but instead refers to them as “Love Crusades.” Anna Zwierz Messar, Note, *Balancing Freedom of Speech with the Right to Privacy: How to Legally Cope with the Funeral Protest Problem*, 28 PACE L. REV. 101, 107 (2007).

³² See *God Hates Fags*, *supra* note 5 (“Therefore, with full knowledge of what they were doing, they voluntarily joined a fag-infested army to fight for a fag-run country now utterly and finally forsaken by God who Himself is fighting against that country.”).

America through the deaths of American troops abroad in Afghanistan and Iraq for a sinful tolerance of homosexuality.³³ In addition to their demonstrations against fallen servicemembers at funerals, the group maintains a website espousing its views and containing press releases that target military individuals by name in a “Roster of the Damned.”³⁴ The WBC has been successful in bringing its message to the attention of the nation and subsets of the nation have responded.

*B. Not Today, Fred: The Response to Westboro Baptist Church Demonstrations*³⁵

The WBC demonstrations have sparked a response among both ordinary citizens and state and federal governments. A group of veterans and Harley-Davidson enthusiasts formed the Patriot Guard Riders to shield grieving families against the demonstrations of the WBC at military funerals.³⁶ The Patriot Guard Riders, with 56,000 members in fifty states, is activated each time the military reports a death in Iraq, and the group will work with the military to do whatever the families request, including escorting a soldier's body when it arrives stateside and forming a human shield at funeral ceremonies to reduce the visibility of the WBC.³⁷ Other citizen groups have also responded to WBC demonstrations with innovative protests of their own. Jim Osborn, a former University of Wyoming student who attended college with Matthew Shepard, has organized several “Phelps-a-thons” in response to the WBC's demonstra-

³³ *Id.* (“[T]he IED is God’s weapon of choice in avenging Westboro Baptist Church by blowing America’s kids to smithereens in Iraq. And the carnage has barely begun.”).

³⁴ *See* God Hates Fags, *supra* note 5; Press Release, Westboro Baptist Church, Week 904 of the Great Gage Park Decency Drive (Oct. 17, 2008) (on file with author) (“Thank God for 14 more dead troops. We are praying for 14,000 more . . . Here is a Roster of the Damned . . .”).

³⁵ Ritts, *supra* note 12, at 145 (quoting Editorial, *Not Tomorrow, Either*, TOPEKA CAP. J., Sept. 16, 2001, http://cjonline.com/stories/091601/opi_nohate.shtml) (“The day after the September 11th attacks . . . a young man stood on a street corner facing the Church’s facility in Topeka, Kansas and held up a hand-painted sign that read ‘Not today, Fred.’ By the end of the second day, nearly ninety people had joined the protest holding American flags and anti-hate signs. Since then, ‘Not today, Fred’ has become a motto for counter-protests against Phelps and the WBC.”).

³⁶ Dan Springer, *Patriot Guard Riders Honor Veterans*, FOX NEWS, Nov. 10, 2006, <http://www.foxnews.com/story/0,2933,228723,00.html>.

³⁷ *Id.* The current policy of the United States government requires the identification and return of every soldier killed in battle. Lawrence J. Siskind, *Grave Silence: Even Free Speech Bows to the Sanctity of the Dead*, 31 LEGAL TIMES (Jan. 21, 2008). This policy “requires the expenditure of enormous resources — including the risk of additional fatalities — to recover the bodies of the fallen.” *Id.* The great lengths to which the government — and other soldiers — will go to retrieve and honor their fellow soldiers speaks to the importance that they place on the burial rite.

tions to encourage others to donate money to causes such as diversity on campus.³⁸

Perhaps most notable, however, has been the response by both state and federal governments to the WBC demonstrations. Thirty-four states have introduced bills to limit demonstrations near cemeteries or funerals and twenty-eight of those states have passed such measures.³⁹ On Memorial Day, 2006, President George W. Bush signed into law the Respect for America's Fallen Heroes Act which limits demonstrations related to veterans buried in a cemetery operated by the National Cemetery Administration.⁴⁰ The Act classifies as misdemeanors any disruptive demonstrations that occur on or within 300 feet of a nationally-controlled cemetery and that occur within one hour preceding, during, or one hour following a funeral.⁴¹

These statutes, while attempting to afford some relief to families paying their respects during military funeral services, have raised serious constitutional questions. The WBC has protested voraciously against the enactment of these statutes and has used their extensive legal savvy to bring its fight to the courts.⁴² The WBC has scored some legal successes in its fight against these state-enacted bans on funeral protest activities.⁴³ The WBC challenged the constitutionality of the Kansas Funeral Picketing Act and won based on the court's findings that the terms of the Act ("before" and "after a funeral") were unconstitu-

³⁸ Shelvia Dancy, *10 Years After Shepard Death, Minister Becomes Gay Ally*, TIMES-PICAYUNE, Oct. 12, 2008, at 28. "For every minute that Phelps protests, somewhere people pledge money and that money goes to a (lesbian-gay-bisexual) cause." *Id.*

³⁹ David L. Hudson, Jr., FIRST AMENDMENT CENTER, http://www.fac.org/assembly/topic.aspx?topic=funeral_protests. The twenty-eight states that have passed these funeral protest bills include: Alabama, Colorado, Delaware, Florida, Georgia, Illinois, Indiana, Iowa, Kansas, Kentucky, Louisiana, Maryland, Michigan, Minnesota, Mississippi, Missouri, Nebraska, New Jersey, North Carolina, Ohio, Oklahoma, Pennsylvania, South Carolina, South Dakota, Tennessee, Texas, Virginia, and Wisconsin. *Id.* These bills typically limit funeral protestors from protesting within 100 feet from a funeral and restrict the activity to at least one hour before and after a service. *See infra* note 40.

⁴⁰ Respect for America's Fallen Heroes Act, Pub. L. No. 109-228, 120 Stat. 387 (2006) (codified at 38 U.S.C. § 2413, 18 U.S.C. § 1387). The Act also encourages states to enact legislation to restrict demonstrations near any military funeral. *Id.*

⁴¹ *Id.*

⁴² *See supra* note 1.

⁴³ The Westboro Baptist Church is not alone in its challenges to state laws restricting demonstrations outside of funerals. The ACLU has joined the WBC in challenging laws restricting the group in Ohio and Missouri. Judy Keen, *Funeral Protesters say Laws Can't Silence Them*, USA TODAY, Sept. 13, 2006, available at http://www.usatoday.com/news/nation/2006-09-13-funeral-protests_x.htm. In addition to its argument that the statutes limit their religious expression, the WBC argues that these laws also limit speech and must be fought in order to protect everyone's rights to free speech. *Id.* According to Tony Rothert of the ACLU of Eastern Missouri, "Today it's a group we don't like. Tomorrow it could be us that are silenced." *Id.*

tionally vague.⁴⁴ Furthermore, the WBC scored another favorable court decision when the district court granted its motion for a preliminary injunction against the Kentucky anti-funeral protest law due to the law's overbreadth and failure to be narrowly tailored to the state's interests.⁴⁵

The federal and state courts that have confronted this issue have done so within the context of the Supreme Court's jurisprudence concerning the right to privacy. Thus, in considering the constitutionality of statutes restricting funeral demonstrations, the courts' concern has been weighing the government's interest in protecting the privacy of its mourning citizens against the demonstrators' right of religious expression.⁴⁶ While critics of these statutes, other than the WBC, do not dispute that protesting funerals is insensitive, they worry about the broader "slippery slope" implications of restricting free speech.⁴⁷ This concern has been reflected in the language of the courts' opinions and their expressed desire to properly consider all parties' interests.⁴⁸ The constitutionality of these statutes will continue to be debated in courtrooms and legislatures across the country; however, a new strategy has emerged to give recourse, if not relief, to families of those affected by these funeral demonstrations — a civil action response.

⁴⁴ *Phelps v. Hamilton*, 122 F.3d 1309, 1315 (10th Cir. 1997). The Kansas legislature subsequently amended the act to include the language "within one hour prior to, during and two hours following the commencement of a funeral." *Id.* The WBC subsequently bragged on its website that this challenge netted them \$47,000 and \$170,000 in attorneys' fees. *To the Pandering, Demagogic Legislatures Now Passing Laws to Stop WBC's Gospel Preaching at Godless Military Funerals*, GOD HATES FAGS, Jan. 14, 2006, available at http://www.godhatesfags.com/fliers/jan2006/20060114_pandering-demagogic-legislatures.pdf. See also Ritts, *supra* note 12.

⁴⁵ *McQueary v. Stumbo*, 453 F. Supp. 2d 975, 975 (E.D. Ky. 2006) (holding that statute was content-neutral but issuing an injunction arguing that the 300-foot buffer zone was too restrictive of the group's activities). However, in January 2007, the United States District Court of the Western District of Missouri denied the WBC's request to prevent the State from enforcing its funeral protest ban. *Phelps-Roper v. Nixon*, 504 F. Supp. 2d 691 (W.D. Mo. 2007) *rev'd*, 545 F.3d 685, 694 (8th Cir. 2008). In its argument the court cited an amicus brief argument "that Missouri also has an interest in protecting funeral attendees' First Amendment rights to free exercise of religion." 504 F.Supp.2d at 696.

⁴⁶ See Amanda Asbury, Note, *Finding Rest in Peace and not in Speech: The Government's Interest in Privacy Protection in and Around Funerals*, 41 IND. L. REV. 383, 384 (2008); Ritts, *supra* note 12. The Supreme Court has not directly addressed whether the right to privacy extends to families mourning the loss of a loved one at a burial service or funeral.

⁴⁷ Professor Eugene Volokh sees the slippery slope as the chief danger of these restrictive statutes: "Once the supposedly narrow exception for residential picketing is broadened to cover funeral picketing, these two exceptions . . . could then be used as precedents in arguments for more exceptions (say, for churches or for medical facilities), which would eventually swallow the rule." Asbury, *supra* note 46, at 413. First Amendment scholar Ronald Collins and First Amendment Center Attorney David Hudson point to the citizen protests at the funeral of John Wilkes Booth who assassinated President Abraham Lincoln and argue that these "rightfully indignant Americans understandably desired to manifest their moral outrage against the man who murdered President Abraham Lincoln." *Id.*

⁴⁸ See *supra* notes 44–45.

C. *WBC Funeral Demonstrations Provoke a Civil Action Response*

Marine Lance Corporal Matthew A. Snyder was killed in Iraq in the line of duty on March 3, 2006.⁴⁹ His family held a traditional funeral and burial service in honor of their son on March 10, 2006, at St. John's Catholic Church, in Westminster, Maryland.⁵⁰ The WBC demonstrated at Lance Corporal Snyder's funeral holding signs stating, "God hates you," "You're going to hell," "Fag troops," "Semper Fi, Semper Fags," and others, in addition to shouting similar words and phrases at mourners.⁵¹ In addition to the demonstration at Lance Corporal Snyder's funeral, the WBC published the following "epic" on its website:

God blessed you, Mr. and Mrs. Snyder, with a resource and his name was Matthew. He was an arrow in your quiver. In thanks to God for the comfort the child could bring you, you had a DUTY to prepare that child to serve the LORD his GOD — PERIOD! You did JUST THE OPPOSITE — you raised him for the devil,

and

Albert and Julie RIPPED that body apart and taught Matthew to defy his Creator, to divorce, and to commit adultery. They taught him how to support the largest pedophile machine in the history of the entire world, the Roman Catholic monstrosity. Every dime they gave the Roman Catholic monster they condemned their own souls. They also, in supporting satanic Catholicism, taught Matthew to be an idolater.⁵²

In response to the funeral demonstrations and his subsequent investigation of the group's website, Albert Snyder, Lance Corporal Snyder's father, filed suit against Fred Phelps, Shirley Phelps-Roper, Rebekah Phelps-Davis and the WBC alleging defamation, invasion of privacy, intentional infliction of emotional distress, and civil conspiracy.⁵³ Snyder alleged that he suffered both emotionally and physically after the demonstrations at his son's funeral and learning

⁴⁹ See Complaint, *supra* note 2.

⁵⁰ *Id.*

⁵¹ *Id.*

⁵² *Id.* This was an "epic" entitled "The Burden of Lance Cpl. Matthew Snyder" published on the website www.godhatesfags.com. *Snyder*, 533 F. Supp. 2d at 570 (D. Md. 2008).

⁵³ *Id.* The suit was filed in the United States District Court of Maryland. *Id.* The District Court got a taste of the WBC's tactics first hand as the WBC and its congregation postponed some of their funeral demonstrations in order to protest outside the courthouse during the trial. Messar, *supra* note 31, at 126.

of the material published on the WBC website.⁵⁴ Specifically, Snyder testified that after reading the offensive material, he “threw up” and cried for hours and that the situation caused him to suffer from depression as well as an exacerbation of his pre-existing diabetic condition.⁵⁵

The case proceeded to trial before a jury on October 22, 2007, on three counts — intrusion upon seclusion, intentional infliction of emotional distress, and civil conspiracy.⁵⁶ The jury returned a verdict for Snyder, in the amount of \$10.9 million, finding that the WBC’s conduct “was outrageous, causing severe emotional distress to the Plaintiff, and that there was an unwarranted invasion of privacy highly offensive to a reasonable person.”⁵⁷ Following the jury’s verdict, the WBC brought post-trial motions challenging both the jury’s verdict on the sufficiency of evidence and the damages award. The court denied the WBC’s motion to set aside the jury’s verdict, holding that there was “more than sufficient evidence” to support the jury verdict on the WBC’s liability.⁵⁸ However, while the court upheld the award of \$2.9 million in compensatory damages, it reduced the total punitive damages award against all defendants to \$2.1 million.⁵⁹

⁵⁴ *Snyder*, 533 F. Supp. 2d at 572.

⁵⁵ *Id.*

⁵⁶ *Id.* at 573. Some states have enacted a civil remedies component of their funeral protest statutes which specifically provides remedies for families of the deceased. *See, e.g.*, MISS. CODE ANN. § 97-35-18 (West 2009); OKLA. STAT. ANN. tit. 21, § 1380 (West 2009).

⁵⁷ *Snyder*, 533 F. Supp. 2d at 570. The damages were apportioned as \$8 million in punitive damages and \$2.9 million in compensatory damages. *Id.* at 573.

⁵⁸ *Id.* at 570.

⁵⁹ *Id.* at 571. The court allocated the new punitive damages award as follows: \$1 million against the WBC, \$600,000 against Shirley Phelps-Roper, \$300,000 against Fred Phelps, and \$200,000 against Rebekah Phelps-Davis. *Id.* at n.3. While the court found that the WBC’s act of “utilizing Matthew Snyder’s death as a vehicle for hateful expression was sufficient to support a punitive damages award,” the court also considered the fact that the behavior which contributed to the damages was not repetitive in that the demonstrations occurred only once on the day of the funeral and there was no further publication directed at the Snyder family. *Id.* at 590–91. However, the main impetus for the reduction in the punitive damages award was the defendants’ ability to pay the award under the standard of *Bowden v. Caldor, Inc.* *Snyder*, 533 F. Supp. 2d at 594–95. The court considered the award in comparison to the financial statements submitted by the Defendants and made the subsequent reductions. *Id.* at 595. The court considered the “far more aggressive posture” of Defendant Shirley L. Phelps-Roper and her proud claim of authorship of “The Burden of Marine Lance Cpl. Matthew Snyder” and subsequently determined that her award should be larger than the awards against her father and sister. *Id.* at 595.

III. FIRST AMENDMENT PROTECTION OF FREE EXERCISE OF RELIGION: NOT NECESSARILY A BAR TO CIVIL ACTIONS

In their post-trial motions for relief, the WBC argued that the content of their speech, in the forms of signs and the “epic” published on their website,⁶⁰ was protected under both the Free Exercise Clause and the Free Speech Clause of the First Amendment. Accordingly, they argued that the lawsuit and resulting jury verdict unconstitutionally restricted their speech.⁶¹ They contended that their conduct was purely religious in nature and therefore entitled to protection.⁶² However, the court correctly rejected this defense.

This section first discusses the First Amendment’s protection for freedom of religious expression and explains the courts’ methodology for analyzing whether civil actions against religious figures or institutions would result in a restriction of this protection. Next, this section will explain why the Maryland District Court in *Snyder v. Phelps* correctly dismissed WBC’s claimed defense. Also, in this section, the Note will argue that victims of the WBC’s conduct should seek relief through private civil actions, as did Mr. Snyder, rather than appealing to state and federal legislatures to enact funeral protest bans. Finally, this section will conclude by exploring the implications of this verdict on future civil actions against religious figures and institutions.

A. *Court Methodology for Analyzing Civil Actions in the Religious Figures and Institutions Context*

The First Amendment of the United States Constitution provides that “Congress shall make no law . . . prohibiting the free exercise [of religion]”⁶³ As such, the Amendment encompasses two concepts, “freedom to believe and freedom to act. The first is absolute but, in the nature of things, the second cannot be. Conduct remains subject to regulation for the protection of society.”⁶⁴

⁶⁰ See *supra* note 52.

⁶¹ *Snyder*, 533 F. Supp. 2d at 570.

⁶² *Id.*

⁶³ U.S. CONST. AMEND. I; These restrictions have been extended to the state governments through the Fourteenth Amendment. *Snyder*, 533 F. Supp. 2d at 576 (quoting *McCreary County v. Am. Civil Liberties Union of Ky.*, 545 U.S. 844, 853 n.3 (2005); *Virginia v. Black*, 538 U.S. 343, 358 (2003)).

⁶⁴ *Cantwell v. Conn.*, 310 U.S. 296, 303–04 (1940); see also *United States v. Ballard*, 322 U.S. 78, 86–87 (1944) (“Freedom of thought, which includes freedom of religious belief, is basic in a society of free men The Fathers of the Constitution were not unaware of the varied and extreme views of religious sects, of the violence of disagreement among them, and of the lack of any one religious creed on which all men would agree. They fashioned a charter of government which envisaged the widest possible toleration of conflicting views. Man’s relation to God was made no concern of the state. He was granted right to worship as he pleased and to answer to no man for the verity of his religious views.”) (internal citations omitted); *West Virginia St. Bd. Of*

Thus, the first step in determining whether a civil suit may be brought against a religious institution or figure is to determine that the entity is encompassed within the protections of the Free Exercise Clause. “Not every enterprise cloaking itself in the name of religion can claim the constitutional protection conferred by that status.”⁶⁵ Courts once interpreted the word “religion,” as used in the First Amendment, to require belief in a deity.⁶⁶ However, the definition has become much more expansive over time. The Supreme Court has held that “religion” in this context applies to non-theistic faiths as well and has recognized such religions as Buddhism, Taoism, Ethical Culture, and Secular Humanism.⁶⁷ In establishing guidelines for defining a “religion,” the United States Court of Appeals for the Third Circuit emphasized “whether the candidate religion addresses matters of ultimate concern, whether its doctrine and practices are comprehensive, and whether it includes certain formal external characteristics of religious organizations.”⁶⁸ The D.C. Court of Appeals found that the Church of Scientology of Washington, D.C., established a *prima facie* case that it was a religion “based upon evidence that the church maintained the formal, external appearance of a religion — it was incorporated as a religion; maintained ministers with the authority to marry and bury; and its writings were found to contain a general account of man and his nature.”⁶⁹ Therefore, if the entity requesting protection under the Free Exercise Clause has not previously been found to constitute a religious organization, an examination by the court of the entity’s legal status, tenets, activities, and officials is proper to ensure that this protection is properly applied.

Once it is established that the entity invoking the Free Exercise Clause is a religious entity under the First Amendment, the next step is to analyze whether the conduct or speech at issue is religious in nature. In order to determine whether the conduct or speech fits this requirement, a court must determine whether adjudication of the central claim at hand would require a judicial determination of the validity of the religious belief.⁷⁰ “Only beliefs rooted in

Educ. v. Barnette, 319 U.S. 624, 645 (1943) (“The right of freedom of thought and of religion as guaranteed by the Constitution against State action includes both the right to speak freely and the right to refrain from speaking at all, except in so far as essential operations of government may require it for the preservation of an orderly society . . .”).

⁶⁵ *Founding Church of Scientology v. United States*, 409 F.2d 1146, 1160 (D.C. Cir. 1969).

⁶⁶ *Davis v. Beason*, 133 U.S. 333, 342 (1890).

⁶⁷ *Torcaso v. Watkins*, 367 U.S. 488, 496 n.11 (1961). *See also* *International Society for Krishna Consciousness, Inc. v. Barber*, 650 F.2d 430 (2d Cir. 1981) (holding that Krishna Consciousness is a religion for free exercise purposes).

⁶⁸ *Malnak v. Yogi*, 592 F.2d 197, 208–09 (3d Cir. 1979) (Adams, J., concurring in the result).

⁶⁹ *Founding Church of Scientology*, 409 F.2d at 1160. Presentation of proof sufficient to make a *prima facie* case would entitle defendant to the protections of the clause unless the plaintiff effectively rebuts that case. *See also* *Van Shaick v. Church of Scientology of California*, 535 F. Supp. 1125 (D. Mass. 1982).

⁷⁰ *Ballard*, 322 U.S. at 78.

religion are protected by the Free Exercise Clause”⁷¹ Thus, where the adjudication of the central claim in a cause of action requires determination of the truth or verity of a religious belief, the religious belief which formed the basis for the conduct or speech will be considered under the protection of the Free Exercise Clause.⁷²

The United States Supreme Court set out and illustrated this test in its early decision of *United States v. Ballard*.⁷³ The Court reversed the fraud convictions of the defendants — Guy Ballard, his wife Edna, and son Donald — and explained that although the defendants’ claim that they were divine messengers with the power to heal persons of incurable diseases may seem ludicrous to most people, any question as to the validity of their beliefs was a forbidden inquiry.⁷⁴ According to the Court,

Heresy trials are foreign to our Constitution. Men may believe what they cannot prove. They may not be put to the proof of their religious doctrines or beliefs. Religious experiences which are as real as life to some may be incomprehensible to others. Yet the fact that they may be beyond the ken of mortals does not mean that they can be made suspect before the law.⁷⁵

Subsequently, the Court held that the jury could not consider whether the defendants truly believed their representations that they were divine messengers with the ability to heal incurable diseases in deciding whether those representations to third parties constituted fraud.⁷⁶

In a more recent case involving the validity of the beliefs held by an employee, the Supreme Court similarly held that a state unemployment agency may not question the validity of a Jehovah Witness’ religious objection to working on products to be used in war.⁷⁷ The Court reversed the decision of the Employment Review Board and held that the plaintiff’s decision to quit — based on his religious beliefs preventing him from participating in the production of war materials — did not preclude him from receiving the same unemployment benefits as any other employee whose termination was based upon good cause.⁷⁸

⁷¹ *Thomas v. Review Board of the Indiana Employment Security Division*, 450 U.S. 707, 713–14 (1981) (quoting *Wisconsin v. Yoder*, 406 U.S. 205, 215–16 (1972)).

⁷² *Ballard*, 322 U.S. at 78.

⁷³ *Id.*

⁷⁴ *Id.*

⁷⁵ *Id.* at 86–87.

⁷⁶ *Id.* at 88.

⁷⁷ *Thomas*, 450 U.S. 707.

⁷⁸ *Id.* “The determination of what is a ‘religious’ belief or practice is more often than not a difficult and delicate task However, the resolution of that question is not to turn upon a judicial perception of the particular belief or practice in question; religious beliefs need not be accept-

The Court emphasized that a believer need not be able to explicitly articulate his belief system with precision and clarity to be deserving of protection; the fact that one “struggl[es]” with their beliefs does not give a court the liberty to inquire into the decision-making process of that person.⁷⁹ The employee drew a line when he was transferred from his employment in the roll foundry to employment in the production of military turrets, and it was not for the Court to say that the line he drew was unreasonable.⁸⁰ The Court further held that the existence of a difference of opinion between the employee in question and another Jehovah’s Witness who continued working at the plant did not have any legal significance because the “guarantee of free exercise is not limited to beliefs which are shared by all of the members of a religious sect.”⁸¹

Thus, these two cases stand for the proposition that courts must not inquire into the substance of an entity’s religious beliefs to determine whether they truly believe or the depth of their beliefs. Such an inquiry is prohibited as a violation of the Free Exercise Clause.⁸² Yet this prohibition does not create an automatic bar for civil actions against religious adherents and institutions. States may create tort law civil actions to regulate conduct of religious entities so long as the laws they promulgate do not require courts to make this prohibited inquiry in adjudicating a cause of action.

The next step in the courts’ analysis is to determine whether the law creating the cause of action in controversy is justified by a sufficient state interest and tailored to that end. Conduct, even that which is religiously grounded, may be subject to regulation by the states in their exercise of their power to promote the health, safety, and general welfare of society or by the Federal Government in the exercise of its delegated powers.⁸³ If the government entity regulates conduct by enacting a general law within its power, the purpose of which is to advance its secular goals, the statute is valid despite an indirect burden on religious observance unless the entity may accomplish its purpose by

able, logical, consistent, or comprehensible to others in order to merit First Amendment protection.” *Id.* at 714.

⁷⁹ *Id.* at 715.

⁸⁰ *Id.*

⁸¹ *Id.* at 715–16. “It is not within the judicial function and judicial competence to inquire whether the petitioner or his fellow worker more correctly perceived the commands of their common faith.” *Thomas*, 450 U.S. at 716.

⁸² *See supra* notes 64 and 71.

⁸³ *Wisconsin v. Yoder*, 406 U.S. 205 (1972); *Braunfield v. Brown*, 366 U.S. 599 (1961); *Prince v. Massachusetts*, 321 U.S. 158 (1944); *Cantwell v. Connecticut*, 310 U.S. 296 (1940). See also *Reynolds v. United States*, 98 U.S. 145, 164 (1878), for the proposition that legislative power over mere opinion is forbidden but it may reach people’s actions when they are found to be in violation of important social duties or subversive of good order, even when the actions are demanded by one’s religion.

means which do not impose such a burden.⁸⁴ Consequently, the “operational activities” of a religion, which are not solely in the ideological or intellectual realm, are subject to judicial review and may be regulated to achieve a sufficiently important state interest.⁸⁵ Thus, the government entity seeking to regulate such conduct must offer a sufficient secular interest to overcome the protection of the Free Exercise Clause and must demonstrate that the regulation is narrowly tailored to meet that interest.

The states, in their promotion of the health, safety, and general welfare of society, have enacted tort laws establishing civil actions as a remedy for various forms of conduct. Because various forms of restitution necessarily accompany a successful civil action, these laws do place a burden on religion indirectly.⁸⁶ Therefore, plaintiffs seeking to pursue civil remedies for a religious entity’s conduct must not only establish the elements of their case; they must also show that their need for protection in the forms of these laws rises to the level of a sufficient state interest so as to warrant the resultant burden on the religious entity.

One important distinction courts have drawn to determine if regulation of a religious entity’s conduct meets a sufficient state interest is whether the conduct involves members of that institution or non-members. Where non-members are harmed by religious conduct, courts are far more likely to find that the cause of action against a religious entity is a valid state interest.⁸⁷ Hierar-

⁸⁴ *Braunfield*, 366 U.S. at 599 (upholding a Pennsylvania statute prohibiting the retail sale of commodities on Sunday even though the statute had an indirect economic burden on Orthodox Jewish storekeepers who closed their businesses from Friday night through Saturday).

⁸⁵ *Turner v. Unification Church*, 473 F. Supp. 367, 371–72 (D.C. R.I. 1978) (citing *Prince v. Massachusetts*, 321 U.S. 158 (1944) (sale by children of religious literature prohibited); *Cox v. New Hampshire*, 312 U.S. 569 (1941) (religious parading without a license prohibited); *Reynolds v. United States*, 98 U.S. 145 (1878) (practice of polygamy prohibited)).

⁸⁶ The United States Court of Appeals for the Ninth Circuit found that the imposition of a tort penalty for the church practice of shunning a disfellowshipped member would compel the church to abandon this part of its religious teachings because the pressure to forego such a practice would be unmistakable. *Paul v. Watchtower Bible & Tract Soc. of New York, Inc.*, 819 F.2d 875 (9th Cir. 1987). “The Church and its members would risk substantial damages every time a former Church member was shunned. In sum, a state tort law prohibition against shunning would directly restrict the free exercise of the Jehovah’s Witnesses’ religious faith.” *Id.* at 881.

⁸⁷ *Compare Redgate v. Roush, et. al.*, 59 P. 1050 (Kan. 1900) (notice of withdrawal of fellowship from a former preacher and publication of this action was privileged and not subject to civil action), and *Watchtower Bible*, 819 F.2d at 883 (“Churches are afforded great latitude when they impose discipline on members or former members.”), with *Guinn v. Church of Christ of Collinsville*, 775 P.2d 766 (Okla. 1989) (Disciplinary actions taken by the church *before plaintiff withdrew her membership* did not constitute a threat and did not justify state interference. However, plaintiff’s withdrawal of membership and her consent to submit to ecclesiastical supervision rendered the church’s subsequent publication of her alleged sins to be outside the purview of the First Amendment protections.), and *Hester v. Barnett*, 723 S.W.2d 544 (Mo. Ct. App. 1987) (where Pastor defamed plaintiffs from the pulpit, the court emphasized that the plaintiffs were not members of the church and had not consented to the church’s or its congregation’s doctrine, religious practices, or discipline).

chical religious organizations are protected in establishing their own rules and regulations for *internal discipline* and government and in creating tribunals for adjudicating those disputes.⁸⁸ Where this choice is exercised, the civil courts are bound by the Constitution to accept these bodies' decisions as binding upon them.⁸⁹ Similarly, where the judicial review is of an interpretation of canonical text, the courts must not question the church's interpretation and must consider that interpretation binding.⁹⁰ A further corollary of this right is that of members to voluntarily consent to being spiritually governed by an established set of ecclesiastical tenets.⁹¹ Where one voluntarily consents to this governance, the civil courts must respect that decision and not impose its own ideas on the religious organization.⁹²

However, when a person does not voluntarily choose to subject himself or herself to governance by the religious entity, state tort laws creating a civil action are more likely to be found to be of sufficient state interest in regulating religious entities' conduct.⁹³ The case of *Guinn v. Church of Christ of Collinsville*⁹⁴ is very instructive in demonstrating this distinction. In this case, Guinn, the plaintiff, became a member of the Collinsville Church of Christ, and her first few years of membership "reflected the mutual support inherent in a relationship between a religious organization and one of its members."⁹⁵ However, in 1980, the Elders of the church — following their doctrinal commands that they monitor the congregation members' actions and discuss any troublesome activity — confronted the plaintiff with a rumor that she had violated the church's prohibition against fornication.⁹⁶ The Elders met with the plaintiff three times outside of the church and advised her that she should stop seeing her companion; they additionally required that she appear before the congregation and repent of her sin.⁹⁷ The Elders informed the plaintiff that if she did not comply with these

⁸⁸ Serbian Eastern Orthodox Diocese, Etc. v. Milivojevich, 426 U.S. 696, 724–25 (1976).

⁸⁹ *Id.*

⁹⁰ *Id.* This doctrine is referred to as the doctrine of ecclesiastical abstention.

⁹¹ *Guinn*, 775 P.2d 766.

⁹² *Id.* at 774. "The right to organize voluntary religious associations to assist in the expression and dissemination of any religious doctrine, and to create tribunals for the decision of controverted questions of faith within the association, and for the ecclesiastical government of all the individual members, congregations, and officers within the general association, is unquestioned. All who unite themselves to such a body do such with an *implied consent* to this government, and are bound to submit to it." *Watson v. Jones*, 80 U.S. (13 Wall.) 679, 728–29 (1872) (emphasis added).

⁹³ See *supra* note 87.

⁹⁴ 775 P.2d 766.

⁹⁵ *Id.* at 767.

⁹⁶ *Id.* at 767–68. The church follows a literal interpretation of the Bible, which serves as its sole source of moral, religious, and ethical guidance. *Id.* at 768. The Elders also have a doctrinal policy of confronting parishioners and discussing problems with anyone who is having trouble. *Id.*

⁹⁷ *Id.*

requirements, the members would withdraw fellowship from her which included reading aloud to the congregation the scriptures that were violated.⁹⁸ At this point, plaintiff informed the Elders that she wished to withdraw her membership from the Church.⁹⁹ Despite the plaintiff's attorney warning the Elders against a public announcement of plaintiff's transgression and personal pleadings from the plaintiff, the Elders publicly branded plaintiff as a fornicator when they read aloud the scriptures she had allegedly violated.¹⁰⁰ As a result, the plaintiff brought suit on the torts of outrage and invasion of privacy and was awarded actual and punitive damages.¹⁰¹

The Supreme Court of Oklahoma refused to find the Elders' post-withdrawal actions to be protected conduct under the Free Exercise Clause.¹⁰² In so doing, the court first emphasized that the issue at hand was not an improper judicial review of ecclesiastical discipline.¹⁰³ The court specified that the plaintiff's complaint was not that another method of discipline was more appropriate according to established doctrine. The chief complaint, according to the court, was that the discipline was an improper interference by the Elders in the plaintiff's life *after* she had withdrawn her membership from the Church of Chr-

⁹⁸ *Guinn*, 775 P.2d at 768. The withdrawal of fellowship from a member is a disciplinary procedure carried out by the entire membership of a congregation within the church. *Id.* In addition to the reading aloud of violated scriptures, it involves the withdrawal of fellowship in the literal sense as congregation members refuse to acknowledge the wayward member's presence. *Id.* The purpose of the punishment is to cause the transgressor to feel lonely and thus desire repentance and a return to the membership while encouraging other members to continue to be pure and free from sin. *Id.*

⁹⁹ *Id.*

¹⁰⁰ *Id.* at 768–69. The Elders informed the plaintiff that withdrawing membership from the Church was doctrinally impossible and that her withdrawal could not halt the disciplinary action. *Guinn*, 775 P.2d at 769. In addition to reading the Scriptures aloud at plaintiff's church, the Scriptures were also read aloud in connection with plaintiff's name at four other area churches. *Id.*

¹⁰¹ *Id.* Specifically, the plaintiff alleged invasion of privacy due to the invasion of her seclusion and publication of private facts about her which were allegedly designed to damage her name and reputation and to expose her to contempt and public ridicule. *Id.* Secondly, the plaintiff alleged the tort of outrage based on extreme and outrageous conduct of an intentional and reckless nature which caused her severe emotional distress and shock due to the Elders' conduct in front of her minor children. *Id.* The jury awarded \$205,000 in actual and \$185,000 in punitive damages, and the trial court then added \$44,737 in pre-judgment interest. *Id.*

¹⁰² *Guinn*, 775 P.2d at 773–75. The Oklahoma Supreme Court distinguished between the Elders' protected conduct prior to the plaintiff's withdrawal of membership and the post-withdrawal conduct which was not protected. *Id.* Because the jury award of the trial court did not adequately distinguish between the awards for post and pre-withdrawal conduct, the court reversed the trial court's decision and remanded for a new trial confined to actionable post-withdrawal conduct. *Id.* at 775.

¹⁰³ The Plaintiff was not attacking the Elders' disciplinary actions on the basis that they contravened Church of Christ polity; this type of inquiry would have placed the action outside the court's power to review. *Id.* "While this dispute involved a religiously-founded disciplinary matter, it was not the sort of private ecclesiastical controversy which the Court has deemed immune from judicial scrutiny." *Id.* at 773. See also *Serbian Eastern Orthodox Diocese v. Milivojevic* 426 U.S. 696, 724–25 (1976).

ist. The court then found that the plaintiff had effectively withdrawn her membership from the church and as a result had withdrawn her consent to be bound by its tenets.¹⁰⁴ Most importantly, the court found that the plaintiff had a constitutionally protected right “to recede from [her] religious allegiance.”¹⁰⁵ Following this line of reasoning, the court found that it was the Collinsville Church of Christ who, by denying her right to disassociate herself from its particular institution, was threatening to curtail her freedom of worship according to her choice.¹⁰⁶ Furthermore, the Oklahoma Supreme Court held that although the “First Amendment requires that citizens be tolerant of religious views different from and offensive to their own, it surely does not require that those like Parishioner, who choose not to submit to the authority of any religious association, be tolerant of that group’s attempt to govern them.”¹⁰⁷ By removing herself from the membership of the church, the Plaintiff chose to remove herself from the church’s acts of monitoring her private life and shepherding her spiritual life through disciplinary acts. Finally, the court held that the disciplinary actions taken by the Elders *after* her withdrawal of membership, which actively involved her in the church’s will and command, were outside the purview of the First Amendment protection and the proper subject of state regulation through a private civil action.

The case of *Hester v. Barnett* is also very helpful in illustrating the distinction between the protected activity of a religious entity carrying out church

¹⁰⁴ The court found that her communication was an effective withdrawal of her membership. *Guinn*, 775 P.2d at 775.

¹⁰⁵ *Id.* at 776. The court then cited *Torcaso v. Watkins* reaffirming that neither a state or the federal government can force or influence a person to go or to remain away from church or to profess a belief or disbelief in any religion. *Id.* Thus, the “First Amendment clearly safeguards the freedom to worship as well as the *freedom not to worship.*” *Id.* (emphasis added).

¹⁰⁶ *Id.*

¹⁰⁷ *Id.* at 779. “No real freedom to choose religion would exist in this land if under the shield of the First Amendment religious institutions could impose their will on the unwilling and claim immunity from secular judicature for their tortious acts.” *Guinn*, 775 P.2d at 779. The Court of Appeal of Louisiana similarly ruled on the issue of a church publicizing information about a former member after that member had been formally dismissed. *Gorman v. Swaggart*, 524 So. 2d 915, 922 (La. Ct. App. 1988). The court stated that it

may be powerless to interpret the religious doctrine which defendants claim compelled them to publicize their accusations to other members of their church, however, this does not mean they can make those accusations outside their church and not face the legal consequences To the extent that the Assemblies of God interprets scripture and its own internal rules to require disclosure of Swaggart’s accusations against Gorman to its members as part of the disciplinary process, civil courts may be precluded from interfering *However, by taking their accusations outside their church, the defendants have also taken themselves outside the scope of the First Amendment’s protection and, to that extent, have exposed themselves to the jurisdiction of the civil courts.*

Id. at 922 (emphasis added).

disciplinary procedures on consenting members and the non-protected activity of publicly announcing information concerning non-members.¹⁰⁸ This case involved an ordained minister of the Baptist Church who approached the Hester family, without invitation, and invited them to confide in him any troubles that were occurring within the family with the promise that any information shared would be kept in the strictest confidence and not be divulged outside the family.¹⁰⁹ The parents confided in the minister that their three children were having both behavior and disciplinary problems, and the minister offered his family counseling services as a solution to this behavior.¹¹⁰ Despite his assurances of confidentiality, the minister divulged to deacons of the church and members of the community confidential communications from the family without their permission.¹¹¹ The minister also lied about the communications made by the family and represented to others that the Hesters abused their children and used them cruelly.¹¹² Specifically, the minister told these lies from the pulpit, in letters and memoranda, in church bulletins and publications, and falsely accused the Hesters over the Hot Line for Child Abuse.¹¹³

In response to the actions of the minister, the Hesters filed suit alleging defamation of character and invasion of privacy, among other counts.¹¹⁴ In defense of his actions, the defendant minister invoked “the privilege due a Minister of the Gospel in performance of his duties” thus “plead[ing] an absolute privilege against liability under the First Amendment mandate of separation of church and state.”¹¹⁵ However, the court rejected this defense finding that the

¹⁰⁸ Hester v. Barnett, 723 S.W.2d 544 (Mo. Ct. App. 1987).

¹⁰⁹ *Id.*

¹¹⁰ *Id.*

¹¹¹ *Id.*

¹¹² *Id.* The minister went so far as to instruct the children to lie to others about the mode of discipline within their home so that they would eventually be removed from the home. *Id.* at 555. In addition to the counts alleging intentional infliction of emotional distress and invasion of privacy, the Hesters also sued Minister Barnett for alienation of affections as his actions caused a rift between the children and their parents. *Id.* at 556–57.

¹¹³ *Hester*, 723 S.W.2d at 556. Among the specific remarks that were made, the minister said that the Hesters “beat their children so badly that they have bruises all over;” they “punish their children by forcing them to lie face down on the bed of a pickup truck and then drive it over plowed ground and bumpy roads;” and “Harold Hester tried to punish Connie Wymer by knocking her into a ditch and then using a bulldozer to cover her with dirt.” *Id.* Additionally, the minister harassed and intimidated the employees of the Hester family to such a degree that they subsequently left their employment with the Hester family causing interference in the family farming business. *Id.* at 550.

¹¹⁴ *Id.* The suit specifically alleged six causes of action: ministerial malpractice, alienation of affections, defamation of character, intentional infliction of emotional distress, invasion of privacy, and interference with contract. *Id.* at 556. The Court of Appeals of Missouri affirmed the lower court’s dismissal of the ministerial malpractice and intentional infliction of emotional distress counts on the basis that neither count sufficiently met the standard of pleading. *Id.*

¹¹⁵ *Id.* at 558.

complaint pleaded a justiciable claim that the minister's conduct posed a substantial threat to public safety, peace, or order.¹¹⁶

In rejecting the minister's defense that the conduct was within his duties as a minister with respect to the count of defamation, the court first noted the concern with suits alleging defamation against clergy because of the prohibition against inquiry into the truth or falsity of religious belief required by the First Amendment.¹¹⁷ However, the court emphasized the distinction in the Supreme Court's jurisprudence of the Free Exercise Clause between the protection of *religious belief* and lack of protection for *secular beliefs* and practices.¹¹⁸ The court thus held that the "claim and proof of defamation . . . may not involve the truth or falsity of religious beliefs" held by Minister Barrett, but proof may be shown that the statements, "although delivered in the milieu of religious practice, were not held as such in good faith but were used to cloak a secular purpose," namely to injure the reputation of the Hester family.¹¹⁹ The court justified its decision thusly,

The denial of legal recourse in such cases engenders a sense of unfairness and frustration in the persons injured and, left unrequited, tends to fester into a substantial threat "to public safety, peace or order." A court, as the organ of government to which a citizen turns for redress of wrongs, therefore, may justly allow the vindication of the right to reputation without constitutional infringement — albeit the words and conduct of defamation were uttered in a religious setting.¹²⁰

The court specifically found that the statements made by the minister were not "of the kind inherently and invariably expressions of religious belief or religious purpose," and, therefore, they were not the kind of statements which would require a prohibited judicial inquiry into the verity and depth of belief.¹²¹

In remanding the defamation claim for trial, the court specified that the validity of the claim turned on whether the Hesters were members of the congregation and, thus, voluntarily consented to the statements as a form of reli-

¹¹⁶ *Id.*

¹¹⁷ *Id.* "A defense based on the Free Exercise Clause, therefore, presents a concern in an action for defamation which does not inhere in the other formulations of tort the petition asserts against Pastor Barnett. That is because defamation involves the truth or falsity of published speech and published speech is a usual means to propagate religious belief." *Id.* (citing *Christofferson v. Church of Scientology of Portland*, 644 P.2d 577 (Or. Ct. App. 1982)). See also *Ballard*, 322 U.S. 78.

¹¹⁸ *Hester*, 723 S.W.2d at 558–59 (citing *Wisconsin v. Yoder*, 406 U.S. 205, 215 (1972)).

¹¹⁹ *Id.* at 558–59.

¹²⁰ *Id.* at 558 (citing *Sherbert v. Verner*, 374 U.S. 398, 403 (1963)); see also *Bear v. Reformed Mennonite Church* 341 A.2d 105, 107 (Pa. 1975).

¹²¹ *Hester*, 723 S.W.2d at 559.

gious discipline.¹²² People may freely consent to being governed by a religious organization, and when they do so, the courts cannot intervene when the religious organization carries out the agreed upon discipline.¹²³ If the Hesters were in fact members of the congregation, they would be bound by the discipline and ecclesiastical policy of the church during their membership, and the remarks of the minister would be protected as ministerial chastening.¹²⁴ If, however, they had not consented to membership in the congregation, the statements would not be protected and would be considered defamation.

In sum, a court must consider the implications of its judicial review of a religious institution's actions against citizens in order not to run afoul of the Free Exercise Clause of the Constitution. This analysis requires a determination of whether the central claim in the tort action is disputing a core religious belief. If the claim requires the court to analyze the verity or strength of such a religious belief, the court must dismiss the action. If the civil action does not require such a prohibited inquiry, then the court must proceed to the analysis of whether the state's regulation of the conduct constitutes a sufficient secular interest to outweigh the religious entity's interest in engaging in it. One of the hallmark determinations in these cases has been whether the affected person was a member of the religious institution at the time of the conduct and thus consented to participation in such conduct. If, however, the affected person is not a member of the religious institution at the time of the conduct in question, the courts are much more likely to find that a sufficient state interest exists in protecting citizens from harmful conduct.

The foregoing analysis of the Free Exercise Clause jurisprudence in the context of civil actions against religious entities is an essential framework through which to view the decision of *Snyder v. Phelps*. The district court's decision in *Snyder* will be analyzed through this framework in the next section in order to determine whether the court followed the proper constitutional line of analysis. This examination will show that the district court reached the legally correct decision when it denied the WBC's Free Exercise Clause defense to the civil action claims of Mr. Snyder.

¹²² *Id.*

¹²³ *Guinn*, 775 P.2d at 774; see also *Watchtower Bible*, 819 F.2d 875.

¹²⁴ *Hester*, 723 S.W.2d at 559. The court here found that there was no intimation in any of the pleadings that the Hesters were members of the church that Minister Barnett administrated or that they ever subjected themselves to the doctrine, religious practices or discipline of the church or its congregation and reversed the lower court's grant of summary judgment for the defendant minister on this issue. *Id.* See also *supra* notes 87 and 92 (discussing the voluntary consent of a congregation member to a church's religious discipline and the protection that exists for religious entities engaging in religious discipline where a member has consented).

B. *The District Court Properly Rejected the WBC's Free Exercise Clause Defense in Snyder v. Phelps*

On February 4, 2008, the Maryland District Court partially upheld a jury verdict against the WBC finding that there was a legally sufficient basis for the verdict and that the compensatory damages of \$2.9 million did not shock the conscience of the court to warrant overturning the verdict.¹²⁵ However, the court also found that the punitive damages award of \$8 million was excessive and reduced that amount to \$2.1 million. In explaining its decision to uphold the jury's verdict, the court specifically rejected the WBC's argument that their actions were entitled to absolute First Amendment protection.¹²⁶ In so doing, the court considered and rejected the WBC's conduct as being protected under the Free Speech and Free Exercise provisions of the First Amendment.¹²⁷ The district court correctly rejected the WBC's religious freedom defense because it properly analyzed the argument within the framework of previous Free Exercise Clause jurisprudence and found it to be without merit.¹²⁸

First, the court's judicial review of the civil action against WBC did not involve a prohibited determination of the verity or truth of the religious beliefs

¹²⁵ *Snyder*, 533 F. Supp. 2d 567.

¹²⁶ The court in this case did not appear to question the WBC's status as a religious entity and proceeded straight to the analysis of the WBC's First Amendment defense. *Id.* at 576. However, the Westboro Baptist Church would likely qualify as a religious entity under the broad definitions used by previous courts in defining such a body. *See supra* notes 65–69. While the record does not address whether the defendants had the authority to marry and bury or whether they performed other activities typical of religious institutions, the writings on their website would support a finding that they contain a general account of man and his nature and relate to issues of life and death. *See* *Founding Church of Scientology v. United States*, 409 F.2d 1146, 1160 (D.C. Cir. 1969). *See also* *Westboro Baptist Church*, www.godhatesfags.com (for further discussion of the beliefs of the Westboro Baptist Church) (last visited Sept. 1, 2009).

¹²⁷ *Snyder*, 533 F. Supp. 2d at 579. Many of the decisions concerning tort claims against religious entities involve a Freedom of Speech defense under the First Amendment as well as a Freedom of Expression defense. In the case of *Snyder v. Phelps*, the defendants alternatively argued that their conduct was protected under the prohibition of state interference with freedom of speech. *Id.* at 578. The Supreme Court has ruled that private individuals could recover damages under a common law defamation claim where the subject of the lawsuit was a matter of private concern. *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 472 U.S. 749, 749 (1985). However, where the person concerned is a public figure or public official, the Supreme Court has found a constitutional privilege to defamatory criticism. *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974). Specifically, the defendants argued that the funeral was a matter of public concern and a public event because his father, Albert Snyder, filed an obituary notice of the funeral in the local newspaper. *Snyder*, 533 F. Supp. 2d at 577. The court found this argument to be completely without merit because the evidence was clear that Albert Snyder did not invite attention and comment when he prepared the funeral for his son but instead intended for the funeral to be private. *Id.* Both Albert Snyder and Father Leo Patalinghug of St. John's Church testified that the funeral was intended to be private. *Id.* As the court stated, "Defendants cannot by their own actions transform a private funeral into a public event and then bootstrap their position by arguing that Matthew Snyder was a public figure." *Id.*

¹²⁸ *See supra* Section II.A.

of the group. Any inquiry of this type would have mirrored the court's inquiry into whether the defendants in *United States v. Ballard* actually believed in their ability to heal incurable diseases as part of the indictment for mail fraud, which the Supreme Court explicitly found to be a violation of the First Amendment's protection of religious expression.¹²⁹ The district court did not conduct any proceeding to determine whether the WBC believed the sentiments which they directed at Lance Corporal Snyder's family or whether these sentiments were actually truth.¹³⁰ Furthermore, the specific causes of action under which the WBC was found to be liable did not include elements which would require the court to make determinations of the truth or strength of their beliefs.¹³¹ Unlike the indictment for fraud in *Ballard*, the elements of intentional infliction of emotional distress did not require the jury to make determinations of truth or verity concerning the beliefs of the WBC defendants, and the district court was thus further able to avoid the complicated problem of jury instructions on this issue that were unconstitutional in *Ballard*.¹³² It is evident that it was not the truth or verity of the WBC's beliefs concerning Lance Corporal Snyder's sexuality that was at issue. Therefore, as the court and jury's review of the conduct of WBC did not involve such a prohibited inquiry, it was proper for the district court to go forward with the next step of analysis — whether the conduct implicated a significant state interest.

In rejecting the WBC's Free Exercise Clause defense, the court found a compelling state interest in establishing tort liability on individuals who engaged in extreme conduct causing others to suffer, even if that tort liability indi-

¹²⁹ *Ballard*, 322 U.S. 78 (1944); see also *supra* notes 73–76 and corresponding text.

¹³⁰ The WBC presented a religious expert who testified as to the nature of the defendants' fire and brimstone religious beliefs; however, this was an attempt to give context to this type of behavior as a common activity of the church rather than as an assertion of the truth of the statements. *Snyder*, 533 F. Supp. 2d at 578. The expert further testified that there was no Biblical or religious connection to defendants' choice of demonstrations at military funerals. *Id.*

¹³¹ In order to prevail in this specific jurisdiction on a claim for intentional infliction of emotional distress, a plaintiff must demonstrate that the "defendant[s], intentionally or recklessly, engaged in extreme and outrageous conduct that caused the plaintiff to suffer severe emotional distress." *Id.* at 580 (quoting *Miller v. Bristol-Myers Squibb Co.*, 121 F. Supp. 2d 831, 839 (D. Md. 2000)). This standard requires that the jury measure the conduct against the standard of "extreme and outrageous conduct" based upon what they themselves consider to be extreme or outrageous rather than what defendants believe. *Id.* The civil conspiracy action requires that there was "an agreement by at least two persons to accomplish an unlawful act, and that the act resulted in damages to Plaintiff." *Id.* at 581–82. Neither of these causes of action require the court or jury to make a factual determination as to truth or verity of beliefs of the WBC.

¹³² The court in *Ballard* instructed the jury that "The issue is: Did these defendants honestly and in good faith believe those things? If they did, they should be acquitted." 322 U.S. at 81. The cause of action for intentional infliction of emotional distress in the *Snyder* case did not require the district court to present the jury with instructions regarding the truth or verity of the WBC's religious beliefs. See generally *Snyder*, 533 F. Supp. 2d 567.

rectly burdened other citizens' religious expression.¹³³ The court began its analysis by noting that an individual's First Amendment rights must be balanced against a state's interest in protecting its citizens.¹³⁴ The court then conducted a balancing analysis of the right of the WBC to religious expression through their protest conduct and "the rights of other private citizens to avoid being verbally assaulted by outrageous speech and comment during a time of bereavement."¹³⁵

The court analogized the conduct of the WBC defendants to the conduct of the Elders in *Guinn v. Church of Christ of Collinsville* and relied on the distinction drawn between liability for pre-withdrawal of membership and post-withdrawal of membership.¹³⁶ Whereas the plaintiff in the *Guinn* case had consented to membership in the Church of Christ and then withdrew her consent to membership, the Snyder family clearly never consented to be bound to any church doctrine established by the WBC because they had never before had any kind of contact or communication with the WBC defendants.¹³⁷ In fact, neither Lance Corporal Snyder nor his family had ever even met any of the members of the WBC.¹³⁸ The WBC did not contact the family prior to the service to inform them of their intentions to protest the service.¹³⁹ The only contact that ever occurred between the Snyder family and the WBC was that which occurred on the day of the funeral and what Mr. Snyder later discovered had been written about his son and published on the WBC website.¹⁴⁰

Furthermore, the WBC's conduct was similar to the conduct in the case of *Hester v. Barnett* where the minister proceeded to injure people who were not even members of his own church.¹⁴¹ Similarly in this case, there existed no bond of trust between minister and adherent. There was no previously agreed to religious doctrine broken. This was simply the action of a religious group targeting complete strangers in order to benefit from the subsequent publicity. Furthermore, the conduct of the WBC at no time invited the family to come forward for religious knowledge and clarification of the ideas of the church.

¹³³ *Snyder*, 533 F. Supp. 2d at 579. The court noted the irony of the WBC's choice to publicize their fundamental beliefs at a funeral in the state of Maryland, which was founded on principles of religious tolerance. *Id.* at 578 n.12.

¹³⁴ *Id.* at 579.

¹³⁵ *Id.*

¹³⁶ *Guinn*, 775 P.2d 766 (The Elders were not liable for pre-withdrawal of membership conduct as the Plaintiff had consented to be governed by the established rules of the church. However, the Elders were found to be liable for the post-withdrawal of membership conduct due to Plaintiff's withdrawal of consent to be bound to church doctrine.).

¹³⁷ *Snyder*, 533 F. Supp. 2d at 580.

¹³⁸ *Id.* at 581.

¹³⁹ *Id.* The Defendants did not contact the family prior to their protest of Lance Corporal Snyder's funeral, but they did feel the need to contact police officials in advance, presumably for their protection and/or advance publicity. *Id.* at 572.

¹⁴⁰ *Id.*

¹⁴¹ 723 S.W.2d 544, 550.

Instead, the WBC's conduct only emphasized the family's alleged damnation directly stemming from their choice of the Catholic religion and their son's choice to join the military. Therefore, the WBC clearly did not establish any consent by the Snyders to membership that would exempt its conduct from the civil action under *Guinn* or *Hester*.

The First Amendment protection established by the Free Exercise Clause was never intended to shield such outrageous conduct as that of the WBC defendants. The jurisprudence on civil actions against religious figures and institutions reflects this understanding of the Free Exercise Clause; it instructs courts as to prohibited inquiries and the proper balance which must be struck between permissible discipline of religious adherents and improper conduct against non-members. The district court's refusal to grant WBC's defense thus accurately incorporates this jurisprudence and as a result correctly protects the rights of the Snyders to be free from outrageous conduct.

C. *Victims of WBC Conduct Should Rely on a Civil Action Response for Relief Rather than State and Federal Legislation*

The novel civil action response utilized by Mr. Snyder against the WBC defendants presents victims of the WBC's behavior with a new form of remedy that will be more appropriate in addressing their concerns than state and federal legislative action. Because the constitutionality of civil actions in response to the conduct of the WBC has been demonstrated in *Snyder v. Phelps*, this recourse will safeguard the interests of mourning families without the risk of punitive claims against the state for unconstitutional regulations that may benefit the WBC.¹⁴²

The remedies created by the states in their tort laws are the most appropriate forum for assessing the conduct of the WBC and for penalizing it when its conduct becomes outrageous. These tort protections established by the state, in actions such as intentional infliction of emotional distress or invasion of privacy, are the only recourse left available to individuals such as the Snyders when a group goes so far as to demonstrate at their personal gatherings accompanied by large signs and shouted epithets.¹⁴³ The determination of when this behavior crosses the line into outrageous conduct is rightly left up to a jury that will apply its own notions of reasonableness to decide what conduct should rise to the level of liability.¹⁴⁴ According to scholars in this area,

¹⁴² See *supra* notes 43–46.

¹⁴³ The district court noted that the WBC complied with local ordinances and police directions with respect to being a certain distance from the church and funeral service. *Snyder*, 533 F. Supp. 2d at 572. Their actions, though morally objectionable, were not criminal.

¹⁴⁴ Civil action judgments “reflect social conventions and tend to reflect what the majority believes to be acceptable behavior.” Howard O. Hunter & Polly J. Price, *Regulations of Religious Proselytism in the United States*, 2001 BYU L. REV. 537, 556 (2001).

The law of torts is a powerful weapon in society's suppression of intolerable activities; its doctrines are flexible and open-ended and the contours of those doctrines often are filled in by juries rather than by legal elites. Tort law is thus extraordinarily responsive to and reflective of societal mores, and serves a useful function in allowing persons who are harmed by another's actions to sue to recover damages for their injuries, judged by a common-sense standard of social tolerance.¹⁴⁵

Because the determination as to what is acceptable conduct comes from the people who compose the jury and represent the interests of all of society, their determinations will likely strike the best balance between the state's interest of preserving the privacy of mourning families and the WBC's interest of expressing its message. These determinations, conducted on a case-by-case basis, will also likely be less restrictive than the blanket funeral protest restrictions which have the aforementioned constitutional implications. In this case, the determination properly rests with the jury composed of people from the society that Maryland seeks to regulate with its state tort laws. In weighing the concerns of both parties', the jury in the *Snyder* case was able to strike a constitutionally proper balance within the constructs of precedent whereas state legislatures attempting to do so may over-regulate the WBC conduct. Thus, by allowing the determination to be accomplished through jury trials of state tort actions, states will avoid the resultant court awards in situations where state statutes are found to be overbroad and unconstitutionally infringe on the activities of the WBC.¹⁴⁶

Additionally, the evaluation of the WBC's conduct in a civil action proceeding and the rejection of the Free Exercise Clause defense in this case serves to protect the Snyders' own choice of worship through the Catholic Church which may not be accomplished by the state and federal legislation. Had the district court agreed with the WBC's defense, the subsequently protected conduct would act as an impediment to the Snyder family's observance of religious rituals.¹⁴⁷ The funeral service picket laws that have been enacted generally focus solely on the context of graveside demonstrations rather than demonstra-

¹⁴⁵ *Id.* On the other hand, there is also the risk that a civil jury will award damages based solely upon the religious conviction of the defendant group. *Id.* at 569. The risk is that the jury will punish socially undesirable behavior that is not also outrageous and extreme as required by the elements of the cause of action. *Id.*

¹⁴⁶ See *supra* notes 43–46.

¹⁴⁷ Cf. *Watchtower Bible*, 819 F.2d at 881 (reasoning that the imposition of tort liability would impermissibly put pressure on religious organizations to forego certain teachings and practices). If tort penalties act as a deterrent to religious activity, it is logical that demonstrations of the nature of the WBC demonstrations accompanying a family's religious observances would be an even greater impediment to future religious activities by the affected family. By arguing that their own conduct is entitled to protection under the First Amendment, the WBC is essentially arguing that the religious expression of the Snyder family in their Catholic rituals is not equally deserving of protection by the state's tort laws.

tions outside of churches.¹⁴⁸ As a result, families who choose to observe religious rituals before they proceed to protected cemetery areas are still vulnerable to the behavior of the WBC. The state's tort protections against outrageous behavior, however, do not restrict those protections to certain times or areas as do some of the funeral picket bans.¹⁴⁹ Thus, these state tort laws offer more encompassing protections to the WBC's victims than the state and federal legislation passed to regulate funeral service demonstrations. Because the district court rejected the WBC's Free Exercise Clause defense and allowed the tort claim to go to the jury, the jury was allowed to weigh the conduct of the defendants against the right of the Snyders to observe their own religious rituals and reach a verdict that protects the interests of all.

Another interesting development in this area of law has been certain states' creations of specific tort causes of action, in their funeral picket bans, to provide a remedy for the harmful conduct during these demonstrations.¹⁵⁰ For example, Mississippi enacted legislation, in addition to its criminal penalties, allowing any surviving member of the deceased's family who is damaged or threatened with loss or injury by reason of a violation to sue for damages, so long as there is credible evidence that a person violated or is likely to violate the state's prohibition against disruptive protest at a funeral service within one hour before, during, or after the service.¹⁵¹ This trend, if noticed and adopted by other states, could provide the WBC's victims with easier access to courts for relief from the group's outrageous behavior. By focusing on the secular conduct that occurs at funeral demonstrations, this type of specific state tort law action will offer a case-by-case analysis of the disruptive protest conduct similar to other state tort law actions that will not be overly restrictive but instead require the fact-finder to examine each specific instance of conduct and weigh it against their own determination of whether the family member suffered a loss or injury from the violation of the statute. While this approach may not fully afford the WBC's victims relief during the funeral service, a series of favorable tort verdicts could chip away at the financial resources that allow the WBC to travel the country protesting at many military funerals.¹⁵² Additionally, this approach will limit this type of conduct without state enactment of funeral demonstration bans

¹⁴⁸ See *supra* notes 39–40.

¹⁴⁹ See *supra* note 131.

¹⁵⁰ See, e.g., MISS. CODE ANN. § 97-35-18 (West 2009), OKLA. STAT. ANN. tit. 21, § 1380 (West 2009).

¹⁵¹ MISS. CODE ANN. § 97-35-18. The main thrust of the statute is to create a misdemeanor penalty for any person who acts with an intent to disrupt a funeral service through protests or pickets within 1000 feet of the location of the service and either during or within one hour preceding or following the service. *Id.* Similarly, Oklahoma provided that, “[n]otwithstanding the penalties provided in subsection E, any district court may enjoin conduct proscribed by this section and may in any such proceeding award damages, including punitive damages, attorney fees or other appropriate relief against the persons found guilty of actions made unlawful by this section.” OKLA. STAT. ANN. Tit. 21, § 1380.

¹⁵² See *infra* note 170.

that may ultimately be found to be unconstitutional and result in verdicts against the states and for the WBC.¹⁵³

As Justice Jackson said in his concurring opinion of *Prince v. Massachusetts*, “[r]eligious activities which concern only members of the faith are and ought to be free — as nearly absolutely free as anything can be.”¹⁵⁴ Yet, “[n]o real freedom to choose religion would exist in this land if, under the shield of the First Amendment, religious institutions could impose their will on the unwilling and claim immunity from secular judicature for their tortious acts.”¹⁵⁵ The WBC is and should be free to practice their religious beliefs in conformance with their established tenets. However, when their conduct becomes harmful to people outside their faith, as in the case of the Snyder family, the state has a compelling interest in ensuring the safety of those people affected despite the incidental burden to the WBC’s conduct. By pursuing the civil action course that is compliant with Free Exercise Clause jurisprudence, plaintiffs in these civil actions will have the effect of regulating WBC’s outrageous conduct through civil penalty verdicts irrespective of the uncertainty associated with the states’ efforts to regulate WBC demonstrations. By encouraging victims of the WBC’s conduct to seek relief through the civil courts, this Note hopes to promote the course of conduct which will give these victims recourse without encouraging state and federal legislative action which may in fact enable the WBC through substantial civil awards.

¹⁵³ See *supra* note 43–45.

¹⁵⁴ *Prince v. Massachusetts*, 321 U.S. 158, 177 (1944).

¹⁵⁵ *Guinn*, 775 P.2d at 779.

D. *Future Implications for Religious Activities Arising from the Snyder v. Phelps Decision*

The Founding Fathers considered the separation of church and state to be so vital that they established this separation in the First Amendment to the Constitution.¹⁵⁶ The separation of church and state has been largely respected by the courts. Most courts who have confronted the question have emphasized the slippery slope potentials of judicial review of religious doctrine.¹⁵⁷ However, where religious entities' conduct has become a threat to the public, these courts have ruled that the state has a compelling interest in the protection of its citizens.¹⁵⁸ These rulings appear to be the exceptions rather than the rule, and one of the main distinguishing characteristics of cases where tort liability has been found for such conduct has been where the affected people were not members of the specific religious institution.¹⁵⁹ As the WBC is a group whose primary targets for their message are individuals with whom they have no religious association, the *Snyder v. Phelps* verdict will likely have a substantial impact on their future activities. Whereas many religions encourage their members to recruit new members to their religious communities, the WBC preaches a message of exclusion and damnation rather than encouraging new members to come into their fold for salvation. This pivotal distinction will likely limit the impact of this ruling on most religious institutions and their clergy while serving as a detrimental blow to the WBC.

¹⁵⁶ Thomas Jefferson articulated the importance of this separation and the distinction between religious opinion and action when he said,

Believing with you that religion is a matter which lies solely between man and his God, that he owes account to none other for his faith or his worship, that *the legislative powers of government reach actions only, and not opinions*, I contemplate with sovereign reverence that act of the whole American people which declared that their legislature should 'make no law respecting an establishment of religion, or prohibiting the free exercise thereof,' thus building a wall of separation between church and State. Adhering to this expression of the supreme will of the nation in behalf of the rights of conscience, I shall see with sincere satisfaction the progress of those sentiments which tend to restore to man all his natural rights, convinced *he has no natural right in opposition to his social duties*.

Braunfield v. Brown, 366 U.S. 599, 604 (1961) (quoting 8 Works of Thomas Jefferson 113) (emphasis added).

¹⁵⁷ See, e.g., *Ballard*, 322 U.S. at 95 (Jackson, J. dissenting) ("Prosecutions of this character easily could degenerate into religious persecution."). In fact, courts generally have applied stricter standards when evaluating cases dealing with regulations concerning religious entities. See, e.g., *Van Shaick v. Church of Scientology of Cal.*, 535 F. Supp. 1125, 1139 (D.C. Mass. 1982) (commenting that "courts generally interpret regulatory statutes narrowly to prevent their application to religious organizations. At times, they will require 'a clear expression of Congress' intent' before subjecting religious organizations to regulatory laws pertaining to other entities." (internal citation omitted)).

¹⁵⁸ See *supra* notes 63–64.

¹⁵⁹ See *supra* notes 95–107.

The WBC is extreme both in its message and its methods for spreading that message. It is the extreme and outrageous nature of its conduct which warranted the imposition of tort liability for its actions, and religious groups who do not conduct their religious activities in such a manner will be largely unaffected by this verdict. Within the Southern Baptist community, Fred Phelps and the WBC are seen to be a completely unaffiliated group whose message is not supported by the teachings of the Baptist church.¹⁶⁰ The Southern Baptist Church is quick to disavow any relationship with the WBC and its methods.¹⁶¹ In fact, the Southern Baptist Church's operational activities appear to be exactly the opposite of those of the WBC — its goal instead is to support through their church a wide array of missionary activities ranging from children's programs to building new churches and other work overseas.¹⁶² These types of religious conduct appear to be aimed at individuals in need who are receptive to both their help and message. Although there is no explicit disavowal of the use of pickets and demonstrations to spread their religious message, this does not seem to be a method which is employed by the Southern Baptist Church in either their ministries or their outreach programs.¹⁶³

The contrasts in the methods employed by both groups illustrate the distinctions that the courts have drawn in allowing states to regulate conduct for the protection of their citizens: whereas the WBC uses demonstrations and epithets against individuals who are not in any way affiliated with their ministry, groups like the Southern Baptists operate missionaries to include people who are receptive to their message. The WBC's conduct exposes it to tort liability when its actions become extreme or outrageous, but the conduct of the Southern Baptists will be protected so long as it does not employ the tactics used by the WBC. It is this distinction in conduct that will make the difference in whether the *Snyder* decision will have any impact on the larger religious community past the impact on the members of the WBC. For groups like the Southern Baptists who conduct themselves with a purpose of helping others and including them in their ministries, their conduct will likely continue to fall within the protection of the First Amendment. However, for groups like the WBC who target unwilling individuals and engage in extreme and outrageous conduct to promote their

¹⁶⁰ Michael Foust, *Night and Day: Stark Differences Between Southern Baptists and Fred Phelps*, SBC LIFE (June 2003), <http://www.sbclife.net/Articles/2003/06/sla6.asp>. In fact, Fred Phelps and his group have picketed Southern Baptist Convention meetings, Southern Baptist churches, and the SBC building in downtown Nashville decrying their "kissy-poo" preaching. *Id.* According to this Southern Baptist Church's beliefs, the position of the WBC is heretical because the Southern Baptists believe that all sinners, including homosexuals, may receive forgiveness through God whereas the WBC preaches that homosexuality leads to eternal damnation. *Id.* See also *supra* note 13.

¹⁶¹ See Foust, *supra* note 160 ("Folks need to realize that this man is not representative of the Christian community.").

¹⁶² Southern Baptist Convention, What is the Cooperative Program?, <http://www.sbc.net/redirect.asp?url=http://www.cpmiissions.net> (last visited Sept. 12, 2009).

¹⁶³ *Id.*

messages, the courts will likely find a compelling state interest in protecting these unwilling individuals.

IV. CONCLUSION

The sight of the members of the Westboro Baptist Church holding signs expressing such sentiments as, “God hates fags,” was, at best, unexpected by the Snyder family on the day that they laid their son Lance Corporal Matthew Snyder to rest. That conduct and the subsequent online publication of the “epic” entitled “The Burden of Lance Cpl. Matthew Snyder” caused the plaintiffs to suffer additional pain and grief on top of the pain of losing their son.¹⁶⁴ Unfortunately, the pain and grief suffered as a result of the WBC’s conduct on that day is not confined to a single incident or a single family; this same pain and grief is felt by the many military families who become the targets of the WBC’s conduct either through its demonstrations at military funerals or its publication of the “Roster of the Damned” on its website.¹⁶⁵

However, these families are not completely without support as many state legislatures have initiated and passed legislation intended to shield them from any protest efforts during the times of their funeral services.¹⁶⁶ Furthermore, the national government passed similar legislation, the Respect for America’s Fallen Heroes Act, also attempting to limit WBC’s demonstrations.¹⁶⁷ However, scholars have decried these legislative enactments as specifically targeting the WBC without attempting to maintain any type of neutrality.¹⁶⁸ By arguing that these statutes are overbroad and not narrowly tailored to the state’s interest of protecting its citizens in a time of mourning, the WBC has scored some successes in the courts.¹⁶⁹

However, the novel approach utilized by Albert Snyder against the WBC — a civil action alleging intentional infliction of emotional distress, among other counts — represents perhaps the most successful avenue of recourse for individuals affected by the WBC’s conduct.¹⁷⁰ By instituting a civil

¹⁶⁴ *Snyder*, 533 F. Supp. 2d at 572.

¹⁶⁵ *See supra* note 34.

¹⁶⁶ *See supra* notes 39–40.

¹⁶⁷ *See supra* note 40.

¹⁶⁸ *See* Ritts, *supra* note 12; Andrea Cornwell, Comment, *A Final Salute to Lost Soldiers: Preserving the Freedom of Speech at Military Funerals*, 56 AM. U. L. REV. 1329 (2007); Lauren M. Miller, Comment, *A Funeral for Free Speech? Examining the Constitutionality of Funeral Picketing Acts*, 44 HOUS. L. REV. 1097 (2007); Cynthia Mosher, Comment, *What They Died to Defend: Freedom of Speech and Military Funeral Protests*, 112 PENN. ST. L. REV. 587 (2007); Christina E. Wells, *Privacy and Funeral Protests*, 87 N.C. L. REV. 151 (2008).

¹⁶⁹ *See supra* notes 43–45.

¹⁷⁰ At least one author has argued that this strategy may be effective if only to bankrupt the group through successful civil action verdicts. MESSAR, *supra* note 31. This strategy is similar to the one pursued by the Southern Poverty Law Center’s Intelligence Project which was created to track hate groups across the country, record their activities, and then use this information in civil

action against the WBC, Albert Snyder was able to get his claim before a jury to evaluate the conduct of the defendants in light of the jury's own sense of what constitutes extreme and outrageous behavior.¹⁷¹ The reviewing court affirmed the verdict ruling that the WBC's conduct was not protected under the First Amendment because the Snyders were not members of the WBC religious organization and had never consented to any religious doctrines or discipline which would require them to submit to such a form of public castigation.¹⁷²

The institution of a civil action against the Westboro Baptist Church represents the best course of action for people, like the Snyders, who are affected by the group's behavior because it allows a jury to evaluate this behavior in light of the community standards of reasonableness and decency. This involves a case-by-case approach which will evaluate the WBC's conduct in light of what occurred at each event rather than evaluating the appropriateness of their religious beliefs overall. Where the group acts to spread their message in a way which does not constitute outrageous and extreme behavior, they will not be found to be liable for that behavior. Furthermore, the courts, in these cases, will act to safeguard the rights of the WBC by explicitly disallowing inquiries into the fundamentals of their belief system in order to determine the truth or verity of their beliefs. This approach justly strikes the appropriate balance between the rights of freedom of expression of the WBC, and others like them, with the right of the state to impose tort penalties on those whose conduct represents a threat to public order.

Additionally, this civil action approach for those who wish to seek recourse against the WBC and its members is more appropriate and likely to be successful than the legislation which has been passed to regulate their conduct. Civil actions are conducted on a case-by-case basis with a new jury deciding whether the behavior in each specific instance meets the standard for tort liability. In the case of the legislative enactments by states, the standards will vary from state to state and may encompass behavior which may not need to be restricted in order to meet the states' goal of protecting mourning citizens' privacy. Furthermore, with the continuing challenges by the WBC to these legislative enactments, their constitutionality is not altogether certain and reliance upon them for protecting citizens' privacy may be premature. And, if these statutes are found to be unconstitutionally restrictive of the religious activities of

lawsuits filed against the Ku Klux Klan. *Id.* While Phelps and his group have expressed their prejudices against homosexuals, they have never preached hatred against African-Americans. According to the group's website, "[T]he Scripture doesn't support racism. God never says 'thou shalt not be black.'" God Hates Fags, Westboro Baptist Church FAQ, <http://www.godhatesfags.com/faq.html> (last visited Sept. 1, 2009). For a more in-depth discussion about the impact of tort law on proselytizing groups, especially in the context of cults and deprogrammers, see Hunter, *supra* note 144.

¹⁷¹ See *supra* note 131 (defining the standard for intentional infliction of emotional distress as a defendant "intentionally or recklessly, engag[ing] in extreme and outrageous conduct that caused the plaintiff to suffer severe emotional distress").

¹⁷² See *supra* Section II.B for the full analysis of this decision.

the WBC, the result may be a verdict against the state and for the WBC. In light of all of these considerations, the approach of private citizens utilizing civil actions against the WBC and its members is the best solution for handling this complex situation. In this way, states are allowed to protect their citizens and respect the principles for which our fallen war heroes have died while protecting the rights of the WBC to practice its religious beliefs.¹⁷³

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¹⁷³ See Ritts, *supra* note 12, at 145 (quoting Ronald K.L. Collins & David L. Hudson, Jr., *A Funeral for Free Speech?*, FIRST AMENDMENT CENTER, Apr. 17, 2006, <http://www.firstamendmentcenter.org/analysis.aspx?id=16775>) (“The highest respect we can pay to our fallen war dead is to respect the principles for which they made the supreme sacrifice. We honor them by honoring those principles of freedom — even when a callous few vainly attempt to demean the dignity rightfully due them.”).

* Notes and Articles Selection Editor, Volume 112 of the *West Virginia Law Review*; J.D. Candidate, West Virginia University College of Law, May 2010; B.A. in Political Science, Women’s Studies, summa cum laude, West Virginia University, 2007. I would like to extend my sincerest thanks to everyone who helped me throughout this Note Process. Specifically, I would like to thank my Note Advisor, Professor andre douglas pond cummings, for his excellent comments and encouragement. Additionally, I would like to thank John Huff, Gabe Wohl, Brandon Stump, Adam Tomlinson, Anna Price, Crystal Canterbury, RJ Alexander, Emily Diederich, and Sarah McDaniel for all their comments and encouragement. Also, my thanks would be incomplete without recognizing my family, Ron, Peyton, Ryder, Emma, and especially my mom, Charlene, who supported me throughout this process and helped me to never give up and strive for my best. Finally, I would like to dedicate this Note to all the families who have been targeted by the WBC’s hateful diatribes. Your sons’ and daughters’ sacrifice and dedication to our country is a legacy that speaks louder than the words of any group ever could.

† This Note received the award for Best Student Note in Volume 112 of the *West Virginia Law Review*.