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

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Articles

A TIME TO MOURN: BALANCING THE RIGHT OF FREE SPEECH AGAINST THE RIGHT OF PRIVACY IN FUNERAL PICKETING

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ABSTRACT

The issue of funeral picketing has received national media coverage and resulted in a frenzy of recent legislation. The group responsible for the funeral picketing, Westboro Baptist Church, has targeted the funerals of soldiers killed in Iraq and Afghanistan, homosexuals, political figures, and even children. Some may dismiss Westboro as a fringe group; however, at least twenty-nine states, the federal government, and the mourners who have been eyewitnesses to the group's tactics have taken notice of and responded to the group's activities.

Funeral picketing raises crucial First Amendment issues, including whether the Supreme Court's interest in protecting unwilling

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listeners and captive audiences is broad enough to cover mourners. This Article reflects on whether the state should recognize mourning as a legitimate interest and how that interest should be properly balanced against the right of free speech. In an attempt to respond to this issue, the majority of state legislatures have produced laws that are unconstitutional because of their geographic overbreadth. This Article examines the legislative response to funeral picketing and proposes ways the statutes can be constitutionally defensible. Additionally, it argues for expansion of the captive audience doctrine and illustrates why privacy in mourning is as important as privacy in the home.

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I. INTRODUCTION

The idea of paying respect to the dead is a concept as old as civilization itself.¹ Respecting the dead and a time of mourning is revered by the religious and the non-religious alike. Some view respecting the dead and a time of mourning as a simple matter of human decency.² The existence of a religious group, specifically a Christian church, choosing to spread its message through picketing at funerals is astonishing. The Christian Bible states that there is a “time for everything, and a season for every activity under heaven,” including a time to mourn.³ It also instructs Christians⁴ to “weep with those who weep,” and “[r]ejoice with those who rejoice.”⁵

The very concept of funeral picketing is a strange paradox.⁶ Death of a friend, acquaintance, or loved one is a universal experience that crosses social class, economic ability, religious beliefs, political status, and ethnic background. Funerals, including military funerals, raise unique privacy concerns. Arguably, attending a funeral can be one of the most private and painful of human experiences. Specific emotions may vary from one funeral to the next; however, the emotional impact of death raises the need for privacy. In a Freedom of Information Act case, a unanimous Supreme Court noted that

1. Archaeologists identified evidence of funerary behavior “within the last 100,000 years, in the Middle and Upper Palaeolithic.” MIKE PARKER PEARSON, *THE ARCHAEOLOGY OF DEATH AND BURIAL* 148 (D. Gentry Steele ed., 2000). Early Neanderthal remains “provide evidence of mortuary practices in the form of body positioning, grave construction, placing of artifacts and animal parts in the grave, the arrangement of stones around the grave, and even the placing of flowers in the grave.” *Id.* There is also evidence of formal burial behavior occurring before Neanderthals. *Id.* at 149; *see also* Paul Pettitt, *When Burial Begins*, *BRIT. ARCHAEOLOGY*, Aug. 2002, available at <http://www.britarch.ac.uk/BA/ba66/feat1.shtml> (describing early funerary behavior dating back as far as 300,000 years ago).

2. *See* Anita Bernstein, *Treating Sexual Harassment with Respect*, 111 *HARV. L. REV.* 445, 516–17 & nn. 437–38 (1997) (noting that laws have long existed to enforce respect in the handling and burying of the dead). The American legal system demonstrates its respect for the dead in tort and criminal law. *Id.* It is an offense in many jurisdictions to desecrate a dead body. For example, possible tort actions related to corpses include intentional mishandling of a dead body and negligent or wrongful interference with a dead body. Remigius N. Nwabueze, *Biotechnology and the New Property Regime in Human Bodies and Body Parts*, 24 *LOY. L.A. INT’L & COMP. L. REV.* 19, 29 (2002). *See generally* RESTATEMENT (SECOND) OF TORTS § 868 (1979 & Supp. 2007) (describing the cause of action in tort of “Interference with Dead Bodies” and reporting cases on the same).

3. *Ecclesiastes* 3:4.

4. The term “Christian” is employed by a variety of individuals to mean different things. The most common definition is “a believer in and a follower of Jesus Christ.” MERILL F. UNGER, *THE NEW UNGER’S BIBLE DICTIONARY* 226 (R.K. Harrison ed., 1988).

5. *Romans* 12:15.

6. Although the term “funeral” is used throughout this Article, it is meant to encompass all services to honor the dead, including memorial services, graveside services, and wakes, no matter where they are held.

“[f]amily members have a personal stake in honoring and mourning their dead and objecting to unwarranted public exploitation that, by intruding upon their own grief, tends to degrade the rites and respect they seek to accord to the deceased person who was once their own.”⁷

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

Unlike most civilian funerals, military funerals include a public dimension. Funerals for soldiers killed in war generate greater publicity. Veteran funerals are also entitled to certain military funeral honors,⁹ including the presentation of a United States flag and the playing of Taps.¹⁰ What the United States must answer as a society is whether a funeral is an appropriate time or place for protesting, and whether the right to free speech, even that speech expressed in a traditional public forum, should have limits.¹¹ Should there be a legally recognized time to mourn?

7. Nat'l Archives and Records Admin. v. Favish, 541 U.S. 157, 168 (2004) (unanimous). If the Supreme Court can state this with respect to a request for documents, surely a case can be made for protecting mourners from physical and emotional intrusions.

8. Paul C. Rosenblatt, *Grief in Small-Scale Societies*, in DEATH AND BEREAVEMENT ACROSS CULTURES 27, 30 (Colin Murray Parkes et al. eds., 1997).

9. 10 U.S.C. § 1491(a)–(c) (2000); see also Major Samuel W. Morris, *A Survey of Military Retirement Benefits*, 177 MIL. L. REV. 133, 152 & n.117 (2003) (citing U.S. DEP'T OF VETERANS' AFFAIRS, FEDERAL BENEFITS FOR VETERANS AND DEPENDENTS 46 (2001)) (explaining the benefits available for “eligible veterans”). Individuals who join the military have an assurance that their surviving family members will feel support from the tradition the military offers through a military honors funeral. The playing of Taps, the display of the flag, and a gun salute can have an important meaning to military families. The symbols used in military funerals are meant to show honor toward deceased soldiers and their families. Unfortunately, the very symbols used to honor deceased soldiers may trigger funeral picketers to action. Westboro Baptist Church claims it does not picket private funerals, only public ones. See A Message From Westboro Baptist Church (WBC) to Lawmakers on Legislation Regarding Her Counter-Demonstrations at Funerals of Dead Soldiers (Dec. 12, 2005), http://www.godhatesfags.com/writings/20051212_legislation-message.pdf [hereinafter A Message from WBC to Lawmakers] (“If any family of a dead soldier wants a private funeral, all they have to do is tell the military and bikers to stay home, and have a private funeral. . . . When they do, there is no public event.”). Consequently, family members may escape picketing if they acquiesce to a funeral conforming to Westboro’s definition of private, and relinquish their right to a military burial.

10. 10 U.S.C. § 1491(c) (2000). Taps is a bugle call traditionally played at military funerals and memorial services in the United States. It was written during the Civil War by General Daniel Adams Butterfield and Oliver Willcox Norton in 1862. See Jari A. Villanueva, *Twenty-four Notes That Tap Deep Emotions*, <http://www.arlingtoncemetery.net/taps.htm> (last visited Feb. 20, 2008) (providing historical background on Taps).

11. The First Amendment right of free speech is esteemed, but it is not absolute. See Patti Stanley, *Constitutional Law—First Amendment—Does the Right to Free Speech Trump the Right to Worship?*, 23 U. ARK. LITTLE ROCK L. REV. 273, 273 (2000) (acknowledging that the

Funeral picketing is a novel concept pioneered by a group identified as Westboro Baptist Church (Westboro).¹² Westboro has led protests and demonstrations for over fifteen years, but recently gained substantial media and legislative attention when it began to protest at military funerals.¹³

right of free speech is not absolute); Note, *Hate Is Not Speech: A Constitutional Defense of Penalty Enhancement for Hate Crimes*, 106 HARV. L. REV. 1314, 1317 (1993) (“[T]he First Amendment does not give absolute protection to every act that has any communicative content.”).

12. Westboro has no known affiliation with mainstream Baptist conventions like the Southern or National Baptist Convention. See Brian Goodman, *Funeral Picketers Sued By Marine's Dad: Lawsuit Claims Anti-Gay Church Furthers Grief for Families of Dead*, CBS NEWS, July 28, 2006, <http://www.cbsnews.com/stories/2006/07/27/national/main1843396.shtml> (proclaiming that Westboro is not affiliated with any “mainstream Baptist organization”). Westboro’s pastor and founder, Fred Phelps, is a former civil rights attorney. Judy Keen, *Funeral protesters say laws can't silence them*, USA TODAY, Sept. 14, 2006, at 5A. The picketing activities of the group are unique to Westboro and have not been practiced by any Baptist, Christian, or other religious group. See The Westboro Baptist Church Frequently Asked Questions, <http://www.godhatesfags.com/faq.html> (last visited Feb. 20, 2008) [hereinafter Westboro, Frequently Asked Questions] (describing Westboro’s picketing as “unique”). Westboro has been described by some as a hate group. See Southern Poverty Law Center, *Anti-Gay Extremism*, <http://www.splcenter.org/intel/intelreport/article.jsp?aid=742> (last visited Feb. 20, 2008) (referring to Westboro as a “notorious anti-gay hate group”). Westboro clearly does not see itself as a hate group, and denounces racism and physical violence; rather, it has expressed intolerance for what it sees as sin. See Westboro, Frequently Asked Questions, *supra* (stating that the group does not believe in physical violence or racism, but that God preaches against homosexuality). Two of the sins identified by Westboro are homosexuality and idolatry. See A Message From WBC to Lawmakers, *supra* note 9. Westboro believes America has embraced homosexuality and is consequently being punished. See *id.* (proclaiming that soldiers in Afghanistan and Iraq were raised hearing about acceptance of homosexuality and that this “generation [is] now being blown to bits by IEDs”). In Westboro’s eyes, the terrorist attacks on September 11, 2001, and the deaths of American soldiers killed in Iraq and Afghanistan, were an example of God’s disgust toward America. Press Release, Westboro, Thank God for Tsunami. Thank God for 3,000 dead Americans! (Jan. 1, 2005), http://www.godhatesfags.com/fliers/jan2005/Tsunami_1-1-2005.pdf; Press Release, Westboro, America. A sodomite nation of flag-worshipping idolaters (May 11, 2006), http://www.godhatesfags.com/fliers/may2006/20060511_week-777.pdf. According to Westboro, idolatry includes worshiping the dead instead of God by elevating them to the status of heroes. A Message From WBC to Lawmakers, *supra* note 9. Westboro believes God’s wrath has turned against America. See *id.* (“[American lawmakers’] acts are all equally impotent under the force of the condign wrath of the Almighty God!”). Westboro is the only such group as yet to view funerals as an appropriate forum to spread its message; however, their relative success in gaining publicity may lead other groups to begin picketing at funerals as well.

13. See, e.g., Lizette Alvarez, *Outrage at Funeral Protests Pushes Lawmakers to Act*, N.Y. TIMES, Apr. 17, 2006, at A14 (reporting that states and Congress are beginning to pass laws restricting Westboro’s funeral demonstrations, and reflecting the attention the media has given the issue).

This Article proposes a balance between the right to mourn and the right to free speech.¹⁴ Part II provides background on Westboro's First Amendment activities, including the nature of its speech and motivations.

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

Part IV will examine the constitutional scrutiny of speech in a public forum in light of the legislative response by the federal and numerous state governments. In less than two years, over twenty states have enacted legislation to address the issue of funeral picketing. Part IV examines the common themes in the legislation and addresses whether the legislation will be viewed as content based or content neutral. The statutes enacted thus far do not attempt to restrict Westboro's message, but impose time, place, and manner restrictions. The legislation will likely be viewed as content neutral by the courts. Finally, Part IV examines and critiques three constitutional challenges to the recent legislation.

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

II. FUNERAL PICKETING AND WESTBORO

Funeral picketing raises important constitutional concerns that go beyond Westboro. Nonetheless, understanding Westboro and its motivations is essential to understanding the speech interests at issue.¹⁵ Westboro has inspired twenty-seven legislative bodies into ac-

14. In addition to protecting free speech, the First Amendment protects the free exercise of religion. U.S. CONST. amend. I. Although protection under the Free Exercise Clause can be asserted by Westboro and the mourners, it is outside the scope of this Article.

15. Most information about Westboro and its beliefs are located on its various websites. See Westboro, *Frequently Asked Questions*, *supra* note 12 (providing information about Westboro and its beliefs); Westboro, *God Hates America Home Page*, <http://www.godhatesamerica.com> (last visited Feb. 20, 2008) [hereinafter Westboro, *God Hates America Home Page*] (same). Based on the websites and the various press releases therein, it seems Westboro's primary goal is to publicize its message. The message appears to be about God's purported judgment of America for its sins, particularly America's alleged support of homosexuality. God's wrath, the group believes, is evident in natural disasters, Westboro, *Thank God For Katrina* (Aug. 31, 2005), http://www.godhatesfags.com/features/20050831_thank-god-for-katrina.html, terrorist attacks, Press Release, Westboro,

tion in less than two years.¹⁶ Members of Westboro have been subjected to threats and abusive language during their protests, although they are cautious to abide by local laws.¹⁷ The Southern Poverty Law Center identified Westboro as a hate group,¹⁸ while Westboro identifies itself as a religious group.¹⁹ If Westboro is a hate

Thank God for Tsunami. Thank God for 3,000 dead Americans! (Jan. 1, 2005), http://www.godhatesfags.com/fliers/jan2005/Tsunami_1-1-2005.pdf, and soldiers dying in the wars in Afghanistan and Iraq, Press Release, Westboro, America. A sodomite nation of flag-worshipping idolaters (May 11, 2006), http://www.godhatesfags.com/fliers/may2006/20060511_week-777.pdf. The group's message is also evident in their protest signs: "Thank God for Dead Soldiers," and "Thank God for IEDs." *McQueary v. Stumbo*, 453 F. Supp. 2d 975, 984 (E.D. Ky. 2006). The acronym "IEDs" refers to Improvised Explosive Devices, homemade devices designed to cause death or injury. Although Westboro's speech may implicate the fighting words doctrine, that doctrine's application to funeral picketing is unlikely, and thus outside the scope of this Article. *See generally* *Chaplinsky v. New Hampshire*, 315 U.S. 568, 569–72 (1942) (explaining that fighting words are words which can inflict injury and tend to lead to breached peace).

16. David L. Hudson Jr., Assembly, Overview of Funeral Protests, (Oct. 2006), http://www.firstamendmentcenter.org/Assembly/topic.aspx?topic=funeral_protests [hereinafter Hudson, Funeral Protests].

17. *See* Molly McDonough, *Picket Fencing*, 92 A.B.A. J. 16, 18 (2006) (describing Westboro as cautious, frequently notifying the media and local law enforcement, agreeing on a time and place for the demonstration, and abiding by law enforcement directives). On its website, Westboro explains its picketing activities:

We stand at a respectful distance, on lawfully accessed public right of ways, and hold up some signs with words. . . . When they falsely claim the soldier is in heaven, we're going to speak words of truth, that the soldier is in hell. When the soldier's family members walk hundreds of feet, sometimes hundreds of yards, to stand squarely in front of us and cuss us, we're going to remind them that their loved one is going to cuss them eons in hell for lying to them on the important matters of eternity.

A Message From WBC to Lawmakers, *supra* note 9.

18. *See Alvarez*, *supra* note 13, at A14 (indicating that the Southern Poverty Law Center has put Westboro "on its watch list").

19. The group identifies itself as Baptist, a Christian denomination. The Westboro Baptist Church Home Page, <http://www.godhatesfags.com/written/wbcinfo/aboutwbc.html> (last visited Feb. 20, 2008) [hereinafter Westboro Home Page]. According to its website, the group professes to follow the teachings of Sixteenth Century theologian John Calvin. *Id.* On the organization's manifesto, Westboro calls itself a five-point Calvinism church. *Id.* Calvinism at its extreme results in hyper-Calvinism, which some scholars consider "an aberration from true Calvinism." IAIN H. MURRAY, *SPURGEON V. HYPER-CALVINISM: THE BATTLE FOR GOSPEL PREACHING* 40 (1997). For example, while Christianity as a religion is characterized for its outreach to reconcile sinners to God through salvation, hyper-Calvinism essentially believes God will save only those he has preselected to save, thus outreach to others (i.e., "witnessing") is unnecessary. Westboro has not directly identified itself as embracing hyper-Calvinism, but evidence of hyper-Calvinism is present in the FAQ section of the group's website. *See* Westboro, Frequently Asked Questions, *supra* note 12 (stating in response to the question "Doesn't the Bible say that God loves everyone," that "God certainly is love, toward His elect (His children). But He certainly is not love toward the reprobate (children of the devil).").

group, a primary target of its hate is homosexuality.²⁰ Westboro believes it is spreading religious messages, not political ones.²¹ Picketing is one of the primary avenues the group uses to spread its message.²² Picketing is a relatively low-cost form of expression and Westboro's picketing has generated tremendous publicity.

The picketing has targeted gatherings as diverse as gay pride weeks, the Southern Baptist Convention, the American Civil Liberties Union, and Billy Graham Crusades.²³ The group, however, first gained substantial media attention in 1998 when it picketed the funeral of Matthew Shepard, a young man who was murdered because of his sexual orientation.²⁴

The group has not limited its picketing activities to known homosexuals. Other notable funerals Westboro has picketed include that of Coretta Scott King,²⁵ Ronald Reagan,²⁶ Chief Justice William Rehn-

20. Westboro Home Page, *supra* note 19. Although Westboro has been very vocal regarding homosexuality, it is not the group's sole concern. In addition to viewing homosexuality as a sin, Westboro is critical of forms of idolatry, also a sin in the group's view. See A Message From WBC to Lawmakers, *supra* note 9 (stating that Westboro believes America worships the dead and that "[t]his [is a] distinct form of idolatry"). The United States, it claims, has committed idolatry by worshiping the dead through memorial services instead of worshiping God. *Id.*

21. In a press release, the group stated: "We aren't anti-war protesters; we aren't anti-don't-ask-don't-tell protesters; we're the prophets of God. We don't care who's in office; we don't care about your politics; we don't care about your policies on the war." A Message From WBC to Lawmakers, *supra* note 9.

22. Westboro, Frequently Asked Questions, *supra* note 12. The group explains on its web page that other means of spreading its message include press releases, its web page, faxes, and television. *Id.* Arguably, if limits were placed on funeral picketing the group would still have ample alternative means of communicating its message. See discussion *infra* Part V.A.

23. See Westboro, Flier Archive (2006), <http://www.godhatesfags.com/fliers/flierarchive2006.html> (last visited Feb. 20, 2008) for a list of the group's past fliers and the events at which they were used. Interestingly, the American Civil Liberties Union (ACLU), criticized by Westboro as the "Anti-Christ Lawsuit Union" and the "Anal Copulators & Lesbians Union," Press Release, Westboro (Dec. 16, 2003), http://www.godhatesamerica.com/ghfmir/fliers/dec2003/Aclu_12-16-2003.pdf, is representing the group in its challenge against the Missouri funeral picketing statute. Press Release, ACLU of Eastern Missouri, Funeral Protest Challenge (July 21, 2006), <http://www.aclu-em.org/pressroom/2006pressreleases/72106funeralprotestchallen.htm>.

24. Goodman, *supra* note 12. Westboro displays on its website the number of days it believes Matthew Shepard has been in hell on its "Gospel Memorial to Matthew Shepard." Westboro, Gospel Memorial to Matthew Shepard, <http://www.godhatesfags.com/library/memorials/matthewshepardmemorial.html> (last visited Feb. 20, 2008). While the group claims that they do not support Shepard's murder, they are quick to say that Shepard "got himself killed" looking for homosexual sex. *Id.* The site includes a photograph of Shepard with red flames surrounding his face. *Id.*

25. Press Release, Westboro, WBC to Picket the Funeral of Coretta Scott King (Feb. 3, 2006), <http://www.godhatesamerica.com/pdf/king.pdf>.

quist,²⁷ and Fred Rogers of the television show, “Mr. Rogers’s Neighborhood.”²⁸ Westboro also appears at other tragic events that generate media coverage, like the funerals of coal miners killed in West Virginia,²⁹ and children.³⁰ According to its website, the group believes funerals are the perfect time to spread its message because they are events at which people consider their own mortality.³¹ While funerals do not appear to be “the perfect time” to spread political messages, individuals do tend to be more vulnerable at funerals:

[T]he idea of death, the fear of it, haunts the human animal like nothing else; it is a mainspring of human activity—activity designed largely to avoid the fatality of death, to overcome it by denying in some way that it is the final destiny for man . . . the fear of death is indeed a universal in the human condition.³²

Although Westboro has been demonstrating for over fifteen years, it did not motivate the general public into action when its members picketed the funerals of targeted political figures or known homosexuals.³³ In fact, Westboro’s presence at the funerals of Matthew Shepard, Coretta Scott King, Ronald Reagan, and Chief Justice Rehnquist received hardly any media attention or legislative response.³⁴ It was not until Westboro’s funeral picketing activities hit a

26. Press Release, Westboro, Picketing of Ronald Reagan’s Funeral (June 7, 2004), http://www.godhatesfags.com/fliers/jun2004/Reagan_Funeral_Schedule_6-7-2004.pdf.

27. Press Release, Westboro, Westboro to Picket Funeral of Chief Justice William Rehnquist (Sept. 5, 2005), http://www.godhatesfags.com/fliers/sep2005/20050905_rehnquist-funeral.pdf.

28. Phillip Elliott, *Group to Demonstrate at Services for Local Soldier Killed in Iraq*, EVANSVILLE COURIER & PRESS, Jan. 6, 2006, at A1.

29. Press Release, Judgment in West Virginia! Thank God for His Outpoured Wrath and for 12 Dead Miners (Jan. 6, 2006), <http://www.godhatesamerica.com/pdf/wvminers.pdf>.

30. Press Release, Westboro, WBC to Picket Funerals of Pennsylvania School Girls (Oct. 4, 2006), http://www.godhatesfags.com/fliers/oct2006/20061004_amish-picket-cancelled.pdf [hereinafter Press Release, Pennsylvania School Girls] (picket ultimately cancelled in exchange for media air time); Press Release, Westboro, WBC to Picket the Funeral of Little Year-old Pennsylvanian Nyia Page (Feb. 9, 2007), http://www.godhatesfags.com/fliers/feb2007/20070209_nyia-page-funeral.pdf.

31. Westboro, Frequently Asked Questions, *supra* note 12.

32. PEARSON, *supra* note 1, at 142 (quoting ERNEST BECKER, *THE DENIAL OF DEATH*, at ix (1973)).

33. McDonough, *supra* note 17, at 16.

34. The first state to enact legislation in response to Westboro’s activities was Westboro’s home state of Kansas. Hudson, Funeral Protests, *supra* note 16; *see also* KAN. STAT. ANN. § 21-4015 (1995). Westboro successfully argued that the Act was overly broad and it was amended. *Phelps v. Hamilton*, 122 F.3d 1309, 1323 (10th Cir. 1997); *see also* Hudson, Funeral Protests, *supra* note 16. Massachusetts and Oklahoma had similar laws

raw nerve—the funerals of deceased soldiers killed in Iraq and Afghanistan—that legislatures and the public took notice.³⁵

Although Westboro is a relatively small organization,³⁶ it has had a large impact on several states in a short period of time. According to the First Amendment Center, between 2005 and 2006 thirty-four states saw legislation addressing funeral picketing proposed, with twenty-seven of those states ultimately passing such laws.³⁷ Many of the states passed emergency legislation in reaction to the group threatening to picket funerals in their states.³⁸ The knee-jerk legislative responses from the different states are similar in many aspects. Whether courts will interpret the laws as content neutral or content based will be the key to their survival. Westboro's activities have raised an important issue that needs further clarification: how to strike a balance between the right to mourn and the right of free speech.

III. PROTECTING THE RIGHT TO MOURN AS A LEGITIMATE GOVERNMENTAL INTEREST

A. *The Right to Mourn and Privacy*

An important issue in determining whether a statute is constitutional is the governmental interest involved. The governmental interest involved in the funeral picketing statutes is protection of what I characterize as “the right to mourn.”³⁹ The distinct problem with balancing the right to mourn against the right of free speech is that free speech is a well-recognized fundamental right.⁴⁰ The right to mourn is not. The right to mourn is a concept based on the need for individuals to mourn in peace. It includes an interest in respecting privacy during the mourning process and a desire to protect individuals from additional emotional distress.

criminalizing disruption of a funeral. MASS. ANN. LAWS ch. 272, § 42 (LexisNexis 1998); OKLA. STAT. ANN. tit. 21, § 1166 (West Supp. 2007).

35. McDonough, *supra* note 17, at 16.

36. Interestingly, Westboro consists of seventy-five members, many of whom are related to the pastor, Fred Phelps, by birth or marriage. Dan Lavoie, CHI. SUN-TIMES, Apr. 20, 2006, at 6.

37. Hudson, Funeral Protests, *supra* note 16.

38. E.g., Dennis Hoey, *Church Group Targets Fallen Soldier's Funeral*, PORTLAND PRESS HERALD, Mar. 23, 2006, at A1.

39. Another governmental interest is to protect unwilling listeners. See discussion *infra* Part V.B.

40. The Supreme Court has stated that “citizens must tolerate insulting, and even outrageous, speech in order to provide ‘adequate “breathing space” to the freedoms protected by the First Amendment.’” *Boos v. Barry*, 485 U.S. 312, 322 (1988) (quoting *Hustler Magazine, Inc. v. Falwell*, 485 U.S. 46, 56 (1988)).

The Court has accepted most interests articulated by the government as legitimate,⁴¹ including an interest in noise reduction,⁴² esthetics,⁴³ public safety,⁴⁴ and protecting citizens from unnecessary and unwanted emotional distress.⁴⁵ Although the Supreme Court has not specifically recognized the right to mourn, it might be considered an extension of the greater privacy right.⁴⁶ Justice Brandeis gave birth to the right of privacy in a dissenting opinion when he discussed the general “right to be let alone.”⁴⁷ Traditionally, the right to privacy related to freedom of choice in marriage, sex, and reproduction.⁴⁸ Although the right to mourn has not yet been established, courts have held that the right of privacy encompasses other rights, including the rights of unwilling listeners and the right to worship.⁴⁹

Justice Brandeis described the right to be “let alone” as “the most comprehensive of rights and the right most valued by civilized men.”⁵⁰ Justice Brandeis’ right to be “let alone” was asserted to support the privacy rights of the unwilling listener in *Hill v. Colorado*.⁵¹ *Hill*, an abortion buffer-zone case, evaluated the constitutionality of a state

41. See generally JOHN E. NOWAK & RONALD D. ROTUNDA, PRINCIPLES OF CONSTITUTIONAL LAW § 16 (2d ed. 2005) (outlining the Court’s First Amendment jurisprudence and its willingness to accept most government interests in curtailing speech as legitimate).

42. See *Ward v. Rock Against Racism*, 491 U.S. 781, 803 (1989) (holding that a city’s sound-amplification guideline was constitutional).

43. See *City Council v. Taxpayers for Vincent*, 466 U.S. 789, 816–17 (1984) (holding that the government’s interest in avoiding visual “clutter” was sufficient to justify a content-neutral restriction on signs).

44. *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 475 (1996).

45. *Hill v. Colorado*, 530 U.S. 703, 729 (2000) (upholding a statute imposing certain physical space restrictions in order to protect people entering health care facilities from unwelcome encounters).

46. The right of privacy was formally developed in *Griswold v. Connecticut*, 381 U.S. 479, 483 (1965). Justice Douglas, writing for the majority, explained that the right is found in the penumbras of guarantees of the Bill of Rights. *Id.* at 483–84.

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

48. In *Roe v. Wade*, Justice Blackmun recognized the right of privacy, whether based on the Fourteenth Amendment or the Ninth Amendment, as broad enough to include a woman’s right to have an abortion. 410 U.S. 113, 153 (1973). Constitutional protection for privacy was asserted more recently in *Lawrence v. Texas* when the Supreme Court struck down a Texas law prohibiting homosexual activity. 539 U.S. 558, 578–79 (2003).

49. See, e.g., *Hill*, 530 U.S. at 718 (recognizing a patient’s interest in remaining free from unwanted communication from protesters when entering a health care facility); *St. David’s Episcopal Church v. Westboro Baptist Church, Inc.*, 921 P.2d 821, 830 (Kan. Ct. App. 1996) (concluding the right to worship is an important interest).

50. *Olmstead*, 277 U.S. at 478 (Brandeis, J., dissenting).

51. 530 U.S. at 716–17.

statute that regulated speech within 100 feet of the entrance to health care facilities.⁵² The statute created a bubble zone that prohibited individuals from approaching closer than eight feet without consent of the speaker.⁵³ The Court held in a 6-3 decision that the statute was a valid content-neutral time, place, and manner regulation.⁵⁴ One of the most significant aspects of *Hill* was the Court's decision to balance the interests of unwilling listeners against the right of free speech outside the home.⁵⁵ Justice Stevens, writing for the majority, explained that "[t]he right of every person 'to be let alone' must be placed in the scales with the right of others to communicate."⁵⁶ There is no time when the right to be let alone would be more poignant than when one is grieving the loss of a loved one and attending rituals related to burial.

Burial customs help satisfy some essential psychological, religious, and social needs.⁵⁷ Funeral practices help the bereaved find comfort and accept the reality of death. A funeral is the most important time to be left alone. Westboro's picketing of funerals confronts mourners

52. *Id.* at 707. *Hill* is an imperfect analogy because it involved the recognized right to abortion. Yet, *Hill* remains essential because of the Court's discussion of the interests of unwilling listeners. In a footnote, the majority clarified that the right to be let alone is "more accurately characterized as an 'interest' that States can choose to protect in certain situations." *Id.* at 716-17 n.24. One of the reasons *Hill* is so significant is that it attempted to balance an important interest against the fundamental First Amendment right of free speech.

53. *Id.* at 707.

54. *Id.* at 725.

55. *Id.* at 714-16. The Court addressed the right of unwilling listeners in the limited context of the privacy of one's home in *Frisby v. Schultz*. See 487 U.S. 474, 477 (1988) (construing the statute to only prohibit targeted picketing in front of specific residences and explaining "[o]ne important aspect of residential privacy is protection of the unwilling listener"); see also discussion *infra* Part V.B.

56. *Hill*, 530 U.S. at 718 (quoting *Rowan v. U.S. Post Office Dep't*, 397 U.S. 728, 736 (1970)). The Court's recognition of the right of unwilling listeners has received substantial criticism. See, e.g., *id.* at 751 (Scalia, J., dissenting) ("[T]he 'right to be let alone' . . . is not an interest that may be legitimately weighed against the speakers' First Amendment rights . . ."); William E. Lee, *The Unwilling Listener: Hill v. Colorado's Chilling Effect on Unorthodox Speech*, 35 U.C. DAVIS L. REV. 387, 390 (2002) (claiming that *Hill*'s protection of a privacy interest of unwilling listeners "is a house of cards that collapses upon close examination"); Jamin B. Raskin & Clark L. LeBlanc, *Disfavored Speech About Favored Rights: Hill v. Colorado, the Vanishing Public Forum and the Need for An Objective Speech Discrimination Test*, 51 AM. U. L. REV. 179, 202 (2001) ("The Court's surprising identification of the unwilling listener interest as a strong potential counterweight to traditional public forum free speech rights is a most troubling development, but also puzzling in its doctrinal ramifications.").

57. Rev. William A. Wendt, *Death Rituals*, AM. J. HOSPICE CARE, Winter 1984, at 24, 25-26.

during a vulnerable period.⁵⁸ It is because of this vulnerability that the right to privacy should be respected.

B. Mourning as an Important Value

The Supreme Court has recognized the emotional and physical impact of First Amendment activities on emotionally vulnerable individuals such as medical patients and their families.⁵⁹ As the Court explained in *NLRB v. Baptist Hospital, Inc.*,⁶⁰ “[h]ospitals, after all, are . . . where patients and relatives alike often are under emotional strain and worry, where pleasing and comforting patients are principal facets of the day’s activity, and where the patient and his family . . . need a restful, uncluttered, relaxing, and helpful atmosphere.”⁶¹ Similarly, in *Hill*, the Court expressed concern over abortion protesters closely approaching patients who “are often in particularly vulnerable physical and emotional conditions.”⁶² The emotional distress involved in bereavement is well documented, and a state’s interest in minimizing further distress should be considered legitimate.⁶³

The loss of a loved one can trigger the grieving process.⁶⁴ It is a time of great vulnerability when people question their lives, faith, and mortality. Although people grieve in different ways, feelings of grief are only exacerbated when special circumstances surround the death.⁶⁵

58. On its website’s FAQ, the group explained that they picket funerals “[t]o warn the people who are still living that unless they repent, they will likewise perish. When people go to funerals, they have thoughts of mortality, heaven, hell, eternity, etc., on their minds. It’s the perfect time to warn them of things to come.” Westboro, Frequently Asked Questions, *supra* note 12.

59. See *Hill*, 530 U.S. at 729–30 (upholding a state statute regulating the free speech rights of visitors to a health care facility because, “[p]ersons who are attempting to enter health care facilities—for any purpose—are often in particularly vulnerable physical and emotional conditions”).

60. 442 U.S. 773 (1979).

61. *Id.* at 783–84 n.12 (quoting *Beth Israel Hosp. v. NLRB*, 437 U.S. 483, 509 (1978) (Blackmun, J., concurring)).

62. *Hill*, 530 U.S. at 729.

63. See, e.g., Brief Amicus Curiae of the American Center for Law & Justice Supporting Defendants and Urging Denial of Plaintiff’s Motion for Preliminary Injunction at 9, *Phelps-Roper v. Nixon*, 504 F. Supp. 2d 691 (W.D. Mo. 2007) (No. 06-cv-4156) (“[T]he emotional vulnerability of bereaved funeral mourners would in most cases exceed that of home residents as well as those who are entering health care facilities.”).

64. “Grief is a wholly natural reaction to the loss of a cherished object or person. While there are cultural variations, particularly with regard to bereavement rituals, there are consistent themes of grieving and behaviour.” Susan Klein & David A. Alexander, *Good Grief: a medical challenge*, 5 *TRAUMA* 261, 262 (2003) (internal citations omitted). Emotions expressed by bereaved individuals may include shock or denial.

65. See *id.* (explaining that the nature of the death can implicate how people grieve).

Regardless of whether death is viewed as a time of celebration or mourning, it is a deeply private time. The pain of the bereaved is even more pronounced when the death involves a life sacrificed because of the tragedy of violence or war. Some scholars have suggested that survivors are comforted by feelings that their loved one died for a noble cause.⁶⁶

Military deaths can be especially painful because the deaths tend to be abrupt.⁶⁷ Although the ages of soldiers killed in Iraq and Afghanistan vary, a large number have been in their early twenties.⁶⁸ In addition to the tragedy of a premature death, some families must conduct services without a body or with a closed casket. For a loved one trying to come to grips with death, these issues make the emotional distress experienced even more pronounced.⁶⁹ Taunting by picketers proclaiming to mourners that their loved one is going to hell reasonably results in additional emotional distress.⁷⁰

It has been noted:

Surely one of the most prominent aspects of death is its potential for intense emotional impact on the survivors. The reasons are as numerous as they are obvious. There is the simple but often searing fact of separation from a loved one; the realization that he or she will no longer enjoy the fruits of life; the suddenness with which death strikes. There can be fear for one's own life, and fear of the power of death in general. There may be anger, directed diffusely at the de-

66. See Paul T. Bartone & Morten G. Ender, *Organizational Responses to Death in the Military*, 18 DEATH STUDIES 25, 33 (1994) (“[M]any family members appear to have less trouble adjusting to the death of a loved one when the loss is construed as serving a noble or ‘good cause,’ such as defending one’s country or family, as opposed to a senseless event like a car accident or natural disaster.”).

67. Eyal Ben-Ari, *Epilogue: A “Good” Military Death*, 31 ARMED FORCES & SOC’Y 651, 653 (2005).

68. See U.S. Dep’t of Defense, *Fallen Warriors*, <http://www.defendamerica.mil/fallen.html> (last visited Feb. 20, 2008) (listing the names and ages of the soldiers killed in combat in Iraq and Afghanistan to date).

69. Klein & Alexander, *supra* note 64, at 266–67. Many individuals go through the bereavement process without counseling. *Id.* at 263. Individuals who are grieving can experience increased rates of depression, alcohol misuse, anxiety, suicide, phobias, and mania. *Id.* at 268.

70. Surviving father Albert Snyder claimed the news coverage and Internet postings about Westboro’s protests at his son’s funeral deepened his depression. Snyder received a \$10.9 million verdict against Westboro for intentional infliction of emotional distress and invasion of privacy, which was reduced to \$5 million by the federal judge who presided over the case. Matthew Dolan, *Judge cuts court award; anti-gay church sees reduction of penalty for protest*, BALT. SUN, Feb. 5, 2008, at 1B.

ceased, or at the persons or powers held responsible. Finally, there are various strong reactions to the corpse itself.⁷¹

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

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

The right to mourn is a novel interest that can be loosely analogized to the right to worship. Many burial services in the United States are religious in nature,⁷² although military funerals are traditionally secular.⁷³ Courts and scholars are slowly recognizing the right to worship (independent from the First Amendment's Free Exercise Clause).⁷⁴ Because most of the enacted legislation is not limited to military funerals,⁷⁵ examining the right to worship demonstrates the application of privacy rights outside the traditional reproductive context.⁷⁶

In *Olmer v. City of Lincoln*,⁷⁷ the Eighth Circuit declined to address the right to worship directly, but noted that the state's interest in protecting this right, "in the abstract, is undoubtedly substantial and important."⁷⁸ *Olmer* was an appeal from a preliminary injunction enjoining the enforcement of a local ordinance.⁷⁹ The ordinance restricted focused picketing of churches and other religious premises thirty minutes before, during, and after scheduled religious activi-

71. PETER METCALF & RICHARD HUNTINGTON, *CELEBRATIONS OF DEATH: THE ANTHROPOLOGY OF MORTUARY RITUAL* 43 (2d ed. 1991).

72. See Tony Walter, *Secularization*, in *DEATH & BEREAVEMENT ACROSS CULTURES* 166, 170 (Colin Murray Parkes et al. eds., 1997) (estimating that, globally, 50% to 90% of funerals are religious).

73. See David Rittgers, *These Dishonored Dead: Veteran Memorials and Religious Preferences*, 5 *FIRST AMEND. L. REV.* 400, 410–11 (2007) (discussing the secular traditions that occur at military funerals).

74. See, e.g., *St. David's Episcopal Church v. Westboro Baptist Church, Inc.*, 921 P.2d 821, 830 (Kan. Ct. App. 1996) (stating that the government has an interest in safeguarding the right to privacy in a place of worship).

75. With the exception of Delaware and Florida, no state picketing statute limits the picketing prohibition to military funerals. See *infra* Appendix.

76. See Alan Phelps, Note, *Picketing and Prayer: Restricting Freedom of Expression Outside Churches*, 85 *CORNELL L. REV.* 271, 291–97 (1999) (discussing privacy rights as commonly applied to reproductive interests, as well as the application of privacy rights to the right to worship).

77. 192 F.3d 1176 (8th Cir. 1999) (en banc).

78. *Id.* at 1180.

79. *Id.* at 1178.

ties.⁸⁰ The respondents were abortion protesters who protested the appointment of an abortion doctor as deacon and elder at Westminster Presbyterian Church.⁸¹ The court held that the ordinance was unconstitutional because it was not narrowly tailored to protect a significant government interest.⁸² Judge Bright, in his dissent, poignantly argued that the right of freedom of worship is as important as the right of privacy in the home.⁸³

Unlike *Olmer*, the Kansas Court of Appeals concluded that the right to worship is an important government interest.⁸⁴ In *St. David's Episcopal Church v. Westboro Baptist Church, Inc.*, Westboro appealed a temporary injunction enjoining it from focused picketing on the public sidewalks surrounding St. David's church.⁸⁵ Unlike the current picketing of military funerals, the picketing in this case was conducted for over a year during normal worship times.⁸⁶ St. David's argued that Westboro's activities infringed on its religious worship.⁸⁷ Applying the test articulated in *Madsen v. Women's Health Center*, the court examined the articulated government interest.⁸⁸ The court of appeals upheld the trial court's conclusion that a "place of worship 'would place a close second to one's residence when it comes to the right to worship and communicate with the maker of one's choice in a tranquil, private and serene environment.'"⁸⁹ Just as there is a value in being left alone during worship, there is equal value in being left alone during a funeral or burial service.

80. *Id.*

81. *Id.*

82. *Id.* at 1182.

83. *Id.* at 1185 (Bright, J., dissenting); see discussion *infra* Part V.B; see also Phelps, *supra* note 76, at 300–05 (explaining the similarities between the church and home and the need for privacy in both, as well as further explaining the holding in *Olmer*); Stanley, *supra* note 11, at 290–95 (discussing both the majority and dissenting opinions in *Olmer*, and their reliance on the captive audience doctrine set forth in *Frisby v. Schultz*, 487 U.S. 474 (1988), to support their positions).

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

85. *Id.* at 824.

86. See *id.* (discussing St. David's request for an injunction on June 13, 1994 to prevent Westboro from picketing around the church during any religious event, a practice that Westboro had been engaged in since March 1992).

87. *Id.* at 828–29.

88. *Id.* at 830.

89. *Id.*

D. Other Significant Interests

There are other important governmental interests undermined by funeral picketing. Demonstrations and picketing can result in negative secondary effects like noise, traffic, and disorder.⁹⁰

Another key interest articulated by legislation is the state's interest in minimizing public disruption.⁹¹ Funerals are traditionally peaceful, dignified, and solemn occasions. Dignity is a value that has also been recognized by the courts.⁹² The state's significant interest in protecting the dignified nature of burial activities is legitimate as well.

Funerals represent one of the few instances where the dignity and purpose of the occasion can be destroyed by protesters.⁹³ In a funeral, the mourners' interest is in solemnizing the event and showing respect to the departed. Unlike abortions, funerals tend to be outdoors, thus making them particularly susceptible to disruption by noise, signs, and chanting. An abortion protester may cause emotional distress to patients and unwilling listeners, but is unable to prevent or disrupt the actual protested act—the abortion—by expressive activity. In contrast, a funeral protester could effectively disrupt a service and interfere with the peaceful and solemn occasion of a funeral.

90. See *City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41, 47–49 (1986) (upholding a zoning ordinance regulating adult theatres where the predominate concern was not with the content of the films but the secondary effects on the community); see also *Chaplinsky v. New Hampshire*, 315 U.S. 568, 569, 573–74 (1942) (upholding a state's right to regulate the use of words in a public place likely to cause a "breach of the peace"); ERWIN CHEMERINSKY, *CONSTITUTIONAL LAW* 1002 (3d ed. 2006) (noting the unlikelihood of success of a fighting words law because the Supreme Court has failed to uphold a fighting words conviction without ever overruling *Chaplinsky*); Burton Caine, *The Trouble With "Fighting Words": Chaplinski v. New Hampshire Is a Threat to First Amendment Values and Should be Overruled*, 88 MARQ. L. REV. 441, 451, 536–38, 556 (2004) (noting that *Chaplinsky* should not be interpreted to include addresses to crowds and that the doctrine has been limited to punishing critical speech against authoritative bodies like police officers); David L. Hudson Jr., *What's on the Horizon* (Apr. 2006), http://www.firstamendmentcenter.org/Assembly/horizon.aspx?topic=assembly_horizon (discussing the improbability of a fighting words statute surviving, particularly in the funeral picketing context).

91. 152 CONG. REC. E774 (daily ed. May 10, 2006) (statement of Rep. Moore).

92. Maxine D. Goodman, *Human Dignity in Supreme Court Constitutional Jurisprudence*, 84 NEB. L. REV. 740, 757 (2006).

93. Albert Snyder described the impact of Westboro's protest during his son's funeral: "I had one chance to bury my son and they took that away from me." Margo Rutledge Kisell, *Father: military funeral protesters took away only chance to bury his son*, DAYTON DAILY NEWS, Feb. 2, 2008, available at <http://www.daytondailynews.com/n/content/oh/story/new/local/2008/02/02/ddn020208picket.html>.

IV. CONSTITUTIONAL SCRUTINY OF FUNERAL PICKETING LEGISLATION

A. *Scrutiny of Speech in a Public Forum*

Balancing the right of free speech against the right to mourn in funeral picketing cases is impacted by location and the application of public forum analysis. Funeral picketing often occurs in public areas, like sidewalks across from funerals, and not on the premises of cemeteries or other funeral locations.⁹⁴ Public streets are considered the quintessential public forum.⁹⁵ As two scholars jointly explained:

Open public spaces like parks, sidewalks, streets, and other accessible government-owned properties have served as the most effective and reliable arena of communication for all citizens regardless of their political ideology, private wealth, property ownership, social status, or popularity. This is why the traditional public forum has been called the “poor man’s printing press.”⁹⁶

The government’s ability to restrict speech in a public forum is limited.⁹⁷ The Supreme Court has stated that “[t]he right of free speech is guaranteed every citizen that he may reach the minds of willing listeners and to do so there must be opportunity to win their attention.”⁹⁸ The First Amendment has been an essential tool in protecting the controversial, marginal, and politically weak.⁹⁹ Thus, while Westboro is controversial, it still has a right to broadcast its message. It is through exposure to the marketplace of ideas that thoughts,

94. One of the determining factors of a public forum is whether it has been open for expressive activity. *Perry Educ. Ass’n v. Perry Local Educators’ Ass’n*, 460 U.S. 37, 45 (1983). The constitutional scrutiny is less when the location involves public property that is not traditionally or by designation a non-public forum. *Id.* at 46. Cemeteries do not have the same historical relationship with speech as public streets and have not been traditionally open for expressive activity such as picketing or demonstrations. *See, e.g.*, *Visitors Rules for Arlington National Cemetery*, 32 C.F.R. § 553.22(e) (1977) (prohibiting demonstrations, picketing, orations, and the display of placards, banners, and foreign flags).

95. *See, e.g.*, *Perry*, 460 U.S. at 45.

96. Raskin & LeBlanc, *supra* note 56, at 180–81.

97. *Boos v. Barry*, 485 U.S. 312, 318 (1988) (noting that in public places, “which occupy a ‘special position in terms of First Amendment protection,’ the government’s ability to restrict expressive activity ‘is very limited.’” (citation omitted) (quoting *United States v. Grace*, 461 U.S. 171, 180 (1983))).

98. *Kovacs v. Cooper*, 336 U.S. 77, 87 (1949) (plurality opinion).

99. *See* Gregory P. Magarian, *The Pragmatic Populism of Justice Stevens’s Free Speech Jurisprudence*, 74 *FORDHAM L. REV.* 2201, 2203 (2006) (noting that the First Amendment serves the need of open discourse in a democracy by protecting marginal voices with distinctive perspectives); *see also* Raskin & LeBlanc, *supra* note 56, at 199 (warning that courts using a more relaxed standard of review for seemingly content-neutral statutes increase the likelihood that “speech will be less free for the politically weak, the controversial, the marginal, and all those who depend on public fora to communicate”).

morals, and opinions develop and change.¹⁰⁰ Although picketing on a public sidewalk is constitutionally protected behavior,¹⁰¹ the idea of picketing a funeral is inherently offensive, regardless of the message being communicated, because it disrupts a solemn event. The government should not try to silence Westboro's message, no matter how offensive, but it can impose reasonable time, place, or manner restrictions in order to protect significant or important competing interests.¹⁰²

When legislation is challenged in court, the threshold question for determining constitutionality is the level of judicial scrutiny to apply. Restrictions on speech based on the content of the message must be subjected to strict judicial scrutiny, requiring a showing of a compelling government interest, while restrictions based on the time, place, and manner of the message are subjected to intermediate scrutiny and need only show a significant government interest.¹⁰³ Content-based restrictions are presumptively invalid,¹⁰⁴ thus escaping the content-based label is essential for any of the funeral picketing statutes to survive.¹⁰⁵ To determine whether the laws are content based or

100. See *Abrams v. United States*, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting) ("But when men have realized that time has upset many fighting faiths, they may come to believe . . . that the best test of truth is the power of the thought to get itself accepted in the competition of the market . . ."). It is not clear, however, that Westboro's speech contributes to the marketplace. The speech of Westboro is not meant to inform and educate as much as enrage and insult. See, e.g., Alvarez, *supra* note 13 (reporting that Westboro demonstrators held placards at a funeral reading "Thank God for Dead Soldiers" and kicked around an American flag, shouting that the dead soldiers were rotting in hell). There is very little that is informative about picketing a funeral. The message delivered is not intended as a statement on the war, politics, the president, the deceased, or the survivors. Rather it is a statement of condemnation of a country Westboro believes is being punished for not condemning homosexuality. *Id.* A funeral is not a venue where conflicting ideas and beliefs are exchanged. A funeral is a venue to mourn.

101. See *Grace*, 461 U.S. at 176–77 (stating that peaceful picketing is speech protected by the First Amendment and that sidewalks are considered public fora for which government restrictions on expressive conduct are very limited).

102. See *Boos*, 485 U.S. at 331 (upholding the constitutionality of a statute prohibiting picketing within 500 feet of official foreign embassies because "it merely regulates the place and manner of certain demonstrations").

103. *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 45 (1983); see also *CHEMERINSKY*, *supra* note 90, at 932–33 (citing *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622 (1994)) (distinguishing between content-based and content-neutral restrictions).

104. *Ashcroft v. ACLU*, 542 U.S. 656, 660 (2004) (citing *R.A.V. v. St. Paul*, 505 U.S. 377, 382 (1992)).

105. A content-based restriction must be narrowly tailored to serve a compelling governmental interest. *Perry*, 460 U.S. at 45 (citing *Carey v. Brown*, 447 U.S. 455, 461 (1980)); see also *NOWAK & ROTUNDA*, *supra* note 41, at 591. Very few statutes can survive this type of strict judicial scrutiny. See *Hill v. Colorado*, 530 U.S. 703, 735 (2000) (Souter, J., concurring) (concluding that "the government is held to a very exacting and rarely satisfied standard" when enacting content-based restrictions).

content neutral, courts apply the standard articulated in *Ward v. Rock Against Racism*.¹⁰⁶

As the Supreme Court stated in *Ward*, “[t]he principal inquiry in determining content neutrality, in speech cases generally and in time, place, or manner cases in particular, is whether the government has adopted a regulation of speech because of disagreement with the message it conveys.”¹⁰⁷ *Ward* involved a time, place, and manner regulation of sound-amplification at a park bandshell.¹⁰⁸ A concert sponsor challenged the regulation as unconstitutional.¹⁰⁹ The regulation required all concert sponsors to use city sound amplification equipment and technicians.¹¹⁰ The court of appeals concluded that the regulation was invalid because it was not the least intrusive method to regulate the sound.¹¹¹ The Supreme Court reversed and explained that the “less-restrictive-alternative analysis” is not part of the test to determine if a time, place, and manner regulation is valid.¹¹² Under *Ward*, a regulation of the time, place, or manner of speech must be content neutral, and narrowly tailored to serve a legitimate government interest, but “it need not be the least restrictive or least intrusive means of doing so.”¹¹³ The regulation should also leave open ample alternative means of communication.¹¹⁴

B. *The Legislative Response to Funeral Picketing*

1. *Federal Legislation*

Legislators across the country have tried to balance the rights of mourners with the rights of protesters. The recent federal and state legislation to date imposes varied time, place, and manner restrictions on funeral picketing. On May 29, 2006, Congress enacted the Respect for America’s Fallen Heroes Act (RAFHA).¹¹⁵ RAFHA prohibits dem-

106. See 491 U.S. 781, 791 (1989) (citing *City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41, 47–48 (1986); *Clark v. Cmty. for Creative Non-Violence*, 468 U.S. 288, 293 (1984)) (explaining that determining content neutrality depends on the government’s purpose in adopting the regulation—a content-neutral regulation is a regulation that serves a purpose unrelated to the content of the expression).

107. *Id.*

108. *Id.* at 784.

109. *Id.*

110. *Id.*

111. *Id.* at 789.

112. *Id.* at 797, 803 (quoting *Regan v. Time, Inc.*, 468 U.S. 641, 657 (1984) (plurality opinion)).

113. *Id.* at 798.

114. *Id.*

115. Pub. L. No. 109-228, 120 Stat. 387 (2006) (codified at 38 U.S.C. § 2413 (West Supp. 2007)). A second proposed federal statute, The Dignity for Military Funerals Act of 2006,

onstrations at funerals controlled by the National Cemetery Administration and Arlington National Cemetery.¹¹⁶ The legislative history clearly indicates that Westboro's picketing activities were the primary motivation for the legislation. As Senator Larry Craig explained, the Act "was conceived in response to hateful, intolerant demonstrations taking place at the funeral services of deceased servicemembers of the global war on terror."¹¹⁷ Congressman Dennis Moore expressed similar sentiments in his speech when RAFHA was being considered:

I find it abhorrent that individuals and groups feel a military funeral is an appropriate forum to display their beliefs on gay rights. . . . It is unfortunate that some individuals and groups add to the anguish and grief of those who have lost a loved one by protesting outside of the funerals of fallen soldiers.¹¹⁸

Although the legislation is clearly targeted at a particular group, it makes no reference to the specific content of the picketing activity; rather, the legislative history and the text of the Act suggest the primary concern was the impact the activity was having on the place of the protest, the funeral attendees, and the dignity of the funeral.¹¹⁹

S. 2452, 109th Cong. (2006), has been referred to the Committee on the Judiciary and is beyond the scope of this Article.

116. 38 U.S.C. § 2413 (West Supp. 2007). The federal legislation is distinct from the state legislation because the federal legislation is limited to cemeteries under the control of the National Cemetery Administration, like Arlington. *Id.*; see Warren v. Fairfax County, 196 F.3d 186, 200-02 (4th Cir. 1999) (Niemyer, J., dissenting) (drawing distinctions between the characteristics of a public and non-public forum and concluding that public cemeteries are not public fora); Visitor's Rules for the Arlington National Cemetery, 32 C.F.R. § 553.22 (1977) (noting that Arlington is not like a sidewalk or a place traditionally open for expressive activity; in fact, Arlington prohibits expressive activity like picketing, orations, solicitations, and placards); see also Perry Educ. Ass'n v. Perry Local Educator's Ass'n, 460 U.S. 38, 46 (1983) (discussing that the regulation of speech in a non-public forum needs only to be reasonably related to a legitimate interest).

117. 152 CONG. REC. S5129 (daily ed. May 24, 2006) (statement of Sen. Craig); see also 152 CONG. REC. E774 (daily ed. May 10, 2006) (statement of Rep. Moore). In some instances, Westboro was identified by name. *Id.*

118. 152 CONG. REC. E774 (daily ed. May 10, 2006) (statement of Rep. Moore).

119. See 38 U.S.C. § 2413 (prohibiting demonstrations on properties controlled by the National Cemetery Administration or on Arlington National Cemetery's property, demonstrations taking place within 150 feet of any route to and from cemetery property, and demonstrations within 300 feet of the cemetery and impeding access to the cemetery 60 minutes before a funeral until 60 minutes after a funeral); 153 CONG. REC. S5129 (daily ed. May 24, 2006) (statement of Sen. Craig) (arguing that there should be greater restrictions on demonstrations the closer a funeral procession is to the cemetery in order "to ensure a dignified, solemn, and respectful burial at our national shrines"); 152 CONG. REC. E774 (daily ed. May 10, 2006) (statement of Rep. Moore) (stating that losing a family member during war is already hard, and this pain should not be magnified by the presence of protestors at funerals).

The Act prohibits demonstrations “beginning 60 minutes before and ending 60 minutes after a funeral, memorial service, or ceremony” that occur “within 150 feet of a road, pathway, or other route of ingress to or egress from” the property.¹²⁰ The 150-foot buffer zone applies to demonstrations that create noise or may disturb the peace.¹²¹ RAFHA also prohibits demonstrations within 300 feet of the cemetery that “impede[] the access to or egress from” the cemetery.¹²² In addition to expressing outrage towards Westboro for its activities, the Act includes a provision encouraging states to enact similar legislation.¹²³

2. *State Legislation*

The federal legislation focused on the negative effect picketing could have on grieving families—not on content of the protesters’ actual message.¹²⁴ State legislative bodies have taken similar approaches, criticizing Westboro for its impact on families and disruption of services, but not criticizing its message or its right to communicate it.¹²⁵ Over twenty-nine states enacted separate anti-funeral-picketing statutes or broadened preexisting disorderly conduct statutes.¹²⁶ Most of the statutes prohibit picketing funerals within a certain distance, and picketing during a certain time period before, during, and after a funeral.¹²⁷

One of the first known funeral picketing statutes was from Westboro’s home state of Kansas.¹²⁸ The Kansas funeral picketing

120. 38 U.S.C. § 2413. Funerals on property controlled by the National Cemetery Administration are typically conducted at committal shelters. 152 CONG. REC. S5129 (daily ed. May 24, 2006) (statement of Sen. Craig). Committal shelters tend to be at least 300 feet from property lines and obstructed by trees and shrubs. *Id.* Consequently it would be difficult to actually disrupt a funeral on government property, and more likely the disruption would occur while the funeral party is approaching or exiting the funeral site. *Id.*

121. 38 U.S.C. § 2413.

122. *Id.*

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

124. *See* 152 CONG. REC. E774 (daily ed. May 10, 2006) (statement of Rep. Moore) (expressing concern for the families of fallen soldiers in having to experience added anguish because of funeral protesting).

125. *See infra* Appendix.

126. The Delaware and Florida statutes are limited to restricting picketing at military funerals, while the other states impose similar time, place and manner restrictions on picketing any funerals. *See infra* Appendix.

127. *See* discussion *infra* Part V.C.

128. *See* Megan Dunn, *The Right to Rest in Peace: Missouri Prohibits Protesting at Funerals*, 71 MO. L. REV. 1117, 1126 (2006) (noting that even though funeral picketing only recently has been a subject of national attention, Kansas enacted an anti-picketing statute in 1992);

statute was found unconstitutionally vague by a federal district court because it failed to define what was meant by “before or after” a funeral.¹²⁹ The statute has since been amended to prohibit funeral picketing during a definite time period of one hour before and two hours after a funeral.¹³⁰

The statutes in Delaware and Nebraska mirror the time period of the Kansas Funeral Picketing Act of one hour before and two hours after a funeral.¹³¹ Illinois and South Carolina impose restrictions of thirty minutes before and after a funeral,¹³² while the majority of state statutes and the federal statute impose restrictions of one hour before and one hour after.¹³³ The majority of the state statutes impose distance restrictions from 500 to 1,000 feet.¹³⁴ Only eight states enacted legislation with distance requirements of 300 feet or less.¹³⁵

The consistent reference to reasonable time, place, and manner restrictions in the text of the statutes shows that legislative bodies intended for the statutes to be content neutral and subject to intermediate scrutiny. Whether the statutes will actually be considered content neutral by the courts is an unresolved issue.¹³⁶

Hudson, Funeral Protests, *supra* note 16 (explaining that in 1992 Kansas passed the Kansas Funeral Picketing Act in response to Westboro’s activities).

129. *Phelps v. Hamilton*, 122 F.3d 1309, 1323 (10th Cir. 1997); Hudson, Funeral Protests, *supra* note 16.

130. KAN. STAT. ANN. § 21-4015 (1995).

131. DEL. CODE ANN. tit. 11, § 1303 (2006); NEB. REV. STAT. § 28-1320.03 (2006).

132. 720 ILL. COMP. STAT. ANN. 5/26-6 (West. Supp. 2007); S.C. CODE ANN. § 16-17-525 (2006).

133. 38 U.S.C. § 2413 (West Supp. 2007); GA. CODE ANN. § 16-11-34.2 (2007); IOWA CODE § 723.5 (West Supp. 2007); MINN. STAT. § 609.501 (West Supp. 2007); MISS. CODE ANN. § 97-35-18 (2006); MO. ANN. STAT. § 578.501 (West Supp. 2007); NJ. STAT. ANN. § 2C:33-8.1 (West Supp. 2007); N.C. GEN. STAT. § 14-288.4 (Supp. 2006); OHIO REV. CODE ANN. § 3767.30 (LexisNexis Supp. 2007); OKLA. STAT. ANN. tit. 21, § 1380 (West Supp. 2007); 18 PA. CONS. STAT. ANN. § 7517 (West Supp. 2007); S.D. CODIFIED LAWS §§ 22-13-17, 22-13-19 (2006); TEX. PENAL CODE ANN. § 42.055 (Vernon Supp. 2006); WIS. STAT. ANN. § 947.011 (West Supp. 2006).

134. *See infra* note 277 and accompanying text (noting thirteen of the eighteen state statutes set distance restrictions of 500 to 1,000 feet).

135. *See infra* note 279 and accompanying text (noting three state statutes requiring only a distance of 100 feet and five state statutes requiring 300 feet).

136. Four courts that have analyzed funeral picketing statutes have concluded that the legislation is content neutral. *See* discussion and accompanying notes *infra* Part IV.E. (discussing the Federal District Court for the Western District of Missouri’s decision in *Phelps-Roper v. Nixon*, 504 F. Supp. 2d 691 (W.D. Mo. 2007), the Eighth Circuit’s reversal in *Phelps-Roper v. Nixon*, 509 F.3d 480 (8th Cir. 2007), the Federal District Court for the Eastern District of Kentucky’s decision in *McQueary v. Stumbo*, 453 F. Supp. 2d 975 (E.D. Ky. 2006), and the Federal District Court for the Northern District of Ohio’s decision in *Phelps-Roper v. Taft*, 523 F. Supp. 2d 612 (N.D. Ohio 2007)).

3. *The Facial Neutrality of the Legislation*

Determining whether a law is content based or content neutral may be challenging because some statutes are both.¹³⁷ To determine if legislation is content based the court will focus on the government's purpose by examining the text of the statute, the government's stated interests, and the legislative history.¹³⁸

The funeral picketing statutes will probably be considered content neutral. In spite of targeted comments by legislators regarding Westboro, there is no mention of suppressing Westboro's message in the legislative history, press releases, or actual statutes. Rather, states have expressed concern over the time, place, and manner of the message.¹³⁹ The federal and state governments' articulated interests are unrelated to the content of Westboro's speech. Indeed, the universal issue identified by the different statutes has been the effect of picketing on the bereaved.¹⁴⁰ The state's interest in protecting the privacy of grieving families and maintaining the peace and dignity of funerals is unrelated to the content of Westboro's speech. Thus, facially, the federal and state laws are content neutral. The funeral picketing statutes focus on the location of Westboro's speech instead of the message.¹⁴¹ The statutes attempt to regulate the places where speech may occur, not the speech itself. Similar to the abortion buffer zone cases, a court would probably conclude that the statutes were not enacted because of disagreement with Westboro's message, but with their disruptive conduct.

C. *Targeted Legislation & Content Neutrality*

Westboro could argue that the legislation is content based because Westboro is the target of the legislation, and it was enacted to

137. Wilson R. Huhn, *Assessing the Constitutionality of Laws That Are Both Content-Based and Content-Neutral: The Emerging Constitutional Calculus*, 79 IND. L.J. 801, 806 (2004). In fact, the federal district court in Kentucky concluded the Kentucky statute was "motivated by both content-based and content-neutral factors." *McQueary v. Stumbo*, 453 F. Supp. 2d 975, 985 (E.D. Ky. 2006). Ultimately, that issue was decided for the Kentucky statute in favor of content neutrality. *Id.*

138. *McQueary*, 453 F. Supp. 2d at 983.

139. See *infra* note 150 and accompanying text (examining the text of funeral picketing statutes).

140. See *infra* note 150 and accompanying text (examining the text of funeral picketing statutes).

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

silence them or a particular form of expression.¹⁴² The targeted nature of the legislation is evidenced by the comments by numerous state officials.¹⁴³ Legislatures, however, can target a group or activity

142. If funeral picketing is seen as a unique medium or form of expression, an argument could be made that the legislation is attempting to silence this specific form of communication, consequently making the legislation content-based. While picketing is considered an effective form of protest because of the low costs involved and the publicity it generates, Stanley, *supra* note 11, at 277, the Court noted in *Frisby* that prohibiting a medium or form of expression may be necessary in some instances. See *Frisby v. Schultz*, 487 U.S. 474, 486 (1988) (quoting *City Council v. Taxpayers for Vincent*, 466 U.S. 789, 810 (1984), in which the Court upheld an ordinance banning all signs on public property because the medium of expression itself was the source of the problem the City hoped to address). Patti Stanley argues, “as picketing becomes more focused or targeted, the coercive aspects of this form of expressive activity create a tension between picketers’ right to free speech and the privacy rights of those they are trying to influence.” Stanley, *supra* note 11, at 277–78. Funeral picketing should not be considered a special form of expression, but an offensive application of the well-established form, picketing. There is nothing unique about funerals truly central to Westboro’s message. The picketing of clinics and health care facilities by abortion and anti-abortion protesters is arguably reasonably related to the picketer’s message. The picketing of funerals, however, is not reasonably related to a message against homosexuality, particularly when Westboro protests military funerals regardless of the sexual orientation or religious beliefs of the deceased. Westboro has exhibited a pattern of protesting at events that have an indirect, if any, connection to its message. The sensationalism involved with funeral picketing has produced an indirect outlet to Westboro’s actual targeted audiences—the media. A prime example of this was Westboro’s planned protest at the funeral of the tragically murdered Amish school children. See Press Release, Pennsylvania School Girls, *supra* note 30. Westboro ultimately cancelled the protest in exchange for media time. *Id.* Westboro claimed that the children were murdered because God was punishing the governor for trying to curtail Westboro’s First Amendment rights. *Id.* Instead of planning the protest at the governor’s mansion or the courthouse, the group chose an event that would receive the most media attention. Arguably, Westboro’s rejoicing over the death of a soldier does not contribute to the marketplace of ideas meant to be protected by the First Amendment. Westboro’s web page describing the organization states clearly that it views fallen soldiers as evidence of God’s wrath against homosexuality, and that it demonstrates against the “modern militant homosexual movement,” not against the war. See Westboro, Home Page, *supra* note 19. Because of the generality of Westboro’s message about America, it could be effectively communicated at countless venues other than funerals.

143. For example, Missouri Governor Matt Blunt stated, “[i]t is offensive that groups would attempt to spread a message of hate as families and friends grieve the loss of a loved one. No family should have to endure such hardship.” Press Release, Matt Blunt, Governor of Missouri, Blunt Signs Law Shielding Mourners; Ending Funeral Protests (July 5, 2006), <http://www.gov.mo.gov/press/HB1026070506.htm>. Oklahoma Senator Mary Easley, sponsor of the Oklahoma Funeral Picketing Act, stated, “I want these groups to know that there is a proper time and place for staging a protest, but during a funeral isn’t one of them.” Press Release, Mary Easley, Senator, Oklahoma State Senate, Easley Files Bill to Protect Families from Funeral Protests (Feb. 2, 2006), http://www.oksenate.gov/news/press_releases/press_releases_2006/pr20060202a.html. In another press release Senator Easley stated, “I hope this finally stops those protesters and lets families mourn their loved ones in peace,” and, “These picketers need to realize what they have been doing at funerals is wrong. . . . If they violate this law, they can expect to the [sic] face the legal consequences.” Press Release, Mary Easley, Senator, Oklahoma State Senate, Easley Applauds

without the legislation being content based as long as the governmental purpose for enacting the legislation is unrelated to the content of the message.¹⁴⁴ The press releases and legislative record suggest a clear disdain for the group's behavior.¹⁴⁵ The disdain does not appear to be towards the group's viewpoint about the war, homosexuality, heaven or hell; rather, the disdain is based on the group's decision to antagonize individuals during the universally difficult human experience of mourning.¹⁴⁶ One of the most critical descriptions of Westboro was drafted in the Preamble of Kentucky's legislation.¹⁴⁷ It states in part:

WHEREAS, certain despicable individuals have been disrupting the funerals of soldiers who died while serving in the United States Armed Forces; and WHEREAS, these disruptions have taken such forms as shouting insults at the parents of the fallen; and WHEREAS, the military dead and their families deserve respect and compassion; and WHEREAS, all mourners should be left in peace¹⁴⁸

The Kentucky statute clearly reflects an animus towards Westboro.¹⁴⁹ Based on the Preamble, the Kentucky statute was enacted due to a concern for the impact of the picketing on mourning families. When the various state statutes identified a purpose, it was related to either the privacy and emotional disturbance of grieving families or the peace and dignity of the funeral.¹⁵⁰ The right to

Governor Henry for Signing Picketing Measure (Mar. 3, 2006), http://www.oksenate.gov/news/press_releases/press_releases_2006/pr20060303c.html.

144. See *Madsen v. Women's Health Ctr., Inc.*, 512 U.S. 753, 763 (1994) (stating that an injunction limited to "people with a particular viewpoint does not itself render the injunction content or viewpoint based"); Stanley, *supra* note 11, at 279 (explaining that regulations that incidentally affect some speakers may nonetheless be considered content neutral if their purpose is not related to the speech's content).

145. See *supra* note 143; *infra* notes 147–148 and accompanying text.

146. 152 CONG. REC. S5129 (daily ed. May 24, 2006) (statement of Sen. Craig); 152 CONG. REC. E774 (daily ed. May 10, 2006) (statement of Rep. Moore).

147. The Kentucky statute was found unconstitutionally broad by a federal district court, and its enforcement was enjoined. *McQueary v. Stumbo*, 453 F. Supp. 2d 975, 997–98 (E.D. Ky. 2006); see also *infra* Part IV.E (discussing the federal district court's opinion in *McQueary*).

148. KY. REV. STAT. ANN. § 525.055 (West Supp. 2006).

149. To date, Kentucky is one of three states that have been challenged in court over the funeral picketing legislation. See *McQueary*, 453 F. Supp. 2d at 976–77 (challenging the Kentucky funeral picketing statute); *Phelps-Roper v. Nixon*, 504 F. Supp. 2d 691, 693–94 (W.D. Mo. 2007), *rev'd*, 509 F.3d 480 (8th Cir. 2007) (challenging the Missouri funeral picketing statute); *Phelps-Roper v. Taft*, 523 F. Supp. 2d 612 (N.D. Ohio 2007) (challenging the Ohio funeral picketing statute).

150. See, e.g., The Right to Rest in Peace Act, COLO. REV. STAT. ANN. § 18-9-125 (West Supp. 2006) ("[I]t is necessary to enact this act in order to: (a) Protect the privacy of

mourn and concern for the emotional distress of citizens burying their loved ones should be viewed as a significant governmental interest.¹⁵¹

grieving families and others who are entering, attending, or leaving a funeral; (b) Preserve the peaceful character of funerals and funeral sites; and (c) Allow for a sufficient distance away from a funeral site so that mourners can be assured that the funeral is not disrupted by violent, abusive, indecent, profane, boisterous, unreasonably loud, or otherwise disorderly conduct.”); GA. CODE ANN. § 16-11-34.2 (a) (2007) (“[T]he interest of persons in planning, participating in, and attending a funeral or memorial service for a deceased relative or loved one without unwanted impediment, disruption, disturbance, or interference, is a substantial interest”); 720 ILL. COMP. STAT. ANN. 5/26-6 (West Supp. 2007) (“[D]ue to the unique nature of funeral and memorial services and the heightened opportunity for extreme emotional distress on such occasions, the purpose of this Section is to protect the privacy and ability to mourn of grieving families directly before, during, and after a funeral or memorial service.”); KAN. STAT. ANN. § 21-4015(2)-(3) (1995) (“[T]he interests of families in privately and peacefully mourning the loss of deceased relatives are violated when funerals are targeted for picketing . . . picketing of funerals causes emotional disturbance and distress to grieving families”); NEB. REV. STAT. § 28-1320.01 (2006) (“[F]amilies have a legitimate and legally cognizable interest in organizing and attending funerals for deceased relatives and . . . the rights of families to peacefully and privately mourn the death of relatives are violated when funerals are targeted for picketing or protest activities. . . . [T]he purposes . . . are to protect the privacy of grieving families and to preserve the peaceful character of cemeteries, mortuaries, churches, and other places of worship during a funeral while still providing picketers and protesters the opportunity to communicate their message at a time and place that minimizes the interference with the rights of funeral participants.”); N.J. STAT. ANN. § 2C:33-8.1(a-d) (2006) (“a. Families have a substantial interest in attending funeral services for their loved ones; b. The interest of families in privately and peacefully mourning the loss of their relatives are violated when funerals are targeted for disruption, picketing and other demonstrations; c. Such disruption causes emotional disturbance and distress to grieving families; and d. It is in the interest of the State of New Jersey to protect families’ privacy immediately prior to, during and after a funeral service.”); OKLA. STAT. ANN. tit. 21, § 1380 (A)(1)(a)–(c) (West Supp. 2007) (“a. it is generally recognized that families have a substantial interest in organizing and attending funerals for deceased relatives, b. the interests of families in privately and peacefully mourning the loss of deceased relatives are violated when funerals are targeted for picketing and other public demonstrations, c. picketing of funerals causes emotional disturbance and distress to grieving families”); 18 PA. CONS. STAT. ANN. § 7517 (West Supp. 2007) (“(1) Families have a substantial interest in organizing and attending commemorative services for deceased relatives. (2) The interests of families in privately and peacefully mourning the loss of deceased relatives are violated when commemorative services are targeted for picketing and other public demonstrations. (3) Picketing of commemorative services causes emotional disturbance and distress to grieving families who participate in commemorative services. (4) Full opportunity exists under the terms and provisions of this section for the exercise of freedom of speech and other constitutional rights at times other than within one hour prior to, during and one hour following the commemorative services.”).

151. Local governments are also justified in enacting anti-funeral-picketing legislation based on concern for the negative effects of the picketing—like noise and traffic—on an event that is typically solemn. *Cf. City of Renton v. Playtime Theatres*, 475 U.S. 41, 47–48 (1986) (recognizing secondary effects as a content-neutral basis for upholding ordinance). Even if the statutes are facially content-based they may still be considered content-neutral if they are motivated by a content-neutral purpose, like the negative secondary effects of the

If the statutes are considered content neutral, a court will analyze whether the statutes are “narrowly tailored” to serve a significant governmental interest and whether ample alternative means for communication exist.¹⁵²

D. Application of Legislation to Counter-Demonstrations

Westboro has argued that the statutes are content based because if the picketing signs were in favor of the deceased, the legislation would never have been enacted. Facially, the funeral picketing statutes can be applied to all demonstrations. For legislation to survive constitutional scrutiny it must be content and viewpoint neutral both facially and as applied.¹⁵³ This raises the special issue of the Patriot Guard Riders.

The Patriot Guard Riders are a group of motorcycle riders who have formed to produce counter-demonstrations in response to Westboro.¹⁵⁴ The application of the statutes to the Patriot Guard Riders is somewhat ironic because they are frequently welcomed by the families¹⁵⁵ and attend most military funerals with the express purpose of drowning out Westboro’s message with their presence and the sound of their motorcycle engines.¹⁵⁶ The primary differences between the Patriot Guard Riders and Westboro are their messages and motives.

Legislation geared towards exempting the Patriot Guard Riders would be blatant viewpoint discrimination. The same concerns for disruption, noise, and traffic would apply to both Westboro and the Patriot Guard Riders. Although there have been many supporters of the Patriot Guard Riders for their efforts in shielding the families,¹⁵⁷ there may be some unwilling listeners who do not wish to hear patri-

picketing. *See id.* (holding an ordinance aimed at the secondary effects of adult theaters as “completely consistent with our definition of ‘content-neutral’ speech”).

152. *Ward v. Rock Against Racism*, 491 U.S. 781, 796 (1989).

153. *See Hill v. Colorado*, 530 U.S. 703, 719 (2000) (quoting *Hill v. Thomas*, 973 P.2d 1246, 1256 (Colo. 1999) (en banc)) (upholding a Colorado statute because the statute’s restrictions applied equally to all demonstrators and the language of the statute made no reference to the speech’s content).

154. *Alvarez*, *supra* note 13; *McDonough*, *supra* note 17, at 18.

155. *See McDonough*, *supra* note 17, at 18 (quoting an organizer for the Patriot Guard Riders as saying, “Since we are invited guests of the family, we consider ourselves part of the service”).

156. *Alvarez*, *supra* note 13.

157. *See id.* (noting that “[h]undreds of well-wishers have written e-mail messages to members of the motorcycle group, thanking them for their presence at the funerals”).

otic music, chants, or motorcycle sounds before entering a funeral.¹⁵⁸ Although the Patriot Guard Riders claim to be invited guests,¹⁵⁹ it would be very difficult to draft content-neutral legislation that would make an exception for their appearance. The current funeral picketing legislation was clearly developed with uninvited guests in mind.

E. Recent Constitutional Challenges

Some states have already faced constitutional challenges to the funeral picketing legislation. In *Phelps-Roper v. Nixon*,¹⁶⁰ the plaintiff, attorney, and daughter of Westboro's founder, filed a preliminary injunction against Missouri's anti-funeral-picketing statute.¹⁶¹ Missouri's statute criminalizes picketing "in front of or about" a funeral.¹⁶² In the event the first section is found unconstitutional, a separate statutory section criminalizes picketing within 300 feet of a funeral.¹⁶³

The district court denied the preliminary injunction and concluded that the plaintiff was not likely to succeed on the merits; however, the Eighth Circuit disagreed.¹⁶⁴ To determine the likelihood of success on the merits the district court had to evaluate the constitutionality of Missouri's funeral picketing statute.¹⁶⁵

First, the district court rejected the plaintiff's argument that the statute was content based, although the statute was motivated in response to Westboro's activities.¹⁶⁶ The court concluded that the statute was content neutral and recognized the government's interest in "protecting the rights of Missouri citizens to be free from interference by other citizens while they mourn the death of friends or family."¹⁶⁷ Without further discussion, the court concluded that the plaintiff failed to prove a likelihood of succeeding in her argument that the state did not have a significant government interest.¹⁶⁸

158. *See id.* (describing a military family who asked the Riders not to attend their son's funeral).

159. McDonough, *supra* note 17, at 18.

160. 504 F. Supp. 2d 691 (W.D. Mo. 2007), *rev'd*, 509 F.3d 480, 488 (8th Cir. 2007).

161. *Id.* at 694.

162. MO. ANN. STAT. § 578.501 (West Supp. 2007).

163. MO. REV. STAT. § 578.502 (Supp. 2006).

164. *Nixon*, 504 F. Supp. 2d at 697.

165. *Id.* at 695-97.

166. *Id.* at 695.

167. *Id.* at 696. The court also recognized the defendants' assertion of the captive audience doctrine and an argument in an amicus brief regarding funeral attendees' First Amendment right to exercise their religion. *Id.*

168. *Id.*

The district court did not address the specific 300-foot distance and instead focused on the provision that prohibited picketing “in front of or about” a funeral.¹⁶⁹ The court concluded that the statute was narrowly tailored because the language was similar to the language upheld by the Supreme Court in *Frisby v. Schultz*.¹⁷⁰ The district court also rejected the plaintiff’s argument that the statute was vague and overbroad.¹⁷¹ The court concluded that although there were undefined terms in the statute, they all had “plain meanings that a person of ordinary intelligence could clearly ascertain.”¹⁷²

The district court’s holding in *Nixon* is troubling. The court correctly recognized the interests in mourning but wrongly decided the issue of vagueness and overbreadth. The disputed provision of “in front of or about” fails to give guidance on where protesters can exercise their rights of free speech.¹⁷³ Although the Missouri statute uses the “in front of” language that was utilized in *Frisby*, the “or about” provision is unique to the Missouri statute.¹⁷⁴ In *Frisby*, the Court targeted picketing “focused on, and taking place in front of, a particular residence.”¹⁷⁵

According to the plaintiff’s brief, Westboro contacted local authorities for guidance on the “in front of or about” description.¹⁷⁶ Conflicting responses were given that included the parking lot of a funeral, 100 feet from the church entrance, “on the other side of

169. *Id.* at 695–96.

170. *Id.* at 696–97 (citing *Frisby v. Schultz*, 487 U.S. 474, 477, 488 (1988) (upholding a ban on picketing “before or about the residence”)). In *Frisby*, the Supreme Court construed the local ordinance as prohibiting picketing “focused on, and taking place in front of, a particular residence.” *Frisby*, 487 U.S. at 482.

171. *Nixon*, 504 F. Supp. 2d at 697.

172. *Id.* The plaintiff also filed a motion to enjoin the prosecuting attorney from enforcing the statute in an overly broad manner. *Id.* The prosecuting attorney informed the plaintiff that the statute applied to all picketing within one hour of a funeral and protests were allowed 400 feet away from the funeral. *Id.* at 698. The prosecuting attorney did not respond to the motion for preliminary injunction and instead entered a stipulation where he essentially agreed not to enforce Missouri’s funeral picketing statute. *Id.* The plaintiff agreed to withdraw the motion for preliminary injunction once a consent judgment was entered. *Id.* The court declined to rule on the preliminary injunction or the proposed consent judgment until a final judgment was entered. *Id.* at 698–99.

173. *See, e.g.*, *Giaccio v. Pennsylvania*, 382 U.S. 399, 402 (1966) (“It is established that a law fails to meet the requirements of the Due Process Clause if it is so vague and standardless that it leaves the public uncertain as to the conduct it prohibits. . .”).

174. *See* MO. ANN. STAT. § 578.501 (West Supp. 2007); *Frisby*, 487 U.S. at 477.

175. *Frisby*, 487 U.S. at 482.

176. Suggestions in Support of Motion for Preliminary Injunction to Prevent Defendants Nixon and Blunt from Enforcing § 578.501 at 5, *Phelps-Roper v. Nixon*, 504 F. Supp. 2d 691 (W.D. Mo. 2007) (No. 06-4156-CV-C-NKL).

town,” and 400 feet.¹⁷⁷ The arbitrary and conflicting interpretations of the provision undermine the court’s conclusion that a person of reasonable intelligence would know the meaning of the terms.¹⁷⁸ The “in front of or about” language in the Missouri statute fails to give proper notice to protesters. Consequently, the proper location where Westboro may picket in Missouri remains a mystery.

On appeal, the Eighth Circuit reversed the district court’s denial of Westboro’s preliminary injunction.¹⁷⁹ Without determining the constitutionality of the statute, the court concluded that Phelps-Roper had a fair chance of showing that the Missouri statute was facially overbroad or not narrowly tailored.¹⁸⁰ The appellate court agreed with the lower court’s conclusion that the statute was content neutral.¹⁸¹ Interestingly, the appellate court was not swayed by the legislative history and concluded that the legislature’s motivation for enactment was irrelevant because the statute is facially neutral.¹⁸² Similar to its decision in *Olmer*, the Eighth Circuit declined to extend *Frisby* beyond the residential context.¹⁸³ The Eighth Circuit failed to elaborate on why *Frisby* should be limited other than stating “we choose to draw the line in such a way as to give maximum possible protection to speech”¹⁸⁴ The Eighth Circuit missed an important opportunity to clarify the rights of unwilling listeners. In a misguided attempt to protect free speech, the court wrongly assumed that speech automatically trumped the rights of unwilling listeners. In fact, *Frisby* and an extension of the captive audience doctrine would properly balance the right of free speech against the rights of mourners.¹⁸⁵

The federal district court in Kentucky reached a different result. In *McQueary v. Stumbo*,¹⁸⁶ the plaintiff, a supporter of Westboro, filed a motion for a preliminary injunction to challenge some of the provisions of the Kentucky statute.¹⁸⁷ The court concluded that the provisions were unconstitutionally overbroad and enjoined enforcement.¹⁸⁸ The challenged provisions prohibited picketing

177. *Id.* at 5–6.

178. *Nixon*, 504 F. Supp. 2d at 697.

179. *Phelps-Roper v. Nixon*, 509 F.3d 480 (8th Cir. 2007).

180. *Id.* at 488.

181. *Id.* at 485.

182. *Id.*

183. *Id.* at 486–87 (concluding that the home is “unique”); *see also* *Olmer v. Lincoln*, 192 F.3d 1176 (8th Cir. 1999) discussed in Part III.C.

184. *Nixon*, 509 F.3d at 487.

185. *See* discussion *infra* Part V.B.

186. 453 F. Supp. 2d 975 (E.D. Ky. 2006).

187. *Id.* at 976–77.

188. *Id.* at 997–98.

within 300 feet of a funeral and prohibited displaying observable images, sounds, chanting, or singing without authorization of the family members.¹⁸⁹ The court addressed the initial inquiry of the correct level of scrutiny to apply.¹⁹⁰ The court concluded that the statute was content neutral in spite of the clear motivations to respond to Westboro's activities.¹⁹¹ The court reasoned that the statute contained both content-neutral and content-based aspects, but the predominate purpose of the statute was the content-neutral purpose of preventing interference with funerals and protecting unwilling listeners.¹⁹² The court concluded that intermediate scrutiny applied, and it found that "[t]he state . . . has a significant interest in prohibiting interference with funerals."¹⁹³

The court wrestled with the application of *Hill v. Colorado* and the interests of unwilling listeners in the context of funerals.¹⁹⁴ The 300-foot distance requirement was held to be not narrowly tailored and the court stated that it "burden[ed] substantially more speech than . . . necessary" because the 300-foot distance could impact communication unrelated to the funeral and was substantially broader than distances the Supreme Court has upheld in protest cases.¹⁹⁵

The court's decision in *McQueary* is well-supported by Supreme Court precedent. Although the court struggled with the application of *Hill* and the interests of unwilling listeners, it ultimately "assumed" that the state's interest was valid.¹⁹⁶ While the preamble to the Kentucky statute probably received applause from constituents, it was poorly drafted, and gratuitous comments regarding "certain despicable individuals" were ultimately used against the state to argue that the statute was content based.¹⁹⁷ The Kentucky legislation was also one of the few statutes that failed to include specific time provisions.¹⁹⁸ Moreover, the 300-foot distance was excessive.¹⁹⁹

189. *Id.* at 977–78.

190. *Id.* at 981–86.

191. *Id.* at 985.

192. *Id.* at 985–86.

193. *Id.* at 987.

194. *Id.* at 991–92.

195. *Id.* at 995–96. The court also found a provision regarding distributing literature "[w]ith no geographic restriction" overbroad. *Id.* at 996.

196. *Id.* at 992.

197. See discussion *supra* Part IV.C.

198. KY. REV. STAT. ANN. §§ 525.055, 525.145 & 525.155 (West Supp. 2006); see also *infra* Appendix.

199. *McQueary*, 453 F. Supp. 2d at 995–96.

Ohio's statute was also challenged in *Phelps-Roper v. Taft*.²⁰⁰ The Ohio statute prohibits "[p]icketing . . . within three hundred feet of any . . . establishment during or within one hour before or one hour after the conducting of an actual funeral or burial service at that place."²⁰¹ The statute also has a floating buffer zone provision which prohibits picketing within 300 feet of a funeral procession.²⁰²

In *Taft*, the plaintiff conceded that Ohio's statute was facially content neutral but attacked it as not being narrowly tailored or leaving open alternative channels.²⁰³ The court concluded that Ohio has a significant interest in protecting mourners and recognized them as a captive audience under *Frisby*.²⁰⁴ The district court also held that the 300-foot fixed buffer zone that prohibited protest activities within 300 feet of a funeral was narrowly tailored, but the 300-foot floating zone was not. The court decided to sever the floating buffer zone provision and deny the plaintiff's request for injunction.²⁰⁵

Although the court accurately decided that mourners are a captive audience, its ultimate conclusion regarding the fixed buffer zone of 300 feet is unsupported. The 300-foot distance will probably be revisited by an appellate court.

The 300-foot distance requirement is not reasonably related to Ohio's or Kentucky's stated interest. States with outlandish distance requirements of 1,000 feet or more are particularly disturbing. There is a huge delta between the distances upheld in prior Supreme Court decisions and the 300- to 1,000-foot provisions that have been enacted in the majority of the funeral picketing statutes.²⁰⁶ The legislatures in Kentucky, Ohio, and other jurisdictions do not protect their citizens by drafting clearly unconstitutional statutes and spending tax dollars on inevitable litigation.

States that have enacted funeral picketing legislation should be applauded for their efforts to protect mourners; however, most of the legislation is vulnerable to overbroad challenges. Funeral picketing is such an emotional issue that judges and legislatures may be tempted to effectively silence Westboro's message by trying to place the group as far as humanly possible from the mourners, hence some statutes have passed legislation as broad as 1,000 feet.²⁰⁷ The government can

200. *Phelps-Roper v. Taft*, 523 F. Supp. 2d 612 (N.D. Ohio 2007).

201. OHIO REV. CODE ANN. § 3767.30 (LexisNexis Supp. 2007).

202. *Id.*

203. *Taft*, 523 F. Supp. 2d at 615.

204. *Id.* at 618–19.

205. *Id.* at 620.

206. See discussion *infra* Part V.C.2.

207. See *infra* note 277 and accompanying text.

and should protect mourners, but it cannot insulate them for an indefinite period of time with geographically overbroad distances.

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

V. SURVIVING CONSTITUTIONAL CHALLENGES

As demonstrated, the government has a significant interest in honoring the right to mourn because it ultimately protects citizens from emotional disturbance, and maintains the dignity of funerals.²⁰⁸ Intermediate scrutiny requires that the legislation be deemed content neutral, that it is “narrowly tailored to serve a significant government interest, and leaves open ample alternative channels of communication.”²⁰⁹

A. *Ample Alternative Means of Communication*

For the funeral picketing statutes to survive constitutional scrutiny, Westboro must “have other adequate ways to reach [its] audience.”²¹⁰ Westboro’s primary means of reaching its audience has been through picketing on public sidewalks across from funerals. The group also publishes its message through numerous websites, fliers, press releases, faxes, and television.²¹¹

Although public sidewalks have traditionally been viewed as public fora, a funeral does not become a public event merely because a flag is draping a coffin or someone is playing Taps in the background. A funeral is a private gathering of people who share the same goal: to show respect to the deceased and/or the survivors.²¹² Whether

208. See discussion *supra* Part III.

209. *McQueary v. Stumbo*, 453 F. Supp. 2d 975, 981 (E.D. Ky. 2006) (quoting *Frisby v. Schultz*, 487 U.S. 474, 481 (1988)).

210. Michael A. Mugmon, *Broadsheet Bullies?: Designated Public Forum and Established Newspapers’ Efforts to Rid Philadelphia’s Public Transit System of a Government-Sponsored Competitor*, 150 U. PA. L. REV. 1969, 1991 (2002). Of course audience selection is up to the protester, not the government. Based on its message, Westboro’s targeted audience is not mourners but the general public. Westboro does not limit its protests to mourners or military families.

211. Some of the websites maintained by the group include: www.godhatesamerica.com; www.godhatesfags.com; www.priestrapeboys.com; www.hatemongers.com; www.yourpastorisawhore.com; www.godhatescanada.com; www.godhatesweden.com; www.smellthebrimstone.com.

212. Many individuals in Western culture announce burial details in obituaries and some funerals receive media attention when the decedent was particularly heroic. These

Westboro is viewed as sincerely trying to share its message, or creating a publicity stunt at the expense of the bereaved, it is clear that Westboro's speech has very little to do with the decedents.²¹³ Westboro's message is about the perceived favoritism America has shown homosexuality.

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

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

The Supreme Court previously upheld an ordinance that prohibited focused residential picketing under the captive audience doctrine.²¹⁴ Funeral picketing is at least as intrusive if not more so than focused picketing of a residence; consequently, the captive audience doctrine should be expanded to protect funeral attendees as well.²¹⁵

facts, however, do not transform a private event into a public one. Total strangers that attend funerals share the same communal goal as the other attendees—to pay respect to the decedent. Funeral picketers do not try to join the gathering; they want to disrupt it.

213. See discussion *supra* note 143 (highlighting the fact that legislators recognize the targeted and hateful nature of the speech).

214. *Frisby v. Schultz*, 487 U.S. 474, 476, 487–88 (1988). The ordinance prohibited “picketing ‘before or about’ any residence.” *Id.* at 476. The Court explained that “[t]he First Amendment permits the government to prohibit offensive speech as intrusive when the ‘captive’ audience cannot avoid the objectionable speech.” *Id.* at 487.

215. An expanded captive audience doctrine is not without its critics. The Eighth Circuit declined to extend the doctrine beyond the residential context. *Phelps-Roper v. Nixon*, 509 F.3d 480, 486–87 (8th Cir. 2007). Constitutional law scholar Eugene Volokh believes the principles of *Frisby* could apply to a funeral and recognizes that funeral picket-

B. *Captive Audience Rationale*

To determine whether an ordinance is narrowly tailored, the Court will consider the extent to which the ordinance is protecting unwilling listeners who are a captive audience. The concept of individuals being held captive was articulated by the Supreme Court in the 1940s in *Kovacs v. Cooper*, a case involving an ordinance that prohibited sound trucks from emitting loud noises.²¹⁶ In a plurality decision, the Supreme Court upheld the ordinance as constitutional.²¹⁷ The Court explained:

The unwilling listener is not like the passer-by who may be offered a pamphlet in the street but cannot be made to take it. In his home or on the street he is practically helpless to escape this interference with his privacy by loud speakers except through the protection of the municipality.²¹⁸

Another important case involving the captive audience doctrine is *Cohen v. California*.²¹⁹ *Cohen* involved a criminal conviction of an individual who wore an offensive jacket inside a courthouse and was later arrested for disturbing the peace.²²⁰ The jacket carried the slogan “Fuck the Draft.”²²¹ There was no speech involved other than the public display of the jacket.²²² The Supreme Court reversed the conviction and stated that individuals who were offended could simply avert their eyes.²²³ In this instance, the rights of the speaker trumped the rights of unwilling listeners.

Cohen is distinguishable from the funeral picketing scenario. Most obviously, Cohen’s speech was an article of clothing. The speech involved in funeral picketing is substantially more confrontational and offends more than the eyes. Funeral picketing is not lim-

ing can be more intrusive than picketing hospitals or abortion clinics; however, he argues that expansion would lead to a “slippery slope” where additional exceptions “would eventually swallow the rule.” Eugene Volokh, *Burying Funeral Protests*, NAT’L REV., Mar. 23, 2006, available at <http://www.nationalreview.com/comment/volokh200603230730.asp>; see also McDonough, *supra* note 17, at 18 (highlighting Eugene Volokh’s concern that complete funeral picketing bans have the potential to restrict general picketing). *But cf.* Phelps, *supra* note 76, at 301 (explaining that courts could avoid stretching “the *Frisby* captive audience doctrine to churches . . . because a liberal application of the doctrine potentially could lead to overly excessive speech regulation”).

216. *Kovacs v. Cooper*, 336 U.S. 77, 78, 86–87 (1949) (plurality opinion).

217. *Id.* at 87.

218. *Id.* at 86–87 (citation omitted).

219. 403 U.S. 15 (1971).

220. *Id.* at 16–17.

221. *Id.* at 16.

222. *Id.* at 16–17.

223. *Id.* at 21, 26.

ited to signs, but includes chanting and other noise. Moreover, unlike a generic message regarding politics, funeral picketing often involves personal attacks rejoicing in the private pain of the bereaved. Over the last few years, in balancing the rights of privacy against the right to free speech, the Court has placed additional emphasis on the rights of unwilling listeners. This shift suggests that the reasoning in *Cohen* should not apply to funeral picketing cases.

Expansion of the captive audience doctrine depends in large part on the Court's ruling in *Frisby v. Schultz*.²²⁴ In *Frisby*, abortion protesters picketed outside an abortion doctor's house on a public street.²²⁵ In response to the picketing, a municipal ordinance was passed that prohibited picketing, with an exception for labor picketing, in residential neighborhoods.²²⁶ The Town Board expressed concern that residential picketing "causes emotional disturbance and distress to the occupants."²²⁷ The lower courts enjoined enforcement of the ordinance, but the Supreme Court reversed.²²⁸ As a threshold matter, the Court deferred to the lower courts' conclusion that the ordinance was content neutral.²²⁹ The Court then held that the statute did not violate the First Amendment because it addressed the targeted evil of focused residential picketing.²³⁰ Most of the Court's opinion was devoted to discussing the government's significant interest in the protection of residential privacy.²³¹

There are many parallels that can be drawn between residential privacy and privacy in mourning. The essential question is whether the concept of residential privacy is based on the location of the home or the idea of what the home represents. The Supreme Court has described the home as a retreat, a place of escape, and a sanctuary.²³² Similarly, a funeral represents a moment of escape. It is a time when individuals similarly put aside "the tribulations of their daily pursuits" while they focus on thoughts of mortality and grief.²³³ The Supreme Court has already exhibited a willingness to apply the captive audi-

224. 487 U.S. 474 (1988).

225. *Id.* at 476.

226. *Id.*

227. *Id.* at 477.

228. *Id.* at 478, 488.

229. *Id.* at 482.

230. *Id.* at 485–88.

231. *Id.* at 484.

232. *Carey v. Brown*, 447 U.S. 455, 471 (1980).

233. *Id.*

ence doctrine outside the context of residential privacy, particularly when the interests of the unwilling listener are at stake.²³⁴

One of the reasons the Court decided in favor of the government in *Frisby* was the targeted nature of the picketing.²³⁵ Justice O'Connor, writing for the majority, explained that the focused picketing was "narrowly directed at the household, not the public. The type of picketers banned by the Brookfield ordinance generally do not seek to disseminate a message to the general public, but to intrude upon the targeted resident, and to do so in an especially offensive way."²³⁶

Targeted picketing of a funeral is analogous to the targeted picketing of a home. Both are coercive forms of harassment.²³⁷ Funeral picketing is not an expression of ideas, but an attempt to force a message down the throat of an unwilling listener during an often tragic and vulnerable time of his or her life.²³⁸ Just as "religious worship [should] not be disturbed by those anxious to preach a doctrine of atheism,"²³⁹ a funeral should not be disturbed by those anxious to announce that the deceased is burning in hell. The presence of picketers at and during a funeral turns a private, solemn setting into a confrontational one. If the states are prevented from protecting their citizens during a time of mourning in favor of harassment dressed up in the guise of the First Amendment, the states would be rendered

234. *Hill v. Colorado*, 530 U.S. 703, 715–18 (2000). As the Court in *Frisby* explained, "[t]here simply is no right to force speech into the home of an unwilling listener." *Frisby*, 487 U.S. at 485.

235. *Frisby*, 487 U.S. at 486. The Court construed the ordinance to apply to targeted residential picketing as opposed to general residential picketing. *Id.* at 482–83.

236. *Id.* at 486.

237. See *Stanley*, *supra* note 11, at 285 ("When people are in a location where they cannot freely leave or where they have a right to remain and the speech is not easily avoided, the invasion of their privacy rights creates a greater justification for regulation.").

238. Westboro has claimed it is exercising its religion in funeral picketing, and thus argues that funeral picketing legislation also violates the group's rights under the Free Exercise Clause. Suggestions in Support of Motion for Preliminary Injunction to Prevent Defendants Nixon and Blunt from Enforcing § 578.501, *Phelps-Roper v. Nixon*, 504 F. Supp. 2d 691 (W.D. Mo. 2007) (No. 06-4156-CV-C-NKL). In its brief, the ACLU presents Westboro as a group concerned with fulfilling its duty to warn survivors of things to come. *Id.* at 3. The argument is perplexing because Westboro's signs do not tell mourners to pray or repent; rather, Westboro's signs indicate jubilation over tragedy and death by displaying signs like "Thank God for Dead Soldiers," and "God Hates Your Tears." See discussion *supra* Part II and accompanying notes. In fact, the ACLU's depiction of Westboro is contradicted by Westboro's statements on its web pages. See Westboro, Home Page, *supra* note 19. Westboro's Free Exercise argument is particularly ironic because the group is content to ignore the beliefs of mourners and others who disagree with its message. See discussion *supra* Part III.C. Arguably, mourners and Westboro can both claim protection under the Free Exercise Clause.

239. *Kovacs v. Cooper*, 336 U.S. 77, 86 (1949) (plurality opinion).

impotent. Grieving families' only redress would be civil litigation.²⁴⁰ Legislatures that have enacted funeral picketing statutes are justified in their attempt to protect funeral attendees. The government's interest in protecting the "unwilling listener" was emphasized in both *Hill* and *Frisby*.²⁴¹

In *Hill*, the Supreme Court continued to "recogniz[e] the interests of unwilling listeners in [captive] situations."²⁴² *Hill* was significant because it involved unwilling listeners in a public forum.²⁴³ In *Hill*, the Court explained that "[t]he right to avoid unwelcome speech has special force in the privacy of the home . . . but can also be protected in confrontational settings."²⁴⁴ The Court in *Frisby* explained:

The First Amendment permits the government to prohibit offensive speech as intrusive when the "captive" audience cannot avoid the objectionable speech. . . . The resident is figuratively, and perhaps literally, trapped within the home, and because of the unique and subtle impact of such picket-

240. The father of Lance Corporal Matthew A. Snyder successfully sued Westboro and several of its members under the tort theories of invasion of privacy and intentional infliction of emotional distress. Order of Judgment, *Snyder v. Phelps*, No. 06-cv-1389-RDB (D. Md. Nov. 5, 2007), available at <http://www.matthewsnyder.org>. The jury awarded Mr. Snyder \$10.9 million, which the trial judge reduced to \$5 million. See Anna Messar, Note, *Balancing Freedom of Speech with the Right to Privacy: How to Legally Cope with the Funeral Protest Problem*, 28 *PAGE L. REV.* 101, 124–26 (2007) (summarizing the Snyder lawsuit); Dolan, *supra* note 70. The large verdict has raised a debate among legal scholars about the role of free speech in tort law. See, e.g., Eugene Volokh, *The Volokh Conspiracy*, <http://volokh.com/posts/chain-1194479521.shtml> (last visited Feb. 20, 2008). Interestingly, Westboro stood 1,000 feet away from the funeral and was not viewed by Mr. Snyder until the news coverage of the protest. Gina Davis, *At Carroll Funeral, a National Protest; Service for Marine is Picketed by Kan. Church that Claims God is Punishing U.S. with Deaths*, *BALT. SUN*, Mar. 11, 2006, at 1A; Matthew Dolan, *Reversal Likely in Protest Verdict; First Amendment Applies Experts Say*, *BALT. SUN*, Nov. 2, 2007, at 1A. The lawsuit was also based on website postings by Westboro criticizing Mr. Snyder for raising his son "for the devil." Complaint ¶¶ 21–22, *Snyder v. Phelps*, No. 06-cv-1389rdb (D. Md. June 5, 2006), available at <http://www.matthewsnyder.org>. Meanwhile Westboro remains undeterred by the verdict and has continued its funeral protests. One of Westboro's websites reads "Thank God for the 10.9M!!! WBC prayed for it to be 109M!!! WBC will continue preaching at funerals!!" Westboro, *God Hates America Home Page*, *supra* note 15. Westboro's appeal of the district court's order denying its motion to dismiss or for summary judgment was dismissed by the Fourth Circuit. *Snyder v. Phelps-Roper*, 2007 WL 4239664 (4th Cir. 2007).

241. *Hill v. Colorado*, 530 U.S. 703, 716–18 (2000); *Frisby v. Schultz*, 487 U.S. 474, 485 (1988).

242. *Hill*, 530 U.S. at 718.

243. See *supra* discussion Part III.A and accompanying notes; see also Jennifer L. Maffett, *Balancing Freedom of Speech Against the Rights of Unwilling Listeners: The Attack on the First Amendment in Hill v. Colorado*, 26 *U. DAYTON L. REV.* 327, 329–30 (2001) (noting that in *Hill*, "[f]or the first time, the Supreme Court gave greater weight to the rights of unwilling listeners than the protection of free speech").

244. *Hill*, 530 U.S. at 717 (citation omitted).

ing is left with no ready means of avoiding the unwanted speech.²⁴⁵

Similarly, funeral attendees are trapped and have no means of avoiding unwanted speech. Picketing at funerals is personally targeted at the decedent and his or her loved ones. The unwilling listener is not subjected to the offensive speech by happenstance, but is a target during an emotionally charged time. The funeral attendee is not simply exposed to offensive speech, but chased in a corner and trapped with no means of escape other than not attending the funeral.²⁴⁶ If unwilling listeners can be protected on sidewalks adjacent to medical facilities, that same protection should apply to unwilling listeners on sidewalks adjacent to funerals.

The Supreme Court has repeatedly stated that “we are often ‘captives’ outside the sanctuary of the home and subject to objectionable speech.”²⁴⁷ Consequently, in a courthouse, or on a public street, we may encounter something offensive by happenstance and we must make the decision to pay attention or avert our eyes. A funeral is different. Funeral picketing represents the type of speech identified in *Hill* “that is so intrusive that the unwilling audience cannot avoid it.”²⁴⁸ *Hill* acknowledged that the interests of the unwilling listener “can . . . be protected [outside the home] in confrontational settings.”²⁴⁹

Frisby can be viewed as potentially supporting the application of the captive audience doctrine to houses of worship.²⁵⁰ As Judge Bright explained in his dissent in *Olmer v. Lincoln*, “houses of worship—whether church, synagogue, or mosque—are sacred places

245. *Frisby*, 487 U.S. at 487.

246. The district court in *Taft* rejected a similar argument by plaintiff that mourners choose to attend funeral services and can avert their eyes. 523 F. Supp. 2d 612, 618 (N.D. Ohio 2007).

247. *Cohen v. California*, 403 U.S. 15, 21 (1971) (quoting *Rowan v. U.S. Post Office Dep’t*, 397 U.S. 728, 738 (1970)).

248. *Hill*, 530 U.S. at 716 (citing *Frisby*, 487 U.S. at 487).

249. *Id.* at 717.

250. See *Phelps*, *supra* note 76, at 300 (citations omitted), arguing that

If the current Supreme Court were to expand the captive audience doctrine beyond the four walls of the home, churches present one of the strongest cases.

First, churches potentially present a high degree of real captivity. Many religions require or strongly encourage in-church worship on specified days and at specified times. The congregation and spiritual leader not only might look upon one’s absence from church with disfavor, but may even regard it as a punishable sin. For the true believers of many religions, whether and where to attend church are matters of less flexibility than virtually any other activity. When protesters surround a house of worship, the faithful do not have the option of avoidance. The unwilling listener simply must endure the offensive speech.

where people seek rest and replenishment.”²⁵¹ Similarly, the home may be “the last citadel of the tired, the weary, and the sick.”²⁵² Because this description of the home applies with equal force to houses of worship, the same arguments can be used to support application of the captive audience doctrine to funerals. Individuals attending funerals should not be forced to choose between attending a funeral and suffering from the signs and sounds of protesters who are literally rejoicing over their pain, or forfeiting their right to mourn in community with others. Just as the sanctity of the home is respected, a funeral is a sacred and private occasion that should be protected.

In *Madsen v. Women’s Health Center, Inc.*, the Supreme Court agreed with the lower court’s conclusion that “the State’s strong interest in residential privacy, acknowledged in *Frisby v. Schultz*, applied by analogy to medical privacy.”²⁵³ The Court highlighted the Florida Supreme Court’s opinion “that while targeted picketing of the home threatens the psychological well-being of the ‘captive’ resident, targeted picketing of a hospital or clinic threatens not only the psychological, but also the physical, well-being of the patient held ‘captive’ by medical circumstance.”²⁵⁴ Similarly, targeted picketing of a funeral could impact the psychological well-being of funeral attendees.²⁵⁵ The process of mourning is a private time and a time necessary for emotional well-being. Just as there is no right to force speech into the home of an unwilling listener, there should be no right to force speech on a gathering of unwilling listeners who may be emotionally vulnerable.

Funeral attendees’ status as unwilling listeners is elevated by the heightened emotions involved in grieving. The emotional distress of funeral attendees may exceed that of residents in their homes or patients entering medical facilities.²⁵⁶ Not only is the captive audience unable to avoid the speech, but their sensitivity to the speech is greater. This should trigger greater protection from the Court.

There are inherent privacy issues involved with funerals and mourning. Like funerals, the Supreme Court has recognized instances where it would be “impractical for the unwilling viewer or au-

251. 192 F.3d 1176, 1185 (8th Cir. 1999) (Bright, J., dissenting).

252. *Id.* (quoting *Gregory v. Chicago*, 394 U.S. 111, 125 (1969) (Black, J., concurring)).

253. 512 U.S. 753, 768 (1994) (citation omitted).

254. *Id.*

255. See discussion *supra* Part III.B.

256. See *supra* notes 59–65 and accompanying text.

ditor to avoid exposure.”²⁵⁷ The federal district court in Kentucky recognized the captive nature of funerals in *McQueary*:

A funeral is a deeply personal, emotional and solemn occasion. Its attendees have an interest in avoiding unwanted, obtrusive communications which is at least similar to a person’s interest in avoiding such communications inside his home. Further, like medical patients entering a medical facility, funeral attendees are captive. If they want to take part in an event memorializing the deceased, they must go to the place designated for the memorial event. Whatever the meaning of *Hill*, for purposes of this Opinion, the Court will assume that the state has an interest in protecting funeral attendees from unwanted communications that are so obtrusive that they are impractical to avoid.²⁵⁸

Funerals are a logical place to extend the captive audience doctrine. As in *Hill*, funeral attendees are presumably unwilling listeners in need of the Court’s protection.²⁵⁹ Funerals provide a stronger case for assuming the existence of unwilling listeners than *Hill*. In *Cohen v. California*, the courthouse in which the offensive speech was displayed was frequented by members of the general public, each with differing views regarding the war that Cohen was protesting.²⁶⁰ Although the Court did not focus on the issue in its analysis, presumably there would have been a mixture of both willing and unwilling listeners in a courthouse open to the public.²⁶¹ In the context of medical clinics, the Court expressed concern over the unwilling listener and the distress caused by the speakers exercising their First Amendment rights.²⁶² The Court did not recognize the possibility of willing listeners being present.²⁶³ The implicit assumption was that individuals

257. *Hill v. Colorado*, 530 U.S. 703, 718 (2000) (quoting *Erznoznik v. City of Jacksonville*, 422 U.S. 205, 209 (1975)).

258. *McQueary v. Stumbo*, 453 F. Supp. 2d 975, 992 (E.D. Ky. 2006).

259. *Hill*, 530 U.S. at 718.

260. 403 U.S. 15, 21–22 (1971).

261. *See id.* (noting that the presence of some unwilling listeners in a public building did not justify conviction, especially when there was no evidence that “persons powerless to avoid appellant’s conduct did in fact object to it”). For a discussion of the Supreme Court’s general failure to consider the rights of willing listeners under the captive audience doctrine, see generally Marcy Strauss, *Redefining The Captive Audience Doctrine*, 19 *HASTINGS CONST. L.Q.* 85 (1991), critiquing the ambiguity of the captive audience doctrine and attempting to provide substance to the slogan.

262. *See Madsen v. Women’s Health Ctr., Inc.*, 512 U.S. 753, 768 (1994) (“[T]argeted picketing of a hospital or clinic threatens not only the psychological, but also the physical, well-being of the patient held ‘captive’ by medical circumstance.”) (citing *Operation Rescue v. Women’s Health Ctr., Inc.*, 626 So. 2d 664, 673 (Fla. 1993)).

263. In a footnote, the majority explained,

seeking medical treatment, or loved ones visiting patients in the hospital, or women who had made decisions to obtain abortions were unwilling to hear pro-life arguments. It is an even more credible argument that individuals attending a funeral are unwilling listeners to speakers who wish to picket the funeral. It is not the speech of the funeral picketers, but the very act of coming to the funeral to picket, that is so intrusive. As the Supreme Court recognized, “[i]t may not be the content of the speech, as much as the deliberate ‘verbal or visual assault,’ that justifies proscription.”²⁶⁴

The very presence of individuals protesting at a funeral, regardless of their message, is disruptive and harassing. As Justice Stevens explained, “[p]icketing is a form of speech that, by virtue of its repetition of message and often hostile presentation, may be disruptive of an environment irrespective of the substantive message conveyed.”²⁶⁵ Similar to targeted residential picketing, the evil of targeted funeral picketing is “created by the medium of expression itself.”²⁶⁶ Legislation drafted towards banning targeted funeral picketing should be considered narrowly tailored.

C. *Narrowly Tailored Requirement*

1. *Time Provisions*

The majority of the state statutes aimed at funeral picketing contain restrictions regulating the time of picketing activities near funerals.²⁶⁷ The temporal restrictions essentially ban speech during a particular period before, during, and after a funeral.²⁶⁸ The time limits also reinforce that picketers have ample alternative means for picketing at any time other than that prescribed by the statute. This total ban on funeral picketing during the proscribed time is justified by the state’s significant interest in regulating targeted picketing. In their

The purpose of the Colorado statute is not to protect a potential listener from hearing a particular message. It is to protect those who seek medical treatment from the potential physical and emotional harm suffered when an unwelcome individual delivers a message (whatever its content) by physically approaching an individual at close range

Hill, 530 U.S. at 718–19 n.25.

264. *Id.* at 716 (quoting *Erznoznik v. Jacksonville*, 422 U.S. 205, 210–11 n.6 (1975) (citations omitted)).

265. *Frisby v. Schultz*, 487 U.S. 474, 498 (1988) (Stevens, J., dissenting).

266. *Id.* at 486 (majority opinion) (quoting *City Council v. Taxpayers for Vincent*, 466 U.S. 789, 810 (1984)).

267. See *supra* Part IV.B (discussing the legislative response to funeral picketing).

268. See *supra* notes 131–135 and accompanying text (noting particular statutes and their temporal restrictions).

rush to enact legislation, however, some states have enacted statutes that are overbroad.

A time, place, or manner regulation “may [not] burden substantially more speech than is necessary to further the government’s legitimate interests.”²⁶⁹ The narrow tailoring requirement is satisfied if the legislation “promotes a substantial government interest that would be achieved less effectively absent the regulation.”²⁷⁰ In other words, the statute must “target[] and eliminate[] no more than the exact source of the ‘evil’ it seeks to remedy.”²⁷¹ Legislation may be considered narrowly tailored, even if it is not the least restrictive or least intrusive means of satisfying the government’s stated interest.²⁷²

The federal and many of the state statutes impose a time regulation ranging from thirty minutes to two hours, with the majority of the legislation containing one-hour time limits.²⁷³ Arguably, speech related to abortion is time-sensitive. Many pro-life demonstrators desire not only to express their opinion, but influence individual decisions. Funeral picketing, in contrast, is not time-sensitive. The message being conveyed will not lose its force after the expiration of a few hours. Even assuming the goal of funeral picketing is to influence ideas, the ideas expressed have nothing to do with the funeral that is being disrupted.²⁷⁴

The government’s interest in protecting those who mourn should be at its highest during and immediately following the funeral. Whether the significant governmental interest is to protect citizens who mourn from additional emotional distress, to protect the solemnity and dignity of funerals, or to control noise and traffic, a one-hour time limitation is narrowly tailored to achieve those goals. The minority of states with provisions restricting picketing for two hours after a funeral²⁷⁵ are at greater risk for being found unconstitutional. A two-hour ban on funeral picketing following a funeral burdens more

269. *Ward v. Rock Against Racism*, 491 U.S. 781, 799 (1989).

270. *Id.* (quoting *United States v. Albertini*, 472 U.S. 675, 689 (1985)).

271. *Frisby v. Schultz*, 487 U.S. 474, 485 (1988).

272. *Hill v. Colorado*, 530 U.S. 703, 726 (2000).

273. *See supra* notes 131-133 and accompanying text; *see also infra* Appendix.

274. *But see* Plaintiff’s Complaint for Declaratory and Injunctive Relief at 3–4, *Phelps-Roper v. Nixon*, 504 F. Supp. 2d 691 (W.D. Mo. 2007) (No. 06-4156-CV-C-NKL) (arguing that funerals are “the only place where [Westboro’s] religious message can and must be delivered in a timely and relevant manner”); Suggestions in Support of Motion for Preliminary Injunction to Prevent Defendants Nixon and Blunt from Enforcing § 578.501 at 3, *Phelps-Roper v. Nixon*, 504 F. Supp. 2d 691 (W.D. Mo. 2007) (No. 06-4156-CV-C-NKL) (same).

275. The statutes in Delaware, Kansas, and Nebraska currently prohibit picketing from one hour before, during, and two hours after a funeral. DEL. CODE ANN. tit. 11, § 1303(b)

speech than necessary. The adoption of time ranges of a half-hour to one hour in other jurisdictions suggests that one hour is sufficient.

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

2. *Distance Requirements*

The state statutes are most vulnerable to attack based on the various distance requirements.²⁷⁶ Most of the funeral picketing statutes prohibit picketing anywhere from 500 to 1,000 feet from the location of the funeral.²⁷⁷ The Supreme Court has been reluctant to impose significant distance requirements in the past. When the Respect for Fallen Heroes Act was submitted to Congress it had an original distance of 500 feet, but was later amended to 300 feet.²⁷⁸ Only eight states enacted legislation with distance requirements of 300 feet or less.²⁷⁹ In *McQueary*, the federal district court found a 300-foot dis-

(Supp. 2006); KAN. STAT. ANN. § 21-4015(e) (1995); NEB. REV. STAT. § 28-1320.03 (Supp. 2006).

276. The state of Missouri prohibited picketing “in front of or about” a funeral and had a separate provision regarding a 300-foot distance that would apply only in the event the former provision was found unconstitutional. MO. REV. STAT. § 578.501 (Supp. 2007). The *Phelps-Roper* court held that the “in front of or about” provision was narrowly tailored because it was similar to the ordinance upheld in *Frisby*. *Phelps-Roper*, 504 F. Supp. 2d at 696-97; see also discussion *supra* Part IV.E.

277. State statutes with distances requiring 500 feet include Georgia (GA. CODE ANN. § 6-11-34.2(b)(1) (2007)), Indiana (IND. CODE ANN. § 35-45-1-3(c)(1) (LexisNexis Supp. 2006)), Iowa (IOWA CODE ANN. § 723.5(1) (West Supp. 2007)), Minnesota (MINN. STAT. ANN. § 609.501(subd. 2)(1) (West Supp. 2007)), New Jersey (NJ. STAT. ANN. § 2C:33-8.1(b)(2) (West Supp. 2007)), Oklahoma (OKLA. STAT. ANN. tit. 21, § 1380(C)(2) (West Supp. 2007)), Pennsylvania (18 PA. CONS. STAT. ANN. § 7517(b) (West Supp. 2007)), Tennessee (TENN. CODE ANN. § 39-17-317(b) (2006)), Texas (TEX. PENAL CODE ANN. § 42.055(b) (Vernon Supp. 2006)), and Wisconsin (WIS. STAT. ANN. § 947.011(2)(a) (West Supp. 2006)). Three states require a distance of 1,000 feet: Mississippi (MISS. CODE ANN. § 97-35-18 (2006)), South Carolina (S.C. CODE ANN. § 16-17-525(A)(1) (Supp. 2006)), and South Dakota (S.D. CODIFIED LAWS § 22-13-19 (2006)).

278. Rebecca Bland, *The Respect for America's Fallen Heroes Act: Conflicting Interests Raise Hell with the First Amendment*, 75 UMKC L. REV. 523, 529-30 (2006).

279. State statutes requiring distances of 100 feet include Colorado (COLO. REV. STAT. ANN. § 18-9-125(1)(a) (West Supp. 2006)) and Maryland (MD. CODE ANN., CRIM. LAW § 10-205(c) (LexisNexis Supp. 2006)). Illinois is the only state with a 200-foot distance. 720 ILL. COMP. STAT. ANN. 5/26-6(c)(2) (West Supp. 2007). Three hundred feet distance requirements were adopted by Delaware (DEL. CODE ANN. tit. 11, § 1303(a) (Supp. 2006)), Kentucky (KY. REV. STAT. ANN. § 525.055(1)(b) (West Supp. 2006)), Nebraska (NEB. REV. STAT. § 28-1320.02(2) (Supp. 2006)), North Carolina (N.C. GEN. STAT. § 14-288.4(8)(a) (Supp. 2006)), and Ohio (OHIO REV. CODE ANN. § 3767.30 (LexisNexis Supp. 2007)).

tance provision unconstitutional.²⁸⁰ Based on prior Supreme Court cases, the minority of states with distance requirements of 100 feet or less will likely be found to be narrowly tailored. Funeral attendees are presumably unwilling listeners; however, there may be listeners in the surrounding areas beyond a 100-foot distance who may be willing listeners. There is no significant governmental interest in protecting listeners greater than 100 feet away, especially those who have no connection with the funeral. Time limitations provide better protection for mourners than overly broad distance requirements. The most analogous cases, in terms of distance requirements, are the buffer zone distances in the abortion cases.

In *Madsen v. Women's Health Center, Inc.*, the Supreme Court declined to uphold a 300-foot buffer zone.²⁸¹ *Madsen* involved an injunction against anti-abortion protesters.²⁸² The injunction established a 36-foot buffer zone around the clinic, a 300-foot no-approach zone around the clinic, and a buffer zone around staff residences.²⁸³ The Court considered the 36-foot buffer zone narrowly tailored because of the government's interest in protecting access to the clinic.²⁸⁴ Moreover, it noted that the protesters were still able to communicate their message while being seen and heard from the clinic parking lots.²⁸⁵ The Court found that the 300-foot zone was not narrowly tailored because it would "ban '[g]eneral marching through residential neighborhoods, or even walking a route in front of an entire block of houses.'" ²⁸⁶ The Court suggested in dicta that "a limitation on the time, duration of picketing, and number of pickets outside a smaller zone" would have been more narrowly tailored.²⁸⁷

The statutes with distance requirements of 500 feet and above pose similar problems. The geographic overbreadth of the statutes is problematic because other expressive activity wholly unrelated to the funeral would be impacted. A 500-foot zone is roughly one and a half

280. See *McQueary v. Stumbo*, 453 F. Supp. 2d 975, 996 (E.D. Ky. 2006) (holding 300-foot zone was overly broad because, "it would restrict communications intended for the general public on a matter completely unrelated to the funeral as well as messages targeted at funeral participants").

281. 512 U.S. 753, 773–74 (1994).

282. *Id.* at 758.

283. *Id.* at 759–61.

284. *Id.* at 769–70.

285. *Id.* at 770.

286. *Id.* at 775 (quoting *Frisby v. Schultz*, 487 U.S. 474, 483 (1988)).

287. *Id.*

football fields.²⁸⁸ Forcing the picketers to demonstrate at this distance would essentially silence them from their targeted audience. Unlike the protesters in *Madsen*, the funeral attendees would probably be unable to hear or see the picketers' message. Although effectively silencing a message that could be characterized as hateful and harassing seems appealing, it fails to strike a proper balance between the right of free speech and the right to mourn. The state regulations cannot prevent funeral picketers like Westboro from communicating their message, but they can find a balance between the protesters' rights and the rights of the mourners. There are no reports of Westboro attempting to enter funeral homes or directly confront the mourners; rather, they tend to picket on sidewalks directly across from the funeral.²⁸⁹

The Court has expressed its reluctance to completely ban generally disseminated communication in public places,²⁹⁰ and sidewalks are well-recognized public fora.²⁹¹ In *Hill*, the Supreme Court upheld a restriction in which unwelcome demonstrators could not come closer than 8 feet to an individual within 100 feet of a health care facility.²⁹² The Court noted that the 8-foot distance "should not have any adverse impact on the readers' ability to read signs displayed by demonstrators,"²⁹³ and would allow protesters to speak within a "normal conversational distance."²⁹⁴ The distance requirements suggested by the states would adversely impact the mourners' ability to read the signs or hear the protesters.

Courts have also been reluctant to impose significant distance restrictions in election polling cases. In *Burson v. Freeman*, the Supreme Court, in a plurality opinion, upheld a Tennessee statute that prohibited campaign speech within 100 feet of a polling place.²⁹⁵ The Supreme Court was concerned about balancing free speech rights

288. See Seth H. Ruzi, Comment, *Reviving Trespass-Based Search Analysis Under the Open View Doctrine: Dow Chemical Co. v. United States*, 63 N.Y.U. L. REV. 191, 225–26 n.249 (1988) (noting that four football fields is 1,200 feet).

289. See Stephen R. McAllister, *Funeral Picketing Laws and Free Speech*, 55 U. KAN. L. REV. 575, 578 (2007) (explaining how, in a typical Westboro funeral protest, a group of Westboro members stand across the street from the funeral and picket).

290. See *Madsen*, 512 U.S. at 769 ("We have noted a distinction between the type of focused picketing banned from the buffer zone and the type of generally disseminated communication that cannot be completely banned in public places, such as handbilling and solicitation.").

291. See, e.g., *Frisby*, 487 U.S. at 480 ("[P]ublic streets and sidewalks have been used for public assembly and debate, the hallmarks of a traditional public forum.").

292. *Hill v. Colorado*, 530 U.S. 703, 729–30 (2000).

293. *Id.* at 726.

294. *Id.* at 726–27 (quoting *Schenck v. Pro-Choice Network*, 519 U.S. 357, 377 (1997)).

295. 504 U.S. 191, 193–95 (1992) (plurality).

against voting rights and electoral integrity.²⁹⁶ Although the Court found the statute was content-based, it held that it served a compelling interest in preventing voter intimidation and election fraud.²⁹⁷ The Court concluded that the 100-foot distance was reasonable.²⁹⁸

Burson was a pre-election case; consequently, the constitutional right to vote was implicated. Circuit courts have also limited distances in post-election cases.²⁹⁹ The Ninth Circuit, in *Daily Herald Co. v. Munro*, considered the constitutionality of a Washington statute that prohibited exit or public opinion polls within 300 feet of polling places.³⁰⁰ The state argued that it wanted to prevent disruption at polling places.³⁰¹ The court held that the statute was unconstitutional, explaining that the areas within the 300 feet were traditional public fora that encompass streets and sidewalks.³⁰²

State legislation banning picketing within 300 feet or more is significantly broader than what the Supreme Court has previously upheld.³⁰³ The distance requirements are unreasonable and reflect an emotional dislike of Westboro's behavior rather than a careful balancing of Westboro's constitutional rights against those of the mourners. States have a right to protect mourners; however, they do not have the right to silence Westboro or its message.

Legislatures should amend the distance requirements in a way that the demonstrator's speech can still be communicated while protecting the rights of mourners. Mourners are presently protected by

296. *Id.* at 198.

297. *Id.* at 197, 206.

298. *See id.* at 210 (finding that Tennessee's decision to impose the 100-foot distance requirement was not unconstitutional).

299. *See, e.g.,* *Anderson v. Spear*, 356 F.3d 651, 663 (6th Cir. 2004) (500 feet not narrowly tailored). *But see* *Schirmer v. Edwards*, 2 F.3d 117, 124 (5th Cir. 1993) (600 feet narrowly tailored in a campaign-free zone). *See also generally* Blake D. Morant, *Electoral Integrity: Media, Democracy, and the Value of Self-Restraint*, 55 ALA. L. REV. 1 (2003) (arguing for voluntary restraint by the media in election coverage and analyzing election polling cases).

300. 838 F.2d 380, 382 (9th Cir. 1988).

301. *Id.* at 385.

302. *Id.* at 384, 388.

303. *But see* *Boos v. Barry*, 485 U.S. 312, 330–32 (1988) (upholding a statute prohibiting congregation within 500 feet of any embassy). The statute in *Boos* prohibited the display of any sign that brings a foreign government into "public disrepute" within 500 feet of a foreign embassy. *Id.* at 315. The statute also prohibited multiple persons from congregating within 500 feet of the embassy. The Court struck down the display clause of the statute because it was not narrowly tailored. *Id.* at 334. The congregation clause was upheld based on the Court's reading that it only applied to groups posing a security threat. *Id.* at 331. The limited nature of *Boos* makes it difficult to apply in the funeral picketing context. In fact, the closest analogy to funeral picketing statutes would be with the display clause that the *Boos* Court found unconstitutional.

the time limits posed on picketing, and most mourners will never be exposed to the picketers' message because of such time limits.³⁰⁴ Distances closer to 100 feet would provide additional protection to mourners while allowing picketers to exercise their First Amendment rights.

D. *Nature of Punishment and Injunctive Relief*

All of the statutory provisions provide some form of criminal punishment for violation.³⁰⁵ The vast majority of the funeral picketing statutes provide for misdemeanor punishment for violation,³⁰⁶ while some of the statutes convert to felony punishment following a second or third conviction.³⁰⁷ The misdemeanor penalty provisions would likely survive intermediate scrutiny because the imposition of a fine or misdemeanor jail time is narrowly tailored to advance the state's interest without placing an excessive burden on the protesters.

Thus far, Westboro has indicated reluctance to directly violate the laws and risk arrest.³⁰⁸ Westboro has asserted facial challenges against the recent legislation, characterizing the laws as overly broad.³⁰⁹ A few of the statutes have specific provisions for injunctive relief. For example, the Oklahoma and Kansas statutes provide for

304. The limitation of this argument is that it effectively shields the targeted audience from the speech. The government cannot control who Westboro decides to target any more than it can control Westboro's message.

305. See *infra* Appendix. A few statutes are also seeking to provide civil remedies to surviving family members. See, e.g., MISS. CODE ANN. § 97-35-18(3) (2006) (providing that violations could result in an injunction, damages, attorney's fees, or remedies such as compensation). The Kansas legislature is proposing similar legislation to allow defamation actions. S.B. 244, 2007 Sess. (Kan. 2007), available at <http://www.kslegislature.org/bills/2008/244.pdf> ("[I]f an act of libel or slander is committed at a funeral and the person defamed is the deceased at such funeral or any living relative of the deceased, an action for libel or slander . . . may be sustained . . .").

306. E.g., COLO. REV. STAT. ANN. § 18-9-125(2) (West Supp. 2006); FLA. STAT. ANN. § 871.01(2) (West Supp. 2007).

307. E.g., DEL. CODE ANN. tit. 11, § 1303(c) (Supp. 2006); 720 ILL. COMP. STAT. ANN. 5/26-6(d) (West Supp. 2007). Indiana and Michigan are the minority jurisdictions that make funeral picketing a felony. IND. CODE ANN. § 35-45-1-3(c) (LexisNexis Supp. 2006); MICH. COMP. LAWS ANN. § 750.167d(2) (West Supp. 2006).

308. See McDonough, *supra* note 17, at 18 (stating that Westboro is cautious in its protests, notifying law enforcement before protests and following law enforcement orders during protests). Instead of violating the law, parishioners of Westboro have filed suits seeking injunctions enjoining the enforcement of statutes that would prohibit them from picketing. *Phelps-Roper v. Nixon*, 504 F. Supp. 2d 691, 694 (W.D. Mo. 2007); *McQueary v. Stumbo*, 453 F. Supp. 2d, 975, 978-79 (E.D. Ky. 2006); see also discussion *supra* Part IV.E.

309. *Phelps-Roper*, 504 F. Supp. 2d at 697; *McQueary*, 453 F. Supp. 2d at 979; see also discussion *supra* Part IV.E.

injunctive relief and award attorney's fees.³¹⁰ The Oklahoma statute also provides a misdemeanor range of punishment for violations.³¹¹ Presumably, if Westboro decided to announce an upcoming protest, a state could preempt Westboro by filing for injunctive relief, which could ultimately result in contempt sanctions against Westboro.

While most statutes would be assessed under the standard in *Ward*, injunctions are evaluated under a higher level of scrutiny.³¹² The Supreme Court addressed the proper scrutiny in *Madsen*.³¹³ In *Madsen*, the Court listed the reason injunctions are treated differently, including the greater risks of censorship and discriminatory application that come with injunctions, as opposed to general ordinances.³¹⁴ The Court thus concluded that injunctions "require a somewhat more stringent application of general First Amendment principles"³¹⁵

As a threshold matter, a court would have to determine if the injunction is content neutral. A content-neutral injunction must "burden no more speech than necessary to serve a significant government interest."³¹⁶ Because of the heightened level of review, seeking an injunction against Westboro poses the additional risk of some provisions being found unconstitutional. For example, an injunction that imposes a felony range of punishment for contempt would be more burdensome than necessary to protect the government's interest. Moreover, overly broad distances of 500 feet, like the distance provisions in both Pennsylvania and Oklahoma,³¹⁷ would fail under a heightened constitutional scrutiny.

VI. CONCLUSION

Speech should not be criminalized merely because it is upsetting or deeply offensive. Although freedom of speech is one of the most cherished rights, it is not absolute. The government must both protect the First Amendment and consider the interests of mourners. Mourners represent the epitome of unwilling listeners. Although citi-

310. OKLA. STAT. ANN. tit. 21, § 1380(F) (West Supp. 2007); KAN. STAT. ANN. § 21-4015(g) (1995).

311. OKLA. STAT. ANN. tit. 21, § 1380(E). The misdemeanor range of punishment, which is usually less than a year in jail and/or a fine, would probably survive the heightened review applied to injunctions.

312. *Madsen v. Women's Health Ctr., Inc.*, 512 U.S. 753, 764–65 (1994).

313. *Id.*

314. *Id.* at 764.

315. *Id.* at 765.

316. *Id.*

317. 18 PA. CONS. STAT. ANN. § 7517(b) (West Supp. 2007); OKLA. STAT. ANN. tit. 21, § 1380(D) (West Supp. 2007).

zens must tolerate offensive speech in public, a funeral is different. Mourners are vulnerable to increased emotional distress, making the government's interest in protecting mourners significant. Protesters have a right to publish their message; however, they do not have the right to impose their message on an audience that is captive and unwilling to hear it. Expansion of the captive audience doctrine to targeted funeral picketing would provide better protection for mourners and properly balance the right of free speech against the right to privacy. Striking the proper balance between the interests of mourners and the fundamental right to free speech can only be accomplished by reasonable time, place, and manner restrictions. Most of the recently enacted state legislation with relatively broad proscriptions should be amended to comply with reasonable distances closer to 100 feet and time limits no longer than one hour. Such amendment would go a long way in upholding the fundamental principles contained in the First Amendment, while protecting funeral attendees during the particularly painful and private mourning process.

APPENDIX

This Appendix contains portions from twenty-nine state statutes that address picketing funerals.

Alabama

Section 1.

(a) A person commits the crime of disrupting a funeral or memorial service if, during the 60 minutes immediately preceding a funeral or memorial service that has a scheduled starting time, during the funeral or memorial service, or immediately following the funeral or memorial service, the person does any of the following with the intention of disrupting the funeral or memorial service:

(1) Engages in a protest, including, but not limited to, protest with or without using an electric sound amplification device, that involves singing, chanting, whistling, yelling, or honking a motor vehicle horn within 500 feet of the entrance to a facility being used for a funeral or memorial service.

Act of April 17, 2006, H.B. 661, REG. SESS. (Al. 2006) (to be codified at ALA. CODE § 13A-11-17).

Colorado

§ 18-9-125. Interference with a funeral

(1) A person commits interference with a funeral if he or she, knowing a funeral is being conducted:

(a) Refuses to leave any private property within one hundred feet of the funeral site upon the request of the owner of the private property or the owner's agent; or

(b) Refuses to leave any public property within one hundred feet of the funeral site upon the request of a public official with authority over the property or upon the request of a peace officer, and the public official or peace officer making the request has reasonable grounds to believe the person has violated a rule or regulation applicable to that property or a statute or local ordinance.

Right to Rest in Peace Act, COLO. REV. STAT. ANN. § 18-9-125 (West Supp. 2006).

Delaware

§ 1303. Disorderly conduct; funeral or memorial service

(a) A person shall not do any of the following within 300 feet of the building or other location where a funeral or memorial service is being conducted, or within 1,000 feet of a funeral procession or burial:

(1) Direct abusive epithets or make any threatening gesture which the person knows or reasonably should know is likely to provoke a violent reaction by another.

(2) Disturb or disrupt the funeral, memorial service, funeral procession, or burial by conduct intended to disturb or disrupt the funeral, memorial service, funeral procession or burial.

(b) This section applies to conduct within 1 hour preceding, during and within 2 hours after a funeral, memorial service, funeral procession or burial.

DEL. CODE ANN. tit. 11, § 1303 (Supp. 2006).

Florida

§ 871.01. Disturbing schools and religious and other assemblies

(2) Whoever willfully interrupts or disturbs any assembly of people met for the purpose of acknowledging the death of an individual with a military funeral honors detail pursuant to 10 U.S.C. s. 1491 commits a misdemeanor of the first degree

FLA. STAT. ANN. § 871.01 (West Supp. 2007).

Georgia

§ 16-11-34.2. Disorderly or disruptive conduct at any funeral or memorial service

(b) It shall be unlawful to engage in any disorderly or disruptive conduct with the intent to impede, disrupt, disturb, or interfere with the orderly conduct of any funeral or memorial service or with the normal activities and functions carried on in the facilities or buildings where such funeral or memorial service is taking place. Any or all of the following shall constitute such disorderly or disruptive conduct:

(1) Displaying any visual images that convey fighting words or actual or imminent threats of harm . . . ;

(2) Uttering loud, threatening, or abusive language or singing, chanting, whistling, or yelling with or without noise amplification including, but not limited to, bullhorns, automobile horns, and microphones, such as would tend to impede, disrupt, disturb, or interfere with a funeral or memorial service within 500 feet . . . ;

(3) Attempting to block or blocking pedestrian or vehicular access to the ceremonial site or location being used for a funeral or memorial service at any time one hour prior to, during, or one hour after the posted time for said funeral or memorial service; or

(4) Conducting a public assembly, parade, demonstration, or other like event, either fixed or processional

GA. CODE ANN. § 16-11-34.2 (2007).

Illinois

§ 5/26-6. Disorderly conduct at a funeral or memorial service

(c) A person commits the offense of disorderly conduct at a funeral or memorial service when he or she:

(1) engages, with knowledge of the existence of a funeral site, in any loud singing, playing of music, chanting, whistling, yelling, or noisemaking with, or without, noise amplification . . . ;

(2) displays . . . within 200 feet of any ingress or egress of that funeral site, any visual images that convey fighting words or actual or veiled threats against any other person; or

(3) . . . knowingly obstructs, hinders, impedes, or blocks another person's entry to or exit from that funeral site

720 ILL. COMP. STAT. ANN. 5/26-6 (West Supp. 2007).

Indiana

§ 35-45-1-3. Disorderly conduct

(a) A person who recklessly, knowingly, or intentionally:

. . . .

(3) disrupts a lawful assembly of persons; commits disorderly conduct, a Class B misdemeanor.

. . . .

(c) The offense described in subsection (a) is a Class D felony if it:

(1) is committed within five hundred (500) feet of:

(A) the location where a burial is being performed;

(B) a funeral procession, if the person described in subsection (a) knows that the funeral procession is taking place;

or

(C) a building in which:

(i) a funeral or memorial service; or

(ii) the viewing of a deceased person; is being conducted; and

(2) adversely affects the funeral, burial, viewing, funeral procession, or memorial service.

IND. CODE ANN. § 35-45-1-3 (LexisNexis Supp. 2006).

Iowa

§ 723.5. Disorderly conduct—funeral or memorial service

1. A person shall not do any of the following within five hundred feet of the building or other location where a funeral or memorial service is being conducted, or within five hundred feet of a funeral procession or burial:

a. Make loud and raucous noise which causes unreasonable distress

b. Direct abusive epithets or make any threatening gesture which the person knows or reasonably should know is likely to provoke a violent reaction by another.

c. Disturb or disrupt the funeral, memorial service, funeral procession, or burial by conduct intended to disturb or disrupt

2. This section applies to conduct within sixty minutes preceding, during, and within sixty minutes after a funeral, memorial service, funeral procession, or burial.

IOWA CODE ANN. § 723.5 (West Supp. 2007).

Kansas

§ 21-4015. Funeral picketing; unlawful acts; penalty; other relief

(e) It is unlawful for any person to engage in picketing before or about any cemetery, church or mortuary within one hour prior to, during and two hours following the commencement of a funeral.

KAN. STAT. ANN. § 21-4015 (1995).

Kentucky

§ 525.055. Disorderly conduct in the first degree

(1) A person is guilty of disorderly conduct in the first degree when he or she:

. . . .

(b) Acts in a way described in paragraph (a) . . . within three hundred (300) feet of a:

1. Cemetery during a funeral or burial;

2. Funeral home during the viewing of a deceased person;

3. Funeral procession; [or]
4. Funeral or memorial service;
- . . . and

(c) Knows that he or she is within three hundred (300) feet of an occasion described in paragraph (b) of this subsection.

KY. REV. STAT. ANN. § 525.055 (West Supp. 2006).

§ 525.145. Disrupting meetings and processions in the first degree

(1) A person is guilty of disrupting meetings and processions in the first degree when, with intent to prevent or disrupt a funeral or burial, funeral home viewing of a deceased person, funeral procession, or funeral or memorial service for a deceased person, he or she does any act tending to obstruct or interfere with it physically or makes any utterance, gesture, or display designed to outrage the sensibilities of the group attending the occasion.

Id. § 525.145.

§ 525.155. Interference with a funeral

(1) A person is guilty of interference with a funeral when he or she at any time on any day:

(a) Blocks, impedes, inhibits, or in any other manner obstructs or interferes with access into or from any building or parking lot of a building in which a funeral . . . is being conducted . . . ;

(b) Congregates, pickets, patrols, demonstrates, or enters on that portion of a public right-of-way or private property that is within three hundred (300) feet of an event specified in paragraph (a) of this subsection; or

(c) Without authorization from the family of the deceased or person conducting the service, during a funeral, wake, memorial service, or burial:

1. Sings, chants, whistles, shouts, yells, or uses a bullhorn, auto horn, sound amplification equipment, or other sounds or images observable to or within earshot of participants in the funeral, wake, memorial service, or burial; or

2. Distributes literature or any other item.

Id. § 525.155.

Louisiana

§ 103. Disturbing the peace

A. Disturbing the peace is the doing of any of the following in such manner as would foreseeably disturb or alarm the public:

. . .

(7) Intentionally engaging in any act or any utterance, gesture, or display designed to disrupt a funeral, funeral home viewing, funeral procession, wake, memorial service, or burial of a deceased person;

(8) Intentionally blocking, impeding, inhibiting, or in any other manner obstructing or interfering with access into or from any building or parking lot of a building in which a funeral, wake, memorial service, or burial is being conducted, or any burial plot or the parking lot of the cemetery in which a funeral, wake, memorial service, or burial is being conducted.

LA. REV. STAT. ANN. § 14:103 (Supp. 2007).

Maryland

§ 10-205. Obstruction, etc., of entry to or exit from funeral, burial, memorial service, or funeral procession

(a) . . .

(2) A person may not knowingly obstruct, hinder, impede, or block another person's entry to or exit from a funeral, burial, memorial service, or funeral procession . . .

(b) . . . A person may not address speech to a person attending a funeral, burial, memorial service, or funeral procession that is likely to incite or produce an imminent breach of the peace.

(c) . . . A person may not engage in picketing activity within 100 feet of a funeral, burial, memorial service, or funeral procession that is targeted at one or more persons attending the funeral, burial, memorial service, or funeral procession.

MD. CODE ANN., CRIM. LAW § 10-205 (LexisNexis Supp. 2006).

Michigan

§ 750.167d. Disturbing funeral, memorial service, procession, or burial

(1) A person shall not do any of the following within 500 feet of a building or other location where a funeral, memorial service, or viewing of a deceased person is being conducted or within 500 feet of a funeral procession or burial:

(a) Make loud and raucous noise and continue to do so after being asked to stop.

(b) Make any statement or gesture that would make a reasonable person under the circumstances feel intimidated, threatened, or harassed.

(c) Engage in any other conduct that the person knows or should reasonably know will disturb, disrupt, or adversely affect the funeral, memorial service, viewing of the deceased person, funeral procession, or burial.

MICH. COMP. LAWS ANN. § 750.167d (West Supp. 2006).

Minnesota

§ 609.501. Funeral or burial service; prohibited acts

Subd. 2. Crime to disrupt. (a) Whoever does any of the following is guilty of a misdemeanor:

(1) with intent to disrupt a funeral ceremony, graveside service, or memorial service, protests or pickets within 500 feet of the burial site or the entrance to a facility or location being used for the service or ceremony, within one hour prior to, during, or one hour following the service or ceremony;

(2) with intent to disrupt a funeral procession, impedes or attempts to impede a vehicle that is part of the procession;

(3) intentionally blocks or attempts to block access to a funeral ceremony, graveside service, or memorial service; or

(4) knowingly engages in targeted residential picketing at the home or domicile of any surviving member of the deceased person's family or household on the date of the funeral ceremony, graveside service, or memorial service.

MINN. STAT. ANN. § 609.501 (West Supp. 2007).

Mississippi

§ 97-35-18. Disturbance by disruptive protest of funeral, burial service, or memorial service

(a) Whoever does any of the following shall be guilty of a misdemeanor:

(i) With intent to disrupt a funeral service, graveside service, memorial service, or funeral ceremony, protests or pickets within 1,000 feet of the location or locations at which the service or ceremony is being conducted within one (1) hour before, during, and one (1) hour following the service or ceremony;

- (ii) With intent to disrupt a funeral procession impedes vehicles that are part of the funeral procession;
- (iii) Intentionally blocks access to a funeral service, funeral ceremony, graveside service or memorial service; or
- (iv) Engages in targeted residential picketing at the home or domicile of any surviving member of the deceased person's immediate family on the date of the service or ceremony

MISS. CODE ANN. § 97-35-18 (2006).

Missouri

§ 578.501. Short title—protest activities at funerals

2. It shall be unlawful for any person to engage in picketing or other protest activities in front of or about any location at which a funeral is held, within one hour prior to the commencement of any funeral, and until one hour following the cessation of any funeral.

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

Nebraska

§ 28-1320.02. Unlawful picketing of a funeral; terms, defined

(2) Picketing of a funeral means protest activities engaged in by a person or persons located within three hundred feet of a cemetery, mortuary, church, or other place of worship during a funeral.

NEB. REV. STAT. § 28-1320.02 (Supp. 2006).

§ 28-1320.03. Unlawful picketing of a funeral; penalty

(1) A person commits the offense of unlawful picketing of a funeral if he or she engages in picketing from one hour prior to through two hours following the commencement of a funeral.

Id. § 28-1320.03.

New Jersey

§ 2C:33-8.1. Demonstrations at funerals; definitions

b. A person is guilty of disrupting a funeral if, during the period beginning one hour prior to the scheduled commencement of a funeral, and until one hour following the actual completion of the funeral, with the purpose of causing inconvenience, annoyance or alarm to the funeral or its

participants, or of recklessly creating the risk thereof, the person knowingly:

(1) obstructs . . . another person's entry to or exit from the funeral, the funeral procession, the funeral home, church, synagogue, temple or other place of public worship or other location at which a funeral takes place as part of demonstration activities, or

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

N.J. STAT. ANN. § 2C:33-8.1 (West Supp. 2007).

North Carolina

§ 14-288.4. Disorderly conduct

(a) Disorderly conduct is a public disturbance intentionally caused by any person who does any of the following:

. . .

(8) Engages in conduct with the intent to impede, disrupt, disturb, or interfere with the orderly administration of any funeral, . . . including a military funeral Any of the following conduct that occurs within one hour preceding, during, or within one hour after a funeral or memorial service shall constitute disorderly conduct under this subdivision:

a. Displaying, within 300 feet of the ceremonial site, . . . any visual image that conveys fighting words or actual or imminent threats of harm

b. Uttering, within 300 feet of the ceremonial site, . . . loud, threatening, or abusive language or singing, chanting, whistling, or yelling with or without noise amplification

c. Attempting to block or blocking pedestrian or vehicular access to the ceremonial site or location being used for a funeral or memorial.

N.C. GEN. STAT. § 14-288.4 (Supp. 2006).

Ohio

§ 3767.30. Protest activities near funeral or burial service or funeral procession

Every citizen may freely speak, write, and publish the person's sentiments on all subjects, . . . but no person shall picket or engage in other protest activities . . . within three

hundred feet of any residence, cemetery, funeral home, church, synagogue, or other establishment during or within one hour before or one hour after the conducting of an actual funeral or burial service at that place. No person shall picket or engage in other protest activities, nor shall any association or corporation cause picketing or other protest activities to occur, within three hundred feet of any funeral procession.

OHIO REV. CODE ANN. § 3767.30 (LexisNexis Supp. 2007).

Oklahoma

§ 1380. Oklahoma Funeral Picketing Act—Findings—Purposes—Definitions—Penalties—Damages

D. It is unlawful for any person to engage in picketing within five hundred (500) feet of any cemetery, church, mortuary or other place where any portion of a funeral service is held during the period from one hour before the scheduled commencement of funeral services until one hour after the actual completion of the funeral services.

Oklahoma Funeral Picketing Act, OKLA. STAT. ANN. tit. 21, § 1380 (West Supp. 2007).

Pennsylvania

§ 7517. Commemorative service demonstration activities

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

18 PA. CONS. STAT. ANN. § 7517 (West Supp. 2007).

South Carolina

§ 16-17-525. Willfully, knowingly or maliciously disturbing funeral service; penalties

(A) It is unlawful for a person to willfully, knowingly, or maliciously disturb or interrupt a funeral service. . . . This subsection applies to a wilful [sic], knowing, or malicious disturbance or interruption within:

- (1) one thousand feet of the funeral service; and
- (2) a time period of one-half hour before the funeral service until one-half hour after the funeral service.

(B) It is unlawful for a person to undertake an activity at a public or privately owned cemetery, other than the decorous participation in a funeral service or visitation of a burial space, without the prior written approval of the public or private owner.

S.C. CODE ANN. § 16-17-525 (Supp. 2006).

South Dakota

§ 22-13-17. Picketing of funeral services prohibited—Violation as misdemeanor

No person may engage in any act of picketing at any funeral service during the period from one hour before the scheduled commencement of the funeral services until one hour after the actual completion of the funeral services.

S.D. CODIFIED LAWS § 22-13-17 (2006).

§ 22-13-19. Picketing defined

[T]he term, picketing, means protest activities engaged in by any person stationed within one thousand feet of a funeral service within one hour prior to, during, and one hour following the commencement of any funeral service.

Id. § 22-13-19.

Tennessee

§ 39-17-317. Disorderly conduct at funerals

(a) A person commits the offense of interfering with a funeral or burial, funeral home viewing of a deceased person, funeral procession, or funeral or memorial service for a deceased person, if the person acts to obstruct or interfere with such commemorative service by making any utterance, gesture, or display in a manner offensive to the sensibilities of an ordinary person. Picketing, protesting, or demonstrating at a funeral or memorial service shall be deemed offensive to the sensibilities of an ordinary person.

(b) The provisions of this section shall only apply to acts within five hundred feet (500') of a funeral or burial

TENN. CODE ANN. § 39-17-317 (2006).

Texas

§ 42.055. Funeral Service Disruptions

(b) A person commits an offense if, during the period beginning one hour before the service begins and ending

one hour after the service is completed, the person engages in picketing within 500 feet of a facility or cemetery being used for a funeral service.

TEX. PENAL CODE ANN. § 42.055 (Vernon Supp. 2006).

Vermont

§ 3771. Disturbing a funeral service

(b) No person shall disturb or attempt to disturb a funeral service by engaging in picketing within 100 feet of the service within one hour prior to and two hours following the publicly announced time of the commencement of the service.

VT. STAT. ANN. tit. 13, § 3771 (Supp. 2006).

Virginia

§ 18.2-415. Disorderly conduct in public places

A person is guilty of disorderly conduct if, with the intent to cause public inconvenience, annoyance or alarm, or recklessly creating a risk thereof, he:

. . .

B. Willfully . . . disrupts any funeral [or] memorial service . . . if the disruption (i) prevents or interferes with the orderly conduct of the funeral, memorial service, or meeting or (ii) has a direct tendency to cause acts of violence by the person or persons at whom, individually, the disruption is directed

VA. CODE ANN. § 18.2-415 (Supp. 2007).

Wisconsin

§ 947.011. Disrupting a funeral or memorial service

(2)(a) No person may do any of the following during a funeral or memorial service, during the 60 minutes immediately preceding the scheduled starting time of a funeral or memorial service if a starting time has been scheduled, or during the 60 minutes immediately following a funeral or memorial service:

1. Engage in conduct that is prohibited under § 947.01 within 500 feet of any entrance to a facility being used for the service with the intent to disrupt the service.

2. Intentionally block access to a facility being used for the service.

WIS. STAT. ANN. § 947.011 (West Supp. 2006).