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# Balancing Freedom of Speech with the Right to Privacy: How to Legally Cope With the Funeral Protest Problem

Anna Zwierz Messar\*

## I. Introduction

“SOLDIERS DIE, GOD LAUGHS.”<sup>1</sup> “THANK GOD FOR IED’S.”<sup>2</sup> “THANK GOD FOR DEAD SOLDIERS.”<sup>3</sup> Most people would find such speech offensive, yet it is still protected as one of our fundamental constitutional rights under the First Amendment.<sup>4</sup> Over the last decade or so, members of the Kansas-based Westboro Baptist Church (“the Church”) have been showing up at funerals, most recently, military ones, displaying such signs and picketing within eye- and ear-shot of families burying their loved ones.<sup>5</sup> Pastor Fred Phelps established the Church in 1955. Believing its message to “be this world’s last hope,” the Church prides itself in what it calls “peaceful sidewalk demonstrations opposing the homosexual lifestyle.”<sup>6</sup>

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1. Photos from Lincoln, NE, Soldier Funeral Picket-November 20, 2006, [http://www.godhatesfags.com/photos/2006/20061120\\_ne.html](http://www.godhatesfags.com/photos/2006/20061120_ne.html) (last visited Aug. 30, 2007).

2. *Id.*

3. *Id.*

4. U.S. CONST. amend. I.

5. Hate-Mongering Group Protests Soldiers’ Funerals, <http://www.godhatesfags.com/main/aboutwbc.html> (last visited Aug. 30, 2007).

6. About Westboro Baptist Church, <http://www.godhatesfags.com/main/aboutwbc.html> (last visited Aug. 30, 2007) [hereinafter About Westboro Baptist Church].

While many are able to dismiss such rhetoric as a mere annoyance, such expression is very difficult to ignore for people who are grieving and attempting to bury a family member.<sup>7</sup> In the past, United States courts have been reluctant to suppress speech, no matter how offensive.<sup>8</sup> However, the United States Supreme Court has upheld bans on protesting in front of private residences as interfering with privacy rights.<sup>9</sup> Two cases involving funeral protest bans have reached federal courts,<sup>10</sup> and similar cases are pending.<sup>11</sup>

This comment will examine the constitutional issues associated with jurisdictions imposing bans on funeral protests. It will discuss the conduct of these protestors, and the actions that lawmakers have taken against them. It will also discuss why courts should follow *Frisby v. Schultz*,<sup>12</sup> and give greater weight to the extreme invasion of privacy which, in rare exceptions, should trump the right of free speech. Furthermore, if the courts refuse to uphold certain jurisdictional funeral protest bans, alternative measures will be examined to suggest an end to this continuing problem.

This comment will also analyze the successful civil lawsuit brought against the Westboro Baptist Church and its members.<sup>13</sup> By pursuing a civil lawsuit, it is possible that those victimized by members of the Church can put an end to its abusive tactics by bankrupting the organization. The Southern Poverty Law Center used this same strategy successfully against the Ku Klux Klan in the 1980s.<sup>14</sup> The goal of this comment is to inves-

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7. Lance Cpl. Matthew A. Snyder, <http://www.matthewsnyder.org> (last visited Aug. 30, 2007).

8. See, e.g., *Olmer v. City of Lincoln*, 192 F.3d 1176 (8th Cir. 1999); *Collin v. Smith*, 578 F.2d 1197 (8th Cir. 1978).

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

10. *Phelps-Roper v. Nixon*, No. 06-4156-CV, 2007 WL 273437 (W.D. Mo. Jan. 26, 2007) (refusing to issue an injunction barring enforcement of funeral protest statute); *McQueary v. Stumbo*, 453 F. Supp. 2d 975 (E.D. Ky. 2006) (holding statute was content-neutral, but issuing an injunction, arguing 300-foot buffer zone was too restrictive).

11. Ann S. Kim, *Legislators Weigh Ban on Protests at Funerals: State House—The Bill is in Response to a Threatened Anti-Gay Demonstration at an Iraq Veteran's Service*, PORTLAND PRESS HERALD (ME), Feb. 9, 2007, at A1.

12. *Frisby*, 487 U.S. 474.

13. Lance Cpl. Matthew A. Snyder, *supra* note 7.

14. SPLCenter.org, Intelligence Project History, <http://www.splcenter.org/intel/history.jsp> (last visited on Aug. 30, 2007).

tigate possible legal ways to combat funeral protesters, examine the history behind the only known group partaking in this activity and recommend mechanisms to deal with these and similar free speech abuses. Although this comment applies to all funeral protests/protestors, it focuses primarily on Westboro Baptist Church members, as they are the only known group to perpetuate this practice.

## II. About The Church

Pastor Fred Phelps is no stranger to controversy or the law. He is a former attorney who violated state rules even before he became a lawyer. Prior to obtaining his law license, Phelps was accused of illegally practicing law.<sup>15</sup>

In 1969, Phelps was suspended from practicing law in Kansas for two years, after he pocketed money that should have been used to pay a client's appearance bond.<sup>16</sup> The court:

concluded that Phelps has, by his conduct, shown that he does not have the proper concept of the obligations devolving upon an attorney requiring him to deal fairly and honorably with his clients, and enjoining him to demean himself in such manner as not to bring embarrassment to nor discredit upon his profession.<sup>17</sup>

Fred Phelps was finally disbarred in 1979.<sup>18</sup> The disbarment stemmed from his treatment of a court reporter who was late in giving him a court transcript.<sup>19</sup> In a subsequent lawsuit filed by Phelps against the same court reporter, Carolene Brady, he accused her of fraud and misrepresentation and sought \$22,000 in monetary damages.<sup>20</sup> During the course of cross-examining Brady, Phelps was described as "abusive, repetitive, irrelevant, and represented a classic case of 'badgering' a witness."<sup>21</sup> The court held that:

[i]t is clear from our examination of the record and transcripts in that case that the trial was a personal vendetta by Fred Phelps, Sr. against Carolene Brady. The jury verdict didn't stop the on-

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15. *In re Phelps*, 459 P.2d 172 (Kan. 1969).

16. *Id.* at 180.

17. *Id.*

18. *State v. Phelps*, 598 P.2d 180 (Kan. 1979).

19. *Id.*

20. *Id.*

21. *Id.* at 181.

slaught of Phelps. He was not satisfied with the hurt, pain and damage he had visited on Carolene Brady. He filed a motion for a new trial.<sup>22</sup>

That motion was denied, and the court finally opined that “the practice of law is a privilege rather than a right and by his conduct, respondent has forfeited his privilege.”<sup>23</sup> In the end, this offense—coupled with his long list of prior fraudulent conduct—resulted in Fred Phelps’ disbarment from the Kansas State Bar and liability for court costs.<sup>24</sup>

Despite the state disbarment, however, Phelps was still permitted to practice in federal court. In 1983, he filed the first of three federal lawsuits against Washburn University Law School after the institution denied three of his children admission.<sup>25</sup> The suit claimed his children, who were white, should be granted minority status and benefit from affirmative action because of their father’s “civil rights” work.<sup>26</sup> The lawsuit later switched the argument, “alleging reverse discrimination because Phelps’ children are white.”<sup>27</sup> All of the suits were dismissed in 1986.<sup>28</sup>

In the meantime, Phelps sued President Ronald Reagan in 1984.<sup>29</sup> That suit alleged violations of the constitutional freedom of religion guarantee, after Reagan sent an ambassador to the Vatican.<sup>30</sup> In 1985, “nine federal judges in Kansas sign[ed] a disciplinary complaint against Phelps, five of his children and a daughter-in-law, alleging the seven made false accusations against the judges.”<sup>31</sup> In 1987, Phelps was censured for “writing abusive letters this year to potential defendants threatening lawsuits if his demands were not met.”<sup>32</sup> In 1989, Phelps finally agreed to stop practicing law altogether, so that members of his

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22. *Id.*

23. *Id.* at 187.

24. *Id.*

25. SPLCenter.org, Fred Phelps Timeline, <http://www.splcenter.org/intel/intel-report/article.jsp?sid=184> (last visited Aug. 31, 2007).

26. *Id.*

27. *Id.*

28. *Id.*

29. *Id.*

30. *Id.*

31. *Id.*

32. *Id.*

family could continue to practice.<sup>33</sup> As part of that settlement, one of Phelps' daughters was suspended from practicing law for one year, and one of his sons was suspended from law practice for six months.<sup>34</sup>

In the 1990s, the Westboro Baptist Church filed several lawsuits against the City of Topeka, Kansas and Shawnee County, after officials there hindered or completely prevented Church members' picketing.<sup>35</sup> The Church was later awarded some \$45,000 in legal fees associated with the lawsuits.<sup>36</sup> That litigation arose out of what Phelps claimed was the Shawnee County District Attorney's wrongful prosecution after she brought "battery, assault and other charges against members of the Westboro Baptist Church."<sup>37</sup> The court finally invalidated a state defamation statute that Church members were accused of violating, and enjoined further prosecution.<sup>38</sup>

Fred Phelps' legal indiscretions aside, The Westboro Baptist Church started to publicly attack homosexuals in 1991, regularly picketing a Topeka park where homosexuals reportedly met.<sup>39</sup> However, the Church's tactics first hit the national spotlight almost a decade later, during the funeral of Matthew Shepard.<sup>40</sup> The 21-year-old student from the University of Wyoming was beaten to death by two other young men.<sup>41</sup> Shepard's story was further thrust into the media when his homosexuality came to light and his killers attempted to use it as a "gay panic defense," arguing that they beat Shepard because he made sexual advances toward them.<sup>42</sup> Shepard's sexual orientation apparently caught the eye of Westboro Baptist Church members, and they showed up at his funeral carrying signs saying, "AIDS CURES FAGS," "NO TEARS FOR QUEERS," "FAGS BURN IN

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33. *Id.*

34. *Id.*

35. *Id.*

36. *Id.*

37. *Id.*

38. *Id.*

39. *Id.*

40. Anti-Defamation League, [http://www.adl.org/special\\_reports/wbc/default.asp](http://www.adl.org/special_reports/wbc/default.asp) (last visited Nov. 1, 2007).

41. Court TV Crime Library, *Mitigating Capital Crimes*, COURT TV, [http://www.crimelibrary.com/criminal\\_mind/forensics/welner/3.html](http://www.crimelibrary.com/criminal_mind/forensics/welner/3.html) (last visited Nov. 1, 2007).

42. *Id.*

HELL,” and “FAGS DIE, GOD LAUGHS.”<sup>43</sup> The day before the funeral, the Casper, Wyoming City Council scrambled to adopt a 50 foot buffer zone between protesters and funerals in the city.<sup>44</sup> By doing this, the City Council balanced the rights of the protesters with the rights of the mourners. They adopted the restriction after researching the “law of abortion protests and buffer zones.”<sup>45</sup> As University of Missouri-Kansas City School of Law Professor Nancy Levit argued,

buffer zones for abortion protesters make some sense: they allow picketers to come within the hearing range of those seeking abortion services, to allow the picketers the possibility of changing minds. . . . But, does precisely the same buffer zone for a picketer at a funeral of a gay or lesbian make sense?<sup>46</sup>

The same reasoning may apply to other funeral pickets as well. One may argue that anti-war protesters may be trying to change the minds of people supporting the conflict. But there are a number of different places where they can gather to make their point and be heard, giving the protesters no reason to picket a funeral, unless their desire is to “preach hate, to desecrate the funeral, and to intrude on the private grief of family and friends mourning their loss.”<sup>47</sup>

Looking at some of the recent pickets planned and/or performed by the Westboro Baptist Church exemplifies this reasoning. In November 2006, members picketed the funerals of one of the school girls killed in a bus accident in Huntsville, Alabama.<sup>48</sup> In October 2006, they threatened to turn up at the funerals of the Amish school girls killed during a school

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43. Nancy Levit, *A Different Kind of Sameness: Beyond Formal Equality and Antisubordination Strategies in Gay Legal Theory*, 61 OHIO ST. L.J. 867, 921 (2000).

44. *Id.* at 922.

45. *Id.*

46. *Id.* at 923.

47. *Id.*

48. The World is Doomed, [http://www.godhatesfags.com/featured/epics/2006/20061124\\_huntsville-al-epic.pdf](http://www.godhatesfags.com/featured/epics/2006/20061124_huntsville-al-epic.pdf) (last visited Sept. 3, 2007) (Members of the Church describe exactly what they did: “We held the signs up for about 55 minutes; the buses created a de facto megaphone that carried the voices of the seers across hundreds of yards; and all the law enforcement paraphernalia caused traffic to be backed up for a half a mile. They all saw the words.” This shows that even though they were placed in a restricted location, mourners were still able to see their signs.).

shooting,<sup>49</sup> but cancelled their plans after a syndicated radio show host offered the Church fifty-five minutes of free airtime instead.<sup>50</sup> Besides using the air time offered to them in exchange for staying away from the funerals, Church members also took their message to their website.<sup>51</sup> But one of their more disturbing appearances took place at the fifth anniversary of 9-11 commemoration just outside the Pennsylvania field where United flight 93 crashed.<sup>52</sup> There, Westboro Baptists held signs reading, "THANK GOD FOR 9-11," "FAG SIN = 9-11" and "PLANES CRASH, GOD LAUGHS."<sup>53</sup>

However, the group has really gained national infamy most recently by protesting military funerals. As of October 31, 2007, 3,842 members of the American military have been killed in the current Iraq conflict.<sup>54</sup> Over a nine month period from June 2005 to March 2006, more than 100 military funerals were disrupted by protests.<sup>55</sup> According to one war widow, she was subjected to protesters screaming things such as, "America is doomed," "God is your enemy," and "you can't wave enough flags to bring that boy back."<sup>56</sup>

The Westboro Baptist Church does not refer to this behavior as anti-war protests. The Church calls them "Love Crusades"<sup>57</sup> and justifies members' behavior with the following reasoning:

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49. The Exploits of Two Happy and Faithful Witnesses in New York, [http://www.godhatesfags.com/featured/epics/2006/20061002\\_amish-girls-epic.pdf](http://www.godhatesfags.com/featured/epics/2006/20061002_amish-girls-epic.pdf) (last visited Sept. 7, 2007).

50. Jacques Steinberg, *Air Time Instead of Funeral Protest*, NY TIMES, Oct. 6, 2006, at A14.

51. The Exploits of Two Happy and Faithful Witnesses in New York, *supra* note 49 (Church members took to their website, writing things that would normally have been shouted at the families such as: "Those little girls were CUT OFF by the Lord your God – they are in hell!" *Id.* As vile as this is, at least it is on their website, where people have the choice of whether or not to view it.).

52. The Burden of Washington, D.C. & Shanksville, Pennsylvania, [http://www.godhatesfags.com/featured/epics/2006/20060911\\_dc-shanksville-pa-epic.pdf](http://www.godhatesfags.com/featured/epics/2006/20060911_dc-shanksville-pa-epic.pdf) (last visited Sept. 3, 2007).

53. *Id.* (Church members posted numerous photos of their children taking part in the protest, holding signs such as: "USA = FAG NATION.").

54. Iraq Coalition Casualties, <http://www.icasualties.org/oif/> (last visited Oct. 31, 2007).

55. Hate-Mongering Group Protests Soldiers' Funerals, *supra* note 5.

56. *Id.*

57. Upcoming Love Crusades (Pickets), <http://www.godhatesfags.com/fliers/pickets.html> (last visited Sept. 3, 2007).

They were raised on a steady diet of fag propaganda in the home, on TV, in church, in school, in mass media - everywhere - the two-pronged lie: 1) It's OK to be gay; and, 2) Anyone saying otherwise, like WBC, is a hater who must be vilified, demonized, marginalized into silence.

Therefore, with full knowledge of what they were doing, they voluntarily joined a fag-infested army to fight for a fag-run country now utterly and finally forsaken by God who Himself is fighting against that country. . . . The IED is God's weapon of choice in avenging Westboro Baptist Church by blowing America's kids to smithereens in Iraq. And the carnage has barely begun. Thus, their funerals are the forum of choice for delivering WBC's message of choice.<sup>58</sup>

This type of speech may qualify as "fighting words," which are not protected under the First Amendment.<sup>59</sup> In *Chaplinsky v. New Hampshire*, the United States Supreme Court defined the "fighting words" test as "what men of common intelligence would understand would be words likely to cause an average addressee to fight."<sup>60</sup> It is a fair contention to say that a group of protesters, showing up at a funeral or memorial service warranting national attention of someone killed in a tragedy, and shouting insults and epithets at the victim's family, may provoke an "average addressee to fight."<sup>61</sup> In fact, this has been the case in a number of funeral/memorial appearances made by Westboro Baptist Church members. For example, one can look at a video of families passing the protesters on the way to the 9-11 memorial in Pennsylvania on the fifth anniversary of the crash of flight 93.<sup>62</sup> Several of the mourners are seen exchanging tense words with the screaming protesters, and one of the family members even breaks loose from his fellow mourners, lunges at the protesters and kicks the barrier separating them from him.<sup>63</sup> There are also reports of violence from church members themselves. In an opinion piece written to a local

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58. Westboro Baptist Church FAQ, <http://www.godhatesfags.com/main/faq.html> (last visited Sept. 3, 2007) (follow "Why do you picket soldiers' funerals?" hyperlink).

59. See *Chaplinsky v. New Hampshire*, 315 U.S. 568 (1942).

60. *Id.* at 573.

61. *Id.*

62. CNN (CNN television broadcast Sept. 11, 2006) (on file with News 12 Westchester).

63. *Id.*

newspaper, church member Maggie Phelps complained about the supporters of victims' family harassing the protesters.<sup>64</sup> She wrote: "[W]e prefer that the violent bikers keep their distance (though the police often let them surround us, shove us and say all manner of filth to us)."<sup>65</sup> This further supports the contention that language used while picketing funerals may be considered fighting words, which are not constitutionally protected.

### III. Standard of Review

Despite being constitutionally protected, free speech is not absolute. Over the last several decades, the United States Supreme Court has issued rulings upholding limitations on expression. In order to be upheld in court, the limitations must pass certain "tests," which are dependant on whether the restricted expression/speech is content based or content neutral and is taking place in a public, designated public or non-public forum.<sup>66</sup>

In public forums (such as the streets leading up to a funeral home or cemetery), the state can impose "time, place and man-

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64. Maggie Phelps, *We Will Never Be Silenced*, THE WICHITA EAGLE, Sept. 26, 2006, at A6.

65. *Id.* (Maggie Phelps is referring to the Patriot Guard riders); See also Patriot Guard Riders, <http://www.patriotguard.org/AboutUs/OurHistory/tabid/145/Default.aspx>, (last visited Nov. 13, 2007).

The Patriot Guard Riders started "in early August 2005 with the American Legion Riders chapter 136 from Kansas. . . . When they heard that the WBC was going to protest at [a local soldier's funeral], they established a Mission Statement" (*Id.*) which includes showing respect for "fallen heroes, their families and communities" and shielding "the mourning family and friends from interruptions created by any protestor or group of protestors."

Patriot Guard Riders Mission Statement, <http://www.patriotguard.org/AboutUs/OurMission/tabid/60/Default.aspx>, (last vistied Nov. 13, 2007). Their ultimate goal "was to get veterans and motorcycle organizations involved in every state" to limit intrusions by protestors showing up at funerals. The Patriot Guard Riders get permission from the deceased's family before attending a funeral. Patriot Guard Riders, <http://www.patriotguard.org/AboutUs/OurHistory/tabid/145/Default.aspx> (last visited Nov. 13, 2007).

66. *Perry Educ. Ass'n. v. Perry Local Educator's Ass'n.*, 460 U.S. 36 (1981) (holding that teacher's mailboxes were not a public forum and the school's provision limiting advertisements in them was not content based).

ner" restrictions.<sup>67</sup> In order to allow the government to suppress content neutral speech in a public forum, the government's regulation of speech must be narrowly tailored to serve a significant governmental interest and the state must leave alternative channels of communication open.<sup>68</sup>

A non-public forum is defined as "public property which is not by tradition or designation a forum for public communication."<sup>69</sup> Here, the government may limit both content based *and* content neutral speech "as long as the regulation on speech is reasonable and not an effort to suppress expression merely because public officials oppose the speaker's view."<sup>70</sup> One may make the argument that cemeteries are non-public forums, as they have not historically been used to make speeches.

In the case of a designated public forum, where the government has opened an area not historically used for expression, the state may still limit speech.

Although a state is not required to indefinitely retain the open character of the facility, as long as it does so it is bound by the same standards as apply in a traditional public forum. Reasonable time, place and manner regulations are permissible, and a content-based prohibition must be narrowly drawn to effectuate a compelling state interest.<sup>71</sup>

As mentioned above, a state may also restrict *content-based* speech, but these restrictions are held to a higher, strict scrutiny, standard.<sup>72</sup> This means the regulation "must be narrowly tailored to promote a compelling Government interest. If a less restrictive alternative would serve the Government's purpose, the legislature must use that alternative."<sup>73</sup>

The government may also limit content-neutral speech when there is a captive audience unwilling to listen to it and

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67. See, e.g., *Heffron v. Int. Soc. for Krishna Consciousness*, 452 U.S. 640, 647-48 (1981); *Grayned v. City of Rockford*, 408 U.S. 104, 115 (1972).

68. *City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41, 47 (1986) (citing, *Clark v. Cmty. For Creative Nonviolence*, 468 U.S. 293 (1989)); see also *Ward v. Rock Against Racism*, 491 U.S. 312 (1989); *Boos v. Barry*, 425 U.S. 312 (1988).

69. *Perry Educ. Ass'n.*, 460 U.S. at 46.

70. *Id.* (citing *U.S. Postal Serv. v. Greenburgh Civic Ass'n*, 453 U.S. 114, 131 (1981)).

71. *Id.* (citing *Widmar v. Vincent*, 454 U.S. 263 (1981)).

72. *United States v. Playboy Entm't Group, Inc.*, 529 U.S. 803 (2000).

73. *Id.* at 813; see also *Carey v. Brown*, 447 U.S. 455 (1980).

unable to avoid it.<sup>74</sup> And, as discussed in depth earlier, there is certain speech that is *not* constitutionally protected, such as “fighting words.”<sup>75</sup>

#### IV. Statutes and Challenges

The fairly recent funeral protest phenomenon and legislative reaction to it are arguably putting First Amendment rights to the test. On the one hand, many may agree that funerals are no place for certain types of expression. However, judges and lawmakers cannot allow blatantly unconstitutional statutes to be upheld for fear that they may be used as future precedent to infringe on other unpopular modes of expression. The solution may be to find a way to make these funeral protest bans least restrictive (so they are upheld), yet allow them to achieve their purpose (to protect grieving families).

##### A. Funeral Protest Statutes and Cases

As a result of increasing demonstrations at military funerals across the United States, “34 states have introduced bills to limit protests near funerals, 27 of which have passed such measures.”<sup>76</sup> Federal lawmakers have also heeded the call to help families, passing the “Respect for America’s Fallen Heroes Act” in May 2006.<sup>77</sup> The federal law prohibits demonstrations at cemeteries controlled by the National Cemetery Administration or on the property of Arlington National Cemetery, unless prior approval is granted.<sup>78</sup> The “prior approval” requirement may pose a potential problem if it gives an administrator too much leeway in determining who may or may not congregate.<sup>79</sup>

In *Shuttlesworth v. City of Birmingham*, the United States Supreme Court held that “a law subjecting the exercise of First Amendment freedoms to the prior restraint of a license, without narrow objective, and definite standards to guide the licensing

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74. *Frisby v. Schultz*, 487 U.S. 474, 484-85 (1988) (citing *Rowan v. Post Office Dept.*, 397 U.S. 728 (1980); *F.C.C. v. Pacifica Found.*, 438 U.S. 726 (1978)).

75. *Chaplinsky v. New Hampshire*, 315 U.S. 568 (1942).

76. First Amendment Center.org: Assembly, [http://www.firstamendmentcenter.org/assembly/topic.aspx?topic=funeral\\_protests](http://www.firstamendmentcenter.org/assembly/topic.aspx?topic=funeral_protests) (last visited Sept. 8, 2007).

77. Respect for America’s Fallen Heroes Act, 38 U.S.C. § 2413 (2006).

78. *Id.*

79. See *Shuttlesworth v. City of Birmingham*, 394 U.S. 147 (1969).

authority, is unconstitutional.”<sup>80</sup> The Court reversed a conviction for violation of a statute requiring prior approval from the city before marching.<sup>81</sup> It is debatable whether a federal cemetery is a public forum, as the city streets were in *Shuttlesworth*. On one hand, a federal cemetery is generally open to the public. On the other, it is not a place considered to be a traditional public forum, since it is not a place that people traditionally get together and speak.<sup>82</sup> However, even if the court did find that cemeteries are public forums for constitutional purposes, the *Shuttlesworth* court “recognized that a statute may be enacted which prevents serious interference with normal usage of streets and parks.”<sup>83</sup> Normal usage of a cemetery is to mourn and bury the dead, not to protest.

In addition to the provision barring protestors from federally owned cemeteries, the Respect for America’s Fallen Heroes Act also makes it a crime to demonstrate for an hour before and an hour after a “military funeral, memorial service, or ceremony.”<sup>84</sup> The penalty for violating this statute is a fine and/or imprisonment for up to one year.<sup>85</sup> The legislation covers the 121 federal cemeteries in the United States and the ninety thousand veterans buried there each year.<sup>86</sup> Currently there is a push in Congress to make the protest ban apply to private ceremonies and cemeteries as well, which would cover more than 650 thousand additional veterans who die annually.<sup>87</sup>

Since current federal law only makes it a crime to protest at federal cemeteries, other local municipalities are in the process of adopting their own bans, which would cover local funer-

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80. *Id.* at 150-51.

81. *Id.*

82. *Perry Educ. Ass’n v. Perry Local Educators’ Ass’n*, 460 U.S. 37 (1983).

83. *Shuttlesworth*, 394 U.S. 147.

84. 38 U.S.C. § 2413 (2006).

85. 18 U.S.C. § 1387 (2006).

86. Press Release, Office of Sen. Johnny Isakson, Sen. Chambliss, Isakson praise legislation to expand protest limitations at military funerals (Dec. 7, 2006) (on file with author).

87. *Id.* (As of December 7, 2006, the Senate approved the measure which was co-sponsored by U.S. Senators Saxby Chambliss, R-Ga. and Johnny Isakson, R-Ga.).

als.<sup>88</sup> Still others were forced to work under the same time constraints as the legislators in Casper,<sup>89</sup> having to adopt funeral protest statutes under imminent threat of Westboro Baptist Church protesters.<sup>90</sup> At the end of January 2007, the Washington State House sent a bill to the state senate which would make it a crime, punishable by fines and/or jail time, to protest at a funeral.<sup>91</sup>

Jurisdictions have to be extremely careful in the wording of their statutes, to ensure that they meet the requirements of content neutrality, which would give the law the best likelihood of being upheld. If the statutes are not content neutral, they will be held to the strict scrutiny standard. This will put the burden on the government to ensure that the statute is narrowly tailored to promote a compelling government interest and that no less restrictive means to achieving the desired end exist.<sup>92</sup> If the government cannot meet this burden of proof, then the statute will most likely be struck down.

Some jurisdictions have enacted laws creating buffer zones, while others have completely banned funeral protests.<sup>93</sup> Alabama makes it a crime to intentionally disrupt a funeral or memorial service and protesters are not permitted within "500 feet of the entrance to a facility being used for a funeral or memorial service" for one hour before the start of the service and immediately afterward.<sup>94</sup> North Carolina has a similar statute, making it a Class 1 felony for a third or subsequent offense for similar conduct taking place within one hour before or one hour after a

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88. Kim, *supra* note 11 ("The proposed law, sponsored by Sen. David Hastings III, R-Fryeburg, would make it a crime to demonstrate, leaflet or protest a funeral within 1,000 feet of the event." *Id.*).

89. Levit, *supra* note 43, at 922.

90. Richard Roesler, *Law Bans Funeral Disruptions*, SPOKESMAN REVIEW, <http://www.spokesmanreview.com/breaking/story.asp?ID=8605> (last visited Aug. 31, 2007).

91. Jim Fisher, *Let Fred Phelps Fulminate Farther From Funerals*, LEWISTON MORNING TRIBUNE, Jan. 28, 2007, at 1F (The bill "prohibits demonstrations within 500 feet of a funeral procession, a grave site or a funeral home or other building where a funeral is taking place. It provides that violations constitute disorderly conduct, a misdemeanor punishable by a maximum penalty of \$1,000 in fines and 90 days in jail.").

92. *United States v. Playboy Entm't Group, Inc.*, 529 U.S. 803 (2000).

93. See, e.g., MISS. CODE ANN. § 97-35-51 (2006); N.C. GEN. STAT. ANN. § 14-288.4 (West 2006); ALA. CODE § 13A-11-17 (2006).

94. § 13A-11-17.

funeral or memorial service.<sup>95</sup> The North Carolina statute goes a step further and also bars protests along the funeral procession route.<sup>96</sup> Mississippi's law does not permit funeral protests within one thousand feet "of the location or locations at which the service or ceremony is being conducted within one hour before, during and one hour following the service or the ceremony."<sup>97</sup>

As with any infringement on the fundamental right to free speech, these laws have to be closely examined. In *McQueary v. Stumbo*, the United States District Court of the Eastern District of Kentucky addressed a Kentucky funeral protest statute.<sup>98</sup> The court held that the ordinance was content neutral and therefore subject to the intermediate scrutiny standard that states: "the provisions are valid if they are narrowly tailored to serve a significant government interest, and leave open ample alternative channels of communication."<sup>99</sup> But the court did issue an injunction because it held that the ordinance, which prevented protesters from coming within 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," was not sufficiently narrowly tailored to be constitutional.<sup>100</sup> The court reasoned that "the zone is large enough that 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."<sup>101</sup>

Some may debate whether three hundred feet is enough of a distance to prevent a family from seeing a large, brightly colored sign or hearing a protester shout disparaging remarks about a deceased loved one. The problem also arises when a family must pass the protesters during a funeral procession.

In January 2007, the United States District Court of the Western District of Missouri denied the Westboro Baptist Church's request to prevent the State from enforcing its funeral

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95. § 14-288.4.

96. *Id.*

97. § 97-35-51.

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

99. *Id.* at 986.

100. *Id.* at 977.

101. *Id.* at 996.

protest ban.<sup>102</sup> The court also cited an amicus brief argument “that Missouri also has an interest in protecting funeral attendees’ First Amendment rights to free exercise of religion.”<sup>103</sup> Furthermore, this law and others like it leave numerous alternative channels of communication open, including protesting after the funeral is concluded or protesting in other sections of town.

A prime example of this is in *Collin v. Smith*, where the Seventh Circuit upheld the Nazi party’s right to march in a predominantly Jewish village populated with Holocaust survivors.<sup>104</sup> When the municipality realized that the protest was planned, the “[v]illage enacted three ordinances to prohibit [the] demonstrations . . . .”<sup>105</sup> The requirements to obtain a permit to allow the protest were very restrictive, and the village acknowledged that those requirements were designed to cover Nazi marches.<sup>106</sup> It was clear that the protestors’ purpose was to inflame and intimidate the residents.

However, the march in *Collin* is still distinguishable from the Westboro Baptist Church’s funeral protests. Funeral protesters take their message directly to the families who are essentially forced to hear it, as they have no way to honor their loved one *and* avoid the hate speech. In *Collin*, the protesters sought to march in the center of town.<sup>107</sup> The court reasoned that “an orderly and peaceful demonstration, with placards, in the vicinity of a seat of government, is ‘an exercise of (the) basic constitutional rights of (speech, assembly, and petition) in their most pristine and classic form.’”<sup>108</sup> The court reasoned further that: “there is room under the First Amendment for the government to protect targeted listeners from offensive speech, but only when the speaker intrudes on the privacy of the home or a

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102. *Phelps-Roper v. Nixon*, No. 06-4156-CV, 2007 WL 273437 (W.D. Mo. Jan. 26, 2007) (In considering whether to grant the injunction, the court used the Eighth Circuit 4-prong test: “(1) the threat of irreparable harm to the movant; (2) the state of balance between this harm and the injury that granting the injunction will inflict on other parties litigant; (3) the probability that the movant will succeed on the merits; and (4) the public interest.”).

103. *Id.* at \*2.

104. *Collin v. Smith*, 578 F.2d 1197 (7th Cir. 1978).

105. *Id.* at 1199.

106. *Id.*

107. *Id.* at 1201.

108. *Id.* (quoting *Edwards v. South Carolina*, 372 U.S. 229, 235 (1963)).

captive audience cannot practically avoid exposure.”<sup>109</sup> Simply stated, the potential victims in the *Collin* case have the option of avoiding the village center on the date the protest is planned and avoid hearing and seeing the offensive message. The victims of the funeral protests do not have that luxury, as they are the prime example of a “captive audience.”<sup>110</sup> As one journalist wrote, referring to Nazi marches in Idaho, “When Nazis march in downtown Coeur d’Alene, decent people can go elsewhere. But no one should have to avoid a funeral because crackpots plan to make those attending wish they were the ones dead.”<sup>111</sup>

Funeral protest bans only cover funeral routes and locations. Protesters are still free to rally in other parts of town. This way the protesters’ message is heard and the families’ rights are protected.

#### B. *Political Protest Statutes*

Similar restrictions have already been routinely used and upheld at numerous other rallies, including political conventions and World Trade Organization meetings.<sup>112</sup>

In 2004, the First Circuit upheld restrictions on protesters attending the Democratic National Convention in Boston.<sup>113</sup> That case involved a “designated demonstration zone.”<sup>114</sup> During the convention, the city set up two separate security zones—a “hard zone” and a “soft zone.”<sup>115</sup> “Only candidates, delegates, staff, press, and other specially authorized classes of persons were permitted into the hard zone,” the area closest to the Fleet Center, where the convention was being held.<sup>116</sup> “This dual arrangement left little opportunity for groups wishing to demon-

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109. *Id.* at 1206 (citing *Erzonznik v. City of Jacksonville*, 422 U.S. 205, 209 (1975)).

110. *Frisby v. Schultz*, 487 U.S. 474 (1988) (“The First Amendment permits the government to prohibit offensive speech as intrusive when the ‘captive’ audience cannot avoid the objectionable speech.”).

111. *Fisher*, *supra* note 91, at 1.

112. Timothy Zick, *Speech and Spacial Tactics*, 84 TEX. L. REV. 581 (2006).

113. *Bl(a)ck Tea Soc’y v. City of Boston*, 378 F.3d 8 (1st Cir. 2004).

114. *Id.* at 10.

115. *Id.* (The hard zone was the “area immediately surrounding the Fleet Center” while the soft zone was less secure and extended “several blocks south in the area known as Bullfinch Triangle.”).

116. *Id.*

strate to do so within sight and sound of the delegates.”<sup>117</sup> Nevertheless, the city allowed protesters to congregate at the edge of the hard zone.<sup>118</sup> It was “a heavily secured space, approximately 90 feet by 300 feet, located for the most part underneath unused rail tracks.”<sup>119</sup>

The city reasoned that the “designated zone” was needed for heightened security surrounding delegates and candidates, especially in the wake of the September 11th terrorist attacks.<sup>120</sup> The protesters asked the court to modify the designated demonstration zone, citing First Amendment free speech violations.<sup>121</sup> However, the First Circuit upheld the zone, saying First Amendment rights are not limitless.<sup>122</sup> The First Circuit agreed with the District Court’s ruling that the zones were put into place for security concerns, were “narrowly tailored” and should be upheld.<sup>123</sup>

The court found in favor of free speech restrictions, despite the fact that there was considerable evidence that the protesters would not have their message heard by the candidates and delegates they were trying to reach.<sup>124</sup> This is a prime example of an instance when one may argue that the protesters’ message

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117. *Id.* at 11.

118. *Id.*

119. *Id.* at 11.

It was surrounded by two rows of jersey barriers topped with eight-foot chain-link fencing; the perimeter was further surrounded by a semitransparent liquid dispersion mesh fabric; and a widely-woven mesh fabric was hung above the DZ between the rail tracks and the fence. Finally, the City placed coiled razor wire along the edges of the rail tracks in the vicinity of the Fleet Center (including the area above the DZ) in order to inhibit access to the tracks.

*Id.*

120. *Id.*

121. *Id.*

122. *Id.* at 12.

Reasonable restrictions as to the time, place, and manner of speech in public forum are permissible, provided that those restrictions ‘are justified without reference to the content of the regulated speech . . . are narrowly tailored to serve a significant governmental interest, and . . . leave open ample alternative channels for communication of the information.

*Id.* (quoting *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989)).

123. *Id.* at 15 (“Here, however, the safety, security, and logistical concerns voiced by the City were real, and the district court was correct in giving those concerns due consideration.”).

124. *Id.*

*should be* allowed to be heard by the people it targets. The protestors in this case were trying to persuade the lawmakers to change their views, and as a result, change governmental policy. Yet the appellate court still upheld the city's reasons for placing the protesters out of their intended audience's view or earshot.<sup>125</sup>

The Ninth Circuit has upheld a similar protest restriction.<sup>126</sup> In *Menotti v. City of Seattle*, protestors challenged the "constitutionality of an emergency order prohibiting access to portions of downtown Seattle."<sup>127</sup> The restrictions were put in place during the World Trade Organization conference in 1999.<sup>128</sup> The plaintiffs claimed the city ordinance violated their First Amendment rights.<sup>129</sup> However, the court upheld the statute, saying that the procedures were "necessary to restore safety and security to its residents and to the visiting world leaders."<sup>130</sup> This is another example of how certain governmental interests can outweigh the complete right to free speech.

Arguably, some of the most turbulent moments in our nation's history took place in the 1960s. The public outcry over the Vietnam War resulted in numerous protests. Perhaps those rallying for peace had learned some lessons from those rallying for civil rights in the years leading up to, and later including the Vietnam War era.

For example, in 1966, the United States Supreme Court heard a First Amendment violation challenge brought by Florida A&M University students.<sup>131</sup> The group had been arrested after holding a civil rights rally on jailhouse property.<sup>132</sup> In the end, the Supreme Court upheld the statute the protestors were prosecuted under.<sup>133</sup> The Court made the very important note that "the rights of free speech and assembly, while fundamental

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125. *Id.*

126. *Menotti v. Seattle*, 409 F.3d 1113 (9th Cir. 2005) (upholding a ban on access to certain parts of downtown Seattle during the 1999 WTO Conference as a facially valid time, place and manner restriction).

127. *Id.* at 1117.

128. *Id.*

129. *Id.*

130. *Id.* at 1156.

131. *Adderley v. Florida*, 385 U.S. 39 (1966).

132. *Id.*

133. *Id.*

in our democratic society, still do not mean that everyone with opinions or beliefs to express may address a group at any public place and at any time.”<sup>134</sup> This is yet another decision supporting the notion that the right to free speech is not absolute.

In recent years, public opposition to the war in Iraq has led to numerous protests in different parts of the country, even before the conflict started.<sup>135</sup> The large scale response rivals that of the more notable anti-war protests during the Vietnam War era. In November 1969, as many as 500,000 rallied in the heart of our nation’s Capitol.<sup>136</sup> Despite numerous rallies throughout the country and very strong opposition to the conflict, protesters did not take their message to military funeral processions or services. Despite several cases in which courts overturned protest convictions in public forums,<sup>137</sup> the courts took a different view on areas not traditionally used for public speaking.

In *United States v. Floyd*, the Tenth Circuit upheld a statute prohibiting demonstrators from entering a military base.<sup>138</sup> The case involved a military officer trying to hold back a group of anti-war protesters—informing them that they would be trespassing if they continued onto the closed base.<sup>139</sup> When they did not heed the warnings, they were arrested and the court denied their motion for acquittal.<sup>140</sup>

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134. *Id.* at 48 (citing *Cox v. Louisiana*, 379 U.S. 536, 554-55 (1965)).

135. CNN, *Cities Jammed in Worldwide Protest of War in Iraq*, CNN, <http://www.cnn.com/2003/US/02/15/sprj.irq.protests.main> (last visited Sept. 12, 2007).

136. Jeff Leen, *The Vietnam Protests: When Worlds Collided*, THE WASHINGTON POST, <http://www.washingtonpost.com/wp-srv/local/2000/vietnam092799.htm> (last visited Nov. 1, 2007).

137. See generally *Bachellar v. Maryland*, 397 U.S. 564 (1970) (overturning the conviction of protestors arrested for disorderly conduct during protest where they laid across the sidewalk refusing to move); *Dellums v. Powell*, 566 F.2d 167, 203 (D.C. Cir. 1977) (“statute could not constitutionally be applied to enforce a policy of keeping off the Capitol Grounds groups of persons merely because they are controversial in character or because they seek to exercise First Amendment rights”); *Farber v. Rizzo*, 363 F. Supp. 386 (E.D.P.A. 1973) (holding that prevention of peaceful protest across the street from where the U.S. President was scheduled to appear violated First Amendment rights, and police officials held in contempt for excluding the protesters under the unconstitutional temporary restraining order enjoining the statute’s enforcement).

138. *United States v. Floyd*, 477 F.2d 217 (10th Cir. 1973).

139. *Id.*

140. *Id.*

These cases show that as protest methods evolve, so do the courts' opinions on when, and to what extent, free speech can be limited. Even though several of the above cases involve protesters being restricted from places traditionally considered to be public forums, courts have found that certain governmental interests suffice to outweigh the First Amendment right to absolute free speech.<sup>141</sup> The major point that needs to be emphasized is that protesters in the above cases pick their protest points so they can reach their target audience.

In cases of funeral rallies, many may argue that protesters do not have a legitimate reason as to why they must be heard by the victims' families. One could argue that mourners may constitute a "captive audience" being subjected to "fighting words." Furthermore, they are private citizens who do not have the power to effectuate governmental change at that particular moment. The mourners are carrying out one of humanity's most sacred and private rituals, burying and mourning the dead. Prohibiting intrusion upon the sanctity of this private moment, coupled with the "captive audience" and "fighting words" arguments, should be a sufficient governmental interest to warrant burdening free speech.

### C. *Watching the Wording*

In order to have the highest likelihood of being upheld, future statutes restricting funeral protests should be content neutral. Unfortunately, this may prevent people from coming out to line the streets supporting the families. Since the Westboro Baptist Church began protesting, members of the Patriot Guard Riders have been turning out to show their support for the families.<sup>142</sup> The group hails from Kansas, the same state that is home to the Westboro Baptist Church. The Patriot Guard Riders and other supporters may be affected, which is why the funeral protest bans must be very carefully worded. Furthermore, if the statutes were held to be viewpoint discriminatory, they would almost certainly be struck down. The Supreme Court reasoned that "the First Amendment's hostility to

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141. *Menotti v. Seattle*, 409 F.3d 1113 (9th Cir. 2005); *Bl(a)ck Tea Soc'y v. City of Boston*, 378 F.3d 8 (1st Cir. 2004).

142. Patriot Guard Riders, <http://www.patriotguard.org/> (last visited Nov. 1, 2007).

content-based regulation extends not only to restrictions on particular viewpoints, but also to prohibition of public discussion of an entire topic.”<sup>143</sup> However, reading many of these statutes carefully reveals that this is not necessarily the case.

The Mississippi statute bars “disruptive protests,” defining perpetrators as having “intent to disrupt a funeral service, graveside service, memorial service, or funeral ceremony.”<sup>144</sup> The statute targets the type of behavior and not the viewpoint of the speech. Therefore, it applies to anyone who shows up to a military funeral with the intention of disrupting the proceeding in any way, regardless of what the content/viewpoint of their gathering is.

The same is true for the North Carolina statute against any funeral protest.<sup>145</sup> There, disruption of any funeral falls under the state’s disorderly conduct clause.<sup>146</sup> The law prohibits “any visual image that conveys fighting words or actual or imminent threats of harm. . . .”<sup>147</sup> It also prohibits “loud, threatening, or abusive language or singing, chanting, whistling, or yelling with or without noise amplification in a manner that would tend to *impede, disrupt, disturb, or interfere with* a funeral, memorial service, or processional route.”<sup>148</sup>

These two particular statutes show how a law might be written to successfully avoid a viewpoint discrimination Constitutional challenge. Accordingly, family supporters and protesters could still turn out, as long as neither side impedes funeral or memorial services.

#### D. *Abortion Protests*

Experts say that if laws banning funeral protests are further challenged, courts will likely look to rulings on laws governing abortion protests.<sup>149</sup> Courts have found floating buffer

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143. *Consol. Edison Co. of N.Y., Inc. v. Pub. Serv. Comm’n of N.Y.*, 447 U.S. 530 (1980).

144. *MISS. CODE ANN.* § 97-35-51 (2006).

145. *N.C. GEN. STAT. ANN.* § 14-288.4 (2006).

146. *Id.*

147. *Id.*

148. *Id.* (emphasis added).

149. The Associated Press, *Indiana Enacts Funeral-Protest Law*, FIRST AMENDMENT CENTER, (Sept. 3, 2003), <http://www.firstamendmentcenter.org/news.aspx?id=16584>.

zones unconstitutional and overturned ordinances prohibiting focused picketing. In *Edwards v. City of Santa Barbara*, the Ninth Circuit affirmed “the district court’s preliminary injunction enjoining enforcement of the floating buffer zone provision.”<sup>150</sup> But the same case upheld a provision creating fixed buffer zones within eight feet of the clinic’s entrance.<sup>151</sup> In *Olmer v. City of Lincoln*, the ordinance at issue made it “unlawful for anyone to stand or walk on public sidewalks or rights of way adjoining religious premises, or if that person is displaying a banner, placard, or sign at certain specified times.”<sup>152</sup> This ordinance was passed to keep anti-abortion protesters from harassing worshipers attending mass.<sup>153</sup> The Eighth Circuit struck down the ordinance as being too broad.<sup>154</sup>

The abortion protest cases are distinguishable from funeral protest cases in several ways. First, it may be argued that abortion protesters are trying to educate people and stop abortions from taking place by taking their message directly to the people who administer and receive the procedure. The intent of funeral protesters is different. It is to harass grieving families, as there is no link between standing outside a funeral home or on the path of a funeral procession and achieving whatever goal a protester is attempting to promote, whether it be ending a war or, as the Westboro Baptist Church claims its purpose, ridding the United States (and the world) of homosexuality.<sup>155</sup>

But perhaps the most legally distinguishable difference between abortion and funeral protests is the idea of a “captive audience.”<sup>156</sup> In *Frisby v. Schultz*, the United States Supreme Court upheld a ban on picketing in front of a private residence.<sup>157</sup> The ordinance was passed after anti-abortion protesters started picketing in front of the private home of a doctor who performed abortions.<sup>158</sup> The very restrictive law made it “unlawful for any person to engage in picketing before or about

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150. *Edwards v. City of Santa Barbara*, 150 F.3d 1213 (9th Cir. 1998).

151. *Id.*

152. *Olmer v. City of Lincoln*, 192 F.3d 1176, 1179 (8th Cir. 1999).

153. *Id.*

154. *Id.*

155. See About Westboro Baptist Church, *supra* note 6.

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

157. *Id.*

158. *Id.* at 476.

the residence or dwelling of any individual in the Town of Brookfield.”<sup>159</sup> In upholding the ordinance, the Supreme Court reasoned that “the First Amendment permits the government to prohibit offensive speech as intrusive when the ‘captive’ audience cannot avoid the objectionable speech.”<sup>160</sup> Families burying their loved ones, even while having to pass through streets traditionally considered to be a public forum, should have the same expectation of not being “required to welcome unwanted speech,”<sup>161</sup> as they do in their own homes. The *Frisby* court reasoned that “there simply is no right to force speech into the home of an unwilling listener.”<sup>162</sup> Families in a motorcade on the way to a cemetery or walking into a church for the sole purpose of attending a funeral or memorial service should have the same expectation of privacy and the ability to stop unwelcome intrusion—as they would in their own homes. Furthermore, the Supreme Court recognized that the “type of picketers banned by the ordinance [in *Frisby*] 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.”<sup>163</sup> This reasoning should apply to funeral protestors. Therefore, instead of relying on precedents dealing with abortion protests outside of clinics in undertaking challenges to funeral protest bans, one may argue that future courts should look toward the Supreme Court’s reasoning in *Frisby*. Contextually, picketing in front of a cemetery or funeral home (or procession) is arguably more akin to picketing in front of a private residence, especially considering the sanctity of burying and mourning the dead.

This is the same reasoning that the Missouri District Court judge relied on when refusing to grant the Westboro Baptist Church an injunction that would have prevented the state’s funeral protest ban from being applied.<sup>164</sup> The judge sided with the defendant who argued that

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159. *Id.* at 477.

160. *Id.* at 487.

161. *Id.* at 485.

162. *Id.*

163. *Id.* at 486.

164. *Phelps-Roper v. Nixon*, No. 06-4156-CV, 2007 WL 273437 (W.D. Mo. Jan. 26, 2007).

spectators to a funeral are more captive than citizens in their own homes, as a citizen in his or her home could leave or otherwise avoid communications outside his or her residence, whereas a funeral spectator cannot leave the funeral or procession without missing the opportunity to pay last respects to the deceased.<sup>165</sup>

## V. Other Options

Should other courts follow the reasoning of the *McQueary* court, there are still other legal options that families can pursue to force Westboro Baptist Church members, and others with similar modus operandi, to cease their behavior. At least one family victimized at a military funeral by protesters has resorted to launching a private civil suit against Fred Phelps and certain other members of his church.<sup>166</sup> Twenty year old Lance Corporal Matthew Snyder was killed in the line of duty in Iraq on March 3, 2006.<sup>167</sup> According to the complaint filed by Matthew's father, Albert Snyder, in the United States District Court of Maryland on June 5, 2006, members of the Westboro Baptist Church protested at Matthew's March 10, 2006 funeral.<sup>168</sup> The lawsuit asked for punitive damages against Fred Phelps and other members of the church for defamation, invasion of privacy and intentional infliction of emotional distress.<sup>169</sup> In addition to punishing the defendants, the complaint stated that another purpose of the suit is to "deter the defendants from further reprehensible conduct."<sup>170</sup> On September 18, 2006, attorneys representing the Church filed a motion asking the judge to dismiss the lawsuit, stating "[t]here can be no falsehood when mere opinions are stated."<sup>171</sup> On October 30, 2006, the District Court refused to dismiss the case.<sup>172</sup> In an answer filed on November 20, 2006, Fred Phelps denied almost all of

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165. *Id.* at \* 3.

166. Lance Cpl. Matthew A. Snyder, *supra* note 7.

167. *Id.*

168. Complaint, Snyder v. Phelps, No. 06-CV-1389, 2006 WL 3081106 (D. Md. Oct. 30, 2006).

169. *Id.*

170. *Id.*

171. The Associated Press, Anti-Gay Church Seeks Dismissal of Defamation Suit (Sept. 23, 2006), <http://www.firstamendmentcenter.org/news.aspx?id=17429>.

172. The Associated Press, Trial Date Set for Defamation Suit Against Anti-Gay Church (Sept. 5, 2007), <http://www.firstamendmentcenter.org/news.aspx?id=18241>.

the allegations listed in the complaint, although he admitted to hosting several websites and protesting at funerals.<sup>173</sup> The answer asked that the complaint be dismissed and that Albert Snyder pay defendants' legal fees.<sup>174</sup> On November 28, 2006, the United States District Court for the District of Maryland issued a scheduling order, calling for discovery and deadlines for numerous filings which continued into May 2007.<sup>175</sup>

On October 15, 2007, the judge in the case dismissed Albert Snyder's defamation claim against the Church, but permitted the suit to "proceed on two fronts – invasion of privacy and intentional infliction of emotional distress."<sup>176</sup> The jury trial commenced in District Court in Baltimore the following week.<sup>177</sup>

On October 31, 2007, the jury returned their verdict, awarding Albert Snyder \$10.9 million—\$2.9 million in compensatory damages, \$6 million in punitive damages for invasion of privacy and \$2 million for emotional distress.<sup>178</sup> The Church has already stated that they plan to appeal.<sup>179</sup> But if they lose on appeal, it appears they may have to declare bankruptcy, as their attorney stated that the compensatory damage award alone "was nearly triple the net worth of Westboro and the three members on trial."<sup>180</sup> Snyder's attorney said the verdict

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173. Answer, *Snyder v. Phelps*, No. 06-CV-1389RDB, 2006 WL 3081106 (D. Md. Oct. 30, 2006), available at (follow "Documents" hyperlink; then follow "Click here to view the answer that was filed on November 20, 2006" hyperlink).

174. *Id.*

175. Scheduling Order, *Snyder v. Phelps*, No. 06-CV-1389RDB, 2006 WL 3081106 (D. Md. Oct. 30, 2006), available at <http://www.matthewsnnyder.org> (follow "Documents" hyperlink; then follow "Click here to view the Scheduling Order issued by the Court on November 28, 2006" hyperlink).

176. The Associated Press, *Federal Judge Dismisses Defamation Claim Against Westboro Baptist*, FIRST AMENDMENT CENTER, [http://www.firstamendmentcenter.org/news.aspx?id=19199&SearchString=westboro\\_baptist\\_church](http://www.firstamendmentcenter.org/news.aspx?id=19199&SearchString=westboro_baptist_church) (last visited Nov. 1, 2007).

177. Brent Jones, *Funeral Protest Case Opens*, THE BALTIMORE SUN, October 24, 2007, at B1, available at [http://www.baltimoresun.com/news/local/bal-md-funeral24oct24,0,5658015.story?coll=bal\\_tab02\\_layout](http://www.baltimoresun.com/news/local/bal-md-funeral24oct24,0,5658015.story?coll=bal_tab02_layout) (last visited Nov. 1, 2007).

178. The Associated Press, *Marine Father Victor in Suit Over Protests*, N.Y. TIMES, Nov. 1, 2007, at A23.

179. The Associated Press, *Federal Jury Awards Father \$10.9 Million in Funeral-Protest Case*, FIRST AMENDMENT CENTER, [http://www.firstamendmentcenter.org/news.aspx?id=19262&SearchString=westboro\\_baptist\\_church](http://www.firstamendmentcenter.org/news.aspx?id=19262&SearchString=westboro_baptist_church) (last visited Nov. 1, 2007).

180. Matthew Dolan & Julie Bykowicz, *Man Wins Case Against Funeral Protesters*, baltimoresun.com, <http://www.baltimoresun.com/news/local/bal-westboro1031,0,7191706.story> (last visited Nov. 1, 2007).

was about stopping the Westboro Baptist Church, rather than about the money.<sup>181</sup> If that is the case, it appears to have worked, at least to a small extent. During the course of the trial, several members of the Church protested outside the courthouse.<sup>182</sup> If it were not for the trial, and given their *modus operandi*, those members would have likely protested at someone's funeral.

In the next several years, we will see the final outcome of Albert Snyder's civil suit against the church and whether other families will follow his lead. Snyder seems to be taking a lesson from the Southern Poverty Law Center's Intelligence Project, which was created in 1981 and initially called "Klanwatch."<sup>183</sup> The initiative began after a black civil rights activist shot a Ku Klux Klan member in self defense and was later convicted of assault with the intent to murder by an all-white Alabama jury.<sup>184</sup> The center appealed the conviction and filed its first civil lawsuit against the Klan.<sup>185</sup> Members of the Intelligence Project began tracking hate groups across the United States and recording their activities, thereby collecting proof later used in civil lawsuits filed against the Ku Klux Klan and other white supremacist groups.<sup>186</sup> Many of the suits involved Klan-sponsored murders, and in the Project's first 17 years, "more than 40 individuals and nine major white supremacist organizations were toppled by Center suits."<sup>187</sup>

Although civil lawsuits may work to dissuade the behavior described in this comment, they should be used only as the last resort. The preferred method would be to prevent funeral protests in the first place. Any person grieving a loved one should be accorded the right to mourn without insults and other similar interference. Although a future lawsuit may prevent others from being subjected to the same intrusions, the person filing it has already been victimized in a way that can never be fully rectified. This is because you only bury a loved one once.

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181. *Id.*

182. *Id.*

183. SPLCenter.org, *supra* note 14.

184. *Id.*

185. *Id.*

186. *Id.*

187. *Id.*

## VI. Conclusion

Although it may seem like an uphill battle now, the hope is that United States courts will uphold current statutes passed to severely hamper, if not completely ban funeral protests. The key is to ensure these restrictions are content neutral and narrowly tailored, in order to have the best chance of being upheld. In addition to this, the hope is that future courts, like prior ones, may evolve with the times. Ideally, they will be able to appreciate the significant governmental interest in protecting a mourning family's privacy rights and rule that this outweighs the absolute right to free speech at that particular place and moment in time. Considering that prior courts have upheld the government's right to place restrictions on free speech in public forums during certain demonstrations,<sup>188</sup> there is reason to believe that they may extend this right to municipalities dealing with funeral protests. There is no real binding precedent with identical facts to the ones presented during funeral demonstrations. Perhaps this is because certain segments of society have evolved for the worst in this situation. That is why the hope is that courts take this unique set of facts and uphold current funeral protest restrictions.

But if they are not upheld, as a last resort, victimized families can still learn a lesson from the past and sue funeral protesters in civil court, putting an end to certain protestors' abusive tactics by bankrupting them. Perhaps jurors will be able to interpret the issues differently than judges, who are forced to abide strictly by the current law and judicial precedent. A layperson may be so outraged at Westboro Baptist Church members' behavior, that he or she might be willing to look beyond the strict letter of the law and reach a verdict based on humanity and the heart. We have already seen the first civil multi-million dollar verdict against the Church. Others may not be far behind.

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188. *Menotti v. Seattle*, 409 F.3d 1113 (9th Cir. 2005); *Bl(a)ck Tea Soc'y v. City of Boston*, 378 F.3d 8 (1st Cir. 2004).