Privacy and Funeral Protests

Christina E. Wells

PRIVACY AND FUNERAL PROTESTS*

CHRISTINA E. WELLS**

This Article examines the free speech implications of funeral protest statutes. Enacted in response to the Westboro Baptist Church, whose members protest at funerals to spread their anti-gay message, such statutes restrict a broad array of peaceful expressive activity. This Article focuses on the states' interest underlying these statutes—protecting mourners' right to be free from unwanted intrusions while at funeral services. Few would argue against protecting funeral services from intrusive protests. These statutes, however, go far beyond that notion and protect mourners from offensive, rather than intrusive, protests. As such, they do not conceive of privacy as protection from intrusion. Rather, they conceive of privacy as protecting human dignity from breaches of civility. American law does not traditionally recognize this conception of privacy. How then do such statutes come to rely on it? To some extent, the fault lies with the Supreme Court's free speech jurisprudence, which has been somewhat unclear regarding the nature of the privacy interest it weighs against free speech rights. Although a careful read of the Court's cases shows that it rejects an interpretation of privacy as protecting against breaches of civility, its jurisprudence sends mixed signals. Lower courts hearing challenges to funeral protest statutes have misread the Court's jurisprudence and have recognized a privacy right to be free from offensive messages while attending funerals. If allowed to stand, these decisions will work a dramatic change in the Court's doctrine.

** Enoch H. Crowder Professor of Law, University of Missouri School of Law. I am extraordinarily grateful to the many people who discussed ideas with me or who read and commented on various versions of this paper, including Vince Blasi, Kent Gates, Paul Heald, Steve Heyman, Heidi Kitrosser, Ron Krotoszynski, Paul Litton, Greg Magarian, Robert Post, Geof Stone, Sherri Wells, Sonja West, and the participants in the University of Georgia School of Law Faculty Colloquium. The final product is unquestionably better as a result of their input. Many research assistants worked very hard to make this article happen. They are Tony Bretz, Ben Cox, Anne Gardner, Christian Mechlin, and Ted Norwood. I am also grateful for the generous support provided by the Lawrence G. Crahan & Linda S. Legg and the John R. Weisenfels Faculty Research Fellowships and the Glenn A. McCleary Memorial Faculty Research Fellowship.

INTRODUCTION

Few things upset us quite like the desecration of a cemetery. As one observer noted, "the human heart has rebelled against the invasion of the cemetery precincts [and] contemplated the grave as the last and enduring resting place after the struggles and sorrows of this world."[1] Indeed, the belief that "the resting-place of the dead [is] hallowed ground"[2] has resulted in significant legal protection of

1. Ritter v. Couch, 76 S.E. 428, 930 (W.Va. 1912).
2. Brown v. Lutheran Church, 23 Pa. 495, 500 (1854).

cemeteries[3] and their elevation as a "cultural institution."[4] Funeral rites are similarly revered as a sign of "respect a society shows for the deceased and for the surviving family members."[5] Decency, most of us agree, requires respect for the dead.[6]

Americans were thus outraged when members of the Westboro Baptist Church violated this code of respect. In 2005, Church members began appearing at the funerals of fallen Iraqi War soldiers, chanting and displaying slogans such as "They turned America over to fags; now they're bringing them home in body bags,"[7] and "Thank God for dead soldiers."[8] Although the protestors claim to disseminate a political message about the sins of homosexuality, the public has uniformly condemned their "repugnant, outrageous, [and] despicable" behavior.[9] The majority of states and Congress responded to the country's outrage by enacting laws regulating protests at or near funeral services.[10]

It is easy to sympathize with the families and friends of the deceased who experience funeral protests at the hands of the Westboro Baptist Church. In a time of extreme grief and vulnerability, such activity must seem an affront of the most egregious kind. The instinct to regulate or punish is powerful and understandable. Such regulation, however, poses significant issues for freedom of speech. Although the First Amendment surely allows government officials to regulate some protests near funerals, the Supreme Court of the United States has generally paid close attention

3. *See generally* Alfred L. Brophy, Jr., *Grave Matters: The Ancient Rights of the Graveyard*, 2006 BYU L. REV. 1469 (discussing common and statutory law relevant to cemeteries).

4. Stanley French, *The Cemetery as Cultural Institution: The Establishment of Mount Auburn and the "Rural Cemetery" Movement*, 26 AM. Q. 37, 38 (1974) (discussing the rise and evolution of the American cemetery as a cultural institution).

5. Nat'l Archives & Records Admin. v. Favish, 541 U.S. 157, 168 (2004); 5 ENCYCLOPEDIA OF RELIGION 450 (Mircea Eliade ed. 1987) ("[F]uneral rites . . . are the conscious cultural forms of one of our most ancient, universal, and unconscious impulses: the need to overcome the distress of death and dying.").

6. GEORGE CRABB, ENGLISH SYNONYMES EXPLAINED 316 (1887) ("[R]egard for the feelings of others enjoins a certain outward decorum upon everyone who attends a funeral."); Ronald K.L. Collins & David Hudson, *A Funeral for Free Speech?*, LEGAL TIMES, April 17, 2006, at 67 ("Decency respects the dead.").

7. Howard Witt, *Lawmakers Rush to Blunt Anti-Gay Church*, CHI. TRIB., Apr. 4, 2006, at 1.

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

9. *Id.* (quoting Representative Steve Buyer (R-IN), who sponsored a bill in Congress to limit protests at federal cemeteries) (internal quotation marks omitted).

10. *See infra* note 37.

to how and why officials regulate. Laws punishing protestors who engage in fighting words[11] or who physically or aurally disrupt funerals are one thing.[12] Laws banning peaceful protests near a funeral ceremony in order to protect the "privacy of grieving families" are quite another.[13] The former are grounded in legal principles allowing regulation of low-value and disruptive speech, assuming the laws are appropriately tailored.[14] The latter raise numerous questions about the nature and scope of privacy protections in public and their effect on free speech rights.

This Article focuses on the latter category of laws regulating peaceful funeral protests and the claim that those laws protect privacy interests. The term "privacy," is amorphous, ill-defined, and malleable,[15] and, therefore, a dangerous justification for regulating speech. Statutes regulating peaceful protests reflect the difficulty both in defining and containing the parameters of a privacy interest. Such laws appear at first glance to equate privacy with intrusion, much like the common law tort of intrusion. But the breadth of the peaceful protest statutes is inconsistent with traditional elements of the intrusion tort. Typically, intrusion torts involve a physical, aural, or harassing invasion into one's solitude or other private space in an especially offensive manner.[16] In contrast, many peaceful protest statutes exclude protestors from areas ranging from 300 to 1,500 feet

11. *See, e.g.*, DEL. CODE ANN. tit. 11, § 1303(a)(1) (2007) (prohibiting any person from "[d]irect[ing] abusive epithets or mak[ing] any threatening gesture which the person knows or reasonably should know is likely to provoke a violent reaction by another" within 1,000 feet of funeral procession).

12. *See, e.g.*, 38 U.S.C. § 2413(a)(2)(A)(ii) (2006) (restricting protestors from "willfully making or assisting in the making of any noise or diversion that disturbs or tends to disturb the peace or good order of the funeral").

13. *See, e.g.*, OKLA. STAT. tit. 21, § 1380 (2007) (prohibiting pickets within 500 feet and one hour before or after a funeral).

14. For cases regarding fighting words, see generally *R.A.V. v. City of St. Paul*, 505 U.S. 377, 393 (1992); *Gooding v. Wilson*, 405 U.S. 518, 523 (1972); and *Chaplinsky v. New Hampshire*, 315 U.S. 568 (1942). For a treatment of disruptive protests, see *Grayned v. City of Rockford*, 408 U.S. 104, 114–21 (1972).

15. *See* James Q. Whitman, *The Two Western Cultures of Privacy: Dignity Versus Liberty*, 113 YALE L.J. 1151, 1153 (2004) (noting that the term privacy is "embarrassingly difficult to define"). For excellent reviews of the many notions of privacy in literature and law, see generally Daniel J. Solove, *A Taxonomy of Privacy*, 154 U. PA. L. REV. 477 (2006) [hereinafter, Solove, *Taxonomy*] and Daniel J. Solove, *Conceptualizing Privacy*, 90 CAL. L. REV. 1087 (2002) [hereinafter, Solove, *Conceptualizing Privacy*]. *See also infra* Part II.A (discussing conceptions of privacy).

16. *See, e.g.*, RESTATEMENT (SECOND) OF TORTS § 652B (1965) ("One who intentionally intrudes, physically or otherwise, upon the solitude or seclusion of another or his private affairs or concerns, is subject to liability to the other for invasion of his privacy, if the intrusion would be highly offensive to a reasonable person.").

around a funeral service or procession,[17] belying any notion of seclusion associated with an intrusion-based privacy interest. Furthermore, because such laws target peaceful protests, officials cannot legitimately claim that they protect against unwanted aural or physical invasions.[18] Peaceful protests do not invade funerals in the sense that this term is traditionally understood. They are neither noisy nor disruptive. They do not necessarily impede funeral services. Nor do they involve harassment causing attendees to avoid the service. In other words, peaceful protests do not invade funeral-goers' seclusion.

In effect, the only aspect of intrusion that these statutes capture is that funeral protests *offend* mourners (and many others). The Montana legislature has justified its funeral protest statute[19] by finding that protesting at funerals "exploit[s] . . . another's grief" in a manner "shocking to the conscience" and that such activity is an "unwanted and unwarranted intrusion" on the "sanctity and dignity of funeral services."[20] While this argument may be vaguely rooted in privacy law, it differs from the law of intrusion.[21] Such an approach equates privacy with decency or civility, i.e., the notion that social norms require certain decorum and respect for others.[22]

American law, however, does not recognize a civility-based privacy interest. The privacy tort of intrusion rejects recovery for purely "psychological" invasions such as insults and bad manners.[23] Our free speech jurisprudence, which borrows heavily from the intrusion branch of privacy torts when balancing privacy interests and free speech rights, eschews regulation of speech based upon its offensive content.[24] But the Supreme Court's cases in this area are

17. *See infra* Part I.B.3.

18. Several states regulate only those protests likely to intrude upon funeral ceremonies—i.e., noisy or physically disruptive protests. *See infra* Part I.B.2.

19. *See* MONT. CODE ANN. § 45-8-116 (2007).

20. Right to Grieve in Privacy Act, 2007 Mont. Laws 10 (codified at MONT. CODE ANN. § 45-8-116 (2007)).

21. *See infra* Part II.B.2.

22. *See, e.g.*, Robert C. Post, *Three Concepts of Privacy*, 89 GEO. L.J. 2087, 2093 (2001) ("If privacy is conceived as a form of dignity, it presupposes a particular kind of social structure in which persons are joined by common norms that govern the forms of their social interactions. These norms constitute the decencies of civilization.").

23. 1 J. THOMAS MCCARTHY, THE RIGHTS OF PUBLICITY & PRIVACY § 5:89, at 625 (2d ed. 2007); William L. Prosser, *Privacy*, 48 CAL. L. REV. 383, 390 (1960).

24. *See* Schenck v. Pro-Choice Network, 519 U.S. 357, 383 (1997); Madsen v. Women's Health Ctr., Inc., 512 U.S. 753, 774 (1994); Cohen v. California, 403 U.S. 15, 21–22 (1971).

complex, and it is difficult to discern the parameters of an audience member's privacy interests, especially while in a public place.

The Court's tendency to discuss the privacy interest in the context of audience "captivity" has further confused the issue.[25] The Court has not clearly explained the circumstances in which audiences are captive or to what kind of expression they can be captive. Further, the Court often uses broad, rhetorically powerful but often unhelpful, language to support its decisions.[26] Over time that rhetoric has occasionally suggested a willingness to find audiences in public captive to offensive speech, although such speech is not intrusive in a traditional sense.[27] Most recently, in *Hill v. Colorado*,[28] the Court seemingly declared that privacy interests gave "unwilling listeners" a right to "avoid unwelcome speech" while in public.[29]

Despite the Court's confusing signals, a careful review of its cases reveals that persons who claim to be captive in public do not have a general right to be free from unwanted speech. Rather, even after *Hill*, an individual's privacy right while in public space amounts to little more than freedom from noisy or disruptive protests or harassing and intimidating behavior while in a defined area.[30] Nevertheless, the confusion arising from the Court's decisions allows states to rely on the broader aspects of the Court's language to justify their peaceful protest statutes[31] as necessary to protect funeral goers from offensive messages.[32] Lower courts have agreed, with all but

25. All of the Court's recent cases discuss privacy in the context of audience captivity. *See, e.g.*, Hill v. Colorado, 530 U.S. 703, 716–18 (2000); *Schenck*, 519 U.S. at 376 n.8; *Madsen*, 512 U.S. at 772–73; Frisby v. Schultz, 487 U.S. 474, 484–85 (1988); *see also infra* Parts III.B–C (discussing the Court's decisions regarding privacy in the context of public places).

26. *See infra* Part III.A.

27. *See infra*, Part III.C.

28. 530 U.S. 703 (2000).

29. *Id.* at 717.

30. *See infra* Parts III.B–C.

31. *See, e.g.*, Phelps-Roper v. Nixon, 504 F. Supp. 2d 691, 696 (W.D. Mo. 2007), (considering state's argument that funeral goers are "*more* captive than citizens in their own homes" (emphasis in original)), *rev'd*, 509 F.3d 480 (8th Cir. 2007); McQueary v. Stumbo, 453 F. Supp. 2d 975, 985 (E.D. Ky. 2006) (considering state's argument that it had "an interest in protecting its citizens from unwanted communications"); State Defendant's Motion for Summary Judgment at 1, Phelps-Roper v. Taft, 523 F. Supp. 2d 612 (N.D. Ohio 2007) (No. 1:06-CV-02038) (arguing that "[p]reventing [funeral goers] from becoming a captive audience for unwelcome speech is the impetus behind the enactment of the regulation"), *aff'd sub nom.* Phelps-Roper v. Strickland, 2008 FED App. 0312P, 539 F.3d 356 (6th Cir. 2008).

32. *See, e.g.*, Appellees' Brief at 33, Phelps-Roper v. Nixon, 509 F.3d 480 (8th Cir. 2007) (No. 07-1295) (arguing that Court's doctrine shows funeral goers are captive audience with right to be free from exposure to "hateful messages").

one court finding privacy interests sufficient to support regulation of peaceful funeral protests.[33]

The lower courts' interpretations of the privacy interest, however, extend it well beyond existing doctrine and essentially create a civility-based privacy interest. Lower courts assume that funeral goers are captive to protests simply because they attend an event (a funeral) at which they find the protestors' presence or message offensive. As one court noted, "protestors' actions of picketing soldiers' funerals and belittling sacrifices made by soldiers are intolerable . . . , making protection of the funeral attendees a substantial interest for the state."[34] Such a civility-based approach disconnects privacy and captivity from any logical notion of intrusion, essentially punishing protestors for violating society's norms. The states may have intended this civility-based approach with their statutes, but the Supreme Court has never taken, and should not take, this route. A civility-based privacy interest is firmly grounded in communicative impact—regulating speech because of the audience's response to it[35]—and allows government officials to restrict speech that offends us. Such laws effectively regulate speech because of its content and rarely withstand constitutional scrutiny.[36]

None of this is to say that privacy interests are irrelevant to funeral protest statutes. Instead, the parameters of that interest must be drawn narrowly, to remain consistent with the principles established in the Court's doctrine. That doctrine has always recognized an intrusion-based privacy interest. Thus, funeral protest statutes that conceive of the privacy interest in terms of freedom from

33. *See Nixon*, 504 F. Supp. 2d at 696 (finding mourners sufficiently captive to protests to support a privacy interest), *rev'd*, 509 F.3d 480 (intimating that state did not have an interest in protecting privacy beyond the home); *Taft*, 523 F. Supp. 2d at 618 (finding funeral protestors' speech intruded upon mourners who were captive audience while attending funeral).

34. *Nixon*, 504 F. Supp. 2d at 696.

35. *See* John Hart Ely, *Flag Desecration: A Case Study in the Roles of Categorization and Balancing in First Amendment Analysis*, 88 HARV. L. REV. 1482, 1497 (1975) (describing regulations grounded in communicative impact as those in which "the harm that the state is seeking to avert is one that grows out of the fact that the defendant is communicating, and more particularly out of the way people can be expected to react to his message"); *see also* Susan H. Williams, *Content Discrimination and the First Amendment*, 139 U. PA. L. REV. 615, 656 (1991) ("When the harm [a] regulation seeks to remedy necessarily flows from the communicative impact of the speech, then the government's purpose is related to content and the regulation is deemed content discriminatory.").

36. Texas v. Johnson, 491 U.S. 397, 411–12 (1989) (striking down statute banning flag desecration in a manner offensive to other people as unconstitutionally regulating communicative impact of speech).

unwanted and invasive intrusions, and which regulate accordingly, are consistent with the Court's existing doctrine and longstanding free speech principles.

Part I of this Article discusses the recent spate of funeral protest laws, focusing most specifically on those that regulate peaceful funeral protests. Part II attempts to unpack the privacy interest that underlies the peaceful protest statutes. It demonstrates that despite state attempts to adopt an intrusion-based privacy right, peaceful protest statutes actually embrace a civility-based privacy right. Yet, privacy and free speech law in the United States do not recognize civility-based privacy rights. Part III discusses the Court's free speech jurisprudence relevant to the regulation of funeral protests. It analyzes those cases in which privacy interests, and especially the captive audience rationale, have figured prominently in the Court's decisions. It ultimately concludes that the Court's doctrine does not recognize a broad interest that defines privacy as freedom from offensive or uncivil speech, even though the cases in this area send somewhat conflicting signals. Part IV analyzes recent lawsuits challenging funeral protest laws and reveals that they confuse the Court's doctrine. Part IV also elaborates on the previously unrecognized privacy interest identified in the lower court cases, which like the statutes, equates privacy with civility norms. Finally, Part IV discusses permissible funeral protest statutes in light of the intrusion-based privacy interest consistent with the Court's doctrine.

I. REGULATING FUNERAL PROTESTS

A. *Background*

The federal government and forty-one states have enacted statutes restricting protests near cemeteries or funerals.[37] The

37. *See* 38 U.S.C. § 2413 (2006); 18 U.S.C. § 1388 (2006); ALA. CODE § 13A-11-17 (LexisNexis Supp. 2007); ARK. CODE ANN. § 5-71-230 (2007); COLO. REV. STAT. § 13-21-126 (2007); DEL. CODE ANN. tit. 11, § 1303 (2007); FLA. STAT. § 871.01 (2007); GA. CODE ANN. § 16-11-34.2 (2007); IDAHO CODE ANN. § 18-6409 (Supp. 2008); 720 ILL. COMP. STAT. ANN. 5/26-6 (West Supp. 2008); IND. CODE ANN. § 35-45-1-3 (LexisNexis Supp. 2008); IOWA CODE ANN. § 723.5 (West Supp. 2008); KAN. STAT. ANN. § 21-4015 (2007); KY. REV. STAT. ANN. §§ 525.055, .145, .155 (LexisNexis Supp. 2007); LA. REV. STAT. ANN. § 14:103 (Supp. 2008); ME. REV. STAT. ANN. tit. 17A, § 501-A (Supp. 2007); MD. CODE ANN. CRIM. LAW § 10-205 (LexisNexis Supp. 2007); MASS. ANN. LAWS ch. 272, § 42A (2007); MICH. COMP. LAWS ANN. §§ 123.1112-13 (West 2007); MINN. STAT. ANN. § 609.501 (West Supp. 2008); MISS. CODE ANN. § 97-35-18 (West Supp. 2007); MO. ANN. STAT. § 578.501 (West Supp. 2008); MONT. CODE ANN. § 45-8-116 (2007); NEB. REV. STAT. §§ 28-1320-01 to 1320.03 (2007); N.H. REV. STAT. ANN. § 644:2-b (LexisNexis Supp.

statutes are almost entirely a response to the activities of the Westboro Baptist Church, an unaffiliated Baptist church consisting of roughly seventy-five members located in Topeka, Kansas.[38] The church is led by the Reverend Fred Phelps and made up largely of Phelps family members.[39] Reverend Phelps and his followers began protesting at funerals in 1991, and have since engaged in over 34,000 anti-gay protests.[40] The church, already well-known in Kansas which passed a funeral picketing law as early as 1992,[41] gained national notoriety in 1998 for protesting at the funeral of Matthew Shephard, a victim of anti-gay violence.[42] Although the church continues its activities at other prominent funerals,[43] its recent protests at military

---

2007); N.J. STAT. ANN. § 2C:33-8.1 (West Supp. 2008); N.M. STAT ANN. § 30-20B-1-5 (West Supp. 2007); N.Y. PENAL LAW § 240.21 (McKinney 2000); N.C. GEN. STAT. § 14-288.4 (2007); N.D. CENT. CODE § 12.1-31-01.1 (Supp. 2007); OHIO REV. CODE ANN. § 3767.30 (LexisNexis 2005 & Supp. 2008); OKLA. STAT. tit. 21, § 1380 (2007); 18 PA. CONS. STAT. ANN. § 7517 (West Supp. 2008); S.C. CODE ANN. § 16-17-525 (Supp. 2007); S.D. CODIFIED LAWS §§ 22-13-17 to 22-13-20 (2007); TENN. CODE ANN. § 39-17-317 (2007); TEX. PENAL CODE ANN. §§ 42.055, 42.04 (Vernon Supp. 2008); UTAH CODE ANN. § 76-9-108 (Supp. 2007); VT. STAT. ANN. tit. 13, § 3771 (Supp. 2007); VA. CODE ANN. § 18.2-415 (Supp. 2008); WASH. REV. CODE ANN. § 9A.84.030 (West Supp. 2008); WIS. STAT. ANN. §§ 947.01, 947.011 (West 2005 & Supp. 2007); WYO. STAT. ANN. § 6-6-105 (2007).

Kansas recently amended its statute. For a discussion of the changes to the Kansas funeral protest statute, see *infra* note 41.

38. Alvarez, *supra* note 8; Fred Mann, *Road to Westboro*, WICHITA EAGLE, Apr. 2, 2006, at 1A.

39. Matt Sedensky, *Ministry of Hate*, HUTCHINSON NEWS (Kan.), June 4, 2006, at A1. For background on the Phelps family, see Rick Musser, *Fred Phelps Versus Topeka*, *in* CULTURE WARS & LOCAL POLITICS 158 (Elaine B. Sharpe ed. 1999).

40. *See* GodHatesFags, http://www.godhatesfags.com (last visited November 3, 2008).

41. *See* Musser, *supra* note 39, at 165–66 (discussing events leading up to enactment of anti-picketing ordinance); *see also* 1992 Kan. Sess. Laws 210 (setting forth provisions of an enacted senate bill, which prohibited picketing "before or about any cemetery, church or mortuary before, during and after a funeral"). A federal district court struck down the law as unconstitutionally vague. *See* Phelps v. Hamilton, 122 F.3d 1309, 1315 (10th Cir. 1997) (discussing lower court's unpublished order).

Kansas updated its funeral protest law in 2007. KAN. STAT. ANN. § 21-4015 (2007). The law contained a trigger provision stating that it would not go into effect until the Attorney General prevailed in a lawsuit regarding the law's constitutionality. KAN. STAT. ANN. § 75-702a (2007). The Kansas Supreme Court held that the trigger provision violated the separation of powers, and struck down the law in March 2008. *See* State *ex rel.* Morrison v. Sebelius, 179 P.3d 366, 390–91 (Kan. 2008). In early 2008, Kansas enacted a funeral protest law substantially similar to the 2007 amended version, but without the trigger language. S.B. 226, 2008 Kan. Sess. Laws 37, *available at* http://kslegislature.org/sessionlaws/2008/chap37.pdf. For ease of reference, this Article will refer to the provisions of section 21-4015.

42. Alvarez, *supra* note 8; Sedensky, *supra* note 39.

43. *See* Robert F. McCarthy, Note, *The Incompatibility of Free Speech and Funerals: A Grayned-Based Approach for Funeral Protest Statutes*, 68 OHIO ST. L.J. 1469, 1474

funerals have generated the greatest media attention and legislative backlash.

Church members began protesting at funerals of soldiers killed in Iraq and Afghanistan in 2005.[44] At such funerals they sing, chant and hold signs reading "God Hates Fags," "God Blew Up the Soldier," "Thank God for Dead Soldiers," "Thank God for IEDs," and "AIDS Cures Fags."[45] Church members claim that soldiers' deaths are a result of the country's willingness to embrace homosexuality. As one church member noted, " 'God is punishing this nation with a grievous, smiting blow, killing our children, sending them home dead, to help you connect the dots .... This is a nation that has forgotten God and leads a filthy manner of life.' "[46] Church members choose funerals as their protest venue because: (1) they believe that funeral attendees' focus on death and dying make funeral ceremonies an appropriate venue at which to warn of God's impending wrath, (2) funeral services provide them with a "sounding board they would otherwise lack," and (3) the government often uses military funerals as a platform to promote a military agenda, which church members believe they must negate with their message.[47]

Public response to the church's activities has been, not surprisingly, quite negative. Their activities have been described as "repugnant, outrageous, [and] despicable."[48] Community members have described the protestors as "pieces of garbage who want to

(2007) (discussing church protests at funerals of Frank Sinatra, Barry Goldwater, Mister Rogers, and others).

44. Alvarez, *supra* note 8; Sedensky, *supra* note 39. Prior to the Church's current protests, members protested primarily at the funerals of gay men and lesbians, most famously at the funeral of Matthew Shepard, a gay man who was beaten to death in Wyoming. Alvarez, *supra* note 8; Sedensky, *supra* note 39.

45. *See* GodHatesFags, http://www.godhatesfags.com/written/wbcinfo/aboutwbc.html (last visited November 3, 2008); Fred Phelps and the Westboro Baptist Church, http://www.adl.org/special_reports/wbc/wbc_on_gays.asp (last visited November 3, 2008). For more in-depth reviews of the Church's activities, see Lauren M. Miller, Comment, *A Funeral for Free Speech? Examining the Constitutionality of Funeral Picketing Acts*, 44 HOUS. L. REV. 1097, 1102–04 (2007) and Cynthia Mosher, Comment, *What They Died to Defend: Freedom of Speech and Military Funeral Protests*, 112 PENN. ST. L. REV. 587, 592–95 (2007).

46. Alvarez, *supra* note 8 (quoting Shirley Phelps-Roper); *see also* GodHatesFags, *supra* note 45 ("God has killed [soldiers] in Iraq/Afghanistan in righteous judgment against an evil nation. America crossed the line on June 26, 2003, when the Supreme Court (the conscience of the nation) ruled that we must respect sodomy.").

47. Mosher, *supra* note 45, at 593–94. In some instances, church members have agreed to forego protests in exchange for alternate media coverage. Church members argue that they do not protest at funerals where there will be no press coverage. *Id.* at 594.

48. Alvarez, *supra* note 8 (quoting Indiana Representative Steve Buyer).

desecrate the memories of fallen servicemen and women."[49] In fact, members of the church call themselves "the most hated family in [the] U.S."[50] The Westboro Baptist Church's protests at military funerals have so offended the public and lawmakers that states and the federal government have engaged in an extraordinary wave of legislative activity, passing the laws referred to above in less than two years.

B. The Statutes

Funeral protest statutes approach regulation in various ways. Many regulate protests involving low-value speech, i.e., speech that is "no essential part of any exposition of ideas."[51] Accordingly, such statutes regulate fighting words, incitement, or threats, i.e., categories of speech deemed to have little expressive value. Other statutes restrict high-value speech, i.e., speech contributing to public discourse.[52] Some such statutes restrict loud, boisterous, and disruptive protests.[53] Other statutes restrict peaceful protests near churches, cemeteries, or other places where funerals are held.[54] Unlike statutes that regulate fighting words or incitement, which have no expressive value, these latter statutes restrict speech that expresses ideas. However, they do so because of the expression's undesirable byproducts—for example, noise pollution, or invasion of mourners' privacy interests.

Understanding these different approaches aids in understanding the legitimacy of the government interests associated with the statutes. In the world of free speech jurisprudence, government interests are integral to determining the constitutionality of speech

---

49. Geoff Oldfather, *A Good Way to Handle Westboro Protestors: Show Up and Ignore Them*, FORT PIERCE TRIB. (Fla.), May 21, 2008, *available at* http://www.tcpalm.com/new/2008/may/21/geoff-oldfather-a-good-way-to-handle-protesters/.

50. BBCNews.com, America's Most Hated Family, Mar. 30, 2007, http://news.bbc.co.uk/2/hi/uk_news/magazine/6507971.stm; *see also* Geoff Oldfather, *Church's Hate Group Won't Find Sympathy Picketing in Stuart*, STUART NEWS (Fla.), May 18, 2008, at A1, *available at* http://www.tcpalm.com/news/2008/May/18/30gtchurchs-hate-group-wont-find-sympathy-in/ (describing church members' actions as "evil" and "reprehensible").

51. Chaplinsky v. New Hampshire, 315 U.S. 568, 572 (1942).

52. *See* Consol. Edison Co. v. Pub. Serv. Comm'n, 447 U.S. 530, 534 (1980) ("[T]he First Amendment 'embraces at least the liberty to discuss publicly . . . all matters of public concern.' "); Robert C. Post, *Community and the First Amendment*, 29 ARIZ. ST. L.J. 473, 481 (1997) (defining public discourse as "the speech necessary for the formation of public opinion").

53. *See, e.g.*, COLO. REV. STAT. § 13-21-126 (2007); IOWA CODE ANN. § 723.5(1) (West Supp. 2008).

54. MASS. GEN. LAWS ANN. ch. 272, § 42A (West 2007); MO. ANN. STAT. § 578.501 (West Supp. 2008).

regulations. Whether it regulates high- or low-value speech, the government must have valid reasons for its actions. Many reasons suffice, including preventing violence, traffic safety, aesthetics, and privacy.[55] Government officials, however, cannot legitimately regulate speech solely because of its communicative impact, i.e., because of the audience's response to the expression.[56] Much of the Court's free speech jurisprudence attempts to distinguish regulations based on legitimate reasons from those based on communicative impact.

Restrictions on low-value speech, for example, are constitutional only if they are narrowly tailored to specific interests, such as preventing violence; they cannot broadly regulate speech because people are offended.[57] Restricting speech due to the audience's offense at the message violates the purpose associated with regulating low-value speech, namely, that such speech has no expressive value. In the realm of high-value speech, a law's constitutionality depends on whether it is content-based or content-neutral. The Court strictly scrutinizes content-based restrictions,[58] in large part because they are more likely to turn on communicative impact.[59] Content-neutral regulations, on the other hand, are more likely to serve neutral state interests. Courts uphold content-neutral regulations if they are narrowly drawn to meet the state's interests and leave open ample alternatives of communication.[60] However, the Court may hold an

55. Christina E. Wells, *Bringing Structure to the Law of Injunctions Against Expression*, 51 CASE W. RES. L. REV. 1, 51 (2000) (describing legitimate interests in Court's cases).

56. *See supra* note 35 and accompanying text.

57. *See infra* notes 66–72 and accompanying text.

58. Under strict scrutiny, the Court asks whether the law is necessary to serve a compelling state interest. Simon & Schuster, Inc. v. Members of N.Y. State Crime Victims Bd., 502 U.S. 105, 106 (1991).

59. Geoffrey R. Stone, *Content Regulation and the First Amendment*, 25 WM. & MARY L. REV. 189, 207 (1983). As Professor Stone explains, when the government restricts speech because it is fearful of how people will react, "it almost invariably relies on constitutionally disfavored justifications," such as paternalism, or protecting people from offense. *Id.* at 217. For discussions of potential motives underlying content-based laws, see Elena Kagan, *Private Speech, Public Purpose: The Role of Governmental Motive in First Amendment Doctrine*, 63 U. CHI. L. REV. 413, 451–56 (1996) and Christina E. Wells, *Reinvigorating Autonomy: Freedom and Responsibility in the Supreme Court's First Amendment Jurisprudence*, 32 HARV. C.R.-C.L. L. REV. 159, 173–75 (1997).

60. *See* Ward v. Rock Against Racism, 491 U.S. 781, 803 (1989) (upholding noise regulation in city park); *see also* Wells, *supra* note 59, at 175–77 (discussing the Court's approach to content-neutral regulations).

This synopsis assumes that protests occur in classic public fora (i.e., streets, parks, and sidewalks). *See* Hague v. Comm. for Indust. Org., 307 U.S. 496, 515 (1939) (discussing the Court's approach to content-neutral regulations). Given the breadth of the zones from

apparently content-neutral law to be content-based if the state's interest in regulating is related to communicative impact.[61]

1. Statutes Regulating Low-Value Speech

Many states have enacted funeral protest statutes targeting certain categories of low-value speech, such as threats, fighting words or incitement of violent activity.[62] Delaware, for example, prohibits anyone from "directing abusive epithets or making any threatening gesture which the person knows or reasonably should know is likely to provoke a violent reaction by another."[63] North Carolina prohibits displaying visual images that convey "fighting words or actual or imminent threats of harm directed to any person or property associated with the funeral."[64] Wisconsin outlaws "abusive, indecent, [and] profane" conduct that "tends to cause or provoke a disturbance" at a funeral service.[65]

---

which funeral protestors are excluded, *see infra* note 97 and accompanying text, much of the speech at issue will occur in such fora. Many laws, however, also effectively ban protestors from cemetery grounds or buildings. The Court's rules differ with respect to these areas. Private property owners may exclude others, even those engaging in expressive activity, from their property. Hudgens v. NLRB, 424 U.S. 507, 520 (1976). Furthermore, a publicly owned cemetery is almost surely a non-public forum where restrictions on speech need only be reasonable and not an effort to suppress viewpoints. Perry Educ. Ass'n v. Perry Local Educators Ass'n, 460 U.S. 37, 46 (1983); *see also* Griffin v. Sec'y of Veterans Affairs, 288 F.3d 1309, 1324 (Fed. Cir. 2002) (holding national cemeteries are nonpublic fora). Most of the laws regulating disruptive protests are not likely to fall afoul of the Court's prohibition on viewpoint suppression in non-public fora. *But see* 18 U.S.C. § 1388(a) (2006) (prohibiting certain disruptive protests within 150 feet of a funeral of a "member or former member of the Armed Forces that is not located at a cemetery under the control of the National Cemetery Administration or part of Arlington National Cemetery"); FLA. STAT. § 871.01(2) (2006) (prohibiting intentionally disruptive protests at ceremonies honoring the deaths of military personnel).

61. *See, e.g.*, Cox v. Louisiana, 379 U.S. 536, 551 (1965) (striking down facially neutral breach of peace law because it was applied to punish protestors for peaceful expression of unpopular views); Kagan, *supra* note 59, at 464; Stone, *supra* note 59, at 215 n.102.

62. *See* GA. CODE ANN. § 16-11-34.2(b)(1) (2007); 720 ILL. COMP. STAT. 5/26-6(c)(2) (West 2008); IOWA CODE ANN. § 723.5(1)(b) (West 2008); KY. REV. STAT. ANN. § 525.055(1)(a)(1) (West 2007); ME. REV. STAT. ANN. tit. 17A, § 501-A(1)(D) (2007); MD. CODE ANN. CRIM. LAW § 10-205(b) (Lexis Nexis 2007); MICH. COMP. LAWS § 123.1113 (2008); N.J. REV. STAT. § 2C:33-8.1(b)(2) (2008); N.M. STAT. § 30-20B-1-5 (2007); N.C. GEN. STAT. § 14-288.4(a)(8)(a) (2008); N.D. CENT. CODE § 12.1-31-01.1 (2007); VA. CODE. ANN. § 18.2-415(B) (West 2008); WASH. REV. CODE § 9A.84.030(1)(a) (2008); WIS. STAT. ANN. § 947.011(2)(a)(1) (West 2007). A handful of statutes also prohibit certain conduct, such as starting fights, at funerals. *See, e.g.*, IND. CODE § 35-45-1-3(a) (2008); KY. REV. STAT. ANN. § 525.055(1)(a)(1) (West 2007); WASH. REV. CODE § 9A.84.030(d)(i) (2008).

63. DEL. CODE ANN. tit. 11, § 1303(a)(1) (2007).

64. N.C. GEN. STAT. § 14-288.4(a)(8)(a) (2007).

65. WIS. STAT. ANN. §§ 947.011(2)(a)(1), 947.01 (West 2005).

In general, the government has legitimate reason to regulate low-value speech, even though such regulation is based at least partly upon the expression's communicative impact. Laws regulating low-value speech, however, are unlike laws that regulate because the audience dislikes the speaker's message. Restrictions on low-value speech do not punish speech because of its appeal to our rational or deliberative capacities but, rather, because it provokes an unthinking, non-deliberative response.[66] Thus, the government may regulate fighting words and incitement because these forms of speech are intended and likely to result in immediate violence.[67] Similarly, the government may regulate some types of threats due to the fear and disruption they cause.[68] Although officials regulate low-value speech because of the audience's response, there is less concern about censorship of ideas than with high-value speech.

Nevertheless, the Court carefully polices the boundaries of low-value speech to ensure that officials do not unduly suppress high-value speech simply because they dislike its message. Accordingly, it has established strict tests for judging when speech is deemed to be low-value. Officials cannot, for example, punish speech that is offensive under the guise of punishing fighting words.[69] Rather, the Court limits punishment of fighting words to those words that "have a direct tendency to cause acts of violence by the person to whom, individually" they are addressed.[70] Similarly, officials can punish advocacy of illegal conduct only if it is "directed to inciting or producing imminent lawless action and . . . likely to incite or produce

66. Wells, *supra* note 59, at 180; *see also* Kagan, *supra* note 59, at 480 ("In holding that a legislature may prohibit fighting words, the Court is doing no more than approving a governmental response to an immediate danger of violence. The premise of the category, no less than of a clear-and- present-danger test, is that the government would respond to such a danger no matter what its views of the ideas affected.").

67. Hess v. Indiana, 414 U.S. 105, 108–09 (1973) (discussing incitement); Chaplinsky v. New Hampshire, 315 U.S. 568, 573 (1942) (discussing fighting words).

68. R.A.V. v. City of St. Paul, 505 U.S. 377, 388 (1992) (discussing state interests in regulating threats).

69. Street v. New York, 394 U.S. 576, 592 (1969) ("It is firmly settled that under our Constitution the public expression of ideas may not be prohibited merely because the ideas are themselves offensive to some of their hearers.").

70. Gooding v. Wilson, 405 U.S. 518, 523 (1972); *see also* Wells, *supra* note 59, at 180 (noting that the Court allows punishment of fighting words because they are "designed to induce us to react violently and without thinking").

such action."[71] Finally, government officials cannot punish hyperbole or political rhetoric under the pretext of punishing threats.[72]

Funeral protest statutes incorporating low-value speech principles reflect a desire to prevent violence or intimidation of mourners attending funeral ceremonies. Such interests are legitimate assuming the legislation is narrowly tailored. Some funeral protest statutes, however, may exceed the scope of the Court's low-value speech jurisprudence. For example, Georgia's law prohibits the use of "fighting words" but never defines that term, leaving the speaker and state officials to guess at its meaning.[73] Although courts may construe "fighting words" consistently with existing Georgia law,[74] lack of definition in the text leaves law enforcement officials with discretion to punish speech they dislike—certainly an imaginable occurrence given the public's sympathy for mourners and antipathy toward protestors. The Court, however, fears such discretion when reviewing statutes purporting to regulate low-value speech,[75] hence its strict requirements with respect to each category of low-value speech.

Wisconsin's statute, which prohibits the use of "abusive, indecent, [or] profane" language that "tends" to cause a disturbance,[76] also poses problems. The statute reaches beyond the Court's definition of fighting words and punishes the mere use of profanity in

71. Brandenburg v. Ohio, 395 U.S. 444, 447–48 (1969); *see also* Wells, *supra* note 59, at 179 (noting that incitement of illegal activity "does not appeal to our thought processes . . . [but] is designed to elicit an unthinking, animalistic response").

72. NAACP v. Claiborne Hardware Co., 458 U.S. 886, 927–28 (1982); Watts v. United States, 394 U.S. 705, 707–08 (1969); *see generally* Kenneth L. Karst, *Threats and Meanings: How the Facts Govern First Amendment Doctrine*, 58 STAN. L. REV. 1337 (2006) (discussing the scope and the purpose of Court's threats doctrine).

73. GA. CODE ANN. § 16-11-34.2(b)(1) (2007). To date, there has been no challenge to the fighting words portion of the Georgia statute. The only challenge to the Georgia statute has involved the prohibitions of intentionally disruptive protests contained in sections 16-11-34.2(b)(2) and (4). *See* GA. CODE ANN. §§ 16-11-34.2(b)(2), (4) (2007). In *Hood v. Perdue*, 540 F. Supp. 2d 1350 (N.D. Ga. 2008), a federal district court dismissed the challenge because plaintiffs, an individual protestor and an organization advocating for the homeless, did not have standing. *Id.* at 1360. According to the court, plaintiffs, although likely to protest near funerals, did not intend to disrupt funerals, and could not show that the statute would be applied to them. *Id.* Thus, they had no standing to bring a facial challenge. *Id.*

74. Georgia's disorderly conduct statute defines fighting words in a manner that attempts to track the Court's modern jurisprudence. *See* GA. CODE ANN. § 16-11-39(a)(3) (2007). Given that the Supreme Court will read language in light of analogous statutes, *see* Grayned v. City of Rockford 408 U.S. 104, 110 (1972), courts may read the funeral protest statute in light of the disorderly conduct definition.

75. *See, e.g.*, Gooding v. Wilson, 405 U.S. 518, 528 (1972) (striking down a law punishing the use of opprobrious words or abusive language because it left "wide open the standard of responsibility . . . [and] was susceptible to improper application").

76. WIS. STAT. ANN. §§ 947.011(2)(a)(1), 947.01 (West 2007).

circumstances where the speech is not directed at a particular individual and violence is unlikely.[77] Although the statute requires that the speaker "inten[d] to disrupt the service," without the other limitations built into the fighting words doctrine, law enforcement officials can find the requisite intent to disrupt a funeral in the mere act of protesting.

Thus, significant problems potentially could arise with the Georgia and Wisconsin statutes. Although both laws attempt to regulate low-value speech, they encompass far more than speech that actually falls into the category of fighting words. Both states should consider following the lead of other states with funeral protest laws that more specifically track the Court's definition of low-value speech. Maine's statute, for example, prohibits a person from "knowingly accost[ing], insult[ing], taunt[ing] or challeng[ing] any person in mourning or in attendance at the funeral ... with [communications] that would in fact have a direct tendency to cause a violent response by the ordinary person in mourning and in attendance at a funeral."[78]

2. Statutes Regulating Disruptive Protests

The second category of laws regulating funeral protests focuses less on speech that causes violence or intimidation than it does on speech that causes aural or physical disruptions. Iowa, for example prohibits protestors from intentionally or recklessly making "loud and raucous noises which cause unreasonable distress to the persons attending [a] funeral ...."[79] Likewise, the federal statute prohibits demonstrations in which "any individual willfully mak[es] or assist[s]

77. In *Cohen v. California*, 403 U.S. 15, 21 (1971), the Court rejected the notion that officials could punish profane words simply to civilize discourse. Wisconsin courts have held the language used in its funeral protest statute to be constitutional in the context of a broader disorderly context statute. *See* State v. Schwebke, 627 N.W.2d 213, 220 (Wis. 2001). However, the case on which they rely, *State v. Zwicker*, 164 N.W.2d 512 (Wis. 1969), was decided before *Cohen*. Other states' courts have held that statutes banning profane words must be narrowed to comply with the Court's fighting words jurisprudence. *See* 12 AM. JUR. 2D *Blasphemy & Profanity* § 13 (2008); 4 WHARTON'S CRIMINAL LAW § 514 (2007).

78. ME. REV. STAT. ANN. tit. 17A, § 501-A(1)(D) (2007); *see also* VA. CODE. ANN. § 18.2-415(B) (West 2007) (criminalizing any disruption that has "a direct tendency to cause acts of violence by the person or persons at whom, individually, the disruption is directed").

79. IOWA CODE ANN. § 723.5(1)(a) (West 2007); *see also* COLO. REV. STAT. § 13-21-126 (2007); GA. CODE ANN. § 16-11-34.2(b)(2) (2007); 720 ILL. COMP. STAT. 5/26-6(c)(1) (2007); IND. CODE § 35-45-1-3(a)(2) (2007); KEN. REV. STAT. ANN. § 525.055(1)(a)(2) (West 2006); N.C. GEN. STAT. § 14-288.4(a)(8)(b) (2007); N.D. CENT. CODE § 12.1-31-01.1 (2007) (each containing similar provisions to the Iowa statute).

in the making of any noise or diversion that disturbs or tends to disturb the peace or good order of the funeral . . . ."[80] Other statutes prohibit protestors from blocking access to funeral services or funeral processions.[81] Rather than regulate speech because it has little value, such statutes generally regulate protests that qualify as high-value speech,[82] but they do so based on the consequences of the protests, such as traffic disruption or noise pollution. The constitutionality of these laws will likely depend on whether they are content-neutral and carefully drafted.[83]

Laws regulating disruptive funeral protests appear to be content-neutral. Most do not regulate speech based upon its content but, rather, limit protests in specific locations near funeral ceremonies.[84] The Court has routinely considered similar regulations to be content-neutral.[85] Additionally, it has recognized state interests in noise

80. 38 U.S.C. § 2413(a)(2)(A)(ii) (2006). Several states have enacted parallel provisions. *See e.g.*, ARK. CODE ANN. § 5-71-230 (2007); DEL. CODE ANN. tit. 11, § 1303(a)(2) (2007); FLA. STAT. § 871.01(2) (2007); IDAHO CODE § 18-6409(2) (2007); LA. REV. STAT. ANN. § 14:103(7) (2007); N.H. REV. STAT. ANN. § 644:2-b(II)(a) (West 2007); N.Y. PENAL LAW § 240.21 (McKinney 1999); S.C. CODE ANN. § 16-17-525(A) (2007); UTAH CODE ANN. § 76-9-108(2) (West 2007).

81. ALA. CODE § 13A-11-17(a)(1)-(3) (LexisNexis Supp. 2007); GA. CODE ANN. § 16-11-34.2(b)(3) (2007); 720 ILL. COMP. STAT. ANN. 5/26-6(c)(3) (West 2007); KY. REV. STAT. ANN. § 525.155(1) (Lexis 2007); LA. REV. STAT. ANN. § 14:103(A)(8) (2007); MD. CODE ANN. CRIM. LAW § 10-205(a)(2) (LexisNexis 2007); N.H. REV. STAT. ANN. § 644:2-b(II)(b) (2007); N.J. REV. STAT. § 2C:33-8.1(b)(1) (2007); N.C. GEN. STAT. § 14-288.4(a)(8)(c) (2007); TEX. PENAL CODE ANN. § 42.055(3)(C) (Vernon Supp. 2008); WIS. STAT. ANN. § 947.011(2)(a)(2) (West 2007).

82. *See, e.g.*, Grayned v. City of Rockford, 408 U.S. 104, 120 (1972) (recognizing that noisy demonstrations may be restricted but assuming that they were still expressive); Police Dep't v. Mosley, 408 U.S. 92, 95 (1972) (noting that statute regulating picketing regulated "expressive conduct").

My attempt to categorize these laws is somewhat inexact. It can be difficult to distinguish between statutes regulating low-value speech and statutes regulating high-value but disruptive speech. Several statutes contain provisions falling into both categories, and occasionally a law contains a single provision covering both contexts. *See, e.g.*, N.C. GEN. STAT. § 14-288.4(a)(8)(b) (2007) (prohibiting the use of threatening and abusive language, and singing, chanting, whistling, or yelling that would "tend to impede, disrupt, disturb or interfere with a funeral"). Many laws in the second category are further labeled as "breach of peace" laws, which is a term commonly associated with fighting words and incitement convictions, although I placed the laws involving such convictions in the first category. I nevertheless categorized these laws differently because the Supreme Court's jurisprudence distinguishes between protests that are disruptive but nevertheless have an expressive component and protests that, although technically speech, have little expressive value.

83. *See supra* notes 58–61 and accompanying text.

84. But see *supra* note 60 and *infra* note 118 regarding possibly content-based laws.

85. *See, e.g.*, Frisby v. Schultz, 487 U.S. 474, 476 (1988) (considering law regulating targeted residential protests); *Grayned* 408 U.S. at 113 (considering law regulating picketing near schools). In *Hill v. Colorado*, 530 U.S. 703, 723 (2000), the Court

control, traffic disruption, and ensuring access to medical services.[86] Such statutes nonetheless face two hurdles regarding their constitutionality.

First, laws regulating disruptive protests may be unconstitutionally vague. The Court requires that statutes give persons of ordinary intelligence sufficient notice of which actions are prohibited.[87] Vague statutes delegate too much discretion to law enforcement officials, allowing them to apply the law in an arbitrary or discriminatory manner.[88] Consequently, vague statutes may chill First Amendment freedoms since "[u]ncertain meanings inevitably lead citizens to 'steer far wider of the unlawful zone' . . . than if the boundaries of the forbidden areas were clearly marked."[89]

Funeral statutes prohibiting protests that "disturb the peace or tend to disturb the peace," "disturb or disrupt the funeral," and "interrupt or disturb" a funeral are so imprecise that they could raise vagueness concerns. Such phrases give little guidance to regulators and allow them to gauge disruptiveness based upon the crowd's response (i.e., because of communicative impact). For example, Idaho's statute, which prohibits anyone from "maliciously and willfully disturb[ing] the dignity or reverential nature of any funeral,"[90] practically invites enforcement based upon the protestors' message or audience response. Not surprisingly, the Court has frequently overturned protestors' convictions under similarly broad "breach of peace" or "disorderly protest" statutes.[91]

At the same time, the Court does not require mathematical precision in drafting statutes regulating disruptive protests. In

---

reaffirmed that laws regulating protests at specific locations, without more, are content-neutral. For criticism of *Hill*, see *infra* note 301.

86. *See* Madsen v. Women's Health Ctr., Inc., 512 U.S. 753, 769–75 (1994) (egress/ingress to buildings); *Grayned*, 408 U.S. at 120 (noise disruption); Cox v. New Hampshire, 312 U.S. 569, 576 (1941) (traffic safety and disruption).

87. Papachristou v. City of Jacksonville, 405 U.S. 156, 162 (1972).

88. *Grayned*, 408 U.S. at 108–09; *Papachristou*, 405 U.S. at 162.

89. *Grayned*, 408 U.S. at 109 (quoting Baggett v. Bullitt, 377 U.S. 360, 372 (1964)).

90. IDAHO CODE ANN. § 18-6409(2) (2007).

91. *See, e.g*, Cox v. Louisiana, 379 U.S. 536, 551 (1965) (striking down convictions of peaceful protestors under statute punishing persons congregating in public places "with intent to provoke a breach of the peace, or under circumstances such that a breach of the peace may be occasioned thereby"); *see also* Gregory v. City of Chicago, 394 U.S. 111, 112 (1969) (overturning convictions when there was no evidence that a prohibition against specific disorderly conduct was violated); Edwards v. South Carolina, 372 U.S. 229, 236 (1963) ("[C]riminal convictions [did not] result from the evenhanded application of a precise and narrowly drawn regulatory statute evincing a legislative judgment that certain specific conduct be limited or proscribed.").

Grayned v. City of Rockford,[92] the Court upheld a statute prohibiting anyone adjacent to a school where classes were in session from "willfully mak[ing] or assist[ing] in the making of any noise or diversion which disturb[ed] or tend[ed] to disturb the peace or good order" of school sessions.[93] The Court acknowledged that the statute's use of imprecise phrases such as "tends to disturb" presented a close question.[94] However, reading the statute in light of its preamble, limiting constructions, intent requirement, and other Supreme Court decisions, the Court upheld the ordinance. Taken together, such factors sufficiently delineated that the prohibited activity involved noisy behavior near a school likely to cause an imminent disruption of school sessions.[95] Thus, funeral protest statutes that successfully track the *Grayned* formula, as does the federal statute, may avoid vagueness challenges.[96] Much may depend on the specific wording of statutes, the clarity with which they identify the prohibited activity, the required mens rea, and whether they provide sufficient criteria for law enforcement officials to apply the law in a nondiscriminatory manner.

Second, some statutes regulating disruptive protests may be insufficiently tailored to satisfy constitutional scrutiny. To survive the intermediate scrutiny associated with content-neutral laws, funeral protest statutes must be narrowly tailored to serve a significant state interest. Most funeral protest statutes contain bubble zones ranging from 100–500 feet.[97] The necessity of large bubble zones to protect against noisy disruptions or to ensure ingress and egress at funerals is questionable. Although the Court has upheld a thirty-six-foot buffer zone around a medical clinic, it has found larger zones unnecessarily

92. 408 U.S. 104 (1972).

93. *Id.* at 108.

94. *Id.* at 100–11.

95. *Id.* at 110–12.

96. 38 U.S.C. § 2413(a)(2)(A)(ii) (2006) (prohibiting any individual from "willfully making or assisting in the making of any noise or diversion that disturbs or tends to disturb the peace or good order of the funeral" within 150 feet of an entrance to cemetery property).

97. *See, e.g.*, COLO. REV. STAT. § 13-21-126 (2007) (prohibiting "electronically amplified funeral picketing within one hundred and fifty feet of [a] funeral site"); IOWA CODE ANN. § 723.5(1) (West 2007) (prohibiting loud noises and other disruptions "within 500 feet of the building or other location where a funeral . . . is being conducted"); N.Y. PENAL LAW § 240.21 (McKinney 2007) (prohibiting "mak[ing] unreasonable noise or disturbance while at a lawfully assembled religious service or within one hundred feet thereof, with intent to cause annoyance or alarm or recklessly creating a risk thereof"); N.D. CENT. CODE § 12.1-31-01.1 (2007) (prohibiting "loud singing, chanting, playing of music . . . within three hundred feet of any ingress or egress of [a] funeral site").

broad to protect the state's interest.[98] *Grayned* noted that "[t]he nature of a place [and] 'the pattern of its normal activities, dictate the kinds of regulations of time, place and manner that are reasonable,' "[99] which suggests that broader zones might be warranted in some circumstances. Funeral ceremonies are certainly candidates for larger quiet zones than many activities. The breadth of the statutory zones, however, raise questions about their necessity to protect against aural or physical disruption.

Furthermore, insufficiently tailored laws raise concerns that government officials operate on pretext,[100] which brings one back to the legitimacy of the government's interest. Large bubble zones raise questions as to whether officials attempt to protect against breaches of the peace and noisy disruptions or, rather, use such interests as a pretext for regulating speech they dislike. In addition, many statutes regulating disruptive protests rely on a privacy interest. As discussed more fully below, large bubble zones do not protect an intrusion-based privacy interest. Rather, they attempt to preserve a civility-based privacy interest that is grounded in communicative impact.[101] To the extent that statutes regulating disruptive protests rely on a privacy interest, they suffer from the same problems as those associated with peaceful protest laws.

3. Statutes Regulating Peaceful Protests

The final category of funeral protest laws involves statutes regulating all protests, even peaceful protests.[102] Such laws have a

---

98. Madsen v. Women's Health Ctr., Inc., 512 U.S. 753, 775 (1994) (upholding injunctive provision imposing thirty-six-foot buffer zone around medical clinic but striking down three-hundred-foot provision around residences of clinic personnel as unnecessary to meet state interest).

99. *Grayned*, 408 U.S. at 116 (quoting Charles Alan Wright, *The Constitution on the Campus*, 22 VAND L. REV. 1027, 1042 (1969)).

100. Alan K. Chen, *Statutory Speech Bubbles, First Amendment Overbreadth, and Improper Legislative Purpose*, 38 HARV. C.R.-C.L. L. REV. 31, 36 (2003) ("[L]egislative precision requirements . . . ensure the sincerity and legitimacy of governmental purpose."); Wells, *supra* note 55, at 58 (insufficiently tailored speech zones "raise[] suspicion that they aim at something more than [the government's proffered] interest"); *see also* Martin v. City of Struthers, 319 U.S. 141, 147 (1943) (noting that the city's interest in residential privacy "can so easily be controlled by traditional legal methods, leaving to each householder the full right to decide whether he will receive strangers as visitors, that stringent prohibition can serve no purpose but that forbidden by the Constitution, the naked restriction of the dissemination of ideas").

101. *See infra* Part II.B.

102. *See* ALA. CODE § 13A-11-17(a)(1) (LexisNexis Supp. 2007); COLO. REV. STAT. § 13-21-126 (2007); GA. CODE ANN. § 16-11-34.2(b)(4) (2007); KAN. STAT. ANN. § 21-4015(e) (2007); MD. CODE CRIM. LAW § 10-205(c) (LexisNexis 2007); MASS. GEN. LAWS

common template. Typically, they regulate one or all of the following types of expressive activity: demonstrations, protests, pickets, parades, processions, and assemblies.[103] Many do not define the terms they use, leaving law enforcement officials with broad authority to determine whether expressive activity falls within the statute.[104] Some statutes provide definitions, although they are often unhelpful. For example, Nebraska defines "picketing" as "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."[105] Other definitions are more specific. Pennsylvania, for example, defines "demonstration activities" as:

> (1) Any picketing or similar conduct.
>
> (2) Any oration, speech or use of sound amplification equipment or device or similar conduct that is not part of a commemorative service.
>
> (3) The display of any placard, sign banner, flag or similar device, unless such display is part of a commemorative service.
>
> (4) The distribution of any handbill, pamphlet, leaflet or other written or printed matter, other than a program distributed as part of a commemorative service.[106]

ANN. ch. 272, § 42A (West 2007); MO. REV. STAT. § 578.501 (West Supp. 2008); MONT. CODE. ANN. § 45-8-1 (2007); NEB. REV. STAT. § 28-1320.03 (2007); OHIO REV. CODE ANN. § 3767.30 (West 2007); OKLA. STAT. tit. 21, § 1380(D) (2007); PA. CONS. STAT. ANN. § 7517(b) (West Supp. 2008); S.D. CODIFIED LAWS ANN. §§ 22-13-17, 22-13-19 (2007); TENN. CODE. ANN. § 39-17-317 (2007); TEX. PENAL CODE ANN. § 42.055(3)(A) (Vernon Supp. 2008); VT. STAT. ANN. tit. 13, § 3771(b) (2007); WYO. STAT. § 6-6-105 (2007).

103. *See, e.g.*, COLO. REV. STAT. § 13-21-126 (2007).

104. *See, e.g.*, MASS. GEN. LAWS ANN. ch. 272, § 42A (West 2007); S.D. CODIFIED LAWS ANN. § 22-13-17 (2007); MO. REV. STAT. § 578.501 (West Supp. 2008); MD. CODE CRIM. LAW § 10-205(c) (LexisNexis 2007); TENN. CODE. ANN. § 39-17-317 (West 2007); WYO. STAT. § 6-6-105 (2007).

105. NEB. REV. STAT. § 28-1320.02(2) (2007); *see also* OKLA. STAT. tit. 21, § 1380(c)(2) (2007) (defining "picketing" as protest activities taking place within 500 feet and a certain time of funeral services); VT. STAT. ANN. tit. 13, § 3771(a)(2) (2007) (defining "picketing" as "protest, demonstration or other similar activity directed at a funeral service").

106. PA. CONS. STAT. ANN. § 7517(c) (West Supp. 2008); *see also* ALA. CODE § 13A-11-17(a) (LexisNexis Supp. 2007) (defining "protest" as "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"); KAN. STAT. ANN. § 21-4015(d)(2) (2007) (defining "public demonstration" as "any picketing or similar conduct" or "any oration, speech, use of sound amplification equipment or device, or similar

Although Pennsylvania's definition more carefully delineates prohibited activities, it nevertheless restricts a wide range of peaceful expression.

Most peaceful protest laws also contain spatial restrictions (i.e., bubble zones), time restrictions, or, more often, both. The most common restriction limits protests within 500 feet of funeral services from one hour before to one hour after the funeral.[107] Several statutes substitute 300 feet for 500 feet,[108] while others regulate protestors in areas ranging from 100 feet[109] to 1,500 feet.[110] Some states rely primarily on time restrictions with only general references to spatial restrictions. For example, Missouri restricts protests "in front of or about any location at which a funeral is held" within one hour before or after a funeral.[111] Conversely, other statutes place clear spatial limits on protests with less well-defined time limits. For example, Tennessee creates a 500-foot bubble zone for "[p]icketing, protesting, or demonstrating at a funeral or memorial service."[112]

These bubble zones are designed to protect a wide variety of ceremonial activities. The majority of statutes regulate protests near "funerals" or "funeral services."[113] On occasion these terms are not

---

conduct that is not part of a funeral"); MONT. CODE. ANN. § 45-8-1 (1991) (using similar definition).

107. *See* ALA. CODE § 13A-11-17(a)(1) (LexisNexis Supp. 2007); GA. CODE ANN. § 16-11-34.2(b)(4) (2007); OKLA. STAT. tit. 21, § 1380(D) (2007); PA. CONS. STAT. ANN. § 7517(b) (West Supp. 2008); TEX. PENAL CODE ANN. § 42.055(3)(A) (Vernon Supp. 2008).

108. NEB. REV. STAT. § 28-1320.03 (2007); OHIO REV. CODE ANN. § 3767.30 (LexisNexis Supp. 2008); WYO. STAT. § 6-6-105 (2007). Nebraska's time limit ranges from one hour before to two hours after the funeral service. NEB. REV. STAT. § 28-1320.03 (2007).

109. VT. STAT. ANN. tit. 13, § 3771(b) (Supp. 2007).

110. MONT. CODE. ANN. § 45-8-1 (1991).

111. MO. REV. STAT. § 578.501 (Supp. 2008). Missouri enacted a contingent statute that takes effect if the original statute is ever "finally declared void or unconstitutional by a court of competent jurisdiction and upon notification by the attorney general." MO. REV. STAT. § 578.503 (West Supp. 2007). The contingent statute establishes a 300-foot buffer zone. MO. REV. STAT. § 578.502 (West Supp. 2007). The Eighth Circuit has indicated that the "in front or about" language in Missouri's existing law may be too vague to withstand constitutional scrutiny. Phelps-Roper v. Nixon, 509 F.3d 480, 487–88 (8th Cir. 2007). However, the case is still in the preliminary injunction stage, and no court has ruled dispositively on the law's constitutionality. *Id.* at 485.

112. TENN. CODE. ANN. § 39-17-317(a)–(b) (2007); *see also* MASS. GEN. LAWS ANN. ch. 272, § 42A (West 2007) (prohibiting "picket[ing], loiter[ing], or otherwise creat[ing] a disturbance within five hundred feet of . . . where funeral services are being held").

113. *See, e.g.*, ALA. CODE § 13A-11-17 (LexisNexis Supp. 2007); MO. REV. STAT. § 587.502 (West Supp. 2007); MONT. CODE ANN. § 45-8-1 (2007); NEB. REV. STAT. § 28-1320-01 (2007); VT. STAT. ANN. tit. 13, § 3771 (Supp. 2007); WYO. STAT. § 6-6-105 (2007).

defined,[114] although most statutes provide at least a minimal definition. For example, Montana defines "funerals" as "the ceremonies, rituals, and memorial services held in connection with the memorial of a deceased person or in connection with the burial, cremation, or other disposition of a human body, including the assembly and dispersal of the persons attending the funeral."[115] Many statutes extend their prohibition of protesting to funeral processions.[116] Others specifically exclude processions.[117]

Courts will likely treat laws regulating peaceful protests as facially content-neutral[118] because, by their terms, they do not regulate content. It is less clear, however, whether such statutes regulate protests because of their communicative impact. Most states regulate peaceful funeral protests based on mourners' privacy interests.[119] The preambles or statutory statements of several laws

114. *See, e.g.*, WYO. STAT. § 6-6-105 (2007).

115. MONT. CODE. ANN. § 45-8-1(5)(a) (2007); *see also* VT. STAT. ANN. tit. 13, § 3771(a)(1) (2007) (defining "funeral service" as "the ceremonies, rituals, and memorial services held at a church, mortuary, cemetery, or home in connection with the burial or cremation of a dead person").

116. *See* COLO. REV. STAT. § 13-21-126 (2007); GA. CODE ANN. § 16-11-34.2(b)(3) (2007); KAN. STAT. ANN. § 21-4015(d)(1) (1995 & 2007); MD. CODE ANN. CRIM. LAW § 10-205(a)(2) (LexisNexis 2007); MO. REV. STAT. § 578.501 (West Supp. 2008); OHIO REV. CODE ANN. § 3767.30 (LexisNexis Supp. 2008); OKLA. STAT. tit. 21, § 1380(C)(1) (2007); PA. CONS. STAT. ANN. § 7517(c) (West Supp. 2008); S.D. CODIFIED LAWS ANN. § 22-13-20 (2007); TENN. CODE. ANN. § 39-17-317(b) (West 2007); TEX. PENAL CODE ANN. § 42.055(a)(2) (Vernon Supp. 2008).

117. *See, e.g.*, NEB. REV. STAT. § 28-1320.02(1) (2007).

118. To date, courts have treated peaceful protest statutes coming before them as content-neutral. *See infra* Part IV.A. One could argue, however, that some statutes are more problematic than others. Pennsylvania's statute, for example, prohibits distribution of circulars or display of signs that are "not part of a commemorative service." *See supra* text accompanying note 106. One could argue that this prohibition textually carves out certain subject matter for protection and is thus facially content-based. *Cf.* C. Edwin Baker, *Unreasoned Reasonableness: Mandatory Parade Permits and Time, Place and Manner Regulations*, 78 NW. U. L. REV. 937, 954–55 (1984) (discussing whether exemption of funeral processions from parade permit requirements is content-based). On the other hand, *Grayned* treated as content-neutral a statute limiting protests near schools in order to protect the "peace and good order" of the school. Grayned v. City of Rockford, 408 U.S. 104, 108 (1972). Such a law clearly singled out school activities for protection, although it did not do so because such activities had an expressive component. Rather, it simply attempted to protect school activities from disruption. Whether Pennsylvania's law is facially content-based or content-neutral may depend on whether one views the language protecting expression that is part of a commemorative service as an attempt to protect the expressive aspects of funeral ceremonies or an attempt to protect the process of the ceremony from disruption.

119. States also often use the same interests to justify laws restricting disruptive protests. This is especially true of statutes that include restrictions on both peaceful and disruptive protests. *See, e.g.*, GA. CODE ANN. § 16-11-34.2 (2007).

explicitly evoke the "privacy of grieving families."[120] Oklahoma's statute, for example, states that "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 .... [P]icketing of funerals causes emotional disturbance and distress to grieving families who participate in funerals."[121] Kansas's funeral protest statute notes the "substantial privacy interest in funerals."[122] State officials also refer to privacy interests to justify statutes. For example, Ohio officials characterized their statute as necessary to prevent "untrammeled intrusion upon [mourners'] private grief."[123]

Privacy is unquestionably a legitimate interest supporting state regulation, but that concept is not self-defining. Without further definition it is impossible to know whether the privacy interest on which states rely is neutral or related to communicative impact. The next part identifies and discusses the concept of privacy underlying peaceful funeral protest statutes. Part III then discusses how that interest fits, if at all, within the Court's jurisprudence.

II. PRIVACY INTERESTS AND FUNERAL PROTESTS

A. *Conceptions of Privacy*

Privacy has been particularly difficult to capture as a unitary concept. Accordingly, the legal and philosophical literature is rife with different definitions of the term. In its broadest sense, privacy has been described as the "right to be let alone," a definition associated with Samuel Warren and Louis Brandeis's influential article, *The Right to Privacy*.[124] Spurred by their perception of increasingly intrusive press reports, Warren and Brandeis argued that

120. KAN. STAT. ANN. § 21-4015(c)(1) (2007); *see also* COLO. REV. STAT. § 13-21-126 (2007) ("protect the privacy of mourners"); NEB. REV. STAT. § 28-1320.01 (2007) ("rights of families to peacefully and privately mourn"); OKLA. STAT. tit. 21; § 1380(A)(1)(b) (2007) ("interests of families in privately and peacefully morning"); PA. CONS. STAT. ANN. § 7517(a)(2) (West Supp. 2008) (same); Right to Grieve in Privacy Act, 2007 Mont. Laws 13, 14 (codified at MONT. CODE ANN. § 45-8-116 (2007)).

121. OKLA. STAT. tit. 21, § 1380(A)(1) (2007).

122. KAN. STAT. ANN. § 21-4015(c)(2) (1995 & 2007).

123. State Defendants' Motion for Summary Judgment, *supra* note 31, at 10; *see also* Appellees' Brief, *supra* note 32, at 34 (characterizing state interest as protecting "the rights of its citizens 'to be let alone' as they mourn the loss of loved ones").

124. Samuel D. Warren & Louis D. Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193, 195 (1890). Warren and Brandeis receive much of the credit for the phrase although they adopted it from Judge Cooley. *See* THOMAS M. COOLEY, LAW OF TORTS 29 (2d ed. 1888).

the elements of a privacy right already existed at common law and that it deserved independent recognition in order to protect the right of "inviolate personality" and to protect against emotional distress.[125]

While the Warren and Brandeis article provides the foundation for much of privacy law in the United States,[126] the phrase "right to be let alone" is too broad to be a useful definitional tool.[127] Thus, the law and scholars have attempted to fill this void with more specific, if widely varying, definitions of privacy. Some scholars describe privacy primarily as a right that entitles a person "to exclude others from watching, utilizing [or otherwise] invading their private realm."[128] The privacy tort of intrusion[129] and the Supreme Court's Fourth Amendment jurisprudence[130] embrace versions of this notion. Other theorists focus on privacy as primarily encompassing control over

125. Warren & Brandeis, *supra* note 124, at 198–205 (arguing that law's protection of one's "thoughts, sentiments, and emotions" from publication was not based on a narrow property right but on a right of inviolate personality).

126. Solove, *Conceptualizing Privacy*, *supra* note 15, at 1099–1100 (noting that the Warren and Brandeis article became the basis of four tort actions for invasion of privacy); Harry Kalven, Jr., *Privacy In Tort Law—Were Warren & Brandeis Wrong?*, 31 LAW & CONTEMP. PROBS. 326, 327 (1966) (referring to the article as the "most influential law review article of all" time); Prosser, *supra* note 23, at 849–50 (detailing the development of privacy law after the Warren and Brandeis article).

127. DAVID M. O'BRIEN, PRIVACY, LAW AND PUBLIC POLICY 5 (1979) (noting that Warren and Brandeis's definition was "too imprecise for judicial construction and principled application"); Tom Gerety, *Redefining Privacy*, 12 HARV. C.R.-C.L. L. REV. 233, 263 (1977) (arguing that the "evocation" of the right to be let alone is of "little or no help" in understanding the balance of privacy and other rights); Solove, *Conceptualizing Privacy*, *supra* note 15, at 1102 ("[D]efining privacy as the right to be let alone is too broad.").

128. Ernest Van Den Haag, *On Privacy*, *in* PRIVACY 149, 149 (J. Ronald Pennock & John. W. Chapman eds., 1971). Other scholars express variations on this theme. Michael Weinstein refers to privacy as "a condition of being apart from others" and specifically the "condition of voluntary limitation of communication to or from certain others, in a situation, with respect to specified information, for the purpose of conducting an activity in pursuit of a perceived good." Michael A. Weinstein, *The Uses of Privacy in the Good Life*, *in* PRIVACY, *supra*, at 88, 94. Richard Parker argues that "privacy is control over when and by whom the various parts of us can be sensed by others." Richard B. Parker, *A Definition of Privacy*, 27 RUTGERS L. REV. 275, 281 (1974).

129. *See infra* notes 164–66 and accompanying text.

130. *See, e.g.*, Kyllo v. United States, 533 U.S. 27, 40 (2001) ("Where, as here, the Government uses a device that is not in general public use, to explore details of the home that would previously have been unknowable without physical intrusion, the surveillance is a 'search' and is presumptively unreasonable without a warrant."); Katz v. United States, 389 U.S. 347, 351–52 (1967) (noting that what a person "seeks to preserve as private, even in an area accessible to the public, may be constitutionally protected"). For a discussion of the privacy interest in the Court's Fourth Amendment jurisprudence, see Ken Gormley, *One Hundred Years of Privacy*, 1992 WIS. L. REV. 1335, 1357–74.

personal information.[131] The privacy torts involving public disclosure of private facts and false light invasion of privacy involve similar notions of control over one's personal information.[132] Still other scholars describe privacy as protecting against conduct that is "demeaning to individuality [or an] affront to personal dignity."[133] In this sense, privacy is a means of protecting personhood. The Supreme Court's substantive due process jurisprudence regarding bodily autonomy most readily reflects this conception of privacy,[134] although rhetoric regarding personhood occasionally appears in connection with other legal issues as well.[135]

131. For example, Alan Westin has described privacy as "the claim of individuals, groups or institutions to determine for themselves when, how, and to what extent information about them is communicated to others." ALAN F. WESTIN, PRIVACY AND FREEDOM 7 (1967). Charles Fried similarly argues that privacy revolves around the "control we have over information about ourselves." Charles Fried, *Privacy*, 77 YALE L.J. 475, 482 (1968); *see also* Hyman Gross, *Privacy and Autonomy*, *in* PRIVACY, *supra* note 128, at 169, 169 (describing privacy as "control over acquaintance with one's personal affairs by the one enjoying it"); ARTHUR R. MILLER, THE ASSAULT ON PRIVACY 25 (1971) (defining privacy as "the individual's ability to control the circulation of information relating to him").

132. *See, e.g.*, RESTATEMENT (SECOND) OF TORTS, *supra* note 16, § 652D (recognizing a privacy tort regarding publicity given to private life); *id.* § 652E (recognizing a privacy tort regarding publicity placing person in false light).

133. Edward J. Bloustein, *Privacy as an Aspect of Human Dignity: An Answer to Dean Prosser*, 39 N.Y.U. L. REV. 962, 973–74 (1964); *see also* Stanley I. Benn, *Privacy, Freedom and Respect for Persons*, *in* PRIVACY, *supra* note 128, at 1, 6 (arguing that actions invade privacy because they fail "to show proper respect for persons" by "treating people as objects or specimens—like 'dirt'—and not as subjects with sensibilities, ends, and aspirations of their own"); Robert Post, *The Social Foundations of Privacy, Community, and Self in Common Law Tort*, 77 CAL. L. REV. 957, 965 (1989) (noting that the intrusion tort empowers plaintiffs "to uphold the interests of social personality which are necessarily impaired by a defendant's breach of a civility rule").

134. *See, e.g.*, Planned Parenthood v. Casey, 505 U.S. 833, 851 (1992); Roe v. Wade, 410 U.S. 113 (1973); Griswold v. Connecticut, 381 U.S. 479, 484–85 (1965). For discussions of the Court's jurisprudence, see Solove, *Conceptualizing Privacy*, *supra* note 15, at 1117; Marcy Strauss, *Redefining the Captive Audience Doctrine*, 19 HASTINGS CONST. L.Q. 85, 108–09 (1991); and Gary L. Bostwick, Comment, *A Taxonomy of Privacy: Repose, Sanctuary, and Intimate Decision*, 64 CAL. L. REV. 1447, 1466, 1478 (1976).

135. For example, the Court has referenced concepts of personhood in its Fourth Amendment jurisprudence, although notions of intrusion generally dominate this area of the law. Whitman, *supra* note 15, at 1213–14. Similarly, Professors Post and Bloustein posit that the desire to protect dignity underlies the intrusion tort. *See* Bloustein, *supra* note 133, at 973–74; Post, *supra* note 133, at 965. For further discussion, see *infra* notes 179–84 and accompanying text.

B. *Privacy, Peaceful Protest Statutes, and First Amendment Concerns*

Statutes regulating peaceful funeral protests purport to embrace a privacy interest that protects against unwanted intrusions. For example, Montana's statute explicitly protects funeral goers against "unwanted intrusion by strangers."[136] Colorado's law prohibits protests that "disrupt[] the fundamental grieving process."[137] Other statutes prohibit the violation of "the rights of families to peacefully and privately mourn," implying that protestors intrude into an otherwise peaceful situation.[138] State officials also describe protests as intrusions on privacy.[139]

To say that peaceful protests intrude upon mourners' privacy, however, begs the question: "how?" The meaning of "intrude" is no more self-evident than the meaning of "privacy." Without further elaboration, such a privacy interest remains amorphous.[140] However, the common law tort of invasion of privacy presents a reasonably fleshed-out conception of intrusion and can provide a framework for discussing privacy interests underlying peaceful funeral protest statutes.[141] This conception is also related to privacy interests recognized in free speech law, providing further reason to use it to assess statutes regulating speech.[142]

---

136. Right to Grieve in Privacy Act, 2007 Mont. Laws 13–14 (codified at MONT. CODE ANN. § 45-8-116 (2007)) (referring to mourners' "privacy rights"); *see also* KAN. STAT. ANN. § 21-4015(b)(2) (2007) (noting family members' "personal stake in honoring and mourning their dead").

137. COLO. REV. STAT. § 13-21-126 (2007); *see also* GA. CODE ANN. § 16-11-34.2(a) (2007) (referring to mourners' right to attend funeral without unwanted disturbance or disruption).

138. NEB. REV. STAT. § 28-1320.01 (2007); *see also* OKLA. STAT. tit. 21; § 1380(A)(1)(b) (2007) (noting the interest of families in "privately and peacefully mourning"); PA. CONS. STAT. ANN. § 7517(a)(2) (West Supp. 2008) (noting individuals' interest in mourning privately and in peace).

139. *See supra* note 123 and accompanying text.

140. Scholars disagree, for example, regarding whether activity amounts to intrusion. Some argue that intrusive noises, odors, or communications into one's private realm threaten privacy. *See, e.g.*, Van Den Haag, *supra* note 128, at 153. Others disagree, arguing that this broad definition encompasses little more than nuisance activities. *See* Ruth Gavison, *Privacy and the Limits of Law*, 89 YALE L.J. 421, 439 (1980); Judith Jarvis Thompson, *The Right to Privacy*, 4 PHIL. & PUB. AFF. 295, 310 (1975).

141. *See, e.g.*, Shulman v. Group W Productions Inc., 955 P.2d 469, 489 (Cal. 1998) ("Of the four privacy torts identified by Prosser, the tort of intrusion into private places, conversations or matter is perhaps the one that best captures the common understanding of an 'invasion of privacy.' ").

142. *See, e.g.*, Hill v. Colorado, 530 U.S. 703, 717 n.24 (2000) (noting that the common law privacy right appears in the Court's constitutional cases as an "interest"). Other

The Restatement (Second) of Torts defines the intrusion branch of privacy as "intentionally intrud[ing], physically or otherwise, upon the solitude or seclusion of another or his private affairs or concerns . . . [when] the intrusion would be highly offensive to a reasonable person."[143] Three requirements thus emerge: (1) an intrusion, (2) into a secluded space or one's private affairs, (3) in an objectively offensive manner. Protection against intrusion is at its zenith in the home or other spatially bounded area.[144] However, courts have recognized "relative" zones of privacy in public spaces in circumstances where individuals can credibly claim a reasonable expectation that certain persons should be excluded.[145] The purpose of protecting against intrusion in either situation is the same—to provide a place of refuge for necessary emotional release and an escape from pressures of daily life.[146]

---

observers also note the relationship between privacy interests in free speech cases and the intrusion tort. *See infra* notes 164–66.

143. RESTATEMENT (SECOND) OF TORTS, *supra* note 16, § 652B. The Restatement adopts Professor Prosser's influential framework, *see* Prosser, *supra* note 23, at 389, which has come to dominate tort law. *See* MCCARTHY, *supra* note 23, § 1:24, at 41 (noting that Prosser's framework and the Restatement are "accepted by nearly all courts").

144. The Restatement, for example, notes that the "defendant is subject to liability . . . only when he has intruded into a private place, or has otherwise invaded a private seclusion that the plaintiff has thrown about his person or affairs." RESTATEMENT (SECOND) OF TORTS, *supra* note 16, § 652B, cmt. c (1997); *see also* MCCARTHY, *supra* note 23, § 5:89, at 626 (noting that a "physical invasion of one's home is a classic example of a violation of privacy by intrusion"). Other areas of law similarly limit intrusion to spatially-bounded areas. *See* Solove, *Taxonomy*, *supra* note 15, at 496–97 (discussing Court's Fourth Amendment jurisprudence limiting protection against government surveillance to private spaces).

145. *See, e.g.*, Sanders v. American Broadcasting Cos., 978 P.2d 67, 68 (Cal. 1999). Here the court found that undercover reporters violated a person's privacy by recording a conversation at work, although the conversation could reasonably have been overheard by others. *Id.* The court recognized that "degrees and nuances to societal recognition of our expectations of privacy" exist and that privacy "is not a binary, all-or-nothing characteristic." *Id.* at 72. Rather, the court found "the concept of 'seclusion' is relative." *Id.*; *see also* Med. Lab. Mgmt. Consultants v. American Broadcasting Cos., 306 F.3d 806, 812–13 (9th Cir. 2002) (recognizing that the "invasion of privacy" includes "the tort of intrusion upon seclusion" when such intrusion is highly offensive to a reasonable person); Danai v. Canal Square Assoc., 862 A.2d 395, 400–01 (D.C. 2004) (finding privacy requires an expectation of privacy created in a place where a person has secluded himself, which is in turn recognized by society as reasonable); Jensen v. Sawyers, 2005 UT 81, ¶ 79, 130 P.3d 325, 339 (Utah 2005) (stating that existence of an "actionable privacy interest" depends on the "expectation of a reasonable person"); MCCARTHY, *supra* note 23, § 5:98 at 660–63 (describing cases).

146. *See* WESTIN, *supra* note 131, at 35 (describing private space as important for emotional release and as providing a "respite from emotional stimulation"); Arnold Simmel, *Privacy Is Not an Isolated Freedom*, *in* PRIVACY, *supra* note 128, at 71, 73–74 (private space allows us to develop "a firmer, better constructed, more integrated position in opposition to dominant social pressures"); David L. Bazelon, *Probing Privacy*, 12

At first glance, funeral protest statutes superficially track this definition. As discussed more fully below, however, the privacy interest underlying these statutes substantially departs from the common law. That interest is neither limited to a truly secluded area nor requires the sort of physical or harassing invasion that the common law deems necessary for an invasion of privacy. As a result, these statutes actually protect a civility-based privacy interest that encompasses freedom from disrespectful and offensive expression. Defining the privacy interest in this manner poses significant problems from a First Amendment perspective.

Much of the Court's doctrine attempts to ensure that government regulators do not unduly restrict speech simply because it angers or upsets the audience. As the Court noted in *Terminiello v. Chicago*:[147]

> The vitality of civil and political institutions in our society depends on free discussion .... Accordingly a function of free speech under our system of government is to invite dispute. It may indeed best serve its high purpose when it induces a condition of unrest, creates dissatisfaction with conditions as they are, or even stirs people to anger. Speech is often provocative and challenging. It may strike at prejudices and preconceptions and have profound unsettling effects as it presses for acceptance of an idea.[148]

Of course, speech that upsets or angers may also cause violence or cross the line into the harassment required for common law invasion of privacy claims, but it does not always do so. Sometimes speech merely angers or offends people. While regulation of harassment is justified, restricting speech merely because it angers or offends discriminates against unpopular messages. Such discrimination "lead[s] to standardization of ideas either by legislatures, courts, or dominant political or community groups"[149] and interferes with democratic deliberation and open discussion.[150]

GONZAGA L. REV. 587, 589–91 (1997) (listing various individual attributes associated with the ability to carve out private space); Prosser, *supra* note 23, at 392 (noting that the intrusion tort is designed primarily to protect mental peace of mind); Solove, *Taxonomy*, *supra* note 15, at 554–55 (stating that privacy allows people "to rest from the pressures of living in public and performing public roles .... Without refuge from others, relationships can become more bitter and tense").

147. 337 U.S. 1 (1949).

148. *Id.* at 4; *see also* Forsyth v. Nationalist Movement, 505 U.S. 123, 134–35 (1992) (noting that speech cannot be punished or banned "simply because it might offend a hostile mob").

149. *Terminiello*, 337 U.S. at 4–5; *see also* Hustler Magazine, Inc. v. Falwell, 485 U.S. 46, 55 (1988) (finding that "outrageousness" standard for punishing speech "in the area of

Unfortunately, it has not always been clear whether officials regulate because speech is offensive or because it is likely to involve violence or harassment. Accordingly, the Court has attempted to establish clear guidelines regarding when speech can be punished and when, although offensive, it is protected. As noted above, the Court narrowly defines its categories of low-value speech to restrict only speech without expressive content.[151] Similarly, its time, place, and manner requirements pertaining to content-neutral regulations try to leave officials with little discretion to discriminate against speech.[152] In both instances, the Court sets forth objective guidelines in an effort to avoid government regulation based on communicative impact.

The remainder of this part discusses the three aspects of the common law intrusion tort—seclusion, intrusion, and offense—and demonstrates that "offense" is the only real aspect of the intrusion tort present in the funeral protest statute. This part also discusses the First Amendment implications of regulating offensive speech under the guise of protecting privacy.

---

political and social discourse has an inherent subjectiveness about it which would allow a jury to impose liability on the basis of the jurors' tastes or views, or perhaps on the basis of their dislike of a particular expression").

150. *See Terminiello*, 337 U.S. at 4 ("[I]t is only through free debate and free exchange of ideas that government remains responsive to the will of the people and peaceful change is effected."); *see also* Cohen v. California, 403 U.S. 15, 24 (1971) (stating that free exchange of ideas is intended to "remove governmental restraints from the arena of public discussion . . . in the hope that use of such freedom will ultimately produce a more capable citizenry and more perfect polity and in the belief that no other approach would comport with the premise of individual dignity and choice upon which our political system rests").

151. *See supra* notes 66–78 and accompanying text; Wells, *supra* note 59, at 178–86 (discussing Court's attempts to craft narrow categories of low-value speech).

152. *Forsyth County*, 505 U.S. at 130–31 ("A government regulation that allows arbitrary application is 'inherently inconsistent with a valid time, place, and manner regulation because such discretion has the potential for becoming a means of suppressing a particular point of view.' "); Shuttlesworth v. Birmingham, 394 U.S. 147, 151 (1969) (" '[T]he peaceful enjoyment of freedoms which the Constitution guarantees contingent upon the uncontrolled will of an official—as by requiring a permit or license which may be granted or withheld in the discretion of such official—is an unconstitutional censorship.' " (quoting Staub v. City of Baxley, 355 U.S. 313, 322 (1958))).

Although the Court's time, place, and manner requirements aim to control governmental discretion, its doctrine has not been entirely successful in this area. Commentators have criticized the Court's time, place, and manner analysis as being too vague and malleable to prevent censorship. *See* David Goldberger, *Judicial Scrutiny in Public Forum Cases: Misplaced Trust in the Judgment of Public Officials*, 32 BUFF. L. REV. 175, 178 (1983); *cf.* Ronald J. Krotoszynski & Clint A. Carpenter, *The Return of Seditious Libel*, 55 UCLA L. REV. 1239, 1259–65 (2008) (criticizing Court's application of intermediate scrutiny to content-neutral statutes, making governmental regulation of disfavored speech less difficult). Nevertheless, the Court's doctrine has control of unreasonable discretion as its aim.

1. Seclusion

On one level, statutes regulating peaceful funeral protests fit comfortably within the common law's definition of intrusion. An intimate and emotional gathering of individuals for the specific purpose of honoring the dead is just the sort of public event where one expects a relative zone of privacy from unwanted and offensive visitors.[153] If the laws were written simply to prevent intrusion into such intimate gatherings, there would be little argument regarding the privacy interest underlying them. But the sheer size of the statutory bubble zones creates difficulties in this regard.

Many statutes create bubble zones of 300 to 1,000 feet around funeral ceremonies.[154] Thus, the statutes exclude protestors not only from the immediate area surrounding the funeral services, but also from a large zone (the equivalent of one to three football fields in length) beyond them. Furthermore, many statutes include within their privacy protections funeral processions, which move through various urban or rural areas.[155] Certainly, funeral goers have a right to exclude unwanted visitors from the procession vehicles or the procession itself (i.e., the procession is a relative zone of privacy). It is unreasonable, however, to expect a zone of solitude extending 300 to 1,000 feet beyond a mobile procession.

The bubble zones' size and their regulation of activity in public space casts doubt on the "seclusion" they seek to protect. When homes or other buildings are involved, a common understanding of what is to be protected from invasion exists: the actual physical space. Funeral ceremonies that occur within such spatially-bounded places are classic areas of seclusion. The Supreme Court's free speech doctrine has, in fact, recognized the importance of spatially-bounded areas to privacy interests.[156] By extending well beyond these spatially-bounded places, however, the statutory bubble zones regulate public areas from which people freely come and go. Similar issues arise with ceremonies that occur outdoors. Recognition of a

153. WESTIN, *supra* note 131, at 36 ("[E]motional release through privacy plays an important part in individual life at times of loss, shock, or sorrow. In such moments society provides comfort both through communal support by gatherings of friends and through respect for the privacy of the individual and his intimates.").

154. *See supra* notes 107–10 and accompanying text.

155. *See supra* note 116 and accompanying text.

156. *See, e.g.*, Madsen v. Women's Health Ctr., Inc., 512 U.S. 753, 764–71 (1994) (concerning a medical clinic); Frisby v. Schultz, 487 U.S. 474, 484–88 (1988) (concerning the home); *cf.* Martin v. City of Struthers, 319 U.S. 141, 149 (1943) (recognizing a right of privacy in the home, but invalidating an ordinance that would punish handing leaflets from door-to-door). For further discussion of these cases, see *infra* Part III.B.

privacy interest there involves recognition of a relative zone of privacy, the borders of which are difficult to discern.

One cannot simply carve out a space in public and call it a relative zone of privacy. Such zones are determined by context, based on "social custom and usage" rather than objective factors such as "time, place and public forum."[157] Compounding this problem is our nature as social creatures. Whether our day is spent largely at work or running errands, we simply cannot avoid being in public for significant amounts of time—time in which we have little expectation of being able to exclude others from any zone of privacy.[158] Thus, recognizing relative zones of privacy involves a delicate balance of preserving social interaction while carving out necessary spaces of refuge in public.[159]

To the extent that social custom recognizes the importance of an intimate gathering for mourning purposes,[160] it seems uncontroversial to recognize a relative zone of seclusion around the immediate areas involving such ceremonies, whether inside or out. Much of the Court's free speech jurisprudence supports this contention. Thus, the Court has recognized the right of individuals to associate with one another for expressive purposes, which includes a right to exclude unwanted expression.[161] Furthermore, the Court's doctrine allows private property owners to exclude unwanted expression from their property.[162] It similarly allows the government to exclude such expression from areas that are not considered public fora, i.e., government property traditionally open to expression.[163]

---

157. MCCARTHY, *supra* note 23, § 5:98, at 662; *see also* Jensen v. Sawyers, 2005 UT 81, ¶ 79, 130 P.3d 325, 341. ("[W]hether a person is entitled to solitude of seclusion is a relative and highly fact-dependent matter.").

158. *See, e.g.*, Shulman v. Group W Productions, Inc., 955 P.2d 469 (Cal. 1998) (refusing to find intrusion where a news cameraman filmed events following a traffic accident on a public highway); W. PAGE KEETON ET AL., PROSSER AND KEETON ON TORTS 855 (5th ed. 1984) ("On the public street, or in any other public place, the plaintiff has no legal right to be alone and it is no invasion of his privacy to do more than follow him about and watch him there."); *see also* MCCARTHY, *supra* note 23, § 5:97, at 654–60 (collecting cases finding no invasion of privacy while in a public place).

159. HARPER ET AL., 2 HARPER, JAMES & GRAY ON TORTS § 9.6, at 752 (3d ed. 2006) ("The extent to which seclusion can be protected is severely limited by the protection that must often be accorded to the freedom of action and expression of those who threaten that seclusion of others.").

160. *See supra* note 157 and accompanying text.

161. Boy Scouts of America v. Dale, 530 U.S. 640, 644 (2000); Hurley v. Irish-American Gay, Lesbian & Bisexual Group of Boston, Inc., 515 U.S. 557, 566 (1995).

162. Hudgens v. NLRB., 424 U.S. 507, 520 (1976).

163. *See* Perry Educ. Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37, 46 (1983) (discussing categories of fora into which government property falls). Courts have found

Accordingly, recognizing a relative zone of seclusion in the area in and immediately around a funeral ceremony—whether held on private or public property—is perfectly reasonable.

Bubble zones of 300 to 1,000 feet, however, turn the notion of seclusion on its head. It is not clear that zones of such breadth are necessary to protect the seclusion associated with mourning a loved one. These zones encompass a great deal of public space, including streets and sidewalks, space that is simultaneously used by others unassociated with a funeral ceremony. Funeral processions, which travel through areas continuously used for other purposes, present the issue more starkly. Surely mourners cannot suspend others' daily routines to preserve a relative zone of seclusion. They similarly cannot prevent peaceful protests in large areas under the guise of creating a zone of seclusion.

2. Intrusion

To some extent, of course, the nature of the intrusion may affect the area of relative seclusion. Perhaps peaceful funeral protests are so intrusive that large bubble zones are necessary to protect mourners' seclusion. Certainly, the statutes seem to contemplate them as an especially egregious form of invasion. Nevertheless, peaceful funeral protests do not fit comfortably within the common law conception of intrusion.

Tort law envisions intrusion as requiring physical, aural, or harassing invasions. Thus, the Restatement notes that an invasion of privacy may occur "by physical intrusion into a place in which the plaintiff has secluded himself" or "by the use of the defendant's senses, with or without mechanical aids, to oversee or overhear the plaintiff's private affairs."[164] Courts have also recognized that persistent harassment of another person while in public constitutes an intrusion.[165] Most actionable intrusion claims have involved

public cemeteries to be non-public fora. Griffin v. Sec'y of Veterans Affairs, 288 F.3d 1309, 1322–24 (Fed. Cir. 2002) (noting that national cemeteries are nonpublic fora, and thus subject to greater regulation).

164. RESTATEMENT (SECOND) OF TORTS, *supra* note 16, § 652B cmt. b.

165. *See, e.g.*, Summers v. Bailey, 55 F.3d 1564, 1566–67 (11th Cir. 1995) (finding that allegations of harassment, stalking, and intimidation stated a claim of intrusion); Wolfson v. Lewis, 924 F. Supp. 1413, 1420 (E.D. Pa. 1996) ("Conduct that amounts to a persistent course of hounding, harassment and unreasonable surveillance, even if conducted in a public or semi-public place, may nevertheless rise to the level of invasion of privacy based upon seclusion.").

unwanted spying, surveillance, eavesdropping, invasions of one's home, bodily searches, and the like.[166]

While it is reasonable to view noisy, disruptive, and harassing protests as invasive,[167] peaceful protest laws restrict all protests regardless of whether they are noisy or disruptive. They prohibit activities such as a small group of people or a lone protestor quietly holding signs or distributing leaflets near a church or cemetery.[168] Such protestors neither physically nor aurally invade a funeral ceremony; nor do their protests amount to the harassing behavior required to constitute an "invasion" at common law. Peaceful protests, therefore, are not an intrusion when they are conducted immediately outside of the church or cemetery, much less if protestors stand 500 feet away.

One could argue that the very presence of protestors intrudes upon mourners' peace of mind, inhibiting the service and the grieving process. But *peaceful* protestors, although concededly offensive to others, do not constitute an intrusion for purposes of privacy law. The common law has been reluctant to recognize psychological invasion as a legally cognizable intrusion.[169] Professor Prosser's influential article noted that "bad manners, harsh names and insulting gestures in public, have not been held to be enough" to satisfy a claim for intrusion.[170]

In free speech doctrine, the Court has been similarly reluctant to restrict protestors in public spaces simply because they offend others. Thus, it has said that "[l]eafletting and commenting on matters of public concern are classic forms of speech that lie at the heart of the First Amendment, and speech in public areas is at its most protected on public sidewalks, a prototypical example of a traditional public

166. MCCARTHY, *supra* note 23, §§ 5:90–5:105 (discussing various forms of intrusion in case law).

167. The common law definition of intrusion does not encompass mere noise. *See* Prosser, *supra* note 23, at 390. Nevertheless, scholars debate whether noise should amount to intrusion, *see supra* notes 128, 133, and the Court recognizes noise disturbances as an aspect of the privacy interest in its free speech doctrine. *See, e.g.*, Kovacs v. Cooper, 336 U.S. 77, 86–89 (1949). Accordingly, it is legitimate to view noisy interruptions of an intimate gathering as a potential intrusion in the funeral protest context, especially given mourners' right to exclude others from the immediate circumstances of the ceremony. *See supra* note 60. Whether existing laws are tailored to noisy intrusions so that one can say they (1) protect mourners' zone of seclusion, and (2) are consistent with the First Amendment, are different matters.

168. Pennsylvania makes clear, for example, that the simple act of distributing a leaflet is a restricted activity. *See supra* note 106 and accompanying text.

169. MCCARTHY, *supra* note 23, § 5:89, at 625.

170. Prosser, *supra* note 23, at 390.

forum."[171] Such protection extends to offensive speech because " 'in public debate ... citizens must tolerate insulting, and even outrageous, speech in order to provide adequate breathing space to the freedoms protected by the First Amendment.' "[172] The breadth of the statutory bubble zones and the statutes' application to peaceful protests seemingly runs afoul of the Court's cases condemning regulation of speech simply because it is offensive.

Nevertheless, statutes restricting peaceful protests openly tout their regulation of protests that offend the audience. Some statutes refer to peaceful protests at funerals as "exploitive"[173] or "shocking to the conscience."[174] Others describe such protests as lacking "respect" for mourners and the dignity of the grieving process.[175] Several statutes refer to the emotional harm caused by funeral protests.[176] Tennessee prohibits "interfering with a funeral" by "utterance[s], gesture[s], or display[s] in a manner offensive to the sensibilities of an ordinary person" and then defines funeral protests as *per se* "offensive to the sensibilities of an ordinary person."[177]

In effect, peaceful protest statutes conflate the common law's second requirement, intrusion, with its third requirement, that the intrusion be offensive to a reasonable person. One could argue, of

171. Schenck v. Pro-Choice Network of W. N.Y., 519 U.S. 357, 377 (1997); *see also* Boos v. Barry, 485 U.S. 312, 318 (1988) (invalidating statute limiting display of signs in public because "public streets and sidewalks [are] traditional public fora").

172. Madsen v. Women's Health Ctr., Inc., 512 U.S. 753, 774 (quoting *Boos*, 485 U.S. at 322); *see also Schenck*, 510 U.S. at 383 (quoting *Boos*, 485 U.S. at 322).

173. *See, e.g.*, KAN. STAT. ANN. § 21-4015(b)(1) (2007) (describing protestors' behavior as "public exploitation").

174. Right to Grieve in Privacy Act, 2007 Mont. Laws 13, 14 (describing protestors' "exploitation of another's grief" as "shocking to the conscience") (codified at MONT. CODE ANN. § 45-8-116 (2007)).

175. Kansas's statute states that "[f]amily members have a personal stake in honoring and mourning their dead and objecting to unwarranted public exploitation that, by intruding upon their own grief, tends to degrade the rites and respect they seek to accord to the deceased person who was once their own." KAN. STAT. ANN. § 21-4015(b)(1) (2007). Pennsylvania officials argued that their statute was necessary to allow families to "remember fallen soldiers with 'honor, dignity, and respect.' " Kathleen Haughney, *Rendell Signs Law Prohibiting Groups Protesting at Funerals*, PITTSBURGH POST-GAZETTE, July 1, 2006, at B5, *available at* http://www.post-gazette.com/pg/06182/702666-85.stm (quoting Pennsylvania Governor Rendell); *see also* Mosher, *supra* note 45, at 601 n.104 (" 'The [funeral protest legislation] ... protects really a sacred right ... for the family to grieve and put their loved ones to rest in a dignified manner.' " (quoting S. 94-97, Reg. Sess., at 33 (Ill. 2006) (statement by Senator Winkel))); Witt, *supra* note 7 (quoting Michigan Representative Michael Rogers as saying that legislation restricting funeral protests was necessary to allow "families [to] grieve peaceably and [to] give them dignity").

176. *See, e.g.*, *supra* note 121 and accompanying text.

177. TENN. CODE. ANN. § 39-17-317(a) (West 2007).

course, that the statute's references to "offense" and "shock to the conscience" merely reflect the common law's third requirement. After all, one expects to see references to "offense" in a statute tracking common law privacy requirements. Peaceful protest statutes, however, do not protect against physically invasive or harassing protests because reasonable people find them offensive. Rather, they characterize otherwise peaceful protests as offensive and, therefore, invasive. In other words, offensiveness is no longer an independent variable that must exist in addition to an invasion. Funeral protest statutes determine that protests are invasive because they offend the audience.

Unpacking the privacy interest in this way reveals that the statutes do not equate that interest with freedom from intrusion. Rather, the privacy interest underlying peaceful protest statutes protects the dignity of the funeral ceremony and those attending it from disrespectful actions.

3. Privacy as Protection of Dignity and Civility

What does it mean to say that peaceful protest statutes equate privacy with protection of dignity? Like the terms "privacy" and "intrusion," the term "dignity" is susceptible to many meanings.[178] The most common conceptions, however, find their way back to Immanuel Kant, who referred to the dignity of individuals as the capacity of persons to make and act on their own decisions.[179] As rational beings who are ends in ourselves, we are all entitled to respect from others.[180] Offensive breaches of social norms,[181] like those that funeral protest statutes contemplate, arguably disrespect mourners, the sanctity of the funeral ceremony, and the core of our dignity.

For this reason, protection of dignity has been an important aspect of privacy torts.[182] As Professor Edward Bloustein noted, "the

178. *See* Guy E. Carmi, *Dignity—The Enemy From Within: A Theoretical and Comparative Analysis of Human Dignity as a Free Speech Justification*, 9 U. PA. J. CONST. L. 957, 983 (2007).

179. IMMANUEL KANT, FOUNDATIONS OF THE METAPHYSICS OF MORALS 44–47 (Lewis White Beck trans., Bobbs-Merrill 1959).

180. *See id.* at 46.

181. A dignity assault in this sense results from an offensive breach of social norms. The *Oxford English Dictionary* defines "offense" as a "breach of law, rules, duty, propriety, or etiquette." THE OXFORD ENGLISH DICTIONARY 724 (2d ed. 1989).

182. Invasion of privacy is one of many "dignitary" torts, like assault, false imprisonment, and intentional infliction of emotional distress, that recognize the harm of

gist of the wrong in intrusion cases is . . . a blow to human dignity, an assault on human personality. Eavesdropping and wiretapping, unwanted entry into another's home, . . . are wrongful because they are demeaning of individuality."[183] Professor Robert Post has also noted:

> [The intrusion tort] safeguards the rules of civility that in some significant measure constitute both individuals and community .... [An] interest arises from the dignitary harm which plaintiffs suffer as a result of having been treated disrespectfully. Violations of civility rules are intrinsically demeaning . . . because dignitary harm does not depend on the psychological condition of an individual plaintiff, but rather on the forms of respect that a plaintiff is entitled to receive from others.[184]

Statutes regulating peaceful funeral protests, however, approach dignity differently from the common law. Professors Bloustein and Post identify the purpose behind the privacy torts, i.e., that they protect against offensive invasions into seclusion in order to protect human dignity.[185] Statutes regulating peaceful funeral protests, on the other hand, protect an individual's dignity from offense regardless of whether there has been a physical, aural or harassing invasion.[186] Without such an invasion, funeral protest statutes effectively protect dignity *qua* dignity. In this sense:

> [Equating privacy with dignity] ground[s] privacy in social forms of respect that we owe each other as members of a common community. So understood, privacy presupposes persons who are socially embedded, whose identity and self-worth depend upon the performance of social norms, the violation of which constitutes "intrinsic" injury .... If privacy is conceived as a form of dignity, it presupposes a particular kind of social structure in which persons are joined by common norms that govern the forms of their social

---

the tort often stems from having suffered certain indignities rather than physical injury. 2 DAN B. DOBBS, THE LAW OF REMEDIES § 7.3(1), at 302–03 (2d ed. 1993).

183. Bloustein, *supra* note 133, at 974.

184. Post, *supra* note 133, at 959–67.

185. *See supra* text accompanying notes 182–83.

186. *See. e.g.*, OKLA. STAT. tit. 21 § 1380 (2007) (prohibiting pickets within 500 feet and one hour before and after a funeral).

> interactions. These norms constitute the decencies of civilization.[187]

Even more specifically, funeral protest laws, by protecting dignity for dignity's sake, are more focused on enforcing proper manners, i.e., preventing breaches of etiquette and social norms,[188] than in grounding dignity in true respect for individuals. While both are aspects of civility associated with dignity, the distinction is an important one. As James Whitman has written, civility rules that require an outward showing of respect are different from rules that require a sincere acknowledgement of the humanity of others.[189] The latter rules "aim[] to create or affirm a deeper dignitary structure for society at large," such as antidiscrimination laws, while the former rules "aim[] to create or affirm a ritual relationship of respect between two individuals."[190] Peaceful funeral protest laws do not require protestors sincerely to acknowledge the humanity of mourners. Rather, they protect mourners from seeing or hearing protestors. Thus, they attempt to enforce an outward showing of respect toward mourners and the funeral ceremony.

More importantly, although privacy and free speech law in the United States embrace notions of human dignity, they do not recognize a concept of dignity that requires an outward showing of respect enforced through law.[191] Some European countries, especially

---

187. Post, *supra* note 22, at 2092–93. Professor Post does not argue for a privacy right untethered from common law requirements. *See id.* But his explanation of the dignity rationale underlying the common law tort is generally useful to understanding the relationship between privacy, dignity and civility.

188. *See* James Q. Whitman, *Enforcing Civility and Respect: Three Societies*, 109 YALE L.J. 1279, 1289 (2000).

189. *Id.* at 1290–92.

190. *Id.* at 1291. Sociologist Erving Goffman also noted the distinction between substantive rules, "which govern[] . . . law, morality, and ethics," and ceremonial rules and expressions, which are "incorporated in what we call etiquette." ERVING GOFFMAN, *The Nature of Deference and Demeanor*, *in* INTERACTION RITUAL 47, 55 (1967).

191. Steven Heyman's thoughtful book, *Free Speech & Human Dignity*, explores the manner in which free speech law embraces the concept of dignity. STEVEN J. HEYMAN, FREE SPEECH & HUMAN DIGNITY (2008). Professor Heyman argues that "rights . . . flow from the respect for human dignity." *Id.* at 39. Building on Kantian notions of dignity, he argues that every person has intrinsic worth which "allows him to 'exact[] *respect* for himself from all other rational beings in the world.' " *Id.* (quoting IMMANUEL KANT, THE METAPHYSICS OF MORALS 186 (Mary Gregor trans., Cambridge Univ. Press 1996). This aspect of Professor Heyman's argument is, in my mind, uncontroversial. *See* Wells, *supra* note 59, at 165–66.

Heyman's argument that the "duty of respect applies both in the moral and in the legal realm, where it takes the form of an obligation to respect the legal rights of others," HEYMAN, *supra*, at 39, is somewhat more difficult to defend. Kant's statements that contemptuous actions deny others the dignity they are due came in the context of his

Germany, recognize such privacy rights. Germany has a well-developed jurisprudence allowing punishment based upon insults to honor.[192] Its privacy law is also rooted in a desire to preserve honor and personal respect.[193] In both cases, the law enforces the rituals through which people interact.[194]

The United States, however, has resisted recognizing such a privacy right. As noted above, "bad manners, harsh names and insulting gestures in public," although disrespectful and offensive, do not amount to an invasion of privacy.[195] Even intentional infliction of emotional distress, the tort most likely to punish a pure dignity infraction,[196] does not equate dignity with forced outward showings of

---

discussion of moral obligations. *See* IMMANUEL KANT, THE METAPHYSICS OF MORALS 209 (Mary Gregor trans., Cambridge Univ. Press 1996). My writings elsewhere suggest that translating those moral obligations into legal obligations—especially when an individual's rights have been invaded by another individual (rather than the state)—involves a more finely drawn process than the balancing of rights that Professor Heyman advocates. *See* Wells, *supra* note 59, at 169–70. Thus, to find a dignity interest invaded requires a finding that speech is so coercive that it attempts to override our thought processes—as, for example, with the Court's categories of low-value speech. *Id.* at 177–86. Rudeness does not suffice. *Id.* at 169–70, 177–86; *see also* Whitman, *supra* note 188, at 1380 ("The Supreme Court has . . . come close to saying that it is unconstitutional to make rudeness actionable.").

192. *Id.* at 1295–1332. German law allows punishment for attacks on honor that show disrespect or lack of respect. Such insults can include calling another person an asshole, an idiot, or a whore. *Id.* at 1305 n.70.

193. Whitman, *supra* note 15, at 1164–71.

194. Many scholars trace Germany's focus on dignity back to Kant, whose writings are enormously influential. *See* KANT, *supra* note 179, at 44–47; KANT, *supra* note 191, at 186. Given Kant's work, one might think that the concept of dignity underlying German law involves the sincere acknowledgement of humans' intrinsic worth. Professor Whitman notes, however, that Kant had less influence on the German law of insult than is supposed. Rather than involving the sincere acknowledgement of another's innate humanity:

> The roots of honor and respect lie in some coarse and unflattering aspects of human psychology .... [W]e have a strong instinct to think of honor as differential, to think that if I am entitled to respect it is because I am better than others. This instinct is so strong that forms of civility tend to have, at their heart, some vision of hierarchical superiority; and societies that are "respectful" societies will be, almost inevitably, societies in which the cultural traditions of social hierarchy are strong.

Whitman, *supra* note 188, at 1331.

195. *See* PROSSER, *supra* note 23.

196. *See* HARPER ET AL., *supra* note 159, § 9.6, at 755 n.15. Although the tort has several requirements, scholars have noted that it effectively boils down to punishing outrageous conduct that offends our dignity. Daniel Givelber, *The Right to Minimum Social Decency and the Limits of Evenhandedness: Intentional Infliction of Emotional Distress by Outrageous Conduct*, 82 COLUM. L. REV. 42, 42–43 (1982); *see also* Robert Post, *The Constitutional Concept of Public Discourse: Outrageous Opinion, Democratic Deliberation, and* Hustler Magazine v. Falwell, 103 HARV. L. REV. 603, 622 (1990) ("[T]he

respect.[197] In the free speech realm, the Court has refused to recognize a similar dignity interest. Accordingly, in *Boos v. Barry*,[198] the Court found unconstitutional a law prohibiting the display of signs within 500 feet of an embassy that tended to bring foreign governments into "public odium or public disrepute."[199] The Court found the interest underlying the law—a desire to protect the dignity of foreign diplomats by shielding them from critical speech—insufficiently neutral.[200] Such an interest was "so inherently subjective" as to run afoul of the Court's " 'longstanding refusal to [punish speech] because [it] may have an adverse emotional impact on the audience.' "[201]

If much of U.S. law rejects a conception of privacy that amounts to an enforced show of respect, how have funeral protest laws come to embrace it? To some extent, the fault lies with the Supreme Court's free speech jurisprudence, which has failed to define adequately the privacy interests it balances against free speech rights.[202] If anything, the Court's careless use of the term "privacy" and its tendency to equate that term with the existence of a "captive audience" has led legislatures to their current conception of privacy. The next part examines the Court's cases involving privacy interests. It begins with a discussion of foundational cases and culminates in a

---

tort, despite its apparent abundance of elements, in practice tends to reduce to a single element—the outrageousness of the defendant's conduct.").

197. *See, e.g.*, HARPER ET AL., *supra* note 159, § 9.2, at 725 (noting that, absent some sort of prior relationship, even abusive speech is generally not actionable because "[o]rdinary irritations, indignities, and unpleasant experiences must be born as a price of living in society where a nice consideration by everyone of everybody else's feelings can hardly be expected"); KEETON ET AL., *supra* note 158, at 59 ("Our manners, and with them our law, have not yet progressed to the point where we are able to afford a remedy . . . for all intended mental disturbance . . . . The plaintiff must necessarily be expected and required to be hardened to a certain amount of rough language, and to acts that are definitely inconsiderate and unkind. There is still, in this country at least, such a thing as liberty to express unflattering opinion of another, however wounding it may be to the other's feelings . . . .").

198. 485 U.S. 312 (1988).

199. *Id.* at 315.

200. *Id.* at 322.

201. *Id.* (quoting Hustler Magazine, Inc. v. Falwell, 485 U.S. 46, 55 (1988)).

202. *See* Gormley, *supra* note 130, at 1376 ("[T]he precise parameters of this 'right to be let alone' [in the Court's free speech jurisprudence] are anything but self-evident."); Franklyn S. Haiman, *Speech v. Privacy: Is There a Right Not to Be Spoken to?*, 67 NW. U. L. REV. 153, 158 (1972) (describing the Court's doctrine as "a morass of inconsistent and often unjust ad hoc resolutions"); Strauss, *supra* note 134, at 106 (characterizing the Supreme Court's analysis of the privacy interest as "woefully lacking").

discussion of *Hill v. Colorado*,[203] the most recent decision confronting the privacy rationale in the context of protestors.

III. PRIVACY AS AN INTEREST IN THE SUPREME COURT'S FREE SPEECH JURISPRUDENCE

Privacy has played a role in the Supreme Court's free speech doctrine since the 1940s.[204] From the beginning, the Court's jurisprudence has characterized the privacy interest as protecting against unwanted intrusions.[205] Unfortunately, the Court's individual cases do not clearly identify when speech is an intrusion for privacy purposes. One can, however, glean some enduring principles from the Court's cases if one carefully reads them.

A. Foundational Cases

1. Privacy in the Home

As with the intrusion tort, the Court's recognition of privacy interests began in the home. In *Martin v. City of Struthers*,[206] although the Court struck down a city ordinance forbidding persons distributing literature from knocking or summoning occupants to the door,[207] it acknowledged that the law legitimately aimed at protecting "householders from annoyance, including intrusion upon the hours of rest."[208] Nevertheless, because narrower regulations were possible

203. 530 U.S. 703 (2000).

204. THOMAS I. EMERSON, THE SYSTEM OF FREEDOM OF EXPRESSION 558–61 (1970) (discussing early Supreme Court cases involving conflicts between privacy rights and free speech).

205. Several scholars have noted that the Court's privacy interest relies on the notion of intrusion. *See id.* at 558–61 (discussing free speech cases under heading of "intrusion on seclusion"); O'BRIEN, *supra* note 127, at 150 (1979) (noting resemblance between free speech cases and the Fourth Amendment intrusion rationale); Bostwick, *supra* note 134, at 1451–56 (describing the Court's early free speech cases as involving privacy of "repose"); Haiman, *supra* note 202, at 157 (noting the similarity between the tort of intrusion and the right "not to be spoken to" asserted in free speech cases).

206. 319 U.S. 141 (1943).

207. *Id.* at 142.

208. *Id.* at 144. All the Justices acknowledged the potential privacy interest in regulating speech. Justice Murphy commented that "few, if any, believe more strongly in the maxim, 'a man's home is his castle,' than I," although he agreed with the majority that free speech rights outweighed the interest in *Martin*. *Id.* at 150 (Murphy, J., concurring). Justice Frankfurter lamented the "lack of privacy and hazards to peace of mind and body" that were increasing realities of crowded urban life and argued that the privacy of the home outweighed the leafletters free speech rights. *Id.* at 152–53 (Frankfurter, J., dissenting); *see also id.* at 154–57 (Reed, J., dissenting) (arguing that the "assurance of privacy" in the home should overcome speakers' rights).

and the means of communication was so important, the Court struck down the ordinance.[209]

Several years later in *Kovacs v. Cooper*,[210] the Court made clear that privacy interests justified regulating speech, this time upholding a regulation banning trucks emitting "loud and raucous noises."[211] *Kovacs* distinguished *Martin* as involving a home owner who "could protect himself from such intrusion by an appropriate sign."[212] In contrast, those subjected to noisy sound trucks were "unwilling listeners." Such persons were "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."[213]

Kovacs and *Martin* are notable for several reasons. First, the Court did not find privacy interests in the home to be absolute.[214] One's home might be one's castle,[215] but individuals, if able to protect their own privacy, must do so before a state may enact laws restricting intrusive speech.[216] Second, *Kovacs* alluded to the "captive audience," which is the idea that individuals or groups sometimes cannot escape intrusive speech.[217] Linking privacy with captivity, whether necessary or not, later became a hallmark of the Court's jurisprudence.[218] Finally, *Kovacs*' reference to a captive audience did not clearly limit that concept to the home. Rather, it intimated that

209. *Id.* at 147–49.

210. 336 U.S. 77 (1949).

211. *Id.* at 79.

212. *Id.* at 86.

213. *Id.* at 87. Justice Frankfurter again observed "the steadily narrowing opportunities for serenity and reflection" in daily life. *Id.* at 97 (Frankfurter, J., concurring). "Without such opportunities," Justice Frankfurter concluded, "freedom of thought becomes a mocking phrase, and without freedom of thought there can be no free society." *Id.*

214. *Id.* at 86–87; Martin v. City of Struthers, 319 U.S. 141, 147–48 (1943).

215. This notion has long roots in Anglo-American legal history. *See* Semayne's Case, 77 Eng. Rep. 194, 195 (K.B. 1603) ("[T]he house of everyone is to him as his . . . castle and fortress, as well for his defense against injury and violence as for his repose."); *see also* Boyd v. United States, 116 U.S. 616, 630 (1886) (acknowledging the "sanctity of a man's home and the privacies of life"). Free speech scholars embrace it as well. *See* ZECHARIAH CHAFEE, FREE SPEECH IN THE UNITED STATES 407 (1948) ("Freedom of the home is as important as freedom of speech."); Alfred Kamin, *Residential Picketing and the First Amendment*, 61 NW. U. L. REV. 177, 182 (1966) ("[T]he quiet enjoyment and privacy of residential premises . . . merits a higher priority than freedom of speech . . . .").

216. *See Martin*, 319 U.S. at 147–48.

217. *Kovacs*, 336 U.S. at 86–87.

218. *See generally* Strauss, *supra* note 134 (discussing the Court's captive audience doctrine).

individuals could be captive to noise while on a public street.[219] Accordingly, *Martin* and *Kovacs* adopted a privacy interest that resembled the intrusion tort, but with decidedly rough and ill-defined edges.

Rowan v. United States Post Office,[220] built on—but also confused—this existing doctrine. *Rowan* involved a federal statute allowing individuals to identify erotic material they did not want to receive through the mail.[221] Congress enacted the statute "to protect minors and the privacy of homes from such material and to place the judgment of what constitutes an offensive invasion of those interests in the hands of the addressee."[222] Noting that a large portion of modern mailings were unsolicited, unwanted and often offensive,[223] the Court upheld the statute, stating:

> Nothing in the Constitution compels us to listen to or view any unwanted communication .... We therefore categorically reject the argument that a vendor has a right under the Constitution or otherwise to send unwanted material into the home of another .... [N]o one has a right to press even "good" ideas on an unwilling recipient. That we are often "captive," outside the sanctuary of the home and subject to objectionable speech and other sound does not mean we must be captive, everywhere.[224]

Analogizing to *Martin*, the Court found the ban a reasonable burden on free speech rights because the statute placed the decision to halt mailings in the hands of the homeowner.[225]

Rowan relied on substantially different notions of intrusion and captive audience than previous cases. To be sure, *Rowan* and *Martin* initially placed the decision to protect privacy with occupants in the home. In *Martin*, the Court carefully balanced the nature of the intrusion against the burden on free speech rights. In *Rowan*, however, the Court never analyzed the allegedly intrusive nature of

219. *Kovacs*, 336 U.S. at 87 (noting sound trucks interfere with a listener's privacy "[i]n his home or on the street" and, that on residential city streets, "the quiet and tranquility so desirable for city dwellers would ... be at the mercy of advocates of particular religious, social or political persuasions").

220. 397 U.S. 728 (1970).

221. *Id.* at 729–30.

222. *Id.* at 732.

223. *Id.* at 736.

224. *Id.* at 737–38 (citing Public Utils. Comm'n v. Pollak, 343 U.S. 451 (1952)).

225. *Id.* at 736–37.

unwanted mailings.[226] Rather, it presumed that individuals in the home were captive and entitled to freedom from unwanted speech.[227] This presumption affected *Rowan*'s treatment of the captive audience issue.[228] *Kovacs* viewed people as captive because they lacked control over unwanted incursions (i.e. aural invasions).[229] By presuming captivity in the home, invasion was never an issue in *Rowan*. Furthermore, the federal law regulated erotic speech because of its offensive content. *Rowan*'s designation of speech as "unwanted" because of its content rather than its physical invasiveness was also a departure from *Martin* and *Kovacs*.

In *FCC v. Pacifica Foundation*,[230] the Court extended *Rowan*'s captive audience rationale. Upholding the FCC's ban on indecent communications as applied to a broadcast of George Carlin's "Seven Dirty Words," the Court noted the increasing presence of "indecent material presented over the airwaves," which confronts citizens "in the privacy of the home, where the individual's right to be left alone plainly outweighs the First Amendment rights of an intruder."[231] In effect, the Court reasoned that the audience was captive to intrusive and indecent broadcasts because saying "that one may avoid further offense by turning off the radio when he hears indecent language is like saying that the remedy for an assault is to run away after the first blow."[232]

Like *Rowan*, *Pacifica* presumed captivity in the home. Although Justice Stevens characterized the broadcast of indecent material as invasive, he never explained why home occupants could not turn off the radio to avoid the intrusion.[233] Rather, like the *Rowan* Court, he assumed that one should not have to endure such "assaults" while in the home.[234] *Pacifica* solidified the idea that unwanted speech can be

226. At least one commentator has noted that the intrusion in *Rowan* was minimal at best: "[T]he act of throwing away unwanted mail . . . [is] such a simple operation that it is difficult to understand the necessity for any further restrictions." Haiman, *supra* note 202, at 180.

227. *See Rowan*, 397 U.S. at 738.

228. *See id.*

229. Kovacs v. Cooper, 336 U.S. 77, 86–87 (1949).

230. 438 U.S. 726 (1978).

231. *Id.* at 748.

232. *Id.* at 748–49.

233. *See id.* at 766 (Brennan, J., dissenting) (noting that an offended listener can "simply extend his arm and switch stations or flick the 'off button' ").

234. Furthermore, unlike *Rowan*, *Pacifica* allowed regulation absent an individual's indication of actual offense, effectively prohibiting even willing audiences from hearing speech. *See* Daniel A. Farber, *Content Regulation and the First Amendment: A Revisionist View*, 68 GEO. L.J. 727, 757 (1980); Thomas G. Krattenmaker & L. A. Powe, Jr., *Televised*

a function of content (i.e., communicative impact) rather than invasiveness, although the Court did note that government officials could not regulate speech in public merely because society found the idea offensive.[235]

The Court's decisions through *Pacifica* thus leave us with a confused doctrine regarding privacy interests in the home. Although the Court began with a narrow approach equating intrusion with uncontrollable invasions and making captivity a function of intrusion and space, later cases appear to presume captivity in the home and expand the notion of intrusion to include speech with offensive content. Over time, the Court has relied on both visions to accept or reject privacy interests,[236] thus creating further uncertainty about that interest.

2. Privacy in Public

The Court has been less willing to recognize privacy interests or captive audiences in public spaces than in the home. Indeed, it has often stated that in public "the burden normally falls upon the viewer to 'avoid further bombardment of [his] sensibilities simply by averting [his] eyes.' "[237] Nevertheless, the captive audience doctrine eventually found its way into cases even when the home was not involved.

As early as the 1950s the Court rejected an argument that transit car passengers were captive to radio programs played by car owners. In *Public Utilities Commission v. Pollak*,[238] the Court dismissed

---

Violence: First Amendment Principles and Social Science Theory, 64 VA. L. REV. 1123, 1231 (1978); Strauss, *supra* note 134, at 93.

235. *Pacifica*, 438 U.S. at 745 ("[T]he fact that society may find the speech offensive is not a sufficient reason for suppressing it. Indeed, if it is the speaker's opinion that gives offense, that consequence is reason for according it constitutional protection.").

236. In *Bolger v. Youngs Drugs*, 463 U.S. 60 (1983), for example, the Court rejected the argument that privacy interests justified a statute prohibiting mailing unsolicited contraceptive advertisements to the home. According to the Court, recipients in the home were not captive to such speech since they could simply throw the advertisements away. *Id.* at 72. The Court distinguished *Rowan* as involving a statute allowing a homeowner to request his mail be stopped. *Id.* In Consolidated Edison Co. v. Public Service Comm'n, 447 U.S. 530 (1980), the Court used similar reasoning to strike down a state policy prohibiting the inclusion of political views in electric bills. According to the Court, home occupants were not sufficiently captive since they could simply throw the billing inserts away. *Id.* at 542. Rather than presuming captivity in the home, the Court determined that the audience was not captive because the mailed material was not sufficiently intrusive. *See id.* at 542 n.11. *But see* Breard v. City of Alexandria, 341 U.S. 622, 645 (1951) (upholding ban on door-to-door commercial solicitation in order to protect the privacy of the home).

237. Erznoznik v. City of Jacksonville, 422 U.S. 205, 210–11 (1975) (alterations in original) (quoting Cohen v. California, 403 U.S. 15, 21 (1971)).

238. 343 U.S. 451 (1952).

arguments that such programs interfered with individual conversations and that the First Amendment "guarantee[d] a freedom to listen only to such points of view as the listener wishes to hear."[239] Over Justice Douglas's dissent,[240] the Court rebuffed the argument that individuals had a privacy right while in transit cars that was comparable to one in the home.[241] Any such privacy right was "substantially limited by the rights of others" and did not permit regulation absent a situation involving excessive noise as in *Kovacs*.[242] *Pollak* thus continued the common law tradition, which recognizes privacy rights in public spaces rarely and only after balancing the right to be left alone against others' rights. By looking to the nature of the intrusion to determine if privacy was invaded, *Pollak* also hearkened back to *Martin* and *Kovacs*.

Cohen v. California[243] seemingly entrenched the notion that privacy interests seldom justify regulation of speech when the audience is in public. *Cohen* reversed a defendant's breach of peace conviction for wearing a jacket bearing the message, "Fuck the Draft," while in a courthouse. The Court rejected the argument that people in the courthouse were a captive audience, holding:

> [T]he mere presumed presence of unwitting listeners or viewers does not serve automatically to justify curtailing all speech capable of giving offense. *See, e.g., Organization for a Better Austin v. Keefe*, 402 U.S. 415 (1971). While this Court has recognized that government may properly act in many situations to prohibit intrusion into the privacy of the home of unwelcome views and ideas which cannot be totally banned from the public dialogue, e.g., *Rowan v. Post Office Dept.*, 397 U.S. 728 (1970), we have at the same time consistently stressed that "we are often 'captives' outside the sanctuary of the home and subject to objectionable speech." *Id.*, at 738. The ability of government, consonant with the Constitution, to shut off discourse solely to protect others from hearing it is, in other words, dependent upon a showing that substantial privacy

239. *Id.* at 463.

240. *Id.* at 468 (Douglas, J., dissenting) ("The streetcar audience is a captive audience. It is there as a matter of necessity, not of choice .... One who tunes in on an offensive program at home can turn it off .... But the man on the streetcar has no choice but to sit and listen, or perhaps to sit and to try *not* to listen." (emphasis in original)).

241. *Id.* at 464. The Court discussed this aspect primarily in the context of a Fifth Amendment challenge to the policy, but its reasoning is also relevant to the free speech issue.

242. *Id.*

243. 403 U.S. 15 (1971).

> interests are being invaded in an essentially intolerable manner.[244]

Cohen, like many earlier cases, located the heart of privacy in the home. It did not, however, limit privacy to that space. Instead, the Court indicated the possibility of more limited privacy interests in certain public areas.[245] Cohen's actions, however, did not invade privacy interests in "an essentially intolerable manner."[246] Regrettably, the Court in *Cohen* never explained when speech in public *did* invade privacy interests although it apparently linked privacy and captivity. *Cohen* distinguished "persons confronted with Cohen's jacket" from "those subjected to the raucous emissions of sound trucks blaring outside their residences."[247] The latter were captive while the former could "effectively avoid further bombardment of their sensibilities simply by averting their eyes."[248]

Cohen's reasoning turned on the type of intrusion (uncontrollable noise as opposed to written communication) when differentiating raucous sound trucks from written messages, suggesting an allegiance with earlier cases like *Martin* and *Kovacs*. But the Court's distinction between the home and the courthouse, coupled with its admonition that one is rarely captive in public, equates the home with captivity as in *Rowan*. At the very least, the Court treats captivity as a function of place, rather than a prerequisite to intrusion. Accordingly, *Cohen* did not clarify the Court's murky doctrine regarding privacy interests. Post-*Cohen* cases continued the confusion.

In *Lehman v. City of Shaker Heights*,[249] a plurality upheld a policy excluding political, but not commercial, advertisements from placards on a city-operated transit system.[250] Citing Justice Douglas's dissent in *Pollak*, the plurality reasoned that " '[t]he streetcar audience is a captive audience. It is there as a matter of necessity, not of choice.' "[251] Unlike the radio broadcasts in *Pollak*, transit riders

---

244. *Id.* at 21 (citations omitted).

245. *Id.* at 21–22 ("[I]t may be that one has a more substantial claim to a recognizable privacy interest when walking through a courthouse corridor than, for example, strolling through Central Park, [but] surely it is nothing like the interest in being free from unwanted expression in the confines of one's own home." (alterations in original)).

246. *Id.* at 21.

247. *Id.*

248. *Id.*

249. 418 U.S. 298 (1974).

250. *Id.* at 304.

251. *Id.* at 302 (quoting Public Utils. Comm'n v. Pollak, 343 U.S. 451, 468 (1952) (Douglas, J., dissenting)).

could not escape political messages which were " 'thrust upon them by all the arts and devices that skill can produce.' "[252] *Lehman* thus appears to link captivity with one's mere presence in a transit car.[253] Previously, the Court refused to uphold bans on written messages.[254] *Lehman*, however, allowed such bans simply because the audience was confined, even though passengers presumably could move to avoid a written advertisement.[255] Furthermore, the plurality expanded the notion of "offensive speech" to include political or controversial, and not merely indecent, speech. Accordingly, the audience in *Lehman* was captive only to speech it did not want to hear rather than speech it could not avoid.

In contrast, *Erznoznik v. City of Jacksonville*[256] ruled that privacy interests of an unsuspecting passersby did not justify an ordinance banning nudity on drive-in movie screens.[257] Government attempts "to shield the public from some kinds of speech on the ground that they are more offensive than others," the Court stated, "have been upheld only when the speaker intrudes on the privacy of the home or the degree of captivity makes it impractical for the unwilling viewer or auditor to avoid exposure."[258] Individuals on the street plainly were not in such a position with respect to drive-in movie theaters. The Court continued,

> [I]n our pluralistic society, ... "we are inescapably captive audiences for many purposes." Much that we encounter offends our esthetic, if not our political and moral, sensibilities. Nevertheless, the Constitution does not permit government to decide which types of otherwise protected speech are

252. *Id.*

253. *See* Strauss, *supra* note 134, at 98.

254. *Lehman,* 418 U.S. at 320 (Brennan, J., dissenting) (discussing differences between written and aural invasions in past cases). In *Packer Corp. v. Utah*, 285 U.S. 105 (1932), the Court upheld a state regulation prohibiting tobacco advertisements on billboards and other public signs. *Id.* at 112. The case did not involve a free speech challenge and the Court discussed captivity in the context of whether the statute was arbitrary in violation of the equal protection clause. *Id.* at 108. For a discussion of *Packer*, see Geoffrey R. Stone, *Fora Americana: Speech in Public Places*, 1974 SUP. CT. REV. 233, 268 (1974). *Packer* has been heavily criticized. *See, e.g.*, Haiman, *supra* note 202, at 178.

255. The plurality's finding that the transit cars were nonpublic fora, *Lehman*, 418 U.S. at 303–04, also had a substantial effect on the Court's decision. Government officials have greater leeway in such fora than in public fora and may enact content-based restrictions as long as they do not attempt to suppress viewpoint. *See supra* note 60 for a discussion of rules in nonpublic fora.

256. 422 U.S. 205 (1975).

257. *Id.* at 217–18.

258. *Id.* at 209 (citing *Lehman*, 418 U.S. 298, 302–04 (1974); Rowan v. Post Office Dep't, 397 U.S. 728, 736–38 (1970)).

> sufficiently offensive to require protection for the unwilling listener or viewer. Rather, absent . . . narrow circumstances, . . . the burden normally falls upon the viewer to "avoid further bombardment of [his] sensibilities simply by averting [his] eyes."[259]

Erznoznik reaffirms *Cohen*'s principle that privacy interests rarely justify speech restrictions in public. However, it also potentially equates captivity with presence in a particular place.[260] First, it directly cites *Lehman* and *Rowan* in its discussion of the notions of captivity and intrusion.[261] Both earlier decisions use extremely generous interpretations of those terms. Second, *Erznoznik* apparently accepted the notion that one can occasionally be captive to offensive speech based on its content.[262] It is unclear from the Court's decisions whether speech need be intrusive in any other way. Even Justice Stevens in *Pacifica* cast the nature of the broadcast medium as invasive.[263] By *Erznoznik*, however, that aspect of the case appears to have been lost. Instead, offensiveness coupled with presence in a particular space might be sufficient to support regulation.

These foundational cases leave us with a great deal of confusion. One can potentially justify and explain them individually, but as a network of coherent jurisprudence and rhetoric, that task is more difficult. Overall, the Supreme Court's recognition of privacy interests, like the common law, focuses on two main issues: whether speech can be characterized as intrusive; and whether the audience can be said to have carved out a place in which it has a right to claim seclusion from (or rather exclusion of) intrusive speech. Unfortunately, the Court has not been careful with terms such as "intrude," "privacy," "unwanted," "offensive," and "captive." Thus, its sometimes careless characterizations of past precedent also point in different directions regarding the parameters of the Court's privacy interest.

---

259. *Erznoznik*, 422 U.S. at 210–11 (alterations in original) (quoting *Rowan*, 397 U.S. at 736; Cohen v. California, 403 U.S. 15, 21 (1971)).

260. *See id.*, 422 U.S. at 209.

261. *Id.*

262. *Id.* (noting limited situations in which "government, acting as censor, [may] undertake[] selecting to shield the public from some kinds of speech on the ground that they are more offensive than others").

263. *See supra* note 232.

B. *Privacy and Protestors*

Cases involving the relationship between privacy and protestors gained momentum in the late 1980s, although the Court occasionally faced the issue in earlier decisions. Generally, however, earlier decisions either recognized the importance of residential privacy while nevertheless refusing to restrict protests[264] or upheld statutes prohibiting invasive protests without directly referencing privacy interests.[265] Although referencing the rhetoric of the earlier decisions, later cases do the heavy lifting when analyzing privacy interests.

In *Frisby v. Schultz*,[266] the Court upheld a content-neutral ordinance banning "focused picketing"—defined as picketing directed at a single residence as opposed to generalized picketing in a neighborhood or residential area.[267] Motivated by a series of anti-abortion protests outside of a physician's residence,[268] the law's purpose was to protect the "well-being, tranquility, and privacy" of the home.[269] The Court acknowledged the home as the "last citadel of the tired, the weary, and the sick" and had little trouble recognizing residential privacy as a legitimate government interest.[270] The Court continued:

> One important aspect of residential privacy is protection of the unwilling listener .... "That we are often 'captives' outside the sanctuary of the home and subject to objectionable speech does not mean we must be captives everywhere." Instead, a special benefit of the privacy all citizens enjoy within their own walls,

---

264. Justice Black, for example, voted to strike down protestors' convictions under a vague statute in *Gregory v. City of Chicago*, 394 U.S. 111 (1969), but also noted that "the homes of men, sometimes the last citadel of the tired, the weary and the sick, can be protected by government from noisy, marching, tramping, threatening picketers and demonstrators bent on filling the minds of men, women, and children with fears of the unknown." *Id.* at 125–26 (Black, J., concurring). Similarly, in *Carey v. Brown*, 447 U.S. 455, 471 (1980), the Court struck down a content-based law regulating residential labor picketing, although it recognized the important interest in "[p]reserving the sanctity of the home, the one retreat to which men and women can repair to escape from the tribulations of their daily pursuits." *Id.* at 455.

265. *See* Grayned v. City of Rockford, 408 U.S. 104, 118 (1972) (upholding restrictions on noisy and disruptive protests near schools during school sessions). For a discussion of the case, see *supra* notes 93–95 and accompanying text.

266. 487 U.S. 474 (1988).

267. *Id.* at 483–84.

268. Schultz v. Frisby, 619 F. Supp. 792, 793–94 (E.D. Wis. 1985), *rev'd*, 487 U.S. 474 (1988).

269. *Frisby*, 487 U.S. at 477. Town officials believed that focused picketing invaded privacy by harassing home occupants and causing emotional distress. *Id.*

270. *Id.* at 484 (quoting Gregory v. City of Chicago, 394 U.S. 111, 125 (1969) (Black, J., concurring)).

> which the State may legislate to protect, is an ability to avoid intrusions. Thus, we have repeatedly held that individuals are not required to welcome unwanted speech into their own homes and that the government may protect this freedom .... This principle is reflected even in prior decisions in which we have invalidated complete bans on expressive activity, including bans operating in residential areas.[271]

Frisby's outcome is hardly surprising given the Court's recognition of the home as a locus of privacy interests and its increasing acceptance of the captive audience rationale in other cases.[272] In fact, *Frisby* made clear that, as a normative matter, the home's importance as a refuge from the outside world supported state attempts to protect occupants from unwanted intrusions. Unfortunately, the decision did not clarify exactly how targeted protests constitute intrusions into the home. The Court described focused picketing as "inherently and offensively intru[sive] on residential privacy" because " 'the home becomes something less than a home .... [The] tensions and pressures may be psychological, not physical, but they are not, for that reason, less inimical to family privacy and truly domestic tranquility.' "[273] This statement could equate focused picketing with harassment, a characterization that is consistent with the common law approach and early free speech cases like *Martin*.[274] More likely, the Court's statement means that the mere presence of targeted picketers constitutes an intrusion due to the occupant's awareness of them.[275] The unique nature of the home and our normative assumptions about what should be required of its occupants may justify an interpretation that equates the presence of targeted protests with intrusion. In fact, such an interpretation is not much different from finding that targeted protests amount to

---

271. *Id.* at 484–85.

272. Unsurprising does not equal uncontroversial. Justice Brennan argued that protection of residential privacy did not require a ban on all peaceful picketing aimed at a home. *See id.* at 492–93 (Brennan, J., dissenting). Commentators also characterized the Court's decision as an expansion of privacy interest. *See infra* note 276.

273. *Frisby*, 487 U.S. at 486 (alteration in original) (quoting Carey v. Brown, 447 U.S. 455, 478 (1980) (Rehnquist, J., dissenting))

274. The Court's statement that the "medium of expression itself" is the evil, *id.* at 487, and its unwillingness to read the ordinance as banning all protests in residential neighborhoods, lends credence to this interpretation. *See id.* at 482. *Frisby*, 487 U.S. at 486 (alteration in original) (quoting Carey v. Brown, 447 U.S. 455, 478 (1980) (Rehnquist, J., dissenting))

275. The Court's reference to psychological intrusion, even by "a solitary picket," *id.* at 487, and its willingness to rely on *Pacifica* and *Rowan*, suggest that the Court may have leaned toward this interpretation. *See id.* at 484–85.

harassment, although it defines the latter term more broadly as a result of the home's involvement.[276] The Court's confusing rhetoric, however, is susceptible to misinterpretation outside of the context of the case.

In *Madsen v. Women's Health Center, Inc.*,[277] the Court again faced a First Amendment challenge to regulation of focused picketing, this time involving anti-abortion protests around health clinics. After a series of disruptions and blockades by protestors, a lower court issued an injunction limiting the protestors' expression in order to protect the health and safety of women seeking medical services, public order, and medical privacy.[278] The Supreme Court acknowledged that this combination of interests was sufficient to justify an appropriately tailored and content-neutral injunction,[279] but its analysis of the privacy interest in the context of the various injunctive provisions is especially noteworthy.

The lower court's injunction established two buffer zones from which all picketing or demonstrating was banned—a thirty-six-foot zone around the health clinic and a 300-foot zone around the homes of clinic staff.[280] The *Madsen* Court upheld the thirty-six-foot zone because, like *Frisby*, it regulated focused picketing and was designed to protect against protestors' interference with access to the clinic.[281] It struck down the 300-foot zone, however, because it banned "[g]eneral marching through residential neighborhoods, or even walking a route in front of an entire block of houses."[282]

---

276. Numerous commentators, however, argued that *Frisby* expanded the Court's existing doctrine. One commentator noted that "*Frisby* suggests the emergence of a new doctrine within first amendment jurisprudence that protects the home as an oasis from the hustle and bustle of the 'marketplace of ideas.'" *The Supreme Court, 1987 Term—Leading Cases*, 102 HARV. L. REV. 261, 266 (1988); *see also* Strauss, *supra* note 134, at 94 (criticizing *Frisby*'s determination that one can be "figuratively" trapped in one's house); Robert E. Rigby, Jr., Comment, *Balancing Free Speech in a Public Forum vs. Residential Privacy:* Frisby v. Schultz, 24 NEW ENG. L. REV. 889, 915 (1989) (criticizing *Frisby*'s expansion of captive audience doctrine).

277. 512 U.S. 753 (1994).

278. *Id.* at 767–68.

279. *Id.* at 768. Over Justice Scalia's dissent, the majority found the injunction to be content-neutral since it was motivated by the protestors' past conduct, and none of the provisions facially regulated the content of the protestors' speech. *Id.* at 762–63. For discussion regarding the *Madsen* injunction and content-neutrality, see Wells, *supra* note 55, at 30–46.

280. *Madsen*, 512 U.S. at 759–60.

281. *Id.* at 769.

282. *Id.* at 775 (alteration in original).

Madsen also upheld the lower court's restriction on singing, chanting, or using sound amplification equipment during clinic hours, reasoning that:

> Noise control is particularly important around hospitals and medical facilities during surgery and recovery periods .... The First Amendment does not demand that patients at a medical facility undertake Herculean efforts to escape the cacophony of political protests. "If overamplified loudspeakers assault the citizenry, government may turn them down."[283]

However, the desire to protect patients did not justify the provision banning displays of images observable to those inside the clinic. The only "plausible reason" that such images would bother a patient inside the clinic, the Court argued, was if she "found the expression contained in such images disagreeable. But it is much easier for the clinic to pull its curtains than for a patient to stop up her ears ...."[284] The Court similarly struck down the "no-approach" portion of the injunction, which prevented all uninvited approaches by protestors within a 300-foot zone of the clinic.[285] Without evidence that the speech was "independently proscribable"—i.e., involved harassment, violence, or fighting words[286]—a prohibition on peaceful, uninvited approaches restricted speech simply because it was outrageous or insulting.[287]

Madsen recognized a privacy interest in public but the opinion's fragmented nature makes it difficult to discern the parameters of that interest. In recognizing medical patients' need for tranquility and solitude, the Court acknowledged that people can be captive to protests in public spaces. This captivity is different from *Frisby*, however. *Madsen* recognized that medical patients were captive to noisy protests but required them to avert their eyes to exterior images. In *Frisby*, on the other hand, the Court protected occupants of the home not only from invasive speech but also from the emotional distress caused by knowledge of protestors' presence. *Madsen* thus distinguished between kinds of invasive speech in ways that *Frisby* did not and further found that speech was intrusive only if one truly could not avoid seeing or hearing it. The Court's treatment

283. *Id.* at 772–73 (quoting Grayned v. City of Rockford, 408 U.S. 104, 116 (1972)).

284. *Id.* at 773. The Court also noted that the ban on images observable was too broad to apply only to threatening speech. *Id.* at 772–73.

285. *Id.* at 776.

286. *Id.* at 774 (citing Milk Wagon Drivers v. Meadowmoor Dairies, Inc., 312 U.S. 287, 292–93 (1941)).

287. *Id.* at 774 (citing Boos v. Barry, 485 U.S. 312, 322 (1988)).

of the thirty-six-foot buffer zone followed similar reasoning, as it noted that the zone was necessary to protect access to the clinic and against disruption. Although *Madsen* cited *Frisby*, it was not concerned with protests outside clinics as inherently intrusive but rather with the concrete invasions such protests cause.[288] Accordingly, *Madsen* accepted *Frisby*'s inherent intrusiveness[289] explanation of focused picketing but relegated it to the home where privacy interests were especially unique.

Madsen is less clear about the status of captivity while on public streets. The Court never discussed the issue directly in the context of the "no-approach" zone. In addition, the meaning of its requirement that speech be "independently proscribable" is not clear. One could interpret that statement as requiring harassment in order to find captivity, which is consistent with the common law's approach to privacy. However, one could also interpret that requirement as a simple statement that speech must be low-value to be restricted. Either way, *Madsen*'s treatment of the no-approach zone was a resounding affirmation of *Cohen* and *Erznoznik*'s requirement that individuals endure much offensive speech in public.

Schenck v. Pro-Choice Network[290] reaffirmed *Madsen*'s conclusions. *Schenck* involved the constitutionality of an injunction requiring that protestors attempting to counsel another person entering a health clinic " 'cease and desist' upon request."[291] The lower court issued the injunction "to protect the right of the people approaching and entering the facilities to be left alone."[292] The Supreme Court upheld the "cease and desist" provision but explicitly rejected the lower court's rationale as not accurately reflecting its jurisprudence.[293] *Madsen*'s injunction, the Court explained, was designed to protect access to clinics and not a generalized " 'right to be let alone' on a public street or sidewalk."[294] *Schenck* not only rejected the argument that privacy interests in public spaces

288. The Court emphasized the unique nature of the privacy interest in the home when it reviewed the 300-foot buffer zone around the homes of clinic staff. *Madsen*, 512 U.S. at 775 (noting that *Frisby* "remarked on the unique nature of the home as 'the last citadel of the tired, the weary, and the sick' " (quoting Frisby v. Schultz, 487 U.S. 474, 484 (1988))). Even that privacy interest, however, was insufficient to support the injunction, as it was too broad to be aimed at only targeted picketing.

289. *See Frisby*, 487 U.S. at 486.

290. 519 U.S. 357 (1997).

291. *Id.* at 366 n.3.

292. *Id.* at 370 (quoting Pro-Choice Network of W. N.Y. v. Project Rescue W. N.Y., 799 F. Supp. 1417, 1435 (W.D.N.Y. 1992)).

293. *Schenk*, 519 U.S. at 383–85.

294. *Id.* at 370.

encompassed protection from offensive speech, it also limited the captive audience rationale to spatially-bounded places. Thus, in reviewing the state's interest, which largely overlapped with those identified in *Madsen*, the Court noted that it need not consider the issue of medical privacy because the case did not involve speech intruding into the medical clinic.[295] Instead, the Court upheld the injunction as a content-neutral regulation of speech based on the petitioners' prior harassing and intimidating conduct.[296]

Frisby, *Madsen*, and *Schenck* establish that protests can invade the privacy interests of others. The parameters of that privacy interest and whether it is invaded, however, are decidedly different depending on the location of the audience and the nature of the speech involved. Building on the principles gleaned from the foundational cases discussed earlier, *Frisby*, *Madsen*, and *Schenck* establish the following propositions: first, one's privacy interest is at the apex in the home, an area where the Court defines that interest more broadly than in other spaces; second, audience members have a privacy interest in other spatially-bounded places but that interest extends primarily to freedom from physical or aural invasions; and finally, audience members have little expectation of privacy when in traditional public fora, such as streets, parks, and sidewalks. *Hill v. Colorado*,[297] however, appeared to throw the last of these principles into doubt.

C. Hill v. Colorado

As with the immediately preceding cases, *Hill* arose out of attempts to rein in anti-abortion protests near clinics. To preserve access to health care treatment and health care facilities,[298] Colorado enacted a law barring anyone from:

> [K]nowingly approach[ing] another person within eight feet of such person, unless such other person consents, for the purpose of passing a leaflet or handbill to, displaying a sign to, or engaging in oral protest, education, or counseling with such

295. *Id.* at 376 n.8.

296. *Id.* at 384–85. For criticism of the Court's treatment of the injunction as content-neutral, see Christina E. Wells, *Of Communists and Anti-Abortion Protestors: The Consequences of Falling Into the Theoretical Abyss*, 33 GA. L. REV. 1, 59–62 (1998).

297. 530 U.S. 703 (2000).

298. COLO. REV. STAT. § 13-21-126 (2007) (noting that "access to health care facilities for the purpose of obtaining medical counseling and treatment is imperative for the citizens of this state" and recognizing a "person's right to obtain medical counseling and treatment in an unobstructed manner").

> other person in the public way or sidewalk area within a radius of one hundred feet from any entrance door to a health care facility.[299]

The Court upheld the law in a 6-3 decision, finding it to be a reasonable content-neutral, time, place, and manner restriction.[300] The Court's discussion of the privacy interest was particularly controversial.[301]

At the outset, it was not clear that privacy interests were involved at all. The stated interests underlying the consent zone involved access to clinics and health care. The lower court did not refer to privacy interests when assessing the validity of the state's interest.[302] Similarly, the state's brief, although referring to several privacy and captive audience cases, took pains to characterize the consent provision as protecting clinic patients from threat and intimidation caused by close approaches in the eight-foot zone.[303] There was logic to the lower court and respondent's approach. The statute regulated only peaceful protests and counseling attempts within eight feet of individuals near clinics.[304] Thus, the only area in which speech could potentially invade privacy involved open, public space and not spatially-bounded areas as in *Madsen* and *Frisby*. Accordingly, addressing the privacy interest would have meant

---

299. *Id.* § 18-9-122(3).

300. *Hill*, 530 U.S. at 719–30.

301. The finding of content-neutrality was also controversial. The dissenting justices argued that a statute regulating protests, counseling, or education outside of medical clinics was content-based. *Id.* at 741 (Scalia, J., dissenting); *id.* at 766–67 (Kennedy, J., dissenting). Scholars also criticized *Hill*'s "unwillingness to pierce the veil of the law's apparent facial content-neutrality." Kathleen Sullivan, *Sex, Money and Groups: Free Speech and Association Decisions in the October 1999 Term*, 28 PEPP. L. REV. 723, 737 (2001); *see also* David B. Cruz, *"Just Don't Call it Marriage:" The First Amendment and Marriage as an Expressive Resource*, 74 S. CAL. L. REV. 925, 993 n.361 (2001); Heidi Kitrosser, *From Marshall McLuhan to Anthropomorphic Cows: Communicative Manner and the First Amendment*, 96 NW. U. L. REV. 1339, 1400 (2002); Krotoszynski & Carpenter, *supra* note 152, at 1262–63; Jamin Raskin & Clark I. 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, 208–12 (2001).

302. Hill v. Thomas, 973 P.2d 1246, 1258 (Colo. 1999) (referring only to the statutorily stated interests), *aff'd sub nom.* Hill v. Colorado, 530 U.S. 703 (2000).

303. Brief on the Merits for Respondents Ken Salazar, State of Colorado, Bill Owens, Governor, and City of Lakewood at 23, *Hill*, 530 U.S. 703 (No. 98-1856) (noting that the consent provision "allows the individual accessing a medical clinic to control only whether a demonstrator's message may be expressed in that individual's face or from a few steps away. The statute is justified in part by patients' sense of intimidation and threat from the manner and proximity of in-your-face approaches."); *see also id.* at 30–31 (discussing protestor harassment to which patients were captive in small space).

304. *See* COLO. REV. STAT. § 18-9-122 (2007).

addressing whether such interests existed in open, public spaces—a question the Court had seemingly answered negatively in *Cohen*, *Erznoznik*, *Madsen*, and *Schenck*. Given the precedents, one can understand why the participants in the lower court proceedings conservatively approached the assessment of the state's interests.

The Supreme Court, however, chose to tackle the privacy issue. The majority began by acknowledging the legitimacy of the state's interest in preserving access to health care and medical clinics,[305] and noting that safety concerns "may justify a special focus on unimpeded access to health care facilities and the avoidance of potential trauma to patients associated with confrontational protests."[306] However, it deliberately linked that discussion with a discussion of privacy interests. "It is also important when conducting this interest analysis,"[307] the Court noted, to differentiate between "restrictions on a speaker's right to address a willing audience and those that protect listeners from unwanted communication. This statute deals only with the latter."[308]

The Court acknowledged that the right to persuade others "may not be curtailed simply because the speaker's message may be offensive to his audience."[309] Citing to *Frisby* and *Erznoznik*, however, it noted that the First Amendment "does not always embrace offensive speech that is so intrusive that the unwilling audience cannot avoid it."[310] "Indeed, '[i]t may not be the content of the speech, as much as the deliberate 'verbal or visual assault,' that justifies proscription.' "[311] Having established that states may sometimes regulate intrusive offensive speech, the Court then surveyed settings in which one has a privacy interest in avoiding offensive speech:

> The recognizable privacy interest in avoiding unwanted communication varies widely in different settings. It is far less important when "strolling through Central Park" than when "in the confines of one's own home," or when persons are "powerless to avoid" it. [*Cohen v. California*, 403 U.S. 15, 21-22 (1971).] But even the interest in preserving tranquility in "the Sheep Meadow" portion of Central Park may at times justify

305. *Hill*, 530 U.S. at 715.
306. *Id.*
307. *Id.* at 715.
308. *Id.* at 715–16.
309. *Id.* at 716.
310. *Id.* (citing Frisby v. Schultz, 487 U.S. 474, 487 (1988)).
311. *Id.* (citing Erznoznik v. City of Jacksonville, 422 U.S. 205, 210–11 (1975)).

> official restraints on offensive musical expression. *Ward* [*v. Rock Against Racism*, 491 U.S. 781, 792 (1989).] More specific to the facts of this case, we have recognized that "[t]he First Amendment does not demand that patients at a medical facility undertake Herculean efforts to escape the cacophony of political protests." *Madsen* [*v. Women's Health Center, Inc.*, 512 U.S. 753, 772-73 (1994).][312]

Although the Court's attempt to directly address the privacy interest in different settings is laudable, the above rhetoric is particularly confusing. The privacy interest evidently changes with place and context and is decidedly less in Central Park than when one is captive in the home or elsewhere, statements that are consistent with past cases. Unfortunately, even though it cited *Cohen*'s oft-quoted passage, the Court did not explain the circumstances in which one is "powerless to avoid" speech. Such an oversight is especially disappointing given the Court's nod to clarifying its doctrine at the beginning of the passage.[313] Until *Hill*, the Court had largely confined its recognition of captivity to spatially-bounded places although its rhetoric was not always clear about this fact. *Hill* presented the Court with the opportunity to discuss explicitly the core meaning of captivity and, in particular, whether that notion was limited to spatially-bounded areas or extended to classic public fora.

Along these lines, the majority's reference to regulating "offensive musical expression" in Central Park may or may not have implied that captivity can exist in the latter space. However, the case to which the passage alludes, *Ward v. Rock Against Racism*,[314] did not involve captive audience analysis in upholding noise restrictions in Central Park.[315] Furthermore, this passage did not illuminate what the Court meant by the term "offensive" expression. That term has been used to describe a wide variety of expression, ranging from simply noisy speech to speech with offensive content, each with vastly different consequences. Without defining the term "offensive," it is not clear which consequences the Court meant to invoke. The majority may possibly have wanted to do no more than invoke its noise control precedents, and certainly the Court's references to *Ward* and *Madsen* support that explanation. But that interpretation makes little sense in that particular context of *Hill*, which did not involve noise levels. Furthermore, cloaking the issue in the rhetoric

312. *Id.*
313. *Id.*
314. 491 U.S. 781 (1989).
315. *Id.*

of "privacy," "offense," and "unwanted communications" seems to broaden the concept of privacy beyond that context.

The Court's next attempt to elaborate on the privacy interest did little to clarify the issue:

> The unwilling listener's interest in avoiding unwanted communication has been repeatedly identified in our cases. It is an aspect of the broader "right to be let alone" that one of our wisest Justices characterized as "the most comprehensive of rights and the right most valued by civilized men." *Olmstead v. United States*, 277 U.S. 438, 478 (1928) (Brandeis, J. dissenting). The right to avoid unwelcome speech has special force in the privacy of the home, *Rowan v. Post Office Dept.*, 297 U.S. 728, 738 (1970), and its immediate surroundings, *Frisby v. Schultz*, 487 U.S. [474, 485 (1988),] but can also be protected in confrontational settings.... None of our decisions has minimized the enduring importance of "a right to be free" from persistent "importunity, following and dogging" after an offer to communicate has been declined. While the freedom to communicate is substantial, "the right of every person 'to be let alone' must be placed in the scales with the right of others to communicate." *Rowan*, 397 U.S. at 736.[316]

As with the earlier passage, this excerpt is subject to multiple interpretations. Its references to the "unwilling listener's interest in avoiding unwanted communication" and the "right to be let alone" encourage readers to interpret the privacy interest broadly despite the Court's attempt to limit the right to certain contexts. Its references to *Frisby* and *Rowan* highlight that privacy is paramount in certain spatially bounded areas but also imply that such areas are unnecessary if a confrontational setting exists. Although there may be a relationship between confrontation and privacy interests, the Court never clearly identified it.[317] Given the Court's past precedents refusing to find a generalized right to be let alone on streets and sidewalks, one can understand the dissenters' outrage at the perceived creation of a new "right to avoid unpopular speech in a public forum."[318]

---

316. *Hill*, 530 U.S. at 716–18.

317. *See* William E. Lee, *The Unwilling Listener:* Hill v. Colorado*'s Chilling Effect on Unorthodox Speech*, 35 U.C. DAVIS L. REV. 387, 409 (2002) (describing Justice Stevens' description of the term "confrontational settings" as "marvelously loose" and potentially encompassing "labor picketing, anti-fur protests, gatherings of neo-Luddites, and innumerable public disputes").

318. *Hill*, 530 U.S. at 771 (Kennedy, J., dissenting); *see also id.* at 753 n.3 (Scalia, J. dissenting) ("[W]e have never made the absurd suggestion that a pedestrian is a 'captive'

The majority denied the dissenters' accusation, claiming that it was:

> [N]ot addressing whether there is ... a "right" [to avoid unpopular speech]. Rather, we are merely noting that our cases have repeatedly recognized the interests of unwilling listeners in situations where "the degree of captivity makes it impractical for the unwilling viewer or auditor to avoid exposure." *See Lehman* [*v. Shaker Heights*, 418 U.S. 298 (1974).][319]

Furthermore, the majority argued, this case simply did not involve such a right:

> 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, i.e., within eight feet. In offering protection from that harm, while maintaining free access to health clinics, the State pursues interests constitutionally distinct from the freedom from unpopular speech ....[320]

It is difficult to decipher the majority's response. From the opinion's beginning, the Court intentionally intertwined its assessment of state interests regarding access to health clinics with a discussion of the right to be free of unwanted communications.[321] Yet, here the Court eschewed that entanglement. The idea that the opinion's discussion of privacy interests was merely an "observation" simply is not plausible.[322] It also is probably not what the Court

---

of the speaker who seeks to address him on the public sidewalks, where he may simply walk quickly away."). Scholars also criticized *Hill* as an unwarranted extension of privacy interests. Chen, *supra* note 100, at 54–55 (noting that *Hill* "without citing any authority ... extended the state's interest in protecting persons from unwanted speech to other 'confrontational settings' "); Lee, *supra* note 317, at 409 (arguing that the privacy right recognized in *Hill* "is without precedent"); Raskin & LeBlanc, *supra* note 301, at 203 (noting that "the Court's constitutionalization of an interest in being left alone against unwanted speech in public places ... [is] at odds with the notion that the First Amendment protects unpopular speech").

319. *Hill*, 530 U.S. at 718 (quoting Erznoznik v. City of Jacksonville, 422 U.S. 205, 209 (1975)).

320. *Id.* at 718–19 n.25.

321. *Id.*

322. *Id.* at 718 ("[W]e are merely noting that our cases have repeatedly recognized the interests of unwilling listeners.").

intended although it requires some effort to unpack the Court's meaning.

The key to the majority's approach comes in its characterization of the expression subject to regulation within the eight-foot consent zone. The opinion's reference to persistent "importunity, following and dogging"[323] suggests that the Court allowed regulation of speech not because it involved an offensive idea but because it was potentially harassing. Its claim that the law protected patients from "the potential physical and emotional harm suffered when an unwelcome individual delivers a message"[324] similarly indicates a right to be free of fear and intimidation in a reasonably enclosed space rather than a right of audience members to turn away unwanted ideas. Furthermore, this privacy interest was linked to the "right of 'passage without obstruction' "[325] since individuals forced to run a gauntlet of intimidation and abuse may abandon attempts to enter medical clinics.[326]

Viewed in this light, the Court's rhetoric regarding the "right to be let alone" in "confrontational"[327] settings is reasonably narrow and consistent with past precedent. Harassment is an aspect of the common law privacy right—dogged following of another in public is considered an intrusive invasion of privacy.[328] Furthermore, *Madsen* indicated that expression analogous to harassment, i.e., speech involving fighting words, threats, or violence, might have justified the "no-approach" zone involved in that case.[329] Accordingly, *Hill*'s

323. *Id.*

324. *Id.* at 718–19 n.25.

325. *Id.* at 718.

326. Citing a passage involving labor disputes from the early twentieth century, the majority noted that:

> In going to and from work, men have a right to as free a passage without obstruction as the streets afford . . . . [If an offer of communication is declined], as it may rightfully be, persistence, importunity, following and then dogging become unjustifiable annoyance and obstruction which is likely soon to savor of intimidation.

Id. at 717 (quoting American Steel Foundries v. Tri-City Central Trades Council, 257 U.S. 184, 204 (1921)). Justice Scalia accused the majority of "distort[ing] First Amendment law" by relying on an inapposite Clayton Act decision. *Id.* at 753–54 (Scalia, J., dissenting). Justice Scalia correctly notes that the majority carelessly used rhetoric, as opposed to analysis, to make its argument. But the cited passage appeared to be making the point that, at times, unwanted communications can devolve into harassment and obstruction. That simple fact is relevant to assessing privacy interests regardless of the case from which it is derived.

327. *Hill*, 530 U.S. at 716–18.

328. *See supra* note 165.

329. Madsen v. Women's Health Ctr., Inc., 512 U.S. 753 (1994).

willingness to recognize audience captivity to harassing speech in a small, carefully defined area is not a significant extension of the law.

That said, the breadth of majority's rhetoric about the "right to be let alone" detracts from a narrower characterization of the privacy interest. Without clear analysis, the majority opinion encourages litigants and later courts to rely primarily on that rhetoric. Furthermore, the majority repeatedly relied on quotations from its past privacy cases without considering their context. Indeed, the decision relies on quotes from *Madsen*, *Frisby*, *Erznoznik*, *Cohen*, *Rowan*, and *Lehman*, none of which provided direct insight into the parameters of the privacy right in *Hill*. Given the carelessness with which earlier Courts described the parameters of the privacy right, reliance on that rhetoric merely continued uncertainty regarding the Court's doctrine. Finally, although earlier harassing and abusive anti-abortion protests in Colorado appear to have motivated the Court's decisions,[330] the *Hill* protestors were never "abusive or confrontational."[331] This, coupled with the fact that the statute allowed regulation upon a counselor's first approach,[332] is problematic. It allows readers to view *Hill* as a prophylactic decision, protecting a right to be free from unwanted communication in public spaces.

Thus, *Hill* cemented the somewhat schizophrenic nature of the Court's privacy cases. It embraces a narrow conception of privacy as well as broader privacy rhetoric. Recent litigation involving the constitutionality of funeral protest statutes reflects the resulting confusion over *Hill* and the Supreme Court's privacy doctrine.

IV. PRIVACY, DIGNITY, AND COMMUNICATIVE IMPACT

Members and supporters of the Westboro Baptist Church have challenged funeral protest statutes in three states.[333] The Court's privacy cases feature prominently in the litigation, as government officials rely on the broader aspects of *Hill* and the Court's privacy rhetoric to argue in favor of a broad right to be left alone. Lower

330. *See Hill*, 530 U.S. at 709–10. The lower court reviewed the legislative history regarding the nature of such protests in some detail. Hill v. Thomas, 973 P.2d 1246, 1247 (Colo. 1999), *aff'd sub nom.* Hill v. Colorado, 530 U.S. 703 (2000).

331. *Hill*, 530 U.S. at 710.

332. Kitrosser, *supra* note 301, at 1404 (noting that "the statute does not target persistent pursuit or long-term, unwanted contact . . .").

333. *See* Phelps-Roper v. Nixon, 504 F. Supp. 2d 691, 693 (W.D. Mo. 2007), *rev'd*, 509 F.3d 480 (8th Cir. 2007); Phelps-Roper v. Taft, 523 F. Supp. 2d 612, 614 (N.D. Ohio 2007), *aff'd sub nom.* Phelps-Roper v. Strickland, 2008 FED App. 0312P, 539 F.3d 356 (6th Cir. 2008); McQueary v. Stumbo, 453 F. Supp. 2d 975, 977 (E.D. Ky. 2006).

courts have often agreed with state officials, finding that privacy interests justify significant restrictions of peaceful funeral protests. Section A briefly surveys litigation involving statutes in Ohio, Missouri, and Kentucky and highlights that both state officials and lower courts interpret the Court's free speech decisions as encompassing a broad right to be free of offensive speech. Section B explains how these interpretations amount to recognition of a civility-based privacy interest and also discusses the implications of such an interpretation for the Court's free speech doctrine. Finally, Section C describes a privacy interest that is consistent with the Court's current doctrine and how that interest, which is grounded in common law notions of intrusion, justifies certain kinds of funeral protest statutes.

A. Litigation Involving Peaceful Funeral Protest Statutes

The statutes in Ohio, Missouri, and Kentucky restrict peaceful protests in slightly different ways. Missouri's law prohibits all protests "in front of or about" funeral ceremonies for an hour before or after the ceremony.[334] Ohio's law prohibits funeral protests within 300 feet of funeral ceremonies and processions.[335] Kentucky also prohibited protesting within 300 feet of a funeral as well as singing, chanting, making loud noises, or showing observable images within eyesight or earshot of funeral goers.[336] Members or supporters of the Westboro Baptist Church challenged each statute on First Amendment grounds, usually arguing that they were prior restraints, overly broad, and potentially content-based.[337] Focusing primarily on the content discrimination issue, courts agree that the statutes are

334. MO. REV. STAT. § 578.501 (West Supp. 2008).

335. OHIO REV. CODE ANN. § 3767.30 (LexisNexis Supp. 2008).

336. Act of March 27, 2006, 2006 Ky. Acts ch. 50, sec 5(b)–(c). A federal court found the statute unconstitutional in *McQueary v. Stumbo*, 453 F. Supp. 2d 975, 977 (E.D. Ky. 2006). Kentucky enacted a new law prohibiting protests that obstruct access to or otherwise interfere with a funeral, or which involve violence or disorderly conduct. *See* KY REV. STAT. ANN. §§ 525.055–.060 (West 2007). Interestingly, Kentucky's new statute defines as disruptive any "utterance, gesture, or display designed to outrage the sensibilities of the group attending the occasion." *Id.* § 525.145.

337. *See, e.g.*, Complaint at 5, *Taft*, 523 F. Supp. 2d 612 (No. 1:06-CV-02038) (alleging that the statute was a prior restraint and overly broad); Complaint at 13–19, *Nixon*, 504 F. Supp. 2d 691 (No. 06-4156-CV-C-NKL) (alleging, among other things, that the statute was content-based, overly broad, and violated the group's association rights); Complaint at 4–5, *McQueary*, 453 F. Supp. 2d 975 (No. 06-24-KKC) (alleging, among other things, that statute was a prior restraint and overly broad). Members of the Westboro Baptist Church challenged the Ohio and Missouri laws. *Taft*, 523 F. Supp. 2d at 615; *Nixon*, 504 F. Supp. 2d at 694. Bart McQueary, a supporter but not a member of the Church, challenged the Kentucky law. *McQueary*, 453 F. Supp. 2d at 978.

content-neutral.[338] Accordingly, they have analyzed the statutes using intermediate scrutiny, asking whether they are narrowly tailored to meet legitimate state interests and leave open ample alternatives of expression.[339]

1. The States' Description of Privacy Interests and Captive Audiences

The states justify their laws as necessary to protect the privacy interests of mourners who are captive at funeral ceremonies, relying on *Frisby*, *Madsen*, *Hill*, and rhetoric from foundational privacy cases. Citing *Frisby*, Missouri asserted that "citizens are, in many ways, more captive when attending funerals than when in their own homes" since "one should not callously assert that individuals are free to leave a funeral or burial of family member or friend."[340] Ohio asserted that "like medical patients entering a medical facility, funeral attendees are captive."[341] State officials also described mourning as a time of extreme grief and emotional vulnerability, which they argued supported recognition of a privacy interest.[342] One state's brief noted, "the Supreme Court's holdings in *Frisby* and *Madsen* indicate a clear recognition that the First Amendment does not require individuals in sensitive circumstances to endure intrusive speech."[343]

---

338. The federal court in Missouri specifically rejected the plaintiffs' content discrimination argument, finding the laws to be content-neutral under the Supreme Court's precedents, including *Hill*. *See Nixon*, 504 F. Supp. 2d at 695. The district court in Kentucky also devoted significant discussion to this issue, ultimately concluding that the law was content-neutral. *McQueary*, 453 F. Supp. 2d at 981–86. The Ohio district court proceeded from an assumption of content-neutrality as the plaintiffs did not argue otherwise. *See Taft*, 523 F. Supp. 2d at 618. The Sixth Circuit, however, explicitly found the statute to be content-neutral. Phelps-Roper v. Strickland, 2008 FED App. 0312P, 539 F.3d 356, 361 (6th Cir. 2008).

339. *See* cases cited *supra* note 152 and accompanying text.

340. Appellees' Brief, *supra* note 32, at 33; *see also* Response Memorandum in Opposition to Plaintiff's Motion for Preliminary Injunction and in Support of Defendant's Motion for Judgment on the Pleadings at 35, *McQueary*, 453 F. Supp. 2d 975 (No. 06-24-KKC) [hereinafter *McQueary* Response Memorandum] ("[P]rotecting the privacy of grieving families at cemeteries and funeral homes from pickets and protesters is at least as significant, if not more so, than [sic] shielding individuals from unwanted speech in their homes.").

341. State Defendants' Motion for Summary Judgment, *supra* note 31, at 13–14.

342. *See* Appellees' Brief, *supra* note 32, at 33; State Defendants' Motion for Summary Judgment, *supra* note 31, at 19 ("[M]ourners made emotionally vulnerable by grief are entitled to be left alone to deal with their loss in privacy."); *McQueary* Response Memorandum, *supra* note 342, at 32 (noting that "privacy right or interests [sic] is especially compelling during a funeral because of the great potential by protesting at funerals to cause emotional trauma to those close family members grieving the loss of a loved one").

343. Appellees' Brief, *supra* note 32, at 34.

State officials also relied on the "right to be let alone" rhetoric in *Hill*.[344] Missouri asserted that funeral goers "have no means by which to simply avoid speech they do not want to hear. It is entirely unreasonable to suggest that the First Amendment forces individuals and families to forgo collective mourning if they are to avoid hateful speech."[345] The Attorney General of Kentucky similarly argued that funeral goers were captive audiences entitled to be free of unwanted messages in a time of extreme emotional vulnerability.[346] Ohio characterized the appropriate standard for judging captivity as follows:

> [T]he degree to which people's privacy can be protected without running afoul of the First Amendment is a function of the nature of the activity taking place in the location targeted by the protestors. If it is a private activity, if the persons engaged in it are a captive audience for protestors, and if the protest would be, if left unregulated, essentially intolerable, [the state may regulate].[347]

The states' arguments fundamentally misread the Court's cases. They attempt, for example, to characterize funeral protests as inherently intrusive in the same way that *Frisby* characterized targeted protests near the home. *Frisby*, however, recognized such protests as inherently intrusive due to the state's interest in preserving the home as a refuge from the everyday world.[348] That interest does not exist when we are in public, even when attending funerals, and the Court's precedents limit the "inherently intrusive" aspect of *Frisby* to the home.[349] Thus, *Madsen* made clear that the state interest in protecting medical patients from targeted protests extends only to noisy or physically disruptive protests.[350] Furthermore, it is not clear

344. All states quoted liberally from *Hill*. *See id.* at 34 (citing to passages from *Hill* set forth *supra* notes 312–20 and accompanying text); State Defendants' Motion for Summary Judgment, *supra* note 31, at 13–14 (citing to passages from *Hill* set forth *supra* notes 312–20 and accompanying text); *McQueary* Response Memorandum, *supra* note 342, at 29–30 (citing to passages from *Hill* set forth *supra* notes 312–20 and accompanying text).

345. Appellees' Brief, *supra* note 32, at 33.

346. *McQueary* Response Memorandum, *supra* note 342, at 35 ("Persons attending a funeral service are as much unwilling captive audiences as those who are targeted by pickets in their residences .... 'A funeral home seems high on the list of places where people legitimately could be or should be protected from unwanted messages.' "); *id.* at 29–30 (quoting Professor Michael Dorf).

347. State Defendants' Motion for Summary Judgment, *supra* note 31, at 19.

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

349. Hill v. Colorado, 530 U.S. 703, 752 (2000); Madsen v. Women's Health Ctr., Inc., 512 U.S. 753, 772–73 (1994).

350. *See supra* note 283 and accompanying text.

that the statutes at issue, which apply to all peaceful protests within hundreds of feet of a funeral, actually regulate targeted protests. *Frisby* and *Madsen* held that a general ban on all protests was not a narrowly drawn regulation of focused or disruptive protests.[351] Accordingly, the states are wrong to characterize peaceful protests as inherently intrusive.

Ohio's attempt to justify its 300-foot zone by likening funeral goers to captive "medical patients entering a medical facility" is also misguided. The Supreme Court has never held that one is captive simply because one must pass by protestors in order to get to one's destination. *Madsen* and *Schenck* found that patients *inside* the clinic have a privacy interest in being free from noisy disruptions.[352] *Hill* did not hold that people entering a clinic were captive merely when faced with unwanted speech. Rather, it held that people in certain well-defined areas have a privacy interest in being free from harassing and intimidating speech.[353] The states' attempt to link mourners' psychological vulnerability to captivity does not solve their problem. The possible psychological effects of protests on patients clearly concerned the justices in *Madsen* and *Hill.* But neither decision held that such vulnerability was alone sufficient reason to regulate all protests. Rather, psychological vulnerability, combined with potential physical complications resulting from the medical procedure, justified recognition of a privacy interest in freedom from noisy or potentially harassing protests.[354]

This distinction is enormously important in understanding the flaws in the states' arguments. It highlights the Court's attempts to distinguish speech that may be offensive, even psychologically painful, but to which we are not unavoidably captive, from speech that is emotionally and physically harmful precisely because we cannot escape it, as in the case of excessive noise or harassment. Only the latter provides a satisfactory description of captive audiences in public places without running afoul of the Court's " 'longstanding refusal to [punish speech] because [it] may have an adverse emotional impact on the audience.' "[355] This distinction also

351. *See supra* notes 288–89 and accompanying text.

352. *See supra* notes 283–87 and accompanying text.

353. *See supra* notes 320, 323–29 and accompanying text.

354. *See supra* notes 283, 324 and accompanying text.

355. Boos v. Barry, 485 U.S. 312, 322 (1988) (quoting Hustler Magazine, Inc. v. Falwell, 485 U.S. 46, 55 (1988)). Since *Cohen v. California*, 403 U.S. 15 (1971), the Court has repeatedly rejected this notion. Every court to discuss captivity alludes to it. Even *Pacifica* noted that regulation of offensive ideas was inconsistent with the First Amendment. FCC v. Pacifica Foundation, 438 U.S. 726, 745 (1978). The crucial issue has

reveals the error in Missouri's claim that the state may regulate "hateful" speech near funerals and Kentucky's claim that it could protect mourners from unwanted messages.[356] Both arguments amount to little more than a claim that the state may protect mourners from offensive ideas. Ohio's characterization of the Court's privacy cases has similar flaws. How does one determine when a gathering in public is "private" and whether protests "if left unregulated" are "essentially intolerable?"[357] Such a description leaves officials ample room to regulate simply because a protestor's message is offensive.

2. Court Decisions

Most of the court decisions involving funeral protest statutes suffer from the same flaws as the states' arguments. In *Phelps-Roper v. Nixon*,[358] for example, the district court refused to issue a preliminary injunction barring enforcement of Missouri's statute, finding that the state would likely prevail at trial on the privacy issue.[359] Citing to *Frisby*, the court described mourners as "*more* captive than citizens in their own homes" because "funeral spectator[s] cannot leave the funeral or procession without missing the opportunity to pay last respects to the deceased."[360] Accordingly, protestors' actions of "picketing soldiers' funerals and belittling the sacrifices made by soldiers [were] intolerable," and the state met *Cohen*'s threshold showing that privacy interests were " 'invaded in an essentially intolerable manner.' "[361]

The district court, like the state, assumed that audience members were captive simply because they attended a particular function at which they found protestors' message offensive. The court did not

---

been to determine when speech shades from mere offense into an invasion of privacy. Cases like *Frisby*, *Madsen*, *Schenck*, and *Hill* attempt to draw those lines, although they do not always succeed in clearly communicating them.

356. *See* text accompanying notes 344–46.

357. *See* text accompanying note 347.

358. 504 F. Supp. 2d 691 (W.D. Mo. 2007), *rev'd* 509 F.3d 480 (8th Cir. 2007).

359. *Nixon*, 504 F. Supp. 2d at 696. Members of the Westboro Baptist Church sought a preliminary injunction barring enforcement of the law. *Id.* Such requests are generally governed by a four-prong inquiry: (1) whether plaintiff has irreparable injury; (2) whether the balance of hardships tips in favor of plaintiff or defendant; (3) whether plaintiff can show a likelihood of success on the merits at trial; and (4) in whose favor the public interest weighs. *See, e.g.*, Dataphase Sys., Inc. v. C.L. Sys., Inc., 640 F.2d 109, 113 (8th Cir. 1981); *see also* DOBBS, *supra* note 182, § 2.11(2), at 187 (describing typical requirements for preliminary injunctions).

360. *Nixon*, 504 F. Supp. 2d at 696 (emphasis in original).

361. *Id.* (quoting Cohen v. California, 403 U.S. 15, 21 (1971)).

attempt to explain how the protestors' actions disrupted or otherwise intruded upon the ceremony other than to say that their act of protesting and message were "intolerable." This is a substantial extension of the Court's doctrine. As noted above, *Frisby* recognized an especially broad privacy right in the home due to its unique nature as a place of refuge. Later cases, however, refuse to extend that broad privacy right in public, instead requiring a showing that speech physically or aurally invades a defined space in ways that are unavoidable. By recognizing a privacy interest in being free from speech "belittling" the dignity of soldiers' memories, the district court violated fundamental tenets of the Court's jurisprudence.

Subsequently, the Eighth Circuit reversed the district court, holding that the plaintiff had "a fair chance" of proving that the protestors' free speech rights outweighed the state's interest in protecting mourners from unwanted speech.[362] The court did not discuss the issue in depth although it relied on an earlier Eighth Circuit decision striking down an ordinance prohibiting focused picketing near churches.[363] According to that earlier decision, which the *Nixon* court quoted with approval:

> As the Supreme Court said in *Frisby*, "the home is different," and, in our view, unique. Allowing other locations, even churches, to claim the same level of constitutionally protected privacy would, we think, permit government to prohibit too much speech and other communication. We recognize that lines have to be drawn, and we choose to draw the line in such a way as to give the maximum possible protection to speech, which is protected by the express words of the Constitution.[364]

As a result, the Eighth Circuit refused to extend a *Frisby*-like right to privacy in public spaces.

The Eighth Circuit, however, remains the only court to find the state's interest in privacy insufficient to justify a funeral protest statute. However, the district court in *McQueary v. Stumbo*,[365] which paid special attention to the privacy interest, looked as if it might make such a finding regarding Kentucky's law. *McQueary* thoroughly reviewed the Supreme Court's cases from *Cohen* through *Hill*,[366] summarizing the Court's doctrine as follows:

362. Phelps-Roper v. Nixon, 509 F.3d 480, 487 (8th Cir. 2007).
363. Olmer v. City of Lincoln, 192 F.3d 1176, 1178 (8th Cir. 1999).
364. *Nixon*, 509 F.3d at 486–87 (quoting *Olmer*, 192 F.3d at 1178).
365. 453 F. Supp. 2d 975 (E.D. Ky. 2006).
366. McQueary v. Stumbo, 453 F. Supp. 2d 975, 987–92 (E.D. Ky. 2006).

> [Although *Hill*] discussed an "unwilling listener's interest in avoiding unwanted communications," it is not clear that, in the end, the Court found the statute was justified by the state's interest in protecting citizens from unwanted communications .... The Supreme Court generally has resisted the invitation to expand to public spaces the limited right of individuals to be left alone *inside* their homes, even when the messages may prove to be offensive to the listener .... Assuming that the Court found the statute at issue in *Hill* was justified by the state's interest in protecting citizens from unwanted communications even when the citizens are outside the home, the case may simply hold that the state has an interest in protecting citizens from unwanted communications when the communicator approaches within eight feet of the recipient because such communications are so obtrusive that they are impractical or impossible to avoid.[367]

Although this passage involves a nuanced and discerning discussion of the Court's jurisprudence, the district court almost immediately undercut it. According to the court, 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 ... his home. Further, like medical patients entering a medical facility, funeral attendees are captive."[368] Such statements bear striking resemblance to the lower court's reasoning in the Missouri litigation, suggesting a broad view of mourners' privacy interests, including freedom from offensive speech. The next passage further confused the issue: "Whatever the meaning of *Hill*, ... [we] 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."[369] This statement seems to straddle both approaches, implying both a broad privacy interest (protection from unwanted communications) and a narrow interest (communications so obtrusive they are impractical to avoid). Accordingly, *McQueary* never clarified its approach to the privacy interest. Although it eventually struck down the statute as insufficiently tailored,[370] the opinion's confusing discussion allowed other courts to justify their recognition of a broad privacy interest.

---

367. *Id.* at 991–92.

368. *Id.* at 992.

369. *Id.*

370. *Id.* at 996. In its analysis, the court again focused on the nature of the privacy interest. The court differentiated provisions restricting disruptive and noisy protestors

Consequently, in *Phelps-Roper v. Taft*,[371] the district court found mourners sufficiently captive to justify the Ohio statute at issue.[372] Family and friends of the deceased, the court wrote, " '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 the deceased person who was once their own.' "[373] Accordingly, the Court concluded that because "mourners are a captive audience unable to avoid communications simply by averting their eyes, the State of Ohio has a significant interest in protecting its citizens from disruption during the events associated with a funeral or burial service."[374] As in *Phelps-Roper v. Nixon*, the court engaged in little analysis, instead relying primarily on rhetoric, including *McQueary*'s statements acknowledging the existence of a privacy interest.[375] The court did not attempt to explain how protests disrupt funeral ceremonies or how mourners are captive other than its statement that protestors intrude upon mourners' grief and degrade dignity of funeral rites. These statements, however, do not support a finding of captivity under the Supreme Court's doctrine. The court did not find

---

from those prohibiting observable images, noting that privacy interests did not support regulation of the latter. *Id.*

371. 523 F. Supp. 2d 612 (N.D. Ohio 2007), *aff'd sub nom.* Phelps-Roper v. Strickland, 2008 FED App. 0312P, 539 F.3d 356 (6th Cir. 2008).

372. *Id.* at 618–19. The court struck down the buffer zone around funeral processions as "not narrowly tailored, in that it burdens substantially more speech than necessary to serve the State of Ohio's interest protecting its citizens from disruption during the events associated with a funeral or burial service. In other words, because the buffer zone 'floats,' the overbreadth is not only real, but substantial, when viewed in relation to the statute's legitimate sweep." *Id.* at 620.

373. *Taft*, 523 F. Supp. 2d at 618 (quoting Nat'l Archives and Records Admin. v. Favish, 541 U.S. 157, 168 (2004)). *Favish* involved a Freedom of Information Act ("FOIA") request for death-scene photos pertaining to Vince Foster, a well-known Clinton advisor who committed suicide. Government officials refused to disclose the records citing to FOIA's privacy exemption. *Id.* at 161–62. The Supreme Court upheld the government's refusal, finding that the privacy rights of Foster's family outweighed the public interest in disclosure. *Id.* at 171–75. In so doing, the Court specifically noted that FOIA's "statutory privacy right" was broader than the common law or the Constitution. *Id.* at 170. *Favish* played a significant role in the Ohio litigation. *See* Phelps-Roper v. Strickland, 2008 FED App. 0312P, 7, 539 F.3d. 356, 366 (6th Cir. 2008) (noting that *Favish's* concerns and points were significant in the context of funeral services); Final Brief for Defendant-Appellee, Governor Ted Strickland and Attorney General Marc Dann at 10, *Strickland*, 2008 FED App. 0312P, 539 F.3d 356 (No. 07-3600) (arguing *Favish* supports Ohio's interest in protecting mourners' privacy). Because *Favish* arose in a totally different context with a different privacy right, however, it is not a useful analogy.

374. *Taft*, 523 F. Supp. 2d at 619.

375. *Id.* at 618–19 (quoting passage from McQueary v. Stumbo, 453 F. Supp. 2d 975, 992 (E.D. Ky. 2006)).

that protests physically or aurally disrupt funeral ceremonies. Nor did it find the protests harassing. Rather, the core of its finding is that protests disrespect funeral services and that mourners will be forced to encounter them at some point. The court simply accepted the idea that states can protect mourners from speech with offensive messages.

The Sixth Circuit recently affirmed the Ohio district court, finding that the state had an important government interest in protecting "mourners at funerals from unwanted intrusions."[376] After reviewing *Frisby*, *Hill*, and *Madsen*,[377] the court concluded that

> burial rites implicate the most basic and universal human expression "of the respect a society shows for the deceased and for the surviving family members. . . ." Unwanted intrusion during the last moments the mourners share with the deceased during a sacred ritual surely infringes upon the recognized right of survivors to mourn the deceased.[378]

Noting that mourners could not "easily avoid unwanted protests without sacrificing their right to partake in the funeral or burial service," the court found funeral attendees to be captive to intrusive and unwanted speech.[379] As with the lower court, the Sixth Circuit did not explain how otherwise peaceful protests disrupt funeral ceremonies. Moreover, the court seems to have found captivity not because the mourners were constantly exposed to protests during a funeral but, rather, because mere knowledge of protestors' presence inflicted emotional harm.[380] Such an approach does not ground captivity in intrusion or disruption in the traditional sense. Rather, it characterizes people attending an event as captive when they find certain messages at the event offensive.[381]

---

376. *Strickland*, 539 F.3d at 362.

377. *Id.* at 363–65. The Sixth Circuit also relied heavily on *Favish*. *See supra* note 373 for more detailed discussion of *Favish*.

378. *Strickland*, 539 F.3d at 366 (quoting *Favish*, 541 U.S. at 168).

379. *Id.*

380. *Id.* ("Nor can funeral attendees simply 'avert their eyes' to avoid exposure to disruptive speech at a funeral or burial service. The mere presence of a protestor is sufficient to inflict the harm.").

381. The court's finding that the law only prohibited targeted protests, *id.* at 368, does not detract from this conclusion. Although the state may have legitimate reasons to regulate targeted funeral protests, the Supreme Court has made clear that the government may regulate targeted protests as inherently offensive or inherently intrusive only with respect to the home. *See, e.g.*, *supra* notes 280–86 and accompanying text. Outside of that context, the Court has upheld regulations of targeted protests only when such protests pose concrete harms, such as threatening access to medical facilitates. *See, e.g.*, Madsen v. Women's Health Ctr., Inc., 512 U.S. 753, 769 (1994) (upholding thirty-six-foot buffer zone barring targeted protests near medical clinic to preserve access to clinic facilities).

B. *Implications*

Lower court decisions recognizing mourners' privacy rights at funerals are a worrisome extension of the Court's doctrine. Their reasoning disconnects notions of captivity from questions of physical, aural, or harassing invasions, or from any significant inquiry into whether the speech is truly unavoidable. Instead, courts characterize protestors' actions and/or messages as "intolerable" because they occur at or near funeral ceremonies, a place where they conclude mourners are entitled to be left alone.[382] Like the statutes initially regulating peaceful protests, lower courts' equation of intrusiveness with offensiveness recognizes a privacy interest that punishes protestors because they have violated civility norms.

As discussed in Part IIB, protection of a civility-based privacy interest violates fundamental tenets of the Court's jurisprudence. That interest allows officials to regulate because of the communicative impact of speech and potentially leads to unwarranted discrimination against speakers.[383] Ultimately, attempts to regulate speech based upon the audience's response allow "a single community to use the authority of the state to confine speech within its own notions of propriety"[384] and lead to an undesirable standardization of ideas.[385]

---

382. A federal district court used similar reasoning when refusing to set aside a verdict against the Westboro Baptist Church in an invasion of privacy and intentional infliction of emotional distress lawsuit brought by the family of a soldier at whose funeral church member's protested. *See* Snyder v. Phelps, 533 F. Supp. 2d 567, 581 (D. Md. 2008). Maryland has adopted the Restatement's version of the intrusion tort. *See* Furman v. Sheppard, 744 A.2d 583, 585–86 (Md. 2000). According to the court in *Snyder*, "[a] reasonable jury could find . . . that when Snyder turned on the television to see if there was footage of his son's funeral, he did not 'choose' to see close-ups of the Defendant's signs and interviews with Phelps and Phelps-Roper, but rather their actions intruded upon his seclusion." *Snyder*, 533 F. Supp. 2d at 581. The court's reasoning allowed a common law invasion of privacy lawsuit to proceed on the theory that plaintiffs were faced with admittedly offensive speech about their son while watching television in their home. Such reasoning turns the intrusion tort on its head. *See supra* note 16 and accompanying text.

383. *See* Boos v. Barry, 485 U.S. 312, 322 (1988) ("A 'dignity' standard, like the 'outrageousness' standard that we rejected in *Hustler*, is so inherently subjective that it would be inconsistent with 'our longstanding refusal to [punish speech] because the speech in question may have an adverse emotional impact on the audience.' " (quoting Hustler Magazine, Inc. v. Falwell, 485 U.S. 46, 55 (1988)); *Hustler*, 485 U.S. at 55 ("An 'outrageousness' standard runs afoul of our longstanding refusal to allow damages to be awarded because the speech in question may have an adverse emotional impact on the audience.").

384. Post, *supra* note 196, at 632 & n.165.

385. Terminiello v. Chicago, 337 U.S. 1, 4–5 (1949) ("[A] function of free speech under our system of government is to invite dispute .... There is no room under our

Arguably, the overwhelmingly negative response to funeral protests does not reflect society's disagreement with the protestors' message, but rather its disagreement with the existence of any protests at the funeral ceremony. In other words, peaceful protest statutes do not regulate protestors because of the ideas they express but because of their acts of protest at a funeral. The action, rather than the expression, constitutes the intolerable assault on the dignity of mourners and the funeral services.[386] For the following reasons, however, this distinction does not render a civility-based privacy interest more palatable.

First, gauging whether officials regulate because protests are inconsistent with a particular event or because they disagree with a specific message is exceedingly difficult. The current controversy is illustrative. Although some commentators argue that protests, regardless of message, are inconsistent with funerals,[387] it is equally obvious that state legislators and courts responded to the hateful messages of the Westboro Baptist Church.[388] A civility-based privacy interest allows officials to regulate for either reason and may mask their attempts to punish an unpopular point of view.[389] Thus, a civility-based privacy interest may actually encourage officials to act for illegitimate reasons.[390]

Second, fear of illegitimate motive aside, an argument that protests are *per se* inconsistent with the dignity of funeral services

---

Constitution for a more restrictive view. For the alternative would lead to standardization of ideas either by legislatures, courts, or dominant political or community groups.").

386. *See, e.g.*, Stone, *supra* note 254, at 263 (distinguishing between negative response to "exposure to any ideas, regardless of the message conveyed" and negative response to "ideas [people] find offensive or distasteful").

387. *See, e.g.*, McCarthy, *supra* note 43, at 1472; Anna Zwierz Messar, Comment, *Balancing Freedom of Speech With the Right to Privacy: How to Legally Cope With Funeral Protest Problem*, 28 PACE L. REV. 101, 115–16 (2008).

388. In fact, commentators positing the *per se* incompatibility of protests and funerals also fell into this trap, responding to the offensiveness of the Westboro Baptist Church rather than analyzing whether protests generally interfere with the dignity of a funeral ceremony. *See, e.g.*, McCarthy, *supra* note 43, at 1471, 1473–76 (claiming that problems associated with the protests arise not from their "extreme content" but from their "disruptive nature," but then focusing primarily on audience's response to the church's message); *see also* Steven R. McAllister, *Funeral Picketing Laws and Free Speech*, 55 U. KAN. L. REV. 575, 608 (2007) (noting that the issue raised by the protests involves the question of whether "deliberately hurtful messages," such as those propounded by Phelps, deserve First Amendment protection).

389. *See* Vincent Blasi, *The Teaching Function of the First Amendment*, 87 COLUM. L. REV. 387, 410–12 (1987) (reviewing LEE C. BOLLINGER, THE TOLERANT SOCIETY (1986) (discussing manifestations of officials' intolerance)).

390. *Id.* at 411–12 (discussing officials' intolerant actions in domains where they are given great discretion).

imposes a particular orthodoxy regarding funeral services. Importantly, the argument that protests are inconsistent with funerals does not focus on whether protests are physically or aurally disruptive. Rather, it assumes that peaceful protests within certain times and distances of funeral services conflict with these services because of their singular character, mood and setting. By arguing for broad restrictions in the name of protecting the "dignity or reverential nature" of funeral services,[391] the argument attempts to carve out a space in which funerals are to be viewed in a specific manner—i.e., with the utmost reverence and respect.

Certainly, as expressive ceremonies, funeral services are worthy of protection. The Court's doctrine recognizes that government regulators may restrict protests that are incompatible with activities in certain places, such as schools and hospitals.[392] That doctrine is careful, however, to ensure that officials only carve out sufficient space for the protected activities to operate without interference. It does not allow officials to impose greater restrictions affecting our attitudes. In contrast, excluding funeral protestors from hundreds of feet around a ceremony because they *should* respect the dignity or reverential nature of such ceremonies flies in the face of the Court's refusal to allow government-imposed orthodoxy. In *Board of Education v. Barnette*,[393] for example, the Court found unconstitutional a local school board's attempt to require students to recite the Pledge of Allegiance. The Court wrote:

> We can have intellectual individualism and the rich cultural diversities that we owe to exceptional minds only at the price of occasional eccentricity and abnormal attitudes .... If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion.[394]

The Court has similarly rejected attempts to protect certain symbols, such as the American flag, from use in what was considered

391. *See, e.g.*, IDAHO CODE § 18-6409(1) (2007); *see also* statutes cited *supra* notes 173–77.

392. *See* Grayned v. City of Rockford, 408 U.S. 104, 109 (1972) (schools); Madsen v. Women's Health Ctr., Inc., 512 U.S. 753, 776 (1994) (hospitals and medical clinics).

393. 319 U.S. 624 (1943).

394. *See id.* at 641–42.

to be offensive expressive activity.[395] As the Court in *Texas v. Johnson*[396] noted:

> There is . . . no indication—either in the text of the Constitution or in our cases interpreting it—that a separate juridical category exists for the American flag alone. Indeed, we would not be surprised to learn that the persons who framed our Constitution and wrote the Amendment that we now construe were not known for their reverence for the Union Jack. The First Amendment does not guarantee that other concepts virtually sacred to our Nation as a whole—such as the principle that discrimination on the basis of race is odious and destructive—will go unquestioned in the marketplace of ideas. We decline, therefore, to create for the flag an exception to the joust of principles protected by the First Amendment.[397]

As with the flag and the Pledge of Allegiance, there is nothing talismanic about funeral services suggesting that the government should be able to preserve a particularly respectful vision of them.

Indeed, as a factual matter, an argument that funeral ceremonies are necessarily solemn, reverential events to be preserved in a particular fashion is simply untrue. Funeral ceremonies vary widely across and within cultures.[398] Many, even most, are quiet, dignified events. However, funerals in the United States have also taken the form of disruptive protests, for example when large groups mourn the untimely death of a member at the hands of the police.[399] A typical New Orleans Jazz funeral involves both a somber journey to the

395. *See* Texas v. Johnson, 491 U.S. 397, 417–18 (1989); United States v. Eichman, 496 U.S. 310, 317–18 (1990).

396. 491 U.S. 397 (1989).

397. *Id.* at 417–18 (citation omitted).

398. *See generally* ROBERT FULTON, DEATH AND IDENTITY (1965) (discussing sociological studies of death rituals in various cultures); David E. Stannard, *Introduction*, *in* DEATH IN AMERICA vii, at vii (David E. Stannard ed. 1975) (noting class, cultural, and geographic differences in funeral rituals).

399. *See, e.g.*, JOYCE L. KORNBLUH, REBEL VOICES: AN IWW ANTHOLOGY 200 (1964) (discussing 1913 funeral protest of two workers killed by private detectives); *Violent Protests Erupt After Funeral*, ORLANDO SENTINEL, Mar. 26, 2000, at A4 (concerning funeral protest for man shot by police involved 3,000 chanting mourners who "clashed with police"); *AIDS Activists Hold Protest Funeral*, SAN JOSE MERCURY NEWS, June 5, 1998, at 16A (discussing funeral of AIDS victim held in front of the White House as a form of protest); Patrick Boyle & Brian Reilly, *Snyder's Funeral Turns Into Protest*, WASH. TIMES, July 11, 1990, at A1 (discussing how funeral of homelessness activist became a "boisterous protest"); Baker, *supra* note 118, at 955 n.34 (discussing numerous instances of funerals used as protests in the early twentieth century).

gravesite and a more raucous, joyful return through the streets.[400] Furthermore, funeral rituals evolve over time as our culture changes.[401] Actions that seem exceedingly odd now, such as giving gifts of trinkets or alcohol to guests, were once reasonably commonplace.[402] It is simply not possible to distill funeral ceremonies into a rigid formula.

Cemeteries are similarly unique and changing places. Although we currently think of cemeteries as places of repose, they did not always command such respect. Prior to the nineteenth century, "graveyards were treated simply as unattractive necessities to be avoided as much as possible by the living."[403] Many were unkempt and often obliterated if needed for other uses.[404] In the nineteenth century, however, the rural cemetery movement, with its emphasis on nature and beauty, changed attitudes toward cemeteries. Cemeteries built during that period were "so attractive that the majority of visitors were not mourners but strollers and sightseers. For these people the cemetery functioned as an outdoor museum and pleasure ground."[405] Modern cemeteries also have multiple social uses, such as hosting concerts or fundraisers.[406] Some cemeteries have frequently been "rallying points" for political protests, even prior to the actions of the Westboro Baptist Church.[407]

---

400. *See generally* ELLIS L. MARSALIS, JR., *Introduction*, *in* REJOICE WHEN YOU DIE: THE NEW ORLEANS JAZZ FUNERALS 1, 1–3 (La. State Univ. Press 1998) (describing the manner in which a typical jazz funeral unfolds).

401. JOHN S. STEPHENSON, DEATH, GRIEF, AND MOURNING: INDIVIDUAL AND SOCIAL REALITIES 203–14 (1985) (discussing evolution of funeral ceremonies in the eras of sacred, secular and avoided death). Stephenson specifically cites studies showing, for example, that Memorial Day services were "no longer as meaningful" in the 1960s and 1970s as they were during and immediately after World War II. *Id.* at 209 (discussing study by Lloyd Warner). He attributes this phenomenon to our increasingly ambivalent attitudes toward later wars and our tendency to avoid the subject of death. *Id.*

402. *Id.* at 204 (discussing practices at colonial funerals where "[f]unerals came to be seen more and more as major social events, at which one paid one respects and remained for the feasting and drinking that followed").

403. French, *supra* note 4, at 39.

404. *Id.*

405. Jules Zanger, *Mount Auburn Cemetery: The Silent Suburb*, 24 LANDSCAPE, no. 2 1980, 23–24; *see also* STEPHENSON, *supra* note 401, at 217 (noting that rural cemeteries "became popular recreational sights"). The rural cemetery movement was designed to "provide 'a suburban cemetery in which the beauties of nature should, as far as possible, relieve from their repulsive features the tenements of the deceased.' " *Id.*

406. *See* Patricia Leigh Brown, *In Need of Income Cemeteries Are Seeking Breathing Clientele*, N.Y. TIMES, May 25, 2007, at A1 (discussing fundraising efforts such as dinner parties, lecture tours, and Sunday jazz concerts, held on cemetery grounds in an effort to raise money for cemetery upkeep).

407. The Administrator of Arlington National Cemetery testified that:

My point in the above discussion is not to highlight the ways in which funeral ceremonies or activities within cemeteries are particularly undignified. Rather, it is that our views of even the most revered spaces and ceremonies vary across cultures and change over time. Attempts to protect mourners' privacy at funeral ceremonies must ensure that they have the space and freedom to mourn uninterrupted while also preserving a diverse and fluid conception of cemeteries and funeral services.[408] The argument that protests are *per se* inconsistent with funeral services, however, assumes that there is only one acceptable view of such activities and spaces. Accordingly, it privileges a particular world view in a manner inconsistent with the Court's jurisprudence. As Robert Post has noted, the Court's doctrine:

> sketches a sphere of constitutional immunity that extends to speech about public subjects, like "religious faith" or "political belief" or "prominent" persons, even though such speech violates the most elementary civility rules against "exaggeration" or "vilification" or "excesses and abuses." The

---

> Because of our urban location in the heart of our Nation's Capital, Arlington National Cemetery frequently becomes a rallying point for groups wishing to express their opposing views and opinions particularly regarding our Nation's military policies. For this reason, certain conduct within the Cemetery grounds is prohibited under Title 32 of the Code of Federal Regulations, section 553.22(f).... Arlington National Cemetery imposes this prohibition, together with other visitors' rules, to prevent disruptive behavior that could violate the sanctity and dignity of our daily mission—to bury our military dead.... The regulatory prohibition mentioned earlier and visitors' rules for Arlington National Cemetery have, in my opinion, adequately addressed potential demonstrations and disruptive behavior in the past.

Legislative Hearing on H.R. 23, H.R. 601, H.R. 2188, H.R. 2963, H.R. 4843, H.R. 5037, and H.R. 5038, Before the Subcomm. on Disability Assistance and Memorial Affairs of the H. Comm on Veteran's Affairs, 109th Cong. 96–98 (2006) (Statement of John C. Metzier, Superintendent, Arlington National Cemetery). Two things are notable about this statement. First, protests occurred at cemeteries well before the Westboro Baptist Church began its activities, suggesting that it is not so much protests generally but this particular group that most people find incompatible with funeral services. Second, federal officials successfully managed protests by prohibiting them on cemetery grounds rather than creating broad bubble zones, as most states have done.

408. Professor Njeri Rutledge argues for recognition of a "right to mourn" in the context of funeral protest statutes. Njeri Mathis Rutledge, *A Time to Mourn: Balancing the Right of Free Speech Against the Right of Privacy in Funeral Picketing*, 67 MD. L. REV. 295, 315–29 (2008). To protect the rights of mourners, she argues that the Court should expand its existing captive audience doctrine, because "[f]uneral picketing is at least as intrusive if not more so than focused picketing of a residence...." *Id.* at 329. As I argue in the text, such an expansion is not necessary to protect funeral-goers' abilities to mourn as they wish.

> justification for this immunity is that America contains "many" diverse communities which are often in sharp conflict. If the state were to enforce the civility rules of one community, say those of Catholics, as against those of another, say Jehovah's Witnesses, the state would in effect be using its power and authority to support some communities and repress others. But the first amendment forbids the state from doing this, in order that "many types of life, character, opinion and belief can develop unmolested and unobstructed."[409]

Although most of us desperately want the Westboro Baptist Church or other protestors to treat funeral goers with greater respect, as long as their speech is part of public discourse,[410] free speech principles allow regulators to do only so much to require an outward showing of civility.

C. *Revisiting Privacy, Captivity, and Funeral Protests*

None of the above discussion diminishes the validity of mourners' privacy interests. We must define the privacy interest with care, however, to comply with the Court's established doctrine. Although the Court's cases are somewhat unclear, over time they have established certain foundational principles regarding the privacy interest in free speech law. Specifically, these principles establish three spheres of privacy in which individuals' interest in being left alone decreases as they are increasingly in public.

First, privacy interests are at their apex in the home which is "the last citadel of the tired, the weary, and the sick."[411] To protect occupants' privacy, the state may regulate physically and aurally invasive speech.[412] It may also restrict speech that psychically invades

409. Post, *supra* note 196, at 629–30 (quoting Cantwell v. Connecticut, 310 U.S. 296, 310 (1940)); *see also* Post, *supra* note 22, at 2093 ("Although much of our social life occurs within such a social structure, we also inhabit many kinds of social structures that are quite different.").

410. Church members believe that their speech contributes to public debate because they attempt to spread a particular message regarding gay activity and the country's military agenda. *See supra* note 47 and accompanying text. Absent additional factors making their expression low-value, such as fighting words or incitement, their speech falls well within the Court's definition of speech contributing to public discourse. *See supra* note 70–72 and accompanying text. Importantly, peaceful funeral protest statutes do not require speech to be low-value before regulating it, nor are they limited to the Phelps family, whose protests many people regard as especially hateful. Rather, they regulate all protests, including the political protests referred to at Arlington National Cemetery, *supra* note 407, which further supports the notion that the statutes aim at high-value speech.

411. Gregory v. City of Chicago, 394 U.S. 111, 125 (1969) (Black, J., concurring).

412. *See* Kovacs v. Cooper, 336 U.S. 77, 87–89 (1949).

the home, for example through targeted protests.[413] Although such protests may be peaceful, they are analogous to harassment because the very presence of protestors targeting one's residence makes " 'the home . . . something less than a home.' "[414] Finally, the state may regulate indecent expression that arrives through particularly invasive media because of the particularly sordid aspects of profanity and nudity.[415] Again, the exceptional nature of the home as a refuge allows the government to regulate particularly offensive speech in a place where we should not be required to avert our eyes.

Second, the privacy interest is decidedly narrower as the audience moves from the home to other spatially-bounded places. The Court has recognized that individuals in buildings, e.g., medical clinics or schools, have a privacy interest in being free from noisy or physically disruptive protests.[416] Thus, the privacy interest ensures that audience members have sufficient space to engage in their intended activities without interference from physically or aurally invasive speech. Speech that merely offends the audience with its content, however, is not sufficiently invasive to warrant either a finding of audience captivity or an invasion of privacy.[417] The Court has rightfully limited the state's ability to regulate offensive content to the home,[418] and even then such regulation relates primarily to indecency.[419]

---

413. *See* Frisby v. Schultz, 487 U.S. 474, 486–88 (1988).

414. *Id.* at 486 (quoting Carey v. Brown, 447 U.S. 455, 478 (1980) (Rehnquist, J., dissenting)).

415. *See* FCC v. Pacifica Found., 438 U.S. 726, 748–51 (1978). The potential presence of children also affected the *Pacifica* Court's decision. *Id.* at 749.

416. *See, e.g.*, Schenck v. Pro-Choice Network, 519 U.S. 357, 380 (1997) (upholding fixed buffer zones outside of abortion clinics); Madsen v. Women's Health Ctr., Inc., 512 U.S. 753, 785 (1994) (upholding a thirty-six-foot buffer zone and limited noise restrictions outside a clinic that performed abortions); Grayned v. City of Rockford, 408 U.S. 104, 120–21 (1972) (upholding a noise prevention ordinance prohibiting individuals from being purposefully disruptive on grounds adjacent to a school building while school was in session).

417. *Madsen*, 512 U.S. at 773.

418. *See* LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW § 12-19, at 950 n.24 (2d ed. 1988) ("[T]he concept of a 'captive audience' is dangerously encompassing, and the Court has properly been reluctant to accept its implications whenever a regulation is not content-neutral.").

419. For example, an attempt to regulate targeted protests based on their content (i.e., anti-abortion picketing) would surely be struck down despite the recognized privacy interest in the home. *See, e.g.*, Carey v. Brown, 447 U.S. 455, 471 (1980) (striking down law restricting all picketing around dwellings except labor picketing although it recognized that "the sanctity of the home, the one retreat to which men and women can repair to escape from the tribulations of their daily pursuits, is surely an important value"). A court would likely presume that such a law attempts to regulate not because one cannot avert

Third, a carefully circumscribed privacy interest exists in the public forum. The Court has unequivocally stated that audience members do not have a broad right to be free of unwanted speech in public spaces like streets, parks, and sidewalks.[420] The Court also seems willing, however, to recognize a privacy interest in being free from deliberately noisy or physical disruptions if audience members attend a specific event in public, such as a concert or other ceremony.[421] Furthermore, individuals within carefully defined public areas have a privacy interest in freedom from expression that is analogous to harassment, such as "persistent 'importunity, following and dogging' " or close approaches within a confined area.[422] Such expression does not invade privacy because it offends us. Rather, it invades our privacy because it invades our personal space and involves intimidation, fear and possibly significant physical complications.[423]

As this summary demonstrates, the Court has recognized an intrusion-based privacy interest in its free speech cases. Two factors are important to the Court's recognition of that privacy interest: (1) whether the expression involved is invasive, rather than merely offensive; and (2) whether that speech invades an area of seclusion in a manner leaving audience members unable to avoid it (i.e., making them captive).[424] Both factors are critical to the Court's finding of an intrusion-based privacy interest. Even in the home, where the privacy interest is at its apex, the Court has not discarded the requirement of an invasion. Rather, it finds otherwise protected speech as invasive because of the nature of the home as our most important sanctuary from daily life.

Statutes regulating peaceful funeral protests and related court decisions focus only on whether the audience was present at a particular event without also requiring that speech be invasive in the

---

one's eyes, but because the state disagrees with the protestors' message. The latter does not fit within any stated notion of the privacy interest.

420. *See* Hill v. Colorado, 530 U.S. 703, 717 (2000); *Schenck*, 519 U.S. at 358.

421. *Hill*, 530 U.S. at 716; Ward v. Rock Against Racism, 491 U.S. 781 (1989).

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

423. *Id.* at 718 n.25 ("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, i.e., within eight feet.").

424. *Lehman v. City of Shaker Heights*, 418 U.S. 298 (1974), is the sole Court decision to truly depart from this formula, as it seems to have focused primarily on the audience's captivity within a particular space without requiring that speech be invasive in the sense that the Court's precedents have established. See *supra* note 255 for discussion.

sense described above. Attempting to analogize to the home, they justify restricting protests due to the special nature of funeral ceremonies. While such ceremonies are unquestionably an important and unique ritual,[425] they do not warrant finding that all unwanted speech is invasive. As noted above, even in the home the Court's jurisprudence does not ignore the requirement of invasiveness. Assuming it did, however, disposing of the invasiveness requirement simply because one attends a certain function is a mistake. Focusing solely on audience presence in a particular space makes little sense. One is never really captive to space; one always has the choice, whether reasonable or not, to leave.[426] The Court's focus on captivity in a particular space makes sense only when coupled with an inquiry into whether speech is so invasive and beyond the audience's control that it is unavoidable.

Extending the *Frisby* rationale to funeral services because they are particularly unique and deserving of broader privacy protection is also a mistake. One can make that claim about a host of events, ranging from graduation ceremonies to weddings and bar mitzvahs. Although funeral services command enormous sympathy as a ritual, nothing prevents the argument that other momentous occurrences should be free of expression that offends. Who among us wants political protests to sully the intense joy of a wedding?[427] Accordingly, the Court must maintain the requirement that speech be invasive if the captive audience doctrine is to have any limits at all.

What then can states do to protect mourners' privacy at funerals? More than many people realize given the seemingly all or nothing manner in which this debate has been framed. The state can exclude protestors from the immediate area in which a ceremony takes place. Thus, if a funeral service occurs within a public or private building, protestors have no free speech right to attend it. Protestors also may be excluded from outdoor ceremonies, especially those taking place in cemeteries.[428] The Court's doctrine makes clear that individuals have a right to gather for expressive purposes and to exclude

425. Rutledge, *supra* note 408, at 319–20.

426. Strauss, *supra* note 134, at 89.

427. Anti-gay protestors have demonstrated outside of the recent weddings of same sex couples in California. *See, e.g.*, Bobby Caina Calvan, *Religious Foes Call Weddings Immoral*, SACRAMENTO BEE, June 18, 2008, at A22.

428. Such space is not considered to be a forum to which speakers are entitled access. *See supra* notes 60, 162–63 and accompanying text discussing Court doctrine pertaining to speakers on private property and government property amounting to non-public fora.

others.[429] That, coupled with the recognized right to be free of noise or other physical disturbances, argues in favor of excluding protestors from the immediate area in which ceremonies occur.

Laws restricting intentionally noisy or disruptive protests are also unproblematic assuming they are appropriately tailored.[430] Although such laws reach speech that occurs in a traditional public forum, prevention of actual disruption is a legitimate interest.[431] Furthermore, "[i]t is difficult to imagine a deeper intrusion into private life . . . than a demonstration that intentionally interferes with the ability of family members to mourn a loved one in peace."[432] Similarly, laws preventing harassing protests or protests that impede access to the funeral fall within the recognized privacy interests in *Madsen*, *Schenck*, and *Hill*.

Laws that restrict peaceful protests for hundreds of feet around funeral ceremonies, however, cannot legitimately claim to do so in the name of protecting privacy. All such protests do not invade the funeral ceremony, since, by definition, they are peaceful, nondisruptive, and do not involve harassment. Even if one argues that the presence of protestors distracts mourners (regardless of message), such an argument supports removing protestors only from the area immediately adjacent to the ceremony and not from the overall location.[433] In other words, a small buffer zone is appropriate to preserve the mourners' ability to carry on a ceremony without disruption. Large buffer zones, however, protect mourners not only during the ceremony but as they enter buildings or cemeteries as well. Such persons are not captive to intrusive speech. They can proceed by peaceful protestors while averting their eyes. Admittedly,

429. Boy Scouts of America v. Dale, 530 U.S. 640, 641 (2000); Hurley v. Irish-America Gay, Lesbian & Bisexual Group of Boston, 515 U.S. 557, 580–81 (1995).

430. Discussion of the tailoring issue under intermediate scrutiny is beyond the scope of this Article. Other commentators have surveyed the validity of funeral statutes in light of the Court's intermediate scrutiny standard. *See, e.g.*, McAllister, *supra* note 388, at 595–602 (generally discussing whether statutes survive intermediate scrutiny); Andrea Cornwell, Comment, *A Final Salute to Lost Soldiers: Preserving the Freedom of Speech at Military Funerals*, 56 AM. U. L. REV. 1329, 1346–71 (2007) (discussing whether federal law would survive intermediate scrutiny); Megan Dunn, Note, *The Right to Rest In Peace: Missouri Prohibits Protesting at Funerals*, 71 MO. L. REV. 1117, 1131–38 (2007) (discussing application of intermediate scrutiny to Missouri's law).

431. *See* Grayned v. City of Rockford, 408 U.S. 104, 115–21 (1972).

432. HEYMAN, *supra* note 191, at 154–55.

433. I distinguish such regulations from existing statutes regulating peaceful protests. The purpose of a small buffer zone protecting the area immediately adjacent to the ceremony is to preserve funeral-goers' ability to mourn as they see fit. The current statutes, by using large buffer zones to protect against civility transgressions, regulate protestors in order to enforce a particular attitude toward funerals.

mourners may initially see or hear such speech, but the Court does not recognize a right never to see or hear unwanted speech in public. Rather, it recognizes a right to be free from constant, unavoidable exposure.[434] Similar problems arise with attempts to protect mourners during funeral processions. Unless protestors attempt to participate in, interrupt, or otherwise harass a procession, it is difficult to argue that individuals in funeral processions are "captive" to speech along the roadside although they may find the expression unpleasant.

CONCLUSION

"Great cases like hard cases," Justice Holmes once said, "make bad law."[435] Such cases "are called great . . . because of some accident of immediate overwhelming interest which appeals to the feelings and distorts the judgment. These immediate interests exercise a kind of hydraulic pressure which makes what previously was clear seem doubtful, and before which even well settled principles of law will bend."[436] Some of the Court's cases involving the clash of privacy interests and free speech were great. Most of them were unquestionably hard. Whether they made bad law is less clear.[437] We do know that the doctrine resulting from the Court's decisions is distinctly lacking in clarity.

Litigation over the legitimacy of funeral protests, however, has the potential to make very bad law. The combination of an ill-defined interest, unclear doctrine, and controversial protests has "exercise[d] a kind of hydraulic pressure" that threatens to engulf our understanding of this issue. It has caused state officials and courts to respond out of emotion rather than with careful analysis of the Court's precedents. The resulting law, if it remains, will have a lasting and detrimental impact on our free speech jurisprudence.

---

434. *See, e.g.*, MELVILLE B. NIMMER, ON FREEDOM OF SPEECH 1–33 (1984) ("[I]nvoluntary but merely momentary contact with the speech of others enough to invoke a captive audience basis for suppressing the unwelcome speech would largely undermine the entire freedom of speech fabric.").

435. N. Sec. Co. v. United States, 193 U.S. 197, 400 (1904) (Holmes, J., dissenting).

436. *Id.*

437. Commentators have argued that specific decisions are wrong, poorly reasoned, and often the result of political pressure regarding unpopular speakers. Justice Scalia, for example, has argued that the Court's upholding restrictions of anti-abortion speech was motivated by politics. *See* Hill v. Colorado, 530 U.S. 703, 741 (2003) (Scalia, J., dissenting); Madsen v. Women's Health Ctr., Inc., 512 U.S. 753, 785 (1994) (Scalia, J., dissenting).