CROSSING THE LINE: RECONCILING THE RIGHT TO PICKET MILITARY FUNERALS WITH THE FIRST AMENDMENT

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You might think you can pass laws that stop us from preaching at the funerals of your Godless brats, but it isn't going to happen. The Messengers of God do not stop preaching the truth just because you pass laws. Here's a little secret. Kansas has had funeral picketing laws for years and we still picket funerals in Kansas!!![1]

I. Introduction

When Albert Snyder arrived at the St. John's Roman Catholic Church in Westminster, Maryland to bury his only son—Matthew, a Marine Lance Corporal who died in Iraq a few days earlier—he was greeted by a group of protestors carrying signs that read "Semper Fi Fags" and "You're Going to Hell."[2] The protestors were members of the Westboro Baptist Church (WBC) headquartered in Topeka, Kansas.[3] Snyder sued the church for invading his privacy and for intentionally inflicting emotional distress on him during the funeral service.[4] A federal jury ultimately agreed with Mr. Snyder and awarded him $2.9 million in compensatory damages, $6 million in punitive damages for

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1 GODHATESAMERICA.com, God Hates America—A Warning to the USA, http:// www.godhatesamerica.com/index.html [hereinafter GODHATESAMERICA.com] (last visited Oct. 23, 2008).

2 Brendan Kearney, *Marine's Father, Church Members Testify*, DAILY RECORD, Oct. 23, 2007, *available at* http://www.internetlawyer.com/article.cfm?id=3141&type=UTTM.

3 *Id.*

4 *Id.*

invasion of privacy, and $2 million for emotional distress.[5] The lawsuit was the first of its kind filed against the WBC and it is unlikely to be the last.

Members of the WBC have gained notoriety over the past several years by staging protests at a number of high-profile funerals throughout the country. The WBC first gained national attention in 1998 when it conducted an antigay rally at the funeral of Matthew Sheppard, a University of Wyoming student who was brutally murdered because he was gay.[6] Since then, WBC members have protested memorial services for victims of 9/11,[7] memorial services for victims of the Columbine massacre,[8] and the funerals of twelve miners who suffocated in a coal mine in Sago, West Virginia.[9] They also publicly celebrated the deaths of five young Amish girls who were savagely executed by a pedophile at their elementary school in Pennsylvania.[10] Members of the group even protested the funeral of America's beloved Mister Rogers.[11]

While the church generally garners a few disparaging headlines from protesting these high-profile memorials, it has managed to heap almost universal condemnation upon itself for picketing the funerals of fallen servicemembers. More than thirty-eight states have introduced legislation banning protests at military funerals and twenty-nine have

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[5] *Church Ordered to Pay $10.9 Million for Funeral Protest*, CNN.com, Oct. 31, 2007, http://www.cnn.com/2007/US/law/10/31/funeral.protests.ap/.

[6] Kathryn Wescott, *Hate Group Targeted by Lawmakers*, BBC NEWS, May 25, 2006, http://news.bbc.co.uk/1/hi/world/americas/5015552.stm.

[7] Brian Goodman, *Funeral Picketers Sued By Marine's Dad*, CBS NEWS.COM, July 28, 2006, http://www.cbsnews.com/stories/2006/07/27/national/main1843396.shtml.

[8] Dr. Clarissa Pinkola Estès, *Virginia Tech Protection Needed: As with Columbine Funerals and Memorial Services, Pastor Fred is Coming to Spread His Screed at VT*, MODERATE VOICE, Apr. 18, 2007, http://the moderate voice.com/religion/12273/Virginia-tech-protection-needed-as-with-columbine-funerals-and-memorial-services-pastor-fred-is-coming-to-spread-his-screed-at-vt/.

[9] Goodman, *supra* note 7.

[10] Sara Bonisteel, *Anti-Gay Kansas Church Cancels Protests at Funerals for Slain Amish Girls*, FOX NEWS.com, Oct. 4, 2006, http://www.foxnews.com/story/0,2933,217760,00. html. The Westboro Baptist Church had originally intended to protest the funerals of the five young victims in Lancaster County, Pennsylvania, but decided to accept the offer of a radio talk show host to publicize their message over the radio instead of at the funeral. The WBC accepted the free airtime in exchange for abandoning the protests. *Id.*

[11] Philip Elliott, *Radicals to Protest at Funeral*, FREE REPUBLIC, Jan. 8, 2006, http://www. freerepublic.com/focus/f-news/1554039/posts. Members of the group protested Rogers's funeral claiming that as a Presbyterian minister he failed to adequately condemn gay people. *Id.*

already approved such measures.[12] In 2006 President Bush signed the Respect for America's Fallen Heroes Act (RAFHA), banning funeral protests at national cemeteries under the federal government's control.[13] Generally, these statutes aim to diminish funeral picketing in a couple of ways. Some make it a crime to shout, whistle, yell, or wave signs for a certain period of time before and after a funeral service is held.[14] Others incorporate buffer zones ranging from 100 to 2000 feet that bar any activity within a certain distance of the ingress or egress of a church, funeral home, or cemetery where a funeral service or memorial is taking place.[15]

This article examines the constitutionality of funeral picketing laws at the state and federal level. Although the article focuses on funeral protest forums in the state of New York, the legal tests and standards discussed therein apply to funeral picketing laws in every state. This article focuses on New York because it presents a unique opportunity to demonstrate how state funeral picketing laws and the RAFHA apply to the many private and national cemeteries located within the state, and how the Supreme Court would apply a distinct set of laws to cemeteries located on military installations like West Point, New York.

The article will explore these funeral picketing laws in a number of different contexts. First, it will examine two distinct funeral picketing bills originally considered by the New York Senate and State Assembly before the governor signed the Senate version into law in 2008. After thoroughly analyzing both bills under the First Amendment, the article will conclude that the Assembly bill impermissibly favored certain forms of expression over others and its buffer zone restriction stifled protected speech. The Senate's buffer restriction, embodied in the current statute, is lawful but its disorderly conduct provisions are unconstitutionally vague. Second, the article will propose a model statute that addresses these shortcomings and incorporates some of the best features of other states' funeral picketing laws. Third, the article will examine the RAFHA and conclude that most of the statute comports with the First Amendment except for its untenable buffer zone restrictions. Lastly, the

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[12] Anti-Defamation League.org, Fred Phelps and the Westboro Baptist Church: In Their Own Words, http://www.adl.org/special_reports/wbc/default.asp (last visited Oct. 23, 2008).

[13] 38 U.S.C.S. § 2413 (LexisNexis 2008).

[14] *See infra* notes 156–57 and accompanying text.

[15] Stephen R. McAllister, *Funeral Picketing Laws and Free Speech*, 55 KAN. L. REV. 575, 580 (2007). The most common buffer zone is 300 feet. *Id.*

article will explain how the Supreme Court has made it virtually impossible to stage protests on military installations, especially for groups like the Westboro Baptist Church.

II. The Westboro Baptist Church

It is almost impossible to understand the philosophy of an organization like the Westboro Baptist Church without understanding something about its founder, Fred Waldron Phelps Sr. Phelps had "as normal and beautiful a home life as anyone ever wanted" according to one of his relatives.[16] Phelps's mother died of throat cancer when he was five years old, leaving him and his younger sister to be cared for by their maternal aunt when his father was away on business.[17] Phelps's aunt later died in a car crash, robbing him of the influence of the two most prominent women in his life.[18] Despite his incredible loss, Phelps excelled in grade school and ended up ranking sixth in his graduating high school class.[19] Phelps's stellar grades enabled him to fulfill a dream that he had been working for all of his young life—accepting an appointment to the United States Military Academy (USMA).[20] Phelps was only sixteen when he graduated high school so he could not enter West Point until after his next birthday.[21] He spent most of the next year preparing to attend West Point.[22] A few months before he was eligible to report, Phelps attended a religious revival at a local Methodist Church that would forever change the direction of his life.[23]

Phelps abandoned his dreams of attending West Point and instead became an ordained Southern Baptist minister, or "Primitive Baptist preacher" as he describes himself.[24] Phelps's first brush with controversy came in 1947 when he conducted a religious revival to convert a large group of Mormons living in Vernal, Utah.[25] His

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[16] Joe Taschler & Steve Fry, *The Transformation of Fred Phelps*, TOPEKA CAP.-J., http://www.cjonline.com/webindepth/phelps/stories/080394_phelps01.shtml (last visited Oct. 27, 2008).
[17] *Id.*
[18] *Id.*
[19] *Id.*
[20] *Id.*
[21] *Id.*
[22] *Id.*
[23] *Id.*
[24] *Id.*
[25] *Id.*

preaching angered the crowd so much that they rushed the platform and tried to yank him from the stage.[26] In 1951, *TIME* magazine ran a story about him preaching to groups of college students about the "sins committed on campus by students and teachers," sins that included profanity, filthy jokes, and lusting after the flesh.[27] Shortly after that, in 1955, Phelps and his wife moved to Topeka, Kansas where he launched the WBC.[28]

There are approximately seventy-five members of the WBC, most of whom are related to Phelps.[29] One reporter who visited the church observed that the building itself "feels like a bunker—from its chain-link fence to its sign pockmarked from gunshots and the enormous American flag hanging at half staff and upside down in front of the building."[30] Another reporter noted that inside the church the "fluorescent lights shine on no crosses or paintings or statues, just a world map and a few signs. 'Thank God for Maimed Soldiers,' reads one."[31] Members of the church are expected to pay ten percent of their earnings to the church, live a secluded lifestyle, and travel around the country spreading the church's inflammatory message.[32] Members of the WBC have taken part in over 25,000 protests since they picketed the funeral of Matthew Shepard in 1998.[33] Most of the WBC's protests center on one topic—homosexuality. Phelps's campaign against homosexuality intensified when Democratic politicians started courting gay voters.[34] Phelps started protesting locally in Topeka against people that he suspected were gay and against local businesses he suspected employed gay people.[35] Members of the WBC even protested the funerals of people Phelps suspected had died of AIDS.[36]

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[26] *Id.*
[27] *Id.*
[28] Kerry Lauerman, *The Man Who Loves to Hate*, MOTHER JONES, Mar./Apr. 1999, *available at* http://www.motherjones.com/news/feature/1999/03/lauerman.html.
[29] Matt Sedensky, *The Kansas Preacher's Message of Hate*, ASSOCIATED PRESS, June 4, 2006, *available at* http://www.azstarnet.com/sn/byauthor/132099.
[30] Lauerman, *supra* note 28.
[31] Sedensky, *supra* note 29.
[32] *Id.*
[33] *Id.*
[34] Lauerman, *supra* note 28. Interestingly, Phelps has dabbled in politics as a democratic candidate for a number of offices. He unsuccessfully ran for governor of Kansas in 1990, 1994, and 1998. He also lost a bid for the U.S. Senate in 1992. *Id.*
[35] *Id.*
[36] *Id.*

After fifteen years of campaigning against homosexuality, Phelps's congregation began to fix their sights on the funerals of servicemembers killed in Iraq and Afghanistan. Members of the church began protesting military funerals in the summer of 2005.[37] The church's decision to picket Soldiers' funerals is as perplexing as it is disturbing. Apparently Phelps and his followers believe that God is killing American Soldiers because they defend a government policy that supports and condones homosexuality.[38] One might suspect that the "don't ask, don't tell"[39] policy would factor into the WBC's disdain for the military, but the group has never gone on record as saying so. Nevertheless, WBC members have conducted hundreds of military funeral protests over the past two and a half years.[40] Members of the group typically chant and carry signs that read "Thank God for Dead Soldiers," "God Hates Fag Soldiers," "Thank God for IEDs," and "God Blew Up the Soldier," among other slogans.[41]

While the WBC has garnered significant media publicity from protesting high profile funerals, it has also drawn unwanted attention from a number of states and the federal government. The U.S. Congress and thirty-eight states have passed funeral protest laws designed to curb the WBC's practice of picketing military funerals.[42] A number of other states are currently in the process of enacting similar legislation, New York being the most recent among them. The next two sections of this article will outline the process the Supreme Court has established for analyzing speech restrictions under the First Amendment. Section III will examine some peripheral considerations likely to impact funeral picketing laws like the fighting words and captive audience doctrines.

[37] Sedensky, *supra* note 29.
[38] Goodman, *supra* note 7.
[39] In 1993, Congress enacted the controversial "don't ask, don't tell" policy which makes it a crime for servicemembers to engage or attempt to engage in homosexual acts, to publicly state that they are a practicing homosexual or bisexual, or to marry or attempt to marry a person of the same biological sex. *See* 10 U.S.C. § 654 (2000).
[40] GODHATESAMERICA.com, *supra* note 1.
[41] *Id.*
[42] *See* McAllister, *supra* note 15, at 579. Section IV of Mr. McAllister's article provides a table of states that have passed funeral protest statutes along with their respective code citations, to include Alabama, Arkansas, California, Colorado, Delaware, Florida, Georgia, Idaho, Illinois, Indiana, Iowa, Kansas, Kentucky, Louisiana, Maryland, Michigan, Minnesota, Mississippi, Missouri, Montana, Nebraska, New Jersey, New Mexico, North Carolina, Ohio, Oklahoma, Pennsylvania, Rhode Island, South Carolina, South Dakota, Tennessee, Texas, Utah, Vermont, Virginia, Washington, Wisconsin, and Wyoming. States currently considering similar legislation are Connecticut, Maine, New Hampshire, New York, Nevada, North Dakota, Oregon, Rhode Island, and West Virginia.

Both have the potential to become decisive issues in these types of cases because if the Court finds one or the other applicable, it can terminate its constitutional inquiry there. Section IV will examine the principles and standards of review traditionally applicable to free speech cases and will apply them to the provisions of the New York funeral-picketing statute.

III. Peripheral Considerations and Speech Restrictions

A. Protected and Unprotected Speech

In order to assess the constitutionality of a regulation that purports to burden free speech, the Court must first determine if the regulation is content-neutral or content-based.[43] Generally, a content-based regulation is one where the government seeks to restrict speech because it disagrees with the ideas or views of the speaker's message.[44] On the other hand, a regulation that imposes incidental restrictions on speech without referencing the views or ideas of the speaker's message is generally considered content-neutral.[45] The distinction between the two can be difficult to discern and is often crucial in determining a regulation's survivability. Content-based regulations are subject to strict scrutiny,[46] while content-neutral regulations are subject to intermediate level review.[47] Strict scrutiny requires a state to demonstrate that its regulation is narrowly tailored to achieve a compelling government interest.[48] Intermediate review, however, requires that the regulation serve a significant government interest, that it be narrowly tailored, and that it leave open alternative channels of communication.[49]

In analyzing whether a regulation is content-based , it is important to remember that not all speech is protected under the First Amendment. The Supreme Court has noted on more than one occasion that "the right of free speech is not absolute at all times and under all circumstances."[50]

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[43] *E.g.*, Perry Educ. Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37, 45 (1983).
[44] *E.g.*, Turner Broad. Sys. v. FCC, 512 U.S. 622, 643 (1994) (citing Burson v. Freeman, 504 U.S. 191, 197 (1992)).
[45] *E.g.*, *id*. (citing City Council of L.A. v. Taxpayers for Vincent, 466 U.S. 789, 804 (1984)).
[46] Texas v. Johnson, 491 U.S. 397, 412 (1989).
[47] *Id*. at 407.
[48] Frisby v. Schultz, 487 U.S. 474, 481 (1988).
[49] Ward v. Rock Against Racism, 491 U.S. 781, 803 (1989).
[50] Chaplinsky v. New Hampshire, 315 U.S. 568, 571 (1942) (citing Schenck v. United States, 249 U.S. 47 (1919), and other related cases).

Certain categories of speech are of such little social value that the Court affords them no constitutional protection at all. These categories include speech that incites imminent lawless behavior, obscenity, child pornography, defamation, false advertising, and fighting words.[51] Of these categories, fighting words is the only one remotely applicable to funeral picketing cases, as the following cases demonstrate.[52]

B. Fighting Words

The Supreme Court established the fighting words doctrine in the case of *Chaplinsky v. New Hampshire*.[53] Walter Chaplinsky was convicted under a breach of peace statute for standing on a public sidewalk and calling the town marshal a "God damned racketeer" and a "damned fascist."[54] The facts indicate that Chaplinsky had been denouncing other religions prior to the police showing up, that some local residents complained about it, and that Chaplinsky got into a shouting match with a police officer who arrived on scene. In deciding the case, the Court explained that fighting words are "those which by their very utterance inflict injury or tend to incite an immediate breach of the peace."[55] The Court also observed that fighting words "are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality."[56] Finally, the Court concluded that "resort to epithets or personal abuse is not in any proper sense communication of information or opinion safeguarded by the Constitution."[57] The Court ultimately upheld the statute because its primary intent was to curtail expression that tended to breach the peace.[58]

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[51] JOHN E. NOWACK & RONALD D. ROTUNDA, CONSTITUTIONAL LAW HORNBOOK SERIES 1131–32 (7th ed. 2004).
[52] Imminent lawless behavior has thus far played no role in funeral picketing cases because the protests have not been directed at inciting or producing such behavior or action. The mere fact that funeral picketing has the potential to breach the peace is insufficient for such a finding. Texas v. Johnson, 491 U.S. at 409 (citing Brandenburg v. Ohio, 395 U.S. 444, 447 (1969)).
[53] 315 U.S. 568 (1942).
[54] *Id*. at 569.
[55] *Id*. at 572.
[56] *Id*.
[57] *Id*.
[58] *Id.* at 573–74.

In subsequent fighting words cases, it is interesting to note that the Supreme Court has either substantially narrowed the doctrine or ignored it altogether. Today the Court seems to focus on two particular aspects of fighting words cases. First, it will try to determine whether the speech can be construed as a direct personal insult to the listener or an invitation for him to exchange blows with the speaker.[59] Next, the Court will consider the speech's impact on the audience and whether the speech tended to stir them to anger or incite them to violence.[60]

Two seminal cases define the fighting words doctrine as it is currently understood. The first is *Texas v. Johnson*.[61] Gregory Lee Johnson attended a political demonstration in front of the Dallas City Hall where he pulled a flag out of his pants and burned it in the middle of a crowd of onlookers.[62] Even though the gesture was offensive, the Court rejected the notion that such a symbolic act amounted to fighting words because "[n]o reasonable onlooker would have regarded Johnson's generalized expression of dissatisfaction with the policies of the Federal Government as a direct personal insult or an invitation to exchange in fisticuffs."[63] In *Cohen v. California*,[64] the other seminal case, Paul Robert Cohen was convicted for breaching the peace when he wore a jacket into a municipal courthouse that read "Fuck the Draft" on the back.[65] Much like the decision in *Texas v. Johnson*, the Court reasoned that "[n]o individual actually or likely to be present could reasonably have regarded the words on appellant's jacket as a direct personal insult."[66] The reasoning of these two decisions have led some critics to argue that the Court has simply reduced the fighting words doctrine to words that are directed to a particular individual during a face-to-face confrontation.[67]

What *Cohen* and *Johnson* also make very clear is that the Court will closely examine the actual circumstances surrounding the utterance of the expression, asking if it "is directed to inciting or producing imminent

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[59] Texas v. Johnson, 491 U.S. 397, 409 (1989).
[60] Cohen v. California, 403 U.S. 15, 20 (1971).
[61] 491 U.S. 397.
[62] *Id*.
[63] *Johnson*, 491 U.S. at 409. Johnson burned the flag as a form of personal protest against some of the Reagan administration's policies. *Id.*
[64] 403 U.S. 15.
[65] *Id*.
[66] *Id*. at 20.
[67] GEOFFREY STONE ET AL., THE FIRST AMENDMENT 88 (2d ed. 2003).

lawless action and is likely to incite or produce such action."[68] The Court draws a distinction between speech that simply stirs people to anger and speech that is intended to incite violence. In *Terminello v. Chicago*[69] the Court held that

> a function of free speech under our system of government is to invite dispute. It may indeed serve its high purpose when it induces a condition of unrest, creates a 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. That is why freedom of speech . . . is nevertheless protected against censorship or punishment, unless shown likely to produce a clear and present danger of a serious substantive evil that rises far above public inconvenience, annoyance, or unrest.[70]

The Court reversed Johnson's flag burning conviction in part after noting that no serious breach of the peace or explosive audience reaction took place when he unfurled the flag and burned it in front of several hundred onlookers, even though many witnesses were seriously offended.[71] Similarly, the Court set aside Mr. Cohen's conviction partly because no one reacted violently to his jacket and because Cohen did not intend to incite potential onlookers to violence or urge them to commit other lawless acts.[72]

When it comes to protesting military funerals, it is unlikely that the fighting words doctrine will ever be used as a basis to uphold funeral picketing laws. Most judges will be hard-pressed to conclude that expressions like "God Hates America," "God Bless the IED," and "God Hates Fag Soldiers" are specifically directed at individual funeral attendees, and in particular members of the deceased's family. Additionally, when funeral picketers conduct their protests several hundred feet away from cemetery exits and entrances as they have in the

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[68] *Johnson*, 491 U.S. at 409 (citing Brandenburg v. Ohio, 395 U.S. 444, 447 (1969)).
[69] 337 U.S. 1 (1949).
[70] *Id*. at 4.
[71] *Johnson*, 491 U.S. at 401.
[72] Cohen v. California, 403 U.S. 15, 20 (1971).

past, the likelihood of an actual face-to-face confrontation with an angry family member is substantially diminished. To date, there have been no reported instances of protestors being attacked or assaulted by angry family members or other funeral attendees. Those two factors—the lack of violence coupled with the fact that the messages being expressed do not target specific individuals—are likely to convince most judges that the protestors' expressions do not constitute fighting words and are therefore constitutionally protected. Furthermore, it is interesting to note that the Supreme Court has not upheld a fighting words conviction since the *Chaplinsky* decision in 1942.[73]

C. The Captive Audience

Even though the Court is extremely hesitant to suppress speech that seriously offends an audience or arouses it to anger, the Court has been willing in certain circumstances to protect unwitting listeners from unwanted expression.[74] For instance, in *Frisby v. Schultz*[75] the Court upheld the convictions of a group of pro-life protestors who picketed the residence of an abortion doctor, noting that the group's picketing activity forced the doctor to become a captive audience in his home despite the significant privacy interests he enjoyed there.[76] The *Frisby* decision confirmed the Court's willingness to distinguish between offensive messages that take place within the walls of one's home from those that take place outside it.[77]

When expression takes place in public, the Court has consistently observed that "we are often 'captives' outside the sanctuary of the home and subject to objectionable speech."[78] The *Cohen* case is a good example. There the Court rejected the notion that unwitting onlookers who had been momentarily subjected to the offensive language on Mr. Cohen's jacket had become captive to his message. It reasoned that onlookers who found Mr. Cohen's jacket offensive could have avoided it by simply averting their eyes to another part of the courthouse.[79]

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[73] STONE, *supra* note 67, at 88.
[74] *Cohen*, 403 U.S. at 21.
[75] 487 U.S. 474 (1988).
[76] *Id*. at 486–87.
[77] *Id.* at 486–88.
[78] Rowan v. Post Office Dep't, 397 U.S. 728, 738 (1970).
[79] Cohen v. California, 403 U.S. 15, 21–22 (1971).

The *Cohen* Court also established a test to determine when the government may protect unwitting observers from unwanted speech: "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 interests are being invaded in an essentially intolerable manner."[80] In the funeral picketing context, the question becomes whether a family's right to grieve rises to the level of a substantial privacy interest. Since funeral picketing statutes are so new, courts have yet to fully consider the issue. The Supreme Court did note in an unrelated case that "family 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."[81] In 2006, a federal judge in Kentucky made a similar observation:

> A funeral is a deeply personal, emotional and solemn occasion. Its attendees have an interest in avoiding unwanted, obtrusive communications which is at least similar to a person's interest in avoiding such communications inside his home. Further, like medical patients entering a medical facility, funeral attendees are captive. If they want to take part in an event memorializing the deceased, they must go to the place designated for the memorial event. . . . [T]he Court will assume that the state has an interest in protecting funeral attendees from unwanted communications that are so obtrusive that they are impractical to avoid.[82]

Most judges considering the legality of funeral picketing laws will recognize that families have a substantial privacy interest in mourning the loss of a loved one at a funeral service. They may also likely conclude that singing, whistling, chanting, and silently holding signs do not invade those interests in an essentially intolerable manner. That of course, depends on the facts of each case. In some, the circumstances may indicate that the funeral service was so closely located to the protest

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[80] *Id*.
[81] Nat'l Archives & Records Admin. v. Favish, 541 U.S. 157, 168 (2004). The Court in this case was referring to the privacy interest of former White House counsel Vincent Foster's family, who sought to prevent the release of photographs pertaining to Mr. Foster's suicide as part of a Freedom of Information Act request.
[82] McQueary v. Stumbo, 453 F. Supp. 2d 975, 992 (E.D. Ky. 2006).

that the captive audience doctrine may very well apply. In others, courts may conclude that the protestors were far enough away from the funeral that attendees could have simply averted their eyes and ears away from unwelcome expression. Because the captive audience doctrine is so fact-driven, judges will continue to shy away from it and opt to strike down funeral protest statutes on other, more traditional grounds. The next section of the article will address the principles and standards of review that apply in almost every speech case, and in particular to the funeral picketing bills that were proposed by the New York Legislature.

IV. State Funeral Protest Laws: Analyzing New York's Legislation

It is sometimes difficult to tell whether a regulation restricting speech is content-neutral or content-based simply by looking at its language. In *Ward v. Rock Against Racism*,[83] the Court held that "the principle inquiry in determining content-neutrality . . . is whether the government has adopted a regulation of speech because of disagreement with the message it conveys."[84] One way a court can determine the government's motive for enacting a particular regulation is to consider the regulation's legislative history.

A. Legislative History

New York Assembly Bill A02779 intended to make it a crime to protest within 300 feet of any building or parking lot where a funeral service or memorial takes place.[85] It further sought to ban singing, chanting, whistling, or other loud noises without first seeking authorization from the deceased's family members or from the person conducting the funeral service.[86] Pertinent sections of the bill can be found in Appendix A. The justification memo accompanying the bill referenced the WBC without specifically mentioning the group by name.[87] The bill's sponsors were particularly concerned with the "repeated instances within the past few years of extremist hate groups

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[83] 491 U.S. 781 (1989).
[84] *Id*. at 791.
[85] Assem. B. A02779, 2007–2008 Reg. Sess. (N.Y. 2007), *available at* http://assembly.state.ny.us/leg/?bn=A02779&sh=t.
[86] *Id.*
[87] A02779 Memo, N.Y. Assem. B. A02779, *available at* http://assembly.state.ny.use/leg/?bn=A02779 [hereinafter A02779 Memo].

using the funerals of slain United States service members as an opportunity to harass the surviving family members and express their views that these fallen troops somehow 'deserved' their fate."[88] The memo further acknowledged the right of Americans to express even the most loathsome ideas and carefully explains that its purpose is not to proscribe any particular point of view, but rather to "provide a measure of protection and tranquility to the mourners."[89] It concluded by reiterating the legislature's desire to protect the sanctity of funeral services for every citizen of New York, regardless of religious affiliation or belief.[90]

The New York statute, as embodied in the original Senate bill, makes it a crime to protest within 100 feet of a funeral service or memorial with the intent to disrupt the service or cause annoyance to any of its attendees.[91] Appendix B contains the full text of the Senate bill as enacted. The Senate's justification memo accompanying the bill cautiously observes:

> In the past couple years a number of state legislatures as well as Congress have passed legislation prohibiting funeral disturbances. These new laws were enacted in response to protests that occurred at the funerals of Iraq and Afghanistan War Veterans. There is no greater sacrifice that an individual can make than to give his or her life for this country. Because of this disgusting conduct, proposals like this one are necessary.[92]

The Senate memo concludes by expressing its desire to "prohibit the disturbance of a funeral or memorial service while also preserving an individual's right to free speech and expression."[93] Even though one of the motives behind the Senate bill is to quell the WBC's "disgusting" conduct, that in itself is not enough to make the statute content-based. In *United States v. O'Brien*,[94] the Court had to consider the constitutionality

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[88] *Id.*
[89] *Id.*
[90] *Id.*
[91] S.B. 56-A, 2007–2008 Reg. Sess. (N.Y. 2007), *available at* http://public.leginfo.state.ny.us/menugetf.cgi (enter "S56-A" in the box next to "Bill No.," then select "2007" from the drop-down menu and check "Text").
[92] *Id.* (check "Sponsors Memo").
[93] *Id.*
[94] 391 U.S. 367 (1968).

of the Universal Military Training and Service Act of 1948, which made it a crime to destroy Selective Service draft cards.[95] The appellants were convicted of burning their draft cards and asserted that because Congress was motivated by a desire to suppress free speech, the statute was unconstitutional.[96] The Court rejected that argument and reiterated that "[i]t is a familiar principle of constitutional law that this Court will not strike down an otherwise constitutional statute on the basis of an alleged illicit legislative motive."[97] The Court cautioned that trying to uncover a legislature's motive is often hazardous, because "[w]hat motivates one legislator to make a speech about a statute is not necessarily what motivates scores of others to enact it."[98] As long as the government's predominant intent is unrelated to suppressing free speech, the Court will likely determine that its motive was content-neutral.[99]

After considering the New York Senate and State Assembly's justifications for their funeral picketing bills, it appears that their primary motive was to provide a measure of "protection and tranquility" to funeral-goers, and not to suppress certain messages because the state disagrees with their content. At first blush, both bills appear to have been appropriately content-neutral; however, inquiring into the legislature's stated justifications is only one aspect of discovering predominant intent.[100] The other is to examine the key provisions reflected in the statute's text.[101] This article will next examine the key provisions of the New York funeral picketing statute and the State Assembly bill to determine whether they are content-based or content-neutral regulations. It will then apply the appropriate standard of review to determine whether the Assembly bill and the subsequent picketing statute could survive constitutional scrutiny.

B. Buffer Zone Restrictions

The concept of buffer zone restrictions was brought to the Court's attention in a series of abortion clinic cases from the 1990s. In *Madsen*

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[95] *Id*.
[96] *Id*. at 382–83.
[97] *Id*. at 383.
[98] *Id*.
[99] Renton v. Playtime Theaters, 475 U.S. 41, 48 (1986).
[100] *See, e.g.*, McQueary v. Stumbo, 453 F. Supp. 2d 975, 983 (E.D. Ky. 2006).
[101] *Id*.

v. Women's Health Center, Inc.,[102] the Court was asked to decide whether buffer zones around a Florida abortion clinic were constitutionally permissible.[103] After a number of troubling disturbances at a handful of Florida clinics, a state judge imposed a thirty-six foot buffer around clinic entrances and driveways.[104] The Court upheld the buffer zone on the grounds that the state had a legitimate interest in protecting clinic access and ensuring that the driveway leading to the clinic entrance remained unobstructed.[105] The Court also observed that a previous injunction failed to protect those interests precisely because it lacked buffer zone restrictions.[106] Finally, the Court noted that the buffer zone was narrowly tailored enough at thirty-six feet to enable protestors standing outside of it to easily communicate with their intended audience.[107]

The *Madsen* Court was also asked to decide whether a court-imposed 300-foot buffer zone around clinic employee residences was lawful.[108] For that determination, it relied on the holding in *Frisby v. Schultz*,[109] where the Court upheld a ban on targeted picketing directly in front of a residence.[110] *Frisby* dealt with a group of pro-life demonstrators who picketed the home of an abortion doctor.[111] The Court considered the anti-picketing ordinance to be a valid time, place, or manner regulation.[112] It also asserted that the government's interest in protecting the home against intrusions is of the "highest order"[113] and that the right to avoid intrusions into one's home is "a special benefit of the privacy all citizens enjoy within their own walls."[114] Relying on the rationale in *Frisby*, the *Madsen* Court maintained that while the government has a substantial interest in protecting the privacy of one's home, the 300-foot

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[102] 512 U.S. 753 (1994).
[103] *Id.*
[104] *Id.* at 759–61.
[105] *Id.* at 769.
[106] *Id.* at 770.
[107] *Id.*
[108] *Id.* at 774–75.
[109] 487 U.S. 474 (1988) (upholding a provision making it unlawful to engage in targeted picketing directly in front of a residence or individual; there was no fixed buffer zone in that case).
[110] *Id.*
[111] *Id.*
[112] *Id.* at 488.
[113] *Id.* at 484.
[114] *Id.* at 484–85.

buffer zone around clinic employees' homes went too far.[115] The Court deemed the buffer zone unconstitutional partly because it barred other forms of protected speech that could potentially take place within it.[116] For instance, individuals participating in an unrelated cause who happened to walk or march in front of one of the residences protected by the ordinance could also be arrested.[117] Finally, the Court noted that there were other ways to protect employees' homes without curtailing protected speech, such as by limiting the time, duration, and number of such pickets.[118]

The last buffer zone restriction the Court had to address in *Madsen* dealt with a 300-foot buffer around the clinic itself. The Court struck it down because there was no evidence that the protestor's message contained fighting words, threats of violence, or other forms of unprotected speech.[119] It noted that "[a]s a general matter . . . our own citizens must tolerate insulting, and even outrageous, speech in order to provide adequate breathing space to the freedoms protected by the First Amendment."[120] Preventing offensive and outrageous speech from encroaching into one's home of course is the exception, but this particular provision had nothing to do with residences. Thus, the Court struck it down in keeping with the Court's prior holding in *Cohen v. California*.[121]

In *Schenk v. Pro Choice Network*,[122] a subsequent abortion clinic case, the Court was asked to uphold a fifteen foot buffer zone surrounding clinic driveways, parking lots, and doorway entrances on the ground that significant government interests were involved. The significant government interests included "ensuring public safety and order, promoting the free flow of traffic on streets and sidewalks, protecting property rights, and protecting a woman's freedom to seek pregnancy-related services."[123] There the Court determined that given the repeated harassment by protestors in impeding clinic access, the

[115] Madsen v. Women's Health Ctr., Inc., 512 U.S. 753, 775 (1994).
[116] *Id*.
[117] *Id*.
[118] *Id*.
[119] *Id*. at 774.
[120] *Id*.
[121] 403 U.S. 15 (1971).
[122] 519 U.S. 357 (1997).
[123] *Id*. at 376.

fifteen foot buffer was appropriately tailored and reasonable under the circumstances.[124]

The *Schenk* Court did strike down what it referred to as a "floating" buffer zone around people and vehicles.[125] Under the statute, protestors wishing to communicate or hand out literature to patients, staff, and vehicles entering or leaving the clinics had to maintain a distance of at least fifteen feet.[126] The Court held that the floating buffer zone burdened more speech than necessary because it barred appellants from conversing about topics of public interest and from handing out leaflets to individuals walking on sidewalks, which are traditional public forums.[127] The Court also noted that the fifteen-foot buffer hindered the speaker's ability to communicate at a "normal conversational distance."[128] With regard to vehicles, the floating buffer was overly broad in the sense that it would bar protestors from expressing themselves along a sidewalk or curb should a vehicle happen to pass within fifteen feet of their location.[129] The Court was also concerned for the safety of the appellants who in some instances would have to endanger themselves by trying to comply with the buffer restrictions.[130]

The final case dealing with buffer zones and abortion clinics was *Hill v. Colorado*.[131] In that case, the State of Colorado made it a crime for any individual within 100 feet of a health care facility to knowingly approach within eight feet of another person without her consent "for the purpose of passing a leaflet or handbill to, displaying a sign to, or engaging in oral protest, education, or counseling with such other person."[132] The Court ultimately held that the 100-foot buffer zone was a valid time, place, or manner regulation because the State of Colorado had a substantial interest in protecting patients and their relatives from

[124] *Id*.
[125] *Id*. at 377.
[126] *Id*. at 367.
[127] *Id*. at 377.
[128] *Id*.
[129] *Id.* at 380.
[130] *Id*. at 378. This is a somewhat weaker argument. The Court articulates its concerns with individuals having to walk backwards in some instances to comply with the buffer and not being able to pay sufficient attention to fellow passersby and traffic in other instances. Short of keeping a yardstick handy, the Court notes that it would be difficult to maintain an exact distance of fifteen feet at all times. *See id.*
[131] 530 U.S. 703 (2000).
[132] *Id*. at 707.

unwanted speech outside of health care facilities.[133] "Hospitals, after all, are not factories or mines or assembly plants."[134] They are places that are supposed to promote a "restful, uncluttered, relaxing, and helpful atmosphere" to patients and families.[135]

While the Court's rationale for supporting the 100-foot fixed buffer was somewhat meager, it did feel compelled to more fully justify the eight-foot floating buffer zone contained within it.[136] The Court argued that the eight-foot buffer would allow appellants to speak and hold their signs at a "normal conversational distance."[137] The statute also permitted speakers to hold up signs or hand out leaflets within eight feet of the buffer zone, and it allowed them to remain in one place without causing the speakers to violate the statute.[138] In other words, the eight-foot restriction provided ample opportunity for appellants to communicate their message and was certainly less restrictive than the total ban on targeted picketing the Court upheld in the *Frisby* case.[139]

Another case worth briefly mentioning is *Grayned v. City of Rockford*.[140] In *Grayned*, Rockford, Illinois enacted an ordinance banning picketing within 150 feet of primary or secondary schools in session.[141] The Court determined that the 150-foot buffer restriction was a valid time, place, or manner regulation due to the significant interest the state had in protecting a child's education.[142] It reasoned that "schools could hardly tolerate boisterous demonstrators who drown out classroom conversation, make studying impossible, block entrances, or incite children to leave the schoolhouse."[143] The Court also upheld the Rockford ordinance on the grounds that it did not specifically target unpopular expression and it did not invite selective enforcement on behalf of city officials.[144]

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[133] *Id*. at 728.
[134] *Id*.
[135] *Id*. at 728–29.
[136] *Id.* at 726–27.
[137] *Id.*.
[138] *Id*. at 727.
[139] *Id*. at 729–30.
[140] 408 U.S. 104 (1972).
[141] *Id.* at 107.
[142] *Id.* at 117–18.
[143] *Id*. at 119.
[144] *Id*. at 113.

With regard to funeral picketing, it remains unsettled how courts will treat buffer zone restrictions around cemeteries, churches, and other places where military funerals are routinely conducted. There is little doubt that most judges will find that a family's right to grieve a fallen loved one is a significant privacy interest worth protecting. Some variation of fixed buffer zones should be permissible, given the fact that funeral-goers have no ability to avoid offensive messages because they cannot control the location of the funeral service. This bodes well for the buffer zone contained in the New York funeral picketing statute, as it only bans disorderly conduct within 100 feet of a funeral service or memorial.[145] The statute is in keeping with the thirty-six-foot buffer zone the Court upheld in *Madsen* and the 100-foot buffer zone it implicitly approved in *Hill v. Colorado*. Interestingly enough, the WBC has decided not to challenge funeral picketing laws containing buffer zones of 100 feet or less.[146] In 2005, the group posted a memo on its website warning legislatures that

> [t]he rule of law you must abide by is that you cannot remove people with a message from their intended audience. So stop all the chatter about distances like 2000 feet. Anything more than about 100 feet will go too far, in most locations, so they will be subject to challenge. We are going to deliver this message to people going to these events . . . and you don't have the constitutional ability to remove us from our audience.[147]

Unlike the recently enacted statute's buffer restriction, the State Assembly bill would not have survived a constitutional challenge. That bill provided for a 300-foot fixed buffer zone around funeral services, burials, and funeral home viewings.[148] Given that the Supreme Court struck down two 300-foot buffer zone restrictions in the *Madsen* case,[149] the likelihood that another 300-foot buffer provision would ever survive is unimaginable in most instances. Judges would have little difficulty

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[145] 2008 N.Y. Consol. Laws Adv. Legis. Serv. 566 (LexisNexis).
[146] *See* GODHATESFAGS.com, A Message from Westboro Baptist Church (WBC) to Lawmakers on Legislation Regarding Her Counter-Demonstrations at Funerals of Dead Soldiers, http://www.godhatesfags.com/written/letters/20051212_legislation-message.pdf [hereinafter GODHATESFAGS.com] (last visited Oct. 23, 2008).
[147] *Id.*
[148] Assem. B. A02779, 2007–2008 Reg. Sess. (N.Y. 2007), *available at* http://assembly.state.ny.us/leg/?bn=A02779&sh=t.
[149] *See* 512 U.S. 753 (1994).

concluding that such a large buffer zone will impinge on other forms of protected speech, as the Supreme Court pointed out in *Madsen*. After all, if the Court was willing to find that 150 feet is enough to prevent protestors from disrupting students engaged in school work,[150] it will certainly conclude that the sanctity of a funeral service can be preserved at the same or shorter distances. In fact, in 2006 a federal judge struck down a 300-foot buffer zone restriction in Kentucky's funeral picketing statute after noting the substantial difference between it and the thirty-six-foot buffer the Court approved in the *Madsen* case.[151] The judge also expressed concern that a buffer that big would encompass other forms of protected speech and in some instances restrict a private property owner's ability to express himself on his own property.[152]

The Assembly bill also provided for a 300-foot floating buffer zone around funeral processions.[153] That restriction is much different than the version the court upheld in the *Hill* case. The eight-foot floating buffer zone in *Hill* did not apply to protestors already standing outside the fixed buffer zone surrounding clinic entrances.[154] The Assembly bill would have subjected protestors to arrest if a funeral motorcade happened to come within 300 feet of their location, even if the protestors were there first. Such a large floating buffer zone would have also restricted other forms of protected speech. If, for example, the same motorcade traveled on a route near a public park where another group was engaged in an unrelated protest, members of that group could be arrested if the motorcade happened to pass within 300 feet of their location. For these reasons alone, floating buffer zones will undoubtedly get struck down by the Court. Fixed buffer zones appear to be permissible in certain circumstances, and funeral picketing is probably one of those circumstances, but the Court would likely disapprove any restriction greater than 150 feet.

C. Disorderly Conduct and Noise Restrictions

Another feature common to the funeral picketing statute and the Assembly bill is a provision barring disorderly conduct. The statute

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[150] *See* Grayned v. Rockford, 408 U.S. 104 (1972).
[151] McQueary v. Stumbo, 453 F. Supp. 2d 975, 996 (E.D. Ky. 2006).
[152] *Id.*
[153] Assem. B. A02779.
[154] *See* Hill v. Colorado, 530 U.S. 703 (2000).

simply prohibits "unreasonable noise or disturbance" at a funeral service.[155] The Assembly provision is slightly more complex. It contained three related restrictions, the first of which makes it a crime to sing, chant, whistle, shout, yell, or use amplification equipment, including a bullhorn or car horn, without first securing permission from the deceased's family or from the funeral officiant.[156] The second restricts "other sounds or images observable to or within earshot of" funeral attendees, and the third prohibits making "any utterance, gesture, or display designed to outrage the sensibilities" of funeral-goers.[157]

Since noise ordinances like these typically regulate traditional forms of speech, courts will scrutinize them closely. One of the first factors a court will examine is where the expression takes place. There are three categories of forums that the Supreme Court has recognized—traditional public forums, designated public forums, and nonpublic forums.[158] Sidewalks,[159] streets,[160] and parks[161] are generally considered traditional public forums. A designated public forum is property that the government has decided to open to the public for various activities, as when the public is invited to a local high school for a school board meeting.[162] A nonpublic forum is one where a speaker has little to no expectation of speech, such as private property,[163] a county jail,[164] or a military installation.[165] Funeral picketers, in particular the WBC, stage most if not all of their protests on public sidewalks and streets in keeping with their strategy of making it more difficult for states to defend their funeral picketing laws.[166]

As some of the cases have already illustrated, the government will never admit regulating speech because it disagrees with the content of a

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[155] 2008 N.Y. Consol. Laws Adv. Legis. Serv. 566 (LexisNexis).
[156] Assem. B. A02779.
[157] *Id*.
[158] NOWAK & ROTUNDA, *supra* note 51, at 1140.
[159] *See* Grayned v. City of Rockford, 408 U.S. 104 (1972); *see also* United States v. Grace, 461 U.S. 171 (1983) (holding that public sidewalks surrounding the Supreme Court building are public forums).
[160] *See* Hague v. Comm. for Indus. Org., 307 U.S. 496, 516 (1939).
[161] *Id*.
[162] *See* Madison Joint Sch. Dist. v. Wis. Employment Relations Comm'n, 429 U.S. 167 (1976).
[163] *See* Adderly v. Florida, 385 U.S. 39, 47 (1966).
[164] *Id.*
[165] *See* Greer v. Spock, 424 U.S. 828 (1976).
[166] *See* GODHATESFAGS.com, *supra* note 146.

particular message.[167] Instead, the government will try to convince the Court that it was simply regulating the time, place, or manner of such expression. Time, place, or manner regulations are appropriate to restrict speech in a public forum so long as they are content neutral, narrowly tailored to achieve a significant government interest, and able to leave open alternative channels of communication.[168] The Supreme Court outlined this three part test in *Ward v. Rock Against Racism*.[169] In *Ward*, appellants challenged the constitutionality of a New York City ordinance restricting sound volume at band shell concerts in Central Park.[170] The City had received a number of complaints from park users about the loud noise emanating from the concerts.[171] In response to these complaints, the City decided to retain an independent sound technician to provide high quality sound equipment for future concerts.[172] The City argued that its primary motive for enacting the ordinance was simply to prevent noise from intruding into surrounding residences and more secluded parts of the park.[173] Based on that justification, the Court held that the ordinance was content-neutral and went on to decide if it was narrowly tailored to achieve a significant government interest.[174]

In determining what constitutes a significant government interest, the Court recalled that the government always has "a substantial interest in protecting its citizens from unwelcome noise."[175] In fact, protecting people from unwanted noise inside their homes is one of government's greatest interests.[176] "[G]overnment may [also] act to protect even such traditional public forums as city streets and parks from excessive noise."[177] The Court ultimately determined that New York City had a significant government interest in protecting some of its citizens from

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[167] *See supra* notes 59–60. In *Texas v. Johnson*, the state argued that it was simply trying to prevent a breach of the peace and to protect the flag as a national symbol. In *Cohen v. California*, the state argued that it was trying to protect unsuspecting viewers from having Mr. Cohen's distasteful expression suddenly thrust upon them.
[168] Ward v. Rock Against Racism, 491 U.S. 781 (1989).
[169] *Id*.
[170] *Id.* at 784.
[171] *Id*. at 785.
[172] *Id.* at 787.
[173] *Id*. at 792.
[174] *Id*.
[175] *Id*. at 796 (quoting City Council of L.A. v. Taxpayers for Vincent, 466 U.S. 789, 806 (1984)).
[176] *Id*. (citing Frisby v. Schultz, 487 U.S. 474, 484 (1988)).
[177] *Id*. (citing Kovacs v. Cooper, 336 U.S. 77, 86–87 (1949)).

loud, unwanted noise in a city park.[178] It also determined that the ordinance was narrowly tailored to achieve that interest.[179] Narrow tailoring means that the government's ability to promote a substantial government interest is less effective without the regulation.[180] The fact that another, less restrictive alternative is available is not enough to render the regulation invalid.[181] The Court reasoned that the City's decision to hire a sound technician to control the mixing board during concerts effectively protected its substantial interest in limiting sound volume.[182] Leaving appellants to their own devices was a less effective means of protecting the City's interest because appellants had previously refused to control the sound such that it did not intrude on people trying to enjoy other areas of the park.[183] The City also easily satisfied the last requirement of a time, place, or manner regulation because the ordinance left open alternative channels of communication.[184] Appellants could still hold concerts in the band shell without any effect on the content of their message. The Court also observed that there had been no showing that the noise ordinance would have any impact on the size of the crowds attending appellants' concerts.[185]

In *Madsen v. Women's Health Center, Inc.,* the Court dealt with a noise ordinance almost identical to the one proposed by the New York Assembly.[186] As discussed earlier, *Madsen* dealt with an injunction prohibiting protestors from engaging in certain activities near abortion clinics.[187] The Court upheld a provision barring protestors from "singing, chanting, whistling, shouting, yelling, use of bullhorns, auto horns, sound amplification equipment or other sounds or images observable to or within earshot of the patients inside the clinic."[188] The first thing the Court considered was the place where the restrictions

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[178] *Id.* at 800.
[179] *Id*. at 796.
[180] *Id*. at 799 (quoting United States v. Albertini, 472 U.S. 675, 689 (1985)).
[181] *Id*. at 800.
[182] *Id*.
[183] *Id*.
[184] *Id.* at 802.
[185] *Id*.
[186] Madsen v. Women's Health Center, Inc., 512 U.S. 753 (1994).
[187] *See supra* notes 102–20. In *Madsen*, a Florida judge permanently enjoined pro-life picketers from protesting within 300 feet of an abortion clinic entrance, from entering a thirty-six-foot buffer zone around the property line of a clinic, from protesting within 300 feet of the homes of clinic staff, and from making certain types of noise within earshot of patients inside an abortion clinic.
[188] *Madsen*, 512 U.S. at 772.

applied.[189] The Court reasoned that just as noise ordinances around public schools were appropriate,[190] so too were similar restrictions around hospitals because patients and their families need a peaceful place to recover physically and emotionally after surgery.[191] The Court observed that "[t]he First Amendment does not demand that patients at a medical facility undertake Herculean efforts to escape the cacophony of political protests."[192] If sound amplification equipment is used to "assault the citizenry," the government may rightfully restrict their use.[193] This was especially so for patients within earshot of abortion clinics and other medical facilities.

In *Kovacs v. Cooper*,[194] the Court upheld a similar ordinance barring the use of sound trucks, loud speakers, and other types of amplification devices that made "loud and raucous" noise on city streets, alleys, or thoroughfares.[195] There the Court held that "[t]he police power of a state extends beyond health, morals and safety, and comprehends the duty, within constitutional limitations, to protect the well-being and tranquility of a community. A state or city may prohibit acts or things reasonably thought to bring evil or harm to its people."[196]

The *Madsen* Court also reviewed a disorderly conduct provision restricting "images observable" to patients inside the clinic.[197] Had the ordinance simply banned "threats" to patients and their families in whatever form, the restriction would have probably survived.[198] Instead, it banned all speech observable to clinic patients and therefore burdened more speech than necessary.[199] Unlike the sound emitted from amplification devices, patients could avoid intrusive or offensive messages observable from inside the clinic by simply averting their eyes.[200] The Court reasoned that "it is much easier for the clinic to pull

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[189] *Id*.
[190] *Id*. (citing Grayned v. City of Rockford, 408 U.S. 104 (1972)).
[191] *Id*. (citing NLRB v. Baptist Hosp., Inc., 442 U.S. 773, 783–84 (1979)).
[192] *Id*. at 772–73.
[193] *Id*. at 773 (quoting Grayned v. City of Rockford, 408 U.S. 104, 116 (1972)).
[194] 336 U.S. 77 (1949).
[195] *Id*. at 78.
[196] *Id*. at 83.
[197] *Madsen*, 512 U.S. at 773.
[198] *Id*.
[199] *Id*.
[200] *Id*.

its curtains than for a patient to stop up her ears, and no more is required to avoid seeing placards through the windows of the clinic."[201]

The last disorderly conduct provision the *Madsen* Court addressed required protestors to secure permission from clinic visitors prior to engaging them in conversation.[202] The Court asserted that unless the protestor used fighting words or some other type of menacing or threatening language, the state could not enact a ban on all uninvited approaches.[203] The Court held that the "consent" requirement alone rendered the provision unconstitutional because its attempt to ensure clinic access and prevent patient intimidation burdened more speech than necessary.[204]

In 2006, a federal judge struck down a number of similar provisions contained in a Kentucky funeral picketing law.[205] The judge struck down Kentucky's "images observable" restriction on the ground that funeral attendees could simply avert their eyes from intrusive observable images when attending a funeral service outdoors, and when attending one indoors, they could simply draw the curtains.[206] The judge also invalidated a provision prohibiting the unauthorized distribution of literature.[207] The restriction barred handing out literature "anywhere" during a funeral.[208] He reasoned that since the provision failed to describe a fixed geographical boundary, it burdened more speech than necessary to prevent disruption of the funeral service.[209] Lastly, the judge struck down a requirement that protestors seek authorization from the deceased's family or from the funeral officiant prior to engaging in picketing activities.[210] The judge noted that such a requirement is overly broad, especially where there is no "evidence that the protestor's speech is independently proscribable (i.e., 'fighting words' or threats), or is so infused with violence as to be indistinguishable from a threat of physical harm."[211]

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[201] *Id*.
[202] *Id.* at 773–74.
[203] *Id.* at 774.
[204] *Id*.
[205] 453 F. Supp. 2d 975 (E.D. Ky. 2006).
[206] *Id*. at 996.
[207] *Id.*
[208] *Id.*
[209] *Id*.
[210] *Id.* at 995–96.
[211] *Id*. at 995.

The judge also struggled with terms contained in the Kentucky statute like "outrageous," "disruptive," and "tend to obstruct" or "interfere" with a funeral.[212] He was asked to consider them unconstitutional under the vagueness doctrine.[213] The vagueness doctrine posits that when a law is so vague that a person of "common understanding must necessarily guess at its meaning and differ as to its application," a court should invalidate it.[214] The Court further explained the doctrine in *Grayned v. City of Rockford*:

> Vague laws offend several important values . . . because we assume that man is free to steer between lawful and unlawful conduct, we insist that laws give the person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly. Vague laws may trap the innocent by not providing fair warning.[215]

In *Grayned*, the Court was asked to determine whether an ordinance banning "the making of any noise or diversion which disturbs or tends to disturb the peace or good order" of schools was impermissibly vague.[216] The Court used a number of principles of statutory interpretation for making such a determination. First, the Court noted that legislatures are not expected to use language with "mathematical certainty" when drafting statutes.[217] Second, the Court examined the statute "as a whole" to determine what expression it restricted.[218] Third, the Court looked at how the state's highest court interpreted similar terms in other statutes.[219] Fourth, the Court considered the particular context for which the statute was written.[220] After considering all of those factors, the Court determined that the words contained in the phrase had been defined with specificity by the state supreme court in another case, and that the

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[212] *Id*. at 997.
[213] *See, e.g.*, Connally v. Gen. Constr. Co., 269 U.S. 385 (1926). Elaborating on the vagueness doctrine, the *Connally* Court famously noted that the "crime, and the elements constituting it, must be so clearly expressed that the ordinary person can intelligently choose, in advance, what course it is lawful for him to pursue." *Id.* at 393.
[214] *Id.* at 391.
[215] Grayned v. City of Rockford, 408 U.S. 104, 108 (1972).
[216] *Id*. at 107–08.
[217] *Id*. at 110.
[218] *Id*.
[219] *Id*. at 111–12.
[220] *Id*. at 112.

restrictions were confined to the context of protecting students from intrusion *only* when school was in session.[221]

The Court established another useful axiom in *Kovacs v. Cooper*.[222] In *Kovacs*, the Court had to decide whether the phrase "loud and raucous" noise was unjustifiably vague.[223] The Court ultimately upheld the phrase after noting that sometimes words, even abstract ones like loud and raucous, "have through daily use acquired a content that conveys to any interested person a sufficiently accurate concept of what is forbidden."[224]

Given the holdings in *Madsen* and in the Kentucky case it appears that three of the four disorderly conduct and noise restrictions in the Assembly bill would have been unconstitutional.[225] The "images observable" restriction is overly broad in that it burdens more speech than necessary to protect funeral-goers from picketers.[226] Funeral attendees can easily avert their eyes away from messages they find offensive, especially when they are outside. Funeral-goers attending services indoors can simply close the curtains.

The provision requiring protestors to seek authorization from the deceased's family prior to engaging in picketing activities would also be invalid.[227] Aside from rendering the Assembly bill a content-based regulation, this provision burdened more speech than necessary. For instance, if members of the WBC held signs supporting 2008 President-elect Barack Obama, they would have violated the statute even though their demonstration had nothing to do with the funeral service and their presence was largely unfelt. The ban on distributing literature regardless of location would similarly be invalid.[228] Under the provision, picketers could be arrested for handing out flyers even if they were ten miles away from the funeral service.

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[221] *Id*. at 111–12.
[222] 336 U.S. 77 (1949).
[223] *Id*. at 79.
[224] *Id*.
[225] *See* Assem. B. A02779, 2007–2008 Reg. Sess. (N.Y. 2007), *available at* http://assembly.state.ny.us/leg/?bn=A02779&sh=t.
[226] *Id.*
[227] *Id.*
[228] *Id.*

The only Assembly bill provision that would have likely been upheld is the one barring yelling, chanting, whistling, and using amplification devices "within earshot" of funeral-goers, but even then that would be on a case-by-case basis.[229] It is much easier for a funeral participant to avert her eyes away from a protestor displaying a sign than for her to avert her ears from a protestor screaming into a bullhorn. For example, if a funeral service were to take place next to the entrance of the cemetery where protestors were assembled, attendees would invariably find it impossible not to be distracted by the noise. No judge would expect the funeral party to pack up and head to another location in order to avoid the disruption under those circumstances.

Curiously enough, the Assembly bill was so specific about what activities were barred that it would have survived a vagueness challenge.[230] The only questionable phrase dealt with conduct designed to "outrage the sensibilities" of funeral-goers.[231] That definition would have hinged on a judge's subjective determination of what she considered to be "outrageous." The bill itself failed to provide examples and there is nothing in the justification memo that provided assistance either. The determination would also hinge on whether New York's highest court had interpreted the term in other statutory contexts.

While the Assembly bill may have been safe from a vagueness challenge because it was so detailed, New York's current picketing statute could run into trouble for precisely the opposite reason. Regulations must be crafted carefully enough that a man of ordinary intelligence could reasonably know what is expected of him.[232] New York's entire funeral picketing statute consists of one paragraph:

> A person is guilty of disruption or disturbance of a religious service, funeral, burial or memorial service when he or she makes unreasonable noise or disturbance while at a lawfully assembled religious service, funeral, burial or memorial service, or within one hundred feet thereof, with intent to cause annoyance or alarm or recklessly creating a risk thereof.[233]

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[229] *Id.*; *see* Madsen v. Women's Health Ctr., Inc., 512 U.S. 753 (1994).
[230] *See* Connally v. Gen. Constr. Co., 269 U.S. 385 (1926).
[231] Assem. B. A02779.
[232] Grayned v. City of Rockford, 408 U.S. 104, 108 (1972).
[233] 2008 N.Y. Consol. Laws Adv. Legis. Serv. 566 (LexisNexis).

Funeral picketers would undoubtedly have a difficult time figuring out what activities are proscribed under this statute. For instance, does "unreasonable" noise or disturbance mean that members of the group can yell and shout but not use amplification equipment? Can they hold up signs in silence? What if the group intends to express its message to passers-by and *not* to funeral participants? If they happen to create a disturbance, can they escape prosecution because it was not their intent to disturb the deceased's family and friends? A court may however, consider the term sufficiently clear given the content and meaning it has acquired through normal, everyday use.[234]

D. Summary of New York's Funeral Picketing Law

After examining the text of the funeral picketing law and its primary motivation as expressed in the Senate justification memo, it is clear that the statute is content-neutral. The legislature's primary purpose for enacting it was to prohibit disruptions at funeral services and nothing more.[235] The statute does not specifically target the WBC or any other group staging protests at military funerals based on the content of their messages. Similarly, it does not favor certain messages over others as the Assembly bill did. Because the picketing statute is content-neutral, it satisfies the first requirement of a time, place, or manner regulation.[236]

The second condition requires that the statute be narrowly tailored to achieve a significant government interest.[237] As previously explained, protecting a family's right to grieve for their fallen loved ones constitutes a significant government interest.[238] The narrow tailoring requirement for a content-neutral regulation is different from the one required for a content-based regulation.[239] Strict scrutiny requires that government use the least intrusive means to promote its interests; intermediate scrutiny does not.[240] If the government can show that it cannot effectively protect its interests absent the regulation, it satisfies the narrow tailoring requirement of intermediate scrutiny.[241] The statute's 100-foot buffer

[234] Kovacs v. Cooper, 336 U.S. 77, 79 (1949).
[235] *See supra* notes 87–90 and accompanying text.
[236] *See supra* notes 168–74.
[237] Ward v. Rock Against Racism, 491 U.S. 781 (1989).
[238] *Supra* notes 81–82 and accompanying text.
[239] *Ward*, 491 U.S. at 798–99.
[240] *Id*. at 797.
[241] *Id*. at 799.

zone effectively protects funeral-goers from intrusion, it burdens no more speech than necessary, and it is similar to the buffer zone restrictions upheld in previous Supreme Court decisions.[242] The terms barring "unreasonable noise or disturbance" may lend themselves to a vagueness challenge, however, because they fail to articulate what types of protest activities are prohibited under the regulation.[243] Failing to specify what activities are restricted arguably violates the requirement that people be given a reasonable opportunity to comport their conduct with the requirements of the law.[244] Because the provisions are so nebulous, and because funeral attendees will have varying opinions as to what constitutes unreasonable conduct, a judge will likely invalidate the current statute on vagueness grounds or alternatively find that it is not narrowly tailored enough to satisfy the requirements of a time, place, or manner regulation.[245]

The Assembly bill would not have survived a First Amendment challenge either. While the bill's primary justification may have been content-neutral, its text was not. The bill would have required the WBC to seek permission from the deceased's family before engaging in any activity within 300 feet of a funeral. That provision was a clear attempt to shield families from objectionable messages, thus rendering it content-based. For example, military families sometimes ask members of the motorcycle group Patriot Guard[246] to shield them from funeral protesters. Under the Assembly bill, the Patriot Guard could have sung, shouted, yelled, and revved their motorcycle engines inside the buffer zone while picketers would have been forced to watch in silence over 300 feet away.

Content-based regulations such as this must be narrowly tailored to achieve a compelling government interest.[247] While protecting a family's right to grieve may constitute a significant government interest, judges might hesitate to consider it a compelling one. Even so, the real

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[242] *See supra* notes 131–35.

[243] *See* 2008 N.Y. Consol. Laws Adv. Legis. Serv. 566 (LexisNexis); *see also* Connally v. Gen. Constr. Co., 269 U.S. 385 (1926).

[244] Grayned v. City of Rockford, 408 U.S. 104, 108 (1972).

[245] *See e.g.*, *Grayned*, 408 U.S. at 108; *Ward*, 491 U.S. 781.

[246] Patriot Guard is a group of service veterans who are motorcycle enthusiasts. *See* Patriot Guard Riders, www.patriotguard.org (last visited Nov. 19, 2008). Families of fallen servicemembers frequently ask the group to scare off or at least drown out the WBC's protests. The group will surround WBC protesters with a wall of flags and rev their engines to drown out the group's message. *See id.*

[247] Perry Educ. Ass'n v. Perry Local Educator's Ass'n, 406 U.S. 37, 45 (1983) (citing Carey v. Brown, 447 U.S. 455, 461 (1980)).

problem for the Assembly bill was that it failed to employ the least restrictive means to protect funeral-goers from unwelcome messages. The 300-foot buffer zone would have burdened more speech than necessary to promote the state's interest in protecting funeral-goers. The Supreme Court shot down two 300-foot buffer zones in the *Madsen* case because they were too large.[248] The *Hill* and *Grayned* decisions also seem to indicate that buffer zones greater than 150 feet are not narrowly tailored enough to satisfy the requirements of strict scrutiny review.[249]

None of the other restrictions were narrowly tailored for the primary reason that they would have required protestors to seek authorization from the deceased's family before the protestors could display signs or make any type of noise. Such a requirement would have impermissibly allowed the family to favor certain messages over others. A judge would have little difficulty concluding that there are less restrictive methods for quelling "observable" images and noise "within earshot" of funeral-goers, like dropping the authorization requirement and simply enforcing the buffer zone restriction.[250]

Appendix D contains a model statute that may serve as New York's best chance of protecting its citizens from the tumult of funeral protests should the current statute be ruled unconstitutional. The model statute proposes a fixed buffer zone no more than 150 feet from the ingress and egress of funeral sites. There are two reasons for such a proposal. First, the Supreme Court has already upheld a 100-foot buffer restriction in the *Hill* case and a 150-foot buffer restriction in the *Grayned* case.[251] Second, the WBC has admitted that it will not challenge buffer zone restrictions 100 feet or less[252] and the statute presumes that they and others like them would not incur the expense of litigating the issue over an additional fifty feet.

The model statute also specifies the types of activities that are prohibited within the buffer zone, like singing, whistling, shouting, and yelling, with or without the aid of amplification devices like bullhorns or auto horns. It contains no "within earshot" provision, as it would likely burden other forms of protected expression in most cases. With regard to

[248] *See* Madsen v. Women's Health Center, Inc., 512 U.S. 753 (1994).
[249] *See* Hill v. Colorado, 530 U.S. 703 (2000); *Grayned*, 408 U.S. 104.
[250] *See, e.g.*, *Madsen*, 512 U.S. at 772–73.
[251] *See Hill*, 530 U.S. 703; *Grayned*, 408 U.S. 104.
[252] *See* GODHATESFAGS.com, *supra* note 146.

displaying images, the model statute does away with any reference to "images observable" for the same reasons—the provision is too vague and restricts more speech than necessary. Instead, the model statute lawfully prohibits displaying images designed to inflict emotional distress or that attempt to convey real or veiled threats of any kind. Arguably, the statute could even prohibit the use of fighting words as the term was defined in section III of this article. Lastly, the model statute eliminates any provision requiring protestors to get the permission of the deceased's family before engaging in protest activities of any kind. That restriction alone would render the entire statute content-based and subject it to the most rigid scrutiny, which means a court would invariably render it invalid.

The next section of this article deals with the federal response to military funeral protests. As this section will demonstrate, the RAFHA does a decent job of specifying what the law prohibits, and does not contain most of the problematic provisions of the New York Assembly bill. Its buffer zone restrictions, however, make the statute likely to run afoul of the First Amendment.

V. Federal Funeral Protest Laws: The Respect for America's Fallen Heroes Act

In response to the WBC's practice of picketing Soldiers' funerals, Congress passed the RAFHA.[253] The RAFHA only applies to Arlington National Cemetery and other cemeteries under control of the National Cemetery Administration,[254] including the six located in New York State.[255] Picketers may not demonstrate within 300 feet of the cemetery if it impedes the access or egress of funeral-goers, and they may not demonstrate within 150 feet of any road, path, or other route leading to the ingress or egress of such cemetery property.[256] The restrictions are enforceable up to an hour before a funeral service begins and an hour after it ends.[257] The full text of the Act is at Appendix C. The following activities constitute a "demonstration" under the RAFHA:

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[253] 38 U.S.C.S. § 2413 (LexisNexis 2008). The RAFHA was signed into law on 29 May 2006.
[254] *Id.*
[255] *See* U.S. Dep't of Veterans Affairs—Burial & Memorials, http://sss.cem.va.gov/cem/listcem.asp#NY (last visited Oct. 23, 2008).
[256] 38 U.S.C.S. § 2413.
[257] *Id.*

> (1) Any picketing or similar conduct.
> (2) Any oration, speech, use of sound amplification equipment or device, or similar conduct that is not part of a funeral, memorial service, or ceremony.
> (3) The display of any placard, banner, flag, or similar device, unless such a display is part of a funeral, memorial service, or ceremony.
> (4) The distribution of any handbill, pamphlet, leaflet, or other written or printed matter other than a program distributed as part of a funeral, memorial service, or ceremony.[258]

The determination of whether the RAFHA is content-neutral or content-based depends on Congress's primary motive for passing the statute.[259] The legislative history of the RAFHA is replete with stories from many of the Act's supporters concerning "extremist protestors" interrupting servicemembers' funerals and inflicting trauma on their families.[260] While the history does not specifically mention the WBC by name, it does make references to supporters carrying signs with slogans such as "Thank God our Soldiers are Dead,"[261] which is one of the WBC's trademarks. One Representative urged his colleagues to pass the bill in order to quell the "radical, hateful agenda" of funeral protestors because in his opinion, their conduct is "reprehensible" and "disgusting."[262] Though it is clear that some members of Congress specifically had the WBC in mind when enacting the RAFHA, that alone is not enough to render the statute content-based.[263] As noted earlier, "[w]hat motivates one legislator to make a speech about a statute is not necessarily what motivates scores of others to enact it."[264]

Representative Mike Rogers, one of RAFHA's sponsors, noted in a floor speech that the Act was created to give servicemembers' families the right "which they so richly deserve, to grieve in peace and have the dignity and the honor to lay their loved ones to rest in peace."[265] While

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[258] *Id*.
[259] *See* Ward v. Rock Against Racism, 491 U.S. 781, 791 (1989).
[260] 109 CONG. REC. H2199 (daily ed. May 9, 2006) (statements of Reps. Rogers, Reyes, Buyer, Baca, and Chabot).
[261] *Id*. (statement of Rep. Buyer).
[262] *Id*. (statement of Rep. Kennedy).
[263] *See* United States v. O'Brien , 391 U.S. 367, 383 (1968).
[264] *Id*.
[265] 109 CONG. REC. H2199 (daily ed. May 9, 2006) (statement of Rep. Rogers).

Representative Rogers's justification is undoubtedly content-neutral, a court will also examine the Act's text to determine whether it targets a particular viewpoint.[266] The RAFHA, unlike the New York Assembly bill, does not concern itself with the impact of the protestor's message on unwitting listeners. The Assembly bill tried to shield funeral-goers from messages they might disagree with by requiring picketers to get authorization from the deceased's family prior to staging a protest. The RAFHA contains no such provision. In fact, nothing in the text of the Act demonstrates that it targets a specific type of expression or viewpoint. It bans *everyone* from demonstrating within 300 feet of a national cemetery or within 150 feet of the roads or paths leading to it. Even then, the 300-foot buffer only applies when protestors block the ingress and egress of the cemetery. Therefore, a court would likely consider the RAFHA to be a content-neutral time, place, or manner regulation.[267]

As discussed earlier, the constitutionality of a regulation will largely depend on the forum where the speech is regulated.[268] The RAFHA is particularly interesting because it regulates speech both on and off of cemetery grounds.[269] Because funeral picketers have traditionally staged their pickets on sidewalks and streets just outside of the cemetery, this article will now focus on how the RAFHA impacts their ability to use these traditional public forums. As the *Ward* case highlighted, a time, place, or manner regulation that restricts speech in a public forum must pass a three-part test: it must be content-neutral, it must be narrowly tailored to achieve a significant government interest, and it must leave open alternative channels of communication.[270]

The RAFHA is content-neutral for at least two reasons. First, Congress's primary motive for enacting it was simply to ensure that military families could mourn for their loved ones in private and in peace. Second, the statute does not discriminate on its face against certain viewpoints. Although it will obviously have an impact on the ability to protest military funerals at national cemeteries, that effect is secondary and therefore constitutionally permissible. Congress's primary motive for enacting the RAFHA also satisfies the requirement

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[266] *See* McQueary v. Stumbo, 453 F. Supp. 2d 975, 983 (E.D. Ky. 2006).
[267] Ward v. Rock Against Racism, 491 U.S. 781 (1989).
[268] *See supra* notes 158–65 and accompanying text.
[269] 38 U.S.C.S. § 2413 (LexisNexis 2006).
[270] *Ward*, 491 U.S. at 791 (citing Clark v. Cmty. for Creative Non-violence, 468 U.S. 288, 293 (1984)).

that the regulation achieve a significant government interest. In deciding the constitutionality of Kentucky's funeral picketing law, the judge determined that the government has a significant interest in protecting a family's right to grieve at a funeral service.[271] The Supreme Court also acknowledged a family's right to grieve in *National Archives and Records Administration v. Favish*,[272] discussed previously in section III.

With the exception of the 150- and 300-foot fixed buffer zone restrictions, the RAFHA is also narrowly tailored. It contains a ban on noises that "tend to disturb the peace or good order" of the funeral which includes the use of amplification devices, similar to the New York Assembly bill.[273] But unlike the New York Assembly bill, funeral protestors are not required to secure authorization from the deceased's family or from the funeral officiant prior to demonstrating outside of the cemetery. Protestors would have to obtain the cemetery director's permission in order to demonstrate *on* a national cemetery, which is discussed in the next section. There is no ban on noise within "earshot" of funeral-goers, nor on "images observable" to funeral-goers, so the issues addressed in the Assembly bill are of no concern to the RAFHA. The ban on distributing literature applies within the buffer zones, so it has an appropriate geographic restriction, unlike the Assembly bill.

The 300-foot fixed buffer zone around the cemetery is problematic for all of the reasons addressed previously. The Supreme Court has never approved a buffer zone that large, nor is it likely to given its holding in the *Madsen* case.[274] The Court did uphold a 150-foot buffer in *Grayned* and the 100-foot buffer in *Hill*, but those were much smaller than the 300 feet provided for in the RAFHA.[275] Even though the RAFHA's 300-foot buffer only applies when it impedes ingress or egress from the cemetery, the zone is still so large that it will end up burdening more speech than necessary and is thus not narrowly tailored enough. The 150-foot buffer zone looks appropriate at first blush, but the Court may have to decide its validity on a case-by-case basis. For instance, assume that road *X*, a five-mile road, is the only entrance and exit to the cemetery. Theoretically, under the RAFHA protestors five miles away from the cemetery could violate the statute if they were to protest within

[271] *McQueary*, 453 F. Supp. 2d at 992.
[272] 541 U.S. 157 (2004).
[273] *See* Assem. B. A02779, 2007–2008 Reg. Sess. (N.Y. 2007).
[274] Madsen v. Women's Health Center, 512 U.S. 753, 773–75 (1994).
[275] *See* Hill v. Colorado, 530 U.S. 703 (2000); Grayned v. City of Rockford, 408 U.S. 104 (1972).

150 feet of the road. In a case like that, the restriction will likely be invalidated.

A related problem with the buffer zones is that they fail to leave open alternative channels of communication. Funeral picketers will have a more difficult time communicating with their intended audience at a distance of over 300 feet away than they would at something more reasonable like 100 to 150 feet. If Congress amended the buffer zone to 100 or 150 feet, the RAFHA would satisfy each of these requirements and survive a constitutional challenge.

In the unlikely event that one of these groups tries to picket *on* one of New York's national cemeteries, it must secure the permission of the cemetery director first.[276] The picketers will likely argue that the requirement constitutes an impermissible prior restraint, but it does not.[277] The United States Court of Appeals for the Federal Circuit dealt with this very issue in *Griffin v. Secretary of Veterans Affairs*.[278] In *Griffin*, a group of veterans sued the Secretary of Veterans Affairs over the right to display a confederate flag at Point Lookout National Cemetery in Maryland, where approximately 3300 Confederate Civil War Soldiers are buried.[279] The group argued that the Veterans Administration (VA) was granted unbridled discretion in making decisions regarding national cemeteries such that it amounted to an unconstitutional prior restraint.[280]

In rendering its decision, the court first noted that national cemeteries are a nonpublic forum.[281] The court held that government regulations in a nonpublic forum are held to a lesser standard than the time, place, or manner test applicable to restrictions in a public forum.[282] It noted that "restrictions in nonpublic for[ums] may be reasonable if they are aimed at preserving the property for the purpose to which it is dedicated."[283] The court also observed that "selectivity and discretion are some of the

[276] 38 U.S.C.S. § 2413 (LexisNexis 2006).
[277] *See* Griffin v. Sec'y of Veterans Affairs, 288 F.3d 1309 (Fed. Cir. 2002).
[278] *Id.*
[279] *Id*. at 1314.
[280] *Id*. at 1318.
[281] *Id*. at 1322. The court made this determination because both parties agreed that VA cemeteries are nonpublic forums and another federal case concluded the same. *Id.* (citing Warner v. City of Boca Raton, 64 F. Supp. 2d 1272, 1291 (S.D. Fla. 1999)).
[282] *Id*. at 1323.
[283] *Id*. (citing Perry Educ. Ass'n v. Perry Local Educator's Ass'n, 460 U.S. 37, 50–51 (1983)).

defining characteristics of the nonpublic forum."[284] In looking at the nature of national cemeteries, the court concluded that the very reason for their existence was to serve "commemorative" and "expressive" roles.[285] The court was also impressed by the duty of the VA to "maintain those cemeteries as national shrines in perpetuity as a final tribute of a grateful Nation to honor the memory and service of those who served in the Armed Forces."[286]

The court had little trouble legitimizing the discretion of national cemetery directors to maintain control over their respective cemeteries. After all, the court concluded,

> national cemeteries are not interstate highway rest areas. The nature and function of the national cemetery make the preservation of dignity and decorum a paramount concern, and the government may impose restraints on speech that are reasonable in that pursuit . . . we conclude that the discretion vested in VA administrators . . . is reasonable in light of the characteristic nature and function of national cemeteries.[287]

It is probably safe to conclude that a federal court in New York would likely uphold the VA's discretion under the RAFHA to disallow funeral picketing on any of its national cemeteries given their special nature and function. That brings us to our last potential funeral protest forum in New York, the West Point Cemetery at the United States Military Academy.

VI. Funeral Picketing on Military Installations: The West Point Example

It is important to note at the outset that the VA has no control over the West Point Cemetery even though it is, in a sense, a national cemetery. Because the cemetery is located on a military installation and controlled by the Army, it is subject to a unique set of laws. The West

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[284] *Id*.
[285] *Id*. at 1324.
[286] *Id*.
[287] *Id*. at 1325.

Point Cemetery was officially designated a military cemetery in 1817.[288] Before that, it served as a burial ground for Soldiers who died in the Revolutionary War.[289] Some of the most famous people in our nation's history are buried there, including Generals Winfield Scott, Robert Anderson, Daniel Butterfield, and George Custer.[290] General William Westmoreland, commander of United States Forces in Vietnam, was buried there in 2005.[291] The cemetery continues to expand as it inters some of the Academy's most recent graduates, young lieutenants and captains who lost their lives fighting in Iraq and Afghanistan. Curiously, funeral protestors have never picketed a funeral at USMA despite its high profile. Members of the WBC, however, did protest outside the gates of the United States Naval Academy before the funeral service of Corporal Snyder, the Marine mentioned in the article's introduction.[292]

Should funeral protestors ever decide to picket a military funeral service at West Point, they will encounter great difficulty. The cemetery actually sits on the installation facing the Hudson River and is inaccessible from the three main gates. Washington Gate is the closest entrance to the cemetery but is still more than a mile away.[293] Because of the distance, protestors will inevitably demand that they be permitted to demonstrate within a reasonable distance of their intended audience. That means they would have to secure permission from the Garrison Commander. The likelihood of that happening is almost nonexistent, thanks to the Supreme Court's holding in *Greer v. Spock*.[294]

The *Greer v. Spock* case dealt with a group of political candidates who wanted to conduct a town hall meeting and hand out campaign literature to Soldiers and their families on the Fort Dix military

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[288] The West Point Cemetery, http://www.usma.edu/cemetery/ (last visited Nov. 19, 2008).
[289] *Id.*
[290] The West Point Cemetery, http://www.usma.edu/Cemetery/descriptions.htm (last visited Nov. 19, 2008).
[291] *Westmoreland to be Buried at West Point*, USATODAY.com, July 23, 2005, http://www.usatoday.com/news/nation/2005-07-23-westmoreland-burial_x.htm.
[292] Gina Davis, *At Carroll Funeral, A National Protest*, BALTIMORESUN.com, Mar. 11, 2006, http://www.baltimoresun.com/news/local/carroll/balte.md.marine11mar11.0.2364189.story?coll=bal-local-carroll.
[293] The author taught at West Point from 2005–2007 and frequently ran the route leading from Washington Gate to the West Point cemetery.
[294] 424 U.S. 828 (1976).

reservation.[295] They sent a letter to the Commanding General expressing their intent to campaign on the installation.[296] The General promptly wrote back, denying them access to the installation for a number of reasons.[297] First, Army regulations prevented Soldiers from participating in partisan political campaign events and from attending public demonstrations in uniform.[298] Second, the General pointed out that his mission was to train the 15,000 Soldiers assigned to Fort Dix for combat operations and that permitting political campaigning on post would interfere with that mission.[299] Third, inviting appellants on the base to talk to Soldiers and their families would give the improper impression that the military endorsed their candidacies.[300] Displeased with the General's response, the candidates obtained an injunction enjoining him from enforcing Fort Dix's regulations against them.[301] The injunction enabled the candidates to conduct one campaign rally on Fort Dix before the Supreme Court decided to hear the government's appeal.[302]

The Supreme Court immediately took issue with one of the cases that the appellate court relied on in granting the injunction. That case, *United States v. Flowers*,[303] was a prior Supreme Court case dealing with a man who was arrested for handing out flyers on a city street that ran through the middle of the Fort Sam Houston military reservation in Texas.[304] The Supreme Court reversed Flowers's conviction on the ground that the city street was a public forum and the government, by allowing people to hand out flyers there in the past, had abandoned its claim to the road.[305] The Court held that *Flowers* was distinguishable from the *Greer* case because the military had never abandoned its claim to regulate political activities on Fort Dix.[306] In reversing the appellate court's decision, Justice Stewart famously noted:

> One of the very purposes for which the Constitution was ordained and established was to provide for the common

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[295] *Id.* at 832–33.
[296] *Id.*
[297] *Id.* at 833.
[298] *Id*. at 833 n.3.
[299] *Id*.
[300] *Id*.
[301] *Id*. at 834.
[302] *Id*.
[303] 407 U.S. 197 (1972).
[304] *Id*. at 835 (citing Flowers v. United States, 407 U.S. 197 (1972)).
[305] *Id*. at 835–36.
[306] *Id*. at 837.

> [defense], and this Court over the years has on countless occasions recognized the special constitutional function of the military in our national life, a function both explicit and indispensible. In short, it is the primary business of armies and navies to fight or be ready to fight wars should the occasion arise. And it is consequently the business of a military installation like Fort Dix to train soldiers, not to provide a public forum.[307]

A similar case arose in May of 2007 when a group of 1,000 antiwar protestors sought permission to enter West Point to protest Vice President Cheney's commencement address to graduating cadets.[308] Both the federal district court and the Second Circuit Court of Appeals denied the group's request.[309] The Second Circuit Court noted that Academy officials had never permitted any group to engage in political activities, including protests, on West Point.[310] In relying on *Greer*, the court held that military installations are not like traditional public forums where private citizens enjoy the right to freely assemble and express their views.[311] It also noted that the "mere presence" of the Vice President did not convert West Point into a public forum, and it certainly did not "serve as an open invitation for 1,000 or more outsiders to engage in freewheeling and potentially distracting . . . acts of political expression."[312]

Freewheeling and distracting would be a good way to describe some of the WBC's funeral protests. Given the Academy's mission to train cadets to become future Army leaders and to prepare them for combat operations upon graduation, no judge would buck precedent and ignore the *Greer* holding. Besides, USMA leaders have never admitted any member of the public or other group to engage in political activities on the installation.[313] Even though the Academy permits members of the public on the installation to view its historic facilities, that alone is not

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[307] *Id*. at 837–38 (citing in part Toth v. Quarles, 350 U.S. 11, 17 (1955)).
[308] John Doherty, *Eagles, Doves Clash at Academy Protest*, TIMES HERALD-RECORD, May 27, 2007, http://www.recordonline.com/apps/pbcsdll/article?AID=/20070527/NEWS/705270338.
[309] Sussman v. Crawford, 488 F.3d 136 (2007).
[310] *Id*. at 140–41.
[311] *Id*. at 140 (quoting Greer v. Spock, 424 U.S. 828, 838 (1976)).
[312] *Id*. at 141.
[313] *Id.* at 140–41.

enough to turn West Point into a public forum. Funeral picketers can only hope to demonstrate outside of West Point's gates during funeral services and even then, they must still abide by the restrictions contained in whatever funeral protest statute the New York Legislature ends up passing.

VIII. Conclusion

This article calls for a sounder method of enacting funeral protest statutes. As a number of states are likely to find out, passing a funeral picketing law that is constitutionally impregnable is not as easy as it may initially appear. The relevant case law demonstrates that legislatures must carefully craft statutes in such a way that they do not unduly limit or restrict other forms of protected speech. The model statute in Appendix D addresses this concern with regard to the two most prevalent features of funeral picketing laws—buffer zone and disturbing the peace restrictions. It incorporates a buffer zone no larger than 150 feet in keeping with the Court's decisions in the *Grayned*, *Hill*, and *Madsen* cases. The "disturbing the peace" provision eliminates any references to "images observable" and noises "within earshot" of funeral attendees. The former restricts perfectly lawful speech and even expressions of sympathy for the deceased, while the latter is only workable on a case-by-case basis.

New York's funeral picketing statute is constitutionally sound, for the most part. The 100-foot buffer restriction is clearly within parameters established by the Court; New York could have even gotten away with enacting a slightly larger buffer as proposed by the model statute . The unreasonable noise or disturbance provision of the statute should have specified the types of activities that it prohibits before a court will ever validate it. The model statute outlines what those activities are and drops the requirement that protestors seek permission from the deceased's family prior to engaging in any of them, as was originally proposed in the Assembly bill. In effect, the statute is a time, place, or manner regulation, capable of surviving a constitutional challenge under the First Amendment.

The RAFHA could be an effective tool to regulate funeral picketing near national cemeteries if it contained smaller buffer zone restrictions. The 300-foot buffer around the ingress and egress of a cemetery where access is impeded or obstructed is simply too large. Additionally, the

150-foot buffer along roads leading into or out of the cemetery is impractical and unconstitutional in a number of instances.[314] The "disturbing the peace" provisions, however, are constitutional and mirror some of the recommendations proposed in the model statute. Overall, the RAFHA was a good attempt at legislative craftsmanship, but the buffer zone restrictions will render the statute unlawful.

That brings us to the West Point example. The Supreme Court has made perfectly clear that the military plays by a different set of rules, and for good reason. As the Court noted in *Greer v. Spock*, the purpose of a military installation is to train troops to fight in combat, not to provide a venue for political protest.[315] Therefore, funeral protestors should never expect to picket funerals on military posts. The most they can expect is to challenge shoddily drafted and hastily enacted picketing laws cobbled together by state legislatures in response to high profile, emotionally charged funeral protests. The New York Legislature appears to have resisted that urge settling instead on a carefully crafted statute that is well poised to withstand the scrutiny of any future constitutional challenge.

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[314] *See supra* Part IV and accompanying text.
[315] Greer v. Spock, 424 U.S. 828, 837–38 (1976).

Appendix A

Bill Text A02779[316]
2007–2008 Regular Sessions
IN ASSEMBLY
January 19, 2007

AN ACT to amend the penal law, in relation to criminal interference with funeral services

THE PEOPLE OF THE STATE OF NEW YORK, REPRESENTED IN SENATE AND ASSEMBLY, DO ENACT AS FOLLOWS:

Section 1. The section heading, subdivision of 1 and the closing paragraph of section 240.70 of the penal law, as added by chapter 635 of the laws of 1999, are amended to read as follows:

Criminal interference with health care services, FUNERAL SERVICES, or religious worship in the SECOND degree.

1. A person is guilty of criminal interference with health services, FUNERAL SERVICES, or religious worship in the second degree when:

(a) this section omitted for illustrative purposes
(b) this section omitted for illustrative purposes
(c) this section omitted for illustrative purposes
(d) this section omitted for illustrative purposes
(e) With intent to prevent or disrupt a funeral or burial, funeral home viewing of a deceased person, funeral procession, or funeral or memorial service for a deceased person, when he or she:

(I) Blocks, impedes, inhibits, or in any other manner obstructs or interferes with access into or from any building or parking lot of a building in which a funeral, wake, memorial service, or burial is being conducted, or any burial plot or the parking lot of the cemetery in which a funeral, wake, memorial service, or burial is being conducted; or

(II) Congregates, pickets or demonstrates within three hundred (300) feet of an event specified in this subdivision; or

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

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[316] A.B. A02779, 2007–2008 Reg. Sess. (N.Y. 2007), *available at* http://assembly.state.ny.us/leg/?bn=A02779&sh=t. This appendix is a direct copy of the assembly bill.

(1) sings, chants, whistles, shouts, yells, or uses a bullhorn, auto horn, sound amplification equipment, or other sounds or images observable to or within earshot of participants in the funeral, wake, memorial service, or burial; or
(2) does or makes any utterance, gesture, or display designed to outrage the sensibilities of the group attending the funeral or burial, funeral home viewing of a deceased person, funeral procession, or funeral or memorial service for a deceased person; or
(3) distributes literature or any other item.

Appendix B

NEW YORK 231ST ANNUAL LEGISLATIVE SESSION
2007–2008 Regular Sessions

CHAPTER 566

ASSEMBLY BILL 2385

2008 N.Y. ALS 566; 2008 N.Y. LAWS 566; 2007 N.Y. A.N. 2385[317]

AN ACT to amend the penal law and the civil rights law, in relation to the crime of disturbance of a funeral, burial or memorial service

THE PEOPLE OF THE STATE OF NEW YORK, REPRESENTED IN SENATE AND ASSEMBLY, DO ENACT AS FOLLOWS:

Section 1. Section 240.21 of the penal law, as added by chapter 614 of the laws of 1967, is amended to read as follows:

Section 240.21 Disruption or disturbance of a religious service, funeral, burial or memorial service.

A person is guilty of disruption or disturbance of a religious service, funeral, burial or memorial service when he or she makes unreasonable noise or disturbance while at a lawfully assembled religious service, funeral, burial or memorial service, or within one hundred feet thereof, with intent to cause annoyance or alarm or recklessly creating a risk thereof.

Disruption or disturbance of a religious service, funeral, burial or memorial service is a class A misdemeanor.

Enacted September 25, 2008

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[317] 2008 N.Y. Consol. Laws Adv. Legis. Serv. 566 (LexisNexis). This appendix is a direct copy of Section 1 of the statute, available at the LexisNexis commercial database.

Appendix C

RESPECT FOR AMERICA'S FALLEN HEROES ACT[318]
38 U.S.C.S. § 2413

§ 2413. Prohibition on certain demonstrations at cemeteries under control of the National Cemetery Administration and at Arlington National Cemetery

(a) Prohibition. No person may carry out--

(1) a demonstration on the property of a cemetery under the control of the National Cemetery Administration or on the property of the Arlington National Cemetery unless the demonstration has been approved by the cemetery superintendent or the director of the property on which the cemetery is located; or

(2) with respect to such a cemetery, a demonstration during the period beginning 60 minutes and ending 60 minutes after a funeral, memorial service, or ceremony is held, any part of which demonstration-

(A) (i) takes place within 150 feet of a road, pathway, or other route of ingress to or egress from such cemetery property; and

(ii) includes, as part of such demonstration, any individual 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, memorial service, or ceremony; or

(B) is within 300 feet of such cemetery and impedes the access to or egress from such cemetery.

(b) Demonstration. For purposes of this section, the term "demonstration" includes the following:

(1) Any picketing or similar conduct.

(2) Any oration, speech, use of sound amplification equipment or device, or similar
conduct that is not part of a funeral, memorial service, or ceremony.

(3) The display of any placard, banner, flag, or similar device, unless such a display is part of a funeral, memorial service, or ceremony.

(4) The distribution of any handbill, pamphlet, leaflet, or other written or printed matter other than a program distributed as part of a funeral, memorial service, or ceremony.

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[318] 38 U.S.C.S. § 2413 (LexisNexis 2008). This appendix is a direct copy of the RAFHA.

Appendix D

§ 240.21. Disorderly Conduct at a Funeral or Memorial Service

(1) The General Assembly finds that over the past few years certain groups have picketed the funerals of fallen service members. As a result, a number of state legislatures and the Congress passed laws prohibiting funeral disturbances. The purpose of this Act is to protect the privacy of grieving family members and friends of the deceased who assemble to mourn at a funeral or memorial service in the State of New York.

(2) For Purposes of this Section:

(a) "Funeral" means a ceremony or memorial service held in connection with the burial or cremation of a person who has died.[319]

(b) "Funeral" does not include a funeral procession or motorcade.[320]

(c) "Funeral site" means a church, synagogue, mosque, funeral home, mortuary, cemetery, gravesite, mausoleum, or other place at which a funeral is conducted or scheduled to be conducted.[321]

(3) A person is guilty of aggravated disorderly conduct when he or she with intent to prevent or disrupt a funeral or memorial service:

(a) blocks, obstructs, or interferes with the ingress or egress of a funeral site in which a funeral or memorial service is being conducted;

(b) engages, with knowledge of the existence of a funeral site, in any loud singing, playing music, chanting, whistling, yelling, or noisemaking with or without noise amplification, including, but not limited to, bullhorns, auto horns, and microphones within 150 feet of any ingress or egress of a funeral site, where the volume of such singing, music, chanting, whistling, yelling, or noisemaking is likely to be audible and disturbing to the funeral site.[322]

(c) displays with knowledge of the existence of a funeral site and within 150 feet of the ingress or egress of a funeral site, any visual image

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[319] ARK. CODE ANN. § 5-71-230 (2008).

[320] *Id*. Arkansas wisely eliminated funeral processions from the scope of its statute and thus avoids the problems associated with floating buffer zones as discussed in Madsen v. Women's Health Center, Inc, 512 U.S. 753 (1994).

[321] ILL. COMP. STAT. ANN. 5/26-6 (2008). This definition includes most, if not all forums for funeral services and memorials.

[322] Section 3(a) is from the New York Assembly bill. Section 3(b) comes from the Illinois law cited in note 320. It eliminates the problems associated with the "within earshot of" language discussed in section IV. The 150-foot buffer zone restriction complies with the *Grayned* and *Madsen* decisions and is only fifty feet larger than the 100-foot buffer that the WBC acknowledges is legally acceptable.

designed to convey fighting words or actual or veiled threats against another person or to inflict emotional distress on a person attending a funeral.[323]

[323] This section also comes from the Illinois funeral picketing law cited in note 320. Unlike the New York Assembly bill, it contains no "images observable" provision and thus eliminates the possibility of restricting other forms of protected speech. Instead it only addresses images that threaten or inflict emotional distress on funeral-goers.