

NOTES

FINDING REST IN PEACE AND NOT IN SPEECH: THE GOVERNMENT'S INTEREST IN PRIVACY PROTECTION IN AND AROUND FUNERALS

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At the funeral of one of the most publicized victims of a crime against homosexuality, the Westboro Baptist Church gained notoriety.¹ Holding an anti-gay protest outside the funeral of brutally-murdered Matthew Shepard, the church became infamous for professing its view that homosexuality is a sin.² Several years later, the church is, again, in the media's spotlight. This time the church is picketing and protesting outside the funerals of American soldiers killed during their military service in the Iraq and Afghanistan wars.³ "Thank God for IEDs [Improvised Explosive Devices]" is just one of the messages that the church's picketers display during their protests in an attempt to convey their larger message that "soldiers' deaths are a sign of God punishing America for tolerating homosexuality."⁴ The church's speech has created much controversy, not only for its content, but also because it arguably disrespects the funerals of the deceased and disregards the privacy of those mourning. For these reasons, such protests have induced both state and federal legislatures to pass laws restricting them.⁵

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1. Brian M. Goodman, *Funeral Picketers Sued by Marine's Dad: Lawsuit Claims Anti-Gay Church Furthers Grief for Families of Dead*, CBSNEWS.COM, July 28, 2006, <http://www.cbsnews.com/stories/2006/07/27/national/main1843396.shtml>.

2. *Id.*

3. Brett Barrouquere, *Judge Suspends Ban on Funeral Protest*, BOSTON.COM, Sept. 26, 2006, http://www.boston.com/news/nation/articles/2006/09/26/judge_suspends_ban_on_funeral_protests/.

4. *Id.*

5. DAVID L. HUDSON, JR., FIRST AMENDMENT CENTER, FUNERAL PROTESTS (2006), http://www.fac.org/assembly/topic.aspx?topic=funeral_protests. "According to the National Conference of State Legislators, [thirty-four] states have introduced bills to limit protests near funerals . . . [and] [twenty-eight] of those states have passed such measures . . ." *Id.* The twenty-eight states include the following: "Alabama, Colorado, Delaware, Florida, Georgia, Illinois,

Kentucky was one of the many states that enacted such legislation.⁶ The constitutionality of its act was recently called into question when a member of the Westboro Baptist Church, Bart McQueary, filed a lawsuit requesting that the court enjoin the state from enforcing certain sections of the Act.⁷ The federal district court granted his request for a preliminary injunction, ruling that the part of the Act prohibiting protesting within 300 feet of a funeral was unconstitutional.⁸ While the constitutionality of the Act did not turn on the issue of privacy, the nature of the government's interest in protecting the privacy of its citizens while attending a funeral is at the heart of the type of legislation that was challenged in *McQueary v. Stumbo*.⁹

This Note analyzes the role of privacy with respect to funerals and explores its relation to the constitutionality of legislation like that enacted and challenged in Kentucky. Part I briefly examines the background of this issue, describing the church and its demonstrations, the recently enacted state and federal legislation

Indiana, Iowa, Kansas, Kentucky, Louisiana, Maryland, Michigan, Minnesota, Mississippi, Missouri, Nebraska, New Jersey, North Carolina, Ohio, Oklahoma, Pennsylvania, South Carolina, South Dakota, Tennessee, Texas, Virginia and Wisconsin." *Id.*; see also ALA. CODE § 13A-11-17 (Lexis Nexis Supp. 2006); COLO. REV. STAT. ANN. § 18-9-106 (West Supp. 2006); DEL. CODE ANN. tit. 11, § 1303 (Supp. 2006); FLA. STAT. ANN. § 871.01 (West 2007); GA. CODE ANN. § 16-11-34.2 (West Supp. 2006); 720 ILL. COMP. STAT. ANN. 5/26-6 (West Supp. 2007); IND. CODE § 35-45-1-3 (Supp. 2006); IOWA CODE ANN. § 723.5 (West Supp. 2007); KAN. STAT. ANN. § 21-4015 (1995); KY. REV. STAT. ANN. § 525.155 (Lexis Nexis Supp. 2007), *partly invalidated* by *McQueary v. Stumbo*, 453 F. Supp. 2d 975 (E.D. Ky. 2006); LA. REV. STAT. ANN. § 14:103 (Supp. 2007); MD. CODE ANN., CRIM. LAW § 10-205 (West Supp. 2007); MICH. COMP. LAWS ANN. § 750.167d (West Supp. 2007); MINN. STAT. ANN. § 609.501 (West Supp. 2007); MISS. CODE ANN. § 97-35-18 (West Supp. 2006); MO. ANN. STAT. § 578.501 (West Supp. 2007); NEB. REV. STAT. § 28-1320.03 (West Supp. 2006); N.J. STAT. ANN. § 2C:33-8.1 (West Supp. 2007); N.C. GEN. STAT. § 14-288.4 (2006); OHIO REV. CODE ANN. § 3767.30 (Lexis Nexis Supp. 2007), *partly invalidated* by *Phelps-Roper v. Taft*, No. 1:06CV2038, 2007 WL 915109 (N.D. Ohio Mar. 23, 2007); OKLA. STAT. ANN. tit. 21, § 1380 (West Supp. 2007); 18 PA. CONS. STAT. ANN. § 7517 (West Supp. 2007); S.C. CODE ANN. § 16-17-525 (Supp. 2006); S.D. CODIFIED LAWS § 22-13-17 (2006); TENN. CODE ANN. § 39-17-317 (2006); TEX. PENAL CODE ANN. § 42.055 (Vernon Supp. 2006); VA. CODE ANN. § 18.2-415 (Supp. 2007); WIS. STAT. ANN. § 947.011 (West Supp. 2006).

6. *McQueary v. Stumbo*, 453 F. Supp. 2d 975, 976-78 (E.D. Ky. 2006).

7. *Id.* at 978-79.

8. *Id.* at 997-98.

9. The *McQueary* court did, however, provide an in-depth analysis of the governmental interest motivating the Act and ultimately "assume[d] that the state has an interest in protecting funeral attendees from unwanted communications that are so obtrusive that they are impractical to avoid." *Id.* at 992. Following *McQueary*, a federal district court in Ohio addressed a similar statute prohibiting protesting near funerals. *Phelps-Roper v. Taft*, No. 1:06CV2038, 2007 WL 915109, at *1 (N.D. Ohio March 23, 2007). In finding a 300-foot fixed buffer zone constitutional and a 300-foot floating buffer zone unconstitutional, the court recognized the government's interest in privacy by stating that "the State of Ohio has an interest in protecting mourners, a captive audience, from unwanted speech." *Id.* at *5-7.

that has resulted from these demonstrations, and the recent decision in *McQueary* regarding the constitutionality of such legislation. Part I serves as a factual framework from which to view the following legal analysis. Part II examines the tests for constitutionality of speech regulations that often concern the competing policies of upholding the freedom of speech and serving governmental interests, like the protection of citizens' privacy. Part III explores cases that have addressed the issue of abrogating the freedom of speech in light of the government's interest in protecting the privacy of individuals and compares these cases to the situation presented in *McQueary* and being presented elsewhere in the United States. This Note argues that constitutionally permissible prohibitions in and around the home and around medical clinics are motivated by the same concerns motivating the national and state legislatures to enact funeral protest bans. This Note concludes that the government does have a significant and important interest in protecting the privacy of its citizens who are attending funerals, which justifies the passage of funeral protest ban legislation.

I. BACKGROUND

A. *The Westboro Baptist Church*

The Kansas-based Westboro Baptist Church ("Church") was founded in 1955 by Fred Phelps¹⁰ and refers to itself as "an Old School (or, Primitive) Baptist Church" that "adhere[s] to the teaching of the Bible, preach[ing] against all form of sin (e.g., fornication, adultery, sodomy), and insist[ing] that [all] doctrines of grace be taught publicly to all men."¹¹ Among other things, the Church believes that America is being punished by God for its acceptance of sin, and more specifically, for its acceptance of homosexuality.¹² While the Church is relatively small—consisting only of an estimated 100 members—it has been able to make its existence and message known across the fifty states by protesting America's "acceptance" of homosexuality at highly publicized funerals.¹³

The Church first gained nationwide media attention in 1998 when its members held an anti-gay protest outside Matthew Shepard's funeral.¹⁴ The Church used the Wyoming funeral of Shepard, the victim of a hate crime who had been brutally beaten and murdered because he was a homosexual, as a platform to express its belief that homosexuality is a sin.¹⁵ More recently, the Church has appeared and protested at the funerals of the Sago coal miners in West Virginia, at the funerals of the victims of the September 11 terrorist attacks, and, perhaps most notably, at the funerals of the fallen soldiers in the Iraq and

10. Goodman, *supra* note 1.

11. Westboro Baptist Church Frequently Asked Questions, <http://www.godhatesfags.com/main/faq.html> (last visited Jan. 14, 2007) [hereinafter Westboro Baptist Church FAQ].

12. Goodman, *supra* note 1.

13. *Id.*

14. *Id.*

15. *Id.*

Afghanistan wars.¹⁶ According to the Church, a funeral is “the perfect time to warn” people that “unless they repent, they will likewise perish,” because people attending funerals “have thoughts of mortality, heaven, hell, eternity, etc., on their minds.”¹⁷

On March 20, 2006, members of the Church protested at the funeral of Marine Lance Corporal Matthew A. Snyder.¹⁸ Again, the Church members displayed signs expressing their belief that the death of American soldiers is punishment from God for their participation in the defense of a country that tolerates homosexuality.¹⁹ Those attending the funeral of the fallen soldier, including his father, Albert Snyder, had to pass the protesting Church members as they entered the church where the private funeral was being held.²⁰ Despite attempts to ignore the protestors and instead focus on his son’s funeral, Albert Snyder was distraught by the presence of the protestors and subsequently brought a lawsuit against the Church for violation of privacy, intentional infliction of emotional distress, and civil conspiracy.²¹ Snyder prevailed on all counts, and, on October 31, 2007, the Church and its members were ordered to pay a total of \$10.9 million in damages.²² Following the jury’s verdict, “U.S. District Judge Richard Bennett noted the size of the award for compensating damages ‘far exceeds the net worth of the defendants,’ according to financial statements filed with the court.”²³ Nevertheless, the lawsuit appears to have had no or minimal deterrent effect on the Church, given that its members continue to demonstrate at the funerals of fallen servicemen.²⁴ The Church, however, is also facing pressure from both the federal government and state governments, as legislation aimed at restricting speech at or near funerals is quickly being enacted on both

16. *Id.*

17. Westboro Baptist Church FAQ, *supra* note 11.

18. Goodman, *supra* note 1.

19. *Id.*

20. *Id.*

21. *Id.* Specifically, Albert Snyder’s pleading alleged:

[T]he defendant church and its members wrongfully intruded upon his son’s funeral and subsequently defamed him on the defendants’ webpage, causing physical and emotional damages. In addition, defendants’ conduct was so intentional and outrageous that the imposition of punitive damages is appropriate to punish the defendants for their actions and to deter the defendants from further reprehensible conduct.

Complaint at 1, Snyder v. Phelps, No. 06CV01389, 2006 WL 2304608 (D. Md. 2007).

22. Punitive Damages at 1, Snyder v. Phelps, No. RBD-06-1389, 2007 WL 3248918 (D. Md. 2007) (awarding \$8 million in punitive damages—\$6 million for invasion of privacy and \$2 million for intentional infliction of emotional distress); Verdict Sheet at 2, Snyder v. Phelps, No. RBD-06-1389, 2007 WL 32489111 (D. Md. 2007) (awarding \$2.9 million in compensatory damages).

23. *Church Ordered to Pay \$10.9 Million for Funeral Protest*, CNN.COM, Oct. 31, 2007, <http://www.cnn.com/2007/US/10/31/funeral.protest/index.html>.

24. Westboro Baptist Church Homepage, <http://www.godhatesamerica.com/index.html> (last visited Nov. 8, 2007).

levels.²⁵

B. Federal and State Legislation

In 1992, the Kansas Funeral Picketing Act²⁶ was signed into law, making Kansas one of the first states to pass an act restricting protests near funerals.²⁷ The enactment of the law was prompted by the actions of the members of the Church who chose to spread their message by protesting at funerals.²⁸ The law was challenged by the Church's founder, Reverend Fred Phelps, and was ultimately found to be unconstitutionally vague; a problem that the Kansas legislature quickly corrected.²⁹

In an increasing effort to spread their message, the Church began to protest near funerals elsewhere in the country, no longer limiting their efforts to Kansas.³⁰ By March 2006, the Church's protests had gained nationwide attention and prompted the federal legislature to take action.³¹ On March 29, 2006, Michigan Representative Mike Rogers introduced the Respect for America's Fallen Heroes Act.³² The bill was passed by the House with 408 votes in favor and only three votes in opposition.³³ In the Senate, an amended version of the bill was passed by unanimous consent.³⁴ On May 29, 2006, President Bush signed the bill into law.³⁵ The Act was passed "to prohibit certain demonstrations at cemeteries under the control of the National Cemetery Administration and at Arlington National Cemetery, and for other purposes."³⁶ More specifically, the Act makes a disruptive demonstration on or within 300 feet of a nationally controlled cemetery a misdemeanor if that disruption occurs during the funeral, within one hour preceding the funeral, or within one hour following the funeral.³⁷ The Act concludes that "[i]t is the sense of Congress that

25. HUDSON, *supra* note 5.

26. KAN. STAT. ANN. § 21-4015 (1995); *see infra* note 29.

27. HUDSON, *supra* note 5.

28. *Id.*

29. *Id.* The original law was found to be unconstitutionally vague in its reference to "before" and "after" funerals. This problem was fixed by amending the statute to read that the prohibition extended "within one hour prior to, during and two hours following the commencement of a funeral." *Id.*

30. *Id.*

31. *Id.*

32. Library of Congress THOMAS Summary of H.R. 5037, <http://thomas.loc.gov/cgi-bin/bdquery/z?d109:HR05037:@@L&summ2=m&> (last visited Jan. 14, 2006) [hereinafter Library of Congress].

33. *Id.*

34. *Id.*

35. *Id.*; HUDSON, *supra* note 5.

36. Respect for America's Fallen Heroes Act, Pub. L. No. 109-228, 120 Stat. 387 (codified as amended in scattered sections of 18 U.S.C. and 38 U.S.C. (2006)).

37. *Id.*

each State should enact legislation to restrict demonstrations near any military funeral,” suggesting that states, in addition to the federal government, are to take their own action in curbing the disruptions.³⁸ The passage of the Act came in the midst of the passage of similar legislation on the state level.³⁹ Currently, in addition to the federal law, thirty-four states have introduced similar legislation with twenty-eight of those states having already passed such laws.⁴⁰

C. *McQueary v. Stumbo*

In March 2006, Kentucky Governor Ernie Fletcher added his state to the list of those with laws restricting funeral protests. His state’s law was called into question in the United States District Court for the Eastern District of Kentucky, and on September 26, 2006, a decision was handed down in that case.⁴¹ In *McQueary v. Stumbo*,⁴² the district court considered the constitutionality of Kentucky’s recently enacted House Bill 333 and Senate Bill 93, two acts which made, among other things, demonstrating within 300 feet of a funeral unlawful and a Class B misdemeanor.⁴³ The court decided to enjoin enforcement of particular sections of the acts, finding that these sections would likely be found to be unconstitutional because “the provisions are not narrowly tailored to serve a significant government interest but are instead unconstitutionally overbroad.”⁴⁴

In analyzing the constitutionality of the acts, the court first determined that they were content-neutral and, therefore, subject only to intermediate scrutiny, as opposed to being content-based and subject to strict scrutiny.⁴⁵ In reaching this conclusion, the court noted that “[l]ooking to the text of the statute, the provisions at issue apply evenhandedly to all speakers” and, thus, the statute is on its face content-neutral.⁴⁶ Furthermore, in considering the totality of the evidence regarding the acts and the motivations behind them, the court held that “the state’s predominate purposes in enacting it were content neutral.”⁴⁷ The

38. *Id.*; HUDSON, *supra* note 5.

39. SARA CANNON & ELAINE HARGROVE, SILHA CENTER, FREEDOM OF SPEECH: CHURCH GROUP’S PROTESTS SPAWN LEGISLATION LIMITING DEMONSTRATIONS (2006), <http://www.silha.umn.edu/Winter%202006%20Bulletin/Funeral%20Protests.pdf>. On March 13, 2006, just weeks prior to the introduction of the bill in Congress, over thirty states “had passed or were considering passing laws banning protests near funerals.” *Id.*

40. HUDSON, *supra* note 5; *see also* statutes cited *supra* note 5.

41. *McQueary v. Stumbo*, 453 F. Supp. 2d 975 (E.D. Ky. 2006). The constitutionality of the funeral protest bans of other states are also being called into question. *See Phelps-Roper v. Taft*, No. 1:06CV02038, 2007 WL 915109 (N.D. Ohio Mar. 23, 2007).

42. 453 F. Supp. 2d 975.

43. *Id.* at 976-78.

44. *Id.* at 997.

45. *Id.* at 985-86.

46. *Id.* at 985.

47. *Id.*

acts, therefore, were subject to intermediate scrutiny.⁴⁸

In applying intermediate scrutiny, the statute could only be upheld if it were found to be for the purpose of serving a significant state interest, narrowly tailored to serve that interest, and also left open alternative channels of communication.⁴⁹ In examining case law, the court noted that despite the need to protect the free exchange of ideas, a state may regulate speech in order to “protect citizens from unwelcome communications . . . where the communications invade substantial privacy interests in an essentially intolerable manner.”⁵⁰ Characterizing a funeral as “deeply personal, emotional and solemn,” the court assumed for the sake of argument that the state does have an interest in protecting attendees from unwanted communications.⁵¹ Ultimately, however, the court concluded that the statute’s means of protecting the attendees “are not narrowly tailored to serve a significant government interest but are instead unconstitutionally overbroad.”⁵²

II. THE LAW GOVERNING THE CONSTITUTIONALITY OF SPEECH RESTRICTIONS

As the *McQueary* court’s analysis illustrated, the initial question in determining the constitutionality of a speech restriction concerns whether the regulation at issue is content-based and, therefore, subject to strict scrutiny or content-neutral and subject to intermediate scrutiny.⁵³ A content-based restriction will pass constitutional muster only if it passes a strict scrutiny test, requiring that the state show a compelling governmental interest for which the law is narrowly tailored.⁵⁴ Content-based restrictions are held to this higher standard in order to “ensure that communication has not been prohibited ‘merely because public officials disapprove of the speaker’s views.’”⁵⁵ In the alternative, if the law is found to be content-neutral, it will be subject to a less restrictive standard. A content-neutral restriction will be upheld if the time, manner, and

48. *Id.* at 986.

49. *Id.* at 981 (quoting *Frisby v. Schultz*, 487 U.S. 474, 481 (1988)).

50. *Id.* at 989 (stating that “where the communications are directed at citizens in their homes or where the communications are directed at a ‘captive’ audience and are so obtrusive that individuals cannot avoid exposure to them” the state may regulate the communications).

51. *Id.* at 992.

52. *Id.* at 997. In finding that the statute was not narrowly tailored, the court noted that the acts “burden[ed] substantially more speech than is necessary to prevent interferences with a funeral or to protect funeral attendees from unwanted, obtrusive communications that are otherwise impractical to avoid.” *Id.* at 995-96. More specifically, the court took issue with the act’s blanket prohibitions on images and sounds, the lack of geographic restrictions regarding their prohibition of distribution of literature, and the fact that the 300-foot buffer zone would prohibit the public’s general communications. *Id.* at 996.

53. *Madsen v. Women’s Health Ctr.*, 512 U.S. 753, 762-63 (1994).

54. *Consol. Edison Co. of N.Y. v. Pub. Serv. Comm’n of N.Y.*, 447 U.S. 530, 536-41 (1980).

55. *Id.* at 536 (quoting *Niemotko v. Maryland*, 340 U.S. 268, 282 (1951) (Frankfurter, J., concurring)).

place restrictions are reasonable—they must “leave open ample alternative channels for communication of the information” and they must be “narrowly tailored to serve a significant governmental interest.”⁵⁶ For the purposes of this Note, the following discussion focuses on the nature of the government’s interest in privacy protection at funerals, though concerns as to whether funeral protests bans are indeed content-neutral and sufficiently tailored are also important constitutional considerations.

The type of privacy the government seeks to protect through speech regulations has been described as “unique” and “a parasite, deriving its importance not from any direct or consistent source in the Constitution, but as a counterweight which has latched itself onto, in order to restrict, free speech under the First Amendment.”⁵⁷ Consequently, the origins and nature of this type of privacy interest are muddled and unclear.⁵⁸ Speculation leads some to believe that the interest in privacy is somehow derived from the First Amendment itself.⁵⁹ Another view proposes that the interest is derived from the Fourth Amendment along with the idea that “a man’s home is his castle.”⁶⁰ Still others attribute the origins to common law tort theories of privacy.⁶¹ Lastly, this type of privacy may be viewed as having its roots in any combination of the aforementioned theories.⁶²

Whatever the origin of the privacy interest, the case law has demonstrated that the government may be permitted to protect privacy even if doing so would restrict another’s otherwise protected speech.⁶³ In the past fifty years, a significant amount of case law has established an arguably increasing ability for the state to protect an individual’s privacy, particularly in the context of the home and near medical clinics.⁶⁴ As will be discussed below, the concerns allowing for

56. *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989) (quoting *Clark v. Cmty. for Creative Non-Violence*, 468 U.S. 288, 293 (1984)).

57. Ken Gormley, *One Hundred Years of Privacy*, 1992 WIS. L. REV. 1335, 1375.

58. *Id.*

59. *Id.* Gormley describes its derivation from the First Amendment by characterizing that amendment as not only the freedom to speak without interference, but also the “freedom of the citizen to think and engage in private thoughts, free from the clutter and bombardment of outside speech.” *Id.* at 1381.

60. *Id.* at 1377 (quoting *Martin v. City of Strathers*, 319 U.S. 141, 150 (1993) (Murphy, J., concurring)).

61. *Id.*

62. *Id.* Appearing to implicate both the First and the Fourth Amendments, for example, Justice Marshall once stated that “[i]f the First Amendment means anything, it means that a State has no business telling a man, sitting alone in his own house, what books he may read or what films he may watch. Our whole constitutional heritage rebels at the thought of giving government the power to control men’s minds.” *Stanley v. Georgia*, 394 U.S. 557, 565 (1969).

63. Gormley, *supra* note 57, at 1375-76 (stating that “the Supreme Court has in essence institutionalized this species of privacy by routinely balancing it against the right of free speech under the First Amendment—often with the victory going to privacy”).

64. *See infra* Parts III.A-C.

privacy protection in these cases also warrant privacy protection near funerals.

III. CASE LAW

The Supreme Court has yet to determine whether privacy protection should extend to those attending a funeral, particularly if doing so would abridge another's constitutional rights. The Court has, however, addressed cases involving privacy protection in other contexts, such as in and about the home and around medical clinics.⁶⁵ Through these analogous cases, insight as to the appropriate test to apply and the relevant factors to consider may be gained.

A. *Deriving a Balancing Test from Case Law Involving Restrictions for Mail Entering the Home*

In analyzing the government's interest in protecting the privacy of those attending a funeral, the *McQueary* court compared funeral protest bans to several cases involving laws regulating picketers and protestors around the home.⁶⁶ Before these cases, however, the Supreme Court addressed a similar issue—the nature of the government's interest in protecting the privacy of its citizens while within the home from unwanted mail. The following sections examine two such cases in an attempt to derive an applicable test to apply when dealing with a statute enacted to serve the government's interest in privacy protection but, as a result, limit and abrogate First Amendment free speech rights.

1. *Rowan: Illustrating the Balance Between the Protection of Privacy and the Right to Speak.*—In 1970, the Supreme Court considered the constitutionality of a federal statute that permitted a person to request that his name be removed from mailing lists to stop future mailings that he deemed to be sexually provocative.⁶⁷ The congressional hearings and the legislative history indicated that Congress's intent in enacting the law was to protect the privacy of the home and its residents, particularly minors, from sexually provocative, offensive, and unsolicited material.⁶⁸ The Supreme Court, finding the statute constitutional, upheld it.⁶⁹

Faced with a persuasive First Amendment argument that the right to free speech is necessary to a free society, the Court responded that although “communication is imperative to a healthy social order . . . [,] the right of every person ‘to be let alone’ must be placed in the scales with the right of others to communicate.”⁷⁰ In this spirit, the Court rejected the argument that mailers have a constitutionally protected right to express their ideas by sending mail to the homes of unwilling recipients.⁷¹ Addressing the First Amendment argument, the

65. See *infra* Parts III.A-C.

66. *McQueary v. Stumbo*, 453 F. Supp. 2d 975, 987-88 (E.D. Ky. 2006); see *infra* Part III.B.

67. *Rowan v. U.S. Post Office Dep't*, 397 U.S. 728, 729-30 (1970).

68. *Id.* at 731-32.

69. *Id.* at 738.

70. *Id.* at 736.

71. *Id.* at 738.

court stated:

If this prohibition operates to impede the flow of even valid ideas, the answer is that no one has a right to press even “good” ideas on an unwilling recipient. That we are often “captives” outside the sanctuary of the home and subject to objectionable speech and other sound does not mean we must be captives everywhere.⁷²

Thus, the government can, in some instances, permissibly abridge the First Amendment rights of others in the name of protecting the privacy of its citizens while in their homes.⁷³ Furthermore, the Court seemed to suggest the government’s interest in protecting the captive audience is not limited to the protection of the homes of its citizens, though the Court failed to define where else the government may restrict speech in the name of a captive audience.⁷⁴

The concern expressed in *Rowan*, namely the right of the captive audience to be let alone, was also a concern voiced by policymakers when enacting statutes prohibiting disturbances at or near funerals.⁷⁵ As *Rowan* indicated, when considering an intrusion into the home, a place in which one is a captive listener without means of escape, the right to free speech must be balanced against the right to be let alone.⁷⁶ The *Rowan* Court expressly stated that these two interests must be balanced when determining the constitutionality of a statute restricting speech entering the home.⁷⁷ So too must the rights be balanced when determining the constitutionality of funeral protest bans; the right of those attending a funeral, made captive by their circumstances, to be let alone must be balanced against the right of those protesting to speak their message.

In certain circumstances, such as those presented by the facts in *Rowan*, the government’s interest in protecting the privacy of its citizens will outweigh the First Amendment rights of another.⁷⁸ In *Rowan*, the residents of the home, bombarded with unwanted speech, became a captive audience whose privacy the government had an interest in protecting.⁷⁹ As the Court determined in *Rowan*, this interest was so great that, when balanced against the mailers’ right to free speech, the interest in the protection of privacy prevailed, allowing the government to constitutionally restrict the mailers’ right to speak.⁸⁰

A similar test could, and arguably should, be employed in determining the

72. *Id.* (citing *Pub. Utils. Comm’n of D.C. v. Pollak*, 343 U.S. 451 (1952)).

73. *Id.*

74. *See id.*

75. *See McQueary v. Stumbo*, 453 F. Supp. 2d 975, 985 (E.D. Ky. 2006) (In defending Kentucky’s House Bill 333 and Senate Bill 93 prohibiting disturbances at funerals, “the Attorney General argue[d] that the state has an interest in protecting its citizens from unwanted communications.”).

76. *Rowan*, 397 U.S. at 736.

77. *Id.*

78. *Id.* at 738.

79. *Id.*

80. *Id.* at 737-38.

constitutionality of the funeral protest bans that restrict speech in the name of privacy protection. The Court has acknowledged that it “has considered analogous issues—pitting the First Amendment rights of speakers against the privacy rights of those who may be unwilling viewers or auditors—in a variety of contexts. Such cases demand delicate balancing.”⁸¹ If the government’s interest in protecting the privacy of its citizens who are attending a funeral and who are essentially a captive audience outweighs the protestor’s right to free speech, then the statutes should be upheld, provided that the statute is otherwise constitutional.

2. *Tipping the Scales in Favor of the Speaker Per Edison*.—Ten years after *Rowan*, in 1980, the Supreme Court considered another case involving the constitutionality of restrictions on mail entering the home.⁸² *Consolidated Edison Co. of New York v. Public Service Commission of New York* asked the Court to determine the constitutionality of an order by the Public Service Commission of the State of New York (“Commission”) prohibiting utility companies from distributing literature about controversial political topics, such as nuclear power, as inserts in their bills to customers.⁸³ The order was given after the Natural Resource Defense Council became aware of the politically controversial inserts, like one entitled “Independence is Still a Goal, and Nuclear Power Is Needed to Win the Battle,” that Consolidated Edison was placing in its bills to customers.⁸⁴ The utility company challenged the constitutionality of the order in the New York state courts, and the New York Court of Appeals upheld the order, finding it to be “a valid time, place, and manner regulation designed to protect the privacy of . . . customers.”⁸⁵ The United States Supreme Court, however, reversed the judgment, holding that the prohibition was “neither a valid time, place, or manner restriction, nor a permissible subject-matter regulation, nor a narrowly drawn prohibition justified by a compelling state interest” and was, therefore, unconstitutional and violative of the right to free speech.⁸⁶

The Court reached its holding based in part on its determination that the restriction on speech was content-based.⁸⁷ In an attempt to overcome that finding, the Commission argued that its regulation was “a precisely drawn means of serving a compelling state interest.”⁸⁸ The Commission argued that the prohibition was necessary to “avoid forcing Consolidated Edison’s views on a captive audience.”⁸⁹ The New York Court of Appeals relied heavily on this argument in support of its decision to uphold the prohibition.⁹⁰ The United States

81. *Erznoznik v. Jacksonville*, 422 U.S. 205, 208 (1975) (citation omitted).

82. *Consol. Edison Co. of N.Y. v. Pub. Serv. Comm’n of N.Y.*, 447 U.S. 530, 532 (1980).

83. *Id.* at 532-33.

84. *Id.* at 532.

85. *Id.* at 533.

86. *Id.* at 544.

87. *Id.* at 538.

88. *Id.* at 540.

89. *Id.*

90. *Id.* at 541.

Supreme Court, however, rejected this claim, recognizing that “[e]ven if a short exposure to Consolidated Edison’s view may offend the sensibilities of some consumers, the ability of government ‘to shut off discourse solely to protect others from hearing it [is] dependent upon a showing that substantial privacy interests are being invaded in an essentially intolerable manner.’”⁹¹ As a clarification, the Court stated that “[w]here a single speaker communicates to many listeners, the First Amendment does not permit the government to prohibit speech as intrusive unless the ‘captive’ audience cannot avoid objectionable speech,”⁹² like “[p]assengers on public transportation”⁹³ or residents of a home disrupted by the loud broadcasts of a passing truck.⁹⁴ The recipient of a utility bill, however, is different.⁹⁵ As the Court noted, the recipient could avoid the objectionable message by tossing it in the trash can.⁹⁶ Thus, the invasion of privacy was not sufficiently intolerable to warrant such restriction, and the restriction was, therefore, an unconstitutional violation of the utility company’s First Amendment right to free speech.⁹⁷

In weighing the interest in protecting privacy against the right to free speech, the *Edison* Court indicated that the unwilling audience was responsible, to a certain extent, in protecting his own privacy.⁹⁸ While a person in one’s home may have no other place of retreat, certain speech can still be avoided by the unwilling residential listener.⁹⁹ Offensive speech may enter the home through mail, email, telephone calls, or television programs. Yet, even these forms of speech can be avoided in the home by, for example, throwing the mail in the trash can, setting up email filters, hanging up the phone, or changing the channel. Given that, at least under these circumstances, the unwilling audience can easily avoid the unwanted speech by his own actions, the Court appears hesitant to uphold a statute that abridges another’s constitutional right to free speech.

When faced with other circumstances, however, avoidance of speech becomes more problematic. As the Court stated in *Edison*, residents whose homes are bombarded with the loud messages of a passing truck and passengers on public transportation fall into this category.¹⁰⁰ These circumstances present the case of unwilling listeners who are virtually unable to avoid the unwanted speech. They are a captive audience, but as the Court recognizes, they need not be.¹⁰¹ In such circumstances, the government is permitted to regulate the unwanted speech and protect the captive audience.

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

92. *Id.* at 541-42.

93. *Id.* at 542 (citing *Lehman v. Shaker Heights*, 418 U.S. 298, 307-08 (1974)).

94. *Id.* (citing *Kovacs v. Cooper*, 336 U.S. 77, 87-89 (1949)).

95. *Id.*

96. *Id.*

97. *Id.*

98. *See id.* at 541-42.

99. *Id.*

100. *Id.* at 542.

101. *Id.* at 541-42.

Similarly, government protection should extend to those attending a funeral who, by virtue of their circumstance, are made a captive audience. Just as a passenger on a public bus and the resident of a home bombarded with a loud message are unable to avoid the unwanted speech, so too are the mourners at a funeral. A funeral provides the friends and family of the deceased one last time to pay their respects before the deceased is finally laid to rest. The funeral only occurs once, giving those who wish to participate in the services one opportunity to do so. When confronted with unwanted speech, only two options exist for the funeral attendee: enduring the speech as a captive audience or leaving the funeral and abandoning the chance to say final goodbyes. The latter option is arguably as unrealistic as telling the captive audience on the public bus that he can choose not to ride the bus or telling the person in his home that he has the option to cover his ears to the noisome broadcast of the passing truck. Those attending a funeral cannot simply avoid the speech directed at them by nearby protestors in the same way that homeowners can discard a piece of unwanted mail. Instead, the speech directed at those attending a funeral is an invasion of a substantial privacy interest “in an essentially intolerable manner.”¹⁰²

In determining that an interest in privacy is intolerably intruded upon and thus outweighs the interest in free speech, a variety of factors may be considered.¹⁰³ Predominate in the Court’s consideration of the restrictions presented in both *Rowan* and *Edison* was the ability of the unwilling listener to give notice that he wishes to no longer be an audience to the speech. On this ground, these two cases can be reconciled. In *Rowan*, for example, the Court noted the special circumstances of the case, namely that “the mailer’s right to communicate is circumscribed only by an affirmative act of the addressee giving notice that he wishes no further mailings from that mailer.”¹⁰⁴ In *Rowan*, residents received mailers and then, based upon their judgment that the mail was too provocative, gave notice to the sender that they wished to be removed from the mailing list.¹⁰⁵ No notice was afforded to the utility companies in *Edison*. Instead, the Commission barred their speech.¹⁰⁶

Notice is a viable option in the context of mailers, given that mailing companies are continuously sending their advertisements and literature to homes, making the residents a continuous audience unless they object. By its very nature, a funeral occurs only once. Thus, notice is not a viable option in the funeral context, making the need for privacy protection at a funeral an even greater interest than is the interest in protecting the privacy of recipients of unwanted mail.

102. *Id.* at 541 (quoting *Cohen v. California*, 403 U.S. 15, 21 (1971)).

103. As will be discussed below, physical characteristics of the place in which the unwilling listener is held captive and the psychological state of the unwilling listener are the primary factors. See *infra* Parts III.B-C.

104. *Rowan v. U.S. Post Office Dep’t*, 397 U.S. 728, 737 (1970).

105. *Id.* at 729-30.

106. *Consol. Edison Co. of N.Y. v. Pub. Serv. Comm’n of N.Y.*, 447 U.S. 530, 532-33 (1980).

B. Cases Involving Restrictions About the Home Illustrating the Physical Characteristics of Places that Hold an Audience Captive and Require Governmental Interest and Protection

The government's interest in privacy protection has also been litigated in terms of regulations that prohibit protesting and picketing outside and about the home, particularly in *Carey v. Brown*,¹⁰⁷ *Frisby v. Schultz*,¹⁰⁸ and *Ward v. Rock Against Racism*.¹⁰⁹ The *McQueary* court used these cases in support of its assumption that the government has an interest in protecting the privacy of those who are attending a funeral.¹¹⁰ Arguably, by analogy, these cases serve as persuasive authority for upholding funeral protest bans in the name of supporting the governmental interest of privacy protection.

1. *Carey and Frisby Illustrating the Physical Characteristics Giving Rise to a Government's Interest in Protecting the Privacy of Captive Citizens.*—In the same year as the Supreme Court decided *Edison*, it also decided *Carey v. Brown*, a case that challenged the constitutionality of an Illinois state statute that made it a misdemeanor “to picket before or about the residence or dwelling of any person, except when the residence or dwelling is used as a place of business.”¹¹¹ The statute also contained an explicit exception stating that it did “not prohibit the peaceful picketing of a place of employment involved in a labor dispute or the place of holding a meeting or assembly on premises commonly used to discuss subjects of general public interest.”¹¹² The question of the statute's constitutionality arose after several members of the Committee Against Racism were arrested for violating the statute by peacefully protesting the political actions of Chicago's mayor outside his home.¹¹³ Writing for the Court, Justice Brennan affirmed the court of appeals's decision that the Act's “differential treatment of labor and nonlabor picketing could not be justified either by the important state interest in protecting the peace and privacy of the home or by the special character of a residence that is also used as a ‘place of employment’” and was, therefore, inconsistent with the principles of the Equal Protection Clause.¹¹⁴

Despite striking down the Illinois law as unconstitutional, the Court recognized the interest that Illinois had in protecting the privacy of the home, declaring it “an important value” and “of the highest order in a free and civilized

107. *Carey v. Brown*, 447 U.S. 455 (1980); *see infra* notes 111-28 and accompanying text.

108. *Frisby v. Schultz*, 487 U.S. 474 (1988); *see infra* notes 130-42 and accompanying text.

109. *Ward v. Rock Against Racism*, 491 U.S. 781 (1989); *see infra* Part III.B.2.

110. *McQueary v. Stumbo*, 453 F. Supp. 2d 975, 987-89 (E.D. Ky. 2006) (citing *Frisby*, 487 U.S. at 482; *Carey*, 447 U.S. at 471; *Ward*, 491 U.S. at 796).

111. *Carey*, 447 U.S. at 457 (quoting ILL. REV. STAT. ch. 38, § 21.1-2 (1977), *invalidated by Carey v. Brown*, 447 U.S. 455 (1980)).

112. *Id.* (quoting ILL. REV. STAT. ch. 38, § 21.1-2 (1977), *invalidated by Carey v. Brown*, 447 U.S. 455 (1980)).

113. *Id.*

114. *Id.* at 458-59, 471.

society.”¹¹⁵ The Court recognized that

no mandate in our Constitution leaves States and governmental units powerless to pass laws to protect the public from the kind of boisterous and threatening conduct that disturbs the tranquility of spots selected by the people either for homes, wherein they can escape the hurly-burly of the outside business and political world, or for public and other buildings that require peace and quiet to carry out their functions, such as courts, libraries, schools, and hospitals.¹¹⁶

Thus, states are constitutionally permitted to restrict speech in the name of the interest of protecting privacy, at least in certain places.¹¹⁷

Justice Rehnquist dissented from the majority, finding that the statute should be upheld and that it was in compliance with both the First Amendment and Equal Protection principles based on the reasonableness of its time, place, and manner restrictions.¹¹⁸ Justice Rehnquist agreed with the majority’s conclusion that the government has an interest in protecting residential privacy.¹¹⁹ In his own explanation, he noted that the state’s interest in protecting residential privacy was of such paramount concern that it should prevail over individuals’ First Amendment right to picket.¹²⁰ In his opinion, the nature of the home justified the protection that the statute provided it by banning residential picketing.¹²¹ Justice Rehnquist explained that “[w]here, as here, the resident has no recourse of escape whatsoever, the State may quite justifiably conclude that the protection afforded by a statute such as this seems even more necessary.”¹²² In his analysis, Justice Rehnquist emphasized that, in dealing with issues of residential privacy, “it is not just the distraction of the noise which is in issue—it is the very presence of an unwelcome visitor at the home.”¹²³

Although the Court rarely addresses why it views the home as being the

115. *Id.* at 471.

116. *Id.* at 470-71 (quoting *Gregory v. Chicago*, 394 U.S. 111, 118 (1969) (Black, J., concurring)).

117. *See id.* (quoting *Gregory*, 394 U.S. at 118 (Black, J., concurring)).

118. *Id.* at 474 (Rehnquist, J., dissenting).

119. *Id.* at 476-77.

120. *Id.* at 477-78. In support of his proposition, Justice Rehnquist cited *Rowan v. U.S. Post Office Department*, recognizing that in that case the Court found that the right of every person to be let alone, especially when in one’s home, weighed so heavily against the rights of others to communicate that it prevailed over them. *Id.* at 477 (citing *Rowan v. U.S. Post Office Dep’t*, 397 U.S. 728, 736 (1970)). Justice Rehnquist also cited *FCC v. Pacifica Foundation*, which upheld the ban of an offensive broadcast because it “confronts the citizen, not only in public, but also in the privacy of the home, where the individual’s right to be left alone plainly outweighs the First Amendment rights of an intruder.” *Id.* (quoting *FCC v. Pacifica Found.*, 438 U.S. 726, 748 (1978)).

121. *Id.* at 479.

122. *Id.*

123. *Id.* at 478.

ultimate sanctuary requiring governmental protection, the Court seems to consider that, given the relatively unrestricted nature of speech in traditional areas of public fora, unwilling listeners should have some place from which they might escape the unwanted speech.¹²⁴ Just as those speaking have a right to speak, those who are intended to be the listeners have a right to not listen. The protection of the home has a long history in the law as a place from which one can escape the outside world and do, to a certain extent, as he pleases.¹²⁵ The home has long been known as a person's "castle," a place over which he has, to some degree, complete dominion.¹²⁶ Thus the Court, in addressing the tranquility and the sanctuary that the home provides, recognizes it as a place in which an unwilling listener should be able to retreat in making his decision to not listen.¹²⁷ Notably, however, the Court does not limit these places to the home, but indicates that the government should also be able to restrict speech in other places as well.¹²⁸

In 1988, the Supreme Court considered *Frisby v. Schultz*,¹²⁹ another case concerning restrictions on residential picketing.¹³⁰ This time the Court was confronted with the constitutionality of a city ordinance that completely banned the "picketing 'before or about' any residence."¹³¹ Brookfield, Wisconsin's Town Board enacted the ordinance after a number of the city's residents peacefully picketed outside the home of a doctor, protesting his practice of performing abortions.¹³² The purpose of the ordinance was the protection of the home and the preservation of the tranquility and privacy of the residents within their homes.¹³³ Moreover, the Town Board believed that picketing and protesting about the home emotionally disturbed and distressed its residents, essentially serving as a means of harassment.¹³⁴ The district court granted the protestors' request for a preliminary injunction, finding that the ordinance was not narrowly tailored.¹³⁵ The court of appeals affirmed this judgment, but the Supreme Court reversed, finding the ordinance to be constitutional because it was content neutral, narrowly-tailored, and left open alternative channels of

124. *See id.* at 470-71 (quoting *Gregory v. Chicago*, 394 U.S. 111, 118 (1969) (Black, J., concurring)).

125. Daniel J. Solove, *The Origins and Growth of Information Privacy Law*, 828 PLI/Pat 23, 27 (2005) ("The law had long protected one's home. The maxim that the home is one's castle appeared as early as 1499.").

126. *Id.* at 27-28.

127. *Carey*, 447 U.S. at 470-71 (quoting *Gregory*, 394 U.S. at 118 (Black, J., concurring)).

128. *See id.* (quoting *Gregory*, 394 U.S. at 118 (Black, J., concurring)) (indicating that the government may also restrict speech in hospitals, libraries, courts, and schools).

129. 487 U.S. 474 (1988).

130. *Id.* at 476.

131. *Id.*

132. *Id.*

133. *Id.* at 476-77.

134. *Id.* at 477.

135. *Id.* at 478.

communication.¹³⁶

In analyzing the constitutionality of the ordinance, Justice O'Connor, writing for a plurality of the Court, placed great emphasis on the household and the ordinance's explicit prohibition of picketing around the household.¹³⁷ Regarding the government's substantial interest in protecting residential privacy, Justice O'Connor noted that the interest was "significant," especially considering that when in one's home, one cannot easily avoid being an unwilling listener.¹³⁸ "The resident is figuratively, and perhaps literally, trapped within the home, and because of the unique and subtle impact of such picketing is left with no ready means of avoiding the unwanted speech."¹³⁹ Justice O'Connor also adopted the language of *Carey*, characterizing the governmental interest in the protection of residential privacy as being "certainly of the highest order in a free and civilized society" and "an important value."¹⁴⁰

Justice O'Connor also noted that "[t]he First Amendment permits the government to prohibit offensive speech as intrusive when the 'captive' audience cannot avoid the objectionable speech."¹⁴¹ Finding the speech both intrusive and directed at the unwilling resident of the home, the Court found the ordinance to be a constitutional restriction on the picketers' right to free speech, holding that "[b]ecause the picketing prohibited by the Brookfield ordinance is speech directed primarily at those who are presumptively unwilling to receive it, the State has a substantial and justifiable interest in banning it."¹⁴²

The progression of case law addressing the right to restrict free speech that impedes upon the privacy of individuals within their homes illustrates a growing willingness of the Court to protect citizens from unwanted noise and unwelcome visitors in places from which the audience has no retreat. Central to the idea of the home in this context and critical to the Court's analysis in both *Frisby* and *Carey*, as in both *Rowan* and *Edison*, is the idea that the home is the last place from which the unwilling listener can escape.¹⁴³ The home is the place in which the unwilling listener can close his doors, draw his curtains, and isolate himself from the unwanted speech occurring in the outside world. The Court sees the kind of privacy that the home provides as an important interest for the government to protect.¹⁴⁴

In the past, funerals and wakes took place in the home of the deceased. Had

136. *Id.* at 488.

137. *Id.* at 484-88.

138. *Id.* at 484.

139. *Id.* at 488 (citing *Cohen v. California*, 403 U.S. 15, 21-22 (1971)).

140. *Id.* at 484 (quoting *Carey v. Brown*, 447 U.S. 455, 471 (1980)).

141. *Id.* at 487 (citing *Consol. Edison Co. of N.Y. v. Pub. Serv. Comm'n of N.Y.* 447 U.S. 530, 542 (1980)).

142. *Id.* at 488.

143. *See id.* at 484; *Carey*, 447 U.S. at 471; *Edison*, 447 U.S. at 541-42; *Rowan v. U.S. Post Office Dep't*, 397 U.S. 728, 737 (1970).

144. *See Frisby*, 487 U.S. at 484; *Carey*, 447 U.S. at 471; *Edison*, 447 U.S. at 541-42; *Rowan*, 397 U.S. at 737.

the issue of funeral protestors presented itself then, the unwilling listeners could shut their windows, close their doors, and pull their curtains. Even in the event that avoidance proved to be too burdensome or impossible, the government could likely restrict the intrusive speech, given the government's interest in privacy protection.¹⁴⁵ Avoidance of speech was, to a certain extent, possible. Today, however, funerals are typically in churches; they proceed in a caravan to a cemetery, where, outside and in the public eye, the deceased is laid to rest. The ability to shut one's door no longer exists. Yet, the need for tranquility and the need to be able to "escape" the unwanted speech remain.

Critical to *Carey* and *Frisby* is the fact that people who are in their homes have no means to avoid the unwanted speech.¹⁴⁶ The home, in both cases, is seen as one's retreat in which one should be able to avoid the "boisterous and threatening conduct that disturbs the tranquility."¹⁴⁷ The same need presents itself at a funeral. Indeed, the government's interest in protecting the privacy of a funeral should be greater because the means of retreat at a funeral is even less realistic than in one's home.

2. *Ward: Illustrating that Speech in Traditional Areas of Public Fora May Be Restricted Through the Government's Interest in Protecting Privacy.*—In 1989, the Court upheld another city's ordinance in the face of constitutional challenges in *Ward v. Rock Against Racism*.¹⁴⁸ In *Ward*, the Court considered the constitutionality of a New York City ordinance that required users of a bandshell located in a public park to use a city-hired, private sound company.¹⁴⁹ The ordinance was partly in response to problems of volume control at events and the resulting disruptions to other, quieter sections of the park and to nearby residents.¹⁵⁰ The ordinance was also enacted to ensure adequate amplification in order to improve and maintain the quality of the performances.¹⁵¹ *Rock Against Racism*, an unincorporated association that had used and planned on using the bandshell for a concert, challenged the constitutionality of the ordinance.¹⁵² The district court upheld the ordinance, but the court of appeals reversed, finding that the ordinance did not incorporate the least intrusive means into meeting its goals.¹⁵³ The court of appeals, however, was overturned by the Supreme Court, which found that the city need not implement the least restrictive means.¹⁵⁴ Furthermore, the Court upheld the ordinance and declared it constitutional on the

145. See *Frisby*, 483 U.S. at 484; *Carey*, 447 U.S. at 471; *Edison*, 447 U.S. at 541-42; *Rowan*, 397 U.S. at 737.

146. See *Frisby*, 483 U.S. at 484; *Carey*, 447 U.S. at 471.

147. *Carey*, 447 U.S. at 470-71 (quoting *Gregory v. Chicago*, 394 U.S. 111, 118 (1969) (Black, J., concurring)).

148. 491 U.S. 781, 803 (1989).

149. *Id.* at 787.

150. *Id.* at 784.

151. *Id.* at 786-87.

152. *Id.* at 784-85.

153. *Id.* at 788-89.

154. *Id.* at 789-90.

ground that the “guideline is narrowly tailored to serve the substantial and content-neutral governmental interests of avoiding excessive sound volume and providing sufficient amplification within the bandshell concert ground, and the guideline leaves open ample channels of communication.”¹⁵⁵

In determining that the ordinance was constitutional, the Court recognized that “it can no longer be doubted that government ‘ha[s] a substantial interest in protecting its citizens from unwelcome noise.’”¹⁵⁶ Furthermore, the Court noted that protecting the interests of “‘well-being, tranquility, and privacy of the home’”¹⁵⁷ from excessive noise is “by no means limited to that context, for the government may act to protect even such traditional public forums as city streets and parks.”¹⁵⁸

Instituting a ban on protests near funerals may give rise to concerns that such a ban will restrict speech in areas that are typically considered public fora, such as sidewalks and streets. As *Ward* illustrates, however, the government, in protecting the tranquility of its citizens’ homes, can even constitutionally restrict speech occurring in public fora, areas generally known to receive strong First Amendment protection.¹⁵⁹ *Ward* also illustrated that regulations designed to protect the privacy of the home are no longer limited to the home, but extend to public streets and parks.¹⁶⁰ Consequently, if courts recognize that the government has a similar interest in protecting the privacy of funerals, states would arguably be allowed to regulate areas around the site of the funeral even if those areas include traditional public fora.

Furthermore, any concerns about the implications of allowing such restrictions in areas typically known for their great and broad protection of the freedom of speech should be quelled by an acknowledgment of the difference, particularly with regards to time limitations, between the kind of restrictions that would be placed about a funeral and those that would be placed about a home. In *Frisby*, for example, the ordinance in question completely banned picketing near a residence.¹⁶¹ At no time could picketing occur in those specified places.¹⁶² The bans against protesting at funerals, like the ones being enacted across the United States, are, by comparison, much less restrictive as the restrictions have specified space and time limitations.¹⁶³

155. *Id.* at 803.

156. *Id.* at 796 (quoting *City Council of L.A. v. Taxpayers for Vincent*, 466 U.S. 789, 806 (1984)).

157. *Id.* (quoting *Frisby v. Schultz*, 487 U.S. 474, 484 (1988)).

158. *Id.*

159. *Id.*

160. *Id.*

161. *Frisby*, 487 U.S. at 476-77.

162. *Id.*

163. *See, e.g.*, Respect for America’s Fallen Heroes Act, Pub. L. No. 109-228, 120 Stat. 387 (codified as amended in scattered sections of 18 U.S.C. and 38 U.S.C. (2006)) (setting both time and distance limitations upon its restriction of speech).

C. Madsen and Hill: *Illustrating the Psychological Characteristics of a Captive Audience Warranting Governmental Interest and Protection*

Thus far, all the cases analogized to the government's interest in protecting the privacy of individuals attending a funeral have concerned the home. Critics may suggest that such a disparity in location precludes any relevancy of these cases to cases like *McQueary*, which involve regulations around funerals. However, the Court, has also acknowledged the government's interest in protecting the privacy of its citizens when they are away from the home, specifically when they are near medical clinics.¹⁶⁴ These cases, too, as the *McQueary* court also recognized, are persuasive authority for acknowledging that the government does have an interest in protecting the privacy of those attending a funeral.¹⁶⁵

In *Madsen v. Women's Health Center, Inc.*,¹⁶⁶ the Supreme Court sought to resolve the differing opinions of the Florida State Supreme Court and the United States Court of Appeals for the Eleventh Circuit on the constitutionality of an injunction issued by a Florida trial court.¹⁶⁷ The injunction was originally issued in response to people protesting outside a medical clinic where doctors performed abortions.¹⁶⁸ However, the operators of the clinics found the injunction to be insufficient to meet their needs and successfully sought to have the injunction broadened.¹⁶⁹ The revised injunction contained a number of provisions including: (1) a prohibition from "congregating, picketing, patrolling, demonstrating or entering that portion of public right-of-way or private property within [thirty-six] feet of the property line of the clinic," (2) a prohibition "[d]uring the hours of 7:30 a.m. through noon, on Mondays through Saturdays, during surgical procedures and recovery periods, 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," and (3) a prohibition from at any time "approaching, congregating, picketing, patrolling, demonstrating or using bullhorns or other sound amplification equipment within [300] feet of the residence of any of the [clinic's] employees, staff, owners or agents."¹⁷⁰ The protestors, feeling that the revised injunction violated their First Amendment rights, challenged its

164. See *Hill v. Colorado*, 530 U.S. 703, 718 (2000); *Madsen v. Women's Health Ctr., Inc.*, 512 U.S. 753, 768 (1994).

165. *McQueary v. Stumbo*, 453 F. Supp. 2d 975, 989-92 (E.D. Ky. 2006) (citing *Madsen*, 512 U.S. at 757 and *Hill*, 530 U.S. at 718).

166. 512 U.S. 753.

167. *Id.* at 762.

168. *Id.* at 758.

169. *Id.* at 758-59.

170. *Id.* at 759-60 (quoting *Operation Rescue v. Women's Health Ctr., Inc.*, 626 So. 2d 664, 679-80 (Fla. 1993)).

constitutionality.¹⁷¹ The Florida Supreme Court upheld the injunction.¹⁷² The Eleventh Circuit Court of Appeals, however, declared the injunction unconstitutional, finding it to be content-based, not for the advancement of a compelling interest, and not narrowly tailored.¹⁷³

In resolving the conflicting opinions of the courts, the United States Supreme Court determined that the injunction was content-neutral.¹⁷⁴ However, the Court determined that it must apply a heightened standard of review because it was reviewing the constitutionality of an injunction.¹⁷⁵ As a result, the Court applied a test more rigorous than the time, manner, and place review. Instead the Court stated that the key question was “whether the challenged provisions of the injunction burden no more speech than necessary to serve a significant government interest.”¹⁷⁶

In making a determination as to the injunction’s constitutionality, the Court considered each provision of the injunction separately.¹⁷⁷ Regarding the thirty-six-foot buffer zone surrounding the clinic, the Court found the provision to be unconstitutional on the basis that it “burden[ed] more speech than necessary to protect access to the clinic.”¹⁷⁸

The Court upheld, however, the provision proscribing excessive noise during certain hours.¹⁷⁹ In doing so, the Court recognized that the state has a significant interest in protecting medical privacy, accepting the analogy to residential privacy that the Florida Supreme Court utilized.¹⁸⁰ Citing to the observations of Florida’s highest court, the Supreme Court stated that “while targeted picketing of the home threatens the psychological well-being of the ‘captive’ resident, targeted picketing of a hospital or clinic threatens not only the psychological, but also the physical[] well-being of the patient held ‘captive’ by medical circumstance.”¹⁸¹ In considering the noise restrictions around the clinic, the Court stated:

Hospitals, after all, are not factories or mines or assembly plants. They

171. *Id.* at 757.

172. *Id.* at 761.

173. *Id.* at 761-62.

174. *Id.* at 763-64.

175. *Id.* at 765. As the Court noted, injunctions are court-issued “remedies imposed for violations (or threatened violations) of a legislative or judicial decree.” *Id.* at 764 (citing *United States v. W.T. Grant Co.*, 345 U.S. 629, 632-33 (1953)). In comparing this to an ordinance, which the Court characterized as “a legislative choice regarding the promotion of particular societal interests,” the Court recognized the greater possibility of “discriminatory application” in an injunction. *Id.*

176. *Id.* at 765.

177. *Id.* at 768.

178. *Id.* at 771.

179. *Id.* at 772-73.

180. *Id.* at 768.

181. *Id.* (citing *Operation Rescue v. Women’s Health Ctr.*, 626 So. 2d 664, 673 (Fla. 1993)).

are hospitals, where human ailments are treated, where patients and relatives alike often are under emotional strain and worry, where pleasing and comforting patients are principal facets of the day's activity, and where the patient and his family . . . need a restful, uncluttered, relaxing, and helpful atmosphere.¹⁸²

Thus, this case illustrates that in certain situations the Court will take into consideration the type of place to which the restriction applies.¹⁸³ If, as in the case of hospitals and medical clinics, the place's atmosphere is of paramount importance and certain speech will disrupt that atmosphere, then the Court may find that the government has an interest in restricting that speech in order to protect and preserve that place and its atmosphere.¹⁸⁴ Furthermore, the Court stated that "[t]he First Amendment does not demand that patients at a medical facility undertake Herculean efforts to escape the cacophony of political protests."¹⁸⁵

The Court differed, however, in its analysis of the "images observable" portion of the same provision and declared it to be unconstitutional.¹⁸⁶ In applying the more rigorous injunction standard, the Court found the portion of the injunction applying to observable images to be too broad and "burden[ing] more speech than necessary to achieve the purpose[s]."¹⁸⁷ In explanation, the Court stated that images, unlike sound, could be more easily avoided, especially when in the confines of a clinic where the "pull [of] its curtains" could eliminate the disruptive speech and its detrimental effects on patients.¹⁸⁸

Finally, the Court considered and struck down the provision of the injunction that prohibited protestors from demonstrating within 300 feet of the residences of clinic staff.¹⁸⁹ The Court recognized that, per *Frisby*, protecting the privacy of the home is an important governmental interest.¹⁹⁰ In comparing the relatively limited zone in *Frisby* to the 300-foot zone in the injunction, the Court found that the 300-foot zone was significantly larger and "would ban '[g]eneral marching through residential neighborhoods, or even walking a route in front of an entire block of houses,'" against which the *Frisby* Court warned.¹⁹¹ As a consequence, this provision of the injunction was found to be unconstitutional, although the Court advised that, had appropriate and reasonable time and place restrictions been included, such a prohibition might have been upheld.¹⁹²

182. *Id.* at 772 (quoting *NLRB v. Baptist Hosp., Inc.*, 442 U.S. 773, 783-84 n.12 (1979)).

183. *See id.*

184. *See id.*

185. *Id.* at 772-73.

186. *Id.* at 773.

187. *Id.*

188. *Id.*

189. *Id.* at 774-75.

190. *Id.* at 775 (citing *Frisby v. Schultz*, 487 U.S. 474, 484 (1988)).

191. *Id.* (quoting *Frisby*, 487 U.S. at 483).

192. *Id.*

The *Madsen* Court recognized the emotional vulnerability and the need to preserve the psychological well-being of both patients *and* their loved ones.¹⁹³ Those grieving the loss of a loved one, like those *Madsen* seeks to protect, are also likely to be faced with anxiety, worry, and concern. Most often, they are extremely emotionally vulnerable. The existence of “grief counselors” illustrates that the psychological well-being of those who are grieving the loss of a loved one is cause for concern. In addressing this concern and protecting the well-being of those grieving, the government has an interest in seeking to maintain a peaceful and tranquil environment during a funeral. Put another way, the family and friends of the deceased “need a restful, uncluttered, relaxing, and helpful atmosphere.”¹⁹⁴ If protestors are acting to disrupt this atmosphere and tranquility, then the government should be allowed to act in order to protect the well-being of its citizens.

More recently, in 2000, the Supreme Court considered a similarly constructed Colorado statute in *Hill v. Colorado*.¹⁹⁵ The challenged section of the statute prohibited a person from “‘knowingly approach[ing]’ within eight feet of another person, without that person’s 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 person.’”¹⁹⁶ The prohibition existed anywhere within 100 feet of a health care facility and was enacted in response to abortion protestors who had blocked the entrances of clinics and who, on certain occasions, had engaged patients in emotional confrontations.¹⁹⁷ The trial court dismissed the protestors’ complaint, holding that “the statute permissibly imposed content-neutral ‘time, place, and manner restrictions’ that were narrowly tailored to serve a significant government interest, and left open ample alternative channels of communication.”¹⁹⁸ The constitutionality of the statute was affirmed by both the Colorado Court of Appeals and the Colorado State Supreme Court.¹⁹⁹ The United States Supreme Court also agreed.²⁰⁰

In analyzing the constitutionality of the statute, the Court explicitly acknowledged the competing interests—the right to free speech and the right of the state to protect the welfare of its citizens.²⁰¹ Protestors have a constitutionally

193. *Id.* at 772 (quoting *NLRB v. Baptist Hosp., Inc.*, 442 U.S. 773, 783-84 (1979)) (noting that in hospitals the “‘patient *and his family* . . . need a restful, uncluttered, relaxing, and helpful atmosphere.” (emphasis added)).

194. *Id.* (quoting *NLRB*, 441 U.S. 773 at 783-84).

195. 530 U.S. 703, 707 (2000).

196. *Id.* (quoting COLO. REV. STAT. § 18-9-122(3) (1999)).

197. *Id.* at 707-10.

198. *Id.* at 710.

199. *Id.* at 711-12.

200. *Id.* at 714, 735.

201. *Id.* at 715-16. While the majority agreed that the state has an interest in protecting privacy, Justice Scalia dissented claiming that the right to be let alone “is the right of the speaker in the public forum to be free from government interference of the sort Colorado has imposed here.” *Id.* at 751 (Scalia, J., dissenting). Even if the majority’s characterization of the government’s

protected right to free speech on public streets and sidewalks—the “quintessential’ public forums for free speech.”²⁰² The First Amendment’s protection, however, does not extend to offensive speech from which the “unwilling audience” is unable to avoid.²⁰³ The Court noted that “[t]he recognizable privacy interest in avoiding unwanted communication varies widely in different settings” and may depend upon whether the speech occurs in a public park or a private residence.²⁰⁴ This interest, the Court found, was “an aspect of the broader ‘right to be let alone’ that one of our wisest Justices characterized as ‘the most comprehensive of rights and the right most valued by civilized men.’”²⁰⁵ Furthermore, the protection of this interest has “special force in the privacy of the home and its immediate surroundings, but can also be protected in confrontational settings,” such as when the speaker relentlessly and doggedly pursues an unwilling audience.²⁰⁶

In addition to discussing *Rowan* and *Frisby*, the Court illustrated its position by discussing *American Steel Foundries v. Tri-City Central Trades Council*, which concerned “the right to free passage in going to and from work.”²⁰⁷ Quoting *American Steel*, the Court stated:

If . . . the offer [to communicate] is declined, as it may rightfully be, then persistence, importunity, following and dogging become unjustifiable annoyance and obstruction which is likely soon to savor of intimidation. From all of this the person sought to be influenced has a right to be free²⁰⁸

Thus, the Court again emphasized the nature of the unwilling, captive audience and the government’s interest in protecting such an audience from the unwanted speech that they are incapable of avoiding.²⁰⁹

Having characterized the competing interests, the Court determined that the

interesting in protecting a citizen’s right to be let alone was correct, Justice Scalia argued that such an interest is “not an interest that may be legitimately weighed against the speakers’ First Amendment rights.” *Id.* In addressing Justice Scalia’s dissent, the majority stated that their decision simply acknowledges that previous Supreme Court cases have recognized the interest in protecting an unwilling listener who is unable to avoid the unwanted speech and that these cases have balanced that interest against First Amendment right to free speech. *Id.* at 718 (citing *Erznoznik v. Jacksonville*, 422 U.S. 205, 208-09 (1975); *Lehman v. Shaker Heights*, 418 U.S. 298 (1974)).

202. *Id.* at 715.

203. *Id.* at 716 (citing *Frisby v. Schultz*, 487 U.S. 474, 487 (1988)).

204. *Id.*

205. *Id.* at 716-17 (2000) (quoting *Olmstead v. United States*, 277 U.S. 438, 478 (1928) (Brandeis, J., dissenting)).

206. *Id.* at 717 (citations omitted).

207. *Id.* (citing *Am. Steel Foundries v. Tri-City Cent. Trades Council*, 257 U.S. 184, 204 (1921)).

208. *Id.* (quoting *Am. Steel Foundries*, 257 U.S. at 204).

209. *See id.*

statute was content-neutral.²¹⁰ Addressing each type of regulated speech separately—the display of signs, oral speech, and leafletting—the Court then concluded that the statute was narrowly tailored.²¹¹ In addition to considering each type of regulated speech, the Court emphasized that it must also “take account of the place to which the regulations apply in determining whether these restrictions burden more speech than necessary.”²¹² State and local governments “plainly have a substantial interest in controlling the activity around certain public and private places.”²¹³ In addition to having an interest in places in or around “schools, courthouses, polling places, and private homes,” the Court also noted that the government has “unique concerns that surround health care facilities.”²¹⁴ In elaborating on the nature of these concerns, the Court, again, quoted *Madsen*, focusing on the fact that hospitals are places where “patients and relatives alike often are under emotional strain and worry, where pleasing and comforting patients are principal facets of the day’s activity, and where the patient and [her] family . . . need a restful, uncluttered, relaxing, and helpful atmosphere.”²¹⁵ Writing for the majority, Justice Stevens described that “[p]ersons who are attempting to enter health care facilities—for any purpose—are often in particularly vulnerable physical and emotional conditions.”²¹⁶ Thus, considering the place covered by the statute, the statute survived the constitutional challenge and was found by the majority of the Court to be “an exceedingly modest restriction.”²¹⁷

With its decisions in both *Madsen* and *Hill*, the Court recognized the need to extend the government’s ability to protect the privacy of its citizens beyond the home to other places where citizens are vulnerable, namely, medical clinics and hospitals.²¹⁸ Concerns for the emotional and psychological well-being of citizens appear to have motivated the Court.²¹⁹ Just as the psychological well-being of the

210. *Id.* at 719. The Court found the statute to be content-neutral because the statute (1) regulated places and not speech, (2) restricted speech regardless of viewpoint, and (3) the advanced interests of the state that were unrelated to content. *Id.* at 719-20. In making its determination, the Court noted that the statute is not content-based simply because it regulates speech based upon where that speech occurs. *Id.* at 724. Furthermore, the statute is not content-based simply because it was enacted by a group of people who disagreed with the message of those who were challenging the speech. *Id.*

211. *Id.* at 726-30 (finding that the statute was narrowly tailored because ability to read placards was not hindered, that the ability to be heard had not been drastically affected, and that the statute did not go so far as to prohibit leafletters from standing and offering material to those who passed).

212. *Id.* at 728 (quoting *Madsen v. Women’s Health Ctr., Inc.*, 512 U.S. 753, 772 (1994)).

213. *Id.*

214. *Id.* (footnotes omitted).

215. *Id.* at 728-29 (quoting *Madsen*, 512 U.S. at 772).

216. *Id.* at 729.

217. *Id.*

218. *See Madsen*, 512 U.S. at 772.

219. *See Hill*, 530 U.S. at 729 (noting that “[p]ersons who are attempting to enter health care

residents of a home is threatened when the home is bombarded with targeted picketing, the psychological well-being of those receiving medical treatment and their visitors is threatened when protestors gather, verbalize, and display their message outside a hospital.²²⁰ Furthermore, the need for tranquility in a hospital is equally important, if not more important, than the need for tranquility in one's own home. Both patients of a hospital and their visitors, who are all under "emotional strain and worry," need a place where they can find rest and relaxation.²²¹ Thus, *Madsen* and *Hill* illustrate that the Court's motivation for extending privacy protection embodies a concern for the psychological well-being of people and their need for tranquility in a given situation.²²² These same concerns should also motivate courts to extend privacy protection to funerals.

However, critics argue that the analogy between the regulations restricting protests about medical clinics and regulations restricting protests about funerals is weak and unpersuasive.²²³ One distinction to which critics point is that *Madsen* and *Hill* involved "the constitutional right of access to reproductive health services," a fact which is obviously absent from all funeral protest scenarios.²²⁴ Moreover, critics argue that no constitutional right of any kind presents itself in the context of funerals.²²⁵ As one critic and First Amendment scholar noted, "There is simply no constitutional right to have a public funeral free of protests."²²⁶

Indeed, both *Madsen* and *Hill* involve reproductive rights—the protestors sought to express an anti-abortion message outside hospitals and medical clinics in which advice concerning abortion was being dispensed and abortions were being performed. However, the fact that these cases involved the hotly litigated topics of abortion and women's reproductive rights does not mean the analysis of the Court in reaching its decisions in these cases was completely centered on or solely guided by protecting a constitutional right to reproductive health services. Although the *Madsen* Court did acknowledge the state's interest in protecting a woman's ability to gain access to medical treatment regarding her pregnancy, the Court also considered the legislation in light of the state's interest

facilities—for any purpose—are often in particularly vulnerable physical and emotional conditions.”).

220. See *Madsen*, 512 U.S. at 774-75 (analogizing the government's interest in protecting the well-being in the home to the well-being of patients at a medical clinic).

221. See *Hill*, 530 U.S. at 728-29 (acknowledging the “unique concerns that surround health care facilities”).

222. See *id.*; *Madsen*, 512 U.S. at 774-75.

223. See Ronald K. L. Collins & David L. Hudson, Jr., *A Funeral for Free Speech?*, FIRST AMENDMENT CENTER, Apr. 17, 2006, <http://www.firstamendmentcenter.org/analysis.aspx?id=16775> (stating that the precedent set by the Supreme Court in decisions regarding the restriction of speech around abortion clinics “lends little real support for funeral protest legislation”).

224. *Id.*

225. *Id.*

226. *Id.*

in protecting the privacy of its citizens.²²⁷ As previously discussed in *Madsen* and *Hill*, the decisions to allow regulations on speech occurring outside a hospital or medical clinic mostly centered on the need to protect the privacy of the unwilling, captive listener, particularly the one whose physical, mental, and emotional well-being is of concern. Just as in the case of medical clinics, the government is warranted in protecting the privacy of its citizens at funerals where the audience is unwilling, captive, and emotionally distraught.

Legislation around the country demonstrates that the American public agrees that the government has a right to protect the privacy of those attending a funeral. Courts, too, should acknowledge that this particular need for privacy protection is imperative, perhaps even more so in the context of funeral protests than in the context of protests outside a medical clinic. While the emotional vulnerability and concern for the psychological well-being of the mourners and patients mirror one another, the similarities between the two scenarios end upon a consideration of the potential impact the speech may have on its audience. In the context of medical clinics, a patient's medical decisions may be influenced by the words or signs of a nearby protestor, whereas those laying the deceased to rest are not likely to change any of their actions. The woman seeking the abortion might realize, upon viewing the picketers' signs and hearing the protestors' cries, that she should instead "choose life." The woman seeking an abortion may then change her course of action, cancel her appointment, and leave the clinic. However, those laying the dead to rest are not making any life-altering decisions. The picketers' signs and the protestors' cries will not alter the actions of the person who seeks to lay his loved one to rest. Instead, those who are mourning will continue to participate in the ceremony.

D. JB Pictures: Illustrating the Treatment of Funerals in the Face of First Amendment Challenges

The Supreme Court has yet to consider a more factually similar case, like *McQueary*, that pits the First Amendment right to free speech against the government's interest in protecting the privacy of its citizens. However, in 1996 the United States Court of Appeals for the District of Columbia decided *JB Pictures, Inc. v. Department of Defense*,²²⁸ a case which placed the First Amendment right of free press against the government's interest in protecting the privacy of the families of fallen soldiers.²²⁹ Although *JB Pictures* more closely resembles *McQueary* than cases like *Rowan*, *Frisby*, *Madsen*, and *Hill* because it deals with both First Amendment rights and privacy interests, *JB Pictures* is also factually distinct. First, *JB Pictures* involves the right to free press, not the right to free speech.²³⁰ Second, *JB Pictures* considers First Amendment rights

227. *Madsen*, 512 U.S. at 768.

228. 86 F.3d 236 (D.C. Cir. 1996).

229. *Id.* at 238.

230. *Id.*

when they are exercised on military bases, not areas of traditional public fora.²³¹ Nevertheless, *JB Pictures* serves to supplement previously discussed case law, given that it essentially involves the right of non-mourners to intrude, under the guise of a First Amendment right, upon ceremonies involving the deceased.²³²

Prior to the lawsuit, soldiers killed overseas were returned to the United States through Dover Air Force Base.²³³ Their ceremonial returns were open to both the press and the public.²³⁴ However, prior to Operation Desert Storm, the Department of Defense implemented a new policy that allowed for the families of the deceased to have their loved ones reenter the United States at a place more convenient to them.²³⁵ The new change in policy also allowed the bereaved families to deny press coverage of the return of their deceased.²³⁶ In defending its change in policy, the government asserted “an interest in protecting the privacy of families and friends of the dead, who may not want media coverage of the unloading of caskets at Dover.”²³⁷

Ultimately, the court of appeals, finding no constitutional violation, affirmed the judgment of the lower court.²³⁸ After making a determination that the policy was not content-based,²³⁹ the court considered the government’s proffered rationales for its policy, including its assertion that the policy attempted to protect the privacy of those mourning the loss of their loved ones.²⁴⁰ Addressing this interest, the court stated that it did “not think the government hypersensitive in thinking that the bereaved may be upset at public display of the caskets of their loved ones.”²⁴¹ Without much discussion as to why the court believed as it did, the court seemed to unhesitatingly acknowledge the government’s interest.²⁴²

Likewise, courts should recognize a similar interest in protecting the privacy of the bereaved at a funeral as in *McQueary*. Although funerals are of a smaller scale—they involve a smaller, more intimate setting than the honoring of fallen military soldiers returning from abroad—the concerns are identical. In both instances, the bereaved are attempting to honor and respect their deceased loved ones, an act that the government is attempting to protect through either policies or statutes. Setting aside the special nature of government and military property, the government’s interest in protecting the privacy of the grieving family is

231. *Id.* (noting that unlike areas of traditional public fora, “First Amendment rights to ‘freedom of speech, [and] of the press’ do not create any per se right of access to government property or activities”).

232. *Id.* at 241.

233. *Id.* at 238.

234. *Id.*

235. *Id.*

236. *Id.*

237. *Id.* at 241.

238. *Id.* at 242.

239. *Id.* at 239-40.

240. *Id.* at 241.

241. *Id.*

242. *Id.*

arguably more important in the context of an actual funeral than it is in the context of the return of fallen soldiers in their caskets. Funerals have been and are private events. However, previous to the policy change challenged in *JB Pictures*, the government allowed for publicity and press coverage of the return of the caskets.²⁴³ Thus, historically, the expectation of privacy is greater in the context of a funeral.

Furthermore, the “public display of the caskets of loved ones” is arguably less intrusive into one’s private life than having strangers impeding upon and interfering with an actual funeral. Although the return of a soldier in a flag-draped coffin is undoubtedly a ceremonial event deserving of respect, it lacks the personal nature and solemn finality of an actual funeral. A funeral, with family and friends present, is a deeply personal occasion allowing those present to say their final goodbyes. If the courts can find that the government is not hypersensitive in restricting press at the return of fallen soldiers in their caskets, even while allowing the general public to attend, then courts should also not hesitate to acknowledge the government’s interest in restricting people who interfere at funerals.

CONCLUSION

The government has a significant interest in the protection of the privacy of its citizens who are attending funerals. As the *McQueary* court described, “[a] funeral is a deeply personal, emotional and solemn occasion. Its attendees have an interest in avoiding unwanted, obtrusive communications”²⁴⁴ The case law acknowledging the government’s interest in protecting the privacy of its citizens in and about the home and about medical clinics is analogous to the government’s interest in protecting the privacy of its citizens while attending the funeral of a loved one.²⁴⁵ As previously illustrated, the critical similarities between the situations include the nature of the audience as captive, emotionally vulnerable, and deserving of protection for their psychological well-being.²⁴⁶

Furthermore, the case law demonstrates the Supreme Court’s increasing willingness to, at least implicitly, support the government in its efforts to protect the privacy of its citizens. In the 1970s, with *Rowan* and *Edison*, the Court acknowledged a governmental interest in protecting the privacy of its citizens while in the home by allowing for the regulation of mail entering the home.²⁴⁷ In the 1980s, with *Frisby*, *Carey*, and *Ward*, the Court acknowledged a governmental interest in protecting the privacy of its citizens about the home, allowing for the regulation of protests and concerts occurring outside the

243. *Id.* at 238.

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

245. *See supra* Parts III.A-C.

246. *See supra* Parts III.A-C.

247. *See* *Consol. Edison Co. of N.Y. v. Pub. Serv. Comm’n of N.Y.*, 447 U.S. 530, 541 (1980); *Rowan v. U.S. Post Office Dep’t*, 397 U.S. 728, 738 (1970).

home.²⁴⁸ In the 1990s, with *Madsen* and *Hill*, the Court acknowledged a governmental interest in protecting the privacy of its citizens from speech occurring, not in or about the home, but near medical clinics and hospitals.²⁴⁹ This progression of case law strongly indicates that, if presented with the issue, courts will likely find, as the *McQueary* court found, that the government, indeed has an interest in protecting the privacy of its citizens while attending a funeral.

Some commentators have criticized such legislation passed in the name of privacy protection as a veiled attempt to restrict speech found offensive based on the content of its message.²⁵⁰ The Supreme Court has noted that “[i]f there is a bedrock principle underlying the First Amendment, it is that the government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable.”²⁵¹ However, funeral protest bans were not enacted simply because the government found the message expressed by the Church’s picketers “offensive and disagreeable.” Instead, these restrictions were enacted because the government found the presence of any uninvited and disruptive person unacceptable. Evidence of this is found in the fact that protestors attempting to counter the message of the Church and express their own appreciation and gratitude for the sacrifice of fallen soldiers have been asked by the bereaved families to not attend the funerals.²⁵²

The Patriot Guard Riders, formed in October 2006, consist of a number of Vietnam War veterans who ride their motorcycles “to form a human shield in front of the protestors so that mourners cannot see them, and when necessary, rev their engines to drown out the shouts of the Westboro Group.”²⁵³ Recently, the family of a twenty-year-old Marine killed while on duty in Iraq asked the Patriot Guard Riders to not attend the funeral, desiring peace and tranquility during the ceremony.²⁵⁴ This family’s request illustrates that the motivation for these speech restrictions is not based upon the content of the message delivered, but is based upon the government’s interest in protecting the privacy of the bereaved when laying their loved ones to rest.

Even so, some critics strongly resist saying “categorically, that all protests

248. See *Ward v. Rock Against Racism*, 491 U.S. 781, 796 (1989); *Frisby v. Schultz*, 487 U.S. 474, 484 (1988); *Carey v. Brown*, 447 U.S. 455, 470-71 (1980).

249. See *Hill v. Colorado*, 530 U.S. 703, 728-29 (2000); *Madsen v. Women’s Health Ctr., Inc.*, 512 U.S. 753, 768 (1994).

250. See *Collins & Hudson*, *supra* note 223 (noting that although some say that funeral protest legislation is a content-neutral, reasonable time, manner, place restriction, it actually is not since “[t]he stated or actual purpose of most, if not all, of the measures is to silence objectionable messages”).

251. *Texas v. Johnson*, 491 U.S. 397, 414 (1989) (citing *Hustler Magazine v. Falwell*, 485 U.S. 46, 55-56 (1988)).

252. Lizette Alvarez, *Outrage at Funeral Protests Pushes Lawmakers to Act*, N.Y. TIMES, April 17, 2006, at A14, available at 2006 WLNR 6394879.

253. *Id.*

254. *Id.*

at all funeral events conducted in public are beyond the pale of decency.”²⁵⁵ Elucidating this argument through example, First Amendment scholar Ronald Collins and First Amendment Center Attorney David Hudson consider that when John Wilkes Booth was “finally released for burial, rightfully indignant Americans understandably desired to manifest their moral outrage against the man who murdered President Abraham Lincoln.”²⁵⁶ Although outraged citizens have a right to speak, the time, place, and manner in which they do it may be restricted. Moreover, “like a pig in the parlor instead of the barnyard,”²⁵⁷ protestors and picketers do not belong at a funeral. Moral outrage as to the crimes of Booth or the policies of this country can and should be expressed elsewhere or at another time.

In addressing whether the government can restrict speech at funerals, courts should weigh the government’s interest in protecting the privacy of its bereaved citizens against the protestors’ right to free speech.²⁵⁸ Special consideration should be given to both the captivity of the audience²⁵⁹ and its emotional and psychological well-being.²⁶⁰ Just as exceptions have been carved out of the First Amendment’s right to free speech in the context of both targeted picketing at a residence²⁶¹ and protesting outside a medical clinic,²⁶² an exception should also be made for those demonstrating at a funeral.

However, adding another exception causes some critics to worry.²⁶³ As Professor Eugene Volokh noted: “The chief danger is the slippery slope: Once the supposedly narrow exception for residential picketing is broadened to cover funeral picketing, these two exceptions . . . could then be used as precedents in arguments for more exceptions (say, for churches or for medical facilities), which would eventually swallow the rule.”²⁶⁴ Thus, the fear is that by continuing to create exceptions to the First Amendment, the right to free speech, which is considered to be the foundation of our nation, is slowly being eroded. These exceptions allowing speech restrictions, however, must still comport with the reasonable time, manner, and place standards.

Furthermore, especially since picketer’s have the opportunity to speak their message in other places and at other times, funeral protest bans are not likely to be in strong conflict with the aims of the First Amendment, namely advancing the

255. Collins & Hudson, *supra* note 223.

256. *Id.*

257. *Euclid v. Ambler Realty Co.*, 272 U.S. 365, 388 (1926).

258. *See supra* Part III.A.

259. *See supra* Part III.B.

260. *See supra* Part III.C.

261. *See Frisby v. Schultz*, 487 U.S. 474, 488 (1988).

262. *See Hill v. Colorado*, 530 U.S. 703, 710-14, 735 (2000); *Madsen v. Women’s Health Ctr., Inc.*, 512 U.S. 753, 776 (1994).

263. Eugene Volokh, *Burying Funeral Protests*, NAT’L REV. ONLINE, Mar. 23, 2006, <http://nationalreview.com/comment/volokh200603230730.asp>.

264. *Id.*

pursuit of truth and achieving a better, more capable democratic society.²⁶⁵ The federal statute, in addition to many of the state statutes, prohibits speech that only occurs within a certain distance and time from a funeral.²⁶⁶ Consequently, the protestors are not completely barred from expressing their message.

Restricting the freedom of speech should not be entered into lightly. However, when the speech of one acts to impede upon the constitutional rights of another, due consideration must be made for both interests. In the context of funerals, when weighing the government's interest in privacy protection against free speech, privacy should prevail. The government should be able to place modest restrictions on the freedom to speak in order to protect the health and well-being of its bereaved citizens—an emotionally distraught, psychologically unstable, and captive audience. Families and friends should be able to lay their loved ones to rest in peace, not in the midst of obnoxious and unwanted speech.

265. *Consol. Edison Co. of N.Y. v. Pub. Serv. Comm'n of N.Y.*, 447 U.S. 530, 534 (1980) (quoting *Whitney v. California*, 274 U.S. 357, 375 (1927) (Brandies, J., concurring); *Cohen v. California*, 403 U.S. 15, 24 (1971)).

266. *Respect for America's Fallen Heroes Act*, Pub. L. No. 109-228, 120 Stat. 387 (codified as amended in scattered sections of 18 U.S.C. and 38 U.S.C. (2006)).