The Westboro Problem: The Abridgement of the Right to Protest

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On March 10, 2006, the Westboro Baptist Church (Westboro) picketed a military funeral in Westminster, Maryland. It was the funeral of Matthew A. Snyder, a U.S. Marine Lance Corporal, who had died in action seven days earlier on March 3, 2006.[2] Albert Snyder, Lance Corporal Snyder's father, sued Pastor Fred Phelps and Westboro for defamation, intrusion upon seclusion, publicity given to private life, intentional infliction of emotional distress and civil conspiracy.[3] This was not Westboro's first funeral protest; it has been protesting for many years in order "to communicate its belief that God hates the United States for its tolerance of homosexuality."[4] When Snyder's case against Westboro came before a jury it held Westboro liable for 10.9 million dollars in compensatory and punitive damages. Westboro challenged the verdict, claiming that it was grossly excessive, and sought judgment on the grounds that the First Amendment fully protected its speech. The District

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2 Press Release, U.S. Dep't of Justice, DoD Identifies Marine Casualty (Mar. 6, 2006) (on file with U.S. Dep't of Justice).

3 Snyder v. Phelps, 533 F. Supp. 2d 567 (D. Md. 2008).

4 Snyder v. Phelps, 562 U.S. 1, 1 (2011).

Court reduced the punitive damages awarded but left the verdict otherwise intact. The verdict was again appealed and the Fourth Circuit Court reversed the jury's ruling, concluding that, "Westboro's statements were entitled to First Amendment protection because those statements were on matters of public concern, were not provably false, and were expressed solely through hyperbolic rhetoric."[5] It was then appealed by writ of certiorari to the Supreme Court, which heard oral arguments on October 6, 2010, and on March 2, 2011 announced an 8-1 decision upholding the Fourth Circuit ruling in favor of Westboro, affirming that Westboro's statements were in fact entitled to the protection of the First Amendment.[6]

The response from citizens, but more especially from legislatures around the country, was decisive. The people disagreed with the courts that such protests should be permitted. At least twenty-nine states[7] and the United States Congress had passed laws or have broadened preexisting disorderly conduct laws to prohibit funeral protests as of 2008.[8] Since 2008, Arizona,[9] Alaska,[10] and California[11] have also passed or begun the process to pass similar laws. All of these laws have certain regulations in common; they all, to some extent, restrict when a funeral protest occurs, the distance a protest can be held from the funeral, and have provisions prohibiting disruptive behavior at a service.[12]

5 *Id.* at 2.

6 *Id.*

7 These states include: Alabama, California, Colorado, Delaware, Florida, Georgia, Illinois, Indiana, Iowa, Kansas, Kentucky, Louisiana, Maryland, Michigan, Minnesota, Mississippi, Missouri, Nebraska, New Jersey, North Carolina, Ohio, Oklahoma, Pennsylvania, South Carolina, South Dakota, Tennessee, Texas, Vermont, Virginia, Wisconsin.

8 Njeri Mathis Rutledge, *A Time to Mourn*, 67 Md. L. Rev. 295, 316 (2008).

9 S.B. 1101, 50th Leg., 1st Reg. Sess. (Ariz. 2011).

10 H.B. 234, 27th Leg., 2nd Sess. (Alaska 2012).

11 S.B. 661, 81st Leg., 1st Reg. Sess. (Cal. 2012).

12 Njeri Mathis Rutledge, *A Time to Mourn: Balancing the Right of Free Speech against the Right of Privacy in Funeral Picketing*, 67 Md. L. Rev. 295, 346-57 (2008).

There is no doubt that there seems to be a problem with the actions of Westboro. To protest a funeral, to use another's death as a platform for gaining national publicity for your personal views, religious or otherwise, seems to be in direct conflict with accepted guidelines of decency and decorum. Yet, there are few rights held so sacrosanct for Americans as the Right of Assembly and the Right of Expression as put forth in the First Amendment of the Bill of Rights. This conflict between society's view of decent and upright conduct and basic constitutional rights will hereafter be referred to as the "Westboro Problem."

This article attempts to dissect this dilemma not by questioning the ruling of the Supreme Court, but the constitutionality of the reactionary laws put forth by state and national legislatures. Section II will discuss the precedent of the proper place, time, and manner of public speech and protests and to what degree the courts have determined that the government, federal or otherwise, may regulate such expression. Section III will delineate the contents of both state and federal laws and explore them in light of the precedent discussed in section II in order to determine their constitutionality. Section IV responds to those who would expand rights to include a right to mourn[13] or expand the definition of the captive audience doctrine[14] as a solution to the Westboro Problem. Section V concludes by demonstrating that the responses by state legislatures, as well as those calling for the expansion of rights, are not in the best interest of the country. It will then set forth two possible solutions to this complex issue.

I. Proper Place, Time, and Manner

The doctrine of proper place, time, and manner is set forth in *Clark v. Community for Creative Non-Violence*. In *Clark*, the Supreme Court ruled in favor of the Park Service, which prevented the demonstrators from sleeping in symbolic tents to call attention to the plight of the homeless. According to the court, the Park Service's

13 *Id.*

14 Stephen Dent, *Freeing the Captive: The Case for Expanding the Captive Audience Doctrine*, 25 BYU Pre. L. Rev. 35 (2011).

regulation did not violate the First Amendment as it (i) was justified without reference to the content of the speech regulated, (ii) was narrowly tailored to serve a compelling government interest,[15] and (iii) left open ample alternative channels for the communication of the information.[16] Justice Roberts said in *Snyder* that, "Westboro's choice of where and when to conduct its picketing is not beyond the Government's regulatory reach—it is 'subject to reasonable time, place, or manner restrictions' that are consistent with the standards announced in this Court's precedents [*Clark*]." Therefore, it is by this same standard that the "Government's regulatory" actions toward Westboro should be considered.[17]

Applying this three-pronged doctrine to the Westboro funeral picketing returns an interesting result. This doctrine dictates that any law passed to prohibit the picketing of funerals, military or otherwise, must be content neutral. It cannot address the type or kind of speech presented, but rather must deal solely with the place, time, and manner of the demonstration. This may be difficult to determine, as the response to the Westboro picketing has been intense in the rapidity and extent of the action taken. The law would have to be worded carefully to object to the fact that such a protest is occurring *at* a funeral and *during* a time of mourning and not to the kind of epithets that are uttered there.

The law must also be tailored *narrowly* to advance a *compelling* government interest. It would not be enough, for example, to say that the law is in place to protect the protestors from the hearers of their speech or to say that it is to maintain the peace. This would be contrary to the regulation in the previous paragraph as it implies a knowledge and condemnation of the content of the rhetoric. As with the example of "fighting words" there are exceptions to this rule.[18] However, in *Snyder*, Chief Justice Roberts addressed this very point claiming that Westboro's rhetoric does not fall under this classifi-

15 Clark v. Cmty for Creative Non-Violence, 468 U.S. 288, 288 (1984).

16 *Id.*

17 Snyder v. Phelps, 562 U.S. 1, 11 (2011).

18 R.A.V. *v.* St. Paul, 505 U.S. 377 (1992); Street *v*. New York, 394 U.S. 576 (1969).

cation: "The 'content' of Westboro's signs plainly relates to broad issues of interest to society at large, rather than matters of 'purely private concern.'"[19] Speaking of the content of the signs themselves, Justice Roberts continues, "While these messages may fall short of refined social or political commentary, the issues they highlight—the political and moral conduct of the United States and its citizens, the fate of our Nation, homosexuality in the military, and scandals involving the Catholic clergy—are matters of public import."[20] The courts were clear that Westboro's rhetoric was not considered an exceptional case and therefore must be treated as protected speech.

It appears that as long as Westboro protests events or issues of national significance and does so peaceably its expression cannot be abridged on account of a fear of violence as it could if they were using fighting words. In fact, the protection of rights is one of the government's fundamental roles; therefore, if there were a threat of violence to Westboro during its protests the government would have a greater responsibility to Westboro and the protection of its right to protest than to the hearers.[21]

The most difficult part of this doctrine for Westboro is whether there are ample alternative channels for the communication of the information. While it is true that Westboro could communicate this information in other ways or at other events, there seems to be no real substitute for the national media coverage they are receiving or the price at which they are receiving it. On two occasions Westboro decided not to protest in exchange for free airtime on the radio to communicate its message.[22] This demonstrates that Westboro's funeral picketing is not done to protest the person who has died, but to find the most effective channel through which it can promulgate its message. The picketing is so controversial that it gets national media coverage, and is therefore the most inexpensive way for Westboro

19 Snyder, 562 U.S. at 8.

20 *Id.*

21 The Federalist No. 84 (Alexander Hamilton).

22 *'Insane' Picketers Cancel Amish Funeral Protest,* The Age (Oct. 1, 2012, 2:16 PM), http://www.theage.com.au/news/world/insane-amish-protest-dropped/2006/10/05/1159641433255.html.

to get its message to the largest number of people. While it is by no means the responsibility of the government to provide groups, large or small, with ample communication, it does not stand in a position in which it can deny a group the channels of communication it presently utilizes so long as that group does so peaceably and in accordance with the doctrine of proper place, time, and manner.

II. Federal Versus State Reactionary Laws

The various states as well as the federal government have passed anti-funeral picketing laws in response to Westboro. All of these laws include similar statutes and regulations. As mentioned in the introduction, all of them place time provisions that limit or stipulate the temporal distance between when the protests take place and when the funerals start and end. They also include distance requirements as well as provisions prohibiting disturbances to the service of behavior or noise. In the laws passed in Kansas,[23] Delaware,[24] and Nebraska[25] funeral picketing is prohibited within an hour before the funeral and two hours following. Most of the states have set a restriction on picketing within 500 to 1,000 feet of the service while a few have limited the distance to as little as 300.[26] Another commonality among all of these laws is that none of them make any distinctions as to the kind of funeral; they hold for any and all funeral services.

The federal law, the "Respect for America's Fallen Heroes Act" (RAFH), includes similar time and distance restrictions: no protests one hour before or after and 500 feet from the funeral, respectively. The RAFH, along with the state laws, suggests that this law is enacted to protect the bereaved and mourning families.[27] The major

23 Kan. Stat. Ann., ch. 21, art. 61, § 21-6106 (2012).

24 Del. Stat. Ann., ch. 5, tit. xi, § 1303 (2006).

25 Neb. Rev. Stat., ch. 28, § 28-1320.03 (2006).

26 Njeri Mathis Rutledge, *A Time to Mourn: Balancing the Right of Free Speech against the Right of Privacy in Funeral Picketing*, 67 md. l. rev. 295, Appendix (2008).

27 Respect for America's Fallen Heroes Act, Pub. L. No. 109-228, 120 Stat. 387, (2006).

distinction between the RAFH and the state laws is that it specifies the type of funeral, claiming only prohibitions on picketing the funeral service of veterans of the United States Armed Forces.[28]

If these laws, both federal and state, are viewed in light of the doctrine of proper place, time, and manner, one can determine their constitutionality. The Incorporation Doctrine indicates that the First Amendment is binding not only to the federal government, but to the states as well. Through the Due Process Clause of the Fourteenth Amendment the Supreme Court has ruled that the First Amendment applies in its totality to the states.[29] Therefore, with questions regarding the abridgement of rights set forth in the First Amendment, there is no distinction between state and federal governments with respect to their responsibility to their citizens or the doctrine that applies to the protection of those rights. Therefore, the RAFH and the state laws will both be evaluated using the same criteria.

(i) Content Neutral

To apply this doctrine, first, these laws are scrutinized to determine if they are content neutral. A law is content neutral if the "restrictions on expression, whether oral or written or symbolized by conduct, . . . are justified without reference to the content of the regulated speech."[30] The Kansas law prohibits, "engaging in a public demonstration at any . . . entrance to any cemetery . . . or other location where a funeral is held or conducted, . . . knowingly obstructing, hindering, [or] impeding . . . another person's entry to or exit from a funeral; or knowingly impeding vehicles which are part of a funeral procession."[31] Nebraska's law prohibits, "[a] person . . . [from] . . . picketing . . . one hour prior to through two hours following the commencement of a funeral."[32] Finally, the RAFH prohibits, "a

28 *Id.*

29 Gitlow v. New York, 268 US 652 (1925)

30 Clark, 468 U.S. at 288.

31 Kan. Stat. Ann. ch. 136, § 176 (2011).

32 Neb. Rev. Stat. § 3 (2006).

demonstration on the property of a cemetery under the control of the National Cemetery Administration or on the property of Arlington National Cemetery unless the demonstration has been approved by the cemetery superintendent or the director of the property on which the cemetery is located."[33] The other laws are all similarly worded. None of them are directed at Westboro explicitly nor do they mention its controversial rhetoric. By this measurement both the state and federal anti-funeral picketing laws appear to be justified without reference to the content of the regulated speech and should be considered content neutral.

(ii) Narrowly Tailored to Serve a Compelling Government Interest

Second, the laws are scrutinized to determine whether they are narrowly tailored to advance or serve a compelling government interest. As mentioned above, the state and federal laws differ in one important respect: the federal law specifically prohibits the picketing of military funerals, but the state laws prohibit any picketing of any funeral. While they are clearly tailored differently, one cannot established whether each is sufficiently narrowly tailored without knowing the intent of the laws, i.e. the government interest that they are seeking to serve or advance.

As was mentioned previously, both the federal and state laws claim that the laws are to be enacted for the protection of the bereaved and mourning. While the protection of its citizens is of primary concern and a fundamental role of the government, that role does not extend to the protection of feelings at the expense of First Amendment rights.[34] As of yet there is no statutory right to mourn or to private bereavement that compels government intervention to protect these rights. The case could be made, and was in *Snyder*, that real emotional damage is done by funeral picketing. The topic of emotional distress and damage was specifically addressed in *Snyder* and there is little reason to believe that, inasmuch as the picketers,

33 H.R. 5037, 109th Cong. 2nd Session (2006) (enacted).

34 Snyder v. Phelps, 562 U.S. 1, 5 (2011).

Westboro or otherwise, are addressing issues of national import, the Court will overturn its previous decision.[35]

To establish a compelling interest, one balances the governmental interest against the constitutional right that is affected by the law.[36] While the government does have a responsibility to and an interest in the protection of the bereaved and mourning from emotional distress, if this responsibility is balanced against the protection of a First Amendment right it is not held to be a *compelling* interest. It appears that a law tailored to this end would not pass strict scrutiny. However, a case can be made that the RAFH serves a compelling government interest. It is the responsibility of the government to maintain and provide for the national defense.[37] The Federal Government does this in large part by maintaining a corps of military personnel. The picketing of military funerals could adversely affect recruiting and the morale of these soldiers. In this regard the prohibition of military funeral picketing serves and advances a compelling government interest and is narrowly tailored to achieve that end. While having this as the purpose of the RAFH would allow it to pass this phase of strict scrutiny it should be noted that the maintenance of a national defense is not the expressed purpose of the law. Such a purpose would have to be inferred from its name or made in oral arguments but could not ascertained from legislative intent alone.

(iii) Ample Alternative Channels of Communication

The final phase is to determine whether these laws leave open ample alternative channels for the communication of the information. The implicit question here is whether ample implies comparative in quality or, simply, in quantity of other options. It is clear that to remove funeral picketing as a form of communication will greatly limit the protestor's ability to communicate as widely, especially in the case of Westboro. As a part of its controversial message and controversial choice of picketing location, Westboro receives an unprec-

35 *Id.*

36 Black's Law Dictionary 300 (8th ed. 2007).

37 u.s. Const. art. 1, § 8.

edented amount of media coverage, which promulgates its message all over the country. A law prohibiting this channel of communication leaves Westboro with no *comparative* channel of communication. In *Ladue v. Gilleo*, the Supreme Court ruled that the government could not prohibit residents from placing signs in their yards or windows, as there was not ample alternative channels of communication. The concern was not that the residents could not communicate the same words or ideas that were communicated through the signs but that they could not do so with the same ease or in the same way.[38] In this regard, it appears that for the government to restrict Westboro from picketing at funerals would remove the controversy that allows them to get national media attention, and, in this way, would leave them without ample alternative channels of communication.

After passing through strict scrutiny, it is clear that the state laws are too broadly tailored and do not serve a sufficiently compelling governmental interest to warrant their existence. As to the RAFH there is the possibility of an argument for the advancement of a compelling governmental interest but such an interest must be explicitly expressed in the statute or be clearly ascertained from the legislative intent. In this case it is not, and without some modification the RAFH would not pass the second phase of strict scrutiny. As to the question of ample alternative channels of communication, both the state and the federal laws appear to fail to give any alternative whatsoever. On these points both the state and federal laws fail to pass strict scrutiny.

III. Rights Endangered Through Their Expansion

Other possible solutions to the Westboro Problem are the creation of new or the expansion of existing rights. In the Maryland Law Review, not long after the passage of Maryland's own anti-picketing act, a plea was made to create a right to mourn.[39] While the appeal to

38 Ladue v. Gilleo 512 U.S. 43 (1994)

39 Njeri Mathis Rutledge, *A Time to Mourn: Balancing the Right of Free Speech against the Right of Privacy in Funeral Picketing*, 67 Md. L. Rev. 295, 304 (2008).

the sentiments seems to indeed call for an expansion of rights to protect the hearer from the speaker, reason appears to dictate a different course. The First Amendment protects the rights of the speaker and the expansion of the hearer's right through the creation of a right to mourn would necessarily abridge the right of the former.[40] The captive-audience doctrine exists for this very purpose. If there is a situation in which a hearer cannot, as a practical matter, remove himself from the intrusive speech of the speaker then Freedom of Speech can be circumscribed.[41] It is true that there are cases in which the courts interpret the law an in doing so create judicial doctrine;[42] this by no means signifies that it is within the judiciary's purview to create rights. Rather, they are to determine whether and where a law infringes on those rights already granted.

A similar argument was made that claimed that the Supreme Court missed an opportunity to expand the definition of the captive-audience doctrine, that the captive-audience doctrine has been assessed too sparingly, and that the only way to balance the rights of the hearers with the rights of the speaker is to expand the definition of a captive audience.[43] While this argument appears compelling on the surface it does not consider the precedent that would be established if the captive-audience doctrine was expanded to include further unwanted speech. One not only has to make sure that she is in line with proper place, time, and manner requirements but must also obtain a permit to protest. While there are many places that one may do any of a myriad of activities performed by the hearers the limits on free speech are more severe. It is a far simpler matter for a hearer to relocate himself than for the speaker to relocate herself if they both want to resume their respective activities. This kind of an expansion if pursued, could destroy the rights of others. While there

40 Bd. of Educ. v. Earls, 536 U.S. 822 (2002); Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503 (1969).

41 Black's Law Dictionary 224 (8th ed. 2007).

42 *See, e.g.,* Gitlow v. New York, 268 US 652 (1925) (discussing the creation of the Incorporation Doctrine); Frisby v. Schultz 487 U.S. 474 (1988) (discussing the Captive Audience Doctrine).

43 Dent, *supra* note 12, at 35.

are certainly differences between a common political protest and those performed by Westboro, the principles are unchanged. While it is true that funeral-goers, unlike other hearers, cannot simply relocate themselves to avoid unwanted speech, it is important to remember that the distance at which the Matthew Snyder protest took place the funeral-goers "'could see no more than the tops of the picketers' signs, and there is no indication that the picketing interfered with the funeral service itself.'"[44] We must be careful lest in giving more rights to one group we remove them from another.

IV. Conclusion

There can be no doubt that the picketing of military funerals by Westboro creates a problem. Their actions are blatantly offensive to public sentiment and to basic civil society, but the laws passed in response to Westboro were reactionary and impulsive at best. It is clear that the state and federal laws do not stand up to the gauntlet that is strict scrutiny. A statutory remedy does not seem to give us the solution to the Westboro Problem, namely one that will protect the right to assembly and expression while also protecting the hearer.

The solution of an expanded definition or the creation of a right by the judiciary also falls short of the ideal. To do so would be to take the easy way out. It would be simple to create a new right each time there is a serious discrepancy between protected rights and social norms, but there can be little doubt that such a path would see the devaluation of rights as its end. Soon we could see the right to health care held in equal esteem with the right to property and the right to Internet access coupled in everyday conversation with the right of the pursuit of happiness.

This, to my mind, leaves two possible solutions to the Westboro Problem. The first, and lesser of the two solutions, is that if it is so offensive to us that it *must* stop, we should pass an amendment. It is for this very purpose that the amendment process was created and included in our Constitution. There was an understanding that society would change and perhaps even improve over time and that if this

44 Snyder, 562 U.S. at 3.

societal change warranted it then we should amend our constitution to reflect that change.[45] The common complaint about this type of a solution is that it is difficult to accomplish. This was also a part of the design of the Constitution; to create a system where change was possible but where it would require a united effort. While this may discourage some from adopting this solution, it seems that if society is anxious enough to squelch speech that it finds disagreeable by curtailing fundamental rights, then it should certainly be willing to do it constitutionally through the amendment process.

The second solution, and the one that reflects a more refined society, is to do nothing. This may sound cowardly to some and just plain unpatriotic to others but if society did nothing then so would Westboro. It is the media frenzy that Westboro causes that keeps the protests going. There are certain acts that laws cannot and should not restrict because the same principle that would restrict their unsavory action would restrict another's good deeds.[46] We cannot outlaw what they are doing without trespassing against the Constitution, yet if society would not endorse the actions of Westboro by lending them their collective ear these protests would stop. We should not curtail the liberties of the whole because of the actions of a few. Westboro will not be here forever, but the rights that we have enjoyed and that ought be enjoyed for generations to come can be.

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45 The Federalist No. 85 (Alexander Hamilton).

46 http://www.patriotguard.org The Patriot Guard Riders is a motorcycle club created in 2005 in direct response to the Westboro protests. Their two-fold purpose is to show sincere respect for our fallen heroes, their families, and their communities, as well as to shield the mourning family and their friends from interruptions created by any protestor or group of protesters. The group was first formed in Mulvane, Kansas, two hours away from the Westboro meetinghouse. When invited by a fallen hero's family, they attend the funeral in order to prevent the members of Westboro from interfering in the services. PGR members position themselves to physically shield the mourners from the presence of the Westboro protesters by blocking the protesters from view with their motorcade, or by having members hold American flags. The group also drowns out the protesters' chants by singing patriotic songs or by revving their motorcycle engines.