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## Funerals and Free Speech

Timothy Zick

*William & Mary Law School*, tzick@wm.edu

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## Funerals and Free Speech

Posted By [Timothy Zick](#) On October 30, 2007 @ 3:50 pm In [First Amendment](#) | [11 Comments](#)

First, thanks to Dan and the other authors for giving me a platform from which to discuss issues relating to public expression as well as other miscellaneous matters. I have greatly enjoyed my guest stint here at CoOp, and am especially grateful to those who have engaged my arguments with thoughtful comments.

In my final post, I want to discuss one of the most difficult cases I have encountered in my study of public speech rights. Many readers are likely already aware of the protest activities of the Westboro Baptist Church, a fundamentalist congregation based in Topeka, Kansas. The church's members — which consist primarily of relatives of a single family — have drawn public attention and ire for protesting at the funerals of service men and women killed in Iraq and Afghanistan. (Members have also protested near military hospitals.) Their "message" is that God is killing American soldiers to punish the United States for "condoning" homosexuality. The protesters tend to stand — peacefully for the most part, but quite noticeably — on sidewalks and other public properties near the entrance to cemeteries. They hold signs conveying messages like "God Hates Fags" and "Thank God for Dead Soldiers." The protesters' presence is obviously deeply upsetting to families and friends who have come to pay their last respects. Three dozen states and Congress have enacted statutes that attempt to limit, in a variety of respects, the time, place, and manner of "funeral protests." The [First Amendment Center](#) <sup>[1]</sup> has a useful summary of the protests and the legal response to them. In a [first-of-its-kind lawsuit](#) <sup>[2]</sup>, the parent of one marine whose funeral was picketed by Westboro members has filed a tort lawsuit against the church, alleging intentional infliction of emotional distress. That trial is currently taking place in Maryland federal court.



One of the things that I find most fascinating about real-space expressive contests is their tendency to challenge our commitment to ideals of "robust and wide open" debate and liberty to offend and provoke others. Of course, content on the Web offends and challenges sensibilities too. But on the sidewalks and streets, as elsewhere on the tangible expressive topography, the offense is felt when and how it hurts most — in person and in real time and space. Because the message is delivered at or very near the point of contest, the audience has a much more difficult time avoiding it. The speech and speakers involved in funeral protests push hard at the First Amendment envelope. Indeed, many wonder how this sort of expression can possibly be defended. I am not concerned here with setting appropriate spatial boundaries — i.e., whether a 200- or 500-foot "buffer zone" is constitutionally permissible. Rather, I am interested in what makes this case so difficult at its core. I address that issue after the jump, and also offer a basis for granting this kind of expression some public space that differs from many of the abstract principles usually cited.

Defending the funeral protester necessitates resort to abstract justifications for expressive rights — ones that apply regardless of the reprehensibility of the message or messenger. Protection for such speech rests upon fundamental commitments to principles like neutrality, autonomy, and self-government. This is, of course, nothing new insofar as First Amendment precedent and tradition are concerned; Nazis, racists, and terrorists have also received some First Amendment protection. For many, however, that doesn't really make abstract support for this new group of hate-mongers any more acceptable. Further, the vulnerability of the targeted audience (although Westboro obviously seeks publicity on a much broader scale as well) makes the case especially difficult. Isn't there something that can be done to shield mourners from this sort of public display? In this respect, the funeral protest resembles

contests involving abortion clinic “sidewalk counselors,” who seek access to the more intimate space of a vulnerable audience. Restricting speech based on audience vulnerability or sensibility seems a slippery path. Even asking, as the jury was recently instructed to do in the Maryland tort suit, whether the speaker’s actions “would be highly offensive to a reasonable person,” may invite dilution of public expression based on listeners’ reactions. The First Amendment generally precludes this, even if the expression is, as here, particularly despicable. Finally, there is the difficulty in identifying any coherent message in these “protests.” Divine retribution for the nation’s sins is not a novel (or even crazy) idea; but the suggested means of retribution strikes one as only faintly related to some divinely inspired plan. (If God wanted us to see our errors, why not speak to us more directly?) In any event, incoherence of a speaker’s message is no more grounds for denying First Amendment protection than is offensiveness.

These are all well-worn justifications and responses. But they are also, as I say, somewhat unsatisfying. Because the speaker and message are so problematic and these justifications wanting, it may be helpful to focus instead on the critical public space issue presented. One of the central arguments in my book is that our public expressive topography has suffered a slow but steady erosion. The spaces we have left — including *all* of the sidewalks and public thoroughfares — are critical to the survival of any tangible public expressive culture. This is not an abstract concern. In this light, small contests like the ones concerning funeral protests attain a significance well beyond the speakers and their hateful message. Restricting or suppressing the Westboro protesters will likely mean denying supporters the opportunity to pay last respects as well (even silently and respectfully). Well, one might say, that’s no big loss — sidewalks near cemeteries do not seem appropriate places for public expression. More generally and seriously, restricting this expression on grounds of audience offense or sensibility will set a negative precedent for future public contests, at many other places on the expressive topography. It will provide yet one more justification for denying speakers an effective opportunity to engage others in a physical setting. The abortion clinic precedents, which are now being cited in the funeral protest cases, tend to bear out that concern. No one likely would mourn the absence of the Westboro protesters. But we ought to be mindful of the loss of public space that may result from defeating (or seriously restricting) them. That, at least for me, is a more comfortable basis for granting even despicable speech like this some public breathing space.

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[1] First Amendment Center: [http://www.firstamendmentcenter.org/Assembly/topic.aspx?topic=funeral\\_protests](http://www.firstamendmentcenter.org/Assembly/topic.aspx?topic=funeral_protests)

[2] first-of-its-kind lawsuit: [http://www.nytimes.com/2007/10/26/us/26funeral.html?\\_r=2&ref=us&oref=slogin&oref=slogin](http://www.nytimes.com/2007/10/26/us/26funeral.html?_r=2&ref=us&oref=slogin&oref=slogin)

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