A MARINE'S HONOR: THE SUPREME COURT FROM *SNYDER* TO *ALVAREZ*

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INTRODUCTION

In the last two years, the Supreme Court has dealt with two cases where the honor of servicemembers and their loved ones has been impugned. One case, *Snyder v. Phelps*,[1] involved private law (a common law suit);[2] the other, *United States v. Alvarez*,[3] involved public law (a federal criminal statute).[4] In both, the Supreme Court ruled that the First Amendment precluded efforts to protect military honor. I submit that the Supreme Court got both cases wrong. In its erroneous decisions, it betrayed a misunderstanding of tort law and exacerbated a misuse of the First Amendment.

I. PRIVATE V. PUBLIC LEGAL ORDERING

My background perspective is one I have written about at some length.[5] *Private ordering* regulates (horizontal) relationships among individuals; *public ordering* regulates (vertical) state-citizen relationships. Tort law, like contract and property law, is a tool of private ordering intended to rectify individual wrongs that damage unwilling victims, not a means of public ordering. Criminal law, on the other hand, as part of public ordering, punishes individuals for wrongfully harming the collectivity. A totalitarian state, for instance, has no private ordering, while an anarcho-capitalistic society would have no public ordering.

Tort regulates our interaction through private ordering. The state is not a party to a tort suit, except of course in its capacity as a private actor.[6] The

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1 131 S. Ct. 1207 (2011).

2 The tort was intentional infliction of emotional distress. *See, e.g.*, Jones v. Harris, 371 A.2d 1104, 1107-06 (Md. Ct. Spec. App.), *aff'd*, 380 A.2d 611 (Md. 1977).

3 132 S. Ct. 2537 (2012).

4 Stolen Valor Act of 2005, 18 U.S.C. § 704 (2006).

5 *See, e.g.*, Michael I. Krauss, *"Retributive Damages" and the Death of Private Ordering,* 158 U. PA. L. REV. PENNUMBRA 167, 169-71 (2010), *available at* http://www.pennumbra.com/responses/02-2010/Krauss.pdf; Michael I. Krauss, *Tort Law and Private Ordering*, 35 ST. LOUIS U. L.J. 623, 644 (1991).

6 For instance, the state owns property, which may be damaged by another's negligence or by an intentional tortfeasor; the state's agents may wrongfully harm others; and a state may waive sovereign

state doesn't even really create most tort rules; they are declared in a common law process and they derive from collective social norms.[7]

Tort suits are not vehicles of public outrage; that is the province of criminal law. Nor is tort properly concerned with implementation of "public policy"; rather, our legislative process is the appropriate forum for policy-setting.[8] In particular, tort suits are not appropriate vehicles for state-coerced redistribution of money from Peters to Pauls, from "haves" to "have nots"—that's the province of tax and welfare law, other important components of public ordering. Judicial implementation of public ordering properly requires constitutional protection (since the state is represented by both a litigant and the judge), while constitutional restrictions on private ordering are much rarer.[9] Indeed, the state constitutional challenges against "Obamacare"[10] were in large part about preserving the distinction between public and private ordering.[11] Of course, private ordering is essentially regulated by the fifty states, not by the federal government.

If public ordering supplants private ordering, administrative law and criminal law will supersede contract, property, and tort. Personal private choice, a bulwark of tort law, may legitimately be ignored in public but not in private ordering—it is criminal to prostitute oneself, for example, but it shouldn't be tortious to do so.[12] That is arguably why, for example, Comment i to Section 402A of the Restatement (Second) of Torts[13] recognizes that the inherent dangers of certain products (e.g., knives' propensity to cut or butter's propensity to raise cholesterol) preclude tort liability for damages caused by the voluntary use of these products.

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immunity and be sued just as a private actor would, precisely because it has renounced its governmental characteristic for the purposes of the suit.

7 *See, e.g.*, James R. Stoner, Jr., *Common Law and the Law of Reason*, NATURAL LAW, NATURAL RIGHTS, & AM. CONSTITUTIONALISM, http://www.nlnrac.org/earlymodern/common-law (last visited Sept. 20, 2012).

8 *See generally* Ernest J. Weinrib, *Understanding Tort Law*, 23 VAL. U. L. REV. 485 (1989).

9 Thus, racially restrictive covenants, a manifestation of freedom of contract, have been banned under the Fourteenth Amendment because state action is required to enforce them. Shelley v. Kraemer, 334 U.S. 1, 20-21 (1948).

10 Patient Protection and Affordable Care Act, Pub. L. No. 111-148, 124 Stat. 119 (2010) (to be codified in scattered sections of the U.S. Code). Supporters and opponents alike have deemed this "Obamacare." *See, e.g.*, *I Like Obamacare*, BARACKOBAMA.COM, http://www.barackobama.com/i-like-obamacare (last visited Sept. 20, 2012).

11 Coerced private contracts through penalties (tax law) is blurring the public/private distinction. *See* Brief for Private Respondents on the Individual Mandate at 60-61, Nat'l Fed'n of Indep. Bus. v. Sebelius, 132 S. Ct. 2566 (2012) (No. 11-398).

12 The prostitute should not be liable for battery to the "John" on the grounds that his consent to the physical touching was illegal.

13 RESTATEMENT (SECOND) OF TORTS § 402A cmt. i (1965).

II. *SNYDER*, *ALVAREZ*, AND MILITARY HONOR

It's in the context of public versus private ordering that I comment on the recent Supreme Court decisions of *Snyder v. Phelps* and *United States v. Alvarez*. Both cases implicate military honor: in *Snyder*, honor that was trampled for a grieving family by malicious detractors; in *Alvarez*, honor that was infringed for all medal holders by an individual prevaricator. In neither was the Court's holding unanimous, and I believe that the majority in each case was incorrect. In *Snyder*, the majority erred in overriding the distinction between private ordering and public ordering under a conception of liberty, falsely understood as license.[14] In *Alvarez*, the majority denied a legitimate use of public ordering under that same pretext.[15] In both cases, malevolent harm was occasioned to honorable people—in *Snyder*, to a family; in *Alvarez*, to an entire class of heroes. The nature of the harm justifies the application of private versus public ordering, respectively. Tragically, only one Justice understood that liability in *Snyder* and that guilt in *Alvarez* were constitutionally permissible.[16]

A. *Backdrop: Speech, the First Amendment, and Tort Law, Properly Understood*

1. Many Kinds of Tort Liability Require Action, Not Just Words

It is true that some torts, such as assault, require more than just speech to incur liability. Threatening harm to another with words alone is legally different than uttering those same words while putting one's hand on one's sword.[17] Also, though whistling suggestively at a young woman walking to her car late at night is boorish and cruel, doing so while crossing the street in her direction might be assault.[18]

2. In Some Cases, Speech *Is* Sufficient for Tort Liability

Sometimes, speech alone can be so outrageous as to constitute intentional infliction of emotional distress.[19] Speech alone, written or oral, can

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14 *See* Snyder v. Phelps, 131 S. Ct. 1207, 1216-17 (2011).

15 *See* United States v. Alvarez, 132 S. Ct. 2537, 2550-51 (2012) (plurality opinion).

16 *See infra* Part IV.C.

17 *See* Tuberville v. Savage, (1669) 86 Eng. Rep. 684, 684 (K.B.).

18 *See* Vietnamese Fishermen's Ass'n v. Knights of Ku Klux Klan, 518 F. Supp. 993, 1013 (S.D. Tex. 1981) (rejecting a claim of assault but only because "there was no testimony that any of [the defendants] were in close enough proximity to any of the plaintiffs to actually commit a battery").

19 Wilkinson v. Downton, [1897] 2 Q.B. 57, 59.

constitute the tort of defamation. If someone were to publicly and falsely state or write that I trade grades for sex, that I molest my students, or even that I am a deadbeat as regards my debts, that speech is defamatory per se and renders the utterer liable to me.[20]

Speech alone can also render one liable for battery. If I am guiding a blind person and tell him the "walk" sign is illuminated, when I know the "don't walk" sign is on and oncoming traffic is dense, I am liable for battery when the blind person is struck by a non-negligent driver.[21] A murder instruction manual, marketed to would-be hit men, has incurred joint liability for wrongful death for the author of the manual.[22] Publishing an ad by a prospective hit-man has had the same result.[23]

3. Speech Can Even Be Sufficient for Unintentional Tort Liability

The prior examples are of intentional torts. But speech can also render someone liable for negligence. Though some very dubious cases have protected publishers from the obvious and foreseeable consequences of negligent speech on constitutional grounds,[24] in other cases liability has been obvious. If D is verbally guiding motorist P out of a ditch into which she slid, and D carelessly states that there is no car coming around the corner, D has breached a duty she voluntarily assumed and will be liable for P's damages if P is hit by an oncoming, non-negligently driven car while reversing.[25]

Slightly more controversially (because of the causal "leap" required), the California Supreme Court held that speech that negligently encouraged teenagers to race their cars on public streets incurred liability for those injured in the ensuing race.[26] In another case, a *Hustler* magazine article on auto-erotic asphyxiation was the object of a wrongful death suit by the heirs of the adolescent who tried it out.[27] The article was accompanied by an edi-

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20 *See, e.g.*, Fleming v. Moore, 275 S.E.2d 632, 635 (Va. 1981).

21 *C.f.* Mandel v. United States, 719 F.2d 963, 968 (8th Cir. 1983) (allowing liability under an exception to the Arkansas Recreational Use Statute where a "National Park Ranger recommended [a particular] swimming hole to [the plaintiff] without knowledge as to whether the swimming hole was safe" though he had "knowledge generally of the existence of rocks in the river and the resulting hazard" (citing RESTATEMENT (SECOND) OF TORTS § 310 (1965))).

22 Rice v. Paladin Enters., Inc., 128 F.3d 233, 242-43 (4th Cir. 1997).

23 Braun v. Soldier of Fortune Magazine, Inc., 968 F.2d 1110, 1122 (11th Cir. 1992).

24 *See, e.g.*, Winter v. G.P. Putnam's Sons, 938 F.2d 1033, 1034, 1037 (9th Cir. 1991) (holding that a book publisher was not liable for harm incurred when a photo of poisonous mushroom was negligently added to the chapter on non-poisonous mushrooms in a how-to-collect-mushrooms book). My critique of *Alvarez* largely applies to the *Winter* case.

25 *See Mandel*, 719 F.2d at 968.

26 Weirum v. RKO Gen., Inc., 539 P.2d 36, 41 (Cal. 1975).

27 Herceg v. Hustler Magazine, Inc., 814 F.2d 1017, 1018-19 (5th Cir. 1987).

tor's note, positioned on the page so that it was likely to be the first text the reader would read, that stated: "Hustler emphasizes the often-fatal dangers of the practice of 'auto-erotic asphyxia,' and recommends that readers seeking unique forms of sexual release DO NOT ATTEMPT this method. The facts are presented here solely for an educational purpose."[28] The suit for incitement to suicide was dismissed by a unanimous Fifth Circuit panel, though the panel emphasized that a negligence suit might have had a different outcome.[29]

In more controversial cases, it has been suggested that violent video games marketed to youth can be the negligent "cause" of violent behavior by consumers of such games.[30]

So it is incontrovertible that speech alone can lead to liability under private ordering. None of these tort cases bans speech or creates any prior restraint. They merely correct harm caused by one person's wrongful speech to another person. The First Amendment was clearly not meant to prohibit liability for such speech, as liability for similar speech was not infrequent at the time of the Bill of Rights[31] and remains enshrined in state constitutions.[32]

B. *Backdrop: Public Ordering (Criminal Law), the First Amendment, and Speech: No Absolute Ban on Criminalization*

The First Amendment[33] appears to prohibit any legislation—either federal or state[34]—that criminalizes speech. Though a First Amendment primer is not possible here,[35] a few examples will illustrate that the First

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28 *Id.* at 1018.

29 *Id.* at 1024-25. Both the majority and Judge Edith Jones in dissent emphasized that the negligence claim was not being disposed of by the court. *See id.* (majority opinion); *id.* at 1030 (Jones, J., concurring and dissenting).

30 *See* Deana Pollard-Sacks, *Constitutionalized Negligence*, 89 WASH. U. L. REV. 1065, 1117-18 (2012). The causation issues here are arguably insuperable—proving that violent media "cause" the free choice to commit a violent act is philosophically extremely problematic.

31 *See infra* note 118 and accompanying text.

32 *See, e.g.*, PA CONST. art. 1, § 7 (provides that "[t]he free communication of thoughts and opinions is one of the invaluable rights of man, and every citizen may freely speak, write and print on any subject, *being responsible for the abuse of that liberty*" (emphasis added)).

33 "Congress shall make no law . . . abridging the freedom of speech, or of the press . . . ." U.S. CONST. amend. I.

34 This applies through the Due Process Clause, U.S. CONST. amend. XIV, § 1 ("[N]or shall any State deprive any person of life, liberty, or property, without due process of law . . . ."), or through the Privileges or Immunities Clause, *id.* ("No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States . . . .").

35 For such a primer, see RODNEY A. SMOLLA, SMOLLA AND NIMMER ON FREEDOM OF SPEECH (2012), or EUGENE VOLOKH, THE FIRST AMENDMENT AND RELATED STATUTES: PROBLEMS, CASES AND POLICY ARGUMENTS (2nd ed. 2005).

Amendment has not been given its literal interpretation by the courts. Thus, in each of the following instances speech alone may constitutionally be a criminal offense:

* Smith yells obscenities at Jones, outside his house late at night, preventing Jones and his family from sleeping and thereby disturbing the peace.[36]

* Smith incites Jones to assault or kill Robinson by stating that people of Robinson's race deserve to be beaten or killed.[37]

* Smith knowingly reveals to Jones, a foreign enemy, the secret formula for a bomb, thereby committing a capital federal offense.[38]

* Pedestrian Smith tells motorist Jones, who is from out of town and lost late at night, that Jones should make the very next right turn to get to the Interstate highway. Smith knows that making the next right turn will immediately lead Jones to plunge into a deep sinkhole that opened ten minutes earlier. Jones' car falls into the sinkhole, and Jones is killed. Smith has possibly committed murder,[39] or at least criminally negligent homicide.[40]

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36 *See, e.g.*, CAL. PENAL CODE § 415(2) (West 1983) (providing for "imprisonment in the county jail for a period of not more than 90 days, a fine of not more than four hundred dollars ($400), or both such imprisonment and fine" for "[a]ny person who maliciously and willfully disturbs another person by loud and unreasonable noise").

37 *See* Wisconsin v. Mitchell, 508 U.S. 476, 480-90 (1993) (unanimously upholding a statute providing for enhanced sentences where the perpetrator "[i]ntentionally selects the person against whom the crime . . . is committed . . . because of the race, religion, color, disability, sexual orientation, national origin or ancestry of that person . . . ." (alteration in original) (quoting WIS. STAT. § 939.645(1)(b) (1989-1990)).

38 *See* 18 U.S.C. § 794(b) (2006); United States v. Rosenberg, 195 F.2d 583, 591-92, 603 (2d Cir. 1952) (affirming the capital convictions of Julius and Ethel Rosenberg).

39 *See* MODEL PENAL CODE § 210.2(1)(b) (1980) (stating that a homicide is murder if "it is committed recklessly under circumstances manifesting extreme indifference to the value of human life"). One interesting example is Vesey v. Vesey, 54 N.W.2d 385, 386-87 (Minn. 1952) (involving a civil suit that held that the complaint alleged a "felonious homicide" where "defendant Mary Ellen Vesey[,] . . . although she knew of decedent's condition and that any exertion might be fatal to him, . . . coerced decedent, who was unaware of his heart condition, to walk with her through deep snow on a cold and windy day, which exertion and exposure caused his death after he had walked two blocks"). *See also* 2 SUBSTANTIVE CRIMINAL LAW § 14.2 (Wayne R. LaFave ed., 2d ed. 2003) ("Words alone may be used to produce an intentional death, as where one perjures an innocent man into the electric chair; or nags another, whom he knows to have heart trouble, into some death-producing exertion; or, seeing a blind man at the edge of a precipice, advises him that it is all clear ahead. Words may be used intentionally to produce death through fright or shock, as when one shouts "boo" at a person leaning precariously over the rim of the Grand Canyon or the balustrade atop the Empire State Building; or where he falsely shouts, "Your son is dead" into the ears of a woman he knows to have a heart condition." (footnotes omitted)).

40 *See, e.g.*, State v. Page, 81 S.W. 3d 781, 792 (Tenn. Crim. App. 2002).

*Smith speaks a lie to an FBI agent, but the agent doesn't believe the lie and doesn't act on it.[41]

* Smith verbally threatens the President of the United States, and never acts on this threat.[42]

* Smith falsely claims to be a park ranger.[43]

* Smith falsely claims to be a lawyer, though no one retains his services.[44]

The fact that a statute criminalizes speech is therefore not sufficient to invalidate that statute under the First Amendment.

III. PAST SUPREME COURT INTERVENTION: SPEECH AND PRIVATE ORDERING

A. *Defamation Cases*

1. *N.Y. Times Co. v. Sullivan*[45]

On March 29, 1960, the *N.Y. Times* carried a full-page advertisement titled "Heed Their Rising Voices," seeking funds to defend Dr. Martin Luther King, Jr. against an Alabama perjury indictment.[46] The advertisement described police actions against civil rights protesters, some of which involved the police force of the city of Montgomery. The advertisement was not totally accurate; for example, referring to the Alabama State Police, the advertisement stated that, "[t]hey have arrested [King] seven times," though at that point King had been arrested only four times.[47] Montgomery's police commissioner, Sullivan, was not named or personally alluded to in the editorial, but he nonetheless sued the *Times* for defamation. The *Times* had virtually no Alabama circulation, and when threatened with a libel suit by Sullivan, the newspaper refused to issue a retraction of errors on the grounds that Sullivan was not targeted by the ad and therefore had no grounds to complain.[48] An (all white) Alabama jury condemned the *Times*

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41 This is a federal offense, even if not spoken under oath. *See* 18 U.S.C. § 1001 (2006).

42 *Id.* § 871.

43 This is a federal offense under 18 U.S.C. § 912.

44 This is an offense in all fifty states. *See, e.g.*, VA. CODE ANN. § 54.1-3904 (West 2008); WASH. REV. CODE ANN. § 2.48.180 (West 2012).

45 376 U.S. 254 (1964).

46 *Id.* at 256-57.

47 *Id.* at 258-59.

48 *See id.* at 260 n.3, 261.The *Times* ultimately did retract the errors upon request by the Governor of Alabama, whom the newspaper viewed as being targeted by the ad. *See id.* at 261-62.

to pay Sullivan $500,000 in damages.[49] The *Times* appealed the affirmation of this judgment by the Alabama Supreme Court to the United States Supreme Court, where, of course, it was unable to argue Alabama tort rules and therefore invoked the Constitution.

It's pretty clear to me that Alabama courts misapplied their own defamation law for political and racial reasons, so a due process and equal protection claim could have been successful.[50] That is not how the case was argued, however. The Court held that to hold speakers liable to public officials for false statements made *without either knowledge of their falsity or reckless disregard for their truth* would seriously "chill" the willingness of citizens to engage in robust public debate.[51]

In *Sullivan*, the Court allowed the First Amendment to limit private liability. However, note that in *Sullivan*: (1) the defendant was the press; (2) the content of the ad was a subject of public concern; (3) the plaintiff was not named or targeted by the *Times*, let alone personally insulted or humiliated; and (4) the ad appealed for political support, and the incorrect factual allegations were trivial.

2. *Curtis Publishing Co. v. Butts*[52]

Sullivan's minimum incursion on private ordering was corroborated in *Curtis Publishing Co. v. Butts*. Georgia Bulldogs football coach Wally Butts sued the *Saturday Evening Post* for libel after an article in the magazine alleged that Butts and Alabama Crimson Tide coach Paul Bryant had conspired to fix games.[53] The *Post* was ordered to pay $3.06 million to Butts in damages, an amount reduced on appeal to $460,000. The court upheld the award, even though Butts was a public figure (assimilated to public official) because of the *Post*'s reckless lack of concern for the facts. "Freedom of the press under the First Amendment does not include absolute license to destroy lives or careers," wrote a concurring Chief Justice Earl Warren.[54] Clearly, the incursion on private ordering in *Sullivan* was limited, and even organs of the press could be held liable for scurrilous reporting that damaged their targets.

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49 *Id.* at 256.

50 *See id.* at 264 n.4 (declining to rule on this claim given that it had struck down the liability judgment on First Amendment grounds).

51 *See Sullivan*, 376 U.S. at 279-80.

52 388 U.S. 130 (1967).

53 *Id.* at 136-37.

54 *Id.* at 170 (Warren, C.J., concurring).

3. *Hustler Magazine, Inc. v. Falwell*[55]

In addition to being arguably a trademark violation, Larry Flynt's "parody" of a then-famous Campari ad series purported to interview Jerry Falwell, who declared that his "first time" was with his mother behind a barn in the outhouse, while both of them were "drunk off [their] God-fearing asses on Campari."[56] In the spoof interview, "Falwell" added that he was so intoxicated that "Mom looked better than a Baptist whore with a $100 donation" and that he finally decided to have sex with his mom since she had "showed all the other guys in town such a good time . . . ."[57] When asked if he had tried Campari since his "first time," the parodied Falwell answered, "I always get sloshed before I go out to the pulpit. You don't think I could lay down all that bullshit sober, do you?"[58] The ad carried a disclaimer in small print that read, "ad parody—not to be taken seriously."[59]

Falwell sued Hustler for libel and for intentional infliction of emotional distress ("IIED") and won $150,000 on the latter claim after a federal jury trial in Virginia (the jury presumably rejected the libel suit because of the "parody" disclaimer). The decision was affirmed by a Fourth Circuit panel, which rejected Flynt's argument that the "actual malice" standard of *Sullivan* applied in cases of IIED where the plaintiff was a public figure.[60] The Supreme Court disagreed in an 8-0 decision that held that actual malice, precluded apparently by the "parody" language, was required in IIED cases involving public figures. The fact that Flynt readily admitted[61] that he

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55 485 U.S. 46 (1988).

56 *See* Robert C. Post, *The Constitutional Concept of Public Discourse: Outrageous Opinion, Democratic Deliberation, and* Hustler Magazine v. Falwell, 103 HARV. L. REV. 601, 606-07 (1990) (discussing *Jerry Falwell Talks About His First Time*, HUSTLER, Nov. 1983).

57 *Id.* at 607.

58 *Id.*

59 *Id.*

60 Falwell v. Flynt, 797 F.2d 1270, 1274 (4th Cir. 1986), *rev'd sub nom.* Hustler Magazine, Inc. v. Falwell, 485 U.S. 46 (1988).

61 As reported by the *Washington Post*, Flynt stated the following in his taped deposition, which was shown to the jury:

> "Yes sir, now you see why I wanted to leave the word 'parody' off of it," Flynt said when asked if the acts of incest and drunkenness attributed to Falwell were true. ". . . He's a liar, a hypocrite and a glutton."
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> "Was it your intention to harm [his] integrity?" Falwell attorney Norman R. Grutman asked Flynt.
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> "To assassinate it," Flynt replied calmly.
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> "Do you realize you can hurt people mentally" by publishing such statements, Grutman asked.
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> "You're goddamned . . . right," Flynt said.

Mary Battiata, *'Felt Like Weeping,' Falwell Tells Jurors: Flynt Says Parody Liquor Ad Was Meant to Harm Preacher*, WASH. POST, Dec. 5, 1984, at A18.

hated everything Falwell stood for apparently did not establish this malice to the satisfaction of the Court.

Hustler was another incursion on private ordering in the name of the First Amendment. Note that: (1) the plaintiff was a public figure; (2) if Falwell's mother had sued for IIED, she would almost certainly have prevailed; and (3) malice was precluded, apparently, by the satirical nature of the ad.[62] Under *Hustler*, non-satirical insults would not be similarly protected.

IV. THE *SNYDER* CASE

A. *Events Preceding the Supreme Court Decision*

Twenty-year old Lance Corporal Matthew Snyder, from Finksburg, Maryland, died from a noncombat-related vehicle accident in Al Anbar province, Iraq on March 3, 2006.[63] The Snyder family organized Corporal Snyder's funeral as a private ceremony, not an official state funeral or other public event.

Fred Phelps, pastor of the forty-member Westboro Baptist Church in Topeka, Kansas, monitors and attempts to disrupt funerals of Iraq and Afghanistan war combatants, because he despises the United States for its toleration of Jews, Catholics, and homosexuals.[64] Phelps and his fellow church members' right to express their hatred of the military and of their country is certainly protected by the First Amendment.[65] However, his efforts to cause harm to individuals should not receive that same protection.

Indeed, these efforts are not limited to the military. The Westboro Baptist Church has harassed funerals of victims of tornadoes, accidents, and

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62 *See* Hustler Magazine, Inc. v. Falwell, 485 U.S. 46, 56-57 (1988). I am not convinced by Chief Justice William Rehnquist's comparison between the *Hustler* ad and celebrated historical political cartoons. *See, e.g.*, *Fellatio Photoshop of Conservative Pundit Sparks Outrage*, SUN NEWS (May 25, 2012, 4:35 PM), http://www.sunnewsnetwork.ca/sunnews/world/archives/2012/05/20120524-163541.html (referencing *Hustler*'s recent photo manipulation of a frequent guest on the Glenn Beck show committing fellatio, defended by Flynt as a "satire").

63 LANCE CPL. MATTHEW A. SNYDER, http://www.matthewsnyder.org (last visited Sept. 20, 2012).

64 Phelps doesn't merely target fallen troops. He despises Catholics and Jews, whether they are combatants or not. *See* A.G. Sulzberger & Colin Moynihan, *Messages of Hate Met by Scorn and Shrugs*, N.Y. TIMES, June 21, 2009, at A17 (discussing how the Westboro Baptist Church held protests at "Jewish institutions" in New York City); PRIESTSRAPEBOYS.COM, http://www.priestsrapeboys.com/america.html (last visited Sept. 20, 2012).

65 Some claim that the U.S. Department of Justice believes that criticism of religion may be illegal discrimination. *See, e.g.*, Paul Joseph Watson, *DOJ Suggests Criticism of Islam Could Be Criminalized*, INFOWARS.COM (July 31, 2012), http://www.infowars.com/doj-suggests-criticism-of-islam-could-be-criminalized. I believe that this position is very unlikely to withstand constitutional scrutiny.

crimes—the effort is always to humiliate and insult Americans during moments of extreme need. Indeed, Fred Phelps has received free airtime on local TV stations in return for foregoing the picketing of the funerals of children (his stated intention is to publicly rejoice in the children's deaths, proclaiming that they were "better off dead" than living in the "fag nation" that is the United States).[66]

While Phelps often attempts to extort media in return for sparing accident victims and children, he does not employ this technique where military heroes are involved. He attends every funeral he can (they tend to be private funerals, as he cannot enter Arlington Cemetery or other large national cemeteries to get close enough to the ceremony).

Phelps issued a press release announcing that his church members would picket Corporal Snyder's funeral because "he died in shame, not honor—for a fag nation cursed by God . . . now in Hell—sine die."[67] At the funeral in Westminster, on the public street across from the church, he and his followers waved signs reading: "God Hates You," "Thank God for Dead Soldiers," "You're Going to Hell," "Not Blessed Just Cursed," "God Hates Fags," "Semper Fi Fags," "Fags Doom Nations," and "Fag Troops," among others.[68] One large sign had a graphic photo of two men engaging in anal sodomy.[69] After the funeral, the Westboro Baptist Church posted a plainly offensive and inflammatory online account of the event.[70] Snyder filed a

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66 *See* Snyder v. Phelps, 131 S. Ct. 1207, 1224-25 (2011) (Alito, J., dissenting). The group maintains that God hates gays above all other kinds of "sinners" and that homosexuality should be a capital crime. *See Westboro Baptist Church FAQ*, GODHATESFAGS.COM, http://www.godhatesfags.com/faq.html#Focus (last visited Sept. 20, 2012).

67 *See Snyder*, 131 S. Ct. at 1225 (Alito, J., dissenting). Note that Corporal Snyder was *not* a homosexual, nor did Phelps believe he was. It mattered not to Phelps whether the people he was picketing were themselves guilty of what Phelps' "church" deemed a sin. What mattered was their status as citizens of a country that tolerated what Phelps' church deemed a sin.

68 *See id.* at 1213 (majority opinion); *id.* at 1225 (Alito, J., dissenting).

69 Reply Brief for Petitioner at 15, *Snyder*, 131 S. Ct. 1207 (No. 09-751), 2010 WL 3167312.

70 The account read in part as follows:

> God blessed you, Mr. and Mrs. Snyder, with a resource and his name was Matthew. He was an arrow in your quiver! In thanks to God for the comfort the child could bring you, you had a DUTY to prepare that child to serve the LORD his GOD—PERIOD! You did JUST THE OPPOSITE—you raised him for the devil.
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> * * *
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> Albert and Julie RIPPED that body apart and taught Matthew to defy his Creator, to divorce, and to commit adultery. They taught him how to support the largest pedophile machine in the history of the entire world, the Roman Catholic monstrosity. Every dime they gave the Roman Catholic monster they condemned their own souls. They also, in supporting satanic Catholicism, taught Matthew to be an idolater.
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> Then after all that they sent him to fight for the United States of Sodom, a filthy country that is in lock step with his evil, wicked, and sinful manner of life, putting him in the cross hairs of a God that is so mad He has smoke coming from his nostrils and fire from his mouth! How dumb was that?

diversity suit in U.S. District Court in Maryland alleging, among other claims, IIED under Maryland tort law.[71] In Maryland law, an IIED plaintiff must demonstrate that the defendant intentionally or recklessly engaged in *extreme and outrageous conduct* that caused the plaintiff to suffer extreme emotional distress.[72]

Maryland is a relatively conservative tort state, not a plaintiff's paradise.[73] It is one of a handful of states to retain the defense of contributory negligence that remains so hated by the plaintiffs' bar.[74] The state's legal and political culture was not intrinsically biased against out-of-state protesters, contrary to the situation in *Sullivan*.

Phelps and his church moved for summary judgment on the grounds that their behavior was protected from adverse state action by the First Amendment. The District Judge denied the motion.[75] The case went to trial, where Mr. Snyder testified that he is now unable to separate the thought of Corporal Snyder from Phelps' desecration of his dead son's funeral. Experts presented evidence of Mr. Snyder's severe depression and exacerbated diabetes caused by the depression.

In its defense, Westboro Baptist Church asserted that it had broken no criminal laws—a claim of dubious relevance since tort liability has never required that a crime be committed. Nonetheless, the church established that its members had complied with local ordinances and had obeyed police instructions. Mr. Snyder testified that he glimpsed the tops of the protesters' signs from the funeral procession, but saw them in their entirety when he watched a news program on his son's funeral on television later that day. He also indicated that he then found the Westboro Baptist Church's full description of its event on its webpage.

The federal jury held Phelps and his church liable for $2,900,000 in compensatory damages and $8,000,000 in punitives, the latter amount re-

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Snyder, 131 S. Ct. at 1126.

71 In reality, the complaint alleged the usual litany of torts: defamation, intrusion upon seclusion, publicity given to private life, intentional infliction of emotional distress, and civil conspiracy. *See* Complaint at 5-10, Snyder v. Phelps, 533 F. Supp. 2d 567 (D. Md. 2008) (No. 1:06-cv-1389-RDB), 2007 WL 3120848. Some of the alleged torts are not torts at all in Maryland, and this comment focuses solely on IIED.

72 *See* Snyder v. Phelps, 580 F.3d 206, 231 (4th Cir. 2009), *aff'd*, 131 S. Ct. 1207 (2011).

73 Maryland is not on the list of so-called "judicial hellholes." *See* ATR FOUND., 2011-2012 JUDICIAL HELLHOLES (2011), *available at* http://www.judicialhellholes.org/wp-content/uploads/2011/12/Judicial-Hellholes-2011.pdf.

74 Mark Hyman, *Bill Offers New Way to Award Damages: Lobbying Fight Waged Over Measure to Ease Burden on Plaintiffs*, BALT. SUN, Feb. 18, 1996, at 1E.

75 Snyder v. Phelps, 131 S. Ct. 1207, 1214 (2011). For the motion to dismiss that raised the First Amendment issue, see Defendants' Memorandum of Points and Authorities Supporting Their Motion to Dismiss at 13-14, *Snyder*, 553 F. Supp. 2d 567 (No. 1:06-cv-01389-RDB), 2006 WL 4927391. For the motion for judgment as a matter of law and for a judgment notwithstanding the verdict, the denial of which served the basis of the Phelps' appeal, see Defendants' Post-Trial Motions at 1, *Snyder*, 553 F. Supp. 2d 567 (No. 1:06-cv-1389-RDB), 2007 WL 4141837.

duced to $2,100,000 by the trial judge under his interpretation of the Supreme Court's punitive damages jurisprudence.[76] Court liens were obtained on church buildings and Phelps' law office in Kansas[77] in an attempt to ensure that the damages were paid.[78]

The Fourth Circuit granted Phelps' appeal and reversed.[79] The court held that the defendants' activities were protected by the First Amendment since their statements related to matters of public concern and were not provably false. Note that falsehood had never been found to be essential for IIED (unlike defamation) in Maryland, and federal courts have no right to remake Maryland tort law. Snyder appealed to the Supreme Court, arguing that Maryland tort law could be constitutionally applied to his case.

B. *The Supreme Court Majority*

Chief Justice John Roberts, writing for seven justices, held that the First Amendment applied to IIED following *Hustler*, even though the plaintiff in *Snyder* was a private citizen and even though the defendant was not a press outlet.[80] Phelps and his church were concerned about homosexuality and the Catholic Church, noted the Chief Justice, and these issues are matters of public concern. The context of the protest, though designed to desecrate the private funeral of a fallen Marine, cannot remove First Amendment protection for the defendants' activity. To rule otherwise, the Court said, would allow juries to find protected speech "outrageous" and would eviscerate the First Amendment.

Justice Stephen Breyer concurred but added that many intentional tort claims will survive the Court's ruling. For example, an assault on a politician, to make a political point, would not be protected by the First Amendment.[81]

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76 Snyder v. Phelps, 533 F. Supp. 2d 567, 571, 590-93 (D. Md. 2008), *rev'd*, 580 F.3d 206 (4th Cir. 2009), *aff'd*, 131 S. Ct. 1207 (2011).

77 Phelps is a disbarred attorney, founder of the law firm, Phelps-Chartered. *See* State v. Phelps, 598 P.2d 180, 187 (Kan. 1979). Phelps maintained his federal practice until 1985, when nine federal judges filed a disciplinary complaint against him and five of his children (all lawyers), alleging false accusations against the judges. In 1989, Phelps agreed to stop practicing law in federal court permanently, and two of his children were suspended. *In re* Phelps, 771 P.2d 934, 934-36 (Kan. 1989). The firm remained active.

78 Mike Hall, *Walls Close in on Phelpses: Judge Orders Liens on Church Building, Law Office*, TOPEKA CAPITAL-J., Apr. 4, 2008, at 1A.

79 Snyder v. Phelps, 580 F.3d 206, 216 (4th Cir. 2009), *aff'd*, 131 S. Ct. 1207 (2011).

80 Snyder v. Phelps, 131 S. Ct. 1207, 1215, 1217-19 (2011).

81 *See id.* at 1221 (Breyer, J., concurring) ("[S]uppose that A were physically to assault B, knowing that the assault (being newsworthy) would provide A with an opportunity to transmit to the public his views on a matter of public concern. The constitutionally protected nature of the end would not shield A's use of unlawful, unprotected means. And in some circumstances the use of certain words as means would be similarly unprotected.").

C. *The Alito Dissent*

In dissent, Justice Samuel Alito emphasized that *Hustler v. Falwell* involved a cartoon about a *public* figure and was published in a magazine far from the public figure's immediate presence.[82] He therefore did not see how *Hustler* provided authority for the Chief Justice's position.

Justice Alito observed that Westboro Baptist Church could have picketed the U.S. Supreme Court, the Pentagon, or the Maryland State House (as it did the day before) with constitutional impunity.[83] In the case at bar, on the other hand, Phelps picketed a *private* ceremony that the victim could *not* avoid because it was his own son's funeral. Phelps did so knowing that the indignation provoked by this outrageous behavior would get much more press coverage than did a State House protest, just as insulting a dead child's memory—arguably a tortious action—gets more attention than picketing Congress—a protected action.

Justice Alito also pointed out that many of the signs, as well as the web posting, falsely suggested that Corporal Snyder was homosexual.[84] The Snyders were themselves severely criticized as parents by the Phelps, and Corporal Snyder's family was used, manipulated, humiliated, and incurred lasting emotional injury just so cameras could be shined on the Phelps' views.

As Justice Alito observed, Justice Breyer's concurrence emphasized that one cannot hide behind the First Amendment if one commits a real independent tort, even if that tort is speech-related and even if it is committed for political reasons.[85] Yet the upshot of the plurality in *Snyder* was to deny exactly that claim. Justice Breyer seemed to have been oblivious to the fact that his effort to minimize the portent of *Snyder* in fact gutted the intellectual coherence of his concurrence. As will be shown below, Justice Breyer made the same mistake in *Alvarez*.

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82 *Id.* at 1228 (Alito, J., dissenting).

83 *Id.* at 1223-24.

84 *Id.* at 1225-26. Professor Richard Epstein's essay on the *Snyder* case is instructive here. Defending the Roberts majority in *Snyder*, Professor Epstein (who was highly critical of the Court's limitation of tort liability in *Sullivan, see* Richard A. Epstein, *Was* New York Times v. Sullivan *Wrong?*, 53 U. CHI. L. REV. 782, 817 (1986)) noted in passing that the *Snyder* case was about a "gay [M]arine." *See* Richard A. Epstein, *Epstein Says SCOTUS Got* Snyder v. Phelps *Right (For Wrong Reasons): Abusing a Dead Marine*, U. OF CHI. LAW SCH. (Mar. 7, 2011) [hereinafter *Epstein Says SCOTUS Got* Snyder v. Phelps *Right*], http://www.law.uchicago.edu/news/epstein-says-scotus-got-snyder-v-phelps-right-wrong-reasons. Professor Epstein's essay paradoxically contains its own undoing, as Epstein was himself misled by Phelps' speech to view Corporal Snyder and, by ricochet, his parents in a false light. *See id.*

85 *Snyder*, 131 S. Ct. at 1226-27 (Alito, J., dissenting).

It bears mentioning in passing that retired Justice John Paul Stevens, the last military veteran to sit on the Supreme Court,[86] said that he would have proudly joined Justice Alito's dissent.[87] Justice Stevens noted that *Snyder*

> did not involve a cartoon about a public figure like Jerry Falwell. It involved a verbal assault on private citizens attending the funeral of their son—a Marine corporal killed in Iraq. To borrow [Justice Alito's] phrase, the First Amendment does not transform solemn occasions like funerals into "free-fire zones."[88]

D. *Critique*

To my mind, Justice Alito's dissent is obviously correct, while the majority effects an unjustified federal skewering of state private ordering.

If we are a free society founded on notions of liberty and responsibility rather than license,[89] then the First Amendment must not immunize an intentional attack on a private person if state tort law finds liability. Tort liability does not ban or even *punish* such an attack;[90] it is not public ordering. Rather, tort liability *compensates* for damage caused by a private wrong that the Constitution gives the defendant no privilege to commit. There is no First Amendment privilege to commit a wrong against a private person in order to make a political point any more than there is a Second Amendment privilege to shoot someone to vindicate the right to bear arms. That was precisely the point of Justice Breyer's self-defeating concurrence, as Justice Alito realized.

The majority implied that IIED—also known as the tort of "outrage"—was an arbitrary tort and therefore subject to infinite malleability by

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86 Phyllis Schlafly, *Schlafly: Obama Would Be Foolish to Leave Supreme Court Without a Veteran*, EAGLE FORUM (Apr. 9, 2010), http://www.eagleforum.org/pr/2010/04-09-10.html. It is striking for someone of my generation to imagine that there are no veterans on the Court.

87 Justice John Paul Stevens (Ret.), Address at the Federal Bar Council Annual Law Day Dinner (May 3, 2011), *available at* http://www.supremecourt.gov/publicinfo/speeches/Federal%20Bar%20Council%20Annual%20Law%20Day%20Dinner(1613_001).pdf.

88 *Id.*

89 *See* JOHN LOCKE, TWO TREATISES OF GOVERNMENT 288-89 (Peter Laslett ed., Cambridge Univ. Press 1960) (1690) ("But though this be a *State of Liberty*, yet it is *not a State of License*; though Man in that State have an uncontroleable [sic] Liberty to dispose of his Person or Possessions, yet he has not Liberty to destroy himself, or so much as any Creature in his Possession, but where some nobler use, than its bare Preservation calls for it. The *State of Nature*, has a Law of Nature to govern it, which obliges every one: And Reason, which is that Law, teaches all Mankind, who will but consult it; that being all equal and independent, no one ought to harm another in his Life, Health, Liberty, or Possessions.").

90 *See* Michael I. Krauss, *Punitive Damages and the Supreme Court: A Tragedy in Five Acts*, 4 ENGAGE 118, 118 (2003). There might be a First Amendment case for banning punitives in such instances. If there is an issue regarding the punitives in *Snyder*, it is a problem with punitives in general, not a First Amendment problem.

juries, who could use it to trample constitutional rights. It quoted *Hustler* to that effect.[91] But that quote is out of context. In *Hustler*, the court was discussing outrageousness in a *caricature* of a *public figure* in a *publication*. *Hustler*, in other words, didn't pass the smell test of a bona fide tort suit. There has *never* been a precedent holding that the First Amendment trumps a private citizen's claim for IIED.[92] The First Amendment does not provide a "special privilege to invade the rights and liberties of others."[93] The speech in *Snyder* included both private and public protest, and the private protest was clearly not worthy of First Amendment protection.[94]

The majority held that Phelps' "speech" was public because it related to broad issues of interest to society at large. But even if signs such as "God Hates the USA/Thank God for 9/11" are protected speech, there were other signs and invectives directed at the victim, such as "God Hates You" and "You're Going to Hell,"[95] and these were exposed within close proximity to the funeral itself, not in a newspaper ad in some far-off state. If one were to defame an individual Catholic as a pedophile while protesting against the Vatican, or if one were to attack an individual Jew as a swine who rejoices at drinking Gentile babies' blood while protesting the United States' support for Israel, tort law could be legitimately invoked. Phelps cannot put Snyder's funeral in the "public domain" just because Phelps' own disruption gets attention. These tortious actions cannot transform a private attack into a matter of public concern that then rescues them from tort liability. I can find no support for the contrary view.[96]

Any legitimate constitutional concern the Court had could have been addressed without the majority's massive intrusion on state tort law. In *Snyder*, there was no transparent effort by the state to stifle legitimate dissent as there had been in *Sullivan*. No one questioned the defendants' right

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91 Snyder v. Phelps, 131 S. Ct. 1207, 1219 (2011) ("'Outrageousness,' however, is a highly malleable standard with 'an inherent subjectiveness about it which would allow a jury to impose liability on the basis of the jurors' tastes or views, or perhaps on the basis of their dislike of a particular expression.'" (quoting Hustler Magazine, Inc. v. Falwell, 485 U.S. 46, 55 (1988))).

92 "The First Amendment was not enacted to enable wolves to parade around in sheep's clothing, feasting upon the character, reputation and sensibilities of innocent private persons. It was enacted to assure a free interchange of ideas." Esposito-Hilder v. SFX Broad., Inc., 654 N.Y.S.2d 259, 263 (N.Y. Sup. Ct. 1996).

93 Branzburg v. Hayes, 408 U.S. 665, 683 (1972).

94 *See* Chaplinsky v. New Hampshire, 315 U.S. 568, 571-72 (1942) (noting that the sanctioning of "the lewd and obscene, the profane, the libelous, and the insulting or 'fighting' words" does not endanger free speech); Cantwell v. Connecticut, 310 U.S. 296, 309-10 (1940) ("Resort to epithets or personal abuse is not in any proper sense communication of information or opinion safeguarded by the Constitution . . . .").

95 *Snyder*, 131 S. Ct. at 1213.

96 *See generally* Vietnamese Fishermen's Ass'n v. Knights of Ku Klux Klan, 518 F. Supp. 993 (S.D. Tex. 1981). While there was no assault in this case because the threat was not imminent enough, the Court never stated that the Klan's actions were protected by the First Amendment. These were private actions, no matter how public the Klan wanted them to be.

to protest outside the Naval Academy, for example (they had been there earlier in the day, but their protest attracted no media presence, precisely because they didn't cause such grievous harm). However, the defendants have no right to attract media presence, much as anti-hunting protesters have no right to publicly tear a live deer limb from limb to encourage protesters to attend their demonstration.

The Supreme Court could easily have adopted a rational basis test for the plaintiff's jury verdict, or even a heightened level of scrutiny. The Maryland tort verdict would have passed either test. In *Sullivan*, Alabama's verdict against the *N.Y. Times* could not have passed muster under any such filter, since the plaintiff had not been named, the editorial was only incidentally viewed in his state, and the plaintiff had influence on local media outlets sufficient to rebut the editorial if he thought it unfair. None of those elements obtained in *Snyder*, which was a textbook case for the tort of outrage. The defendant caught the plaintiff when and where he was most vulnerable—grieving at and shortly after his own son's funeral—and desecrated the memory of a heroic Marine who could not defend himself. Indeed, on appeal, Phelps and the Westboro Baptist Church did not dispute that Snyder satisfied all four requirements for IIED under Maryland law: (1) intentional or reckless behavior; (2) extreme or outrageous conduct; (3) infliction of emotional distress; and (4) the severity of the distress. All that Phelps and the Westboro Baptist Church relied on was the willingness of the Supreme Court to strike down IIED liability as if it were the equivalent of a criminal statute banning funeral protests. Though only private ordering was involved, the Court treated this as a case of public ordering.[97] Failing to distinguish the private from the governmental is failing to recognize the importance of private action to a free society.[98]

E. *The Volokh Defense of* Snyder

Professor Eugene Volokh has defended the Supreme Court majority in *Snyder* in an online law review article.[99]

Volokh asserts, by way of comparison to the *Snyder* case, that publishing the Muhammad cartoons offended millions of Muslims,[100] that criticizing affirmative action possibly offends millions of blacks, and that he doubts there is any standard that could insulate those two cases from tort

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97 *See Snyder*, 131 S. Ct. at 1217 (majority opinion); *id.* at 1223 (Alito, J., dissenting).

98 For the same point defended apropos a different constitutional issue, see Lillian BeVier & John Harrison, *The State Action Principle and Its Critics*, 96 VA. L. REV. 1767 (2010).

99 Eugene Volokh, *Freedom of Speech and the Intentional Infliction of Emotional Distress Tort*, 2010 CARDOZO L. REV. DE NOVO 300.

100 *See* John Ward Anderson, *Cartoons of Prophet Met with Outrage: Depictions of Muhammad in Scandinavian Papers Provoke Anger, Protest Across Muslim World*, WASH. POST, Jan. 31, 2006, at A12.

liability if the Supreme Court had come down the other way in *Snyder*.[101] Professor Volokh concedes that reasonable "time, place, and manner restrictions" on speech are constitutional, and he quite correctly notes that time place and manner restrictions were not at issue in *Snyder*.[102] He concludes that a ruling for Mr. Snyder would have suppressed speech and that the First Amendment is not about suppressing speech.[103]

With respect, I think Professor Volokh is mistaken, and his about-face in *Alvarez*[104] suggests he might perhaps agree with me. What Professor Volokh never sees is that *Snyder* is not about suppressing speech at all. Suppressing speech is a matter of *public ordering* properly provided for by the Bill of Rights, with its attendant time place and manner exceptions. *Snyder* is only about compensating for a wrongfully caused harm, however caused. Voters who stampede to the polls, trampling passers-by, are liable to them, even though they were (abusively) exercising a constitutional right at the time—and holding them liable does not infringe on the right to vote. Professor Volokh, in other words, has perhaps unwittingly abandoned the field to his and my common collectivist adversary: he is assuming that there isn't any difference between retributive and corrective justice, between criminal statutes and the common law, between ex ante prohibition and ex post compensation, between public ordering and private ordering.

What if, in *Wilkinson v. Downton*,[105] Downton had been motivated to tell Wilkinson that her husband was dying *because* Wilkinson was a Catholic and Downton believed Catholics should be made so miserable that they would all emigrate? Should Downton still be liable, according to Professor Volokh? Perhaps Professor Volokh would distinguish the cases by saying that the lie about the hospital distinguishes *Wilkinson* from *Snyder*. What about the lie about Corporal Snyder's sexual orientation, a lie that fooled none other than Professor Richard Epstein?[106] In any case, making truth and lies the fulcrum of IIED is making IIED an adjunct of defamation, when it is, in fact, an independent tort.[107]

On the contrary, *Wilkinson* is correctly decided because in that case the defendant did something *private* and *intentionally bad* with the *desire to harm a private plaintiff*, and he *succeeded* in his intent. That he did this

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101 Volokh, *supra* note 99, at 300-01.

102 *Id.* at 306-07.

103 *See id.* at 312 ("*Hustler v. Falwell* got it right, and so did the Fourth Circuit in *Snyder v. Phelps*. That speech expresses outrageous ideas can't justify its being suppressed.").

104 *See* Brief of Professors Eugene Volokh and James Weinstein as Amici Curiae in Support of Petitioner at 5, 20, United States v. Alvarez, 132 S. Ct. 2537 (2012) (No. 11-210), 2011 WL 6179424 (mentioning intentional infliction of emotional distress and other private tort actions as speech restrictions permitted by the First Amendment).

105 [1897] 2 Q.B. 57.

106 *See Epstein Says SCOTUS Got* Snyder v. Phelps *Right*, *supra* note 84.

107 *See* Brief for Petitioner at 41-42, Snyder v. Phelps, 131 S. Ct. 1207 (2011) (No. 09-751), 2010 WL 2145497.

using speech is irrelevant to his liability. This is just what tort law is there for. That even Professor Volokh can't see this shows how far we have gone in publicizing the private in American law.

V. PUBLIC ORDERING AND THE DESTRUCTION OF GROUP HONOR: *UNITED STATES V. ALVAREZ*

The Supreme Court exacerbated the damage it caused in the *Snyder* case the very next year in *United States v. Alvarez*. In that case, Xavier Alvarez, a newly elected board member of a California governmental entity, attended his first public meeting after his 2007 election and introduced himself as follows: "I'm a retired [M]arine of 25 years. I retired in the year 2001. Back in 1987, I was awarded the Congressional Medal of Honor. I got wounded many times by the same guy."[108]

Every one of those claims was false.[109] Alvarez had only fleetingly served in the military, had never seen combat or been wounded, and had never won any medal. Doubters did some research, revealed Alvarez's perfidy, and put an end to his short-lived political aspirations.

Separately, and one thousand miles away, Rick Strandlof had founded a nonprofit charity called the Colorado Veterans Alliance ("CVA").[110] Strandlof had founded the CVA under an alias: he claimed to be Rick Duncan, a former Marine captain and a graduate of the U.S. Naval Academy. An improvised explosive device had gravely wounded "Rick Duncan" during his third tour in Iraq, where he was awarded the Silver Star and Purple Heart medals. As with Alvarez, alas, none of this was true—no Rick Duncan ever existed. When the truth was uncovered, the CVA tried to stay together but ultimately voted to disband. "As far as we're concerned, Rick has permanently damaged the integrity of the CVA, and there's nothing we can do to repair it," said spokesman Daniel Warvi.[111]

Both Alvarez and Strandlof impugned, through their widely-publicized self-portrayals, all those servicemembers who are in fact decorated. People who learn these stories invariably lose some of their admiration for those who (truthfully) claim to have received a military medal. Such behavior could not result in a tort suit, however—no one person or family was attacked by Alvarez or Strandlof, and any individual harm is too diffuse to be "proximately caused." But their duplicity damaged a collectivity and was

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108 United States v. Alvarez, 132 S. Ct. 2537, 2542 (2012) (plurality opinion).

109 *See id.* at 2543.

110 *See* United States v. Strandlof, 667 F.3d 1146, 1151-52 (10th Cir. 2012), *abrogated by* United States v. Alvarez, 132 S. Ct. 2537 (2012).

111 *See* Lance Benzel, *Veterans' Group Disbands After Founder Exposed as Impostor*, GAZETTE (Colo. Springs) (May 14, 2009, 13:55:08), http://www.gazette.com/articles/veterans-53985-group-colorado.html.

therefore properly the subject of criminal legislation. Some states[112] and, since 2005, the Federal government through the Stolen Valor Act,[113] have criminalized such fraud. Both Alvarez and Strandlof were therefore federally prosecuted—in Strandlof's case a maximum punishment of six months was available, while Alvarez risked a year in prison.[114] Alvarez pleaded guilty at trial, reserving the right to contest the constitutionality of the statute on appeal. His conviction was reversed on constitutional grounds by a divided panel of the Ninth Circuit.[115] Strandlof, for his part, pleaded not guilty on the grounds that the statute was unconstitutional. The trial court agreed, but its holding was reversed by a divided panel of the Tenth Circuit.[116] Only the *Alvarez* case reached the Supreme Court.

A four-Justice plurality in *Alvarez* agreed with the Ninth Circuit majority (and with the trial court and Tenth Circuit dissent in *Strandlof*) that strict scrutiny applied to determine the constitutionality of the Stolen Valor Act, since that law criminalized speech. Justice Anthony Kennedy held that in no prior case had a federal statute criminalized "falsity and nothing more" and that any such criminalization of speech because of its content is presumptively unconstitutional.[117] The federal government failed to meet the heavy burden of showing that the Stolen Valor Act survived strict scrutiny in the plurality's eyes. So it appears that for four Justices, it cannot be a federal offense to falsely claim to be a recipient of a military honor.

This is despite these uncontroverted facts:

(1) At America's founding, criminal penalties awaited those who claimed military honors without cause,[118] and there is absolutely no indication that the First Amendment was seen as undoing this state of affairs;

(2) Case law[119] explicitly distinguishes between false *ideas*, which cannot be penalized in any way by law, and false *statements of fact*, which lack constitutional value unless their repression would unduly chill otherwise protected speech;

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112 *E.g.*, CONN. GEN. STAT. ANN. § 53-378(b) (West 2012) (prohibiting lies about receiving military awards); KAN. STAT. ANN. § 21-6410(a) (West 2012) (punishing falsely claiming to be a member of a veterans' association).

113 18 U.S.C. § 704(b) (2006).

114 The penalty for falsely claiming to be a Congressional Medal of Honor winner is twice as long as the penalty for claiming other military honors. *See id.* §§ 704(c)-704(d).

115 United States v. Alvarez, 617 F.3d 1198, 1200 (9th Cir. 2010), *aff'd*, 132 S. Ct. 2537 (2012).

116 *See* United States v. Strandlof, 667 F.3d 1146, 1170 (10th Cir. 2012), *abrogated by* United States v. Alvarez, 132 S. Ct. 2537 (2012).

117 United States v. Alvarez, 132 S. Ct. 2537, 2545 (2012) (plurality opinion).

118 GENERAL ORDERS OF GEORGE WASHINGTON, COMMANDER-IN-CHIEF OF THE ARMY OF THE REVOLUTION, ISSUED AT NEWBURGH ON THE HUDSON, 1782-1783, at 34-35 (Harbor Hill Books 1973) (Edward C. Boynton ed., 1883) ("Should any who are not entitled to the honors, have the insolence to assume to the badges of them, they shall be severely punished.").

119 *See* Gertz v. Robert Welch, Inc., 418 U.S. 323, 339-40 (1974).

(3) Perjury (knowingly false testimony under oath) is criminal in every state and at the federal level[120]—this speech is criminal just because of its falsehood, and even if the lie is not believed by the fact-finder;

(4) Falsely claiming to be a federal officer (for example, a Ninth Circuit federal judge) is a federal crime, just because it is false, and even if the utterer is not under oath and no one believes or acts on the false claim;[121]

(5) Falsely claiming to be endorsed by the Social Security Administration ("SSA") is a federal offense, even if it is "naked falsehood"—that is, even if the SSA is not defrauded;[122] and

(6) Military medals have clearly been devalued by rampant false claims.

As Justice Alito indicated, even *Who's Who*[123] and the Library of Congress[124] have been victims of false medal claims. The claim that one is a medal recipient must now be taken with a grain of salt because of such frequent, phony assertions. Indeed, in a single year (2004), in a single state (Virginia), over 600 people falsely claimed to have won the Medal of Honor.[125] One judge even falsely claimed to have been awarded two Medals of Honor, displaying counterfeit medals in his courtroom.[126] A *Fox News* mili-

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120 *See, e.g.*, 18 U.S.C. §§ 1621, 1623 (2006); VA. CODE ANN. § 18.2-434 (West 2012).

121 *See* 18 U.S.C. § 912.

122 42 U.S.C. §1320b-10(a) (2006); *see* United States v. Lepowitch, 318 U.S. 702, 704 (1943) (stating that there is no need to prove fraud because the statute is meant to "maintain the general good repute and dignity of the [government] service" (alteration in original) (quoting United States v. Barnow, 239 U.S. 74, 80 (1915))).

123 "An investigation of the 333 people listed in the online edition of *Who's Who* as having received a top military award revealed that fully a third of the claims could not be substantiated." United States v. Alvarez, 132 S. Ct. 2537, 2558 (2012) (Alito, J., dissenting).

124 "When the Library of Congress compiled oral histories for its Veterans History Project, 24 of the 49 individuals who identified themselves as Medal of Honor recipients had not actually received that award." *Id.*

125 *Id.* (citing Edward Colimore, *Pinning Crime on Fake Heroes N.J. Agent Helps Expose and Convict Those with Bogus U.S. Medals*, PHILA. INQUIRER (Feb. 11, 2004), http://articles.philly.com/2004–02–11/news/25374213_1_medals–military–imposters–distinguished–flying–cross.

In preparation for this Essay, I related this factoid to some twenty people, among them law students, attorneys, and family members. I asked each of them whether these false claims will cause them to react differently if they meet someone who claims to be a Medal of Honor winner. Each and every one responded in the affirmative: they would not fully trust the representation and would not feel as honored to be in the presence of their interlocutor. I asked those same twenty people which of the following two wrongful acts would cause them more harm: (1) a corporation publishes an inaccurate report about someone's alleged prior bankruptcy, and when informed of the error corrects the misstatement; or (2) their son dies and a group of haters line the route of his funeral procession, hurl false insults about his sexual deviancy, and waive placards with vile accusations about him, his parents, and others—statements which the group repeats on a local radio broadcast. All twenty stated the second case would cause them immeasurably more harm than the first.

126 Linda Young, *His Honor Didn't Get Medal of Honor*, CHI. TRIBUNE, Oct. 21, 1994, at D1.

tary consultant falsely claimed to be a Silver Star recipient.[127] The public depreciation of military honor defeats a valid congressional purpose and was clearly known to Congress when it enacted the Stolen Valor Act. The reputational loss suffered by true Medal of Honor winners is analogous to the dilution and goodwill loss suffered by the trademark holder in the face of counterfeit goods.[128]

It should be noted that five Justices disagreed with the majority's refusal to allow punishment of false speech. They did so in two separate opinions. A two-Justice concurrence, written by Justice Breyer, predictably[129] preferred an "intermediate scrutiny" that required a *sui generis* weighing of advantages and disadvantages of the act.[130] Justice Breyer found that the Stolen Valor Act could have been somewhat more narrowly tailored (though he didn't specify how) and concluded that the statute failed the balancing test in its current iteration only because it was not more narrowly tailored. Both the plurality and Justice Breyer's concurrence conjured up the specter, under the Stolen Valor Act, of a Gestapo-like federal police force interrogating grandchildren of men who, in whispered voices, had falsely bragged around the living room table that they had won military medals.[131]

With respect, this claim is particularly weak. In *Watts v. United States*,[132] the Supreme Court used standard techniques of criminal law interpretation to conclude that a federal statutory prohibition on "any threat" against the President excluded non-serious threats (satirical, rhetorical, literary and theatrical, hyperbolic, etc.).[133] Such interpretation was clearly available as regards the Stolen Valor Act—and it would not have shielded Alvarez or Strandlof. Nor would validating the Stolen Valor Act have, as some have feared,[134] authorized Congress to outlaw ideological falsehoods,

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127 Jim Rutenberg, *At Fox News, the Colonel Who Wasn't*, N.Y. TIMES, Apr. 29, 2002, at C1.

128 *See, e.g.*, Lois Sportswear, U.S.A., Inc. v. Levi Strauss & Co., 799 F.2d 867, 873 (2d Cir. 1986) ("Th[e] misuse of goodwill is at the heart of unfair competition.").

129 Justice Breyer is the Court's resident pragmatist. *See generally* Cass R. Sunstein, *Justice Breyer's Democratic Pragmatism*, 115 YALE L.J. 1719 (2006).

130 *Alvarez*, 132 S. Ct. at 2551-52 (Breyer, J., concurring).

131 *See id.* at 2547 (plurality opinion) ("The Act by its plain terms applies to a false statement made at any time, in any place, to any person. . . . Here the lie was made in a public meeting, but the statute would apply with equal force to personal, whispered conversations within a home."); *id.* at 2555 (Breyer J., concurring) ("As written, it applies in family, social, or other private contexts, where lies will often cause little harm. . . . And so the prohibition may be applied where it should not be applied, for example, to bar stool braggadocio . . . ."). To the plurality, this helped make the statute unconstitutional per se. To the concurrence, it helped make the statute too "broad."

132 394 U.S. 705 (1969) (per curiam).

133 *Id.* at 705.

134 Brief for Respondent at 43, *Alvarez*, 132 S. Ct. 2537 (No. 11-210), 2012 WL 160227 ("Other countries make it a crime to deny the Holocaust or the Armenian genocide. It has generally been believed that such a law would not be permissible under the First Amendment, but it would seem to pass the government's test . . . ." (citations omitted)); Brief of Professor Jonathan D. Varat as Amicus Curiae

such as Holocaust denial, since the utterers of such falsehoods believe in their truth and therefore lack the scienter required by the statute.

Justice Alito, writing for Justices Antonin Scalia and Clarence Thomas in dissent, agreed with Justice Breyer that it was constitutionally possible to punish false medal claims.[135] However, Alito saw nothing in Supreme Court case law that forbade the Stolen Valor Act. As Justice Alito gently pointed out, Breyer never enunciated a standard that the false medal claim prohibition would have to meet to be constitutional, except perhaps an "acceptable to Justice Breyer" standard.[136] Exactly as in *Snyder*, Justice Breyer's pragmatism seems to devolve into an unprincipled ad hoc-ism.

CONCLUSION

On August 14, 2012, a three-judge panel of the Fourth Circuit upheld the conviction of a Virginia man who had falsely claimed to be a Fairfax County police officer.[137] The dissenting judge could not see how this punishment squares with *Alvarez.*[138] That dissenting judge is clearly correct (unless, of course, the Virginia statute passes Justice Breyer's opaque ad hoc balancing test). Trademarks receive protection from dilution, while honorable public service apparently does not.[139]

Ruthless and false insults of a hero and his family; deprecation of an entire class of heroes—clearly, we have a ways to go in preserving the distinction between private and public ordering, and in validating both when they are appropriately invoked to preserve the honor of a Marine.

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in Support of Respondent at 13, *Alvarez*, 132 S. Ct. 2537 (No. 11-210) ("Simply because a statement is false and fundamentally factual in nature does not mean that it cannot carry within it an idea that the United States may seek to suppress. To take one current example, assertions by segments of the population that the current President is not a United States citizen are fundamentally factual statements, yet they are inextricably intertwined with the expression of subjective beliefs concerning the trustworthiness and legitimacy of the current President. A regulation aimed at the prohibition of such statements could, therefore, be a vehicle for idea suppression. Many other types of false factual statements similarly are intertwined with the expression of contested ideas, including statements regarding the threat of climate change or statements concerning the impact of legislation on the federal budget.").

135 *Alvarez*, 132 S. Ct. at 2557 (Alito, J., dissenting).

136 *See id.* at 2560.

137 *See* United States v. Chappell, 691 F.3d 388 (4th Cir. 2012).

138 *Id.* at 410 (Wynn, J., dissenting).

139 First Amendment rights do preclude a trademark owner from prohibiting uses of the mark in speech. For example, one may use the trademarks of another in a truthful manner in a comparison ad. False use, commonly known as counterfeiting, has never received First Amendment protection. The proliferation of counterfeit copies of luxury goods dilutes the signals given out by the purchasers of the originals. William Landes & Richard A. Posner, *Trademark Law: An Economic Perspective*, 30 J.L. & ECON. 265, 308 (1987).