

OF LOCKE AND VALOR: WHY THE SUPREME COURT'S DECISION IN *UNITED STATES V. ALVAREZ* DOES NOT FORECLOSE CONGRESS'S ABILITY TO PROTECT THE PROPERTY RIGHTS OF MEDAL OF HONOR RECIPIENTS

Timothy J. Geverd¹

INTRODUCTION

On September 8, 2009, Marine Corporal Dakota L. Meyer went above and beyond the call of duty when fifty enemy fighters ambushed his joint United States-Afghani patrol in Kunar Province, Afghanistan.² After learning that the patrol was cut-off from its exit route, Corporal Meyer manned an exposed gunner position on a truck that a fellow Marine drove towards the fighting.³ As the gun truck entered the field of battle, the lone vehicle drew significant fire from enemy forces.⁴ However, disregarding the significant risk to his life, Corporal Meyer and his fellow Marine driver repeatedly braved the firefight to evacuate the dead and wounded.⁵ During the six-hour firefight, Corporal Meyer made a total of five such trips.⁶ Although Corporal Meyer suffered a shrapnel-wound to his arm on his third run into the firefight, he continued fighting and searching for missing members

¹ George Mason University School of Law, J.D. Candidate, May 2014; Executive Editor, *GEORGE MASON L. REV.*, 2013-14; St. Michael's College, B.A., Political Science, December 2009.

² *The President of the United States in the Name of Congress Takes Pleasure in Presenting the Medal of Honor to Corporal Dakota L. Meyer United States Marine Corps*, MARINES.MIL (last visited Sept. 11, 2012, 09:31 AM), <http://community.marines.mil/community/Pages/medalofhonorsgtdakotameyer-citation.aspx>. [hereinafter *Corporal Meyer's Citation*].

³ *Id.*

⁴ *Id.*

⁵ *Id.*

⁶ *Id.*

of the United States team.⁷ His selfless, heroic acts inspired fellow warriors to face the vicious firefight and help in the recovery mission.⁸ In all, Corporal Meyer's heroism brought thirty-six men, who otherwise would have likely died that day, home alive and brought four fallen Americans home for a proper burial.⁹ Through his gallantry, Corporal Meyer earned the Medal of Honor (the "Medal") and,¹⁰ with it, membership in one of the most exclusive clubs in the world.¹¹ However, on June 28, 2012, the Supreme Court significantly diminished the value of Corporal Meyer's—and 3,462 fellow Medal recipients'¹²—membership in that club by reducing Congressional protection of that vested right with their decision in *United States v. Alvarez*.¹³

Addressing a split between the Ninth and Tenth Circuits,¹⁴ the Court invalidated the Stolen Valor Act's prohibition on making false claims about receiving military honors as an unconstitutional content-based restriction on free speech.¹⁵ In so holding, the Court essentially deemed false claims regarding receipt of a military honor, harmless false speech.¹⁶ Although the government's argument in the case evidences that false claims regarding receipt of military honors dilute the integrity and honor of the award,¹⁷ the Court found that maintaining the honor of the awards themselves

⁷ *Id.*

⁸ *Id.*

⁹ *Remarks by the President Awarding the Medal of Honor to Sergeant Dakota Meyer*, WHITE HOUSE OFFICE PRESS SEC'Y (Sept. 15, 2011, 2:50 PM), <http://www.whitehouse.gov/the-press-office/2011/09/15/remarks-president-awarding-medal-honor-sergeant-dakota-meyer>.

¹⁰ *Id.*

¹¹ *See, e.g., Archive Statistics*, CONG. MEDAL OF HONOR SOC'Y, <http://www.cmohs.org/medal-statistics.php> (last visited Oct. 24, 2013) [hereinafter *Medal of Honor Statistics*] (reporting the relatively limited number of Medal recipients).

¹² *Id.*

¹³ 132 S. Ct. 2537 (2012).

¹⁴ *United States v. Strandlof*, 667 F.3d 1146 (10th Cir. 2012) (finding the Stolen Valor Act constitutional); *United States v. Alvarez*, 617 F.3d 1198 (9th Cir. 2010) (finding the Stolen Valor Act facially invalid under the First Amendment).

¹⁵ *Alvarez*, 132 S. Ct. at 2548.

¹⁶ *Id.* at 2547-48.

¹⁷ *Id.* at 2549.

was not a sufficient government interest warranting restriction on free speech rights.¹⁸

In response to the Court's decision in *United States v. Alvarez*, the United States House of Representatives pressed to amend the Stolen Valor Act.¹⁹ On September 13, 2012, the proposed Stolen Valor Act of 2012, prohibiting fraudulent representation regarding receiving military honors, passed the House.²⁰ Subsequently, the Senate passed an Act authorizing appropriations for military operations during the 2013 fiscal year.²¹ Included within this defense authorization bill, is a proposed amendment to the Stolen Valor Act that, like the Act passed in the House, prohibits only those false claims to military honor aimed at fraudulently securing material benefit or personal gain in the form of employment, financial gain, election to public office, or appointment to other public body.²² Most recently, on January 15, 2013, Representative Joe Heck reintroduced the Stolen Valor Act of 2012 in the House as the Stolen Valor Act of 2013.²³ On May 20, 2013, the House passed the Stolen Valor Act of 2013 with only three opposition votes.²⁴ The bill "narrows the [Stolen Valor Act] to make it a crime when people falsely claim to be a recipient of military decorations in order to carry out a fraud."²⁵ On May 22, 2013, the Senate passed the bill with unanimous consent,²⁶ and, on June 3, 2013, President Barack Obama signed the

¹⁸ *Id.*

¹⁹ See 158 CONG. REC. H4,607 (daily ed. June 29, 2012) (statement of Rep. Joe Heck) (pressing the House to pass the Stolen Valor Act of 2011, originally introduced on May 5, 2011, on the day after the Supreme Court invalidated the Stolen Valor Act of 2005).

²⁰ See Stolen Valor Act of 2012, H.R. 1775, 112th Cong. (2d Sess. 2012).

²¹ S. 3254, 112th Cong. (2d Sess. 2012).

²² See Stolen Valor Act of 2012, S. 3254, 112th Cong. §§ 5011-14 (2012); see also Rick Maze, *Senate Passes Revised Stolen Valor Act*, ARMY TIMES (Dec. 3, 2012, 7:31 PM), <http://www.armytimes.com/news/2012/12/military-senate-passes-revised-stolen-valor-act-120312>.

²³ The Stolen Valor Act of 2013, H.R. 258, 113th Cong. (2013).

²⁴ See 159 CONG. REC. H2786 (daily ed. May 20, 2013).

²⁵ *Id.* at H2779-80 (statement of Rep. Doug Collins).

²⁶ 159 CONG. REC. S3789 (daily ed. May 22, 2013).

Stolen Valor Act of 2013 into law.²⁷

Unlike Eric C. Yarnell's very thoughtful argument that the Supreme Court decided *United States v. Alvarez* incorrectly,²⁸ this Note argues not that the Supreme Court erred in its decision, but rather that Congress erred in redrafting the Stolen Valor Act in the spirit of a fraud prohibition. This Note argues that Congress should amend the Stolen Valor Act in the spirit of laws prohibiting the appropriation of another's name, likeness, or celebrity in order to protect the proprietary interest in the Medal's reputation that recipients earn when awarded the Medal. Unlike the Stolen Valor Act of 2013's focus on preventing public harm that false claimants to military honor cause, this Note will focus on the individual harm that false claimants cause bona fide Medal recipients when they wrongfully appropriate the Medal's honor and reputation.²⁹

Part I of this Note will examine the history of military honors with particular focus on the Medal. Part II will analogize earning the Medal to earning a vested property right under a Lockean labor-mixing analysis. Part III will then examine the Supreme Court's decision in *United States v. Alvarez*, and the circuit split that the decision sought to resolve.³⁰ Finally, Part IV of this Note will argue that if Congress drafts an amended Stolen Valor Act aimed at protecting those individual vested rights from wrongful appropriation, the prohibition on false claims regarding receipt of military honors can withstand constitutional and judicial scrutiny.³¹

²⁷ Stolen Valor Act of 2013, Pub. L. No. 113-12, 127 Stat. 448 (2013).

²⁸ Eric C. Yarnell, *Medals of Dishonor?: Military, Free Speech and the Stolen Valor Act*, 5 VETERANS L. REV. 56 (2013).

²⁹ Whereas Yarnell's article concluded that the Stolen Valor Act of 2005 could not escape strict scrutiny analysis, *see id.* at 134-35, this Note proposes a way for Congress to relieve an amended statute from strict scrutiny analysis. *See infra* Part IV.

³⁰ *United States v. Strandlof*, 667 F.3d 1146 (10th Cir. 2012) (finding the Stolen Valor Act constitutional); *United States v. Alvarez*, 617 F.3d 1198 (9th Cir. 2010) (finding the Stolen Valor Act facially invalid under the First Amendment).

³¹ In a sense, this argument expands on Yarnell's suggestion that if the Stolen Valor Act of 2005 properly fit within the traditional exception to First Amendment speech

I. STOLEN VALOR AND MILITARY HONORS

This Part provides historical context through a discussion of the history of military honors and the emergence of the Medal in Section A and Congress's subsequent effort to protect the dignity of that highest honor in Section B. Section C discusses the continued problem of individuals falsely holding themselves out to the public as Medal recipients and Section D concludes by tracing the legislative history criminalizing false representations regarding military honors.

A. History of Military Honors and the Medal of Honor

Recognition of valor in combat has been a staple of this world's great armies since the Greeks and Romans dominated battlefields.³² Today, the United States Government recognizes seventy-three individual medals and ribbons of military distinction.³³ These seventy-three medals are organized in a "Pyramid of Honor."³⁴ At the base lies a set of medals equal in merit, and the Medal, the Armed Forces highest commendation, sits at the pinnacle.³⁵

of defamation, the Act could have escaped strict scrutiny analysis. See Yarnell, *supra* note 28, at 115-20. Common law appropriation and statutory right of publicity law both evolved out of defamation causes of action. Cf. Michael Madow, *Private Ownership of Public Image: Popular Culture and Publicity Rights*, 81 CALIF. L. REV. 127, 166-67 (1993) (noting that before the "law . . . caught up with . . . commercial practices . . . unauthorized commercial appropriation of a celebrity's name or persona [may have been] actionable as defamation . . . [a]nd in some jurisdictions, a celebrity could invoke her 'right of privacy'").

³² See DWIGHT JON ZIMMERMAN & JOHN D. GRESHAM, UNCOMMON VALOR: THE MEDAL OF HONOR AND THE SIX WARRIORS WHO EARNED IT IN AFGHANISTAN AND IRAQ 47 (2010).

³³ See, e.g., *Ribbons – Order of Precedence*, THE INST. OF HERALDRY, http://www.tioh.hqda.pentagon.mil/Awards/order_of_precedence.aspx (last visited Nov. 26, 2012) [hereinafter *Ribbons – Order of Precedence*] (displaying all 73 individual honors in addition to non-United States Awards and Unit Awards).

³⁴ E.g., ZIMMERMAN & GRESHAM, *supra* note 32, at 48 (stating that military honors were so ordered according to escalating criteria).

³⁵ *Id.*; *Ribbons – Order of Precedence*, *supra* note 33.

The President of the United States is authorized to award, “in the name of Congress,” the Medal to any member of the Armed Forces who goes above and beyond the call of duty and distinguishes himself by gallantry in risking his or her own life in the service of country.³⁶ The Medal is the military’s highest distinction and it derives from General George Washington’s directive that members of the military be awarded honorary ribbons of distinction known as the Badge of Military Merit,³⁷ and alternatively as the Purple Heart,³⁸ for their exemplary service.³⁹

While the Continental Congress awarded military honors only to officers,⁴⁰ Washington’s Badge of Military Merit represents the first time in American history that enlisted men could earn a military commendation; therefore, historians consider the award America’s first true military decoration.⁴¹ In declaring that those who earned such distinction were entitled to wear ribbons symbolizing the honor, General Washington also declared that anyone who wore ribbons to which they were not entitled would be subject to harsh penalty.⁴² Military awards under Washington were not only to honor those who had served meritoriously, but were also aimed at encouraging further military merit as soldiers sought to earn the entitlement of wearing ribbons emblematic of

³⁶ See 10 U.S.C. §§ 491, 3741, 6241, 8741 (2006) (Coast Guard, Army, Navy and Marine Corps, and Air Force respectively).

³⁷ ZIMMERMAN & GRESHAM, *supra* note 32, at 49.

³⁸ E.g., STAFF OF SUBCOMM. ON VETERAN’S AFFAIRS, S. COMM. ON LABOR AND PUB. WELFARE, 90TH CONG., MEDAL OF HONOR 1863-1968, at 3 (Comm. Print 1968) [hereinafter REP. ON THE MEDAL OF HONOR]. Washington’s Purple Heart is not to be confused with the modern Purple Heart that is awarded to members of the Armed Forces who are sustain wounds in combat that require the attention of a medical officer. See Exec. Order No. 11016, 3 C.F.R. § 596 (1959-1963).

³⁹ General Order of George Washington, Commander-in-Chief of the Army of the Revolution (Aug. 7, 1782), in GENERAL ORDERS OF GEORGE WASHINGTON ISSUED AT NEWBURGH ON THE HUDSON 1782 – 1783, at 34 (Maj. Edward C. Boynton ed., 1973) [hereinafter WASHINGTON’S ORDERS].

⁴⁰ ZIMMERMAN & GRESHAM, *supra* note 32, at 48-49.

⁴¹ See *id.* at 49.

⁴² WASHINGTON’S ORDERS, *supra* note 39, at 34.

meritorious accomplishment.⁴³ Evidencing the high level of valor requisite for earning distinction under General Washington, only three soldiers distinguished themselves as deserving of wearing the Badge of Military Merit.⁴⁴

After the Revolutionary War, however, Washington's Badge of Military Merit was apparently forgotten.⁴⁵ However, at the onset of the Civil War, Washington's idea of recognizing military distinction reentered national discussion as Union leaders struggled to maintain their fighting forces amid mass defections to the Confederacy that threatened to decimate the Union military.⁴⁶ As the United States descended into the brutal hostilities at the outset of the Civil War, a sudden and violent upheaval in the nature of the United States' Armed Forces sparked this desire to recognize members who distinguished themselves in service.⁴⁷ Though all members of the Armed Forces served bravely, Congress and the Nation at large resolved that those who gallantly sacrificed, displaying uncommon heroism in the face of battle, deserved the Nation's formal recognition.⁴⁸ The best precedent for recognizing this type of heroism was Washington's Badge of Military Merit, and the philosophy behind Washington's ribbon remained the philosophy at the heart of Congress' Act of 1861, establishing the Medal for members of the Navy and Marine Corps.⁴⁹ Two months later, another Act of Congress made the honor available to

⁴³ *Id.*

⁴⁴ *A Brief History - The Medal of Honor*, U.S. DEP'T OF DEF., http://www.defense.gov/faq/pis/med_of_honor.aspx (last visited Oct. 24, 2013).

⁴⁵ ZIMMERMAN & GRESHAM, *supra* note 32, at 49.

⁴⁶ *Id.* at 51-52.

⁴⁷ During the country's early years, America's Armed Forces were largely out of sight and out of mind as they served in relatively unpopulated outposts guarding against attacks from abroad. However, at the onset of hostilities close to home during the early stages of the Civil War, forces were called to America's front yards and the polity witnessed how brave and valuable members of the Armed Services were and "quite naturally caused that Nation to seek some means of rewarding" exemplary service. REP. ON THE MEDAL OF HONOR, *supra* note 38, at 2.

⁴⁸ *See id.*

⁴⁹ *Id.* at 3.

members of the Army.⁵⁰ President Abraham Lincoln signed both Acts into law on July 12, 1862, and Congress later amended the law, on March 3, 1863, to make the honor available to officers as well as enlisted men.⁵¹

Today, the military's highest honor remains reserved for only the most deserving exemplifiers of uncommon heroism and valor.⁵² Each branch of the Armed Services has its own regulations that govern the Medal's awarding, but the standard for even garnering consideration for the award remains substantially high and relatively uniform across the entirety of the Armed Services.⁵³ In light of the fact that the environment in which our Armed Forces operate is one that makes bravery and courage commonplace, the level of gallantry and heroism worthy of consideration for the Medal is very difficult for a lay person to comprehend, much less put into words.⁵⁴ At the very least, one's act of valor must clearly rise above and "beyond the call of duty" so as to distinguish a particular service member's gallantry from other service members' lesser acts of valor.⁵⁵ Not even mere deadly risk alone is enough to justify consideration for the Medal; the act of valor must be in the face of such a risk to death that the soldier would not face any "justified criticism" for declining to face the risk in order to accomplish the task.⁵⁶

This threshold is so high that, as a general rule, only those members of the Armed Forces who faced enemy fire during actual combat can even be considered for the Medal.⁵⁷ Due to this

⁵⁰ *Id.*

⁵¹ *Id.*

⁵² See, e.g., *Medal of Honor Statistics*, *supra* note 11 (reporting statistics of Medals awarded since the award's inception in 1863).

⁵³ See 10 U.S.C. §§ 491, 3741, 6241, 8741 (2006) (Coast Guard, Army, Navy and Marine Corps, and Air Force respectively); see also DAVID F. BURRELLI, CONG. RESEARCH SERV., ORDER CODE 95-519, MEDAL OF HONOR: HISTORY AND ISSUES 1 (2006).

⁵⁴ See BURRELLI, *supra* note 53, at 1 n.1.

⁵⁵ See *id.* at 1.

⁵⁶ *Id.*

⁵⁷ E.g., *id.* at 2 (stating the general rule that recipients must engage in actual combat

extremely high threshold for consideration for the Medal, only 3,463 people have earned the honor for their gallantry.⁵⁸ Congress presented the first Medal to Private Jacob Parrott on March 25, 1863, and most recently presented the Medal to Captain William D. Swenson on October 15, 2013.⁵⁹

B. Congress Seeks to Protect the Medal's Honor

When originally signed into effect, the Medal became the United States' first medal aimed at recognizing exemplary valor in battle after eighty-five years as a nation.⁶⁰ However, given that the Medal was also the nation's *only* military decoration and little criteria existed for awarding the Medal.⁶¹ Indeed, the Medal in its original form was the military's default award rather than an award reserved for only the most deserving.⁶² Consequently, although today the Medal is reserved only for only those members of the Armed Forces who display the highest valor in the face of death,⁶³ shortly after its inception confusion as to who truly *earned* the Medal abounded.⁶⁴ Not only were imitation Medals and false claims to the Medal almost immediately a problem for Congress,⁶⁵ but lack of oversight made it difficult to ensure that those awarded the Medal were in fact deserving of such high recognition.⁶⁶ As

with an enemy of the Nation, but noting select exceptions for awarding the Medal during peacetime). However, in a controversial bit of Medal of Honor history, Mary Edwards Walker, a civilian doctor was awarded the Medal after being captured by Confederates. *Id.* Dr. Edwards's Medal was initially revoked during the "Purge of 1917," *see infra* Part I.B, because she was a civilian who did not engage the enemy in combat. It wasn't until 1977 that President Jimmy Carter restored Dr. Edwards's Medal. *See* ZIMMERMAN & GRESHAM, *supra* note 32, at 69-70.

⁵⁸ *Medal of Honor Statistics*, *supra* note 11.

⁵⁹ *Id.*

⁶⁰ ZIMMERMAN & GRESHAM, *supra* note 32, at 53.

⁶¹ "[G]allantry in action, and other soldier-like qualities, during the present insurrection[.]" *See id.* (noting vague criteria, such as "gallantry in action, and other soldier-like qualities").

⁶² *Id.* at 53-54.

⁶³ *See* REP. ON THE MEDAL OF HONOR, *supra* note 38, at 2-4.

⁶⁴ *Id.* at 4.

⁶⁵ *Id.*

⁶⁶ *See id.* (discussing incidents of Medal abuses that ultimately led to the institution

a result of this dearth of oversight, Congress originally awarded an astonishing 2,445 Medals during the Civil War alone.⁶⁷ While Congress awarded some Medals as a direct result of oversight problems, doling out Medals to individuals whose actions would hardly warrant a second glance from today's military,⁶⁸ other Medals were awarded out of sheer abuse.⁶⁹

One such example of this abuse occurred when President Abraham Lincoln used the award as a means to entice soldiers from the Twenty-seventh Maine Volunteer Infantry Regiment to reenlist at the end of their tours of duty.⁷⁰ Although Lincoln hoped that the award would serve as a reward for and recognition of bravery in reenlisting to serve the Union and to protect Washington, D.C. from General Robert E. Lee's Army of Northern Virginia,⁷¹ a clerical error led to all 864 regiment members receiving the Medal despite the fact that only 309 men actually reenlisted.⁷² Even those men who did reenlist, did so only for a total of four days and never saw combat.⁷³ Illustrative of Lincoln's abuse of the Medal is the fact that although he handed out 864 Medals to the Twenty-seventh Maine, he presented only sixty-four Medals in recognition of gallant service during the battle at Gettysburg.⁷⁴

Due to the abuse of discretion in awarding the Medal and an ever-increasing amount of ex-soldiers applying for recognition without any substantive supporting documentation,⁷⁵ Congress

boards of review to help ensure that only the most deserving acts of valor were awarded the Medal).

⁶⁷ ZIMMERMAN & GRESHAM, *supra* note 32, at 54.

⁶⁸ *See id.* (noting that soldiers who merely captured Confederate colors (flag) were commonly recommended for the Medal).

⁶⁹ *Id.*

⁷⁰ *Id.*

⁷¹ ZIMMERMAN & GRESHAM, *supra* note 32, at 54.

⁷² *See* BURRELLI, *supra* note 53, at 2.

⁷³ ZIMMERMAN & GRESHAM, *supra* note 32, at 54-55.

⁷⁴ *Id.* at 54.

⁷⁵ *See id.* at 58. (noting that Lt. Col. Asa Gardiner requested a Medal of Honor "as a

created boards to both review recommendations for the Medal and to oversee its general policy.⁷⁶ In 1878, Congress convened the first such board of review to examine the Medals awarded to soldiers of the Seventh Cavalry who fought at Little Big Horn.⁷⁷ This board narrowed the criteria for awarding the Medal, making only those acts “that if omitted . . . [would] not justly subject the person to censure for shortcoming or failure” eligible for citation.⁷⁸ In 1897 the War Department, by executive order, codified the requirement that only those who go above and beyond the call of duty be considered for the Medal.⁷⁹

In light of reforms aimed at setting the criteria for the Medal, Congress, in 1916, created a board to investigate all Medals previously awarded.⁸⁰ This board, nicknamed “the blue-ribbon group,”⁸¹ had authority to determine eligibility for the Medal and to review cases of Medals already presented to ensure that no abuse of discretion corrupted the award.⁸² If the board found an abuse in the award of a Medal, it was authorized to strike the name of the recipient from Medal records.⁸³ Further, if the board divested an individual of his right to the Medal, the board decreed the continued wearing of the Medal a misdemeanor.⁸⁴ In sum, of the 2,625 Medals reviewed, the board determined that 911 did not pass muster as worthy of the honor.⁸⁵ Included within this so-called “Purge of 1917” were the members of the Twenty-seventh Maine Volunteer Infantry Regiment.⁸⁶ The Purge represented the first affirmative step towards establishing the Medal as the top military

souvenir of memorable times past” in his application and was awarded the Medal).

⁷⁶ REP. ON THE MEDAL OF HONOR, *supra* note 38, at 4.

⁷⁷ ZIMMERMAN & GRESHAM, *supra* note 32, at 59.

⁷⁸ *Id.*

⁷⁹ *Id.* at 61.

⁸⁰ *Id.* at 66-67.

⁸¹ *Id.* at 67.

⁸² *Id.*

⁸³ *Id.*

⁸⁴ *Id.*

⁸⁵ *Id.* at 69.

⁸⁶ *Id.*

honor that we know today.⁸⁷ However, despite eliminating issues of abuse and lack of oversight that threatened the Medal's status, fraudulent claims to the Medal continued to threaten the Medal's value and honor.⁸⁸

C. Valor by Deceit

Although Congress was able to address problems that plagued early award of the Medal,⁸⁹ those reforms did not specifically deter individuals from making false claims about receiving the Medal *ex ante*.⁹⁰ After Congress established stringent standards for awarding the Medal, the respect and reputation associated with the Medal bred envy among those not rightfully entitled to that honor and distinction.⁹¹ This envy led not only to a market in the sale of unauthorized Medals, but also to an increasing problem of individuals falsely holding themselves out to the public as Medal recipients.⁹²

One of the most notable instances of falsely claiming the Medal occurred when Illinois district court judge Michael O'Brien was exposed for falsely displaying, and claiming entitlement to, two Medals.⁹³ Judge O'Brien displayed the two Medals in his chambers and held himself out to the public as a double-Medal recipient.⁹⁴ As a result of O'Brien's elaborate deception, his municipality afforded him the honor of leading parades and the

⁸⁷ *See id.*

⁸⁸ *See, e.g.*, Stolen Valor Act of 2005, Pub. L. No. 109-437, 120 Stat. 3266, 3266 (2006) [hereinafter *The Stolen Valor Act of 2005*].

⁸⁹ *See supra* Part I.B.

⁹⁰ *See cf.* ZIMMERMAN & GRESHAM, *supra* note 32, at 172-73 (relating extra legislative measures aimed at combating false claims to the Medal of Honor).

⁹¹ *See* REP. ON THE MEDAL OF HONOR, *supra* note 38, at 4.

⁹² *See generally* ZIMMERMAN & GRESHAM, *supra* note 32, at 172-77.

⁹³ *Id.* at 176.

⁹⁴ *Id.* This farce would have been quite an accomplishment, as there are only 19 double-recipients in the Medal's entire history. *Double Recipients*, CONG. MEDAL OF HONOR SOC'Y, <http://www.cmohs.org/double-recipients.php> (last visited Oct. 24, 2013).

public regarded him as a celebrity.⁹⁵ However, Illinois Department of Veterans' Affairs Director Harold Fritz discovered O'Brien as an imposter and reported him to authorities for prosecution.⁹⁶

Ultimately, O'Brien avoided prosecution by resigning from the bench.⁹⁷ However, his false claims to the reputation associated with bona fide Medal recipients is not unique as unauthorized claims to the Medal continue to trouble Congress and diminish the value of bona fide recipients' proprietary interest in the honor and reputation associated with the Medal of Honor.⁹⁸

D. The Stolen Valor Act of 2005

Law enforcement entities threatened Judge Michael O'Brien with prosecution, under both state and federal law, for falsely displaying counterfeit Medals.⁹⁹ Although the threat of state prosecution for false claims and for official misconduct ultimately influenced O'Brien's resignation,¹⁰⁰ he was also facing possible federal prosecution,¹⁰¹ likely under 18 U.S.C. § 704 prohibiting anyone from "knowingly wear[ing], manufacur[ing], or sell[ing]" any military medal or ribbon without authorization under military regulations.¹⁰² Congress adapted this version of 18 U.S.C. § 704, in 1948, from the original act prohibiting falsely wearing or displaying military honors, 10 U.S.C. § 1425.¹⁰³ Courts interpreting 18 U.S.C. § 704, as originally enacted, largely conclude that the

⁹⁵ ZIMMERMAN & GRESHAM, *supra* note 32, at 176.

⁹⁶ See Linda Young, *His Honor Didn't Get Medal of Honor*, CHI. TRIB. (Oct. 21, 1994), http://articles.chicagotribune.com/1994-10-21/news/9410210318_1_congressional-medal-highest-military-award-fritz.

⁹⁷ ZIMMERMAN & GRESHAM, *supra* note 32, at 176.

⁹⁸ See 151 CONG. REC. 12,684, 12,688-89 (2005) (statement of Sen. Kent Conrad).

⁹⁹ See Linda Young, *Medal Lie Is Judge's Downfall: O'Brien Resigning Amid Talk of His Prosecution*, CHI. TRIB. (Sept. 24, 1995), http://articles.chicagotribune.com/1995-09-24/news/9509240286_1_resign-congressional-medal-plates.

¹⁰⁰ See *id.*

¹⁰¹ See *id.*

¹⁰² 18 U.S.C. § 704 (1952).

¹⁰³ *Id.* (original version at 10 U.S.C. § 1425 (1940) (prohibiting unauthorized wearing of Army and Navy decorations and medals).

prohibition on falsely wearing or displaying military honors is constitutional.¹⁰⁴ However, that narrow prohibition did not deter individuals from making false claims regarding receiving the Medal.¹⁰⁵

On November 10, 2005, in an attempt to address this continued problem, Senator Kent Conrad introduced the Stolen Valor Act of 2005 on the Senate floor.¹⁰⁶ The Act aimed to honor the brave young men and women who serve, and have served, the United States with such valor that they have received military distinction.¹⁰⁷ In recognizing the honorable sacrifices that military honor recipients have made to earn such distinction, Senator Conrad noted that individuals making false claims to military distinction and displaying counterfeit medals continued to threaten the honor and reputation of those honors.¹⁰⁸ Such actions, it was argued, diminish the value of bona fide recipients' honorable service.¹⁰⁹ The proposed bill aimed to broaden law enforcement's capabilities to pursue not only those individuals who falsely display military medals, but also those who make false claims regarding earning military honors.¹¹⁰ In that way, those proposing the legislation hoped to honor America's heroes, ensure that imposters would never "cheapen[]" their sacrifices,¹¹¹ and to "protect the

¹⁰⁴ See, e.g., *Shacht v. United States*, 398 U.S. 58, 61-62 (1970) (concluding that prohibition against wearing military uniforms without authorization is facially constitutional, but declining to uphold the statute as applied to a theatrical performance); see also *United States v. Perelman*, 737 F. Supp. 2d 1221, 1238-39 (D. Nev. 2010) (determining that prohibition against wearing military medals without authorization under 18 U.S.C. § 704(a) is merely an incidental restriction on First Amendment rights that is outweighed by the substantial government interest in protecting the reputation of military awards that Congress has power to pursue through its power to make all laws necessary and proper to raise and support armies).

¹⁰⁵ See, e.g., 151 CONG. REC. 12,684, 12,688 (2005) (statement of Sen. Kent Conrad) (noting the continued problem of individuals falsely claiming entitlement to the Medal despite the prohibition on wearing or displaying false Medals).

¹⁰⁶ *Id.*

¹⁰⁷ *Id.*

¹⁰⁸ *Id.*

¹⁰⁹ *Id.*

¹¹⁰ *Id.*

¹¹¹ *Id.* at 12,689.

reputation of [America's] heroes with the full force of law."¹¹²

On December 10, 2006, President George W. Bush signed the Stolen Valor Act of 2005 into law “to enhance protections relating to the reputation and meaning of the Medal . . . and other military decorations”¹¹³ After finding that false claims regarding receipt of the Medal and other military distinctions damage the reputation and the meaning of military awards, Congress concluded that legislative action was necessary to enable law enforcement officers to better protect the reputation of military awards.¹¹⁴

While all previous amendments to 18 U.S.C. § 704 prohibited only unauthorized display, manufacture, and sale of military decorations,¹¹⁵ Congress deemed it necessary to expand law enforcement capabilities under the Stolen Valor Act of 2005.¹¹⁶ In expanding law enforcement officials’ power to protect military honors, the Stolen Valor Act of 2005 broke with previous amendments to 18 U.S.C. § 704 and made it a crime for individuals not only to wear military decorations without authorization, but also to falsely claim that they had earned a military honor.¹¹⁷ In doing so, Congress directly regulated speech and thus opened 18 U.S.C. § 704(b) to strict scrutiny review by courts.¹¹⁸

¹¹² 151 CONG. REC. 13,497, 13,497 (2005) (statement of Sen. Conrad Burns).

¹¹³ The Stolen Valor Act of 2005, § 2, 120 Stat. 3266.

¹¹⁴ *Id.*

¹¹⁵ See 18 U.S.C. § 704 (1952) (encompassing 1948 act and 1949 amendments, prohibiting the unauthorized wear or display of military decorations under punishment of \$250 fine and/or imprisonment up to six months).

¹¹⁶ The Stolen Valor Act of 2005, § 2, 120 Stat. at 3266 (determining that legislative action was necessary in order to enable law enforcement officers to better protect the reputation and meaning of military honors).

¹¹⁷ Compare 18 U.S.C. § 704(a), (b) (2006), with 18 U.S.C. § 704 (1952).

¹¹⁸ See *infra* Part III (discussing judicial treatment of the Stolen Valor Act of 2005). Compare *United States v. Alvarez*, 132 S. Ct. 2537, 2543-47 (2012) (concluding that 18 U.S.C. § 704(b) represents a content-based restriction on free speech that is presumed invalid and puts the burden on the government to present a compelling justification for the restriction), with *United States v. Perelman*, 737 F. Supp. 2d 1221, 1237-38 (D. Nev. 2010) (concluding that prohibiting individuals from wearing military medals without

E. The Stolen Valor Act of 2013

Most recently, in response to the Supreme Court's invalidation of the Stolen Valor Act of 2005's prohibition on all false claims to the Medal,¹¹⁹ Congress passed the Stolen Valor Act of 2013. On June 3, 2013, President Barack Obama signed the latest version of the Stolen Valor Act into law.¹²⁰ As amended, the Stolen Valor Act now criminalizes any false representation regarding receipt of military decorations or medals made "with the intent to obtain money, property, or other tangible benefit."¹²¹ In doing so, Congress sought to narrow the Stolen Valor Act to proscribe only those false claims to military honor aimed at carrying out public fraud.¹²² Although titled the Stolen Valor Act of 2013, the law as enacted represents a "tweaked version" of the Stolen Valor Act of 2012,¹²³ originally introduced by Representative Joe Heck.¹²⁴

authorization did not regulate speech, because the process of awarding military honors was not expressive in nature).

¹¹⁹ See *infra* Part III.C.

¹²⁰ Stolen Valor Act of 2013, Pub. L. No. 113-12, 127 Stat. 448 (2013).

¹²¹ *Id.*

¹²² 59 CONG. REC. H2779-80 (daily ed. May 20, 2013) (statement of Rep. Doug Collins) ("[T]he Stolen Valor Act of 2013[] *narrows* the law to make it a crime when people falsely claim to be a recipient of military decorations in order to carry out a *fraud*. The bill rewrites the [Stolen Valor Act] to prohibit holding oneself out to be a recipient of certain military decorations or medals with the intent to obtain money, property, or other *tangible* benefit. The penalty is *limited to fraudulent claims* related only to the Congressional Medal of Honor and those decorations or medals listed in the statute, including the Purple Heart." (emphasis added)).

¹²³ See Lee Farren, *Obama Signs Stolen Valor Act into Law*, ABC News (June 3, 2013, 3:03 PM), <http://abcnews.go.com/blogs/headlines/2013/06/obama-signs-stolen-valor-act-into-law/> (noting that the Stolen Valor Act of 2013 was adapted from the Stolen Valor Act of 2012, introduced to "narrow[] the act to say the liar must be attempting to somehow materially profit from the lies, making the would-be crime more akin to fraud").

¹²⁴ Representative Heck's attempts to amend the Stolen Valor Act began in 2011 with the introduction of the Stolen Valor Act of 2011. 157 CONG. REC. H3106 (daily ed. May 5, 2011). Following the Supreme Court's decision in *United States v. Alvarez*, see *infra* Part III.C, the House amended Representative Heck's original proposal and passed it as the Stolen Valor Act of 2012. The Stolen Valor Act of 2012, H.R. 1775, 112th Cong. (2012).

II. The Medal as a Property Right

Given the significant acts of heroism required to garner consideration for the Medal,¹²⁵ it would be disingenuous to say that the honor is *given* to the recipient. Rather, it is evident from the text of the statutes establishing the Medal for the several branches of the Armed Forces that those who earn the Medal must distinguish themselves from their peers by going “above and beyond the call of duty” in both gallantry and in the risk to their lives.¹²⁶ Therefore, it can be said, in distinguishing themselves through exemplary gallantry, Medal recipients mix their exemplary labor with their common service to earn a proprietary interest in the Medal, and in the reputation associated with it.¹²⁷

This Part establishes that bona fide Medal recipients do in fact earn a proprietary interest in the Medal. Section A relates John Locke’s theory of private property in sufficient detail to provide a working base for this discussion. Section B addresses commonly leveled criticisms of Locke’s theory. Section C

¹²⁵ See *supra* Part I.A (tracing the establishment of the Medal as this Nation’s highest military honor); see also *infra* Part II.C.2 (illustrating just how much labor is necessary to justify a proprietary interest in the reputation and honor associated with the Medal).

¹²⁶ See 10 U.S.C. §§ 491, 3741, 6241, 8741 (2006) (Coast Guard, Army, Navy and Marine Corps, and Air Force respectively).

¹²⁷ Cf. JOHN LOCKE: TWO TREATISES OF GOVERNMENT §27 (Peter Laslett ed., Cambridge Univ. Press 1988) [hereinafter LOCKE, TWO TREATISES OF GOVERNMENT] (introducing Locke’s labor-mixing theory of property rights). The Medal has value only because of the award’s prestigious reputation as the Nation’s highest military honor, and this reputation derives from the heroic service of those entitled to wear the Medal. See Mike Wallace, *Introduction* to ALLEN MIKAEALIAN, MEDAL OF HONOR: PROFILES OF AMERICA’S MILITARY HEROES FROM THE CIVIL WAR TO THE PRESENT ix (2002) (stating that the Medal derives its significance from the fact that “the [M]edal is reserved strictly for those who act of their own accord and out of complete selflessness . . . [This requirement sets] the Medal of Honor apart from all other military commendations”). This reward for selfless commitment to country is so coveted by members of the military that the great General George Patton once remarked, “that he would have given his immortal soul” to be counted as among those worthy of wearing the Medal. *Id.* It is because of this great value that Congress has continually attempted to protect the Medal’s reputation as being awarded only to the select few who have rightly earned the honor of wearing it. *E.g., supra* Part I.B-D.

concludes by applying Locke's theory to the proprietary interests that Medal recipients earn in that honor.

A. Of Locke and Labor

To Locke, property is best understood as providing a justification for, and a limit to civil government.¹²⁸ Locke sets his theory of property out in the *Second Treatise of Government*, presented against the backdrop of his theory of the state of nature.¹²⁹ In Locke's state of nature, there is no government and man exists in perfect freedom and perfect equality.¹³⁰ However, while there is no government in Locke's state of nature, man is still governed by natural law that God's will dictates.¹³¹ Under natural law, man is not only entitled to certain natural rights, but is also subject to correlative duties.¹³² Therefore, man's liberty in Locke's state of nature is not absolute.¹³³ For instance, no man has the right "to harm another in his Life, Health, Liberty, or Possessions."¹³⁴ If any man disobeys this limit on individual liberty and invades another's rights under natural law, mankind has a correlative right to punish transgressors to a degree that will discourage further transgressions.¹³⁵ Punishment of transgressors is justified in the fact that the transgressor violates God's will that all men be secure.¹³⁶ Consequently, these transgressors represent a danger to all of mankind and, therefore, punishment is necessary to preserve security to all mankind.¹³⁷

¹²⁸ See, e.g., David C. Snyder, *Locke on Natural Law and Property Rights*, 16 CAN. J. PHIL. 723, 724-25 (1986) (stating that Locke's property theory shows why otherwise free men would consent to the rule of civil government).

¹²⁹ See LOCKE, TWO TREATISES OF GOVERNMENT, *supra* note 128, §§ 4-15; see also Snyder, *supra* note 117, at 729-30.

¹³⁰ See LOCKE, TWO TREATISES OF GOVERNMENT, *supra* note 127, § 4.

¹³¹ See *id.* § 6; see also Snyder, *supra* note 128, at 730.

¹³² Snyder, *supra* note 128, at 731-32.

¹³³ LOCKE, TWO TREATISES OF GOVERNMENT, *supra* note 127, § 6.

¹³⁴ *Id.*

¹³⁵ *Id.* § 7.

¹³⁶ *Id.* § 8.

¹³⁷ *Id.* §§ 8-9.

After setting forth his state of nature and natural law theory, Locke sets forth his theory establishing how men come to have property rights in things originally given to men in common.¹³⁸ Locke grounds his theory of private property in God's will that man uses the earth's goods for sustenance, preservation, and social good.¹³⁹ In order for man to use the goods God gave men, it is inevitable that he must appropriate those goods to his own use, and thus make them his exclusive property.¹⁴⁰ After establishing that property rights are necessary to carrying out God's will, Locke sets forth his labor-mixing theory as the manner in which man can appropriate nature's goods to his use.¹⁴¹

Locke begins his labor-mixing discussion by recognizing that every man owns his person; therefore, the "*Labour* of his Body and the *Work* of his Hands" are also his property.¹⁴² As such, Locke posits that whatever man may take out of nature, and mix his labor with, becomes exclusively his property as well.¹⁴³ Locke does acknowledge that there is a limit to the amount of property man may appropriate in that he must leave "enough, and as good" so as not to prejudice others through this appropriation.¹⁴⁴ Consequently, man cannot appropriate all of nature's goods to his own use.¹⁴⁵ Man may appropriate only so much that he can "make use of to any advantage of life before it spoils."¹⁴⁶

Locke's theory can therefore be viewed not only as a justification for ownership of material goods, but also an argument that establishes man's "propriatorship over [his] capacity to labor."¹⁴⁷ It is also apparent that, not only are man's rights to

¹³⁸ See generally *id.* §§ 25-51.

¹³⁹ *Id.* § 25; see also Snyder, *supra* note 128, at 735.

¹⁴⁰ See Snyder, *supra* note 128, at 735.

¹⁴¹ LOCKE, TWO TREATISES OF GOVERNMENT, *supra* note 127, § 26.

¹⁴² *Id.* § 27.

¹⁴³ *Id.*

¹⁴⁴ *Id.* § 33.

¹⁴⁵ *Id.* § 36.

¹⁴⁶ *Id.* § 31.

¹⁴⁷ J.E. Parsons, Jr., *Locke's Doctrine of Property*, 36 Soc. Res. 389, 397 (1969).

appropriate limited by his capacity to labor, they are also limited by the natural law limitations of “sufficiency” and of “spoilage.”¹⁴⁸ Under Locke’s theory of property, the natural law of property and its limitations are supreme and civil government exists to protect man’s natural right to property.¹⁴⁹

Arguably then, civil government must protect the rights of the “Industrious and Rational” from “the Fancy or Covetousness of the Quarrelsome and Contentious.”¹⁵⁰ Under Locke’s theory, anyone who has “enough, and as good left” should not intrude upon the rights of others in what has already been improved by another’s labor.¹⁵¹ Such an invasion plainly seeks the benefit of another’s labor, and anyone who seeks the benefit of labor in this manner has no right to that benefit.¹⁵²

B. Locke’s Critics

Locke’s theory of private property has been criticized as both fallacious and as a non sequitur.¹⁵³ Some scholars have gone so far as to argue that Locke’s labor-mixing theory of private property is an entirely unworkable justification for property rights.¹⁵⁴ Among these criticisms, most attacks focus on Locke’s apparent lack of guidance in just how much labor is necessary to

¹⁴⁸ *Id.* at 402.

¹⁴⁹ See, e.g., LOCKE, TWO TREATISES OF GOVERNMENT, *supra* note 127, § 29-30 (arguing that the natural law of reason is the first law of property in civilized society); see also Snyder, *supra* note 128, at 749-50 (arguing that private property engenders jealousy and thus necessitates civil government to protect against the “destruction of peace and preservation”).

¹⁵⁰ LOCKE, TWO TREATISES OF GOVERNMENT, *supra* note 127, § 33 (stating that God gave the world to men in common so that the industrious and rational could make use of the earth).

¹⁵¹ *Id.*

¹⁵² *Id.*

¹⁵³ See generally A. John Simmons, *Maker’s Rights*, 2 J. ETHICS 197, 209 (1998) (stating that Locke’s principal interference argument is a non sequitur and that, overall, his arguments are “simply unintelligible”).

¹⁵⁴ E.g., Adam Mossoff, *Locke’s Labor Lost*, 9 U. CHI. SCH. ROUNDTABLE 155, 156-157 (2002).

create a property right, and for the theory's apparent unsustainable "enough and as good" limitation.¹⁵⁵

In particular, the late Professor Robert Nozick attacks Locke's labor-mixing theory by exposing questions Locke leaves unanswered.¹⁵⁶ Nozick first addresses Locke's theory by questioning just how much labor one must mix with an object in nature to effectively appropriate that object to his own use.¹⁵⁷ After failing to reach a satisfactory conclusion, Nozick suggests that Locke's labor-mixing theory is really an added value theory, but then dismisses this as ineffective as "[n]o workable or coherent value-added property scheme has yet been devised."¹⁵⁸

Turning then to Locke's "enough and as good" limitation to appropriating private property, Nozick contends that the proviso is unsustainable because the theory unravels when analyzed in reverse order from the first person for whom "not enough and as good left to appropriate."¹⁵⁹ After concluding that Locke's "as much and as good" proviso is inevitably violated when interpreted strictly, Nozick goes on to posit that a looser interpretation of the proviso is necessary for Locke's theory to survive.¹⁶⁰ However, Locke does not provide necessary guidelines for what constitutes "as much and as good" within his theory and, therefore, Nozick finds Locke's theory unworkable.¹⁶¹

However valid Nozick's critique of Locke's labor-theory may be when applied to a literal reading of Locke's work, the critique fails when Locke's labor-theory is applied to the property

¹⁵⁵ ROBERT NOZICK, *ANARCHY, STATE, AND UTOPIA* 174-76 (1974); *see also* Mossoff, *supra* note 154, at 156-57 (setting forth criticisms of Locke's labor-mixing theory more generally).

¹⁵⁶ *See* NOZICK, *supra* note 155, at 174-76.

¹⁵⁷ *See id.* at 174-75 (discussing that if one spills tomato juice into the sea, do you thereby come to own the sea or just lose your juice).

¹⁵⁸ *Id.* at 175.

¹⁵⁹ *Id.* at 176.

¹⁶⁰ *Id.* at 176-77.

¹⁶¹ *Id.* at 177-78.

rights that Medal recipients earn in their military distinction.

C. Of Locke, Value-Adding, and Valor

Locke's labor-mixing theory is better interpreted, especially for the purpose of those rights that Medal recipients earn in their military distinction, as human labor that increases the value of human life for society.¹⁶² Supporters of this interpretation of Locke do not interpret labor as merely "unpleasant activity which deserves compensation," but rather as "purposeful activity" that adds value to society by increasing resource productivity.¹⁶³ Therefore, Locke recognizes only those activities that add value to or improve society as capable of appropriating resources to individuals.¹⁶⁴

This value increasing interpretation of Locke allays concerns about the insufficiency of the "enough and as good" limitation on individual appropriation. Appropriation under this theory is not harmful in that the labor recognized by Locke is value increasing, and thus increases the value of the common stock, thereby not leaving anyone worse off.¹⁶⁵ This so-called "workmanship model" of interpreting Locke,¹⁶⁶ not only responds to critics focused on questions about the unsustainability of Locke's "as much and as good" limitation on appropriation, but also identifies valuable human activities that civil society's legislatures should incentivize and protect.¹⁶⁷ In doing so, this model of

¹⁶² See STEPHEN BUCKLE, *NATURAL LAW AND THE THEORY OF PROPERTY: GROTIUS TO HUME* 150 (1991); see also Mossoff, *supra* note 154, at 159.

¹⁶³ BUCKLE, *supra* note 162, at 150.

¹⁶⁴ *Id.* at 151-52.

¹⁶⁵ *Id.* at 152-53.

¹⁶⁶ *Id.* at 151 n.84.

¹⁶⁷ See Eric R. Claeys, *Locke Unlocked: Productive Use in Trespass, Adverse Possession, and Labor Theory* 20-21 (George Mason U. L. & Econ. Res. Paper Series No. 12-21, 2012), available at <http://ssrn.com/abstract=1759551>. While it is true that Locke's theory of property addresses how man comes to possess things that are necessities of life, Congress has identified acts of substantial valor as value increasing activity that contributes to the "esprit de corps" that is essential to sustaining a robust fighting

interpretation provides a workable theory for how Medal recipients earn a proprietary interest in the Medal and the reputation that goes along with it.

This Section will establish that Medal recipients add value to society through their labor and will also answer questions posed by Locke skeptics like the late Professor Robert Nozick.

i. What Value Do Medal Recipients Add to Society?

Today's Medal of Honor derives from Washington's Badge of Military Merit.¹⁶⁸ Representing the first military award available to enlisted men, Washington's Badge of Military Merit was awarded for especially meritorious service in hopes of inspiring further meritorious service, thereby increasing the morale and the effectiveness of the Continental Army.¹⁶⁹ Service worthy of such recognition not only deserves public recognition and prestige, but also "fosters morale, mission accomplishment and esprit de corps."¹⁷⁰ This morale and esprit de corps are essential elements to mission accomplishment and an otherwise successful military.¹⁷¹

morale necessary to mission accomplishment in the military just as shelter, food, and health is essential to human life in Locke's justification for private property. See LOCKE, TWO TREATISES OF GOVERNMENT, *supra* note 127, §§ 86, 92; *cf.* Brief for the United States at 38, *United States v. Alvarez*, 132 S. Ct. 2537 (2011) (No. 11-210) (quoting *Examination of Criteria for Awards and Decorations: Hearing Before the Military Personnel Subcomm. of the House Comm. on Armed Services*, 109th Cong. 24, 24-26 (2006) (statements of Lt. Gen. Roger A. Brady, Deputy Chief of Staff, Manpower and Personnel, Headquarters U.S. Air Force and Brig. Gen. Richard P. Mills, Dir., Personnel Mgmt. Div., Manpower and Reserve Affairs, HQ, U.S. Marine Corps)). Additionally, although Locke's theory is focused on "self-preservation" and pursuit of "[p]reservation," the value increasing activity Congress identified for recognition in the context of military service is selfless and in pursuit of the improvement of others and the preservation of comrades and of country. See, e.g., *supra* Part II.C.2 (relating examples of extraordinary labor worthy of the Medal in which the Medal recipients laid down their own lives to preserve that of their comrades).

¹⁶⁸ See *supra* Part I.A.

¹⁶⁹ See WASHINGTON'S ORDERS, *supra* note 39.

¹⁷⁰ Brief for the United States at 37-38, *United States v. Alvarez*, 132 S. Ct. 2537 (2011) (No. 11-210).

¹⁷¹ See *supra* note 157 (discussing the importance of morale).

However, in noting that those deserving such recognition for exemplary heroism would be unlikely to claim it for themselves, it was deemed necessary to provide a medal, or “token,” representing the value of that service without words.¹⁷²

ii. How Much Labor Justifies a Property Right in the Medal?

Many of Locke’s critics focus on the indeterminate amount of labor that justifies private ownership of a resource originally given to man in common.¹⁷³ However, soldiers deserving of the Medal are not subject to doubts regarding whether they have invested enough labor to justify a proprietary interest in the honor and reputation associated with the Medal.¹⁷⁴

When determining whether a prospective Medal recipient is entitled to the honor, each branch of the Armed Forces has rigorous regulations to evaluate every nominee.¹⁷⁵ After early embarrassment due to lack of oversight in awarding the Medal,¹⁷⁶ each branch of the Armed Forces now requires that Medal recipients meet a standard of review that allows no margin for error as to who shall wear the Medal.¹⁷⁷ Although the standards for awarding the Medal vary to some degree across the branches of the Armed Forces,¹⁷⁸ the general standard is that any recipient must go “above and beyond the call of duty” in self-sacrifice and risk to life, while in the service of America’s Armed Forces and engaged

¹⁷² See REP. ON THE MEDAL OF HONOR, *supra* note 38, at 2-4.

¹⁷³ See NOZICK, *supra* note 155, at 174-76; see also Mossoff, *supra* note 154, at 156-57.

¹⁷⁴ Although not an easily objectified standard, the labor requisite for establishing a property right in the Medal is akin to the standard that defines pornography in that it is not readily objectified, but evident when observed. See, e.g., *Jacobellis v. Ohio*, 378 U.S. 184, 197 (1964) (Stewart, J., concurring) (declining to state what material might constitute pornography due to the difficulty in establishing an objective standard and famously declaring, “I know it when I see it”).

¹⁷⁵ See REP. ON THE MEDAL OF HONOR, *supra* note 38, at 1.

¹⁷⁶ See *supra* Part I.B.

¹⁷⁷ See REP. ON THE MEDAL OF HONOR, *supra* note 38, at 1.

¹⁷⁸ Congress codified the requirements for earning the Medal of Honor for all branches of the Armed Forces. See 10 U.S.C. §§ 491, 3741, 6241, 8741 (2006) (Coast Guard, Army, Navy and Marine Corps, and Air Force respectively).

in combat.¹⁷⁹

Given that the degree to which Medal recipients must distinguish themselves is likely difficult for civilian outsiders to understand,¹⁸⁰ a few brief examples of the kind of uncommon valor that is a prerequisite for consideration for the Medal are essential for illustrating the labor necessary to earn a proprietary interest in that distinction.

a. Michael P. Murphy: The Ultimate Sacrifice Rewarded

For as long as family and friends can remember, Lieutenant Michael P. Murphy was a “protector”.¹⁸¹ He spent his childhood standing up for friends, colleagues, co-workers, and acquaintances when they found themselves being bullied or otherwise taken advantage of.¹⁸² It was this protection drive that pushed Lieutenant Murphy above and beyond the call of duty on June 27-28, 2010.¹⁸³

While running a special operations mission in the mountains of Afghanistan, an insurgent force, with both superior numbers and superior positioning, ambushed Lieutenant Murphy and his team of three other Navy SEALs.¹⁸⁴ The force of between thirty and forty enemy insurgents outflanked Lieutenant Murphy’s four-man SEAL team and forced them down a steep, rocky mountain slope to a village below.¹⁸⁵ During the team’s descent, Lieutenant Murphy was wounded in the abdomen, but he continued to push his team towards the relative safety of the village despite facing fire from all sides.¹⁸⁶ Of the four SEALs that began the

¹⁷⁹ *E.g.*, REP. ON THE MEDAL OF HONOR, *supra* note 38, at 1.

¹⁸⁰ See BURRELLI, *supra* note 53, at 1 n.1.

¹⁸¹ ZIMMERMAN & GRESHAM, *supra* note 32, at 121.

¹⁸² *Id.* at 121-22.

¹⁸³ See *Official Citation for Lt. Michael P. Murphy*, USN, <http://www.navy.mil/moh/mpmurphy/oc.html> (last visited Oct. 24, 2013).

¹⁸⁴ ZIMMERMAN & GRESHAM, *supra* note 32, at 144-46.

¹⁸⁵ *Id.* at 144-45.

¹⁸⁶ *Id.* at 145-46.

descent, Lieutenant Murphy managed to lead three to cover in the village.¹⁸⁷

However, Lieutenant Murphy's role as protector was not through, with communications blocked by the ridgeline above, Murphy disregarded the substantial risk to his own life and broke cover to get a signal to radio for help.¹⁸⁸ In doing so, Murphy exposed himself to a barrage of enemy fire and was mortally wounded.¹⁸⁹ Although he made the ultimate sacrifice in battle, Lieutenant Murphy's courageous acts ultimately saved the life of one of his team members.¹⁹⁰

For his courageous actions during what has become known as the "Battle of Murphy's Ridge," Lieutenant Michael P. Murphy became the first member of the Armed Forces to earn the Medal for his service in Afghanistan.¹⁹¹

b. Michael A. Monsoor: Guardian of Warriors

Petty Officer Michael A. Monsoor defined his character through unparalleled hard work and a "staunch loyalty" to family and friends.¹⁹² These characteristics marked not only his personal life, but also his military career as a Navy SEAL, proving that his given name had meaning that helped define him as "*the guardian of warriors.*"¹⁹³

On September 29, 2006, Petty Officer Monsoor's fierce loyalty and dedication drove him above and beyond the call of duty

¹⁸⁷ *Id.* at 146.

¹⁸⁸ *Id.* at 146-48.

¹⁸⁹ *Id.* at 148.

¹⁹⁰ *Id.* at 148-49.

¹⁹¹ *Id.* at 149-51.

¹⁹² *Id.* at 187-89.

¹⁹³ *Id.* at 189. Michael A. Monsoor was of Christian Arab descent. In that religious tradition, Saint Michael is the guardian of warriors. *Id.*

in Ramadi, Iraq.¹⁹⁴ While assigned to the most dangerous sector of Ramadi as part of a mission to clear the insurgents out of Iraq's most violent region, Petty Officer Monsoor acted as the machine gunner for a team tasked as a support team for a sniper-overwatch element.¹⁹⁵ After facing insurgent attacks early on in the mission, Petty Officer Monsoor was repositioned to a rooftop between two SEAL snipers overlooking the insurgents' likely attack route.¹⁹⁶ Shortly after repositioning, a hand grenade bounced off of Monsoor's chest and landed amidst the team of three other SEALs and eight Iraqis.¹⁹⁷ While Monsoor could have easily fled to safety out through the nearby roof exit without rebuke, he disregarded his own safety and threw his body on top of the grenade to absorb the blast, making the ultimate sacrifice to save his teammates.¹⁹⁸

As a result of Petty Officer Monsoor's selfless act that likely saved the lives of his team members, he became just the third member of the Armed Forces to earn the Medal of Honor for acts of valor during the Iraq War.¹⁹⁹

c. An Elite and Select Club

The stringent, but defined standards for earning the Medal are exemplified by the fact that although millions served this Nation with the ordinary bravery expected out of members of the Armed Forces, the President of the United States has only awarded the Medal 3,476 times to 3,462 service members,²⁰⁰ with only eighty of those entitled to the correspondent reputation and honor alive today.²⁰¹

¹⁹⁴ *Official Citation for MA2 Michael Anthony A. Monsoor*, USN, <http://www.navy.mil/moh/monsoor/oc.html> (last visited Oct. 24, 2013).

¹⁹⁵ ZIMMERMAN & GRESHAM, *supra* note 32, at 201.

¹⁹⁶ *Id.* at 202.

¹⁹⁷ *Id.*

¹⁹⁸ *Id.* at 202-03.

¹⁹⁹ *Id.* at 204-05.

²⁰⁰ See *United States v. Alvarez*, 132 S. Ct. 2537, 2548 (2012); *Medal of Honor Statistics*, *supra* note 11.

²⁰¹ *Medal of Honor Statistics*, *supra* note 11.

iii. Medal of Honor Recipients Leave “Enough and As Good” for All Members of the Armed Forces

According to Locke and other natural law theorists, labor as a value-increasing activity is to be understood as any activity that aims at improving what God has given man in common in order to advance human life.²⁰² This value-increasing labor emerges not only as a “duty to preserve oneself[,]” but also to preserve all of mankind.²⁰³ However, appropriation through such value-increasing activity remains limited by Locke’s “enough and as good” proviso requiring, at the least, that no individual be left worse off by another’s appropriation of private property.²⁰⁴ Within the sphere of the Armed Forces, this duty of self-preservation and of preserving others is never more salient than in combat situations.

When, in this setting, an individual labors to the level worthy of recognition in the form of the Medal,²⁰⁵ it is certain that his appropriation of a share in the Medal does not leave any individual worse off.²⁰⁶ In fact, in this setting, more than any other, those who did not earn a right to the Medal received a benefit from the labor of the individual who did earn a right to the Medal.²⁰⁷ Indeed, in establishing the first military medal during the Revolutionary War, General George Washington declared that he hoped that those recognized for exemplary valor would foster further military merit throughout the Armed Forces and thus

²⁰² BUCKLE, *supra* note 162, at 152.

²⁰³ *Id.*

²⁰⁴ See LOCKE, TWO TREATISES OF GOVERNMENT, *supra* note 127, §§ 32-33 (arguing that appropriation of resources given to man in common is proper as long as any individual’s appropriation does not prejudice any other man); see also NOZICK, *supra* note 155, at 175 (arguing that Locke’s proviso is meant to ensure that no individual’s situation is worsened by another’s appropriation of a resource).

²⁰⁵ See *supra* Part II.C.2.

²⁰⁶ Cf. BUCKLE, *supra* note 162, at 153 (arguing that appropriation under Locke’s theory of property does not necessarily leave others worse off).

²⁰⁷ See *supra* Part II.C.2.a-b (recounting the heroic, life-saving efforts of recent Medal of Honor recipients); cf. BUCKLE, *supra* note 162, at 153 (arguing that, in some cases, even the unpropertied are benefitted by the labor of the propertied).

expand military resources and effectiveness in battle.²⁰⁸

Further, no one man's right in the Medal prevents another man from rightfully earning his own entitlement to a share in the Medal's reputation through the appropriate channels set forth in statute.²⁰⁹ Therefore, concerns regarding the unsustainability of Locke's "enough and as good" proviso are not relevant in this context.²¹⁰

iv. False Claims to the Medal of Honor Wrongfully Seek Benefits from Another's Labor

Locke's theory of property is aimed at protecting the rights of the "Industrious and Rational" whose productive labor adds value to society from the "Fancy or Covetousness of the Quarrelsome and Contentious."²¹¹ Locke makes it very clear that, where there is "as much and as good [left]," those who have not earned rights through their own labor should not intrude on what another has already improved with their labor.²¹² Those who have not labored for a right should not be able to benefit from another's pains for he has no right to those benefits.²¹³

In addition to receiving the physical Medal as an emblem of their service, Medal recipients are entitled to a modest package of benefits.²¹⁴ However, the greatest benefit that Medal recipients

²⁰⁸ See WASHINGTON'S ORDERS, *supra* note 39, at 35; *cf.* BUCKLE, *supra* note 162, at 154 (suggesting that, under Locke, appropriation of a resource into private property ultimately expands the bank of available social resources, because such appropriations are productive).

²⁰⁹ See *supra* notes 163-65 and accompanying text (briefly explaining the statutory scheme regulating award of the Medal).

²¹⁰ *E.g.*, NOZICK, *supra* note 155, at 175-76 (arguing that when Locke's "enough and as good" proviso is interpreted literally it proves untenable as it unravels in reverse order from the first individual who is made worse off from another's appropriation of a resource in common).

²¹¹ See LOCKE, TWO TREATISES OF GOVERNMENT, *supra* note 127, § 34.

²¹² *Id.*

²¹³ *Id.*

²¹⁴ See BURRELLI, *supra* note 49, at 5-6 (stating that Medal recipients are entitled to a

receive is the recognition of an appreciative nation.²¹⁵ Such reverence from the general public breeds, perhaps inevitably, envy among those who have not earned such respect.²¹⁶

Under Locke's theory of property, those who falsely claim to be Medal recipients represent the "Quarrelsome and Contentious" driven by "Fancy or Covetousness."²¹⁷ Therefore, civilized society's legislature should protect the rights of the "industrious and rational" by prohibiting the misappropriation of the reputation and honor associated with Medal recipients to the benefit "of the quarrelsome and contentious[.]" thus protecting bona fide recipients' uncommon investment and sacrifice.²¹⁸

III. The Supreme Court Resolves Circuit Split Regarding the Stolen Valor Act in *United States v. Alvarez*

This Part examines the Supreme Court's decision in *United States v. Alvarez*,²¹⁹ invalidating the Stolen Valor Act of 2005 as unconstitutional, and the circuit split the decision resolved. Section A examines the Ninth Circuit decision in *United States v. Alvarez*,²²⁰ concluding that the Stolen Valor Act of 2005 was unconstitutional. Section B examines the Tenth Circuit's decision in *United States v. Strandlof*,²²¹ holding that the Stolen Valor Act of 2005 was constitutional, thus creating a circuit split between the Ninth and Tenth Circuits. Section C concludes this

monthly pension, increases in retirement pay, certain travel privileges, modest privileges on bases, children of Medal recipients are exempt from Military academy quotas if they are qualified to attend, and recipients are to be accorded other modest privileges "commensurate with the prestige associated with [the Medal]."

²¹⁵ See, e.g., REP. ON THE MEDAL OF HONOR, *supra* note 38, at 2-4 (explaining that the overwhelming motivation behind the Medal of Honor was a nation expressing gratitude that the soldiers themselves would never seek out on their own).

²¹⁶ See *id.* at 4.

²¹⁷ LOCKE, TWO TREATISES OF GOVERNMENT, *supra* note 127, § 34.

²¹⁸ Cf. Claeys, *supra* note 167, at 20 (suggesting that Locke's theory of labor provides legislatures with the parameters of protecting private property rights).

²¹⁹ 132 S. Ct. 2537 (2012).

²²⁰ 617 F.3d 1198 (9th Cir. 2010).

²²¹ 667 F.3d 1146 (10th Cir. 2012).

Part by recounting the Supreme Court's decision in *United States v. Alvarez*, resolving the circuit split *United States v. Strandlof* created, and concluding that the Stolen Valor Act of 2005 was unconstitutional.

A. *United States v. Alvarez in the Ninth Circuit*

After winning a seat on the Tree Valley District Board of Directors, Xavier Alvarez introduced himself to a joint meeting with a neighboring district as a military veteran of twenty-five years and a Medal recipient.²²² However, Mr. Alvarez did not receive the Medal, nor had he ever even served in the Armed Forces.²²³ Accordingly, after the FBI obtained a recording of Mr. Alvarez's lies, he was indicted on two charges of violating the Stolen Valor Act.²²⁴ After Mr. Alvarez entered a conditional guilty plea at trial, the Court of Appeals for the Ninth Circuit entertained his appeal on constitutional grounds.²²⁵

The government argued that the Stolen Valor Act was constitutional because it prohibited only false factual speech, and such speech is not entitled to full First Amendment protection.²²⁶ The court disagreed, maintaining that First Amendment protection did not turn on the truth or falsity of the speech's content.²²⁷ Instead, the court concluded that the First Amendment presumptively protects all speech regardless of the speech's value or veracity.²²⁸ After concluding that the false speech under the Stolen Valor Act did not fit into any special class of speech not afforded full protection,²²⁹ the court determined that the Stolen Valor Act could not survive strict scrutiny analysis because the

²²² *United States v. Alvarez (Alvarez I)*, 617 F.3d 1198, 1200 (9th Cir. 2010).

²²³ *Id.* at 1200-01.

²²⁴ *Id.* at 1201.

²²⁵ *Id.*

²²⁶ *Id.* at 1202.

²²⁷ *Id.* at 1203.

²²⁸ *Id.* 1205-06.

²²⁹ *Id.* at 1215.

government did not demonstrate that the Act was narrowly tailored to accomplish its legitimate end of protecting the reputation and meaning of military honors.²³⁰

B. *United States v. Strandlof* Creates Circuit Split

Rick Strandlof falsely claimed to have graduated from the United States Naval Academy and falsely claimed to have served in Iraq as a Marine Captain and to have received a Purple Heart for a wound suffered in combat there.²³¹ A veteran's group suspected that Strandlof was lying about his military accolades and notified the FBI.²³² After a subsequent investigation, prosecutors charged Strandlof with violating the Stolen Valor Act.²³³

On appeal to the Tenth Circuit after the district court found that the Stolen Valor Act was unconstitutional, the court addressed the sole issue of whether the content-based restriction on speech embodied in the Stolen Valor Act was facially constitutional.²³⁴ Although the court acknowledged that the content-based restrictions on speech were presumptively invalid,²³⁵ the court ultimately concluded that the Stolen Valor Act was facially constitutional as the Act prohibited only knowingly false speech, the likes of which the Supreme Court has consistently declined to afford full First Amendment protection.²³⁶ Further, the court concluded that concerns over any possible chilling effect on speech were ameliorated by the fact that Congress narrowly tailored the Stolen Valor Act to protect the legitimate government interest in preserving the prestige and dignity of military honors.²³⁷

²³⁰ *Id.* at 1216-18.

²³¹ *United States v. Strandlof*, 667 F.3d 1146, 1151-52 (10th Cir. 2012).

²³² *Id.* at 1152.

²³³ *Id.*

²³⁴ *Id.*

²³⁵ *Id.* at 1157.

²³⁶ *Id.* at 1167.

²³⁷ *Id.* at 1168-69.

**C. *United States v. Alvarez* before the Supreme Court—
Stolen Valor’s Fatal Blow**

On October 17, 2011, faced with division among circuits over whether Congress could permissibly regulate false-speech under the Stolen Valor Act, the Supreme Court granted certiorari on the issue.²³⁸ In analyzing the constitutionality of the Stolen Valor Act, the Court sided with the Ninth Circuit in concluding that the Act was fundamentally at odds with the First Amendment.²³⁹ The Court went on to conclude that, despite the fact that the government’s purpose in passing the Stolen Valor Act was one of significant importance, the manner in which the Act operated could not withstand exacting scrutiny.²⁴⁰

In denying the Government’s argument that false statements “have no First Amendment value in themselves,” and therefore are not entitled to the full extent of First Amendment protections,²⁴¹ the Court examined traditional categories of speech where content-based restrictions were traditionally permissible and concluded that false statements in general did not constitute an exempt category on their own.²⁴² The Court did note that, in certain circumstances, false statements were treated differently under the First Amendment than truthful statements.²⁴³ However, the Court distinguished those instances from the issue at hand by recognizing those cases all dealt with some independent, “legally cognizable harm associated with a false statement,”²⁴⁴ whereas

²³⁸ *United States v. Alvarez (Alvarez II)*, 132 S. Ct. 2537, 2542 (2012); *see also* 132 S. Ct. 457 (granting certiorari in this case).

²³⁹ *Alvarez II*, 132 S. Ct. at 2547-48.

²⁴⁰ *Id.* at 2548-49.

²⁴¹ *Id.* at 2543.

²⁴² *See id.* at 2544 (listing advocacy of imminent lawless action, obscenity, defamation, speech integral to criminal conduct, “fighting words,” child pornography, fraud, true threats, and speech presenting grave and imminent threat as those categories not traditionally afforded full First Amendment protection).

²⁴³ *Id.* at 2545.

²⁴⁴ *Id.* The Supreme Court noted examples such as defamation, invasion of privacy, or vexatious litigation. *Id.*

the Stolen Valor Act targeted falsity alone.²⁴⁵ Therefore, the Court suggested that identifying a traditionally cognizable harm to anchor a prohibition of false statements on was a condition precedent for upholding such a content-based restriction on speech under intermediate, rather than strict, scrutiny review.²⁴⁶ Given that the Government failed to present compelling evidence that the false speech prohibited under the Stolen Valor Act of 2005 fell within the ambit of any historically unprotected category of speech,²⁴⁷ the Stolen Valor Act had to withstand strict scrutiny as a purely content-based restriction of free speech.²⁴⁸

After reciting the Medal's significance,²⁴⁹ the Court determined that, notwithstanding the significance of protecting military honors' reputations, the government failed to establish a causal connection between the Stolen Valor Act and the end of protecting the honor and integrity of military honors.²⁵⁰ Additionally, the Court found that the Stolen Valor Act was not the least restrictive manner available to accomplish the government's stated purpose as counter-speech could serve as an alternative, non-criminal remedy for false speech tending to diminish the integrity of military honors.²⁵¹

²⁴⁵ *Id.*

²⁴⁶ *See id.* at 2544-47 (explaining that the existence of a legally cognizable harm triggers the government's ability to permissibly regulate false speech, but the existence of legally cognizable harms with false statements as an element does not suggest that the government can permissibly prohibit a wider variety of false statements for their falsity alone); *id.* at 2551-52 (Breyer, J., concurring) (stating that, given the importance of First Amendment rights, permissible restrictions on free speech are still subject to intermediate scrutiny rather than the "near-automatic approval" standard of rational basis).

²⁴⁷ While courts do not have "freewheeling authority to declare new categories of speech outside the scope of the First Amendment . . . there are some categories of speech that have been historically unprotected, but have not yet been specifically identified or discussed as such in our case law." *United States v. Stevens*, 559 U.S. 460, 472 (2010).

²⁴⁸ *See Alvarez II*, 132 S. Ct. at 2547-49.

²⁴⁹ *Id.* at 2548-49.

²⁵⁰ *Id.* at 2549.

²⁵¹ *Id.* at 2549-51.

Given that there was no demonstrated connection between the Act and the goal of protecting the integrity of military honors, the Stolen Valor Act failed to survive strict scrutiny and the Court affirmed the Ninth Circuit's invalidation of the law as an unconstitutional restriction on speech.²⁵²

IV. Stolen Valor Act's Flaws and the Remedy

As the reputation and the honor associated with the Medal can be seen as a property right vested in bona fide recipients,²⁵³ Congress can constitutionally protect that right without infringing on traditionally accepted First Amendment rights.

There has been a significant amount of literature published regarding the constitutionality, or lack thereof, of the Stolen Valor Act. Critics have argued that the Act is an impermissible restriction on free speech and is therefore unconstitutional.²⁵⁴ Supporters argue that the Act finds justification in either the fact that the false statements prohibited should receive little constitutional protection,²⁵⁵ or the fact that the Act is narrowly structured to pursue the government's legitimate interest in protecting the reputation of military distinctions.²⁵⁶ However,

²⁵² *Id.* at 2450-51.

²⁵³ *See supra* Part II.

²⁵⁴ *See* Kathryn Smith, Note, *Hey! That's My Valor: The Stolen Valor Act and Government Regulation of False Speech Under the First Amendment*, 53 B.C. L. REV. 775, 795-806 (2012) (arguing, prior to the Supreme Court's ruling, that the Stolen Valor Act was unconstitutional); *see also* Nat Stern, Note, *Implications of Libel Doctrine for Nondefamatory Falsehoods Under the First Amendment*, 10 FIRST AMEND. L. REV. 465, 489-91 (2012) (arguing that the intersection of themes governing the Supreme Court's treatment of defamation is too complex and nuanced to infer the susceptibility of all false statements to regulatory discretion).

²⁵⁵ *E.g.*, Josh M. Parker, Comment, *The Stolen Valor Act as Constitutional: Bringing Coherence to First Amendment Analysis of False-Speech Restrictions*, 78 U. CHI. L. REV. 1503 (2011).

²⁵⁶ *See* Nicholas Mull, Note, *Stolen Valor Act: A Constitutional Instrument to Prosecute "Public Fraud"*, 13 J.L. Soc'y 317, 348-50 (2011) (arguing that the Stolen Valor Act should be construed in a manner to preserve the clear intent of Congress as demonstrated by the legislative history and a common sense reading of the text of the statute in light of the context of military awards).

these arguments are now all for naught as the Supreme Court agreed with those critics who viewed the Stolen Valor Act as an unconstitutional restriction on speech, albeit false speech.²⁵⁷

There are some critics of the Stolen Valor Act who, although not agreeing with the means, agree with the government purpose in drafting the Act and argue that false claims to military distinctions would be better regulated by redrafting the Act as a prohibition on public fraud.²⁵⁸ In fact, the Stolen Valor Act of 2013 expressly adopts this suggested model, prohibiting “Fraudulent Representations About Receipt of Military Decorations.”²⁵⁹ While these points are well taken, not only does fraud fail to specifically protect bona fide recipients’ proprietary interest in the Medal,²⁶⁰ fraud also hamstrings enforcement by requiring third-party reliance and harm.²⁶¹ Section A of this Part explains how the Stolen Valor Act 2013, requiring reliance and third-party harm, under-enforces the prohibition against false claims regarding the Medal.²⁶²

Given the Supreme Court’s acknowledgement of the fact that false speech is permissibly regulated in certain traditionally accepted circumstances,²⁶³ Section B explains how Congress can

²⁵⁷ *Alvarez II*, 132 S. Ct. at 2545, 2550-51.

²⁵⁸ *E.g.*, Jeffery C. Barnum, Comment, *False Valor: Amending the Stolen Valor Act to Conform with the First Amendment’s Fraudulent Speech Exception*, 86 WASH. L. REV. 841, 843 (2011); Stephanie L. Gal, Note, *Resolving the Conflict Between the Stolen Valor Act of 2005 and the First Amendment*, 77 BROOK. L. REV. 223, 254-57 (2011); Mull, *supra* note 256, at 342-43.

²⁵⁹ Stolen Valor Act of 2013, Pub. L. No. 113-12, 127 Stat. 448 (2013).

²⁶⁰ *See Alvarez II*, 132 S. Ct. at 2542-43 (stating that establishing the Medal was a proper Congressional Act and suggesting that protecting the value of the Medal might also be proper, if done within the parameters of the Constitution).

²⁶¹ *See* Barnum, *supra* note 258, at 865-66 (disposing of these issues simply by arguing fraud does not require evidence of pecuniary harm in reliance on a representation).

²⁶² *See, e.g.*, Stolen Valor Act of 2012, S. 3254, § 5012 (finding that dangers of harm to defrauded parties necessitated effective amendment to the Stolen Valor Act); Stolen Valor Act of 2012, H.R. 1775, § 2(b) (prohibiting only those false claims made with the intent “to obtain money, property, or other tangible benefit”).

²⁶³ *E.g.*, *Alvarez II*, 132 S. Ct. at 2544 (listing advocacy of imminent lawless action, obscenity, defamation, speech integral to criminal conduct, “fighting words,” child

better protect the rights of Medal recipients by drafting the statute to prohibit false claimants from misappropriating the honor and respect associated with the Medal that bona fide recipients create, and are entitled to, through their exemplary service.

Section C concludes this Part by illustrating how a Stolen Valor Act redrafted to prohibit appropriating bona fide Medal recipients' honor can survive judicial scrutiny.

A. The Stolen Valor Act of 2013 Does Not Get the Job Done

Simply put, the Stolen Valor Act of 2013 under-enforces and under-protects the proprietary interests bona fide recipients earn in the reputation and honor associated with the Medal.²⁶⁴ Redrafting the Stolen Valor Act to prohibit only those false claims aimed at “obtain[ing] money, property, or other tangible benefit,”²⁶⁵ protects only the interest of defrauded parties, rather than bona fide Medal recipients' proprietary interests.²⁶⁶ Not only does the Stolen Valor Act of 2013 fail to protect bona fide recipients' proprietary interests, the law does not heed the Supreme Court's suggestion that protecting the value associated with the Medal is a compelling government interest that justifies federal legislation—not that protecting third-parties from such fraudulent representations was

pornography, fraud, true threats, and speech presenting grave and imminent threat as those categories not traditionally afforded full First Amendment protection); *see also id.* at 2545 (mentioning invasion of privacy and vexatious litigation as instances where false statements are not afforded the same protection as truthful statements).

²⁶⁴ *See, e.g.*, 151 CONG. REC. 12,684, 12,688 (2005) (statement of Sen. Kent Conrad) (explaining that the proposed Stolen Valor Act of 2005 aimed to prevent false claims regarding receiving the Medal in order to take advantage of the reputation associated with bona fide recipients and thus protecting the accomplishments of those bona fide recipients).

²⁶⁵ Stolen Valor Act of 2013, Pub. L. No. 113-12, § 2(b), 127 Stat. 448, 448 (2013).

²⁶⁶ *See* Stolen Valor Act of 2012, S. 3254 (citing concerns about harm to third-parties resulting from reliance on false claimants' representations during debates on an earlier version of the Stolen Valor Act of 2013); *see also* RESTATEMENT (SECOND) OF TORTS § 525 (1977) (positing that anyone who makes a fraudulent misrepresentation of fact, aimed at inducing another to act, is liable to the party defrauded for the harm caused).

a similarly compelling government interest.²⁶⁷ The most recent Stolen Valor Act's prohibition on "Fraudulent Representations About Receipt of Military Decorations or Medals"²⁶⁸ also fails to fully address President Barack Obama's commitment to preventing the "contemptible" practice of stealing American heroes' valor.²⁶⁹ President Obama did not express concern regarding a contemptible practice of defrauding the American public. Indeed, the Stolen Valor Act of 2013's prohibition of false claims aimed at obtaining *tangible* benefits fails to fully effectuate legislators' goal of punishing those who "lie about service in order to gain *notoriety*, profit personally and professionally, and to receive *benefits* reserved for those who fought in defense of this Nation."²⁷⁰ Accordingly, fraud is the incorrect modality for protecting bona fide Medal recipients' proprietary interest in the reputation associated with the Medal.²⁷¹

²⁶⁷ See *Alvarez II*, 132 S. Ct. at 2542-43 (stating that establishing the Medal was a proper Congressional Act and suggesting that protecting the value of the Medal might also be proper, if done within the parameters of the Constitution).

²⁶⁸ Stolen Valor Act of 2013 § 2, 127 Stat. at 448.

²⁶⁹ See Jake Tapper, *Fighting 'Stolen Valor,' President Obama Announces New Website to Combat Those Falsely Claiming Military Medals*, ABC NEWS (July 23, 2012, 7:58 PM), <http://abcnews.go.com/blogs/politics/2012/07/fighting-stolen-valor-president-obama-announces-new-website-to-combat-those-falsely-claiming-military-medals/> (reporting President Obama's statements at the annual convention of the Veterans of Foreign Wars after the Supreme Court's decision declaring the Stolen Valor Act of 2005 unconstitutional in *United States v. Alvarez*). Specifically, President Obama stated: "It may no longer be a crime for con artists to pass themselves off as heroes, but one thing is certain—it is contemptible. So this week, we will launch a new website, a living memorial, so the American people can see who's been awarded our nation's highest honors. Because no American hero should ever have their valor stolen." Barack Obama, President of the United States, Remarks by the President to the 113th National Convention of the Veteran's of Foreign Wars (July 23, 2012), *available at* <http://www.whitehouse.gov/the-press-office/2012/07/23/remarks-president-113th-national-convention-veterans-foreign-wars>.

²⁷⁰ 159 Cong. Rec. H2780 (daily ed. May 20, 2013) (statement of Rep. Joe Heck) (emphasis added).

²⁷¹ Importantly, the goal of the Stolen Valor Act has not changed. "In 2006, every Member of both the House and the Senate clearly understood the need to protect the integrity and honor of military service and demonstrated that by unanimously passing the Stolen Valor Act in each Chamber. That body understood that the proliferation of false claims occurring at the time cheapened the integrity of the military awards system and threatened the trust and honor bestowed upon military servicemembers and

Congress can, however, protect bona fide Medal recipients' proprietary interest in the reputation of the Medal by redrafting the Stolen Valor Act within the ambit of the wrongful appropriation of the reputation and honor of the Medal.²⁷² Unlike prohibiting only fraudulent misrepresentations,²⁷³ a law drafted in the spirit of wrongful appropriation covers all public false claims to the Medal aimed at appropriating any benefit, material or otherwise, that derives from the reputation and honor of bona fide Medal recipients.²⁷⁴ Additionally, although broader in scope than a prohibition drafted in the spirit of fraud, a prohibition drafted in the spirit of common law appropriation or right of publicity statutes addresses concerns regarding the seemingly unbounded scope of the prohibition on false statements embodied in the Stolen Valor Act of 2005.²⁷⁵

While it is true that wrongful appropriation of another's reputation, name, or likeness traditionally provides a private right of action,²⁷⁶ a private right of action is not proper for wrongful appropriation of the reputation and honor of bona fide Medal recipients. General George Washington, and later Congress, established the Medal and other lesser military distinctions as a

veterans by this Nation. . . . [T]he need to protect the honor, service, and sacrifice of our veterans and military personnel is just as strong today as it was in 2006. The need is just as strong today as it was last year when this body passed the 2012 Stolen Valor legislation 410-3. The need will be just as strong as long as there are individuals who continue to lie about service in order to gain notoriety, profit personally and professionally, and to receive benefits reserved for those who fought in defense of this Nation." *Id.*

²⁷² See RESTATEMENT (SECOND) OF TORTS § 652C cmt. a (1977) (stating that the interest protected by the cause of action is the individual's proprietary interest in their identity, represented by their name or likeness, and any benefit that may be associated with it).

²⁷³ See *Alvarez II*, 132 S. Ct. at 2554 (Breyer, J., concurring) (stating that fraud statutes "require proof of a misrepresentation that is material, upon which the victim relied, and which caused actual injury").

²⁷⁴ See, e.g., REP. ON THE MEDAL OF HONOR, *supra* note 38, at 1 (recognizing that the honor earned by Medal of Honor recipients is by and large the greatest interest in the Medal, while any material benefits are periphery benefits).

²⁷⁵ See *Alvarez II*, 132 S. Ct. at 2553, 2555 (Breyer, J., concurring).

²⁷⁶ See RESTATEMENT (SECOND) OF TORTS § 652C cmt. a (1977) (providing individuals whose rights have been violated with a cognizable right of action for appropriation of their name or likeness).

way to recognize the exemplary service of soldiers who would not seek such recognition on their own accord.²⁷⁷ Therefore, asking bona fide recipients to sue false claimants in order to vindicate their proprietary interest in the reputation and honor associated with the Medal is inconsistent with the purpose of the award itself.²⁷⁸ Further, creating a private right of action under common law appropriation places the disproportionate burden of enforcing the proprietary rights of 3,463 recipients on the eighty living Medal recipients.²⁷⁹ This burden would force bona fide Medal recipients to shoulder legal fees in order to bring the suit and, after filing, proving damages. Accordingly, instead of creating a private right of action, the Federal Government should criminalize the wrongful appropriation of the reputation associated with bona fide Medal recipients. Protecting the honor and reputation of Medal recipients is a proper government purpose and criminalizing wrongfully appropriating that honor and reputation is a proper means to effectuate that end.²⁸⁰

B. Restricting First Amendment Rights to Protect Reputation is Permissible

In deciding to subject the Stolen Valor Act of 2005 to strict

²⁷⁷ See, e.g., REP. ON THE MEDAL OF HONOR, *supra* note 38, at 3 (stating that the philosophy behind Washington's Purple Heart, and behind the Congressional Medal of Honor, was that "no true soldier, sailor or marine" would seek recognition for their exemplary service on their own accord).

²⁷⁸ See *Ethos*, U.S. NAVY SEALS, <http://www.sealswcc.com/navy-seals-ethos.aspx> (last visited Feb. 16, 2013) ("My loyalty to Country and Team is beyond reproach. I humbly serve as a guardian to my fellow Americans always ready to defend those who are unable to defend themselves. *I do not advertise the nature of my work, nor seek recognition* for my actions. I voluntarily accept the inherent hazards of my profession, placing the welfare and security of others before my own. I serve with honor on and off the battlefield. The ability to control my emotions and my actions, regardless of circumstance, sets me apart from other men. Uncompromising integrity is my standard. My character and honor are steadfast. My word is my bond." (emphasis added)).

²⁷⁹ See *Medal of Honor Statistics*, *supra* note 11.

²⁸⁰ See *Alvarez II*, 132 S. Ct. at 2542-43 (stating that creating the Medal of Honor was a proper Congressional act, suggesting that constitutionally permissible protection of that Honor is also a proper Congressional pursuit).

scrutiny, the Court reasoned that the government failed to offer compelling evidence that the prohibited false speech was of such a nature to warrant establishing a new category of content-based speech beyond the ambit of full First Amendment protection.²⁸¹

Courts can permissibly recognize new categories of unprotected speech only when that new category of permissibly regulated speech is historically entitled to little or no First Amendment protection.²⁸² This exacting standard recognizes that there might be historically unprotected categories of speech that have not been specifically identified in Supreme Court case law,²⁸³ but does not allow for a free-floating test to trample on the First Amendment's guarantee of free speech.²⁸⁴ Further restraining courts from establishing new permissible restrictions on content-based speech is the fact that even when restricting categories of speech that are historically unprotected, those restrictions must advance social benefits that outweigh the Constitution's preference for unbounded free speech rights.²⁸⁵

There are restrictions on free speech, however, that society and courts uniformly find beneficial.²⁸⁶ In passing the Stolen Valor Act of 2013, Congress seized on Justice Anthony Kennedy's recognition of fraud as a category of speech not afforded full First Amendment protection.²⁸⁷ However, within Justice Kennedy's non-

²⁸¹ *Id.* at 2547.

²⁸² *United States v. Stevens*, 559 U.S. 460, 472 (2010).

²⁸³ *See id.* "Maybe there are some categories of speech that have been historically unprotected, but have not yet been specifically identified or discussed as such in our case law." *Id.*

²⁸⁴ *Id.* at 470.

²⁸⁵ *Id.*

²⁸⁶ *E.g., Alvarez II*, 132 S. Ct. at 2544 (listing advocacy of imminent lawless action, obscenity, defamation, speech integral to criminal conduct, "fighting words," child pornography, fraud, true threats, and speech presenting grave and imminent threat as those categories not traditionally afforded full First Amendment protection).

²⁸⁷ *See* 159 Cong. Rec. H2780 (daily ed. May 20, 2013) (statement of Rep. Bobby Scott) ("Justice Kennedy in writing that opinion, also set out certain parameters he suggested that would pass constitutional muster should Congress seek to rewrite the legislation. He advised: Where false claims are made to effect a fraud or secure moneys or other

exhaustive list of “historic and traditional categories [of expression] long familiar to the bar” included defamation.²⁸⁸ Wrongful appropriation is a related, yet distinct,²⁸⁹ restriction on speech that prohibits appropriating another’s name or likeness for one’s own benefit without prior consent.²⁹⁰

This doctrine originated in the first examination of an American right of privacy in a law review article by Samuel D. Warren and Louis D. Brandeis.²⁹¹ In its current form, right of privacy law is divided into four distinct, but related torts.²⁹² The fourth category of right of privacy, appropriation, recognizes that individuals own a property right in their name, likeness, reputation, or in the goodwill associated with their person.²⁹³ In protecting

valuable considerations, say offers of employment, it is well-established that the government may restrict speech without affronting the First Amendment.”).

²⁸⁸ *E.g.*, *Alvarez II*, 132 U.S. at 2544 (alteration in original) (internal quotations omitted).

²⁸⁹ *See, e.g.*, William L. Prosser, *Privacy*, 48 CALIF. L. REV. 383, 389 (1960) (stating that both defamation and one’s proprietary interest in their identity fall under the more general umbrella of one’s right to privacy, or “in the phrase coined by Judge Cooley, ‘the right to be let alone’ (footnote omitted)).

²⁹⁰ *E.g.*, *Zacchini v. Scripps-Howard Broad. Co.*, 433 U.S. 562, 571-73 (1977) (discussing both common law right of privacy prohibition on appropriation of another’s name or likeness without prior consent and state statutory “right of publicity” establishing the same prohibition).

²⁹¹ Samuel D. Warren & Louis D. Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193 (1890); *see, e.g.*, Prosser, *supra* note 289, at 383-84 (tracing the development of American privacy law to Brandeis’s and Warren’s law review article).

²⁹² *E.g.*, Prosser, *supra* note 289, at 389 (dividing right of privacy into four distinct torts: (1) Intrusion upon seclusion or solitude; (2) Public disclosure of embarrassing private facts; (3) False light publicity; (4) Appropriation of another’s name or likeness for defendant’s advantage).

²⁹³ *E.g.*, STUART BANNER, *AMERICAN PROPERTY: A HISTORY OF HOW, WHY, AND WHAT WE OWN* 150-52 (2011) (discussing the different interests that right of privacy and right of publicity protect. Whereas traditional rights of privacy protect private individuals from intrusion on seclusion or “unwanted publicity,” rights of publicity protect proprietary interests that individuals control exclusively); *cf.* *Matthews v. Wozencraft*, 15 F.3d 432, 437 (5th Cir. 1994) (declining to find liability for appropriation of plaintiff’s name or likeness, because there was “nothing unique about [plaintiff’s] name or likeness that create[d] value for [defendant] to appropriate”); Prosser, *supra* note 289, at 403 (stating that appropriation protects an “[individual’s] name as a symbol of his identity . . . not his name as a mere name”).

a person's exclusive right to the advantages of their reputation, statutory "right of publicity" and common law protection against unauthorized appropriation of one's name or likeness are analogous to federal copyright and patent laws in that they incentivize productive activity.²⁹⁴ The theory behind these protections is that an individual should be exclusively entitled to the benefits produced by one's own labors.²⁹⁵

As this restriction on speech inevitably narrows the protection the First Amendment affords, the prohibition against appropriating another's name or likeness without prior consent is not absolute. For instance, some courts recognize a "newsworthiness" exception for the publication of another's name or likeness in connection with matters concerning public interest or concern.²⁹⁶ In determining whether a given publication is entitled to the "newsworthiness" protection, courts recognizing the exception balance the legitimacy of the public concern underlying the publication in question against the individual's interest in their reputation, likeness, or name.²⁹⁷ Additionally, some courts also recognize an exception to appropriation of another's name or likeness or right of publicity for expressive or editorial works.²⁹⁸ Like the "newsworthiness" exception, courts that recognize an exception for expressive or editorial works engage in balancing the

²⁹⁴ *Zacchini v. Scripps-Howard Broad. Co.*, 433 U.S. 562, 573 (1977).

²⁹⁵ *E.g., id.* (suggesting a state's interest in protecting a proprietary interest in one's reputation so as to encourage productive endeavors); *cf. LOCKE, TWO TREATISES OF GOVERNMENT, supra* note 127, § 34 (stating that individuals "ought not to meddle with what was already improved by another's Labour" and that "[i]f he did [it is] plain [that] he desired the benefit of another's Pains, which he had no right to").

²⁹⁶ *See, e.g., Toffoloni v. LFP Publ'g Grp. L.L.C.*, 572 F.3d 1201, 1208 (11th Cir. 2009) (stating that Georgia law recognizes a "newsworthiness" exception to an individual's right of publicity).

²⁹⁷ *E.g., id.* (introducing the balancing required in determining whether a publication is entitled to "newsworthiness" protection under Georgia law).

²⁹⁸ *See, e.g., ETW Corp. v. Jireh Publ'g, Inc.*, 332 F.3d 915, 931 (6th Cir. 2003) (stating that Ohio law provides First Amendment protection for those works that are of public interest or expressive in nature); *see also Bosley v. Wildwett.com*, 310 F. Supp. 2d 914, 929 (N.D. Ohio 2004) (concluding that only works that are expressive or editorial in nature are entitled to robust First Amendment protection under Ohio law).

speech's expressive, as opposed to commercial nature, against the individual's property right in one's own identity.²⁹⁹

C. Redrafting the Stolen Valor Act to Protect the Reputation Medal Recipients Earn Can Survive Constitutional Scrutiny

In *Alvarez II*, the Supreme Court found that the prohibited false speech under the Stolen Valor Act did not fit within categories of permissible content-based regulations on free speech and, therefore, subjected the Act to strict scrutiny review.³⁰⁰ The Supreme Court found that the Act was not necessary to protect the honor of military medals and was not the least restrictive means towards the legitimate end of protecting military medals.³⁰¹ Redrafting the Stolen Valor Act to protect the reputation that bona fide Medal recipients earn from wrongful appropriation will relieve the Act from strict scrutiny review and the amended Act can survive the more relaxed, intermediate scrutiny review for the following reasons.³⁰²

First, the Court referenced a willingness to recognize categories of permissible content-based restrictions on free speech if the restriction is within the ambit of traditional restrictions “long familiar to the bar.”³⁰³ Prohibiting false-claimants from appropriating the reputation and honor that bona fide recipients earn is very similar to both common law invasion of privacy laws covering appropriation of another's name or likeness and statutory

²⁹⁹ See, e.g., *Parks v. LaFace Records*, 329 F.3d 437, 461 (6th Cir. 2003) (explaining that the individual's property right in a name must be balanced against the freedom of artistic expression); see also *Bosley*, 310 F. Supp. at 929 (explaining the importance of an individual's property right in one's own identity in determining whether a work is entitled to First Amendment protection).

³⁰⁰ *United States v. Alvarez (Alvarez II)*, 132 S. Ct. 2537, 2543-47 (2012).

³⁰¹ *Id.* at 2551.

³⁰² See *id.* at 2551-52 (Breyer, J., concurring) (stating that, given the importance of First Amendment rights, permissible restrictions on free speech are still subject to intermediate scrutiny rather than the “near-automatic approval” standard of rational basis).

³⁰³ *Id.* at 2544 (quoting *United States v. Stevens*, 559 U.S. 460, 468 (2010)).

right of publicity laws.³⁰⁴ Right of publicity law recognizes that individuals own a property right in their personality, reputation or goodwill earned through their own efforts.³⁰⁵

Similarly, through their exemplary service, bona fide recipients not only add to the Medal's value, but also earn a proprietary interest in the reputation and honor associated with the Medal that derives from that service.³⁰⁶ Medal recipients are entitled to the gratitude of a thankful nation and the reverence that comes from gallantly risking their life to preserve his comrades and his nation.³⁰⁷

When an individual makes a false claim, in a public setting, regarding receiving the Medal, it is clear that the false claimant seeks to appropriate the benefits of bona fide Medal recipients' labor that provides the basis for the respect and honor

³⁰⁴ See *supra* Part IV.B. Justices Scalia, Thomas, Breyer, Alito, and Kagan suggested a reasoning similar to that set forth by this Note in analogizing the prohibition of false speech under the Stolen Valor Act of 2005 to prohibitions on similar speech under trademark infringement statutes. *Alvarez II*, 132 S. Ct. at 2554-55 (Breyer, J., concurring); *id.* at 2559 (Alito, J., dissenting). Although these Justices believed trademark infringement was the closest analogous content-based restriction on free speech to those statements prohibited under the Stolen Valor Act of 2005, the analogy is subject to this Note's criticism of drafting the Stolen Valor Act in the spirit of fraud as trademark infringement statutes, like fraud, focus initially on third-party harm (i.e. consumer confusion). See, e.g., James E. Clevenger, *False Advertising under Lanham Act § 43(a)(1)(B)*, 44 AM. JUR. PROOF OF FACTS 3d 1, §§ 11-14 (explaining that a necessary prerequisite for an action under the Lanham Act is evidence suggesting consumer confusion or deception). However, the Court suggested that the primary object of a permissible restriction on free speech in this context should be the value associated with the Medal and other military honors as protection of that value represents a compelling government interest. *Alvarez II*, 132 S. Ct. at 2542-43.

³⁰⁵ See, e.g., *Parks v. LaFace Records*, 329 F.3d 437, 459 (6th Cir. 2003) (explaining that common law right of publicity created a species of property right in a person's personality, especially that of celebrities whose identity is of appreciable commercial value).

³⁰⁶ The most significant proprietary interest earned is that in the respect and honor from a grateful Nation. See, e.g., REP. ON THE MEDAL OF HONOR, *supra* note 38, at 1; *supra* Part II.

³⁰⁷ See REP. ON THE MEDAL OF HONOR, *supra* note 38, at 2-4 (explaining that the overwhelming motivation behind the Medal of Honor was a nation expressing gratitude that the soldiers themselves would never seek out on their own).

associated with the Medal.³⁰⁸ False claimants dilute the value of the reputation and honor associated with Medal recipients to which bona fide Medal recipients are entitled.³⁰⁹ In order to prevent such harm to bona fide recipients' proprietary interests and, as part of the government's legitimate interest in incentivizing heroic service among members of the Armed Forces, the government is authorized to prevent such wrongful appropriation of the honor and reputation to which only bona fide Medal recipients are entitled.³¹⁰

Second, in assessing the scope and restrictive nature of the content-based prohibition of speech under the Stolen Valor Act of 2005, the Supreme Court noted concerns regarding just what kind of false statements about receiving military awards the Act prohibited.³¹¹ However redrafting the Stolen Valor Act to protect bona fide recipients' proprietary interest in the reputation associated with the Medal in the spirit of right of publicity laws provides clear limiting principles.

A necessary prerequisite for prosecution under a Stolen Valor Act drafted in this manner is that the false claim to the Medal must be made with the intent of appropriating the reputation and honor associated with bona fide Medal recipients to the

³⁰⁸ See LOCKE, TWO TREATISES OF GOVERNMENT, *supra* note 127, § 34 (stating that individuals "ought not to meddle with what was already improved by another's Labour" and that "[i]f he did [it is] plain [that] he desired the benefit of another's Pains, which he had no right to").

³⁰⁹ See 151 CONG. REC. 12,684, 12,688 (2005) (statement of Sen. Kent Conrad); *cf.* *Matthews v. Wozencraft*, 15 F.3d 432, 437 (5th Cir. 1994) (stating that protection from appropriation of one's name or likeness is aimed at protecting the value on an individual's reputation); *McFarland v. Miller*, 14 F.3d 912, 919 (3d Cir. 1994) (stating that the harm done by unauthorized appropriation of another's name or likeness is unjustly diluting the value of the reputation to which the appropriator had no right).

³¹⁰ See *United States v. Alvarez (Alvarez II)*, 132 S. Ct. at 2548-49 (setting out the government's compelling interest in incentivizing gallant military service by protecting military honors); *Zacchini v. Scripps-Howard Broad. Co.*, 433 U.S. 562, 573 (1977) (explaining that the compelling interest in protecting one's proprietary interest in his or her reputation and personality as a legitimate means towards promoting socially beneficial activity is akin to federal patent and copyright law).

³¹¹ See *Alvarez II*, 132 S. Ct. at 2547-48 (identifying the lack of a clear limiting principle in the Stolen Valor Act of 2005).

speaker's own benefit.³¹² Further, prosecution will be limited by traditional exceptions recognized by right of publicity law such as the “newsworthiness” exception and the exception for expressive or editorial works.³¹³

While balancing competing interests in right of publicity actions can sometimes be difficult for courts,³¹⁴ the same will not be true for prosecuting false claims to the Medal of Honor under a revised Stolen Valor Act. As for the “newsworthiness” exception, bona fide Medal recipients' proprietary interest in the reputation and honor of the Medal will categorically outweigh the public interest in false claims to the Medal, as “[f]alse statements of fact are particularly valueless.”³¹⁵ Additionally, the protection for expressive or editorial works allays concerns noted by some courts that the Stolen Valor Act could allow for prosecuting performers who claim or wear the Medal in theatrical performances.³¹⁶ Here again, the speaker's First Amendment interest in artistic expression is balanced against the proprietary interest held by bona fide recipients in the reputation and honor associated with the Medal.³¹⁷ In this case, however, First Amendment rights will likely

³¹² Cf. *Matthews*, 15 F.3d at 437 (stating that, in order for appropriation of one's name or likeness to be actionable, the defendant must advertise the name or likeness in a manner aimed at taking advantage of the name's, likeness', or reputation's value).

³¹³ E.g., *Toffoloni v. LFP Publ'g Grp., L.L.C.*, 572 F.3d 1201, 1208 (11th Cir. 2009) (stating that Georgia law recognizes a “newsworthiness” exception to an individual's right of publicity); *Bosley v. Wildwett.com*, 310 F. Supp. 2d 914, 929 (N.D. Ohio 2004) (concluding that only works that are expressive or editorial in nature are entitled to First Amendment protection under Ohio law).

³¹⁴ See, e.g., *Joe Dickerson & Assocs. v. Dittmar*, 34 P.3d 995, 1003 (Colo. 2001) (explaining the inquiry as to whether or not a given publication is sufficiently noncommercial for the newsworthiness exception to apply).

³¹⁵ *Hustler Magazine, Inc. v. Falwell*, 485 U.S. 46, 52 (1988); cf. *Donahue v. Warner Bros. Pictures*, 194 F.2d 6, 11-13 (10th Cir. 1952) (explaining that the publication in question was of the sort generally entitled to the protection of the newsworthiness exception, but finding that the exception did not apply given the false light nature of the publication).

³¹⁶ See, e.g., *United States v. Perelman*, 737 F. Supp. 2d 1221, 1237 (D. Nev. 2010) (noting an argument that 18 U.S.C. § 704 could ultimately prohibit actors from wearing military medals in plays).

³¹⁷ See *Parks v. LaFace Records*, 329 F.3d 437, 461 (6th Cir. 2003) (noting that an individual's property right in their name must be balanced against the freedom of

categorically outweigh bona fide Medal recipients' proprietary interests. Not only does the Constitution provide robust First Amendment protection for artistic expression,³¹⁸ it is also doubtful that an actor will make a false claim to obtain the benefit of the reputation and honor associated with bona fide recipients and therefore such a claim would not be unlawful under the revised Stolen Valor Act.

Third, when drafted in the spirit of prohibiting the appropriation of bona fide Medal recipients' reputation, the Supreme Court's suggestion of alternative enforcement mechanisms to those provided by the Stolen Valor Act of 2005 lose their relevance.³¹⁹ The Court suggested that the most effective, and least restrictive way, to protect the value of military honors and the Medal was for recipients to engage in counterspeech when individuals made false claims regarding receiving the Medal.³²⁰ Further, the Court suggested that compiling databases, accessible publicly through the Internet, would allow citizens to verify claims regarding receiving military honors.³²¹

However, if the Stolen Valor Act is redrafted to protect bona fide Medal recipients' proprietary interests in the Medal and the reputation associated with it, these alternative measures are no longer satisfactory. Placing the burden on Medal recipients to engage in counter-speech diminishes the value of their honor in a similar way as false claims dilute the value of their honor. Further, directing citizens to investigate all claims to the Medal against an Internet database also diminishes the value of the honor in which

artistic expression).

³¹⁸ See, e.g., *Miller v. California*, 413 U.S. 15, 25-27 (1973) (exploring the outer-limit of constitutionally protected artistic expression in a pornography case and providing a limiting principle only in obscenity).

³¹⁹ See *United States v. Alvarez (Alvarez II)*, 132 S. Ct. 2537, 2549-51 (suggesting that counterspeech is the proper enforcement mechanism to combat false claims to the Medal of Honor).

³²⁰ *Id.*

³²¹ *Id.* at 2551.

recipients have a proprietary interest. Instead of those who have earned the Medal being recognized with honor and gratitude from the Nation they served, such a measure would frustrate the purpose of the Medal by causing citizens to view even bona fide recipients with skepticism until their story checked out.³²² Such a “[f]rust, but verify” system does not honor our veterans who have served with distinction in the spirit envisioned by General George Washington and the United States Congress.³²³

CONCLUSION

General George Washington was right when he recognized a need for our Nation to recognize the uncommon gallantry of those soldiers who went above and beyond the call of duty in protecting our sovereignty. Congress was right in adopting Washington’s philosophy in establishing the Medal, and Congress was absolutely right in acting on the need to protect the honor and reputation associated with our Nation’s highest military honor. However, in drafting the Stolen Valor Act of 2005, Congress erred in protecting the honor and reputation of the Medal itself rather than the proprietary interest in the honor and reputation that bona fide Medal recipients earn and the Supreme Court was right in invalidating that law with its decision in *United States v. Alvarez*.

Every day, the men and women of our Armed Forces go above and beyond what is asked of the average American citizen. Specifically, our bravest are expected to fill the void where other countries have failed in the global fight to vindicate freedom in the face of terrorism.³²⁴ Every day, our Nation’s bravest men

³²² See REP. ON THE MEDAL OF HONOR, *supra* note 38, at 2-4 (explaining that the overwhelming purpose behind the Medal was a Nation expressing gratitude that the soldiers themselves would never seek out on their own).

³²³ See *Preventing Stolen Valor: Challenges and Solutions: Hearing Before the Subcomm. on Nat. Sec., Homeland Def. & Foreign Operations of the H. Comm. on Oversight and Gov’t Reform*, 112th Cong. 3 (2012) (statement of Rep. Jason Chaffetz, Chairman, Subcomm. on National Sec., Homeland Def. & Foreign Operations).

³²⁴ E.g., Bing West, *With the Warriors*, NAT’L REV. ONLINE (Mar. 21, 2011, 4:00 AM),

and women face improvised explosive devices and enemies behind “murder holes” to preserve our freedoms and free others from oppression.³²⁵ Some have served multiple tours of duty in these foreign, hostile lands, while others refuse rotation back to the United States after serious injuries in order to remain with their comrades.³²⁶

Glory does not drive these men and women;³²⁷ rather, an ethos, dictating that they serve bravely and honorably no matter what the circumstances, and regardless of the consequences, fuels their remarkable service.³²⁸ Despite the sacrifice and the danger, few of these men and women ask for anything more than simple gratitude from those Americans safe at home. Still fewer will ever be formally recognized for their exemplary service with military distinction, let alone be awarded the Medal.

Those brave warriors who have earned our Nation’s highest military honor deserve not only our utmost respect and gratitude, but also deserve to have the honor that our bravest soldiers have labored and died for protected from the “Fancy or Covetousness of the Quarrelsome and Contentious.”³²⁹ Through appropriate legislation aimed at incentivizing meritorious service, Congress is uniquely situated to protect the honor bona fide Medal recipients earn. In drafting the Stolen Valor Act of 2013, Congress—in response the Court’s decision in *United States v. Alvarez*—shifted the protections the law affords from the honor Medal recipients earn to the public at large. However, as set forth above, the *United States v. Alvarez* need not be the end of legislation specifically protecting the honor and reputation associated with the Medal. As such, instead of prohibiting only fraudulent claims to military

<http://www.nationalreview.com/articles/262537/warriors-bing-west>.

³²⁵ *E.g., id.* “Murder holes” are peepholes hollowed out of the walls of domiciles and other compounds that enemy fighters can lay fire on American forces through. *See id.*

³²⁶ *Id.*

³²⁷ *Id.*

³²⁸ *Id.*

³²⁹ LOCKE, TWO TREATISES OF GOVERNMENT, *supra* note 127, § 34.

distinction, Congress should criminalize false claims regarding receiving the Medal, and other military distinction aimed at wrongfully appropriating the reputation associated with those honors, thus protecting the proprietary interest in the reputation and honor associated with those distinctions that bona fide recipients earn.