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COMBATING THIEVES OF VALOR: THE STOLEN VALOR ACT OF 2013 IS CONSTITUTIONAL YET UNENFORCED

Mary E. Johnston*

INTRODUCTION

The first proponent of formidable stolen valor legislation, George Washington, established the first “[h]onorary badges of distinction” for meritorious service in the United States military, and he warned, “[s]hould any, who are not entitled to the honors, have the insolence to assume the badges of them, they shall be severely punished.”¹

A generation equipped with social media, smart phones, and such an unquestionable propensity to impersonate others that a new word had to be added to the dictionary,² has created the perfect atmosphere for exposing the growing epidemic of stolen valor.³ “Stolen valor” is the term used to describe the occurrence of an individual falsely representing him or herself as a decorated military service member in an attempt to receive something of value for patriotic service that he or she never completed.⁴ Contemporary society boasts a combination of effortless accessibility of social media, smart phones capable of taking videos that can instantly be uploaded to the Internet, and the availability of websites such as Amazon and eBay that both sell military uniforms and awards, including an imitation of the U.S. Medal of Honor.⁵

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¹ JOHN WHITING, REVOLUTIONARY ORDERS OF GENERAL WASHINGTON 228 (Henry Whiting ed., New York & London, Wiley & Putnam 1844).

² Katy Steinmetz, *#Selfie, Steampunk, Catfish: See This Year's New Dictionary Words*, TIME (May 19, 2014), <http://time.com/103503/merriam-webster-dictionary-selfie-catfish/> [<https://perma.cc/H25Q-CBH8>] (announcing the addition of the word “catfish” to the MERRIAM-WEBSTER DICTIONARY to describe the phenomenon of online impersonation used in online dating).

³ See generally B.G. BURKETT & GLENNA WHITLEY, STOLEN VALOR: HOW THE VIETNAM GENERATION WAS ROBBED OF ITS HEROES AND ITS HISTORY (1998) (establishing the term “stolen valor” for the first time to describe the occurrences of military impersonation after the Vietnam War).

⁴ The definition of stolen valor varies by each state depending on the state’s stolen valor law. This Note will use the definition of “stolen valor” based on the federal Stolen Valor Act of 2013, 18 U.S.C. § 704 (Supp. I).

⁵ See Amazon Search for U.S. Military Uniform, AMAZON, <http://www.amazon.com> [<https://perma.cc/BX26-SGES>] (search starting point field for “U.S. Military Uniform”); eBay Search for U.S. Medal of Honor, EBAY, <http://www.ebay.com> [<https://perma.cc/Q5FD>]

This combination has culminated in both a growing number of people willing to misrepresent themselves as war heroes as well as irate veterans willing to utilize social media as a forum to expose the seemingly unpoliced problem of stolen valor.

Stolen valor occurs much more frequently than many people may realize. “The number of stolen valor cases reported to the FBI has tripled in the last decade[,]”⁶ and the FBI has been cited for stating that for every “real Navy SEAL there are 300 imposters[,]”⁷ in addition to the fact that “for every one of the 120 Living Medal of Honor Recipients, there are twice as many phonies.”⁸ Additionally, as of 2009, the Department of Veteran Affairs paid disability benefits to more than 670 people falsely claiming to have been prisoners of war in the Vietnam and Persian Gulf Wars.⁹ And, “in a single year, *more than 600* Virginia residents falsely claimed to have won the Medal of Honor.”¹⁰ It has also been determined that there have been false claims of military decorations incorporated into obituaries and even engraved on headstones of those who never earned such high honors.¹¹ Finally, YouTube has become a modern forum for shaming those who engage in stolen valor. For example, the official “Stolen Valor” YouTube page hosts over thirty videos that depict veterans exposing military impersonators, and these videos have collectively garnered over *thirty million* views.¹²

The stolen valor epidemic captured the attention of over five million people on Black Friday 2014 when an army veteran, Ryan Berk, approached Sean Yetman, who was presenting himself as an elite Army Ranger while shopping at a mall and

-RTL5] (search starting point field for “US Medal of Honor.” Filter results by “Medals & Ribbons” under categories on left side).

⁶ *Restoring Valor*, SKYHORSE PUB., <http://skyhorsepublishing.com/titles/1135-9781626365513-restoring-valor> [<https://perma.cc/J25P-56JB>].

⁷ DOUG STERNER & PAT STERNER WITH MICHAEL MINK, *RESTORING VALOR: ONE COUPLE’S MISSION TO EXPOSE FRAUDULENT WAR HEROES AND PROTECT AMERICA’S MILITARY AWARDS SYSTEM* 32 (2014) [hereinafter STERNER ET AL.].

⁸ *Id.*

⁹ See Allen G. Breed, *AP: POW Benefit Claimants Exceed Recorded POWs*, USA TODAY (Apr. 12, 2009, 2:56 AM), http://usatoday30.usatoday.com/news/topstories/2009-04-11-2960821722_x.htm [<https://perma.cc/7ZLY-6VUG>] (“There are only 21 surviving POWs from the first Gulf War in 1991, the Department of Defense says. Yet the Department of Veterans Affairs is paying disability benefits to 286 service members it says were taken prisoner during that conflict, according to data released by VA to The Associated Press. A similar discrepancy arises with Vietnam POWs. Only 661 officially recognized prisoners returned from that war alive—and about 100 of those have since died, according to Defense figures. But 966 purported Vietnam POWs are getting disability payments, the VA told AP.”).

¹⁰ *United States v. Alvarez*, 132 S. Ct. 2537, 2558 (2012) (Alito, J., dissenting) (citing Edward Colimore, *Pinning Crime on Fake Heroes: N.J. Agent Helps Expose and Convict Those with Bogus U.S. Medals*, PHILA. INQUIRER, Feb. 11, 2004, at A01).

¹¹ STERNER ET AL., *supra* note 7, at 212 (citing John Crewdson, *Claims of Medals Amount to Stolen Valor*, CHI. TRIB. (Oct. 26, 2008, 1:53 AM), <http://www.chicagotribune.com/news/chi-valor-oct25-story.html> [<https://perma.cc/BK2R-CDXD>]).

¹² *Stolen Valor*, YOUTUBE (Jan. 20, 2012), <https://www.youtube.com/channel/UCGDj7TypwdmUIR9K2Owki1g/about>.

allegedly receiving military discounts on his purchases.¹³ The three-minute YouTube video depicts Berk, who had legitimately earned a Purple Heart for his service in Afghanistan, using his iPhone to record his questioning of Yetman, who stumbled over answers to simple questions regarding his current rank, duty station, and why his uniform patches were either misplaced, missing, or impossible to have earned for his age.¹⁴ According to the executive director of the National Infantry Association at Fort Benning, Georgia, Yetman was not in the U.S. Army database that includes records of all active duty, reservist, and recently retired soldiers, including Army Rangers.¹⁵

Specifically, one aspect of Yetman's uniform—that Berk questioned him about—constitutes a violation of the Stolen Valor Act of 2013. Yetman wore three Combat Infantryman Badges (CIBs), which he claimed were awarded to him for his service in Iraq and two different tours in Afghanistan.¹⁶ Yet, these badges actually represent that he would have needed to personally fight in active combat in three different wars.¹⁷ This represents a violation of the Stolen Valor Act of 2013, which criminalizes misrepresentation of oneself as receiving one of a delineated list of honorary medals, including the CIB, with the intent to obtain a tangible benefit.¹⁸ Yet, no criminal charges have been brought against Yetman for his blatant public misrepresentation that has been featured on social media and nearly every large news network.¹⁹

¹³ Stolen Valor, *Veteran of 2/506th Calls Out Fake Ranger at Oxford Valley Mall*, YOUTUBE (Nov. 28, 2014), <https://www.youtube.com/watch?v=sOj07ClhEi8>.

¹⁴ *Id.*; see also *Hero Veteran Calls Out Fake Soldier on Video*, FOXNEWS.COM (Dec. 2, 2014), <http://video.foxnews.com/v/3919115724001/hero-veteran-calls-out-fake-soldier-on-video/#sp=show-clips> [<https://perma.cc/3949-WYWZ>] (depicting Berk explaining a service member would need to serve in three different wars to earn some of Yetman's badges).

¹⁵ Jo Ciavaglia, *Man at Center of Stolen Valor Case Once Impersonated Dead Cop*, MORNING CALL (Dec. 3, 2014, 5:56 PM), <http://www.mcall.com/news/breaking/mc-pa-fake-army-ranger-impersonated-cop-in-2003-20141203-story.html> [<https://perma.cc/46DL-MTY5>].

¹⁶ Stolen Valor, *supra* note 13.

¹⁷ U.S. Army, *Combat Infantryman Badge*, ARMY.MIL, <http://www.army.mil/symbols/CombatBadges/infantry.html> [<https://perma.cc/9P7F-4N6B>].

¹⁸ Stolen Valor Act of 2013, 18 U.S.C. § 704 (Supp. I) (“Whoever, with intent to obtain money, property, or other tangible benefit, fraudulently holds oneself out to be a recipient of a decoration or medal described in subsection (c)(2) or (d) shall be fined under this title, imprisoned not more than one year, or both. . . . (d) Enhanced Penalty for Offenses Involving Certain Other Medals. . . . Combat badge defined. - In this subsection, the term ‘combat badge’ means a Combat Infantryman’s Badge . . .”).

¹⁹ See, e.g., Johnny Dodd, *Military Posers Are ‘An Epidemic,’ Says Soldier Who Outs Them*, PEOPLE (Dec. 22, 2014, 10:10 AM), <http://www.people.com/crime/military-posers-an-epidemic-says-soldier-who-outs-them/> [<https://perma.cc/76XQ-CHBG>]; Kyle Jahner, *Congressman: Investigate Alleged Fake Ranger*, USA TODAY (Dec. 4, 2014, 10:32 AM), <http://www.usatoday.com/story/news/nation/2014/12/04/fake-ranger-congressman-investigation/19884179/> [<https://perma.cc/6YUA-T3E4>]; *VIDEO: Vet Calls Out Man at Mall, Accuses Him of Posing as Army Ranger*, FOXNEWS INSIDER (Dec. 2, 2014, 8:37 AM), <http://insider.foxnews.com/2014/12/02/video-army-vet-ryan-berk-angrily-calls-out-phony-army-ranger-pennsylvania-mall> [<https://perma.cc/E2RQ-UQDF>].

Sean Yetman is by far not the worst case of stolen valor when compared to others who have claimed to be recipients of more prestigious honors, such as the Medal of Honor, America's highest military honor, or others who have claimed to commit heroic acts such as capturing Saddam Hussein,²⁰ or being a member of the Navy SEAL team that killed Osama Bin Laden.²¹ Even politicians, congressmen, and judges have attempted to use false claims of admirable military service both to get elected and to advance their careers.²²

Congress initially attempted to combat stolen valor in 2005 by enacting The Stolen Valor Act of 2005, which criminalized the act of lying about military service, either verbally or in writing.²³ That Act was deemed unconstitutional by the U.S. Supreme Court in *United States v. Alvarez* in 2012.²⁴ Continuing to recognize both the legitimacy of the problem and the need for an act to criminalize this deceptive behavior, in 2013 President Obama signed into law an amended version of the Stolen Valor Act.²⁵ The 2013 Stolen Valor Act criminalizes the fraudulent acts of those who misrepresent themselves as recipients of certain prestigious military awards for the purposes of obtaining "money, property, or other tangible benefit."²⁶ Specifically, the Act is limited to misrepresentations about the Medal of Honor, Navy Cross, Air Force Cross, Silver Star, Purple Heart, and combat badges.²⁷

The problem is that, although the Stolen Valor Act of 2013 is constitutional, there have been only two arrests and prosecutions for fraudulent representation under

²⁰ See STERNER ET AL., *supra* note 7, at xi, xiv (describing in detail how Gilbert Velasquez misled his local paper to run a front page story detailing, among other false stories, how Velasquez was the one who found Saddam Hussein in a pit in Tikrit, Iraq, and all of his extensive heroic and life-saving actions that allegedly led to him being awarded the Silver Star, Distinguished Service Cross. Doug Sterner quickly determined that nearly every word of Velasquez's story "simply could not be true.").

²¹ Matt Gutman, Chris Kilmer & Lauren Effron, *Exposing a Navy SEAL Imposter: How A.J. Dicken Was Found to Be a Fake*, ABC NEWS (Jan. 3, 2014), <http://abcnews.go.com/US/exposing-navy-seal-imposter-aj-dicken-found-fake/story?id=21403794> [<https://perma.cc/MTE6-5RCU>].

²² STERNER ET AL., *supra* note 7, at 14; Shaun Kenney, *Gary McCollum's Stolen Valor*, BEARING DRIFT (Sept. 18, 2015), <http://bearingdrift.com/2015/09/18/gary-mccollums-stolen-valor/> [<https://perma.cc/75LN-7Y7F>]; Ron Dickey, *Mississippi Candidate for Congress Lies About Being a Green Beret*, GUARDIAN VALOR, <http://guardianofvalor.com/ron-dickey-mississippi-candidate-congress-lies-green-beret/> [<https://perma.cc/LX7N-G68V>].

²³ Stolen Valor Act of 2005, 18 U.S.C. § 704 (2006), *invalidated by* *United States v. Alvarez*, 132 S. Ct. 2537 (2012) (plurality opinion), *amended by* Stolen Valor Act of 2013, 18 U.S.C. § 704 (Supp. I).

²⁴ 132 S. Ct. 2537, 2551 (2012) (plurality opinion).

²⁵ Lee Ferran, *Obama Signs Stolen Valor Act into Law*, ABC NEWS (June 3, 2013), <http://abcnews.go.com/blogs/headlines/2013/06/obama-signs-stolen-valor-act-into-law/> [<https://perma.cc/J8NK-PU6K>].

²⁶ *Id.*

²⁷ Stolen Valor Act of 2013, 18 U.S.C. § 704 (2012 & Supp. I 2013) (amending Stolen Valor Act of 2005, 18 U.S.C. § 704 (2006)).

the new act, leaving a growing atmosphere of vigilante veterans exposing imposters via YouTube and social media in an effort to substitute public shaming for legitimate criminal penalties that should be enforced against this behavior.²⁸ The U.S. Supreme Court even seemed to endorse this behavior as an adequate remedy for stolen valor by stating that “[the government] has not shown, and cannot show, why counterspeech would not suffice to achieve its interest.”²⁹ However, these veteran-imposter encounters are increasingly leading to violence³⁰ and instances of false stolen valor accusations against actual veterans.³¹ For example, a false accusation occurred in June 2015 when a police officer publicly humiliated a seventy-five-year-old marine veteran in a false stolen valor confrontation.³² In response to this false stolen valor incident, Doug Sterner, who is considered a stolen valor expert, told the Washington Post, “[t]here is a vigilante mentality right now in a lot of these veterans circles which is leading to—I just call it what it is . . . ’ bullying.”³³

Additionally, the lack of enforcement of the federal Act has led to twenty-two states enacting or proposing legislation to take enforcement into their own hands.³⁴

²⁸ See Joshua Kellogg, *Man Pleads Guilty to Stolen Valor Charge*, FARMINGTON DAILY TIMES (Feb. 8, 2017), <http://www.daily-times.com/story/news/crime/2017/02/08/man-pleads-guilty-stolen-valor-charge/97645398/> [<https://perma.cc/A6PC-NZ78>] (explaining the case of a man who was under investigation for a firearms charge when he falsely stated to federal agents that he was a combat veteran who previously received a purple heart); Janis Mara, *San Rafael Man Who Lied About Purple Heart Accepts Plea Deal*, MARINIJ.COM (July 28, 2016), <http://www.marinij.com/article/NO/20160728/NEWS/160729799> [<https://perma.cc/LH9Z-ZLU6>] (discussing a man who accepted a plea deal after using a fake Purple Heart to obtain about \$23,000 in donations for his business); see also U.S. Att’y’s Office S. Dist. of Iowa, *Davenport Man Sentenced for Stolen Valor Act Conviction*, U.S. DEP’T JUST. (Aug. 31, 2016), <https://www.justice.gov/usao-sdia/pr/davenport-man-sentenced-stolen-valor-act-conviction> [<http://perma.cc/SZK9-QKNF>] (discussing seventy-year-old man who pled guilty to a violation of the Stolen Valor Act where he purchased the Silver Star, Purple Heart, and CIB without proper authorization, and was sentenced to five years probation and a \$5,000 fine. This is a separate part of the Act from subsection (b), which criminalizes false representation.).

²⁹ *Alvarez*, 132 S. Ct. at 2550.

³⁰ Warner Todd Huston, *Stolen Valor VIDEO: Man Pretending to Be a Navy SEAL Picks the Wrong Guys to Scam—Two Army Rangers!*, RIGHT WING NEWS (Feb. 3, 2015), <http://rightwingnews.com/culture/stolen-valor-video-man-pretending-navy-seal-picks-wrong-guys-scam-two-army-rangers/> [<https://perma.cc/AN6T-2DFR>] [hereinafter *Man Pretending to Be a Navy SEAL*]; USMC Life, *Fallujah Marine Veteran Beaten Over Mistaken Case of Stolen Valor*, USMC LIFE (Oct. 29, 2015), <http://usmclife.com/2015/10/fallujah-marine-veteran-beaten-over-mistaken-case-of-stolen-valor/> [<https://perma.cc/F9JY-3TBE>] [hereinafter *Marine Veteran Beaten*].

³¹ Sarah Larimer, *The Problem with Calling Out ‘Stolen Valor’: What if You’re Wrong?*, WASH. POST (June 5, 2015), <https://www.washingtonpost.com/news/checkpoint/wp/2015/06/05/the-problem-with-publicly-accusing-someone-of-stolen-valor-what-if-youre-wrong/> [<https://perma.cc/WV5S-SMX5>] [hereinafter *The Problem with Calling Out*].

³² *Id.*

³³ *Id.* (quoting Doug Sterner).

³⁴ See *infra* notes 129–31 and accompanying text.

Recently, there has been a sharp increase among states passing these laws. Between 2014 and 2015, five state stolen valor laws were enacted; in 2016 one state enacted a stolen valor law; and in 2015 eight states proposed stolen valor legislation.³⁵ In fact, some states are so serious about their commitment to taking up the slack of federal enforcement against stolen valor that one state—New Jersey—has already arrested a stolen valor offender on Veteran’s Day 2015, less than one month after its stolen valor law was passed, and his case is currently pending.³⁶

This Note analyzes the constitutionality of the current fraudulent representation section of the Stolen Valor Act of 2013 under two different interpretations: an act criminalizing fraud and an act limiting commercial speech. Further, this Note proposes solutions to the current non-enforcement of the federal Act by suggesting: (1) that the current Stolen Valor Act of 2013 be redrafted to mirror the current federal criminal impersonation statute utilized to prosecute police impersonation; or (2) the federal Act be redrafted to mirror one of the constitutional state stolen valor laws that allows for more effective enforcement.

I. HISTORY OF STOLEN VALOR

A. History of the First Amendment and False Statements

The iconic text of the First Amendment resounds that “Congress shall make no law . . . abridging the freedom of speech[.]”³⁷ In accordance with the words of the First Amendment, the U.S. Supreme Court subjects any government action that seeks to regulate or restrict speech based on its content to the highest possible standard of review—strict scrutiny.³⁸

However, the protection of the First Amendment is not absolute because “the First Amendment was not intended to protect every utterance.”³⁹ Although the U.S. Supreme Court has found that “[c]ontent-based regulations are presumptively invalid[.]”⁴⁰ the Court has also upheld certain content-based restrictions on speech, which are “of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality.”⁴¹ These limited categories of speech that fall outside the protection of the First Amendment include

³⁵ See *infra* notes 129–31 and accompanying text.

³⁶ *POLICE: NJ Man Impersonated Soldier on Veterans Day*, 6ABC (Nov. 12, 2015), <http://6abc.com/news/police-nj-man-impersonated-soldier-on-veterans-day/1080993/> [<https://perma.cc/R3H8-3CCR>] [hereinafter *NJ Impersonation*].

³⁷ U.S. CONST. amend. I.

³⁸ *Reed v. Town of Gilbert*, 135 S. Ct. 2218, 2228 (2015).

³⁹ *Roth v. United States*, 354 U.S. 476, 483 (1957).

⁴⁰ *R. A. V. v. City of St. Paul*, 505 U.S. 377, 382 (1992) (citing *Simon & Schuster, Inc. v. Members of N.Y. State Crime Victims Bd.*, 502 U.S. 105, 115 (1991)).

⁴¹ *Chaplinsky v. New Hampshire*, 315 U.S. 568, 572 (1942).

the following: incitement,⁴² obscenity,⁴³ defamation,⁴⁴ speech integral to criminal conduct,⁴⁵ fighting words,⁴⁶ child pornography,⁴⁷ true threats,⁴⁸ “speech presenting some grave and imminent threat the government has the power to prevent,”⁴⁹ and fraud.⁵⁰

In addition to these limited categories, “[t]ime and again, [the U.S. Supreme] Court has recognized that as a general matter false factual statements possess no intrinsic First Amendment value.”⁵¹ Indeed, America has a long history of criminalizing false statements of fact, as noted in *Gertz v. Robert Welch, Inc.*⁵²:

10 of the 14 States that had ratified the Constitution by 1792 had themselves provided constitutional guarantees for free expression, and 13 of the 14 nevertheless provided for the prosecution of libels. Prior to the Revolution, the American Colonies had adopted the common law of libel. . . . Seditious libel was punished as a contempt by the colonial legislatures and as a criminal offense in the colonial courts.⁵³

Further, the U.S. Supreme Court’s history of finding that false statements of fact exist outside of the protection of the First Amendment arguably began in 1919 with

⁴² See *Ashcroft v. Free Speech Coal.*, 535 U.S. 234, 253 (2002).

⁴³ See, e.g., *Miller v. California*, 413 U.S. 15, 23 (1973); see also *Roth*, 354 U.S. at 476; *Chaplinsky*, 315 U.S. at 571–72.

⁴⁴ See, e.g., *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974); *N.Y. Times Co. v. Sullivan*, 376 U.S. 254 (1964); *Beauharnais v. Illinois*, 343 U.S. 250 (1952).

⁴⁵ *Ashcroft*, 535 U.S. at 253.

⁴⁶ *Chaplinsky*, 315 U.S. at 571–72.

⁴⁷ See generally *Ashcroft*, 535 U.S. 234; *New York v. Ferber*, 458 U.S. 747 (1982).

⁴⁸ *Virginia v. Black*, 538 U.S. 343, 359–60 (2003).

⁴⁹ *United States v. Alvarez*, 132 S. Ct. 2537, 2544 (2012) (plurality opinion) (citation omitted).

⁵⁰ *Id.*

⁵¹ *Id.* at 2560 (Alito, J., dissenting) (citing, *inter alia*, *BE&K Constr. Co. v. NLRB*, 536 U.S. 516, 531 (2002) (“[F]alse statements may be unprotected for their own sake.”); *Hustler Magazine, Inc. v. Falwell*, 485 U.S. 46, 52 (1988) (“False statements of fact are particularly valueless; they interfere with the truth-seeking function of the marketplace of ideas, and they cause damage to an individual’s reputation that cannot easily be repaired by counterspeech, however persuasive or effective” (citation omitted)); *Keeton v. Hustler Magazine, Inc.*, 465 U.S. 770, 776 (1984) (“There is ‘no constitutional value in false statements of fact.’” (citation omitted)); *Bill Johnson’s Rests., Inc. v. NLRB*, 461 U.S. 731, 743 (1983) (“[F]alse statements are not immunized by the First Amendment right to freedom of speech.”); *Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc.*, 425 U.S. 748, 771 (1976) (“Untruthful speech, commercial or otherwise, has never been protected for its own sake.” (citations omitted))).

⁵² 418 U.S. 323 (1974).

⁵³ *Id.* at 380–81 (White, J., dissenting) (footnotes omitted) (citing *Roth v. United States*, 354 U.S. 476, 482 (1957)).

Schenck v. United States,⁵⁴ where the Court, and specifically Justice Holmes, famously determined that even “[t]he most stringent protection of free speech would not protect a man in falsely shouting fire in a theater and causing a panic.”⁵⁵ In other words, the First Amendment would not protect someone shouting a false statement that created a “clear and present danger.”⁵⁶

Next, in 1942 in *Chaplinsky v. New Hampshire*,⁵⁷ the Court reasoned that freedom of speech

is not absolute at all times and under all circumstances. There are certain well-defined and narrowly limited classes of speech, the prevention and punishment of which have never been thought to raise any Constitutional problem. These include the lewd and obscene, the profane, the libelous, and the insulting or ‘fighting’ words.⁵⁸

In this case, the Court listed libel, or false speech that wrongly defames a person’s reputation, as a category of unprotected speech.⁵⁹

Later, in 1964, the Court further expanded the exception for libelous speech in *New York Times Co. v. Sullivan*⁶⁰ and *Garrison v. Louisiana*,⁶¹ two cases involving the defamation of public figures.⁶² In *New York Times Co.*, the Court emphasized that “erroneous statement[s] [are] inevitable in free debate, and that [they] must be protected if the freedoms of expression are to have the ‘breathing space’ that they ‘need . . . to survive.’”⁶³ Based on this reasoning, the Court held that for a public official to successfully recover in a defamation or libel claim, that public figure must “prove[] that the statement was made with ‘actual malice[,]’ . . . [meaning] knowledge that it was false or [made] with reckless disregard of whether it was false or not.”⁶⁴ Within the same year as *New York Times Co.*, the Court also decided *Garrison v.*

⁵⁴ 249 U.S. 47 (1919).

⁵⁵ *Id.* at 52.

⁵⁶ *Id.*; see also *United States v. Alvarez*, 617 F.3d 1198, 1214 (9th Cir. 2010) (“Although *Schenck* was concerned with seditious speech, it is particularly instructive here, given that the ‘clear and present danger’ test emerged from the ‘fire in a theater’ hypothetical, *which is quintessentially about a false statement of fact.*” (emphasis added)), *aff’d*, 132 S. Ct. 2537 (2012) (plurality opinion).

⁵⁷ 315 U.S. 568 (1942).

⁵⁸ *Id.* at 571–72 (footnotes omitted).

⁵⁹ *Id.*

⁶⁰ 376 U.S. 254 (1964).

⁶¹ 379 U.S. 64 (1964).

⁶² *Garrison*, 379 U.S. at 67; *New York Times Co.*, 376 U.S. at 256.

⁶³ *New York Times Co.*, 376 U.S. at 271–72 (quoting *NAACP v. Button*, 371 U.S. 415, 433 (1963)).

⁶⁴ *Id.* at 279–80.

Louisiana, in which the Court extended the “actual malice” requirement to criminal defamation statutes, and reasoned that “the use of the known lie as a tool is at once at odds with the premises of democratic government and with the orderly manner in which economic, social, or political change is to be effected.”⁶⁵

Ten years later, in 1974, the Court decided *Gertz v. Robert Welch, Inc.*,⁶⁶ which involved defamation through false statements about private individuals.⁶⁷ In *Gertz*, although the Court determined that the “actual malice” requirement utilized for public figures would not be extended to the cases of defamation of private individuals,⁶⁸ the Court did reason that “there is no constitutional value in false statements of fact[.]”⁶⁹ and that “the erroneous statement of fact is not worthy of constitutional protection.”⁷⁰ The Court reasoned that it needed to “protect some falsehood in order to protect speech that matters[.]”⁷¹ but it found that the “false statements of fact” in that case were not protected by the First Amendment because defaming lies have such low societal value that “[t]hey belong to that category of utterances which ‘are no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality.’”⁷²

The Court’s finding of slight societal value, and therefore little need for First Amendment protection, continued to be referenced throughout later libel cases. For example, in *Bill Johnson’s Restaurants, Inc. v. NLRB*,⁷³ the Court stated “false statements are not immunized by the First Amendment right to freedom of speech.”⁷⁴ And, in *Hustler Magazine, Inc. v. Falwell*,⁷⁵ the Court reasoned that “[f]alse statements of fact are particularly valueless; they interfere with the truth-seeking function of the marketplace of ideas, and they cause damage to an individual’s reputation that cannot easily be repaired by counterspeech, however persuasive or effective.”⁷⁶

⁶⁵ *Garrison*, 379 U.S. at 74–75.

⁶⁶ 418 U.S. 323 (1974).

⁶⁷ *Id.* at 325.

⁶⁸ *Id.* at 342–43.

⁶⁹ *Id.* at 340. “Neither the intentional lie nor the careless error materially advances society’s interest in ‘uninhibited, robust, and wide-open’ debate on public issues. They belong to that category of utterances which ‘are no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality.’” *Id.* (citations omitted).

⁷⁰ *Id.*; see also ERWIN CHERMERINSKY, CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES 1051 (3d ed. 2006) (“A public figure can recover for defamation only by meeting the *New York Times* standard; . . . a private figure can recover compensatory damages for defamation by proving falsity of the statement and negligence.”).

⁷¹ *Gertz*, 418 U.S. at 341.

⁷² *Id.* at 340 (quoting *Chaplinsky v. New Hampshire*, 315 U.S. 568, 572 (1942)).

⁷³ 461 U.S. 731 (1983).

⁷⁴ *Id.* at 743 (citing *Herbert v. Lando*, 441 U.S. 153, 171 (1979); *Gertz*, 418 U.S. at 340).

⁷⁵ 485 U.S. 46 (1988).

⁷⁶ *Id.* at 52 (citing *Gertz*, 418 U.S. at 340, 344 n.9).

In addition to false statements that are defamatory in nature, fraudulent speech also has been repeatedly cited by the Court as being among the “narrowly defined” categories of speech that are unprotected by the First Amendment.⁷⁷

Although the foregoing U.S. Supreme Court precedent tended to show a trend of not extending First Amendment protection to purely false statements, this trajectory changed abruptly when the Court decided *United States v. Alvarez* in 2012.⁷⁸

B. Stolen Valor Act of 2005

Prior to the Stolen Valor Act of 2005, it was only a crime to physically wear an unearned medal of valor.⁷⁹ In response to a growing number of cases where law enforcement was powerless to prosecute unless an individual was *physically* wearing a medal,⁸⁰ Congress unanimously passed the Stolen Valor Act of 2005.⁸¹ This Act represented an initial attempt to safeguard the legitimacy of the U.S. Military’s awards for true valor. The controversial portions of the Act read as follows:

(b) FALSE CLAIMS ABOUT RECEIPT OF MILITARY DECORATIONS OR MEDALS. Whoever falsely represents himself or herself, verbally or in writing, to have been awarded any decoration or medal authorized by Congress for the Armed Forces of the United States, any of the service medals or badges awarded to the members of such forces, the ribbon, button, or rosette of any such badge, decoration, or medal, or any colorable imitation of such item shall be fined under this title, imprisoned not more than six months, or both.⁸²

⁷⁷ See, e.g., *Donaldson v. Read Magazine, Inc.*, 333 U.S. 178, 190 (1948) (“[Congress’s power] to protect people against fraud . . . has always been recognized in this country and is firmly established.”); *Schneider v. New Jersey*, 308 U.S. 147, 164 (1939) (“Frauds may be denounced as offenses and punished by law.”).

⁷⁸ 132 S. Ct. 2537, 2556–57 (2012) (Alito, J., dissenting).

⁷⁹ STERNER ET AL., *supra* note 7, at 47.

⁸⁰ *Id.* at 176. In one particularly disturbing case, Doug Sterner described in his book how District Judge Michael O’Brien prominently displayed “two Medals of Honor . . . in a frame on the wall of his courtroom” and “would quickly tell anyone who asked that he had earned both during his service in Vietnam.” *Id.* at 14. Because this happened before the passage of the Stolen Valor Act of 2005, “under existing law, [Judge O’Brien] was in violation of no statute that could remove him [from the bench] or otherwise punish him for his act of stolen valor.” *Id.*

⁸¹ *Id.* at 35, 37.

⁸² Stolen Valor Act of 2005, 18 U.S.C. § 704(b) (2006), *invalidated by* *United States v. Alvarez*, 132 S. Ct. 2537 (2012) (plurality opinion), *amended by* Stolen Valor Act of 2013, 18 U.S.C. § 704 (2012 & Supp. I 2013).

C. United States v. Alvarez—“*The Constitutional Right to Lie*”⁸³

“I’m a retired marine of 25 years. I retired in the year 2001. Back in 1987, I was awarded the Congressional Medal of Honor. I got wounded many times by the same guy. I’m still around.”⁸⁴

This is how Xavier Alvarez introduced himself on July 23, 2007, at a board meeting shortly after being elected to serve as the Director of the Three Valley Water District Board.⁸⁵ However, Alvarez never served one day in the military as a marine, or as an active duty service member in any of the branches of the U.S. Armed forces.⁸⁶ Therefore, he was never even eligible to earn the Congressional Medal of Honor. As the Ninth Circuit reasoned, “with the exception of ‘I’m still around,’ his self-introduction was nothing but a series of bizarre lies”⁸⁷ and that “Alvarez makes a hobby of lying about himself to make people think he is ‘a psycho from a mental ward with Rambo stories.’”⁸⁸

After the FBI obtained a recording of the Water District Board Meeting, Alvarez was indicted on two counts under 18 U.S.C. § 704(b), (c)(1) (2006) for “falsely represent[ing] verbally that he had been awarded the Congressional Medal of Honor when, in truth and as [he] knew, he had not received the Congressional Medal of Honor.”⁸⁹ Strikingly, Alvarez was the first person, as of 2010, to be charged and convicted under the Stolen Valor Act of 2005.⁹⁰

Alvarez pled guilty and reserved his right to appeal the First Amendment question.⁹¹ Alvarez appealed the constitutional issue to the U.S. Court of Appeals for the Ninth Circuit, which held that the Stolen Valor Act, specifically 18 U.S.C. § 704(b) and (c) were “facially invalid under the First Amendment, and [were] unconstitutionally

⁸³ STERNER ET AL., *supra* note 7, at 176.

⁸⁴ United States v. Alvarez, 617 F.3d 1198, 1200 (9th Cir. 2010) (quoting Xavier Alvarez), *aff’d*, 132 S. Ct. 2537 (2012) (plurality opinion).

⁸⁵ *Id.*

⁸⁶ *Id.* at 1200–01.

⁸⁷ *Id.* at 1201.

⁸⁸ *Id.* “Alvarez [said] that he won the Medal of Honor for rescuing the American Ambassador during the Iranian hostage crisis, and that he had been shot in the back as he returned to the embassy to save the American flag. . . . [He] reportedly told another woman that he was a Vietnam veteran helicopter pilot who had been shot down but then, with the help of his buddies, was able to get the chopper back into the sky. . . . Alvarez has [also] claimed to have played hockey for the Detroit Red Wings, to have worked as a police officer (who was fired for using excessive force), and to have been secretly married to a Mexican starlet.” *Id.*

⁸⁹ *Id.* (quoting 18 U.S.C. § 704(b) (2006), *invalidated by* United States v. Alvarez, 132 S. Ct. 2537 (2012) (plurality opinion)).

⁹⁰ *Id.* (showing that the Stolen Valor Act of 2005 was rarely enforced, similar to the current 2013 Act).

⁹¹ *Id.*

applied to make a criminal out of a man who was proven to be nothing more than a liar.”⁹² The U.S. Supreme Court granted certiorari and published a plurality opinion.⁹³

1. Plurality Opinion—Justice Kennedy

Authoring the plurality opinion, Justice Kennedy held that the Stolen Valor Act of 2005 constituted an unconstitutional content-based restriction on free speech.⁹⁴ Justice Kennedy acknowledged that although the Court had previously reasoned, for example, that “‘false statements of fact are particularly valueless [because] they interfere with the truth-seeking function of the marketplace of ideas’ and that false statements ‘are not protected by the First Amendment in the same manner as truthful statements,’” that did not lead to the conclusion that intentional false statements are unequivocally unprotected by the First Amendment.⁹⁵ Justice Kennedy stated that those previous quotations from the Court, which appear to imply a lessened form of constitutional protection for false statements, “all derive from cases discussing defamation, fraud, or some other legally cognizable harm associated with a false statement,” and “[i]n those decisions the falsity of the speech at issue was not . . . determinative” to the Court’s analysis.⁹⁶ Justice Kennedy also looked to “permissible” federal statutes that criminalize false speech, including: 18 U.S.C. § 1001 (2012), which prohibits false statements made to the government; 18 U.S.C. § 1623 (2012), and its state-law equivalents, prohibiting perjury; 18 U.S.C. § 709 (2012), which punishes false representations that one is speaking on behalf of the government; and 18 U.S.C. § 912 (2012), which criminalizes misrepresentations that an individual is an officer of the government.⁹⁷ He found that each of these statutes had aspects that made their application sufficiently narrower than the Stolen Valor Act of 2005.⁹⁸ For example, Justice Kennedy focused on the fact that 18 U.S.C. § 1001 was limited only to false statements to “Government officials, in communications concerning official matters,” perjury laws prohibit false statements made under oath, and “[s]tatutes that prohibit falsely representing that one is speaking on behalf of the Government, or that prohibit impersonating a Government officer . . . protect the integrity of the Government processes.”⁹⁹

Ultimately, Justice Kennedy found the Stolen Valor Act of 2005 unconstitutional because it failed to pass the Court’s strict scrutiny analysis,¹⁰⁰ which requires that a law “is justified by a compelling government interest[,] . . . is narrowly drawn

⁹² *Id.* at 1217.

⁹³ *Alvarez*, 132 S. Ct. at 2541.

⁹⁴ *Id.* at 2543.

⁹⁵ *Id.* at 2545 (first quoting *Hustler Magazine, Inc. v. Falwell*, 485 U.S. 46, 52 (1988); then quoting *Brown v. Hartlage*, 456 U.S. 45, 60–61 (1982)).

⁹⁶ *Id.*

⁹⁷ *Id.* at 2545–46.

⁹⁸ *See id.* at 2546.

⁹⁹ *Id.*

¹⁰⁰ *Id.* at 2549–51.

to serve that interest[,] . . . and the curtailment of free speech [is] actually necessary to the solution.”¹⁰¹ Justice Kennedy determined that the Act failed this analysis for two reasons.¹⁰² First, the Stolen Valor Act did not possess a sufficient causal link between the “Government’s compelling interest” in “protecting the integrity of the military honors system and the Act’s restriction on the false claims of liars” to prove that the law was “actually necessary.”¹⁰³ This is because the Government provided “no evidence to support its claim that the public’s general perception of military awards is diluted by false claims, such as those made by Alvarez.”¹⁰⁴ Second, furthering the Court’s finding that the Stolen Valor Act of 2005 was not “actually necessary,” the Government also failed to prove that “counterspeech” and public outrage in reaction to false statements of military valor “would not suffice to achieve [the Government’s compelling] interest” in protecting the integrity of America’s military awards.¹⁰⁵

Despite the fact that Justice Kennedy found the Stolen Valor Act of 2005 unconstitutional, his plurality opinion implied that the law could be amended to fix its unconstitutional breadth.¹⁰⁶ Specifically, Justice Kennedy found that the fatal flaw of the Act was that it “applie[d] to a false statement made at any time, in any place, to any person. . . . And it does so entirely without regard to whether the lie was made for the purpose of material gain.”¹⁰⁷ He continued that “[w]here false claims are made to effect a fraud or secure moneys or other valuable considerations, say offers of employment, it is well established that the Government may restrict speech without affronting the First Amendment.”¹⁰⁸ With this line of reasoning, Justice Kennedy was suggesting that the Act would be constitutional if it had focused on limiting fraudulent speech.

2. Concurring Opinion—Justice Breyer

Justice Breyer drew an analogy between stolen valor and trademark infringement¹⁰⁹—reasoning that “[t]rademarks identify the source of a good; and infringement causes harm by causing confusion among potential customers (about the source) and thereby diluting the value of the mark to its owner, to consumers, and to the economy.”¹¹⁰ And comparatively, “a false claim of possession of a medal or other honor creates confusion about who is entitled to wear it, thus diluting its value to those who have earned it, to their families, and to their country.”¹¹¹ However, trademark

¹⁰¹ *Brown v. Entm’t Merchs. Ass’n*, 564 U.S. 786, 799 (2011) (citation omitted).

¹⁰² *Alvarez*, 132 S. Ct. 2549–51.

¹⁰³ *Id.* at 2549.

¹⁰⁴ *Id.* (citation omitted).

¹⁰⁵ *Id.*

¹⁰⁶ *See id.* at 2547.

¹⁰⁷ *Id.* (citation omitted).

¹⁰⁸ *Id.* (citing *Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc.*, 425 U.S. 748, 771 (1976)).

¹⁰⁹ *Id.* at 2554 (Breyer, J., concurring in the judgment).

¹¹⁰ *Id.*

¹¹¹ *Id.*

statutes require a proof of injury that “narrow[s] the statute to a subset of lies where specific harm is more likely to occur[.]”¹¹² thereby distinguishing them from the Stolen Valor Act of 2005, which Justice Breyer found to “lack[] any such limiting features.”¹¹³

Justice Breyer was concerned that the Act was written so broadly that it could apply to virtually any context including private or political settings. Additionally, because so many military awards were covered under the Act, Breyer reasoned that an individual could make a careless, unintentional, false statement and still be held liable for it.¹¹⁴ As a proposed solution, Breyer called on Congress to create a “more finely tailored statute” by narrowing the scope of the Act to apply to a limited amount of military awards that “warrant greater protection than others[.]” and to limit the application of the Act to instances where false statements caused specific or material harm, “or [to] contexts where such lies are most likely to cause harm.”¹¹⁵

Thus, because the Act lacked these limiting features, Justice Breyer found the Stolen Valor Act of 2005 unconstitutional and unable to satisfy even intermediate scrutiny.¹¹⁶

3. Dissenting Opinion—Justice Alito

Justice Alito began his powerful dissent by stating:

Only the bravest of the brave are awarded the Congressional Medal of Honor, but the Court today holds that every American has a constitutional right to claim to have received this singular award. The Court strikes down the Stolen Valor Act of 2005, which was enacted to stem an epidemic of false claims about military decorations. These lies, Congress reasonably concluded, were undermining our country’s system of military honors and inflicting real harm on actual medal recipients and their families.¹¹⁷

Justice Alito further explained that this decision illustrates a departure from the Court’s repeated reasoning and holdings that “the right to free speech does not protect false factual statements that inflict real harm and serve no legitimate interest.”¹¹⁸

¹¹² *Id.* at 2555.

¹¹³ *Id.*

¹¹⁴ *Id.*

¹¹⁵ *Id.* at 2556.

¹¹⁶ *Id.* Justice Breyer applied intermediate scrutiny because “false factual statements are less likely than are true factual statements to make a valuable contribution to the marketplace of ideas. And the government often has good reasons to prohibit such false speech.” *Id.* at 2552 (citation omitted).

¹¹⁷ *Id.* at 2556 (Alito, J., dissenting).

¹¹⁸ *Id.* at 2557.

Justice Alito further pointed out five limits the Stolen Valor Act of 2005 possessed¹¹⁹ despite the other Justices' findings to the contrary. These limits included: (1) it applied only to the narrow category of false statements about "objective facts that can almost always be proved or disproved with near certainty[;]" (2) it concerned "facts that [were] squarely within the speaker's personal knowledge[;]" (3) a conviction under the Act would require a showing of "proof beyond a reasonable doubt that the speaker actually knew that the representation was false[;]" (4) the Act does not apply to "dramatic performances, satire, parody, hyperbole," etc.; and (5) the Act is viewpoint neutral because it "applies equally to all false statements, whether they tend to disparage or commend the Government, the military, or the system of military honors."¹²⁰

Justice Alito further drew an analogy between the Stolen Valor Act of 2005 and trademark law by stating that much like the existence of "cheap imitations of luxury goods" confuses purchasers of the originals, "the proliferation of false claims about military awards blurs the signal given out by the actual awards by making them seem more common than they really are, and this diluting effect harms the military by hampering its efforts to foster morale."¹²¹ He continued that "[s]urely it was reasonable for Congress to conclude that the goal of preserving the integrity of our country's top military honors is at least as worthy as that of protecting the prestige associated with fancy watches and designer handbags."¹²²

Justice Alito further attacked the plurality and concurrence by finding that they are essentially claiming that the Stolen Valor Act of 2005 was overbroad.¹²³ Yet, "to strike down a statute on the basis that it is overbroad, it is necessary to show that the statute's 'overbreadth [is] *substantial*, not only in an absolute sense, but also relative to [its] plainly legitimate sweep."¹²⁴

Justice Alito bolstered his dissent by referencing the fact that "there are more than 100 federal criminal statutes that punish false statements made in connection with areas of federal agency concern."¹²⁵ Based on a combination of U.S. Supreme Court precedent, the existence of such a significant amount of federal criminal statutes and the fact that "the Stolen Valor Act presents no risk at all that valuable speech will be suppressed[;]" Alito concluded that the Act should have been upheld.¹²⁶

D. Stolen Valor Act of 2013

Due to the ongoing recognition of the need for an act to criminalize stolen valor, Congress passed the Stolen Valor Act of 2013 within a year of the U.S. Supreme

¹¹⁹ *Id.*

¹²⁰ *Id.*

¹²¹ *Id.* at 2559.

¹²² *Id.* (citation omitted).

¹²³ *Id.*

¹²⁴ *Id.* at 2564 (quoting *United States v. Williams*, 553 U.S. 285, 292 (2008)).

¹²⁵ *Id.* at 2562 (citing *United States v. Wells*, 519 U.S. 482, 505–07 & nn.8–10 (1997) (Stevens, J., dissenting)).

¹²⁶ *Id.* at 2564.

Court decision in *Alvarez*.¹²⁷ Below is the amended text of the fraudulent representation section of the Act:

(b) FRAUDULENT REPRESENTATIONS ABOUT RECEIPT OF MILITARY DECORATIONS OR MEDALS.—Whoever, with intent to obtain money, property, or other tangible benefit, fraudulently holds oneself out to be a recipient of a decoration or medal described in subsection (c)(2) or (d) shall be fined under this title, imprisoned not more than one year, or both.¹²⁸

E. State Stolen Valor Laws

As a result of the under-enforced federal Stolen Valor Act of 2013, twenty-two states currently have enacted, or have pending, legislation criminalizing various forms of military impersonation.¹²⁹ Two states in particular have passed stolen valor legislation that both criminalizes a wider range of conduct and applies stronger penalties than the federal Act—New Jersey and Massachusetts.¹³⁰ Further, although state stolen valor laws vary among the states and are not identical to the federal Stolen Valor Act, most are effectively mirrored after it in criminalizing similar behavior in a similar manner.¹³¹ Therefore, the constitutional framework provided in

¹²⁷ Stolen Valor Act of 2013, 18 U.S.C. § 704 (2012 & Supp. I 2013).

¹²⁸ *Id.* (Subsections (c) and (d) omitted—these subsections describe that the protected medals are the Congressional Medal of Honor, the distinguished-service cross, the Navy cross, the Air Force cross, the silver star, the Purple Heart, a combat badge, “or any replacement or duplicate medal for such medal as authorized by law”).

¹²⁹ ALA. CODE § 13A-8-10.5 (2016); CAL. GOV’T CODE § 3003 (West 2016); CONN. GEN. STAT. ANN. § 53-378 (West 2016); DEL. CODE ANN. tit. 11, § 907C (West 2016); FLA. STAT. ANN. § 817.312 (West 2016); 20 ILL. COMP. STAT. ANN. 1805/101 (West 2016); IND. CODE ANN. § 35-43-5-22 (West 2016); KY. REV. STAT. ANN. § 434.444 (West 2016); ME. REV. STAT. ANN. tit. 17-A, § 354 (2016); MASS. GEN. LAWS ANN. ch. 272, § 106 (West 2016); MO. ANN. STAT. § 570.350 (West 2016); NEV. REV. STAT. ANN. § 205.412 (West 2015); N.J. STAT. ANN. § 38A:14-5 (West 2016); OKLA. STAT. ANN. tit. 72, § 6-1 (West 2016); S.C. CODE ANN. § 16-17-760 (2016); TEX. PENAL CODE § 32.54 (West 2015); WIS. STAT. ANN. § 946.78 (West 2016). Proposed legislation: H.B. 1466, 91st Gen. Assemb., Reg. Sess. (Ark. 2017); H.B. 4020, 98th Leg., Reg. Sess. (Mich. 2013); S.B. 5201, 238th Leg., Reg. Sess. (N.Y. 2015); A.B. 7244, 238th Leg., Reg. Sess. (N.Y. 2015); A.B. 8154, 238th Leg., Reg. Sess. (N.Y. 2015); S.B. 43, 199th Gen. Assemb., Reg. Sess. (Pa. 2015); H.B. 5999, 2015 Leg., Gen. Assemb., Reg. Sess. (R.I. 2015); H.B. 2015, 84th Leg., Reg. Sess. (Tex. 2015).

¹³⁰ See *supra* Section III.B for discussion.

¹³¹ See ALA. CODE § 13A-8-10.5 (2016); CAL. GOV’T CODE § 3003 (West 2016); CONN. GEN. STAT. ANN. § 53-378 (West 2016); DEL. CODE ANN. tit. 11, § 907C (West 2016); FLA. STAT. ANN. § 817.312 (West 2016); 20 ILL. COMP. STAT. ANN. 1805/101 (West 2016); KY. REV. STAT. ANN. § 434.444 (West 2016); ME. REV. STAT. ANN. tit. 17-A, § 354 (2016); MASS. GEN. LAWS ANN. ch. 272, § 106 (West 2016); MO. ANN. STAT. § 570.350 (West 2016); NEV. REV. STAT. ANN. § 205.412 (West 2015); N.J. STAT. ANN. § 38A:14-5 (West

this Note will be applicable to any future constitutional challenge to a state stolen valor law.

II. THE STOLEN VALOR ACT OF 2013 IS CONSTITUTIONAL WHEN ANALYZED AS EITHER CRIMINALIZING FRAUDULENT SPEECH OR LIMITING FALSE COMMERCIAL SPEECH, YET THE ACT REMAINS VIRTUALLY UNENFORCED BY THE FEDERAL GOVERNMENT AND IS LEFT TO BE POLICED BY PUBLIC SHAMING

A. The Stolen Valor Act of 2013 Is Constitutional

The current Stolen Valor Act is constitutional under two different interpretations. First, and primarily, the Act can be viewed as criminalizing fraudulent speech, which has consistently been held to be a category of speech outside of the protection of the First Amendment.¹³² Second, when an individual commits stolen valor by making false claims of “battlefield bravery,” it can be construed as a form of self-promotional commercial speech utilized for the purpose of economic gain, thereby qualifying the Act for a lower level of First Amendment scrutiny.

1. Stolen Valor Act of 2013 & *United States v. Swisher*

In addition to the Act’s controversial fraudulent representation section, the constitutionality of the Stolen Valor Act of 2005’s general subsection (a)¹³³ has also been challenged. For example, a recent Ninth Circuit case, *United States v. Swisher*,¹³⁴ held the 2005 version of 18 U.S.C. § 704(a) unconstitutional due to its prohibition of the mere wearing of “any decoration or medal authorized by Congress for the armed forces of the United States.”¹³⁵ The rationale the Ninth Circuit adopted in this case was that this section of the statute constituted a content-based restriction of speech that could not survive strict scrutiny due to the availability of less restrictive means for the government to meet its compelling objective.¹³⁶ However, the 2013 version of the Act removed the word “wears” from subsection (a) and now only criminalizes the actions of an individual who intentionally “purchases, attempts to

2016); S.C. CODE ANN. § 16-17-760 (2016); TEX. PENAL CODE § 32.54 (West 2015); WIS. STAT. ANN. § 946.78 (West 2016).

¹³² See *Illinois ex rel. Madigan v. Telemarketing Assocs., Inc.*, 538 U.S. 600, 612 (2003) (“[T]he First Amendment does not shield fraud.” (citation omitted)); *Donaldson v. Read Magazine, Inc.*, 333 U.S. 178, 190 (1948) (explaining that the government’s power “to protect people against fraud” has “always been recognized in this country and is firmly established”).

¹³³ Stolen Valor Act of 2005, 18 U.S.C. § 704 (2006), *invalidated by* *United States v. Alvarez*, 132 S. Ct. 2537 (2012) (plurality opinion), *amended by* Stolen Valor Act of 2013 18 U.S.C. § 704 (Supp. I 2013).

¹³⁴ 811 F.3d 299 (9th Cir. 2016).

¹³⁵ *Id.* at 303 n.1.

¹³⁶ *Id.* at 317.

purchase, solicits for purchase, mails, ships, imports, exports, produces blank certificates of receipt for, manufactures, sells, attempts to sell, advertises for sale, trades, barter, or exchanges” any officially authorized military medal.¹³⁷ This amendment to subsection (a) makes the subsection analogous to 18 U.S.C. § 641 (2012) which criminalizes the action of anyone who

knowingly converts to his use or the use of another, or without authority, sells, conveys or disposes of any . . . thing of value of the United States or of any department or agency thereof, or any property made or being made under contract for the United States or any department or agency. . . .¹³⁸

Moreover, 18 U.S.C. § 641 has been consistently found to be constitutional.¹³⁹

Because 18 U.S.C. § 704(b) has been the more litigated and controversial subsection, this Note will focus on the constitutionality of subsection (b).

2. Stolen Valor Act of 2013 Construed as Limiting Fraudulent Speech

The U.S. Supreme Court has consistently held that since its enactment in 1791, “the First Amendment has ‘permitted restrictions upon the content of speech in a few limited areas[.]’” “including obscenity, defamation, *fraud*, incitement, and speech integral to criminal conduct . . . ‘the prevention and punishment of which *have never been thought to raise any constitutional problem.*”¹⁴⁰ Justice Kennedy further emphasized that fraud remains a category of unprotected speech in the plurality opinion of *Alvarez* by stating that “[w]here false claims are made to effect a fraud or secure moneys or other valuable considerations, [such as] offers of employment, it is well established that the Government may restrict speech without affronting the First

¹³⁷ 18 U.S.C. § 704(a). The Ninth Circuit acknowledged this amendment to the Stolen Valor Act in their *Swisher* Opinion. *Swisher*, 811 F.3d at 304 (“§ 704(a) was amended to remove the word ‘wears’ from the list of prohibited actions with respect to decorations and medals authorized by Congress. That is, § 704(a) no longer prohibits the conduct for which Swisher was convicted. Because Swisher was convicted under the prior version of the statute, however, the case is not moot.” (citations omitted)).

¹³⁸ 18 U.S.C. § 641 (2012); *see also* *Bernhardt v. United States*, 169 F.2d 983, 984 (6th Cir. 1948) (per curiam) (affirming defendant’s convictions for stealing “property purchased for the military or naval service” pursuant to the former version of this statute); *Horowitz v. United States*, 262 F. 48 (2d Cir. 1919) (holding that the unlawful selling of cloth “intended for use in making [clothing] for the military or naval service” fell within the statute), *cert. denied*, 252 U.S. 586 (1920).

¹³⁹ *See, e.g.*, *United States v. McAusland*, 979 F.2d 970 (4th Cir. 1992); *United States v. Jones*, 677 F. Supp. 238 (S.D.N.Y. 1988).

¹⁴⁰ *United States v. Stevens*, 559 U.S. 460, 468 (2010) (emphasis added) (internal citations omitted).

Amendment.”¹⁴¹ Accordingly, the current Stolen Valor Act of 2013 now constitutionally regulates fraudulent speech and behavior, which has long been held to fall within one of the categories “historically unprotected” by the First Amendment.¹⁴²

In *Alvarez*, both Justice Kennedy, in the plurality opinion, and Justice Breyer, in the concurring opinion, suggested that a more finely tailored Stolen Valor Act would be able to pass constitutional muster.¹⁴³ These suggestions culminated in the carefully drafted Stolen Valor Act of 2013, which narrowly criminalizes the behavior of individuals who fraudulently misrepresent receipt of specific military honors in an attempt to obtain financial or tangible gain.¹⁴⁴ The fundamental change to the Stolen Valor Act of 2013 is the completely redrafted subsection (b), which now reads: “Whoever, *with intent to obtain money, property, or other tangible benefit, fraudulently holds oneself out to be a recipient of a decoration or medal described in subsection (c)(2) or (d) shall be fined under this title, imprisoned not more than one year, or both.*”¹⁴⁵

This revised subsection makes it clear that the Act no longer criminalizes “[w]hoever falsely represents himself or herself, verbally or in writing, to have been awarded any decoration or medal authorized by Congress for the Armed Forces of the United States” as the Stolen Valor Act of 2005 did.¹⁴⁶ The 2013 Act is more narrowly tailored to protect the government’s interest in safeguarding the integrity of America’s highest awards for military valor.¹⁴⁷

A single definition of fraud has been debated among the courts as both the U.S. Supreme Court and circuit courts have defined fraud differently when referring to either the entire category of fraud or a specific type of fraud.¹⁴⁸ For example, the U.S. Supreme Court has broadly reasoned that “[f]raud connotes perjury, falsification, concealment, [and] misrepresentation.”¹⁴⁹ In contrast, when considering a specific type of fraud, such as securities fraud, the Court has required the proof of many specific elements such as “(1) a material misrepresentation or omission by the defendant; (2) scienter; (3) a connection between the misrepresentation or omission and the purchase or sale of a security; (4) reliance upon the misrepresentation or

¹⁴¹ *United States v. Alvarez*, 132 S. Ct. 2537, 2547 (2012) (plurality opinion) (citation omitted).

¹⁴² *Stevens*, 559 U.S. at 470.

¹⁴³ *Alvarez*, 132 S. Ct. at 2547; *id.* at 2556 (Breyer, J., concurring in the judgment).

¹⁴⁴ Stolen Valor Act of 2013, 18 U.S.C. § 704 (2012 & Supp. I 2013).

¹⁴⁵ *Id.* (emphasis added).

¹⁴⁶ Stolen Valor Act of 2005, 18 U.S.C. § 704 (2006), *invalidated by United States v. Alvarez*, 132 S. Ct. 2537 (2012) (plurality opinion), *amended by* 18 U.S.C. § 704 (Supp. I 2013).

¹⁴⁷ *Compare id.*, with 18 U.S.C. § 704 (Supp. I 2013) (criminalizing the fraudulent misrepresentation of only the delineated military awards referenced *supra* note 128).

¹⁴⁸ See Natali Wyson, *Defining Fraud as an Unprotected Category of Speech: Why the Ninth Circuit Should Have Upheld the Stolen Valor Act in United States v. Alvarez*, 2012 BYUL REV. 671, 675–76. See generally 18 U.S.C. §§ 1001–40 (2012) (“Fraud and False Statements”).

¹⁴⁹ *Knauer v. United States*, 328 U.S. 654, 657 (1946).

omission; (5) economic loss; and (6) loss causation.”¹⁵⁰ Additionally, fraud is generally considered against the backdrop of the common-law tort of fraud, the exact elements of which vary from state to state.¹⁵¹ The generally required elements are that someone (1) make a false representation, (2) with the intention of either making someone act or refrain from acting in reliance upon that representation, (3) and that person reasonably relied on the representation and it did induce the desired action or inaction, and (4) this resulted in pecuniary loss or damage to the listener.¹⁵²

Further, impersonation or false personation statutes are generally considered to constitute a subsection of the broader category of fraud¹⁵³ and are “drafted to apply narrowly to conduct performed in order to obtain, at a cost to another, a benefit to which one is not entitled.”¹⁵⁴ For example, consider the federal false personation statute, 18 U.S.C. § 912 (2012), which states that

[w]hoever falsely assumes or pretends to be an officer or employee acting under the authority of the United States or any department, agency, or officer thereof, and acts as such, or in such pretended character demands or obtains any money, paper, document, or thing of value, shall be fined under this title or imprisoned¹⁵⁵

In *United States v. Lepowitch*,¹⁵⁶ the Court considered a case regarding the former version of 18 U.S.C. § 912 (2012), titled 18 U.S.C. § 76 (1940), which contained similar statutory language.¹⁵⁷ In that case the Court determined that the impersonation

¹⁵⁰ *Stoneridge Inv. Partners, LLC v. Sci.-Atlanta, Inc.*, 552 U.S. 148, 157 (2008).

¹⁵¹ *See, e.g.*, John C.P. Goldberg, Anthony J. Sebok & Benjamin C. Zipursky, *The Place of Reliance in Fraud*, 48 ARIZ. L. REV. 1001, 1067 n.20 (2006) (indicating varying elements in different jurisdictions).

¹⁵² RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR ECONOMIC HARM § 9 (AM. LAW INST. 2014).

¹⁵³ *See People v. Montes-Rodriguez*, 219 P.3d 340, 343 (Colo. App. 2009) (“[B]y its nature, the charge of criminal impersonation involves *fraud and dishonesty, because assuming a false or fictitious identity or capacity is equivalent to lying about one’s identity or status.*” (emphasis added)), *rev’d on other grounds*, 241 P.3d 924 (Colo. 2010); *State v. Oliver*, 456 N.E.2d 591, 594 (Ohio Mun. Ct. 1982) (“*The gist of the various crimes of impersonating proscribed by [statute] . . . is the fraud of making a person believe that the actor enjoys a certain status or identity other than that which he, in actuality, possesses.*” (emphasis added)); *see also* N.Y. PENAL LAW § 190.25 (McKinney 2016) (“Title K. Offenses Involving Fraud. Article 190. Other Frauds. § 190.25 Criminal impersonation in the second degree.”); VA. CODE ANN. § 18.2-177.1 (West 2016) (“Chapter 6. Crimes Involving Fraud. Article 2. Impersonation.”).

¹⁵⁴ *United States v. Alvarez*, 617 F.3d 1198, 1212 (9th Cir. 2010) (citation omitted), *aff’d*, 132 S. Ct. 2537 (2012) (plurality opinion).

¹⁵⁵ 18 U.S.C. § 912 (2012).

¹⁵⁶ 318 U.S. 702 (1943).

¹⁵⁷ *Id.* at 703 n.1 (“Falsely pretending to be United States officer. Whoever with intent to defraud either the United States or any person, shall falsely assume or pretend to be an officer

statute contained two elements: (1) the “impersonation of an officer of the government” and (2) “acting as such with intent to defraud either the United States or any person.”¹⁵⁸ The Court further defined the phrase “intent to defraud” by reasoning that this element “do[es] not require more than that the defendants have, by artifice and deceit, sought to cause the deceived person to follow some course he would not have pursued but for the deceitful conduct.”¹⁵⁹

The Stolen Valor Act of 2013 most closely resembles an impersonation statute similar to the federal criminal impersonation statute discussed above, 18 U.S.C. § 912.¹⁶⁰ The current federal impersonation statute “defines two separate and distinct offenses. The offenses are impersonation coupled with acting as such *and* impersonation coupled with demanding or obtaining something of value in such pretended character. False personation of an officer or employee of the United States is an element of both offenses.”¹⁶¹ The Stolen Valor Act of 2013 is most closely analogous to the second of those offenses, which contains two elements: (1) “falsely assum[ing] or pretend[ing] to be an officer or employee acting under the authority of the United States or any department, agency or officer thereof,” (2) and “in such pretended character demands or obtains any money, paper, document, or thing of value.”¹⁶² The Stolen Valor Act of 2013 satisfies these elements. First, the Stolen Valor Act fulfills the first element by requiring the offender “fraudulently holds oneself out to be a recipient” of the narrowly defined list of America’s highest military awards for valor, as opposed to impersonation of a government officer.¹⁶³ With regard to the second element, 18 U.S.C. § 912 requires the offender must “demand[] or obtain[] any

or employee acting under the authority of the United States, or any department, or any officer of the Government thereof, or under the authority of any corporation owned or controlled by the United States, and shall take upon himself to act as such, or shall in such pretended character demand or obtain from any person or from the United States, or any department, or any officer of the Government thereof, or any corporation owned or controlled by the United States, any money, paper, document, or other valuable thing, shall be fined not more than \$1,000 or imprisoned not more than three years, or both.” (quoting 18 U.S.C. § 76 (1940) (current version at 18 U.S.C. § 912)).

¹⁵⁸ *Id.* at 703 (“They were indicted under 18 U.S.C. § 76, the first branch of which includes two elements: impersonation of an officer of the government and acting as such with intent to defraud either the United States or any person.”).

¹⁵⁹ *Id.* at 704 (footnote omitted).

¹⁶⁰ 18 U.S.C. § 912 (“Whoever falsely assumes or pretends to be an officer or employee acting under the authority of the United States or any department, agency or officer thereof, and acts as such, or in such pretended character demands or obtains any money, paper, document, or thing of value, shall be fined under this title or imprisoned not more than three years, or both.”).

¹⁶¹ U.S. DEP’T OF JUST., UNITED STATES ATTORNEYS’ MANUAL § 1470 (1997), <http://www.justice.gov/usam/criminal-resource-manual-1470-false-personation-elements-offenses> [<https://perma.cc/33GU-AYGM>] [hereinafter USAM].

¹⁶² 18 U.S.C. § 912.

¹⁶³ Stolen Valor Act of 2013, 18 U.S.C. § 704 (Supp. I).

money, paper, document, or thing of value,”¹⁶⁴ whereas the Stolen Valor Act requires the offender must make the requisite misrepresentations “with intent to obtain money, property, or other tangible benefit.”¹⁶⁵ The Stolen Valor Act’s requirements are consistent with the federal criminal impersonation statute’s second element that an offender can be liable for demanding the acquisition of a tangible benefit, meaning that the offender does not have to successfully obtain the benefit but merely seek to obtain it, much like the Stolen Valor Act’s language that the offender must intend to obtain an economic or tangible benefit.¹⁶⁶

However, it may be argued that the Stolen Valor Act of 2013 is not a constitutional fraud statute because it does not include the common-law fraud elements of actual reliance and injury stemming from the requisite misrepresentations.¹⁶⁷ This argument fails because not every constitutionally valid fraud statute contains these elements, and none of the fraudulent impersonation statutes contain these elements.¹⁶⁸ For example, the federal statutes which criminalize both mail and bank fraud, 18 U.S.C. § 1341 (2012) and 18 U.S.C. § 1344 (2012), respectively, do not require that the intended victim suffer actual harm; rather, the mere act of attempting the intentional misrepresentation is the criminalized fraudulent act.¹⁶⁹ Additionally, in order for the government to prove perjury, one of the most central cases of fraud, the government is only required to prove: “(1) that [the defendant] testified under oath about certain material matters; (2) that the testimony was false; (3) that . . . [the defendant] knew such testimony was false; and (4) that [the defendant] voluntarily and intentionally gave the testimony.”¹⁷⁰ Crucially, the government is not required to show that the false testimony caused any harm to an ongoing investigation or the proceedings at issue.¹⁷¹ Finally,

¹⁶⁴ 18 U.S.C. § 912.

¹⁶⁵ 18 U.S.C. § 704.

¹⁶⁶ See 18 U.S.C. § 704; 18 U.S.C. § 912.

¹⁶⁷ See RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR ECONOMIC HARM, *supra* note 152, § 9 (laying out the common-law fraud elements).

¹⁶⁸ See 18 U.S.C. § 912; USAM, *supra* note 161 (referring to 18 U.S.C. § 912, “[i]t is the view of the Criminal Division, however, that there is no such reliance requirement inherent in the statute” (citation omitted)); see, e.g., 18 U.S.C. § 912 (federal impersonation statute); 18 U.S.C. § 1341 (2012) (federal fraud statute); 18 U.S.C. § 1344 (2012) (federal bank fraud statute); N.J. STAT. ANN. § 2C:28-8 (West 2016) (impersonation statute); VA. CODE ANN. § 18.2-174 (West 2016) (impersonation statute).

¹⁶⁹ 18 U.S.C. § 1341; 18 U.S.C. § 1344; see also *United States v. Flanders*, 491 F.3d 1197, 1212 (10th Cir. 2007) (“Under 18 U.S.C. § 1344(1) [bank fraud], the government must prove that: (1) the defendant knowingly executed or attempted to execute a scheme or artifice to defraud a financial institution; (2) the defendant had the intent to defraud a financial institution; and (3) the bank involved was federally insured.” (citation omitted)); *United States v. Buchanan*, 633 F.2d 423, 427 (5th Cir. 1980) (“The intended victim need not have been actually defrauded in order for a mail fraud violation to have occurred.”).

¹⁷⁰ *United States v. Swink*, 21 F.3d 852, 857 (1994).

¹⁷¹ 18 U.S.C. § 1621 (2012); *Brogan v. United States*, 522 U.S. 398, 402 n.1 (1998) (“The government need not show that because of the perjured testimony, the grand jury threw in

and most applicable to the analogy in this Section, the U.S. Department of Justice, United States Attorneys' Manual explains that with regard to the federal False Personation statute, 18 U.S.C. § 912,

action alone may amount to a false pretense of federal authority. . . . It has been held that evidence of reliance by the intended victim is admissible because reliance is an essential element of the offense. *Haid v. United States*, 157 F.2d 630, 632 (9th Cir. 1946). This conclusion seems to originate from a misinterpretation of *United States v. Barnow*, 239 U.S. 74, 80 (1915) Obviously, in cases under 18 U.S.C. § 912 in which a thing of value has been obtained, reliance by the victim is almost always provable. *It is the view of the Criminal Division, however, that there is no such reliance requirement inherent in the statute. See Levine v. United States*, 261 F.2d 747, 751 (D.C. Cir. 1957).¹⁷²

Thus, these statutes illustrate that a statute criminalizing misrepresentations can be constitutionally valid without including all of the traditional elements of common-law fraud.

Overall, the Stolen Valor Act of 2013 is constitutional as it criminalizes impersonation advancing the fraudulent intent of obtaining “money, paper, document, or thing of value,” which is a subcategory of fraud.¹⁷³ This statute falls under the impersonation subcategory of the broad category of fraud,¹⁷⁴ which has been historically unprotected by the First Amendment. Additionally, the Stolen Valor Act of 2013 has elements analogous to the federal criminal false personation statute that has been consistently upheld as constitutional.¹⁷⁵ Therefore, the misrepresentations criminalized by the Stolen Valor Act of 2013 are not protected by the First Amendment and can be constitutionally restricted.

the towel. . . . Grand jurors . . . are free to disbelieve a witness and persevere in an investigation without immunizing a perjurer.” (quoting *United States v. Abrams*, 568 F.2d 411, 421 (5th Cir.), *cert. denied*, 437 U.S. 903 (1978))).

¹⁷² USAM, *supra* note 161 (first citation omitted).

¹⁷³ See 18 U.S.C. § 912.

¹⁷⁴ *Id.*

¹⁷⁵ See *id.*; see also *Littell v. United States*, 169 F. 620, 622–23 (9th Cir. 1909) (“[If] the gist of the offense [under this section had been] the demanding or the obtaining of money or other thing of value of another . . . there might be doubt whether the act . . . could be made an offense against the United States, for the reason that it has no relation to the execution of any of the powers of Congress or to any matter within the jurisdiction of the United States; but the gist of the offense is the . . . false impersonation, [which] . . . was made punishable at common law, and Congress undoubtedly has the power to punish the false personation of an officer of the United States.”).

3. Stolen Valor Act Construed as Limiting Commercial Speech

Commercial speech traditionally has been applied to businesses engaged in various kinds of misleading or false advertising.¹⁷⁶ However, the U.S. Supreme Court has applied commercial speech, along with its lessened First Amendment scrutiny, to the actions of individuals seeking economic gain from false advertising.¹⁷⁷ This trajectory can be expanded to include the misrepresentations regulated by the Stolen Valor Act of 2013.

Originally, the U.S. Supreme Court found that individuals who were advertising their professional services could engage in commercial speech.¹⁷⁸ The application of commercial speech to individual actors began in 1976 with *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.*,¹⁷⁹ when the Court found that a Virginia statute that limited individual pharmacists from advertising the prices of their prescription drugs was unconstitutional because it prohibited “truthful information about entirely lawful activity.”¹⁸⁰ Next, the following year in 1977, the Court extended its reasoning in *Virginia State Board of Pharmacy* to *Bates v. State Bar of Arizona*¹⁸¹ by striking down a law that prohibited the ability of individual attorneys to truthfully advertise the availability of their legal services.¹⁸²

The Court’s reasoning in *Bates* has been reaffirmed as recently as 1995 in *Florida Bar v. Went For It, Inc.*¹⁸³ when the Court stated, “[i]t is now well established that lawyer advertising is commercial speech and, as such, is accorded a measure of First Amendment protection[,]” but First Amendment protection for commercial speech is not absolute.¹⁸⁴ The Court went on to explain that “‘commercial speech [enjoys] a limited measure of protection, commensurate with its subordinate position in the scale of First Amendment values,’ and is subject to ‘modes of regulation that might be impressive in the realm of noncommercial expression.’”¹⁸⁵ Additionally, the Court explained the framework it developed for evaluating commercial speech cases in *Central Hudson Gas & Electric Corp. v. Public Service Commission*,¹⁸⁶

¹⁷⁶ See *infra* note 178 and accompanying text.

¹⁷⁷ See, e.g., *Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc.*, 425 U.S. 748, 771–72 (1976).

¹⁷⁸ See, e.g., *id.* at 770.

¹⁷⁹ 425 U.S. 748 (1976).

¹⁸⁰ *Id.* at 773; see also *id.* at 771 (“Nor is there any claim that prescription drug price advertisements are forbidden because they are false or misleading in any way. Untruthful speech, commercial or otherwise, has never been protected for its own sake. . . . Obviously, much commercial speech is not provably false, or even wholly false, but only deceptive or misleading.” (citations omitted)).

¹⁸¹ 433 U.S. 350 (1977).

¹⁸² *Id.* at 384.

¹⁸³ 515 U.S. 618 (1995).

¹⁸⁴ *Id.* at 623.

¹⁸⁵ *Id.* (quoting *Bd. of Trs. of State Univ. of N.Y. v. Fox*, 492 U.S. 469, 477 (1989)).

¹⁸⁶ 447 U.S. 557 (1980).

under which “the government may freely regulate commercial speech that concerns unlawful activity or is *misleading*.”¹⁸⁷

Moving away from commercial speech strictly in the advertising context, the Court decided *Ibanez v. Florida Department of Business & Professional Regulation*.¹⁸⁸ In *Ibanez*, the Court found the actions of an attorney who was displaying her qualifications of being both a Certified Public Accountant and a Certified Financial Planner in a yellow pages listing, on her business cards, and on her office stationary, to amount to commercial speech, despite not being traditional advertising.¹⁸⁹ Further, because the lawyer’s commercial speech in that case was truthful, the Court found the Florida Board of Accountancy reprimanding the lawyer was “incompatible with First Amendment restraints on official action.”¹⁹⁰ The Court quoted *In re R. M. J.*¹⁹¹ in stating that “[t]ruthful advertising related to lawful activities is entitled to the protections of the First Amendment. . . . Misleading advertising may be prohibited entirely.”¹⁹² Accordingly, because the advertising in *Ibanez* was truthful, and the Florida Board of Accountancy failed to prove that it was misleading or that the regulation was “no more extensive than necessary,” the Court determined that the Respondent’s “order reprimanding Ibanez [could not] stand.”¹⁹³

When *Alvarez* was decided by the Ninth Circuit Court of Appeals, that court suggested how different the analysis would have been if either party had argued that the Stolen Valor Act of 2005 regulated commercial speech.¹⁹⁴ Building upon this suggestion made by the Ninth Circuit, the current Stolen Valor Act of 2013 can be construed as constitutional because it regulates commercial speech.

An official definition or test for identifying commercial speech has not been clearly defined.¹⁹⁵ However, in *Bolger v. Youngs Drug Products Corp.*¹⁹⁶ the U.S. Supreme Court announced a three-factor test that the Court utilized in that case to

¹⁸⁷ *Florida Bar*, 515 U.S. at 623–24 (emphasis added) (citing *Cent. Hudson*, 447 U.S. at 563–64).

¹⁸⁸ 512 U.S. 136 (1994).

¹⁸⁹ *Id.* at 138–39.

¹⁹⁰ *Id.* at 139.

¹⁹¹ 455 U.S. 191 (1982).

¹⁹² *Ibanez*, 512 U.S. at 142 (quoting *In re R. M. J.*, 455 U.S. at 203).

¹⁹³ *Id.* at 143 (“Commercial speech that is not false, deceptive, or misleading can be restricted, but only if the State shows that the restriction directly and materially advances a substantial state interest in a manner no more extensive than necessary to serve that interest.”).

¹⁹⁴ 617 F.3d 1198, 1206 n.6 (9th Cir. 2010) (“Of course, in the area of commercial speech, the analysis that follows might be very different.”), *aff’d*, 132 S. Ct. 2537 (2012) (plurality opinion); see *Nike v. Kasky*, 539 U.S. 654, 654 (2003) (per curiam) (dismissing certiorari in a case involving the question of whether false speech with both commercial and public interest factors is entitled to a degree of First Amendment protection).

¹⁹⁵ See, e.g., *Edenfield v. Fane*, 507 U.S. 761, 765 (1993) (“[A]mbiguities may exist at the margins of the category of commercial speech.” (internal citations omitted)).

¹⁹⁶ 463 U.S. 60 (1983).

determine the speech at issue there was commercial speech.¹⁹⁷ These factors were: (1) the communication was an advertisement; (2) the speech referred to a specific product; and (3) the speaker had an economic motivation in conveying the speech in question.¹⁹⁸ The Court further stated that neither the presence nor absence of any of the three factors would be determinative of a commercial speech analysis in the future.¹⁹⁹ The speech criminalized by the Stolen Valor Act of 2013 falls within these factors for commercial speech.

The first factor, that the speech be an advertisement, is the hardest factor to apply to the speech regulated by the Stolen Valor Act. However, any one factor of the *Bolger* factors is not dispositive.²⁰⁰ With that in mind, certain situations where stolen valor takes place can be argued to be a form of self-promotional advertising. For example, the misrepresentation of military awards on resumes or job applications can be done in order to “advertise” oneself as the best candidate for a particular employment position.

The second factor, that the speech refers to a specific product, is met by the Stolen Valor Act of 2013 as the current Act limits penalties to the misrepresentation of being a recipient of only the highest military decorations, including the Congressional Medal of Honor, distinguished-service cross for the Army, Navy cross, Air Force Cross, silver star, Purple Heart, or combat badges.²⁰¹

Finally, the Stolen Valor Act of 2013 also meets the third factor that the speech must be made with an economic motivation.²⁰² The current Act’s requirement that the criminalized speech must be made “with intent to obtain money, property, or other tangible benefit,”²⁰³ illustrates that the 2013 Act is predominately targeting those seeking economic gain.²⁰⁴

A balancing of these factors weighs in favor of considering the misrepresentations criminalized by the Stolen Valor Act of 2013 as commercial speech. Therefore, because it falls within the category of commercial speech that is false or misleading, it is constitutional to prohibit the speech entirely.²⁰⁵ However, as noted by the Ninth

¹⁹⁷ *Id.* at 66–67.

¹⁹⁸ *See id.*

¹⁹⁹ *See id.*

²⁰⁰ *See id.*

²⁰¹ Stolen Valor Act of 2013, 18 U.S.C. § 704(c)–(d) (2012 & Supp. I 2013).

²⁰² *Id.* § 704(b).

²⁰³ *Id.*

²⁰⁴ The only stolen valor speech which can be argued to be commercial speech is the speech seeking money or property, because the “other tangible benefit[s]” included in the statute may be construed as non-economic and therefore, would only fall under the fraudulent justification. An example of a non-economic yet tangible benefit that may be included in the “other tangible benefit” could be misrepresenting the receipt of one of the requisite military decorations in order to be elected to a voluntary board.

²⁰⁵ *See Commercial Speech*, CORNELL U.L. SCH., LEGAL INFO. INST., https://www.law.cornell.edu/wex/commercial_speech [<https://perma.cc/BL4E-BNUD>].

Circuit in *Alvarez*, a case of stolen valor qualifying as commercial speech may fall within a category of speech the Court touched on in *Nike, Inc. v. Kasky*²⁰⁶ and described as “a blending of commercial speech . . . and debate on an issue of public importance.”²⁰⁷ In *Nike*, although the Court dismissed that case, the Justices reasoned that such commercial speech intertwined with issues of public concern may be subject to some First Amendment protection.²⁰⁸ This would mean the speech criminalized by the Stolen Valor Act of 2013, if found to constitute commercial speech also involving issues of public concern, would be subject to intermediate scrutiny because that is the relevant First Amendment standard of review for commercial speech that is not completely false.²⁰⁹ In order for a statute to pass intermediate scrutiny, the statute must “further an important government interest by means that are substantially related to that interest.”²¹⁰ The Stolen Valor Act of 2013 should survive an intermediate scrutiny review because: (1) as conceded by both the Ninth Circuit and the Supreme Court, the government’s purpose for the Act—protecting the integrity of the nation’s highest military awards while also safeguarding the valor and honor of true war heroes—reaches the even higher standard of being a compelling purpose,²¹¹ and (2) the 2013 Act is substantially related to the government’s interest in safeguarding the integrity of the military awards system, as it narrowly criminalizes only misrepresentations of receipt of a limited number of the highest awards that are made with the intent to obtain “money, property, or other tangible benefit.”²¹²

B. Although Constitutional, the Stolen Valor Act of 2013 Is Unenforced

Although the Stolen Valor Act of 2013 is constitutional, only two arrests and prosecutions have been made for false representation under the new Act since its enactment.²¹³ This is further illustrated by the fact that Sean Yetman, a military impersonator who garnered over five million YouTube video views for his blatant

²⁰⁶ 539 U.S. 654 (2003) (per curiam).

²⁰⁷ *Id.* at 663 (Stevens, J., concurring) (citation omitted).

²⁰⁸ *Id.* at 656–65.

²⁰⁹ *Commercial Speech*, *supra* note 205.

²¹⁰ *Intermediate Scrutiny*, CORNELL U.L. SCH., LEGAL INFO. INST., https://www.law.cornell.edu/wex/intermediate_scrutiny [<https://perma.cc/GK4M-PT7M>].

²¹¹ *United States v. Alvarez*, 132 S. Ct. 2537, 2549 (2012) (plurality opinion) (“The Government’s interest in protecting the integrity of the Medal of Honor is beyond question. But to recite the Government’s *compelling interests* is not to end the matter.” (emphasis added)); *United States v. Alvarez*, 617 F.3d 1198, 1216 (9th Cir. 2010), *aff’d*, 132 S. Ct. 2537 (2012) (plurality opinion) (“Especially at a time in which our nation is engaged in the longest war in its history, Congress certainly has an interest, *even a compelling interest*, in preserving the integrity of its system of honoring our military men and women for their service and, at times, their sacrifice.” (emphasis added)).

²¹² *See* 18 U.S.C. § 704(b) (Supp. I 2013).

²¹³ *See* Kellogg, *supra* note 28; Mara, *supra* note 28.

fraudulent misrepresentation of an Army Ranger,²¹⁴ has not been investigated or prosecuted by authorities, and it has been over two years since the actions leading to his notorious video occurred. Even though there is a constitutional federal law criminalizing the fraudulent misrepresentation of earning high military honors that has been in place since June of 2013, not even the most flagrant violations of this Act have been prosecuted.²¹⁵ The fact that the Stolen Valor Act of 2013 has been essentially unenforced is leading to several problems: (1) veterans are left to police this situation virtually by themselves,²¹⁶ which can, at times, lead to violence and confrontations of individuals who are not actually engaging in stolen valor;²¹⁷ and (2) states are now, at increasing rates, enacting broader and harsher stolen valor laws with stronger penalties than the federal version, in a desperate attempt to see this behavior adequately criminalized and prosecuted.²¹⁸

1. Public Shaming and Vigilante Justice Are Not Adequate Enforcement Mechanisms

In *United States v. Alvarez*, Justice Kennedy seemed to advocate for the use of public shaming through the use of social media and “counterspeech” by veterans as an adequate remedy to the problem of stolen valor.²¹⁹ Kennedy conveyed this point by asserting that “[the government] has not shown, and cannot show, why counterspeech, such as the ridicule respondent received online and in the press, would not suffice to achieve its interest.”²²⁰

First and foremost, the government’s primary interest in having a law proscribing the misrepresentation of military awards for extraordinary valor is to defend the legitimacy of these awards and to ensure that the true war hero award recipients are properly honored and respected.²²¹ This goal cannot be advanced by the countless videos the public is exposed to on both social media and the ones that garner so

²¹⁴ Stolen Valor, *supra* note 13.

²¹⁵ See Kathryn Watson, *Here’s Why Stolen Valor Gets Ignored*, DAILY CALLER (Jan. 28, 2017), <http://dailycaller.com/2017/01/28/heres-why-stolen-valor-goes-ignored/> [https://perma.cc/6BBB-JGZD].

²¹⁶ See, e.g., Michael J. Gaynor, *If You’re Lying About Being a Navy SEAL, This Man Will Catch You*, WASHINGTONIAN (Aug. 30, 2015), <http://www.washingtonian.com/articles/people/if-youre-lying-about-being-a-navy-seal-veteran-don-shiple-y-will-catch-you/> [https://perma.cc/FB35-6B5B] (“When I asked an FBI representative how many Stolen Valor cases it has worked, I was told the numbers ‘are not readily available.’ That means the only sanction some fakers will face is Shipley’s *vigilante justice*.” (emphasis added)).

²¹⁷ See *supra* notes 13–22 and accompanying text; *infra* notes 222–27 and accompanying text.

²¹⁸ Perry Chiamonte, *Above and Beyond: 2 States Craft ‘Stolen Valor’ Laws that Exceed Federal Version*, FOXNEWS (Mar. 21, 2015), <http://www.foxnews.com/us/2015/03/21/above-and-beyond-2-states-craft-stolen-valor-laws-that-exceed-federal-version/> [https://perma.cc/C68Q-LGZG] [hereinafter *Above and Beyond*]; see *supra* Section I.E.

²¹⁹ See 132 S. Ct. 2537, 2540 (2012) (plurality opinion).

²²⁰ *Id.*

²²¹ See *supra* note 147 and accompanying text.

many views that they are covered by large media outlets because the more stories the public hears of imposters of these awards, the more likely it is that civilians will generally doubt the claims of an actual recipient. Second, further evidence of the inadequacy of Kennedy's assertion is that as of now, five years after *Alvarez* was decided, the vigilante pursuit of military imposters has devolved into instances of assault and public humiliation as a result of false accusations.²²²

Recently, incidents of assault resulting from false accusations of stolen valor have been increasing. This is inevitable when the task of policing stolen valor is placed in the hands of citizens to monitor and expose the frauds by themselves. For example, on November 19, 2015, a sixty-six-year-old Vietnam veteran who had been previously awarded a Purple Heart for his service, was attacked and physically assaulted at an airport as a result of a case of mistaken stolen valor.²²³ Jack Hughes, United States Marine veteran, described this confrontation at the Charlotte, North Carolina airport, in his own words:

“All of a sudden (a man) jumps up and he’s got a camera in my face screaming, ‘Your medals are crooked. You’re a fake. You’re not a Marine’ . . . He kept screaming at me, telling me I was nothing, that everything I had was fake. I was a fake and phony.”²²⁴

This incident induced Hughes to have flashbacks to when he returned home from Vietnam in the 1960s when servicemen received a “less than welcoming return.”²²⁵

These incidents are happening more often, and the injuries resulting from the false stolen valor encounters are also increasing in severity. Over the weekend of October 24, 2015, Michael Delfin, a marine combat veteran who served for over twelve years in the Marine Corps was attacked and brutally assaulted at a bar in California after an airman accused him of stolen valor and later ambushed Delfin in the parking lot.²²⁶ Delfin suffered a broken tibia and a fractured jaw.²²⁷

²²² Stephen Bajza, *Unstolen Valor! Bolden Was a Marine*, UNDER RADAR (July 30, 2014), <http://undertheradar.military.com/2014/07/unstolen-valor-bolden-was-a-marine/> [https://perma.cc/6YWT-YF7K] (detailing the story of a seventy-seven-year-old marine veteran diagnosed with dementia who was confronted and humiliated for false stolen valor accusations); *Man Pretending to Be a Navy SEAL*, *supra* note 30; *The Problem with Calling Out*, *supra* note 31.

²²³ Coleen Harry, *Vietnam Vet Says Men Assaulted Him Over Medals at Charlotte Airport*, CHARLOTTE OBSERVER (Nov. 19, 2015), <http://www.charlotteobserver.com/news/local/community/news-alliance/wbtv-news/article45454578.html> [https://perma.cc/P6ZP-LCYD].

²²⁴ *Id.* (quoting Vietnam veteran, Jack Hughes).

²²⁵ *Id.*

²²⁶ Suzanne Phan, *Combat Veteran Wrongly Accused of ‘Stolen Valor’ Attacked; Suspects Still on the Loose*, ABC10 (Oct. 29, 2015 7:40 PM), <http://sacramento.abc10.com/news/news/524941-combat-veteran-wrongly-accused-stolen-valor-attacked-suspects-still-loose> [https://perma.cc/FG5K-JX2H]; *Marine Veteran Beaten*, *supra* note 30.

²²⁷ Phan, *supra* note 226.

These incidents illustrate that the counterspeech initially suggested to be an adequate solution to the epidemic of stolen valor is not as effective as it was predicted to be. Just one incident of a veteran being attacked and humiliated after contributing years of service, and even possibly engaging in combat, is one incident too many.

III. SOLUTIONS: TO INCREASE THE ENFORCEMENT OF THE STOLEN VALOR ACT OF 2013, THE ACT CAN BE AMENDED TO MIRROR 18 U.S.C. § 912 OR IT CAN BE REDRAFTED TO MODEL A STRONGER STATE-LEVEL STOLEN VALOR LAW

A. Amend the Act to Address the Dichotomy Between Impersonating a Police Officer and Impersonating a War Hero

One potential solution to the problem of the lack of enforcement of the Stolen Valor Act of 2013 is to amend the Act and model it after a federal act that criminalizes similar behavior. 18 U.S.C. § 912 criminalizes police impersonation and is both constitutional and enforced much more frequently than the Stolen Valor Act.²²⁸

The case of *United States v. Chappell*²²⁹ illustrates this dichotomy.²³⁰ The Fourth Circuit Court of Appeals decided this case only one month after the U.S. Supreme Court struck down the Stolen Valor Act of 2005 in *Alvarez* for being overbroad and violating the First Amendment.²³¹ In *Chappell*, the Fourth Circuit considered whether Virginia Code section 18.2-174 violated the First Amendment by analyzing the text of the statute which reads, “Any person who *falsely assumes* or exercise the functions, powers, duties, and *privileges* incident to the office of sheriff, police officer, marshal, or other peace officer . . . or who *falsely assumes or pretends to be any such officer*, is guilty of a Class 1 misdemeanor.”²³² The Fourth Circuit upheld the statute and reasoned that “[f]alsely identifying oneself as a policeman in order to get out of a speeding ticket is simply not the kind of expressive conduct the Framers of our first and one of our greatest amendments had in mind.”²³³

The Fourth Circuit distinguished *Chappell* from *Alvarez* by adopting an overbreadth analysis suggested by the dissent in *Alvarez*, and by arguing that because the Court in *Alvarez*

recognized . . . the general validity of laws prohibiting “the false representation that one is speaking as a Government official or on behalf of the Government.” Indeed, each of the Court’s opinions expressly confirmed the constitutionality of a law bearing

²²⁸ See *supra* notes 155–66 and accompanying text.

²²⁹ 691 F.3d 388 (4th Cir. 2012), *cert. denied*, 133 S. Ct. 965 (2013).

²³⁰ *Id.* at 400.

²³¹ See *United States v. Alvarez*, 132 S. Ct. 2537, 2551 (2012) (plurality opinion).

²³² VA. CODE ANN. § 18.2-174 (West 2016) (emphasis added).

²³³ *Chappell*, 691 F.3d at 400.

striking similarities to the one before us: 18 U.S.C. § 912, the federal statute prohibiting impersonation of government officers.²³⁴

In other words, the Fourth Circuit distinguished *Chappell* because it dealt with a statute that criminalized police impersonation as opposed to military impersonation.²³⁵ However, as stated by Judge Wynn in his dissent in *Chappell*,

This case involves a content-based restriction on speech—namely, false claims of being a police officer. Just a few weeks ago, the Supreme Court addressed the very question of whether false statements, generally, are afforded First Amendment protection and ‘reject[ed] the notion that false speech should be in a general category that is presumptively unprotected.’ A straightforward application of *Alvarez*’s analysis and holding compels the invalidation of the challenged provision at issue in this case.²³⁶

This precedent establishes that speech is unprotected by the First Amendment when an individual merely falsely represents themselves as a police officer, yet, it is only unprotected by the First Amendment for an individual to falsely represent themselves as a war hero when that individual both misrepresents receipt of one of the requisite awards and does so with the intention of economic or tangible gain. The fact that the government has to prove these additional elements in the realm of military impersonation may add to the difficulty of prosecution, and subsequent conviction, of stolen valor offenders.

A possible solution to this dichotomy would be to either merge the Stolen Valor Act of 2013 with 18 U.S.C. § 912 or to redraft the Stolen Valor Act to mirror the broader scope of § 912. First, an example of how the two Acts could merge would be to add an additional paragraph to § 912 specifying the criminalization of military impersonation, while keeping the same elements of proof required for police impersonation. Second, the Stolen Valor Act could be redrafted to encompass both the mere impersonation of a military member (either active duty or retired) and the impersonation of being a distinguished medal recipient, much like § 912. Section 912 serves as a good model for a broader Stolen Valor Act because: it criminalizes similar impersonation behavior, and it carries a higher penalty (up to three years imprisonment versus one year);²³⁷ it is more frequently enforced (at least seven ongoing cases for

²³⁴ *Id.* (footnote omitted) (first quoting *Alvarez*, 132 S. Ct. at 2545–46; then citing *id.* at 2546–47; *id.* at 2554 (Breyer, J., concurring in the judgment); *id.* at 2561–62 (Alito, J., dissenting)).

²³⁵ *Id.* at 397.

²³⁶ *Id.* at 400 (Wynn, J., dissenting) (quoting *Alvarez*, 132 S. Ct. at 2546–47 (plurality opinion)).

²³⁷ 18 U.S.C. § 912 (2012).

violations of § 912 in 2015 alone);²³⁸ and as “the Supreme Court has said so in *Alvarez* itself: all nine [J]ustices affirmed that the federal officer impersonation statute, 18 U.S.C. § 912, is constitutional.”²³⁹

B. States as Laboratories of Experimentation

Supreme Court Justice Louis Brandeis created the phrase that states are “laboratories of democracy”²⁴⁰ for his notion that states can more easily “try novel social and economic experiments without risk to the rest of the country.”²⁴¹ In other words, states are in a better position to test, or experiment with, the enforcement of laws than is the federal government. It is possible that the federal Stolen Valor Act is remaining unenforced so the states will have a chance to enact their own variations of the Act and to allow the federal government to access how states adjudicate and prosecute cases of stolen valor. If a state happens to come up with a successful solution to the problem of stolen valor, the federal Stolen Valor Act may be amended to mimic the more successful variation.

New Jersey and Massachusetts serve as examples of how states can pass their own variations of federal laws that are both broader and provide for tougher penalties than the federal Act.

1. New Jersey Stolen Valor Act: N.J. Stat. Ann. § 38A:14-5

Members of the New Jersey legislature were inspired after watching the viral YouTube video of Sean Yetman “in full military uniform at the Oxford Valley Mall in Bucks County, Pa. asking for money” who was later exposed as never having served in the military, yet was never prosecuted for his fraudulent activity.²⁴² As a result, on October 26, 2015, New Jersey enacted a stolen valor law that encompasses a broader scope of behavior and imposes harsher penalties than the federal law.²⁴³

²³⁸ *Id.*; see, e.g., *United States v. Schnetzka*, 629 F. App’x 422 (3d Cir. 2015); *United States v. Thetford*, 806 F.3d 442 (8th Cir. 2015), *cert. denied*, 137 S. Ct. 187 (2016); *United States v. McCulley*, 605 F. App’x 658 (9th Cir. 2015); *United States v. Barros-Villahermosa*, 91 F. Supp. 3d 261 (D.P.R. 2015); *United States v. Colvard*, No. 1:13-CR-109, 2015 WL 5123893 (M.D. Pa. Sept. 1, 2015); *Commonwealth v. Widberg*, No. 14-P-891, 2015 WL 5009275 (Mass. App. Ct. Aug. 25, 2015); *Cornwell v. State*, 471 S.W.3d 458 (Tex. Crim. App. 2015).

²³⁹ *Chappell*, 691 F.3d at 394 (quoting *Alvarez*, 132 S. Ct. at 2546–47; *id.* at 2554 (Breyer, J., concurring in the judgment); *id.* at 2561–62 (Alito, J., dissenting)).

²⁴⁰ Reihan Salam, ‘Laboratories of Democracy’ and What Works Where, NAT’L REV. (Mar. 17, 2013), <http://www.nationalreview.com/agenda/343218/laboratories-democracy-and-what-works-where-reihan-salam> [<https://perma.cc/7V83-SRK7>].

²⁴¹ *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting).

²⁴² Dan Alexander, *Stolen Valor Law: It’s Now a Crime to Impersonate Military in NJ* (Oct. 27, 2015, 7:09 AM), <http://nj1015.com/stolen-valor-law-its-now-a-crime-to-impersonate-military-in-nj/> [<https://perma.cc/JX74-5XVJ>].

²⁴³ *Above and Beyond*, *supra* note 218.

The New Jersey Stolen Valor law criminalizes the actions of “[a]ny person who knowingly, with intent to impersonate and with intent to deceive, misrepresents oneself” as either an active duty member or a veteran of any of the branches of U.S. Armed Forces by: (1) “wearing the uniform or any medal or insignia authorized for use by the members or veterans of the United States Armed Forces” alone;²⁴⁴ (2) subsection (1) combined with the “purpose of obtaining money, property, or other tangible benefit”;²⁴⁵ or (3) subsection (1) combined with “the purpose of obtaining money, property, or other tangible benefit” in conjunction with “hold[ing] oneself out to be a recipient of any decoration or medal created by Federal and State laws and regulations to honor the members or veterans of the United States Armed Forces or the organized militia.”²⁴⁶ Subsection (1) is considered to be a crime of the fourth degree, while subsections (2) and (3) are deemed to be crimes of the third degree, which are additionally “subject to a minimum fine of \$1,000.”²⁴⁷

Additionally, one of the best features of New Jersey’s stolen valor legislation is that all of the money collected from the stolen valor fines will go into the “Military Dependents Scholarship Fund” that will provide college scholarships to both spouses and children of services members who have been killed, gone missing, or become disabled during “Operation Noble Eagle, Operation Enduring Freedom, Operation Iraqi Freedom, or Operation New Dawn.”²⁴⁸

While signing this bill into law, New Jersey Governor Chris Christie stated that, by passing this Stolen Valor Act, in addition to creating the military dependents scholarship, and a law aiding businesses owned by disabled veterans, “we are not only reaffirming a pledge to those who serve, we are providing important opportunities for educational access and business development, and upholding the integrity and dignity of their service by punishing those who misrepresent themselves as serving in the military.”²⁴⁹

What distinguishes New Jersey’s Stolen Valor Act from the federal Stolen Valor Act of 2013 is the severity of the penalty, the destination of the fines, and the scope of behavior criminalized by the law. In New Jersey, a third degree offense can lead to the offender receiving a three- to five-year prison term along with a mandatory \$1,000 fine.²⁵⁰ In contrast, the federal Act imposes a maximum penalty of a fine of an unspecified amount or imprisonment of one year, or both.²⁵¹ All fines collected under the New Jersey law go directly into a fund to help the families of actual veterans who have suffered debilitating injury or loss of their lives in combat.²⁵² Whereas the

²⁴⁴ N.J. STAT. ANN. § 38A:14-5 (West 2016).

²⁴⁵ *Id.*

²⁴⁶ *Id.*

²⁴⁷ *Id.*

²⁴⁸ Alexander, *supra* note 242.

²⁴⁹ *Id.*

²⁵⁰ § 38A:14-5.

²⁵¹ Stolen Valor Act of 2013, 18 U.S.C. § 704 (Supp. I 2013).

²⁵² *See* Alexander, *supra* note 242.

federal Act does not specify where the fines will go, it is likely the fines will go to the U.S. Treasury Department.²⁵³ Finally, the New Jersey Stolen Valor Act separately criminalizes (1) the wearing of any official uniform, medal, or insignia of the armed forces; and (2) the wearing of a uniform, medal, or insignia with the “intent to deceive for the purpose of obtaining money, property, or other tangible benefit.”²⁵⁴ This allows the state to prosecute more offenders than the federal Act, which is limited in scope to only offenders wearing specified medals with the intent to obtain money, property, or another tangible benefit.²⁵⁵

Impressively, less than a month after enacting the state’s Stolen Valor Act into law, New Jersey had already arrested and charged its first stolen valor offender.²⁵⁶ This draws a sharp contrast to the lack of enforcement of the federal Stolen Valor Act of 2013, which has been effective since June 3, 2013. Four years later there have only been two fraudulent representation arrests under the law.²⁵⁷ Michael Porter is a twenty-five-year-old New Jersey resident who was arrested for impersonating a soldier on Veterans Day, November 11, 2015, and is the first to be arrested and charged under New Jersey’s stolen valor law.²⁵⁸ Following his arrest, “[a] judge sent Porter to county jail in lieu of \$5,000 bail.”²⁵⁹

2. Massachusetts Stolen Valor Act: MASS. GEN. LAWS ANN. ch. 272, § 106

Similar to New Jersey’s Stolen Valor Act, Massachusetts’s Stolen Valor Act criminalizes a broader scope of misrepresentation than the federal Stolen Valor Act of 2013.²⁶⁰ The Massachusetts act criminalizes: (1) the fraudulent misrepresentation of oneself as a member of the armed forces by manufacturing, selling, using, or wearing

²⁵³ Lynn Stuart Parramore, *When Giant Banks Pay Fines, Where Does the Money Go? Does It Stop Crime?*, ALTERNET (Oct. 8, 2013), <http://www.alternet.org/economy/bank-fines-and-crime> [https://perma.cc/HK7Z-H87C] (“[A] former [Department of Justice] officer, Billy Jacobson, has gone on record as saying that the fines . . . go the [sic] U.S. Treasury. Restitution for victims is rare, and constitutes a trivial amount of what the DOJ brings in.”); see also USAM, *supra* note 161, at tit. 12.3-12000, <http://www.justice.gov/usam/usam-3-12000-collection-criminal-monetary-impositions> [https://perma.cc/Z5TT-MATC] (listing the fines themselves, but not specifying the fines’ ultimate destination).

²⁵⁴ § 38A:14-5.

²⁵⁵ 18 U.S.C. § 704.

²⁵⁶ See *NJ Impersonation*, *supra* note 36.

²⁵⁷ *Above and Beyond*, *supra* note 218 (“[T]here have been no arrests under the [current] federal law.”).

²⁵⁸ See *NJ Impersonation*, *supra* note 36.

²⁵⁹ Dan Stamm, *Stolen Valor: Police Bust New Jersey Man for Impersonating a Soldier on Veterans Day*, NBC10 (Nov. 12, 2015, 6:17 AM), <http://www.nbcphiladelphia.com/news/local/Stolen-Valor-Arrest-Galloway-Porter-346592602.html> [https://perma.cc/J62X-GZLQ] [hereinafter *Police Bust NJ Man*].

²⁶⁰ See Tiffany Chan, *‘Stolen Valor’ Bill Signed Preventing Veteran Impersonation*, 22NEWS WWLP.COM (Nov. 23, 2015, 5:55 PM), <http://wwlp.com/2015/11/23/stolen-valor-bill-signed-preventing-veteran-impersonation/> [https://perma.cc/95K3-7D2L].

a uniform or using a fake military identification; and (2) fraudulent misrepresentation of oneself as a recipient of the same high honors criminalized by the federal Act.²⁶¹

The Massachusetts Stolen Valor law differs from the federal Stolen Valor Act in scope of behavior criminalized by expanding the scope to include the mere using or wearing a uniform or using a fake military identification.²⁶² Additionally, another difference is that the Massachusetts law requires that the offender actually “*obtains* money, property or another tangible benefit through such fraudulent representation.”²⁶³ Whereas, the federal Stolen Valor Act requires the individual to misrepresent himself with the “*intent* to obtain money, property, or other tangible benefit.”²⁶⁴ Further, the Massachusetts legislation carries a penalty of imprisonment of a maximum of one year, “a fine of \$1,000, or both.”²⁶⁵ These penalties are similar to the federal Act’s penalty of a fine of an unspecified amount, or imprisonment of not more than a year, or both.²⁶⁶

3. New Jersey’s and Massachusetts’ Tough Stolen Valor Laws Are Constitutional

As discussed above, fraud statutes are generally thought to include the following elements of the common law tort of fraud: (1) a speaker made a false statement of material fact knowing it was false; (2) the speaker intended the statement to mislead; and (3) the false statement did in fact mislead or deceive.²⁶⁷ However, the Stolen Valor Act of 2013 and, by extension, the state laws mirrored after it, most closely resemble impersonation statutes similar to the federal criminal impersonation statute discussed above, 18 U.S.C. § 912.²⁶⁸ As delineated above, 18 U.S.C. § 912 encompasses two offenses: (1) “impersonation coupled with acting as such” and (2) “impersonation coupled with demanding or obtaining something of value in such pretended character.”²⁶⁹ Additionally, an element of both offenses is the “[f]alse personation of an officer or employee of the United States.”²⁷⁰ Most applicable to the laws criminalizing stolen valor is the second of these two offenses, which contains two elements: (1) “falsely assum[ing] or pretend[ing] to be an officer or employee acting under the authority of the United States or any department, agency or officer thereof[;]” and (2) “in such pretended character demands or obtains any money, paper, document, or thing of value.”²⁷¹

²⁶¹ MASS. GEN. LAWS ANN. ch. 272, § 106 (West 2016).

²⁶² *Id.*

²⁶³ *Id.* (emphasis added).

²⁶⁴ Stolen Valor Act of 2013, 18 U.S.C. § 704 (Supp. I).

²⁶⁵ ch. 272, § 106.

²⁶⁶ 18 U.S.C. § 704.

²⁶⁷ See RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR ECONOMIC HARM, *supra* note 152, § 9; see also *supra* Section II.A.

²⁶⁸ See 18 U.S.C. § 912 (2012); see also *supra* notes 148–66 and accompanying text.

²⁶⁹ *Criminal Resource Manual*, in USAM, *supra* note 161, § 1470.

²⁷⁰ *Id.*

²⁷¹ 18 U.S.C. § 912.

The New Jersey Stolen Valor Act fulfills the first element of a constitutionally valid impersonation statute by requiring the offender to intentionally and falsely “misrepresent[] oneself as a member or veteran of the United States Armed Forces.”²⁷² The second element is satisfied through the statute’s second and third subsections that require the offender to impersonate either an active duty member or veteran of the armed forces “for the purpose of obtaining money, property, or other tangible benefit.”²⁷³ However, it may be argued that New Jersey’s Stolen Valor Act’s first subsection, which criminalizes the knowing misrepresentation of a veteran or active duty military member through the wearing of an authorized uniform or medal, does not pass constitutional muster, as it does not fulfill the second element of the false personation statute, requiring that the person demand or obtain “money, paper, document, or thing of value.”²⁷⁴ This opposition to New Jersey’s Stolen Valor Act would be unsuccessful because this may fall under § 912’s “acts as such” crime because “action alone” can constitute a completed violation of § 912.²⁷⁵ Further, there is current federal law prohibiting the unauthorized wearing of a military uniform, 18 U.S.C. § 702 (2012),²⁷⁶ that the Supreme Court has held is “a valid statute on its face.”²⁷⁷

The Massachusetts Stolen Valor Law satisfies the first element of a constitutionally valid false personation statute, which requires an individual to falsely assume or pretend to be an officer or employee of the United States.²⁷⁸ The Massachusetts law does this by requiring that a person “fraudulently represents [himself or herself] to be an active member or veteran of” the armed forces or “fraudulently represents [himself or herself] to be a recipient of” the same medals qualified in the Stolen Valor Act of 2013.²⁷⁹ The second element, which requires that “in such pretend character, [the offender] demand[] or obtain[] any money, paper, document, or thing of value,”²⁸⁰ is satisfied by the requirement that the offender engage in these misrepresentations purposefully and “with the intent to obtain money, property or any other tangible benefit.”²⁸¹ Additionally, although not required for constitutional validity, the

²⁷² N.J. STAT. ANN. § 38A:14-5 (West 2016).

²⁷³ *Id.*

²⁷⁴ 18 U.S.C. § 912.

²⁷⁵ USAM, *supra* note 161 (“Thus action alone may amount to a false pretense of federal authority.” (citing *Heskett v. United States*, 58 F.2d 897, 902 (9th Cir. 1932))).

²⁷⁶ 18 U.S.C. § 702 (2012) (“Whoever, in any place within the jurisdiction of the United States or in the Canal Zone, without authority, wears the uniform or a distinctive part thereof or anything similar to a distinctive part of the uniform of any of the armed forces of the United States, . . . shall be fined under this title or imprisoned not more than six months, or both.”).

²⁷⁷ *Schacht v. United States*, 398 U.S. 58, 61 (1970) (“18 U.S.C. § 702, making it an offense to wear our military uniforms without authority is, standing alone, a *valid statute on its face*.” (emphasis added) (citation omitted)).

²⁷⁸ See MASS. GEN. LAWS ANN. ch. 272, § 106 (West 2016).

²⁷⁹ *Id.*

²⁸⁰ 18 U.S.C. § 912 (2012).

²⁸¹ ch. 272, § 106.

Massachusetts Stolen Valor Law satisfies the traditional common-law fraud elements of actual reliance and injury.²⁸² The Massachusetts Stolen Valor Act does this by requiring that an offender must misrepresent himself as either an active member of the armed forces or a recipient of an honorable distinction from the armed forces, in addition to the requirement that they must “*obtain*[] money, property or another tangible benefit through such fraudulent representation.”²⁸³

Thus, both New Jersey’s and Massachusetts’ stolen valor acts are constitutional when construed as false personation statutes limiting fraudulent speech and conduct. Additionally, New Jersey’s Stolen Valor Act appears to be more easily enforceable, as the state is already prosecuting its first offender.²⁸⁴ Either of these variations on the federal Stolen Valor Act of 2013 provides positive examples of ways Congress could amend the federal Act to criminalize a broader range of fraudulent stolen valor conduct and potentially impose harsher sentences.

CONCLUSION

The United States of America has a longstanding tradition of both honoring our nation’s heroes through medals of valor and protecting that award system through legislation. This tradition traces back to Framers of the U.S. Constitution, “George Washington, as the commander of the Continental Army, [who] created the very first ‘honorary badges of distinction’ for service in our country’s military.”²⁸⁵ In doing so, Washington “established a rigorous system to ensure that these awards would be received and worn by only the truly deserving.”²⁸⁶ Washington required that “‘incontestable proof’ of ‘singularly meritorious action’ [be presented] to the Commander in Chief” before a badge of distinction would be issued, and he ordered that “‘anyone with the ‘insolence to assume’ a badge that had not actually been earned would be ‘severely punished.’”²⁸⁷

This tradition has been continued through the passage of the Stolen Valor Act of 2005 and the amendment of that Act to create the Stolen Valor Act of 2013 to ensure that this country continued to constitutionally criminalize the egregious impersonation of war heroes for personal gain.²⁸⁸ The Stolen Valor Act of 2013 is constitutional under two separate interpretations: (1) as a statute that criminalizes fraudulent speech and conduct; and (2) as a statute that criminalizes a form of individualized

²⁸² *See id.*

²⁸³ *Id.* § 106(a)(ii) (emphasis added) (delineating the protected medals).

²⁸⁴ *Police Bust NJ Man*, *supra* note 259.

²⁸⁵ *United States v. Alvarez*, 132 S. Ct. 2537, 2557 (2012) (Alito, J., dissenting) (citation omitted).

²⁸⁶ *Id.*

²⁸⁷ *Id.* at 2557–58 (citation omitted).

²⁸⁸ *See* Stolen Valor Act of 2013, 18 U.S.C. § 704 (2012 & Supp. I 2013) (including commentary on previous iterations of the Stolen Valor Act, such as the 2005 version).

commercial speech. The Act is constitutional under either interpretation because fraud has been a “historically unprotected”²⁸⁹ category of speech, and “the government may freely regulate commercial speech that concerns unlawful activity or is misleading.”²⁹⁰

Despite the enactment of a constitutional Stolen Valor Act, the federal government has only prosecuted two offenders for fraudulent representation under this Act since its enactment in 2013.²⁹¹ This has led to a vigilante atmosphere where veterans have been left to police these impersonations on their own, and where states are pushing for their own legislation to actively combat these relentless threats to the legitimacy of the nation’s honors for “only the bravest of the brave.”²⁹² Evaluation of the enforcement of stolen valor legislation is crucial at this time because stolen valor encounters between veterans and imposters are turning increasingly violent, leading to extensive injuries, including broken jaws. Furthermore, instances of false stolen valor accusations are occurring and leading to the humiliation of veterans who have honorably served and survived combat.²⁹³

There are two solutions for the current lack of federal enforcement of the constitutional Stolen Valor Act of 2013: (1) amend the Stolen Valor Act of 2013 to more closely mirror the federal criminal impersonation statute used to prosecute police impersonation, 18 U.S.C. § 912; or (2) continue to watch the development of successful and constitutional state stolen valor laws and redraft the Stolen Valor Act of 2013 after the one that best combats stolen valor.

As a nation, we owe it to our war heroes to continue to follow George Washington’s guidance and “guard against the impostures of pretended patriotism.”²⁹⁴

²⁸⁹ *United States v. Stevens*, 559 U.S. 460, 470, 472 (2010).

²⁹⁰ *Fla. Bar v. Went For It, Inc.*, 515 U.S. 618, 623–24 (1995) (citing *Cent. Hudson Gas & Elec. Corp. v. Public Serv. Comm’n*, 447 U.S. 557, 563–64 (1980)).

²⁹¹ *See Mara*, *supra* note 28.

²⁹² *Alvarez*, 132 S. Ct. at 2556 (Alito, J., dissenting).

²⁹³ *See supra* notes 222–27 and accompanying text.

²⁹⁴ *George Washington’s Farewell Address*, FRONTIERS FREEDOM (Jan. 7, 2013), <https://ff.org/george-washingtons-farewell-address/> [<https://perma.cc/S8EB-236Z>] (presenting George Washington’s address on September 19, 1796).