Of Locke and Valor: Why the Supreme Court's Decision in United States v. Alvarez Does Not Foreclose Congress's Ability to Protect the Property Rights of Medal of Honor Recipients

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INTRODUCTION

On September 9, 2009, Marine Corporal Dakota Meyer went above and beyond the call of duty when fifty enemy fighters ambushed his joint United States-Afghani patrol in Kunar Province, Afghanistan. After learning that the patrol was cut-off from its exit route, Corporal Meyer manned an exposed gunner position on a truck that a fellow Marine drove towards the fighting. As the gun truck entered the field of battle, the lone vehicle drew significant fire from enemy forces. However, disregarding the significant risk to his life, Corporal Meyer and his fellow Marine driver repeatedly braved the firefight to evacuate the dead and wounded. During the six-hour firefight, Corporal Meyer made a total of five such trips. Although Corporal Meyer suffered a shrapnel-wound to his arm on his third run into the firefight, he continued fighting and searching for missing members of the United States team. His selfless, heroic acts inspired fellow warriors to face the vicious firefight and help in the recovery mission. In all, Corporal Meyer’s heroism brought thirty-six men, who otherwise would have likely died that day, home alive and brought four fallen Americans home for a proper burial. Through his gallantry,

1 Official Citation: The President of the United States in the Name of Congress Takes Pleasure in Presenting the Medal of Honor to Corporal Dakota L. Meyer United States Marine Corps, MARINES.MIL (last visited Sept. 11, 2012 09:31 AM), http://www.marines.mil/community/pages/MedalofHonorSgtDakotaMeyer-Citation.aspx [hereinafter Corporal Meyer’s Citation].
2 Id.
3 Id.
4 Id.
5 Id.
6 Id.
7 Corporal Meyer’s Citation, supra note 1.
Corporal Meyer earned the Medal of Honor (“the Medal”) and, with it, membership in one of the most exclusive clubs in the world. However, on June 28, 2012, the Supreme Court significantly diminished the value of Corporal Meyer’s—and 3,458 fellow Medal recipients’—membership in that club by reducing Congressional protection of that vested right with their decision in United States v. Alvarez.

There, addressing a split between the Ninth and Tenth Circuits, the Court invalidated the Stolen Valor Act’s prohibition on making false claims about receiving military honors as an unconstitutional content-based restriction on free speech. In so holding, the Court essentially deemed false claims regarding receipt of a military honor, harmless false speech. Although, the government’s argument in the case evidences that false claims regarding receipt of military honors dilute the integrity and honor of the award, the Court found that maintaining the honor of the awards themselves was not a sufficient government interest warranting restriction on free speech rights.

In response to the Court’s decision in United States v. Alvarez, the United States House of Representatives pressed to amend the Stolen Valor Act. On September 10, 2012, the proposed Stolen Valor Act of 2012, prohibiting fraudulent representation regarding receiving

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9 Id.
11 Id.
13 E.g., United States v. Strandlof, 667 F.3d 1146 (10th Cir. 2012) (finding the Stolen Valor Act constitutional); United States v. Alvarez, 617 F.3d 1198 (9th Cir. 2010) (finding the Stolen Valor Act facially invalid under the First Amendment).
14 Alvarez, 132 S. Ct. at 2548.
15 Id. at 2547-48.
16 Id. at 2549.
17 Id.
military honors, passed the House.\textsuperscript{19} If signed into law, the Act, as amended, will outlaw only those false claims to the Medal aimed at inducing reliance or at securing some material benefit.\textsuperscript{20} Subsequently, on December 3, 2012, the Senate passed an Act authorizing appropriations for military operations during the 2013 fiscal year.\textsuperscript{21} Included within this defense authorization bill, is a proposed amendment to the Stolen Valor Act that, like the Act passed in the House, prohibits only those false claims to military honor aimed at fraudulently securing material benefit or personal gain in the form of employment, financial gain, election to public office, or appointment to other public body.\textsuperscript{22}

This Note argues not that the Supreme Court erred in its decision, but rather that the House of Representatives and the Senate erred in proposing to redraft the Stolen Valor Act in the spirit of a fraud prohibition. Instead, this Note argues that Congress should amend the Stolen Valor Act in the spirit of laws prohibiting the appropriation of another’s name, likeness, or celebrity in order to protect the proprietary interest in the Medal’s reputation that recipients earn when awarded the Medal. Unlike the amendments to the Stolen Valor Act passed in both the House of Representatives and the Senate that focus on preventing public harm that false claimants to military honor cause, this Note will focus on the individual harm that false claimants cause bona fide Medal recipients when they wrongfully appropriate the Medal’s honor and reputation.

Part I of this Note will examine the history of military honors with particular focus on the Medal. Part II will analogize earning the Medal to earning a vested property right under a

\textsuperscript{20} See id.
\textsuperscript{21} S. 3254, 112th Cong. (2012).
Lockean labor-mixing analysis. Part III will then examine the Supreme Court’s decision in *United States v. Alvarez*, and the circuit split that the decision sought to resolve.\(^{23}\) Finally, Part IV of this Note will argue that if Congress drafts an amended Stolen Valor Act aimed at protecting those individual vested rights from wrongful appropriation, the prohibition on false claims regarding receipt of military honors can withstand constitutional and judicial scrutiny.

I. **STOLEN VALOR AND MILITARY HONORS**

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

A. **History of Military Honors and the Medal of Honor**

Recognition of valor in combat has been a staple of this world’s great armies since the Greeks and Romans dominated battlefields.\(^{24}\) Today, the United States Government recognizes 73 individual medals and ribbons of military distinction.\(^{25}\) These 73 medals are organized in a “Pyramid of Valor.”\(^{26}\) At the base lies a set of medals equal in merit and the Medal, the Armed Forces highest commendation, sits at the pinnacle.\(^{27}\)

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\(^{23}\) United States v. Strandlof, 667 F.3d 1146 (10th Cir. 2012) (finding the Stolen Valor Act constitutional); United States v. Alvarez, 617 F.3d 1198 (9th Cir. 2010) (finding the Stolen Valor Act facially invalid under the First Amendment).


\(^{26}\) E.g., Zimmerman & Gresham, supra note 24, at 48 (stating that military honors were so ordered according to precedence); Ribbons – Order of Precedence, supra note 25.

\(^{27}\) E.g., Ribbons – Order of Precedence, supra note 25.
The President of the United States is authorized to award, “in the name of Congress,” the Medal to any member of the Armed Forces who goes above and beyond the call of duty and distinguishes himself by gallantry in risking his or her own life in the service of country. The Medal is the military’s highest distinction and it derives from General George Washington’s directive that members of the military be awarded honorary ribbons of distinction known as Badges of Military Merit, and alternatively as the Purple Hearts, for their exemplary service.

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

29 ZIMMERMAN & GRESHAM, supra note 24, at 49.
30 E.g., S. COMM. ON LABOR AND PUBLIC WELFARE, STAFF OF SUBCOMM. ON VETERAN’S AFFAIRS, 90TH CONG., REP. ON THE MEDAL OF HONOR 1863-1968 3 (Comm. Print 1968) [hereinafter REP. ON THE MEDAL OF HONOR]. Washington’s Purple Heart is not to be confused with the modern Purple Heart that is awarded to members of the Armed Forces who are sustain wounds in combat that require the attention of a medical officer. See Exec. Order No. 11,016, 3 C.F.R. 596 (1959-1963).
32 See ZIMMERMAN & GRESHAM, supra note 24, at 48-49.
33 See id. at 49.
34 WASHINGTON’S ORDERS, supra note 31, at 34.
35 Id. at 35.

After the Revolutionary War, however, Washington’s Badge of Military Merit was apparently forgotten.\footnote{ZIMMERMAN & GRESHAM, supra note 24, at 49.} However, at the onset of the Civil War, Washington’s idea of recognizing military distinction reentered national discussion as Union leaders struggled to maintain their fighting forces amid mass defections to the Confederacy that threatened to decimate the Union military.\footnote{Id. at 50-51.} As the United States descended into the brutal hostilities at the outset of the Civil War, a sudden and violent upheaval in the nature of the United States’ Armed Forces sparked this desire to recognize members who distinguished themselves in service.\footnote{During the country’s early years, America’s Armed Forces were largely out of sight and out of mind as they served in relatively unpopulated outposts guarding against attacks from abroad. However, at the onset of hostilities close to home during the early stages of the Civil War, forces were called to America’s front yards and the polity witnessed how brave and valuable members of the Armed Services were and “quite naturally caused that Nation to seek some means of rewarding” exemplary service. REP. ON THE MEDAL OF HONOR, supra note 30, at 2.} Though all members of the Armed Forces served bravely, Congress and the Nation at large resolved that those who gallantly sacrificed, displaying uncommon heroism in the face of battle, deserved the Nation’s formal recognition.\footnote{See id.} The best precedent for recognizing this type of heroism was Washington’s Badge of Military Merit, and the philosophy behind Washington’s ribbon remained the philosophy at the heart of Congress’ Act of 1861, establishing the Medal for members of Navy and Marine Corps.\footnote{See id. at 3.} Two months later, another Act of Congress made the honor available to members of the Army.\footnote{See id.} President Abraham Lincoln signed both Acts into law on July 12, 1862,
and Congress later amended the law, on March 3, 1863, to make the honor available to officers as well as enlisted men.43

Today, the military’s highest honor remains reserved for only the most deserving exemplifiers of uncommon heroism and valor.44 Each branch of the armed services has its own regulations that govern the Medal’s awarding, but the standard for even garnering consideration for the award remains substantially high and relatively uniform across the entirety of the Armed Services.45 In light of the fact that the environment in which our Armed Forces operate is one that makes bravery and courage commonplace, the level of gallantry and heroism worthy of consideration for the Medal is very difficult for a lay person to comprehend, much less put into words.46 At the very least, one’s act of valor must clearly rise above and “beyond the call of duty” so as to distinguish a particular service member’s gallantry from other service members’ lesser acts of valor.47 Not even mere deadly risk alone is enough to justify consideration for the Medal; the act of valor must be in the face of such a risk to death that the soldier would not face any “justified criticism” for declining to face the risk in order to accomplish the task.48

This threshold is so high that, as a general rule, only those members of the Armed Forces who faced enemy fire during actual combat can even be considered for the Medal.49 Due to this extremely high threshold for consideration for the Medal, only 3,459 people have earned the

43 See id.
44 See, e.g., Medal of Honor Statistics, supra note 10 (reporting statistics of Medals awarded since the award’s inception in 1863).
46 See BURRELLI, supra note 45, at 1 n. 1.
47 See id. at 1.
48 See id.
49 E.g., id. at 2 (stating the general rule that recipients must engage in actual combat with an enemy nation, but noting select exceptions for awarding the Medal during peacetime). However, in a controversial bit of Medal of Honor history, Mary Edwards Walker, a civilian doctor was awarded the Medal after being captured by Confederates. Dr. Edwards’s Medal was initially revoked during the “Purge of 1917,” see infra Part I.B, because she was a civilian who did not engage the enemy in combat. It wasn’t until 1977 that President Jimmy Carter restored Dr. Edwards’s Medal. See ZIMMERMAN & GRESHAM, supra note 24, at 69-70.
honor for their gallantry. Congress presented the first Medal to Private Jacob Parrott on March 25, 1863, and most recently presented the Medal to Specialist Fourth Class Leslie H. Sabo, Jr. on May 16, 2012.

B. Congress Seeks to Protect the Medal’s Honor

When originally signed into effect, the Medal became the United States’ first medal aimed at recognizing exemplary valor in battle after eighty-five years as a nation. However, given that the Medal was also the nation’s only military decoration and little criteria existed for awarding the Medal, the Medal in its original form was the military’s default award rather than an award reserved for only the most deserving. Consequently, although today the Medal is reserved only for only those members of the Armed Forces who display the highest valor in the face of death, shortly after its inception confusion as to who truly earned the Medal abounded. Not only were imitation Medals and false claims to the Medal almost immediately a problem for Congress, but lack of oversight made it difficult to ensure that those awarded the Medal were in fact deserving of such high recognition. As a result of this dearth of oversight, Congress originally awarded an astonishing 2,445 Medals during the Civil War alone. While Congress awarded some Medals as a direct result of oversight problems, doling out Medals to individuals

50 Medal of Honor Statistics, supra note 10.
51 Id.
52 ZIMMERMAN & GRESHAM, supra note 24, at 53.
53 “[G]allantry in action, and other soldier-like qualities, during the present insurrection[]” Id. at 53.
54 See id. at 53-54.
55 See REP. ON THE MEDAL OF HONOR, supra note 30, at 4.
56 See id.
57 Id.
58 See cf. id. (discussing incidents of Medal abuses that ultimately led to the institution boards of review to help ensure that only the most deserving acts of valor were awarded the Medal).
59 ZIMMERMAN & GRESHAM, supra note 24, at 54.
whose actions would hardly warrant a second glance from today’s military, other Medals were awarded out of sheer abuse.

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

Due to the abuse of discretion in awarding the Medal and an ever-increasing amount of ex-soldiers applying for recognition without any substantive supporting documentation, Congress created boards to both review recommendations for the Medal and to oversee its general policy. In 1878, Congress convened the first such board of review to examine the Medals awarded to soldiers of the Seventh Cavalry who fought at Little Big Horn. This board narrowed the criteria for awarding the Medal, making only those acts “that if omitted . . . [would]
not justly subject the person to censure for shortcoming or failure” eligible for citation. In 1897 the War Department, by executive order, codified the requirement that only those who go above and beyond the call of duty be considered for the Medal.

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

C. **Valor by Deceit**

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70 Id.
71 See id. at 61.
72 Id. at 66.
73 Id. at 67.
74 Burrelli, supra note 45, at 3.
75 Id.
76 Id.
77 Zimmerman & Gresham, supra note 24, at 69
78 Id.
79 See id.
Although Congress was able to address problems that plagued early award of the Medal,\(^1\) those reforms did not specifically deter individuals from making false claims about receiving the Medal ex ante.\(^2\) After Congress established stringent standards for awarding the Medal, the respect and reputation associated with the Medal bred envy among those not rightfully entitled to that honor and distinction.\(^3\) This envy led not only to a market in the sale of unauthorized Medals, but also to an increasing problem of individuals falsely holding themselves out to the public as Medal recipients.\(^4\)

One of the most notable instances of falsely claiming the Medal occurred when Illinois district court judge Michael O’Brien was exposed for falsely displaying, and claiming entitlement to, two Medals.\(^5\) Judge O’Brien displayed the two Medals in his chambers and held himself out to the public as a double-Medal recipient.\(^6\) As a result of O’Brien’s elaborate deception, his municipality afforded him the honor of leading parades and the public regarded him as a celebrity.\(^7\) However, Illinois Department of Veterans’ Affairs Director Harold Fritz discovered O’Brien as an imposter and reported him to authorities for prosecution.\(^8\)

Ultimately, O’Brien avoided prosecution by resigning from the bench.\(^9\) However, his false claims to the reputation associated with bona fide Medal recipients is not unique as unauthorized claims to the Medal continue to trouble Congress and diminish the value of bona

\(^{1}\) See supra Part I.B.

\(^{2}\) See cf. ZIMMERMAN & GRESHAM, supra note 24, at 172-74 (relating extra-legislative measures aimed at combatting false claims to the Medal of Honor).

\(^{3}\) See REP. ON THE MEDAL OF HONOR, supra note 30, at 4.

\(^{4}\) See generally ZIMMERMAN & GRESHAM, supra note 24, at 172-77.

\(^{5}\) Id. at 176.

\(^{6}\) Id. This farce would have been quite an accomplishment, as there are only 19 double-recipients in the Medal’s entire history. Double Recipients, CONGRESSIONAL MEDAL OF HONOR SOCIETY, http://www.cmohs.org/double-recipients.php (last visited Nov. 26. 2012).

\(^{7}\) ZIMMERMAN & GRESHAM, supra note 24, at 176.


\(^{9}\) ZIMMERMAN & GRESHAM, supra note 24, at 176.
fide recipients’ proprietary interest in the honor and reputation associated with the Medal of Honor.\(^90\)

D. The Stolen Valor Act of 2005

Law enforcement entities threatened Judge Michael O’Brien with prosecution, under both state and federal law, for falsely displaying counterfeit Medals.\(^91\) Although the threat of state prosecution for false claims and for official misconduct ultimately influenced O’Brien’s resignation,\(^92\) he was also facing possible federal prosecution,\(^93\) likely under 18 U.S.C. § 704 prohibiting anyone from “knowingly wear[ing], manufacur[ing], or sell[ing]” any military medal or ribbon without authorization under military regulations.\(^94\) Congress adapted this version of 18 U.S.C. § 704, in 1948, from the original act prohibiting falsely wearing or displaying military honors, 10 U.S.C. § 1425.\(^95\) Courts interpreting 18 U.S.C. § 704, as originally enacted, largely conclude that the prohibition on falsely wearing or displaying military honors is constitutional.\(^96\) However, that narrow prohibition did not deter individuals from making false claims regarding receiving the Medal.\(^97\)

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\(^{92}\) See id.

\(^{93}\) See id.

\(^{94}\) See 18 U.S.C. § 704 (1952); Young, supra note 91.

\(^{95}\) See 18 U.S.C. § 704 (1952) (original version at 10 U.S.C. § 1425 (1940) (prohibiting unauthorized wearing of Army and Navy uniforms and decorations)).

\(^{96}\) See, e.g., Shacht v. United States, 398 U.S. 58, 61-62 (1970) (concluding that prohibition against wearing military uniforms without authorization is facially constitutional, but declining to uphold the statute as applied to a theatrical performance); United States v. Perelman, 737 F. Supp. 2d 1221, 1238 (D. Nev. 2010) (determining that prohibition against wearing military medals without authorization under 18 U.S.C. § 704(a) is merely an incidental restriction on First Amendment rights that is outweighed by the substantial government interest in protecting the reputation of military awards that Congress has power to pursue through its power to make all laws necessary and proper to raise and support armies).

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

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

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99 See id.
100 Id.
101 Id.
102 Id.
103 Id. at 1289.
105 The Stolen Valor Act of 2005, supra note 80, at 3266.
106 See id.
The 2005 amendment to the 18 U.S.C. § 704, the Stolen Valor Act, represents the latest in a line of legislative action aimed at protecting the Medal’s reputation and honor. While all previous amendments to 18 U.S.C. § 704 prohibited only unauthorized display, manufacture, and sale of military decorations,\textsuperscript{107} Congress deemed it necessary to expand law enforcement capabilities under the Stolen Valor Act of 2005.\textsuperscript{108} However, in expanding law enforcement officials’ power to protect military honors, the Stolen Valor Act of 2005 broke with previous amendments to 18 U.S.C. § 704 and made it a crime for individuals not only to wear military decorations without authorization, but also to falsely claim that they had earned a military honor.\textsuperscript{109} In doing so, Congress directly regulated speech and thus opened 18 U.S.C. § 704(b) to strict scrutiny review by courts.\textsuperscript{110}

II. THE MEDAL AS A PROPERTY RIGHT

Given the significant acts of heroism required to garner consideration for the Medal,\textsuperscript{111} it would seem disingenuous to say that the honor is \textit{given} to the recipient. Rather, it is evident from the text of the statutes establishing the Medal for the several branches of the Armed Forces that those who earn the Medal must distinguish themselves from their peers by going “above and beyond the call of duty” in both gallantry and in the risk to their lives.\textsuperscript{112} Therefore, it can be said

\textsuperscript{107} See 18 U.S.C. § 704 (1952) (encompassing 1948 act, 1949 and 1950 amendments, prohibiting the unauthorized wear or display of military decorations under punishment of $250 fine and/or imprisonment up to six months).

\textsuperscript{108} See, e.g., The Stolen Valor Act of 2005, supra note 80, at 3266 (determining that legislative action was necessary in order to enable law enforcement officers to better protect the reputation and meaning of military honors).


\textsuperscript{110} See infra Part III (discussing judicial treatment of the Stolen Valor Act of 2005). Compare United States v. Alvarez, 132 S. Ct. 2537, 2543-47 (concluding that 18 U.S.C. § 704(b) represents a content-based restriction on free speech that is presumed invalid and puts the burden on the government to present a compelling justification for the restriction) with United States v. Perelman, 737 F. Supp. 2d 1221, 1237-38 (D. Nev. 2010) (concluding that prohibiting individuals from wearing military medals without authorization did not regulate speech, because the process of awarding military honors was not expressive in nature).

\textsuperscript{111} See, e.g., supra Part I.A (tracing the establishment of the Medal as this Nation’s highest military honor); infra Part II.C.2 (illustrating just how much labor is necessary to justify a proprietary interest in the reputation and honor associated with the Medal).

that, in distinguishing themselves through exemplary gallantry, Medal recipients mix their
exemplary labor with their common service to earn a proprietary interest in the Medal, and in the
reputation associated with it.\footnote{Cf. John Locke, The Second Treatise on Civil Government § 26 (Prometheus Books 1986) [hereinafter Locke, The Second Treatise on Civil Government] (introducing Locke’s labor-mixing theory of property rights). The Medal has value only because of the award’s prestigious reputation as the Nation’s highest military honor, and this reputation derives from the heroic service of those entitled to wear the Medal. See cf. Mike Wallace, Introduction to Medal of Honor: Profiles of America’s Military Heroes from the Civil War to the Present IX, XIV-XV (2002) (stating that the Medal derives its significance from the fact that “the [M]edal is reserved strictly for those who act of their own accord and out of complete selflessness . . . [this requirement sets] the Medal of Honor apart from all other military commendations”). This reward for selfless commitment to country is so coveted by members of the military that the great General George Patton once remarked, “that he would have given his immortal soul” to be counted as among those worthy of wearing the Medal. See id. at XV. It is because of this great value that Congress has continually attempted to protect the Medal’s reputation as being awarded only to the select few who have rightly earned the honor of wearing it. E.g., supra Part I.B-D.}

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

A. \textit{Of Locke and Labor}

To Locke, property is best understood as providing a justification for, and a limit to civil government.\footnote{See, e.g., David C. Snyder, Locke on Natural Law and Property Rights, 16 Can. J. Phil. 723, 724-25 (1986) (stating that Locke’s property theory shows why otherwise free men would consent to the rule of civil government).} Locke’s sets his theory of property out in the Second Treatise on Civil Government, presented against the backdrop of his theory of the state of nature.\footnote{See Locke, The Second Treatise on Civil Government, supra note 113, at §§ 4-15; see also Snyder, supra note 114, at 729-30.} In Locke’s state of nature, there is no government and man exists in “perfect freedom” and perfect equality.\footnote{See Locke, The Second Treatise on Civil Government, supra note 113, at § 4.} However, while there is no government in Locke’s state of nature, man is still governed by natural law that God’s will dictates.\footnote{See id. at § 6; see also Snyder, supra note 114, at 730.} Under natural law, man is not only entitled to
certain natural rights, but is also subject to correlative duties. For instance, no man has the right “to harm another in his life, health, liberty, or possessions[].” If any man disobeys this limit on individual liberty and invades another’s rights under natural law, mankind has a correlative right to punish transgressors to a degree that will discourage further transgressions. Punishment of transgressors is justified in the fact that the transgressor violates God’s will that all men be secure. Consequently, these transgressors represent a danger to all of mankind and, therefore, punishment is necessary to preserve security to all mankind.

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

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118 Snyder, supra note 114, at 731-32.
120 Id.
121 See id. at § 7.
122 See id. at § 8.
123 See id. at §§ 8-9.
124 See generally id. at §§ 24-51.
125 See LOCKE, THE SECOND TREATISE ON CIVIL GOVERNMENT, supra note 113, at § 25; see also Snyder, supra note 114, at 735.
126 See Snyder, supra note 114, at 735.
Locke begins his labor-mixing discussion by recognizing that every man owns his person; therefore, the “‘labour’ of his body and the ‘work’ of his hands” are also his property.\textsuperscript{128} As such, Locke posits that whatever man may take out of nature, and mix his labor with, becomes exclusively his property as well.\textsuperscript{129} Locke does acknowledge that there is a limit to the amount of property man may appropriate in that he must leave “enough and as good” so as not to prejudice others through this appropriation.\textsuperscript{130} Consequently, man cannot appropriate all of nature’s goods to his own use.\textsuperscript{131} Man may appropriate only so much that he can “make use of to any advantage of life before it spoils[.]”\textsuperscript{132}

Locke’s theory can therefore be viewed not only as a justification for ownership of material goods, but also an argument that establishes man’s “proprietorship over [his] capacity to labor[.]”\textsuperscript{133} It is also apparent that, not only are man’s rights to appropriate limited by his capacity to labor, they are also limited by the natural law limitations of “sufficiency” and of “spoilage.”\textsuperscript{134} Under Locke’s theory of property, the natural law of property and its limitations are supreme and civil government exists to protect man’s natural right to property.\textsuperscript{135}

Arguably then, civil government must protect the rights of the “industrious and rational” from “the fancy and the covetousness of the quarrelsome and contentious.”\textsuperscript{136} Under Locke’s theory, anyone who has “enough and as good left” should not intrude upon the rights of others in

\textsuperscript{128} Id.
\textsuperscript{129} See id.
\textsuperscript{130} See id. at § 32.
\textsuperscript{131} See id. at § 35.
\textsuperscript{132} See id. at § 30.
\textsuperscript{133} J.E. Parsons, Jr., Locke’s Doctrine of Property, 36 SOC. RES. 389, 397 (1969).
\textsuperscript{134} Id. at 402.
\textsuperscript{135} See, e.g., LOCKE, THE SECOND TREATISE ON CIVIL GOVERNMENT, supra note 113, at § 29 (arguing that the natural law of reason is the first law of property in civilized society); see also Snyder, supra note 114, at 749-50 (arguing that private property engenders jealousy and thus necessitates civil government to protect against the “destruction of peace and preservation”).
\textsuperscript{136} Cf. LOCKE, THE SECOND TREATISE ON CIVIL GOVERNMENT, supra note 113, at § 33 (stating that God gave the world to men in common so that the industrious and rational could make use of the earth).
what has already been improved by another’s labor.\textsuperscript{137} Such an invasion plainly seeks the benefit of another’s labor, and anyone who seeks the benefit of labor in this manner has no right to that benefit.\textsuperscript{138}

B. \textit{Locke’s Critics}

Locke’s theory of private property has been criticized as both fallacious and as a non sequitur.\textsuperscript{139} Some scholars have gone so far as to argue that Locke’s labor-mixing theory of private property is an entirely unworkable justification for property rights.\textsuperscript{140} Among these criticisms, most attacks focus on Locke’s apparent lack of guidance in just how much labor is necessary to create a property right, and for the theory’s apparent unsustainable “enough and as good” limitation.\textsuperscript{141}

In particular, the late Professor Robert Nozick attacks Locke’s labor-mixing theory by exposing questions Locke leaves unanswered.\textsuperscript{142} Nozick first addresses Locke’s theory by questioning just how much labor one must mix with an object in nature to effectively appropriate that object to his own use.\textsuperscript{143} After failing to reach a satisfactory conclusion, Nozick suggests that Locke’s labor-mixing theory is really an added value theory, but then dismisses this as ineffective as “[n]o workable or coherent value-added property scheme has yet been devised\textsuperscript{[.]}.\textsuperscript{144}

Turning then to Locke’s “enough and as good” limitation to appropriating private property, Nozick contends that the proviso is unsustainable because the theory unravels when

\begin{footnotesize}
\begin{enumerate}
\item[137] \textit{Id.} at §§ 32-33.
\item[138] \textit{Id.}
\item[140] E.g., Adam Mossoff, \textit{Locke’s Labor Lost}, 7 U. CHI. SCH. ROUNDTABLE 155, 155 (2002).
\item[141] See ROBERT NOZICK, \textit{ANARCHY, STATE, AND UTOPIA} 174-76 (1974); see also Mossoff, \textit{supra} note 140, at 156-57 (setting forth criticisms of Locke’s labor-mixing theory more generally).
\item[142] See NOZICK, \textit{supra} note 141, at 174-76.
\item[143] See \textit{id.} at 174.
\item[144] See \textit{id.} at 175.
\end{enumerate}
\end{footnotesize}
analyzed in reverse order from the first person to which “as much and as good was not left.”

After concluding that Locke’s “as much and as good” proviso is inevitably violated when interpreted strictly, Nozick goes on to posit that a looser interpretation of the proviso is necessary for Locke’s theory to survive. However, Locke does not provide necessary guidelines for what constitutes “as much and as good” within his theory and, therefore, Nozick finds Locke’s theory unworkable.

However valid Nozick’s critique of Locke’s labor-theory may be when applied to a literal reading of Locke’s work, the critique fails when Locke’s labor-theory is applied to the property rights that Medal recipients earn in their military distinction.

C. Of Locke, Value-Adding, and Valor

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

This value increasing interpretation of Locke allays concerns about the insufficiency of the “enough and as good” limitation on individual appropriation. Appropriation under this theory is not harmful in that the labor recognized by Locke is value increasing, and thus increases the

145 Id. at 176.
146 See id. at 176-77.
147 See id. at 177-78.
148 See STEPHEN BUCKLE, NATURAL LAW AND THE THEORY OF PROPERTY 150 (1991); see also Mossoff, supra note 140, at 159.
149 BUCKLE, supra note 148, at 150.
150 Id. at 151-52.
value of the common stock, thereby not leaving anyone worse off.\textsuperscript{151} This so-called “workmanship model” of interpreting Locke,\textsuperscript{152} not only responds to critics focused on questions about the unsustainability of Locke’s “as much and as good” limitation on appropriation, but also identifies valuable human activities that civil society’s legislatures should incentivize and protect.\textsuperscript{153} In doing so, this model of interpretation provides a workable theory for how Medal recipients earn a proprietary interest in the Medal and the reputation that goes along with it.

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

1. What Value Do Medal Recipients Add to Society?

Today’s Medal of Honor derives from Washington’s Badge of Military Merit.\textsuperscript{154} Representing the first military award available to enlisted men, Washington’s Badge of Military Merit was awarded for especially meritorious service in hopes of inspiring further meritorious service, thereby increasing the morale and the effectiveness of the Continental Army.\textsuperscript{155} Service

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\textsuperscript{151} Id. at 153.
\textsuperscript{152} Id. at 151.
\textsuperscript{153} See Eric Claeys, Locke Unlocked: Productive Use in Trespass, Adverse Possession, and Labor Theory, GEO. MASON L. & ECON. RES. PAPER SERIES 12-21 at 20 (working draft as of Feb. 21, 2012). While it is true that Locke’s theory of property addresses how man comes to possess things that are necessities of life, see JOHN LOCKE, THE FIRST TREATISE OF GOVERNMENT, §§ 86, 92 (Cambridge Univ. Press Student ed. 1988), Congress has identified acts of substantial valor as value increasing activity that contributes to the “espirit de corps” that is essential to sustaining a robust fighting morale necessary to mission accomplishment in the military just as shelter, food, and health is essential to human life in Locke’s justification for private property. See cf. Brief for the United States at 38, United States v. Alvarez, 132 S. Ct. 2537 (2012) (No. 11-210) (quoting Examination of Criteria for Awards and Decorations: Hearing Before the Military Personnel Subcomm. of the House Comm. on Armed Services, 109th Cong. 24, 26 (2006) (statements of Lt. Gen. Roger A. Brady, Deputy Chief of Staff, Manpower and Personnel, Headquarters U.S. Air Force and Brig. Gen. Richard P. Mills, Dir., Personnel Mgmt. Div., Manpower and Reserve Affairs, HQ, U.S. Marine Corps)). Additionally, although Locke’s theory is focused on “self-preservation” and pursuit of “[p]reservation,” see JOHN LOCKE, THE FIRST TREATISE OF GOVERNMENT, § 86 (Cambridge Univ. Press Student Ed. 1988) (emphasis omitted), the value increasing activity Congress identified for recognition in the context of military service is selfless and in pursuit of the improvement of others and the preservation of comrades and of country. See, e.g., infra Part II.C.2 (relating examples of extraordinary labor worthy of the Medal in which the Medal recipients laid down their own lives to preserve that of their comrades).
\textsuperscript{154} See supra Part I.A.
\textsuperscript{155} See WASHINGTON’S ORDERS, supra note at 31.
worthy of such recognition not only deserves public recognition and prestige, but also “fosters morale, mission accomplishment and esprit de corps.” 156 This morale and esprit de corps are essential elements to mission accomplishment and an otherwise successful military. 157 However, in noting that those deserving such recognition for exemplary heroism would be unlikely to claim it for themselves, it was deemed necessary to provide a medal, or “token,” representing the value of that service without words. 158

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

Many of Locke’s critics focus on the indeterminate amount of labor that justifies private ownership of a resource originally given to man in common. 159 However, soldiers deserving of the Medal are not subject to doubts regarding whether they have invested enough labor to justify a proprietary interest in the honor and reputation associated with the Medal. 160

When determining whether a prospective Medal recipient is entitled to the honor, each branch of the Armed Forces has rigorous regulations to evaluate every nominee. 161 After early embarrassment due to lack of oversight in awarding the Medal, 162 each branch of the Armed Forces now requires that Medal recipients meet a standard of review that allows no margin for error as to who shall wear the Medal. 163 Although the standards for awarding the Medal vary to

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157 See supra note 153 for a brief discussion on the importance of morale.
158 See REP. ON THE MEDAL OF HONOR, supra note 30, at 4.
159 See Nozick, supra note 141, at 174-76; see also Mossoff, supra note 140, at 156-57.
160 Although not an easily objectified standard, the labor requisite for establishing a property right in the Medal is akin to the standard that defines pornography in that it is not readily objectified, but evident when observed. See, e.g., Jacobellis v. Ohio, 378 U.S. 184, 197 (1964) (Stewart, J. concurring) (declining to state what material might constitute pornography due to the difficulty in establishing an objective standard, but noting that “[h]e know[s] [pornography] when [h]e see[s] it . . .”).
161 See REP. ON THE MEDAL OF HONOR, supra note 30, at 1.
162 See supra Part I.B.
163 See REP. ON THE MEDAL OF HONOR, supra note 30, at 1.
some degree across the branches of the Armed Forces, the general standard is that any recipient must go above and beyond the call of duty in self-sacrifice and risk to life, while in the service of America’s Armed Forces and engaged in combat.

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

a. Michael P. Murphy: The Ultimate Sacrifice Rewarded

For as long as family and friends can remember, Lieutenant Michael P. Murphy was a protector. He spent his childhood standing up for friends, colleagues, co-workers, and acquaintances when they found themselves being bullied or otherwise taken advantage of. It was this protection drive that pushed Lieutenant Murphy above and beyond the call of duty on June 27-28, 2010.

While running a special operations mission in the mountains of Afghanistan, an insurgent force, with both superior numbers and superior positioning, ambushed Lieutenant Murphy and his team of three other Navy SEALS. The force of between thirty and forty enemy insurgents outflanked Lieutenant Murphy’s four-man SEAL team and forced them down a steep, rocky mountain slope to a village below. During the team’s descent, Lieutenant Murphy was

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165 E.g., REP. ON THE MEDAL OF HONOR, supra note 30, at 1.
166 See BURRELLI, supra note 45, at 1 n. 1 (2006).
167 ZIMMERMAN & GRESHAM, supra note 24, at 121-22.
168 Id.
170 ZIMMERMAN & GRESHAM, supra note 24, at 144-45.
171 Id. at 145.
wounded in the abdomen, but he continued to push his team towards the relative safety of the village despite facing fire from all sides. Of the four SEALs that began the descent, Lieutenant Murphy managed to lead three to cover in the village.

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

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

b. Michael A. Monsoor: Guardian of Warriors

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

On September 29, 2006, Petty Officer Monsoor’s fierce loyalty and dedication drove him above and beyond the call of duty in Ramadi, Iraq. While assigned to the most dangerous

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172 Id. at 145-46.
173 Id. at 146.
174 Id. at 146-47.
175 Id. at 148.
176 ZIMMERMAN & GRESHAM, supra note 24, at 148-49.
177 Id. at 149-51.
178 Id. at 187-89 (2010).
179 Id. at 189. Michael A. Monsoor was of Christian Arab descent. In that religious tradition, Saint Michael is the guardian of warriors. Id.
sector of Ramadi as part of a mission to clear the insurgents out of Iraq’s most violent region, Petty Officer Monsoor acted as the machine gunner for a team tasked as a support team for a sniper-overwatch element.\textsuperscript{181} After facing insurgent attacks early on in the mission, Petty Officer Monsoor repositioned to a rooftop between two SEAL snipers overlooking the insurgents’ likely attack route.\textsuperscript{182} Shortly after repositioning, a hand grenade bounced off of Monsoor’s chest and landed amidst the team of three other SEALs and eight Iraqis.\textsuperscript{183} While Monsoor could have easily fled to safety out through the nearby roof exit without rebuke, he disregarded his own safety and threw his body on top of the grenade to absorb the blast, making the ultimate sacrifice to save his teammates.\textsuperscript{184}

As a result of Petty Officer Monsoor’s selfless act that likely saved the lives of his team members, he became just the third member of the Armed Forces to earn the Medal of Honor for acts of valor during the Iraq War.\textsuperscript{185}

c. \textit{An Elite and Select Club}

The stringent, but defined standards for earning the Medal are exemplified by the fact that although millions served this Nation with the ordinary bravery expected out of members of the Armed Forces, the President of the United States has only awarded the Medal 3,476 times to 3,459 service members,\textsuperscript{186} with only eighty-one of those entitled to the correspondent reputation and honor alive today.\textsuperscript{187}

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

\textsuperscript{181} Zimmerman & Gresham, supra note 24, at 201.
\textsuperscript{182} Id. at 202.
\textsuperscript{183} Id.
\textsuperscript{184} Id. at 202-03.
\textsuperscript{185} Id. at 204-05.
\textsuperscript{187} Medal of Honor Statistics, supra note 10.
According to Locke and natural law theorists, labor as a value-increasing activity is to be understood as any activity that aims at improving what God has given man in common in order to advance human life.\textsuperscript{188} This value-increasing labor emerges not only as a “duty to preserve oneself[,]” but also to preserve all of mankind.\textsuperscript{189} However, appropriation through such value-increasing activity remains limited by Locke’s “enough and as good” proviso requiring, at the least, that no individual be left worse off by another’s appropriation of private property.\textsuperscript{190} Within the sphere of the Armed Forces, this duty of self-preservation and of preserving others is never more salient than in combat situations.

When, in this setting, an individual labors to the level worthy of recognition in the form of the Medal,\textsuperscript{191} it is certain that his appropriation of a share in the Medal does not leave any individual worse off.\textsuperscript{192} In fact, in this setting, more than any other, those who did not earn a right to the Medal received a benefit from the labor of the individual who did earn a right to the Medal.\textsuperscript{193} Indeed, in establishing the first military medal during the Revolutionary War, General George Washington declared that he hoped that those recognized for exemplary valor would foster further military merit throughout the Armed Forces and thus expand military resources and effectiveness in battle.\textsuperscript{194}

\begin{footnotes}
\item[188] BUCKLE, supra note 148, at 151.
\item[189] Id.
\item[190] See, e.g., LOCKE, SECOND TREATISE ON CIVIL GOVERNMENT, supra note 113, at § 32 (arguing that appropriation of resources given to man in common is proper as long as any individual’s appropriation does not prejudice any other man); see also NOZICK, supra note 141, at 175 (arguing that Locke’s proviso is meant to ensure that no individual’s situation is worsened by another’s appropriation of a resource).
\item[191] See infra Part II.C.2.
\item[192] Cf. BUCKLE, supra note 148, at 153 (arguing that appropriation under Locke’s theory of property does not necessarily leave others worse off).
\item[193] See, e.g., supra Part II.C.2:a-b (recounting the heroic, life-saving efforts of recent Medal of Honor recipients); see cf. BUCKLE, supra note 148, at 153 (arguing that, in some cases, even the unpropertied are benefitted by the labor of the propertied).
\item[194] See WASHINGTON’S ORDERS, supra note 31, at 35; see cf. BUCKLE, supra note 148, at 154 (suggesting that, under Locke, appropriation of a resource into private property ultimately expands the bank of available social resources, because such appropriations are productive).
\end{footnotes}
Further, no one man’s right in the Medal prevents another man from rightfully earning his own entitlement to a share in the Medal’s reputation through the appropriate channels set forth in statute.\textsuperscript{195} Therefore, concerns regarding the unsustainability of Locke’s “enough and as good” proviso are not relevant in this context.\textsuperscript{196}

4. False Claims to the Medal of Honor Wrongfully Seek Benefits from Another’s Labor

Locke’s theory of property is aimed at protecting the rights of the “industrious and rational” whose productive labor adds value to society from the “fancy or covetousness of the quarrelsome and contentious.”\textsuperscript{197} Locke makes it very clear that, where there is “as much and as good” left, those who have not earned rights through their own labor should not intrude on what another has already improved with their labor.\textsuperscript{198} Those who have not labored for a right should not be able to benefit from another’s pains for he has no right to those benefits.\textsuperscript{199}

In addition to receiving the physical Medal as an emblem of their service, Medal recipients are entitled to a modest package of benefits.\textsuperscript{200} However, the greatest benefit that Medal recipients receive is the recognition of an appreciative nation.\textsuperscript{201} Such reverence from the general public breeds, perhaps inevitably, envy among those who have not earned such respect.\textsuperscript{202}

\textsuperscript{195} See supra notes 160-64 and accompanying text (briefly explaining the statutory scheme regulating award of the Medal).

\textsuperscript{196} E.g., NOZICK, supra note 141, at 175-76 (arguing that when Locke’s “enough and as good” proviso is interpreted literally it proves untenable as it unravels in reverse order from the first individual who is made worse off from another’s appropriation of a resource in common).

\textsuperscript{197} See LOCKE, SECOND TREATISE ON CIVIL GOVERNMENT, supra note 113, at § 33.

\textsuperscript{198} See id.

\textsuperscript{199} See id.

\textsuperscript{200} See, e.g., BURELLI, supra note 45, at 5-6 (stating that Medal recipients are entitled to a monthly pension, increases in retirement pay, certain travel privileges, modest privileges on bases, children of Medal recipients are exempt from Military academy quotas if they are qualified to attend, and recipients are to be accorded other modest privileges “commensurate with the prestige associated with [the Medal]”).

\textsuperscript{201} See, e.g., REP. ON THE MEDAL OF HONOR, supra note 30, at 2-4 (explaining that the overwhelming motivation behind the Medal of Honor was a nation expressing gratitude that the soldiers themselves would never seek out on their own).

\textsuperscript{202} See id. at 4.
Under Locke’s theory of property, those who falsely claim to be Medal recipients represent the “quarrelsome and contentious” driven by “fancy or covetousness.” Therefore, civilized society’s legislature should protect the rights of the “industrious and rational” by prohibiting the misappropriation of the reputation and honor associated with Medal recipients to the benefit “of the quarrelsome and contentious[,]” thus protecting bona fide recipients’ uncommon investment and sacrifice.

III. THE SUPREME COURT RESOLVES CIRCUIT SPLIT REGARDING THE STOLEN VALOR ACT IN UNITED STATES V. ALVAREZ

This Part examines the Supreme Court’s decision in United States v. Alvarez, invalidating the Stolen Valor Act of 2005 as unconstitutional, and the circuit split the decision resolved. Section A examines the Ninth Circuit decision in United States v. Alvarez, concluding that the Stolen Valor Act of 2005 was unconstitutional. Section B examines the 10th Circuit’s decision in United States v. Strandlof, holding that the Stolen Valor Act of 2005 was constitutional, thus creating a circuit split between the 9th and Tenth Circuits. Section C concludes this Part by recounting the Supreme Court’s decision in United States v. Alvarez, resolving the circuit split United States v. Strandlof created, and concluding that the Stolen Valor Act of 2005 was unconstitutional.

A. United States v. Alvarez in the Ninth Circuit

After winning a seat on the Tree Valley District Board of Directors, Xavier Alvarez introduced himself to a joint meeting with a neighboring district as a military veteran of twenty-

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204 Cf. Claey, supra note 153, at 20 (suggesting that Locke’s theory of labor provides legislatures with the parameters of protecting private property rights).
206 617 F.3d 1198 (9th Cir. 2010).
207 667 F.3d 1146 (10th Cir. 2012).
five years and a Medal recipient. However, Mr. Alvarez did not receive the Medal, nor had he ever even served in the Armed Forces. Accordingly, after the FBI obtained a recording of Mr. Alvarez’s lies, he was indicted on two charges of violating the Stolen Valor Act. After Mr. Alvarez entered a conditional guilty plea at trial, the Court of Appeals for the Ninth Circuit entertained his appeal on constitutional grounds.

The government argued that the Stolen Valor Act was constitutional because it prohibited only false factual speech, and such speech is not entitled to full First Amendment protection. The court disagreed, maintaining that First Amendment protection did not turn on the truth or falsity of the speech’s content. Instead, the court concluded that the First Amendment presumptively protects all speech regardless of the speech’s value or veracity. After concluding that the false speech under the Stolen Valor Act did not fit into any special class of speech not afforded full protection, the court determined that the Stolen Valor Act could not survive strict scrutiny analysis because the government did not demonstrate that the Act was narrowly tailored to accomplish its legitimate end of protecting the reputation and meaning of military honors.

B. United States v. Strandlof Creates Circuit Split

Rick Strandlof falsely claimed to have graduated from the United States Naval Academy and falsely claimed to have served in Iraq as a Marine Captain and to have received a Purple Heart for a wound suffered in combat there. A veteran’s group suspected that Strandlof was

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208 United States v. Alvarez, 617 F.3d 1198, 1200 (9th Cir. 2010).
209 Id. at 1201.
210 Id.
211 Id.
212 Id. at 1202.
213 Id. at 1203.
214 Alvarez, 617 F.3d at 1205-06.
215 Id. at 1215.
216 Id. at 1216-18.
217 United States v. Strandlof, 667 F.3d 1146, 1151-52 (10th Cir. 2012).
lying about his military accolades and notified the FBI.\textsuperscript{218} After a subsequent investigation, prosecutors charged Strandlof with violating the Stolen Valor Act.\textsuperscript{219}

On appeal to the Tenth Circuit after the district court found that the Stolen Valor Act was unconstitutional, the court addressed the sole issue of whether the content-based restriction on speech embodied in the Stolen Valor Act was facially constitutional.\textsuperscript{220} Although the court acknowledged that the content-based restrictions on speech were presumptively invalid,\textsuperscript{221} the court ultimately concluded that the Stolen Valor Act was facially constitutional as the Act prohibited only knowingly false speech, the likes of which the Supreme Court has consistently declined to afford full First Amendment protection.\textsuperscript{222} Further, the court concluded that concerns over any possible chilling effect on speech were ameliorated by the fact that Congress narrowly tailored the Stolen Valor Act to protect the legitimate government interest in preserving the prestige and dignity of military honors.\textsuperscript{223}

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

On February 22, 2012, faced with division among circuits over whether Congress could permissibly regulate false-speech under the Stolen Valor Act, the Supreme Court heard oral argument on the issue.\textsuperscript{224} In analyzing the constitutionality of the Stolen Valor Act, the Court sided with the Ninth Circuit in concluding that the Act was fundamentally at odds with the First Amendment.\textsuperscript{225} The Court went on to conclude that, despite the fact that the government’s

\textsuperscript{218} Id. at 1152.
\textsuperscript{219} Id.
\textsuperscript{220} Id.
\textsuperscript{221} Id. at 1157.
\textsuperscript{222} Id. at 1167.
\textsuperscript{223} Strandlof, 667 F.3d at 1168-69.
\textsuperscript{225} Id. at 2548.
purpose in passing the Stolen Valor Act was one of significant importance, the manner in which the Act operated could not withstand exacting scrutiny. 226

In denying the Government’s argument that false statements “have no First Amendment value in themselves,” and therefore are not entitled to the full extent of First Amendment protections, 227 the Court examined traditional categories of speech where content-based restrictions were traditionally permissible and concluded that false statements in general did not constitute an exempt category on their own. 228 The Court did note that, in certain circumstances, false statements were treated differently under the First Amendment than truthful statements. 229 However, the Court distinguished those instances from the issue at hand by recognizing those cases all dealt with some independent, “legally cognizable harm associated with a false statement,” 230 whereas the Stolen Valor Act targeted falsity alone. 231 Therefore, the Court suggested that identifying a traditionally cognizable harm to anchor a prohibition of false statements on was a condition precedent for upholding such a content-based restriction on speech under intermediate, rather than strict, scrutiny review. 232 Given that the Government failed to present compelling evidence that the false speech prohibited under the Stolen Valor Act of 2005

226 Id.
227 Id. at 2543.
228 E.g., id. at 2544 (listing advocacy of imminent lawless action, obscenity, defamation, speech integral to criminal conduct, “fighting words,” child pornography, fraud, true threats, and speech presenting grave and imminent threat as those categories not traditionally afforded full First Amendment protection).
229 See id. at 2545.
230 Such as defamation, invasion of privacy, or vexatious litigation. Alvarez II, 132 S. Ct. at 2545.
231 Id.
232 See id. at 2544-47 (explaining that the existence of a legally cognizable harm triggers the government’s ability to permissibly regulate false speech, but the existence of legally cognizable harms with false statements as an element does not suggest that the government can permissibly prohibit a wider variety of false statements for their falsity alone); id. at 2551-52 (Breyer, J. concurring) (stating that, given the importance of First Amendment rights, permissible restrictions on free speech are still subject to intermediate scrutiny rather than the “near-automatic approval” standard of rational basis).
fell within the ambit of any historically unprotected category of speech,\textsuperscript{233} the Stolen Valor Act had to withstand strict scrutiny as a purely content-based restriction of free speech.\textsuperscript{234}

After reciting the Medal’s significance,\textsuperscript{235} the Court determined that, notwithstanding the significance of protecting military honors’ reputations, the government failed to establish a causal connection between the Stolen Valor Act and the end of protecting the honor and integrity of military honors.\textsuperscript{236} Additionally, the Court found that the Stolen Valor Act was not the least restrictive manner available to accomplish the government’s stated purpose as counter-speech could serve as an alternative, non-criminal remedy for false speech tending to diminish the integrity of military honors.\textsuperscript{237}

Given that there was no demonstrated connection between the Act and the goal of protecting the integrity of military honors, the Stolen Valor Act failed to survive strict scrutiny and the Court affirmed the Ninth Circuit’s invalidation of the law as an unconstitutional restriction on speech.\textsuperscript{238}

IV. STOLEN VALOR ACT’S FLAWS AND THE REMEDY

As the reputation and the honor associated with the Medal can be seen as a property right vested in bona fide recipients,\textsuperscript{239} Congress can constitutionally protect that right without infringing on traditionally accepted First Amendment rights.

There has been a significant amount of literature published regarding the constitutionality, or lack thereof, of the Stolen Valor Act. Critics have argued that the Act is an

\textsuperscript{233} While courts do not have “freewheeling authority to declare new categories of speech outside the scope of the First Amendment . . . there are some categories of speech that have been historically unprotected, but have not yet been specifically identified or discussed as such in or case law.” United States v. Stevens, 130 S. Ct. 1577, 1586 (2010).
\textsuperscript{234} See Alvarez II, 132 S. Ct. at 2547-48.
\textsuperscript{235} Id. at 2548-49.
\textsuperscript{236} Id. at 2549.
\textsuperscript{237} Id. at 2549-51.
\textsuperscript{238} Id. at 2450-51.
\textsuperscript{239} See supra, Part II.
impermissible restriction on free speech and is therefore unconstitutional.\footnote{240} Supporters argue that the Act finds justification in either the fact that the false statements prohibited should receive little constitutional protection,\footnote{241} or the fact that the Act is narrowly structured to pursue the government’s legitimate interest in protecting the reputation of military distinctions.\footnote{242} However, these arguments are now all for naught as the Supreme Court agreed with those critics who viewed the Stolen Valor Act as an unconstitutional restriction on speech, albeit false speech.\footnote{243}

There are some critics of the Stolen Valor Act who, although not agreeing with the means, agree with the government purpose in drafting the act and argue that false claims to military distinctions would be better regulated by redrafting the Act as a prohibition on public fraud.\footnote{244} In fact, on September 10, 2012, the United States House of Representatives adopted this suggested model in passing a proposed amendment to the Stolen Valor Act.\footnote{245} Further, on December 3, 2012, the Senate included a similar proposed amendment to the Stolen Valor Act within the defense authorization bill of 2013.\footnote{246} While these points are well taken, not only does fraud fail to specifically protect bona fide recipients’ proprietary interest in the Medal,\footnote{247} fraud also hamstrings enforcement by requiring third-party reliance and harm.\footnote{248} Section A of this Part

\footnote{240 See, e.g., Kathryn Smith, Hey! That’s My Valor: The Stolen Valor Act and Government Regulation of False Speech under the First Amendment, 53 B.C. L. Rev. 775, 784 (2012); Nat Stern, Implications of Libel Doctrine for Nondefamatory Falsehoods under the First Amendment, 10 First Amend. L. Rev. 465, 490-91 (2012).}
\footnote{241 See, e.g., Josh M. Parker, The Stolen Valor Act as Constitutional: Bringing Coherence to First Amendment Analysis of False-Speech Restrictions, 78 U. Chi. L. Rev. 1503 (2011).}
\footnote{243 Alvarez II, 132 S. Ct. at 2543.}
\footnote{244 See, e.g., Jeffery C. Barnum, False Valor: Amending the Stolen Valor Act to Conform with the First Amendment’s Fraudulent Speech Exception, 86 Wash. L. Rev. 841, 843 (2011); Stephanie L. Gal, Resolving the Conflict Between the Stolen Valor Act of 2005 and the First Amendment, 77 Brook. L. Rev. 223, 254-57 (2011); Mull, supra note 242, at 342-43.}
\footnote{245 See The Stolen Valor Act of 2012, H.R. 1775, 112th Cong. § 2 (2012).}
\footnote{246 See The Stolen Valor Act of 2012, S. 3254, 112th Cong. §§ 5011-14 (2012); see also Maze, supra note 22.}
\footnote{247 See cf. Alvarez II, 132 S. Ct. at 2542-43 (stating that establishing the Medal was a proper Congressional Act and suggesting that protecting the value of the Medal might also be proper, if done within the parameters of the Constitution).}
\footnote{248 See cf. Barnum, supra note 244, at 865-66 (disposing of these issues simply by arguing fraud does not require evidence of pecuniary harm in reliance on a representation).}
explains how the proposed amendment to the Stolen Valor Act, requiring reliance and third-party harm, under-enforces the prohibition against false claims regarding the Medal.249

Given the Supreme Court’s acknowledgement of the fact false speech is permissibly regulated in certain traditionally accepted circumstances,250 Section B explains how Congress can better protect the rights of Medal recipients by drafting the statute to prohibit false claimants from misappropriating the honor and respect associated with the Medal that bona fide recipients create, and are entitled to, through their exemplary service.

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

A. The Stolen Valor Acts of 2012 Does Not Get the Job Done

Simply put, the proposed amendments to the Stolen Valor Act under-enforce and under-protect the proprietary interests bona fide recipients earn in the reputation and honor associated with the Medal.251 Re-drafting the Stolen Valor Act to prohibit only those false claims aimed at “obtain[ing] money, property, or other tangible benefit,”252 protects only the interest of defrauded parties, rather than bona fide Medal recipients’ proprietary interests.253 Not only do these

249 See, e.g., The Stolen Valor Act of 2012, S. 3254, 112th Cong. § 5012 (2012) (finding that dangers of harm to defrauded parties necessitated effective amendment to the Stolen Valor Act); The Stolen Valor Act of 2012, H.R. 1775, 112th Cong. § 2(b) (2012) (prohibiting only those false claims made with the intent “to obtain money, property, or other tangible benefit”).
250 E.g., Alvarez II, 132 S. Ct. at 2543-44 (listing advocacy of imminent lawless action, obscenity, defamation, speech integral to criminal conduct, “fighting words,” child pornography, fraud, true threats, and speech presenting grave and imminent threat as those categories not traditionally afforded full First Amendment protection); see also Id. at 2545 (mentioning invasion of privacy and vexatious litigation as instances where false statements are not afforded the same protection as truthful statements).
251 See, e.g., 151 CONG. REC. S12685, 12688 (2005) (statement of Sen. Kent Conrad) (explaining that the proposed Stolen Valor Act of 2005 aimed to prevent false claims regarding receiving the Medal in order to take advantage of the reputation associated with bona fide recipients and thus protecting the accomplishments of those bona fide recipients).
253 See The Stolen Valor Act of 2012, S. 3254, 112th Cong. § 5012 (2012) (citing concerns about harm to third-parties resulting from reliance on false claimants’ representations); see also RESTATEMENT (SECOND) OF TORTS § 525 (1965) (positing that any one who makes a fraudulent misrepresentation of fact, aimed at inducing another to act, is liable to the party defrauded for the harm caused).
proposed amendments to the Stolen Valor Act fail to protect bona fide recipients’ proprietary interests, the proposals also do not heed the Supreme Court’s suggestion that protecting the value associated with the Medal is a compelling government interest that justifies federal legislation—not that protecting third-parties from such fraudulent representations was a similarly compelling government interest. Accordingly, fraud is the incorrect modality for protecting bona fide Medal recipients’ proprietary interest in the reputation associated with the Medal.

Congress can, however, protect bona fide Medal recipients’ proprietary interest in the reputation of the Medal by redrafting the Stolen Valor Act within the ambit of the wrongful appropriation of the reputation and honor of the Medal. Further, unlike prohibiting only fraudulent misrepresentations, a law drafted in the spirit of wrongful appropriation covers all public false claims to the Medal aimed at appropriating any benefit, material or otherwise, that derives from the reputation and honor of bona fide Medal recipients. Additionally, although broader in scope than a prohibition drafted in the spirit of fraud, a prohibition drafted in the spirit of common law appropriation or right of publicity statutes addresses concerns regarding the seemingly unbounded scope of the prohibition on false statements embodied in the Stolen Valor Act of 2005.

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

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

256 See Alvarez II, 132 S. Ct. at 2554 (2012) (Breyer, J. concurring) (stating that fraud statutes “require proof of a misrepresentation that is material, upon which the victim relied, and which caused actual injury”).

257 See, e.g., REP. ON THE MEDAL OF HONOR, supra note 30, at 1 (stating that the honor earned by Medal of Honor recipients is by and large the greatest interest in the Medal, while any material benefits periphery benefits).

While it is true that wrongful appropriation of another’s reputation, name, or likeness traditionally provides a private right of action, a private right of action is not proper for wrongful appropriation of the reputation and honor of bona fide Medal recipients. General George Washington, and later Congress, established the Medal and other, lesser military distinctions as a way to recognize the exemplary service of soldiers who would not seek such recognition on their own accord. Therefore, asking bona fide recipients to sue false claimants in order to vindicate their proprietary interest in the reputation and honor associated with the Medal is inconsistent with the purpose of the award itself. Further, creating a private right of action under common law appropriation, places the disproportionate burden of enforcing the proprietary rights of 3,549 recipients on the eighty-one living Medal recipients. This burden would force bona fide Medal recipients to shoulder legal fees in order to bring the suit and, after filing, proving damages. Accordingly, instead of creating a private right of action, the Federal Government should criminalize the wrongful appropriation of the reputation associated with bona fide Medal recipients. Protecting the honor and reputation of Medal recipients is a proper government purpose and criminalizing wrongfully appropriating that honor and reputation is a proper means to effectuate that end.

B. Restricting First Amendment Rights to Protect Reputation is Permissible

In deciding to subject the Stolen Valor Act of 2005 to strict scrutiny, the Court reasoned that the government failed to offer compelling evidence that the prohibited false speech was of

259 See RESTATEMENT (SECOND) OF TORTS §652C cmt. a (1977) (providing individuals whose rights have been violated with a cognizable right of action for appropriation of their name or likeness).
260 See, e.g., REP. ON THE MEDAL OF HONOR, supra note 30, at 3 (stating that the philosophy behind Washington’s Purple Heart, and behind the Congressional Medal of Honor, was that “no true soldier, sailor, or marine” would seek recognition for their exemplary service on their own accord).
262 See cf. Alvarez II, 132 S. Ct. at 2542-43 (stating that creating the Medal of Honor was a proper Congressional act, suggesting that constitutionally permissible protection of that Honor is also a proper Congressional pursuit).
such a nature to warrant establishing a new category of content-based speech beyond the ambit of full First Amendment protection.\textsuperscript{263}

Courts can permissibly recognize new categories of unprotected speech only when that new category of permissibly regulated speech is historically entitled to little or no First Amendment protection.\textsuperscript{264} This exacting standard recognizes that there might be historically unprotected categories of speech that have not been specifically identified in Supreme Court case law,\textsuperscript{265} but does not allow for a freewheeling test to trample on the First Amendment’s guarantee of free speech.\textsuperscript{266} Further restraining courts from establishing new permissible restrictions on content-based speech, is the fact that even when restricting categories speech that are historically unprotected, those restrictions must advance social benefits that outweigh the Constitution’s preference for unbounded free speech rights.\textsuperscript{267}

There are restrictions on free speech that society and courts find beneficial.\textsuperscript{268} Among speech permissibly restricted, is commercial appropriation under common law right to privacy and statutory right of publicity that prohibits appropriating another’s name or likeness for one’s

\textsuperscript{263} Id. at 2544.
\textsuperscript{264} See United States v. Stevens, 130 S. Ct. 1577, 1586 (2010).
\textsuperscript{265} See id.
\textsuperscript{266} See id. at 1585.
\textsuperscript{267} See, e.g., United States v. Stevens, 130 S. Ct. 1577, 1585 (2010).
\textsuperscript{268} E.g., Alvarez II, 132 S. Ct. at 2543-44 (2012) (listing advocacy of imminent lawless action, obscenity, defamation, speech integral to criminal conduct, “fighting words,” child pornography, fraud, true threats, and speech presenting grave and imminent threat as those categories not traditionally afforded full First Amendment protection).
own benefit without prior consent. Although not recognized in all jurisdictions, most states recognize statutory right of publicity or common law right to privacy.

This doctrine originated in the first examination of an American right of privacy in a law review article by Samuel D. Warren and Louis D. Brandeis. In its current form, right of privacy law is divided into four distinct, but related torts. The fourth category of right of privacy, appropriation, recognizes that individuals own a property right in their name, likeness, reputation, or in the goodwill associated with their person. In protecting a person’s exclusive right to the advantages of their reputation, statutory “right of publicity” and common law protection against unauthorized appropriation of one’s name or likeness are analogous to federal copyright and patent laws in that they incentivize productive activity. The theory behind these protections is that an individual should be exclusively entitled to the benefits produced by their labors.

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

270 For example, North Dakota has no relevant statutes covering an individual’s right of publicity or right to privacy. Further, North Dakota courts have not yet determined if a common law tort action lies for invasions of such rights. See City of Grand Forks v. Grand Forks Herald, Inc., 307 N.W.2d 572, 578 n. 3 (N.D. 1981); Volk v. Auto-Dine Corp., 117 N.W.2d 525, 529 (N.D. 1970).

271 E.g., Bi-Rite Enters. v. Bruce Miner Co., 757 F.2d 440, 444 (1st Cir. 1985) (stating that, although states can differ in the extent of protection provided, most American jurisdictions recognize a right of publicity).


273 E.g., Prosser, supra note 272, at 389 (dividing right of privacy into four distinct torts: (1) Intrusion upon seclusion; (2) Public disclosure of embarrassing private facts; (3) False light publicity; (4) Appropriation of another’s name or likeness).

274 E.g., STUART BANNER, AMERICAN PROPERTY 150-53 (2011) (discussing the different interests that right of privacy and right of publicity protect. Whereas traditional rights of privacy protect private individuals from intrusion on seclusion or “unwanted publicity,” rights of publicity protect proprietary interests that individuals control exclusively); see cf. Matthews v. Wozencraft, 15 F.3d 432, 437 (5th Cir. 1994) (declining to find liability for appropriation of plaintiff’s name or likeness, because there was “nothing unique about [plaintiff]’s name or likeness that create[d] value for [defendant] to appropriate”); Prosser, supra note 272, at 403 (1960) (stating that appropriation protects an “[individual’s] name as a symbol of his identity . . . not his name as a mere name”).


276 See, e.g., id. at 573 (suggesting a state’s interest in protecting a proprietary interest in one’s reputation so as to encourage productive endeavors); cf. LOCKE, SECOND TREATISE ON CIVIL GOVERNMENT, supra note 113, at § 33
As this restriction on speech inevitably narrows the protection the First Amendment affords, the prohibition against appropriating another’s name or likeness without prior consent is not absolute. For instance, some courts recognize a “newsworthiness” exception for the publication of another’s name or likeness in connection with matters concerning public interest or concern.277 In determining whether a given publication is entitled to the “newsworthiness” protection, courts recognizing the exception balance the legitimacy of the public concern underlying the publication in question against the individual’s interest in their reputation, likeness, or name.278 Additionally, some courts also recognize an exception to appropriation of another’s name or likeness or right of publicity for expressive or editorial works.279 Like the “newsworthiness” exception, courts that recognize an exception for expressive or editorial works engage in balancing the speech’s expressive, as opposed to commercial nature, against the individual’s property right in their own identity.280

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

In Alvarez II, the Supreme Court found that the prohibited false speech under the Stolen Valor Act did not fit within categories of permissible content-based regulations on free speech and, therefore, subjected the Act to strict scrutiny review.281 The Supreme Court found that the

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277 See, e.g., Toffolini v. LFP Publ’g Grp., 572 F.3d 1201, 1208 (11th Cir. 2009) (stating that Georgia law recognizes a “newsworthiness” exception to an individual’s right of publicity).

278 See, e.g., id. at 1208 (introducing the balancing required in determining whether a publication is entitled to “newsworthiness” protection under Georgia law).

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

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

Act was not necessary to protect the honor of military medals and was not the least restrictive means towards the legitimate end of protecting military medals.\textsuperscript{282} Redrafting the Stolen Valor Act to protect the reputation that bona fide Medal recipients earn from wrongful appropriation will relieve the Act from strict scrutiny review and the amended Act can survive the more relaxed, intermediate scrutiny review for the following reasons.\textsuperscript{283}

First of all, the Court referenced a willingness to recognize categories of permissible content-based restrictions on free speech if the restriction is within the ambit of traditional restrictions “long familiar to the bar.”\textsuperscript{284} Prohibiting false-claimants from appropriating the reputation and honor that bona fide recipients earn is very similar to both common law invasion of privacy laws covering appropriation of another’s name or likeness and statutory right of publicity laws.\textsuperscript{285} Right of publicity law recognizes that individuals own a property right in their personality, reputation or goodwill earned through their own efforts.\textsuperscript{286}

Similarly, through their exemplary service, bona fide recipients not only add to the Medal’s value, but also earn a proprietary interest in the reputation and honor associated with the

\textsuperscript{282} See id. at 2551.
\textsuperscript{283} See id. at 2551-52 (Breyer, J. concurring) (stating that, given the importance of First Amendment rights, permissible restrictions on free speech are still subject to intermediate scrutiny rather than the “near-automatic approval” standard of rational basis).
\textsuperscript{284} Id. at 2544 (citing United States v. Stevens, 130 S. Ct. 1577, 1584 (2010)).
\textsuperscript{285} See supra Part IV.B. Justices Scalia, Thomas, Breyer, Alito, and Kagan suggested a reasoning similar to that set forth by this Note in analogizing the prohibition of false speech under the Stolen Valor Act of 2005 to prohibitions on similar speech under trademark infringement statutes. See Alvarez II, 132 S. Ct. at 2554-55 (Breyer, J. concurring); id. at 2559 (Alito, J. dissenting). Although these Justices believed trademark infringement was the closest analogous content-based restriction on free speech to those statements prohibited under the Stolen Valor Act of 2005, the analogy is subject to this Note’s criticism of drafting the Stolen Valor Act in the spirit of fraud as trademark infringement statutes, like fraud, focus initially on third-party harm (i.e. consumer confusion). See, e.g., James E. Clevenger, False Advertising under Lanham Act § 43(a)(1)(B), 44 Am. Jur. Proof of Facts 3d 1, §§ 11-14 (explaining that a necessary prerequisite for an action under the Lanham Act is evidence suggesting consumer confusion or deception). However, the Court suggested that the primary object of a permissible restriction on free speech in this context should be the value associated with the Medal and other military honors as protection of that value represents a compelling government interest. See Alvarez II, 132 S. Ct. at 2542-43.
\textsuperscript{286} See, e.g., Parks v. LaFace Records, 329 F.3d 437, 459 (6th Cir. 2003) (explaining that common law right of publicity created a species of property right in a person’s personality, especially that of celebrities whose identity is of appreciable commercial value).
Medal that derives from that service. When an individual makes a false claim, in a public setting, regarding receiving the Medal, it is clear that the false claimant seeks to appropriate the benefits of bona fide Medal recipients’ labor that provides the basis for the respect and honor associated with the Medal. False claimants dilute the value of the reputation and honor associated with Medal recipients to which bona fide Medal recipients are entitled. In order to prevent such harm to bona fide recipients’ proprietary interests and, as part of the government’s legitimate interest in incentivizing heroic service among members of the Armed Forces, the government is authorized to prevent such wrongful appropriation of the honor and reputation to which only bona fide Medal recipients are entitled.

Second, in assessing the scope and restrictive nature of the content-based prohibition of speech under the Stolen Valor Act of 2005, the Supreme Court noted concerns regarding just what kind of false statements regarding receiving military awards the Act prohibited. However redrafting the Stolen Valor Act to protect bona fide recipients’ proprietary interest in the

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287 The most significant proprietary interest earned is that in the respect and honor from a grateful Nation. See, e.g., REP. ON THE MEDAL OF HONOR, supra note 30, at 1; supra Part II.
288 See id. at 2-4 (explaining that the overwhelming motivation behind the Medal of Honor was a nation expressing gratitude that the soldiers themselves would never seek out on their own).
289 See cf. LOCKE, SECOND TREATISE ON CIVIL GOVERNMENT, supra note 113, at § 33.
290 See 151 CONG. REC. S12684, 12688 (2005) (statement of Sen. Kent Conrad, sponsor of the Stolen Valor Act of 2005); cf. Matthews v. Wozencraft, 15 F.3d 432, 437 (5th Cir. 1994) (stating that protection from appropriation of one’s name or likeness is aimed at protecting the value on an individual’s reputation); McFarland v. Miller, 14 F.3d 912, 919 (3d. Cir. 1994) (stating that the harm done by unauthorized appropriation of another’s name or likeness is unjustly diluting the value of the reputation to which the appropriator had no right).
291 See cf. Alvarez II, 132 S. Ct. at 2548-49 (setting out the government’s compelling interest in incentivizing gallant military service by protecting military honors); Zacchini v. Scripps-Howard Broad. Co., 433 U.S. 562, 573 (1977) (explaining that the compelling interest in protecting one’s proprietary interest in his or her reputation and personality as a legitimate means towards promoting socially beneficial activity is akin to federal patent and copyright law).
reputation associated with the Medal in the spirit of right of publicity laws provides clear limiting principles.

A necessary prerequisite for prosecution under a Stolen Valor Act drafted in this manner is that the false claim to the Medal must be made with the intent of appropriating the reputation and honor associated with bona fide Medal recipients to the speaker’s own benefit. Further, prosecution will be limited by traditional exceptions recognized by right of publicity law such as the “newsworthiness” exception and the exception for expressive or editorial works.

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

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293 See cf. Matthews v. Wozencraft, 15 F.3d 432, 437 (5th Cir. 1994) (stating that, in order for appropriation of one’s name or likeness to be actionable, the defendant must publish the name or likeness in a manner aimed at taking advantage of the name’s, likeness’s, or reputation’s value).
294 E.g., Toffolini v. LFP Pub’l Grp., 572 F.3d 1201, 1208 (11th Cir. 2009) (stating that Georgia law recognizes a “newsworthiness” exception to an individual’s right of publicity); Bosley v. Wildwett.com, 310 F. Supp. 2d 914, 929 (N.D. Ohio 2004) (concluding that only works that are expressive or editorial in nature are entitled to First Amendment protection under Ohio law).
295 See, e.g., Joe Dickerson & Assocs., L.L.C. v. Dittmar, 34 P.3d 995, 1003 (Colo. 2001) (explaining the inquiry as to whether or not a given publication is sufficiently noncommercial for the newsworthiness exception to apply).
296 Hustler Magazine, Inc. v. Falwell, 485 U.S. 46, 52 (1988); see cf. Donahue v. Warner Bros. Pictures, 194 F.2d 6, 11-13 (10th Cir. 1952) (explaining that the publication in question was of the sort generally entitled to the protection of the newsworthiness exception, but finding that the exception did not apply given the “false light” nature of the publication).
bona fide recipients in the reputation and honor associated with the Medal.\textsuperscript{298} In this case, however, First Amendment rights will likely categorically outweigh bona fide Medal recipients’ proprietary interests. Not only does the Constitution provide robust First Amendment protection for artistic expression,\textsuperscript{299} it is also doubtful that an actor will make a false claim to obtain the benefit of the reputation and honor associated with bona fide recipients and therefore such a claim would not be unlawful under the revised Stolen Valor Act.

Third, when drafted in the spirit of prohibiting the appropriation of bona fide Medal recipients’ reputation, the Supreme Court’s suggestion of alternative enforcement mechanisms to those provided by the Stolen Valor Act of 2005 lose their relevance.\textsuperscript{300} The Court suggested that the most effective, and least restrictive way, to protect the value of military honors and the Medal was for recipients to engage in counter-speech when individuals made false claims regarding receiving the Medal.\textsuperscript{301} Further, the Court suggested that compiling databases, accessible publicly through the Internet, would allow citizens to verify claims regarding receiving military honors.\textsuperscript{302}

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

Instead of those who have earned the Medal being recognized with honor and gratitude from the

\textsuperscript{298} See \textit{cf.} Parks v. LaFace Records, 329 F.3d 437, 461 (6th Cir. 2003) (the individual’s property right in their name must be balanced against the freedom of artistic expression).

\textsuperscript{299} See, \textit{e.g.}, Miller v. California, 413 U.S. 15, 25-27 (1978) (exploring the outer-limit of constitutionally protected artistic expression in a pornography case and providing a limiting principle only in obscenity).

\textsuperscript{300} See \textit{Alvarez II}, 132 S. Ct. at 2550-51 (suggesting that counter-speech is the proper enforcement mechanism to combat false claims to the Medal of Honor).

\textsuperscript{301} \textit{Id.} at 2550-51.

\textsuperscript{302} \textit{Id.} at 2551.
Nation they served, such a measure would frustrate the purpose of the Medal by causing citizens to view even bona fide recipients with skepticism until their story checked out.\textsuperscript{303} Such a “trust, but verify” system does not honor our veterans who have served with distinction in the spirit envisioned by General George Washington and the United States Congress.\textsuperscript{304}

CONCLUSION

General George Washington was right when he recognized a need for our Nation to recognize the uncommon gallantry of those soldiers who went above and beyond the call of duty in protecting our sovereignty. Congress was right in adopting Washington’s philosophy in establishing the Medal, and Congress was absolutely right in acting on the need to protect the honor and reputation associated with our Nation’s highest military honor. However, Congress erred in protecting the honor and reputation of the Medal itself rather than the proprietary interest in the honor and reputation that bona fide Medal recipients earn.

Every day, the men and women of our Armed Forces go above and beyond what is asked of the average American citizen. Specifically, our bravest are expected to fill the void where other countries have failed in the global fight to vindicate freedom in the face of terrorism.\textsuperscript{305} Everyday, our Nation’s bravest men and women face improvised explosive devices and enemies behind “murder holes” to preserve our freedoms and free others from oppression.\textsuperscript{306} Some have

\textsuperscript{303} See REP. ON THE MEDAL OF HONOR, supra note 30, at 2-4 (explaining that the overwhelming purpose behind the Medal was a Nation expressing gratitude that the soldiers themselves would never seek out on their own).


\textsuperscript{305} E.g., Bing West, With the Warriors, THE NATIONAL REVIEW ONLINE (Mar. 21, 2011 4:00 AM), http://www.nationalreview.com/articles/262537/warriors-bing-west.

\textsuperscript{306} E.g., id. “Murder holes” are peepholes hollowed out of the walls of domiciles and other compounds that enemy fighters can lay fire on American forces through. See id.
served multiple tours of duty in these foreign, hostile lands, while others refuse rotation back to the United States after serious injuries in order to remain with their comrades.\textsuperscript{307} 

Glory doesn’t drive these men and women;\textsuperscript{308} rather, an ethos, dictating that they serve bravely and honorably no matter what the circumstances and regardless of the consequences, fuels their remarkable service.\textsuperscript{309} Despite the sacrifice and the danger, few of these men and women ask for anything more than simple gratitude from those Americans safe at home. Still fewer will ever be formally recognized for their exemplary service with military distinction, let alone be awarded the Medal.

Those brave warriors who have earned our Nation’s highest military honor deserve not only our utmost respect and gratitude, but also deserve to have the honor that our bravest soldiers have labored and died for protected from the “fancy and the covetousness of the quarrelsome and contentious."\textsuperscript{310} Congress is uniquely situated to protect the honor bona fide Medal recipients through appropriate legislation aimed at incentivizing meritorious service. As such, Congress should criminalize false claims regarding receiving the Medal, and other military distinction, by protecting the proprietary interest in the reputation and honor associated with those distinctions that bona fide recipients earn rather than by protecting the Medals and distinctions themselves.

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\textsuperscript{307} E.g., id. \\
\textsuperscript{308} E.g., id. \\
\textsuperscript{309} See id. \\
\textsuperscript{310} \textsc{Locke}, \textsc{The Second Treatise on Civil Government}, \textit{supra} note 113, at \S 33.
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